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DECISIONS OF THE IOWA INDUSTRIAL COMMISSIONER

July 1, 1990 through June 30, 1991

Clair R. Cramer
Acting Iowa Industrial Commissioner

T2
Iowa
Room

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERRY ANDERSEN, Claimant, vs. A. C. DELLOVADE, Employer, and KEMPER GROUP, Insurance Carrier, Defendants.	:	File No. 839832 A P P E A L D E C I S I O N

FILED
NOV 29 1990
IOWA INDUSTRIAL COMMISSIO

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 filed May 21, 1990 is affirmed and is adopted as the final agency action in this case.

Defendants shall pay the costs of the arbitration proceeding and claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 29th day of November, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Sheldon M. Gallner
Attorney at Law
803 Third Avenue
P.O. Box 1588
Council Bluffs, Iowa 51502

Mr. Thomas M. Plaza
Attorney at Law
200 Home Federal Building
P.O. Box 3086
Sioux City, Iowa 51102

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK ANDERSON, Claimant, vs. HIGH RISE CONSTRUCTION SPECIALISTS, INC., Employer, and THE HARTFORD, Insurance Carrier, Defendants.	File No. 850096 A P P E A L D E C I S I O N

FILED
JUL 31 1990
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 April 10, 1987. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 7; and defendants' exhibits 1 through 8. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. The manner in which the average weekly wage was determined.

2. The sufficiency of the proof that items contained in the Iowa Methodist Medical Center statement are related to the injury claimant received.

3. Prejudice to the defendants by the action of the Deputy in learning the contents of the Offer to Confess Judgment prior to the filing of the Arbitration Decision.

4. Refusal to grant rehearing and admit newly discovered evidence.

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

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

ANALYSIS

The first issue to be addressed on appeal is claimant's rate. Claimant began work for defendant as a construction laborer in the middle of a work week and was paid at his hourly rate of $6.50 per hour for 32 hours. The second week claimant could have worked 40 hours, but claimant only worked 35.5 hours, taking 4.5 hours off for personal business. The third week claimant worked for three days and was injured on the third day. Claimant was paid for the entire day he was injured, for a total of 24 hours. However, all other employees at claimant's job site also worked only 24 hours that week.

Claimant had worked for defendant less than 13 weeks at the time he was injured. Under Iowa Code section 85.36(7), his rate would be calculated based on the amount he would have earned had he been employed by the employer the full thirteen weeks preceding the injury and had worked when work was available to other employees in a similar occupation.

In this case, since claimant had not worked for 13 weeks preceding his injury, evidence was offered of the hours worked by another employee of defendant. (See Respondent's exhibit 8.) Because this defendant did not have employees that performed similar work in the 13 weeks immediately preceding claimant's injury, records of an employee that worked approximately one year earlier were used in respondent's exhibit 8. Although the exhibit was admitted over objection, the deputy declined to give this evidence weight, reciting that there was no showing that the project worked on by the prior employee was similar or that climatic conditions were similar.

More importantly, even assuming that respondent's exhibit 8 reflects similar work to that which claimant was engaged in, it clearly covers a period of time outside the 13 weeks immediately preceding the injury. Section 85.36(7) contemplates using this 13 week period of time to calculate what claimant would have made if he had been employed by this employer in a similar occupation when work was available. The record shows that 13 weeks of work would not have been available to claimant from this employer in the 13 weeks leading up to his injury. Rather, only the 2 and 1/2 weeks claimant actually did work would have been available.

Even the records of a similar employee doing similar work more than a year earlier do not meet the requirements of section 85.36(7), as that section clearly focuses on the 13 weeks immediately preceding the injury and not any other time period.

Thus, no evidence of the amount the claimant would have earned had he been employed by defendant in the 13 weeks preceding his injury is in the record. Because of this, claimant's rate is to be calculated by dividing his total wages by the number of weeks he did work. See Barker v. City Wide Cartage, 1 Iowa Industrial Commissioner Reports 12, 15,(appeal decision, 1980). Under this fact situation, the only rational method of determining a representative rate for claimant is to divide the total hours worked over the three weeks of his employment by three. His total hours for those three weeks was 91.5 hours, which divided by three equals an average work week of 30.5 hours. Multiplied by claimant's hourly rate of $6.50, claimant's gross weekly wages were $198.25. This yields a rate of $129.30 for a single employee with two exemptions injured on April 10, 1987.

Defendants also challenge their obligation to pay claimant's medical expenses, and allege that claimant has failed to put into the record evidence establishing that the charges are reasonable and necessary. Although defendants' brief listed as an issue only whether claimant's medical expenses were related to his injury, the brief itself

Iowa Code section 85.27 requires employers to provide reasonable and necessary medical services to an injured worker. Defendants disputed the reasonableness and necessity of claimant's medical bills in the prehearing report. Claimant put his medical bills into the record at the hearing. Claimant testified that all of his medical bills, with the exception of a portion relating to haircuts while in the hospital, were related to his work injury. (Transcript, page 35-40 line 1). A claimant's own testimony may establish the necessity of treatment. Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963). Claimant's description of the nature and purpose of his hospital stay establishes that such charges are necessary.

Claimant is not qualified to testify that charges for medical services are reasonable. Claimant has not put into the record any evidence on this issue. Although defendants have not put into the record any evidence that the charges are unreasonable, claimant bears the burden of proof. Claimant was clearly on notice that the reasonableness of the charges was disputed by defendants. See prehearing report and order approving same, item 8-(a). At the hearing, claimant failed to introduce any evidence to establish that the fees were

reasonable. Defendants will not be ordered to pay claimant's medical bills.

Defendants' final issue on appeal concerns their request to submit additional evidence and for a rehearing. This agency's ruling on these motions, filed August 23, 1989, is incorporated herein by reference and reaffirmed.

FINDINGS OF FACT

1. As a result of claimant's work related injury on April 10, 1987, he sustained various injuries to his right leg.

2. As a result of his work injury on April 10, 1987, claimant has incurred various hospital expenses which have not yet been paid by defendants in the sum of $1,708.99.

3. **Claimant's weekly rate of compensation is calculated to** be $129.30 per week.

4. Claimant did not sustain any injuries to his mouth, teeth, or bridgework as a result of his work injury on April 10, 1987.

CONCLUSIONS OF LAW

Defendants are not liable for claimant's medical expenses.

Claimant is entitled to 65.857 weeks of healing period benefits at the rate of $129.30 per week as a result of his work injury on April 10, 1987.

Claimant is entitled to 88 weeks of permanent partial disability benefits for a 40 percent loss of use of the leg at the rate of $129.30 per week.

The motion to admit new evidence was properly denied.

WHEREFORE, the decision of the deputy is affirmed in part and reversed in part.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant sixty-five point eight-five-seven (65.857) weeks of healing period benefits at a rate of one hundred twenty-nine and 30/100 dollars ($129.30) per week.

That defendants are to pay unto claimant eighty-eight (88) weeks of permanent partial disability benefits to the right leg

at the rate of one hundred twenty-nine and 30/100 dollars ($129.30) per week with said benefits to commence on July 15, 1988.

That defendants are not liable for the payment of claimant's hospital expenses to Iowa Methodist Medical Center.

That payment for accrued healing period and permanent partial disability benefits shall be paid in a lump sum together with statutory interest thereon pursuant to Iowa Code section 85.30.

That defendants shall receive credit for all benefits paid.

That a claim activity report shall be filed upon payment of this award.

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

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. James A. Brewer
Attorney at Law
612 Kellogg Avenue
Ames, Iowa 50010

Mr. Robert C. Landess
Attorney at Law
Terrace Center, Ste. 111
2700 Grand Avenue
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK ANDERSON, Claimant, vs. HIGH RISE CONSTRUCTION SPECIALISTS, INC., Employer, and THE HARTFORD, Insurance Carrier, Defendants.	File No. 850996 N U N C P R O T U N C O R D E R

FILED
AUG 2 1990
IOWA INDUSTRIAL COMMISSIONER

An appeal decision was filed in this case on July 31, 1990. A portion of the decision is in error.

WHEREFORE, IT IS ORDERED:

Page three of the appeal decision is hereby struck, and revised page three, attached to this order, is inserted in lieu thereof.

Claimant's rate as set forth in the findings of fact, conclusions of law, and order on pages 4 and 5 of the appeal decision are hereby amended to reflect a rate of $131.90.

Signed and filed this 2nd day of August, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. James A. Brewer
Attorney at Law
612 Kellogg Avenue
Ames, Iowa 50010

Mr. Robert C. Landess
Attorney at Law
Terrace Center, Ste. 111
2700 Grand Avenue
Des Moines, Iowa 50312

Even the records of a similar employee doing similar work more than a year earlier do not meet the requirements of section 85.36(7), as that section clearly focuses on the 13 weeks immediately preceding the injury and not any other time period.

Thus, no evidence of the amount the claimant would have earned had he been employed by defendant in the 13 weeks preceding his injury is in the record. Because of this, claimant's rate is to be calculated by dividing his total wages by the number of weeks he did work. See Barker v. City Wide Cartage, 1 Iowa Industrial Commissioner Reports 12, 15,(appeal decision, 1980). Under this fact situation, the only rational method of determining a representative rate for claimant is to divide the total hours worked over the three weeks of his employment by three. His total hours for those three weeks was 91.5 hours, which divided by three equals an average work week of 30.5 hours. Multiplied by claimant's hourly rate of $6.50, claimant's gross weekly wages were $198.25. This yields a rate of $131.90 for a single employee with two dependents injured on April 10, 1987.

Defendants also challenge their obligation to pay claimant's medical expenses, and allege that claimant has failed to put into the record evidence establishing that the charges are reasonable and necessary. Iowa Code section 85.27 requires employers to provide reasonable and necessary medical services to an injured worker. Defendants disputed the reasonableness and necessity of claimant's medical bills in the prehearing report. Claimant put his medical bills into the record at the hearing. Claimant testified that all of his medical bills, with the exception of a portion relating to haircuts while in the hospital, were related to his work injury. (Transcript, page 35-40 line 1). A claimant's own testimony may establish the necessity of treatment. Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963). Claimant's description of the nature and purpose of his hospital stay establishes that such charges are necessary.

Claimant is not qualified to testify that charges for medical services are reasonable. Claimant has not put into the record any evidence on this issue. Although defendants have not put into the record any evidence that the charges are unreasonable, claimant bears the burden of proof. Claimant was clearly on notice that the reasonableness of the charges was disputed by defendants. See prehearing report and order approving same, item 8-(a). At the hearing, claimant failed to introduce any evidence to establish that the fees were

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK ANDERSON, Claimant, vs. HIGH RISE CONSTRUCTION SPECIALISTS, INC., Employer, and THE HARTFORD, Insurance Carrier, Defendants.	File No. 850096 R U L I N G O N R E H E A R I N G

FILE
OCT 23 1991
IOWA INDUSTRIAL COMM

An appeal decision was issued in this case on July 31, 1990. A separate Ruling on Costs was filed on August 1, 1990 assigning the costs of the case to the defendants.

Defendants filed an Application for Rehearing of the order on costs on August 8, 1990. An order granting the rehearing was filed on August 28, 1990 which ordered that defendants should file any brief on the rehearing question within 20 days of the order, and claimant was ordered to file his brief within 20 days of service of defendants' brief.

Claimant filed a Petition for Judicial Review on August 29, 1990. The application for rehearing and the ruling granting the rehearing, however, retain jurisdiction over the matter of assignment of costs in this agency.

By letter dated August 29, 1990 defendants indicated that they would be relying on authorities cited in their original application for rehearing. A proof of service stamp indicates that counsel for claimant received a copy of this letter. The letter of August 29, 1990, therefore constitutes service of defendants' brief on rehearing. More than 20 days have elapsed since August 29, 1990. Claimant has not filed a brief on rehearing.

Iowa 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."

Defendants presented claimant with a written offer to confess judgment pursuant to Iowa Code section 677.4, et seq.:

> 677.4 Offer to confess after action brought. After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action.
>
> 677.5 Nonacceptance -- costs. If the plaintiff, being present, refuses to accept judgment for such sum in full of the plaintiff's demands in the action, or, having had three days' notice that the offer would be made, of its amount, and of the time of making it, fails to attend, and on the trial does not recover more than was offered to be confessed, the plaintiff shall pay the costs of the defendant incurred after the offer.

Defendants urge on rehearing that the commissioner is bound by sections 677.4 and 677.5 to assign costs to claimant after the offer to confess judgment. Defendants rely on Iowa Division of Industrial Services Rule 343-4.35, which states that the Iowa Rules of Civil Procedure shall govern contested case proceedings before the industrial commissioner when not in conflict with the agency's rules. Claimant, in resisting the application for rehearing, has argued that there is no statutory authority for the commissioner to accept or give effect to an offer to confess judgment.

Rule 4.35 refers to the Iowa Rules of Civil Procedure. Sections 677.4 and 677.5 of the Code of Iowa are not part of the Rules of Civil Procedure. In addition, these sections are not directly applicable to the industrial commissioner by any language in either chapter 677 or chapters 85, 85A, 85B, 86 or 87 of the Code of Iowa.

Rule 4.33 places the assignment of costs in the discretion of the commissioner. Sections 677.4 and 677.5, while not altering this discretion, do serve as a guideline for the proper assignment of costs. Offers to confess judgment, to the extent that they tend to encourage settlement of contested cases, are not to be discouraged.

The offer to confess judgment in this case was presented to claimant at the time of the commencement of the hearing on February 21, 1989. Claimant refused the offer on the record at

the beginning of the hearing. The deputy's decision awarded claimant benefits in a greater amount than contained in the offer to confess judgment. However, the deputy's decision was appealed to the commissioner, and the appeal decision denied medical benefits to claimant. The final agency decision therefore awarded benefits to claimant in an amount less than contained in the offer to confess judgment.

THEREFORE, it is ordered:

Defendants shall pay the costs of this action up until the time the offer to confess judgment was refused by claimant. Claimant shall pay the costs of this action after the refusal of the offer to confess judgment.

Signed and filed this 23rd day of October, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. James A. Brewer
Attorney at Law
612 Kellogg Avenue
Ames, Iowa 50010

Mr. Robert C. Landess
Attorney at Law
Terrace Center, Ste. 111
2700 Grand Avenue
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEVIN L. BARKLEY, Claimant, vs. STONER FARMS, Employer, Defendant.	:	File No. 853629 A P P E A L D E C I S I O N

FILED
NOV 29 1990
IOWA INDUSTRIAL COMMISSIONER

The record before the deputy has been reviewed de novo on appeal. The decision of the deputy filed June 14, 1990, which denied claimant's motion to set aside dismissal is affirmed and is adopted as the final agency action in this case.

Claimant shall pay the costs of this proceeding.

Signed and filed this 29th day of November, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Keith Ferguson
Attorney at Law
P.O. Box 67
35 South Main
Dayton, Iowa 50530

Mr. Robert Holliday
Attorney at Law
2910 Grand Avenue
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

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

FILE
APR 29 1991
IOWA INDUSTRIAL COMMIS

On January 23, 1991, the Iowa Supreme Court issued a decision in the above-captioned case, Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991). The decision at 456 N.W.2d 531, 537, stated in part:

> We remand to the commissioner for an order awarding Bearce benefits based on a permanent partial disability of thirty-five percent of the body as a whole.

ACCORDINGLY, IT IS ORDERED:

The order portion of the appeal decision filed March 17, 1989, is hereby amended in part as follows:

Defendant is to pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of three hundred twenty-one and 10/100 dollars ($321.10) per week from October 23, 1986.

All other portions of the appeal decision and order filed March 17, 1989, remain in effect except as specifically modified by the decision of the supreme court.

Signed and filed this 29th day of April, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Thomas M. Wertz
Attorney at Law
4089 21st Ave. S.W., Ste 114
Cedar Rapids, Iowa 52404

Mr. James E. Shipman
Attorney at Law
1200 MNB Building
Cedar Rapids, Iowa 52401

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICKY L. BORG,

Claimant,

vs.

KING OF CLUBS, INC.,

Employer,

and

MARYLAND CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 881019

A P P E A L

D E C I S I O N

FILED
AUG 23 1990
INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision holding that claimant was an employee of the defendant employer and awarding claimant medical benefits and temporary total benefits as a result of claimant's September 14, 1987 work injury.

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

ISSUE

The issue on appeal is whether claimant was an employee of defendant employer.

REVIEW OF THE EVIDENCE

The arbitration decision dated January 5, 1990 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. The following additional citations are appropriate.

Iowa Code section 85.61(2) provides:

> "Worker" or "employee" means a person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship, for an employer; anexecutive officer elected or appointed and empowered under and in accordance with the charter and bylaws of a corporation, including a person holding an official position, or standing in a representative capacity of the employer...

Iowa Code section 85.61(3)(b) lists an "independent contractor" one of the persons who shall not be deemed as a "worker" or "employee."

> In the event a prima facie case is established, the burden is upon the employer to go forward with the evidence to overcome or rebut the case. An independent contractor allegation is an affirmative defense which must be established by the employer by a preponderance of the evidence. Daggett v. Nebraska-Eastern Exp., Inc., [252 Iowa 341, 346 (Iowa 1961)]. The term "independent contractor" is not defined in the Workers' Compensation Act and resort must be had to the common law to give the term its meaning. Norton v. Day Coal Co., 192 Iowa 160 (1921).

Funk v. Bekins Van Lines Company, I Iowa Indus. Comm'r Rep. 82, 83 (1980).

ANALYSIS

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

Claimant has the burden of proof as to employer-employee relationship. Defendant employer advertised for softball umpires in the newspaper. A general meeting was held to select umpires which defendant, along with the head umpire, attended. Defendant through the head umpire selected people to umpire the softball games at their complex. In addition, defendant scheduled when the teams would play and defendant, through the head umpire, scheduled umpires to the particular game. Claimant was required to be at a particular field at the assigned time. Finally, defendant received benefit from having people umpire the games as the defendant entered into to an agreement with the teams that umpires would be provided by the defendant.

The right to control work, rather than the actual exercise of the right to control, is decisive. While claimant was free to call the softball game as he saw fit, the ultimate control of his

conduct remained with the defendant. Defendant testified that if an umpire arrived at the park intoxicated they would terminate him or her. In addition, if there was a dispute between a team and an umpire and head umpire failed to take care of it to the defendant's satisfaction, they would talk to the umpire. Under the facts of this case, the greater weight of the evidence supports the conclusion that claimant was an employee of the defendant.

The burden of proof then shifts to the defendants to prove that claimant was not an employee but an independent contractor. Of particular note to the analysis of the evidence in this particular case is the method of payment. Claimant was paid by the number of games that he umpired, and not by the hour. Defendant employer testified that the monies which the softball teams paid to play were placed into defendant's checking account and the umpires paid from that account. The teams did not directly pay claimant nor were the funds set aside strictly for the payment of the umpires as the funds in the checking account were used for other purposes. Defendant controlled the rate of payment.

Defendant controlled the duration and progress of claimant's work. It was the defendant who scheduled the length of the softball season and defendant who scheduled the games. Defendant scheduled multiple teams at different times and claimant was then directed by the head umpire to the particular game. Defendant provided the base markers and the softball complex, while claimant provided his own umpiring equipment.

For these reasons and those laid out in the deputy's proposed decision, it is determined that defendants failed to meet their burden of proof that claimant was an independent contractor under the facts of this case.

FINDINGS OF FACT

1. On September 14, 1987, claimant was working as an umpire at defendant's softball park near Sioux City, Iowa.

2. While working as an umpire, claimant was struck in the mouth by a bat, resulting in a fractured jaw. He subsequently developed an infection which led to loss of one of his front teeth.

3. Claimant started his employment with defendant in 1981 when he was hired by the head umpire which defendant selected and continued to umpire in the summer and fall until the time of his injury on September 14, 1987.

4. Claimant was paid by the game and worked at times designated by the defendant through their head umpire.

5. Defendant determined claimant's rate of payment.

6. The work which claimant performed as an umpire for defendant was a part of the entire package of facilities and services which defendant provided to the softball teams which paid to use the facility.

7. Defendant received benefit from furnishing the softball teams with the service which claimant performed.

8. Defendant paid claimant from the corporation's checking account where the fees which the softball team paid were placed.

9. Claimant provided his own uniform and equipment to umpire the games. Defendant provided the base markers.

10. Claimant was free to work for other softball complexes or terminate his employment at any time.

11. Defendants were in control of the park where the services which the claimant provided were performed and were responsible for providing the services which claimant performed to the teams which used the facility.

12. The evidence does not contain any express written or oral agreement between the parties to this proceeding or an expression of intent made prior to the time of the injury which characterized claimant as being an independent contractor rather than an employee.

13. Claimant did not claim the income which he received from defendant in any manner on his income tax return.

14. Defendant did not provide claimant with either a W-2 form or a statement of nonemployee compensation (form 1099).

CONCLUSIONS OF LAW

Claimant proved that he was an employee of defendants when he was injured on September 14, 1987.

Defendants failed to prove that claimant was an independent contractor when he was injured on September 14, 1987.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant two (2) weeks of compensation for temporary total disability at the rate of eighty-eight and

01/100 dollars ($88.01) per week payable commencing September 15, 1987.

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

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

Signed and filed this 23rd day of August, 1990.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. P. D. Furlong
Attorney at Law
401 Commerce Building
Sioux City, Iowa 51101

Mr. Michael P. Jacobs
Attorney at Law
300 Toy National Bank Building
Sioux City, Iowa 51101

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICKY L. BORG, Claimant, vs. KING OF CLUBS, INC., Employer, and MARYLAND CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 881019 N U N C P R O T U N C O R D E R

FILED
SEP 20 1990
IOWA INDUSTRIAL COMMISSIONER

An appeal decision was filed in this case on August 23, 1990. On September 7, 1990 claimant filed an application for rehearing. Claimant's application for rehearing is moot as a result of this order and is denied. The order portion of the appeal decision should read as follows:

THEREFORE, it is ordered:

That defendants pay claimant two (2) weeks of compensation for temporary total disability at the rate of eighty-eight and 01/100 dollars ($88.01) per week payable commencing September 15, 1987.

That all past due amounts of weekly compensation be paid to claimant in a lump sum together with interest pursuant to the provision of Iowa Code section 85.30.

That defendants pay the following medical expenses:

St. Luke's Medical center	$1,636.38
Anesthesia Consultants, P.C.	324.00
Sioux City Radiology Group	41.50
Drs. Hinds and Dorhmann	765.00
Dr. Guy Posey	108.00
Dr. Donna Gardner	18.00
Total	$2,893.38

That defendants pay the reasonable costs of the tooth replacement procedure recommended by Dr. Gardner.

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

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

Signed and filed this 20th day of September, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. P. D. Furlong
Attorney at Law
401 Commerce Building
Sioux City, Iowa 51101

Mr. Michael P. Jacobs
Attorney at Law
300 Toy National Bank Building
Sioux City, Iowa 51101

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LOIS H. BOYD, Claimant,	
vs.	File No. 890207
WESTERN HOME, Employer,	A P P E A L
and	D E C I S I O N
BITUMINOUS INSURANCE COMPANY, Insurance Carrier, Defendants.	

FILED
JUN 2 6 1991
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. The decision of the deputy filed January 25, 1991, is affirmed and is adopted as the final agency action in this case, with the following additional analysis.

Claimant was 67 years old at the time of the hearing. 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 34 (Appeal Decision 1979); Merrill v. Eaton Corp., Appeal Decision, May 9, 1990; Barkdoll v. American Freight System, Inc., Appeal Decision, June 28, 1988. Claimant has an industrial disability of 15 percent.

Claimant and defendants stipulated that claimant's healing period for the right knee condition ended April 23, 1990. Claimant urges that it began on January 20, 1990, when treatment for the condition began. Defendants urge that the healing period did not begin until the date of surgery, March 2, 1990.

Iowa Code section 85.34(1), dealing with healing period, states that the healing period begins at the date of injury. In this case, however, claimant did not begin to experience symptoms in her right knee until January of 1990, some 18 months after her injury. Claimant was not working at this time.

The dispute between the parties is whether claimant is entitled to healing period benefits for her right knee injury for the period of time between her initiation of treatment on January 2, 1990, and the knee surgery on March 2, 1990. Claimant was clearly disabled from work during the period from her surgery on March 2, 1990 to the stipulated end of the healing period, April 23, 1990.

Although claimant experienced right knee symptoms during the period January 2, 1990 to March 2, 1990, there is no clear indication as to whether the condition prevented claimant from working. Claimant was not working during this time period, and thus there is no physician's release from work. A fair reading of Iowa Code section 85.34(1) indicates that the section contemplates a period of time when the employee is off work due to the injury, beginning on the date of the injury, and ending when the employee returns to work, or it is medically indicated that the employee is capable of returning to work or that further improvement is not anticipated. The clear fact that healing period ends when an employee works again or can work again indicates that healing period contemplates an inability to work, not just the existence of work-related symptoms. Conversely, a period of time when claimant is experiencing work-related symptoms but nevertheless is physically capable of working cannot be termed healing period under section 85.34(1). Claimant bears the burden of proof of entitlement to benefits. Claimant is not entitled to healing period benefits for the period January 2, 1990 to March 2, 1990.

Claimant also sought penalty benefits under Iowa Code section 86.13. Defendants did not acknowledge the causal connection between claimant's right knee condition and her work injury until the hearing. Arnold Delbridge, M.D., had opined that such a causal connection existed as early as July 2, 1990. However, Dr. Delbridge's statements on causal connection were qualified, and claimant did have a preexisting condition that accounted for some of claimant's right knee condition.

The standard for determining whether a penalty is appropriate is whether claimant's claim is fairly debatable. Where claimant asserts a claim that is fairly debatable, defendants do not act unreasonably in the denial of payment. Seydel v. U of I Physical Plant, Appeal Decision, November 1, 1989. In this case, even though Dr. Delbridge's opinion was the only medical evidence, the causal connection of claimant's right knee condition was still fairly debatable in light of claimant's preexisting right knee condition and Dr. Delbridge's description of his diagnosis as a "tough call." Penalty benefits are not appropriate.

Defendants shall pay the costs of the appeal, including the preparation of the appeal transcript.

Signed and filed this 26th day of June, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Thomas L. Staack
Mr. J. Scott Bayne
Attorneys at Law
3151 Brockway Rd.
PO Box 810
Waterloo, Iowa 50704

Mr. J. Richard Johnson
Attorney at Law
1715 First Avenue SE
PO Box 607
Cedar Rapids, Iowa 52406

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH BRAASCH, Claimant, vs. FARMLAND FOODS, Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	File No. 865997 A P P E A L D E C I S I O N FILED SEP 26 1990 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding 20 percent industrial disability as a result of claimant's November 4, 1987 work injury.

The record on appeal consists of the transcript of the arbitration decision and joint exhibits 1 through 35. Defendants filed a brief on appeal.

ISSUES

Defendants state the issues on appeal are:

I. Did the Deputy industrial commissioner err in finding an injury which arose out of and in the course of claimant's employment on November 4, 1987?

II. Did the deputy industrial commissioner err in failing to find claimant's recovery was barred by the statute of limitations?

III. Did the deputy industrial commissioner err in finding a causal connection between claimant's alleged injury and any disability which he now suffers?

IV. Did the deputy industrial commissioner err in awarding healing period benefits?

V. Did the deputy industrial commissioner err in finding that claimant has a 20% industrial disability?

REVIEW OF THE EVIDENCE

The arbitration decision filed August 22, 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. The following additional analysis is appropriate.

Defendants contend that claimant's injury began in December of 1984 and did not arise out of the course of claimant's employment on November 4, 1987. Claimant sought treatment in December 1984 for low back pain. Claimant was off work but never received workers' compensation benefits. Claimant received conservative treatment and was released to return to work in January 1985 without restrictions. (Joint Exhibit 8 and 9) While claimant's symptoms in November 1987 were similar to those claimant experienced in 1984, claimant's November 1987 work injury was not the continuation of claimant's 1984 injury. Claimant returned to work following his December 1984 injury and continued to perform his job duties which included a great deal of heavy lifting and bending.

Claimant began work with defendant employer in October 1954. Claimant worked various positions throughout defendants' operations. Claimant began working as a serviceman in the boning room in 1981. Claimant's responsibilities as a serviceman included stacking pallets that weigh between thirty-five and seventy pounds, pulling boxes out and folding boxes. (Transcript, Pages 8-9) Claimant's back injury is consistent with claimant's work assignments. Claimant's work required bending, twisting and lifting heavy objects on a repetitive basis and claimant's back injury is consistent with the work.

In addition, defendants assert that claimant may have been injured in June of 1987 or in February of 1988. Dennis Crabb, M.D., treated claimant in June of 1987 for similar problems. Claimant reported an incident when he was performing duties as a volunteer fire fighter in January 1988 when he strained his back and another incident where claimant slipped

getting into a truck. Claimant did not miss work immediately after the January 1988 incident.

On November 4, 1987 claimant sought the treatment of Ronald Dreyer, D.C., for low back pain that slowly began to worsen. Claimant received conservative treatment and as released to return to work January 4, 1988. Claimant continued to experience back pain. In February 1988 claimant was seen by Maurice P. Margules, M.D., who diagnosed a herniated lumbar disc due to trauma initially sustained in November 1987. (Jt. Ex. 23, p. 2 and Deposition of M. P. Margules, M.D., p. 17) Claimant's prior examinations revealed moderate or mild lordosis. Surgery was performed on February 12, 1988 by Dr. Margules who excised large disc herniation at the L5-S1 level. Claimant's November 4, 1987 work injury arose out of and in the course of his employment with defendants. Claimant timely filed his originial notice and petition and his claim is not barred by the statute of limitations.

On the issue of casual connection, Edward M. Schima, M.D., was unable to pinpoint whether claimant's work or his other activities caused his back problems. While Dr. Schima's clinical qualifications are impressive, he examined claimant almost six months after claimant's surgery. Dr. Margules treated claimant after the onset of acute pain and performed surgery. Dr. Margules' opinion that there was a causal connection between claimant's injury is given greater weight. Dr. Margules opined that claimant's work caused claimant's back problems and that the cause was not due to a specific trauma but a combination of work activities leading to acute onset of pain.

Claimant proved entitlement to healing period benefits from November 4, 1987 through January 4, 1988. In addition, claimant proved entitlement to healing period benefits from February 3, 1988 through April 12, 1988. Defendants contend that claimant reinjured his back while performing his duties as a volunteer fire fighter and claimant is not entitled to healing period benefits during this period. Claimant reported that the fire fighting incident occurred on January 21, 1988. Claimant did not miss work until February 3, 1988, more than a week after the fire fighting incident. Claimant returned to his service line position on January 4, 1988 and performed his duties which included heavy lifting and bending. Claimant's pain worsened. Claimant sought treatment and Dr. Margules performed surgery on February 12, 1988. Claimant proved entitlement to healing period benefits from November 4, 1987 through January 4, 1988 and from February 3, 1988 through April 12, 1988.

On the issue of industrial disability, claimant was born on January 7, 1942. Claimant completed ten years of school and has not received his GED. Claimant started work with defendant employer on October 25, 1958 and is near the top of the seniority

system. Claimant injured his back in December 1984 but returned to work. Claimant sought treatment on November 4, 1987 for his low back pain. Claimant returned to work on January 4, 1988 and performed his same duties. Claimant's back pain worsened and he sought additional treatment on February 3, 1988. Surgery was performed February 12, 1988 for claimant's herniated lumbar disc. Dr. Margules opined that claimant's functional impairment was 10 to 15 percent of the body as a whole as a result of his back injury. Dr. Schima opined that claimant sustained a 10 percent functional impairment on account of his low back condition. Claimant suffers from a hearing loss. As a result of claimant's seniority, claimant obtained a position sharpening knives which falls within claimant's work restrictions. Claimant is earning the same wage as he earned prior to his work injury. Claimant proved entitlement to 20 percent industrial disability as a result of his November 4, 1987 work injury.

FINDINGS OF FACT

1. Claimant's disability is the result of a work-related low back repetitive injury on November 4, 1987.

2. Claimant had a preexisting degenerative disc and nerve root condition involving the L5 and S1 vertebrae which was materially aggravated, accelerated and worsened by claimant's repetitive injury on November 4, 1987.

3. Claimant's work-related repetitive injury occurred on November 4, 1987 and claimant's petition filed on March 10, 1988 is timely and in compliance with Iowa Code section 85.26.

4. Claimant was born January 7, 1942.

5. Claimant completed ten years of school and has not received his GED.

6. Claimant has been employed with defendant employer since October 25, 1958 and has worked various positions in the defendant's plant.

7. Claimant is near the top of the seniority system at defendant's plant.

8. Claimant obtained a position sharpening knives that falls within his work restrictions. Claimant is receiving the same wage sharpening knives as he did as a service line person.

9. Claimant is restricted to sedentary type of employment and was advised to discontinue his activities as a volunteer fire fighter.

10. Claimant incurred a 10 percent functional impairment to the body as a whole as a result of his repetitive work-related injury on November 4, 1987.

11. Claimant proved entitlement to healing period benefits from November 4, 1987 to January 3, 1988, inclusively, and from February 3, 1988 to April 12, 1988 inclusively.

12. Claimant sustained a 20 percent reduction in earning capacity as a result of his November 4, 1987 work injury and subsequent back surgery.

13. Claimant's medical bills in the amount of $5,220.49 are a result of claimant's November 4, 1987 work injury.

14. Claimant was paid $2,158.20 in sick leave benefits and was paid no healing period or temporary total disability benefits during his time off as a result of his November 4, 1987 work injury.

CONCLUSIONS OF LAW

Claimant proved that his low back injury arose out of and in the course of his employment on November 4, 1987.

Claimant timely filed his petition in accordance with Iowa Code section 85.26.

Claimant proved that his November 4, 1987 work-related low back injury is casually connected with the disability he now suffers.

Claimant proved entitlement to healing period benefits from November 4, 1987 to January 4, 1988, inclusively, and February 3, 1988 to April 12, 1988, inclusively.

Claimant proved entitlement to 20 percent industrial disability.

WHEREFORE, the decision of the deputy of affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant healing period benefits at the rate of two hundred seventy-seven and 15/100 dollars ($277.15) per week for the period beginning November 4, 1987 to January 3, 1988, inclusively and beginning February 3, 1988 to April 12, 1988, inclusively.

That defendants pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the rate of two hundred seventy-seven and 15/100 dollars ($277.15) per week commencing April 13, 1988.

That defendants reimburse claimant, or the medical provider if not already paid:

A. Bluffs Neurosurgical Associates, dated February 10, 1988 through September 28, 1988	$3,690.00
B. Dr. Ronald H. Dreyer, dated December 8, 1984 through February 5, 1988	418.20
C. Jennie Edmundson Hospital, dated June 24, 1988	176.73
D. Medical Anesthesia Associates, P. C., dated June 29, 1988	33.20
E. Dr. Michael N. Crawford, dated July 1988	67.10
F. P. L. Meyer, D. O., dated July 27, 1988	25.00
G. Dr. William R. Hamsa, Jr., dated January 6, 2988	165.00
H. Walters Pharmacy, dated February 3, 1988	20.56
I. Copies of checks to Dr. Margules	256.50
Copies of checks to Dr. Ronald Dreyer	368.20
Total	$5,220.49
Already Paid	4,108.20
Balance	$1,112.29

That defendants shall pay the accrued weekly benefits in a lump sum and shall receive credit against the award for weekly benefits. Defendants shall receive two thousand one hundred fifty-eight and 50/100 dollars ($2,158.50) credit for the sick leave benefits paid claimant.

That defendants shall pay interest on benefits awarded herein as set out 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, which includes bills of Blair & Associates in the amount of one hundred forty-one and 50/100 dollars ($141.50); Bluffs Neurosurgical Associates, P.C., in the amount of one hundred fifty dollars

($150.00); Dr. Ronald Dreyer, in the amount of forty dollars ($40.00); and Dr. William R. Hamsa, in the amount of seventy-five dollars ($75.00).

That defendants pay the costs of this proceeding including the costs of transription 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 26th day of September, 1990.

Clair R Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Sheldon M. Gallner
Attorney at Law
803 3rd Avenue
PO Box 1588
Council Bluffs, Iowa 51502

Ms. Judith Ann Higgs
Attorney at Law
200 Home Federal Bldg.
PO Box 3086
Sioux City, Iowa 51102

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICK BRADLEY,	:	
Claimant,	:	
vs.	:	File No. 847287
ALLEN MEMORIAL HOSPITAL,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
FIREMAN'S FUND INSURANCE COMPANIES,	:	
Insurance Carrier, Defendants.	:	

FILED
NOV 30 1990
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 March 12, 1987. The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 25. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

Defendants state the following issues on appeal:

1. Whether the deputy erred in finding claimant sustained a 20% impairment to each upper extremity.

2. Whether the deputy erred in finding that interest on claimant's benefits began to run on May 15, 1987.

REVIEW OF THE EVIDENCE

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

Claimant worked in defendants' hospital as a maintenance worker, where he developed bilateral carpal tunnel syndrome. Claimant underwent surgery on both hands by Jitu D. Kothari, M.D., an orthopaedic surgeon specializing in arthroscopic surgery. Dr. Kothari gave claimant a rating of seven percent "disability" of each hand after the surgeries. If Dr. Kothari's rating of disability is in fact a rating of impairment, it would convert, under the AMA Guides to the Evaluation of Permanent Impairment, 3rd edition, to six percent impairment of each upper extremity, which would in turn convert to four percent impairment of the body as a whole for each upper extremity. Using the combined values chart yields an eight percent permanent partial impairment of the body as a whole.

Claimant was also examined by John R. Walker, M.D., an orthopaedic specialist with practice limited to orthopaedics. Dr. Walker assigned claimant a permanent partial impairment rating of 20 percent of each upper extremity. This would convert into a 12 percent impairment to the body as a whole for each upper extremity, and 23 percent permanent partial impairment of the body as a whole under the combined values chart.

APPLICABLE LAW

Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128,133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983). The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 339 (1942); Roberts v. Pizza Hut of Washington, Inc., II Iowa Industrial Commissioner Report, 317, 320 (1982); Sheflett v. Clearfield Veterinary Clinic, II Iowa Indus. Comm'r Rep., 334, 347 (1982); and Webster v. John Deere Component Works, II Iowa Indus. Comm'r Rep., 435, 450 (1982).

A treating physician's testimony is not entitled to greater weight as a matter of law than that of a physician who later examines a claimant in anticipation of litigation. The weight to be given testimony of a physician is a fact issue to be decided by the industrial commissioner in light of the record the parties develop. Rockwell Graphic Systems, Inc., v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Iowa Code section 85.34(2)(s) states:

> The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused

by a single accident, shall equal five hundred weeks and shall be compensated as such, however, if said employee is permanently and totally disabled the employee may be entitled to benefits under subsection 3.

Iowa Code section 85.30 states:

Compensation payments shall be made each week beginning on the eleventh day after the injury, and each week thereafter during the period for which 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

Defendants argue that Dr. Walker's rating of impairment was affected by his knowledge that claimant had been terminated by defendant. As this is a scheduled member case, the fact that claimant was terminated from his employment due to the effects of his injury is not relevant. Factors of industrial disability are not utilized in a scheduled member case. Only claimant's impairment may be considered. Consideration is not given to what effect the scheduled loss has on claimant's earning capacity. However, Dr. Walker's report clearly shows that the doctor is aware of the distinction between physical impairment and disability. Dr. Walker's rating is a rating of physical impairment alone. (See Joint Exhibit 25, pages 3 and 4).

Claimant has been given two ratings of impairment. Dr. Kothari was claimant's treating physician and saw claimant 19 times. Dr. Walker saw claimant only once, apparently in midyear 1988. Dr. Kothari operated on claimant's hands, but Dr. Walker did not.

Dr. Kothari's rating was a rating of "disability." Dr. Kothari is not qualified to rate claimant's disability. His expertise is limited to a rating of claimant's physical impairment. However, there is no indication in the record that Dr. Kothari improperly relied on disability factors in establishing a rating of impairment for claimant. Although the improper terminology may have been used, it appears that Dr. Kothari's rating is a rating of impairment.

In assessing the weight to be given to the testimony of any witness, bias is a relevant factor. In this case, Dr. Kothari had hospital privileges at defendant employer's hospital. Dr. Kothari's offices were in the same medical complex as the hospital. Dr. Kothari delayed the issuance of a rating of impairment for over a year after it was requested. The rating

was reported in a letter dated June 20, 1989. There is no explanation for this delay in the record. Dr. Kothari was not, however, an employee of the hospital, nor was there any showing that Dr. Kothari had any financial interest in the hospital. In addition, it would be speculative to treat the delay in the issuance of a rating of impairment as somehow indicating the existence of bias in defendants' favor. Although these factors are noted and given appropriate weight, it is concluded that Dr. Kothari's relationship with defendant hospital is not so close as to cast doubt on the validity of the rating of impairment he gave to claimant.

Both doctors who gave claimant a rating are orthopaedic specialists. However, Dr. Kothari also specializes in orthopaedic surgery, and in fact did operate on both of claimant's hands. Because of Dr. Kothari's greater contact with claimant, and his opportunity to make an internal examination of claimant's condition, the opinion of Dr. Kothari will be given the greater weight.

Defendants raise the question of when interest on unpaid benefits would begin to accrue. As this is a case in arbitration, interest on unpaid benefits awarded to claimant shall begin to accrue from the end of the healing period. Farmer's Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Center, Ruling on Rehearing, October 18, 1989

FINDINGS OF FACT

1. Claimant received a work-related bilateral carpal tunnel syndrome on March 12, 1987.

2. Claimant had a left carpal tunnel release on March 12, 1987 and a right carpal tunnel release on April 9, 1987.

3. Claimant's work-related bilateral carpal tunnel injury on March 12, 1987 resulted in a seven percent permanent partial impairment to each of claimant's left and right upper extremities.

4. Claimant incurred an eight percent impairment to his body as a whole as a result of the combined effects of claimant's bilateral carpal tunnel injury on March 12, 1987.

5. Claimant's permanent partial disability benefits and interest on said benefits are to begin after the end of claimant's healing period, which period ended on May 15, 1987.

CONCLUSIONS OF LAW

As a result of his work related injury on March 12, 1987, claimant has a seven percent impairment of each hand which converts to an eight percent permanent partial impairment of the body as a whole.

Interest on unpaid benefits shall accrue from May 15, 1987.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant forty (40) weeks of permanent partial disability benefits at the rate of one hundred sixty-three and 02/100 dollars ($163.02) per week beginning May 15, 1987.

That defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30. The interest shall accrue from May 15, 1987.

That defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against the award for weekly benefits previously paid.

That defendants shall file claim activity reports as required by this agency pursuant to rule 343 IAC 3.1(2).

That defendants shall pay the costs of this action pursuant to rule 343 IAC 4.33.

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

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Gerald B. Carney
Attorney at Law
303 First Ave. NE
P.O. Box 786
Waverly, Iowa 50677

Mr. Greg A. Egbers
Attorney at Law
600 Union Arcade Bldg.
111 E. Third Street
Davenport, Iowa 52801-1596

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLAYTON BRAL, Claimant, vs. FARMLAND FOODS, INC., Employer, and AETNA CASUALTY & SURETY CO., Insurance Carrier, Defendants.	:	File No. 839759 A P P E A L D E C I S I O N

FILED
MAR 5 1991
IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on November 18, 1986. The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 38; and claimant's exhibits A, B and C. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

The issues as stated by claimant are:

A. Whether the deputy industrial commissioner erred by excluding the testimony of James T. Rogers at the hearing in this matter.

B. Whether the deputy industrial commissioner erred by not finding a period of temporary partial disability from February 17, 1987 to April 6, 1987.

C. Whether the deputy industrial commissioner erred by finding only a twenty 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. In addition, the following authorities are noted:

> 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.

Iowa Rule of Civil Procedure 125(c).

ANALYSIS

Claimant raises as an issue on appeal the deputy's exclusion of the testimony of James Rogers, a vocational rehabilitation specialist. Rogers was listed on claimant's witness list provided to defendants, and a written report by Rogers was listed by claimant on the exhibit list and a copy timely provided to defendants. However, defendants had served interrogatories on claimant, one of which requested claimant to list all expert witnesses claimant intended to utilize at the hearing. Claimant's response when he originally answered the interrogatories was that the identity of expert witnesses was unknown at that time, but that the answer to the interrogatory would be supplemented prior to the completion of discovery.

At the time of the hearing, claimant had not supplemented the interrogatory answer dealing with expert witnesses. The written report of Rogers was admitted into the record (as Joint Exhibit 32), but the witness was not allowed to testify except by way of offer of proof.

Subsequent to the hearing in this case, the hearing assignment order utilized by this agency was modified. The modification now makes it clear that parties are required to comply with Iowa Rule of Civil Procedure 125(c), and must supplement interrogatory answers in a timely fashion. However, the hearing assignment order used in this case did not contain

such a requirement. The hearing assignment order in this case was filed August 22, 1988.

Claimant argues that the case should be remanded to the deputy to allow the testimony of Rogers, or, in the alternative, that the offer of proof be considered on appeal. Claimant states that the exclusion of this testimony is not harmless error, as Rogers' testimony expands upon his written findings and supplements those findings with later events.

Defendants cannot claim any surprise or prejudice. Defendants were in possession of Rogers' written report some 11 months prior to the hearing. Defendants were informed 15 or more days prior to the hearing that Rogers would be called as a witness at the hearing. Defendants point out that the industrial commissioner's newsletter of November 1988, cautioned the workers' compensation bar in Iowa to comply with the duty to supplement interrogatory responses under Iowa R.Civ.P. 125(c) in regard to expert witnesses. However, a later appeal case, Nammany v. Stellco, decided October 17, 1989, addressed a situation where defendants had listed an expert witness under the hearing assignment order then in use, but had failed to supplement an earlier interrogatory requesting the identity of expert witnesses. Claimant acknowledged in that case that there was a technical non-compliance only, and no surprise or prejudice would result by admitting the testimony. The deputy in that case allowed the expert to testify, over claimant's objection. The deputy's decision to allow the testimony was affirmed on appeal to the industrial commissioner.

In the instant case, there was also no surprise or prejudice to defendants. Defendants were aware of James Rogers, were aware that he was an expert witness, were aware from his written report of the substance and basis of the opinions he intended to offer, and were aware that claimant intended to call him as a witness at the hearing, all within the time limits required by the rules or an order of this agency. In light of this, the testimony of James Rogers should have been admitted at the hearing. The testimony of James Rogers was preserved in the transcript of the hearing with an offer of proof, and this testimony will be considered on appeal in conjunction with the other evidence.

Although the hearing assignment order now used by this agency clearly spells out the role played by Iowa R.Civ.P 125(c) in adjudicated cases before this agency, the hearing assignment order in effect at the time of the hearing in the instant case did not. Any conflict between Iowa R.Civ.P. 125(c) and the hearing assignment order that existed at the time of the hearing in this case has now been resolved by the additional language of the "new" hearing assignment order. Thus, both this decision and Nammany are decisions confined to the facts and the record in

existence in those cases at the time of those hearings and the evidentiary rulings made at those hearings. Neither Nammany nor this case serve as valid precedent for cases where the hearing assignment order, containing language requiring the parties to comply with Iowa R.Civ.P. 125(c), is present and controlling.

In addition, it is pointed out that Iowa R.Civ.P. 125(c) contemplates the exercise of discretion by the decision maker on whether to admit or exclude evidence. An appeal to the industrial commissioner contemplates a de novo review of the deputy's decision. Thus, the industrial commissioner possesses the same discretion under Iowa R.Civ.P. 125(c) as the deputy industrial commissioner who originally heard the case. The commissioner is not bound to exercise that discretion in the same manner as exercised by the deputy.

Claimant's second issue on appeal concerns temporary partial disability. However, defendants' assertions in their appeal brief, and claimant's statement in his reply brief, indicate that this issue has been resolved. The parties agree that defendants will not receive credit against permanent partial disability benefits for amounts paid for temporary partial disability.

Claimant's final issue on appeal is the extent of his industrial disability. Claimant, in his reply brief, argues that defendants cannot urge a lowering of the deputy's award of 20 percent industrial disability without filing a cross-appeal. Claimant's assertion is incorrect. An appeal to the industrial commissioner is de novo. The decision of the deputy, once an appeal is taken, cannot be reinstated. Tussing v. Hormel & Co., 481 N.W.2d 450 (Iowa 1990). The extent of claimant's industrial disability is listed by claimant as an issue on appeal, and the industrial commissioner can raise, lower, or maintain the deputy's award of industrial disability. Defendants are free to urge a lower award of industrial disability on appeal.

However, defendants' brief also appears to address the issue of the date when claimant's permanent disability begins. Although appeals from the decision of a deputy industrial commissioner are considered de novo, review on appeal is limited to those issues properly raised on appeal by an appealing party. A party cannot raise an issue on appeal without filing an appeal or a cross-appeal under rule 343 IAC 4.27. Allowing an appellee to raise an appeal issue simply by discussing the issue in the appeal brief would deny the appellant the opportunity to properly present a brief and argument on the issue. Although rule 343 IAC 4.27(1) contemplates a reply brief by appellant, a reply brief is normally utilized to give appellant an opportunity to respond to appellee's arguments responding to issues properly preserved on appeal. It is not the purpose of a reply brief to respond to new issues raised in appellee's brief. This issue is not listed by

claimant, and defendants have not filed a cross-appeal. The issue has not been preserved and the commencement date for permanent disability benefits will not be addressed on appeal.

Claimant has a permanent impairment of his back. Claimant has two ratings of permanent impairment. D.M. Tan Creti, M.D., claimant's treating physician, rated claimant as having a 21 percent permanent impairment of the body as a whole. Lonnie Mercier, M.D., rated claimant as having a five percent permanent impairment of the body as a whole. Dr. Mercier's examination of claimant was later in time, but only by one month. Dr. Mercier is an orthopedic specialist, while Dr. Tan Creti is a general practitioner. Dr. Tan Creti's examination of claimant was based on the results of various tests performed on claimant.

In addition, it is noted that impairment is only one factor in industrial disability. Claimant is 33 years old, and has an eighth grade education. Claimant's lack of formal education is a disadvantage to him in the job market. However, claimant is young enough to seek retraining. Claimant's work experience is limited to manual labor. Claimant cannot return to his work in the meat packing industry.

Claimant's vocational rehabilitation tests show that he would have difficulty in obtaining employment in any occupation requiring a full eight hour shift. Claimant also has significant medical restrictions that would negatively impact on his ability to perform manual labor. After returning to work for a short time, claimant is presently unemployed. Claimant was found to be able to perform jobs that would earn him in the range of $3.35 to $5.00 per hour. Claimant was earning in excess of $9.00 per hour at the time of his injury. Claimant has suffered a significant loss of earnings as a result of his work injury.

The testimony of James Rogers indicates that claimant has an overall rating of average intellectual capacity, and that claimant could obtain a GED. Claimant was found to have aptitude for 9 out of 66 occupational aptitude patterns. Rogers' evaluation, however, was limited to one interview with claimant and did not involve a market survey. Rogers did state that some of the jobs claimant had an aptitude for were not available in claimant's home area of Denison, Iowa.

Claimant does have a skill unrelated to his work experience. Claimant has established a woodworking business in his home. This business has not shown a profit to date, although claimant apparently has a steady supply of customers and has recently expanded his business' physical facility. Defendants argue that claimant's business has not shown a profit because claimant has re-invested all profits into expanding the business.

The profitability or non-profitability of claimant's business is not directly relevant. Predictions of claimant's income from his business would be speculative. Claimant's ability to perform wood working services for an employer, rather than in a self-employed capacity, is relevant to the extent a market for those services exists. Claimant's wood working skills and abilities are marketable skills claimant can offer to an employer. However, the record does not show that such jobs are presently available. Claimant's demonstrated willingness to establish this business, rather than remain idle, does indicate positive motivation on claimant's part.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 20 percent.

Finally, even if it is determined on further appeal that it was improper to admit the testimony of James Rogers, it is hereby found that even without the evidence of Rogers' testimony in the record, claimant's industrial disability is 20 percent. The testimony of Rogers, although corroborating and to a certain extent expanding upon his written report, the admissibility of which is not disputed, does not materially alter the record and does not materially affect the determination of claimant's industrial disability. If it is error to admit this testimony, the error is harmless in that the result remains the same.

FINDINGS OF FACT

1. Claimant was injured on November 18, 1986 when, while working for defendant employer unloading 50 pound bags of sawdust, he hurt his low back.

2. As a result of his November 18, 1986 injury, claimant incurred a healing period from and including November 19, 1986 to and including February 16, 1987 and again beginning and including April 7, 1987 to and including October 26, 1987.

3. As a result of his November 18, 1986 injury, claimant has ratings of five percent and 21 percent permanent impairment to his body as a whole.

4. Claimant has restrictions resulting from his work injury on November 18, 1986 of 15 pounds occasional lifting, no repeated lifting or bending tasks more often than five minutes, and not to remain with a confined posture for more than 15 minutes without a break to exercise.

5. Claimant has a 20 percent loss of earning capacity as a result of the work injury of November 18, 1986.

6. Claimant incurred gastrointestinal problems which were not the result of his injury of November 18, 1986 and have not resulted in any impairment.

7. Claimant reached maximum recovery on October 27, 1987.

8. Claimant has incurred medical expenses involving his work-related injury for treatment of his back which should be paid by defendants.

9. The weekly rate of compensation is $265.02.

CONCLUSIONS OF LAW

The testimony of James Rogers was admissible.

Claimant sustained an injury which arose out of and in the course of his employment on November 18, 1986.

Claimant's injury on November 18, 1986 is causally connected to his disability.

Claimant has sustained an industrial disability of 20 percent.

Claimant reached maximum recovery on October 27, 1987.

Claimant incurred a healing period beginning and including November 19, 1986 to and including February 16, 1987 and a second healing period of April 7, 1987, inclusive, to and including October 26, 1987.

Claimant has incurred medical expenses for his back which are causally connected to his work injury of November 18, 1986 and were necessary and reasonable.

WHEREFORE, the decision of the deputy is affirmed in part and reversed in part.

ORDER

THEREFORE, it is ordered:

That defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability at the stipulated rate of two hundred sixty-five and 02/100 dollars ($265.02) commencing October 27, 1987.

That defendants are to pay unto claimant twelve and six-sevenths (12 6/7) weeks of healing period benefits for the period of and including November 19, 1986 to and including February 16,

1987, and twenty-nine (29) weeks for a second healing period from and including April 7, 1987 to and including October 26, 1987, both totaling forty-one and six-sevenths (41 6/7) weeks at the weekly rate of two hundred sixty-five and 02/100 dollars ($265.02).

That defendants shall pay the Crawford County Memorial Hospital bill of one hundred sixty dollars ($160.00) and the Denison Chiropractic Clinic bill of one thousand three hundred fifty-three and 38/100 dollars ($1,353.38), either directly to the provider or if already paid by claimant then to reimburse claimant.

That defendants are to be given credit for benefits previously paid. Defendants shall not receive credit for temporary total disability benefits previously paid except as a credit for defendants' obligation to pay temporary total disability benefits.

That defendants shall pay the 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 including the cost of the transcription of the hearing proceeding.

That defendants file claim activity reports as requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 5th day of March, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. R. J. Tilton
Attorney at Law
1312 First Ave. S
Denison, Iowa 51442

Ms. Judith Ann Higgs
Attorney at Law
200 Home Federal Bldg.
P.O. Box 3086
Sioux City, Iowa 51102

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLAYTON BRAL, Claimant, vs. FARMLAND FOODS, INC., Employer, and AETNA CASUALTY & SURETY CO., Insurance Carrier, Defendants.	File No. 839759 O R D E R N U N C P R O T U N C

FILED
MAR 11 1991
IOWA INDUSTRIAL COMMISSIONER

An appeal decision was filed in this case on March 5, 1991. The fourth unnumbered paragraph of the Order in the decision states, in part: "Defendants shall not receive credit for temporary total disability benefits previously paid except as a credit for defendants' obligation to pay temporary total disability benefits." It has been brought to this agency's attention that the benefits previously paid by defendants were in the nature of temporary partial disability benefits, rather than temporary total disability benefits.

THEREFORE, it is ordered:

The fourth unnumbered paragraph of the order in the appeal decision filed March 5, 1991, is hereby amended to read:

That defendants are to be given credit for benefits previously paid. Defendants shall not receive credit for temporary partial disability benefits previously paid except as a credit for defendants' obligation to pay temporary partial disability benefits.

Signed and filed this 11th day of March, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. R. J. Tilton
Attorney at Law
1312 First Ave. S
Denison, Iowa 51442

Ms. Judith Ann Higgs
Attorney at Law
200 Home Federal Bldg.
P.O. Box 3086
Sioux City, Iowa 51102

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CEDRIC BROWN, Claimant, vs. CMC, Employer, and CIGNA, Insurance Carrier, Defendants.	File No. 936538 A P P E A L R U L I N G

FILED
NOV 28 1990
IOWA INDUSTRIAL COMMISSION

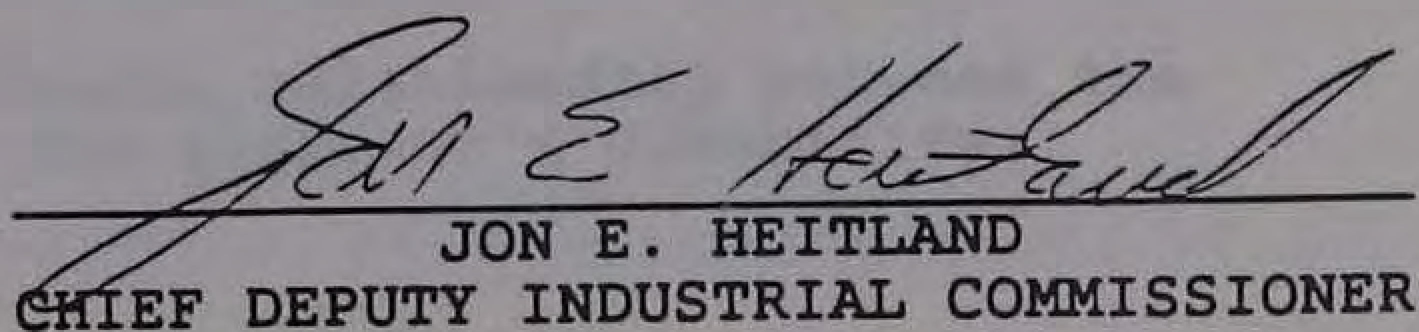
Rule 343 IAC 4.27 states in part:

> No appeal shall be separately taken under this or 4.25(17A,86) from an interlocutory decision, order or ruling of a deputy industrial commissioner. A decision, order or ruling is interlocutory if it does not dispose of the contested case, unless the sole issue remaining for determination is claimant's entitlement to additional compensation for unreasonable denial or delay of payment pursuant to Iowa Code section 86.13.

The ruling filed November 8, 1990, which is the subject matter of this appeal, is not dispositive of the contested case and therefore interlocutory.

THEREFORE, the appeal filed November 19, 1990 is hereby dismissed.

Signed and filed this 28th day of November, 1990.



JON E. HEITLAND
CHIEF DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. James P. Hoffman
Attorney at Law
Middle Road
Keokuk, Iowa 52632-1066

Mr. Craig A. Levien
Attorney at Law
600 Union Arcade Bldg.
111 E. Third Street
Davenport, Iowa 52801

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TIM BROWN, Claimant, vs. REINSCHMIDT FLOOR SPECIALISTS, Employer, and ST. PAUL PROPERTY AND LIABILITY INSURANCE, Insurance Carrier, Defendants.	File No. 834047 A P P E A L D E C I S I O N

FILED
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IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision determining that claimant was an employee of the alleged defendant employer and awarding claimant 50 percent industrial disability as a result of an alleged work injury on July 31, 1986.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibit 1; and joint exhibits 1 through 27. Both parties filed briefs on appeal and defendants filed a reply brief.

ISSUES

Defendants state the issues on appeal are:

1. Whether an employer-employee relationship existed between Claimant and the alleged Defendant Employer at the time of the alleged injury;

2. Whether Claimant received an injury arising out of and in the course of his employment;

3. Whether there is a causal relationship between the alleged work injury and the claimant's disability;

4. The extent of Claimant's entitlement to weekly benefits for disability; and

5. The extent of Claimant's entitlement to medical benefits.

REVIEW OF THE EVIDENCE

Claimant was born April 4, 1944 and obtained his GED following his alleged July 31, 1986 work injury. In addition, claimant received vocational rehabilitation through Southeastern Community College in the area of robotics but was unable to complete the program. The majority of claimant's work experience has been in the field of installation of floor covering. Claimant had been employed by defendant employer previously but left in 1978. Claimant had been self-employed as a floor installer and once operated a tavern. Claimant also worked as a commercial carpenter. Claimant returned to defendant employer from 1982 until November 15, 1986 as a floor installer. Claimant testified that he terminated his employment with defendant employer as a result of a dispute concerning a job assignment. Claimant was paid by defendant employer $20,044.78 in 1985 and $18,586.89 until he left in 1986 for his work as a carpet installer.

James Rheinschmidt, the president and officer in charge of the day-to-day operations of defendant employer, testified that claimant was an independent contractor. No withholding taxes or social security taxes were deducted from amounts paid claimant. Claimant filed a business schedule to report his income from defendant employer on his tax returns. Rheinschmidt testified that claimant agreed to this arrangement. According to Rheinschmidt, other installers who objected to a subcontracting arrangement were paid by the hour and were considered employees of the defendant employer.

Claimant was paid by the square yard for carpet installed. Claimant testified that he was also paid by the hour for moving furniture. Claimant and Peter Beyers, a former employee of the defendant employer, testified that no bidding or negotiating process determined the amount the installer would be paid by defendant employer. Claimant would submit a piece of paper to defendant employer with claimed expenses. Rheinschmidt testified that adjustments would be made to reflect corrections of errors in arithmetic and fees which failed to comply with the fee schedule. Claimant received one check at the end of the week for jobs completed. Claimant was not paid for each job individually.

Claimant furnished his own tools, however, the defendant employer furnished specialized tools that were not used regularly by the installers. Claimant furnished his own truck to drive to

assignments and was reimbursed $.10 a mile for out-of-town installation. Claimant testified that he hired his sons as assistants and claimant's tax return in 1986 indicated that claimant paid his assistants $3,000 in wages. Claimant was required by defendant employer to furnish general liability insurance. The general insurance policy was in claimant's name doing business as Browns Carpet Service. Claimant testified that the general liability insurer needed a business name to fill out the policy and unilaterally put that name on the policy.

Claimant offered into evidence a copy of an advertisement published by defendant employer which stated that their carpet was installed by their "own professionals." Claimant testified that customer complaints were handled by the defendant employer. In addition, claimant was to contact the defendant employer for guidance if problems developed during installation. The installer received a layout plan and pre-cut carpeting for each installation job. Installers received assignments on a daily basis according to the defendant employer's work schedule.

Claimant testified that it was understood that installers were not to work for competitors. Rheinschmidt testified the defendant employer attempted to keep the installers busy so they would have no need to seek other employment with competitors. Installers, however, were not directed not to work for the competitors.

Claimant testified that in April 1986, claimant felt a "tear" in his low back and low back pain ensued while loading carpeting into his truck. Claimant continued to work but eventually sought medical treatment at a local hospital or emergency room two weeks later. The hospital records indicate that claimant denied that he sustained an injury. X-rays taken on April 22, 1986 revealed narrowing of the L4-5 disc space and minimal marginal spurring at several levels. Joint Exhibit 5, page 26.

Claimant testified that on July 31, 1986, claimant injured his back again when he felt pain following another "tear" after turning or twisting to reach for a tool while installing floor covering. Office records from Orthopaedic & Reconstructive Surgery Association, P.C., dated July 25, 1986 states: "Called the office requesting prescription for APAP #3, for back pain. The patient has a [sic] appointment on August 5th, Dr. Nelson okays APAP #3." Jt. Ex. 2, p. 8. Claimant was examined by Dwayne Nelson, M.D., on August 5, 1986. Medical records state: "[m]y impression is that his low back pain is secondary to irritation and degenerative breakdown of the lumbar discs." Jt. Ex. 2, p. 8. A six-week release was written.

Claimant was off work due to his back pain from August 5 through October 13, 1986. Claimant returned to Dr. Nelson on September 15, 1986 for a follow-up appointment for his low back pain. Dr. Nelson diagnosed degenerative disc disease at L4-5 level and opined that there is no surgical treatment for the condition. During this time, claimant received medication, a back brace, and physical therapy exercise.

Also at this time, claimant developed left cubital tunnel syndrome. Claimant previously had problems with his wrist and received surgical treatment for bilateral carpal tunnel syndrome. Claimant was scheduled for cubital tunnel release on February 17, 1987.

Claimant testified that he returned to work on October 14, 1986. Claimant testified that he left work on November 15, 1986 when defendant employer assigned a job to another employee. Claimant did not return to work with defendant employer.

In December 1986, claimant worked for two weeks for Messer Carpet. Sandra Messer, the co-manager of Messer Carpet, testified that claimant worked for them for eleven days in December 1986 laying floors. Messer testified that her husband told her that claimant left their employment because he wanted more money. Claimant earned $12.50 an hour as a carpet installer at Messer Carpet. Claimant testified that he was compelled to quit his job with Messer Carpet because of continuing back pain.

Claimant was evaluated on January 14, 1987 by Thomas Lehman, M.D., at the University of Iowa Hospitals and Clinics in Iowa City, Iowa. Dr. Lehman opined:

> This 42-year-old white male has what most likely appears to be a ruptured nucleus pulposus (mild to moderate) at the level of 5-6 and 4-5. He has had a work related injury and is presently temporarily totally disabled with 10 percent body impairment since 12-19-86. If his pain and symptoms worsen, he may be a surgical candidate in the future. However, at the present time patient complains of decreased back pain and leg pain because he has not been working. The patient is to return to clinic PRN and continue using his Naprosyn and flexion exercises.

Jt. Ex. 6, p. 1.

Claimant returned to the University of Iowa Hospitals and Clinics on September 6, 1987 but his chart could not be produced for the visit. Rather than receiving treatment that day, claimant left. The medical record states that:

> The patient was unwilling to discuss his case today, fearing that some of the fact [sic] might be different from prior visits and this might have an effect on his litigation and so that [sic] rather than be seen today and rediscuss his history to any extent at all he elected to come back when the chart could be produced.

Jt. Ex. 6, p. 2.

On September 17, 1987, claimant was seen by William R. Miley, M.D., at the University of Iowa Hospitals and Clinics. Dr. Miley reported that after his evaluation of claimant he found that claimant was suffering from chronic low back pain possibly secondary to a herniated disc with only moderate amount of leg pain. Dr. Miley opined that claimant suffers from a 10 percent permanent partial impairment.

In November 1986, Dr. Nelson left the employ of the professional corporation and another orthopedic surgeon from that corporation, Jerry Jochims, M.D., began treating claimant. His treatment essentially consisted of prescriptions for pain medication. In July 1988, Dr. Jochims performed a disability evaluation on claimant. Upon a final diagnosis of "failed disc syndrome" claimant was rated by Dr. Jochims as having a 10 percent permanent partial impairment to the body as a whole. Dr. Jochims did not feel that surgery was warranted and recommended conservative management with job modification including vocational retraining.

At the hearing, defendants' attorney asked claimant whether he had back problems prior to 1986, claimant testified that he had hip problems but his back was real good. The records of Raymond Hanks, D.C., accounted claimant's extensive history of back treatments.

> He was cared for by me previous to that time but I sold my office and left all my records. I moved to Oklahoma for approximately 2 years and returned. His previous records have been destroyed. During that period he was treated mostly for low back and knee problems.
>
> TX - 9-29-75, 10-27-75, 10-31-75, 11-11-75, 11-24-75, 12-3-75, 12-24-75 (lower back) (MAN)
>
> ____________________
>
> TX - 2-3-76, 2-9-76, 5-28-76, 6-25-76, (6-30-76 Occipital headache on the right side), 7-2-76, 8-27-76, 9-3-76, 11-12-76, 11-24-76 (lower back) (MAN)
>
> ____________________

TX - 2-10-77, 4-15-77, 4-20-77, 5-17-77, 5-25-77, 5-31-77, 6-20-77, 10-27-77, 10-28-77, 11-8-77, 12-7-77 (lower back) (MAN)

TX - 2-14-78, 2-20-78, 3-2-78, 3-15-78, 4-12-78, 5-17-78, 7-21-78, 7-25-78, 8-10-78, 8-16-78, 8-23-78, 8-30-78 (carpet laying problem left shoulder) as well as 9-1-78 --- 9-5-78, 9-13-78, 9-20-78, 9-28-78, 10-2-78, 10-6-78, 10-18-78, 11-7-78, 12-1-78, 12-18-78. (No insurance -- MAN lower back) (high blood pressure 8-10-78 - TX MD)

TX - 3-5-79, 3-13-79, 4-2-79, 4-20-79, 4-26-79, 5-8-79, 5-25-79, 6-7-79, 6-27-79 (No insurance - MAN - lower back)

TX - (4-20-80 slipped off a ladder at home) TX on 4-21-80 for low back - Ins: Carpenters Welfare. 7-1-80, 7-8-80, 7-11-80, 7-14-80 (muscle spasms in his neck - wry neck) and on 7-17-80, 7-25-80 - MAN. 10-18-80 fell down steps at home and on 10-20-80 leaned over to pick up quarter - resultant pain DX, muscle spasm lower thoracic spine and L-S sprain and TX on: 10-29-80, 10-31-80, 11-3-80, 11-5-80, 11-11-80, 11-14-80 (US & MAN - Ins: Carpenters Welfare). 11-21-83 [sic], 11-23-80 - Slight headache over left eye and lower back. 11-26-80, 11-28-80 - Slight headache over left eye and lower back. 12-16-80

TX - 1/8/81 (started smoking again) 2-9-81, 3-19-81, 8-25-81, 10-13-81, 11-25-81; 12-27-81 twisted lower back lifting on wood - 12-29-81, 12-30-81, 12-31-81, 1-5-82, 1-7-82, 1-8-82 DX Acute, severe, post traumatic lumbar sprain/strain with associated deep and superficial muscle spasms radiating the trajectory of the lumbosacral plexus, bilaterally.

Jt. Ex. 1, pp. 1-2.

In 1982, claimant suffered a neck injury following an automobile accident and was rated by Dr. Hanks as suffering from a 40 percent permanent partial disability due to these injuries. Dr. Jochims also rated claimant's neck impairment following the

1982 accident and according to him, claimant suffered only a two percent permanent partial impairment due to the neck problems and a one percent permanent partial impairment due to a thumb problem.

Claimant was seen on July 15, 1988 for an evaluation of claimant's back problem by Dr. Jochims. Dr. Jochims testified that the x-rays indicated that claimant had "mild signs of disk degeneration in the lower lumber levels, consistent with and normal for the patient's age." Ex. 8, p. 15. Dr. Jochims opined that claimant's potential for employment in physically demanding jobs was low. As a result of claimant's back injury, Dr. Jochims rated claimant as 10 percent permanency to the whole man. Dr. Jochims opined that claimant's condition is non-operative. On cross-examination, Dr. Jochims indicated that he was not aware that claimant had an extensive history of chiropractic adjustment care for low back pain beginning sometime in the 1960's.

Claimant states that after the July 1986 incident, he no longer lifts heavy objects, sits or stands for prolonged periods of time, and can no longer crawl, twist or bend in the manner necessary to install floor coverings. Claimant said that he is improved when he does not exert himself. Neither physician at the University of Iowa Hospitals and Clinics prescribed any work restrictions. Dr. Miley encouraged claimant to continue college. Dr. Jochims did not place restrictions upon claimant but recommended job retraining.

APPLICABLE LAW

Claimant has the burden of proving an employee-employer relationship between himself and defendant employer at the time of the alleged injury. Only employees are entitled to compensation for work related injuries and occupational diseases under Chapters 85 and 85A of the Iowa Code. Iowa Code subsections 85.61(2) and (3) define employee as follows:

> 2. "Worker" or "employee" means a person who as entered into the employment of, or works under contract of service, express or implied, ... for an employer;...
>
> ....
>
> 3. The following persons shall not be deemed "workers" or "employees":
>
> ....
>
> b. An independent contractor.

The Iowa Supreme Court stated in Nelson v. Cities Service Oil Co., 259 Iowa 1209, 1213, 146 N.W.2d 261 (1966) as follows:

> This court has consistently held it is a claimant's duty to prove by a preponderance of the evidence he or his decedent was a workman or employee within the meaning of the law, and he or his decedent received an injury which arose out of and in the course of employment.
>
> And, if a compensation claimant establishes a prima facie case the burden is then upon defendant to go forward with the evidence and overcome or rebut the case made by claimant. He must also establish by a preponderance of the evidence any pleaded affirmative defense or bar to compensation. (Citations omitted.)

The Iowa Supreme Court has recognized five factors in determining whether or not an employee-employer relationship exists: (1) the right of selection, or to employ at will; (2) responsibility for payment of wages by the employer; (3) the right of discharge or termination of the relationship; (4) the right to control the work; and (5) identity of the employer as the authority in charge or for whose benefit it is performed. The overriding issue is the intention of the parties. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981). In the Caterpillar Tractor case, the court added that the primary practice of the workers' compensation statute is to benefit the workers as far as the statute permits and should be interpreted liberally with the view toward that objective. The court stated as follows at 506:

> [T]he statute is intended to cast upon the industry in which the worker is employed a share of the burden resulting from industrial accidents.... As a result, "any worker whose services form a regular and continuing part of the cost of the product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channeled, is within the presumptive area of intended protection." (Citations omitted.)

If then a claimant has established a prima facie case for employee-employer relationship, the defendant may assert an affirmative defense that claimant was an independent contractor. The Iowa Supreme Court has provided the following tests to determine independent contractor status:

> ... An independent contractor, under the quite universal rule, may be defined as one who carries on an

> independent business, and contracts to do a piece of work according to his own methods, subject to the employer's control only as to results. The commonly recognized tests of such a relationship are, ...: (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price; (2) independent nature of his business or of his distinct calling; (3) his employment of assistants, with the right to supervise their activities; (4) his obligation to furnish necessary tools, supplies, and materials; (5) his right to control the progress of the work, except as to final results; (6) the time for which the workman is employed; (7) the method of payment, whether by time or by job; (8) whether the work is part of the regular business of the employer.

Mallinger v. Webster City Oil Co., 211 Iowa 847, 851; 234 N.W. 254 (1931).

It is for triers of fact to determine whether or not there is a sufficient group of favorable factors to establish a relationship of independent contractors. Hassebroch v. Weaver Construction Co., 246 Iowa 622, 67 N.W.2d 549, 553 (1955).

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on July 31, 1986 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.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 31, 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, 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).

To be a preexisting condition, an actual health impairment must exist, even if it is dormant. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

Our supreme court has stated many times that a claimant may recover for a work connected aggravation of a preexisting condition. Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934). See also Auxier v. Woodward State Hosp. Sch., 266 N.W.2d 139 (Iowa 1978); Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960).

An employer takes an employee subject to any active or dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler, 252 Iowa 613, 620, 106 N.W.2d 591, and cases cited.

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.

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

The issue of odd-lot was asserted by claimant at the hearing but denied because it was not timely raised. Claimant did not assert odd-lot on appeal, therefore, it will not be considered.

1. Whether an employer-employee relationship existed between the Claimant and the alleged Defendant Employer at the time of the alleged injury?

Claimant has the burden of proving an employee-employer relationship. Claimant could terminate the relationship with defendant employer at any time regardless of the completeness of the job. Defendant employer paid claimant one check for weekly wages on both work claimant did by the yard and the hourly work claimant performed. The rates which claimant was paid were set out on a payment schedule and there was no negotiation or bidding that took place between the installers and the defendant employer. If there were errors in the arithmetic or the fees did not correspond to the rate schedule, defendant employer would make the changes unilaterally.

Installers picked up pre-cut carpet and instructions on how the carpet should be laid out for each particular job. Although claimant worked unsupervised, if problems developed he was expected to call defendant employer for instructions. Claimant was permitted to hire assistants to help with the installations. Claimant was responsible for the supervision and the compensation of the assistants hired. Sales were made by defendant employer who then assigned installers to the particular jobs. Defendant employer controlled the assignment of work. Installers were able to request time off by either telling defendant employer or marking their name off the calendar for the particular day. If claimant completed a job early he was able to leave and was not required to return to the defendant employer's place of business.

Defendant employer represented to the public that the carpet was installed by their "own professionals." Furthermore, the installation of carpet by professionals, with which defendant employer had an on going relationship, was an integral part of the defendant employer's business. Customers purchased carpet through the defendant employer relying upon the expertise of the defendant employer's installers.

It is difficult to determine the intent of the parties as to whether an employee-employer relationship was established. When it came to paying social security and unemployment taxes or workers' compensation insurance premiums, claimant was treated as an independent contractor. On the other hand, defendant employer represented to the public that the carpet was installed by their "own professionals." Obviously, this implies that the defendant employer had the installers under their supervision. Claimant was paid by the yard of carpet installed or by the hour in certain circumstances. Many employees in the industrial setting are paid on a piece work basis and still considered employees. While intent of the parties is unclear as to whether claimant was an employee, the greater weight of the evidence supports the conclusion that claimant is an employee.

Defendant employer asserts that claimant is an independent contractor. Defendant employer has the burden of proving that claimant is an independent contractor. There was no written contract between the claimant and defendant employer. Claimant had an on going relationship with defendant employer from 1982 to 1986. The installation of the carpet which the defendant employer sold is a regular part of the business of the employer.

It is clear the defendant employer controlled the progress of work. Defendant employer provided claimant pre-cut carpet and a lay out of the place where the carpet was to be laid. Assignments were made on a daily basis according to prescheduled calendars. If there were any problems, claimant was to call the defendant employer to get instructions.

Claimant has proven by the greater weight of the evidence that an employee-employer relationship existed. Defendants failed to prove that claimant was an independent contractor.

2. Whether Claimant received an injury arising out of and in the course of his employment.

The uncontroverted evidence is that in April 1986 claimant sustained an injury to his lower back. Claimant testified that he was loading a roll of carpet into his truck and when he leaned over to pick up the carpet he felt a tear in his back with pain radiating down his legs. Claimant reported this incident to his employer. Claimant received treatment for this incident but did not miss work.

Claimant testified that he re-injured his back on July 31, 1986 when he turned to reach some tools. Claimant testified that he felt a tear in his back and pain in his legs. Claimant completed his work that day. Claimant continued to work until August 5, 1986 when he was taken off work by Dr. Nelson. Claimant proved by the greater weight of the evidence that he

sustained an injury which arose out of and in the course of his employment.

3. Whether there is a causal relationship between the alleged work injury and the claimant's disability.

Claimant had been treated by a number of physicians for low back pain following the July 1986 incident. Claimant, however, did not receive continuing treatment from any one physician. In addition, claimant provided an inaccurate medical history to his physicians. Claimant failed to tell his physicians, Dr. Jochims, Dr. Lehman and Dr. Miley, about his prior lower back problems that were treated by Dr. Hanks.

Dr. Jochims prescribed medication to patient and performed an evaluation on claimant's lower back on July 15, 1988. Dr. Jochims opined that claimant's x-rays indicated that claimant suffered mild signs of disc degeneration consistent with a person claimant's age. Dr. Jochims also opined that claimant's work history is the type that could aggravate a preexisting back condition. Dr. Jochims was unable to equivocally relate claimant's work injuries to his permanent impairment.

Claimant has the burden of proving a causal relationship between his work injury and his alleged disability. The record is devoid of any reliable medical evidence to establish a causal connection between claimant's work injury and his permanent impairment. Claimant failed to tell his physicians that he had been treated before for low back pains. The work injuries in April and July 1986 were merely symptoms of an ongoing degenerative condition. Claimant established a temporary aggravation of a preexisting condition in April and July 1986. Claimant failed to prove a causal connection between his work injury and his permanent impairment.

4. The extent of Claimant's entitlement to weekly benefits for disability.

Claimant is not entitled to permanent partial disability benefits. He failed to prove a causal connection between his work injuries and his disability. Claimant proved a temporary aggravation of a preexisting condition as a result of the work injuries in April and July 1986. Claimant is entitled to temporary total disability benefits from August 5, 1986 through October 13, 1986. Claimant returned to work on October 14, 1986.

5. The extent of Claimant's entitlement to medical benefits.

Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of

work injury. Claimant is entitled to an order of reimbursement only if he has paid those expenses. Otherwise, claimant is entitled to an order directing the responsible defendants to make the payment directly to the providers. See Krohn v. State, 420 N.W.2d 463 (Iowa 1988).

Defendants stipulated that the requested medical expenses contained in claimant's exhibit 1 were causally connected to the back condition upon which the claim was based but that the issue of the causal connection remained an issue. As it has been determined that there is a causal connection between claimant's lower back treatment and his employment with defendant employer, claimant is entitled to payment of the medical expenses in exhibit 1.

FINDINGS OF FACT

1. Claimant was born April 4, 1944.

2. Claimant had only a ninth grade education but has received his GED and some vocational rehabilitation since sustaining his work-related injury. Claimant, through no fault of his own, has been unable to complete his vocational rehabilitation. Claimant is motivated for retraining.

3. The majority of claimant's work experience has been in floor covering installation. Claimant has been employed as a carpenter and has been a self-employed owner of a tavern.

4. Claimant was paid by the yard of carpet which he installed and by the hour for moving furniture. Claimant submitted a statement to the defendant employer on Friday morning and was paid in one check later in the day.

5. Sale of the carpet was made by defendant employer who scheduled an installer for a particular job. The installation of carpet was an integral part of defendant employer's business.

6. Claimant picked up pre-cut carpet and instructions on how the carpet should be laid out for each job. Claimant was unsupervised when he went to install the carpet but if problems developed he would contact his employer for instructions.

7. Claimant supplied his own tools and drove his own truck to assignments. Defendant employer reimbursed claimant $.10 for each mile when claimant drove his truck out-of-town. Defendant employer supplied speciality tools which claimant used occasionally.

8. Claimant was permitted to hire assistants and paid for their compensation. Claimant was treated as an independent contractor for tax purposes.

9. Claimant worked for friends and relatives and at times received compensation for his work. Claimant was free to work for competitors.

10. Claimant had a preexisting lower back condition, however, this back condition did not cause claimant to miss work.

11. In April 1986 claimant sustained an injury which arose out of and in the course of his employment with defendant employer. Claimant was attempting to lift a roll of carpet. Claimant did not miss work and later sought medical treatment.

12. On July 31, 1986 claimant sustained another work related injury to his lower back when he reached for a tool while installing floor covering.

13. The work injury of July 31, 1986 caused a period of temporary total disability from work beginning on August 5, 1986 through October 13, 1986, at which time claimant returned to work.

14. Claimant voluntarily quit working for defendant employer due to an unrelated misunderstanding.

15. Claimant worked for another carpet installer for two weeks in December and voluntarily quit. Claimant has not worked since December 1986.

16. Claimant suffered mild signs of disc degeneration consistent with a patient claimant's age.

17. Claimant failed to tell physicians who treated him after the April and July 1986 incidents that he had been treated before for low back pains.

18. Claimant sought medical treatment after an incident in December 1986 which occurred with an employer other than the defendant employer.

19. There is no reliable medical evidence to establish a causal connection between the incidents in April and July 1986 and a permanent impairment.

20. Dr. Jochims opined that claimant's work history is the type that could aggravate a preexisting back condition.

21. Medical expenses listed in claimant's exhibit 1 are fair and reasonable and were incurred by claimant for reasonable and necessary treatment of his lower back condition as a result of the work injury on July 31, 1986.

CONCLUSIONS OF LAW

Claimant has proven by the greater weight of the evidence that an employee-employer relationship existed between claimant and the alleged defendant employer at the time of the July 31, 1986 work injury.

Defendants failed to prove that claimant was an independent contractor.

Claimant has proven by the greater weight of the evidence that he sustained a work injury on July 31, 1986.

Claimant has failed to prove a causal relationship between his July 31, 1986 work injury and his permanent impairment.

Claimant proved entitlement to temporary total disability benefits from August 5, 1986 through October 13, 1986 as a result of his aggravation of a preexisting condition.

Claimant has proven by the greater weight of the evidence entitlement to payment of the medical expenses in exhibit 1.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant temporary total disability benefits from August 5, 1986 through October 13, 1986 at the rate of three hundred fifty-eight and 87/100 dollars ($358.87) per week.

That defendants shall pay claimant the medical expenses listed in claimant's exhibit 1 totaling one thousand seven hundred ninety and 95/100 dollars ($1,790.95). Claimant shall be reimbursed for any portion of these expenses he has paid. Otherwise, the defendants are ordered to pay the provider directly less any attorney lien the claimant's attorney may have upon this award.

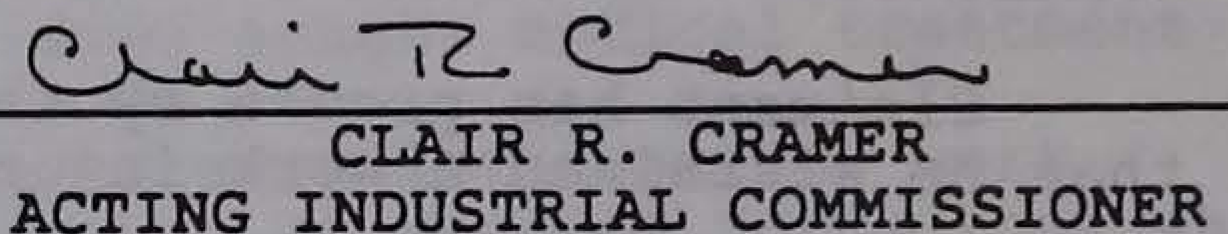
That defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid.

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

That defendants shall pay the costs of this action including the costs .f transcribing the arbitration hearing pursuant to rule 343 IAC 4.33.

That defendants shall file activity reports on the payment of this award as requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 28th day of March, 1991.



CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Craig D. Warner
Mr. Patrick L. Woodward
Attorneys at Law
321 North Third Street
Burlington, Iowa 52601

Mr. Greg A. Egbers
Mr. Mark W. Woollums
Attorneys at Law
600 Union Arcade Building
111 East Third Street
Davenport, Iowa 52801-1596

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN W. BUGELY, Claimant,	
vs.	File No. 805409
AMES PROCESSED FOOD CO., INC., Employer,	A P P E A L
and	D E C I S I O N
IOWA MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	

FILED
SEP 28 1990
INDUSTRIAL SERVICES

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.

Claimant shall pay the costs of the appeal, including the preparation of the appeal transcript.

Signed and filed this 28th day of September, 1990.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Fredd J. Haas
Attorney at Law
5001 SW 9th Street
Des Moines, Iowa 50315

Mr. Roy M. Irish
Attorney at Law
729 Ins. Exchange Bldg.
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN A. CARLSEN, Claimant, vs. DEPARTMENT OF TRANSPORTATION, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 736867 REMAND DECISION

FILED
APR 30 199
IOWA INDUSTRIAL COM

This case has been remanded to the Iowa Industrial Commissioner by order of the Iowa District Court for further proceedings. The district court order, dated September 4, 1990, orders this agency to enter an award of 55 percent industrial disability for claimant, without reduction for prior disability.

It is noted that since the prior appeal decision in this case, the Iowa Supreme Court has issued a decision in the case of Bearce v. FMC Corporation, 465 N.W.2d 531 (Iowa 1991). The order of the district court appears to conform with the Bearce decision.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant two hundred seventy-five (275) 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 file claim activity reports as requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 30th day of April, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Harry H. Smith
Attorney at Law
632-640 Badgerow Bldg.
P.O. Box 1194
Sioux City, Iowa 51102

Mr. Robert P. Ewald
Assistant Attorney General
Iowa Dept. of Transportation
800 Lincoln Way
Ames, Iowa 50010

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RALPH R. COOK, Claimant, vs. IOWA MEAT PROCESSING COMPANY, Employer, and ARGONAUT INSURANCE COMPANY and CHUBB INSURANCE COMPANY, Insurance Carriers, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 727578 R E M A N D D E C I S I O N FILED OCT 31 1990 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This matter is on remand from the Iowa District Court to determine the proper liability of the Second Injury Fund of Iowa (hereinafter the Fund).

ISSUES

As set forth in the Order for Filing of Briefs, filed May 29, 1990, the following issues are involved in this remand decision:

The nature and extent of claimant's disability, if any, resulting from an injury on February 17, 1983.

The extent of claimant's current cumulative industrial disability, if any, resulting from the work injury on February 17, 1983 and the non-work injury to the right arm in 1975.

The extent of second injury fund liability, if any, and the extent of liability of the employer and Argonaut Insurance Company, if any.

Whether the February 8, 1985 appeal decision is res judicata for determining the employer's and Argonaut Insurance Company's liability for the February 17, 1983 injury.

REVIEW OF THE EVIDENCE

Claimant suffered a work injury to his left arm on February 17, 1983. A deputy industrial commissioner issued an arbitration decision on September 7, 1984. That decision determined that claimant had suffered a 20 percent disability to his left upper extremity, and that claimant's injury to his left arm did not extend to the body as a whole. The Second Injury Fund of Iowa was not a party to this action. Defendants appealed the decision of the deputy to the industrial commissioner.

Claimant filed a petition in review-reopening and arbitration shortly after the deputy's decision was issued. The Second Injury Fund of Iowa was made a party to this action.

An appeal decision on the arbitration decision of September 7, 1984, affirmed the finding of an injury confined to the left upper extremity, and the award of 20 percent permanent partial disability of the left upper extremity.

In the review-reopening action, a hearing assignment order was filed on September 27, 1985, listing as an issue to be litigated at the hearing "res judicata; Second Injury Fund." A hearing was held on October 18, 1985. A decision was issued on February 19, 1986, finding that claimant had failed to show entitlement to further benefits for his February 17, 1983, left arm injury. The decision also found that claimant's industrial disability as a result of the February 17, 1983 injury was 10 percent of the body as a whole. Benefits were awarded against the Fund.

The Fund appealed this decision to the Iowa Industrial Commissioner. An appeal decision was issued on May 12, 1987. That decision affirmed and modified the deputy's decision, finding that the compensable value of the impairment to claimant's left arm was 50 weeks, and that claimant's left arm condition had not changed since the hearing of June 14, 1984. The decision recited intervening clarification of application of the Second Injury Fund law, and held that a determination of the industrial disability caused by claimant's left arm injury was appropriate only if the injury extended to the body as a whole. That decision stated: "As no change of condition is found in this decision which holds that the February 17, 1983 injury has resulted in subsequent disability to the body as a whole, the nature of claimant's 1983 injury is res judicata." (Appeal Decision, page 3) Thus, the review-reopening decision erroneously determined the industrial disability of claimant's

left arm injury. The appeal decision correctly analyzed claimant's left arm injury on the basis of a scheduled member injury.

On April 26, 1988, the district court affirmed the original arbitration award of 20 percent impairment of the left arm. On July 10, 1989, the district court issued a decision on the review-reopening and arbitration petitions. That decision remanded this matter to the industrial commissioner, stating that the commissioner had erroneously applied the doctrine of res judicata in the May 12, 1987 appeal decision because the Fund was not a party to the original arbitration decision that found claimant's injury was confined to the left arm. The district court ordered a remand to the commissioner to reconsider the liability of the Fund.

It is noted that the Second Injury Fund of Iowa was named as a defendant in the review-reopening and arbitration petition filed in September 1984. The Fund's liability and any res judicata effect of the prior determination as to the extent of claimant's left arm injury were specifically listed as issues on the hearing assignment order in that case. The Fund had a full opportunity to litigate whether claimant's left arm injury extended to the body as a whole in the October 18, 1985 hearing.

APPLICABLE LAW

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

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 preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

> Any benefits received by any such employee, or to which he may be entitled, by reason of such increased disability from any state or federal fund or agency, to which said employee has not directly contributed, shall be regarded as a credit to any award made against said second injury fund as aforsaid.

An injury to the shoulder is an injury to the body as a whole. Alm v. Morris Barrick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (1982); Godwin v. Hicklin GM Power, II Iowa Industrial Commissioner Report 170 (1981).

When an injury results in impairment of the shoulder, the situs of the impairment is controlling and the injury is to the body as a whole. Snyder v. Sioux Transportation, III Iowa Industrial Commissioner Report 240 (1983).

Pain that is not substantiated by clinical findings is not a part of impairment. Waller v. Chamberlain Manufacturing, II Iowa Industrial Commissioner Report 419, 425 (1981); Angerman v. K-Mart Corp., Arbitration Decision, February 20, 1990; Godwin, II Iowa Industrial Comm'r Report 170.

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

The Second Injury Fund of Iowa was not a party to the arbitration action. Although the February 8, 1985 appeal decision in the arbitration case found that claimant's left arm injury was confined to the arm and did not extend to the body as a whole, the Fund cannot be bound by a decision where the Fund did not participate. Thus, the February 8, 1985 appeal decision is not res judicata as regards the Second Injury Fund of Iowa.

It must also be determined whether the February 8, 1985 appeal decision is res judicata as concerns the employer and Argonaut Insurance. Those parties did participate in the original arbitration hearing and the later appeal of that decision to the industrial commissioner. Therefore, that decision is res judicata for those parties as it pertains to the issues involved in an arbitration action, and to the extent the decision determined claimant's condition as of the date of the arbitration hearing.

This case, however, is in review-reopening. A review-reopening action looks to any change in the claimant's condition occurring after the original award of benefits. An arbitration decision fixing the extent of claimant's liability as of the date of the arbitration hearing would not be res judicata as to a later review-reopening action, as different points in time are

considered in each action. In review-reopening, claimant bears the burden of showing that he has suffered a change in condition not contemplated by the original award of benefits. Claimant's condition may at the time of review-reopening be better, worse, or the same as it was at the time of the original award of benefits.

However, even a determination at the time of review-reopening that claimant's condition has not changed since the original award, as occurred in this case, is not equivalent to giving the effect of res judicata to the prior arbitration decision. Rather, such a finding means that claimant's condition was re-examined at a later point in time, and found to have been unchanged. The appeal decision of February 8, 1985, is not res judicata as to the employer and Argonaut Insurance Company on the issues involved in this review-reopening action.

The deputy's review-reopening decision in this case determined that no change of condition had occurred since the original award of benefits; that claimant's left arm injury did not extend to the body as a whole; and that claimant's left arm impairment was still 20 percent. These determinations were affirmed on appeal on May 12, 1987. The Second Injury Fund sought judicial review of that decision. On remand from the district court, this agency must now determine the extent of claimant's left arm condition as it affects the liability of all defendants.

Claimant's left arm injury was confined to the left biceps. Claimant's left shoulder was not directly injured. However, an injury to one body member can result in an impairment of another body member and thereby extend the injury to the body as a whole.

After receiving his left biceps injury, claimant did complain of pain in his left shoulder. Pain alone is insufficient to extend an injury from a scheduled member to the body as a whole. The extent of the impairment resulting from the injury is the controlling consideration. In this case, claimant's injury to his left biceps has not resulted in impairment of the shoulder itself. Dr. Blume stated:

> Q. Okay. But what I'm wondering, Doctor, is the actual trauma is not so much in the shoulder as it is the shoulder and it's then causing pain into the shoulder.
>
> A. Exactly. Exactly.
>
> Q. And is that pain, is therefore limiting how he's able to use his arm I take it?

A. That's correct.

Q. The actual resulting disability, then, is in the arm area. The left arm area.

A. That's correct.

(Exhibit 1, Blume Deposition, page 12, lines 15-24)

The medical evidence indicates that claimant's injury of February 17, 1983 does not extend beyond the left upper extremity into the body as a whole. Claimant's condition as a result of his February 17, 1983 injury is confined to 20 percent impairment of the left arm.

The medical evidence indicates that claimant now suffers a 62 1/2 percent loss of use of his right arm. Claimant also has a 20 percent loss of use of his left arm. Claimant's work experience is limited to manual labor and heavy lifting. Claimant's impairment of his arms precludes him from holding jobs requiring extensive lifting.

Claimant was 47 years old at the time of the prior appeal decision. His education is limited to the sixth grade, and he has had no vocational training. Claimant is well motivated.

Claimant's cumulative industrial disability as a result of the effects of his February 17, 1983 left arm injury and his preexisting right arm condition is determined to be 75 percent. The employer and Argonaut Insurance Company are liable to claimant for the effects of the left arm injury only, or 50 weeks of benefits. The Second Injury Fund of Iowa is entitled to a credit for the disability caused by claimant's preexisting right arm condition, or 156 1/4 weeks of benefits. The Second Injury Fund of Iowa is therefore liable to claimant for the remaining disability claimant now suffers as a result of the combined effect of his injuries, or 168 3/4 weeks of benefits.

FINDINGS OF FACT

1. As a result of his work-related injury of February 17, 1983, claimant has a permanent functional impairment of his left upper extremity equal to 20 percent.

2. Claimant's February 17, 1983 work injury to his left arm is confined to the left upper extremity and does not extend to the body as a whole.

3. As the result of a non-work injury in 1975, claimant has permanent functional impairment or loss of use of his right arm equal to 62 1/2 percent.

4. At the time of the May 12, 1987 appeal decision, claimant was 47 years old and had a sixth grade education.

5. Claimant has no special vocational training.

6. All of claimant's past employment involved heavy lifting.

7. Claimant is well motivated and has continued to work in spite of severe pain.

8. It is unlikely claimant will be able to continue employment with defendant employer.

9. Claimant's rate of compensation is $282.42.

10. Claimant's cumulative loss of earning capacity as a result of the work injury to his left arm and the prior loss of use of his right arm is 75 percent.

11. The impairment to claimant's right arm is 62 1/2 percent or 156 1/4 weeks of benefits.

12. The compensable value of the impairment to claimant's left arm is 50 weeks.

CONCLUSIONS OF LAW

Claimant has an industrial disability of 75 percent.

Claimant's February 17, 1983 injury is a scheduled injury.

Since claimant's February 17, 1983 injury is not an injury to the body as a whole, there is no apportionment of industrial disability to be made.

Claimant's employer and Argonaut Insurance Company are liable to claimant for 50 weeks of benefits for a 20 percent impairment of the left arm for the February 17, 1983 injury.

The Second Injury Fund of Iowa is entitled to a "credit" equivalent to 50 weeks of benefits for the February 17, 1983 injury, and 156 1/4 weeks for the 1975 injury to claimant's right arm. The Second Injury Fund of Iowa is liable to claimant for the remaining 168 3/4 weeks of benefits.

ORDER

THEREFORE, it is ordered:

That the Second Injury Fund of Iowa shall pay unto claimant one hundred sixty-eight and three-fourths (168 3/4) weeks of permanent partial disability benefits, at the rate of two hundred eighty-two and 42/100 dollars ($282.42).

That the employer and Argonaut Insurance Company shall pay unto claimant fifty (50) weeks of permanent partial disability benefits, at the rate of two hundred eighty-two and 42/100 dollars ($282.42).

That the costs are taxed to the Second Injury Fund.

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

That interest shall accrue from the date of this decision, pursuant to Second Injury Fund v. Braden, 459 N.W.2d 467 (Iowa 1990).

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

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Harry H. Smith
Attorney at Law
P.O. Box 1194
Sioux City, Iowa 51102

Mr. Thomas M. Plaza
Attorney at Law
P.O. Box 3086
Sioux City, Iowa 51102

Mr. Barry Moranville
Attorney at Law
West Bank Building, Ste. 212
1601 22nd
West Des Moines, Iowa 50265

Mr. Harry W. Dahl, Sr.
Attorney at Law
974 73rd St., Suite 16
Des Moines, Iowa 50312

Ms. Shirley A. Steffe
Assistant Attorney General
Tort Claims Division
Hoover State Office Bldg.
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARLAN E. DAGGETT, Claimant, vs. ACE LINES, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 818879 A P P E A L D E C I S I O N

FILED
AUG 8 1990
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability of 25 percent for industrial purposes.

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

ISSUES

The issues on appeal are:

I. Whether substantial evidence exists to support the deputy's decision awarding claimant permanent partial disability of 25 percent for industrial purposes.

II. Whether the deputy erred in the computation of claimant's rate of compensation.

REVIEW OF THE EVIDENCE

The arbitration decision dated May 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 except as it relates to the determination of the rate of compensation.

The issue of the proper rate of compensation must be resolved. While defendants attempted to offer evidence of the gross wages of a similarly situated employee they failed to assemble data for 13 weeks immediately preceding the injury, Iowa Code section 85.36(7). In addition, defendants combined the salary of claimant and another similarly situated employee. The method advocated by defendants to determine rate cannot be relied upon as the evidence submitted is inconsistent with the statute. Therefore, claimant's actual gross wages will be used to compute his rate of compensation. Barker v. City Wide Cartage, I Iowa Industrial Commissioner Report, Page 12 (1980).

The evidence shows that claimant worked for defendants from February 3, 1986 thru March 14, 1986 (six weeks). The correct rate of compensation in this case is determined by totaling claimant's gross earnings and dividing by 6 weeks ($2509.81 ÷ 6). The average weekly wage is $418.30 per week. Claimant is entitled to three exemptions and was single at the time of the hearing. Claimant is entitled to a compensation rate of $251.83.

FINDINGS OF FACT

1. Claimant sustained an injury to his neck and shoulders on March 13, 1986 which arose out of and in the course of his employment.

2. Claimant's injury is the cause of a permanent impairment and is the cause of the disability on which claimant bases his claim.

3. Claimant was born February 6, 1953 and is a high school graduate.

4. Claimant's prior employment experience includes food service worker, welder, truck driver and laborer.

5. Claimant's restrictions include avoiding heavy physical activity with respect to his upper extremity.

6. Dr. Carlstrom released claimant to return to work knowing that claimant had been employed as a truck driver.

7. Claimant was discharged from his employment with defendants for reasons unrelated to his work injury.

8. Subsequent to claimant's March 13, 1986 work injury, claimant has been employed cleaning houses, driving a cement truck and driving patients for the Veterans Administration hospital.

9. Claimant is currently employed in a position paying wages comparable to that he was earning in truck driving.

10. Claimant's earning capacity has been reduced as a result of his work injury.

11. On January 9, 1987, claimant underwent anterior cervical fusion surgery.

12. Claimant was in healing period from March 14, 1986 through June 21, 1986 and January 9, 1987 through March 30, 1987.

13. Claimant has sustained a 25 percent loss of earning capacity.

14. Claimant's rate of compensation is $251.83 based on a gross average weekly wage of $418.30, being single at the time of the injury and entitled to 3 exemptions.

CONCLUSIONS OF LAW

Claimant has established that as a result of the injury of March 13, 1986, he sustained a permanent partial disability of 25 percent for industrial purposes.

Claimant's appropriate rate of compensation is $251.83.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of two hundred fifty-one and 83/100 dollars ($251.83) per week commencing March 31, 1987.

That defendants shall pay unto claimant eleven point five seven one (11.571) weeks of temporary total disability benefits at the rate of two hundred fifty-one and 83/100 dollars ($251.83) for the period from January 9, 1987 through March 30, 1987.

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

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

That costs of this proceeding including the transcription cost of the arbitration decision are assessed against defendants pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 8th day of August, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert W. Conrad
Attorney at Law
P.O. Box 541
Knoxville, Iowa 50138

Mr. Donald G. Beattie
Attorney at Law
204 8th St., SE
P.O. Box 387
Altoona, Iowa 50009

Ms. Dorothy L. Kelley
Attorney at Law
500 Liberty Bldg.
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA DAVIS, Claimant, vs. DES MOINES GENERAL HOSPITAL, Employer, and LIBERTY MUTUAL, Insurance Carrier, Defendants.	File No. 820525 A P P E A L D E C I S I O N

FILED
AUG 8 1990
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant thirty percent permanent partial disability for industrial purposes as a result of claimant's April 1, 1986 work injury.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 5 and 9 through 11; joint exhibits 6 through 8 were deleted by the parties prior to hearing. Both parties filed briefs on appeal.

ISSUES

Defendants state the issues on appeal are:

I. Was there causal connection between Claimant's alleged injury of April 1, 1986, and her ultimate impairment by Dr. Neff of 10% which would support a finding of industrial disability?

II. Did the Claimant bear her burden of establishing any industrial disability or, alternatively, did the records support the finding of the Deputy Industrial Commissioner of 30% Permanent Partial Industrial Disability?

REVIEW OF THE EVIDENCE

The arbitration decision dated May 25, 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 the evidence.

ANALYSIS

Claimant was born July 13, 1946 and is a high school graduate. The greater share of claimant's work experience has been in the health care field, although claimant worked briefly as a waitress, and in general office personnel and manufacturing.

Defendants hired claimant on July 24, 1978 as a nurse's aid. Claimant received satisfactory evaluations from her supervisors and advanced up the pay scale. Claimant was at the top of the pay scale for two years prior to her April 1, 1986 work injury. Claimant injured her back on May 12, 1983 and experienced back pain flare-ups following May 12, 1983 injury which caused her to miss work.

The uncontroverted evidence from Scott B. Neff, D.O., establishes that there is a casual connection between claimant's April 1, 1986 work injury and a permanent partial impairment to the body as a whole. Claimant is restricted in her activities from lifting over forty pounds and cannot lift, bend or pull objects while bending over a bed.

Dr. Neff did not apportion the 10 percent functional impairment rating between claimant's 1983 and 1986 injuries. Claimant's rating was based on a discetomy for herniated discs at multiple levels. One of the levels, L4-L5, Dr. Neff attributed to the April 1, 1986 work injury. The second level requiring surgery, L5-S1, was calcified and was attributable to claimant's 1983 injury. It is clear from the evidence that claimant continued to have back pain flare-ups following her 1983 injury. In addition, claimant testified that she missed work but never more than a week at a time as a result of the 1983 injury. Therefore, a portion of the 10 percent functional impairment is attributable to claimant's 1983 injury. Claimant was able to return to her duties as a nurse's aid following the 1983 injury. Claimant has not returned to her duties as a nurse's aid following the 1986 work injury. The greater portion of claimant's 10 percent functional impairment is attributable to claimant's April 1, 1986 work injury.

Claimant was placed by defendants in a new position with the same salary as she had prior to her injury and the same opportunity to advance, however, that does not preclude the finding that claimant experienced a loss of earning capacity. "Loss of actual earnings does not equate to loss of earning capacity. Reduction of actual earnings or lack thereof, like functional impairment, is only one component of earning capacity. Claimant's restrictions limit his ability to secure a position for which he is qualified." Elderkamp v. Archer Daniels Midland, Appeal Decision, May 31, 1990. Claimant is restricted from lifting over forty pounds, and was instructed to use proper back biomechanics. These restrictions limit claimant's ability to return to her duties as a nurse's aid.

After evaluating all the evidence presented, it is found that claimant sustained a 20 percent industrial disability as a result of claimant's April 1, 1986 work injury.

FINDINGS OF FACT

1. Claimant was born July 13, 1946 and is a high school graduate with the majority of her work experience in the health care field.

2. The parties stipulated that claimant suffered a back injury on April 1, 1986 that arose out of and in the course of her employment with the defendants.

3. There is a casual connection between claimant's April 1, 1986 work injury and claimant's permanent disability.

4. Claimant suffered a back injury on May 12, 1983 which caused claimant to have back pain flare-ups and resulted in claimant missing work.

5. Claimant's current restrictions include no lifting over forty pounds, and no lifting, pulling or pushing in a bent over position.

6. Claimant had multilevel lumbar surgery on an acute large herniated disc at L4-L5; and at the L5-S1 level on September 30, 1986.

7. Dr. Neff rated claimant 10 percent functionally impaired. A portion of the 10 percent functional impairment is attributable to claimant's 1983 injury, while the majority of the functional impairment is attributable to claimant's April 1, 1986 work injury.

8. As a result of claimant's restrictions, she is unable to perform the duties required as a nurse's aid. Defendants placed claimant in a position as a clerk technician which allowed claimant to use skills acquired as a nurse's aid and allows her to remain in the health care field for which she is suited.

9. Claimant's current salary is the same as prior to her injury.

10. Claimant has the same opportunity to advance to the top salary level at her new position as in her old position as a nurse's aid.

11. Claimant suffered a 20 percent loss of earning capacity as a result of her April 1, 1986 work injury.

CONCLUSION OF LAW

Claimant has proved a casual connection between the April 1, 1986 work injury and a permanent disability.

Claimant has proved entitlement to 20 percent industrial disability as a result of claimant's April 1, 1986 work injury.

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 one hundred sixty-three and 09/100 dollars ($163.09) per week from May 9, 1988.

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

That defendants shall pay interest on weekly benefits awards herein pursuant to Iowa Code section 85.30.

That defendants shall pay the costs of this proceeding including the cost of transcription of the arbitration decision pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 8th day of August, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Channing L. Dutton
Attorney at Law
West Towers Office
1200 35th St., Ste. 500
West Des Moines, Iowa 50265

Mr. W. C. Hoffmann
Attorney at Law
500 Liberty Building
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LINDA DOLPH, Claimant, vs. LAMONT LIMITED, Employer, and GREAT AMERICAN INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 847583 A P P E A L D E C I S I O N

FILED
NOV 28 1990
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. The decision of the deputy is affirmed and is adopted as the final agency action in this case.

Claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 28th day of November, 1990.

Clair R Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. George E. Wright
Attorney at Law
607 Eighth St.
Fort Madison, Iowa 52627

Mr. Jon K. Swanson
Attorney at Law
900 Des Moines Bldg.
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CRAIG EDWARDS, Claimant, vs. DECKER TRUCK LINES, Employer, and LIBERTY MUTUAL INS. CO., Insurance Carrier, Defendants.	:	File No. 908602 A P P E A L D E C I S I O N

FILED
APR 29 199
IOWA INDUSTRIAL COMM

STATEMENT OF THE CASE

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

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 13. Both parties filed briefs on appeal.

ISSUES

Defendants state the issue on appeal as: whether the award of 45 percent permanent partial disability is greatly excessive in view of the evidence.

APPLICABLE LAW

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

FINDINGS OF FACT

The findings of fact in conjunction with the law in the arbitration decision is adopted.

CONCLUSIONS OF LAW

The conclusions of law are adopted with the following additional analysis:

Claimant is precluded from returning to his work as a truck driver. Claimant has attempted to return to this line of work more than once since his injury, and each time has had to quit due to back pain. However, claimant has skills in other areas. Claimant is motivated to keep working. Defendants did not offer to accommodate claimant, but this is reasonable in light of the statement of one of claimant's physicians that he should avoid truck driving. Claimant's ratings of permanent physical impairment are not high. Claimant's medical restrictions foreclose him from some jobs, but not all jobs.

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

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

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant forty-four (44) weeks of healing period benefits at the rate of two hundred forty-one and 18/100 dollars ($241.18) per week commencing October 13, 1987 and totalling ten thousand six hundred eleven and 92/100 dollars ($10,611.92).

That defendants pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of two hundred forty-one and 18/100 dollars ($241.18) per week commencing August 16, 1988 and totalling forty-two thousand two hundred six and 50/100 dollars ($42,206.50).

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

That defendants shall have credit for all benefits paid voluntarily prior to hearing.

That defendants shall pay the costs of the appeal, including the preparation of the hearing transcript.

That defendants file claim activity reports as requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 29th day of April, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. David D. Drake
Attorney at Law
1200 35th St., Suite 500
West Des Moines, Iowa 50265

Mr. Tito Trevino
Attorney at Law
P.O. Box 1680
Fort Dodge, Iowa 50501

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JANICE EISENBARTH, Claimant, vs. SNAP-ON TOOLS CORPORATION, Employer, and ROYAL INSURANCE, Insurance Carrier, Defendants.	:	File No. 865360 A P P E A L D E C I S I O N

FILED
JUN 25 1991
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. The decision of the deputy filed August 14, 1989 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

The claimant's appeal arguments concerning the cumulative date of injury are without merit. Claimant is not entitled to a "running" injury date. See McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985); Terwilliger v. Snap-On Tools, Appeal Decision, May 24, 1991.

The calculation of interest is governed by Farmer's Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); Benson v. Good Samaritan Center, Ruling on Rehearing, Oct. 18, 1989; McNeal v. Iowa Department of Transportation, Order Nunc Pro Tunc, May 31, 1990; and Clausen v. Carmar Farms, Ltd., Vol. 1, No. 3 State of Iowa Industrial Commissioner Decisions 540 (1985). No further ruling is required.

Claimant urges on appeal that the claimant's injury extended to the body as a whole. It is noted that the opinion of Timothy C. Mead, M.D., was based on subjective evidence, and that the objective findings of Dr. Mead did not indicate a permanent impairment of the shoulders. Many tests of claimant's shoulders were impeded by claimant's failure to cooperate with the testing procedures. Taken as a whole, the evidence of Dr. Mead and Dr. Wirtz as to claimant's shoulder condition is given less weight than the evidence of the numerous other physicians that examined

claimant and found no objective indicia of permanent impairment. In addition, claimant's significant functional overlay, acknowledged by all of her physicians, also supports the conclusion that claimant's injury did not extend beyond the upper extremity to the body as a whole.

Claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Defendants shall pay all other costs of this action.

Signed and filed this 25th day of June, 1990.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Mark S. Soldat
Attorney at Law
714 E. State St.
Algona, Iowa 50511

Mr. Paul C. Thune
Attorney at Law
218 6th Ave., Suite 300
P.O. Box 9130
Des Moines, Iowa 50306

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GAYLL FOOR, Claimant, vs. LOUIS RICH, Employer, and THE HARTFORD, Insurance Carrier, Defendants.	File Nos. 946067/916715 A P P E A L D E C I S I O N

FILED
JAN 31 1991
IOWA INDUSTRIAL COMMISSION

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 filed August 16, 1990 is affirmed and is adopted as the final agency action in this case.

Defendants shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 31st day of January, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. David W. Newell
Attorney at Law
323 East 2nd St.
Muscatine, Iowa 52761

Mr. Larry L. Shepler
Attorney at Law
Suite 102 Executive Square
400 Main Street
Davenport, Iowa 52801

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY FRANKS, Claimant, vs. CITY OF COUNCIL BLUFFS, Employer, and ARGONAUT INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 784334 A P P E A L D E C I S I O N

F I L E
SEP 28 1990
IOWA INDUSTRIAL COMMISS

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, with the following additional analysis:

Claimant's age makes retraining a possibility. Claimant expressed an inability to support his family if he underwent retraining. Claimant is presently without employment. Retraining is feasible.

Defendants shall pay the costs of the appeal, including the preparation of the appeal transcript.

Signed and filed this 28th day of September, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Michael Murphy
Attorney at Law
100-101 Park Bldg.
Council Bluffs, Iowa 51501

Mr. Barry Moranville
Attorney at Law
West Bank Bldg., Ste. 212
West Des Moines, Iowa 50265

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VIRGIL GILBREAITH, Claimant, vs. WILSON FOODS, INC., Employer, Self-Insured, and SECOND INJURY FUND OF IOWA, Defendants.	:	File No. 689229 R E M A N D D E C I S I O N

FILE
APR 30 199
IOWA INDUSTRIAL COM

This case is on remand from the Iowa District Court following judicial review. Claimant seeks Second Injury Fund benefits. In order to be awarded benefits from the Second Injury Fund, claimant must show that at the time of his November 23, 1983 left knee injury, claimant had a prior loss of his right leg. Iowa Code section 85.64. The judicial review decision orders that this agency "determine, using the functional method, the extent of Petitioner's permanent partial disability to his right knee, if any, at the time of the injury to Petitioner's left knee, and shall determine the amount of Petitioner's claim against the Second Injury Fund."

The judicial review decision found that the agency had improperly relied on industrial disability factors, rather than functional impairment factors, in assessing claimant's right knee injuries. Specifically, the decision regarded discussion of claimant's return to work as indicative of an industrial disability approach, even though claimant's right knee injuries did not extend to the body as a whole.

It is noted that claimant's right knee injuries were not assigned formal ratings of impairment. Evidence that claimant was able to return to work following those injuries, therefore, is probative as to the extent of the functional impairment of the right knee at that point in time. The district court correctly notes that a return to work is a factor in assessing industrial disability, and should not be a factor in assessing claimant's right knee impairment. However, a distinction exists between

using a return to work as a factor of industrial disability, and using a return to work as evidence of the extent of functional impairment of a body part. In the absence of a medical rating of impairment, claimant's ability to return to work and perform the duties of his job is indicative of the degree to which his knee was injured. In this case, consideration of claimant's ability to return to work following his right knee injuries will be confined to the extent the return to work sheds light on the degree of claimant's right knee impairment.

The medical evidence of claimant's right knee impairment following his 1970 and 1971 right knee injuries consists of Plaintiff's exhibit 3 (W.J. Robb, M.D., 1970 notes), Second Injury Fund exhibit F (Dr. Robb's 1985 letter to claimant's attorney), and Plaintiff's exhibit 1 (Jerome G. Bashara, M.D., 1986 evaluation). Dr. Robb's 1970 notes indicate that claimant underwent surgery in the form of a medial meniscectomy on his right knee on August 17, 1970. Dr. Robb describes the result of the surgery as "excellent." Claimant was released to work on September 28, 1970. On October 6, 1970, Dr. Robb notes that claimant had right knee soreness, but an "excellent range of motion." Dr. Robb added, "I did not take him off his job." Exhibit 3.

Claimant received a second injury to his right knee on September 17, 1971. Dr. Robb diagnosed internal derangement, lateral meniscus, right knee. Dr. Robb prescribed conservative treatment, and postponed a decision on further surgery depending on claimant's progress.

In a letter dated September 12, 1985, or nearly 14 years later, Dr. Robb again described the results of the initial surgery as "excellent," and stated that following the examination of claimant's right knee after his September 17, 1971 injury, claimant did not return to Dr. Robb for further treatment. Second Injury Fund exhibit F.

Claimant injured his left knee in November 23, 1981. In connection with that injury, claimant was examined by Jerome Bashara, M.D., an orthopedic surgeon, on April 1, 1986. Dr. Bashara issued ratings of impairment for claimant's right and left knee injuries. In regard to claimant's right knee, Dr. Bashara found that claimant lacked five degrees of full extension, and 15 degrees of flexion. Dr. Bashara gave claimant a permanent physical impairment rating of 10 percent of the right lower extremity, with five percent for claimant's prior surgery, and five percent for loss of motion.

Exhibit F, Dr. Robb's 1985 letter to claimant's attorney, contains the following statement by Dr. Robb in reference to claimant's 1970 surgery (prior to claimant's 1971 injury): "No

impairment of function was assigned to him or to the knee for the torn meniscus and its excision." The judicial review decision determined that this statement was ambiguous, in that it could be taken to mean either that no impairment existed, or simply that no determination of the degree of impairment was made.

Dr. Robb stated that claimant's recovery from his first right knee injury was excellent. Dr. Robb also examined claimant following his second right knee injury, and at that time diagnosed an internal derangement of the lateral meniscus. Claimant was able to return to work in spite of his right knee injuries. Claimant has testified that he continued to experience pain for several years following his right knee injuries. Claimant, however, did not return to Dr. Robb for further treatment. There is no evidence of a possible intervening cause for claimant's right knee condition other than claimant's 1970 and 1971 work injuries. In addition, generally speaking an intrusive surgery results in some degree of impairment.

Dr. Bashara found claimant, in 1986, to have a loss of range of motion in his right knee. Dr. Bashara appears to causally link claimant's right knee condition, observed in 1986, to claimant's 1970 and 1971 work injuries. Dr. Robb's statement that no impairment rating was given, having been judicially determined to be ambiguous, cannot be said to contradict Dr. Bashara's findings. Thus, Dr. Bashara's rating of 10 percent permanent partial impairment to the right knee stands uncontroverted in the record.

Dr. Bashara's evaluation of claimant took place several years after the injuries to the right knee, and three years after claimant's left knee injury. However, the other evidence on claimant's right knee condition is consistent with Dr. Bashara's rating. Claimant is determined to have had a 10 percent permanent partial impairment of his right lower extremity as a result of his 1970 and 1971 work injuries.

In order to determine the liability of the Second Injury Fund, it is necessary to determine the degree of disability resulting from the 1983 injury, as well as claimant's overall disability. Dr. Bashara, an evaluating physician, assigned claimant's left lower extremity a permanent partial impairment rating of 10 percent as a result of the 1983 work injury. However, Dr. Turner, claimant's treating physician, assigned claimant a permanent partial impairment rating of five percent of the left lower extremity. Dr. Turner had more opportunity to observe claimant's condition than Dr. Bashara. Dr. Turner was in a better position to gauge the overall effects of claimant's left knee condition. The deputy's arbitration decision gave the greater weight to the opinion of Dr. Turner, and concluded that claimant's left knee injury had resulted in five percent

permanent partial impairment of the left leg. This finding was adopted in the appeal decision. The judicial review decision adopted Dr. Turner's rating as a finding of fact as well. The analysis, finding of fact, and conclusion of law pertaining to claimant's left leg injury contained in the June 20, 1988 appeal decision is adopted herein. Claimant's left knee injury of November 23, 1983, resulted in a five percent permanent partial impairment of the left leg.

Claimant has shown that his prior right knee injuries did result in permanent physical impairment. Claimant's left knee injury also resulted in loss of use. Claimant has thus met the threshold criteria for Second Injury Fund entitlement.

Claimant's cumulative disability subsequent to the second injury must be determined. Claimant's physical impairment as a result of his injuries, as noted above, was five percent of the left leg and 10 percent of the right leg. Claimant was born on May 25, 1919. He was therefore 64 years old at the time of his November 23, 1983 injury, and 67 years old at the time of the arbitration hearing in 1986. Claimant had worked in meat packing, as well as for John Deere as an assembly line worker, and as a grocery store produce manager. Claimant retired voluntarily, in part because of a strike at his employer's plant. Claimant was working as a security guard at the time of the hearing. Claimant has a tenth grade education.

Claimant's age affects his industrial disability. Compared to a younger worker with the same injury, claimant has lost less future earning capacity as a result of his 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 34 (Appeal Decision 1979); Hainey v. Protein Blenders, Inc., (Appeal Decision October 18, 1985).

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of five percent, or 25 weeks of benefits. Under the Second Injury Fund statute, claimant is only entitled to an award of benefits from the Fund if the overall industrial disability exceeds the disability from the current injury and the prior injuries. Claimant's disability from his 1970 and 1971 right knee injuries is 10 percent of the right leg, or 22 weeks of benefits. Claimant's disability from his 1983 left knee injury is five percent of the left leg, or 11 weeks of benefits. The Second Injury Fund of Iowa is therefore entitled to a credit of 33 weeks. Since the credit exceeds claimant's

overall industrial disability, claimant shall take nothing from the Second Injury Fund of Iowa.

FINDINGS OF FACT

1. Claimant suffered an injury to his right knee in 1970.

2. Claimant underwent a medial meniscectomy on his right knee on August 17, 1970.

3. Claimant again injured his right knee on September 17, 1971.

4. Claimant injured his left knee on November 23, 1983.

5. Claimant was given a rating of permanent partial impairment of 10 percent of the right lower extremity by Dr. Bashara.

6. Claimant had a ten percent impairment of the right leg at the time of his November 23, 1983 injury.

7. Claimant was given a rating of permanent partial impairment of ten percent of the left lower extremity by Dr. Bashara, and five percent of the left lower extremity by Dr. Turner.

8. Claimant was born on May 25, 1919.

9. Claimant's prior work experience consisted of assembly line work, and grocery store management.

10. Claimant retired voluntarily at age 63.

11. Claimant was employed as a security guard at the time of the hearing.

12. Claimant has a tenth grade education.

13. Claimant has a five percent loss of earning capacity as a result of his 1970, 1971, and 1983 injuries.

CONCLUSIONS OF LAW

The opinion of Dr. Turner in regards to claimant's left leg should be given greater weight than the opinion of Dr. Bashara.

As a result of his work injuries in 1970 and 1971, claimant has a permanent partial impairment of ten percent of the right leg.

As a result of his work injury in 1983, claimant has a permanent partial impairment of five percent of his left leg.

Claimant's overall industrial disability as a result of the cumulative effect of his 1970, 1971, and 1983 work injuries is five percent.

Claimant is not entitled to an award of benefits from the Second Injury Fund of Iowa.

ORDER

THEREFORE, it is ordered:

That claimant take nothing further from this proceeding.

That claimant pay the costs of these proceedings pursuant to 343 IAC 4.33.

Signed and filed this 30th day of April, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Phil Vonderhaar
Attorney at Law
840 Fifth Avenue
Des Moines, Iowa 50309

Mr. John M. Bickel
Attorney at Law
800 MNB Bldg.
P.O. Box 2107
Cedar Rapids, Iowa 52406

Ms. Shirley A. Steffe
Assistant Attorney General
Tort Claims Division
Hoover State Office Bldg.
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DOROTHY GORMAN, Claimant, vs. WESTERN INTERNATIONAL, INC., Employer, and THE HARTFORD, Insurance Carrier, Defendants.	File No. 834841 A P P E A L D E C I S I O N

FILED
NOV 28 1990
IOWA INDUSTRIAL COMM

The record before the deputy has been reviewed de novo on appeal. The decision of the deputy granting defendants' motion for summary judgment is affirmed and is adopted as the final agency action in this case.

Claimant shall pay all costs of this proceeding.

Signed and filed this 28th day of November, 1990.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Timothy J. Walker
Mr. Thomas Henderson
Attorneys at Law
1300 First Interstate Bank Bldg.
Des Moines, Iowa 50309

Mr. Jeff M. Margolin
Attorney at Law
2700 Grand Ave., Suite 111
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONNA GRAHAM,	:	
Claimant,	:	File No. 846903
vs.	:	A P P E A L
SHELLER-GLOBE CORPORATION,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
APR 2 2 1991
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. The decision of the deputy, filed July 19, 1990, is affirmed and is adopted as the final agency action in this case with the following additional analysis and except as specified below:

Defendant urges on appeal that claimant's prior compromise special case settlements bar recovery. The injury involved in this case is a new injury, in the form of an aggravation of a preexisting condition. A new injury is not barred by a prior compromise special case settlement. However, claimant's recovery is limited to the extent of disability caused by the aggravation of the condition that was the subject of the special case settlement.

ORDER

THEREFORE, it is ordered:

That defendant pay the claimant temporary total disability benefits from June 4, 1987 through October 31, 1987 at the rate of two hundred twenty-nine and 95/100 dollars ($229.95) per week.

That defendant pay the medical expenses listed in the prehearing report; namely, three hundred ten dollars ($310) for Dr. Crenshaw, and five hundred sixty-seven and 15/100 dollars ($567.15) for prescriptions. Claimant shall be reimbursed for any of these expenses actually paid by her. Otherwise, defendant shall pay the provider directly.

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

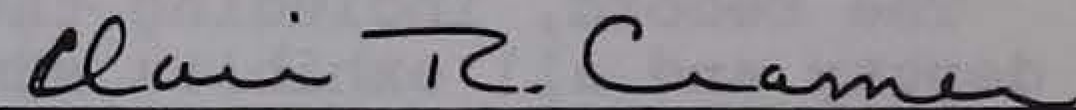
That defendant receive credit for previous payment of benefits under a nonoccupational group insurance plan, under Iowa Code section 85.38(2) as set forth in the prehearing report.

That defendant pay interest on weekly 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 hearing.

That defendant file claim activity reports as requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 22nd day of April, 1991.



CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. James P. Hoffman
Attorney at Law
Middle Road
Keokuk, Iowa 52632-1066

Mr. Harry W. Dahl
Attorney at Law
974 73rd St., Suite 16
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LINDA GREER,	:	
Claimant,	:	
vs.	:	File No. 840641
SARTORI MEMORIAL HOSPITAL,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
EMPLOYERS MUTUAL COMPANIES,	:	
Insurance Carrier, Defendants.	:	

FILED
NOV 28 1990
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal and claimant cross-appeals from an arbitration decision awarding claimant permanent total disability benefits as a result of a work injury on August 21, 1986. The record on appeal consists of the transcript of the arbitration decision, joint exhibits 1 through 18 and defendants' exhibits 1 through 11. Both parties filed briefs on appeal.

ISSUE

The sole issue preserved on appeal is whether claimant sustained an injury that arose out of and in the course of her employment.

REVIEW OF THE EVIDENCE

The arbitration decision filed May 22, 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

Defendants assert that the record does not support the conclusion that claimant sustained an injury that arose out of and in the course of her employment. Defendants rely on the testimony of two witnesses and the emergency room record from Sartori Hospital. The witnesses testified that claimant stated to them that she did not injure herself at work. However,

defendants' witness William J. Robb, M.D., testified that claimant's description of spot cleaning the carpet in the summer of 1986 was consistent with a minor back strain.

Claimant's description of spot cleaning the carpet and feeling a back strain while doing the job has been consistent throughout the proceeding. Claimant's lack of education and ability to understand appears to have caused confusion concerning reporting her work injury to her employer.

The determination that claimant is a credible witness is reviewable by the industrial commissioner on appeal. The objective evidence presented indicates that claimant consistently described the incident of spot cleaning carpets.

> 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.

Asmus v. Waukesha Engine, Appeal Decision, August 24, 1989.

The objective evidence supports claimant's assertion that she suffered an injury arising out of and in the course of her employment. A coworker testified that claimant worked on Mondays in the laundry department and that the rest of the week claimant was a floater with the housekeeping department. Spot cleaning carpets would be the type of work which claimant would be assigned to perform by her supervisor. Claimant mentioned to Arvilla Gerloff, a coworker, a couple of times in late August that she had back problems. This time frame is consistent with the injury date which claimant provided to her treating physicians.

As defendants point out there are inconsistences in the objective evidence presented at the hearing. Arvilla Gerloff asked claimant if she had hurt her back at work and Ms. Gerloff testified that claimant told her that she did not hurt her back at work. Arvilla Gerloff testified that occasionally an employee who sustained what he or she thought was a minor injury did not fill out an incident report or report to the emergency room as the employer required. Finally, defendants note that claimant failed to report that she suffered a work injury when she went to the Sartori emergency room on August 31, 1986. Claimant had been told by coworkers and her supervisor that if she suffered a work injury to report to the emergency room. Claimant did report to the emergency room on August 31, 1986 when she could no longer stand the back pain. The fact that claimant did not tell the emergency room personnel that she suffered a work injury is not

critical. Claimant maintained a consistent description of her injury throughout her treatment for her back problem.

Claimant had been described as a good employee and an honest individual by her coworkers. Claimant sought medical care within ten days of her back injury and provided consistent statements to her medical care providers of her back injury. On balance, objective evidence supports the conclusion that claimant sustained a back injury that arose out of and in the course of her employment with defendants. Demeanor is not a substantial factor in the determination that claimant is credible. Claimant proved that she sustained an injury which arose out of and in the course of her employment with defendants on August 21, 1986.

Claimant's appeal brief correctly notes that the issue of permanent total disability was not preserved by the defendants on appeal. Therefore, the issue of permanent total disability is not before the industrial commissioner. It is not necessary to respond to claimant's assertion that claimant is an odd-lot employee since she was found to be permanently totally disabled.

FINDINGS OF FACT

1. Claimant is found to be credible based upon the objective evidence presented at the hearing.

2. Claimant's witnesses were credible.

3. On August 21, 1986 claimant suffered an injury to the low back which arose out of and in the course of her employment with Sartori. This injury occurred while scrubbing a spot in floor carpeting. Claimant had been doing heavy work that work week consisting of pushing and loading a heavy laundry cart. Claimant felt a sudden strain in her back while on all fours and reaching. This pain was continuous from this event and became worse over time until she sought medical treatment from the Sartori emergency room physicians. Claimant did not report the injury before going to the emergency room because she felt that the injury was only minor and would heal.

4. At the time of the work injury, claimant had serious emotional psychological problems with panic attacks and depression. Claimant also had a heart condition called a mitral valve prolapse which is associated with the panic attacks. She was under medication and receiving regular counseling for this disorder. However, despite these problems she was able to work and her supervisors at Sartori felt she was a good dependable worker before the work injury.

5. Claimant had a back problem following an exercising program in 1981 but she fully recovered from this injury. She had no low back problems between 1981 and the work injury herein.

6. Claimant is functionally illiterate with only a fourth grade education. Claimant has an IQ of 64 which is in the mid-retardation range.

7. The work injury of August 21, 1986 was a cause of a 12 percent permanent functional physical impairment to the body as a whole and of permanent restrictions on her physical activity consisting of no heavy work and working only in sedentary employment where the amount of prolonged sitting and standing is restricted.

8. The work injury of August 21, 1986 and resulting physical restrictions, is a significant cause of mental impairment which renders claimant incapable of employment. The work injury and resulting functional impairment precipitated additional stress which was aggravated by a lack of understanding due to limited intelligence and insufficient education. The work injury was the last straw in a sequence of events leading to complete unemployability.

9. The work injury of August 21, 1986 and resulting physical and mental functional impairments is a cause of a 100 percent loss of earning capacity. Claimant was 36 years old at the time of the arbitration hearing but illiterate and with little formal education. Claimant is unable to read multiple syllable words. Claimant is able to communicate only orally. Claimant has a lack of understanding as to the nature of her disability and only very aggressive rehabilitation activity will improve her physical condition, her emotional state and her illiteracy. To date, no such effort has been made. Sartori hospital has not attempted to return claimant to work at their institution or any other place of employment. Claimant has not worked in any capacity since September 9, 1986. Claimant was terminated by Sartori Hospital as a result of an inability to work due to her work injury.

10. The medical expenses requested in the prehearing report which total $6,103.06 are fair and reasonable and were incurred by claimant for reasonable and necessary treatment of her work injury.

11. The costs requested in the prehearing report are reasonable and were paid by claimant.

CONCLUSION OF LAW

Claimant proved that she suffered an injury which arose out of and in the course of her employment with defendants on August 21, 1986 when she felt a strain in her lower back while spot cleaning carpet.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant permanent total disability benefits for an indefinite period of time during the period of her disability at the rate of one hundred twenty-one and 26/100 dollars ($121.26) per week from September 9, 1986.

That defendants shall pay the medical expenses listed in the prehearing report but only to claimant if she has paid those expenses. Otherwise, defendants are directed to pay the provider directly subject to any attorney lien claimant's attorney may have for his services.

That defendants shall receive credit for previous payment of benefits under nonoccupational group insurance plan, if applicable and appropriate under Iowa Code section 85.38(2).

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

That defendants shall pay the costs of the arbitration proceeding including costs of the transcription of the hearing proceeding. Defendants shall also pay the costs requested by claimant in the prehearing report in the amount of six hundred and forty-five and 00/100 dollars ($645.00).

That defendants file claim activity reports as requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 28th day of November, 1990.

Clair R. Cramer

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert D. Fulton
Attorney at Law
616 Lafayette St.
P.O. Box 2634
Waterloo, Iowa 50704-2634

Mr. Jay P. Roberts
Attorney at Law
528 West Fourth St.
P.O. Box 1200
Waterloo, Iowa 50704

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD M. HAAS, Claimant,	:	
vs.	:	File No. 699381
ST. REGIS PAPER CO., Employer,	:	A P P E A L
and	:	D E C I S I O N
WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	

FILE
JUN 28 1991
IOWA INDUSTRIAL COMMIS

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant permanent total disability benefits on account of his March 29, 1982 work-related injury.

The record on appeal consists of the transcript of the arbitration hearing and claimant's exhibits 1 through 5. Both parties filed briefs on appeal.

ISSUES

Defendants state the issues on appeal are:

1. Whether the deputy erred in excluding defendants' cross-examination of the claimant.

2. Whether the deputy erred in determining that claimant was a credible witness?

3. Whether the deputy erred in finding a causal connection between claimant's work injury and his current disability?

4. Whether claimant is disabled from employment on account of a non-work related cardiovascular problem?

REVIEW OF THE EVIDENCE

The arbitration decision filed May 11, 1989 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE 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. Additional analysis is necessary to determine whether the deputy erred in excluding defendants' cross-examination of the claimant.

Pursuant to Iowa Rules of Civil Procedure 134 made applicable by rule 343 IAC 4.35, a deputy industrial commissioner filed a ruling imposing sanctions upon defendants' attorney for failure to comply with an order compelling discovery. The ruling indicated that the record would be closed to further activity or evidence by defendants. The ruling stated that the record could be opened for further activity upon compliance with the ruling. Defendants did not comply with the ruling and proceeded to hearing. The defendants do not assert that the deputy erred in imposing sanctions for its failure to comply with the agency's order. Defendants assert that the deputy erred in excluding the cross-examination of claimant.

It was not an abuse of discretion by the deputy to order the record closed to further activity by the defendants until the time that the defendants complied with the ruling. "Imposition of such sanctions is vested in the discretion of trial court and we will not reverse such an order unless there has been an abuse of that discretion." Wernimont v. International Harvester Corp., 309 N.W.2d 137, 143 (Iowa App. 1981). Defendants failed to comply with an order compelling discovery. The deputy industrial commissioner assigned to the hearing did not have the authority to disregard a prior ruling by another deputy industrial commissioner. The cross-examination by defendants of claimant was properly excluded.

FINDINGS OF FACT

1. Claimant was born August 19, 1935.

2. Claimant completed the tenth grade.

3. Claimant began his employment with defendant employer in 1962. The majority of claimant's work experience is in the field of heavy, manual labor.

4. Claimant has a long history of low back problems.

5. Claimant underwent fusion surgery at the L3-L4 level in January 1965 and received impairment ratings of 10 to 30 percent of the body as a whole and 25 percent of the body as a whole in September 1966.

6. Claimant returned to his same job with defendant employer and suffered additional low back injuries which kept him off work, but he always returned to his job.

7. Claimant received a work-related low back injury on March 29, 1982 when he attempted to lift a stuck overhead trailer door.

8. Claimant had a preexisting low back injury which was substantially and materially aggravated by his injury of March 29, 1982.

9. Claimant returned to work on May 12, 1982 but left work on June 22, 1982 on account of his back pain.

10. Claimant obtained a work release in February of 1984 and returned to work in March 1984 to his position as shipping clerk.

11. Shortly after claimant's return to work, Georgia Pacific bought the defendant employer and all employees had to reapply for positions. On July 14, 1984 Georgia Pacific informed claimant that he would not be rehired.

12. Claimant's physicians opined that claimant has only a 50 percent chance of improvement if he underwent surgery for his low back pain.

13. On January 19, 1989, Ernest Found, M.D., opined that claimant had an additional 15 percent medical impairment on account of the injury at L4-L5 level and indicated that claimant will not be able to seek employment that will require prolonged standing, any lifting, repetitive bending or stooping.

14. Claimant is no longer able to do heavy, manual labor on account of his work-related back injury of March 29, 1982.

15. Don Laverz, a counselor for the Division of Vocational Rehabilitation Services, upon meeting with claimant and reviewing his medical records, opined that claimant will not be able to find competitive employment.

16. Due to claimant's age and education claimant is not a candidate for the rehabilitation program at the a University of Iowa Hospitals and Clinics.

17. Claimant's testimony was credible.

18. Claimant has a 100 percent reduction of earning capacity as a result of his March 29, 1982 work-related injury.

CONCLUSIONS OF LAW

Defendants' cross-examination of claimant was properly excluded. Defendants failed to comply with an order compelling discovery and a ruling was filed ordering the record closed to further activity and evidence by the defendants until such time that defendants complied with the order. Defendants never complied with the order.

The greater weight of the evidence supports the conclusion that a causal connection exists between claimant's March 29, 1982 work-related injury and his disability.

The greater weight of the evidence supports the conclusion that claimant is permanently totally disabled as a result of his March 29, 1982 work-related injury to his lower back. Claimant's disability is not related to his cardiovascular problems.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant compensation for permanent total disability at the stipulated rate of two hundred twelve and 20/100 dollars ($212.20) per week during the period of the claimant's disability commencing with the injury date of March 29, 1982.

That all accrued unpaid weekly benefits be paid in a lump sum together with interest from the date each payment became due in accordance with Iowa Code section 85.30.

That defendants shall be given credit for any benefits previously paid and for the six (6) weeks claimant worked, May 12, 1982 to and including June 22, 1982.

That defendants shall reimburse claimant in the amount of one thousand two hundred fifty and 92/100 ($1,250.92) for medical, drug, and transportation bills, and to pay four thousand seventy-eight and 92/100 dollars ($4,078.92) for medical bills

directly to the providers of the services to claimant, totaling five thousand three hundred twenty-nine and 84/100 dollars ($5,329.84) as set out in Attachment A of the prehearing report.

That defendants shall pay the costs of this action including the cost of transcription of the hearing proceeding pursuant to rule 343 IAC 4.33.

That defendants shall file an activity report upon payment of this award as required by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 28th day of June, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Louis P. Pfeiler
Attorney at Law
679 Bluff Street
Dubuque, Iowa 52001

Mr. Larry L. Shepler
Attorney at Law
Suite 102 Executive Square
400 Main Street
Davenport, Iowa 52801

Mr. E. J. Giovannetti
Ms. Anne L. Clark
Attorneys at Law
2700 Grand Ave., Suite 111
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEWIS HALL, Claimant, vs. DR. DARYL LARSON, d/b/a HILL TOP PORK, Employer, Uninsured, Defendant.	:	File No. 846905 A P P E A L D E C I S I O N

FILED
APR 22 1991
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. The decision of the deputy filed October 19, 1989 is affirmed and is adopted as the final agency action in this case.

Defendant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Defendant is again ordered to file a first report of injury as required by Iowa Code section 86.11 within twenty (20) days of the date of this decision.

Signed and filed this 22nd day of April, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Brian Anderson
Attorney at Law
405 Tracy Street
Audubon, Iowa 50025

Hill Top Pork
c/o Dr. Daryl Larson
Hwy 71 North
P.O. Box 163
Audubon, Iowa 50025
CERTIFIED AND REGULAR MAIL

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STUART HALL, Claimant, vs. BACKMAN SHEET METAL, Employer, and IOWA CONTRACTORS' WORKERS' COMPENSATION GROUP, Insurance Carrier, Defendants.	File No. 688256 R E M A N D D E C I S I O N FILED JUN 28 1991 IOWA INDUSTRIAL COMMISSIONER

On April 2, 1991, the Iowa Court of Appeals issued a decision in the above-captioned case, remanding the case to this agency for further proceedings.

ACCORDINGLY, IT IS ORDERED:

Defendants shall pay to claimant healing period benefits in the amount of seven thousand seventy-one and 70/100 dollars ($7,071.70) plus interest.

Defendants are entitled to a credit for overpayment of permanent partial disability benefits of seven thousand six hundred twenty-five and 92/100 dollars ($7,625.92) plus interest.

Signed and filed this 28th day of June, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Arthur C. Hedberg, Jr.
Attorney at Law
840 Fifth Ave.
Des Moines, Iowa 50309

Mr. John A. Templer, Jr.
Mr. Dean C. Mohr
Attorneys at Law
3737 Woodland, Suite 437
West Des Moines, Iowa 50265

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALLEN F. HARDY,	
Claimant,	
vs.	File No. 814126
ABELL-HOWELL COMPANY,	A P P E A L
Employer,	D E C I S I O N
and	
LIBERTY MUTUAL INSURANCE CO.,	
Insurance Carrier, Defendants.	

FILED
DEC 21 1990
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent total disability benefits as the result of an alleged injury on January 11, 1986. Claimant cross-appeals.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits A through S; and defendants' exhibits D-1 through D-6. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

1. Whether the deputy erred in finding that there is a causal connection between the alleged injury and claimant's disability.

2. Whether the deputy erred by finding that claimant has a permanent total disability.

Claimant states the following issue on cross-appeal:

Claimant's correct weekly benefit rate should be $288.87 per week.

REVIEW OF THE EVIDENCE

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

Briefly stated, claimant worked for 25 years as an ironworker. On January 11, 1986, claimant injured his leg, arm and back in a fall. Claimant was 55 years old at the time of his injury, and had an eleventh grade education. Claimant's work experience was limited to his work as an ironworker, which required claimant to climb, work in high places, lift, bend, twist, and carry 70 pounds of equipment.

Following his injury, claimant was treated by several physicians. Donald Berg, M.D., performed surgery on claimant's leg. Claimant was then referred to Edward P. Hermann, D.O. Dr. Hermann performed surgery on claimant's wrists and elbows. A CT scan of claimant's back ordered by Dr. Hermann showed claimant was suffering from degenerative disk disease with slight nerve root narrowing on the right of L4,5; and a marked degenerative bony spur formation nerve root on the left at L5, S1. Dr. Hermann attributed claimant's back condition to his fall.

Dr. Hermann opined that claimant cannot sit or stand for longer than twenty to thirty minutes, cannot walk beyond 4-6 blocks without back pain, and that claimant has permanent restrictions to avoid any bending, stooping or lifting. Claimant was also advised to avoid riding in motor vehicles to prevent aggravating his back pain. Dr. Hermann assigned claimant a 25 to 30 percent permanent partial "disability" of the body as a whole.

Dr. Hermann also recommended that claimant undergo either an epidural block, or a laminectomy. Claimant refused both types of treatment.

Claimant was also seen by David J. Boarini, M.D., a neurosurgeon, at defendants' request. Dr. Boarini opined that claimant has some limitation in the range of motion for his lower back in all directions, and that claimant's low back pain is due to his osteoarthritis, which was aggravated by his fall. Dr. Boarini imposed a 50 pound lifting restriction, and avoidance of bending. Dr. Boarini rated claimant's impairment as three percent "disability of the whole man." Dr. Boarini also recommended that claimant undergo a myelogram.

Claimant was also evaluated by David L. Cunningham, M.D., also at defendants' request. Dr. Cunningham found that claimant exhibited pain in the lumbar area, and that flexion and extension of the lumbar spine were limited to 20 percent of normal limits. An MRI recommended by Dr. Cunningham showed a bulging or ruptured

disc at the L4 level protruding toward the right plus some midline posterior bulging of the L2,3 intervertebral disk. Dr. Cunningham recommended claimant undergo outpatient lumbar myelography.

Claimant attempted to return to work, but was initially told no work was available. Claimant did eventually return to work, but pain in his back prevented him from continuing to work.

Claimant was evaluated by vocational rehabilitation specialist George Brian Paprocki. Paprocki opined that based on claimant's inability to work for eight hours and the fact that claimant's skills as a welder and ironworker did not transfer to a sedentary occupation, claimant was unemployable. H. Shelby Swain, another vocational rehabilitation consultant, opined that claimant preferred to be working but had perhaps given up looking for work in light of his physical limitations.

Claimant's earnings with the defendant employer were as follows:

w/e 10/19/85	120.00
w/e 10/26/85	------
w/e 11/02/85	------
w/e 11/09/85	60.00
w/e 11/16/85	496.00
w/e 11/23/85	620.00
w/e 11/30/85	372.00
w/e 12/07/85	620.00
w/e 12/14/85	651.00
w/e 12/21/85	372.00
w/e 12/28/85	201.50
w/e 01/04/86	------
w/e 01/11/86	209.25

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 unreasonable refusal of proffered medical benefits can result in a loss of weekly benefits. Johnson v. Tri-City Fabricating & Welding Co., 33rd Biennial Report of the Iowa Industrial Commissioner 179 (Appeal Decision 1977).

Failure to undergo surgery which carries some significant risk and the outcome of which is not altogether certain does not represent an unreasonable refusal of medical care. Arnaman v. Mid-American Freight Lines, I-3 Iowa Industrial Commissioner

Decisions 497 (1985); Barkdoll v. American Freight System, Inc., Appeal Decision, June 28, 1988.

Iowa Code sections 85.36(6) and (7) state in part:

> 6. In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.
>
> 7. In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, the employee's weekly earnings shall be computed under subsection 6, taking the earnings, not including overtime or premium pay, for such purpose to be the amount the employee would have earned had the employee been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

ANALYSIS

The first issue on appeal is whether claimant has carried his burden to show that his present condition is causally connected to his work injury. Dr. Hermann opined that claimant's present back condition was the result of claimant's fall at work. Dr. Boarini stated that it was his opinion that claimant's fall did aggravate his preexisting osteoarthritis, but that this aggravation later stabilized, followed by further natural degeneration. When questioned on this point in his deposition, Dr. Hermann expressed the belief that claimant's present back problems were not the result of natural degeneration, but rather were caused by trauma. Dr. Berg also testified that claimant's back condition was caused by "lumbosacral strain."

It is noted that Dr. Hermann is claimant's treating physician. Dr. Hermann has had more contact with claimant, and has had more opportunity to observe claimant's back condition. In addition, claimant did not experience back pain or limitations in movement prior to his fall. These symptoms appeared soon in time after the fall, and have not alleviated. It is not necessary that claimant's injury be the only cause of his present condition. It is sufficient if it is a substantial cause. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). The opinion of Dr. Hermann will be given the greater

weight. Claimant's work injury was a substantial cause of his present back condition.

The next issue raised by defendants is whether claimant has proven entitlement to permanent total disability benefits. However, defendants offer no argument in their appeal brief that claimant is not permanently and totally disabled at this time. No argument is offered on the various factors that determine industrial disability. Rather, defendants on appeal appear to urge that claimant is not entitled to permanent total disability benefits due to his refusal to undergo certain recommended medical treatment.

Claimant was advised by Dr. Hermann to undergo an epidural block or a laminectomy. Both Dr. Cunningham and Dr. Boarini recommended a myelogram. Claimant has declined to undergo the recommended procedures. Benefits cannot be reduced, however, unless the refusal to undergo medical procedures is unreasonable.

Dr. Hermann has stated that even with the recommended procedures, claimant would still not be able to work for eight hours at a time. Dr. Boarini acknowledged that even if claimant underwent the surgery, he would still have a lifting and bending restriction. Dr. Boarini predicted an 80 percent chance of success with surgery. The other physicians predicted no more than a 35 percent to 50 percent chance of improvement. Dr. Hermann testified that some people would not benefit from the surgery, and could even become worse. Dr. Hermann stated he could not say claimant would be improved with surgery, but that he possibly would.

None of the physicians were able to state that surgery, even if successful, would significantly improve claimant's impairment. Claimant testified that Dr. Hermann told him he would not be able to return to his work as an ironworker even with the surgery.

There was little evidence offered on the risk of the procedures recommended. Claimant did testify that Dr. Hermann told him he could be better after surgery, he could be worse, or he could be in a wheelchair. Claimant stated he would not undergo surgery unless he became paralyzed. Dr. Hermann stated that he felt claimant's refusal was reasonable under the circumstances.

In addition, impairment is only one of the factors that determine industrial disability. Claimant's decision not to undergo surgery is reasonable, and benefits should not be reduced because of this refusal. In light of claimant's age of 55, his ratings of physical impairment, his eleventh grade education, his past work history, his loss of earnings since his injury, his lack of potential for vocational rehabilitation as shown by the

testimony of the vocational rehabilitation experts, as well as the other factors that determine industrial disability, it is concluded that claimant is permanently and totally disabled.

Claimant raises the issue of rate of weekly compensation as an issue on cross-appeal. The defendants calculated claimant's weekly benefit rate by including three weeks in which claimant apparently received no earnings due to being laid off. Defendants also included in the calculation one week where claimant earned only $60 due to claimant only working part of one day due to lead poisoning, and another week where claimant was laid off part way through the week and only earned $120. Claimant's position is that these weeks are unrepresentative and should not be considered. Rather, claimant urges, the previous five weeks that he worked for another employer should be used to calculate his rate.

Initially, a determination must be made which subsection of Iowa Code section 85.36 is appropriate. Section 85.36(6) deals with employees paid on an hourly basis. Section 85.36(7) deals with employees that have been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury.

Claimant was apparently paid on an hourly basis for the work he performed for defendant employer. Under Iowa Code section 85.36(6), the weekly earnings for an employee who is paid on an hourly basis is computed by dividing by thirteen the earnings of the employee earned in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury. Claimant's work from October 16, 1985, through his injury on January 11, 1986, constitutes twelve and one-half weeks only. Thus, section 85.36(7) is the appropriate method to determine claimant's earnings.

Section 85.36(7) states that the weekly earnings shall be computed as under section 85.36(6), but the earnings to be divided by thirteen shall be the amount the employee would have earned had the employee been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

Claimant urges that the three full weeks and one partial week where he earned no wages or less than his usual wages due to being laid off should not be considered. Weeks that are not representative of claimant's usual earnings should not be utilized in the calculation of claimant's rate. Claimant earned no wages during three of the thirteen weeks immediately preceding his injury, due to being laid off. These weeks are not representative of claimant's normal earnings. Thus, claimant's earnings for the weeks ending October 26, 1985; November 2,

1985; and January 4, 1986, should not be included in the thirteen weeks calculation under section 85.36(7).

The week ending October 19, 1985, was a partial week only, with claimant earning $120. Claimant began working for defendant during that week, on October 16, 1985. If this week was a partial week due to claimant beginning work in the middle of the workweek, it might very well constitute an unrepresentative week. However, in his answers to interrogatories, admitted into the record as Exhibit J, claimant states: "The week ending 10/19/85 was only a partially completed week with earnings of $120. Claimant worked only part of the week ending 10/19/85 because of no work from the employer."

Thus, it appears that the week ending October 19, 1985, was a "short" week not because claimant began his employment in the middle of the pay period, but because of a lack of work. Although weeks in which claimant earned no wages at all due to being laid off are not to be included in the calculation of claimant's rate, weeks in which claimant did earn some wages, even though he was laid off for a portion of the week, are to be included in the calculation. Thus, the week ending October 19, 1985, is to be included in the rate calculation.

During the week ending November 9, 1985, claimant worked only one day due to steel poisoning. There is no contrary assertion from defendants. Absence from work due to illness does make the week ending November 9, 1985, unrepresentative of claimant's true earnings, and thus that week's earnings will not be included in the 85.36(7) calculation.

Thus, there remain only nine representative weeks of earnings with defendant employer. Claimant urges utilizing his earnings with a prior employer to complete the requirement of a representative thirteen weeks. However, both sections 85.36(6) and 85.36(7) refer to "the employer," which indicates that the earnings to be included are limited to those earned from the defendant employer. Utilizing the earnings of claimant with a prior employer would not be appropriate in this case.

Under section 85.36(7), when the claimant has worked less than thirteen weeks for the employer, a determination is to be made as to what the claimant's earnings would have been had the claimant been employed by the employer for the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation.

The record in the present case does not disclose what claimant's earnings would have been had he been employed the full thirteen weeks preceding his injury, nor does the record show

what employees in a similar occupation earned from the employer during this period.

When it is not possible to determine a representative thirteen weeks of earnings for claimant, a proper determination of earnings can be made by dividing claimant's wages for the weeks he did work by the number of weeks. Barker v. City Wide Cartage, I Iowa Industrial Commissioner Report, 12, 15, (Appeal Decision, 1980). Claimant worked nine representative weeks for the defendant employer. His total earnings for those nine weeks was $3,661.75. Divided by nine, this yields weekly earnings of $406.86. Under the rate tables pertaining to an injury occurring on January 11, 1986, a married claimant with two dependents would have a weekly rate of $252.82.

FINDINGS OF FACT

1. Claimant worked as an ironworker for defendant employer.

2. Claimant suffered an injury to his back arising out of and in the course of his employment on January 11, 1986.

3. Claimant received ratings of permanent physical impairment of 25-30 percent of the body as a whole, and three percent of the body as a whole.

4. Claimant has permanent restrictions on lifting, bending, and stooping, and claimant has difficulty in walking or standing as a result of his work injury. Claimant cannot work eight hours at a time without lying down to rest.

5. Claimant did not have back problems prior to his work injury.

6. Claimant had a preexisting case of osteoarthritis in his back.

7. Claimant experienced back pain after his work injury which continues to the present time.

8. Dr. Hermann expressed the opinion that claimant's back condition was caused by trauma and not by degenerative disease.

9. Claimant was advised to undergo either an epidural block or a laminectomy, but claimant refused to do so.

10. Dr. Hermann indicated that surgery on claimant's back might or might not improve his condition, and might make claimant's condition worse.

11. Dr. Hermann expressed the opinion that claimant's refusal was reasonable from a medical standpoint.

12. Dr. Boarini expressed the opinion that even with surgery, claimant would still have restrictions and pain.

13. Claimant was 55 years old at the time of his injury and had an eleventh grade education.

14. Claimant's work experience is limited to ironworking. Claimant cannot return to ironworking or work at other occupations involving manual labor due to his impairment.

15. A vocational rehabilitation expert concluded that claimant is unemployable.

16. Claimant was paid an hourly wage.

17. Claimant's wages from defendant were as follows:

w/e 10/19/85	120.00
w/e 10/26/85	------
w/e 11/02/85	------
w/e 11/09/85	60.00
w/e 11/16/85	496.00
w/e 11/23/85	620.00
w/e 11/30/85	372.00
w/e 12/07/85	620.00
w/e 12/14/85	651.00
w/e 12/21/85	372.00
w/e 12/28/85	201.50
w/e 01/04/86	------
w/e 01/11/86	209.25

CONCLUSIONS OF LAW

Claimant's present back condition is causally connected to his January 11, 1986 work injury.

Claimant's refusal to undergo recommended medical treatment was reasonable.

Claimant is permanently and totally disabled.

Claimant's rate of compensation is $252.82 per week.

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

ORDER

THEREFORE, it is ordered:

That defendants are to pay untc claimant permanent total disability benefits at the rate of two hundred fifty-two and 82/100 dollars ($252.82) per week during the period of his disability.

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

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

That defendants are to pay the costs of this action. Defendants and claimant shall share equally the costs of the appeal, including the preparation of the appeal transcript.

That defendants shall file claim activity reports as required by this agency pursuant to rule 343 IAC 3.1(2).

Signed and filed this 21st day of December, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Dennis W. Emanuel
Attorney at Law
P.O. Box 601
Ottumwa, Iowa 52501-0601

Mr. Walter F. Johnson
Attorney at Law
P.O. Box 716
Ottumwa, Iowa 52501

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
JUL 30 1990
IOWA INDUSTRIAL COMMISSIONER

LARRY HART,	:	
Claimant,	:	File No. 816126
vs.	:	APPEAL
FRENCH & HECHT,	:	DECISION
Employer, Self-Insured, Defendant.	:	

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. The decision of the deputy is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

A claimant's subjective retirement plans prior to the injury are given little weight in the determination of industrial disability. Brittain v. Fisher Controls, Appeal Decision, February 28, 1989.

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

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. James M. Hood
Attorney at Law
302 Union Arcade Bldg.
Davenport, Iowa 52801

Mr. Larry L. Shepler
Attorney at Law
Executive Square, Suite 102
400 Main St.
Davenport, Iowa 52801

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

FILED
MAR 30 1990
IOWA INDUSTRIAL COMMISSIONER

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

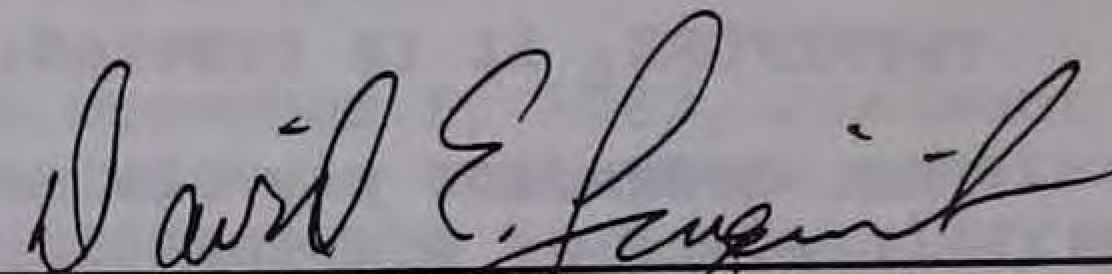
That defendant is ordered to pay claimant's medical bills incurred at St. Joseph Mercy Hospital but not that portion of the bill which relates to treatment of claimant's bowels; claimant's bill from Sickroom Service only to the extent said bill is not duplicative of the bill from Corner Drug Store Company; 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
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Harry W. Dahl
Attorney at Law
974 73rd St., Suite 16
Des Moines, Iowa 50312

Mr. Allan Bjork
Attorney at Law
1300 Des Moines Bldg.
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

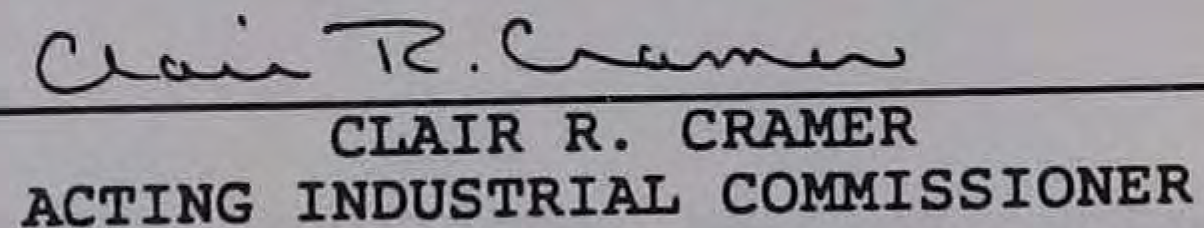
PAUL HIKE, Claimant, vs. IBP, INC., Employer, Self-Insured, Defendant.	:	File No. 764571 A P P E A L D E C I S I O N

FILED
OCT 23 1990
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. The ultimate decision and conclusion of the deputy is affirmed and is adopted as the final agency action in this case.

Defendant shall pay the costs of the appeal, including the preparation of the appeal transcript.

Signed and filed this 23rd day of October, 1990.



CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Dennis L. Hanssen
Attorney at Law
Terrace Center, Ste. 111
2700 Grand Avenue
Des Moines, Iowa 50312

Mr. Robert L. Harris
Mr. Wendell F. Cowan
Attorneys at Law
P.O. Box 515, Dept. #41
Dakota City, NE 68731

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS HILL,	:	
Claimant,	:	File Nos. 881074/842646
vs.	:	APPEAL
OSCAR MAYER FOODS CORP.,	:	DECISION
Employer, Self-Insured, Defendant.	:	

FILE
JUN 28 1991
IOWA INDUSTRIAL COMMISS

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 filed September 12, 1989 is affirmed and is adopted as the final agency action in this case.

Defendant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 28th day of June, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Wayne H. McKinney, Jr.
Attorney at Law
P.O. Box 209
Waukee, Iowa 50263-0209

Mr. Harry W. Dahl
Attorney at Law
974 73rd St., Suite 16
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BIRDEEN HIMSCHOOT, Claimant, vs. MONTEZUMA MANUFACTURING, Employer, and FIREMAN'S FUND INSURANCE, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 672778/738235 R E M A N D D E C I S I O N

FILED
FEB 26 1991
IOWA INDUSTRIAL COMMISSIONER

The Iowa Court of Appeals issued its ruling in this case on February 22, 1990. That decision affirmed the district court decision filed December 12, 1989, which remanded this case to this agency for further award of healing period benefits.

ACCORDINGLY, IT IS ORDERED:

Defendants shall pay to claimant additional healing period benefits from August 9, 1982, through August 23, 1983, pursuant to Iowa Code section 86.13.

Defendants shall receive credit for any section 86.13 benefits previously paid.

Signed and filed this 26th day of February, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Dennis L. Hanssen
Attorney at Law
2700 Grand Ave., Suite 111
Des Moines, Iowa 50312

Mr. Richard G. Book
Attorney at Law
500 Liberty Building
Des Moines, Iowa 50309

Mr. Greg Knoploh
Assistant Attorney General
Tort Claims Division
Hoover State Office Bldg.
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

NEIL HOLLOWAY,	:	
Claimant,	:	
vs.	:	File No. 916768
RUGE ELECTRIC,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
GENERAL CASUALTY COMPANIES,	:	
Insurance Carrier, Defendants.	:	

FILED
JUN 28 1991
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. The decision of the deputy filed March 11, 1991 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Claimant raises two issues on appeal, the extent of industrial disability and the rate of weekly benefits.

Claimant has not suffered any loss of earnings. The employer has commendably accommodated claimant's condition. There is no requirement that the percentage of industrial disability exceed the percentage of impairment. Claimant does not have any medically imposed work restrictions. Claimant is unable to perform certain job tasks at work, and these limitations may affect his future ability to be hired by other employers. However, an award of seven percent industrial disability reflects this loss of earning capacity. Based on these and all the other factors of industrial disability, claimant is found to have an industrial disability of seven percent.

The pay period of November 10, 1988, was incorrectly utilized in the calculation of claimant's rate. Claimant worked only two days that week, then underwent surgery and recovery. Claimant worked 40 hours or slightly less for each of the other 12 weeks preceding his injury. The week of his surgery, claimant only worked 16 hours. The week of November 10, 1988, is not representative of claimant's actual wages and should be

disregarded. In order to obtain 13 representative weeks prior to claimant's injury, the pay period of July 21, 1988 should be considered. Applying claimant's $578 in wages earned during that pay period, yields a gross weekly wage of $574.62 per week. The parties stipulated that claimant was married and entitled to two exemptions. For an injury occurring on November 8, 1988, this results in a weekly compensation rate of $350.58.

Defendants have pointed out a numerical error in the statement of medical expenses and amounts paid by insurance. Central Iowa Orthopaedics is found to have been paid $1,905.60 in insurance payments. Total insurance payments are $5,794.37. Defendants are entitled to a credit in that amount.

The decision of the deputy is affirmed and modified.

Defendants are to pay the costs of this action, including the costs of the hearing transcript.

Signed and filed this 28th day of June, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Tito Trevino
Attorney at Law
801 Carver Bldg.
P.O. Box 1680
Fort Dodge, Iowa 50501

Ms. Claire F. Carlson
Attorney at Law
P.O. Box 957
Fort Dodge, Iowa 50501

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CANDACE HOLMES, Claimant, vs. GLENWOOD STATE HOSPITAL-SCHOOL, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File Nos. 844544 861984 A P P E A L D E C I S I O N

FILED
AUG 30 1990
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 November 3, 1986. The record on appeal consists of the transcript of the arbitration proceeding; defendants' exhibits 1 through 4; and joint exhibits 1 through 23.

ISSUES

None of the parties 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 issues in dispute between the parties at the arbitration hearing concerned whether the medical costs and healing period related to claimant's second surgery were causally connected to

her work injury, and the nature and extent of claimant's present disability.

Defendants urged a rejection of claimant's testimony as not credible. It is noted that claimant did apparently either conceal or minimize her condition in her job application for rehiring. Although this may affect the weight given to claimant's testimony, it does not justify a total rejection of her testimony.

The medical evidence consists of the testimony of two physicians. Schuyler Gooding, M.D., performed a left L4-5 interlaminal discectomy. At that time, Dr. Gooding noted:

> She underwent a total myelogram with Isovue M-300 under light general anesthesia on 2/3/87. This revealed a moderate bulging of the C5-C6 disc in the cervical region which was not felt to be surgically significant at this time. There was a more striking bulging of the L4-L5 disc in the lumbar region -- especially when the patient was raised to an erect posture. There was minimal bulging of the L5-S1 disc in the lumbar region. This was not felt to be surgically significant...

(Exhibit 16)

Leslie Hellbusch, M.D., examined claimant some time later, and performed a partial hemilaminectomy at L4-5 on the left, and a micro-lumbar discectomy at L5-S1, on the left.

Claimant testified that she initially felt better after both surgeries, then her condition deteriorated after each surgery. Claimant gained weight after her first surgery, but Dr. Gooding reported a significant weight loss later as a result of a weight loss program. Claimant's symptoms continued after her weight loss.

Claimant also described a 1979 automobile accident in which she suffered cervical and thoracic spine injuries. However, there is no evidence to indicate that claimant's present condition or her L5-S1 condition is causally connected to her 1979 automobile accident.

Dr. Gooding did not operate on claimant's L5-S1 disc, and stated that it was not, at the time he was treating claimant, a significant injury:

> That that disc problem was the direct result of the original on-the-job injury, which brought this patient to my attention initially, I have no objective evidence (in the form of diagnostic studies that I obtained), or subjective evidence (in the form of my examination of

> her upon the occasion of her 11/19/87 visit), that she had a significant L5-S1 disc abnormality upon the occasion of her release from my care on 1/16/88...

(Ex. 21)

Dr. Gooding does not clearly state that claimant's L5-S1 disc condition, later operated on by Dr. Hellbusch, is not related to claimant's work injury. A reading of Dr. Gooding's statement yields no definite opinion by him on whether claimant's L5-S1 condition is causally connected to her work injury. Dr. Gooding merely states that although the condition existed when he treated claimant, he did not regard it as significant at that time.

Dr. Hellbusch stated, in a letter dated August 31, 1988, that the surgical procedure he performed was related to claimant's work injury. Dr. Hellbusch operated on both the L4-5 level and the L5-S1 level in that surgery. Thus, Dr. Hellbusch appears to causally connect both conditions to claimant's work injury.

Dr. Gooding's statement is ambiguous as to causal connection between the L5-S1 condition and claimant's work injury. Dr. Hellbusch's statement as to causal connection is more definite. In addition, Dr. Hellbusch's conclusion is corroborated by claimant's lack of symptoms prior to her work injury, and the lack of evidence of any intervening cause for her present complaints. It is concluded that claimant has shown by a preponderance of the evidence that her L5-S1 condition is causally connected to her work injury of November 3, 1986. As a result, defendants are responsible for claimant's medical costs, including the second surgery. Claimant is also entitled to a healing period from August 1, 1988 to November 24, 1988.

Claimant's injury is to the body as a whole, and thus claimant has suffered an industrial disability. Claimant was 39 years old at the time of the hearing on January 31, 1989. Claimant was injured on November 3, 1986. Claimant's age puts her at a time of her life when normally her earnings would be at a maximum. Claimant is also young enough to be retrained, and in fact claimant is training to become a chemical dependency counselor, although claimant has doubts she will be able to perform this job due to an inability to drive a car because of her injury.

Dr. Gooding rated claimant's permanent partial impairment as 15 percent of the body as a whole, and imposed a maximum lifting restriction of 40 pounds, and a repetitive lifting restriction of 25 pounds. Dr. Hellbusch rated claimant's permanent partial impairment as 20-25 percent of the body as a whole, with a

restriction against lifting more than 20 pounds and no repetitive back bending.

Claimant's education consists of a high school diploma and two years of college. Claimant has worked in both the advertising and insurance industries, and claimant is a certified medication aide and obstetrics technician. Claimant has experience as a residential treatment worker, but cannot return to that occupation. Claimant applied to return to work for her former employer in a light duty capacity, but the employer did not rehire her. However, claimant has not demonstrated good motivation in that she has not made any other job applications.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 40 percent.

FINDINGS OF FACT

1. Claimant suffered an injury to her back arising out of and in the course of her employment on November 3, 1986.

2. Claimant was born on February 11, 1949.

3. Claimant has received ratings of permanent partial impairment of 15 percent of the body as a whole and 20-25 percent of the body as a whole; and a repetitive lifting restriction of 25 pounds from Dr. Gooding, and a lifting restriction of 20 pounds and no repetitive back bending by Dr. Hellbusch.

4. Claimant has a high school education and two years of college, including training as a chemical dependency counselor.

5. Claimant has work experience in advertising, in insurance, and as a residential treatment worker. Claimant is a certified medication aide and obstetrics technician.

6. Claimant applied to return to her former job but her employer did not rehire her.

7. Claimant did not apply for any other jobs.

8. The November 3, 1986 injury to claimant's low back was a substantial factor in producing the need for the surgery and other medical treatment which claimant received under the direction of Dr. Leslie Hellbusch.

9. Claimant has experienced a 40 percent loss of her earning capacity as a result of the physical impairment and limitations which were produced by the November 3, 1986 injury.

CONCLUSIONS OF LAW

The injury of November 3, 1986 was a proximate cause of the surgery and treatment provided to Candace Holmes by Dr. Leslie Hellbusch and the period of recuperation following surgery and medical expenses incurred in the course of that treatment.

Defendants are responsible for the costs of medical treatment incurred under the direction of Dr. Hellbusch.

Defendants are responsible to pay healing period compensation to claimant for the period of August 1, 1988 to November 24, 1988, a period of 16 4/7 weeks.

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

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant sixteen and four-sevenths (16 4/7) weeks of healing period compensation at the stipulated rate of one hundred eighty-two and 73/100 dollars ($182.73) per week payable commencing August 1, 1988.

That defendants pay claimant two hundred (200) weeks of compensation for permanent partial disability at the stipulated rate of one hundred eighty-two and 73/100 dollars ($182.73) per week payable commencing January 27, 1988. The permanent partial disability compensation is to be interrupted by the sixteen and four-sevenths (16 4/7) weeks of healing period payable commencing August 1, 1988 and then resumed to be paid commencing November 25, 1988 until the entire amount is fully paid.

That defendants pay claimant's medical expenses associated with her surgery and treatment under Dr. Hellbusch.

That defendants pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 in the amount of one hundred twenty and 00/100 dollars ($120.00) as shown in items B and C of the costs statement submitted by claimant.

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 August, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Sheldon M. Gallner
Attorney at Law
803 Third Avenue
P.O. Box 1588
Council Bluffs, Iowa 51502

Mr. Robert D. Wilson
Assistant Attorney General
Tort Claims Division
Hoover State Office Building
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA A. HOOVER,	:	
Claimant,	:	
vs.	:	File No. 529205
IOWA DEPARTMENT OF AGRICULTURE,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
STATE OF IOWA,	:	
Insurance Carrier, Defendants.	:	

FILED
APR 30 1991
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding permanent total disability benefits as the result of an alleged injury on August 2, 1978. The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 1-41 and defendants' exhibits A, B, C, E and F. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. Did the Deputy abuse his discretion in refusing to admit Exhibit G (Claimant's deposition) on the ground that Defendants did not reasonably supplement their answers to interrogatories pertaining to surveillance activities of the Defendant?

2. Did the deputy err in finding Claimant had suffered increased disability which was proximately caused by Claimant's work-related injury?

3. Did the Deputy err in finding that claimant's problems with degenerative joint disease, which the Deputy found as the cause of Claimant's increased

disability, was not contemplated by the parties at the time of the prior hearing?

4. Did the Deputy err in finding that Claimant was a credible witness?

5. Did the Deputy abuse his discretion in failing to recuse himself from this case?

APPLICABLE LAW

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

ANALYSIS

Claimant was employed by the Iowa Department of Agriculture as an animal inspector. Claimant was injured when she fell on August 2, 1978. Claimant was diagnosed as suffering from degenerative disc disease in her lower back and degenerative joint disease in her left knee. After a hearing in 1985, claimant received an award of 55 percent industrial disability. Claimant now seeks further review-reopening based upon an alleged worsening of her back and knee conditions.

The initial issue on appeal is the deputy's exclusion of claimant's deposition from the evidence admitted into the record. Although this issue and another appeal issue were phrased by defendants in terms of whether the deputy abused his discretion, the abuse of discretion is a standard of review utilized in judicial review of appeals of final agency action under Iowa Code chapter 17A. An appeal of a deputy's proposed decision to the industrial commissioner is de novo.

Defendants utilized surveillance evidence in this case consisting of personal observations, videotape, and still photographs. An interrogatory served upon defendants by claimant inquired whether any surveillance activity had occurred, and on April 22, 1987, defendants responded that no such activity had occurred as of that date. Surveillance was commenced on May 11, 1987. Defendants conducted a deposition of claimant on May 27, 1987. At said deposition, claimant allegedly made statements that were contradicted by the surveillance videotapes. After claimant's deposition, defendants supplemented their earlier interrogatory answer to indicate that surveillance had occurred (supplemental answers were served June 2, 1987) and claimant's attorney was given an opportunity to depose those witnesses involved in the surveillance and to examine the surveillance evidence. At hearing over a year later (the hearing was held on July 8, 1988), objection was made to the deposition of claimant based upon the failure to timely supplement the interrogatory and

the deputy excluded the deposition. The surveillance evidence itself was admitted into the record and is not challenged in this appeal.

Rule 343 IAC 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 122"d"(2)(B) states:

> A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:
>
> (B) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment;

Defendants urge that "seasonably" in this context means that the interrogatory must be supplemented in sufficient time before the hearing to avoid prejudice to claimant. Defendants cite several analogous federal cases for this proposition. Defendants also cite federal rule decisions that create an exception to the requirement to supplement answers to interrogatories when the purpose of the interrogatory is to thwart cross-examination. In the surveillance context, these federal cases approve delaying supplementation of interrogatory responses until after the opposing party has committed to a position that the surveillance was designed to controvert. Defendants point out that revealing the existence of surveillance evidence would allow claimant to tailor her deposition answers to conform with the surveillance evidence.

In <u>Daniels v. National Railroad Passenger Corp.</u>, 110 F.R.D. 160, at 161 (USDC, New York, 1986), it is stated:

> The federal discovery rules were designed to encourage liberal pre-trial disclosure in order to make trial "less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." (Citations omitted).

> However, in order to protect the value of surveillance films to be used for impeachment of the plaintiff if he exaggerates his disabilities, while still serving the policy of broad discovery, it may be appropriate to require disclosure of such impeachment materials only after the depositions of the plaintiff or other witnesses to be impeached, so that their testimony may be frozen.
>
> ...Before the disclosure, however, defendant must be afforded the opportunity to take the depositions of the plaintiff and any other affected persons, so that the prior recording of their sworn testimony will avoid any temptation to alter that testimony in light of what the films or tapes show.

Hikel v. Abousy, 41 F.R.D. 152, at 155 (USDC, Maryland, 1966) noted: "...[Surveillance films] would represent material prepared for cross-examination or impeachment, and this Court has held in analogous situations that interrogatories need not be answered when the only purpose of the interrogatory is to prevent effective cross-examination. (Citations omitted)"

In Martin v. Long Island Rail Road Company, 63 F.R.D. 53, at 55 (USDC, E.D. New York, 1974), although disclosure was ordered, defendants were not required to disclose the surveillance films until after the plaintiff's deposition was taken: "The plaintiff has already been committed to his position by deposition and interrogatory, blunting the argument that surprise may discourage successful perjury. Were this not the case, the court would condition its order granting an inspection on the plaintiff's first giving his deposition and answering interrogatories."

Finally, in Blyther v. Northern Lines, Inc., 61 F.R.D. 610, at 611-612 (USDC, E.D. Penn., 1973), it is stated:

> The underlying philosophy of predisclosure deposition is not that the "plaintiff" be deposed but that the deposition is to be taken of any person who will, when their testimony is reduced to written form under oath, furnish the reasonable degree of protection to the certainty of the matters that the film depicts so that there will be no temptation, intentionally, or otherwise, to alter testimony following the viewing of the film in order to meet evidentiary disadvantages that may be suggested by what the film shows.

The record clearly shows that defendants failed to supplement their interrogatory answer as soon as it was possible to do so, but rather intentionally withheld supplementing the response until after claimant's deposition as a tactical maneuver

designed to bring to light any possible inconsistent statement by claimant. The record also shows that claimant was not prejudiced by the delay in supplementing the response in terms of lack of time to prepare or foreclosure from cross-examining the participants in the surveillance, as more than sufficient time elapsed between the interrogatory supplementation and the hearing for claimant to depose the participants and examine the evidence, which claimant did do. Rather, any possible prejudice would lie in an alleged right to have the interrogatory supplemented prior to claimant's deposition.

Iowa R.Civ.P. 122"d"(2)(B) does not set forth a time frame for such a supplementation. Rather, it speaks in terms of "seasonably" supplementing the response. There is no Iowa authority for the meaning of "seasonably" in this context. However, other jurisdictions have addressed the issue. Supplemental answers to interrogatories were held not to be seasonable when the answers were made so close to the time of the trial that the party seeking discovery was prevented from preparing adequately for trial, even with the exercise of due diligence. Willoughby v. Kenneth W. Wilkins, M.D., P.A., 65 N.C. App. 626, 310 S.E.2d 90, 100. It has also been held that a party who supplements an interrogatory within a reasonable time does so seasonably. State ex rel. Missouri Highway and Transp. Com'n v. Pully, 737 S.W.2d 241, 244 (Mo. App.). "Seasonably" under Iowa R.Civ.P. 122"d"(2)(B) would therefore appear to mean that an interrogatory supplement must be made in sufficient time to prevent prejudice to the opposing party at the time of trial. The purpose of discovery is timely exchange of information in preparation for trial. As noted above, the supplemental response in this case was made well in advance (more than a year) of the hearing on claimant's petition.

Rule 122 prohibits a knowing concealment of information that should be provided to the opposing party. Here, it seems clear that there was no intention to ultimately conceal the existence of surveillance evidence from claimant, but rather the intention was to delay the revelation of that evidence's existence until after claimant's deposition so that the evidence might have its maximum effect for purposes of impeachment.

Iowa precedent on this question is lacking. However, the federal cases cited by defendants, interpreting the federal rules of civil procedure relating to surveillance and interrogatories, do provide valid guidelines for interpreting defendants' obligation to supplement their interrogatory response under Iowa R.Civ.P. 122"d"(2)(B).

In that the supplementation of the interrogatory response was not withheld from claimant, but rather postponed until after claimant's deposition, and since the surveillance evidence was

garnered for impeachment purposes, defendants did not improperly fail to supplement their interrogatory response. Postponing the supplementation to protect the impeachment value of the evidence until after claimant's deposition, where sufficient time remained before hearing for claimant to avoid prejudice by examining the evidence and cross-examining the surveillance witnesses, was not improper discovery. To hold otherwise would be to hold that claimant is entitled to protection from evidence that might tend to impeach her credibility. Impeachment evidence is a valid and recognized tool of advocacy, and claimant is not entitled to any such protection. Claimant's deposition should have been admitted into the record.

Although a remand to a deputy industrial commissioner to consider the deposition would be appropriate, the nature of the excluded evidence is such that it can be considered on de novo review. In light of the age of this case, the delay that would be caused by a remand is not in the interests of administrative economy. Claimant's deposition will be considered part of the record on appeal.

Defendants' second issue on appeal concerns whether claimant has carried her burden on review-reopening to establish a change of condition. Claimant's degenerative disc disease and her degenerative joint disease were present and clearly contemplated at the time of the original award. Upon review-reopening, claimant has the burden to show that she has suffered a change in her condition since the original award was made. Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). 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). Claimant, on review-reopening, must show more than a change of circumstances. Claimant must show that the change of circumstances was not contemplated by the original award. Huffman v. Keokuk General Hospital, Appeal Decision, Aug. 25, 1988.

The testimony of Albert R. Coates, M.D., revealed that claimant's degenerative joint disease in her knee was contemplated at the time of her initial award, and that it was contemplated at that time that because the disease is degenerative, it would continue to deteriorate. Thus, even if claimant has experienced a deterioration of her knee condition, that fact alone would not necessarily compel a finding of a change of condition. Where further worsening of a condition is expected at the time of the award, later deterioration of the condition does not constitute an uncontemplated change of condition unless the worsening occurs at a faster rate than originally anticipated, or to a greater degree than contemplated at the time of the prior award.

However, Dr. Coates also testified that claimant's increased obesity, and resulting immobility, since the prior award contributes to her present impairment. There is medical evidence in the record that obesity also tends to put more pressure on the joints, thus aggravating the degenerative joint disease. Therefore, claimant's knee impairment contributes to her obesity, which in turn contributes to her knee impairment. Claimant was described as having experienced a "marked" increase in obesity since the prior medical examinations. Claimant's obesity, which contributes to her degenerative joint disease beyond the normally expected rate of degeneration, may be a change of condition not contemplated by the original award if it has resulted in additional physical impairment.

Although both Dr. Coates and Dr. Boulden remark on claimant's obesity, there is no medical evidence to indicate that claimant's obesity has resulted in increased disability. Claimant's obesity was noted at the time of the 1985 award of benefits, and her failure to lose weight after being advised to do so appears in the findings of fact for that decision. Although Dr. Coates states that claimant has gained weight since his last examination, and that claimant's immobility contributes to her weight gain, there is no showing that claimant's weight gain has resulted in increased disability.

Dr. Coates said at the time of the original award that claimant's condition would not get better and predicted that claimant would have difficulty kneeling, bending, stooping, or lifting. In the present action, Dr. Coates stated that claimant had not experienced any worsening of her degenerative disk disease or degenerative joint disease in her knee or back, even though claimant now had subjective complaints of pain in her legs. A CT scan showed no spinal stenosis. Although Dr. Coates noted that claimant suffered from Briquet's syndrome, a psycholgical condition that prompts a person to seek medical treatment, testing by two psychologists and a psychiatrist did not reveal any psychiatric disability.

Dr. Coates, at the time of the prior hearing, gave claimant the following prognosis:

> Q. Now, what is her prognosis, if any, as it relates to the back?
>
> ....
>
> A. That's difficult to assess. She has enough degenerative disease that she isn't going to get better or at least significantly better, but frankly, may not get significantly worse as far as the back is concerned, because as you lose motion and she's already

lost some motion, then it tends to stabilize, doesn't get worse, doesn't get better, just is there which is the history of degenerative joint disease of the back.

Q. Are there any types of activities that you would feel that she is not able to perform at this time based upon your knowledge of her history and her medical condition?

A. Yes. I think any type of stooping or squatting, stair climbing, walking hills would be contraindicated because of the severity of her symptoms. The stooping primarily in regards to the back, but kneeling or squatting in regards to the knee or climbing ladders or hills. The knee simply isn't stable enough to withstand that type of stress.

(Dr. Coates Deposition, pages 21-22)

On September 15, 1986, Dr. Coates stated that claimant's knee was unchanged, and that although there was some bulging of disc material from L-3 through S-1, there was no significant herniation and no evidence of significant spinal stenosis. Dr. Coates also described the CT scan as "quite accurate" for diagnosing spinal stenosis. Dr. Coates predicted that claimant's obesity would compound her symptoms. Dr. Coates also adopted a statement summarizing a phone conversation with claimant's attorney in which Dr. Coates states that claimant's objective findings in relation to the stability of her knee and her back had not improved since his last examination of claimant in February of 1984; claimant's subjective symptoms of pain had worsened; and claimant's degenerative joint disease in her left knee and back has continued to worsen as a result of her original injury, resulting in a worsening of symptoms.

William Bolden, M.D., orthopedic surgeon, noted further degenerative change at all five levels of claimant's lower spine since 1985. Dr. Boulden opined that claimant might have spinal stenosis, although he did not conduct a CT scan to verify this.

Dr. Boulden opined:

Q. All right. Was there a baseline that you were using to compare with any x-rays that you had in your possession prior to the examination of April 26th, 1988?

A. Yes. We compared those with the 1984 films, when I first saw her.

> Q. And the difference was that there were several levels of the lumbar spine involved that were not involved previously?
>
> A. That's correct, with increasing disk space narrowing; in other words, the space between the vertebrae had narrowed, and also an increased amount of bony spurs. So there were basically three things that were new compared to her 1984 films: More disks were involved, what disks were involved in 1984 were even narrower now, as well as increased bony spur reaction.

(Dr. Boulden Depo., p. 8)

Thus, the evidence indicating a change of condition, other than claimant's own subjective testimony, consists of Dr. Boulden's notation of additional disc degeneration and possible spinal stenosis. However, claimant's CT scan shows she does not suffer from spinal stenosis, and Dr. Coates, who examined claimant later in time than Dr. Boulden, opined that claimant did not suffer from spinal stenosis, based on the CT scan. Dr. Coate's testimony shows no objective evidence to indicate a physical change of condition, but only claimant's subjective complaints of increased pain.

Dr. Coates does not find any physical change of condition other than claimant's subjective complaints of increased pain. Dr. Boulden noted degenerative changes, but did not state whether those changes were greater than would have been expected in a degenerative condition. In addition, Dr. Boulden's diagnosis of possible spinal stenosis has been refuted by the CT scan and findings of Dr. Coates.

At the time of the 1985 award of benefits, claimant's condition consisted of a degenerative back condition and a degenerative knee condition. The nature of a degenerative condition is such that further deterioration is expected, and thus contemplated by the award of benefits. The medical reports of Dr. Coates and Dr. Boulden note further degeneration of the knee and back conditions, but fail to state that the degeneration observed is greater than that which was contemplated at the time of the earlier hearing. Dr. Coates, in his September 15, 1986 letter, refers to the fact that progressive degenerative joint disease was "considered initially and will continue to be the case."

Claimant's description of her symptoms as worse now than before the 1985 award were ambiguous. Claimant relies on these allegedly more severe symptoms to establish that a change of condition has occurred, yet claimant is less than certain as to their frequency or severity:

Q. Okay. This daily occurrence of the sharp pain and this stiffness and soreness that you get in your knee and the slippage did not occur on a daily basis back in October of 1985 when you were awarded benefits?

A. It occurs more often now.

Q. And as I understand your testimony, it occurs on a daily basis?

A. Yes.

Q. And it did not occur on a daily basis back then, in October of 1985?

A. To the best of my knowledge, it never occurred every day.

Q. How often would it occur, let's say, back in October of 1985, before?

A. To the best of my knowledge, a couple of times a week. I can't remember for sure.

Q. Is there anything else about your knee that you think has physically changed or deteriorated since you received your award in October of 1985? We talked about the slippage, the sharp pain, and the stiffness and soreness which occurs on a daily basis. Is there anything else?

A. Not that I can recall at this time.

Q. Fine.

How about your back? Tell me how your back has deteriorated since October of 1985.

A. Okay. It, too, becomes stiff and sore; and I have pain, more pain than I did before.

Q. Okay. So that I understand you, I assume that prior to your award in October of 1985 you had some stiffness and soreness and pain in your back, but the stiffness and soreness and pain is more frequent and worse now than it was in back in October of 1985?

A. Yes.

Q. How often is your back sore and how often is it stiff?

A. Every day.

Q. Are you telling me then that prior to October of 1985 when you received your benefits your back was not stiff and sore every day?

A. The best that I could recall, it was not stiff and sore every day.

....

Q. Can you tell me what you can't do or what you can't do as well now that you could before your award in 1985, in October of 1985?

A. Whatever I do at this time, I cannot do it as long; and in doing it I have more pain and stiffness and soreness.

Q. All right. Let me characterize some physical maneuvers, and you characterize it for me as the contrast between now and back in October of 1985.

Let's say walk; how far could you walk back then in October of 1985 and how far can you walk now?

A. I do not recall how far I could walk back then.

(Barbara Hoover Depo., pp. 11-13, 31)

Claimant bears the burden of proof in review-reopening to show that a change of condition not contemplated by the earlier award has occurred. Claimant has failed to carry that burden.

Even if a change of condition has been shown, claimant must also show that the change of condition has resulted in further disability in order to be awarded further benefits. A change of physical condition without a change of industrial disability is not sufficient to justify an increase in benefits. Doyle v. Land O' Lakes, Inc. (Appeal Decision, November 30, 1987).

At the time of the prior award, claimant had a lifting restriction of 15-20 pounds, a rating of 50 percent permanent partial impairment of her left leg, and an industrial disability of 55 percent. Claimant was also restricted from stooping, running, squatting, and climbing.

Claimant now states that both her back and knee have worsened, and that now she can only sit for one hour at a time, can stand for only ten minutes at a time, and that she must rest after one to two hours exertion. She states she can only lift

items weighing no more than ten pounds, cannot bend over without experiencing pain, and that she must frequently use a cane. Claimant states that her pain has radiated.

Thelma Allan testified that claimant uses a cane for walking up steps and inclines, and has to be helped up after kneeling.

Claimant testified as follows at the hearing in this case:

Q. Now, as far as standing is concerned, do you have any estimate as to how long you can stand and/or walk comfortably?

MR. LAVORATO: Can we break that down to standing and walking?

MR. JAYNE: Sure.

How long can you stand comfortably, if you can estimate the time?

A. Well, as of recently to stand comfortably until I like to change position is probably 10 minutes at the most.

Q. As far as walking is concerned, how long, in your estimate, can you walk comfortably, that is, as far as time is concerned?

A. Well, if it is on level ground, I might be able to walk -- you mean time like minutes?

Q. Yes, or distance, whichever is easiest for you.

A. It would be real uncomfortable in walking on smooth ground, or a smooth walk or something, it might be maybe 10 to 15 minutes. But on rougher ground, it could be less than that depending on the pressure.

Q. After you walked this 10 minutes, 15 minutes, do you need to do anything?

A. I need to change my position, that is, by either sitting down or sometimes rest against something or getting pressure off of one -- off the knee or something to this effect, changing to help alleviate some of the pain.

Q. How does your tolerance for being able to stand and walk now compare with three years ago, you know, at or about the time of the hearing?

A. Well, at this time it has gotten worse. The last time -- it is less time that I have that I would consider comfortable.

....

Q. During the normal course of a day, can you estimate how frequently you think you would lift, from any position, more than 10 pounds?

A. Boy, I don't know. Not very often. You know, 10 pounds is not too much. I don't think -- I can't think of lifting that too often at all. I mean I would have to go someplace or something.

Q. If you were standing up and like had to pick a paper clip off the floor, are you able to do that?

A. Yes.

Q. How would you do it?

A. Well, I grab ahold of something. If I don't have to get down -- if I am not around people, I can swing my leg out and bend over, hanging onto something picking it up. Or sometimes I may have to get clear down, but I need help to get down or up.

....

Q. When you get to the dump, what do you do as far as unloading, if anything, is concerned?

A. I really don't do anything hardly. I just stand there and get out of the road or move the truck once in a while when they unload and it gets too filled up. I move the truck up, so --

....

BY MR. LAVORATO:

Q. Mrs. Hoover, as I understand it, you don't think you can lift more than 10 pounds comfortably, is that correct?

A. I don't believe I can lift 10 pounds comfortable over a period of time without hurting me.

Q. How much do you think you can lift at any one time?

A. Well, that would depend on the circumstances, sir. If it was an emergency, I might be able to lift more than that, but I would pay for it.

But normally I would not lift, say, more than 10. I would say the normal 10 to 12 pounds. If I am going to lift something more than that, I would pay for it.

....

Q. Thank you. With regards to lifting, let me ask you this. Do you recall May of 1987 your lifting a tire and its rim with one arm out of the trunk of a car?

A. With one arm?

Q. Yes.

A. No, sir, I don't.

Q. Could that have happened?

MR. JAYNE: It is the same objection, by the way. I believe this may be information from the surreptitious --

DEPUTY COMMISSIONER WALSHIRE: Same ruling.

A. It could have happened when I was younger. I would lift 50 pounds when I was able.

Q. I want to hand you the same exhibit. I want to direct you to photographs 21 and 23. Do those photographs depict somebody lifting a tire and rim out of the back of the car? I'm looking at 21 and 23.

A. Is that the only photographs you have, sir?

Q. Answer the question. Do the photographs depict somebody picking a tire and a rim out of the back of a car trunk?

A. It does depict someone.

Q. Is that someone you?

A. I can't tell, sir.

Q. Is that person picking that tire up with one hand?

A. It looks like it, sir.

(Transcript, pp. 64-66, 88-89, 93, 99-100, 105-106)

Claimant testified as follows in her deposition:

Q. Now, you say you can walk maybe ten minutes or less?

A. Depending on how long it takes me to get -- I can walk approximately a block and I'm feeling stiffness and soreness more. If I have my cane, I may be able to walk a little longer.

Q. What happens after a block?

A. Well, if I can, I sit down or I rest or I stop.

Q. You say you can walk maybe a block, maybe longer if you have your cane, but then, as I understand it, you may have to sit down or stop; is that correct?

A. Yes.

Q. All right. In relation to walking, how long can you keep on your feet? You said ten minutes, you gave a figure of ten minutes; is that about the extent of how long you can keep on your feet?

A. You mean stand?

Q. Yes.

A. Within ten minutes I'm feeling the pain or stiffness and soreness that I wish to change my position by sitting down, lying down or ---

Q. Okay. Can you kneel?

A. I need a lot of help to kneel.

Q. What do you mean?

A. I have to hang on to an object or some one to kneel, and it takes me a while to get down.

Q. Does somebody have to aid you or assist you in getting down?

A. Some object or some one.

Q. Is that true always?

A. Yes.

Q. If you're down there, how long do you think you can stay there on your knees?

A. I don't stay on my knees that long. I sit down if I have to go down.

Q. So you don't actually put any weight on your knees?

A. I go down, then I sit completely down if I have to do something. I sit down on the ground or on the floor.

Q. Okay. So if I understand it then, if you've got something you have to do closer to the ground, somebody has to assist you to the ground and you sit down instead of kneel down?

A. Some object or some one to assist me down and then I sit down.

Q. You don't actually put any weight on your knees?

A. My good knee to get down to the sitting position.

Q. But once you're down there, you don't put any weight on your knees?

A. No.

Q. Is that because they hurt too much or --

A. Yes.

Q. So I can characterize it by saying you don't do any kneeling?

A. In that respect, no.

Q. How about lifting?

A. Very little.

Q. Can you clarify that for me? What do you mean by "very little"?

A. A little handbag or I'd say less than ten pounds.

Q. In other words, you can't lift more than ten pounds comfortably?

A. Correct.

Q. And can you at least squat down and pick something up less than ten pounds or is that just from the waist, bent? I'm talking about bending.

A. If I have to pick something off the floor, again, I have an object to assist me; and that way I have something to hang on to, and lean over and pick it up. And if it's -- It would have to be less than ten pounds or it will stay there as far as I'm concerned.

Q. So as I understand it, if you're going to pick something up from the ground, you assist yourself by bending, by leaning against something, and then leaning against it you pick the object up; if you can't lean against something or assist yourself in bending over you don't pick it up, is that right?

A. That's right.

....

Q. I note in looking at the prior records with regard to your job description as an inspector, you as part of your job had to climb hills and things of that nature; is that correct?

A. Yes.

Q. Or inclines, whatever you want to call them. Can you climb hills or inclines now without assistance?

A. An incline with much difficulty.

Q. What do you mean, "with much difficulty"?

A. Well, I'd have to use my good leg and any assistance that I could to climb up an incline.

Q. How about a hill?

A. Depending on the hill.

Q. So as I understand it, if you had to go up an incline you would need assistance?

A. Yes.

....

Q. Okay. How long do you think you could stand or walk in combination for any given period of time?

A. Ten minutes. Approximately ten minutes.

Q. And what would happen after ten minutes?

A. I'd have to sit down or lie down or something to that effect.

....

A. I planted tomato plants. I sit on the ground. I had assistance, and I scooted my hiney across the ground.

Q. To plant those?

A. Yes. And I dug the hole and put the plant in and watered them and so forth and then I had assistance to get up.

Q. Is that because you couldn't bend or squat?

A. Yes.

....

Q. All right. Let me ask you this: Are you saying that you have this discomfort and pain on such a continuous basis that no matter what you did you just couldn't fulfill any type of light duty?

A. Anything that I would have to be required to do over a long period of time, whether it was sitting, standing, walking, over a long period of time I would get a lot of discomfort and pain.

Q. What's a long period of time to you?

A. After ten minutes of walking or standing or the combination I get discomfort and pain. Sitting, I get discomfort and pain. So these jobs -- I've done this before and I know it requires a lot of walking and stairs, climbing stairs, up and down stairs, and so forth, and standing. Standing.

Q. I guess what I'm saying is: If you had an opportunity to change position any time you wanted to from standing to sitting and walking, you couldn't do that? That would not help you?

A. Over a long period of time.

Q. And that's ten minutes to you?

A. Well, on the average of ten minutes, yes.

....

Q. How do you get rid of your garbage?

....

A. Well, it's loaded into a pickup that Thelma has, and they take it the dump.

....

Q. Do you ever help load it?

A. I might throw a small garage [sic] bag on, but it's usually loaded by the time they're -- I don't have much to do with it.

Q. Do they then go to the dump?

A. They have to go to the dump to get rid of it.

Q. Do you ever go with them?

A. Once in a while I might ride along.

Q. Do you ever do any unloading?

A. No.

(Cl. Depo., pp. 32-35, 36, 38, 50, 59-60, 72-73)

Surveillance videotapes offered by defendants, showed claimant engaged in outdoor activities at her residence over a period of several days. Claimant did not use a cane. Claimant was observed to lift light objects, walk up small inclines without assistance or apparent difficulty, kneel down on her knees and arise without assistance, bend over to work inside her car, etc. Claimant appeared to avoid lifting, but was not observed to require resting or sitting down. However, claimant was out of sight during those periods of time she was indoors.

Claimant was seen lifting a car tire with rim out of a car trunk and placing it on the ground; bending over until her back was parallel to the ground; using a stick as a lever to hold a doghouse off the ground in order to flush a rat out from under the doghouse; unloading boards and other items from a pickup bed into a dumping area; and bending over repeatedly to remove items from a car interior for loading onto a small wagon.

The tapes of claimant's activities controvert her assertions that she must use a cane, and that she has difficulty walking up inclines and kneeling. The tapes also contradict claimant's assertion that she cannot walk more than 150 feet at a time, that she cannot lift more than 10 pounds, and that she cannot bend over. The opinion of vocational rehabilitation worker Carma Mitchell that claimant was unemployable was based in part on these assertions by claimant.

The surveillance tapes were not viewed by the physicians offering opinions in this case, and thus it is unknown if any of these medical opinions would be altered after viewing the tapes. However, the surveillance tapes still have probative value in that claimant's actions can be observed and compared to claimant's statements of what she can and cannot physically do, and are also relevant to claimant's credibility.

Licensed physical therapist, Thomas Bower, performed a functional capabilities evaluation of claimant in 1987. Those tests showed that claimant was capable of lifting 25 pounds from knee to chest; lifting 37 pounds over her head; and maximum carrying of 22 pounds, maximum pushing of 48 pounds, and maximum pulling of 44 pounds. These findings contradict claimant's assertion that she cannot lift more than 10 pounds.

It is concluded that claimant has not carried her burden to show that she has suffered a change of condition not contemplated in the prior proceeding. Even if claimant's deposition is not brought into the record, claimant has merely shown that she has subjective symptoms of increased pain. The opinion of Carma Mitchell was based on claimant's description of her physical inabilities. As discussed above, claimant's statements to Ms. Mitchell have been refuted by the surveillance tapes and photos. Ms. Mitchell acknowledged that if claimant could perform some of the tasks claimant is plainly observed performing in the tapes, that her opinion on claimant's unemployability would be altered. The medical evidence does not establish any new restrictions on claimant's activities. The tests of the licensed physical therapist indicate physical impairment roughly in keeping with claimant's prior award. Even without the benefit of claimant's deposition testimony, claimant has failed to show further disability not contemplated by the original award. Claimant's deposition is, however, a proper part of the record.

Thus, claimant's subjective complaints of increased pain are unsubstantiated by objective medical evidence. Claimant's restrictions and ratings of impairment are unchanged. Although degenerative changes have occurred, these changes were clearly contemplated at the time of the original award. Claimant has failed to show a change of condition.

Defendants also asserted a motion for recusal to the deputy at the time of the hearing, based on the hearing deputy's position as a president of the union local representing state employees in grievance matters and contract negotiations adverse to the state of Iowa as employer. The state of Iowa is the employer/defendant in this case. In essence, the motion was a motion for disqualification pursuant to 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) refers to a timely affidavit alleging grounds for disqualification. No such affidavit was filed by the state in this case. In addition, a motion for recusal filed on the day 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. The deputy's union position and activities were known to the defendants well in advance of the date of the hearing. In that the motion for recusal was not properly raised in this instance, it will not be addressed on appeal. See Miller v. Woodward State Hospital School, Appeal Decision, May 31, 1990.

FINDINGS OF FACT

Claimant's permanent physical impairment of her left leg and back has not increased beyond the extent contemplated at the time of the prior award of benefits.

Claimant's credibility was successfully impeached by the surveillance evidence.

Claimant's degenerative back condition and degenerative left knee condition have not degenerated since the prior award of benefits to a greater degree or at a faster rate than contemplated at the time of the original award of benefits.

Claimant has not received increased or further medical restrictions since the prior award of benefits.

Claimant has not suffered a change of condition since the prior award of benefits.

CONCLUSIONS OF LAW

Claimant's deposition is admissible.

Claimant has failed to carry her burden of proof to show that she has suffered a change of condition since the prior award of benefits.

Claimant's degenerative joint disease was contemplated by the original award of benefits.

Claimant is not a credible witness.

Claimant's industrial disability has not increased since the prior award of benefits.

Recusal of the hearing deputy was not required.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

Claimant shall take nothing from these proceedings.

Defendants are to pay the costs of this action, including the costs of transcribing the hearing.

Signed and filed this 30th day of April, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Steven C. Jayne
Attorney at Law
5835 Grand Avenue
Suite 201
Des Moines Iowa, 50312

Mr. Charles S. Lavorato
Assistant Attorney General
Tort Claims Division
Hoover State Office Building
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM HOWARD,	
Claimant,	
vs.	File No. 779866
WHITEHALL TRANSPORTATION,	A P P E A L
Employer,	D E C I S I O N
and	
HOME INDEMNITY COMPANY,	
Insurance Carrier, Defendants.	

FILED
MAY 14 1991
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant temporary total disability benefits.

The record on appeal consists of the transcript of the arbitration hearing and defendants' exhibits A-1 through A-6 and also A-8. Claimant was pro se at the arbitration hearing. Defendants filed a brief on appeal.

ISSUES

The issues on appeal are:

1. Whether the deputy erred in finding that claimant was an employee of defendant Whitehall Transportation (hereinafter Whitehall).

2. Whether the deputy erred in finding that claimant was not an independent contractor.

3. Whether the deputy erred in finding that claimant proved by a preponderance of the evidence that he received an injury on November 28, 1983 which arose out of and in the course of his employment.

4. Whether the deputy erred in finding that claimant proved by a preponderance of the evidence that the injury of November

28, 1983 was causally related to the disability on which he based his claim.

5. Whether the deputy erred in finding that claimant was entitled to temporary total disability benefits from November 28, 1983 through April 6, 1986.

REVIEW OF THE EVIDENCE

The arbitration decision filed July 26, 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 deputy's analysis of the evidence in conjunction with the law in the arbitration is adopted on the issues of whether claimant proved that he sustained an injury arising out of and in the course of his employment on November 28, 1983 and whether there was a causal connection between claimant's injury and his alleged disability. Additional analysis is necessary on the remaining issues.

The first issue to address is the employment status between claimant and Whitehall. The greater weight of the evidence indicates an employee-employer relationship. The deputy's analysis on this issue is adopted. "The right to control work, rather than the actual exercise of the right to control, is decisive." Borg v. King of Clubs, Inc., Appeal Decision (August 23, 1990). Pursuant to the agreement claimant and Whitehall entered into, Whitehall had exclusive possession, control and use of claimant's equipment. In addition, claimant was given a one percent bonus if he made an on-time delivery. Claimant was free to choose which routes he took to his destination but Whitehall ultimately controlled how claimant operated the tractor by the incentive program for on-time delivery. For these reasons, and those in the deputy's proposed decision, it is determined that claimant proved an employer-employee relationship.

Defendants assert that claimant is an independent contractor. Defendants have the burden of proving that claimant is an independent contractor. There is a written agreement between the parties dated September 27, 1983. A written contract, however, will be disregarded if it is designed to relieve an employer of liability pursuant to Iowa Code section 85.18. The written agreement between the parties is long term in

nature. The agreement specified that it would be effective for one year and continue to be renewed automatically unless either party notified the other within thirty days.

Whitehall engaged in the interstate trucking business and under the agreement claimant was responsible for hauling loads for Whitehall. Claimant was engaged in the employment for the purpose of furthering Whitehall's business. The delivery of goods by drivers is an integral part of Whitehall's business. The claimant furnished a tractor and also drove the equipment. Whitehall assumed all responsibility to the public, shipper, and all State and Federal regulatory bodies for the operation of the equipment during the lease period.

Whitehall paid claimant pursuant to the agreement in defendants' exhibit A-8. Claimant was not paid by the hour. No taxes were withheld from claimant's payments. Claimant filed tax returns as if he were self-employed. Whitehall was authorized to deduct from claimant's payment for cash advances, advances for maintenance and repairs, fines, and other expenses which claimant would be obligated to pay. In addition, money was taken out of claimant's payments to establish an escrow account. Whitehall maintained the escrow account and paid interest on a quarterly basis. The escrow account was used to pay cash advances, advances made for maintenance, fines, mileage, fuel or road taxes, cost of permits and other expenses from operations.

Claimant's equipment was subject to inspection and approval by Whitehall. Claimant agreed to maintain the equipment supplied. Claimant was free to hire his own employees and would be liable for their pay. Defendants' witness testified that claimant was responsible to pay for the operation of the truck.

Claimant testified that he was an independent contractor employed by Whitehall. During his testimony, claimant designated when he was employed as an employee and when he was an independent contractor.

Claimant determined the details of how he would perform his job, and determine what route he would take. Claimant was free to take a load or refuse a load. In addition, claimant was free to contract with other carriers. Claimant was employed in Whitehall, Wisconsin and lived in Lamont, Iowa. Lamont is approximately one hundred and fifty miles from Whitehall, Wisconsin. Pursuant to the agreement, claimant was encouraged to identify the equipment as his own. The contract specified that if either party violated the agreement either party had the right to terminate the contract.

There are facts which indicate that claimant was an independent contractor. Claimant was free to chose the route he

took, own his own tractor, and hire his own employees. Claimant filed taxes as an independent contractor, and even called himself an independent contractor at the hearing. There are, however, facts which indicate that Whitehall controlled the method which claimant operated. Whitehall retained a portion of claimant's payment to place in an escrow account. Whitehall paid claimant a bonus for on-time delivery of goods, which indicates that they had some control over the time of delivery. In addition, Whitehall had exclusive control over claimant's tractor and assumed responsibility to the public for operation of the equipment. In light of the persuasive evidence on both sides, it is determined that Whitehall failed to prove by the greater weight of the evidence that claimant was an independent contractor.

The final issue is whether the deputy erred in finding that claimant was entitled to temporary total disability benefits from November 28, 1983 through April 6, 1986. Claimant allegedly sustained an work-related injury on November 28, 1983 when he slipped and fell while attempting to get into his truck. On November 29, 1983 claimant sought treatment from William Drier, M.D. Claimant complained of chest pain radiating to his arm and leg, numbness in his arm, and drooping of the left side of his face following the injury. Dr. Drier recommended that claimant remain off work for a week and if symptoms persist, claimant should seek a neurological evaluation. Defendants' Exhibit A-1, page 7.

Next, claimant was treated by Harold C. Hallberg, M.D., beginning on December 9, 1983. In a Surgeon's Report dated January 11, 1984, Dr. Hallberg indicated that claimant would need further treatment. Dr. Hallberg indicated that he did not know when claimant would be able to resume work. Claimant was being treated for "sprain/strain of back, left shoulder and right hip" injury. Dr. Hallberg opined that claimant's injury would not result in a permanent defect. Defendants' Ex. A-2, p. 1.

Claimant was seen by David F. Poe, M.D., on January 11, 1984. Claimant reported some headaches related to the cervical spine. Dr. Poe noted that claimant was making progress in physical therapy and opined that claimant may be able to return to light duty and then full duty. Dr. Poe thought claimant would be off work for at least another month before even returning to light duty. Defendants' Ex. A-3 p. 1.

Claimant then underwent further treatment with the University of Iowa Hospitals and Clinics. Claimant received physical therapy and a cervical collar. On March 22, 1984 claimant was seen in the Neurology Clinic. A Thomas collar was provided in the hope that claimant would attain sufficient help. In a letter dated August 1, 1984, Richard W. Fincham, M.D.,

stated that he assumed that claimant continued to work with physical therapy. Defendants' Ex. A-4, p. 12. Claimant testified that he improved in some areas with the exercises. Transcript, p. 57.

In a letter dated September 14, 1984, Dr. Fincham opined that claimant's head and left upper limb dysfunction were related to the fall. Dr. Fincham did not recommend treatment besides the continued use of a Thomas collar.

Claimant was seen on January 23, 1985 by Dr. Fincham. Dr. Fincham opined that claimant's initial concern about left cervical radiculopathy was no longer present. Defendants' Ex. A-4, pp. 19-20. Dr. Fincham opined that claimant's major concerns centered around his post-traumatic head pain.

On February 6, 1985, claimant was seen in the Otolaryngology Clinic. At this time, claimant reported to the physician that he hit his head on the sidewalk when he fell from his truck. This is the first indication in the medical records that claimant may have suffered a head trauma during the fall. Claimant did not receive treatment for his headaches during this visit.

In a letter dated April 19, 1985, Dr. Fincham diagnosed post-traumatic headaches and hoped that claimant would "improve with time, even to the point of being able to return to work." Defendants' Ex. A-4, p. 29.

Claimant bears the burden of proof as to entitlement to temporary total disability benefits.

"Temporary total disability does not necessarily contemplate that all residuals from an injury must be completely healed and returned to normal. It is only when the evidence shows that because of the effects of the injury gainful employment cannot be pursued." McDonald v. Wilson Foods Corp., 34 Biennial Rep., Iowa Indus. Comm'r 197, 199 (Appeal Decision 1979).

> In such circumstances, the end of the temporary total disability period cannot be determined by either a return to work or at a time when claimant should be medically able to return to work because claimant may never be able to return to the lid sorting job. Therefore, the most appropriate end to the temporary total disability period should coincide with the termination of active treatment of the work injury.

Montez v. Heinz USA, II-2 Iowa Indus Comm'r Dec. 661, 664 (1985).

"'Active treatment' is a vigorous form of medical or surgical treatment aiming at an immediate cure." Schmidt's Attorney Dictionary of Medicine.

It is determined that claimant proved entitlement to temporary total disability benefits from November 23, 1983 through September 14, 1984. While none of the physicians released claimant to return to work, none of the physicians recommended that claimant should continue in an active treatment program. In a letter dated September 14, 1984, Dr. Fincham did not recommend treatment besides the continued use of a Thomas collar. There is no evidence that claimant continued physical therapy after this date. Continued visits to physicians without recommendations for active medical treatment will not extend temporary total disability benefits.

FINDINGS OF FACT

1. Claimant entered into a written agreement with Whitehall where by claimant would transport goods for Whitehall using his tractor. The duration of the written agreement was one year, and it was automatically renewable.

2. Whitehall engaged in the interstate transportation of goods.

3. Whitehall paid claimant pursuant to the written agreement.

4. Claimant received a one percent bonus for on-time delivery. Whitehall retained a portion of claimant's payment and placed the money in an escrow account to be used to pay advances.

5. Claimant was responsible for the maintenance and repair of his tractor, although Whitehall retained exclusive control over the tractor.

6. Whitehall maintained the authority to inspect and approve claimant's tractor.

7. Claimant was free to chose the route to drive. Claimant was free to accept or reject a load. Claimant was free to hire employees and would be liable for their payment.

8. Whitehall maintained the right to control the method by which claimant operated his tractor.

9. Claimant was an employee of Whitehall on November 28, 1983.

10. Claimant was not an independent contractor.

11. Claimant fell from his truck and sustained a work-related injury to his neck, arm, hip and back on November 28, 1983.

12. Claimant experienced post-traumatic headaches which were caused by the November 28, 1983 work-related injury.

13. Claimant failed to prove that he sustained a permanent disability as a result of claimant's work-related injury.

14. None of claimant's physician's released claimant to return to work.

15. Temporary total disability benefits ended on September 14, 1984 when active medical treatment was no longer recommended.

16. Claimant returned to work on April 6, 1986 with a different employer.

CONCLUSIONS OF LAW

Claimant sustained the burden of proof that he was an employee of the Whitehall.

Defendants failed to prove by the greater weight of the evidence that claimant was an independent contractor.

The greater weight of the evidence proves that claimant sustained an injury on November 28, 1983 which arose out of and in the course of his employment with Whitehall.

The greater weight of the evidence proves that the injury was the cause of temporary total disability.

The greater weight of the evidence proves that temporary total disability ended on September 14, 1984 when active medical treatment was no longer recommended.

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

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant temporary total disability benefits from November 29, 1983 through September 14, 1984 at the stipulated rate of two hundred ninety-four and 00/00 dollars ($294.00) per week.

That defendants are entitled to a credit for thirty-seven point five seven one (37.571) weeks of workers' compensation benefits paid prior to hearing at a rate of two hundred ninety-four and 00/00 dollars ($294.00) per week.

That the remaining benefits be paid in lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That the cost of this action including the cost of transcribing the hearing are charged to defendants pursuant to rule 343 IAC 4.33.

That defendants are to file claim activity reports as requested by this agency pursuant rule 343 IAC 3.1.

Signed and filed this 14th day of May, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

William Howard
P.O. Box 255
Lamont, Iowa 50650
CERTIFIED AND REGULAR MAIL

Ms. Dorothy L. Kelley
Attorney at Law
500 Liberty Bldg.
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VASILIOS KARRAS/KARYDAKIS,	:	
Claimant,	:	
vs.	:	File Nos. 717004 753628 753629
ITT CONTINENTAL BAKING CO., INC.,	:	
Employer,	:	A P P E A L
and	:	D E C I S I O N
CIGNA INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

FILED
AUG 31 1990
INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant disability benefits for alleged work injuries on August 19, 1981, October 8, 1982 and March 15, 1983.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 96. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are:

I. Whether claimant suffered a work injury of March 15, 1983 which arose out of and in the course of claimant's employment with the defendants?

II. Whether the work injuries of August 19, 1981, October 8, 1982 and March 15, 1983 are the cause of permanent disability?

III. Whether claimant is entitled to benefits for permanent disability as a result of the alleged August 19, 1981, October 8, 1982, and March 15, 1983 work injuries?

REVIEW OF THE EVIDENCE

The arbitration decision dated December 30, 1988 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE 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. Claimant has had a number of work-related and non-work-related accidents and injuries beginning in 1969 when he underwent a hemilaminectomy as a result of a work injury.

2. As early as 1975, treating physicians found degenerative changes in claimant's cervical and lumber spine.

3. Since his 1969 injury claimant has never been pain free and has seen a myriad of doctors complaining of multiple symptoms from head to toe.

4. Claimant sustained an injury arising out of and in the course of his employment on August 19, 1981, when he twisted his back while pulling out a metal shelf.

5. Claimant sought medical treatment as a result of the injury.

6. Claimant suffers extensively from degenerative disc disease and physicians could not, with any degree of medical certainty, specify how claimant's injury of August 19, 1981 contributed to his present condition.

7. Claimant sustained a temporary aggravation of a preexisting condition as a result of the injury of August 19, 1981.

8. Claimant sustained an injury arising out of and in the course of his employment on October 8, 1982, when he fell.

9. Claimant sought medical treatment as a result of the injury.

10. Claimant suffers extensively from degenerative disc disease and physicians could not, with any degree of medical certainty, specify how claimant's injury of October 8, 1982 contributed to his present condition.

11. Claimant sustained a temporary aggravation of a preexisting condition as a result of the injury of October 8, 1982.

12. Claimant injured his knee in November 1980 and sought medical treatment therefor.

13. Claimant was diagnosed as having a tearing of the medial meniscus which was found to be degenerative in character.

14. Claimant alleged he injured his knee on March 15, 1983; the last day he worked for defendants.

15. The damages to claimant's knee could have occurred as a result of normal wear and tear on the joint, with or without a contributing injury.

16. Claimant's credibility is suspect.

17. Claimant has developed a fixation on his symptoms.

18. No casual connection exists between claimant's alleged March 15, 1983 work injury and his knee problems.

CONCLUSIONS OF LAW

Claimant failed to prove that he sustained any permanent partial disability as a result of the injury of August 19, 1981.

Claimant failed to prove that he sustained any permanent partial disability as a result of the injury of October 8, 1982.

Claimant proved that he sustained a temporary aggravation of a preexisting condition as a result of the injuries of August 19, 1981 and October 8, 1982 for which he has been compensated.

Claimant failed to prove that he sustained an injury which arose out of and in the course of his employment on March 15, 1983.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from this proceeding.

That claimant pays the costs of this appeal including the costs of the transcription of the arbitration hearing.

That defendants pay all other costs of this proceeding pursuant to Division of Industrial Services Rule 343-4.33.

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

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. David Gill
Attorney at Law
300 Badgerow Building
P.O. Box 328
Sioux City, Iowa 51102

Mr. James M. Cosgrove
Mr. M. James Daley
Attorneys at Law
1109 Badgerow Building
P.O. Box 1828
Sioux City, Iowa 51102

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN C. KIRKLAND,	:	
Claimant,	:	
vs.	:	File No. 768821
OMAR E. WHITLOW EXCAVATING,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
EMPLOYERS MUTUAL INSURANCE CO.	:	FILED
Insurance Carrier,	:	SEP 28 1990
and	:	
SECOND INJURY FUND OF IOWA,	:	INDUSTRIAL SERVICES
Defendants.	:	

STATEMENT OF THE CASE

Defendant, Second Injury Fund of Iowa, appeals from a second injury fund benefits decision filed on September 26, 1989. The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 12. Both parties filed briefs on appeal.

ISSUE

The Second Injury Fund did not set forth a statement of issues in its brief. The issues raised by the Fund are set forth below.

FINDINGS OF FACT

The second injury fund benefits decision adequately and accurately reflects the pertinent evidence and it will not be totally set forth herein.

ANALYSIS

Claimant was afflicted with infantile polio which resulted in a loss of use of his left arm. On June 7, 1984, claimant sustained an injury arising out of and in the course of his

employment that resulted in an injury to his right arm. Claimant received a rating of permanent partial impairment of 100 percent of the left arm and 25 percent of the right arm.

The Second Injury Fund of Iowa (hereinafter the Fund) raises several arguments on appeal concerning its liability when a claimant's second injury is a scheduled injury. The Iowa Supreme Court stated in Second Injury Fund v. Neelans, 436 N.W.2d 355, at 358 (Iowa 1989):

> If the second scheduled injury, standing alone, does not amount to a disability of the body as a whole, we believe a fair reading of Mich Coal and section 85.64 limits the liability of the employer to payment of the scheduled amount attributed to the last injury.

The Fund argues that although Neelans clarified the limitation on the liability of the employer, it does not necessarily specifically state that the Fund is responsible for the difference between the scheduled impairment, and the industrial disability caused by the second injury. The Fund argues it is not liable at all when the second injury is a scheduled injury, or, that if it is liable, that it is only liable for the excess of the total industrial disability over the industrial disability of either of the injuries, when those injuries are considered in isolation.

According to the Fund's reasoning, the second employer would be liable to claimant for the scheduled amount of the injury only, as indicated in Neelans. The Fund would then only be liable for the portion of claimant's industrial disability caused by the two injuries in conjunction, and above and beyond the industrial disability of the second injury. Under this reasoning, part of the claimant's disability--that portion of his industrial disability caused by his second injury in isolation--would go uncompensated.

The Fund's argument must be rejected. The Iowa Supreme Court has recently held:

> [T]he clear import of Neelans is that where both injuries are scheduled, that is, neither is itself an injury to the body as a whole, the Fund is liable for the entire amount of the industrial disability minus the two scheduled amounts. Only where one of the injuries is to the body as a whole must there be an apportionment. Second Injury Fund v. Braden, ___ N.W.2d ___ (Iowa 1990).

The Fund also argues on appeal that second injury cases should always be based on functional impairment, rather than industrial disability, and cites Iowa Code section 85.34(2)(s),

and Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983). The Simbro case states that injuries under section 85.34(2)(s) are to be evaluated under a functional impairment analysis.

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. (emphasis added)

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. (emphasis added)

Section 85.64 refers to two injuries occurring at separate times, while section 85.34(2)(s) refers to injuries in a single accident. In addition, the holding in Braden clearly contemplates the use of industrial disability in second injury cases.

The Fund next argues that claimant's infantile polio did not keep him from seeking or holding employment, and therefore it did not constitute a "handicap" to him. There is no requirement that claimant be totally disabled in order to qualify for second injury fund benefits. "Loss of use" in this section does not require total loss of use of the member or the body as a whole. Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188 (Iowa 1968). Claimant's polio clearly resulted in some degree of permanent impairment. The fact that claimant was able to obtain employment in spite of his polio does not compel a conclusion that his polio did not affect his earning capacity.

The Fund further argues that claimant does not have 95 percent industrial disability as a result of his injuries. The sole argument offered by the Fund in this regard goes to claimant's motivation. The Fund takes issue with the deputy's determination that claimant did not seek re-employment due to the extent of his injuries and impairment. Claimant's lifelong work history, however, does show good motivation to work. Claimant's loss of use of his arms severely narrows the number of occupations claimant is able to perform. The vocational expert

concluded that claimant was 100 percent disabled. The severity of a claimant's impairment is a relevant factor in assessing his failure to seek alternative work and his motivation.

In addition, claimant's motivation is, of course, only one factor in determining industrial disability. Claimant lacks a high school education. Claimant has lost much of the use of both of his arms. Claimant was 56 years old at the time of his injury.

It is concluded that claimant has established an overall industrial disability as a result of the combined effects of both the flail upper left extremity and the work injury of June 7, 1984 of 95 percent or 475 weeks of permanent partial disability benefits.

It is further concluded that the compensable value of the permanent injury to the left upper extremity is 250 weeks.

The extent of the liability of the Fund depends to a great extent on how much of the disability from the second injury is attributable to the second employer. If the second injury is in fact a scheduled injury as the deputy held, the Fund's liability will be determined under the approach in Braden, above. However, if the second injury extends to the body as a whole, the second employer is responsible for the industrial disability represented by that injury. In this case, the deputy concluded that claimant's injury was to his arm, and did not extend to the body as a whole. The deputy apparently based this on the prior agreement of settlement based on a scheduled injury to the right upper extremity, which was approved by the industrial commissioner. The deputy held that an approved settlement is equivalent to an award decision and the Fund was bound by the determination in the settlement that claimant's injury was to the arm and did not extend into the body as a whole.

However, the Fund was not a party to the settlement. Prior memorandums of agreement do not bind the Second Injury Fund if the Fund was not a party to them. Himschoot v. Montezuma Manufacturing, appeal decision, April 15, 1988. Similarly, the Fund cannot be bound by a prior settlement, fixing claimant's injury as a scheduled injury, when the Fund was not a party to the settlement and did not agree to it. The question of whether claimant's injury constitutes a scheduled injury or an injury to the body as a whole for purposes of determining the Fund's liability has not been adequately addressed. A remand to the deputy for a ruling on this question is in order.

ORDER

THEREFORE, it is ordered:

That this case is remanded to a deputy industrial commissioner for a determination of whether claimant's injury is a scheduled injury or an injury to the body as a whole for the purpose of determining extent of the Second Injury Fund's liability and to determine the Second Injury Fund's liability.

That the defendant, Second Injury Fund, shall pay the costs of this proceeding including the cost of transcription of the arbitration hearing.

Signed and filed this 26th day of September, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. J. W. Conway
Mr. Dennis D. Cohen
Attorneys at Law
210 Cedar Street
P.O. Box 237
Muscatine, Iowa 52761

Mr. Thomas N. Kamp
Attorney at Law
600 Davenport Bank Bldg.
Davenport, Iowa 52801

Mr. Robert D. Wilson
Assistant Attorney General
Tort Claims
Hoover State Office Building
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAT KOCH, Claimant, vs. LAND O'LAKES, Employer, and KEMPER INSURANCE GROUP, Insurance Carrier, Defendants.	File No. 933532 R U L I N G

FILED
APR 9 1991
IOWA INDUSTRIAL COMMISSION

Claimant has filed an appeal following the granting of a motion for summary judgment by defendants. Defendants have moved to dismiss the appeal, alleging that claimant has failed to file an appeal brief as required by rule 343 IAC 4.28.

No transcript has been filed in case number 933532, but defendants acknowledge in their motion to dismiss the appeal that a transcript of the summary judgment proceedings is not necessary. Claimant also filed a motion for waiver of transcript. In that the appeal in this case is based on a motion for summary judgment that was granted, and thus no hearing has taken place, claimant's motion for waiver of transcript in this case is granted.

Rule 343 IAC 4.28(1) states, in 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."

Claimant filed his notice of appeal in this case on December 11, 1990. The rule requires the filing of claimant's appeal brief within 50 days of the notice of appeal, as the appeal was from the granting of a summary judgment. No hearing transcript could be filed, in that no evidentiary hearing had taken place. Claimant was certainly aware of this, as evidenced by his February 20, 1991 motion for waiver of hearing transcript. Thus, claimant has failed to timely file an appeal brief.

The failure to timely file an appeal brief does not constitute grounds for dismissal. An untimely filed brief which is objected to, however, will not receive consideration. The motion to dismiss the appeal is overruled.

By letter dated January 9, 1990, claimant indicated a desire to dismiss the appeal in this case. In response, a letter from this agency invited a formal motion to dismiss, but no motion has been filed. Claimant is hereby ordered to file either a formal motion to dismiss the appeal, or a statement of intent to pursue the appeal, by April 30, 1991. A failure to file either response to this order will result in dismissal of claimant's appeal. Since claimant has failed to timely file a brief, and defendants have objected, even if a statement of intent to pursue the appeal is filed, claimant will not be allowed to file a brief. The appeal will be considered generally and without regard to specific issues.

Signed and filed this 9th day of April, 1991.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. John E. Behnke
Attorney at Law
Box F
Parkersburg, Iowa 50665

Mr. Joseph M. Bauer
Attorney at Law
309 Court Ave., Suite 500
Des Moines, Iowa 50309

Mr. Michael A. McEnroe
Attorney at Law
3151 Brockway Road
P.O. Box 810
Waterloo, Iowa 50704

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

FILED
JUN 13 1990
INDUSTRIAL SERVICES

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.

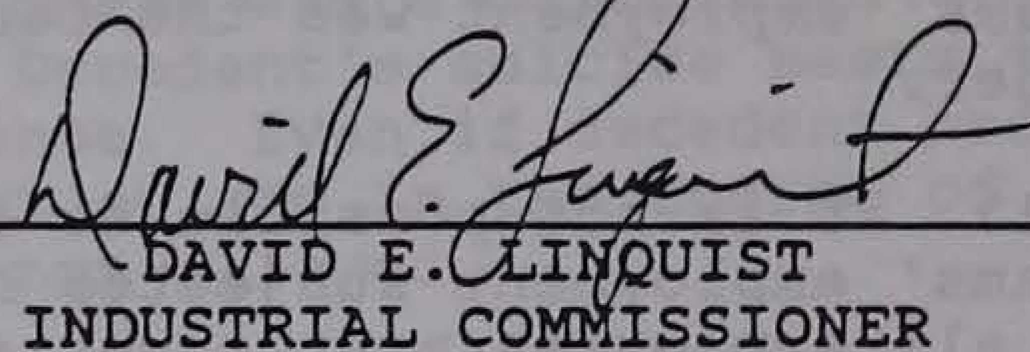
ORDER

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
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Charles T. Patterson
Ms. Judith Ann Higgs
Attorneys at Law
200 Home Federal Building
P.O. Box 3086
Sioux City, Iowa 51102

Mr. Jack W. Rogers
Mr. David Shinkle
Attorneys at Law
100 Court Avenue, Suite 203
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

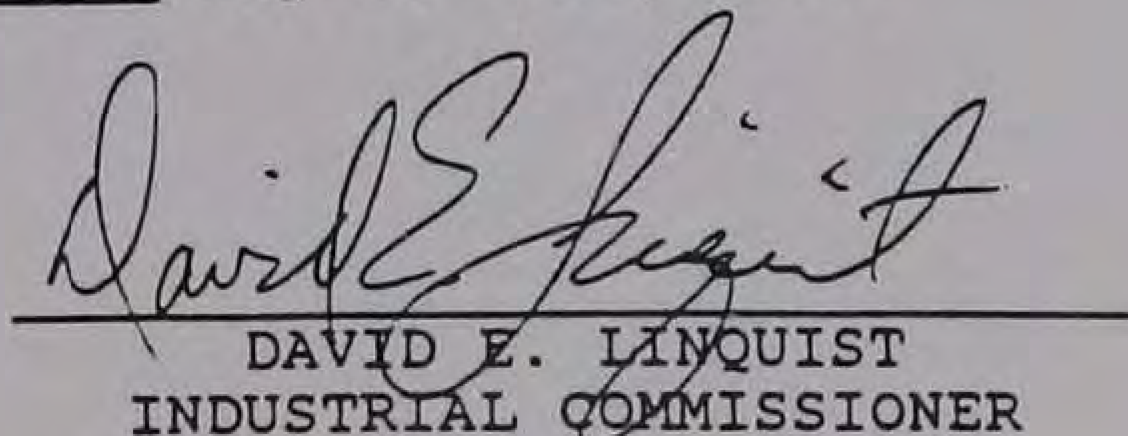
SUZANNE K. WILLIAMS KOSTELAC, Claimant,	
vs.	File No. 760401
FELDMAN'S, INC., Employer,	N U N C P R O T U N C O R D E R
and GREAT AMERICAN INSURANCE CO., Insurance Carrier, Defendants.	

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

Copies To:

Mr. Charles T. Patterson
Ms. Judith Ann Higgs
Attorneys at Law
200 Home Federal Building
P.O. Box 3086
Sioux City, Iowa 51102

Mr. Jack W. Rogers
Mr. David Shinkle
Attorneys at Law
100 Court Avenue, Ste. 203
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LORIN KUETER, Claimant, vs. FDL FOODS, INC., Employer, Self-Insured, Defendant.	:	File No. 847947 A P P E A L D E C I S I O N

FILED
DEC 21 1990
IOWA INDUSTRIAL COMMISSION

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 filed June 21, 1989 is affirmed and is adopted as the final agency action in this case.

Defendant shall pay the costs of the appeal, including the preparation of the appeal transcript.

Signed and filed this 21st day of December, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Nick J. Avgerinos
Attorney at Law
135 South LaSalle Street
Suite 1527
Chicago, IL 60603

Mr. Stephen Smalling
Attorney at Law
101 North Wacker Drive
Suite 740
Chicago, IL 60606

Mr. James M. Heckmann
Mr. David C. Bauer
Ms. Joyce L. Klimesh
Attorneys at Law
One CyCare Plaza, Suite 216
Dubuque, Iowa 52001

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DALE E. LARSON, Claimant, vs. EICHLEAY CORPORATION, Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	File No.701560 A P P E A L D E C I S I O N

FILED
JUL 30 1990
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a deputy industrial commissioner's decision awarding permanent partial disability benefits based on an industrial disability of 60 percent and awarding healing period benefits from April 8, 1982 to December 20, 1985.

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

ISSUES

The issues on appeal are:

I. Whether there is a causal connection between claimant's alleged injury of April 8, 1982 and claimant's permanent disability?

II. Whether the greater weight of the evidence supports an industrial disability award of 60 percent as a result from an alleged injury of April 8, 1982?

III. Whether the greater weight of the evidence demonstrates that the claimant's healing period ended prior to December 20, 1985?

REVIEW OF THE EVIDENCE

The deputy's decision dated March 30, 1989 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the deputy's decision are appropriate to the issues and evidence. Additional agency decisions will be discussed as necessary in the analysis.

ANALYSIS

The analysis of the evidence in conjunction with the law in the deputy's decision is adopted. The following additional comments are appropriate.

The deputy's analysis of the nature and extent of claimant's industrial disability is adopted and becomes the final agency decision on the issue of industrial disability.

The greater weight of the evidence supports a conclusion that a casual connection exists between claimant's work-related injury and his industrial disability. Claimant's treating physician, Dr. Hoover opined that claimant recovered completely from his automobile accident in January or early February and noted that claimant had returned to work at the time of his injury. (Joint exhibit 1, Page 45). Dr. Hoover opined that claimant's present back problem was related to the work injury which occurred on April 8, 1982. (Jt. ex. 1, p. 27).

Parties stipulated that if it is determined that claimant is entitled to healing period benefits then it runs from April 8, 1982 to December 20, 1985. See prehearing report dated September 20, 1988 and the transcript of the hearing page 4, line 1 through 6. Parties will be bound by stipulations unless they are clearly contrary to the law. One of the conditions that ends healing period is when "it is medically indicated that significant improvement is not anticipated". (Iowa Code section 85.34(1)). It was held in a decision by this agency:

> That a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond that point when maximum medical recuperation had been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve that condition.

Derochic v. City of Sioux City, II Industrial Commissioner Report 112, 114 (1982).

In addition, a recent agency decision is pertinent:

> 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).
>
> ...
>
> The fact that claimant may need to undergo further treatment does not mean that claimant is still in healing period. Claimant's healing period can end and permanency begin with further treatment anticipated at a later time.

Brown v. Weitz Company, Appeal Decision, March 13, 1990.

Claimant was admitted for treatment in a chronic pain program at Sister Kenny Institute from December 1, 1985 through December 20, 1985. Claimant's overall progress in the program was considered good and claimant continued to improve in his overall physical conditioning as well as his mental outlook. (Jt. ex. 1, p. 78). Evidence in the record exists to support the conclusion that the parties' stipulation to healing period from April 8, 1982 to December 20, 1985 is consistent with Iowa Code section 85.34(1).

FINDINGS OF FACT

1. Claimant sustained a back injury arising out of and in the course of his employment with defendants on April 8, 1982.

2. Claimant had a long history of back problems including a laminectomy as a result of a prior work-related injury.

3. Claimant was born April 13, 1928 and is approaching normal retirement age.

4. Claimant received his GED in 1964.

5. Claimant received training and became certified as a chemical dependency counselor subsequent to his injury on April 8, 1982.

6. Claimant's past work experience includes carpentry and millwright.

7. Claimant's treating physician opined that there is a casual connection between claimant's April 2, 1982 injury and claimant's permanent partial disability.

8. Claimant is unable to return to any position in the construction industry where there is climbing, twisting, bending or stooping as a result of claimant's April 8, 1982 work injury.

9. Claimant has not been motivated to seek employment in the field of chemical dependency counselor.

10. Claimant has a functional impairment of 20 percent of the body as a whole as a result of his preexisting injuries.

11. Claimant has an additional functional impairment of 30 percent of the body as a whole as a result of his April 8, 1982 work-related injury.

12. Claimant was in healing period from April 8, 1982 through December 20, 1985.

13. Claimant suffered a 60 percent loss of earning capacity as a result of the injury he sustained on April 8, 1982.

CONCLUSIONS OF LAW

Claimant established by a preponderance of the evidence that the work-related injury of April 8, 1982 was the cause of permanent partial disability.

Claimant established by a preponderance of the evidence that he is entitled to healing period benefits from April 8, 1982 through December 20, 1985 at the weekly rate of $280.95 per week.

Claimant established that he is entitled to 300 weeks of permanent partial disability based upon an industrial disability of 60 percent of the body as a whole.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant healing period benefits beginning April 2, 1982 through May 10, 1983 at a weekly rate of two hundred eighty and 95/100 dollars ($280.95).

That defendants are to pay unto claimant three hundred (300) weeks of permanent partial disability benefits at the rate of two hundred eighty and 95/100 dollars ($280.95) 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 defendants shall be given credit for all benefits previously paid to claimant.

That defendants shall pay the costs of the appeal including the costs of transcription of the hearing before the deputy.

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

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

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. David Drake
Attorney at Law
West Towers Office
1200 35th St., Ste. 500
West Des Moines, Iowa 50265

Mr. Glenn Goodwin
Ms. Lorraine J. May
Attorneys at Law
4th Floor Equitable Bldg.
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DALE E. LARSON, Claimant, vs. EICHLEAY CORPORATION, Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	:	File No. 701560 R U L I N G O N R E H E A R I N G

FILED
SEP 24 1990
IOWA INDUSTRIAL COMMI

STATEMENT OF THE CASE

Defendants have requested a rehearing limited to the question of the appropriate healing period. The rehearing request was granted.

ISSUE

The sole issue on rehearing is the appropriate healing period. Briefs were not requested on rehearing as the issue of the appropriate healing period had been addressed by both parties in prior briefs.

REVIEW OF THE EVIDENCE

The deputy's decision filed March 30, 1989 which was adopted by the appeal decision filed July 30, 1990 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

The citations of law in the deputy's decision which were adopted by the appeal decision are appropriate to the issue and evidence.

ANALYSIS

Claimant was admitted for treatment in a chronic pain program at Sister Kenny Institute from December 1, 1985 through December 20, 1985. Claimant's overall progress in the program was considered good and claimant continued to improve in his overall physical conditioning as well as his mental outlook. (Joint Exhibit 1, Page 78) The treatment claimant received while at the Sister Kenny Institute was maintenance in nature designed to help relieve claimant's back pain. There is no indication that this treatment improved claimant's functional impairment. Matthew Monsein, M.D., writes in his report of December 27, 1985: "according to Dale, there really was not much improvement in his experience of pain." Claimant failed to prove that he was in healing period until December 20, 1985 when he was released from the Sister Kenny Institute.

N.W. Hoover, M.D., opined after his July 9, 1982 examination of claimant:

> This is an early time for such an evaluation coming only 3 months from time of injury and therefore I emphasize that the reasons for the early evaluation is the patient's need to establish a base for his negotiation. I cannot assume that this is indicative of his ultimate condition but at the present time I find him to be impaired to the degree of 50% of the lumbar spine...

(Jt. Ex. 1, pp. 27-28)

> I will reiterate the substance of my note of July 27 when I said that the evaluation was premature and therefore only an early prediction of probably permanent partial impairment.

(Jt. Ex. 1, p. 27)

In Dr. Hoover's September 17, 1982 office notes he reiterates that claimant's permanency rating is premature and only an early prediction of claimant's probable permanent impairment. (Jt. Ex. 1, p. 27) Follow-up care for claimant's back problem was then handled by R.L. Emerson, M.D. In an office note dated May 10, 1983 Dr Emerson opined that: "[A]t the present time I see no need to change his disability status." (Jt. Ex. 1, p. 26) Dr. Emerson recommended a TENS unit in an attempt to reduce claimant's symptoms of low back and bilateral buttock discomfort.

Claimant received an impairment rating from Dr. Hoover first on July 27, 1982 which Dr. Hoover considered to be premature. Claimant continued to receive treatment and follow-up care from

Dr. Hoover and Dr. Emerson. On May 10, 1983, Dr. Emerson opined that there had been no change in claimant's disability status. "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 aniticpated. This satisfies the requirements of Iowa Code section 85.34(1)." Brown v. Weitz Company, Appeal Decision, March 13, 1990. The greater weight of the evidence supports the conclusion that healing period ended on May 10, 1983 when maximum medical recuperation had been accomplished and claimant's condition had not improved.

FINDINGS OF FACT

1. Claimant reached maximum medical recuperation on May 10, 1983.

2. Claimant's healing period ended May 10, 1983 when Dr. Emerson opined that there had been no change in claimant's disability status.

CONCLUSION OF LAW

Claimant proved entitlement to healing period benefits from April 8, 1982 through May 10, 1983 when claimant reached maximum medical recuperation at the weekly rate of two hundred and eighty and 95/100 dollars ($280.95).

ORDER

THEREFORE, it is ordered:

That defendants shall pay claimant healing period benefits beginning April 8, 1982 through May 10, 1983 at a weekly rate of two hundred and eighty and 95/100 dollars ($280.95).

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 the Order in the Appeal Decision filed July 30, 1990, is modified as it relates to healing period. The remainder of the Order incorporated in this Order.

That defendants shall pay the cost of this proceeding including the cost of the transcription of the hearing before the deputy.

Signed and filed this 24th day of September, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. David D. Drake
Attorney at Law
West Towers Office
1200 35th St., Ste. 500
West Des Moines, Iowa 50265

Mr. Glenn Goodwin
Ms. Lorraine J. May
Attorneys at Law
4th Floor, Equitable Bldg.
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LINDA LITTLE, Claimant, vs. BONDURANT-FARRAR COMMUNITY SCHOOLS, Employer, and EMPLOYERS MUTUAL INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 873368 A P P E A L D E C I S I O N FILED JAN 9 1991 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 October 27, 1987. The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 16. Both parties filed briefs on appeal.

ISSUE

The issue that is dispositive on appeal is whether claimant sustained her burden of proof showing an entitlement to permanent partial disability benefits.

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

Pain that is not substantiated by clinical findings is not a substitute for impairment. Waller v. Chamberlain Manufacturing, II Iowa Industrial Commissioner Report 419, 425.

A defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

A claimant who has no increase in functional impairment but who cannot return to his old job because his employer believes the injury disqualifies him, resulting in a palpable reduction in earning capacity, is not precluded from a finding of industrial disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); Risius v. Todd Corporation, Appeal Decision, May 31, 1990.

ANALYSIS

Claimant worked as a custodian at a public school. Claimant began experiencing pain in her back, which was aggravated when she performed her work duties. Claimant eventually left work due to her pain.

Claimant's treating physician, Charles Denhart, M.D., has recommended that claimant not return to her custodial work due to the aggravation of pain her work causes. Dr. Denhart conducted x-rays, an EMG, a bone scan, and other tests, all of which showed normal results. Dr. Denhart diagnosed claimant as suffering from myofascial pain. Dr. Denhart's report, dated October 8, 1988, states:

> She does not have any motor weakness, sensory abnormalities, or loss of range of motion, although I believe that she does have the pain and it is exacerbated by her work. She does not have any abnormalities on physical exam, and I do not believe she has a functional impairment as a result of this pain. (Emphasis added.)

(Joint Exhibit 1, page 13.)

Claimant was also examined by Scott B. Neff, D.O. On June 6, 1988, Dr. Neff opined:

> [A]ccording to the AMA Guidelines she does not have any significant impairment. Her x-ray studies have showed a small bulging disc at the T8 level which apparently is not of any consequence. Her other studies have been normal. (Emphasis added.)

(Jt. Ex. 2, p. 1)

In his deposition, Dr. Neff testified as follows:

Q. After your examination of Linda Little, Doctor, have you reached an opinion or do you have an opinion based upon your examination of the treatment, the records of treatment, the medical history, your examination of this patient, as well as your training and experience, reached an opinion as to whether or not as a consequence of her complaints she has any functional disability?

A. Yes, I have an opinion.

Q. And would you tell us that opinion, please?

A. As I stated in my report of 6 June 1988, based on my findings and the records that I have reviewed, the AMA and orthopedic guidelines would not impart an impairment to this patient, based on normal motion and no diagnosis of any significant pathology.

Essentially, it was the opinion of Doctor Denhart, and apparently everyone else, that she had sore muscles; and that in and of itself is not a disabling condition.

....

Q. Is it true that you stated in your report that you found tenderness over her left sacroiliac joint?

A. That's correct.

Q. And over her paravertebral muscles?

A. That's correct.

Q. Okay. Is that an objective finding?

A. Yes, it is.

....

Q. You also reported that you found that she was sore in the medial border of the left scapula?

A. That's correct.

Q. And that's consistent with the trigger point myofascial type syndrome?

A. That's correct. That's English for sore muscle.

....

Q. Well, I guess I was asking you direct, does she have a problem?

A. No.

Q. All right. She has no problem?

A. She has sore muscles.

Q. But that is not a problem in your opinion.

A. Well, it's not something for which surgery is recommended or narcotic medication or bed rest or disablement or even restriction but short of the heaviest repetitive manual labor. It's sore muscles.

....

There will be the possibility of recurrence of sore muscles, but the same would be true if she were doing housework or gardening or painting the ceiling in her bathroom.

So the subjective recurrence of symptoms is not a diagnosis. Were she desirous of doing that job and had no other alternative and no source of funds except for that type of employment, she would continue that employment or would take aspirin.

Q. Well, is that a medical diagnosis, whether she would continue that job if it's the only one available?

A. No, it's not a medical diagnosis. That's a statement that this is a subjective symptom complex based on nothing seriously being wrong. (Emphasis added.)

(Jt. Ex. 15, pp. 13-30)

Dr. Denhart, in his deposition, stated as follows:

Q. Based upon your examination of this patient, the treatment that you prescribed, your education experience, do you have an opinion today as to whether or not this lady has a permanent functional impairment as a result of this pain expressed to you?

A. Assuming nothing has changed, yes.

Q. And does that remain that she does not have a functional impairment?

A. Correct.

....

Q. Can you state whether or not it remains your opinion, based on reasonable medical certainty, that Linda Little should not be in a job that requires lifting or bending and that she should have the opportunity to sit and stand at will?

....

A. Again, my position on this is, is that she is functionally capable of doing what she does, and I feel that way because of the normal neurologic exam and the fact she was able to perform in the work-hardening program and the fact that at least at that time or at least shortly before she was able to perform her work, albeit uncomfortable, but that it's my feeling that for a long term, retaining her job, it would be unrealistic to ask her to put up with what I believe is, despite the fact that it comes only as a subjective complaint, is significant pain on her part. So that's my position on the matter.

....

Q. Now, Mr. Spaulding has made several references to subjective tests versus objective tests. Dr. Denhart, you mentioned early on that there was a finding, I think you called it a dermatographia?

A. Skin writing.

Q. Is that an objective finding?

A. Yes.

Q. What in your professional opinion was the cause of that you found in Linda Little?

A. It is a finding that is seen with myofascial pain, and I do believe it is linked with the myofascial pain.

....

Q. Is it then your opinion, based on reasonable medical certainty, that Linda should lead a more -- or work in a more sedentary line of occupation than that

which she previously engaged in at the Bondurant-Farrar School District as a janitor?

A. I need to go back to my position again. She can do it, but I believe she has the pain and I think it's unrealistic if she has a significant amount of pain to expect that, you know, someone who's probably got thirty more years to work could put up with it for that long.

(Jt. Ex. 14, pp. 45-65)

Claimant was not given any work restrictions by either physician, other than Dr. Denhart's recommendation that she consider finding more sedentary work. However, Vicki Torvik, OTR/L, Work Hardening Consultant, stated:

I place this patient at the Medium Work category which is defined by the U.S. Labor Department as: maximum occasional lifting of up to 50 pounds. Frequent lifting of up to 25 pounds: typically on feet minimum of six hours out of an eight hour day. Modification to this definition is to keep her lifting to no more than 40 to 50 pounds for a maximum occasional lift.

(Jt. Ex. 7, pp. 9-10)

Physical impairment is only one factor in the determination of industrial disability. However, generally industrial disability can rarely be found without physical impairment. Greenlee v. Northbrook Manor Care Center, Vol. 1, No. 3 State of Iowa, Industrial Commissioner Decisions 592. In this case, claimant has no permanent physical impairment. Both physicians indicate this. Claimant states she has pain, and there is some objective confirmation of this in the form of the dermatography results. The evidence indicates that this is a "soft" finding, and even if this test does confirm the presence of pain, pain in and of itself does not constitute a permanent physical impairment.

The evidence also shows test results and recommendations concerning maximum weights claimant can lift, and recommendations concerning prolonged standing or sitting. However, these are test results, not restrictions, and the source of this evidence is a non-physician. The fact remains that claimant's doctors still rate claimant as having no permanent physical impairment.

Claimant has been diagnosed as suffering from myofascial pain. Dr. Neff describes this condition as "sore muscles." Claimant's x-ray, MRI, and other test results are all normal. The evidence indicates that claimant developed myofascial pain

after strenuous activities in her job as a custodian. Dr. Neff cautioned against confusing a symptom with a disease or injury. Taken as a whole, the evidence indicates that claimant does not suffer a permanent physical impairment.

Claimant has already been paid temporary disability benefits for her time off work. Claimant is now seeking permanent disability benefits. Claimant bears the burden of proof. Claimant has failed to show by a preponderance of the evidence that she has suffered a cumulative injury that has resulted in a permanent physical impairment.

A permanent physical impairment is not always necessary in order to be awarded industrial disability. Even in the absence of permanent impairment, industrial disability can be awarded where the employer refuses to rehire the claimant because of the injury, or where the injured worker is transferred to another position that results in a loss of earnings because of the injury.

In this case, the employer did not refuse to rehire claimant or transfer claimant to a lower paying job because of her injury. The employer offered claimant a lighter duty job paying $8,600 less per year, but claimant did not regard this job as being lighter duty and declined the offer. Claimant acknowledged that the employer made efforts to keep her on the job because she was a valued employee.

Claimant eventually left her employment with the school district, and accepted a position that paid $6,600 less per year. Claimant maintains that she did so because of the pain she experienced working for defendant-employer. However, although Dr. Denhart suggested she seek more sedentary work, there is no medical evidence that claimant was told by either Dr. Denhart or Dr. Neff she could not return to her work as a custodian. The absence of work restrictions and medical statements that claimant has no permanent impairment indicate that there is no medical reason claimant could not continue working at her custodian job other than the fact that this work resulted in muscle soreness.

Thus, none of the employer conduct that sometimes justifies an award of industrial disability, despite the lack of permanent physical impairment, exists in this case. It appears that although claimant has shown she suffers from "muscle soreness," the medical evidence taken as a whole shows that this is not a permanent impairment. Claimant apparently cannot perform the duties of the custodial job not because of an injury, but because the work is simply too strenuous for her. Based on the facts in this case, without some evidence of permanent physical impairment as a result of the injury, and absent the kind of employer conduct outlined in McSpadden and Blacksmith, claimant has failed to carry her burden of proof to show a work injury resulting in

industrial disability. Claimant has not shown entitlement to permanent disability benefits.

FINDINGS OF FACT

1. Claimant worked as a custodian for defendant-employer.

2. Claimant's custodial work was occasionally strenuous.

3. Claimant developed myofascial pain in her back as a result of her work activity.

4. Dr. Denhart found that claimant's condition does not result in any permanent physical impairment.

5. Dr. Neff found that claimant's condition does not result in any permanent impairment. Dr. Neff described claimant's condition as "muscle soreness."

6. Claimant's EMG, bone scan, and x-ray results are all normal.

7. Claimant has no physician-imposed lifting restrictions or work restrictions.

8. Defendant-employer did not refuse to rehire claimant.

9. Defendant-employer did not transfer claimant to a lower-paying position as a result of her back pain.

10. Defendant-employer made efforts to accommodate claimant.

CONCLUSIONS OF LAW

Claimant has failed to carry her burden of proof to show that she has suffered a work injury that has resulted in permanent physical impairment.

Claimant has failed to carry her burden of proof to show employer conduct that justifies a finding of industrial disability in the absence of physical impairment.

Claimant is not entitled to further benefits.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from these proceedings.

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

Signed and filed this 9th day of January, 1991.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Donald G. Beattie
Attorney at Law
204 8th Street SE
Altoona, Iowa 50009

Mr. Larry D. Spaulding
Attorney at Law
1100 Des Moines Bldg.
Des Moines, Iowa 50309-2464

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GERRY LOWE, Claimant, vs. SPENCER BROKERAGE, INC. and D & D LEASING COMPANY, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 825138 808341 A P P E A L D E C I S I O N

FILED

OCT 2 9 1990

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant weekly benefits and medical expenses.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 10; and defendants' exhibits A through D. Both parties filed briefs on appeal.

ISSUES

Defendants state the issues on appeal are:

> The deputy erred in finding that the two contracts were intended to avoid the effect of the worker's [sic] compensation laws of the state and violated Iowa Code §85.18.
>
> The deputy erred in finding that claimant had carried his burden of proving an employer-employee relationship; likewise, the deputy erred in finding that defendants had failed to prove that claimant was an independent contractor.

REVIEW OF THE EVIDENCE

The arbitration decision filed June 28, 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. The following additional comments are added.

Claimant is not bound by the holding in Voss v. Swenson and Spencer Brokerage, III Iowa Industrial Commissioner Report 273 (1982). Although the same alleged employer may be involved in that case, it appears that the arrangement between Spencer Brokerage and the driver in that case differs in several aspects from the arrangement in this case. In addition, that decision would not be res judicata as regards claimant in this case when claimant was not a party to that action.

FINDINGS OF FACT

1. Defendant, Spencer, had a contract with Morton Buildings to the transport and deliver all of their buildings and provide the necessary equipment in order to do so. Defendant, D & D, own the tractors and defendant, Spencer, owned the trailers.

2. Defendant, Spencer, selected and employed claimant at will as a truck driver to deliver Morton buildings.

3. Defendant, Spencer, paid claimant compensation to transport and deliver Morton buildings.

4. Defendant, Spencer, terminated claimant at will and not pursuant to the written contract with claimant when Spencer lost the contract with Morton.

5. Defendant, Spencer, had the exclusive right to control the work by designating which driver would deliver a load.

6. The loads were all picked up, delivered and the tractors returned along with the paper work and check for the buildings pursuant to detailed instructions from Morton and Spencer to claimant.

7. Spencer was the responsible authority in charge of the work of delivering and transporting Morton buildings and hired claimant as a truck driver to deliver the buildings. Claimant was not engaged in the business of independent trucking.

8. Claimant had no business name, business address, business telephone, business stationary, business invoices, business checking account and had no other clients or customers who used his services as an independent trucker.

9. The contract signed by claimant and Spencer and D & D are not contracts with an independent contractor.

10. Claimant was not in the business of truck driving as a risk taking entrepreneur at the time of this contract.

11. Claimant did not employ assistants or ever contemplate employing assistants.

12. Employers supplied the necessary tractors, trailers and other materials to perform the job of transporting Morton's buildings.

13. The right to control the work from beginning to end was vested with employer, Spencer Brokerage.

14. Claimant and employer had a series of one year contracts from 1981 through 1985 which were basically the same provisions each year.

15. The work of transporting Morton buildings was the regular business of employer, Spencer.

16. Claimant was an employee of Spencer Brokerage on April 16, 1985 and May 26, 1986.

17. Claimant did sustain an injury on April 16, 1985 when he fell from the trailer and suffered multiple fractures of his left foot and leg.

18. Claimant did sustain an injury arising out of and in the course of employment when he fell and hit his head and received a cerebral concussion on May 26, 1986.

19. The injury to the leg on April 16, 1985 was the cause of healing period from April 16, 1985 to September 16, 1985.

20. The injury of May 26, 1986 was the cause of temporary disability from May 28, 1986 to June 16, 1986.

21. Claimant sustained an eight percent loss of function of the left leg due to the injury of April 16, 1985.

22. Claimant incurred medical expenses in the amount of $7,774.74 for the injury of April 16, 1985.

23. Claimant sustained medical expenses in the amount of $1,045.10 for the injury of May 26, 1986.

CONCLUSIONS OF LAW

Claimant did sustain the burden of proof by a preponderance of the evidence that he was an employee of Spencer Brokerage on April 16, 1985 and May 26, 1986.

Defendants did not sustain the burden of proof by a preponderance of the evidence that claimant was an independent contractor on April 16, 1985 and May 26, 1986.

Claimant did sustain the burden of proof by a preponderance of the evidence that he sustained an injury arising out of and in the course of employment on both April 16, 1985 and again on May 26, 1986.

Claimant is entitled to healing period benefits for 22 weeks for the period from April 16, 1985 to September 16, 1985 for the injury to the left leg.

Claimant is entitled to 17.857 weeks of permanent partial disability for the injury to the left leg.

Claimant is entitled to 2.857 weeks of temporary total disability for the period from May 28, 1986 to June 16, 1986 for the injury to the head.

Claimant is entitled to the payment of medical expenses to himself or to the provider of services in the amount of $7,774.74 for the injury of April 16, 1985.

Claimant or the provider of services is entitled to the payment of $1,045.10 for the medical expenses of the injury of May 26, 1986.

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

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant twenty-two (22) weeks of healing period benefits at the rate of two hundred fifteen and 63/100 dollars ($215.63) per week in the total amount of four thousand seven hundred forty-three and 86/100 dollars ($4,743.86) for the period from April 16, 1985 to September 16, 1985 for the injury to the left leg.

That defendants pay to claimant seventeen point eight five seven (17.857) weeks of permanent partial disability benefits for the injury to the left leg at the rate of two hundred fifteen and 63/100 dollars ($215.63) per week in the total amount of three thousand eight hundred fifty and 50/100 dollars ($3,850.50) commencing on September 17, 1985 as stipulated to by the parties.

That defendants pay to claimant two point eight five seven (2.857) weeks of temporary total disability benefits at the rate of two hundred fifteen and 63/100 dollars ($215.63) per week in the total amount of six hundred sixteen and 05/100 dollars ($616.05) for the period from May 28, 1986 to June 16, 1986 for the injury to the head.

That the workers' compensation weekly benefits are to be paid in a lump sum.

That the workers' compensation weekly benefits are entitled to interest pursuant to Iowa Code section 85.30.

That defendants pay to claimant or the provider for services seven thousand seven hundred seventy-four and 74/100 dollars ($7,774.74) in medical expenses as itemized above for the injury of April 16, 1985.

That defendants pay to claimant or to the provider of medical services one thousand forty-five and 10/100 dollars ($1,045.10) for the medical expenses for the injury of May 26, 1986.

That defendants pay the costs of this proceeding including cost of transcribing 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 29th day of October, 1990.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Ned Stockdale
Attorney at Law
108 N 7th Street
Estherville, Iowa 51334

Mr. Tito Trevino
Attorney at Law
503 Snell Building
PO Box 1680
Fort Dodge, Iowa 50501

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHERRY L. LUNDQUIST, Claimant,	:	File Nos. 792729 798238 798239
vs.	:	
FIRESTONE TIRE & RUBBER COMPANY, Employer,	:	R E M A N D
and	:	D E C I S I O N
INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	

FILED
AUG 30 1990
INDUSTRIAL SERVICES

STATEMENT OF THE CASE

This is a proceeding on remand that comes as a result of the following history. An arbitration decision dated January 15, 1988 concluded that claimant sustained an injury that arose out of and in the course of her employment with Firestone Tire and Rubber Company; that claimant was entitled to healing period and that claimant had 40 percent industrial disability as a result of her work injuries while employed with defendants. Defendants appealed that decision to the industrial commissioner, and in an appeal decision dated March 21, 1989 the commissioner concluded that claimant proved that her April 22, 1985 work injury was the cause of temporary total disability but that claimant failed to prove that her work injuries were the cause of a permanent disability.

Claimant appealed the decision to the District Court of Polk County. In a ruling dated November 13, 1989, the district court held that claimant met her burden of showing that her permanent partial disability was caused by claimant's work injuries. The district court ordered that the decision of the industrial commissioner should be reversed and the arbitration decision of the deputy industrial commissioner should be reinstated. Defendants appealed the decision of the district court and both parties stipulated that the conclusion of the district court was correct but that the district court erred in not remanding the

case to the industrial commissioner. The supreme court ordered that the case be remanded back to the industrial commissioner to determine the extent of claimant's industrial disability.

The record on remand consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 3; and defendants' exhibits A through C. Neither party filed briefs on remand but both parties filed briefs in the prior appeal proceeding.

ISSUE

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

REVIEW OF THE EVIDENCE

The arbitration decision filed January 15, 1988 which was adopted in the prior appeal decision filed March 31, 1989 adequately and accurately reflects the pertinent evidence and it will not be reiterated 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

Claimant testified to an incident on April 22, 1985 where she and a co-worker were attempting to move a bale of plastic and experienced back pain. Claimant was diagnosed with a lumbar strain and remained off work for three days. Claimant sought the treatment of Kent Patrick, M.D., who recommended one additional week of rest, anti-inflammatory medication and light duty upon her return to work. Claimant attempted to return to work on May 16 and 17, 1985, but was unsuccessful.

In January 1986, claimant had fusion surgery on account of her spondylolisthesis. Dr. Patrick testified that healing period following fusion surgery is from six months to one year. Dr. Patrick testified that claimant is restricted from jobs that require repetitive stooping, bending, twisting, or lifting and should avoid lifting over 30 pounds. As a result of a grade I spondylolithesis, claimant's functional impairment is 20 percent.

Claimant was born August 27, 1937 and is a high school graduate. Claimant's work experiences include retail sales, dental assistant, waitress and assembly line manufacturing. Claimant worked with a vocational counselor who testified that claimant was motivated to find work. Roger Marquardt, a vocational rehabilitation counselor, testified that claimant experienced a 37 percent through 39 percent reduction of wages as a result of her work injury. (Arbitration Decision, pages 126-127)

Claimant contacted defendant employer for a position within her work restrictions. James Allpress, a safety director and in charge of workers' compensation for defendants, testified that defendant employer did not have a position available for claimant within her work restrictions. However, claimant is still considered on lay off status and could be called up if a position became available.

As a result of the above analysis, claimant is adjudged to be 40 percent disabled for industrial purposes on account of her work injuries to her back.

FINDINGS OF FACT

1. Claimant sustained an injury in the nature of an aggravation of a preexisting condition on April 22, 1985, which injury occurred while she was pushing a plastic bale in the course of her employment with defendants.

2. Claimant underwent fusion surgery and was released to return to work with restrictions, on April 13, 1986.

3. Claimant is restricted from jobs that require repetitive stooping, bending, twisting, or lifting and should avoid lifting over 30 pounds.

4. Claimant's functional impairment rating is 20 percent on account of the lumbar fusion surgery.

5. Claimant was born August 27, 1937 and is a high school graduate.

6. Claimant's work experiences include retail sales, dental assistant, waitress and assembly line worker.

7. Claimant is medically incapable of returning to work in employment substantially similar to that in which she engaged in at the time of the injury.

8. Claimant is motivated to seek employment within her work restrictions.

9. Defendant employer was unable to offer claimant a position within her medical restrictions because of the seniority system at the plant but maintained claimant on lay off status in the event that a position became available.

10. Claimant had a multitude of injuries to her back, shoulders and arms prior to her April 22, 1985 work injury.

11. Claimant sustained a 40 percent loss of earning capacity as a result of the injuries she sustained.

CONCLUSION OF LAW

Claimant has a 40 percent permanent partial disability for industrial purposes on account of her work injury and is entitled to 200 weeks of compensation.

ORDER

THEREFORE, it is ordered:

That defendants shall pay claimant two hundred (200) weeks of compensation for permanent partial disability at the rate of three hundred twenty and 59/100 dollars ($320.59) per week commencing August 14, 1986.

That defendants shall pay all past due weekly compensation in a lump sum together with interest pursuant to Iowa Code section 85.30 from the date each payment came due until the date of actual payment.

That defendants shall pay the cost of this proceeding including the cost of transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

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

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

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Timothy J. Walker
Mr. Thomas Henderson
Attorneys at Law
1300 First Interstate Bank Bldg.
Des Moines, Iowa 50309

Mr. E. J. Giovannetti
Attorney at Law
Terrace Center, Ste. 111
2700 Grand Avenue
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHARON K. MACK, Claimant, vs. LETICA CORPORATION, Employer, and GRANITE STATE INS. CO., Insurance Carrier, Defendants.	File No. 939197 A P P E A L D E C I S I O N

FILED

APR 29 1991

IOWA INDUSTRIAL COMMISSIONER

The record has been reviewed de novo on appeal. The ruling of the deputy on defendants' motion for summary judgment filed November 14, 1990 is affirmed and is adopted as the final agency action in this case.

Claimant shall pay the costs of the appeal.

Signed and filed this 29th day of April, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. James P. Hoffman
Attorney at Law
Middle Road
P.O. Box 1066
Keokuk, Iowa 52632

Mr. Richard G. Blane, II
Attorney at Law
803 Fleming Bldg.
218 Sixth Avenue
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICK H. MALLOY, Claimant, vs. FLOYD VALLEY PACKING COMPANY, Employer, and ARGONAUT INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 727883 R U L I N G

FILED
APR 1 0 1991
IOWA INDUSTRIAL COMMISSIONER

Defendants have filed a motion to dismiss the appeal, based on a failure to file an affidavit of ordering transcript, a failure to file the transcript, and a failure to reimburse claimant for the costs of the transcript previously prepared.

Rule 343 IAC 2.1 provides: "For good cause the industrial commissioner or the commissioner's designee may modify the time to comply with any rule."

Rule 343 IAC 4.30 provides:

> When an appeal to or review on motion of the commissioner is taken pursuant to 4.27(86,17A), or 4.29(86,17A), a transcript of the proceedings before the industrial commissioner shall be filed with the industrial commissioner within thirty days after the notice of the appeal is filed with the industrial commissioner. The appealing party shall bear the initial cost of the transcription on appeal and shall pay the certified shorthand reporter or service for the transcript. In the event there is a cross-appeal, the appellant and cross-appellant shall share the cost of the transcript. In the event the cost of the transcript has been initially borne by a nonappealing party prior to appeal, the appealing party or parties within thirty days after notice of appeal or cross-appeal shall reimburse the cost of the transcript to the nonappealing party and if not so reimbursed the appeal shall be dismissed.

The file in this case now reflects that claimant has reimbursed defendants for the cost of preparing the transcript. Refusal of the claimant as the appealing party to reimburse the nonappealing party requires the dismissal of claimant's appeal. See Pratt v. Orr, IV Iowa Industrial Commissioner Report 279 (1984). That case can be distinguished from the instant case because in the instant case claimant has indicated a willingness to reimburse for the cost of the transcript and has not refused to pay the cost of the transcript. Claimant reimbursed defendants for the transcript on or about March 21, 1991. (Defendants had made request for payment of transcript on February 13, 1991.) Pursuant to rule 343 IAC 2.1 there exists good cause to extend the time in which to reimburse the cost of the transcript as provided in rule 343 IAC 4.30. The time in which to reimburse the cost of transcript is extended to March 21, 1991, the date of actual reimbursement.

The transcript also appears in the file. Since the transcript is already prepared, an affidavit is not required. Defendants' motion to dismiss the appeal is overruled.

Signed and filed this 10th day of April, 1991.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Raymond E. Pogge
Mr. Christopher J. Tinley
Attorneys at Law
P.O. Box 1502
Council Bluffs, Iowa 51503

Mr. Harry W. Dahl
Attorney at Law
974 73rd St., Suite 16
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM MATHESON,	:	
Claimant,	:	File No. 877064
vs.	:	A P P E A L
JOHN DEERE DES MOINES WORKS,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
OCT 25 1990
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from a dismissal of claimant's original notice and petition.

The record on appeal consists of the transcript at the arbitration hearing. Both parties filed briefs on appeal.

ISSUES

The issue on appeal is whether dismissal of claimant's petition by claimant was proper.

REVIEW OF THE EVIDENCE

The record in this matter showed that a hearing assignment order filed March 23, 1989 set this matter for hearing on August 31, 1989 at 8:30 a.m. On August 29, 1989 the employer filed a motion in limine to prohibit claimant from calling witnesses or introducing exhibits. Claimant resisted that motion. At 8:50 a.m. on August 31, 1989 a deputy industrial commissioner, assigned to hear this matter, began the proceedings. The deputy industrial commissioner who was responsible for prehearing matters ruled on defendant's motion and ruled that claimant's exhibits would not be allowed and the only witness for claimant would be the claimant.

The following are excerpts from the August 31, 1989 proceedings at which counsel and potential witnesses for both parties were present.

> Mr. Ferris: I have reviewed the prehearing report and believe that for our part at least we can stipulate as is indicated in there with the exception that the

nature of the dispute might change somewhat because of the ruling on the motion in limine.

I would assume that there is now the additional dispute as to whether or not the claimant can introduce the exhibits which are listed on claimant's exhibit list. In other words, I'm assuming that you would contest the ruling.

Mr. Elkin: Well, yes, we would. We would certainly offer those exhibits, make an offer of proof in that respect. If that is accepted, then we would proceed with Mr. Matheson's testimony.

The Deputy Commissioner: They can be accepted as an offer of proof....

....

The Deputy Commissioner: I wouldn't be doing it because those exhibits will not be considered because they have already been eliminated by Ms. Walleser's ruling. I'm just permitting you to submit them as an offer of proof, but I still think they should be in proper form in case the appellate authorities want to refer to them by -- they need to refer to what page they are talking about.

Mr. Elkin: In light of the ruling, Your Honor, my client would agree to move to dismiss this case without prejudice if -- unless there's some reason that we would not be allowed to do that.

....

The Deputy Commissioner: Iowa Rule of Civil Procedure 215 is entitled Voluntary Dismissal. It says, "A party may without order of court dismiss that party's own petition, counterclaim, cross-petition, or petition of intervention at any time before trial has begun, subject to the provisions of Rule of Civil Procedure 181.4."

I guess in my opinion if no hearing is scheduled, we are all present for it, no witnesses have been sworn, no opening statements were made, technically I don't believe trial has begun and it would appear that he has the privilege of, as the rule says, dismissing his own petition at any time before trial has begun. Therefore, I probably don't really need to rule on the motion, but --

> Mr. Ferris: I didn't make a motion. You mean his motion?
>
> The Deputy Commissioner: His motion, yes. So according to reading the rule it really doesn't require ruling, but if it does require ruling, I would say that I have no choice but I would voluntarily dismiss without prejudice under provisions of Rule 215....

(Transcript, Pages 7-11)

APPLICABLE LAW

Division of Industrial Services Rule 343-4.35 provides:

> The rules of civil procedure shall govern the contested case proceedings before the industrial commissioner unless the provisions are in conflict with these rules and 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 215 which was in effect at the time of the hearing provided:

> A party may, without order of court, dismiss that party's own petition, counterclaim, cross-petition or petition of intervention, at any time before the trial has begun, subject to the provisions of R.C.P. 181.4. Thereafter a party may dismiss an action or that party's claim therein only by consent of the court which may impose such terms or conditions as it deems proper; and it shall require the consent of any other party asserting a counterclaim against the movant, unless that will still remain for an independent adjudication. A dismissal under this rule shall be without prejudice, unless otherwise stated; but if made by any party who has previously dismissed an action against the same defendant, in any court of any state or of the United States, including or based on the same cause, such dismissal shall operate as an adjudication against that party on the merits, unless otherwise ordered by the court, in the interests of justice.

The Iowa Supreme Court discussed this rule in State, Iowa Dept. of Environ. v. Greenley, 336 N.W.2d 414 (Iowa 1983) the court stated at 336 N.W.2d 414, 415-416:

For the purposes of rule 215, we follow the definition of "trial" as found in Iowa R.Civ.P. 176: "A trial is a judicial examination of issues in an action, whether of law or fact...." In Orr v. Iowa Public Service Co., 227 N.W.2d 899 (Iowa 1979), we considered rule 176 as it applied to a motion for a new trial made on a summary judgment. There we defined "trial" as follows:

> A trial is one kind of judicial examination of issues in an action, but it is not the only kind. Motions under Iowa R.Civ.P. 104(b) [failure to state a claim], 105 [adjudication of law points]. and 222 [judgment on pleadings], like motions for summary judgment, may result in rulings disposing of a case without trial. Proceedings on these motions are not trials under rule 176 but are preliminary and alternative methods to obtain judicial determination of actions. A trial within the meaning of rule 176 is a hearing on the merits of the controversy after the opportunity for such preliminary proceedings has passed. (Emphasis added)

ANALYSIS

The fighting issue in this case is whether the trial had begun within the meaning of Iowa Rule Civil Procedure 215 in effect at the time of the hearing (hereinafter rule 215). It should be noted that Iowa R.Civ.P. 215 has been amended since August 31, 1989. This decision is based on the prior rule. If the trial had not begun claimant had an absolute right to dismiss his petition without prejudice. The hearing deputy quoted a portion of rule 215 at the proceeding August 31, 1989. It is fairly clear that the deputy only considered whether claimant had a right to voluntary dismissal and not whether the dismissal must be consented to by the deputy.

The proceeding on August 31, 1989 had elements of both preliminary proceedings and a trial. Acceptance of the prehearing report and ruling on the motion in limine might be considered preliminary proceedings. However, there were also elements of a trial. The proceedings convened at the time and place scheduled for hearing. Counsel and witnesses for both parties as well as the court reporter were present. Although claimant's exhibits were to be excluded claimant offered those exhibits as an offer of proof.

There appears to be some confusion concerning voluntary dismissals under rule 215. Rule 215 replaced Code of Iowa section 11562 (1931). The comments following rule 215 unequivocally state that rule 215 is a substantial change in the

law governing voluntary dismissals. Rule 215 shortens the time when a party may dismiss a cause of action without court approval. The supreme court stated that "rule 215 provides that 'a party may ... dismiss his own petition ... at any time before the trial has begun ...'" State, Iowa Dept of Environ. v. Greenley, 336 N.W.2d, at 415.

Prior to the start of a hearing, a party could voluntarily dismiss their contested case without the consent of the industrial commissioner. Pursuant to rule 215, parties in a hearing may not voluntarily dismiss their case without approval of the deputy presiding over the contested case. In the interest of judicial efficiency, a deputy must have the authority to control voluntary dismissals once a hearing has begun. The deputy had the authority to determine whether a party's dismissal should be granted, with or without prejudice. This is not an expansion of the deputy's authority nor a change in agency policy. Under the facts of this case the trial had begun. Because the trial had begun the deputy had authority to determine whether claimant's voluntary dismissal should be allowed.

This matter should be remanded to the deputy to determine whether the deputy consents to claimant's motion for dismissal. Further proceedings shall be ordered, if necessary.

One other matter should be addressed. On October 10, 1989 a ruling by the industrial commissioner indicated that defendant's request for extension of time to file sanctions was effectively stayed pending this appeal decision. Defendant's request to extend the time to file a motion for sanctions is hereby granted and the time to file is extended until such time as the deputy shall order.

FINDING OF FACT

When claimant made his motion to dismiss his petition at the proceeding on August 31, 1989 the trial in this matter had begun.

CONCLUSION OF LAW

At the time claimant made his motion to dismiss the claimant lost the absolute right to voluntary dismissal and claimant's petition could only be dismissed with the consent of the deputy.

WHEREFORE, the ruling of the deputy is reversed and remanded.

ORDER

THEREFORE, it is ordered:

That this matter is remanded to the deputy for determination of whether the deputy consents to claimant's motion for dismissal.

That defendant's request to extend the time to file a motion for sanctions is extended until such time as the deputy shall order.

Signed and filed this 25th day of October, 1990.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. David R. Elkin
Attorney at Law
315 East 5th Street
Suite Five
Des Moines, Iowa 50309

Mr. Roger L. Ferris
Attorney at Law
1900 Hub Tower
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
JAN 31 1991
IOWA INDUSTRIAL COMMISSIONER

RONALD E. McINTIRE, Claimant,	:	
vs.	:	File No. 776428
SUPER VALU STORES, INC., Employer,	:	A P P E A L
and	:	D E C I S I O N
LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding claimant permanent partial disability benefits based on a 10 percent industrial disability.

The record on appeal consists of the transcript of the arbitration hearing, joint exhibits A through Y, claimant's exhibits AA and BB, and defendants' exhibit 1. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are:

I. Whether the denial of the motion for continuance was an abuse of discretion; and

II. Whether the deputy industrial commissioner was correct in finding that the claimant has an industrial disability of 10 percent of the body as a whole.

REVIEW OF THE EVIDENCE

The arbitration decision dated April 17, 1989, adequately and accurately reflect the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

Rule 343 IAC 2.1 states:

> For good cause the industrial commissioner or the commissioner's designee may modify the time to comply with any rule.

Rule 343 IAC 4.23 provides in pertinent part that:

> 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.

Iowa Rule of Civil Procedure 183(a) provides:

> A continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained. It shall be allowed if all parties so agree and the court approves.

Iowa Rules of Civil Procedure 183(b) provides in part that:

> All such motions based on absence of evidence must be supported by affidavit of the party, his agent or attorney,...

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."

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251 (1963), cited with approval a decision of the industrial commissioner for the following proposition:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered....In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because

of the injury, to engage in employment for which he is fitted. * * * *

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257.

ANALYSIS

The first issue to be resolved in this case is whether the deputy industrial commissioner abused his discretion by denying claimant's motion for continuance.

The Iowa courts in interpreting rule 183 consistently stated that the granting of or refusal of a motion for continuance rests largely in the sound discretion of the trial court and such discretion is very broad. The reviewing court on appeal will interfere with the action of the trial court in passing on a motion for continuance only where there has been a clear abuse of judicial discretion and injustice was thereby done. State v. Kyle, 271 N.W.2d 689 (Iowa 1978).

The hearing in this matter was scheduled to begin at 1:00 p.m. on March 1, 1989. At 1:30 p.m. the claimant's attorney appeared and moved for a continuance of the hearing because his client was not present. The motion was heard by the industrial commissioner's designee, Helen Jean Walleser, who, after listening to arguments of counsel, denied the motion. As part of his motion, the claimant's attorney offered into evidence a letter he had written to his client dated December 16, 1988, wherein he had informed his client of the hearing date. The letter was admitted into evidence as exhibit "AA." No affidavits or other sworn testimony was offered by claimant's attorney in support of his motion. Claimant's attorney stated that after talking with claimant's wife it was his understanding that claimant was working as a truck driver for the employer and was making a delivery in Nebraska at the time of the hearing. Claimant's attorney further stated that claimant was apparently confused about whether there was to be a hearing or not and that the employer, by sending him on a delivery, contributed to the confusion. The claimant's attorney also implied that the employer may have done this to prevent claimant from attending the hearing. Claimant's attorney argued that claimant could not have a fair hearing without the evidence that the claimant, by his testimony, would offer.

The decision denying the continuance was the correct one under the circumstances. Rule 183 of the Rules of Civil

Procedure requires that a motion for continuance based on absence of evidence must be supported by affidavit. No such affidavit was offered. Furthermore, it was not an abuse of discretion for the deputy commissioner to deny the motion. Under rule 183 a motion for continuance may be granted for good cause not growing out of the fault or negligence of the applicant, which satisfies the court that substantial justice will be more nearly obtained. No good cause was advanced for the continuance other than the supposed confusion of the claimant. There is no showing that the actions of the employer prevented the claimant's attendance at the hearing. The claimant has only himself to blame for his failure to be at the hearing. There was no abuse of discretion by the deputy industrial commissioner and the denial of the motion for continuance is affirmed.

The second issue to be resolved is whether the deputy industrial commissioner was correct in finding that the claimant has an industrial disability of 10 percent of the body as a whole.

Claimant is 43 years old and has a high school education. He has a good work history at the Super Valu warehouse and has served as a union steward. He underwent an operation for the removal of a lumbar disc in his back but has been released to return to work without any restrictions. Thomas A. Carlstrom, M.D., the surgeon who operated on the claimant's back, has expressed the opinion that claimant has a permanent partial impairment of eight percent of the body as a whole. John T. Bakody, M.D., examined the claimant and expressed the opinion that the claimant has a permanent partial impairment of 15 percent of the body as a whole. Medical records indicate that claimant was able to return to regular duties on May 10, 1988.

At the time of his injury claimant worked as a towman. A towman operates a pallet jack in order to move pallets of merchandise from one part of the warehouse to the other. The job involves minimal lifting. The yearly compensation of a towman averages between $30,000.00 to $32,000.00 per year. When claimant returned to work after recovery from the surgery on his back he bid into the position of country truck driver. In this position the claimant drives semi-trailer trucks and makes deliveries to Super Valu affiliated stores in other cities. Depending upon the store, the claimant may or may not have to unload the truck and lift the merchandise in the process. Drivers are assigned a certain route by seniority and, generally speaking, the easier routes with minimal or no lifting go to drivers with more seniority than claimant's. Although the job of country truck driver is more physically demanding than the towman job, the claimant has not missed any work because of his back condition since being released to return to work after the surgery. The claimant is doing a good job for the employer and

is meeting the requirements of the job. Country truck drivers are paid between $35,000.00 to $52,000.00. For the last four weeks prior to the hearing the claimant averaged $761.00 per week during a time of the year when business usually slows down for Super Valu.

Claimant has not sustained an actual reduction in earnings. In fact he is making more money than before the injury because he has bid into a new job. Dr. Carlstrom did not place any specific restrictions on the claimant. He is now working in a job which is more physically demanding than the job he held at the time of his injury without any problems. The employer is happy with the claimant's work performance.

Functional impairment is only one factor in determining industrial disability. Industrial disability may be less than, equal to, or exceed the amount of the functional impairment. Based upon claimant's education, age, qualifications, experience and ability to engage in employment for which he is fitted, the fact that claimant has increased earnings after the injury and the fact that claimant has not been restricted from those jobs for which he was previously fitted, claimant has an industrial disability of 10 percent.

FINDINGS OF FACT

1. Claimant is a 43 year old truck driver and graduated from high school in 1963. He has been employed by Super Valu Stores since 1968.

2. Claimant injured his back on September 20, 1984, while unloading 50-60 pound bags of carrots from a produce bin within a semi-trailer.

3. His condition was diagnosed as a herniated/ruptured disc with nerve root compression and an L-5/S1 laminectomy disc excision was performed.

4. Claimant has a permanent impairment as a result of his September 20, 1984 injury.

5. Claimant was able to return to his employment on February 10, 1988.

6. Dr. Carlstrom, the surgeon who performed the laminectomy on claimant, indicated that claimant did not have physical restrictions when he returned to work.

7. Claimant has not had an actual loss of earnings.

8. Claimant has incurred a 10 percent loss of earning capacity as a result of his injury of September 20, 1984.

CONCLUSIONS OF LAW

Claimant's motion for continuance was properly denied.

As a result of the injury of September 20, 1984, claimant has an industrial disability of 10 percent.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, IT IS ORDERED:

That claimant is entitled to fifty (50) weeks of permanent partial disability benefits at the rate of three hundred eleven and 87/100 dollars ($311.87) per week, with payments commencing May 10, 1988.

That defendants shall pay the accrued weekly benefits in a lump sum and shall receive credit against the award for weekly benefits previously paid.

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

That defendants shall pay the costs of this action including the costs of preparation of the hearing transcript pursuant to rule 343 IAC 4.33.

That defendants shall file an activity report upon payment of this award as required by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 31st day of January, 1991.

Clair R Cramer
CLAIR CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Thomas R. Isaac
Attorney at Law
3213 E 14th St
Des Moines IA 50316

Mr. W. C. Hoffmann
Mr. Richard G. Book
Attorneys at Law
500 Liberty Bldg
Des Moines IA 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SUSANO MEJORADO,	:	
Claimant,	:	File No. 438551
vs.	:	A P P E A L
CATERPILLAR TRACTOR COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILE
FEB 2 6 1991
IOWA INDUSTRIAL COMMISS

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, with the following additional analysis:

Claimant's industrial disability is not affected by the fact that he has previously pursued a workers' compensation claim through the administrative and judicial forums. The "litigiousness" of claimant that the deputy relied upon in part is not a proper factor of industrial disability. However, the remainder of the deputy's decision was based on appropriate factors of industrial disability, and the determination of claimant's industrial disability as 45 percent is affirmed.

Defendant shall pay the costs of the appeal, including the preparation of the appeal transcript.

Signed and filed this 26th day of February, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Michael W. Liebbe
Attorney at Law
116 East 6th St.
P.O. Box 339
Davenport, Iowa 52805-0339

Mr. Larry L. Shepler
Attorney at Law
Suite 102 Executive Square
400 Main Street
Davenport, Iowa 52801

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEAN MOHL,	:	
Claimant,	:	File No. 801704
vs.	:	A P P E A L
IBP, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
JUL 30 1990
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. Although claimant requested a briefing schedule in his notice of appeal, the time for filing briefs is set forth in Iowa Division of Industrial Services Rule 4.28. Neither party filed a brief on appeal. The decision of the deputy is affirmed and is adopted as the final agency action in this case. Defendant's tender of checks to claimant does not toll the accrual of interest on unpaid benefits. Interest is not a penalty. Interest is the beneficial use of money. Defendant had the use of claimant's compensation and pursuant to Iowa Code section 85.30, defendant is ordered to pay claimant interest on unpaid benefits.

Defendant shall pay the costs of the action, except claimant shall pay the costs of the appeal, including the preparaion of the appeal transcript.

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

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Willis J. Hamilton
Attorney at Law
606 Ontario St.
P.O. Box 188
Storm Lake, Iowa 50588

Mr. Harry W. Dahl
Attorney at Law
974 73rd St.
Suite 16
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GRACE NEIL,	:	
Claimant,	:	File No. 756209
vs.	:	A P P E A L
JOHN DEERE COMPONENT WORKS,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

F I L E D
AUG 30 1990
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appealed from an arbitration decision denying claimant benefits for the death of her husband on August 18, 1983. The record on appeal consists of the arbitration decision and joint exhibits A through L. Both parties filed briefs on appeal and claimant filed a reply brief.

ISSUE

The issue on appeal is whether claimant proved that decedent's injury and subsequent death arose out of his employment with defendant?

REVIEW OF THE EVIDENCE

The arbitration decision dated May 10, 1989 adequately and accurately reflects the pertinent evidence and will not be totally reiterated herein.

Decedent was seen by R. V. Corton, M.D., on August 12, 1983, three days prior to decedent's return to work and six days prior to his death. Dr. Corton noted that decedent was heavy, overweight and had a history of myocardial problems. In addition, Dr. Corton noted that decedent looked several years older than his stated age and may require further protection. (Joint exhibit A1)

The temperatures outside on the week of August 15th were above normal and the area where claimant worked was not air conditioned. There were overhead blowers that circulated air throughout the department and doors were open. Employees of the

defendant testified that the conditions in the plant were hotter than normal but not unusual for August.

The evidence surrounding decedent's August 18, 1983 death shows that decedent experienced shortness of breath when he walked from his daughter's car to the defendants' gate on August 17, 1983. Decedent's co-worker testified that claimant went to his work station and sat down. The co-worker did not see the decedent do any work that day, although claimant testified that decedent's shirt was soiled and it appeared that he had been working. After a short time, the co-worker went over to inquire about decedent's health and decedent was instructed to go to an air conditioned area and medical personnel were contacted.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that Paul Neil received an injury on or about August 17, 1983 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Musselman, 261 Iowa 352, 154 N.W.2d 128.

The requirement that the injury or a death "arise out of" the employment relates to the cause and origin of the injury. The "arising out of" requirement is satisfied by showing a causal relationship between the employment and the injury. Sheerin v. Holing Co., 380 N.W.2d 415, 417 (Iowa 1986); McClure, 188 N.W.2d 283, 287. For a cause to be proximate, it must be a substantial factor in bringing about the result, but it need not be the only cause. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

The employer correctly states that the test to determine whether an employee's injury arose out of his employment is based on a causal connection between the conditions under which work was performed and the resulting injury. Briar Cliff College v. Campolo, 360 N.W.2d 91, 94 (Iowa 1984).

An employer takes an employee subject to any active or dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960), and cases cited.

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler, 252 Iowa 613, 106 N.W.2d 591. See also Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934).

ANALYSIS

Claimant bears the burden of proving that the decedent's injury and subsequent death on August 18, 1983 arose out of his employment with the defendants. There must be a casual relationship between decedent's injury and subsequent death and his employment.

Claimant argues that she is entitled to death benefits under the "positional or actual risk" doctrine. In her reply brief, claimant cites the decision of the court of appeals Hanson v. Reichelt. The supreme court has subsequently decided Hanson and adopted "the actual risk rule in workers' compensation cases involving injuries from exposure to the elements." Hanson v. Reichelt, 452 N.W.2d 164, 168 (Iowa 1990). (emphasis added) The court in Hanson clearly limited its holding to cases involving exposure to the elements. Claimant's reliance upon Hanson is misplaced as Hanson involved a death following heatstroke.

The court has laid out the appropriate analysis to determine whether there is a work-related connection between claimant's injury and subsequent death and his preexisting heart condition to entitle claimant to compensation. First, claimant may prove that the "work ordinarily requires heavy exertion which, superimposed on an already-defective heart, aggravates or accelerates the condition, resulting in compensable injury." Sondag v. Ferris Hardware, 220 N.W.2d 903, 905 (Iowa 1974). The court later established that "the comparison is not with this employee's usual exertion in his employment but with the exertions of normal nonemployment life of this or any other person." Campolo, 360 N.W.2d at 94. In the alternative, claimant may prove an "unusually strenuous employment exertion, imposed upon a pre-existing diseased condition, results in a heart injury." Sondag, 220 N.W.2d at 905. Finally, claimant may prove that decedent felt impelled to work after the onset of symptoms and the physical and emotional stress of continuing to work was a factor in worsening decedent's overall heart

condition. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407, 410 (Iowa 1984).

First, claimant proves a compensable injury when it is shown that an instance of unusually strenuous employment exertion imposed on decedent's already fragile cardiac system resulted in decedent's heart attack. Decedent was not under time constraints to complete a project and there were no emergencies at the plant. Decedent was placed on special work status when he returned to work on August 15, 1983 to allow decedent to adjust to work after his long absence and so decedent would not feel pressure to over work.

On August 17, 1983, the decedent's co-worker testified that he did not see decedent perform any work in the hour that he was at his job station. Decedent's supervisor did not find a log sheet of decedent's activities on the morning of August 17, 1983. Claimant testified that the decedent's shirt was dirty indicating that he may have performed some work the morning of August 17, 1989. Even if decedent performed some work, there is no evidence that the work was unusually strenuous. Claimant failed to prove that an unusually strenuous work activity caused decedent's injury and subsequent death.

In determining whether decedent's work required heavy exertion on his already fragile cardiac system it is important to know whether the employment exertion was greater than that of nonemployment life. The court cited 1A Larson Workmen's Compensation Law section 38.83, page 7-172 "that the employment must contribute something substantial to increase risk." Sondag, 220 N.W.2d at 905. (emphasis added)

> The variance between the exertions of normal, nonemployment life of the population is tremendous. It ranges from individuals who perform nothing more strenuous than slowly ascending or descending one or two steps to those individuals who engage in activities such as marathon running. What is normal for a homeowner who mows the lawn and shovels snow may be strenuous in comparison to the nonemployment exertions made by person who resides in an apartment.

Alexander v. Great Plains Bag Corporation, Appeal Decision, October 17, 1989.

While the testimony of defendant's employees clearly establishes that the conditions in the plant prior to decedent's death were hot, the question is whether the heat and humidity at defendant's plant were a substantial factor in causing decedent's death. Decedent started work at 7:00 a.m. and medical personnel responded to a call for help at 8:05 a.m. Decedent was taken to the hospital at 8:35 a.m. The temperatures between 6:00 a.m. and

condition. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407, 410 (Iowa 1984).

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9:00 a.m. was between 78 and 82 degrees. (Joint exhibits J1-J4) There was evidence that a department where car batteries were charged and a welding area were located behind claimant's bay. However, there is no evidence that these areas substantially increased the temperatures in the area.

David Kabel, M.D., testified on behalf of claimant that the extreme heat and humidity that decedent experienced while at work aggravated decedent's preexisting heart condition. However, Dr. Kabel testified that if claimant merely remained outside in the heat and the humidity that he could have aggravated his preexisting heart condition. At his deposition Dr. Kabel testified in response to questions posed by defendant's attorney:

> Q. So it's not the lifting that has anything, it's not that work has anything to do with it?
>
> A. It's any kind of lifting, even of small weights given the right conditions can be potentially detrimental.
>
> Q. That same statement would hold true at home, any place?
>
> A. Yes, that's right.
>
> Q. So if his activity at the job were no different than normal activity people engage in off work, off the job, your opinion wouldn't change? It was that activity and not related specifically to the job, would it?
>
> A. Yes, that would be correct.
>
> ....
>
> Q. Had he done anything substantial at home it would have happened the same?
>
> A. Possibly.
>
> Q. So then it would seem clear if he had a similar episode before he came to work that his work that day didn't cause it?
>
> A. Yes, that would be a reasonable assumption.

(Deposition David Kabel, M.D., pages 14, 22-23.)

At the arbitration hearing, Dr. Kabel testified:

Q. So the fact that it may have been hotter indoors than out or the very same temperature, that does not change your opinion, does it?

A. No.

Q. It was still the heat and the humidity that led to the cause of his death?

A. Yes.

(Arbitration earing p. 202.)

The autopsy report determined that the cause of decedent's death was attributable to acute myocardial infarction, secondary to severe atherosclerosis of the left anterior descending coronary artery. (Joint exhibit D2.) Decedent's arteries were 90 percent blocked by a build up of cholesterol deposits. "Once coronary artery disease has become sufficiently severe, a death that results from relatively minor exertion is not compensable since the exertion is no greater than the exertion of normal, nonemployment life." Alexander v. Great Plains Bag Corporation, Appeal Decision, October 17, 1989.

Finally, claimant attempted to present evidence that decedent continued to work after the onset of his symptoms and this work aggravated his fragile cardiac condition. Decedent's supervisor at the time of his death testified that decedent would overwork himself on occasions. In addition, there was evidence that decedent returned to work in order to maintain his current benefit package. However, unlike the claimant in Sumner, decedent was not impelled to work. Decedent was placed on other work by his supervisor so he would not feel the pressure to over work. Claimant failed to prove that decedent continued to work after the onset of his symptoms and that the work aggravated his fragile cardiac system

The conditions at the plant on August 17, 1983 were not ideal. The bay where decedent worked was hot and not air conditioned. Yet, there is nothing in the record that the work conditions or decedent's work on August 17, 1983 subjected decedent to a greater risk of injury or harm from his preexisting condition than would have been found in normal, nonemployment life. Claimant failed to prove that the injury and subsequent death of her husband arose out of his employment with defendants.

FINDINGS OF FACT

1. On August 15, 1983, decedent's heart was diseased with severe atherosclerosis.

2. On August 17, 1983, decedent suffered a myocardial infarction.

3. The exertion level which produced that myocardial infarction is not shown to have exceeded the exertions of normal nonemployment life of decedent or of any other person.

4. The evidence fails to demonstrate that decedent's work ordinarily required heavy exertions which aggravated, or accelerated, clairant's preexisting heart condition.

5. The evidence fails to demonstrate that decedent engaged in any instance of unusually strenuous employment excretion at or about the time of his attempt to return to work in August 1983.

6. Decedent's myocardial condition was so fragile that exertions which were within range of normal nonemployment life were sufficient to produce a myocardial infarction injury and death.

7. The evidence fails to demonstrate that decedent was compelled to continue work after the onset of symptoms.

CONCLUSION OF LAW

Claimant has failed to prove that decedent sustained an injury and subsequent death on August 18, 1983 arose out of his employment with the defendants.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

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

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

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert C. Andres
Attorney at Law
First National Building, Sixth Floor
P.O. Box 2634
Waterloo, Iowa 50704-2634

Mr. John W. Rathert
Attorney at Law
620 Lafayette Street
P.O. Box 178
Waterloo, Iowa 50704

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM E. NESBIT, SR., Claimant, vs. MUSCATINE POWER & WATER, Employer, and U S F & G, Insurance Carrier, Defendants.	File No. 761994 R U L I N G

FILED
APR 30 1991
IOWA INDUSTRIAL COMMISSION

The record in this matter shows that the arbitration hearing was held on November 27, 1990. At the arbitration hearing, claimant sought to introduce a report by Dr. William Verduyn. The deputy excluded the exhibit as untimely.

An arbitration decision was filed on March 20, 1991. Claimant filed an appeal on April 1, 1991. On April 18, 1991 claimant filed an application to present additional evidence, and seeks to admit the same report of Dr. Verduyn into the record as part of the appeal. Defendants have filed a resistance.

Rule 343 IAC 4.28 provides in relevant 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.

Claimant has not established that the evidence in question could not with reasonable diligence have been discovered and produced at the hearing. Claimant cannot circumvent the deputy's ruling excluding the exhibit by attempting to supplement the record on appeal with evidence that should have been placed into the record prior to the arbitration hearing in a timely fashion.

The appeal process is for the purpose of determining whether or not the decision of the deputy was proper based on the

evidence presented and not whether or not it should have been different if different evidence had been presented.

Accordingly, claimant's request for the taking of additional evidence is denied.

Signed and filed this 30th day of April, 1991.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. David W. Newell
Attorney at Law
323 East Second St.
Muscatine, Iowa 52761

Mr. John E. Wunder
Attorney at Law
210 Cedar Street
Muscatine, Iowa 52761

Mr. Mark D. Cleve
Mr. John D. Stonebraker
Ms. Patricia Rhodes Cepican
Attorneys at Law
P.O. Box 2746
Davenport, Iowa 52809

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DWIGHT L. NICHOLS, Claimant, vs. MAHARISHI INTERNATIONAL UNIVERSITY, Employer, and BITUMINOUS CASUALTY CORP., Insurance Carrier, Defendants.	File No. 878455 A P P E A L D E C I S I O N

FILED
JUL 30 1990
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. The decision of the deputy is affirmed and is adopted as the final agency action in this case.

Claimant shall pay the costs of the appeal, including the preparation of the appeal transcript.

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

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. J. W. McGrath
Attorney at Law
4th & Dodge
Keosauqua, Iowa 52565

Mr. William D. Scherle
Attorney at Law
Eighth Floor
Fleming Building
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY A. NORTHRUP, Claimant, vs. TAMA MEAT PACKING, Employer, and RANGER INSURANCE, Insurance Carrier, and THE SECOND INJURY FUND, Defendants.	File No. 724196 A P P E A L D E C I S I O N

FILED
MAR 1 9 1990
IOWA INDUSTRIAL COMMI

STATEMENT OF THE CASE

Defendant Second Injury Fund appeals from an arbitration decision awarding claimant second injury fund benefits based on an industrial disability of 60 percent and an impairment of 12 percent of the left arm and an impairment of 14 percent of the right arm.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 12; and the agency files on file numbers 690703 and 724196. 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 so, the amount of the benefits.

REVIEW OF THE EVIDENCE

The arbitration decision filed March 27, 1989 adequately and accurately reflects the pertinent evidence and it will not be

reiterated herein. Additional evidence will be discussed as necessary in the analysis and the findings of fact.

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

The issues to be discussed are whether claimant is entitled to second injury fund benefits and, if so, the amount of the benefits. Several matters must be resolved in deciding the main issue. The first matter to be resolved is Second Injury Fund's argument that it is entitled to credit for the disability of both scheduled injuries. Second Injury Fund is correct and Neelans, 436 N.W.2d 355, so held. It would appear that the deputy's failure to give credit for both injuries was due to oversight. (The deputy gave credit for only the first of two injuries).

The second matter to be resolved is whether the amount of credit for the injuries should be the amount of impairment that the employer and claimant agreed to in the settlement agreements and commutations. Second Injury Fund argues that it should be given credit for the amount of settlement agreements and commutations entered into between the employer and the claimant. Claimant responds by arguing that the Second Injury Fund is not bound by the settlement agreements and commutations. In order to discuss this matter certain facts are necessary.

Agency records in this matter reveal the following. In file number 690703 claimant alleged an injury to his left arm on December 19, 1981. An agreement for settlement and full commutation was filed in that matter. The full commutation was approved by a deputy industrial commissioner on September 26, 1988. The basis of the agreement for settlement and commutation was that the employer was to pay claimant for a 100 percent impairment of the left arm. In file number 724196 claimant alleged an injury to his right arm on January 24, 1983. An agreement for settlement and full commutation was filed in that matter. The full commutation was approved by a deputy industrial commissioner on September 26, 1988. The basis for settlement and commutation was that the employer was to pay claimant for a 46 percent impairment of the right arm. In both matters claimant was represented by the same counsel as in the current matter.

Claimant is right that Second Injury Fund is not bound by the settlement agreements and commutations. Second Injury Fund is not bound by these agreements because the employer and the claimant could reach an agreement that would be detrimental to the Second Injury Fund. See Johnson v. George A. Hormel & Co., (Appeal Decision, June 21, 1988).

However, a full commutation presumes that claimant's disability can be and has been definitely determined. See McCollough v. Campbell Mill & Lumber Co., 406 N.W.2d 812 (Iowa App. 1987). A full commutation is binding on claimant. A claimant should not be allowed to enter into a settlement and full commutation fixing the amount of disability and then later

argue in seeking second injury fund benefits that the disability is something less than the basis of the settlement and commutations. To hold otherwise would be to give claimant a windfall at the expense of the Second Injury Fund. The Second Injury Fund should receive credit for the amount of impairment approved in the settlement agreement and commutations.

The next matter to be resolved is the extent of claimant's cumulative industrial disability. In order to make this determination it is necessary to determine the actual impairment of each of claimant's arms. There are numerous ratings in the records by various physicians. The rating of Carl O. Lester, M.D., orthopedic surgeon, cannot be relied upon. The rating did not use the AMA guidelines, was made upon an examination only, appears to be influenced by an earlier rating by Arnis B. Grundberg, M.D., who later lowered his rating, and is inconsistent in that it gives a 50 percent "disability" rating for both the upper extremity and the left hand. Dr. Grundberg gave impairment ratings of 20 percent of the left hand and 25 percent of the right hand on February 28, 1984 but he expected the impairments to improve with time. Dr. Grundberg gave no subsequent ratings. His ratings cannot be relied upon because he thought claimant would improve so there is no way of knowing what his "final" ratings would be. This is particularly true in light of the fact that he had previously given a 50 percent rating of the left hand and expected further improvement with time. Claimant was also examined by John R. Walker, M.D., who apparently only saw claimant one time in anticipation of litigation. Dr. Walker based his opinions on the amount of nerve injury but his standard for determining the impairment is not given and his opinion can be given little weight.

Claimant was evaluated by William W. Eversmann, Jr., M.D., who conducted a series of tests to rate claimant's impairments. Although he initially gave claimant higher impairment ratings, he subsequently gave impairment ratings (January 13, 1984) which he stated were consistent with the guidelines published by the American Medical Association and the American Society for Surgery of the Hand. Dr. Eversmann's ratings were 20 percent of the left upper extremity and ten percent of the right upper extremity. William F. Blair, M.D., an orthopedic surgeon from the University of Iowa Hospitals and Clinics, was the primary treating physician. As the deputy correctly noted Dr. Blair's qualifications and past experiences in a teaching hospital are impressive and he has had the most clinical experience with claimant. Dr. Blair's ratings were 14 percent of the right upper extremity and 12 percent of the left upper extremity (Joint Exhibit 11, page 23, lines 16-22). His ratings and Dr. Eversmann's later more reliable ratings were consistent. The ratings of Dr. Blair and Dr. Eversmann are used to conclude that claimant has an impairment of

the left upper extremity of 12-20 percent and an impairment of the right upper extremity of 10-14 percent.

Claimant was born July 21, 1953 and was 29 years old at the time of the injury on January 24, 1983. He has impairments of each upper extremity discussed above. Claimant has a high school education and potentially he is retrainable. The vocational rehabilitation report (joint exhibit 6) indicates that claimant has normal intelligence. Because of loss of strength and loss of feelings in his hands claimant is unable to utilize his past employment skills. Claimant's wages at the time of the injuries was $6.20 per hour and subsequent jobs he has had have paid $3.65 per hour. When all relevant factors are considered claimant has suffered a cumulative industrial disability of 50 percent as a result of work injuries on December 19, 1981 and January 24, 1983.

Second Injury Fund liability is claimant's cumulative industrial disability less the credit for the benefits of amount of impairment agreed to by claimant in the settlement agreements and commutations. The benefits of claimant's cumulative industrial disability is 250 weeks (500 weeks x 50%). The credit for benefits of the left arm is 250 weeks (250 weeks x 100%) and the credit for benefits of the right arm is 115 weeks (250 weeks x 46%). The total credits from the two injuries (365 weeks) exceeds the benefits of the cumulative industrial disability (250 weeks). Therefore, Second Injury Fund has no liability in this matter.

FINDINGS OF FACT

1. Settlement agreements and commutations approved benefits to claimant for a 100 percent impairment to the left arm and 46 percent to the right arm.

2. Claimant sustained an impairment of 12-20 percent to his left arm from a work injury on December 19, 1981 and an impairment of 10-14 percent to his right arm from a work injury on January 24, 1983.

3. Claimant was born July 21, 1953 and was 29 years old at the time of the work injury on January 24, 1983.

4. Claimant has a high school education and normal intelligence.

5. Claimant has had a loss of strength and loss of feelings in his hands.

6. Because of his condition claimant is unable to utilize his past employment skills which has been manual labor.

7. Claimant has had a loss of wages.

8. Claimant's cumulative loss of earning capacity as a result of injuries on December 19, 1981 and January 24, 1983 is 50 percent.

CONCLUSION OF LAW

Claimant has not proved entitlement to benefits from Second Injury Fund.

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

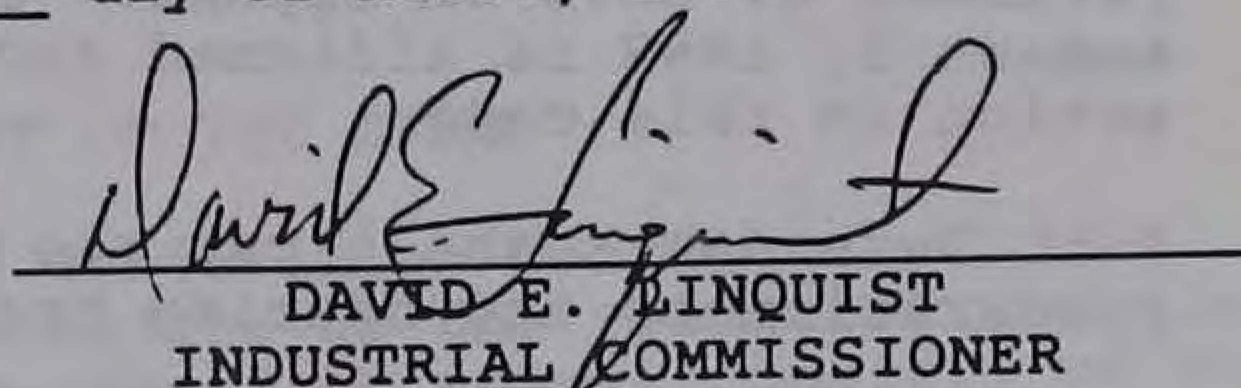
ORDER

THEREFORE, it is ordered:

That claimant take nothing from this appeal.

That defendant, Second Injury Fund, pay the cost of this action including transcription of the arbitration hearing.

Signed and filed this 19th day of March, 1990.



DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Thomas M. Wertz
Attorney at Law
4089 21st Avenue SW
Suite 114
Cedar Rapids, Iowa 52404

Mr. W. C. Hoffmann
Mr. Joseph S. Cortese II
Attorneys at Law
418 6th Ave., Suite 500
Des Moines, Iowa 50309-2421

Mr. Greg Knoploh
Assistant Attorney General
Tort Claims Division
Hoover State Office Bldg.
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WAYNE PARKER, Claimant, vs. CASSADY REFRIGERATION, Employer, and IOWA CONTRACTORS WORKERS' COMPENSATION GROUP, Insurance Carrier, Defendants.	:	File No. 758539 A P P E A L D E C I S I O N

FILE
JUN 28 1991
IOWA INDUSTRIAL COMM

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 filed August 3, 1989 is affirmed and is adopted as the final agency action in this case.

Defendants shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 28th day of June, 1991.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Toby Swanson
Attorney at Law
1922 Ingersoll Ave., Ste B-1
Des Moines, Iowa 50309

Ms. Ann M. Ver Heul
Mr. John A. Templer, Jr.
Mr. Dean C. Mohr
Attorneys at Law
3737 Woodland, Ste 437
West Des Moines, Iowa 50265

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROSE A. PEDERSEN, Claimant, vs. EVENTIDE LUTHERAN HOME FOR THE AGED, Employer, and NORTHWESTERN NATIONAL INS., Insurance Carrier, Defendants.	File Nos. 826938 812431 A P P E A L D E C I S I O N

FILED
MAR 23 1990
IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

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

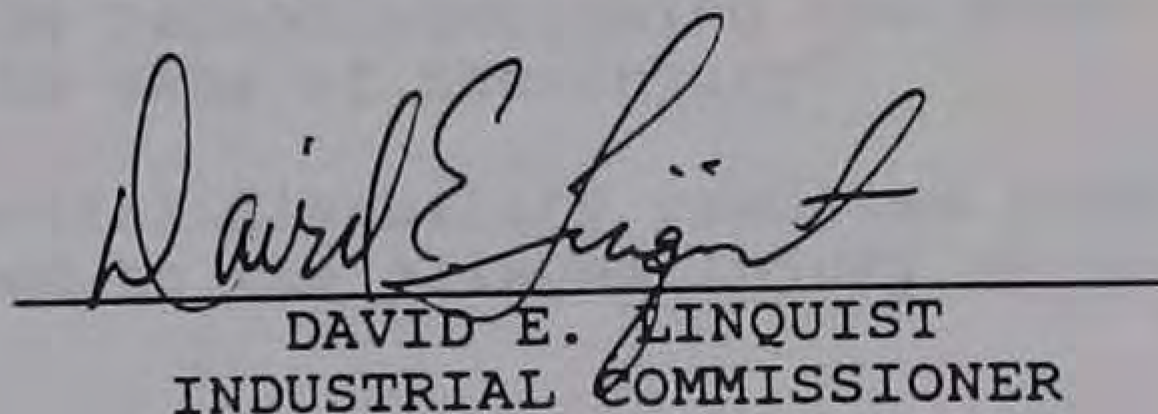
That all accrued benefits are to be paid in a lump sum.

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
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Stephan M. Engelhardt
Attorney at Law
P O Box 217
Denison, Iowa 51442

Mr. Michael R. Mundt
Attorney at Law
1321 Broadway
Denison, Iowa 51442

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ESTHER M. PHILLIPS, Claimant, vs. IOWA METHODIST MEDICAL CENTER, Employer, and AETNA CASUALTY, Insurance Carrier, Defendants.	File No. 765826 A P P E A L D E C I S I O N FILED JUL 30 1990 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant running healing period benefits and medical expenses.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 6. Both parties filed briefs on appeal. Defendants' reply brief was filed after an extension to file the brief had been denied and the reply brief was not considered.

ISSUE

The defendants state the issues on appeal are:

I. Do the facts and circumstances in this case establish an open healing period continuing now more than five years after the date of the injury?

II. What permanent partial disability resulted from and is causally connected to the alleged injury of May 21, 1984?

III. Should the Defendants be required to pay for clearly unauthorized medical care, once they have authorized medical treatment and instituted indemnity payments?

REVIEW OF THE EVIDENCE

Claimant was born April 21, 1942 and worked at Iowa Methodist Medical Center as a housekeeper from November 30, 1981 through August 31, 1984 at which time she voluntarily quit. Claimant has not been employed since that time although she does maintain a household with her husband. Claimant testified that she did not provide a reason for quitting Iowa Methodist Medical Center but admitted one of the reasons was to care for her ill mother.

The facts surrounding claimant's May 21, 1984 work injury are not in dispute. Claimant testified that she bumped her lower left extremity and later in the afternoon she again injured herself when furniture stacked in her work area fell on her lower left extremity. Although claimant began to limp, she continued to work and following work went to the Iowa Methodist Medical Center emergency room. Claimant's physician then took her off work for three weeks and returned her to half days on May 30, 1984. On June 25, 1984, claimant was released to return to full duty by her treating physician and orthopedic surgeon, Joe Fellows, M.D. Claimant continued to have pain and discomfort in her arch area and Dr. Fellows prescribed an arch support.

Claimant stated that her lower left extremity never returned to normal and numbness and swelling persisted between August 1984 and June 1987. Claimant sought treatment and was referred back to Dr. Fellows on June 2, 1987. Dr. Fellows referred claimant to orthopaedic surgeon, A. B. Grundberg, M.D. After a positive EMG test, Dr. Grundberg diagnosed tarsal tunnel syndrome as a result of the May 21, 1984 work injury. Surgery was performed on June 25, 1987. Dr. Grundberg provided follow up care and released claimant to return to housekeeping type duties on August 17, 1987. (Joint exhibit 1, Page 13).

Claimant returned to Dr. Grundberg on February 2, 1988 with persistent symptoms and an EMG was ordered. The EMG showed that claimant's left tarsal tunnel syndrome had been relieved. (Jt. ex. 1, p. 14). Claimant was advised that sometimes surgery may not relieve all problems and her residual discomfort should improve with time. No further treatment was prescribed besides use of tylenol for pain.

In an office note dated March 29, 1988, Dr Grundberg noted that he discussed claimant's condition with counsel for both parties. Dr. Grundberg stated that he told claimant that "she would improve anywhere from 6 to 18 months from now and eventually would finally end up with a five percent permanent impairment due to permanent nerve deficit consisting of mild pain and weakness in her ankle and foot." (Jt. ex. 1, p. 14). In a letter dated June 27, 1988 addressed to defendants' attorney, Dr Grundberg again opined: "[h]er permanent impairment is 5% in her left lower extremity due to residuals from tarsal tunnel syndrome. These residuals consist of mild pain, mild weakness in her ankle and foot." (Jt. ex. 1, p. 10).

Claimant was evaluated by orthopaedic surgeon, Peter Wirtz, M.D., on September 10, 1987. According to Dr. Wirtz claimant had reached maximum healing at that time. Dr. Wirtz noted that claimant's "x-ray, AP, Lateral, weightbearing (sic) of foot shows normal bony anatomy and calcification." (Jt. ex. 1, p. 29). He recommended treatment of continuing on ambulatory status with improvement in six to nine months and concluded that claimant's present restrictions include limitations of standing, walking and lifting. Dr. Wirtz agreed with the permanent partial impairment rating of Dr. Grundberg. Dr. Wirtz likewise released claimant to housekeeping type of duties.

Claimant, at the request of her attorney, went to orthopaedic surgeon Martin S. Rosenfeld, D.O., on November 24, 1987 for an evaluation. Dr. Rosenfeld opined that claimant had residual sinus-tarsi syndrome. X-rays were taken which revealed no gross bony abnormalities. Dr. Rosenfeld opined that a repeat EMG and further treatment, such as steroids, intense physical therapy or chemical sympathectomy should be carried out. (Jt. ex. 1, p. 3). Dr. Rosenfeld opined that claimant was still in healing period and that her problems relate back to May 21, 1984 injury. Dr. Rosenfeld goes on to say that: "I do not feel that with the amount of discomfort that she has in her feet as well as the swelling and problems that she would be able to do an occupation that required her to be on her feet for any significant amount of time." (Jt. Ex. 1, p. 3).

On March 1, 1988 claimant scheduled her own appointment with Dr. Rosenfeld complaining of persistent pain and problems walking. (Jt. ex. 1, p. 7). Claimant received physical therapy from March 1, 1988 through June of 1988 upon orders from Dr. Rosenfeld. In a report dated June 16, 1988, Dr. Rosenfeld stated that claimant is making progress and opined that she has not reached maximum healing from her treatment. Dr. Rosenfeld opined that:

> Esther's permanent impairment rating is very difficult due to the fact that her permanent physical impairment is 25-30% of the lower extremity, but her functional impairment I feel is much higher due to the fact that she cannot stand or walk on her foot or ankle for any significant amount of time.

(Jt. ex. 1, p. 1).

At the arbitration hearing, in response to a question posed by claimant's attorney about her condition from the fall of 1984 until June of 1987, claimant testified: "[w]hen I would get up, I couldn't get my normal work done, and as I like walked during the day, I had this numbness in my foot, and then it would swell up, but I thought it was arthritis, I guess." (Transcript, p. 10). Claimant testified that she was getting better with physical therapy but had failed to improve as she wanted to and that treatment gives her peace. (Tr., p. 16). When asked what type

of symptoms she had at the time of hearing, claimant testified that she had a lot of pain. (Tr., p. 17). Finally, when claimant was asked whether she could perform her prior duties as housekeeper she testified that she could not due to her pain. (Tr., p. 20).

Claimant testified that all bills from Dr. Grundberg and Dr. Fellows were paid by Iowa Methodist Medical Center. Claimant also testified that when she sought treatment from Dr. Rosenfeld, that she had problems with her medical bills being paid. Claimant discontinued physical therapy apparently upon receiving notice from defendants that Dr. Rosenfeld's care and the physical therapy ordered by him was not authorized.

Defendants in their answer to claimant's petition denied liability for claimant's work injury due to lack of information. Defendants paid all medical expenses related to claimant's treatment prior to claimant's filing of her original notice and petition. On the hearing assignment order, filed February 17, 1988, hearing issues included arising out of and in the course of, causal connection, nature and extent of benefits and entitlement to medical benefits. On July 11, 1988, defendants amended their answer to admit liability for claimant's work injury. Defendants notified claimant on July 11, 1988 that the only authorized physicians were Dr. Grundberg and Dr. Fellows.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 21, 1984 is causally related to the disability on which claimant now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. Sourpuss v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id., at 907. Further, the weight to

be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Iowa Code section 85.34(2). Baton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

ANALYSIS

The first issue on appeal, defendants contend that the treatment claimant received from Dr. Rosenfeld was unauthorized and they are not obligated to pay for those medical expenses. An agency decision is relevant in that it held "that it is inconsistent to deny liability and the obligation to furnish (medical) care on one hand and at the same time claim a right to choose the care." Mason v. Thermo-Gas, (Appeal Decision, July 28, 1989). In their answer, defendants denied liability for claimant's work injury and liability was designated as an issue on the hearing assignment order. Defendants cannot deny liability and assert the right to choose medical care. Defendants later admitted liability in their amended answer. Therefore, defendants are liable for medical benefits during the time they denied liability.

The second issue is healing period benefits. The deputy in his proposed decision found that claimant reentered healing period on March 1, 1988 when she began to receive treatment from Dr. Rosenfeld and that claimant was entitled to running healing period benefits. There is a lack of medical evidence to support the conclusion that claimant is entitled to addition healing period benefits. Therefore, claimant failed to prove entitlement to healing period benefits beginning on March 1, 1988.

Claimant has the burden of proving entitlement to healing period benefits. Healing period for an injury may terminate and then begin again. Lawyer & Higgs, Iowa Workers' Compensation -- Law & Practice, section 13-3. Willis v. Lehigh Portland Cement Company, I-2 Iowa Industrial Commissioner Decisions 485 (1984); Riesselman v. Carroll Health Center, III Iowa Industrial Commissioner Report 209 (Appeal Decision 1982); Clemens v. Iowa Veterans Home, I-1 Iowa Industrial Commissioner Decisions 35 (1984). In the case sub judice, claimant must prove that healing period has started anew in order to meet her burden of proof as to entitlement to healing period benefits.

Claimant received a permanent impairment rating in both March 1988 and June 1988 and was released to return to housekeeping type duties by Dr. Grundberg. In addition, Dr. Wirtz and Dr. Rosenfeld provided a permanent impairment rating of

claimant's lower left extremity. In an appeal decision, this agency has held that:

> Claimant's healing period terminated when Dr, Hawkins rated him as having a 15 percent permanent body as a whole impairment on October 25, 1983. This rating indicates that Dr. Hawkins did not expect claimant to improve and as such meets the criteria of section 85.34(1) and Thomas v. William Knudson & Sons, Inc., 349 N.W.2d 124 (Iowa App. 1984). The finding of a termination of healing period necessarily precludes the discussion of a running award.

Hoskins v. Quaker Oats, Vol. 2, No. 1, State of Iowa Industrial Commissioner Decisions, 181, 185 (Appeal Decision, July 18, 1985). In order to prove entitlement to benefits, claimant has the burden of proving that healing period started up again.

Upon review of the evidence, it is clear that claimant's complaints have not changed since injury. Claimant noted in her appeal brief that claimant's medical records show that she has been symptomatic since May 1984. Claimant testified that she has never been free from pain since her May 21, 1984 work injury. "[C]laimant's complaints of continued pain without objective evidence neurological impairment or physical trauma are not sufficient to sustain a running award for healing period benefits..." Dietz v. Iowa Meat Processing, File No. 757109, (Appeal Decision, November 12, 1986). Claimant's pain without additional medical evidence fails to satisfy claimant's burden of proof as to entitlement to healing period benefits.

In addition, it appears that the treatment claimant received from Dr. Rosenfeld's was maintenance in nature designed to relieve claimant's persistent complaints of pain rather than to improve functional impairment. In Dr. Rosenfeld's January 4, 1988 letter, he noted that as a result of the "amount of discomfort"... as well as the "swelling and problems" that he did not feel that claimant would be able to do her occupation. On the physical therapy report dated June 19, 1988 it is noted that claimant's foot felt much better. (Jt. ex. 1, pp. 3,6). An appeal decision by this agency held:

> That a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond that point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition.

Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112, 114 (1982). Merely because the treatment prescribed

by Dr. Rosenfeld caused claimant's pain to subside does not prove entitlement to healing period benefits.

Claimant failed to prove by the greater weight of the evidence entitlement to healing period benefits beginning on March 1, 1988. Medical treatment designed to relieve claimant's persistent complaints of pain does not prove entitlement to additional healing period benefits. Claimant failed to carry her burden as to entitlement to healing period benefits.

The nature and extent of claimant's injury was not determined by the deputy. Therefore, the claim will be remanded to the deputy to determine the nature and extent of claimant's injury to her lower left extremity based upon the record.

FINDINGS OF FACTS

1. As stipulated, on or about May 21, 1984 claimant suffered an injury to her lower left extremity which arose out of and in the course of her employment with Iowa Methodist Medical Center.

2. Claimant was off work from May 22, 1984 through June 24, 1984 when she was released by Dr. Fellows to return to her employment as housekeeper for Iowa Methodist Medical Center.

3. Claimant experienced continued pain and swelling in her lower left extremity and was referred to Dr. Grundberg. Claimant was diagnosed with left tarsal tunnel syndrome as a result of her work injury of May 21, 1984. On June 25, 1987, claimant had surgery to relieve her left tarsal tunnel syndrome.

4. Claimant had tarsal tunnel surgery on June 2, 1987 and was released to return to housekeeping type duties by Dr. Grundberg on August 17, 1987.

5. On March 29, 1988, Dr. Grundberg provided claimant permanent impairment rating to the lower left extremity due to residuals from tarsal tunnel syndrome. The residuals include mild pain, mild weakness in her ankle and foot.

6. On September 10, 1987, Dr. Wirtz evaluated claimant and provided claimant a permanent impairment rating of the lower left extremity.

7. On June 16, 1988, Dr. Rosenfeld provided claimant a permanent physical impairment rating of the lower left extremity.

8. On March 1, 1988, claimant sought treatment from Dr. Rosenfeld to relieve her persistent complaints of pain. Treatment from Dr. Rosenfeld helped to relieve claimant's complaints of pain.

9. Defendants up until July 11, 1988 denied liability for claimant's work injury. On July 11, 1988 defendants amended their answer to admit liability at which time they notified claimant that Dr. Rosenfeld was not an authorized physician and that the only authorized physicians were Drs. Grundberg and Fellows.

CONCLUSIONS OF LAW

Claimant failed to prove by the greater weight of the evidence entitlement to healing period benefits beginning on March 1, 1988.

Defendants denied liability for claimant's work injury up until July 11, 1988. Claimant is entitled to seek medical care of her own choice and defendants are liable for reasonable medical care up until July 11, 1988 when defendants amended their answer to admit liability.

WHEREFORE, the decision of the deputy is affirmed and modified in part and remanded to determine the nature and extent of claimant's injury to her lower left extremity.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant the medical expenses listed in the prehearing report except for four and 20/100 dollars ($4.20). These expenses total one thousand seven hundred forty-one and 78/100 dollars ($1,741.78). Claimant will be reimbursed only if she has paid those expenses, otherwise defendant is ordered to pay the provider directly.

That defendants shall pay the cost of this proceeding including the cost of transcription of the arbitration decision.

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

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

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. James R. Lawyer
Mr. Tom Drew
Attorneys at Law
West Towers Office
1200 35th St., Ste. 500
West Des Moines, Iowa 50265

Mr. Hugh J. Cain
Mr. Glenn Goodwin
Attorneys at Law
4th Floor, Equitable Bldg.
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VIRGINIA PUTZIER, Claimant, vs. WILSON FOODS CORPORATION, Employer, Self-Insured, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 804582/835165 A P P E A L D E C I S I O N

FILED
MAY 24 1991
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant Second Injury Fund of Iowa appeals from an arbitration decision awarding claimant Second Injury Fund benefits as the result of injuries on September 14, 1985 and April 2, 1986.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 11. Both parties filed briefs on appeal.

ISSUES

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

A. Whether The Fund Applies Where There Is No Permanent Impairment Relative To The Claimed First Injury Of 9/14/85.

B. Whether The Fund Applies Where Claimed Second Injury Has No Permanent Impairment.

C. Whether The Fund Applies Where There Is A Bilateral Simultaneous Second Injury To Both Hands, Including The One That Was The Subject Of The Claimed First Injury.

D. Whether The Fund Applies Where Neither First Nor Second Injury Constitutes A Substantial Handicap And Where There Is No Industrial Disability.

E. Whether The Fund Applies Where Any Industrial Disability Is Attributable Solely To The Simultaneous, Bilateral Second 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, with the additional authority cited in the analysis, below.

ANALYSIS

Initially, the Second Injury Fund argues that the Second Injury Fund Act does not apply where there is no permanent impairment relative to the claimed first injury of September 14, 1985. The Fund correctly cites Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978), for the proposition that the prior loss must be permanent.

In this regard, the Fund relies exclusively on the evidence from Scott B. Neff, D.O., which rated claimant's right hand injury as having no permanent functional impairment. However, the Fund disregards the fact that the record contains the evidence of two other physicians, namely David G. Paulsrud, M.D., and Horst G. Blume, M.D., a neurosurgeon. Dr. Paulsrud rated claimant's right hand as having a permanent impairment of five percent as a result of her 1985 injury. Dr. Blume rated claimant's right hand as eight percent permanent partial impairment. Dr. Paulsrud was claimant's treating physician for this injury. Dr. Neff observed the scarring and residual effects of claimant's right hand injury, but did not assign a rating. Dr. Paulsrud repaired the lacerations to claimant's right hand, and thus had an opportunity to make an internal examination of claimant's condition. Taken as a whole, the medical evidence shows that as a result of her 1985 injury, claimant had at least some degree of permanent impairment of the right hand. The requirement that the prior loss be permanent is met.

The Fund also urges the evidence shows that the claimed second injury resulted in no permanent impairment. On September 11, 1986, an electromyography revealed that claimant suffered from mild carpal tunnel syndrome bilaterally. On October 1, 1986, Dr. Neff found carpal tunnel syndrome of the left hand, and

performed a surgical release on the left hand on October 10, 1986, as well as a trigger finger release of the left long finger. On September 28, 1987, Dr. Blume found that claimant had a permanent partial impairment of five percent of the left wrist. On February 18, 1988, claimant was found to lack two to five degrees of extension in the left long finger. The only medical evidence contradicting Dr. Blume's opinion is the February 18, 1988 findings of Dr. Neff, which found that inadequate stretching of the scar from the left trigger finger release resulted in the loss of extension. Dr. Neff's examination gave claimant an "extremely minimal rating because of the almost normal motion of both of her hands." It is noted that although Dr. Neff's rating is "minimal," this acknowledges some degree of permanency, and "almost normal" range of motion is something less than normal range of motion. Thus, even without giving weight to Dr. Blume's five percent rating of impairment, claimant has carried her burden to show that her second injury has resulted in permanency.

Next, the Second Injury Fund argues that the Fund does not apply where there is a bilateral simultaneous second injury to both hands, including the one that was the subject of the claimed first injury. The Fund argues that since Iowa Code section 85.64 speaks of previously losing the use of "one" hand, arm, etc., and the subsequent loss of "another" member, that claimant does not qualify for Second Injury Fund benefits because she has, in her second injury, lost the use of two members, i.e., both arms.

The Fund is correct in its assertion that liability is not established when the loss or loss of use of the member or organ is the same member in both the first and second injury. Anderson, 262 N.W.2d 789. However, that is not the situation in this case.

Claimant's second injury consists of a cumulative injury resulting in carpal tunnel syndrome bilaterally. The Second Injury Fund argues that if the second injury affected the same member injured by the first injury, in this case the right hand, then claimant is not entitled to Fund benefits even if another member, in this case the left hand, is also affected by the second injury. The Anderson case addresses a factual situation where the same member that was affected by the first injury is again affected by the second injury, and no other member is affected by the second injury. The present case is distinguishable in that another member is affected by the second injury, even though the prior member is also again affected. It would not be in keeping with the purposes and intent of the Second Injury Compensation Act to deny claimant recovery for her second injury merely because it also affected another member as well. As long as "another" member is affected by the second injury, the requirements of the act are met. This aspect of Second Injury Fund entitlement has been established by claimant.

The Fund next argues that claimant has failed to show that either the first or second injury constitutes a substantial handicap, and claimant has failed to show any industrial disability. The Fund points out that even Dr. Blume's ratings of five percent and eight percent are not "substantial" numerically. The Fund argues that claimant was able to return to work, and thus did not suffer a "substantial" handicap. However, there is no requirement that the prior loss be total, or even substantial. Second Injury Fund v. Neelans, 436 N.W.2d 355, 356 (Iowa 1989). There is no minimum amount of loss of the scheduled members to qualify for Second Injury Fund benefits. Second Injury Fund v. Braden, 459 N.W.2d 467 (Iowa 1990).

Finally, the Fund argues that the Second Injury Fund Act does not apply where any industrial disability is attributable solely to the simultaneous, bilateral second injury. The Fund asserts that the employer at the time of the second injury should be required to pay for the full industrial disability caused by the second injury, even where the second injury is limited to a scheduled member.

Again, recent decisions of the Iowa Supreme Court refute the Fund's arguments. "If the second scheduled injury, standing alone, does not amount to a disability of the body as a whole, we believe a fair reading of Mich Coal and section 85.64 limits the liability of the employer to payment of the scheduled amount attributed to the last injury." Neelans, 436 N.W.2d 355, 358.

"...[T]he clear import of Neelans is that where both injuries are scheduled, that is, neither is itself an injury to the body as a whole, the Fund is liable for the entire amount of the industrial disability minus the two scheduled amounts. Only where one of the injuries is to the body as a whole must there be an apportionment." Braden, 459 N.W.2d 467, 471.

The Fund argues that by compensating an injured worker industrially when both injuries are to scheduled members, the result is that a claimant is compensated industrially when otherwise his injuries would be compensated only functionally. Regardless of the Fund's disapproval of this result, this appears to be the intent of the legislature in setting up the Second Injury Compensation Act. In this case, the second injury did not extend to the body as a whole, and thus no industrial disability results from the second injury. Claimant's industrial disability results from the cumulative effect of her two injuries. This is the disability the Second Injury Fund was set up to compensate. The analysis and findings of fact by the deputy in regards to the functional impairments to claimant's right hand, left hand, and overall industrial disability are adopted and incorporated herein.

FINDINGS OF FACT

1. On September 14, 1985 claimant suffered a laceration of her right hand while performing the duties of her employment with Wilson Foods Corporation.

2. The 1985 injury to claimant's right hand produced a five percent permanent impairment of the hand as a result of laceration of the radial nerve.

3. On April 2, 1986 claimant sustained an injury affecting both her right and left hands as a result of cumulative trauma which she had experienced in her work at Wilson Foods Corporation.

4. Claimant has a three percent permanent impairment of her left hand as a result of the residuals of carpal tunnel syndrome affecting her left hand as a result of the 1986 injury.

5. Claimant has no permanent impairment of the right hand as a result of the 1986 injury. She has no permanent impairment resulting from the trigger finger releases performed on either hand as a result of the 1986 injury.

6. Claimant has experienced a cumulative ten percent loss of her earning capacity as a result of the totality of the impairments resulting from the 1985 and 1986 injuries.

CONCLUSIONS OF LAW

Claimant is entitled to receive 9.5 weeks of compensation from Wilson Foods Corporation as a result of the 1985 injury payable commencing November 11, 1985 at the rate of $175.12 per week.

Claimant is entitled to receive 5.7 weeks of compensation from Wilson Foods Corporation payable commencing February 2, 1987 at the rate of $206.78 per week as a result of the 1986 injury.

Claimant is entitled to recover 34.8 weeks of compensation from the Second Injury Fund of Iowa payable at the rate of $206.78 per week commencing March 15, 1987, the date following the end of payment by the employer.

As a result of her September 14, 1985 injury and her April 2, 1986 injuries, claimant has a cumulative industrial disability of ten percent.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That Wilson Foods Corporation pay claimant nine point five (9.5) weeks of compensation for permanent partial disability at the rate of one hundred seventy-five and 12/100 dollars ($175.12) per week payable commencing November 11, 1985.

That Wilson Foods Corporation pay claimant five point seven (5.7) weeks of compensation for permanent partial disability at the rate of two hundred six and 78/100 dollars ($206.78) per week payable commencing February 2, 1987.

That the Second Injury Fund of Iowa pay claimant thirty-four point eight (34.8) weeks of compensation for permanent partial disability at the rate of two hundred six and 78/100 ($206.78) per week payable commencing March 15, 1987.

That all payments from Wilson Foods Corporation to be paid together with interest computed from the date each payment came due until the date of actual payment pursuant to Iowa Code section 85.30 after giving credit for the four point seven (4.7) weeks of compensation previously paid by Wilson Foods Corporation.

That the costs of this proceeding including the cost of transcribing the hearing are assessed against the Second Injury Fund of Iowa pursuant to rule 343 IAC 4.33.

That both defendants file claim activity reports as requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 24th day of May, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Harry H. Smith
Attorney at Law
P.O. Box 1194
Sioux City, Iowa 51102

Mr. David L. Sayre
Attorney at Law
P.O. Box 535
Cherokee, Iowa 51012

Ms. Eleanor E. Lynn
Assistant Attorney General
Tort Claims Division
Hoover State Office Bldg.
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CATHY RAY, Claimant, vs. DUBUQUE PACKING CO., Employer, and SENTRY INCURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 837615 A P P E A L D E C I S I O N

FILED
DEC 2 . 1990
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 April 27, 1987. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 33, 35 and 36; and defendants' exhibits A through C. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

Defendants state the following issues on appeal:

A. Whether the Deputy Industrial Commissioner erred as a matter of law in determining that a permanent physical impairment or permanent limitation in work activity is not necessary to arrive at a finding of permanent disability.

B. Whether there exists substantial evidence in the record to support the deputy's findings of fact and in particular:

(1) Finding #2: That Claimant suffered an injury to her shoulders and neck on April 27, 1987 which forced her to permanently leave her employment at Dubuque.

(2) Finding #3: That although there is no ascertainable functional impairment, Claimant is unable to return to work as a meat cutter or any other heavy or medium heavy repetitive strenuous work due to her tendinitis and synovitis condition.

(3) Finding #4: That Claimant suffered a sixty (60) percent loss of earning capacity and that her physician imposed activity restrictions prevent a return to work to all manual labor jobs that she held in the past.

C. Whether the Deputy erred in determining that as a matter of law Claimant was entitled to 300 weeks of permanent partial disability benefits and to medical benefits set forth in the prehearing report.

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' first issue on appeal asserts that the deputy improperly held that claimant could be awarded industrial disability absent any evidence of permanent physical impairment. Defendants assert that the record is devoid of evidence to indicate that claimant suffers a permanent physical impairment, and thus claimant has failed to carry her burden of proof. Defendants assert that industrial disability cannot be found unless claimant has shown she has suffered a permanent injury.

It is not necessary to address this question, as the record does contain medical evidence of permanent physical impairment. Pat Luse, B.S., P.C., F.A.C.D., assigned claimant a rating of permanent physical impairment of five percent of the whole person, using the AMA Guides to the Evaluation of Permanent Impairment. Defendants argue that diagnoses of synovitis and tendonitis by two of claimant's physicians were made while claimant was still working, and represent temporary conditions related to the ongoing work activity. However, claimant stopped working in 1987. Dr. Luse's rating of permanency was given in November of 1989, considerably after claimant stopped working. Dr. Luse's rating of impairment is the only rating in the record.

In addition, there is no medical opinion in the record stating that claimant's condition is other than permanent. Joel T. Cotton, M.D., did conclude that claimant had no neurological injury, but he could not state whether she had suffered any injury to her bones or other systems. Her neck and back condition is described as "chronic" and "recurring" by several physicians. Even absent the permanent impairment rating of Dr. Luse, the medical evidence taken as a whole indicates that claimant's condition is a permanent physical impairment.

Defendants also assert as appeal issues that various findings of fact in the deputy's decision are not supported by substantial evidence. Initially, it is noted that review of a deputy's decision by the industrial commissioner is de novo. Keifer v. Swift Independent Packing Co., Appeal Decision, September 12, 1986. Substantial evidence is the standard of judicial review of final agency action. Defendants' appeal issues B(1), B(2) and B(3) will be considered to be allegations that claimant has failed to meet her burden of proof in regard to the findings of fact listed in defendants' appeal issues. Defendants' appeal issue C challenges the conclusion that claimant is 60% industrially disabled.

Claimant has met her burden of proof to show that as a result of a cumulative injury on April 27, 1987, she now suffers an industrial disability. The analysis of the deputy is adopted in all aspects except the degree of industrial disability.

Claimant's work experience is limited to manual labor jobs. Claimant cannot return to her former job. Claimant has been out of work and suffered a severe loss of earnings. Claimant's permanent physical impairment is not extensive, but it does affect the parts of her body she formerly utilized to perform her duties for employer. Claimant would now be foreclosed from similar occupations due to her impairment.

Claimant was 28 years old at the time of her injury, and 32 years old at the time of the hearing. Claimant has a G.E.D. Claimant is low functioning intellectually. Claimant is young enough to be retrained. However, the vocational rehabilitation studies show that claimant would not benefit greatly from classroom retraining due to her marginal intellect. Claimant would need on the job training for any occupation she undertook. Claimant's difficulty in being retrained increases her disability.

Based on these and all other factors pertaining to industrial disability, claimant is found to have an industrial disability of 40% as a result of her work injury.

FINDINGS OF FACT

1. Claimant received an injury arising out of and in the course of her employment with defendant employer.

2. Claimant's injury was a cumulative injury to her neck and back.

3. Claimant was compelled to leave her work as a result of her injury on April 27, 1987.

4. Claimant was 28 years old at the time of her injury. Claimant was 32 years old at the time of the hearing.

5. Claimant has a GED and poor academic skills.

6. As a result of her injury, claimant has a five percent permanent partial impairment of the body as a whole.

7. Claimant has physician-imposed work activity restrictions as a result of her work injury.

8. Claimant's work experience is limited to manual labor.

9. As a result of her injury, claimant cannot return to her work as a meat packer or work in other manual labor occupations.

10. Claimant has little or no potential for classroom retraining.

11. Claimant is capable of performing light duty jobs.

12. As a result of her work injury, claimant has lost 40 percent of her earning capacity.

CONCLUSION OF LAW

Claimant has established under law entitlement to 200 weeks of permanent partial disability benefits and to medical benefits set forth in the prehearing report.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant two hundred (200) weeks of permanent partial disability benefits at the rate of two

hundred seventeen and 27/100 dollars ($217.27) per week from April 27, 1987.

That defendants shall pay the medical expenses listed in the prehearing report, exhibits 33 through 36. Claimant shall be reimbursed for any of these expenses paid by him. Otherwise, defendants shall pay the provider directly along with any lawful late payment penalties imposed upon the unpaid account by the provider.

That defendants shall pay the 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, including the cost of transcribing the arbitration decision, pursuant to rule 343 IAC 4.33.

That defendants file claim activity reports as requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 24th day of December, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Harry H. Smith
Attorney at Law
632 Badgerow Bldg.
Sioux City, Iowa 51101

Mr. Paul W. Deck, Jr.
Mr. Brian L. Yung
Attorneys at Law
635 Frances Bldg.
Sioux City, Iowa 51101

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARGARET J. REED, Claimant, vs. GLENWOOD STATE HOSPITAL SCHOOL, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 647621 A P P E A L D E C I S I O N

FILED
MAY 24 1991
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding permanent total disability benefits as the result of an alleged injury on September 5, 1980. The record on appeal consists of the transcript of the review-reopening proceeding; claimant's exhibits 1-28, and defendants' exhibits A-D. Defendants filed a brief on appeal.

ISSUE

The issue on appeal is whether there was worsening of claimant's condition related to the original injury since the time of the first hearing.

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

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 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).

A claimant must demonstrate a reasonable effort to secure employment in the area of his residence as part of a prima facie showing that he is an odd-lot employee. Emshoff v. Petroleum Transportation and Great West Casualty, appeal decision, March 31, 1987; Collins v. Friendship Village, Inc., appeal decision, October 31, 1988.

ANALYSIS

This is a case in review-reopening. Claimant therefore bears the burden of showing that a change of condition caused by the original injury has occurred since the prior award of benefits.

The review-reopening decision that awarded claimant 70 percent industrial disability found that claimant had suffered a back injury; that claimant had pain similar to electric shocks in her back; that claimant tended to drag her right leg; claimant could not vacuum, bend or lift over 20 pounds; claimant had difficulty sitting; claimant could not drive a motor vehicle due to her medication; claimant's job had required lifting and claimant was no longer able to return to that job. It was also found that claimant had not made any attempt to find substitute employment after her injury. H. Randal Woodward, M.D., had given claimant a rating of permanent partial impairment of 30 percent of the body as a whole. Claimant also received a rating of 20 percent permanent partial impairment.

At the hearing on this petition, claimant testified that she was now experiencing the same restrictions and the same symptoms as she had at the time of the first hearing, with the exception of a neck pain that was no longer present. (See Transcript, pages 29-32, 36). Dr. Woodward, who examined claimant prior to

the first hearing and issued an impairment rating, again examined claimant in 1987 and concluded "it does not appear to me as if her condition has deteriorated any since I last saw her." (Exhibit 1). Dr. Woodward reiterated his previous 30 percent impairment rating.

Claimant also testified that between August 8, 1983, the date of the first review-reopening decision, and January 24, 1989, the date of the hearing on the present petition, claimant still had not made any attempts to find employment other than to ask her family doctor, who was also a personal friend, for employment. Claimant indicated that she did not seek work because her doctor had told her she could not work. Claimant testified she had not looked at any want ads or checked with Iowa Job Service in the nearly 8 and 1/2 years since the prior award.

It is concluded that claimant has failed to carry her burden to show that she has suffered a physical change of condition caused by her original injury not contemplated by the original award of benefits. Claimant's condition has not changed.

A change of condition need not be based on a physical change of condition. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980). However, the claimant has not shown a non-physical change of condition either. Claimant was not working at the time of the original award, and is still not working. Claimant has failed to show either a physical or non-physical change of condition.

Even if claimant had carried her burden to show a change of condition, claimant is not permanently totally disabled under the odd-lot doctrine. Application of the odd-lot doctrine requires a claimant to demonstrate reasonable efforts to secure substitute employment. Claimant has not shown any reasonable effort to obtain substitute employment. Claimant is not an odd-lot employee.

FINDINGS OF FACT

1. Claimant was awarded 70 percent industrial disability in 1983.

2. At the time of the award, claimant had ratings of physical impairment of 20 percent and 30 percent of the body as a whole.

3. At the time of the award, claimant had pain in her back and neck, radiating into her right leg.

4. At the time of the award, claimant had difficulty operating a motor vehicle.

5. At the time of the award, claimant had not sought alternative employment.

6. Since the award, claimant has been re-examined by Dr. Woodward and her condition was found not to have changed since 1983. Claimant's current rating of permanent physical impairment by Dr. Woodward remains 30 percent of the body as a whole.

7. Claimant currently has back and leg pain similar to that which existed at the time of the award, except that claimant no longer has neck pain.

8. Claimant currently has difficulty operating a motor vehicle.

9. Claimant still has not sought alternative employment other than inquiring of her personal physician for work.

10. Claimant's physical condition is unchanged since the prior award.

CONCLUSIONS OF LAW

Claimant has failed to show that she has suffered a change of condition since the prior award.

Claimant is not an odd-lot employee.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from these proceedings.

That defendants are to pay the costs of this action including the costs of transcribing the hearing.

Signed and filed this 24th day of May, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Sheldon M. Gallner
Attorney at Law
803 Third Avenue
PO Box 1588
Council Bluffs, Iowa 51502

Mr. Greg Knoploh
Assistant Attorney General
Tort Claims Division
Hoover State Office Building
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LESLIE R. REXROAT, Claimant, vs. MIDWEST MFG. CO., Employer, and SENTRY INSURANCE, Insurance Carrier, Defendants.	File No. 883562 A P P E A L D E C I S I O N

FILED
DEC 21 1990
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. The decision of the deputy filed December 15, 1989 is affirmed and is adopted as the final agency action in this case.

Claimant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 21st day of December, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Dennis L. Hanssen
Attorney at Law
2700 Grand Ave., Suite 111
Des Moines, Iowa 50312

Mr. Harry W. Dahl
Attorney at Law
974 73rd St., Suite 16
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LESLIE R. REXROAT, Claimant, vs. MIDWEST MFG. CO., Employer, and SENTRY INSURANCE, Insurance Carrier, Defendants.	File No. 883562 A R B I T R A T I O N D E C I S I O N FILED DEC 15 1989 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Leslie R. Rexroat, against Midwest Mfg. Co., employer, and Sentry Insurance Company, insurance carrier, to recover benefits as a result of an alleged injury sustained on July 25, 1988. This matter came on for hearing before the deputy industrial commissioner in Des Moines, Iowa, on September 28, 1989. The record consists of the testimony of claimant claimant's wife, Mary K. Rexroat, and Bill King; and joint exhibits I through VI.

ISSUES

The issues set out in the prehearing report for resolution are:

1. Whether claimant's alleged injury arose out of and in the course of his employment;

2. Whether claimant's alleged disability is causally connected to his injury;

3. The nature and extent of claimant's disability;

4. Claimant's entitlement to 85.27 medical benefits;

5. Whether claimant is an odd-lot employee; and

6. Claimant's entitlement to 86.13 penalty benefits.

REVIEW OF THE EVIDENCE

Claimant testified in person and through his deposition on April 5, 1989. Claimant said he quit school during the seventh grade at age 15. Claimant described his jobs up to the time he began work with defendant employer in April 1977. Claimant's prior work history involved jobs as a part-time auto mechanics teacher at a community college, an auto mechanic, an experimental mechanic, utility machinist, welder, sheet metal worker, and maintenance worker. During this time, claimant stated he had two U.S. Navy enlistments in 1943 and 1953 for four and five years respectively.

Claimant said he obtained a GED in 1971 at approximately age 45. He said his only other formal education was specializing in electrical work through schools sponsored by General Motors.

Claimant testified he had back problems in 1975 which were cleared up with a cortisone shot. Claimant related hernia surgeries in November 1977, January 1978, and then returned to work after fourteen weeks. Claimant said he injured his back in August 1979 while working for defendant employer. Claimant related three back surgeries for this injury and was off three years and nine months, August 1979 to May 1983. Claimant said his surgeon placed a 30 to 35 pound lifting limit on him and he returned to work at the same job he was doing at the time of his 1979 injury.

Claimant testified he had three surgeries in late 1987 and early 1988 for prostrate cancer and returned to work in 1988. Claimant then worked until his July 25, 1988 alleged injury. Claimant indicated that between May 1983 and July 25, 1988, he had a few back problems if he bent the wrong way, lifted too much or stood in one position. He indicated he took pain pills over all these years.

Claimant testified that he lifted the head of a large cast iron gear cutting saw on July 25, 1988 and thereafter experienced pain down his left leg, hip and back, and into his other leg. Claimant sought medical help on August 8, 1988 from his family physician, Erwin Wittenberg, M.D. Claimant said he was taken off work by the doctor on August 15, 1988. Dr. Wittenberg referred claimant to Robert A. Hayne, M.D., for further evaluation.

Claimant revealed he was suspended by defendant employer on August 9, 1988, and accused of stealing some items he placed in his lunchbox. Claimant estimated the value at $12 to $15. Claimant claimed these items were his as he took personal things to work to do during his lunch hour. Claimant was officially fired on August 17, 1988 after an investigation. Claimant acknowledged he fought his termination with union representation, but it was upheld later by the Labor Relations Board. Claimant admitted he was also accused of theft in 1983 and received a 30 day suspension and 90 days probation.

Claimant said today he is unable to walk more than one to two blocks, can only stand thirty minutes to an hour, and has problems sitting. He stated his left leg is throbbing as he testifies and is ice cold. Claimant indicated he wears a girdle brace when his pain gets bad. Claimant said he did not have these same problems before July 25, 1988, but admitted he wore the girdle on occasions prior to July 25, 1988. Claimant contends he cannot perform a maintenance job today. Claimant was asked:

Q. Do you think that you still would be working there if you hadn't 't been terminated?

A. I definitely know I would have been.

Claimant also admitted that at the time of his termination in August 1988, he was wanting to try to get his job back as he thought he could do the work. In claimant's recorded statement taken on August 31, 1988, approximately six days after his alleged injury, claimant wasn't sure of the injury date.

Mary Kay Rexroat, claimant's wife, testified claimant's physical condition has been deteriorating ever since his alleged July 25, 1988 injury. She described claimant's physical problems and limitations and what he could do before and after his July 25, 1988 alleged injury. Mrs. Rexroat emphasized she took Dr. Wittenberg's note excusing claimant from work to defendant employer ten minutes after she received it and gave it to Tom Hoetger. She said claimant was on suspension at that time. She acknowledged she did not have a copy of the note with her in court.

Bill King testified he is the human resources manager at defendant employer's, which includes handling workers' compensation and labor relations matters. He said he was familiar with claimant's termination. King emphasized claimant was suspended on August 9 or 10, 1988 pending an investigation. He said the written suspension notice was dated August 10, 1988. King related the plant rule, which is part of the handbook accepted by the company and union, which prohibits removing any company material from the plant for other than company use.

King said claimant admitted he had a small electrical repair business on the side and did not report the information for income tax purposes. King indicated he first heard of claimant's pain problems on August 17, 1988, after claimant was given his termination notice. King indicated he was presented a doctor's statement and King acknowledged he did not know if the doctor's statement had been presented to the company before or after claimant's termination notice. Claimant said usually if a claimant has an ache or pain, he is to immediately notify the company supervisor. King emphasized claimant's alleged disability had nothing to do with claimant's dismissal.

Robert A. Hayne, M.D., a neurosurgeon, testified through a deposition on August 3, 1988 that he performed a lumbar laminectomy on claimant for spondylolisthesis of the fifth lumbar segment of the first sacral segment, a congenital abnormality, in October 1979. The doctor said at this time, Joe F. Fellows, M.D., carried out a fusion of the first sacral segment of the sacrum to the fifth lumbar. Dr. Hayne then described other back surgeries claimant has had as follows:

> And in November 1981, because of recurrent pain in the back, lower extremities, he was subjected to a second operative procedure, the nature of decompression of the first sacral nerve root on each side. This decompression was the removal of some scar tissue which was felt to bind the nerve root, that is the first sacral nerve root, on each side down some so that it would be productive of pain.
>
> He persisted, however, in having pain; and the third surgical procedure was carried out in October 1982 at which time there was a recurrence of the intervertebral disc at the -- recurrence of protrusion of the intervertebral disc at the fifth lumbar interspace, and this was removed so as to decompress the first sacral nerve root again on each side.

(Joint Exhibit III, Page 6)

He said he saw claimant on March 28, 1986, at which time claimant complained of low back and low extremity pain. Dr. Hayne testified the next time he saw claimant was in September 1988 with low back and lower extremity complaints.

An MRI was done on September 12, 1988, and the doctor read the report as follows:

> Joint space narrowing at the L4-5 and the L5-S1 levels. Disc herniation is present at the L4-5 level in the midline without significant nerve root displacement. Moderate to severe degenerative changes are seen in the articular facets at the L4-5 level with some foraminal stenosis present. More prominent on the right side. Definite nerve root entrapment was not identified.
>
> Postoperative changes are seen bilaterally in the area of the articular facets from previous fusions, surgeries. A grade 1 spondylolisthesis of L5 and S1 was present with postoperative changes in the facet areas bilaterally from previous fusion. Some draping of nerve roots over the S1 vertebral body was noted, but no individual nerve root entrapment was identified.
>
> (Jt. Ex. III, p. 8)

The doctor said these changes appear to be from surgery and the passage of time as opposed to trauma or acute episode. Dr. Hayne acknowledged claimant called him on September 21, 1988 and said he was fired at work after he got hurt at work.

Dr. Hayne testified that on September 7, 1988, it appeared unlikely claimant could return to work sooner than two or three months. The doctor said that at the time of his last examination of claimant on June 2, 1989, claimant's restrictions were occasional lifting not over 40 pounds, otherwise, not over 25 pounds, and no repetitious bending. Dr. Hayne indicated that from the nature of the job claimant described to him, claimant should not return to that job but might return to a very sedentary type of work. The doctor did not describe the nature of this work claimant told him he does, but it appears Dr. Hayne understood it required frequent bending and rather heavy lifting.

Dr. Hayne acknowledged that claimant was given a 35 pound weight restriction due to his pre-1988 injuries and indicated that this is for all practical purposes the same as the limitation of 35 to 40 pounds today. He said "I think the limitation is essentially the same." Dr. Hayne indicated claimant is probably not as able physically to carry on with work as he was back in March 1986. Dr. Hayne indicated claimant would have difficulty with work that required him to be on his feet for

six to eight hours per day without some opportunity to sit for awhile at one-half hour intervals or thereabouts. Dr. Hayne gave claimant a 10 percent additional physical impairment for his injury on July 25, 1988. The doctor said he attributed a portion of claimant's physical limitations to the history of the injury claimant gave him.

Dr. Hayne was asked:

> Doctor, apparently the MRI has revealed, and you have testified, as to changes at the L4-5 level. The fusion was performed at the L5-S1 level. Could you tell me what oftentimes happens in your experience with levels higher than those that are fused?
>
> A. I think that the disc immediately above, say, the fusion does have more stress and strain put on it than it would have were the levels not fused below it.
>
> And in the case of the fifth lumbar segment fused to the sacrum, the incidence of trouble, the nature of herniation of the fourth lumbar interspace disc, is greater than if the fifth lumbar segment were not fused.
>
> Q. Would a factor such as age increase that possibility or likelihood of problem with the next level up?
>
> A. Yes. I think that age would play a significant factor.

(Jt. Ex. III, p. 16-17)

Dr. Hayne acknowledged that claimant's age and previous fusion would make claimant more susceptible to any injury than someone who did not have the fusion and was a younger individual. On April 25, 1983, Dr. Hayne wrote:

> He was complaining of pain in the low back and left lower extremity. I feel that it would be beneficial for Mr. Rexroat to return to work. He was given a release to return to work on May 1, 1983, with a thirty-five weight lifting limitation. He also should be able to sit for a portion of his working time and he should not be required to work that does permit him to use good body mechanics.
>
> I am very doubtful that when he does return to work that it will be successful. He appears to have too great an apprehension about reinjuring himself.

The permanent disability rating that can be dated back to his injury in August of 1979 is approximately 30% of body total.

(Jt. Ex. VI, p. 43)

Alfredo D. Socarras, M.D., a neurologist, opined in a report dated May 2, 1989, as follows:

> It is my opinion that Mr. Rexroat has a chronic pain syndrome. There also is a large functional overlay. I did not find any evidence of radiculitis. I do not believe that further surgery is indicated. A referral to a pain center might be beneficial. Although he claims that his symptoms have progressively gotten worse since the incident of July 25, 1988, I do not feel that this has caused any objective changes in this patient's condition. If you have further questions regarding this matter please do not hesitate to contact me.

(Jt. Ex. VI, p. 3)

The office notes of Erwin Wittenberg, M.D., on August 8, 1988 reflect that claimant told the doctor that six days prior thereto claimant lifted a big saw at work and then had an onset of pain. His notes of August 15, 1988 reflect:

> Is in for his follow-up on his back. Apparently doing poorly. He is having many problems at work apparently on several occasions he had been caught taking something and he apparently now had been found working on some type of an extension cord from home. He feels that today they are going to fire him, he doesn't know what he is going to do. He has felt depressed. He has even related that he had halfway thought about doing something to himself and yet doesn't really feel that he could or would do something.
>
> ON EXAM he complains of pain primarily in the hip area and low down in the back. He moves fairly well, he appears in mild to moderate distress secondary to the back pain. With relating all this he cries easily and appears anxious and somewhat depressed. He refuses to go into the hospital at present. He thinks they will be calling him today, hopefully he will not be fired.
>
> He will begin some Amitriptyline 75 mg. at h.s., along with his usual medication, then he will be seen

by Doctor Hayne for follow-up on his back. He will be rechecked in several weeks.

IMP: Back pain, chronic, #2: Anxiety and depressive syndrome.

(Jt. Ex. VI, p. 13)

On August 25, 1987, the doctor's notes reflect claimant again had pain in the lower back area when a jack had slipped while he was using it. Dr. Wittenberg's notes from October 1975 up to October 29, 1988 reflect claimant's problems with his back over these years. (Jt. Ex. III, p. 15)

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on July 25, 1988 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 25, 1988 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-61 (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).

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.

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager, 253 Iowa 369, 112 N.W.2d 299; Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960). See also Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934).

Claimant is 63 years old and left the seventh grade at age 15. He obtained his GED at age 45. It is undisputed that claimant was an employee of defendant employer. Claimant contends he was injured on July 25, 1988 while repairing and lifting a commercial saw head. The testimony is confused as to when this actually happened. Claimant told Dr. Wittenberg on August 8, 1988 that he injured his back about six days earlier, which would be around August 2, 1988. Although sometimes the specific date is not necessarily crucial, the nature of this alleged injury and the other circumstances that occurred around this two or three week period casts a doubt on the actual occurrence of the injury and the alleged resulting disability flowing therefrom.

Claimant was suspended on August 9 or 10, 1988 because of a theft of property at defendant employer's place of business contrary to company rules. Although the evidence does not show when the theft itself occurred and when claimant was actually caught with the stolen items, one could conclude either August 8 or 9, 1988. Claimant downplays this based on the contention that the value of the theft was $12 or $15. Claimant had these items hidden in his lunchbox. Could the value of the theft be limited to the size of the items stolen and the capacity of the lunchbox to hide them from detection? This was at least the second time claimant had actually been caught stealing company property. Dr. Wittenberg's notes of August 15, 1988 indicate that claimant told him claimant had been caught taking something on several occasions. Claimant felt defendant employer was going to fire him.

Claimant called Dr. Hayne on September 21, 1988 and told him that defendant employer fired claimant after getting hurt at work. Claimant obviously did not tell the doctor about being suspended and later fired for theft of defendant employer's property. Dr. Hayne was claimant's doctor for several years, at least since claimant's 1979 surgery. Dr. Hayne testified he relied on the history and information given to him by claimant along with his examination in forming his opinion. The undersigned does not believe claimant was totally honest in his discussion with Dr. Hayne. Claimant's comment to his long-time treating physician that claimant was fired because he was hurt at work can only incite the emotions and affect one's prejudices and taint a medical opinion.

Claimant has had low back problems for many years. Claimant has had several low back surgeries beginning in 1979 and was opined to have a 30 percent permanent impairment to the body as a whole resulting from the 1979 injury. Dr. Hayne testified that the incident of future problems at the discs above a fusion is greater than if claimant's fifth lumbar segment were not fused. He indicated age also increases likelihood of problems with the next level up. Dr. Hayne opined claimant had an additional 10 percent impairment as a result of claimant's alleged July 25, 1988 injury.

Dr. Socarras examined claimant and opined that claimant had a chronic pain syndrome with a large functional overlay with no evidence of radiculitis. He did not causally connect claimant's alleged disability or problems to claimant's alleged injury of July 25, 1988. He did not think claimant's symptoms were worse since his July 25, 1988 incident.

Claimant missed no work prior to his suspension and ultimate firing on August 17, 1988. He has not worked since his firing. Claimant's contention that defendant employer fired him because of his injury is not well founded. Claimant is his own worst enemy. Claimant saw his firing coming and the undersigned believes claimant would be working today for defendant employer if it were not for the theft unless the natural effects of claimant's spondylolisthesis, preexisting injury, permanent impairment and age would be taking their own course and be the material factor in claimant's current condition. Claimant's preexisting low back condition was not materially aggravated, worsened, or lighted up by claimant's alleged injury on July 25, 1988. The undersigned believes Dr. Socarras' opinion as to causation deserves more weight as he was not possibly tainted by incorrect history or other influencing factors that crept into claimant's medical records with Dr. Hayne. Dr. Hayne said claimant's restrictions are essentially the same now as they were prior to July 25, 1988.

The undersigned finds claimant did not incur a new injury on July 25, 1988, but, in fact, claimant experienced a flare-up of a preexisting condition that has been ongoing over the last several years. The undersigned further finds that this condition was not materially aggravated, worsened or lighted up by any work-related incident on July 25, 1988. The undersigned further finds that claimant's alleged disability is not causally connected to any work-related injury on July 25, 1988.

All the other remaining issues have been made moot by the above findings and will not be further discussed. Claimant takes nothing from these proceedings.

FINDINGS OF FACT

1. Claimant did not receive a compensable work-related injury on July 25, 1988.

2. Claimant had a preexisting 30 percent permanent impairment to his body as a whole as a result of a low back injury in August 1979, which condition was not materially aggravated, worsened or lighted up by claimant's alleged July 25, 1988 injury.

3. Claimant was fired on August 17, 1988 by defendant employer for theft of company property.

4. Claimant's current restrictions are essentially the same as they were prior to July 25, 1988.

5. Claimant's alleged disability is not the result of claimant's alleged injury on July 25, 1988.

6. Claimant is not a credible witness.

CONCLUSIONS OF LAW

Claimant did not receive an injury on July 25, 1988 which arose out of and in the course of claimant's employment.

Claimant's alleged disability is not causally connected to his alleged July 25, 1988 injury.

Claimant had a preexisting 30 percent permanent impairment to his body as a whole as a result of a low back injury in August 1979, which condition was not materially aggravated, worsened or lighted up by claimant's alleged July 25, 1988 injury.

Claimant was fired on August 17, 1988 by defendant employer for theft of company property.

Claimant's current restrictions are essentially the same as they were prior to July 25, 1988.

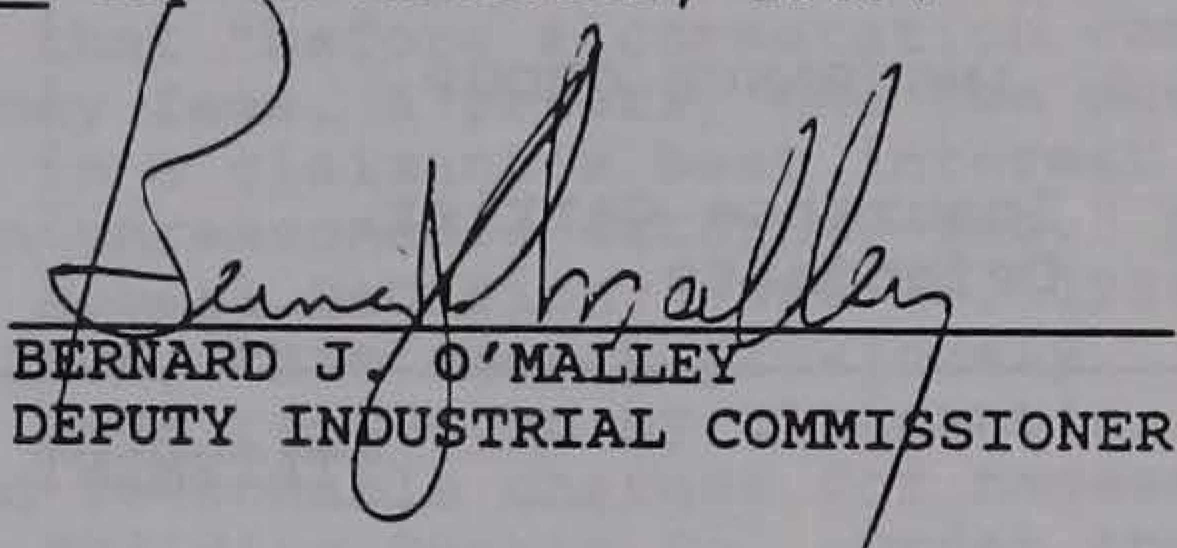
Claimant is not a credible witness.

ORDER

Claimant takes nothing from these proceedings.

Claimant and defendants shall each pay one-half the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 15th day of December, 1989.



BERNARD J. O'MALLEY
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr Dennis L Hanssen
Attorney at Law
Terrace Ctr Ste 111
2700 Grand Ave
Des Moines IA 50312

Mr Harry W Dahl
Attorney at Law
974 73rd St
Ste 16
Des Moines IA 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD R. RICKETT, Claimant, vs. HAWKEYE BUILDING SUPPLY CO., Employer, and U. S. INSURANCE GROUP, Insurance Carrier, Defendants.	File No. 739306 A P P E A L D E C I S I O N

FILED
JUL 19 1990
INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendants appeal a ruling on a partial summary judgment awarding claimant partial commutation of claimant's permanent total disability benefits. The record before the deputy has been reviewed de novo on appeal. The decision of the deputy is affirmed and adopted as the final agency action in this case.

ISSUES

The issues on appeal are:

1. Whether granting claimant a partial commutation of benefits is in his best interest?

2. Whether the period during which compensation is payable can be determined pursuant to Iowa Code section 85.45?

3. Whether it is claimant's best interest to grant a partial commutation when defendants have file a petition for a review-reopening hearing to determine the extent of claimant's disability?

REVIEW OF THE EVIDENCE

The ruling on motion for partial summary judgment dated May 4, 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 for partial summary judgment are appropriate to the issue and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the ruling on motion for partial summary judgment is adopted.

In addition, the following analysis is added:

Defendants contend that claimant's attorney fees which constitute the bulk of claimant's request for partial commutation are the subject of dispute between the parties. In a prior decision, this agency stated that "before a commutation can be granted for payment of attorney fees, a priori, the fee must be reasonable. It would not be in a claimant's best interest to grant a commutation to pay an unreasonable attorney fee." Rickett v. Hawkeye Building Supply, Appeal Decision, June 28, 1988. In an order approving attorney fees, this agency previously determined that the attorney fees requested by claimant's attorney constituted fair and reasonable charges for necessary services. Rickett v. Hawkeye Building Supply Co., Order Approving Attorney Fee, December 19, 1988. Therefore, the deputy was correct in ruling on the motion for partial summary judgment that the payment of claimant's attorney fees was in his best interest. Defendants do not have a dispute over the remainder of claimant's request for partial commutation.

Next, defendants assert that an issue exists as to whether the period during which compensation is payable can be determined pursuant to Iowa Code section 85.45, and therefore, a summary judgment is improper. Defendants' argument was settled previously by this agency, See Rickett v. Hawkeye Building Supply Co., Appeal Decision, June 28, 1988. Also see, Sidles Distributing Company v. Heath, 366 N.W.2d 1 (Iowa 1985).

Finally, defendants assert that an issue exists as to whether claimant is permanently totally disabled, therefore, it would not be in claimant's best interest to grant the partial commutation. Defendants have subsequently filed a petition for a review-reopening hearing to determine the extent of claimant's disability. The fact that claimant may be found in his subsequent review-reopening hearing not to be permanently totally disabled is merely speculation. At this time, claimant is permanently totally disabled and this is the final action of the agency.

CONCLUSION OF LAW

Claimant proved by a preponderance of the evidence that it is in his best interest to grant a partial commutation of $21,659.42, for the payment of attorney fees and related legal expenses, medical expenses for claimant and his wife, including the cost of dental work and hearing aids, and a new refrigerator. Claimants remaining weekly benefits are adjusted to equal to one hundred ninety-two and 78/100 dollars ($192.78) per week for as long as claimant remains totally disabled.

WHEREFORE, the ruling on the motion for partial summary judgment is affirmed.

ORDER

THEREFORE, it is order:

That defendants pay claimant twenty-one thousand six hundred fifty-nine and 42/100 dollars ($21,659.42) representing a commutation of forty-five and 31/100 dollars ($45.31) of each weekly benefit. Defendants shall pay unto claimant his remaining benefits at the adjusted rate of one hundred ninety-two and 78/100 dollars ($192.78) per week for as long as claimant remains totally disabled.

That all costs of this action are charged to defendants pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 19th day of July, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Gary L. Johansen
Attorney at Law
508 Davidson Building
Sioux City, Iowa 51101

Mr. Melvin C. Hansen
Attorney at Law
800 Exchange Building
1905 Harney Street
Omaha, NE 68102

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CYNTHIA SAWDEY,	:	
Claimant,	:	File No. 843379
vs.	:	A P P E A L
SHELLER-GLOBE CORPORATION,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
AUG 29 1990
INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding claimant 12 percent permanent partial disability for industrial purposes as the result of an January 12, 1987 work injury. The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 7 and defendant's exhibits 1 through 4. Both parties filed briefs on appeal.

ISSUES

Defendant states the issues on appeal are:

I. Did the deputy err in deciding that the claimant carried her burden of proving causal connection between her January 12, 1987 foot injury and her claimed back pain?

II. Did the deputy err in awarding healing period benefits through January 5, 1988?

III. Did the deputy err in finding industrial disability?

IV. Did the deputy err in awarding benefits under section 85.27?

REVIEW OF EVIDENCE

The arbitration decision dated June 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. The following additional citation is appropriate.

Expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (Iowa 1955). The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id., at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (Iowa 1965). See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

ANALYSIS

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted on the issues of industrial disability and section 85.27 medical benefits.

On the issue of casual connection the testimony of claimant's treating physician is relevant. William Pontarelli, M.D., testified:

> Q. Is there anything that showed on the x-rays of the lumbar spine that indicated that there was a defect or bony damage from injury, recent injury, say, as in January?
>
> A. She had two soft herniations of disk at 3-4 and 4-5 above this level.

(Claimant Exhibit 5, Deposition of Dr. Pontarelli, page 10)

> Q. Doctor, you mentioned an old back injury that might have been congenital. Was there evidence after you completed the tests that were performed of some injury that had been recent?
>
> A. I thought the appearance of the disk protruding backward at L4-5 has been described as bulging which connotes something less than a significant problem still represented fresh injury in my mind.

(Cl. Ex. 5, Dep. of Dr. Pontarelli, p. 19.)

When asked about the results of claimant's CT scan, Dr. Pontarelli opined that claimant injured her disk above the level where there was an old problem. Dr. Pontarelli had the opportunity to review claimant's CT and myelogram, therefore, his opinion on causation is given greater weight.

Charles Skaustad, M.D., treated claimant's foot immediately following her work injury. In his deposition, Dr. Skaustad testified that if claimant had complained of back pain following her work injury he would have included this information in his office notes. Dr. Skaustad did not note any back pain but noted that claimant complained of numbness in her thigh a few days following her work injury. Dr. Skaustad referred claimant to Dr. Pontarelli upon claimant's request.

The opinion of Rouben Mirbegian M.D., concerning casual connection is given little weight. Dr. Mirbegian refused to answer questions concerning his continuing medical education. Pursuant to Iowa Rules of Evidence, rule 702, Dr. Mirbegian's refusal to answer certain questions concerning his medical experiences effects the weight to be given his testimony by the trier of fact. In addition, Dr. Mirbegian saw claimant for an evaluation nine months after claimant's work injury. For these reasons, the testimony of Dr. Mirbegian is given little weight.

Based upon the testimony of Dr. Pontarelli and upon the claimant's testimony concerning the work injury, claimant proved a casual connection between the work injury of January 12, 1987 and claimant's back injury. Claimant complained of back pain and sought treatment shortly after the injury to her foot in a time frame appropriate for a lifting injury. (Cl. Ex. 5, Dep. of Dr. Pontarelli, pp. 6-7.) An agency decision is relevant in that it states, "[i]t is reasonable to believe that not all of claimant's injuries were immediately known to him or his physicians. It is also reasonable to believe that his lower back condition did not manifest itself until after the injury or until after his extensive bedridden period." Worrell v. Griffin Wheel Co., Appeal Decision, February 26, 1988. Claimant was on crutches and in a cast as a result of her foot injury and it is reasonable to believe that her back injury did not manifest itself immediately following her foot injury.

Healing period ends when significant improvement from the injury is not anticipated; or when an employee is able to return to his or her former work or to substantially similar work. An agency decision stated:

> That a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond that point when maximum medical recuperation had been accomplished. Medical treatment

> that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition.

Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112, 114 (1982). Dr. Pontarelli did not release claimant to return to work. However, in an office note dated August 14, 1987, Dr. Pontarelli stated that claimant's symptom patterns had not changed and he ruled out low back surgery at that time. Further conservative treatment was recommended, including physical therapy. (Cl. Ex. 3, p. 5.) Prior to this appointment, Dr. Pontarelli prescribed the use of a chairback brace and had not ruled out the possibility of back surgery. In an office note dated November 9, 1987, Dr. Pontarelli opined that claimant is not likely to recover from her back injury. In addition, claimant's physical examination showed "motor and sensory in her lower extremities to be intact" and "reflexes present". (Cl. Ex. 3, p. 3.)

Dr. Pontarelli testified in responses to a question posed by defendants' attorney:

> Q. Did you think that her condition in November was pretty much the same that it had been when you saw her in August?
>
> A. Yes. pretty much.

(Cl. Ex. 5, Dep. of Dr. Pontarelli, p. 16.)

The greater weight of the evidence supports the conclusion that claimant's healing period ended on August 14, 1987 when Dr. Pontarelli opined that claimant had reached maximum medical improvement.

FINDINGS OF FACT

1. Claimant sustained a back injury arising out of and in the course of her employment on January 12, 1987.

2. Claimant's back injury was casually connected to claimant's January 12, 1987 work injury and resulted in permanent disability.

3. Dr. Pontarelli opined that claimant sustained physical impairment of five percent of the whole body as a result of claimant's January 12, 1987 work injury to her back.

4. Claimant's date of birth is October 1, 1955 and claimant has her GED.

5. In approximately 1974, claimant received training at a community college as a nurse's aide and worked as a nurse's aide.

6. Subsequent to claimant's January 12, 1987 work injury, claimant sought vocational rehabilitation and is being trained to be a medical assistant.

7. Claimant has a learning disability.

8. Claimant's restrictions include no repetitive bending and lifting, and Dr. Pontarelli recommended light duty type work.

9. Claimant was in healing period from January 12, 1987 through August 14, 1987 when Dr. Pontarelli opined that claimant's back would not improve and ruled out surgery.

10. Claimant incurred reasonable medical expenses as a result of her work injury in January 12, 1987.

11. As a result of the January 12, 1987 work injury, claimant may incur further medical expenses including treatment at the New Life Fitness Center for claimant's back problem.

12. Claimant has proved that she sustained a 12 percent loss of earning capacity.

CONCLUSIONS OF LAW

Claimant proved a causal connection between her back pain and her January 12, 1987 work injury.

Claimant proved entitlement to healing period benefits from January 12, 1987 through August 14, 1987.

Claimant proved entitlement to 12 percent permanent partial disability benefits as a result of her January 12, 1987 work injury.

Claimant proved entitlement to reasonable medical expenses and that she will be entitled to reasonable and necessary future medical expenses, including treatment at the New Life Fitness Center incurred as a result of her January 12, 1987 work injury.

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

ORDER

THEREFORE, it is ordered:

That defendant shall pay unto claimant sixty (60) weeks of permanent partial disability benefits at the stipulated rate of

two hundred forty-five and 22/100 dollars ($245.22) per week as a result of the injury on January 12, 1987.

That defendant shall pay unto claimant healing period benefits beginning on January 12, 1987 through August 14, 1987 at the stipulated rate of two hundred forty-five and 22/100 dollars ($245.22) per week as a result of the injury on January 12, 1987.

That defendant shall pay medical expenses in the amount of twenty-two dollars ($22) to Steindler Orthopedic Clinic.

That defendant shall pay future reasonable and necessary medical expenses related to claimant's lower back including, but not limited to, the costs of treatment at the New Life Fitness Center.

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 shall be given credit for all benefits previously paid to claimant.

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

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

Signed and filed this 29th day of August, 1990.

Clair R. Cramer

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Emmit George, Jr.
Attorney at Law
500 Dubuque Street
P.O. Box 3090
Iowa City, Iowa 52244

Mr. Harry Dahl
Attorney at Law
974 73rd Street
Suite 16
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CYNTHIA SAWDEY,

Claimant,

vs.

SHELLER-GLOBE CORPORATION,

Employer,
Self-Insured,
Defendant.

File No. 843379

R U L I N G O N A N

A P P L I C A T I O N

F O R

D E T E R M I N A T I O N

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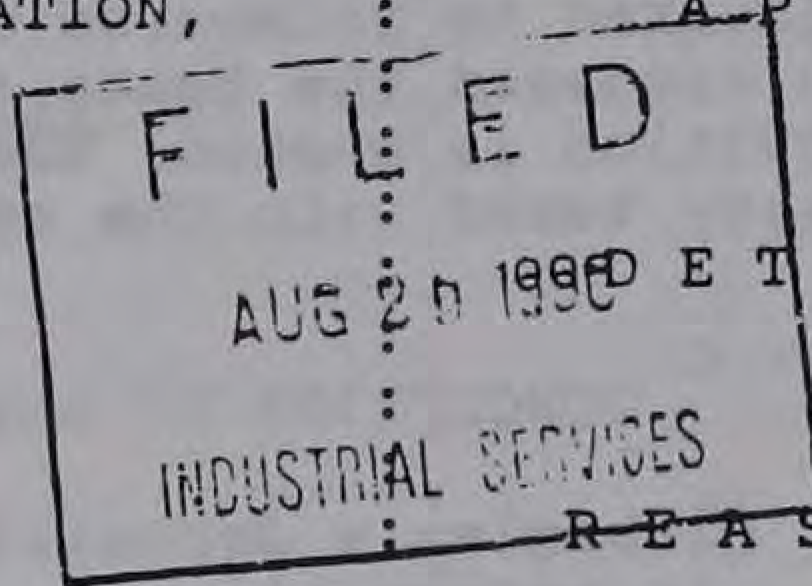
R E A S O N A B L E N E S S



Claimant makes an application for the determination of the reasonableness of charges assessed by Rouben Mirbegian, M.D. Claimant asserts that Dr. Mirbegian's charges are excessive in light of the fact that Dr. Mirbegian refused to answer certain questions to qualify as a expert.

Specifically, Dr. Mirbegian declined to answer questions concerning his military career and some aspects of his continuing medical education. Claimant contends that Dr. Mirbegian failed to qualify as an medical expert, therefore, the cost of his deposition is unreasonable. Dr. Mirbegian understandably declined to discuss his military career while in Iran. Dr. Mirbegian's military career is not relevant to qualify him as a medical expert.

However, Dr. Mirbegian's continuing medical education is relevant to qualify a person as a medical expert. Certainly if Dr. Mirbegian had failed to keep abreast of his obligations for continuing medical education he could not practice in the state of Iowa. Since Dr. Mirbegian testified that he was qualified to practice in Iowa and had practiced orthopedic surgery in the Keokuk area for five years with local hospital privileges, he has satisfied the threshold requirements to be qualified as an expert witness. Dr. Mirbegian's refusal to answer certain questions concerning his continuing medical education goes to the weight of his testimony, not the admissibility. See 5A Iowa Rules of Civ.Pro.Ann. Iowa R.Evid., rule 702, Committee Comment, 1984.

Pursuant to Division of Industrial Services Rule 343-4.33 costs are assessed at the discretion of the deputy industrial commissioner and the industrial commissioner. In the deputy's

arbitration decision dated June 16, 1987 the cost of the arbitration decision were assessed against the defendants. Division of Industrial Services Rule 343-4.33(5) indicates the costs include "the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided in Iowa Code section 622.69 and 622.72." The cost of Dr. Mirbegian's deposition, one hundred and fifty dollars, meets the requirements of the section 622.69 and 622.72.

If claimant paid the cost of Dr. Mirbegian's deposition, then defendant is required to reimburse claimant since the arbitration decision assessed the costs against defendant. If Dr. Mirbegian's deposition is unpaid, the defendant shall pay the cost as it is the party taxed with the costs of the arbitration decision.

CONCLUSION OF LAW

The cost of Dr. Mirbegian's deposition, one hundred and fifty dollars ($150), is reasonable.

ORDER

THEREFORE, it is ordered:

That the cost of Dr. Mirbegian's deposition, one hundred and fifty dollars ($150), is assessed against the defendant pursuant to Division of Industrial Services Rule 343-4.33(5).

Signed and filed this 29th day of August, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Emmit George, Jr.
Attorney at Law
500 Dubuque Street
P.O. Box 3090
Iowa City, Iowa 52244

Mr. Harry Dahl
Attorney at Law
974 73rd Street
Suite 16
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHIRLEY SCHINTGEN, Claimant, vs. ECONOMY FIRE AND CASUALTY COMPANY, Employer, and KEMPER GROUP, Insurance Carrier, Defendants.	File No. 855298 A P P E A L D E C I S I O N

FILED
APR 26 1991
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant 20 percent functional impairment to her left hand which is causally connected to her injury on June 15, 1987.

The record on appeal consists of the transcript of the arbitration decision; claimant's exhibits 1 through 19, 21 and 23 through 26; and defendants' exhibits A through C and E through H. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

The issues on appeal are:

1. Whether the deputy erred in finding that claimant sustained a 20 percent functional impairment to her left hand which was causally connected to her work injury on June 15, 1987.

2. Whether the deputy erred in holding that defendants delayed commencement of permanent partial disability benefits without reasonable or probable cause or excuse.

3. Whether the deputy erred in holding that Dr. Walker's bill was reasonable for services rendered in connection with his examination pursuant to Iowa Code section 85.39.

REVIEW OF THE EVIDENCE

The arbitration decision filed August 7, 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 with the law in the arbitration decision is adopted except as modified herein. Additional analysis is necessary on the issues of nature and extent of claimant's alleged disability, 86.13 penalty and the reasonableness of Dr. John R. Walker's, independent medical examination.

Claimant originally sought treatment from Bruce Harlan, M.D., in Mason City. Defendants requested that claimant be treated by John Grant, M.D., in Ames, Iowa. On July 13, 1987, claimant was examined by Dr. Grant who diagnosed mild carpal tunnel syndrome. Dr. Grant did not provide an impairment rating but recommended claimant continue with symptomatic care plus a job change. Dr. Grant referred claimant back to Dr. Harlan and/or Thomas F. DeBartolo, M.D. Claimant's Exhibit 4, p. 3. Claimant saw Dr. Harlan on July 16, 1987 and on August 13, 1987. Dr. Harlan referred claimant to Dr. DeBartolo, an orthopedic surgeon.

> Section 85.27, Code of Iowa, (1977) requires an employer to provide the reasonable care necessary to treat the injury. It follows then that when such a designated physician sees fit to refer a patient to another physician, he acts as the defendant-employer's agent, and permission for such referral from the defendants is not necessary.

Kittrell v. Allen Memorial Hospital, 34 Biennial Report of the Indus. Comm'r 164 (1979).

While Dr. DeBartolo was not explicitly an authorized physician, according to agency precedent, Dr. Grant, defendants' agent, authorized claimant's treatment under Dr. DeBartolo's care. Dr. DeBartolo, therefore became claimant's authorized physician and provided claimant care as an authorized physician.

In a letter dated, May 6, 1988, Dr. DeBartolo provided the insurer with an impairment rating of 20 percent of the left upper

extremity. Claimant's Exhibit 12, p.1. On June 14, 1988 Ronald Bergman, M.D., examined claimant and provided a zero percent impairment as a result of claimant's left carpal tunnel. Claimant received an independent medical examination from John R. Walker, M.D., who opined that claimant suffered a 18 percent temporary, partial impairment of the left upper extremity which could be reduced with proper treatment. Claimant was reevaluated by Dr. Bergman on April 4, 1989. Dr. Bergman opined that claimant suffered a one percent permanent partial disability of the left hand. Greater weight is given to Dr. DeBartolo's opinion. Dr. DeBartolo was claimant's treating physician and treating claimant from August 25, 1987 through May 8, 1988.

Defendants did not compensate claimant for her permanent disability until May 15, 1989, the morning of the hearing. Pursuant to Iowa Code section 86.13 claimant may be entitled to fifty percent of benefits which were unreasonably delayed or denied. Iowa Code section 86.13 provides that an unreasonable delay is one that "occurs without reasonable cause or excuse." Dr. DeBartolo, claimant's treating physician and authorized medical provider, provided a rating in a May 6, 1988 letter. Defendants did not pay claimant any benefits, instead claimant was referred to Dr. Bergman. Defendants gave no reason or excuse as to why they did not pay claimant any benefits when they obtained Dr. DeBartolo's impairment rating. Defendants unreasonably waited to the eleventh hour, the morning of the hearing, to pay claimant any benefits.

The second issue, defendants dispute the reasonableness of medical expenses occurred in the examination conducted by Dr. Walker. Iowa Code section 85.39 requires that a defendant employer pay the reasonable fees of an approved independent medical examination. Defendants indicated they consented to claimant's independent medical examination conducted by Dr. Walker to the extent that the cost of the examination was reasonable and customary. See Application-Medical Examination filed July 15, 1988. In addition, defendants disputed the reasonableness of Dr. Walker's fees in the hearing assignment order and the prehearing order.

Claimant testified that the independent medical examination was conducted at Dr. Walker's office and the examination took a full day to complete. Claimant spent up to an hour and one-half with Dr. Walker. Claimant has the burden of proving the reasonableness of medical expenses. A recent agency decision is relevant to this issue, it states:

> Claimant is not qualified to testify that charges for medical services are reasonable. Claimant has not put into the record any evidence on this issue. Although defendants have not put into the record any

> evidence that the charges are unreasonable, claimant bears the burden of proof. Claimant was clearly on notice that the reasonableness of the charges was disputed by defendants. See prehearing report and order approving same, item 8-(a). At the hearing, claimant failed to introduce any evidence to establish that the fees were reasonable. Defendants will not be ordered to pay claimant's medical bills.

Anderson v. High Rise Construction Specialists, Inc., Appeal Decision, July 31, 1990.

Anderson discussed the burden of proof for reasonableness of medical services under Iowa Code section 85.27. The instant case deals with the reasonable fee for a medical examination pursuant to Iowa Code section 85.39. Under both Code sections the employer is liable for reasonable charges.

Claimant bears the burden of proof. Claimant was clearly on notice that the reasonableness of Dr. Walker's charges was disputed by defendants. The application for medical examination which was filed by claimant was consented to by defendants "but only to the extent of reasonable and customary charges." The prehearing report and order approving same, item 8(e) indicated that the reasonableness of Dr. Walker's charges was an issue. Claimant failed to introduce any evidence to establish that the disputed fees were reasonable. Claimant's total bill with Dr. Walker was $528.00. Defendants paid $175.00 of Dr. Walker's medical bill and an outstanding balance of $353.00 remains. Claimant failed to present evidence at the hearing that Dr. Walker's fee was reasonable, therefore defendants will not be ordered to pay the outstanding balance of $353.00 of Dr. Walker's medical examination.

Claimant, in her appeal brief, argues that the deputy erred in finding the extent of claimant's disability to her left hand. Claimant appears to have acquiesced to the deputy's finding that her injury was to the left hand and not the left upper extremity. However, claimant's point on the extent of disability is correct. Claimant's disability is to her left hand and a functional impairment rating of the upper extremity should be converted to the hand. Claimant's 20 percent functional impairment to the left upper extremity is converted to 22 percent functional impairment of the left hand pursuant to the Guides to the Evaluation of Permanent Impairment, American Medical Association, 3rd Edition.

FINDINGS OF FACT

1. Claimant suffered a bilateral carpal tunnel syndrome as a result of her work-related injury on June 15, 1987.

2. Claimant has no impairment to her right hand or her right upper extremity as a result of her work-related injury on June 15, 1987.

3. Claimant is right-handed.

4. Claimant has a 20 percent functional impairment of the left upper extremity as a result of her work-related injury on June 15, 1987. According to the Guides to the Evaluation of Permanent Impairment, AMA, 3rd Ed., 20 percent functional impairment of the left upper extremity converts to 22 percent functional impairment of the left hand.

5. Claimant reached maximum healing on March 6, 1988.

6. Claimant's permanent partial disability benefits shall commence March 7, 1988.

7. Claimant incurred a healing period beginning June 15, 1987 up to and including September 10, 1987 and another healing period beginning September 30, 1987 up to and including March 6, 1988.

8. Claimant was paid stipulated temporary partial disability benefits for February 29, 1988 through March 6, 1988, in the amount of $31.87.

9. Defendants' doctor recommended claimant see Dr. DeBartolo, a specialist. Defendants are responsible for Dr. DeBartolo's $35.00 bill.

10. Claimant failed to present evidence that the disputed fees generated by Dr. Walker's independent medical examination were reasonable.

11. Defendants delayed commencement of permanent partial disability benefits without reasonable or probable cause or excuse.

CONCLUSIONS OF LAW

Claimant has a 22 percent functional impairment of her left hand which is causally connected to her injury on June 15, 1987.

Defendants delayed commencement of permanent partial disability benefits without reasonable or probable cause or excuse and shall pay 10 percent penalty benefits under Iowa Code section 86.13.

Claimant failed to meet her burden of proving that Dr. Walker's fee for his independent medical examination was

reasonable pursuant to Iowa Code section 85.39. Defendants are not liable for the disputed portion of claimant's medical expenses.

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

ORDER

THEREFORE it is ordered:

That defendants shall pay unto claimant healing period benefits at the rate of one hundred forty-nine and 46/100 dollars ($149.46) for the period beginning June 15, 1987 up to and including September 10, 1987 and beginning September 30, 1987 up to and including March 6, 1988.

That defendants shall pay unto to claimant forty-one point eight (41.8) weeks of permanent partial disability benefits at the rate of one hundred forty-nine and 46/100 dollars ($149.46) beginning March 7, 1988.

That defendants shall pay Dr. DeBartolo thirty-five dollars ($35.00).

That defendants shall pay Iowa Code section 86.13 penalty benefits of ten percent (10%) on six thousand two hundred forty-seven and 43/100 dollars ($6,247.43), which amounts to a penalty of six hundred twenty-four and 74/100 dollars ($624.74).

That defendants shall pay the cost of this action including the costs of transcribing the hearing

That defendants shall file an activity report upon payment of this award as requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 26th day of April, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert S. Kinsey III
Attorney at Law
214 N. Adams
P.O. Box 679
Mason City, Iowa 50401

Mr. Michael A. McEnroe
Attorney at Law
3151 Brockway Road
P.O. Box 810
Waterloo, Iowa 50704

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHIRLEY SCHINTGEN, Claimant,	:	
vs.	:	File No. 855298
ECONOMY FIRE AND CASUALTY COMPANY, Employer,	:	R U L I N G
and	:	O N
KEMPER GROUP, Insurance Carrier, Defendants.	:	R E H E A R I N G

FILED
JUN 28 1991
IOWA INDUSTRIAL COMM

An order granting reconsideration of an appeal decision dated April 26, 1991 was granted. All issues raised by both claimant and defendants in their filings are now considered.

Claimant makes a request for the payment of accrued interest on all awarded benefits pursuant to Iowa Code section 85.30. The issue of interest was included by the parties on the prehearing order. The deputy industrial commissioner presiding over the arbitration hearing, however, failed to award section 85.30 interest in his order. Claimant did not assert the issue of interest on appeal. Claimant filed application seeking an order nunc pro tunc following the filing of the appeal decision.

Customarily, a party who fails to assert an issue on appeal waives that issue for further consideration. Claimant did not assert the issue of the deputy's failure to award section 85.30 benefits on appeal. Claimant has a statutory right to section 85.30 interest on accrued benefits. "Waiver requires proof of voluntary and intentional relinquishment of a known right." In re Guardianship of Collins, 327 N.W.2d 230, 234 (Iowa 1982). On the prehearing order, the issue of interest was listed among the other issues to be considered by the parties. While the deputy failed to award claimant interest on benefits, it appears that claimant did not intend to waive the right to payment of interest.

Therefore, all accrued unpaid weekly benefits shall be paid in a lump sum together with interest from the date each payment became due in accordance with section 85.30.

The next issue to be considered is the reasonableness of charges for the independent medical examination. Claimant asserts that the parties stipulated that the providers of the medical services would testify to the reasonableness of the charges in section 8(a) of the prehearing report and assert that it is defendants' burden to introduce evidence that the charges are unreasonable.

The attorneys and the deputy prior to the start of the hearing discussed the issues to be considered during the arbitration hearing:

> THE COURT: [B]ut as to Doctor Walker, we do not have a 85.27 issue but we have the issue of reasonableness.
>
> MR KINSEY: That's a 85.39 issue, as I understand.
>
> THE COURT: On Walker. okay.
>
> ....
>
> THE COURT: It's my understanding Doctor Walker, the defendants indicated 85.39 application but apparently had the understanding that there would be reasonableness to the bill.
>
> MR. McENROE: Correct, Your Honor.
>
> ....
>
> MR. KINSEY: And there's an interest [sic] as to interest and costs. We had two issues on 85.27, the bill and the authorized continuing care. The reasonableness of Doctor Walker's charges and then the first two that you mentioned, causal connection, nature and extent. I think those are the issues.

(Transcript pages 3-4, 5)

The issue of reasonableness of the independent medical examination was asserted by defendants on the application approving the section 85.39 examination, the prehearing order, at the hearing itself and finally, on appeal. When all information is considered in this case it is clear that the issue of the reasonableness of the costs of the examination by Dr. Walker pursuant to Iowa Code section 85.39 was in dispute. Claimant failed to present evidence at the hearing that Dr. Walker's fee

was reasonable, therefore defendants will not be ordered to pay the outstanding balance of $353.00. The appeal decision on the reasonableness of the cost of the independent medical examination remains unchanged.

The appeal decision filed April 26, 1991 remains unchanged except as modified by this decision on the issue of interest.

THEREFORE, it is additionally ordered:

That all accrued unpaid weekly benefits shall be paid by defendants in a lump sum together with interest from the date each payment became due in accordance with Iowa Code section 85.30.

Signed and filed this 28th day of June, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert S. Kinsey III
Attorney at Law
214 N. Adams
P.O. Box 679
Mason City, Iowa 50401

Mr. Michael A. McEnroe
Attorney at Law
3151 Brockway Road
P.O. Box 810
Waterloo, Iowa 50704

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. SHIRLEY,	:	
Claimant,	:	
vs.	:	
	:	File No. 811696
SHIRLEY AG SERVICE,	:	
	:	A P P E A L
Employer,	:	
	:	D E C I S I O N
and	:	
EMPLOYERS MUTUAL,	:	
Insurance Carrier,	:	
and	:	
SECOND INJURY FUND OF IOWA,	:	
Defendants.	:	

FILED
MAR 21 1990
IOWA INDUSTRIAL COMMISSIONER

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 prehearing 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.

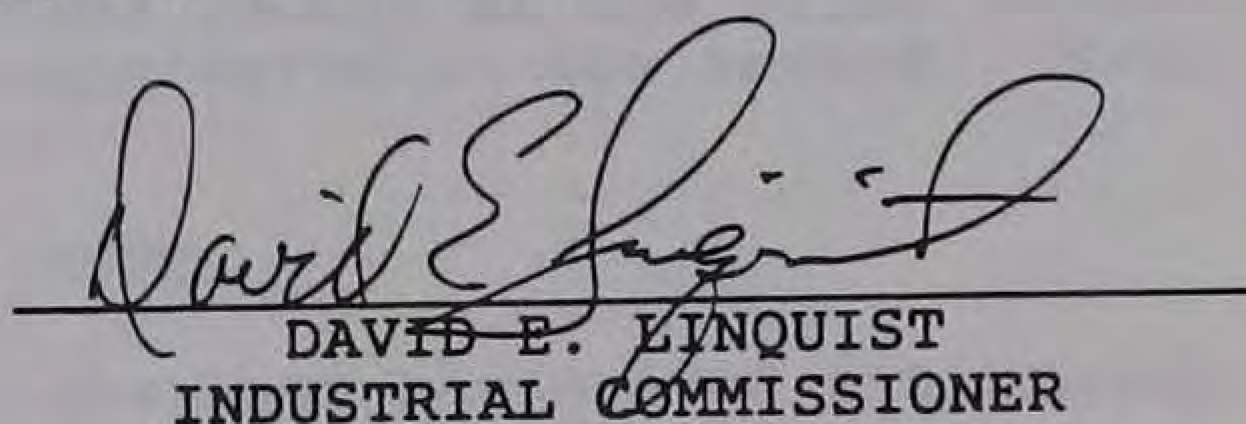
That the employer and its insurance carrier pay interest pursuant to the provisions of Code section 85.30.

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

Copies To:

Mr. Jon H. Johnson
Attorney at Law
P.O. Box 659
Sidney, Iowa 51652

Mr. W. Curtis Hewett
Attorney at Law
P.O. Box 249
Council Bluffs, Iowa 51502

Ms. Joanne Moeller
Assistant Attorney General
Tort Claims Division
Hoover State Office Bldg.
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAWRENCE R. SMALLEY, Claimant, vs. DOMAIN INDUSTRIES/DOBOY FEED DIVISION, Employer, and NEW HAMPSHIRE INSURANCE GROUP, Insurance Carrier, Defendants.	:	File No. 492251 A P P E A L D E C I S I O N

FILED

SEP 24 1990

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision denying claimant additional industrial disability benefits.

The record on appeal consists of the transcript of the review-reopening hearing and joint exhibits 1 through 18. Parties stipulated that the entire record of the first review-reopening proceeding shall be considered in the record. Both parties filed briefs on appeal.

ISSUE

The sole issue is whether claimant has proved entitlement to additional industrial disability benefits.

REVIEW OF THE EVIDENCE

The review-reopening decision filed June 22, 1989 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. Claimant sustained a strain injury to his back when he experienced pain while lifting on March 29, 1978.

2. Claimant's prior award of 40 percent industrial disability was based on a weight restriction of 20 pounds and no prolonged bending stooping or twisting.

3. Claimant was born March 22, 1934.

4. Claimant received associate degrees in art and science from a community college subsequent to his work injury. Claimant also took some courses at Iowa State University but did not obtain a degree.

5. Claimant was hired by Preferred Risk on March 6, 1986 as a control data operator I and worked for more than one year without missing a day of work on account of his back.

6. Claimant's restrictions at the time of the second hearing were essentially the same as they were at the time of the first hearing. Claimant is restricted to working no more than eight hours a day; he is restricted to 20 pounds of lifting and no excessive bending, stooping or twisting of his lower back.

7. The prior appeal decision found that claimant had a permanent partial impairment of 20 percent of the body as a whole.

8. Both John H. Kelley, M.D., and Jerome G. Bashara, M.D., diagnosed claimant's condition as Grade II spondylolisthesis.

9. Dr. Kelley said that claimant's impairment from the injury of March 29, 1978 was eight percent, even though his overall impairment was 20 percent when his preexisting spondylolisthesis condition was considered.

10. Dr. Bashara increased his impairment rating from 20 percent to 25 percent after the hearing of January 28, 1982, but gave no specific justification for it in terms of claimant's ability or inability to do his job or to perform other work.

11. The AMA Guides to the Evaluation of Permanent Impairment, second edition, rates a Grade I or II spondylolisthesis at 20 percent impairment of the whole person. (Joint exhibit 3).

12. The medical evidence, especially the x-rays, shows that claimant's back complaints are due to congenital, developmental and degenerative conditions as distinguished from the back strain that claimant encountered on March 29, 1978.

13. Claimant's earning capacity has not decreased because he now has associate degrees of art and science. Claimant is trained for and has experience, through his job with Preferred Risk, in semi-skilled work rather than unskilled work, and claimant is earning more money now than he was at the time of the injury on March 29, 1978.

CONCLUSIONS OF LAW

Claimant failed to prove that he sustained a change of physical or medical condition or a change of nonphysical or nonmedical condition that is worse than his condition at the time of his hearing on January 26, 1982.

Claimant failed to prove entitlement to additional permanent partial disability benefits.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay the costs of this action including the costs of the transcription of the review-reopening hearing.

Signed and filed this 24th day of September, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Phil Vonderhaar
Attorney at Law
840 Fifth Avenue
Des Moines, Iowa 50309

Mr. Roger L. Ferris
Attorney at Law
1900 Hub Tower
699 Walnut Street
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAWRENCE R. SMALLEY, Claimant, vs. DOMAIN INDUSTRIES/DOBOY FEED DIVISION, Employer, and NEW HAMPSHIRE INSURANCE GROUP, Insurance Carrier, Defendants.	File No. 492251 RULING ON APPLICATION FOR REHEARING AND MOTION TO ENLARGE FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED
OCT 16 1990
IOWA INDUSTRIAL COMMISSIONER

Defendants filed an application for rehearing from an appeal decision filed September 24, 1990 pursuant to Iowa Code section 17A.16(2). After considering the reasons given for the rehearing it is decided that the application for rehearing should be and is hereby denied.

Claimant filed a motion to enlarge and amend the findings of fact and conclusions of the appeal decision. Having considered claimant's motion to amend, it is decided that it should be granted in part and denied in part. Claimant's motion to amend the findings of fact is granted. Claimant's motion to amend the conclusions of law is denied. The conclusions of law of the appeal decision filed September 24, 1990 are correct and are not modified by this ruling.

Findings of fact 13 is modified to read as follows:

13. Claimant's earning capacity has not decreased because he now has associate degrees of art and science. Claimant is trained for and has experience, through his job with Preferred Risk, in semi-skilled work rather than unskilled work, and claimant has the capacity to earn more money now based upon his employment with Preferred Risk than at the time of his injury in March 29, 1978.

New finding of fact 14 is added:

14. Claimant is on medical leave from Preferred Risk for an unrelated injury and there is a job available for claimant at Preferred Risk.

Signed and filed this 16th day of October, 1990.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Phil Vonderhaar
Attorney at Law
840 Fifth Avenue
Des Moines, Iowa 50309

Mr. Roger L. Ferris
Attorney at Law
1900 Hub Tower
699 Walnut Street
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SUSAN SPALDING,	:	
Claimant,	:	
vs.	:	File No. 892690
EMCO INDUSTRIES,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
CRUM & FORSTER COMMERCIAL INSURANCE,	:	
Insurance Carrier, Defendants.	:	

FILED

NOV 28 1990

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on July 22, 1988. Defendants cross-appeal.

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

ISSUES

Claimant states the following issue on appeal:

Are the scheduled member sections of the Iowa workers' compensation law unconstitutional?

Defendants state the following issue on cross-appeal:

The deputy erred in finding that the claimant sustained a 15 percent permanent partial impairment of the left arm which is causally related to her employment.

REVIEW OF THE EVIDENCE

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

Briefly stated, claimant worked as a factory machine operator. On July 22, 1988, claimant suffered a crushing blow to her left hand and forearm arising out of and in the course of her employment. Claimant was off work for various intermittent periods of time following her injury.

Claimant had x-rays taken of her left arm shortly after the injury. Those x-rays did not reveal any fractures. On November 1, 1988, further x-rays did show a fracture of the left forearm. The fracture was described by Ronald S. Bergman, M.D., as a "healing" fracture. Dr. Bergman re-examined the x-rays taken shortly after the injury, and again concluded that no fracture was indicated on those x-rays. Claimant testified that she did not have any intervening trauma to her arm from the time of her injury on July 22, 1988, until the fracture was discovered on November 1, 1988.

Claimant was returned to work with some restrictions, which were honored by the employer. Claimant was placed in a "light duty" job.

Rodney E. Johnson, M.D., opined on July 26, 1988, that claimant had no permanent impairment of her left arm. Dr. Bergman opined on November 14, 1988, after the x-rays revealed the fracture, that claimant had a minimal to zero "disability."

Claimant then sought an independent evaluation by Jerome Bashara, M.D., on June 9, 1989. Dr. Bashara found claimant to have a 15 percent permanent partial impairment of the left upper extremity.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 22, 1988 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).

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

Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

ANALYSIS

On appeal, defendants raise as an issue whether claimant has carried her burden to prove that her present condition is causally related to her work injury. None of the medical evidence contains an expert medical opinion that claimant's present condition is caused by her work injury of July 22, 1988. Dr. Bashara did state as follows:

> Diagnosis: Crush injury left forearm with healed fracture of the radius.
>
> I would give this patient a 15% permanent partial physical impairment of her upper extremity related to her fracture and injuries.

(Joint Exhibit K, pages 4-5)

This statement by Dr. Bashara does not clearly state that claimant's fracture is a result of her work injury of July 22, 1988. This is especially important where the x-rays taken immediately after the injury showed no fracture, while the x-rays that did show the fracture were not taken until several months later.

Although there is no evidence in the record to show an intervening cause for claimant's fracture, it is not incumbent on defendants to show the cause of the fracture. Claimant bears the burden of proof. In light of the fact that both Dr. Bergman and Dr. Johnson failed to causally connect claimant's fracture with her work injury, and Dr. Bashara merely rates claimant's present condition without relating the fracture to the injury, claimant has failed to carry her burden to show that her present left arm fracture is causally connected to her work injury of July 22, 1988.

Even if claimant had shown that her present left arm fracture was causally connected to her work injury of July 22,

1988, claimant has not shown entitlement to permanent partial disability benefits. Dr. Johnson stated that claimant did not suffer any permanency as a result of her injury. Dr. Bergman stated that claimant had minimal or zero impairment as a result of the injury. Dr. Johnson and Dr. Bergman were claimant's treating physicians. Dr. Bashara performed an evaluation only. Dr. Johnson and Dr. Bergman had more contact with claimant and are in a better position to ascertain the permanent nature of claimant's impairment. Dr. Bergman also had the opportunity to examine claimant's x-rays. The opinions of Dr. Johnson and Dr. Bergman will be given the greater weight. Claimant has not carried her burden of proof to show that she has suffered a permanent partial impairment as a result of her July 22, 1988 work injury.

Claimant raises as an issue on appeal whether the scheduled member provisions of the Iowa Workers' Compensation Law are constitutional. Claimant contends that these sections of the law in their application to claimant operate to deny her equal protection of the law as compared to other claimants who suffer injuries that extend to the body as a whole, and thus are compensated on the basis of industrial disability. Claimant relies on both equal protection under the U.S. Constitution and Article I, Section 6 of the Iowa Constitution. These sections have been previously upheld by the Iowa Supreme Court as an appropriate determination by the legislature to treat various injuries differently under the workers' compensation system. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983). Claimant also alleges that the statute is unconstitutional on its face. This agency lacks jurisdiction to determine the constitutional validity of a statute. Salsbury Laboratories v. Iowa Dept. of Environmental Quality, 276 N.W.2d 830 (Iowa 1979).

FINDINGS OF FACT

1. Claimant was employed by defendant employer as a factory machine operator.

2. Claimant received an injury to her left arm on July 22, 1988, arising out of and in the course of her employment.

3. Claimant's x-rays of her left arm taken immediately after the July 22, 1988 injury do not show a fracture.

4. Claimant's x-rays of her left arm taken November 1, 1988, do show a healing fracture of the left arm.

5. Dr. Johnson treated claimant and found that claimant did not have any permanent partial impairment of her left arm.

6. Dr. Bergman treated claimant and found that claimant had minimal to zero permanent impairment of her left arm.

7. Dr. Bashara found that claimant had a 15 percent permanent partial impairment of her left arm as a result of her work injury and her fracture.

8. None of claimant's physicians expressed an opinion causally connecting claimant's present left arm condition to her work injury of July 22, 1988.

CONCLUSIONS OF LAW

Claimant has failed to carry her burden of proof to show that her present left arm condition is causally connected to her work injury of July 22, 1988.

Claimant has failed to carry her burden of proof to show that she has a permanent partial impairment of her left arm.

WHEREFORE, the decision of the deputy is affirmed in part and reversed in part.

ORDER

THEREFORE, it is ordered:

That defendants shall pay ten point three seven two (10.372) weeks of a combination of temporary total disability or healing period benefits and temporary partial disability benefits at the rate of two hundred forty-three dollars ($243.00) per week for the periods of July 23, 1988 through July 29, 1988, July 30, 1988 through August 3, 1988 (temporary total disability), and temporary partial disability benefits from October 31, 1988 through December 11, 1988, December 21, 1989, January 11, 1989 through January 22, 1989, and November 1, 1989 through December 2, 1989, for all inclusive periods of time the parties stipulated to be ten point three seven two (10.372) weeks, which amount defendants have already paid.

That defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against the award for weekly benefits previously paid.

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

That defendants shall pay the costs of this action pursuant to rule 343 IAC 4.33.

That defendants file claim activity reports as requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 28th day of November, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Philip F. Miller
Attorney at Law
309 Court Ave., Suite 200
Des Moines, Iowa 50309

Mr. Harry W. Dahl
Attorney at Law
974 73rd St., Suite 16
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAVONDA SPARROW,	:	
Claimant,	:	File No. 803234
vs.	:	APPEAL
ARMOUR-DIAL, INC.,	:	DECISION
Employer, Self-Insured, Defendant.	:	

FILED
JUL 30 1990
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. The decision of the deputy is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

The deposition of Dr. Jochims was properly admitted pursuant to Risius v. Todd Corporation, (Remand Order, October 17, 1989).

The impairment rating of Dr. Jochims is given weight only to the extent that it describes claimant's present physical impairment.

Defendants shall pay the costs, including the costs of the appeal.

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

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. James Hoffman
Attorney at Law
Middle Road
P. O. Box 1066
Keokuk, Iowa 52632

Mr. Larry Shepler
Attorney at Law
Executive Square, Ste. 102
400 Main Street
Davenport, Iowa 52801

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA S. STANLEY, Claimant, vs. WILSON FOODS CORPORATION, Employer, Self-Insured, Defendant.	File No. 753405 A P P E A L D E C I S I O N

FILED
AUG 23 1990
INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding 14 percent permanent partial disability benefits from industrial purpose as a result of claimant's work injury and awarding claimant benefits under Iowa Code section 86.13. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 5 and defendant's exhibits B, C, and D. Both parties filed briefs on appeal.

ISSUES

Defendant states the issues on appeal are:

I. Whether the deputy erred in finding that Claimant has 14% permanent partial disability.

II. Whether the deputy erred in finding that the employer unreasonably failed to pay claimant 7.5 weeks of compensation entitling her to 3.75 additional weeks of compensation under 86.13.

REVIEW OF THE EVIDENCE

The arbitration decision dated May 30, 1989 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 November 16, 1983 which arose out of and in the course of her employment. McDowell v.

Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The 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 "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe, 246 Iowa 402, 68 N.W.2d 63.

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

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 16, 1983 is causally

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

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

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 injury to a scheduled member may, because of after effects (or compensatory change), result in permanent impairment of the body as a whole. Such impairment may in turn form the basis for a rating of industrial disability. Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Iowa Code Section 85.34(2) provides:

> The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such, however, if said employee is permanently and totally disabled the employee may be entitled to benefits under subsection 3.

Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co.,

252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

An injury may occur over a period of time. For time limitation purposes, the injury in such cases occurs when, because of pain or physical disability, the claimant is compelled to leave work. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

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

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted on the issue of the extent of claimant's permanent impairment. Additional analysis is relevant on the issue of imposition of penalty pursuant to section 86.13.

On the issue of penalty under Iowa Code section 86.13, a recent agency decision sets out the standard to evaluate defendant's behavior. The standard is whether defendant's claim is fairly debatable. Where defendant asserts a claim that is fairly debatable, they do not act unreasonably in the denial of payment. Seydel v. U of I Physical Plant, Appeal Decision, November 1, 1989. The industrial commissioner in Seydel held that defendants failed to show a reasonable dispute concerning the issue of notice and a penalty under section 86.13 was appropriate.

The medical evidence in this case is undisputed, there is a casual connection between claimant's bilateral carpal tunnel and cubital tunnel syndromes and claimant's work. Both Drs. Walker and Eversmann agreed that claimant had some permanent impairment as a result of the 1983 injury. There is no evidence in the record of this case to suggest that the existence of such an impairment could not have been discovered through the exercise of reasonable diligence or reasonable investigation at the time claimant returned to work in March 1984. Carpal tunnel syndrome often leaves some permanent impairment. The most minimal amount of effort would have been to simply ask Dr. Eversmann whether or not any permanency had resulted and, if so, how much. The record does not show that an investigation or inquiry of that nature was made at the time claimant returned to work. When an inquiry was

finally made in 1985, Dr. Eversmann reported that there was some permanent impairment. There was ample evidence of residual symptoms in this case to alert the employer to the potential for the existence of some permanent impairment.

On November 26, 1985, defendant's selected physician, Dr. Eversmann, rated claimant's upper right extremity at three percent permanent impairment on account of claimant's injury. Defendant's refusal to pay even the lowest impairment rating given by defendant's selected physician is unreasonable and under the facts of this particular case, a penalty under section 86.13 is warranted.

FINDINGS OF FACTS

1. On November 16, 1983, claimant became disabled as a result of injuries to her arms including carpal tunnel syndrome and cubital tunnel syndrome.

2. The disabling condition resulted from cumulative trauma to which claimant was subjected as a result of the activities that she performed as a part of the duties of her employment with Wilson Foods Corporation.

3. Following surgery for the conditions and other treatment, claimant returned to work with defendant on March 19, 1984.

4. The treatment that was provided did not completely resolve the conditions and claimant was left with residual permanent partial impairment of 15 percent of the upper right extremity and 10 percent of the upper left extremity.

5. Claimant incurred additional permanent impairment affecting her arms subsequent to July 1, 1984 when Farmstead Foods acquired the plant in which claimant was employed.

6. Defendant unreasonably delayed and denied the payment of weekly compensation to the extent that it failed to make a prompt payment for three percent permanent impairment of the claimant's upper right extremity.

7. Defendant failed to conduct a reasonable investigation of the claim by virtue of the fact that claimant had residual symptoms and the defendant failed to request an impairment rating from Dr. Eversmann at the time of the end of claimant's healing period.

CONCLUSIONS OF LAW

Claimant proved entitlement to 14 percent permanent partial disability under the provisions of Iowa Code section 85.34(2)(s),

but her entitlement to compensation for permanent partial disability is limited to 62 3/7 weeks by virtue of claimant's failure to attend examinations scheduled by the employer under the provisions of Iowa Code section 85.39.

Defendant failed to pay claimant the 7.5 weeks of compensation which represent the three percent impairment of claimant's right arm that was rated by the defendant's physician, Dr. Eversmann. Accordingly, 3.75 additional weeks of compensation shall be awarded to claimant under the provisions of the fourth unnumbered paragraph of Iowa Code section 86.13.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That the defendant pay claimant sixty-two and three sevenths (62 3/7) weeks of compensation for permanent partial disability at the stipulated rate of two hundred thirty-three and 78/100 dollars ($233.78) per week payable commencing March 19, 1984.

That the entire amount thereof is past due and owing and shall be paid to claimant in a lump sum together with interest from the date each weekly payment came due pursuant to Iowa Code section 85.30.

That defendant pay claimant three point seven five (3.75) weeks of compensation at the stipulated rate of two hundred thirty-three and 78/100 dollars ($233.78) per week payable in lump sum of eight hundred seventy-six and 67/100 dollars ($876.67).

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

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

Signed and filed this 23rd day of August, 1990.

Clair R. Cramer

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Lowell H. Forte
Attorney at Law
200 2nd Avenue SW
Cedar Rapids, Iowa 52404

Mr. Leslie E. Stokke
Attorney at Law
837 Higley Building
Cedar Rapids, Iowa 52402

Mr. John M. Bickel
Attorney at Law
500 MNB Building
P.O. Box 2107
Cedar Rapids, Iowa 52406-2107

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PEARL J. STARK, Claimant, vs. DONNELLEY MARKETING, Employer, and THE HARTFORD, Insurance Carrier, Defendants.	:	File No. 861926 A P P E A L D E C I S I O N FILED JUL 20 1990 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

The record on appeal was reviewed de novo and this decision is based on the motion, resistance and all supporting affidavits and documents. Claimant's appeal brief was not timely filed, therefore, the appeal was considered generally without any specified errors to determine compliance with the law.

APPLICABLE LAW

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

An additional citation is pertinent:

> In order to be entitled to a summary judgment, the defendants were required to show there was no genuine issue of material fact involved in the case and that a summary judgment should be entered in their favor as a matter of law. Rule 237(c), Rules of Civil Procedure; Unification Church v. Clay Central School District, 253 N.W.2d 579, 581 (Iowa 1977) and citations. In passing upon motions for summary judgment, a court is required to look at the entire record in a light most favorable to the party opposing the motion to determine whether the moving party has met his burden. Unification Church v. Clay Central School District, 253 N.W.2d at 581; Sand Seed Service, Inc. v. Poeckes, 249 N.W.2d 663, 664 (Iowa 1977).

Iowa Department of Transportation v. Read, 262 N.W.2d 533, 536 (Iowa 1978).

ANALYSIS

The analysis of the evidence in conjunction with the law in the summary judgment decision filed May 16, 1989 is adopted.

FINDINGS OF FACT

1. Claimant was hired by defendants in Sioux City, Iowa in April 1980 to work as a production employee.

2. Claimant worked at defendants' facility in Sioux City, Iowa until 1982, 1983, or 1984, at which time the defendants moved its production works to a location at South Sioux City, Nebraska.

3. Claimant maintained her domicile in the state of Iowa after defendants' transfer to Nebraska.

4. Defendants were licensed to do business in Nebraska where it maintained its principal place of operations at the time of claimant's injury.

5. Defendants maintained warehouse facilities in North Sioux City, South Dakota and Sioux City, Iowa subsequent to the move of the production operation.

6. Claimant's wages were paid to her as a Nebraska employee from the time of her relocation and claimant paid taxes pursuant to Nebraska laws, see defendants exhibit E. Claimant's salary check was mailed to her from defendant's Nevada, Iowa address.

7. Occasionally, claimant would work at the warehouse facilities subsequent to the time that the production operations had been moved to Nebraska.

8. The allegations upon which claimant makes this claim are that she was injured at the South Dakota warehouse while lifting a table on September 4, 1986.

9. In claimant's original notice and petition, she stated that she was receiving workers' compensation benefits pursuant to South Dakota law.

10. Exhibit D which is attached to defendants' motion establishes that most of claimant's work was performed in Nebraska after the production operation was moved to the state of Nebraska and that claimant's work in the state of Iowa was only occasional.

11. Majority of claimant's working time was spent in the state of Nebraska.

CONCLUSION OF LAW

The evidence shows that defendant employer is principally localized in the state of Nebraska and that claimant regularly works in the state of Nebraska, therefore there was no genuine issue of material fact and that defendants are entitled to entry of summary judgment as a matter of law.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant's claim against the defendants is dismissed for lack of subject matter jurisdiction.

That claimant pay the cost of this action pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 20th day of July, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Harry H. Smith
Attorney at Law
P.O. Box 1194
Sioux City, Iowa 51102

Mr. James M. Cosgrove
Attorney at Law
P.O. Box 1828
Sioux City, Iowa 51102

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TRACY LEE TEBOE, Claimant, vs. CONTINENTAL BAKERY, Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	File No. 818243 A P P E A L D E C I S I O N

FILED
OCT 30 1990
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal and claimant cross-appeals from an order dismissing claimant's contested case without prejudice. The record on appeal consists of the transcript of the arbitration hearing. Defendants did not file a brief on appeal, therefore, the record will be considered generally without reference to specific errors.

ISSUES

The issues on appeal are:

I. Whether the deputy industrial commissioner has the authority to grant claimant's request for voluntary dismissal after the hearing had begun?

II. Whether the deputy's order that sustained defendants' objection to the admission of evidence because it was not timely served upon defendants should be modified?

REVIEW OF THE EVIDENCE

The record in this matter shows that a hearing assignment order filed October 25, 1988 set this matter for hearing on June 12, 1989 at 1:00 p.m. On June 12, 1989 the deputy industrial commissioner assigned to hear this matter began the proceedings. At the introduction of claimant's evidence, defendants objected on the grounds that claimant failed to comply with the prehearing

order. The substance of the objection is that claimant failed to timely file exhibit and witness lists.

The following are excerpts from the June 12, 1989 proceedings at which counsel for both parties were present.

> The Hearing Officer: ...The division of industrial services, the entire industrial commissioner's office was created from statutes, and thus by statute one is created of rules. It's not a question of discretion. It's not a question of surprise on the part of defendants. It's a question that it is the order. It is not my order. It is mandatory order. I do not have the authority or the jurisdiction to alter that order.
>
> Any witnesses that were not listed on a witness list that was not exchanged 15 days prior to hearing and any exhibits that were not on an exhibit list that was not exchanged 15 days prior to hearing or no later than 15 days prior to hearing are not considered in making a decision. That's -- that's something that has been upheld by the industrial commissioner repeatedly.
>
> ....
>
> [Mr. O'Brien:] I don't see the prejudice, and I fail to -- I understand that there is a technical violation here, and I guess there's really no one to blame except myself, but we're certainly not going to proceed with the case if your ruling stands.
>
> I, of course, will be making a motion to dismiss without prejudice so it could be refiled.
>
> The Hearing Officer: I am not going to allow the exhibits because they were not served in compliance with the order. Claimant, of course, always has the -- I think it's always understood that claimant can testify on behalf of his or her ownself. Claimant is entitled to testify without being served as a witness. As far as any witnesses that were not indentified as witnesses are not allowed to testify.
>
> Mr. O'Brien: Based upon the court's ruling, I would like to move to dismiss this at this time without prejudice so that it can be refilled at a later date.
>
> The Hearing Officer: Mr. Patterson, I suppose you want to object. I don't know that I have any authority to do anything to the claimant if the claimant wishes to dismiss.

....

[The Hearing Officer:] However, I don't think the rules allow me to dismiss an action with prejudice. I will be entering an order that dismisses the matter that is subject to being appealed to the commissioner. If he wishes to change the policy in his office, he certainly can do that.

....

The Hearing Officer: However -- And I agree with Mr. Patterson. We are here. We are ready to proceed. A hearing assignment order was filed in this matter in October of 1988. There is absolutely no reasonable basis for someone not to have read that order, not to have been familiar with the fact that witness and exhibit lists have to be served within 15 days.

(Transcript, pages 10-16)

APPLICABLE LAW

Division of Industrial Services Rule 343-4.20 states in part:

A deputy commissioner or the industrial commissioner may order parties in the case to either appear before the commissioner or a deputy commissioner for a conference, or communicate with the commissioner or a deputy commissioner and with each other in any manner as may be prescribed to consider, so far as applicable to the particular case:

....

4.20(7) Specifying all proposed exhibits and proof thereof;

....

4.20(9) Specifying all witnesses expected to testify;

Division of Industrial Services Rule 343-4.35 provides:

The rules of civil procedure shall govern the contested case proceedings before the industrial commissioner unless the provisions are in conflict with these rules and Iowa Code chapters 85, 85A, 85B, 86, 87 and 17A, or obviously inapplicable to the industrial commissioner. In those circumstances, these rules or

> 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."

Division of Industrial Services Rule 343-4.36 states:

> If any party to a contested case or an attorney representing such party shall fail to comply with these rules or any order of a deputy commissioner or the industrial commissioner, the deputy commissioner or industrial commissioner may dismiss the action. Such dismissal shall be without prejudice. The deputy commissioner or industrial commissioner may enter an order closing the record to further activity or evidence by any party for failure to comply with these rules or an order of a deputy commissioner or the industrial commissioner.

Iowa Rule of Civil Procedure 215 in effect at the time of the hearing provided:

> A party may, without order of court, dismiss that party's own petition, counterclaim, cross-petition or petition of intervention, at any time before the trial has begun, subject to the provisions of R.C.P. 181.4. Thereafter a party may dismiss an action or that party's claim therein only by consent of the court which may impose such terms or conditions as it deems proper; and it shall require the consent of any other party asserting a counterclaim against the movant, unless that will still remain for an independent adjudication. A dismissal under this rule shall be without prejudice, unless otherwise stated; but if made by any party who has previously dismissed an action against the same defendant, in any court of any state or of the United States, including or based on the same cause, such dismissal shall operate as an adjudication against that party on the merits, unless otherwise ordered by the court, in the interests of justice.

ANALYSIS

A recent agency decision is pertinent to the issue of the deputy's authority concerning voluntary dismissals pursuant to Iowa Rule of Civil Procedure in effect at the time. It states:

> There appears to be some confusion concerning voluntary dismissals under rule 215. Rule 215 replaced Code of Iowa section 11562 (1931). The comments following rule 215 unequivocally state that rule 215 is a substantial change in the law governing voluntary

> may dismiss a cause of action without court approval. The supreme court stated that "rule 215 provides that 'a party may ... dismiss his own petition ... at any time before the trial has begun ...'" State, Iowa Dept of Environ. v. Greenley, 336 N.W.2d, at 415.
>
> Prior to the start of a hearing, a party could voluntarily dismiss their contested case without the consent of the industrial commissioner. Pursuant to rule 215, parties in a hearing may not voluntarily dismiss their case without approval of the deputy presiding over the contested case. In the interest of judicial efficiency, a deputy must have the authority to control voluntary dismissals once a hearing has begun. The deputy had the authority to determine whether a party's dismissal should be granted, with or without prejudice. This is not an expansion of the deputy's authority nor a change in agency policy. Under the facts of this case the trial had begun. Because the trial had begun the deputy had authority to determine whether claimant's voluntary dismissal should be allowed.

Matheson v. John Deere Des Moines Works, (Appeal Decision, October 25, 1990).

An agency decision is relevant on the issue of the deputy's ruling on claimant's failure to comply with the hearing assignment order requiring parties to file witness and exhibit lists no later than fifteen days prior to the hearing, it states:

> Testimony of witnesses will be excluded where the party offering the witnesses failed to comply with a pretrial order requiring the filing of a witness list prior to the hearing. The burden is on the non-complying party to show a good reason why the order was not complied with. Klass v. Commercial Services, Inc., IV Iowa Industrial Commissioner Report 205 (Appeal Decision, June 29, 1984).
>
> ....
>
> It is not uncommon to find in the administration of workers' compensation cases that the attorney for one or both of the parties fails to read an order issued in the case and mailed to the attorney, or reads only a portion of the order. This practice shows a complete disregard for the order and for the authority of the deputy who issued it.

The hearing deputy was correct in excluding witnesses and exhibits which were not included in a list set out in the hearing assignment order.

Clousing v. Rosenboom Machine & Tool, (Appeal Decision, May 15, 1989).

The deputy properly excluded claimant's evidence where claimant failed to comply with the hearing assignment order. Claimant's counsel's incorrect reading of the hearing assignment order did not justify the non-compliance with the unambiguous requirements of the order.

Defendants have also requested a judgment for costs against the claimant. In the order filed June 16, 1989, the deputy assessed costs against the claimant. It would appear that it is not necessary to rule on defendants' motion in this appeal decision. Costs have already been assessed by the deputy. If this matter is appealed again the question of costs can be addressed, if necessary, when all costs are known.

FINDINGS OF FACT

1. A hearing assignment order dated October 25, 1988 set a hearing date for June 12, 1989.

2. The hearing assignment order specified that a list of witnesses and exhibits were to be served upon opposing parties no later than fifteen days prior to the date of the hearing.

3. A list of witnesses and exhibits were not served upon opposing parties as required by the hearing assignment order.

4. When claimant made the motion to dismiss the petition at the proceeding on June 12, 1989 the trial in this matter had begun.

CONCLUSIONS OF LAW

Claimant's exhibits were properly excluded.

At the time claimant made the motion to dismiss, the claimant had lost the absolute right to voluntary dismissal and claimant's petition could only be dismissed with consent of the deputy.

WHEREFORE, the ruling of the deputy is affirmed in part and reversed and remanded in part.

ORDER

THEREFORE, it is ordered:

That this matter is remanded to the deputy for determination of whether the deputy consents to claimant's motion for dismissal.

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

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. David A. O'Brien
Attorney at Law
922 Douglas Street
PO Box 3223
Sioux City, Iowa 51102

Mr. Charles T. Patterson
Attorney at Law
200 Home Federal Bldg.
PO Box 3086
Sioux City, Iowa 51102

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA TERWILLIGER, Claimant, vs. SNAP-ON TOOLS CORPORATION, Employer, and ROYAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 777628/791749 862946/877065 A P P E A L D E C I S I O N

FILED
MAY 24 1991
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on August 24, 1987. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits A, B and C; and defendants' exhibits 1 through 21. Both parties filed briefs on appeal. Claimant filed a reply brief. The post-hearing briefs of the parties were also considered on appeal.

ISSUES

Claimant states the following issues on appeal:

1. Did the Deputy err by limiting the post-hearing briefs to four pages and then totally disregarding Pat's four-page brief?

2. Did the Deputy err by failing to order the stipulated payment of medical benefits?

3. Did the Deputy err by failing to specify whether Snap-On was being taxed with the fees and mileage of Pat's witnesses?

4. Did the deputy err by misapprehending the wages upon which to base the weekly compensation rate?

5. Did the Deputy err by not resolving the issue concerning how the weekly compensation rate should be computed?

6. Did the Deputy err by mischaracterizing what injuries had been alleged or were at issue?

7. Did the Deputy err by not resolving the issue concerning whether from 1978-1989, Pat had sustained an unitary, work-related injury to that regional part of her body which was comprised of her upper extremities, shoulders, and neck?

8. Did the Deputy err by not resolving the issue concerning whether Pat had sustained any kind of work-related injuries, [other than a cumulative one on August 24, 1987, to the carpal tunnels]?

9. Did the Deputy err by barring any part of Pat's claims for being outside the applicable statute of limitations?

10. Did the Deputy err by not resolving the entire issue concerning Pat's entitlement to temporary disability compensation?

11. Did the Deputy err by not resolving the entire issue concerning Snap-On's credit for payment of temporary disability compensation and by otherwise incorrectly determining this issue?

12. Did the Deputy err by failing to resolve the issue raised by Pat concerning when temporary disability compensation is due?

13. Did the Deputy err by failing to specify how interest was to be computed?

14. Did the Deputy err by failing to address the section 86.13 penalty issue?

15. Did the Deputy err by determining that Pat had sustained a functional disability of only 3% to each of her hands?

16. Did the Deputy err by failing to resolve the issue of whether work-related injury to Pat's upper extremities, shoulders, and/or neck was a proximate case [sic] of any permanent disability to her whole body?

17. Did the Deputy err by failing to resolve the issue concerning when Pat became permanently partially disabled?

18. Did the Deputy err by failing to resolve the issue concerning the extent of industrial disability Pat had sustained?

19. Did the Deputy err by entertaining Snap-On's oral Rule 80(a) motion for sanctions and by making findings with respect to it?

20. Did the Deputy err by failing to resolve Pat's written Rule 80(a) cross motion for sanctions?

REVIEW OF THE EVIDENCE

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

Briefly stated, claimant began work for defendant-employer on December 4, 1973 as an electrical assembler. Claimant first began to experience pain on January 20, 1978, when she felt pain in her neck while lifting a box at work. On June 22, 1978 she reported pain in her chest and shoulder blades. On July 17, 1978 claimant experienced pain, tingling and numbness in her fingers at work.

Claimant was treated in 1980 for neck pain by Franklin L. Tepner, D.O. On May 21, 1980 claimant reported neck pain after heavy lifting at work.

From October 30, 1978 through May 10, 1982 claimant worked as a lead person. In this job she trained other workers instead of working on an assembly line.

On August 9, 1982 and August 13, 1982 claimant was treated by Dr. Tepner for strained upper right side strain.

On April 27, 1983 claimant reported pain between her neck and shoulder blades after an incident at work. Claimant did not seek medical attention.

On October 2, 1984 claimant reported pain in her right wrist and arm while working. Claimant was taken off work until October 15, 1984 for inflammation of her right shoulder joint. From October 9, 1984 to October 18, 1984 claimant experienced

headaches. Claimant alleges October 2, 1984 as the date of injury in case number 777628.

On January 23, 1985 claimant was in a car accident involving a deer. Claimant indicates she suffered a whiplash injury to her neck, left shoulder, and hand. Claimant returned to work on February 11, 1985.

On March 21, 1985 claimant reported bilateral hand numbness, right and left elbow pain, and leg tingling. Claimant was off work until May 13, 1985. Claimant alleges March 21, 1985 as the date of injury in case number 791749.

On April 4, 1985 claimant was diagnosed by Michael J. Kitchell, M.D., as suffering from work-related carpal tunnel syndrome or tendonitis, musculoskeletal pain with functional overlay, and myofasciitis. Also in April 1985, claimant was treated by Allen G. Lang, M.D., upon complaints of pain in the neck, both shoulders, numbness in both hands and both feet, pain in the tailbone, low back, thighs, and upper arms. Claimant was also diagnosed by Jack L. Dodd, M.D., as suffering from hysterical neurosis.

On December 9, 1985 claimant was treated by Franklin L. Tepner, D.O., for mid thoracic muscle spasm on her right side.

On June 30, 1986 and July 28, 1986 claimant reported right fingers, wrist and elbow burning, and sharp pains.

Beginning September 23, 1986 claimant was treated by a chiropractor for neck pain following an incident of tripping at home.

On May 26, 1987 claimant reported right finger, wrist, and elbow pain.

Claimant was taken off work by Dr. Tepner from August 24, 1987 to September 14, 1987. Dr. Tepner diagnosed bilateral traumatic arthritis starting in her fingers, wrists, and elbows. The condition was thought to be work related.

Claimant was off work from September 15, 1987 to February 22, 1988, while under the care of Dr. Bergman for her fingers, wrists, and elbows bilaterally.

Claimant underwent carpal tunnel surgeries on October 30, 1987 and January 8, 1988. Claimant alleges October 24, 1987 as the date of injury in case number 862946. Claimant returned to work on February 22, 1988. Following the surgeries, claimant was referred by Dr. Bergman for an evaluation of her impairment, yielding permanent partial impairment ratings of two percent of the right hand, and one percent of the left hand.

Claimant reported pain in her hands, arms, shoulders, and neck on February 29, 1988; March 7, 1988; and March 14, 1988.

On March 25, 1988 claimant was seen by Ben Bagon, M.D., for pain in the leg, shoulder and elbow, as well as anxiety and depression.

On March 29, 1988 Alfredo D. Socarras, M.D., said claimant suffered from a large functional element, and advised her to quit work. Dr. Socarras conducted tests of both upper extremities, and concluded that there was no carpal tunnel syndrome.

On June 23, 1988 Michael W. Crane, M.D., evaluating claimant for defendants, concluded that claimant had a tendonitis pain picture, and took claimant off work for one week. Dr. Crane termed claimant's carpal tunnel surgeries "unfortunate."

On July 5, 1988 Dr. Crane assigned claimant a rating of permanent partial impairment of three percent to each hand, and also treated claimant for depression. Dr. Crane found no objective evidence of shoulder or neck impairment or pain.

Claimant filed four petitions on June 9, 1988. Petitions in cases 777628, 791749, and 862964 alleged injury to claimant's upper extremities, shoulders, and neck. Case number 877065 alleged an injury to claimant's legs.

On August 8, 1988 the company nurse observed a lump on the back of claimant's right hand.

On September 27, 1988 claimant reported arm and shoulder pain and numbness at work. On October 3, 1988 claimant was seen by David Carlyle, M.D., for shoulder and neck pain.

ANALYSIS

Claimant has set forth twenty issues on appeal. In order to facilitate the clarity of this decision, some issues will be combined and considered in a differing order than set forth by claimant in her brief.

Claimant's first issue concerns whether the deputy erred by limiting the post-hearing briefs to four pages and disregarding the brief filed by claimant. At the conclusion of the hearing, the deputy stated:

> THE COMMISSIONER: Why don't we have simultaneous briefs and have them by October 1. That should give everyone ample time to get them in. I am going to request that you limit them to four typed pages, 8 and a half by 11, and do it in a letter format. You can squeeze as much onto four pages as you want, and I

> don't care if you single space it. I don't care if you don't put any margins, but at the bottom of page 4, I am stopping, okay? So whatever you put afterwards, I am just not going to read it.

(Transcript, pages 171-172)

Claimant submitted a post-hearing brief numbering four pages in length, but devoid of paragraphing, without margins, and with reduced type. In addition, claimant adopted by reference a brief in another case allegedly dealing with similar issues. That brief, which was attached to the post-hearing brief, was 164 pages in length. The deputy also noted that claimant filed a motion to reconsider, which included extensive argument and authority on the rule 80(a) sanctions issue. In the arbitration decision, the deputy indicated that none of claimant's post-hearing briefs would be considered.

Rule 343 IAC 4.36 states:

> If any party to a contested case or an attorney representing such party shall fail to comply with these rules or any order of a deputy commissioner or the industrial commissioner, the deputy commissioner or industrial commissioner may dismiss the action. Such dismissal shall be without prejudice. The deputy commissioner or industrial commissioner may enter an order closing the record to further activity or evidence by any party for failure to comply with these rules or an order of a deputy commissioner or the industrial commissioner.

Claimant was ordered to limit her post-hearing brief to four pages. Claimant attempted to expand that limitation by incorporating a 164 page brief, and also by incorporating an additional brief into her motion to reconsider. By doing so, claimant's attorney improperly disobeyed the order of the deputy. The deputy was empowered under rule 4.36 to dismiss claimant's case for disobedience of the deputy's order. Instead, the deputy imposed the lesser sanction of disregarding claimant's post-hearing brief. The deputy properly declined to consider claimant's incorporated brief in an unrelated case.

Claimant's petition for rehearing, approximately 64 pages in length, also contained a brief of extensive authorities. Rule 343 IAC 4.9 does contemplate the submission of a brief of authorities with a motion. Those aspects of claimant's petition for rehearing that constitute a memorandum brief and argument were properly considered in ruling on the petition for rehearing, but were properly not considered as part of claimant's post-hearing brief. Claimant cannot circumvent the limitations placed

on her post-hearing brief by disguising additional briefs under the guise of a motion for rehearing.

The physical formatting of claimant's post-hearing brief makes the brief difficult, if not impossible, to read. Normally, an attempt to circumvent a brief length limitation by omitting paragraphing, extending margins to the edges of the paper, and reducing the type size, would also justify imposition of a sanction. The deputy was within her discretion to limit the length of the post-hearing briefs. However, the deputy's order at the conclusion of the hearing could be read to authorize these unusual measures. Claimant's post-hearing brief of four pages should have been considered by the deputy.

Because an appeal to the industrial commissioner results in a de novo review of the case, any error committed in not accepting claimant's post-hearing brief will be remedied in this appeal. Claimant's post-hearing brief will be considered on appeal along with claimant's appeal brief and reply brief.

Claimant's sixth issue, and argued under other issues as well, alleges the deputy erred by "mischaracterizing" the injuries in cases 777628, 791749, and 862946. Claimant maintains that the deputy improperly dismissed the petitions in cases 777628 and 791749 under Iowa Code section 85.26. Claimant urges that the injuries in these cases were "ongoing" as well as cumulative, and no particular date of injury exists, or that the injury date should be "from 1/20/78-9/5/89."

Claimant filed four petitions on June 9, 1988. One case was dismissed by claimant at the time of the hearing. In case number 777628, claimant alleged a cumulative injury to the upper extremities, shoulder, and neck occurring on October 2, 1984. Claimant was off work from October 2, 1984 until October 14, 1984.

In case number 791749, claimant alleged a cumulative injury to the upper extremities, shoulder, and neck occurring on March 21, 1985. Claimant sought medical attention on that date, and was off work from March 25 through May 13, 1985.

In case number 862946, claimant alleged a cumulative injury to the upper extremities, shoulder, and neck occurring on August 24, 1987. This petition was not dismissed by the deputy.

The deputy concluded that claimant had failed to comply with Iowa Code section 85.26(1) in case number 777628 because the date of filing of the petition, June 9, 1988, was more than two years beyond the stated date of injury, October 2, 1984. The deputy also applied the three year statute of limitations under Iowa Code section 85.26(2), applicable where benefits are voluntarily paid, and concluded that the petition had been filed more than three years after the period of time claimant was off work.

In case number 791749, the deputy concluded that the filing of the petition on June 9, 1988 was beyond the two year statute of limitations in Iowa Code section 85.26(1), since the date of injury alleged was March 21, 1985. The deputy also applied the three year statute of limitations under Iowa Code section 85.26(2) to the period of time claimant was off work, and concluded that the petition was filed beyond three years as well.

In both cases, the deputy used the last date claimant was off work as the starting point for the three year statute of limitations. However, Iowa Code section 85.26 speaks of three years "from the date of the last payment of weekly compensation benefits." Claimant's statement of the case in her appeal brief sets forth the benefits that were voluntarily paid by defendants, the period of disability represented by those payments, when the payments were received, and what exhibit corroborates the figures.

Claimant's brief and the corresponding exhibits in the record show that the temporary disability benefits paid by defendants for the period claimant was off work following the October 2, 1984 injury in case number 777628 were received on November 30, 1984. Because weekly compensation benefits were paid, an original proceeding must be maintained within three years from the date of the last payment. This would require an action on this injury be instituted no later than November 30, 1987. Claimant's petition in case number 777628 was filed on June 9, 1988. Claimant's petition was not timely filed and is barred by the statute of limitations in Iowa Code section 85.26.

Claimant's brief and the corresponding exhibits in the record show that the temporary disability benefits paid by defendants for the period claimant was off work following the March 21, 1985 injury in case number 791749 were received on May 9, 1985. This would require an action on this injury be instituted no later than May 9, 1988. Claimant's petition in case number 791749 was filed on June 9, 1988. Claimant's petition was not timely filed and is barred by the statute of limitations in Iowa Code section 85.26.

Claimant's petition in case number 877946 was timely filed, and no statute of limitations defense was raised by defendants in that case. Although temporary disability benefits were paid in both case number 777628 and 791749, and thus clearly controlled by the three year statute of limitations under Iowa Code section 85.26, claimant urges that no statute of limitations is applicable, because claimant has suffered a cumulative injury that is ongoing.

Under McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985), the date of injury occurs when the worker is unable to continue working due to the effects of the work injury. Claimant argues, however, that a cumulative injury does not occur when the claimant is first compelled to leave work due to pain from the injury, but only occurs when the pain forces the claimant to leave work permanently. Thus, claimant urges, since she was able to return to work, the statute of limitations had not yet begun to run even when the hearing occurred. In her appeal brief, claimant argues that the specific injury dates pled--October 2, 1984; March 21, 1985; and August 24, 1987, respectively--were merely "specific manifestations," and that claimant's cumulative injuries "occurred from 1978 to the 1989 date of hearing." Claimant urges that since the cumulative injury is yet ongoing, there is no statute of limitations and no date of injury.

Claimant cannot avoid the statute of limitations by relying on a "running" injury date. Under McKeever, the injury date is when claimant's cumulative injury compelled her to leave work. In effect, claimant's interpretation of McKeever would result in no statute of limitations for cumulative injuries where the worker is able to return to work in spite of her condition. Although the technical rules of pleading have been abolished for workers' compensation actions, there still must be some semblance of specificity in the pleadings to allow defendants to defend, and adjudicators to decide. Taken to its illogical extreme, claimant's argument would require this agency to accept as an injury date any date from the beginning of claimant's employment until the date of the hearing. This is an absurd result and an incorrect reading of McKeever. McKeever resolves this question by establishing the date of injury as the date on which claimant is compelled to leave work due to her injury. Although as a factual matter the claimant in McKeever did not eventually return to work, there is no indication in that case that leaving work must be permanent to establish a cumulative injury date. The deputy properly dismissed cases 777628 and 791749.

Issues ten and eleven urge that the deputy erred in the awarding of temporary disability, and also that the deputy erred in not specifying the credit defendants were entitled to for temporary disability paid. The deputy awarded claimant healing period benefits for the time she was off work from August 24,

Claimant's second issue on appeal concerns an alleged failure to order the payment of medical benefits. Since this issue was stipulated to by defendants at the hearing it will be ordered in this decision. Transcript, pp. 10-11. Similarly, in regard to claimant's issue 3, the deputy's decision did order defendants to pay the costs of the proceedings. Rule 343 IAC 4.33 contemplates payment of witness fees and mileage as part of the costs. A specific order for these items was not required. Defendants do not dispute their obligation to pay these costs.

Similarly, claimant, in issues 12 and 13, urges that interest ordered under Iowa Code section 85.30 on unpaid temporary total disability benefits be calculated from the first day of each week the benefits were payable, applying payments to interest first, then to principle, on a weekly, rather than annual, basis.

In Farmer's Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979), at 180 the Iowa Supreme Court said:

> Section 85.30 expresses legislative intent that interest on unpaid compensation be computed from the date each payment comes due, starting with the eleventh day after the injury....Interest is therefore payable on such installment from that due date, and similarly with the following weekly payments.

Interest is computed according to the longstanding rule that partial payments are applied first to accrued interest and the remainder to reduce the permanent partial disability award. McNeal v. Iowa Department of Transportation, Order Nunc Pro Tunc, May 31, 1990. Also see Clausen v. Carmar Farms, Ltd., Vol.1, No. 3 State of Iowa Industrial Commissioner Decisions 540 (1985).

Defendants did not address this issue in their appeal brief. Claimant did not raise this issue before the deputy. It is unclear whether the calculation of interest is in dispute between the parties. The parties are directed to calculate interest on any weekly benefits not paid when due based on Iowa Code section 85.30 and the above cited authority. If a dispute exists between the parties on how the interest should be calculated, the parties can then bring the question before this agency for resolution.

Claimant's issue 14 involves penalty benefits under Iowa Code section 86.13. The claimant correctly points out that although the issue of penalty benefits under Iowa Code section 86.13 was listed on the hearing assignment order as an issue, and was announced to be an issue at the beginning of the hearing, it was not addressed in the arbitration decision. Claimant urges a 25 percent penalty be imposed, on both "principal" (compensation payments) and the interest thereon.

As set out in claimant's brief, the delay in payments of compensation were minimal. In most cases, the time between accrual of the obligation and payment was less than one month. The longest delay was slightly over two months. Claimant alleges that compensation for the period May 26, 1987 to May 27, 1987 (two days), July 6, 1988 to July 20, 1988 (two weeks), and compensation for June 12, 1989, have never been paid.

Imposition of penalty benefits are within the discretion of this agency. Section 86.13 speaks of delay without reasonable cause or excuse. The delays in payment in this case where payment was made are not unreasonable. Although there is no showing as to the reason for the delay, the length of time involved does not warrant imposition of a penalty. In regards to compensation for May 26, 1987 through May 27, 1987; July 6, 1988 through July 20, 1988; and June 12, 1989, a reasonable dispute existed between the parties and a penalty is not appropriate.

Issue 19 deals with sanctions under rule 80(a) of the Iowa Rules of Civil Procedure. The deputy made a finding in the decision that claimant's counsel should have dismissed the petition in case number 877065 when, during discovery, it became apparent that the petition had no merit. Claimant's counsel did not move to dismiss this petition until the hearing.

Although making a finding that the petition should have been dismissed sooner, the deputy did not impose sanctions on claimant or her counsel. Claimant basically seeks to reverse the finding of fact. Review by the industrial commissioner of a deputy's decision is de novo. A deputy's decision, once properly appealed, cannot be reinstated. Tussing v. Hormel & Co., 461 N.W.2d 450 (Iowa 1990). Thus, although no determination is here made on whether the finding was correct, the finding of fact by the deputy no longer has any legal effect. Since no sanction was imposed, this issue is moot and will not be addressed.

Claimant's final issue concerns her cross-motion for sanctions against defendants. Iowa Rule of Civil Procedure 80(a) is applicable to proceedings before the Iowa Industrial Commissioner. Olson v. Wilson Foods Corporation, Appeal Decision, May 31, 1990. Claimant apparently seeks to impose sanctions on defendants for unreasonably defending claimant's petition in case 877065 by conducting discovery. Claimant eventually dismissed the petition in case number 877065, but waited until the hearing to do so. Defendants did not engage in improper conduct violative of Iowa R.Civ.P. 80(a) in conducting discovery for all four pending petitions from claimant. As pointed out by the deputy, virtually the same discovery would have been conducted in this case by defendants with or without case number 877065. Sanctions against defendants are not appropriate.

1987 to February 22, 1988; and for the period June 23, 1988 to July 6, 1988. These periods were in conjunction with the award of permanent benefits for claimant's bilateral carpal tunnel syndrome found in file number 862946.

Claimant urges that temporary total disability or healing period benefits should also have been awarded for the following periods of time that claimant was off work: October 5, 1984 to October 14, 1984; March 25, 1985 to May 12, 1985; May 26, 1987 to May 8, 1988; May 31, 1988; June 16, 1988; June 23, 1988 to July 20, 1988; September 28, 1988; May 17, 1989; June 2, 1989; June 5, 1989; and June 12, 1989.

Claimant has set forth on pages 54-56 of her appeal brief the periods of temporary total disability/healing period she claims she is entitled to, and when benefits for these periods were paid. Of the periods of disability set forth in the preceding paragraph, claimant acknowledges she has already been paid for all periods set forth with the exception of May 26, 1987-May 27, 1987; July 6, 1988-July 20, 1988; and for 3 hours on June 12, 1989. Although not listed on pages 54-56 of claimant's brief, on page 97 claimant also appears to claim she is entitled to temporary total disability/healing period benefits for the period April 10, 1988 to April 17, 1988.

Defendants did not address this issue in their appeal brief. It appears that claimant was absent from work from April 10, 1988-April 17, 1988; July 6, 1988-July 20, 1988; and for 3 hours on June 12, 1989, as a result of her work injury. Defendants will be ordered to pay claimant for the periods of temporary total disability/healing period set forth in claimant's exhibit A and on pages 54-56 of claimant's appeal brief. Claimant is not entitled to benefits for the period May 26-27, 1987, as that period occurred prior to the only injury date claimant has established in this action, August 24, 1987.

Claimant's issue 17 urges that the deputy erred in not specifying when the permanent disability as a result of the August 24, 1987 injury began. Claimant contends that permanency began on October 15, 1984, the date claimant returned to work following her alleged October 2, 1984 injury, and continued thereafter but was interrupted by various periods of further healing period.

Claimant's petition for an alleged injury on October 2, 1984 has been dismissed. The injury of August 24, 1987 is the only injury claimant has proven. Under Iowa Code section 85.34(1), the healing period ends when the employee returns to work. For this injury, claimant returned to work on February 22, 1988. Claimant's healing period ended February 22, 1988, and her permanency began on that date.

Claimant's 7th, 8th, 15th, 16th and 18th issues address the nature and extent of claimant's disability. Claimant received two ratings of impairment: two percent of the right hand and one percent of the left, from Dr. Bergman; and three percent of each hand by Dr. Crane. Claimant urges that the medical evidence shows an injury to the body as a whole.

Claimant alleges the deputy erred in not analyzing claimant's condition as a "unitary" injury involving that "regional" part of her body comprised by the upper extremities, shoulders, and neck. Claimant urges that the consolidation of her three separate petitions for hearing, and statements by her counsel, should have prompted an analysis based on a single cumulative injury.

Whether an injury is viewed as traumatic or cumulative, and whether it is viewed as to a scheduled member or to the body as a whole, is determined by the medical evidence, and not by claimant's pleadings.

Claimant's view of the case is not clear. Claimant filed three petitions, alleging three cumulative injuries to the arms, shoulder, and neck on three separate injury dates. Yet in her appeal brief claimant clearly argues that claimant has suffered one continual cumulative injury, that affected the hands, elbows, shoulders, and neck. See claimant's brief on appeal, pp. 83-84.

Defendants urge that claimant's neck and shoulder pain is not the result of a work injury, but caused by claimant's January 1985 car accident. Claimant also had an experience of neck pain after tripping at home on September 23, 1986. Defendants point out that claimant did not have any complaints of shoulder pain until October 2, 1984, when she complained to Dr. Tepner. Claimant did not again complain of shoulder pain until after her car accident. Dr. Crane found full range of motion and no loss of pulse in claimant's shoulders.

Defendants also note that Dr. Dodd observed an element of functional overlay in claimant's case as early as April 9, 1985, referring to claimant as a "classic conversion," where physical symptoms develop as a reaction to mental stress. Dr. Crane also noted a degree of functional overlay or symptom magnification. Dr. Crane specifically stated that claimant did not have any permanent functional impairment of the shoulders or neck.

Claimant bears the burden of proof to show that her injury extends beyond the scheduled member, and to the body as a whole. If a claimant contends he has industrial disability he has the burden of proving his injury results in an ailment extending beyond the scheduled loss. Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964). Although claimant can point to numerous instances where she experienced and reported

FINDINGS OF FACT

1. Claimant worked for defendant employer as an electrical assembler.

2. Claimant experienced pain in her fingers, back, and neck at various times from 1978 to 1983.

3. Claimant experienced pain in her right wrist and arm at work on October 2, 1984. Claimant was off work until October 15, 1984.

4. Claimant was in a car accident on January 23, 1985 which resulted in injury to her neck, left shoulder, and hand. Claimant was off work until February 11, 1985.

5. Claimant reported bilateral hand numbness, right and left elbow pain, and leg tingling on March 21, 1985. Claimant was off work until May 13, 1985.

6. Claimant was diagnosed on April 4, 1985, as suffering from work-related carpal tunnel syndrome or tendonitis, with functional overlay and hysterical neurosis.

7. Claimant experienced a tripping accident at home during September 1986, which resulted in neck pain.

8. Claimant reported finger, wrist, elbow, shoulder, and neck pain at various times throughout 1985, 1986, 1987, and 1988.

9. Claimant was diagnosed as suffering bilateral traumatic arthritis in August 1987. Claimant was off work from August 24, 1987 to February 22, 1988.

10. Claimant underwent carpal tunnel surgeries to her hands on October 30, 1987 and January 8, 1988.

11. On May 31, 1988 claimant received ratings of permanent physical impairment of two percent of the right hand and one percent of the left hand.

12. On March 29, 1988, Dr. Socarras found that claimant did not suffer from carpal tunnel syndrome, but did suffer from a large functional element.

13. Dr. Crane also concluded that claimant did not actually suffer from carpal tunnel syndrome, but assigned claimant a permanent partial impairment of three percent of each hand as a result of her surgeries on July 5, 1988. Dr. Crane found no objective evidence of shoulder or neck impairment.

14. Claimant's petitions were filed on June 9, 1988.

15. Claimant was absent from work due to a work injury April 10-April 17, 1988; July 6, 1988-July 20, 1988; and for 3 hours on June 12, 1989,

16. Claimant's August 24, 1987 injury was confined to claimant's hand and wrist, and did not extend to the body as a whole. Claimant experienced pain in her shoulders and neck, but did not experience any impairment to the body as a whole. Claimant's pain in her shoulders and neck was the result of functional overlay. Claimant's pain in her shoulders and neck did not result in disability.

17. Claimant's gross wages at the time of her August 24, 1987 injury were $10.05 per hour.

CONCLUSIONS OF LAW

1. Post-hearing briefs of the parties were properly limited by the deputy.

2. Claimant's petitions in case 777628 and 791749 were barred by the statute of limitations.

3. The date of injury for a cumulative injury is the date claimant is compelled to leave work due to the work injury. Claimant is not entitled to a "running" injury date. Claimant's date of injury in case 877946 is August 24, 1987.

4. The date of injury for a cumulative injury is established by the date on which claimant is compelled to leave work due to pain or disability from the work injury, whether the inability to work at the job is temporary or permanent.

5. Claimant is entitled to healing period benefits for April 10-April 17, 1988; July 6, 1988-July 20, 1988; and for 3 hours on June 12, 1989.

6. Claimant's permanent partial disability began on February 22, 1988.

7. Claimant's cumulative injury affected her hands and wrists. Claimant's injury did not extend to the body as a whole.

8. Claimant did not carry her burden of proof to show that her neck and shoulder pain were caused by a work injury.

9. As a result of her work injury, claimant has a permanent partial impairment of three percent of the right hand.

10. As a result of her work injury, claimant has a permanent partial impairment of three percent of the left hand.

pain in her shoulders and neck, the medical evidence does not substantiate this. Both doctors that gave ratings of impairment confined the impairment to the hands. In addition, pain that is not substantiated by clinical findings is not a substitute for impairment. Waller v. Chamberlain Manufacturing, II Iowa Industrial Commissioner Report 419, 425 (1981).

Claimant has failed to carry her burden to show that her injury extends to the body as a whole. The only evidence supporting this contention is claimant's own testimony, which is not substantiated by any medical evidence. There is substantial evidence that the pain described by claimant is the result of functional overlay, rather than her work injury. The psychological effects of a scheduled member injury are contemplated by the schedule and do not extend the injury to the body as a whole. Cannon v. Keokuk Steel Casting, Appeal Decision, January 27, 1988.

In addition, there is no showing that claimant's alleged neck and shoulder pain, even if it is caused by her work injury, has caused her disability. Dr. Crane's finding of no loss of motion in the shoulders contradicts claimant's assertion.

Finally, even if claimant is viewed as having neck and shoulder impairment, claimant's car accident and tripping incident are as likely causes of her condition as her work injury. Claimant bears the burden of proof, and has failed to show that any neck and shoulder condition has been caused by her work.

As there is no medical evidence in the record to indicate that claimant's work injury extends to the body as a whole, claimant is not entitled to an award of industrial disability.

When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Iowa Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Claimant has two ratings of impairment to her hands. Dr. Crane, although an evaluating physician, had extensive contact with claimant. Dr. Crane's contact with claimant was also later in time than the contact between claimant and Dr. Bergman. The testimony of Dr. Crane will be given the greater weight. Claimant is determined to have suffered a three percent permanent partial impairment of her right hand as a result of her work injury of August 24, 1987. Claimant is also determined to have suffered a three percent permanent partial impairment of her left hand as a result of her work injury of August 24, 1987.

Since claimant's cumulative bilateral hand injuries were incurred simultaneously, any award of benefits is governed by Iowa Code section 85.34(2)(s). Under the AMA Guides to the

Evaluation of Permanent Impairment, claimant's hand impairments convert to a four percent impairment of the body as a whole.

Claimant's fourth and fifth issues on appeal concern claimant's rate of compensation. Claimant argues that the deputy erred in concluding that claimant was being paid $6.37 at the time of her injury. Claimant states that on appeal, claimant and defendants are stipulating that claimant's actual wages at the time of the injury was $10.05 per hour.

Subsequent to the deputy's decision, claimant filed a Request for the Taking of Additional Evidence, seeking to submit evidence on the rate question. Claimant subsequently filed a stipulation signed by counsel for both claimant and defendants setting forth claimant's wages for 1987 through 1989, which ranged from $10.05 per hour to $10.55 per hour. A ruling issued by this agency on January 30, 1990, denied the request, reciting that the record was closed, that rate was not an issue at the original hearing, and that claimant could not seek to supplement the record after the close of the hearing and issuance of a decision. However, upon further examination of the record on appeal, it appears that numerous exhibits entered into the record by both claimant and defendants at the time of the hearing (see claimant's appeal brief, p. 66) do establish that claimant's wages at the time of the August 24, 1987 injury in case number 862946 were $10.05 per hour.

The record establishes that claimant worked a 40 hour week, for a gross weekly wage of $402.00. Claimant was married with two exemptions. Claimant's correct rate for the August 24, 1987 injury is $253.05.

Claimant's fifth issue on appeal concerns the date of injury to be applied to claimant's alleged cumulative injury for purposes of calculating claimant's rate. Claimant argues that since claimant's "injury" (claimant does not specify which alleged injury) was cumulative, her rate should be calculated according to the highest wage she received during the period of time claimant alleges the trauma was ongoing. Claimant cites McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 375 (Iowa 1985). However, as discussed above, McKeever clearly establishes the injury date in a cumulative injury case as occurring when pain prevents the employee from continuing work.

In regard to claimant's bilateral carpal tunnel, claimant alleged August 24, 1987 as the date of injury. Claimant was compelled to leave work on August 24, 1987 and was off work for 28 weeks. McKeever establishes August 24, 1987 as the date of injury in case number 862946. Claimant's rate is to be calculated according to her wages on the date of injury.

11. Under Iowa Code section 85.34(2)(s), claimant is entitled to 20 weeks of benefits, representing four percent of the body as a whole.

12. Claimant's rate of weekly compensation is $253.05. Claimant's rate is determined by her wages on the date of cumulative injury, August 24, 1987.

13. Penalty benefits are not appropriate.

14. Sanctions under Iowa R.Civ.P. 80(a) are not appropriate against either party.

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

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant for file number 862946 twenty (20) weeks of permanent partial disability benefits at the rate of two hundred fifty-three and 05/100 dollars ($253.05) per week as a result of the injury on August 24, 1987.

That defendants are to also pay healing period benefits at the rate of two hundred fifty-three and 05/100 dollars ($253.05) per week for the period August 24, 1987 through February 22, 1988; and June 23, 1988 through July 6, 1988. Defendants shall also pay healing period benefits for the periods April 10, 1988 through April 17, 1988; July 6, 1988 through July 20, 1988; and for three (3) hours on June 12, 1989.

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

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

That claimant takes nothing from files numbered 877065, 777628 and 791749.

Defendants shall pay claimant's medical expenses in the amount of $173.25.

Claimant is to pay the costs of the appeal including the cost of transcribing the hearing. Defendants are to pay the other costs of this action, including the costs for the attendance of witnesses contemplated by rule 343 IAC 4.33.

Signed and filed this 24th day of May, 1991.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Mark S. Soldat
Attorney at Law
714 E. State St.
Algona, Iowa 50511

Mr. Paul C. Thune
Attorney at Law
218 6th Ave., Suite 300
P.O. Box 9130
Des Moines, Iowa 50306

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ERNESTINE C.THOMAS,	:	
Claimant,	:	
vs.	:	File Nos. 812401
BROADLAWNS MEDICAL CENTER; MEDICAL PERSONNEL POOL OF IOWA, INC.; and CITY OF DES MOINES, IOWA,	:	716036
Employer,	:	A P P E A L
and	:	D E C I S I O N
ST. PAUL FIRE & MARINE INS. CO.; LIBERTY MUTUAL INSURANCE COMPANY; and CITY OF DES MOINES - SELF-INSURED,	:	
Insurance Carriers,	:	
and	:	
SECOND INJURY FUND OF IOWA,	:	
Defendants.	:	

FILED
OCT 31 1990
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals and defendant Broadlawns Medical Center cross-appeals from an arbitration decision awarding claimant 10 percent permanent partial disability on account of claimant's left hand injury which she sustained on June 22, 1982. Claimant was denied benefits for an alleged November 11, 1985 injury to her right hand.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 15, excluding exhibit 2; defendants' exhibits A through EE. All parties filed briefs on appeal. Claimant and defendant Broadlawns Medical Center filed reply briefs.

ISSUES

Claimant states the issues on appeal are:

I. Whether the deputy industrial commissioner erred in finding claimant did not sustain her burden of proof in establishing a causal connection between the work injury and the right carpal tunnel syndrome.

II. Whether the deputy industrial commissioner erred in dismissing the Second Injury Fund of Iowa claim.

III. Whether the deputy industrial commissioner erred in refusing to allow medical expenses tc be paid as they related to claimant's established injuries.

Defendant Broadlawns Medical Center state the issues on cross-appeal are:

I. Whether the hearing deputy erred in finding that the June 22, 1982 incident caused a 10% permanent partial impairment of the left hand.

II. Whether the claimant sustained an injury to her right hand which arose out of and in the course of her employment with Broadlawns Medical Center.

III. Whether the hearing deputy erred in not ordering Broadlawns or St. Paul Insurance to pay the medical bills marked Exhibits 1, 5, 6, 7, 10, 11, 12, 13, 14, and 15.

IV. Whether the hearing deputy erred in ordering St. Paul and Broadlawns to pay the medical bills of Dr. Stein (Exhibit 3) and the University of Iowa Hospitals (Exhibit 4).

REVIEW OF THE EVIDENCE

The arbitration decision filed April 24, 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. Additional analysis is appropriate to the issues.

The medical evidence clearly establishes that claimant suffered from left carpal tunnel syndrome and left DeQuervain's disease related to a work injury on June 22, 1982 while employed with defendant Broadlawns. (Defendants' Exhibit D, Page 6.) Claimant was treated by Arnis B. Grundberg, M.D., an orthopedic and hand surgeon. Dr. Grundberg estimated that 95 percent of his practice constituted problems that involve the medical care and treatment of the hand. Dr. Grundberg performed surgery on claimant's left DeQuervain's disease and then performed decompression surgery of claimant's left carpal tunnel on March 23, 1983. (Def. Ex. D, pp. 1-2). Claimant's condition improved and she was released to return to work.

Claimant failed to prove a causal connection between her work and her right carpal tunnel syndrome diagnosed November 11, 1985. Claimant was seen by Dr. Grundberg on September 3, 1985. Claimant did not complain of problems with her right hand at that time. Ralph A. Dorner, M.D., examined claimant on October 4, 1985. Dr. Dorner noted in claimant's chart that claimant complained of a multitude of problems but that she had no symptoms in her right hand despite being right handed. (Def. Ex. J, p. 4). Claimant received an extensive general examination at the University of Iowa Hospitals and Clinics on June 26, 1985. Claimant was seen in the neurology, orthopedic, and psychology clinics, and was the subject of extensive testing. Claimant did not report right hand pain during her evaluation.

Dr. Grundberg testified as to whether there was a causal connection between claimant's right hand carpal tunnel syndrome and claimant's employment with defendant Broadlawns:

> Q. First, do you have an opinion to a reasonable degree of medical certainty as to whether the incident in June of 1982 caused Ernestine Thomas to suffer from any right finger, hand or upper extremity problems?
>
> A. I don't think it did.
>
> Q. That would be your opinion to a reasonable degree of medical certainty?
>
> A. Yes.
>
> Q. I would like you to assume that Ernestine Thomas last worked for Broadlawns Hospital in April of 1984. Can you assume that?

A. Yes.

Q. Based upon your training, education, experience and evaluation of Ernestine Thomas, do you have an opinion based upon a reasonable degree of medical certainty as to whether anything happening at Broadlawns Hospital caused, created or aggravated any right-sided arm, hand or finger problems that Ernestine Thomas may have?

A. I don't think it did.

....

Q. If Ernestine Thomas last worked at Broadlawns Hospital in April of 1984 and if something at Broadlawns Hospital created a problem which led to the complaints in Ernestine Thomas' right hand and wrist that you saw her for on April 10 of 1986, would it have appeared before November of 1985?

A. Yes.

(Def. Ex. CC, Deposition of Arnis B. Grundberg, M.D., pp. 24-25, and 27.)

Ivan Pakiam, M.D., who specializes in reconstructive and plastic surgery, treated claimant for her right hand problem. During direct examination, Dr. Pakiam testified as to causal connection between claimant's work and her right hand injury, however, on cross-examination Dr. Pakiam's testimony was equivocal. Dr. Pakiam testified, on cross-examination conducted by defendant Broadlawns' attorney:

Q. So let me ask you this: If something on the left was responsible for what developed on the right and Miss Thomas was continuing to perform the work at Broadlawns Hospital which is contained in Exhibit 9, isn't it true that you would expect the right-sided problems to appear within a couple of months of the left getting bad and being out of commission, so to speak?

A. Yes. I think it depends on how bad the left side was.

Q. If it was in a splint?

A. If she was in a splint, yes, I would think she would develop this fairly soon rather than later.

Q. And would you expect it to remain at least to the extent that it would come and go on given days or while she was working and not working; is that correct?

A. That's correct.

Q. If it was something as a result of something in June of 1982 and a surgery in March of 1983, you wouldn't expect two years of no problems in the right wrist; correct?

A. That's correct.

(Def. Ex. BB, Depo. of A. Ivan Pakiam, M.D., pp. 88-89.)

Claimant terminated her employment on April 5, 1984 with defendant Broadlawns. Claimant did not report the right hand injury until November 11, 1985, more than one year after claimant ended her employment with defendant Broadlawns. Claimant failed to prove a causal connection between her work and her right carpal tunnel condition. Claimant proved that she suffered a permanent impairment to her left hand. Since claimant failed to prove a compensable injury to her right hand, the claim against the Second Injury Fund should be dismissed.

On the issue of the nature and extent of claimant's disability to her left hand, Dr. Grundberg testified that claimant suffered permanent impairment as a result of her left hand surgeries. In addition, the general medical consensus recognizes that claimant suffered some permanency as a result of her work injury to her left hand.

Dr. Grundberg testified that he did not think that claimant's disability exceeded 10 percent permanent impairment to her left hand as he has never seen more than 10 percent impairment as a result of carpal tunnel release. (Def. Ex. CC, Depo. of Dr. Grundberg, p. 23) Scott B. Neff, M.D., evaluated claimant more than four years after Dr. Grundberg performed surgery on claimant's left hand. Dr. Neff provided an impairment rating of five percent of claimant's hand and opined that her impairment did not extend into her extremity. (Def. Ex. A, p. 3.) Dr. Pakiam rated claimant's impairment of the left extremity as 23 percent. (Def. Ex. F, p. 7.) Dr. Grundberg performed claimant's surgery to her left hand. In addition, Dr. Grundberg has a great deal of experience in hand surgery. The greater weight of the evidence supports the impairment rating of 10 percent permanent disability to claimant's left hand.

On the issue of medical expenses, claimant asserts that defendant Broadlawns should be liable for all the medical expenses. Claimant failed to prove that she sustained a work injury to her right hand. Defendant Broadlawns asserts that Dr.

Grundberg was the only authorized physician for claimant's left hand and that defendant Broadlawns should not be liable for the evaluation conducted by Michael J. Stein, D.O., exhibit 3 and claimant's appointment at the University of Iowa Hospitals and Clinics, exhibit 4. Claimant was referred to Dr. Stein by Dr. Pakiam. Exhibit 3, an evaulation of claimant's medical condition by Dr. Stein, is an unauthroized medical expense. Dr. Stein did not prescribe any treatment designed to relieve claimant's left hand condition.

In addition, defendant Broadlawns contends that claimant was not authorized to go to University of Iowa for treatment of claimant's left hand. Furthermore, defendant Broadlawns contends that they are not liable for portions of exhibit 4 which relate to treatment of claimant's psychiatric condition which does not concern this proceeding. Dr. Grundberg was claimant's treating physician. Claimant was aware of the procedure under Iowa Code section 85.27 to seek other medical treatment as claimant filed three Applications for Medical Examination. Claimant's treatment at the University of Iowa was unauthorized. Claimant failed to follow the procedure established in the section 85.27 when she sought medical care at the Univeristy of Iowa Hospitals and Clinics.

Claimant testified that the main reason she sought medical treatment in Iowa City was for her emotional and memory problems. There is no causal connection between claimant's left hand injury and claimant's emotional problems. While in Iowa City, claimant was seen in the orthopedic and neurology clinics. Diagnostic tests were performed. Claimant's left hand complaint was not treated in Iowa City. Claimant's left hand was merely evaluated and William Blair, M.D., opined that no restrictions were necessary on claimant's left hand. (Def. Ex. K, p. 15) Defendant Broadlawns is not liable for the medical expenses in exhibit 4. Those expenses were for unauthorized evaluation of claimant which did not result in any proven improvement of claimant's work related injury.

FINDINGS OF FACT

1. On June 22, 1982 claimant suffered a work injury to her left hand which arose out of and in the course of her employment with defendant Broadlawns.

2. Dr. Grundberg diagnosed claimant's condition to her left hand as deQuervian's syndrome and carpal tunnel syndrome. Dr. Grundberg performed surgery to correct claimant's left hand condition.

3. Claimant returned to work on April 1, 1983 following the recovery from the surgeries to claimant's left hand.

4. Claimant's June 22, 1982 injury does not extend beyond claimant's left hand.

5. Medical evidence demonstrates that claimant suffered some permanent disability to her left hand as a result of her work injury on June 22, 1982.

6. Dr. Grundberg opined that claimant sustained a 10 percent permanent impairment of her left hand as a result of the surgeries to claimant's left hand.

7. Claimant began to experience carpal tunnel syndrome problems in her right hand which was eventually treated surgically in November 1985. Claimant failed to prove a causal connection between claimant's right hand carpal tunnel syndrome and her employment with Broadlawns, Medical Personnel Pool of Iowa, Inc., and the City of Des Moines.

8. Claimant failed to prove a causal connection between her employment and her right carpal tunnel syndrome, therefore, the complaint against the Second Injury Fund should be dismissed as there is no compensable second injury.

9. Medical expenses in exhibits 3 and 4 represent unauthorized medical treatment. Claimant failed to prove that the evaluations improved her left hand condition, therefore, defendant Broadlawns is not liable for the medical expenses in exhibit 3 and 4.

CONCLUSIONS OF LAW

The greater weight of the evidence supports the conclusion that claimant sustained a work injury to her left hand on June 22, 1982 while employed with defendant Broadlawns.

Claimant failed to sustain her burden of proof in establishing an injury which arose out of and in the course of her employment on November 11, 1985 to her right hand.

Claimant failed to sustain her burden of proof in establishing a causal connection between the work injury and the right carpal tunnel syndrome.

The claim against the Second Injury Fund should be dismissed.

Defendant Broadlawns is liable for medical expenses incurred for the treatment of claimant's left hand.

Defendant Broadlawns is not liable medical expenses in exhibit 3 and 4. The medical expenses represent unauthorized

treatment and claimant failed to prove that the evaluations she received improved her left hand condition.

The greater weight of the evidence supports the conclusion that claimant suffered 10 percent permanent impairment of her left hand as the result of the June 22, 1982 work injury while employed with defendant Broadlawns.

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

ORDER

THEREFORE, it is ordered:

That the claims against defendants, Medical Personnel Pool, Inc.; the City of Des Moines, Iowa; and, the Second Injury Fund of Iowa are dismissed with prejudice.

That defendants, Broadlawns and St. Paul Fire & Marine Insurance Company, shall pay to claimant nineteen (19) weeks of permanent partial disability benefits at the rate of one hundred ten and 62/100 dollars ($110.62) per week from April 1, 1983.

That defendants, Broadlawns and St. Paul Fire Marine Insurance Company, shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously.

That defendants, Broadlawns and St. Paul Fire Marine Insurance Company, shall receive credit for previous payments of benefits under a non-occupational group insurance plan if applicable and appropriate under Iowa Code section 85.38(2).

That defendants, Broadlawns and St. Paul Fire Marine Insurance Company, shall pay interest on weekly benefits awarded herein as set forth in Iowa Code section 85.30.

That defendants, Broadlawns and St. Paul Fire Marine Insurance Company, and claimant shall each pay an equal share of the costs of this proceeding including transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

That defendants, Broadlawns and St. Paul Fire Marine Insurance Company shall file activity reports on the payment of this ward as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

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

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Jon B. Schuster
Attorney at Law
303 Locust, Ste. 106
Des Moines, Iowa 50309

Mr. Charles E. Cutler
Attorney at Law
729 Ins. Exchange Bldg.
Des Moines, Iowa 50309

Mr. W. C. Hoffmann
Attorney at Law
500 Liberty Bldg.
Des Moines, Iowa 50309

Mr. Greg Knoploh
Assistant Attorney General
Tort Claims Division
Hoover State Office Bldg.
Des Moines, Iowa 50319

Mr. Patrick J. Hopkins
Attorney at Law
900 Des Moines Bldg.
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT C. STOUFFER, Claimant, vs. SWIFT INDEPENDENT PACKING COMPANY, Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 814736 A P P E A L D E C I S I O N

FILED
DEC 20 1990
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant temporary total benefits and industrial disability benefits for an alleged mental injury on November 23, 1984.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 33. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether or not claimant suffered a compensable injury?

REVIEW OF THE EVIDENCE

The arbitration decision filed May 18, 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 issue to be resolved is whether or not claimant suffered a compensable injury. In order to prevail, claimant must prove that he suffered an injury which arose out of and in the course of his employment.

Recent agency precedent lays out the frame work necessary to determine whether claimant suffered a mental-mental injury that arose out of and in the course of his employment.

> 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).

Williams Kostelac v. Feldman's, Inc., Appeal Decision, June 13, 1990.

First, the claimant must prove factual causation between his alleged mental injury and his employment. Craig Rypma, Ph.D., treated claimant for his depression. Dr. Rypma is a clinical psychologist. Even if Dr. Rypma were a physician, his opinion of causation was not based upon full medical information. Dr. Rypma did not know that Orville Jacobs, M.D., treated claimant in 1977. Dr. Rypma was informed during his deposition that claimant was on antidepressive medication in the past. Dr. Rypma testified that this fact would be significant and would be a factor to consider in determining causation.

Claimant was treated by Kelly S. Bast, M.D. Dr. Bast is a family practitioner. Dr. Bast testified that medical causation existed between claimant's work and his alleged mental injury. Dr. Bast testified, however, that a psychiatrist would have greater expertise in evaluating a psychological disorder than a family practitioner.

Claimant was examined twice by Michael Taylor, M.D., a psychiatrist. In a December 6, 1985 report, Dr. Taylor stated that the issue of causation was not clear cut. At his deposition, Dr. Taylor was informed that claimant had been treated by Dr. Jacobs and that claimant had been taking

antidepressive medication during that time. Dr. Taylor testified in response to questions by defendants' counsel:

> Q. Now, Dr. Taylor, do you have an opinion, based upon a reasonable degree of psychiatric certainty, as to whether Mr. Stauffer's [sic] need for treatment and present inability to work in a stressful environment is a direct result of his depressive disorder which arose independently of his employment with Swift Independent Packing Company, or whether it is a direct result of the conditions of his employment with Swift Independent Packing Company?
>
> A. Yes.
>
> Q. What is your opinion?
>
> A. His current difficulties are a result of his depressive illness which arose independently of any employment situation.
>
> Q. And that is a biochemical disorder?
>
> A. Yes.
>
> Q. When we say "biochemical disorder," how would you explain that to a layman?
>
> A. We know that there are changes that take place in the chemistry of certain areas of the central nervous system in people who suffer from this disorder. The chemicals are chemicals which are important in the transmission of the electrical impulses within the brain, which is the basis for everything we do.

(Deposition of Michael Taylor, Exhibit 10, pages 24-25)

Claimant failed to prove factual causation between his alleged mental injury and his work. Dr. Rypma, is a psychologist, not a physician. Even if Dr. Rypma was a physician, his opinion of causation was based upon incomplete medical records. Kelly S. Bast, M.D., a family practitioner, testified as to causation between claimant's alleged mental injury and his work. In addition, Dr. Bast testified that a psychiatrist would have greater expertise to evaluate a psychological disorder than a family practitioner. Dr. Taylor, after learning that claimant had been treated in the past with antidepressants, testified that claimant's depression was the result of a biochemical condition and not the result of his employment. Dr. Taylor is a physician and a psychiatrist. Therefore, his opinion as to factual causation is given greater

weight. Claimant failed to prove factual causation between his employment and his alleged mental injury.

Even if claimant sustained his burden of proof and established factual causation, claimant still has the burden of proving that there is legal causation between claimant's work and his alleged mental injury.

> 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. 1986).

Ohnemus v. John Deere Davenport Works, Appeal Decision, February 26, 1990.

Claimant returned to work with defendant employer in December of 1980. During this time, claimant worked long hours with little breaks. In 1981 claimant did not receive a raise he was expecting. Claimant testified that his supervisor told him that Swift was a young man's plant and suggested that claimant look for other work. In October 1981, claimant was publicly reprimanded and demoted for an incident on the kill floor to the receiving department. Claimant became a grey hat which is a management support position. Claimant's pay did not decrease. Claimant did not receive a raise nor was he allowed to work overtime while a grey hat. Claimant was still being paid a blue hat rate while working as a grey hat. Claimant worked in receiving from 1981 until 1984. Claimant testified that he liked his job in receiving.

In 1984 claimant was promoted to a blue hat position in the hide department. Part of claimant's responsibilities included record keeping. Claimant had a difficult time accurately completing his assignments as he made errors in composing numbers and errors in mathematics. In October 1984, claimant was passed over for a promotion in the hide cellar and a person who he had trained was promoted. Changes were implemented in the department during this time.

Claimant's personnel file contained references in November 1984 to claimant's attitude and his inability to get along with his new supervisor. Claimant's supervisor noted incidents in November 1984 where claimant failed to properly complete his job. On November 23, 1984 claimant was demoted to grey hat, was transferred to another area, and received a pay decrease as a result of his work performance. Claimant was upset by the turn of events and sought a week's vacation which was denied. Claimant did not return to work with the defendant employer.

Dr. Taylor testified at his deposition concerning the events prior to claimant's demotion. Claimant's attorney posed the following question:

> Q. So in your view then, what he perceived as broken promises regarding promotions and raises would not have any bearing on his symptoms?
>
> A. Mr. Stouffer, because of his depression, was susceptible to being more upset by those sorts of things than he would have been had he not been depressed.

(Dep., Dr. Taylor, p. 41)

Claimant testified that he had trouble sleeping and did not eat normally during August and September 1984. Claimant testified that in the middle of November 1984 that he had a difficult time functioning and felt "owly" with his children. Claimant had family problems throughout 1984. Claimant's sister-in-law was diagnosed with a brain tumor in March of 1984. Claimant' wife testified that the news upset the entire family.

Claimant failed to prove that the mental stress that he suffered from on November 23, 1984 is greater than that of normal work life. A demotion may be a stressful situation, however, it is the type of situation which is a common part of the workplace. Claimant's personnel file indicates that claimant had been making errors in his job and had a difficult time working with his supervisor. Evidence appears to support claimant's demotion. Incidents that occurred in 1981 which included a public reprimand by claimant's supervisor and working overtime are too remote in time to be considered factors in claimant's alleged disability. In addition, evidence exists that claimant's home life was stressful. Claimant was having trouble sleeping and was upset over the news that his sister-in-law had brain cancer.

Claimant failed to prove factual causation between his alleged mental injury and his employment. Claimant failed to meet his burden of proof that his employment caused greater stress than normal employment life and was the legal cause of a mental injury. Therefore, claimant failed to prove that he suffered an injury which arose out of and in the course of his employment with defendants on November 23, 1984.

FINDINGS OF FACT

1. Claimant was born November 29, 1935. The majority of claimant's work experience was in the meat packing business.

2. Claimant was treated by Orville Jacobs, M.D., in 1978 for anxiety and depression. Dr. Jacobs prescribed antidepressant medication for these conditions which evidence that claimant has endogenous depression or a mental depression caused by a chemical imbalance in the brain which can only be adequately treated by long-term medication over a period of several months.

3. Claimant was rehired at Swift in December 1980 when the plant reopened. Claimant was required to work overtime during the start up period.

4. In 1981 claimant was publicly reprimanded and demoted from a supervisory position to an assistant supervisory position in the receiving department. Claimant did not receive a pay cut when he was demoted, however, claimant did not receive raises nor was he allowed to work overtime as he made more money than the other grey hats.

5. Claimant enjoyed working in the receiving department and remained there until 1984 when he was offered a promotion to blue hat in the hide department.

6. In 1984 claimant began working in the hide department. Claimant experienced difficulties accurately completing the paperwork involved with his job.

7. Claimant was passed over for a promotion in the hide department. A person claimant trained in the hide department was given the promotion and implemented changes in department procedure.

8. Claimant's personnel file contains memoranda accounting claimant's attitude and inability to get along with his supervisor in the beginning of November 1984. Additional memoranda refer to errors claimant made in loading shipments and failure to report mechanical malfunctions.

9. On November 23, 1984, claimant was demoted from a blue hat supervisor to a grey hat in the purchasing department which would result in a cut of pay and loss of status as a result of his inadequate job performance while a supervisor in the hide department.

10. Claimant reacted adversely to the demotion and requested a vacation which was denied by his employer.

11. Claimant testified that he experienced loss of appetite and loss of sleep during August and September of 1984. Dr. Taylor testified that loss of sleep and appetite are among the symptoms a person experiences when he or she suffers from depression.

12. Dr. Taylor testified that claimant's depression was the result of a biochemical imbalance. Claimant's depressive disorder was not the result of his employment.

13. Dr. Taylor is a physician and a psychiatrist. Dr. Taylor's diagnosis of a biochemical imbalance which resulted in claimant's depression is given greater weight.

14. Claimant's employment was not the factual cause of claimant's depression.

15. The mental work stress and tensions claimant experiences during his employment with defendant employer were not greater than the day to day mental stresses and tensions which all employees must experience.

16. Claimant's mental condition was not the result of a work injury.

CONCLUSION OF LAW

Claimant failed to prove that he suffered a mental injury that arose out of and in the course of his employment on November 23, 1984.

WHEREFORE, the decision of the deputy is affirmed.

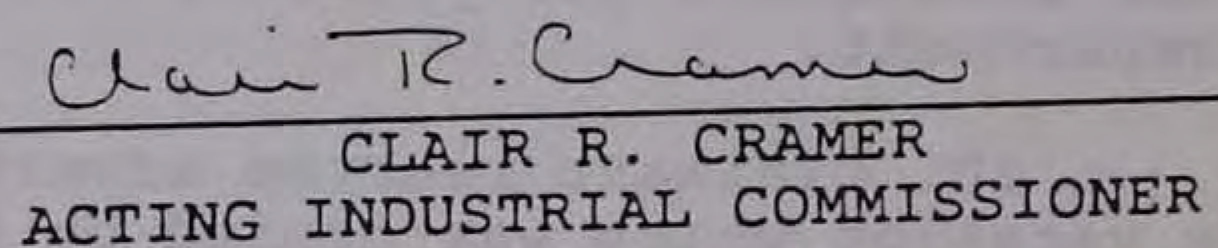
ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay the cost of this action including the cost of transcribing the arbitration hearing.

Signed and filed this 20th day of December, 1990.



CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Wendell J. Harms
Attorney at Law
4215 Hubbell Avenue
Des Moines, Iowa 50317-4507

Mr. Richard G. Book
Attorney at Law
500 Liberty Building
Des Moines, Iowa 50309-2421

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBBIE TOFTEE,	:	
Claimant,	:	File Nos. 686176/814729
vs.	:	A P P E A L
WEBSTER CITY PRODUCTS,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
JAN 30 1991
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from a review-reopening and arbitration decision denying claimant's review-reopening claim and awarding claimant 20 percent industrial disability to the body as a whole as a result of an alleged February 18, 1987 shoulder injury.

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

ISSUES

Defendant states the issues on appeal are:

1. Whether claimant's shoulder injury is causally related to claimant's September 25, 1981 injury?

2. Whether the deputy erred in denying defendant's motion to prevent introduction of the records and reports of James V. Nepola, M.D., and the University of Iowa Hospitals and Clinics as evidence?

3. Whether claimant's industrial disability related to her injury is less than 20 percent of the body as a whole?

REVIEW OF THE EVIDENCE

The review-reopening and arbitration decision filed March 31, 1989 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

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

ANALYSIS

On October 30, 1986 claimant sustained a traumatic injury to her right shoulder. (Hereinafter claimant's injury refers to the work injury alleged in file number 814729 and does not relate to claimant's 1981 injury.) Claimant testified that on October 30, 1986 she felt as if her right shoulder caught when she reached to get a machine part. Claimant testified that she continued working that day but that the following day she could not stretch out her arm. Claimant reported the incident to her employer and was sent to J.X. Latella, D.O., in the beginning of November 1986 for her shoulder problem. Claimant received treatments throughout November from Dr. Latella who eventually referred claimant to University of Iowa Hospitals and Clinics. Claimant did not miss work for her right shoulder problem until February 1987 when she was taken off work for chronic overuse syndrome. The evidence is uncontroverted that claimant sustained an injury and sought medical treatment.

From 1984 through 1986, claimant complained of pain which radiated into her right shoulder to Arnis Grundberg, M.D., the physician who treated claimant for her right carpal tunnel condition. Claimant testified that her right shoulder would burn or ache but it would not pop or crack as it did following the October 30, 1986 incident. There is no evidence that the right shoulder pain claimant described to her physician rose to the level which required treatment prior to the October 1986 work injury nor did the right shoulder pain cause claimant to miss work prior to February 18, 1987. Claimant sustained an injury which arose out of and in the course of her employment.

There is a causal connection between claimant's right shoulder injury and claimant's employment. In an office note, James V. Nepola, M.D., stated that, "[p]atient should not return to work until further notice, because of work related bicipital tendonitis and shoulder impingement syndrome." (Claimant's Exhibit A, page 6)

Other facts support the conclusion that claimant's right shoulder injury is causally related to claimant's employment. Claimant testified that in late 1984 she became a Class A Operator in charge of scrap metal. Claimant's new position required claimant to lift pieces of metal into large dumpsters that were between four and five feet tall on a daily basis. Claimant testified that this work required her to use both arms and that parts could weigh as much as 23 pounds each. Both

medical opinion and the facts support the conclusion that claimant's right shoulder injury is causally related to claimant's employment.

The second issue is whether claimant's industrial disability relating to her right shoulder injury is less than 20 percent of the body of a whole.

Claimant's date of birth is August 19, 1956 and claimant is a high school graduate. Claimant's work experience includes waitressing and manufacturing with the majority of claimant's work experience in manufacturing. Claimant sustained a compensable injury on September 25, 1981 which resulted in 10 percent impairment rating of right upper extremity. All benefits had been paid for the September 25, 1981 work injury.

Claimant had numerous shoulder arthrograms and on May 28, 1987 claimant underwent surgery to repair an "anterior labral tear right shoulder." (Cl. Ex. A, p. 45) Surgery did not relieve claimant's right shoulder pain and claimant underwent a second surgery on October 12, 1987 to repair claimant's right shoulder impingement. On April 11, 1988 claimant was released to return to work. Claimant's restrictions are no overhead work, no repetitive motion, no lifting over five pounds, no climbing, crawling, and no heavy equipment. (Cl. Ex. A, p. 12) Claimant's treating physician assigned claimant 17 percent permanent impairment rating of the right upper extremity which translated to 10 percent permanent impairment of the whole person.

As a result of claimant's injury to her right shoulder, claimant has not been able to return to her position as a Class A press operator which required overhead lifting of greater than five pounds. Dr. Nepola opined in a letter dated March 10, 1988: "We don't feel that she will be a good candidate for returning to her previous high level of repetitive overhead activities, and I have also strongly recommended vocational technical rehabilitation." (Cl. Ex. A, p. 9)

Dr. Nepola reviewed several job descriptions and made a suggestion as to which position would be best suited for claimant in light of her restrictions. Defendant-employer placed claimant in a labor intensive position which did not comply with claimant's restrictions. Claimant was required to stack wooden pallets and cardboard at least four or five times a day. Claimant's right shoulder bothered her doing this work and claimant was sent to Dr. Nepola who placed claimant in an immobilizer. Defendant removed claimant from that position. Claimant was off work for more than a month while defendant-employer attempted to find a position which would fit within her restrictions.

Finally, after union intervention, claimant was returned to work in a position in general production. Claimant's current duties in general production involve various jobs including: building pulleys, mounting the plates on the pulleys, drilling ground wires, and taking parts off the production line for inner doors. As a result of claimant's injury, claimant has not been medically capable of working overtime as a press operator. At the time of the hearing, a general production worker made $8.93 per hour and a Class A operator made $9.29 per hour.

Based upon the greater weight of the evidence, it is determined that claimant sustained 20 percent industrial disability as a result of her work related right shoulder injury.

The last issue to be discussed is whether the deputy erred in denying defendant's motion to prevent the introduction of records and reports of Dr. Nepola and the University of Iowa Hospitals and Clinics.

At the pretrial conference on August 1, 1988, defendant's attorney indicated that discovery had not been completed. The deposition of Dr. Nepola had not been taken at the time of the pretrial. At the pretrial, the parties agreed that discovery would be completed prior to the hearing or waived. The case, at that time, was set for hearing on November 9, 1988.

On October 19, 1988, claimant filed a motion to prevent the introduction of documents. Defendant asserted that attempts to schedule a deposition with Dr. Nepola had been unsuccessful due to scheduling conflicts. Defendant requested that "all testimony, either verbally or any documentation through submission be excluded at the time of trial for the reasons that the employer has been unable to discover the doctors [sic] position." Defendant included letters with the motion evidencing attempts to reach Dr. Nepola to schedule a time to take the deposition. The majority of defendant's correspondence with Dr. Nepola precede the pretrial date. The only letter evidencing defendant's attempt to reach Dr. Nepola after the pretrial is dated October 12, 1988, more than two months following the pretrial. Defendant did not file a motion to continue the hearing after learning that Dr. Nepola could not be deposed.

Defendant has the right, pursuant to rule 343 IAC 4.18, to depose medical practitioner providing medical care, however, defendant must comply with prehearing orders.

> 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.

Rosenbaum v. Associated Properties, Inc., Appeal Decision, filed December 28, 1989.

Defendant failed to complete discovery within the specified time frame. Defendant waived the right to object to the introduction of testimony or documents that relates to any possible testimony that could have been obtained from Dr. Nepola.

In addition, claimant's introduction of medical evidence is not contingent upon defendant's ability to depose Dr. Nepola. Claimant's right to introduce medical evidence is independent of defendants' right to depose Dr. Nepola.

Rule 343 IAC 4.18 states: "Any relevant medical record or report served upon a party in compliance with these rules prior to any deadline established by order for service of the records and reports shall be admissible as evidence at hearing of the contested case."

Defendant's failure to obtain the deposition of Dr. Nepola is not a valid ground to exclude medical evidence of claimant who had complied with all the agency rules and orders.

Defendant failed to comply with the pretrial order which required that discovery be completed prior to trial. The deputy's ruling denying defendant's motion was proper.

FINDINGS OF FACT

1. Claimant's date of birth is August 19, 1956. Claimant is a high school graduate.

2. Claimant's work experience includes waitressing and manufacturing as a press operator. Manufacturing accounts for the majority of claimant's work experience.

3. Claimant sustained a compensable injury on September 25, 1981 which resulted in 10 percent impairment rating of the right upper extremity. All healing period benefits and permanent partial disability benefits were paid and claimant returned to work following the September 25, 1981 injury.

4. Claimant continued to receive treatment from Arnis Grundberg, M.D., from 1984 through 1986 for right arm pain which included occasional pain that radiated into her right shoulder.

5. On October 30, 1986 claimant "felt her arm catch" while at work and sought medical treatment for the pain in the beginning of November 1986. Claimant did not miss work but continued to receive treatment.

6. Claimant continued to work until February 18, 1987 when she was taken off work for several months by Dr. Nepola who diagnosed possible chronic overuse syndrome in her right shoulder.

7. Claimant had numerous shoulder arthrograms and on May 28, 1987 claimant underwent surgery to repair an "anterior labral tear right shoulder."

8. The surgery on May 28, 1987 did not relieve claimant's right shoulder pain and claimant underwent a second surgery on October 12, 1987 to repair claimant's right shoulder impingement syndrome.

9. On April 11, 1988, claimant was released to return to work and was restricted to no overhead work, no repetitive motion, no lifting over five pounds, no climbing, crawling, no heavy equipment, and no pneumatic equipment.

10. Dr. Nepola assigned claimant a 17 percent permanent impairment rating of the right upper extremity which translated to 10 percent permanent impairment of the whole person.

11. Prior to claimant's injury, she was a Class A press operator. Claimant was required to place scrap metal, weighing as much as 23 pounds, into large dumpsters.

12. As a result of claimant's work injury to her right shoulder, claimant has not been able to return to her position as a Class A press operator which required overhead lifting of greater than five pounds.

13. As a result of claimant's work injury, claimant has only been able to return to work as a general production worker.

14. Claimant's current position is in general production, where claimant works various jobs including: building pulleys, mounting the plates on the pulleys, drilling ground wires, and taking parts off the production line for inner doors.

15. At the time of the hearing, a general production worker made $8.93 per hour and a Class A operator made $9.29 per hour.

16. As a result of claimant's injury on, claimant has not been medically capable of working overtime as a press operator.

17. Claimant's right shoulder injury is not the result of claimant's injury on September 25, 1981.

CONCLUSIONS OF LAW

Claimant sustained a right shoulder injury that arose out of and in the course of her employment with defendant on October 30, 1986. Claimant's right shoulder injury is not causally related to claimant's September 25, 1981 right extremity injury.

There is a causal relation between claimant's shoulder injury and claimant's functional impairment.

Defendant's motion to prevent the introduction of documents was properly denied.

Claimant has met her burden of proving she has a 20 percent permanent partial disability attributable to her right shoulder injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the rate of two hundred twenty-one and 30/100 dollars ($221.30) per week.

That defendant shall pay unto claimant fifty-five point five (55.5) weeks of healing period benefits at the rate of two hundred twenty-one and 30/100 dollars ($221.30) per week.

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

That defendant shall receive credit for benefits previously paid.

That defendant pay the cost of the proceedings including the costs of transcription of the review-reopening and arbitration hearing.

That defendant file claim activity reports pursuant to rule 343 IAC 3.1(2).

Signed and filed this 30th day of January, 1991.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Tito Trevino
Attorney at Law
P.O. Box 1680
Fort Dodge, Iowa 50501

Mr. Robert C. Landess
Attorney at Law
2700 Grand Ave., Suite 111
Des Moines, Iowa 50312

The case sub judice, the method to determine rate is not clear. During the hearing, Walter Annett testified that the amount paid the owner operators represented equipment rental and that no part of the monies paid the drivers represented compensation for driving the truck. Annett testified:

> Q. Let me ask you your view as general manager of Mickow. Is it your view that the entire sum of the earnings of the truck relates to labor performed by the operator?
>
> A. No, sir. It's -- the total sum would be equipment rental only. There's no labor involved whatsoever.
>
> Q. So the total sum is?
>
> A. $21,386.86 for equipment rental.
>
> Q. Why do you say that relates to equipment rental only?
>
> A. That's what it is, We're just leasing equipment. We're not leasing people.
>
> ....
>
> Q. So I understand your view then is you're relating that twenty-one thousand you paid the owner operator in this case, twenty-one thousand for equipment rental and he provides his driver free then?
>
> A. Right.

(Tr., pp. 97-98.)

It would be absurd to think that the total earnings of the truck did not represent at least a portion of decedent's labor in operation of the truck. There is evidence in the record that one-third of the decedent's gross receipts for a thirteen week period were used by the insured to determine decedent's earnings, plaintiff's exhibit 15. Gross receipts for this analysis are equal to the total amount decedent received from Mickow and everyone else decedent hauled for while employed by Mickow.

Decedent's gross receipts are:

3/12/81	1,961.00 x 75%	1,470.75	
	801.72 x 95%	761.63	
	Total		2,232.38

APPLICABLE LAW

The citations of law in the remand decision filed December 20, 1988 are appropriate to the issue and evidence. Additional law will discussed in the analysis of the evidence.

ANALYSIS

The sole issue on remand is the appropriate rate in light of the supreme court's recent decision wherein the supreme court stated:

> We cannot improve on the language employed by the district court. ... We quote and adopt it as our own:
>
>> It is not absurd to deduct known expenses to arrive at actual wages. ... Many factors, such as interest paid, depreciation, [and other matters] enter into a determination of taxable income that would not be applicable to determine actual wages....
>
> The district court then quoted Iowa Code section 85.36(8), which we have noted above, and went on to state:
>
>> There is evidence in the record that the standard wage rate for drivers is 25% of the gross receipts. The burden is on [Sperry] to show his actual earnings. If he cannot do so, then... the provisions of section 85.36(8) should apply.

D & C Express v. Sperry, 450 N.W.2d 842, 845 (Iowa 1990).

The parties did not have the benefit of Sperry when the facts were presented in the instant case. While there is evidence of some of decedent's expenses, it is unclear that all of decedent's actual expenses are known. Actual expenses such as fuel costs, maintenance and repair of decedent's vehicle are not among the expenses list in claimant's exhibit 5. Walter Annett, the general manager for defendant employer, testified that decedent would be required to pay fuel, maintenance, repairs and other operating expenses (transcript, page 129). Neither party requested submission of additional evidence to prove decedent's actual expenses. Since decedent's actual expenses are not known, it is concluded that rate should be determined pursuant to Iowa Code section 85.36(8).

ANALYSIS

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

FINDINGS OF FACT

1. Claimant received a low back injury at work on April 1, 1987 when he fell from a defective chair.

2. Claimant's disability is a result of his injury of April 1, 1987.

3. All healing period benefits to which claimant is entitled have been paid and is not an issue herein.

4. Claimant was born December 3, 1924 and is nearing the normal retirement age.

5. Claimant is a high school graduate and completed one and one-half years of college at Drake University.

6. Claimant worked for Super Valu for twenty-six years and his duties included order desk, stock person, and assistant manager.

5. Claimant has a history of back problem which include surgeries in 1961, 1980 and 1982. Claimant's physician imposed restrictions upon claimant which he did not honor.

6. Claimant was told he could return to a light duty job with defendant employer on November 18, 1987. On February 10, 1988, claimant was released to return to light duty work with restrictions of no lifting within this restriction; no standing or sitting longer than two hours without being able to move about; and minimal stooping, bending and twisting.

7. Defendants offered to return claimant to work within his restriction but claimant did not return to employment with defendants.

8. Claimant voluntarily chose to retire on March 7, 1988, effective April 3, 1988.

9. Claimant has a 10 percent functional impairment to his body as a whole due to his low back injury at L2-L3 which resulted in lumbar laminectomy on May 28, 1987.

10. Claimant has a 15 percent reduction in earning capacity.

3/19/81	560.35 x 75%	420.26	
	Sammons #70981	511.50	
	Total		931.76
3/26/81	1,419.84 x 75%	1,064.88	
	699.72 x 95%	664.73	
	Bounce	60.00	
	Maverick #2083	673.09	
	Total		2,462.70
4/2/81	1,123.64 x 75%	842.73	
	170.84 x 95%	162.30	
	Total		1,005.03
4/9/81	2,066.51 x 75%	1,549.88	
	Total		1,549.88
4/16/81	1,098.04 x 95%	1,043.14	
	Mercer #039836	562.43	
	Total		1,605.57
4/23/81	864.77 x 75%	648.58	
	bounce	135.00	
	Total		783.58
4/30/81	1,548.81 x 75%	1,161.61	
	344.63 x 95%	327.40	
	stop-off charge	100.00	
	Total		1,589.01
5/7/81	917.70 x 75%	688.28	
	stop-off charge	50.00	
	Total		738.28
5/21/81	581.02 x 75%	435.77	
	396.54 x 95%	376.71	
	Helms #453789	349.06	
	Total		1,161.54
5/28/81	784.55 x 75%	588.41	
	Total		588.41
6/4/81	2,277.47 x 75%	1,708.10	
	bounce	50.00	
	bounce	60.00	
	Mercer #046997	743.48	
	Total		2,561.58

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILMA VAN GUNDY, Claimant,	:	
vs.	:	File No. 521774
MEREDITH CORPORATION, Employer,	:	A P P E A L
and	:	D E C I S I O N
INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	:	

FILED
OCT 31 1990
IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision denying benefits.

The record on appeal consists of the transcript of the review-reopening hearing; claimant's exhibits 1 and 2; and defendants' exhibits 1 through 23. Neither party filed briefs on appeal.

ISSUES

The appeal will be considered generally and without regard to specific issues.

REVIEW OF THE EVIDENCE

The review-reopening decision filed August 3, 1989 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.

3. One-third of decedent's gross receipts represents wages of the driver.

4. Claimant, decedent's wife, as co-driver of decedent's truck, furnished 42 percent of the labor for the operation of the truck.

5. Decedent's weekly earnings are $282.51.

CONCLUSION OF LAW

Decedent's rate of compensation is $176.48.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant weekly compensation at the rate of one hundred seventy-six and 48/100 dollars ($176.48) per week commencing on June 11, 1981 and continuing until such time as claimant becomes disqualified for compensation.

That interest is to accrue on this award at a rate of ten percent (10%) per year pursuant to Iowa Code section 85.30 from the date payments become due.

That accrued but unpaid amounts shall be paid in a lump sum.

That costs including the costs of this remand are taxed to defendants pursuant to rule 343 IAC 4.33.

That defendants be given credit for amounts previously paid.

That defendants shall file claim activity reports as required by this agency pursuant to rule 343 IAC 3.1(2).

Signed and filed this 18th day of January, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Roger L. Ferris
Attorney at Law
1900 Hub Tower
699 Walnut Street
Des Moines, Iowa 50309

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant shall pay all costs of this proceeding, including the preparation of the hearing transcript.

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

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert W. Pratt
Attorney at Law
1913 Ingersoll
Des Moines, Iowa 50309-3320

Mr. Charles E. Cutler
Attorney at Law
729 Insurance Exchange Bldg.
Des Moines, Iowa 50309

Ms. Wilma Van Gundy
4240 N.E. 46th St.
Des Moines, Iowa 50317
CERTIFIED MAIL

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES VAN BLARICUM, Claimant, vs. SUPER VALU STORES, INC., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 852132 A P P E A L D E C I S I O N

FILED
JUL 20 1990
INDUSTRIAL SERVICES

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding claimant 15 percent permanent partial disability benefits as the result of a work injury on April 1, 1987. The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 9 and defendants' exhibit A. 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 finding that claimant is entitled to 15 percent permanent partial disability benefits as a result of claimant's April 1, 1987 work injury.

REVIEW OF THE EVIDENCE

The arbitration decision dated May 18, 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 deputy found a cumulative injury to claimant's right wrist as a result of his work activity as a carpenter. Dr. Blair testified that claimant's condition was causally connected to his work activity, and that his work activity accelerated his condition. J. S. Koch, M.D., stated that although claimant's work activity may have made him aware of his condition by causing pain, it did not aggravate the condition. Dr. Blair has had greater contact with claimant than did Dr. Koch, who was not a treating physician. Dr. Blair specializes in hand surgery. However, Dr. Blair did not have available to him the x-rays of claimant's hand taken in September of 1985.

Here, claimant apparently suffered a cumulative injury over a period of time during which he worked for two different employers at virtually the same occupation. There is nothing in the record to contradict claimant's statement that his right wrist pain did not manifest itself until shortly before he left his employment at Steuve. The pain reappeared shortly after beginning work with this defendant employer. Dr. Urbatsch's description of the fracture as "old" would indicate that claimant developed that part of his condition while employed by Stueve. However, his work with defendant employer has clearly aggravated and accelerated his right wrist condition.

An employer takes an employee as he finds him. Zeigler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960). If a subsequent injury aggravates a preexisting condition rendering the condition disabling, the employer is liable for the disability. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-61 (1956). But, a worker is not entitled to recover for a preexisting disability. Olsen v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). A prior non-disabling defect does not reduce the industrial disability caused by an injury, however, even if the defect contributes to the end result. If an injury precipitates industrial disability from a latent prior condition, the entire disability is compensable. To reduce industrial disability caused by an injury, a preexisting defect must have produced some degree of industrial disability before the injury. Varied Enterprises v. Sumner, 353 N.W.2d 407 (Iowa 1984). Where it cannot be shown that a prior, work-related injury to the same body part caused industrial disability, all present disability is compensable. Tussing v. Hormel & Co., 461 N.W.2d 450 (Iowa 1990); Bearce v. FMC Corporation, Iowa Supreme Court, January 23, 1991 [No. 458/89-1423].

If claimant's condition, contracted at Stueve, had caused disability, defendants in this action might be entitled to an apportionment of the disability award. However, claimant did not complain of pain in his right wrist until three days before leaving Stueve. He did not miss any work during that employment.

CONCLUSION OF LAW

The greater weight of the evidence supports that claimant has an industrial disability of 15 percent.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the stipulated rate of two hundred fifty-six and 49/100 dollars ($256.49), commencing November 19, 1987.

That defendants are to pay or reimburse claimant for the fifty-one dollar ($51) medical bill of Dr. Cunningham and eighteen and 06/100 dollars ($18.06) for mileage.

That defendants are to pay interest on benefits awarded pursuant to Iowa Code section 85.30.

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

That defendants pay all other costs of this proceeding.

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

Signed and filed this 20th day of July, 1990.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Channing L. Dutton
Attorney at Law
West Towers Office
1200 35th Ste. 500
West Des Moines, Iowa 50265

Mr. W. C. Hoffmann
Mr. Richard G. Book
Attorneys at Law
500 Liberty Bldg.
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD WARREN, Claimant,	:	File No. 857199
vs.	:	A P P E A L
FRENCH & HECHT, Employer, Self-Insured, Defendant.	:	D E C I S I O N

FILED
JAN 31 1991
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. The decision of the deputy filed August 28, 1990 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Claimant has not sought alternative employment. It is normally incumbent upon an injured worker at a hearing to determine loss of earning capacity to demonstrate a reasonable effort to secure employment in the area of residence. Hainey v. Protein Blenders, Inc., 445 N.W.2d 398 (Iowa App. 1989). Claimant's industrial disability must be evaluated without reliance on the odd-lot doctrine.

Claimant is 51 years old. Claimant has ratings of impairment of 33 percent of the right arm, and 30 percent of the left arm. Claimant has a lifting restriction of ten pounds. Claimant has worked most of his working life in heavy labor and foundry work. Claimant cannot return to his old job or any similar job where claimant would have to use his arms for any substantial amount of lifting. Claimant is also illiterate, and cannot read job application forms or apply for any job that requires the ability to read or write. Based on these and all other appropriate factors for determining industrial disability, it is determined that claimant is permanently and totally disabled.

ANALYSIS

The analysis of the evidence in conjunction with the law in the review-reopening decision is adopted with the following additional analysis:

Even if claimant had shown a nonphysical change of condition, claimant's odd-lot argument must be rejected. A failure to search for work prohibits the odd-lot doctrine and shifting of the burden of proof. Emshoff v. Petroleum Transportation Services, Appeal Decision, March 31, 1987.

FINDINGS OF FACT

1. The evidence introduced has failed to show, by a preponderance of the evidence, any substantial change in claimant's physical condition that has occurred since the first hearing in this case was conducted on December 16, 1982.

2. The evidence introduced fails to demonstrate, by a preponderance of the evidence, that there has been any change in claimant's economic condition that has occurred since December 16, 1982.

3. Claimant's lack of employment is as likely a result of her failure to seek employment as it is of her disability.

4. The fact that claimant has aged since 1982 is a matter which would have been anticipated by the deputy who originally decided this case based upon the December 16, 1982 hearing.

CONCLUSIONS OF LAW

Claimant has failed to introduce evidence establishing, by a preponderance of the evidence, that she has experienced a change of condition which would permit reconsideration of the extent of permanent partial disability which was awarded in 1983.

Claimant has failed to prove, by a preponderance of the evidence, that there has been any substantial change in circumstances affecting the extent of her disability which has occurred since this case was originally heard on December 16, 1982 and which was not within the contemplation of the deputy who heard the case at that time.

WHEREFORE, the decision of the deputy is affirmed.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD WEBB, JR., Claimant, vs. LOVEJOY CONSTRUCTION COMPANY, Employer, and BITUMINOUS CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 474988 A P P E A L D E C I S I O N

FILED SEP 25 1990 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals the denial of a motion for rehearing. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

Claimant states the following issues on appeal:

I. The deputy industrial commissioner violated rules governing contested case proceedings when he refused to conduct a hearing before issuing his decision.

II. The deputy industrial commissioner's decision fails to set forth any facts which support his conclusion.

III. Substantial evidence does exist which should be considered on the re-hearing of this matter.

IV. The deputy's award of the attorney fee in this case violates reasonable standards for the determination of when an attorney fee is appropriate.

V. The deputy industrial commissioner's decision reveals that he acted in a wholly arbitrary and capricious manner.

ANALYSIS

The analysis of the evidence in conjunction with the law in the review-reopening decision is adopted with the following additional analysis:

Even if claimant had shown a nonphysical change of condition, claimant's odd-lot argument must be rejected. A failure to search for work prohibits the odd-lot doctrine and shifting of the burden of proof. Emshoff v. Petroleum Transportation Services, Appeal Decision, March 31, 1987.

FINDINGS OF FACT

1. The evidence introduced has failed to show, by a preponderance of the evidence, any substantial change in claimant's physical condition that has occurred since the first hearing in this case was conducted on December 16, 1982.

2. The evidence introduced fails to demonstrate, by a preponderance of the evidence, that there has been any change in claimant's economic condition that has occurred since December 16, 1982.

3. Claimant's lack of employment is as likely a result of her failure to seek employment as it is of her disability.

4. The fact that claimant has aged since 1982 is a matter which would have been anticipated by the deputy who originally decided this case based upon the December 16, 1982 hearing.

CONCLUSIONS OF LAW

Claimant has failed to introduce evidence establishing, by a preponderance of the evidence, that she has experienced a change of condition which would permit reconsideration of the extent of permanent partial disability which was awarded in 1983.

Claimant has failed to prove, by a preponderance of the evidence, that there has been any substantial change in circumstances affecting the extent of her disability which has occurred since this case was originally heard on December 16, 1982 and which was not within the contemplation of the deputy who heard the case at that time.

WHEREFORE, the decision of the deputy is affirmed.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD WEBB, JR., Claimant,	:	
vs.	:	
LOVEJOY CONSTRUCTION COMPANY, Employer,	:	File No. 474968
and	:	APPEAL DECISION
BITUMINOUS CASUALTY COMPANY, Insurance Carrier, Defendants.	:	

FILED
SEP 25 1990
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals the denial of a motion for rehearing. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

Claimant states the following issues on appeal:

I. The deputy industrial commissioner violated rules governing contested case proceedings when he refused to conduct a hearing before issuing his decision.

II. The deputy industrial commissioner's decision fails to set forth any facts which support his conclusion.

III. Substantial evidence does exist which should be considered on the re-hearing of this matter.

IV. The deputy's award of the attorney fee in this case violates reasonable standards for the determination of when an attorney fee is appropriate.

V. The deputy industrial commissioner's decision reveals that he acted in a wholly arbitrary and capricious manner.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
FEB 2 [illegible] 1991
IOWA INDUSTRIAL COMMISSIONER

LOWELL VOSHELL,	:	
Claimant,	:	
vs.	:	File No. 805464
WILLIAM ROYS REMODELING,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
WEST BEND MUTUAL INSURANCE,	:	
Insurance Carrier, Defendants.	:	

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 filed May 31, 1990 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

The record shows that claimant's fracture did not occur during his employment with defendant employer. Claimant experienced pain in his right wrist while working for Stueve Construction Company. Although claimant worked for that employer three years, the pain did not manifest itself until a few days before claimant stopped working there. When claimant began work for defendant employer, he again experienced pain. Claimant acknowledged that Susan Urbatsch, M.D., may have described his fracture as an old fracture. There was no traumatic incident that prompted claimant's complaint of pain in September of 1985. Claimant had only worked for defendant employer a few days when the pain prompted him to seek medical attention.

William F. Blair, M.D., testified that claimant's particular condition, a fracture compounded by Keinbock's disease, was not well studied, and he could not state whether the fracture occurred first and was followed by the development of the disease, or whether the disease occurred first. Dr. Blair also stated that there was no way to predict how long a period of time would normally elapse between the onset of the disease and the appearance of symptoms.

contested case. Thus, rule 4.4 is not directly applicable to the present attorney fee dispute.

The real question in this appeal is whether a new matter was decided in the deputy's October 10, 1989 determination that the commutation of benefits was contemplated by the attorney fee arrangement between Attorney Oliver and claimant. Claimant contends that the commutation settlement reached by his new attorney was not contemplated by the deputy's January 23, 1989 ruling. Claimant urges that there is now a new attorney fee dispute that requires a hearing.

The December 16, 1988 attorney fee hearing provided claimant a full opportunity to contest the fee arrangement between Attorney Oliver and claimant. Although claimant argues that only accrued amounts were directly involved in that hearing, nevertheless the fee arrangement at issue contemplated a one-third interest on the part of Attorney Oliver in future compensation received by claimant as well. It would be absurd to contend that each new weekly receipt of benefits by claimant might form the basis for a new attorney fee dispute. The deputy's ruling went to future receipt of benefits as well. The ruling specifically stated: "Oliver should continue to be paid for any benefits claimant obtains which resulted from Oliver's efforts and work product."

A commutation of benefits previously awarded is merely a change in the manner in which the benefits will be paid. Attorney Oliver would be entitled to his approved attorney fee of one-third of claimant's benefits whether those benefits are being paid weekly or are paid in a lump sum. If the commutation in this case were based solely on 25 percent industrial disability award obtained for claimant by Attorney Oliver, no further hearing would be required and the deputy's ruling on the motion and refusal to provide a further hearing would have been correct.

However, the commutation in this case involves an industrial disability of 95 percent. It is possible that the increase in the overall award from 25 percent industrial disability to 95 percent industrial disability was obtained through the efforts of an attorney other than Attorney Oliver. Thus, a hearing is required to determine to what extent Attorney Oliver's services contributed to the attainment of the benefits claimant received in the commutation of July 11, 1989.

CONCLUSION OF LAW

A hearing was required on the question of attorney Arvid Oliver's entitlement to attorney fees on benefits involved in the commutation of July 11, 1989.

WHEREFORE, the decision of the deputy is reversed.

Thus, he did not suffer any disability until September 1985, while employed with defendant employer. Defendants are not entitled to an apportionment. Defendants are responsible for claimant's entire present disability.

Signed and filed this 27th day of February, 1991.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. John Ricolo
Mr. David L. Baker
Attorneys at Law
Suite 1140, The Center
425 2nd Street S.E.
Cedar Rapids, Iowa 52401

Mr. John M. Bickel
Ms. Diane H. Kutzko
Mr. Douglas R. Oelschlaeger
Attorneys at Law
500 MNB Bldg., P.O. Box 2107
Cedar Rapids, Iowa 52406

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 D E C I S I O N O N R E M A N D FILED DEC 1 1990 IOWA INDUSTRIAL COMMISSIONER

In a ruling filed December 4, 1990, the Iowa District Court for Polk County remanded this case for further order relating to interest on the benefits awarded to claimant. The district court cited Second Injury Fund of Iowa v. Braden, 459 N.W.2d 467 (Iowa 1990, which held that in workers' compensation cases, the Second Injury Fund of Iowa is liable for interest on benefits assessed against the Fund from the date of the commissioner's decision.

ACCORDINGLY, it is ordered:

That the Second Injury Fund of Iowa shall pay interest on unpaid benefits awarded against the Fund from December 29, 1989 pursuant to Iowa Code section 85.30.

Signed and filed this 13th day of December, 1990.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Defendant shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 31st day of January, 1991.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. James M. Hood
Attorney at Law
302 Union Arcade Bldg.
Davenport, Iowa 52801

Mr. Larry L. Shepler
Attorney at Law
Executive Square, Suite 102
400 Main Street
Davenport, Iowa 52801

On April 20, 1988, Dr. Richards opined that claimant suffered from overuse tendonitis of both shoulders. On May 4, 1988, Dr. Richards noted that defendants had asked claimant to lift 50 pound boxes at work in violation of her lifting restrictions. Claimant was taken off work until May 19, 1988.

On May 18, 1988, claimant was again seen by Dr. Richards. Dr. Richards imposed a lifting restriction of not over 15 pounds, and rotation of work duties every two hours.

On June 3, 1988, Dr. Bottjen diagnosed claimant as suffering from chronic tendonitis of the right shoulder. On June 7, 1988, Robert F. Breedlove, M.D., rated claimant's shoulders as zero impairment. Although claimant testified that Dr. Bottjen refused to examine her shoulders and only examined her hands, Dr. Bottjen reported that claimant suffered from tenderness and a positive impingement sign in the shoulders, but had full range of motion in the shoulders.

On June 9, 1988, Dr. Crane diagnosed tendonitis, both shoulders, which he described as subjective. He indicated that claimant's tendonitis was simply a muscle pull area at most. Dr. Crane suggested claimant restrict working above shoulder level, but keep working. Dr. Crane indicated that of the 25 percent rating of impairment, four percent was applicable to the whole person and 21 percent to the upper extremity.

On July 5, 1988, Dr. Crane endeavored to clarify his rating, and indicated that he had factored pain into the calculation. He acknowledged that he could not distinguish between a body as a whole injury and a scheduled injury in the legal sense. He indicated that his rating considered the joint, bone and muscle. On September 19, 1988, claimant was reduced to four hour shifts by Dr. Crane. On September 28, 1988, claimant's lifting restriction was reduced by Dr. Crane to five pounds, with no work over the shoulders, and two hour rotation.

Dr. Crane returned claimant to six hour shifts on October 10, 1988. On October 19, 1988, Dr. Crane noted that claimant experiences right shoulder problems after working above shoulder level, and reiterated claimant's restrictions.

On December 22, 1988, claimant was told by her employer that unless her restrictions were lifted, she would be laid off, as her restrictions kept her from "bumping" another employee with less seniority under the union contract. On December 29, 1988, claimant was laid off.

REVIEW OF THE EVIDENCE

Claimant was injured on August 18, 1977. An original notice and petition was filed on November 26, 1979. Claimant was represented by attorney Arvid Oliver. On April 11, 1980, claimant entered into a retainer agreement with Attorney Oliver, whereby claimant agreed to pay to Attorney Oliver one-third of any and all sums secured for him, with the exception of certain items covered by group hospitalization insurance.

A review-reopening hearing was held on May 7, 1980. A review-reopening decision was filed August 20, 1980, awarding claimant 35 percent industrial disability. This decision was appealed to the industrial commissioner by the defendants. An appeal decision filed October 20, 1981 awarded claimant 25 percent industrial disability.

On November 19, 1981, claimant filed a petition for judicial review of the appeal decision. On June 21, 1982, the commissioner's decision was affirmed by the district court. On July 28, 1982, the decision of the district court was appealed to the supreme court by claimant. The appeal was dismissed by claimant on August 19, 1982.

On February 9, 1982, claimant filed an original notice and petition seeking medical benefits. A review-reopening decision was filed on October 24, 1983, awarding claimant future medical benefits and a running healing period award. This decision was appealed by defendants. On March 12, 1984, the deputy's decision was affirmed on appeal. Defendants filed a petition for judicial review on July 5, 1984. The district court affirmed the commissioner's decision on July 30, 1984. Defendants filed an appeal to the supreme court on August 29, 1984. The case was assigned to the Iowa Court of Appeals which affirmed the commissioner and the district court on November 26, 1985.

Attorney Oliver later testified that at some point during this time, he and the claimant entered into an oral agreement to increase the amount of the attorney lien to 50 percent in light of the difficulty of the case. Claimant later testified that he understood the agreement to be one-third at all times and did not recall an oral agreement. Claimant received approximately $60,000 in January 1986, in workers' compensation benefits. A dispute arose between claimant and his attorney over the amount of fees Mr. Oliver was entitled to. Claimant then hired Attorney Gordon Darling.

Attorney Oliver eventually agreed to a one-third fee in light of the misunderstanding. The one-third fee arrangement continued in effect from January 1986 until June 19, 1987. Claimant discharged attorney Oliver by letter dated June 26,

Claimant next urges on appeal that she has suffered an injury that is not limited to her arms, but to her shoulders and back as well. If a claimant contends he has industrial disability he has the burden of proving his injury results in an ailment extending beyond the scheduled loss. Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964).

Alternatively claimant urges that if her injury is not an injury affecting the arms and shoulders as well as the arms, then her present arm and shoulder conditions are sequelae of her arm injuries. An injury to a scheduled member may, because of after effects (or compensatory change), result in permanent impairment of the body as a whole. Such impairment may in turn form the basis for a rating of industrial disability. Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

The medical evidence does not support the conclusion that claimant's bilateral carpal tunnel syndrome has resulted in impairment to her shoulders or back. Claimant first complained of shoulder pain on April 19, 1986. Dr. DeBartolo, claimant's treating physician and the surgeon who performed claimant's carpal tunnel surgery, examined claimant's shoulders on November 4, 1986, and found a full range of motion. Dr. DeBartolo examined claimant again on January 6, 1986, and again found no abnormalities in the shoulders. Dr. Breedlove examined claimant on November 10, 1987, and found the shoulders to be normal. Dr. Mixdorf also found no shoulder or back deficiencies in his examinations.

Although claimant made numerous complaints of pain in her shoulders, only one of claimant's physicians gave a rating of permanent partial impairment to her shoulders. All the other doctors that examined claimant found full range of motion in the shoulders. Dr. Richards attributed claimant's shoulder pain to overuse tendonitis. Dr. Bottjen also diagnosed chronic tendonitis. Dr. Breedlove rated claimant's shoulder impairment as zero. None of claimant's physicians, except Dr. Crane, assigned permanent impairment to claimant's shoulders.

Although Dr. Crane did assign a rating of impairment for claimant's shoulders, he found no abnormalities in claimant's shoulders and clarified that his rating was for pain alone. Dr. Crane also described claimant's shoulder condition as a muscle pull, and stated he had no objective findings of shoulder impairment. Although the majority of claimant's complaints may have revolved around her shoulders, no doctor stated that claimant's carpal tunnel syndrome extended to her shoulders. Similarly, no physician expressed an opinion that claimant's shoulder pain was a sequelae of her carpal tunnel syndrome, nor did any physician opine that claimant's shoulder pain was the

On August 31, 1989, Attorney Oliver filed a motion for determination of application of deputy's decision, requesting a determination that the commutation represented the result of services and work product of Mr. Oliver. Claimant resisted the motion on September 19, 1989.

On October 10, 1989, a deputy industrial commissioner issued a ruling on the motion. The ruling held that the commutation represented benefits obtained through the efforts of Attorney Oliver, and that the prior attorney fee ruling clearly contemplated that fees would be paid from any future benefits, including a settlement by commutation.

On October 16, 1989, claimant filed an application for rehearing-request for permission to submit evidence. Attorney Oliver resisted the motion, alleging that claimant was attempting to retry the hearing that resulted in the attorney fee decision of January 23, 1989, which was now res judicata in light of the dismissal of claimant's appeal of that ruling. After claimant's motion was deemed denied by operation of Division of Industrial Services Rule 343-4.24, claimant filed this appeal.

APPLICABLE LAW AND ANALYSIS

On appeal, claimant contends that the case should be remanded to the deputy for an evidentiary hearing on whether Attorney Oliver is entitled to 1/3 of the commuted funds. Claimant contends the deputy erred in ruling on attorney Oliver's motion for determination of application of deputy's decision without allowing a further evidentiary hearing, and in making findings of fact without such a hearing.

Claimant points out that both Attorney Oliver in his motion, and claimant in his resistance, requested a hearing. Claimant also points to Division of Industrial Services Rule 343-4.4, which states:

> A hearing shall not be held in proceedings under 4.1(8),(9),(10),(11),(12), unless requested in writing by the petitioner in the original notice or petition or by the respondent within ten days following the time allowed by these rules for appearance.

However, rule 4.4 refers to an original notice and petition. The attorney fee dispute here did not arise by the filing of an original notice and petition under rule 4.1(9). The February 18, 1988 application for determination of attorney fees was in the form of a motion in the existing case, rather than an original notice and petition for a new contested case proceeding. Similarly, the August 31, 1989 motion for determination of application of deputy's decision was not a petition and original notice under rule 4.1(9), but again a motion in the existing

Claimant has received several ratings of impairment of her upper extremities. Dr. DeBartolo rated claimant's right upper extremity at 16 percent, left upper extremity at 15 percent, for a combined value of 29 percent, which converts to a whole body impairment of 17 percent. However, Dr. DeBartolo apparently misapplied the AMA Guides to the Evaluation of Permanent Impairment. Dr. DeBartolo obtained his ratings of each upper extremity, then utilized the combined values chart, and then converted the combined value to a whole body rating. The AMA Guides contemplate converting the upper extremity ratings to whole body ratings first, then using the combined values chart. Using Dr. DeBartolo's ratings of claimant's upper extremities, claimant's whole body impairment according to Dr. Bartolo's findings would be 18 percent instead of 17 percent. Dr. Boarini examined claimant and found a 3.5 percent impairment of the right upper extremity, and zero impairment of the left upper extremity. Dr. Carignan found 11.5 percent impairment of the right upper extremity, and 5.5 percent of the left upper extremity, for a whole body impairment of 8.5 percent. Dr. Breedlove found 10 percent impairment of the right upper extremity, and 9.5 percent of the left upper extremity, which he converted to whole body impairments of six percent for each upper extremity, for a total of 12 percent.

Dr. Crane rated claimant's right upper extremity at 10 percent, left upper extremity at five percent, and added three percent for each elbow and two percent for each shoulder. Dr. Crane rated claimant's whole body impairment at 25 percent. However, Dr. Crane later stated that only four percent of that rating was whole body, and 21 percent represented the impairment of the upper extremities.

Dr. Crane's rating of the shoulders is disregarded, in that Dr. Crane indicated this rating was for pain only, and it has been determined that claimant has failed to establish that her impairment extended to the shoulders or back. Dr. Breedlove's rating did not utilize the combined values chart of the AMA Guides to the Evaluation of Permanent Impairment. Rather, Dr. Breedlove merely added the whole body equivalents of the upper extremity impairments he found. If the combined values chart had been used, ratings of impairment of 9.5 percent and 10 percent would yield a combined value of 17 or 18 percent, which would convert to a whole body impairment of 10 or 11 percent.

Similarly, Dr. Carignan's ratings do not properly apply the AMA Guides. Apparently, Dr. Carignan averaged his left and right upper extremity ratings. When the AMA Guides are properly applied and the combined values chart is used, upper extremity ratings of 11.5 percent and 5.5 percent would yield a combined value of 15-17 percent, which converts to a whole body impairment of 9-10 percent.

ORDER

THEREFORE, it is ordered:

This matter is remanded to a deputy industrial commissioner for determination of the entitlement of Attorney Arvid Oliver to an attorney's extent of the fee on benefits that are the basis of the commutation of July 11, 1989.

Signed and filed this 25th day of September, 1990.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Gordon K. Darling
Attorney at Law
53 Jefferson Street
Winterset, Iowa 50273

Mr. Arvid D. Oliver
Attorney at Law
2635 Hubbell Avenue
Des Moines, Iowa 50317

Mr. Channing L. Dutton
Attorney at Law
West Towers Office
1200 35th Street, Ste. 500
West Des Moines, Iowa 50265

December 4, 1987, and paid claimant a lump sum payment of 57.5 weeks of benefits on January 13, 1988, based on Dr. Breedlove's rating. Defendants paid another lump sum of 6.25 weeks on June 23, 1988, representing an average of the ratings given by Dr. Crane and Dr. Breedlove.

There was an extensive exchange of letters between the parties concerning defendants' nonpayment of medical appointment bills, which defendants did pay on September 24, 1987. There was also a dispute between the parties on how to calculate claimant's entitlement to healing period. Defendants later accepted claimant's calculation.

Defendants were aware of Dr. DeBartolo's rating of claimant's arms almost a full year before paying any permanent partial disability benefits. Even after receiving Dr. Boarini's opinion, it was another six months before payment was made. Defendants, in their appeal brief, justify the delay in paying benefits by pointing out that the claimant's claim for benefits for the shoulders was in dispute, and that various settlement offers were being made to the claimant.

The defendants were justified in not paying permanent partial disability benefits for claimant's alleged shoulder injury, as that injury was in dispute and a bona fide argument as to non-compensability existed. However, withholding the payment of benefits for claimant's arm injuries, which were admitted to be compensable, simply because another part of claimant's claim was in dispute, is unreasonable. The fact that settlement negotiations were ongoing does not excuse the delay in payment of benefits that claimant was clearly entitled to. Defendants cannot withhold benefits that are warranted in order to pressure a settlement on other benefits claimed. A penalty under Iowa Code section 86.13 is appropriate. Defendants will be ordered to pay claimant an additional 25 percent of benefits awarded as a penalty.

Claimant also urges on appeal that defendants should be ordered to pay interest on unpaid benefits under Iowa Code section 85.30, and that interest should be assessed on the interest itself. Claimant also urges that an injury date other than the injury date for statute of limitations purposes should control for the calculation of interest. Finally, claimant requests this agency to calculate the interest due on each week of unpaid benefits.

There is no provision in the workers' compensation law for "interest on interest." McKeever, above, establishes the date of injury and the interest for any unpaid benefits will be calculated according to the principles enunciated in Teel v. McCord, 394 N.W.2d 405 (1986); Dickenson v. John Deere Prod.

Copies To:

Mr. Steve Hamilton
Attorney at Law
P.O. Box 188
Storm Lake, Iowa 50588

Mr. Paul W. Deck, Jr.
Attorney at Law
635 Frances Bldg.
Sioux City, Iowa 51101

Ms. Joanne Moeller
Assistant Attorney General
Tort Claims Division
Hoover State Office Bldg.
Des Moines, Iowa 50319

7. Claimant experienced possible intervening causes of traumatic back or shoulder injury in November 1986; on January 28 or 29, 1987; and on January 15, 1988. The incidents on these dates are not the subject of the instant proceedings.

8. Defendants unreasonably withheld benefits related to claimant's bilateral carpal tunnel injury.

CONCLUSIONS OF LAW

Claimant has an 18 percent impairment to her body as a whole as the result of a bilateral carpal tunnel injury arising out of and in the course of her employment on September 3, 1985.

Claimant's back and shoulder condition did not result from her bilateral carpal tunnel injury.

Claimant is entitled to a 25 percent penalty under Iowa Code section 86.13.

Claimant is not entitled to additional healing period benefits.

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

ORDER

THEREFORE, it is ordered:

That claimant is entitled to ninety (90) weeks of permanent partial disability benefits at the weekly rate of two hundred seventeen and 45/100 dollars ($217.45) beginning January 6, 1987.

Claimant is entitled to an additional twenty-two point five (22.5) weeks of benefits as a penalty under Iowa Code section 86.13.

That defendants shall pay accrued benefits in a lump sum and receive credit against the award for any amounts of permanent partial disability benefits previously paid.

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

That defendants shall pay the costs of this action including the cost of transcribing the hearing proceeding pursuant to rule 343 IAC 4.33.

injury to her arms or of the sequelae of the injury to her hands?

IV. If the deputy did not err by failing to assign any disability to the shoulders and/or the elbows then did he err by failing to reduce Snap-on's credit for permanent partial disability benefits already paid?

V. Did the deputy err by failing to consider whether there had been a cumulative injury to Sandy's shoulders which had occurred from approximately April 29, 1986, to the time she was laid off from work on December 29, 1988?

VI. Did the deputy err by failing to consider whether there had been an unitary or single cumulative injury and disability to Sandy's arms and shoulders extending to her upper mid back?

VII. Did the deputy err by failing to consider whether the odd lot doctrine should be employed in the determination of Sandy's disabilities?

VIII. Did the deputy err in failing to consider the extent of industrial disability Sandy had sustained?

IX. Did the deputy err by failing to award section 86.13 penalties?

X. Did the deputy err by failing to direct the manner in which statutory interest was to be calculated?

XI. Did the deputy err by failing to award additional healing period benefits?

REVIEW OF THE EVIDENCE

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be completely set forth herein. Briefly stated, claimant first experienced pain in her right hand on September 3, 1985. On December 18, 1985, Thomas F. DeBartolo, M.D., found claimant to have severe right carpal tunnel, and mild carpal tunnel syndrome on the left. On January 3, 1986, claimant underwent carpal tunnel surgery on her right hand.

On April 29, 1986, claimant was examined by Dr. DeBartolo, who noted that claimant suffered numbness in her hands when she was engaged in sanding at work. Claimant complained of discomfort in the forearm, wrist, and shoulder areas. Claimant

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. YOUNGREN, II,	:	
Claimant,	:	
vs.	:	File No. 798464
MacMILLAN OIL COMPANY, INC.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
CIGNA,	:	
Insurance Carrier, Defendants.	:	

FILED
MAR 23 1990
IOWA INDUSTRIAL COMMISSIO

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.

On June 22, 1987, claimant was granted a three month leave of absence for educational purposes. The testimony indicated that this length of leave had never previously been granted by the employer.

On June 25, 1987, David J. Boarini, M.D., examined claimant, and assigned permanent partial impairment ratings of three to five percent right arm, zero percent left arm. No rating for the shoulders or back was given. Claimant alleges Dr. Boarini did not examine her shoulders.

On July 8, 1987, Dr. Moss examined claimant's shoulders, and found them to be better but tender. Dr. Moss advised that claimant should rotate her work duties if she returned to work.

On September, 28, 1987, Dr. Moss noted that claimant was back at work for one week and experienced discomfort in her shoulders.

On October 20, 1987, C. B. Carignan, Jr., M.D., examined claimant and found normal range of motion and strength in both hands, with some residual paresthesia, permanent, both hands. Dr. Carignan assigned claimant a rating of 8.5 percent of the whole person (11.5 percent impairment right arm, 5.5 percent impairment left arm).

On November 10, 1987, Robert F. Breedlove, M.D., assigned claimant a 12 percent of the whole person rating, combining both the left and right upper extremities (10 percent and 9.5 percent extremity = 6 percent whole person for each). Dr. Breedlove found no permanent impairment of the shoulders.

On January 15, 1988, claimant was seen by Dr. Richards for right upper mid back pain, which began the day before after claimant tried to move a large dye weighing 300-400 pounds.

On March 9, 1988, claimant went to her personal physician, Dr. Fuller, who took her off work for five weeks, until April 16, 1988, for irregular heart beat due to work stress.

On April 15, 1988, claimant was examined by Michael W. Crane, M.D. Dr. Crane issued a rating, which he indicated was based on subjective findings, of 10 percent right upper extremity; 5 percent left upper extremity; 3 percent for each elbow; 2 percent each shoulder. Dr. Crane's total impairment rating (including pain) was 15 percent of the whole person. However, Dr. Crane noted that he found no abnormalities in the shoulder, and his rating of the shoulder was based strictly on pain. Claimant was diagnosed as suffering from chronic tendonitis of the shoulder girdle, and mild carpal tunnel syndrome.

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.

APPLICABLE LAW

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

ANALYSIS

Claimant correctly notes that the standard of review on appeal to the industrial commissioner is de novo. Defendants' statements in their brief as to whether "substantial evidence" exists are inappropriate. A de novo review will be made of the record.

Claimant's first issue on appeal concerns the injury date for her cumulative injury or injuries. Claimant originally failed to specify an injury date in her petitions. Claimant was ordered by this agency to amend the petitions to allege specific injury dates, and claimant then alleged September 3, 1985, as the injury date for her right hand injury; April 14, 1986, as the date of injury for her left hand injury; and April 29, 1986, as the date of injury for her alleged shoulders and back injury. Claimant urges on appeal that a cumulative injury is ongoing, and therefore no specific date of injury can be assigned. Alternatively, claimant urges that the date of injury in a cumulative injury case should be the date on which the symptoms of the cumulative injury first manifest themselves, rather than the date claimant is compelled to leave work.

Under McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985), the date of injury occurs when the worker is unable to continue working due to the effects of the work injury. McKeever recognizes the ongoing nature of the cumulative injury, but also recognizes the need to establish a definite date of injury for various purposes, such as the statute of limitations. A definite injury date is also necessary for the establishment of claimant's rate. Although the technical rules of pleading have been abolished for workers' compensation actions, there still must be some semblance of specificity in the pleadings to allow defendants to defend, and adjudicators to decide. See Terwilleger v. Snap-On Tools Corp., Appeal Decision, May 24, 1991.

The record shows that claimant's left and right carpal tunnel syndromes developed over the same period of time. Under McKeever, the date of injury would be the date on which the condition first compelled claimant to miss work. A single cumulative injury to both arms would result in a single injury date, even if symptoms or treatment began for each arm on different dates. In this case claimant suffered a single bilateral carpal tunnel cumulative injury on September 3, 1985.

result of compensation by claimant as a result of her carpal tunnel syndrome. Claimant bears the burden of proof. Claimant has failed to show that her carpal tunnel syndrome extends to the shoulders or back, either as a part of a cumulative injury or as a sequelae of her cumulative injury.

In addition, even if claimant had shown that her alleged shoulder and back pain was caused by her cumulative injury or as a sequelae of her injury, claimant at most has only shown that her shoulder and back conditions result in pain and discomfort. There is no showing of impairment. Although one physician did impose a rating of impairment and a restriction against working above shoulder level, all the other physicians found full range of motion. Even Dr. Crane, the physician assigning the rating and restriction to the shoulders, acknowledged that they were based on subjective complaints of pain alone. Pain that is not substantiated by clinical findings is not a substitute for impairment. Waller v. Chamberlain Manufacturing, II Iowa Industrial Commissioner Report 419, 425 (1981); Godwin v. Hicklin GM Power, II Iowa Industrial Commissioner Report 170 (1981). Pain is not compensable under chapter 85 unless there is an impact on earning capacity. Benton v. Hyman Freightways, Review-Reopening Decision, January 7, 1991. Claimant's shoulder condition appears to be tendonitis, or a "muscle pull." Claimant has not carried her burden to show that her shoulder condition represents permanent impairment.

Finally, the record shows that claimant suffered an injury to her upper body in November 1986, when a file cabinet fell on her. Claimant may have suffered another back injury on January 28 or 29, 1987, when she tried to open a stuck drawer. Claimant may have suffered a third injury on January 15, 1988, when she tried to move a 300-400 pound dye. Any of these traumatic incidents are possible causes of claimant's alleged shoulder and back pain. The November 1986, January 28 or 29, 1987, and January 15, 1988 work incidents are not a part of the cases addressed in this decision. Claimant has failed to carry her burden of proof that her work activity resulted in a cumulative injury to her shoulders or back.

Claimant next urges on appeal that Dr. Crane's rating of impairment to her elbows was not adequately considered. Drs. DeBartolo, Boarini, Carignan, Breedlove, and others rated claimant's upper extremities. The upper extremity includes the elbow. The fact that Dr. Crane chose to rate the elbows and wrists separately does not change the nature of claimant's condition. Absent contrary evidence, it can be assumed that the ratings of impairment to the upper extremities by the other physicians contemplated any impairment to the elbow as well.

Dr. DeBartolo was claimant's treating physician, and had more contact with claimant than other physicians. Dr. DeBartolo also performed claimant's surgery, and thus had an opportunity to make an internal examination as well. The medical evidence of Dr. DeBartolo will be given the greater weight. Claimant, as a result of her bilateral carpal tunnel syndrome, has a whole body impairment of 18 percent.

At the hearing, claimant stipulated that defendants had previously paid 63.75 weeks of permanent partial disability benefits. On appeal, claimant asserts she erred in so stipulating, and that defendants had paid only 49.75 weeks of permanent partial disability.

A stipulation is an agreement by the parties that certain facts are true and need not be litigated. Claimant acknowledges error and now seeks to reduce the amount of credit defendants are entitled to. Claimant should not benefit from lack of preparation before entering into the stipulation. On the other hand, defendants should not enjoy a windfall as a result of a computation error. The amount of benefits previously paid to claimant should be readily verifiable. The parties will be ordered to apply credit for any amounts actually paid against any award of benefits below.

Claimant also raises on appeal the question of whether claimant was an odd-lot employee. It has been determined above that claimant's injury did not extend to the body as a whole, and thus a discussion of industrial disability is not required. However, even if claimant had shown entitlement to industrial disability, claimant did not list odd-lot as an issue at the time of hearing. An examination of the hearing assignment order, and the hearing transcript, pages three through six, reveals that odd-lot was not an issue at the time of the hearing. 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, 198; In re Jack H. Kohlmeyer, Appeal Decision, Feb. 22, 1990. Claimant's odd-lot appeal issue will not be addressed.

Claimant on appeal also seeks a penalty for unreasonable delay in payment of healing period and permanent partial disability benefits. A review of the record reveals that there was no dispute between the parties as to the compensability of claimant's right and left arm conditions. The issue of contention between the parties was whether claimant's injury extended to the shoulders and back as well. Dr. DeBartolo gave claimant a rating of 18 percent of the body as a whole as a result of the bilateral carpal tunnel syndrome on January 6, 1987. Dr. Boarini assigned claimant a rating of 3-5 percent on July 6, 1987. Defendants received Dr. Breedlove's report on

Eng., 395 N.W.2d 644 (Iowa App. 1986); Farmer's Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979); and Benson v. Good Samaritan Center, Ruling on Rehearing, Oct. 18, 1989

Finally, claimant seeks an award of additional healing period benefits for periods of time she was off work for shoulder pain occurring after her alleged shoulder injury date of April 29, 1986; specifically, January 15, 1988 to January 18, 1988; May 9, 1987 to May 13, 1987; May 4, 1988 to May 18, 1988; and parts of June 1, 1988; June 7, 1988; June 9, 1988; and June 25, 1988. These dates were not part of the stipulation of the parties as to healing period. They were not listed as issues at the time of the hearing. Claimant bases this appeal issue on evidence introduced into the record by defendants showing that claimant was off work during these periods, and was not compensated. Claimant now seeks additional healing period benefits, as well as penalty and interest.

Claimant cannot raise an issue on appeal that was not presented as an issue at the hearing before the deputy. Claimant has waived any claim for additional healing period, penalty or interest by failing to assert these issues at the hearing. It is also noted that these periods of absence from work were related to claimant's shoulder and back pain, which has been found above not to be compensable in the instant proceedings. Claimant is not entitled to a further award of healing period benefits, or penalty or interest thereon.

FINDINGS OF FACT

1. Claimant incurred a bilateral carpal tunnel injury as a result of a cumulative single injury on September 3, 1985 to her right and left hands.

2. Claimant has an 18 percent impairment of the whole person as a result of the combined carpal tunnel injury to her left and right hands on September 3, 1985.

3. Claimant failed to prove she received any work-related shoulder or back injury for the injury dates alleged.

4. Claimant's shoulder and back condition is not the result of her bilateral carpal tunnel injury.

5. Claimant's back condition is not a sequelae of her bilateral carpal tunnel syndrome.

6. Claimant's back condition is not the result of claimant compensating for her carpal tunnel syndrome.

That defendants file claim activity reports as requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 28th day of June, 1991.

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

Copies To:

Mr. Mark S. Soldat
Attorney at Law
714 E. State St.
Algona, Iowa 50511

Mr. Paul C. Thune
218 6th Ave., Suite 300
P.O. Box 9130
Des Moines, Iowa 50306

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.

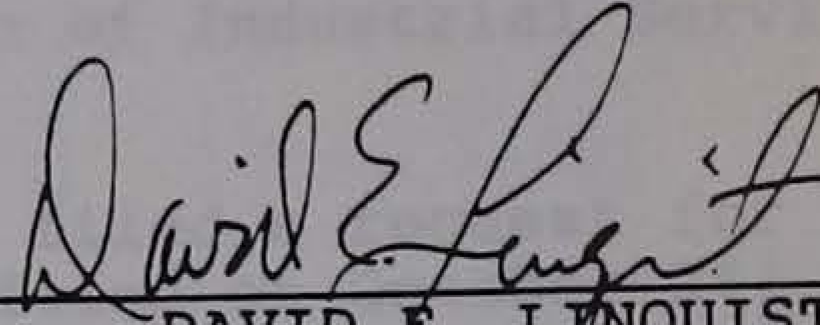
On January 4, 1989 defendants filed an application to reconsider. The deputy, on January 24, 1989, filed a ruling on defendants' application to reconsider which is now the basis of this appeal.

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

Signed and filed this 23rd day of March, 1990.



DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Thomas Henderson
Attorney at Law
1300 First Interstate Bank Bldg.
Des Moines, Iow 50309

Mr. E. J. Kelly
Attorney at Law
2700 Grand Ave., Suite 111
Des Moines, Iowa 50312

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