IAWC

DECISIONS OF THE IOWA INDUSTRIAL COMMISSIONER

July 1, 1991 through June 30, 1992

Clair R. Cramer
Acting Iowa Industrial Commissioner

Byron K. Orton
Iowa Industrial Commissioner
(August 6, 1991)

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

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Claimant,

vs.

K-PRODUCTS, INC.,

Employer,

and

GENERAL CASUALTY COMPANIES,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File Nos. 883281/910528

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed June 26, 1991 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 26th day of November, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DANIEL D. ANDERSON, Claimant, vs. CITY OF MASON CITY, Employer, and USF & G COMPANY, Insurance Carrier, and SECOND INJURY FUND OF IOWA Defendants.	File No. 829836 A P P E A L D E C I S I O N FILED DEC 23 1991 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.

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed July 1, 1991 are adopted as set forth below. Segments indicated by asterisks (****) indicate portions of the language from the proposed agency decision that have been intentionally deleted and do not form a part of this final agency decision.

It is determined that claimant did not sustain an injury on June 30, 1986, which arose out of and in the course of employment with employer.

Claimant, born October 2, 1931, was 54 years old at the time of the alleged injury ****. He attended school through the eighth grade. He was 16 years old at that time. He started to work at age 13 in a machine shop. He served in the army as a foot soldier, truck driver and mechanic for four years. He started to work for employer on April 18, 1955, and was employed there for 31 years until the date of the

alleged injury on June 30, 1986. All of his past employments and this employment included heavy lifting of 100 pounds or more. At the time of this alleged injury, claimant was a mechanic who repaired heavy equipment for employer such as: trucks, garbage trucks, garbage boxes, police cars, fire trucks, crawlers and graders.

Claimant began having trouble with his right knee in the 1950's. After several episodes of his knee catching and popping in and out four or five times a day, the medial meniscus was removed on July 26, 1961 (exhibit 1, pages 160-170). Claimant continued to have difficulty with the right knee (ex. 1, p. 52) and another arthrotomy was performed on August 9, 1966, to remove residual medial cartilage (ex. 1, pp. 48-53). On December 5, 1980, claimant received a total right knee arthroplasty for degenerative arthritis of the right knee (ex. 1, pp. 42-44). The surgical report disclosed a markedly degenerated joint with the absence of nearly all articular cartilage in the medical compartment and the anterior cruciate was severely deteriorated (ex. 1, p. 127). On December 15, 1980, just prior to that surgery, his physician reported that this is a 49-year-old laborer had developed arthritis in both knees. He once weighed 340 pounds, but this had been reduced to 208 pounds at the time of the surgery due to a gastric bypass operation performed in 1977 (ex. 1, p. 124).

At the time of the hearing claimant testified that he was five feet six inches tall and weighed approximately 252 pounds at the time of the alleged injury on June 30, 1986 and at the time of the hearing on February 19, 1990 (transcript p. 84). At the time of the total right knee arthroplasty, the treating physician reported through his physician's assistant that the left knee also had moderate medial pseudolaxity. He found medial compartment narrowing on the left knee at that time (ex. 1, p. 126). Darrell E. Fisher, M.D., who performed the right total knee replacement, recorded in his notes on November 24, 1980, that claimant had degenerative crepitation in his left knee, but that it was more severe in his right knee (tr. p. 137; ex. 1, p. 44). The events which led to the December 5, 1980, total right knee replacement were described by Dr. Fisher through his physician's assistant as follows:

> This 49 year old male [sic] has had a long standing [sic] history of right knee problems starting back in the 1950s [sic] when he

> twisted his knee and had a surgical removal of a cartilage. Then again in the 1960s [sic] he had a twisting injury to his knee and had the knee reoperated on and evidently considerable fragments of the articular cartilage were removed at that point. He did fairly well until a week ago when he was walking out the front door on level ground at his house and his knee gave out, after which he had severe pain.

(joint exhibit 1, page 125).

Claimant testified that on June 30, 1986, "I come from the storeroom, which is the supply room for the water department, or the whole city, I come across there, went to open the shop door, when I stepped in and when my leg twisted and popped, and that's when I tore up my knee." (tr. p. 53). Claimant testified that the floor is rough where this occurred, but he did not testify that the rough floor was a cause of his knee twisting or popping or how it caused it (tr. p. 57). He also testified that there is mud and water in this area, but he did not testify that mud or water were the cause of his twisting his left knee at the time of this alleged injury or how they caused it (tr. p. 57). Claimant denied that he had any previous problem with his left knee or that he had received any medical treatment for his left knee prior to June 30, 1986 (tr. p. 58). Claimant testified that he reported the injury to the supervisor who is his brother, Kenny Anderson. Claimant was able to work the rest of the day and reported to work the following day on July 1, 1986, at which time his brother-supervisor told him to see a doctor. Claimant saw Timothy C. Mead, M.D., on July 2, 1986 (tr. pp. 59 & 60).

The supervisor's investigation report, which was stipulated to be the report of Kenny Anderson, claimant's brother and supervisor, described what took place in answer to the question, "What happened?", with these words, "Dan was walking in the garage on cement floor and his left knee went out." The next section of the report instructs the supervisor to get all the facts by studying the job and situation involved and answer the question, "Why did it happen?" Mr. Anderson wrote, "No apparent reason." The next section of the report instructs the supervisor to determine what items of equipment, material or people require additional attention and asks this question, "What should be done?" The supervisor responded, "N/A." The next section of the report says take or recommend action,

depending upon your authority and asks the question, "What you done thus far?" and the supervisor replied, "N/A." The next section of the report states that the objective is to eliminate job hindrances and asks the question, "How will this improve operations?" and the supervisor wrote in, "N/A." (ex. 1, p. 212; tr. p. 135).

Claimant testified that when he went to the doctor he had to go to city hall to make out an accident report. He went over to the mayor's office and he personally gave the information to the mayor's secretary (tr. pp. 178 & 179). The first report of injury filed by employer on July 3, 1986, described the injury as follows, "walking on cement shop floor and tore left knee cartilege [sic]." The next question asks, "How did the accident or injury occur?" The answer on the first report states, "no apparent reason." Another question asks, "Name the object or substance which directly injured the employee." This question is answered, "N/A." (ex. 1, p. 213).

In his deposition, given on December 18, 1987, Dr. Mead testified that claimant had rather diffuse arthritis which involved the whole area of his left knee of moderately severe extent and that the arthritis had been there for some time prior to this incident (ex. 5, p. 5). Dr. Mead agreed that Dr. Fisher noted degenerative crepitation in the left knee on November 24, 1980, and that Dr. Fisher's physician's assistant recorded pseudolaxity which was the wearing out of the inner side of the left knee (ex. 5, pp. 8 & 9).

On July 9, 1986, Dr. Mead performed an arthroscopy on the left knee and found a torn meniscus and degenerative arthritis (ex. 1, p. 9; ex. 5, p. 11). Claimant failed to improve after the arthroscopy and Dr. Mead said he felt that something more needed to be done. Dr. mead reported, "He has one total knee and is really anxious to have the other one done." (ex. 1, p. 11). Dr. Mead further testified, "Mr. Anderson was having enough discomfort and problems with his knee that he was anxious to have something done. He had total knee arthroplasty on the right with fairly good result and wished to have that done on the other side." (ex. 5, pp. 13 & 14). A total left knee arthroplasty was performed on December 31, 1986 (ex. 5, p. 14). Dr. Mead further testified that the cause of the left total knee replacement was a preexisting arthritis in the left knee (ex. 5, p. 16). Dr. Mead agreed that he found no evidence in the medical records of problems with his left knee after the total right knee

arthroplasty in 1980 and furthermore, claimant told him that he had not had any problems prior to when the knee gave way on June 30, 1986 (ex. 5, pp. 20 & 21). However, the arthritis was there and the twisting incident flared it up (ex. 5, pp. 25 & 26).

Dr. Mead gave a second deposition on November 21, 1988, at which time he stated that claimant had morbid obesity. He explained that morbid obesity means that you have a condition of obesity that adversely affects your health and has been causing problems. The doctor stated that the morbid obesity had been affecting his left knee joint at the time of the alleged injury on June 30, 1986. He said that his left knee joint had a large amount of arthritis in it at that time (ex. 6, p. 17).

Dr. Mead further clarified that at claimant's approximate age something relatively minor could cause his knee to give out because of the previous wear and tear (ex. 6, pp. 19 & 20). He further indicated that the instable situation in claimant's left knee itself could both possibly and probably cause it to buckle and to give away (ex. 6, p. 20). Dr. Mead was asked:

> Q. If he had not had the meniscus tear, do you have an opinion as to whether, through his normal work of hard labor, we would have eventually had to have a knee replacement, Doctor?
>
> A. I feel he had severe enough arthritis that somewhere down the road he would have had to consider a replacement.

(exhibit 6, page 24)

Dr. Mead testified that both obesity and genetics were factors that could bring about claimant's condition, accelerate it and make it more symptomatic (ex. 6, pp. 26-28). There was evidence that claimant had a sister and a brother with arthritic knee problems, but he had other siblings where there was no evidence of arthritic knee problems. The brother and the sister who had the arthritic knees did need total knee arthroplasties.

On cross-examination of claimant, it was shown that in a pretrial deposition, claimant testified that he fell to the ground when his left knee gave out (tr. pp. 176 & 177) which is in conflict with the supervisor's investigation report, the first report of injury, what

he told Dr. Mead and what he testified to at the hearing (tr. pp. 174-181). When claimant was pressed as to whether he actually fell down or not, his answer was ambiguous. He stated, "I don't remember. But I don't think I went all the way. I can't remember for sure." (tr. p. 162). Claimant couldn't remember if he actually slipped first or if his knee gave out and then he fell (tr. pp. 170 & 173). He told A.J. Wolbrink, M.D., a consulting orthopedic surgeon, that his leg stopped, but he didn't (ex. 1, p. 10).

****

**** [P]rior to the total right knee replacement in 1980, claimant had several incidents where his knee simply twisted or gave out. As it happened, the last such incident in 1980 occurred at his home. Claimant denies any medical treatment or any left knee complaints prior to the incident of June 30, 1986. Nevertheless, in 1980, Dr. Fisher recorded degenerative crepitation in the left knee. His physician's assistant recorded pseudolaxity in the left knee. Dr. Mead found what he described as, "moderately severe" and on another occasion, "a large amount of arthritis in the left knee." Claimant had morbid obesity. Claimant had some genetic factors that tended to predispose his arthritis in both knees. Dr. Mead testified that claimant's arthritic condition possibly and probably created an unstable condition which could cause the knee to buckle and give way (ex. 6, p. 20).

****

Claimant did not establish that anything connected with his employment caused the knee to give way or twist. Claimant described the surface as rough where he fell. He told Dr. Mead the surface was irregular at that point. He said this area was always muddy. Nevertheless, claimant did not testify that the roughness, irregularity or mud were in any way connected with the particular giving way or twisting that occurred at the time of the incident on June 30, 1986. Nor did he explain how the roughness, irregularity or mud contributed to his twist or giving away. Moreover, claimant could not accurately describe exactly what happened. In his deposition he said he fell down. In the supervisor's report, the first report of injury, the report to Dr. Mead and his testimony at hearing there is no evidence that he fell down.

If in fact the floor had been dangerously rough, dangerously irregular or dangerously muddy, claimant's brother, who was his supervisor, would have included this in his supervisor's investigation report in response to the questions, "What should be done?; What have you done thus far?; How will this improve operations?" The supervisor's report said there was no apparent reason for the fall.

****

The weight of the evidence in this case establishes that claimant's giving way or twisting of the knee was caused by his severe preexisting arthritis in both knees (which he also has in other parts of his body) coupled with morbid obesity and some genetic factors. There was no evidence that employment placed him in a position which aggravated the effects of his fall or precipitated the effects of his condition by strain or trauma. Claimant testified he was simply walking and his knee gave out or twisted. Although he suggested the area was muddy, rough and irregular, he did not say or explain how any one of these conditions contributed to or caused his left knee injury. Wherefore, it is determined ****, that claimant did not sustain an injury which arose out of and in the course of employment with employer on June 30, 1986, when his knee gave out or twisted on that date.

CONCLUSIONS OF LAW

The dispositive issue in this matter is whether claimant suffered an injury on June 30, 1986 that arose out of and in the course of his employment.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on June 30, 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).

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.

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 testimony varies as to whether claimant actually struck anything with his knee in the incident on June 30, 1986. If claimant did strike anything, any damage done to the knee would not have been a result of the contact. This is not a case where claimant's alleged injury was caused by a blow to or contact with a body part. The damage to claimant's knee was, in part, due to the twisting incident. Note that Dr. Mead attributes damage to the cartilage to arthritis present in the knee prior to the twisting episode (exhibit 1, p. 28).

Claimant does not argue that this is a case of a cumulative trauma to his knee. Claimant's theory of recovery is that traumatic occurrence on a specific date was a work-related injury.

The twisting of claimant's knee is in the category of idiopathic falls. "To shift the loss in the idiopathic-fall cases to the employment, then, it is reasonable to require a showing of at least some substantial employment contribution to the harm." I Larson, Workmen's Compensation Law, §12.14 page 3-369. Claimant clearly had previous damage to his left knee from the arthritis. He had a nonwork incident to the right knee which was remarkably similar to the occurrence and the consequences of the June 30, 1986 event. There was no competent evidence that the event of June 30, 1986 was a lighting up of claimant's condition. Claimant has not proved that he suffered an injury that arose out of his employment. To the contrary, the conclusion in this case is that the twisting of claimant's knee and the damage to his knee was the result of his arthritic condition. Claimant's employment was not a substantial contribution to the harm caused by the arthritis.

Claimant has not proved that he sustained a compensable injury on June 30, 1986. Because he has not proved a compensable injury, claimant is not entitled to second injury fund benefits pursuant to Iowa Code section 85.64.

One last matter should be noted. Claimant apparently alleges in his appeal brief it is error to rely upon the first report of injury. The first report of injury is exhibit 3, p. 213. That exhibit is a joint exhibit. It is inappropriate for a

party to allege that it is error to consider that party's exhibit (in this case a joint exhibit).

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That neither defendant employer nor defendant Second Injury Fund of Iowa owes any compensation for weekly benefits or medical payments arising out of the alleged injury on June 30, 1986.

That the costs of this action are charged to claimant pursuant to rule 343 IAC 4.33, including the cost of the transcript of the hearing.

That defendants file any claim activity reports which might be requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 23rd day of December, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEITH ANDERSON,	:	
Claimant,	:	File No. 789530
vs.	:	A P P E A L
J. I. CASE COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
SEP 27 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 22, 1990, 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 17th day of September, 1991.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES ANDREW, Claimant, vs. ANDREW PALLETT COMPANY, Employer, and EMPLOYERS MUTUAL COMPANIES, Insurance Carrier, Defendants.	:	FILED DEC 17 1991 File No. 875653 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed May 22, 1991 is affirmed and is adopted as the final agency action in this case with the following additional analysis:

Although evidence may have been admitted concerning claimant's potential future earnings as a social worker if he completes his course of studies at the University of Iowa, such evidence is speculative. The determination of claimant's industrial disability is confined to claimant's loss of earning capacity at the time of the hearing.

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

Signed and filed this 17th day of December, 1991.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DANIEL ANTHOFER,

Claimant,

vs.

RON JENSEN,

Employer,

and

GRINNELL MUTUAL REINSURANCE,

Insurance Carrier,
Defendants.

FILED

DEC 24 1991

IOWA INDUSTRIAL COMMISSIONER

File No. 901287

A P P E A L

D E C I S I O N

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

FINDINGS OF FACT

The findings of fact in the deputy's proposed decision filed October 1, 1990 are affirmed and adopted with the following modifications.

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 Co., 253 Iowa 285, 100 N.W.2d 660 (1961).

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.

Claimant is relatively young, thirty-two years old at the time of the injury. The majority of claimant's work experience is heavy labor. Claimant is a high school graduate. Claimant's treating physician, Mark P. Brodersen, M.D., advised claimant to not participate in physical activities involving lifting greater than 50 pounds. Dr. Brodersen also advised claimant to avoid repetitive lifting, bending or twisting. (Joint Exhibit 1, p. 4.) Dr. Brodersen opined that claimant sustained a seven percent impairment to the body as a whole. Claimant was referred to William R. Boulden, M.D. who opined that claimant sustained a five percent impairment based on the fact of non-operative treatment of a herniated disc. (Jt. ex. 2, p. 2.) Dr. Boulden opined that claimant could not return to heavy manual work. Claimant is motivated to improve his physical condition and find employment within his restrictions. Claimant enrolled in school learning to become barber.

Based upon these facts and those set out in the deputy's proposed decision, it is determined that claimant proved entitlement to 20 percent permanent partial disability benefits as a result of his October 17, 1988 work injury.

CONCLUSIONS OF LAW

The conclusions of law in the deputy's proposed decision are affirmed and adopted with the following modification.

Claimant proved by a preponderance of the evidence entitlement to twenty percent permanent partial disability benefits as a result of his October 17, 1988 work injury. Iowa Code section 85.34(2)(u).

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

ORDER

THEREFORE, it is ordered:

That defendants pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of two hundred twenty and 69/100 dollars ($220.69) per week commencing on February 24, 1989 as stipulated to by the parties.

That defendants are entitled to credit for fifty point seven one four (50.714) weeks of permanent partial disability benefits paid to claimant up to the time of hearing and any subsequent permanent partial disability benefits that have been paid to claimant subsequent to the hearing. Defendants agreed that they paid at the rate of one hundred sixty-nine and 29/100 dollars ($169.29), but claimant was entitled to a rate of two hundred twenty and 69/100 dollars ($220.69).

That all accrued benefits are to be paid in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

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

That defendants shall file a claim activity report pursuant to rule 343 IAC 3.1.

Signed and filed this 24th day of December, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GUSTAVO ARAUJO,	:	
Claimant,	:	File No. 921097
vs.	:	A P P E A L
IBP, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed September 19, 1990 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 30th day of June, 1992.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DUANE ARNHOLD,	:	
	:	File Nos. 825923
Claimant,	:	861959
	:	
vs.	:	A P P E A L
	:	
CITY OF DES MOINES,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. Pursuant to an Order of former industrial commissioner David E. Linquist of June 13, 1990, claimant's untimely-submitted appeal brief was stricken and not considered on appeal. Defendant's timely-submitted appeal brief was considered on appeal. The decision of the deputy filed November 30, 1989, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

The record reflects that, subsequent to his February 25, 1986, motor vehicle accident, Lutheran Hospital personnel instructed claimant to see Kevin Cunningham, M.D., should he have continuing problems. The deputy recites that claimant was directed to see a Dr. K. Anderson. Such appears to be clerical error as there is no further reference to a Dr. Anderson in the record.

The law regarding industrial disability does not state that the filing of the litigated workers' compensation claim is a factor to be considered in assessing the loss of earning capacity. As defendant rightly points out in its appeal brief, employment action against an employee because the employee has filed a workers' compensation claim is against public policy under Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988). Loss of job mobility is, however, a legitimate factor to consider in assessing actual loss of earning capacity. This record clearly demonstrates that, on account of his work injury, claimant would have great difficulty competitively seeking employment in the areas in which he has expertise and training. Such clearly limits claimant's ability to personally choose to leave his current employment, should he believe his working conditions are

less than satisfactory. Claimant's inability to competitively reenter the job market in the areas in which he has expertise, education, and experience--an inability his work injury produced--reflects an actual loss of earning capacity for which the deputy appropriately compensated claimant with an award of industrial disability benefits representing a permanent partial disability of 10 percent of the body as a whole.

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

Signed and filed this 25th day of November, 1991.

Byron K. Orton
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILMA JEAN BACON (LEEPER), Claimant, vs. AMERICAN NATIONAL CAN COMPANY, Employer, and GALLAGHER & BASSETT, Insurance Carrier, Defendants.	FILED NOV 26 1991 File No. 858027 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed February 7, 1991 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Defendants argue that claimant sustained no loss of earning capacity as a result of her July 10, 1987 work injury and that an award of industrial disability is inappropriate. Claimant returned to work with no pay loss and no loss of seniority. Robert C. Jones, M.D., claimant's treating physician, imposed restrictions upon claimant's activities. Claimant's restrictions as a result of her work injury reduce claimant's earning capacity and therefore warrant a finding of 20 percent industrial disability.

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

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

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Des Moines, Iowa 50306-9130

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RON BAILEY, Claimant, vs. L & L BUILDERS, Employer, and GENERAL CASUALTY, Insurance Carrier, Defendants.	File No. 898754 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed February 27, 1991, 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 17th day of October, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS BAKER,

Claimant,

vs.

CLEMENT AUTO & TRUCK, INC.,

Employer,

and

FARM BUREAU INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 889382

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed May 21, 1991 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 18th day of November, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARJORIE BALDWIN,	:	
Claimant,	:	File No. 802083
vs.	:	A P P E A L
WILSON FOODS CORPORATION,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
DEC 17 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 31, 1991 is affirmed and is adopted as the final agency action in this case with the following additional analysis:

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).

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

Signed and filed this 17th day of December, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

JUL 23 1991

IOWA INDUSTRIAL COMMISSIONER

DAN BANNER,	:	
Claimant,	:	
vs.	:	File No. 758583
IOWA FALLS ROOFING,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
BITUMINOUS INSURANCE COMPANY,	:	
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 June 26, 1989 is affirmed and is adopted as the final agency action in this case.

Defendants shall pay all costs of this proceeding, including the preparation of the hearing transcript.

Signed and filed this 23rd day of July, 1991.

Clair R. Cramer

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TONY L. BARNES, Claimant, vs. HON INDUSTRIES, Employer, and THE TRAVELERS INSURANCE COMPANIES, Insurance Carrier, Defendants.	File Nos. 846639/939159 939160 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on March 20, 1989. The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 10. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issue on appeal:

I. Did the deputy err in awarding the claimant healing period benefits from March 20, 1989, through March 13, 1990, as a result of the 1989 injury?

II. Did the deputy err in awarding permanent partial disability benefits equal to ten per cent [sic] (10%) of the right arm on account of the injury of March 21, 1988, and permanent partial disability benefits equal to five per cent [sic] (5%) of the right arm on account of the injury of March 20, 1989?

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed June 12, 1991 are adopted as final agency action.

CONCLUSIONS OF LAW

The conclusions of law contained in the proposed agency decision filed June 12, 1991 are adopted as final agency action, with the following additional analysis:

In regards to healing period, William F. Blair, M.D., indicated in December 1989 that there was no medical reason claimant could not return to work. Under Iowa Code section 85.34(1), healing period ends when claimant is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of the injury. In addition, William R. Irey, M.D., indicated in October 1989, that he would like to see claimant again in two months, which would have been December 1989, but was not actually scheduled until March 1990. The greater weight of the medical evidence indicates that claimant's healing period ended December 12, 1989.

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

ORDER

THEREFORE, it is ordered:

That as a result of the injury of March 21, 1988, defendants shall pay to claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of two hundred thirty-eight and 62/100 dollars ($238.62) per week from November 12, 1988.

That as a result of the injury of March 20, 1989, defendants shall pay to claimant an additional twelve point five (12.5) weeks of permanent partial disability benefits at the rate of two hundred thirty-nine and 97/100 dollars ($239.97) per week from March 14, 1990.

That as a result of the injury of March 20, 1989, defendants shall pay to claimant healing period benefits through December 12, 1989 at the rate of two hundred thirty-nine and 97/100 dollars ($239.97) per week.

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

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

That defendants shall pay the costs of this action pursuant to rule 343 IAC 4.33, including reimbursement to claimant for any

filing fee paid in this matter and 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 28th day of February, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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Davenport, Iowa 52801

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT R. BEAMER,	:	
	:	
Claimant,	:	FILED
	:	
vs.	:	
	:	File No. 809720 JUN 30 1992
A-1 READY MIX, INC.,	:	
	:	A P P E A L IOWA INDUSTRIAL COMMISSIONER
Employer,	:	
	:	D E C I S I O N
and	:	
	:	
AETNA CASUALTY & SURETY COMPANY,	:	
	:	
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 July 30, 1990 is affirmed and is adopted as the final agency action in this case with the following additional analysis:

That portion of the deputy's decision pertaining to claimant's ability to earn sufficient wages to support himself or to earn a living as a factor of industrial disability is not adopted as part of this appeal decision.

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

Signed and filed this 30th day of June, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH BELLAMY, Claimant, vs. ARROW-ACME CORPORATION, Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File Nos. 784013/797315 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed January 24, 1991 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 October, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAURETTA BELLER,	:	
Claimant,	:	
vs.	:	File No. 799401
IOWA STATE PENITENTIARY,	:	
Employer,	:	A P P E A L
and	:	D E C I S I O N
STATE OF IOWA,	:	
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 January 23, 1990, is affirmed and is adopted as the final agency action in this case with the following additional comments:

The purpose of the workers' compensation statutes is clear in providing weekly compensation to injured employees. The amount of weekly benefits, which are not taxable, to be received by an employee is eighty percent of spendable earnings. Spendable earnings is defined in Iowa Code section 85.61(9)(1991) to be the "amount remaining after payroll taxes are deducted from gross weekly earnings." The employer's liability to an employee for workers' compensation benefits under chapter 85 is to leave the employee with funds that are in effect "after tax" compensation. If the defendant-employer's scheme were accepted, the liability of the employer for workers' compensation benefits would be something other than that contemplated by the statute. It is also interesting to note that the state of Iowa is the sole provider of the long-term group benefits for disability. Therefore, the credit for an employer under Iowa Code section 85.38(2) is the net amount which the employee receives after payment of all applicable taxes.

Whether the disability benefits are taxable may be a complicated matter. E.g., see Iowa Code section 422.7(4) and 701 IAC 40.22. It is not within the purview of this agency to make a definitive ruling on whether particular disability payments are taxable or subject to tax. The conclusion reached in the

preceding paragraph is sufficient to determine the issue before this agency.

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

Signed and filed this 10th day of July, 1991.

Clair R Cramer

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

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Assistant Attorney General
Tort Claims Division
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Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DELORES BENOIT,

Claimant,

vs.

COLLIS, INC.,

Employer,

and

AMERICAN MOTORISTS INSURANCE,

Insurance Carrier,
Defendants.

File No. 889639

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed April 12, 1991, 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 4th day of October, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARILYN BERGERT,

Claimant,

vs.

WILSON FOODS,

Employer,

Self-Insured,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 855200

A P P E A L

D E C I S I O N

FILED

SEP 16 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 8, 1991 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 16th day of September, 1991.

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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Hoover State Office Bldg.
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT BERGESON,	
Claimant,	FILED
vs.	
CITY PLUMBING & HEATING INC.,	File No. 781863
Employer,	A P P E A L
and	D E C I S I O N
DODSON INSURANCE GROUP,	
Insurance Carrier,	
and	
SECOND INJURY FUND OF IOWA,	
Defendants.	

JUN 30 1992

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 8, 1990 is affirmed and is adopted as the final agency action in this case.

The Second Injury Fund shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 30th day of June, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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Mr. Robert D. Wilson
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Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DUANE BEVINS,

Claimant,

vs.

FARMSTEAD FOODS,

Employer,

and

EMPLOYERS MUTUAL COMPANY,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File Nos. 834865/881784
877458/888705

A P P E A L

D E C I S I O N

Subsequent to the filing of the appeal and cross-appeal, claimant and defendants entered into a full commutation settlement that was approved by this agency. The sole remaining issues on appeal concern the liability of the Second Injury Fund of Iowa.

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 liability of the Second Injury Fund is not limited to cases where the prior loss is confined to a "scheduled" member. The list of body members mentioned in Iowa Code section 85.64 differs from the schedule of members set forth in Iowa Code section 85.34(2). A prior loss for purposes of section 85.64 must result in the loss or loss of use of a hand, arm, foot, leg or eye.

It is also established in the law that a prior loss that affects a member enumerated in section 85.64 will trigger fund liability even if the loss extends to the body as a whole. In such a case, a determination must be made as to the disability

caused by the prior loss. Second Injury Fund v. Neelans, 436 N.W.2d 355 (Iowa 1989); Second Injury Fund v. Braden, 459 N.W.2d 467 (Iowa 1990); Second Injury Fund v. Mich Coal Co., 274 N.W.2d 300 (Iowa 1979).

The deputy determined that, as a result of his two injuries on February 15, 1988, claimant had a 55 percent industrial disability. In the commutation proceedings, claimant and defendants stipulated that as a result of the work injury of February 15, 1988, claimant had an industrial disability of 56 percent. The Second Injury Fund of Iowa was not a party to the stipulation, and is therefore not bound by it. Similarly, since the Second Injury Fund of Iowa was not a party to the commutation proceedings, it is not bound by the approval of the commutation. Although the determination of 56 percent industrial disability as a result of the February 15, 1988, injuries is binding on the defendants and claimant, claimant's disability from those injuries for purposes of determining the amount of offset or credit the fund is entitled to in this appeal will be determined anew.

The deputy's findings of fact and conclusions of law concerning claimant's industrial disability subsequent to his February 15, 1988 injuries is also adopted herein. That is, claimant's total overall industrial disability as a result of the combined effect of his injuries does not exceed the disabilities from his various injuries when viewed in isolation. Claimant's total present industrial disability is fully compensated by the awards against defendants for the prior losses and the February 15, 1988 injuries. The Second Injury Fund is not obligated to pay claimant any further benefits.

Interest accrues from the onset of permanency in arbitration cases. For case number 834865, claimant's right elbow injury on September 17, 1986, claimant's healing period ended on November 10, 1986. Claimant's permanency began at that time, not when it was rated over a year later by the physician. Interest on unpaid benefits for this injury shall accrue from November 10, 1986.

Defendants and claimant shall jointly pay the costs of the appeal, including the preparation of the appeal transcript, in equal shares.

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

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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Hoover State Office Bldg.
Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MERLE P. BICE,	:	
Claimant,	:	File No. 881267
vs.	:	A P P E A L
ALUMINUM COMPANY OF AMERICA,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed March 11, 1991, 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 22nd day of November, 1991.

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

DEC 17 1991

IOWA INDUSTRIAL COMMISSIONER

JAMES A. BLAIR,	:	
Claimant,	:	File Nos. 936504/901455
vs.	:	
FARMLAND FOODS, INC.,	:	A P P E A L
Employer,	:	
and	:	D E C I S I O N
AETNA CASUALTY & SURETY CO.,	:	
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 August 9, 1991 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 17th day of December, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HERBERT L. BLAND,

Claimant,

vs.

ATLANTIC CARRIERS,

Employer,

and

GREAT WEST CASUALTY,

Insurance Carrier,
Defendants.

File No. 838602

A P P E A L

D E C I S I O N

FILED

NOV 20 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 29, 1991 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 20th day of November, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY BLOCKER, Claimant, vs. SPOONER SPORTS, Employer, and FIREMAN'S FUND INSURANCE CO., Insurance Carrier, Defendants.	:	FILED AUG 30 1991 File No. 851726 IOWA INDUSTRIAL COMMISSION A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed March 15, 1991 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 30th day of August, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DARRELL D. BROWN, Claimant, vs. MIDWEST READY MIX, Employer, and HAWKEYE SECURITY INSURANCE, Insurance Carrier, Defendants.	File No. 833027 A P P E A L D E C I S I O N

FILED

SEP 26 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 December 26, 1990, 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 26th day of September, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DOUGLAS BROWN,	:	
Claimant,	:	
vs.	:	File No. 888774
JOHN MORRELL & CO.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
NATIONAL UNION FIRE INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

FILED
SEP 12 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 9, 1991 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 12th day of September, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA BROWN, Claimant, vs. WESTERN INTERNATIONAL, INC., Employer, and LIBERTY MUTUAL, Insurance Carrier, Defendants.	:	File No. 878934 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants Western International (hereinafter Western) and Liberty Mutual Insurance Company appeal and claimant cross-appeals from an arbitration decision awarding 300 hundred weeks of permanent partial disability benefits as a result of claimant's February 2, 1988 work injury.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 6. Defendants filed brief on appeal. Claimant did not file a brief on appeal.

ISSUE

Defendants state the issue on appeal is:

Whether the award of 300 weeks of permanent partial disability benefits was excessive under the facts and circumstances of this case?

REVIEW OF THE EVIDENCE

The arbitration decision filed February 19, 1990, adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

APPLICABLE LAW

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587,

593, 258 N.W.2d 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term `disability' to mean `industrial disability' or loss of earning capacity and not a mere `functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963).

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 (1963). Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. This is so as impairment and disability are not synonymous. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the latter to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc.

Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

A worker is totally disabled if the only services the worker can perform are so limited in quality, dependability, or quantity, that a reasonable, stable market for them does not exist. When a combination of industrial disability factors preclude a worker from obtaining regular employment to earn a living, a worker with only a partial functional disability has a total industrial disability. Guyton v. Irving Jensen Company, 373 N.W.2d 101 (Iowa 1985).

The decision of the deputy industrial commissioner was a proposed decision within the contemplation of Iowa Code section 17A.15(2). Because it was appealed to the agency (the commissioner) within the time provided by the rule, the commissioner pursuant to section 17A.15(3), assumed full responsibility for deciding anew all issues of fact and law. Tussing v. George A. Hormel & Co., 461 N.W.2d 450, 451-452 (Iowa 1990).

ANALYSIS

The parties stipulated to the fact that claimant sustained an injury to her right shoulder which arose out of and in the course of her employment with Western. The only issue is the extent of claimant's entitlement to permanent disability benefits as a result of the February 5, 1988 work injury.

Claimant was born September 25, 1930 and was 57 years old at the time of her injury. Claimant failed to complete high school but subsequently obtained a GED. Claimant worked in the army for two years as a surgical technician. Claimant began working for AMF, the predecessor of Western, in 1966. Claimant operated a punch press while working for Western. This position involved lifting in excess of fifty pounds frequently. Claimant was off work, recovering from her surgery, when the Western plant closed.

Following the plant closing, claimant took advantage of educational opportunities offered by Western at Des Moines Area Community College. Claimant has taken courses in reading, writing, improved thinking skills and study skills. Claimant has also taken courses in introduction to data processing and keyboard work. Prior to taking the courses, claimant took tests which indicated that she performed below average in the areas of language, reading, and numerical skills. Tests have not been performed following claimant's completion of the above mentioned

classes. At the time of the hearing, claimant expressed an interest in commercial art and has taken courses in this area. Claimant has shown motivation to continue educational pursuits. It is speculation, however, to predict the success of future employment searches as a result of training. Steward v. Crouse Cartage Co., Appeal Decision filed February 20, 1987.

Claimant had no ascertainable disability prior to her work injury on February 5, 1988. Robert F, Breedlove, M.D., treated claimant for her work injury. Dr. Breedlove opined that claimant sustained a 17 percent permanent partial impairment of the right upper extremity as a result of the work injury. Dr. Breedlove opined that the 17 percent impairment converts to 10 percent permanent partial impairment of the body as a whole and claimant has an additional five percent permanent partial impairment to the body as a whole as a result of pain. Claimant is restricted from performing overhead work utilizing her right upper extremity. Claimant has a 10 pound weight restriction and she is not to obtain any occupation which involves repetitive use of her right upper extremity. Claimant is prohibited from performing her former job which required repetitive movements and lifting in excess of 50 pounds. Claimant is limited to sedentary employment.

Claimant failed to demonstrate an adequate job search. Defendants retained a vocational consultant; however, claimant refused to interview with potential employers paying in the range of $5.00 to $6.00 an hour. Claimant's failure to pursue employment opportunities reflects adversely upon claimant's motivation. The vocational consultant identified five potential categories of jobs which claimant was qualified for; however, the positions identified according to the Dictionary of Occupational Titles are classified as light duty which is beyond claimant's restrictions.

Claimant is nearing the end of her employment career. Claimant's loss of earnings as a result of her disability is not as severe as it would be in the case of a younger individual who has many years left in the employment market.

Based upon the above mentioned facts, it is determined that claimant sustained 45 percent industrial disability as a result of her work related injury on February 5, 1988.

FINDINGS OF FACT

1. Claimant sustained an injury on February 5, 1988, to her right shoulder which arose out of and in the course of her employment with Western.

2. Claimant was born September 25, 1930 and was 57 years old at the time of her injury and is nearing the end of her employment career.

3. Claimant has her GED and has taken courses at the Des Moines Area Community College following her work-related injury.

4. Claimant operated a punch press while working for Western. This position involved lifting in excess of 50 pounds and repetitive movements.

5. Claimant was off work, recovering from her surgery, when the Western plant closed.

6. Dr. Breedlove opined that claimant sustained a 17 percent permanent partial impairment of the right upper extremity as a result of the work injury. Dr. Breedlove opined that the 17 percent impairment converts to 10 percent permanent partial impairment of the body as a whole and claimant has an additional five percent permanent partial impairment to the body as a whole as a result of pain.

7. Claimant is restricted from performing overhead work utilizing her right upper extremity. Claimant has a 10 pound weight restriction and she is not to obtain any occupation which involves repetitive use of her right upper extremity.

8. Claimant's failure to pursue employment opportunities reflects adversely upon claimant's motivation. Claimant has shown motivation to continue educational pursuits which reflects favorably upon claimant.

CONCLUSIONS OF LAW

Claimant has proven by a preponderance of the evidence that she sustained 45 percent industrial disability as a result of her work-related injury on February 5, 1988.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay claimant two hundred twenty-five (225) weeks of permanent partial disability benefits at the rate of three hundred fifty-two and 30/100 dollars ($352.30) from October 25, 1988.

That defendants shall pay healing period benefits stipulated to in the prehearing report.

That defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against all benefits previously paid as stipulated in the prehearing report.

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

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

That defendants shall file claim activity reports pursuant to rule 343 IAC 3.1(2).

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

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA E. BRYSON, Claimant, vs. JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, Employer, Self-Insured, Defendant.	:	File No. 837619 A P P E A L D E C I S I O N

FILED

SEP 12 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 April 13, 1990 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 12th day of September, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GLORIA BUMPUS,	:	
Claimant,	:	
vs.	:	File No. 850493
DES MOINES PUBLIC SCHOOLS,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
EMPLOYERS MUTUAL COMPANIES,	:	
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 April 18, 1990, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

On page 9 of the Arbitration Decision, the deputy identifies Michael J. Taylor, M.D., as the individual who performed a psychological assessment of claimant. This is apparently a mere scrivener's error in that the deputy, at page 5 of the Arbitration Decision, properly identifies Samuel L. Graham, Ph.D., as having performed such psychological assessment. The record by way of the letterhead on Dr. Graham's report reflects that Dr. Graham is an associate of Dr. Taylor.

On appeal, claimant contends that the deputy's finding that claimant lacked motivation is not supported by the record. We disagree. The record is replete with instances where attempts were made to assist claimant, both towards further physical rehabilitation and towards finding appropriate employment. The record is also replete with instances where claimant self-selected not to pursue options presented for reasons either not related to her work injury or only subjectively related to her work injury. Claimant chose not to pursue a pain management program through the Iowa Methodist Pain Center. Claimant chose not to accept employment as a lunch room associate, indicating that the hours, approximately 10 per week, were too few for her.

Claimant chose not to accept employment as a volunteer transfer associate, indicating that she did not wish to be employed outside in the winter. Claimant subjectively decided that she could not accept the associate's position working with kindergartners and first graders. Objective medical evidence suggests that claimant might well have been able to return to work in such a position. Likewise, defendants' answers to interrogatories state that the school district regards the position of educational associate to be primarily a sedentary position with infrequent lifting. Such would appear consistent with the type of job duties that claimant described and that Mr. Ruths described. Claimant, in her deposition, at hearing, and in her conversations with Mr. Ruths, stated she preferred to work part time. In her deposition, she stated she preferred staying at McDonald's part time to returning to the school district. All the above demonstrates that claimant has minimal desire to continue in a wage earning capacity at this point in her life. It is clearly indicative of a lack of motivation to fully rehabilitate and seek full-time gainful employment.

Likewise, claimant argues that claimant's restrictions would "place upon this worker an industrial disability far in excess of 5 percent." We again disagree. Claimant's restrictions do not remove her from a sedentary work classification. Claimant's previous work experience has largely been in nonheavy industrial positions. It appears claimant has transferrable skills which she could readily utilize within her restrictions. Likewise, claimant's age of itself has bearing on her actual earning capacity. Clearly, earning capacity is reduced with the approach of the end of the normal span of an individual's employment life. Claimant, who was age 65 at hearing and who had voluntarily retired from her McDonald's position immediately subsequent to her 65th birthday, was clearly at an age where her earning capacity was naturally reduced from that of a younger worker. The deputy's award of five percent permanent partial disability was appropriate.

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

Signed and filed this 16th day of December, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBORAH BUOL, Claimant, vs. MERCY HOSPITAL, Employer, and IOWA SMALL BUSINESS EMPLOYERS, Insurance Carrier, Defendants.	File No. 877234 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed February 7, 1991, 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 17th day of October, 1991.

Byron K. Orton
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROSE BUSS, Claimant, vs. JON SCRIVEN, Employer, and THE FIDELITY & COMPANY OF, NY, c/o UAC, Insurance Carrier, Defendants.	FILED SEP 17 1991 File No. 908685 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

The parties submitted this case to arbitration on stipulated facts. The record has been reviewed de novo on appeal. The decision of the deputy filed January 10, 1990 is affirmed and adopted as the final agency action in this case with the following additional analysis:

The deputy refers to both the arbitration decision and the appeal decision of Klodt v. Hillside Manor Care Center, since the arbitration decision was appealed the deputy's arbitration decision is no longer viable step in the proceeding. Tussing v. George A. Hormel & Co., 461 N.W.2d 450 (Iowa 1990). Correct reference to the law governing this issue can be found in Klodt v. Hillside Manor Care Center, Appeal Decision filed August 17, 1989.

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

Signed and filed this 17th day of September, 1991.

Byron K. Orton

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INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RADA CAMPBELL, Claimant, vs. KIMBERLY QUALITY CARE, Employer, and GALLAGHER BASSETT, Insurance Carrier, Defendants.	File No. 943879 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed December 23, 1991, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

The line of industry the claimant works in is medical pools providing certified nurse's aides. Claimant testified that she was not working exclusively for the defendant employer (Transcript, pages 41-42). This fact was acknowledged by defendant employer (Tr., pp. 51-53). Defendant employer's witness, Jane Phillips, testified that "most of our people worked for us exclusively." (Tr., p. 53, lines 14-15) Claimant worked for three different agencies and gave her general impressions about the employment relationships with those agencies. Both claimant and Phillips testified that claimant turned down work at times when work was offered by defendant employer. There is sufficient evidence in the record to make a finding that claimant's earnings with defendant employer were less than the usual weekly earnings of someone working in a medical pool for certified nurse's aides. Claimant did not work exclusively for defendant employer and at times turned down work. Defendant employer's Exhibit B (referred to at the hearing as Exhibit 2) is not sufficient to rebut evidence of this finding. Exhibit B lists a number of employees. Only 11 of them (Bayless, Breeze, Broughton, claimant, Cherry, Duane, Fister, Hall, Kriegel, Perky and Roop) received payment each week during the period November 3, 1989 through February 2, 1990. Some received more than claimant (two)

and some (eight) received less than claimant. It is impossible to tell from this exhibit what someone who was regularly employed would earn if they were working full time. In this analysis someone working full time would be someone who worked every week during this 13 week period and who worked 30 more hours in a week. It is also worth noting that during this 13 week period claimant only worked 30 or more hours for six weeks.

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

Signed and filed this 30th day of April, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LILLIAN CARLSON, Claimant, vs. AALF'S MANUFACTURING, Employer, and EMPLOYER'S MUTUAL COMPANIES, Insurance Carrier, Defendants.	FILED SEP 23 1991 File No. 816945 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed October 9, 1989 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Claimant states that one of the issues on appeal is "whether this case should be remanded to another Deputy Industrial Commissioner who can make a decision based solely on the review of the case as presented at the original hearing or in the alternative, to allow the case to be heard de novo." Claimant contends that the deputy industrial commissioner who was reassigned to the contested case should have recused himself. The deputy was employed with Job Service and had heard a case in which claimant was awarded unemployment benefits.

Rule 343 IAC 4.38 deals with self-disqualification by the hearing officer. By its language, the rule is invoked only when the deputy subjectively concludes that an appearance of impropriety exists. Miller v. Woodard State Hospital School, File No. 853647, Appeal Decision May 31, 1990. The deputy stated in his arbitration decision that he made no memory of the Job Service hearing or the decision. In addition, the arbitration decision itself is, by statute, reviewed de novo on appeal.

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

Signed and filed this 23rd day of September, 1991.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CECIL J. CHRISTIAN,

Claimant,

vs.

HIRSCHBACH MOTOR LINES, INC.,

Employer,

and

AETNA CASUALTY & SURETY COMPANY,

Insurance Carrier,
Defendants.

File No. 855413

A P P E A L

D E C I S I O N

FILED

SEP 23 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 24, 1990 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 23rd day of September, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH CHURCHILL,

Claimant,

vs.

MARV PESEK MASONRY, INC.,

Employer,

and

WEST BEND MUTUAL,

Insurance Carrier,
Defendants.

File No. 899119

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed March 13, 1991 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 18th day of November, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERRY L. CLAIR,

Claimant,

vs.

RINDERKNECHT ASSOCIATES, INC.,

Employer,

and

WAUSAU INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 850320

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent total disability benefits as the result of an alleged injury on April 6, 1987. The record on appeal consists of the transcript of the arbitration proceeding and claimant's exhibits 1 through 18.

ISSUES

Defendants failed to file 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

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.

Iowa Rules of Civil Procedure 134"b"(2)(B) states:

> If a party or an officer, director or managing agent of a party or a person designated under R.C.P. 147"e" to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision "a" of this rule or R.C.P. 132, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> ....
>
> An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

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."

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted. In addition, the following additional analysis is made.

Defendants were prohibited from offering evidence at the hearing. A review of the procedural history of the case leading up to the imposition of this sanction is appropriate.

On June 25, 1988 claimant filed a request for production of documents, seeking certain records from defendants. On September 29, 1988 claimant filed an application for an 85.39 independent medical examination, to be conducted at the Mayo Clinic in Rochester, Minnesota. Defendants did not resist this application. On October 26, 1988 a deputy industrial

commissioner granted claimant's application for an examination, including travel expenses.

On November 1, 1988 claimant propounded interrogatories to defendants. On January 5, 1989 claimant's attorney contacted defendants and requested production of the documents identified in the motion to compel by January 23, 1989. On February 10, 1989, after failing to receive the documents, claimant filed a motion to compel production of the documents, and to compel defendants to answer the interrogatories. On February 23, 1989, a ruling sustaining the motion to compel was issued, ordering defendants to comply within 14 days of the order. No reconsideration of this ruling was sought by defendants.

On March 7, 1989 claimant received a letter from defendant insurance carrier stating that the travel expenses associated with the medical examination at Mayo Clinic would not be paid because the examination was not done locally. On March 30, 1989 claimant filed an application for sanctions on defendants' failure to pay the travel expenses of the independent medical examination previously ordered, and on April 14, 1989 claimant filed another motion for sanctions against defendants for failing to produce the documents ordered on February 23, 1989. Also on April 14, 1989 claimant amended his petition to seek penalty benefits under Iowa Code section 86.13, and to add odd-lot as an issue.

On April 18, 1989 defendants served unverified answers to the interrogatories on claimant. The documents previously ordered were not provided. On April 19, 1989 a ruling was issued on claimant's motion for sanctions for failure to produce the documents. The ruling closed the record to defendants.

On April 24, 1989 defendants filed a resistance to the motion for sanctions, and a motion to reconsider the ruling, alleging that defendants' counsel never received the ruling ordering production within 14 days. On May 1, 1989 claimant's attorney contacted defendants by telephone, requesting claimant's personnel file, and a formal response to the request for production of documents. Defendants did not respond to either request. On May 4, 1989 claimant filed a resistance to defendants' motion to reconsider sanctions. On the same date, the deputy who issued the sanctions order reversed the order.

On May 5, 1989 defendants filed a supplemental resistance to motion to compel, reciting that some portions of the bill for the independent medical examination represented treatment. Apparently counsel for defendants confused the motion to compel the production of documents with the application for an 85.39 examination.

On May 19, 1989 claimant's attorney sent a letter to defendants asking for an answer to interrogatory number 25, and again asking for claimant's personnel file. There was no response from defendants. Defendants indicate they never received this correspondence.

On May 22, 1989 a deputy industrial commissioner ordered that claimant's motion for sanctions on the failure to pay the costs of the independent medical examination would be ruled on at the hearing.

On June 14, 1989 claimant's attorney again wrote to defendants, again reciting documents requested in the May 19, 1989 letter, and also requesting vocational rehabilitation test results. Again, defendants did not respond.

On July 7, 1989 claimant filed a second motion for sanctions on the failure to produce documents, alleging that although the interrogatories had been answered, the documents requested had still not been provided. This motion was not resisted. However, on July 20, 1989, defendants' attorney sent a letter to claimant's attorney indicating defendants felt they had sent all the documents requested. On July 20, 1989 a deputy industrial commissioner sustained claimant's motion for sanctions on the failure to produce documents, and again closed the record to defendants. On July 21, 1989 defendants' attorney sent by letter to claimant's attorney wage information requested. Defendants also on this date made both an oral and a written motion to reconsider the sanction order. During the telephone hearing on the motion to reconsider, defendants offered to FAX wage information to claimant's attorney, and did so the same day. The motion to reconsider was overruled.

The arbitration hearing was held on July 27, 1989. On that date, claimant filed a resistance to defendants' motion to reconsider.

The deputy's arbitration decision was filed August 31, 1989. A notice of appeal was filed September 19, 1989. Claimant filed a motion to dismiss the appeal on November 14, 1989, for defendants' failure to file a transcript and failure to file an appeal brief. Defendants filed the transcript on November 21, 1989. A letter from the shorthand reporter indicated that defendants' counsel had called her on November 20, 1989, and requested preparation of the transcript.

On January 23, 1990 an appeal ruling extended the time for filing of the transcript, but ordered that the appeal would be considered generally. Claimant later requested permission to file a brief, but this was denied in a ruling dated February 22, 1990. On July 9, 1990, new counsel appeared for defendants.

Defendants were prohibited from producing evidence at the arbitration hearing as a result of an order for sanctions. The procedural history of the case, taken as a whole, reveals that defendants did not comply with their discovery obligations, or comply with orders of this agency, on more than one occasion. Defendants suffered one sanction order prohibiting their evidence, but were able to obtain a reversal of that order. However, continued noncompliance resulted in yet another sanction order, which was not reversed.

The Iowa Rules of Civil Procedure are applicable to workers' compensation proceedings under rule 343 IAC 4.35. Documents are discoverable under Iowa R.Civ.P. 122"a". The remedy for a failure to respond to discovery is governed by Iowa R.Civ.P. 134, which includes prohibiting a party from introducing evidence. Rule 343 IAC 4.36 provides the commissioner the authority to close the record to further activity or evidence by a party failing to comply with the rules or an order. Defendants ignored repeated requests and orders to provide the documents claimant sought. It was only after a motion for sanctions was granted that defendants made any effort to comply with their discovery obligations.

The imposition of discovery sanctions is discretionary. When discovery sanctions are imposed by a district court, they will not be disturbed on appeal absent an abuse of discretion. Suckow v. Boone State Bank & Trust Co., 314 N.W.2d 421, 425 (Iowa 1982). Dismissal is a discovery sanction generally used when a party has violated a trial court's order. Id., at 426, citing Zimmerman v. Purex Corp., 256 Iowa 190, 194-5, 125 N.W.2d 822, 825 (1964); Krugman v. Palmer College, 422 N.W.2d 470 (Iowa 1988). Before a court can impose the sanctions of dismissal or default, it must find that the refusal to comply was the result of willfulness, fault, or bad faith. Smiley v. Twin City Beef Co., 236 N.W.2d 356, 360 (Iowa 1975). Dismissal or default as sanctions are usually limited to violation of a court's order. Postma v. Sioux Center News, 393 N.W.2d 314, 318 (Iowa 1986). This is not to say that a court may never impose sanctions of dismissal or default even absent willfulness or bad faith. Kendall Hunt Publishing Co. v. Rowe, 424 N.W.2d 235 (Iowa 1988).

It is noted that in this case, defendants violated the deputy's order to produce the documents within 14 days. Similar conduct, along with procrastination and inattentiveness in the case, was held to justify a dismissal in Krugman, 422 N.W.2d 470. Defendants' actions in this case, if performed by a claimant, might well justify a dismissal under our rule. Defendants' conduct therefore justifies the entry of a default against defendants. However, the deputy imposed a less onerous sanction of closing the record to defendants. Defendants' conduct justifies closing the record to defendants as the most

appropriate sanction for the noncompliance with the deputy's order.

Defendants have not been denied due process in the imposition of sanctions. The sanction imposed in this case was pursuant to Iowa R.C.P. 134. Before sanctions under R.C.P. 80"a", dealing with the filing of legal actions, can be imposed, the Iowa Supreme Court has held that the alleged offender be afforded (1) fair notice and (2) an opportunity to be heard. Carr v. Hovick, 451 N.W.2d 815 (Iowa 1990). In Carr, the Iowa Supreme Court noted that counsel was entitled to a hearing not only on the question of what sanctions would be imposed, but also on the question of whether a violation of R.C.P. 80"a" had occurred.

The Carr case involved R.C.P. 80"a". Although it is not clear that the due process holdings in Carr would apply to sanctions imposed under R.Civ.P. 134, it is found that defendants in this case did have both notice of the fact that sanctions were contemplated, and an opportunity to be heard on both the question of whether sanctions would be imposed and what the sanctions would be. Claimant filed a written motion for sanctions, and in the prayer of the motion moved for (1) default, or (2) closure of the record to defendants, and (3) assessment of attorney's fees. Thus, defendants were on notice that sanctions were being sought.

The sanction order in question was issued on July 20, 1989, after the deputy reviewed the file. Apparently no hearing was held prior to the order imposing sanctions. Defendants sought, and were granted, a hearing on reconsideration of the imposition of this sanction. Defendants were given an opportunity to participate in a telephone hearing on the question of whether a sanction should be imposed, and what the extent of the sanction should be. This is all that due process requires. Olson v. Wilson Foods Corp., Appeal Decision, May 31, 1990.

Next the issue of sanctions against defendants for failing to pay for claimant's section 85.39 independent medical examination will be addressed. Defendants, in spite of being ordered to pay for the exam and the transportation costs associated with it, did not do so. Defendants later objected to the costs on the basis that they were obligated only to pay for an examination in the state of Iowa, and that claimant visited the Mayo Clinic three times. These are not valid reasons for not paying. Claimant's motion for an 85.39 examination clearly stated that the Mayo Clinic of Rochester, Minnesota, was to be used for the examination. This motion was not resisted by defendants. In addition, there is no requirement that an independent medical examination must be completed in one session. A supplemental explanation of charges obtained from the clinic by claimant's counsel shows that the three visits were all part of

the examination and not treatment. Finally, defendants' adjuster had no medical evidence to justify a refusal to pay.

The deputy that conducted the arbitration hearing noted that penalty benefits under Iowa Code section 86.13 and interest under Iowa Code section 85.30 are limited to the non-payment of weekly benefits, and those sections cannot be applied to the non-payment of medical benefits. The deputy granted the motion for sanctions for failure to pay medical benefits, and again closed the record to defendants as a sanction separate and distinct from the earlier sanction. The deputy's ruling was correct. There was no rational basis for denying the payment of medical benefits, and pursuant to rule 343 IAC 4.36, the record was properly closed to defendants on this ground as well.

Claimant is 37 years old, with a GED. He has worked nearly all his life in ironworking. Claimant cannot return to his old job. Claimant has a permanent partial impairment rating of 20 percent of the body as a whole as a result of his work injury. Claimant has work restrictions. Vocational rehabilitation tests of claimant show low potential for retraining. Vocational rehabilitation, however, had not been completed at the time of the hearing. Part of claimant's vocational rehabilitation program involved working with a counselor on obtaining employment, and one potential line of work identified for claimant was in distributing or selling industrial supplies or equipment. Claimant was still in a work-hardening program, however, and thus no actual job applications had been made.

Claimant alleged that he was an odd-lot employee. Claimant's cooperative efforts with the vocational rehabilitation program in this case, which was clearly designed to enable claimant to re-enter the work force, satisfies claimant's obligation under the odd-lot doctrine to actively seek employment, especially since claimant had not yet completed the work hardening program. The record as a whole shows that with claimant's impairment and work restrictions, his education and work experience, he is incapable of obtaining employment in any well known branch of the labor market, and the services he can perform are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. Defendants were precluded from presenting evidence, and thus did not rebut the presumption that no jobs were available to claimant. The deputy correctly noted that if the completion of claimant's vocational rehabilitation program improves his employability, defendants have the option of seeking a review-reopening. However, as of the time of the hearing, claimant was permanently and totally disabled.

Claimant is also entitled to payment of his medical expenses. As noted above the charges associated with the Mayo

Clinic examination were properly authorized and defendants are responsible for their payment. Defendants are also responsible for claimant's other medical expenses associated with his work injury. Defendants denied the compensability of claimant's injury, and thus are precluded from objecting to medical expenses because they were not authorized. Kindhart v. Fort Des Moines Hotel, I State of Iowa Industrial Commissioner Decision 611 (Appeal Decision 1985); Barnhart v. MAQ Inc., I Iowa Industrial Commissioner Report 16 (Appeal Decision 1981); Pickett v. Davenport Lutheran Home, Appeal Decision, October 30, 1987.

FINDINGS OF FACT

1. On April 6, 1987 claimant suffered an injury to the low back which arose out of and in the course of employment with Rinderknecht. This injury precipitated chronic low back and right leg pain as a result of extruded and herniated disc in claimant's lower spine. Claimant underwent two surgeries in an attempt to alleviate this pain. As a result of his injuries, claimant was off work from April 6, 1987 through April 20, 1987 and continuously since June 2, 1987.

2. The work injury of April 6, 1987 was a cause of a 20 percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no lifting over 20 pounds, no bending, pushing, pulling or prolonged sitting or standing in excess of one hour without a change of positions. Claimant is restricted to sedentary occupations.

3. The work injury of April 6, 1987 and the resulting permanent partial impairment and work restrictions are a cause of a 100 percent loss of earning capacity. Claimant is unable to return to any of the work for which he is best suited given his age, education and past work history. Claimant is 37 years of age with only a tenth grade formal education. Claimant has earned his GED but has low potential for scholarly endeavor. Claimant has made a reasonable attempt to look for employment in the geographical area of his residence but no suitable work has been offered to him despite the assistance of a vocational rehabilitation counselor. Despite full cooperation with all vocational and physical rehabilitation efforts, claimant remains unemployed as a result of his work injury. Therefore, no suitable work is available to claimant and he remains unemployable.

4. The medical expenses requested by claimant in the prehearing report, including those from the Mayo Clinic in 1989, are fair and reasonable. To the extent that the Mayo Clinic examinations in this case are considered treatment as opposed to

disability evaluation, such treatment is reasonable treatment as a second opinion as suggested by the primary treating physician.

CONCLUSIONS OF LAW

Claimant has established under law entitlement to permanent total disability benefits and to medical benefits as ordered below.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay permanent total disability benefits at the rate of three hundred nineteen and 02/100 dollars ($319.02) per week from April 6, 1987 through April 20, 1987 and from June 2, 1987 for an indefinite period of time during the period of claimant's disability.

That defendants shall pay claimant the medical expenses listed in the prehearing report. Claimant shall be reimbursed only to the extent he paid those expenses. Otherwise, defendants shall pay the provider directly.

That defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this 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 including the cost of the transcription of the hearing 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 September, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MAURICE CONN, Claimant, vs. YOUNKERS, Employer, and AETNA CASUALTY & SURETY, Insurance Carrier, Defendants.	:	File No. 902039 A P P E A L D E C I S I O N

FILED
DEC 20 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 1, 1991 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 20th day of December, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RAYMOND L. COX,

Claimant,

vs.

SKT CONSTRUCTION,

Employer,

and

CINCINNATTI INSURANCE/ CASUALTY,

Insurance Carrier,
Defendants.

FILED

AUG 30 1991

IOWA INDUSTRIAL COMMISSIONER

File No. 923214

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Defendants, SKT Construction and Cincinnati Insurance/ Casualty appeal from arbitration decision awarding claimant temporary total disability benefits and medical expenses as a result of a work-related injury on July 24, 1989.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1-A, 1-F, 1-I (1-6); and claimant's exhibit 1. Both parties filed briefs.

ISSUES

Defendants state that the issues on appeal are:

Whether or not conditions which were diagnosed as existing in claimant's right knee are related to an incident in his employment on July 24, 1989.

Whether or not defendants are responsible for the expense of a medical examination ordered by claimant's attorney; further temporary total disability benefits; and future surgical benefits.

REVIEW OF THE EVIDENCE

The arbitration decision filed February 18, 1991 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 on the issue of temporary total disability benefits. Additional analysis on the issue of future medical benefits is necessary.

Claimant has the burden to prove a causal connection between his work-related injury on July 24, 1989 and the need for surgery. The Iowa Supreme Court stated "[c]laimant was entitled to recover the expenses in treating whatever aggravation of her pre-existing condition, was caused by her work-related injury. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 374-375, 112 N.W.2d 299, 302 (1961)." Auxier v. Woodward State Hospital-School, 266 N.W.2d 139, 144 (Iowa 1978). Medical evidence indicates that claimant's anterior cruciate ligament tear and tear in the posterior horn of the medial meniscus and the need for surgery existed prior to his work-related injury on July 24, 1989. (Joint exhibit 6(1), page 2.) While it is true that claimant had been able to work prior to his injury, the medical evidence shows that the need for surgery pre-existed claimant's injury despite the fact that claimant was unaware of his right knee condition. Claimant failed to prove a causal connection between his work-related injury on July 24, 1989 to his right knee and the need for surgery.

Claimant sought the treatment of Mark B. Kirkland, D.O., at his own expense, after defendants had refused to provide further medical treatment. Claimant was justified in seeking treatment from Dr. Kirkland as claimant's right knee continued to be painful and claimant had not been released to return to work following the July 24, 1989 work-related injury. Since claimant is justified in seeking medical treatment, the defendants are liable for the expenses of the medical treatment. Richards v. Dept. of General Services, Building & Grounds Division, I-3 Indus. Comm'r Dec. 684 (1985).

FINDINGS OF FACT

1. Claimant sustained a work-related injury on July 24, 1989 to his right knee.

2. Claimant had an anterior cruciate tear and tear in the posterior horn of the medial meniscus which pre-existed his work-related injury on July 24, 1989.

3. The work-related injury of July 24, 1989 lighted up claimant's asymptomatic preexisting right knee condition.

4. The need for surgery to repair the anterior cruciate tear and the tear in the posterior horn of the medial meniscus was in existence prior to the work-related injury on July 24, 1989 and is not causally connected to the work-related injury.

5. Claimant was off work from July 24, 1989 until June 6, 1990 when he returned to work for a different employer as a foreman for a weatherization company.

CONCLUSIONS OF LAW

Claimant proved by a preponderance of the evidence entitlement to temporary total disability benefits from July 24, 1989 through June 5, 1990 as a result of the work-related injury.

Claimant proved by a preponderance of the evidence entitlement to a reimbursement for medical expenses incurred in the visit to Dr. Kirkland.

Claimant failed to prove a causal connection between the work-related right knee injury on July 24, 1989 and the need for surgery to repair the anterior cruciate tear and the tear in the posterior horn of the medial meniscus.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay claimant temporary total disability benefits from July 24, 1989 through June 5, 1990 at the stipulated rate of one hundred seventy and 30/100 ($170.30) per week.

That defendants shall reimburse claimant for medical expenses of one hundred twenty-seven and 50/100 ($127.50).

That defendants shall pay all benefits that have accrued in a lump sum together with statutory interest pursuant to Iowa Code section 85.30.

That defendants shall receive credit for all benefits paid and not previously credited.

That defendants shall pay the costs of the appeal including the costs of transcription of the arbitration hearing.

That defendants shall file a claim activity report pursuant rule 343 IAC 3.1(2).

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

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEE DAGNILLO, Claimant, vs. IOWA ASBESTOS COMPANY, Employer, and IOWA CONTRACTORS WORKERS' COMPENSATION GROUP, Insurance Carrier, Defendants.	File No. 806001 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed August 14, 1990 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 20th day of September, 1991.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VICKI DENEKAS, Claimant, vs. AALFS MANUFACTURING COMPANY, Employer, and THE HARTFORD INSURANCE COMPANY and EMPLOYERS MUTUAL COMPANIES, Insurance Carriers, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 794353/823077 A P P E A L D E C I S I O N FILED DEC 31 1991 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeals from an arbitration decision awarding benefits.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 77; claimant's exhibits 5, 6, and 8 through 10; and Second Injury Fund's exhibits A and B. All parties filed briefs on appeal.

ISSUES

Defendants state the issues on appeal are:

Whether substantial evidence supports a finding of 65% permanent partial disability relating to the shoulder injury of April 14, 1986.

A. The medical evidence shows a number of preexisting conditions resulting in substantial

disability for which the defendants cannot be held responsible.

B. The claimant's functional impairment, lack of motivation and credibility do not support a finding of 65% permanent partial disability.

FINDINGS OF FACT

The findings of fact contained in the arbitration decision adequately and accurately reflect the pertinent evidence and will not be set forth herein, except that claimant is found to have sustained a loss of 45 percent of her earning capacity as a result of her work injury.

CONCLUSIONS OF LAW

The conclusions of law in the arbitration decision are adopted herein, as modified by the following additional analysis:

Defendants are not entitled to an apportionment from the award for claimant's preexisting knee condition. The award is limited to the industrial disability caused by the shoulder injury. An apportionment is appropriate only where a prior condition is lighted up, accelerated, or aggravated by a work injury. Varied Enters., Inc. v. Sumner, 353 N.W.2d 407, 411 (Iowa 1984); Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-61 (1956).

Even if apportionment of a prior condition unrelated to the present injury were appropriate, there is no indication that the knee injury caused claimant any industrial disability, as opposed to functional impairment. Tussing v. Hormel & Co., 461 N.W.2d 450 (Iowa 1990); Bearce v. FMC Corporation, 465 N.W.2d 531 (Iowa 1991).

Although claimant's functional impairment is not high, the other factors of industrial disability indicate that claimant has lost a substantial portion of her earning capacity. Claimant has shown motivation to return to work. Claimant's intellectual faculties limit the job opportunities available to her. Claimant cannot return to her prior job. Based on these and all other factors of industrial disability, claimant's industrial disability is found to be 45 percent.

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

ORDER

THEREFORE, it is ordered in file number 794353:

That defendants Aalfs Manufacturing Company and Employers Mutual Insurance Companies shall pay unto claimant twenty-one point one four three (21.143) weeks of temporary total disability benefits commencing May 7, 1985 at the stipulated rate of one hundred eleven and 53/100 dollars ($111.53) per week and totalling two thousand three hundred fifty-eight and 08/100 dollars ($2,358.08).

That defendants shall have credit for all payments made voluntarily prior to hearing.

That as all benefits have accrued, they shall be paid in a lump sum with interest pursuant to Iowa Code section 85.30.

That the costs of this action, including the costs of appeal, shall be assessed to defendants pursuant to 343 IAC 4.33.

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

FURTHER, it is ordered in case number 823077:

That claimant shall take nothing from defendant Second Injury Fund of Iowa.

That defendants Aalfs Manufacturing Company and The Hartford Insurance Company shall pay unto claimant eighty-eight point one four three (88.143) weeks of healing period benefits commencing April 14, 1986 at the stipulated rate of one hundred seventeen and 04/100 dollars ($117.04) per week and totalling ten thousand three hundred sixteen and 26/100 dollars ($10,316.26).

That those defendants shall also pay unto claimant two hundred twenty-five (225) weeks of permanent partial disability benefits commencing March 4, 1988 at the stipulated rate of one hundred seventeen and 04/100 dollars ($117.04) per week and totalling twenty-six thousand three hundred thirty-four and 00/100 dollars ($26,334.00).

That defendants shall have credit for all payments made voluntarily prior to hearing.

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

That the costs of this action including, the costs of appeal, shall be assessed to defendants pursuant to 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 31st day of December, 1991.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

AUG 29 1991

IOWA INDUSTRIAL COMMISSIONER

TOM DONNELLY, Claimant, vs. SWIFT INDEPENDENT PACKING COMPANY, Employer, and TRANSPORTATION INSURANCE COMPANY/CNA, Insurance Carrier, Defendants.	File Nos. 850429/850430 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on June 12, 1987. The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits A to E. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. The nature and extent of any injury occurring June 12, 1987, and whether cumulative trauma has properly been considered by the Deputy.

2. The extent of any industrial disability,....

3. Authorization under §85.27, The Code, for Dr. Misol's charges and the Mercy Medical Center and prescription charges incurred at his direction.

4. Whether the Deputy has engaged in speculation regarding whether claimant would have been compelled to leave Swift's employment by this injury.

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

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

ANALYSIS

Claimant alleged two injury dates: April 28, 1986 and June 12, 1987. Claimant's April 28, 1986 injury consisted of an episode of neck and shoulder pain. Claimant lost no time from work as a result of this incident. There is no medical evidence indicating that any permanent impairment resulted. The arbitration decision concluded that no permanency resulted from this injury, and awarded medical benefits only. Defendants have not raised this injury on appeal, and claimant has not filed a cross-appeal. Although marginally addressed in claimant's appeal brief, the determination that claimant did not suffer a compensable injury on April 28, 1986 is not a proper issue on appeal. Therefore, this decision will address the June 12, 1987 low back injury only.

Claimant clearly suffered a traumatic injury on June 12, 1987, when he slipped on ice and fell at work. Peter D. Wirtz, M.D., has found claimant to have a five percent permanent partial impairment of the whole body. Dr. Wirtz opines that claimant's June 12, 1986 injury aggravated a preexisting degenerative disc disease, but only temporarily. (Joint Exhibit A, page 25.)

The evidence of Sinesio Misol, M.D., also establishes that claimant's current back condition results from a preexisting degenerative disc disease. Dr. Misol declined to opine to what extent claimant's current condition was attributable to his preexisting degenerative disc disease, his obesity, or his employment. Dr. Misol appears to attribute claimant's current back condition to all of these factors. In his deposition, Dr. Misol stated that claimant's work, along with his weight and age, did aggravate his preexisting degenerative disc condition. Dr. Misol assigned claimant a rating of permanent impairment of ten percent of the whole body.

Dr. Wirtz saw claimant only for purposes of evaluation. Although defendants insisted claimant see Dr. Wirtz only, they did not accommodate his request for an appointment and claimant was compelled to seek treatment elsewhere. Dr. Misol then became claimant's treating physician, and Dr. Misol had much more

extensive contact with claimant. The opinion of Dr. Misol as to both causation and permanency will be given the greater weight.

Dr. Misol at times appears to attribute claimant's condition to his work in general, rather than to the specific injury of June 12, 1987. Defendants urge that claimant is precluded from a finding of cumulative injury because his pleadings alleged a traumatic injury. However, a finding of a cumulative injury and establishment of a cumulative injury date may be made even though the claimant has relied on a traumatic injury theory and a traumatic injury date in his pleadings. Johnson v. George A. Hormel & Company, Appeal Decision, June 21, 1988. Claimant's work activity of pushing beef carcasses is not of a cumulative nature. Although this work may be strenuous and may even expose claimant to frequent injuries, it is not work that subjects claimant to a series of micro-traumas that may be termed a cumulative injury. See McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985) and Babe v. Greyhound Lines, Inc., (Appeal Decision, February 29, 1988). Affirmed by the Iowa Court of Appeals, March 27, 1990.

Taken as a whole, the medical evidence indicates that claimant's current back condition was caused by a combination of his June 12, 1987 injury, which aggravated a preexisting degenerative disc condition; his overall work activity, which also aggravated his degenerative disc condition; and claimant's age and obesity. Claimant bears the burden of proof to show that his condition is causally connected to his work injury. To establish compensability, the injury need only be a significant factor, not the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980); Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d 667, 670 (Iowa 1971). Claimant's age and weight did not cause claimant to experience disability prior to his June 12, 1987 injury. Prior to his June 12, 1987, slip and fall injury, claimant was able to perform all the duties of his job. Claimant did not have any restrictions on his work activity prior to his fall, but now has substantial restrictions. Although claimant had prior episodes of back pain, none of the three incidents appear to be possible intervening causes of claimant's present back condition, but rather appear to be symptoms of his degenerative disc condition. Claimant's June 12, 1987 work injury is found to have been a significant factor in causing claimant's current permanent impairment of the body as a whole.

Based on the conclusion above that claimant does have permanent disability as a result of his injuries, claimant is entitled to healing period benefits for the period June 12, 1986 to December 29, 1987, the date Dr. Misol last saw claimant for treatment purposes.

Defendants also raise on appeal the extent of claimant's industrial disability. Claimant has received ratings of impairment of five percent and ten percent. Claimant has restrictions on bending and stooping. Although surveillance evidence showed claimant limping at one time and not limping at another time, the surveillance tapes do not contradict the ratings of impairment or restrictions. Claimant has declined surgery, a decision his physician concurred with.

Claimant was 29 years old at the time of the hearing. Claimant did not complete high school, although he lacked a diploma only by a few credits. Claimant's work experience is limited to drywall finishing work, and his work with defendant employer. Claimant was given medical permission to return to "sit down" work, but defendant employer had no such work available for claimant. Claimant has not returned to work since his June 12, 1987 injury. Claimant was making $8.30 per hour at the time of his June 12, 1987 injury, but has had no income since then. Claimant has consulted vocational rehabilitation personnel, but has not attempted to look for alternative employment.

A defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of industrial disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). Claimant was allegedly discharged for his third unexcused absence from work four days after his slip and fall injury. However, claimant testified that he did call in on the day in question per company policy, and the company records verify this. Defendants have not offered a satisfactory explanation of why claimant was discharged, and defendants have not attempted to accommodate claimant and his restrictions.

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

Although claimant had a preexisting condition, an apportionment is not appropriate. Claimant's preexisting degenerative disc disease was not disabling. Prior to his June 12, 1987 fall, claimant was gainfully employed and had no restrictions. Now claimant has significant medical restrictions. Employers take employees as they find them. 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). Apportionment is limited to those situations where a prior injury or illness independently produces some ascertainable portion of the ultimate industrial disability

which exists following the employment-related aggravation. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984).

Defendants also urge on appeal that claimant is not entitled to medical benefits for the services of Dr. Misol because claimant sought his services without authorization. Claimant was advised by Dr. Paulillo to see Dr. Wirtz, and claimant asked defendants to set up an appointment with Dr. Wirtz, but this was not done. Claimant then went to Dr. Misol on his own.

Whether claimant's injury arose out of and in the course of employment was an issue contested by defendants. Where the employer denies liability for a work-related injury, the employer loses the right to select the care which the injured worker receives. Kindhart v. Fort Des Moines Hotel, I State of Iowa Industrial Commissioner Decision 611 (Appeal Decision 1985). Claimant is entitled to medical benefits for the services of Dr. Misol.

Defendants urge that the arbitration decision engaged in impermissible speculation in concluding that claimant would have been compelled to leave his employment with Swift eventually even if he had not been discharged because of his decision not to undergo surgery and to find another line of work. The decision of the deputy is reviewed de novo on appeal. Even if the statement of the deputy constituted speculation, no such conclusion is drawn here.

FINDINGS OF FACT

1. On April 28, 1986 claimant suffered an injury in the form of muscle strain to the neck and shoulders which arose out of and in the course of employment with Swift. The injury necessitated medical treatment and restricted duty but claimant was not compelled to be absent from work as treatment was received after work hours. Claimant has not shown that he suffered any permanent loss of function due to this injury.

2. On June 12, 1987 claimant suffered a trauma from a fall which resulted in low back pain and absence from work. This injury was an aggravation of underlying and prior existing degenerative disc disease which accelerated the degenerative process and was one of the significant causative factors in the development of the degenerative low back discs.

3. As a result of the work injury of June 12, 1987, claimant was absent from work beginning on June 12, 1987 and ending on December 29, 1987, at which time claimant reached maximum healing.

4. The work injury of June 12, 1987 was a cause of a 5 to 10 percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activities consisting of no heavy lifting and no repetitive lifting, bending or twisting.

5. Claimant is 29 years of age with only a tenth grade education. Claimant has no other formal training or schooling.

6. Claimant's only prior work experience has been in heavy construction work as a drywaller requiring the type of activities he can no longer perform.

7. Claimant has not been reemployed by Swift. Claimant has not returned to work in any capacity since June 12, 1987.

8. Claimant has not looked for work since his release from treatment by his physicians and his physicians have not opined that claimant is unable to work in any capacity.

9. Claimant has only recently contacted vocational rehabilitation counselors.

10. The requested medical expenses in the prehearing report are fair and reasonable and were incurred by claimant for reasonable and necessary treatment of his cumulative trauma of June 12, 1987.

11. Claimant's average gross weekly earnings over 13 representative weeks prior to the injury was $351.98.

12. The work injury of June 12, 1987 and the resulting permanent partial impairment and permanent work restrictions is a cause of a 20 percent loss of earning capacity.

CONCLUSIONS OF LAW

Claimant's back condition is causally related to his work injury of June 12, 1987.

Claimant has an industrial disability of 20 percent as a result of his June 12, 1987 work injury.

Defendants are responsible for the medical services rendered by Dr. Misol.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That Defendants shall pay to claimant one hundred (100) weeks of permanent partial disability benefits at the rate of two hundred nine and 78/100 dollars ($209.78) per week from December 30, 1987.

That defendants shall pay to claimant healing period benefits from June 12, 1987 through December 29, 1987 at the rate of two hundred nine and 78/100 dollars ($209.78) per week.

That defendants shall pay claimant the medical expenses requested in the prehearing report namely Dr. Misol, one hundred thirty-seven and 50/100 dollars ($137.50); Mercy Medical Center, nine hundred thirty-one and 00/100 dollars ($931.00); and prescription charges in the amount of one hundred twenty and 29/100 dollars ($120.29). Defendants are ordered to pay the provider directly. Defendants shall pay claimant only if he has paid those bills.

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

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

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

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 August, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SCHLENA A. DOWELL, Claimant, vs. EDWIN WAGLER, d/b/a ED'S SUPER VALU, Employer, and UNITED FIRE & CASUALTY COMPANY, Insurance Carrier, Defendants.	:	File No. 880145 A P P E A L D E C I S I O N

FILED

NOV 26 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 26, 1991 is affirmed and is adopted as the final agency action in this case, with the following modifications:

Claimant requests that a disputed medical bill of $110 be ordered paid by defendants. (See Joint Exhibit 4) Claimant testified the bill was for treatment of the phantom pain associated with the work injury to the right arm. Claimant has the burden of proving entitlement to payment for medical services. Claimant is competent to testify that treatment was necessary for treatment related to the work injury. Claimant's testimony is unrefuted. The bill in question was related to treatment of claimant's work injury and should be paid by defendants.

Claimant argues that the deposition of Marilyn Holland should be considered. Claimant is correct that the deposition was part of the joint exhibits (Joint Exhibit 3). It appears defendants agree in their appeal brief that deposition should be considered. The deposition of Marilyn Holland is in the record and has been considered on appeal. (It should be noted that the confusion on the part of the deputy, if any, could have been avoided if the parties had realized that the deposition in question was one of the joint exhibits as well as an apparent

separate proposed exhibit by the defendants and had taken the proper steps to avoid duplication.)

Claimant next asks that deposition costs of Dr. Hines, billed at $675 (Joint Exhibit 5) be ordered paid. Costs are taxed pursuant to rule 343 IAC 4.33) which provides that "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." Iowa Code section 622.72 provides a maximum of $150. Therefore, the costs assessed against the defendants by the deputy shall be limited to $150 for Dr. Hines' deposition. Costs are taxed pursuant to rule 343 IAC 4.33.

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

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

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES D. DUSENBERRY, Claimant, vs. STONE CONTAINER CORPORATION, Employer, and AMERICAN MOTORISTS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File Nos. 892708/879532 919546/921011 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed April 17, 1991 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 4th day of October, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY G. ELDER,	:	FILED
Claimant,	:	MAR 25 1992
vs.	:	
RILEY STOKER CORP.,	:	File No. 870989 IOWA INDUSTRIAL COMMISSIONER
Employer,	:	A P P E A L
and	:	D E C I S I O N
CIGNA,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on December 10, 1987. The record on appeal consists of the transcript of the arbitration proceeding; defendants' exhibits A through F; and a portion of claimant's exhibit A. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

I. Whether the deputy erred in finding that Elder sustained his burden of proving he has a thirty per cent [sic] permanent partial disability to his hand.

II. Whether the deputy erred under §85.27 Code of Iowa in granting Elder's request for alternate care by Dr. Szabados.

FINDINGS OF FACT

The findings of fact contained in the arbitration decision filed October 18, 1990 adequately and accurately reflect the pertinent evidence and will not be set forth herein.

CONCLUSIONS OF LAW

The conclusions of law contained in the deputy's proposed decision are adopted herein, as modified by the following additional analysis.

Defendants discuss in their appeal brief whether claimant's hand condition is causally related to his work injury. However, defendants, as appellants, have not listed causal connection as an issue on appeal in their brief. The evidence indicates that claimant's condition is caused by his work injury. His activities with extinguishing a fire do not constitute an intervening cause or injury, but rather only a temporary aggravation of his hand condition.

Defendants also challenge on appeal the authorization of alternative care by Dr. Szabados. The reasoning and conclusions contained in the deputy's proposed decision concerning alternative care are adopted herein.

ORDER

THEREFORE, it is ordered:

That defendants shall pay unto claimant forty-eight point two eight six (48.286) weeks of healing period benefits at the stipulated rate of four hundred thirty-seven and 11/100 dollars ($437.11) per week payable commencing December 10, 1987 and totalling twenty-one thousand one hundred six and 29/100 dollars ($21,106.29).

That defendants shall pay unto claimant nineteen (19) weeks of permanent partial disability benefits at the stipulated rate of four hundred thirty-seven and 11/100 dollars ($437.11) per week payable commencing November 12, 1988 and totalling eight thousand three hundred five and 09/100 dollars ($8,305.09).

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

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

That defendants shall pay all reasonable and necessary charges for further trea[illegible]r. Szabados that are causally related to the subject w[illegible].

That defendants shall pay the costs of this matter including the transcription of the hearing.

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

Signed and filed this 25th day of March, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY G. ELDER,

Claimant,

vs.

RILEY STOKER CORP.,

Employer,

and

CIGNA,

Insurance Carrier,
Defendants.

File No. 870989

O R D E R

N U N C

P R O

T U N C

An appeal decision was filed in this case on March 25, 1992. A portion of the decision is in error. The Order portion of this decision should be corrected to read:

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant forty-eight point two eight six (48.286) weeks of healing period benefits at the stipulated rate of four hundred thirty-seven and 11/100 dollars ($437.11) per week payable commencing December 10, 1987 and totalling twenty-one thousand one hundred six and 29/100 dollars ($21,106.29).

Defendants shall pay unto claimant fifty-seven (57) weeks of permanent partial disability benefits at the stipulated rate of four hundred thirty-seven and 11/100 dollars ($437.11) per week payable commencing November 12, 1988 and totalling twenty-four thousand nine hundred fifteen and 27/100 dollars ($24,915.27).

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

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

Defendants shall pay all reasonable and necessary charges for further treatment by Dr. Szabados that are causally related to the subject work injury.

The costs of this action shall be assessed to defendants pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 5th day of May, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RANDALL LEE ELLIS, Claimant, vs. B & B DISTRIBUTING CO., INC., Employer, and CIGNA, Insurance Carrier, Defendants.	File No. 787559 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants, B & B Distributors, Co., Inc., and Cigna, appeal from an arbitration decision awarding claimant 10 percent industrial disability and healing period benefits as a result of a January 31, 1985 work-related injury.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits A through I. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

Defendants state the issues on appeal are:

I. Whether claimant has proved, by a preponderance of the evidence, his entitlement to healing period benefits from May 4, 1987 through November 8, 1987.

II. Whether the record supports the finding that the claimant was terminated from his employment with the insured due to his work related injury.

Claimant states an additional issue concerning the standard of review on appeal.

REVIEW OF THE EVIDENCE

The arbitration decision filed October 12, 1989 adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 31, 1985 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Iowa Code section 86.24 states in part:

1. Any party aggrieved by a decision, order, ruling, finding or other act of a deputy commissioner in a contested case proceeding arising under this chapter or chapter 85 or 85A may appeal to the industrial commissioner in the time and manner provided by the rule. The hearing on an appeal shall be in Polk county unless the industrial commissioner shall direct the hearing be held elsewhere.

2. In addition to the provisions of section 17A.15, the industrial commissioner may affirm, modify, or reverse the decision of a deputy commissioner or the commissioner may remand the decision to the deputy commissioner for further proceedings.

....

5. The decision of the industrial commissioner is final agency action.

ANALYSIS

The first issue to be resolved is the standard of review of an arbitration decision before the industrial commissioner. Claimant asserts that the standard of review should be at law and that the industrial commissioner should only reverse an arbitration decision if it is not supported by substantial evidence. The standard of review on appeal of an arbitration decision is de novo. The Iowa Supreme Court stated:

> The May 1985 decision of the deputy industrial commissioner was a proposed decision within the contemplation of Iowa Code section 17A.15(2). Because it was appealed to the agency (the commissioner) within the time provided by rule, the commissioner, pursuant to section 17A.15(3), assumed full responsibility for deciding anew all issues of fact and law.

Tussing v. George A. Hormel & Co., 461 N.W.2d 450, 453 (Iowa 1990).

Defendants state that the next issue on appeal is whether claimant proved entitlement to healing period from May 4, 1987 through November 9, 1987. Claimant has the burden of proving by a preponderance of the evidence that a causal connection exists between claimant's January 31, 1985 work-related injury and the time claimant was off work following the April 16, 1987 nonwork automobile accident. Claimant testified that he returned to work following the January 31, 1985 work-related injury performing the duties which he had performed prior to the work-related injury. Claimant testified that he worked up to one hundred hours in a week for the defendant employer following his work-related injury.

Claimant testified that he had continuing problems with his neck and shoulder upon returning to work and sought medical treatment. On April 10, 1987, Jesse J. Landhuis, M.D., treated claimant for chronic cervical strain. Prior to the April 16, 1987 auto accident, claimant was able to work for the defendant employer for two years without incident. Claimant testified that the only time claimant missed work was to attend doctors' appointments. Claimant testified that he had pain while working and worn a TENS unit and at times a cervical collar, however, he performed fairly heavy labor and worked long hours before the April 16, 1987 accident.

Dr. Landhuis characterized claimant's condition after the April 16, 1987 accident as additional cervical strain. Claimant

testified that his condition remained unchanged from first accident to the second accident. Claimant was released to return to work by Dr. Landhuis on May 4, 1987 following the April 16, 1987 accident. The defendant employer, however, would not allow claimant to return to work. Claimant continued to receive medical treatment, including physical therapy, during this time. Claimant was referred by Dr. Landhuis to the pain clinic at the University of Iowa Hospitals and Clinics. Claimant's chief complaint was characterized as chronic cervical strain secondary to the January 1985 and the April 1987 automobile accidents.

Claimant failed to prove a causal connection between his work-related injury and the period of time, May 4, 1987 through November 9, 1987, that claimant was off work following his April 16, 1987 nonwork injury. Claimant's chronic cervical strain had been treated with medication and a TENS unit prior to the April 16, 1987 accident. While claimant's pain did not completely resolve, claimant had been able to work without incident. The additional cervical strain following the second nonwork accident caused claimant to seek additional medical treatment. In the time claimant was off work, May 4, 1987 through November 9, 1987, claimant was being treated for cervical pain attributable to the second nonwork accident. Therefore, the second nonwork accident on April 16, 1987 is the proximate cause of claimant's missing work from May 4, 1987 through November 8, 1987.

The final issue to be resolved is whether claimant was terminated on account of his work-related injury. It is true that an employer's refusal to give any sort of work to an impaired employee may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). It first must be determined whether claimant was terminated by the defendant employer on account of his work-related injury or some other reason. If claimant proves that he was terminated on account of a work-related injury, then it must be determined whether claimant is entitled to an award of industrial disability.

Both claimant and Robert Pecka, claimant's employer, testified that claimant was demoted from a salaried employee to an hourly worker following an altercation at work. Both testified that this incident occurred in February 1987. Pecka testified that claimant continued to have problems and that he and his manager had made the decision to terminate claimant prior to the second accident. Pecka testified that his manager had intended to fire claimant on the morning of the April 16, 1987 accident. While claimant testified that he was involved in an altercation with other employees and had been demoted, it appears that Pecka's testimony that he intended to fire claimant on the morning of the accident is self serving. Therefore, it is determined that claimant was not terminated on account of misconduct at work.

Next it must be determined whether claimant was terminated on account of his work-related injury or the second nonwork injury. Claimant worked for two years following the work-related accident. Claimant wore a TENS unit during this time, took pain medication and on occasion wore a cervical collar. Claimant performed his job and even worked overtime following the work-related injury.

After the second nonwork accident, claimant was released to return to work by Dr. Landhuis on May 4, 1987. The defendant employer would not allow claimant to return to work. Claimant's treating physician, Dr. Landhuis talked to the manager of the defendant employer on May 8, 1987 and made the following notations:

> Yesterday Randy Ellis called and reported that his employer had told him that he was not ready to return to work and gave me permission to talk with his employer. Today I called Mr. John Ferguson who expressed concern that Randy would be unable to do his job safely and adequately because of wearing of his cervical collar and taking medications. He also noted that it did not seem logical to him to have him work all day and then leave work to go to physical therapy. He also indicated that Mr. Ellis appeared to be having much pain at the time that he talked to him.
>
> I told Mr. Ferguson that my primary concern was getting Randy back to work and that I thought the sooner he returned to work the better since the longer patients with chronic back and neck pains stay off work, the less likely is the chance they will be able to return to work. Mr. Ferguson agreed to send me a description of Mr. Ellis' job and the reasons that he felt Mr. Ellis would not be able to perform satisfactorily on the job.
>
> I then called Mr. Ellis and discussed my conversation with Mr. Ferguson. As a compromise solution to this problem, I advised Mr. Ellis to remain off work for an additional month until June 4th and we will try and wean him from physical therapy and any medications which might produce drowsiness.

(Joint exhibit B.)

Claimant was released to return to work by Dr. Landhuis on June 3, 1987. In a notation dated July 1, 1987, Dr. Landhuis noted that the defendant employer refused to accept claimant's release to return to work.

Claimant worked for the defendant employer for more than two years following the work-related accident. Claimant worked wearing a TENS unit, while on pain medication and on occasion wearing a cervical collar. Claimant was not terminated until after the second accident. While the defendant employer's refusal to accept claimant back to work following the April 16, 1987 injury cannot be condoned, claimant failed to prove that he was terminated on account of his work-related injury. Since claimant failed to prove that he was terminated on account of his work-related injury, the issue of whether claimant is entitled to industrial disability benefits is moot.

FINDINGS OF FACT

1. On January 31, 1985, claimant was involved in a work-related automobile accident.

2. Claimant was off work on account of the work-related accident from February 4, 1985 through February 11, 1985.

3. Dr. Landhuis initially diagnosed claimant's condition as chronic cervical strain secondary to his work-related accident.

4. Claimant underwent medical treatment as a result of his work-related injury, including pain medication, TENS unit and claimant occasionally wore a cervical collar. No permanency resulted from the work-related accident, although claimant testified that he continued to experience pain.

5. Claimant returned to work following the January 31, 1985 work-related injury. Claimant performed heavy labor and worked up to one hundred hours in one week after the work-related injury.

6. Claimant was involved in an altercation with another employee and was demoted from an salaried employee to an hourly employee in February 1987.

7. On April 16, 1987 claimant was involved in a nonwork accident which Dr. Landhuis opined caused additional cervical strain.

8. Dr. Landhuis released claimant to return to work on May 4, 1987, however, the defendant employer refused to accept claimant's release to return to work. Claimant was again released to return to work on June 4, 1987, but again, the defendant employer refused to accept claimant's release. Claimant never returned to work for the defendant employer.

9. Claimant continued to receive medical treatment following the April 1987 nonwork accident. Claimant was referred

to the pain clinic at the University of Iowa Hospitals and Clinics following the second nonwork accident.

CONCLUSIONS OF LAW

The standard of review of an arbitration decision on appeal is de novo.

Claimant failed to prove by a preponderance of the evidence a causal connection between his January 31, 1985 work-related accident and May 4, 1987 through November 9, 1987, the time claimant was off work following the nonwork accident.

Claimant failed to prove by a preponderance of the evidence that he was terminated in 1987 as a result of his January 31, 1985 work-related accident.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered

That claimant shall take nothing from this proceeding.

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

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

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY ETHELL, Claimant, vs. 3 M COMPANY, Employer, and NORTHWESTERN NATIONAL, Insurance Carrier, Defendants.	File Nos. 858197/933329 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed May 21, 1991 is affirmed and is adopted as the final agency action in this case with the following additional analysis:

Defendants raise on appeal the issue whether certain testimony of defendants' witness was improperly excluded. A fair reading of the transcript indicates that defendants' witness, a vocational rehabilitationist, had generated a Bureau of Labor salary survey and had used that information in part to produce a written report. The deputy disallowed defendants' offering by live testimony information that could not have been offered in writing. (Presumedly, the information or report would not have been allowed into evidence as it would not have been served on the claimant in a timely manner.) Defendants' witness offered testimony as to various types of jobs that might be available to claimant and the pay range of those jobs (transcript, pages 128-129). Defendants argue in their appeal brief that the ruling prohibited testimony about specific examples of available jobs for claimant. However, defendants' witness did give testimony on specific jobs that might be available to claimant. Defendants were allowed to offer and did give testimony on available employment suitable for claimant. The deputy's ruling apparently only precluded a limited portion of the witness' testimony. There was no error in the ruling which precluded offering evidence indirectly that would not have been admissible directly. Even if the ruling were in error, the error would be harmless. There is evidence in the record that there is suitable employment

available to claimant and the potential pay for the employment. Those facts, as well as all other relevant facts, support the finding that claimant currently has a present cumulative industrial disability of 40 percent. A claimant's loss of earnings, or in this case claimant's current earnings, is only one factor used to determine claimant's loss of earning capacity.

Claimant and defendants shall equally bear the costs of the appeal, including the preparation of the hearing transcript.

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

BYRON K. ORTON
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEIL FARGO,	:	
Claimant,	:	
vs.	:	
	:	File No. 920838
IOWA NATURAL CASINGS,	:	
Employer,	:	A P P E A L
	:	D E C I S I O N
and	:	
TRAVELERS INSURANCE CO.,	:	
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 8, 1991 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 October, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RAYMOND J. FELDPAUSCH, Claimant, vs. ALUMINUM COMPANY OF AMERICA, Employer, Self-Insured, Defendant.	: : : : : : : : : : :	File Nos. 931316 931317 A P P E A L D E C I S I O N

FILED
NOV 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 9, 1991, is affirmed and adopted as the final agency action in this case with the following additional analysis.

Claimant asserts that the deputy erred in holding that claimant failed to give timely notice of his January 18, 1988 work injury. Claimant contends that he was unaware of the seriousness of his condition until after the 90 day notice period had run.

> The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease....The reasonableness of the claimant's conduct is to be judged in the light of his own education and intelligence.

Robinson v. Department of Transp., 296 N.W.2d 809, 812 (Iowa 1980).

Claimant worked for the defendant-employer since 1953. Claimant testified that he is aware of the procedure to report a work injury. In fact, claimant had reported a number of injuries over the years. In January 1987, claimant reported experiencing pressure numbness in his left thumb from using an Allen wrench. (Claimant's exhibit 5, page 20) Surely a reasonable person in claimant's position with claimant's knowledge would have reported an injury which persisted for a number of months.

Even if claimant gave timely notice of his work injury, he failed to prove by a preponderance of the evidence a causal con-

nection between his work injury and his permanent condition. Daniel B. Johnson, M.D., claimant's treating physician, gave equivocal testimony on the issue of causal connection.

Furthermore, even if Dr. Johnson's opinion on casual connection is accepted, claimant failed to prove that he sustained a compensable work injury. All of the objective test results were normal indicating that claimant did not suffer a permanent injury and Dr. Johnson's impairment rating must be rejected. Dr. Johnson wrote: "In my opinion the AMA guidelines for impairment ratings does not address the issue of chronic pain without any other disabilities adequately. In my opinion, Mr. Feldpausch has about a 10% impairment rating of the total body related to his chronic low back pain." (Defendant's ex. A, p. 31) 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 G.M. Power, II Iowa Industrial Commissioner Report 170 (1981). The impairment rating provided by Dr. Johnson appears to be based strictly on claimant's subjective complaints of pain and, therefore, is rejected.

For these reasons and those in the proposed decision, it is determined that claimant failed to give timely notice pursuant to Iowa Code section 85.23.

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

Signed and filed this 25th day of November, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEITH J. FINKEN, Claimant, vs. DIXON CONSTRUCTION CO., Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 931182 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed February 6, 1991 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 1st day of October, 1991.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT FOLEY,

Claimant,

vs.

ROSS DANIELS, INC.,

Employer,

and

FARMLAND MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 838945

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed May 25, 1990 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 20th day of September, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY FREDERICK, Claimant, vs. BROADLAWNS MEDICAL CENTER, Employer, and AETNA CASUALTY & SURETY CO., Insurance Carrier, Defendants.	File No. 834026 A P P E A L D E C I S I O N

FILED

OCT 21 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 12, 1989, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

The deputy's decision and this decision should not be read to mean anything other than the claimant bears the burden of proof of causal connection. Claimant bears the burden of proof of causal connection.

Also, the final agency action in this case should be as ordered below. Any order by the deputy inconsistent with the below should be disregarded.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant temporary total disability benefits from October 27, 1986 through January 19, 1987, at the rate of one hundred seventy-five and 49/100 dollars ($175.49) per week.

That defendants shall pay the medical expenses listed in the prehearing report. Claimant shall be reimbursed for any of these expenses paid by him. Otherwise the defendants shall pay the provider directly.

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

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

That defendants shall pay the costs of this action, including the preparation of the hearing transcript, 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 2nd day of October, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY FREDERICK Claimant, vs. BROADLAWNS MEDICAL CENTER, Employer, and AETNA CASUALTY & SURETY CO., Insurance Carrier, Defendants.	File No. 834026 DENIAL OF MOTION TO ENLARGE OR AMEND FINDINGS AND CONCLUSIONS DECISION ON REHEARING

MOTION TO ENLARGE OR AMEND FINDINGS

On October 10, 1991 the employer and insurance carrier filed a motion to enlarge or amend findings and conclusions (hereinafter referred to as "motion") and an application for rehearing (hereinafter referred to as "application"). Claimant has filed a response and resistance to each. The application for rehearing was granted on October 30, 1991.

The motion was filed pursuant to Iowa Rule of Civil Procedure 179 and asks for a modification of the appeal decision filed in this matter. The relief sought is the same as the relief sought in the application and can be considered in the rehearing. It should be noted that decisions of this agency are governed by Iowa Code section 17A.16(1). The Iowa Rules of Civil Procedure are adopted under rule 343 IAC 4.35, but that rule specifically states that where a conflict exists between a statute and the Iowa Rules of Civil Procedure, the statute controls. The motion under Iowa R.Civ.P. 179 would not be appropriate to merely change the format of the appeal decision.

In addition, the decision of the deputy industrial commissioner that the October 2, 1991 appeal decision adopts by reference fully complies with the requirements of Iowa Code section 17A.16(1).

The motion is denied.

DECISION ON REHEARING

A review of the deputy's rulings is being made without deciding whether the other issues also raised on appeal need be addressed in an appeal decision. There was no error in allowing exhibits O, P, and Q into evidence. The reasons stated by the deputy can be found at pages 9-10 of the hearing transcript. Also, there was no error in failure to default claimant or dismiss the action. Iowa Code section 17A.12(3) clearly allows a presiding deputy to proceed with a hearing and make a decision in the absence of a party. (It should also be noted that the record reflects that claimant's counsel was present at the hearing.)

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

Byron K. Orton
BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DALE RAY FRELAND,

Claimant,

vs.

IOWA STATE PENITENTIARY,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

File No. 848427

A P P E A L

D E C I S I O N

FILED
NOV 18 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 22, 1991 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Claimant has clearly not met his burden of proving that his work injury of January 27, 1986 was the cause of a permanent disability. Numerous medical reports chronologically proximate to the injury date indicate no permanent condition resulting from the injury. Dr. Courtney's opinion is so inconsistent with overwhelming contrary medical evidence that the opinion can be given no weight. Also, Dr. Found's opinion can be given little weight. Dr. Found examined claimant more than four years after the injury. The x-ray taken in that examination showed no abnormalities. He recites in his notes that tests conducted shortly after the injury showed no permanency. It is impossible to tell what Dr. Found relied upon to make an assessment of permanent partial disability. The reliable medical evidence in this case clearly shows that claimant's injury did not cause a permanent disability

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

Signed and filed this 18th day of November, 1991.

Byron K. Orton

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INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STUART FRENCH,	:	
Claimant,	:	File No. 983826
vs.	:	A P P E A L
WILSON FOODS,	:	R U L I N G
Employer, Self-Insured, Defendant.	:	

FILED
NOV 18 1991
IOWA INDUSTRIAL COMMISSIONER

Claimant has appealed a ruling sustaining a motion to dismiss. This ruling dismissed this matter because the petition was not filed within two years after the date of injury as provided in Iowa Code section 85.26(1).

Claimant has not made sufficient convincing argument that the discovery rule applies in this situation. Claimant alleged he suffered a traumatic injury to the left knee. The injury date alleged in claimant's petition was November 2, 1987. The record indicates that claimant sought medical treatment for the left knee on that date and that a note was made about "w/c" [presumedly workers' compensation]. The claimant has specified no "latent manifestation" resulting from the work injury that would justify application of the discovery rule.

Even if the discovery rule were to be applied, claimant's claim would be barred by Iowa Code section 85.26(1). Claimant sought treatment on November 2, 1987 and he saw a specialist three times shortly after. Claimant related his knee problem to a work incident in April 1986.

Claimant's petition was clearly filed more than two years after the injury date either as alleged in the original notice and petition (November 2, 1987) or an earlier event (April 1986). If the discovery rule were to be applied, the petition was also filed more than two years after claimant would have "discovered" the condition was work related. See Jones v. Continental Baking Company, Appeal Decision, September 24, 1991, file No. 908648.

THEREFORE, it is ordered:

That this matter is dismissed.

Signed and filed this 18th day of November, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUDITH M. FUNK, Claimant, vs. MERCY HOSPITAL OF COUNCIL BLUFFS, IOWA, Employer, Defendant.	:	File No. 857598 A P P E A L D E C I S I O N

FILED

MAY 29 1992

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.

Defendant Mercy Hospital of Council Bluffs, Iowa, self-insured, shall pay the costs of the appeal, including the preparation of the appeal transcript.

Signed and filed this 29th day of May, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN A. GALLARDO, Claimant, vs. THE FIRESTONE TIRE & RUBBER COMPANY, Employer, and CIGNA INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILED APR 29 1992 IOWA INDUSTRIAL COMMISSIONER File No. 643357 R E M A N D D E C I S I O N

On March 18, 1992, the Iowa Supreme Court remanded this case for a recomputation of benefits.

ACCORDINGLY, IT IS ORDERED:

That defendants are to pay unto claimant 250 weeks of permanent partial disability benefits at the rate of three hundred nine and 67/100 dollars ($309.67) per week.

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

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

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

Signed and filed this 29th day of April, 1992.

Byron K. Orton

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INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CONNIE GARRETT, Claimant, vs. ROCHESTER PRODUCTS, Employer, and ROYAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 877007 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on April 7, 1986. The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 20 (volume 1), 1 through 11 (volume II), and claimant's exhibits A through I; and claimant's A through I. Defendants failed to timely serve or file an appeal brief. Claimant was prohibited from filing a brief pursuant to an order filed June 28, 1991.

ISSUES

Defendants failed to timely file an appeal brief. Therefore, the appeal will be considered generally and without regard to specific issues.

FINDINGS OF FACT

The arbitration decision adequately and accurately reflects the pertinent evidence and it will not be set forth herein. However, the deputy's findings as to claimant's credibility are not adopted herein.

CONCLUSIONS OF LAW

Claimant alleges she injured her back while lifting a bucket of heavy parts above her head at work on April 7, 1986. One of

claimant's physicians, Nino R. Lentini, M.D., an orthopedic surgeon, diagnosed lumbosacral strain or sprain. Dr. Lentini opined that claimant possibly had a two percent permanent partial impairment, but added that it was too early to offer an impairment rating.

Another of claimant's physicians, Robert Durnin, M.D., stated that claimant's pain was inconsistent and that claimant exaggerated her pain complaints. Dr. Durnin could find no objective evidence of back injury. Dr. Durnin refused to provide a rating of impairment based on subjective complaints.

Michael Morrison, M.D., an orthopedic surgeon, also found no objective evidence of back injury. Dr. Morrison predicted claimant would be able to return to work without restrictions.

Claimant was also evaluated by a clinical psychologist, who concluded that claimant was "hypochondriacal" and attributed claimant's pain complaints to psychogenic causes. Claimant was also examined by J. M. Duggan, D.O., a psychiatrist, who found claimant to be suffering from an affective disorder. Leonard E. Weber, M.D., a neurologist, diagnosed claimant as suffering from chronic pain disorder with possible exaggerated symptoms due to psychiatric problems. Dr. Weber found no objective evidence of back injury, and gave claimant a rating of zero percent permanent impairment, but did assign five percent impairment based strictly on subjective pain.

A functional capabilities evaluation in 1987 concluded that claimant suffered from symptom magnification. Claimant was also evaluated in Indiana by Robert K. Silbert, M.D., and the Indiana Center for Rehabilitation Medicine. The conclusion of the center was that claimant had psychogenic problems with secondary gain factors.

Thus, claimant has seen numerous physicians, but none have given claimant a rating of permanent physical impairment. Most of claimant's physicians state that the pain she reports has a psychological, rather than physical, origin. There is no medical evidence in the record indicating that claimant's psychological condition is itself caused by her injury. Claimant bears the burden of proof to show that she has permanent disability causally related to her work injury. Claimant has failed to carry her burden.

Taking the medical evidence as a whole, it is found that claimant has not shown any evidence of permanent physical disability. Claimant's reported symptoms are exaggerated, and there is no objective finding of permanent impairment to claimant's back. Although claimant has shown an injury arising

out of and in the course of her employment, she has not shown that the injury resulted in any permanent disability.

Claimant injured her back on April 7, 1986. Claimant has been paid temporary total disability benefits or temporary partial disability benefits through March 17, 1987. Claimant has been off work since March 17, 1987. Claimant seeks additional temporary total disability benefits or healing period benefits from March 17, 1987.

Following her April 7, 1986 injury, claimant was released to return to work in August of 1986 by Dr. Lentini. Claimant was also released to return to part-time work by Dr. Durnin in August of 1987. There is no medical evidence that claimant was prohibited from working after March 17, 1987, other than claimant's own testimony that she was unable to do so. It has already been determined that much of claimant's perception of pain is psychological in origin. After leaving work in March 1987, claimant was evaluated by Dr. Durnin, who reiterated Dr. Lentini's conclusion that claimant should return to work. In that claimant has failed to establish permanent disability, claimant is not entitled to healing period benefits. Claimant has also failed to carry her burden to show that she is entitled to temporary total disability benefits beyond March 17, 1987.

Claimant seeks medical benefits. Claimant did suffer an injury arising out of and in the course of her employment. Although her condition may be exaggerated, nevertheless the medical services provided were related to the effects of the work injury. Claimant is entitled to the medical benefits sought.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay the medical expenses listed in the prehearing report. Claimant shall be reimbursed for any of these expenses paid by her. Otherwise, defendants shall pay the provider directly along with any lawful late payment penalties imposed upon the account by the provider.

That defendants shall receive credit for previous payment of benefits under a non-occupational group insurance plan under Iowa Code section 85.38(2) plus any tax deductions from those payments, as set forth in the prehearing report.

That defendants are to pay all costs of the arbitration proceeding including the cost of transcription of the hearing.

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 August, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALFRED GETTNER,	:	
Claimant,	:	File No. 860259
vs.	:	A P P E A L
WILSON FOODS CORPORATION,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
NOV 18 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 17, 1990 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 18th day of November, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEN D. GILE, Claimant, vs. DIERCKS, LTD., and MAHLER CONCRETE, Employers, and IOWA MUTUAL INSURANCE and FIREMAN'S FUND INSURANCE COS., Insurance Carriers, Defendants.	File Nos. 850778/881063 A P P E A L D E C I S I O N FILED OCT 31 1991 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants, Mahler Concrete and Fireman's Fund Insurance Companies (hereinafter Mahler) appeal and claimant cross-appeals from an arbitration decision awarding claimant temporary total disability benefits as a result of claimant's April 6, 1987 work-related injury and awarding claimant healing period benefits and permanent partial disability benefits as a result of claimant's July 24, 1987 work-related injury.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 5; defendant-Diercks' exhibits A through D and F; and defendant-Mahler's exhibits A-F. Mahler and claimant filed briefs on appeal. Mahler filed a reply brief.

ISSUES

Defendant Mahler states the issues on appeal are:

1. The proposed decision of the deputy industrial commissioner is contrary to record evidence, is not supported by substantial evidence in the record made before the agency when viewed as a whole, and is in error as a matter of law, improperly assessing the entire award of permanent impairment against the defendant, Mahler Concrete.

2. The deputy erred in finding that claimant met his burden of proving by a preponderance of the evidence that he received an injury of July 24, 1987, which arose out of and in the course of his employment with Mahler Concrete which resulted in permanent impairment.

Claimant states the issue on cross-appeal is:

II. The Deputy Industrial Commissioner erred in her assessment of Claimant's industrial disability due to a misinterpretation of evidence concerning Claimant's return to work in June of 1988 as unrestricted, rather than on a restricted basis.

REVIEW OF THE EVIDENCE

The arbitration decision filed February 28, 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 issues and evidence. The following additional citation is appropriate to the issue of apportionment:

> We have made it clear that apportionment is
>
> [limited] to those situations where a prior injury or illness, unrelated to the employment, independently produces some ascertainable portion of the ultimate industrial disability which exists following the employment related aggravation. Varied Enters., Inc. v. Sumner, 353 N.W.2d 407, 411 (Iowa 1984). (Citations omitted.)
>
> As Larson puts it:
>
> > Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable, and except in states having special statues on aggravation of disease, no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability or death. Apportionment does not apply in such cases, nor in any case

> in which the prior condition was not a disability in the compensation sense.

2A. Larson, The Law of Workmen's Compensation, section 59.22(a), at 10-371-76 (1989) (emphasis added).

....

> The distinction between functional disability or impairment and industrial disability is critical in understanding Larson's statement that apportionment does not apply to a "prior condition [which] was not a disability in the compensation sense." By this statement Larson means apportionment is not applied to an impairment that prior to the accident had no effect on the employee's ability to earn wages. Simply put, the "disability" Larson is talking about is industrial disability and not simply functional disability.

Bearce v. FMC Corp., 465 N.W.2d 531, 535 (Iowa 1991).

ANALYSIS

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

Claimant has proven by a preponderance of the evidence that he sustained an injury on April 6, 1987 which arose out of and in the course of his employment with defendant Diercks and an injury on July 24, 1987 which arose out of and in the course of his employment with defendant Mahler.

Claimant was released by John Hoffman, M.D., to return to full duty following the April 6, 1987 work injury. Claimant began working for defendant Mahler with no restrictions. Claimant sought no medical treatment for his back between the time of his April 6, 1987 work injury and the July 24, 1987 work injury. The July 24, 1987 work injury materially aggravated claimant's preexisting back problem to the point where claimant needed surgery. "When employees are hired, employers take them subject to any active or dormant health impairments incurred prior to employment." Zeigler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960). Apportionment is not proper in this case as claimant was released to full duty following the April 6, 1987 work injury. Claimant was not disabled for industrial purposes following the April 6, 1987 work injury. It was only after claimant sustained the July 24, 1987 work injury did he need surgery. Any industrial disability which claimant sustained is a result of the July 24, 1987 work injury.

Claimant was born August 29, 1960 and was twenty-six at the time of his injury with defendant Mahler. Claimant completed the tenth grade and has not obtained a GED. Claimant started working for defendant Diercks at age seventeen. Claimant's work experience consists of physical labor. Claimant had been treated by a chiropractor prior to his April 6, 1987 work injury but had not received treatment for a number of years. Following claimant's April 6, 1987 work injury, Dr. Hoffman released claimant with no limitations on his activities. Dr. Hoffman performed a laminectomy on October 14, 1987 at the L5-S1 level. On August 30, 1988, Dr. Hoffman opined that claimant sustained nine percent permanent impairment of the whole person, half of which he attributed to claimant's April 6, 1987 work injury and half to the July 24, 1987 work injury. Dr. Hoffman released claimant to return to work following the July 24, 1987 work injury with no restrictions. Claimant testified that he limited his activities due to back pain following the July 24, 1987 work injury. Claimant earned $10.50 an hour prior to his injury while he was working for defendant Mahler and $7.50 an hour while working for defendant Diercks. At the time of the hearing, claimant had been working in a sheet metal shop earning $8.72 an hour. Claimant was laid off at the time of the hearing.

Claimant proved by a preponderance of the evidence entitlement to 15 percent permanent partial disability benefits as a result of the July 24, 1987 work injury.

FINDINGS OF FACT

1. Claimant sustained an injury to his lower back which arose out of and in the course of his employment with defendant Diercks on April 6, 1987.

2. Claimant was temporarily disabled as a result of his work injury on April 6, 1987.

3. Dr. Hoffman released claimant to return to work without restrictions following the April 6, 1987 work injury.

4. Claimant sustained an injury to his lower back on July 24, 1987 which arose out of and in the course of his employment with defendant Mahler.

5. As a result of the July 24, 1987 work injury, claimant underwent a laminectomy at the L5-S1 level.

6. Claimant was born August 29, 1960 and completed the tenth grade.

7. Claimant began working for defendant Diercks at age seventeen. Claimant's work experience is in the area of heavy labor.

8. Claimant earned $10.50 an hour working for the defendant Mahler at the time of the July 24, 1987 work injury. After surgery, claimant obtained a position with a sheet metal shop earning $8.72 an hour but was laid off at the time of the hearing.

9. Dr. Hoffman, following claimant's surgery, released claimant to return to work without restrictions. The only limits on claimant's activities are those he places upon himself.

10. Dr. Hoffman opined that claimant sustained nine percent permanent impairment of the whole person, half of which he attributed to claimant's April 6, 1987 work injury and the half to the July 24, 1987 work injury.

11. Claimant experienced a 15 percent reduction in his earning capacity as a result of the July 24, 1987 work injury.

CONCLUSIONS OF LAW

Claimant proved by a preponderance of the evidence that he sustained a work-related injury to his lower back on April 6, 1987 while working for defendant Diercks and a work-related injury to his lower back on July 24, 1987 while working for defendant Mahler.

Defendant Mahler is liable for the entire amount of claimant's industrial disability following the July 24, 1987 work injury. Claimant was not disabled for industrial purposes following the April 6, 1987 work injury.

Claimant proved by a preponderance of the evidence entitlement to 15 percent permanent partial disability benefits as a result of the July 24, 1987 work injury.

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

ORDER

THEREFORE, it is ordered:

That defendant Diercks shall pay unto claimant temporary total disability benefits from April 6, 1987 to June 15, 1987 at the rate of two hundred forty-six and 43/100 dollars ($246.43) per week as a result of the April 6, 1987 work injury.

That defendant Mahler shall pay unto claimant healing period benefits from July 28, 1987 to January 11, 1988 at the rate of two hundred sixty-nine and 48/100 dollars ($269.48) per week as a result of the injury on July 24, 1987.

That defendant Mahler shall pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of two hundred sixty-nine and 48/100 dollars ($269.48) per week as a result of the injury on July 24, 1987.

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

That defendants are given credit for all benefits previously paid.

That defendant Mahler shall pay the cost of this action including the costs of transcription of the arbitration hearing.

That defendants file claim activity reports pursuant to rule 343 IAC 3.1(2).

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

Byron K. Orton
BYRON K. ORTON
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201 West Second St.
Davenport, Iowa 52801

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEVIN G. GLASER,	:	
Claimant,	:	File No. 888736
vs.	:	A P P E A L
FLEXSTEEL INDUSTRIES, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed March 29, 1990, 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 10th day of December, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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Dubuque, Iowa 52001

Mr. E. J. Giovannetti
Attorney at Law
Suite 111, Terrace Center
2700 Grand Avenue
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES GLENN,

Claimant,

vs.

GEORGE A. HORMEL & COMPANY,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 715176

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed August 16, 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. All other costs are assessed against defendants pursuant to rule 343 IAC 4.33.

Signed and filed this 16th day of July, 1991.

Clair R. Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

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Mr. Tito Trevino
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK GOODE, Claimant, vs. GOERGE A. HORMEL & CO., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 798415/813084 A P P E A L D E C I S I O N FILED SEP 18 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 November 5, 1990, 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 18th day of September, 1991.

Byron K. Orton
BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES T. GRAVER,

Claimant,

vs.

LUCKY STORES, INC., d/b/a EAGLES DISCOUNT SUPERMARKET,

Employer,

and

NATIONAL UNION,

Insurance Carrier,
Defendants.

File No. 826626

A P P E A L

D E C I S I O N

FILED

NOV 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 July 18, 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 22nd day of November, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DOROTHY GRIFFITH,	:	FILED
Claimant,	:	SEP 17 1991
vs.	:	File No. 878096 IOWA INDUSTRIAL COMMISSIONER
NIEMANN FOODS, d/b/a COUNTY MARKET,	:	
	:	A P P E A L
Employer,	:	
	:	D E C I S I O N
and	:	
KEMPER 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 February 4, 1991 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

The deputy's reference to the knowledge of claimant's spouse concerning workers' compensation law is misplaced. Claimant is not charged with the knowledge of his or her spouse concerning workers' compensation law. It is irrelevant whether or not claimant's spouse had knowledge of entitlement to workers' compensation benefits.

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

Signed and filed this 17th day of September, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BERNARD GROSS, Claimant, vs. QUAKER OATS COMPANY, Employer, Self-Insured, and SECOND INJURY FUND OF IOWA, Defendants.	:	File No. 921036 A P P E A L D E C I S I O N

FILED
NOV 26 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 16, 1991 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Agency precedent is clear, where a party fails to comply with prehearing order requiring service of exhibit & witness list on opposing party that party's evidence is excluded. See, Clousing v. Rosenboom Machine & Tool, Appeal Decision, filed May 15, 1989.

Lack of prejudice or disadvantage does not justify admission of evidence where claimant failed to comply with the prehearing order.

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

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

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

149

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS V. HAGEMAN,

Claimant,

vs.

THOMAS V. HAGEMAN d/b/a HAGEMAN CONSTRUCTION AND LUMBER,

Employer,

and

IOWA MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 889156

FILED

OCT 28 1991

IOWA INDUSTRIAL COMMISSIONER

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed May 3, 1991 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 October, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DANIEL S. HALL,

Claimant,

vs.

PST, INC.,

Employer,

and

FIREMANS FUND INSURANCE,

Insurance Carrier,
Defendants.

File No. 877031

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed March 13, 1991, 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 17th day of October, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KAREN HAMILTON,	:	
Claimant,	:	File Nos. 854465/877068
vs.	:	A P P E A L
COMBINED INS. OF AMERICA,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed February 21, 1991 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 31st day of October, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH HARTZER,

Claimant,

vs.

SWIFT INDEPENDENT PACKING CO.,

Employer,

and

NATIONAL UNION FIRE INS.,

Insurance Carrier,
Defendants.

FILED

File No. 786164

JUN 30 1992

A P P E A L

IOWA INDUSTRIAL COMMISSIONER

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed January 31, 1990 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 30th day of June, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DUANE R. HEIDT, Claimant, vs. LINN PHOTO CO., Employer, and CRUM & FORSTER COMMERCIAL INS., Insurance Carrier, Defendants.	:	FILED File No. 916737 FEB 2 5 1992 A P P E A L IOWA INDUSTRIAL COMMISSIONER D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding temporary total disability benefits as the result of an alleged injury on June 30, 1989.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits A through E. Both parties filed briefs on appeal. Defendants filed a reply brief.

ISSUES

Defendants state the following issues on appeal:

I. Whether the deputy erred in finding that claimant sustained a compensable injury on June 30, 1989 involving both upper extremities?

II. In the alternative, if it is found that claimant sustained a compensable injury, whether the deputy erred in making an award of penalty benefits pursuant to section 86.13?

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed November 20, 1990 are adopted as final agency action, with the exception of those portions of the findings of

fact dealing with the assessment of penalty under Iowa Code section 86.13.

CONCLUSIONS OF LAW

The conclusions of law contained in the proposed agency decision filed November 20, 1990 addressing the issue of causal connection are adopted as final agency action.

In regards to the assessment of a penalty under Iowa Code section 86.13, it is found that defendants acted reasonably in withholding the voluntary payment of disability benefits. The medical evidence showed two opinions on causal connection of claimant's condition to his work injury. Dr. Hales' opinion stated that claimant's condition was probably causally connected to his work. Dr. Colah's opinion acknowledged that claimant's condition was possibly connected to his work activity. In that a possibility is insufficient to establish causal connection, the medical evidence contained two differing, although not necessarily contradicting, opinions on the issue of causation. The issue of causal connection was fairly debatable and a penalty is not appropriate.

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 six point two eight six (6.286) weeks of temporary total disability benefits at the rate of one hundred ninety-five and 19/100 dollars ($195.19), beginning with the period of June 30, 1989 to and not including August 13, 1989.

That defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against the award for weekly benefits previously paid. The record indicates there has been no previous benefits of any kind paid to claimant.

That defendants shall pay claimant's medical expenses incurred to date which amount to three thousand five hundred sixty-nine and 30/100 dollars ($3,569.30), and also shall pay his future medical expenses that are necessary for the continued treatment of claimant's bilateral carpal tunnel syndrome problems and bilateral ulnar nerve condition.

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

That defendants shall pay the costs of this matter including the transcription of the hearing.

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

Signed and filed this 25th day of February, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEITH E. HILL, Claimant, vs. JOHN DEERE OTTUMWA WORKS, Employer, Self-Insured, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 940609 A P P E A L D E C I S I O N FILED MAR 20 1992 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 November 25, 1991, 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 20th day of March, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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Hoover State Office Building
Des Moines, Iowa 50319

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEATING HISSEM,	:	
Claimant,	:	File No. 896512
vs.	:	A P P E A L
GRIFFIN WHEEL COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed March 5, 1991 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 23rd day of December, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN L. HOFFMANN, Claimant, vs. NATIONAL FARMERS ORGANIZATION, Employer, and AETNA LIFE AND CASUALTY, Insurance Carrier, Defendants.	File No. 760418 A P P E A L D E C I S I O N

FILED
OCT 28 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 April 30, 1991 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 October, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROY E. HONEYWELL, II, Claimant, vs. ALLEN DRILLING CO., Employer, and BITUMINOUS CASUALTY CORP., Insurance Carrier, Defendants.	:	File No. 833232 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on February 5, 1983. Defendants cross-appeal. The record on appeal consists of the transcript of the arbitration proceeding; and joint exhibits A and B. Both parties filed briefs on appeal. Both parties filed reply briefs.

ISSUES

The issues stated by the claimant are:

I. The injury should be evaluated as an injury to the body as a whole.

II. Healing period should continue uninterrupted to June 1986, the time of treatment at Oklahoma Osteopathic Hospital.

III. The treatments and healing period following the August 1985 surgery to remove the plates are causally connected to the injury.

IV. Pre-existing impairment is irrelevant in this case.

Defendants state the following issues on cross-appeal:

V. Did the deputy err in determining the extent of permanent partial disability sustained by the claimant as a result of the February 5, 1983 incident?

VI. Did the deputy err in assessing an expert witness fee against the employer/insurance carrier when claimant's expert did not appear at trial.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

The analysis contained in the proposed agency decision is adopted herein as set forth below. Segments designated by asterisks (*****) indicate portions of the proposed agency decision that have been intentionally deleted and do not form a part of this final agency decision. Segments designated by brackets ([ ]) indicate additional analysis.

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.

Claimant has met his burden in proving that the February 5, 1983 amputation injury aggravated his preexisting substance abuse disorder and personality disorder.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 5, 1983 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257

Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Section 85.34(1), Code of Iowa, provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) he has returned to work; (2) is medically capable of returning to substantially similar employment or (3) has achieved maximum medical recovery. The industrial commissioner has recognized that healing period benefits can be interrupted or intermittent. Willis v. Lehigh Portland Cement Company, Vol. 2-1, State of Iowa Industrial Commissioner Decisions, 485 (1984).

The end of the healing period occurs at the time when the physicians indicate that no further improvement is forthcoming. It is not determined by hindsight looking back to find the point at which recovery ceased. Thomas v. William Knudson & Son Inc., 394 N.W.2d 124, 126 (Iowa App. 1984); Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981).

Claimant has met his burden in proving entitlement to an intermittent healing period beginning February 5, 1983 through April 16, 1985; beginning August 15, 1985 through October 15, 1985; and beginning May 13, 1986 through June 12, 1986. Further awards of healing period would be speculative as the medical evidence does not support any other periods of lost time.

Claimant has failed to prove the causal connection of the February 5, 1983 injury to the medical expenses listed in Exhibit B.

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

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

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).

A claimant may not recover benefits for industrial disability if the injury is to a scheduled member and not to the body as a whole even when psychological problems affect earning capacity. A claimant is compensated for any reduction in earning capacity through the schedule. 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 399 (1942); Pilcher v. Penick and Ford, file number 618597 Industrial Commissioner (Appeal Decision October 21, 1987); Cannon v. Keokuk Steel Casting, file number 795331 Industrial Commissioner (Appeal Decision January 27, 1988).

Claimant has requested an award of industrial disability. Claimant's injury and impairment are limited to the right upper extremity. Psychological impairment and loss of earning capacity attributable to the aggravation have not been demonstrated. The undersigned is without jurisdiction to award industrial disability in a scheduled member case. As a matter of

law, the claimant is not entitled to industrial disability.

A treating physician's testimony is not entitled to greater weight as a matter of law than that of a physician who later examines claimant in anticipation of litigation. Weight to be given testimony of physician is a fact issue to be decided by the industrial commissioner in light of the record the parties develop. In this regard, both parties may develop facts as to the physician's employment in connection with litigation, if so; the physician's examination at a later date and not when the injuries were fresh; his arrangement as to compensation, the extent and nature of the physician's examination; the physician's education, experience, training, and practice; and all other factors which bear upon the weight and value of the physician's testimony. Both parties may bring all this information to the attention of the factfinder as either supporting or weakening the physician's testimony and opinion. All factors go to the value of the physician's testimony as a matter of fact not as a matter of law. Rockwell Graphics Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The Guides of the Evaluation of Permanent Impairment, published by the American Medical Association, are adopted as a guide for determining permanent partial disability under Iowa Code section 85.34(2)"a"-"r". Rule 343 IAC 2.4.

Upon considering all material factors, it is found that the evidence in this case supports an award of 91 percent permanent partial disability which entitles the claimant to recover 230 weeks of benefits under Iowa Code section 85.34(2)"m" as a result of the injury to claimant's right upper extremity.

The commencement date for permanent partial disability shall be April 17, 1985 and such disability shall be paid intermittently before and after the healing periods.

All costs incurred in the hearing before the deputy commissioner shall be taxed in the discretion of the deputy commissioner unless otherwise required by the rules of civil procedure governing discovery. Iowa Code section 86.40, Rule 343 IAC 4.33.

A deputy commissioner is without jurisdiction to consider an issue not listed as an issue on the hearing assignment order. See Joseph Presswood v. Iowa Beef Processors, (Appeal Decision filed November 14, 1986) holding an issue not noted on the hearing assignment order is an issue that is waived.

*****

Claimant has requested reimbursement for costs listed in Dr. Bost's letter of June 29, 1990. Dr. Bost's charges were for a section 85.39 medical examination to be used exclusively for trial.

*****

[Rule 343 IAC 4.33 sets forth allowable costs. Subsection 5 of that rule allows costs for the expenses of obtaining a doctor's deposition testimony provided that the costs do not exceed the amounts set forth in Iowa Code sections 622.69 and 622.72. Dr. Bost's report was not deposition testimony and cannot be awarded as costs under rule 4.33(5).

Rule 343 IAC 4.33(6) states that costs may be awarded for the reasonable costs of obtaining no more than two doctors' or practitioners' reports. Claimant seeks the costs of Dr. Bost's services under this rule. However, the rule contemplates the imposition of costs that are otherwise justified. Claimant did not seek prior authorization for an 85.39 examination, and 85.39 was not listed as an issue at the hearing. Claimant cannot seek an after the fact authorization of an 85.39 examination in the form of an award for costs. Costs are in the discretion of the commissioner pursuant to Iowa Code section 86.40. Claimant will not be awarded costs for Dr. Bost's fees.]

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

ORDER

THEREFORE, it is ordered:

That defendants are to pay claimant one hundred twenty-seven (127) weeks of healing period benefits at the rate of three hundred eight and 02/100 dollars ($308.02) for the periods February 5, 1983 through April 16, 1985; August 15, 1985 through October 15, 1985; and May 13, 1986 through June 12, 1986.

That defendants are to pay claimant two hundred thirty (230) weeks of permanent partial disability benefits at the rate of

three hundred eight and 02/100 dollars ($308.02) per week commencing April 17, 1985, and to be paid intermittently.

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

That defendants are to pay accrued amounts in a lump sum.

That defendants are to pay interest pursuant to Iowa Code section 85.3.

That defendants are to pay costs of the hearing proceeding pursuant to rule 343 IAC 4.33, and as set out in the analysis portion of the decision and the cost of the transcription of the hearing proceeding shall be shared equally.

That defendants are to file claim activity reports as required by this agency pursuant to rule 4.33 IAC 3.1.

Signed and filed this 21st day of October, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROY E. HONEYWELL, II, Claimant, vs. ALLEN DRILLING CO., Employer, and BITUMINOUS CASUALTY CORP., Insurance Carrier, Defendants.	:	File No. 833232 O R D E R N U N C P R O T U N C

The arbitration decision filed February 5, 1991, contained an error in computation. The arbitration decision and the appeal decision filed October 31, 1991 incorporating the arbitration decision are hereby amended as follows:

Defendants are to pay claimant two hundred twenty-seven and five/tenths (227.5) weeks of permanent partial disability benefits at the rate of three hundred eight and 02/100 dollars ($308.02) per week commencing April 17, 1985, and to be paid intermittently.

Signed and filed this 27th day of March, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD E. HOOPMAN, Claimant, vs. QUAKER OATS COMPANY, Employer, and TRANSPORTATION INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 822543 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed April 26, 1990 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

A motion in limine was sustained by the deputy at the hearing, excluding from the record certain economic studies of claimant's future loss of earnings. Loss of earnings is, of course, a relevant factor in the determination of claimant's industrial disability. However, this factor is limited to an analysis of claimant's loss of earnings from his injury as of the time of the hearing. It would be speculation to project that loss of earnings into the future. Claimant may retrain for a better job, or find employment that results in a lesser loss of earnings, no loss of earnings, or even greater earnings.

In addition, the reports in question clearly rely on factors not relevant to industrial disability. The projections seek to show loss of earning capacity, rather than loss of earnings. The determination of the loss of earning capacity is the province of this agency to decide.

For purposes of this de novo appeal, the testimony of Dr. Sandberg and Dr. Conway is considered only to the extent their reports show claimant's loss of earnings up to the date of the hearing. Those portions of their reports purporting to show a future loss of earnings, however, are not considered herein.

Defendants' exhibit 9, pertaining to wage and overtime information, was admitted into the record over claimant's objection. Defendants acknowledge the exhibit was not timely served under this agency's rules. Defendants' exhibit 9 is not considered a part of the record in this de novo appeal.

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

Signed and filed this 20th day of September, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS HOVEY,

Claimant,

vs.

QUAKER OATS COMPANY,

Employer,

and

TRANSPORTATION INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 854004

A P P E A L

D E C I S I O N

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IOWA INDUSTRIAL COMMISSIONER

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed April 26, 1990 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 17th day of September, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN HOWERTON, Claimant, vs. SULNEL COMPANY, Employer, and AETNA CASUALTY AND SURETY, Insurance Carrier, Defendants.	:	File No. 901700 A P P E A L D E C I S I O N

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STATEMENT OF THE CASE

Defendants appeal and claimant cross-appeals from an arbitration decision awarding benefits.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits A through I; claimant's exhibits 1 through 5; and defendants' exhibits A, B, D and E. Both parties filed briefs on appeal.

ISSUES

Defendants state the issues on appeal are:

I. Whether claimant met his burden of proving that he suffered a compensable injury on October 27, 1988.

II. Whether the arbitration decision awarded the claimant an erroneously high industrial disability.

III. Whether arbitration decision below should have included a finding of the claimant's credibility as it relates to his claim of a compensable injury.

Claimant states the issue on cross-appeal is:

The claimant's rate should have been calculated using the usual and customary hours worked by all

ironworkers, rather than by his earnings subsequent to his injury.

FINDINGS OF FACT

The findings of fact contained in the arbitration decision adequately and accurately reflect the pertinent evidence and will not be set forth herein, except that claimant is found to have sustained a loss of five percent of his earning capacity as a result of his work injury.

CONCLUSIONS OF LAW

The conclusions of law in the arbitration decision are adopted herein, as modified by the following additional analysis:

Claimant was able to return to his job after his injury although there was testimony that claimant later changed jobs to a lighter duty position, the record does not clearly establish that this was due to his injury rather than as a result of being able to bid into a lighter duty job because of seniority. Although claimant asserts he is uneasy doing the height work of an ironworker due to dizzy spells, his physicians have not imposed any restrictions on him other than a restriction to avoid any activity that causes pain. Tests showed that claimant is able to lift weights up to 170 pounds. Claimant has a rating of impairment, but has not suffered a loss of wages and in fact is now earning more than prior to his injury. Based on these and all the other factors of industrial disability, as set forth in the proposed agency decision, claimant has an industrial disability of five percent.

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

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant twenty-one point five seven one (21.571) weeks of healing period benefits at the rate of two hundred eighty-nine and 66/100 dollars ($289.66) per week in the total amount of six thousand two hundred forty-eight and 26/100 dollars ($6,248.26) commencing on December 8, 1988.

That defendants pay to claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of two hundred eighty-nine and 66/100 dollars ($289.66) per week in the total amount of seven thousand two hundred forty-one and 50/100 dollars ($7,241.50).

That all accrued benefits are to be paid in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That the costs of the arbitration proceeding are charged to defendants and the costs of appeal, including the cost of the transcript, are charged equally to defendants and claimant pursuant to rule 343 IAC 4.33. Claimant is also awarded the itemized costs of a medical report in the amount of twenty-five dollars ($25) paid to Robert C. Jones, M.D., which cost is supported by an itemized statement attached to the prehearing report.

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, 1991.

Byron K. Orton

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INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GENEVA HURLEY,	:	
Claimant,	:	File Nos. 910546/910548
vs.	:	A P P E A L
SHELLER GLOBE CORP.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed December 17, 1990 is affirmed and is adopted as the final agency action in this case except for reference to Beeck v. Kapalis, 302 N.W.2d 90, 93 (Iowa 1981).

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

Signed and filed this 17th day of September, 1991.

Byron K. Orton
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TIMOTHY INGERSOLL, Claimant, vs. TAMA MEAT PACKING CORPORATION, Employer, and AMERICAN MOTORISTS INSURANCE, Insurance Carrier, Defendants.	FILED NOV 18 1991 File No. 829275 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed June 25, 1990 is affirmed and adopted as the final agency action in this case with the following additional analysis.

Defendants assert on appeal that claimant experienced a change in condition in December of 1987 which was new and intervening. Upon reviewing the record, it is determined that defendants did not raise this issue at the hearing. Therefore, it will not be considered.

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

Signed and filed this 18th day of November, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LOUISE INGRAM, Claimant, vs. GENERAL MILLS, Employer, and LIBERTY MUTUAL, Insurance Carrier, Defendants.	:	File No. 870305 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed April 9, 1991 and all rulings herein are 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 20th day of November, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JESSE W. JAMES,	:	
Claimant,	:	File No. 747521
vs.	:	R E M A N D
SHELLER-GLOBE CORPORATION,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

STATEMENT OF THE CASE

This case is returned to the industrial commissioner on remand from the court of appeals.

The record on remand consists of the transcript of the arbitration hearing, joint exhibits 1 through 38 and defendant's exhibits A through C. Both parties filed briefs on remand.

ISSUES

The issues on remand are:

1. Whether or not decedent's asthmatic condition was caused or aggravated by her employment with the defendant?

2. If it is found that decedent's asthmatic condition was caused by her employment, was decedent's fatal acute asthmatic attack a natural and direct consequence of decedent's asthmatic condition?

REVIEW OF THE EVIDENCE

The prior appeal decision dated December 28, 1989 incorporated the review of evidence of the arbitration decision filed September 20, 1988. That review adequately and accurately reflects the pertinent evidence and it will not be totally reiterated herein.

John Beckert, D.O., was decedent's family physician. Medical records from Dr. Beckert reveal that Dr. Beckert treated decedent on August 4, 1981 for acute sinusitis and trachea bronchitis. Dr. Beckert continued to treat decedent on numerous occasions from 1983 through 1985 for acute bronchitis. On July

2, 1983, Dr. Beckert opined that decedent suffered from chronic chemical bronchitis. (Joint exhibit 19, page 6) Dr. Beckert opined that "patient appears to be having episode of bronchitis which I feel will continue if she continues to work at Sheller Globe." (Jt. ex. 19, p. 7) Dr. Beckert referred decedent to Leonard D. Grayson, M.D., for an evaluation. Dr. Beckert continued to treat decedent up until her death.

Dr. Grayson specializes in the areas of allergy and clinical immunology. Dr. Grayson used substances which decedent brought from work to test decedent's reactivity. The four substances were identified only as wax, a sponge-like gray plastic, soap solution and a solvent. Following the examination, Dr. Grayson opined:

> In an attempt to summarize all of this material, I have to say that of all the things that the patient brought in from work, the only item I can incriminate as causing some problem would be the jar that contained the wax. If there is wax vapor in the air, then I think it can cause trouble for this patient.
>
> However, the initial baseline pulmonary function study did show a mild obstructive pattern compatible with bronchitis, and this may be what the patient has as an underlying condition, possibly aggravated by exposure to the wax.

(Ex. 21, p. 3)

On October 26, 1983, Dr. Grayson performed an allergic reaction evaluation. Decedent tested positive for mixed molds and respiratory bacteria. Dr. Grayson prescribed medication and opined that "this patient, who has underlying chronic bronchitis condition, probably has the condition worsened by exposure to noxious fumes." (Jt. ex. 19, p. 6)

On April 22, 1985, claimant went to the University of Iowa Hospitals and Clinics. Decedent complained of wheezing, shortness of breath, and coughing which decedent associated with chemical fumes at work. Decedent related that her condition improved while she was off work and that each time she went back to Department 78 it took longer for her symptoms to improve. Decedent had been less symptomatic following her transfer from Department 78 to 15 in January 1984. Decedent, however, continued to be bothered by strong fumes from fork lifts and trucks, as well as by strong odors, cold exposure and emotional upsets.

Tests were performed by Walter Heirholzer, M.D., at the University of Iowa Hospitals and Clinics, who opined that

decedent suffered from "[h]yperactive airways disease, temporally related to work exposure by history, [with] positive methacholine challenge test. Further evaluation pending receipt of information to be sent by union on exposure history and by local M D and allergist." (Jt. ex. 22, pp. 6-7) Decedent was told that she could continue working at her job in Department 15 where she was not exposed to irritating chemicals. In a letter dated May 2, 1985, Dr. Heirholzer opined that decedent suffered from hyperactive airway disease possibly occupational asthma. (Jt. ex. 22, p. 12)

James Merchant, M.D., saw decedent on June 7, 1985. Dr. Merchant directs the Occupational Medicine Clinic at the University of Iowa Hospitals and Clinics. At that time decedent's diagnosis was occupational asthma. Dr. Merchant saw decedent again on July 15, 1985. Pulmonary function tests revealed that decedent experienced good reversal of her condition with bronchodilators. Dr. Merchant testified that:

> It was our opinion that she had occupational asthma and it was induced by her work exposure, by her history, and she had other medical evaluations which tended to support that that [sic] were done prior to coming to our clinic. So we felt that she did have occupational asthma.

(Jt. ex. 1, p. 8)

Mark D. Ravreby, M.D., testified concerning the cause of decedent's death. Dr. Ravreby is board certified in internal medicine. Dr. Ravreby did not treat decedent prior to her death. Dr. Ravreby examined decedent's medical records and the deposition of Jesse James in preparation for his deposition. Dr. Ravreby testified:

> Q. What do you believe to be the cause of the asthma that Rosa James had?
>
> A. She has a fairly typical background. She has a genetic background. Her mother and father had pulmonary disease. One of them had asthma, the other had emphysema. That's fairly typical in the genetic development of asthma. And so she was predisposed to having hypersensitive airway problems.
>
> ....
>
> A. I think the underlying asthma was most probably a genetic predisposition for it....

Q. So it's your belief that the primary reason that she developed asthma in the first instance was the genetic makeup that she has?

A. Genetic hypersensitivity, right.

....

Q. Now, Rosa James's complaints and symptoms are consistent with occupational asthma to the extent that she would repeatedly have symptoms at work and would seem to be better when she's away from work; isn't that right?

A. I would answer that this way: Her symptoms could be aggravated by any factor in her life. One of them was her occupation.

....

Q. Mr. Dahl's questions to you on direct examination posed the question of whether you found any direct relationship or words similar to that between her work and her death. Do you find any indirect relationship?

A. I do not find an indirect relationship other than the fact that if she were occupied and developed symptoms during work, that would temporarily aggravate her asthma at the time she was experiencing them. And so then I would have to conclude that there were some factors in her work that were responsible from time to time for symptoms.

But I would also have to say that when an exhaustive investigation was made of all the factors, none could be pinpointed. You would also have to say that her social family life had as much influence as did her occupation because she would develop attacks associated with anxiety as related to the Ativan she was taking and needed to take for an allay of anxiety from various physicians. And the third factor was infections; that when she'd get infections, her asthma would flare up again.

So to point to the aggravation of occupation as the predominant factor in her asthma would be unfair. It was associated with her living in general that caused her asthma to continue to progress. And it's sort of a -- Once the chain is developed, it's much easier, and

> so that factors in everyday life would flare up her asthma....

(Jt. ex. 3, pp. 14-16, 19 and 23-24)

Paul From, M.D., testified via deposition. Dr. From did not treat decedent for her asthmatic condition but reviewed decedent's medicine records and the deposition of Jesse James. Dr. From is board certified in internal medicine. Claimant's attorney asked Dr. From whether anything at work could have caused decedent's asthma. Dr. From responded:

> It's possible that exposure to materials at work could have at least aggravated an underlying bronchitic condition or an asthmatic bronchitic condition. That's not impossible. She had a history. She did have an evidence that she could have hyperactivity of her airways. She did have some sort of a reaction to this wax that she was exposed to at work. She also had skin test sensitivity to molds and bacteria, and in fact it was that to which she was hyposensitized. But all of those things, especially with the history of the wax and that sort of thing, that would indicate that she could have had some of her asthma aggravated by exposure at work.

(Jt. ex. 2, pp. 31-32)

In addition Dr. From testified:

> Q. And in this particular case, am I correct in saying that it's at least possible that the exposure to this wax material in the workplace over a period of years was possibly a cause of her developing this asthmatic underlying condition?
>
> A. I believe that's possible, yes.

(Jt. ex. 2, p. 34)

On redirect examination Dr. From testified:

> Q. Doctor, in your opinion was Rosa James, along with many other people, probably born with a hyperactivity or a sensitivity to certain irritants?
>
> A. Well, her body had the capacity to react to one or two exposures, at least repeated exposures of allergens with the peculiar disorder call asthma. I mean if she didn't have the tendency within her body, you know, she might have been exposed hundred of times and never had

> any trouble. But with that tendency, some exposures bring out the problem.

(Jt. ex. 2, p. 40)

Decedent's mother, Reba Cochenour testified that she suffered from asthma and that decedent's father suffers from emphysema.

APPLICABLE LAW

The court of appeals stated:

> It is the law of our state that where an accident occurs to an employee in the usual course of his employment, the employer is liable for all consequences that naturally and proximately flow from the accident. Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 491 (1936). A cause is considered proximate if it is a substantial factor in bring about the result. It need to be one cause; it does not have to be the only cause. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).
>
> Professor Larson, in his treatise on worker's compensation discusses the "Range of Compensable Consequences". In this section he states:
>
> > When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.
>
> 1 Larson, The Law of Worker's [sic] Compensation, §13.00 (1978).

James v. Sheller-Globe Corporation, (Court of Appeals, May 29, 1991)

Expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id., at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the

completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Expert testimony that claimant's condition could be causally related to claimant's employment, although not sufficient alone to support a finding of causal connection, may be coupled with nonexpert testimony tending to show causation and thus be sufficient to sustain an award. However, such evidence does not compel an award as a matter of law. It is for the fact finder to determine its ultimate probative value. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974).

An employer takes an employee subject to any active or dormant health impairments, and a work-connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960), and cases cited.

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

ANALYSIS

Claimant failed to prove by a preponderance of the evidence that it is probable that decedent's work was a substantial factor in causing or aggravating decedent's asthmatic condition.

Decedent was afflicted with a predisposition towards asthma. Decedent's mother suffered from asthma and her father suffered from emphysema. Dr. Ravreby testified that the primary reason decedent developed asthma was that decedent had a genetic hypersensitivity to asthma. Drs. Ravreby and From testified that it was possible that decedent's underlying asthmatic condition could be aggravated by factors at work. Neither physician, however, testified that it was probable that decedent's genetic hypersensitivity to asthma was aggravated by her employment.

Decedent's family physician Dr. Beckert opined that decedent's condition which he diagnosed as chemical bronchitis, would continue as long as decedent worked for defendant. Dr. Beckert did not express an opinion as to whether decedent's work caused or aggravated her condition and Dr. Beckert was not called

upon to testify. Decedent's condition was later diagnosed as asthma rather than bronchitis.

Even Dr. Grayson who tested decedent's reactivity to certain work placed substances opined that it was possible that decedent's work aggravated her underlying condition. A possibility is insufficient; a probability is necessary. Burt, 247 Iowa 691, 73 N.W.2d 732.

Dr. Heirholzer opined that decedent suffered from hyperactive airways disease, temporarily related to work exposure by history. Dr. Heirholzer thought further tests should be conducted pending information being sent to the clinic. These tests were never conducted.

Dr. Merchant testified that decedent suffered from asthma caused by workplace exposure. Dr. Merchant based his opinion on decedent's history and other medical evaluations. It appears that Dr. Merchant relied upon the tests performed by Dr. Grayson. As noted, Dr. Grayson opined that the wax substance from work could possibly aggravate decedent's underlying condition. In the medical records from the University of Iowa, there is no evidence that they had actually checked decedent's reactivity to the workplace wax or any other solvents. A methacholine test was performed but that looks for hyperactivity of the lining or mucosa of airways. While Dr. Merchant is a highly qualified physician, his opinion that decedent suffered from asthma caused by workplace exposure can be given little weight. Dr. Merchant performed no tests to determine whether decedent reacted positively to workplace substances. Dr. Merchant appears to rely, in part, upon the records of Dr. Grayson who opined that the wax substance could possibly aggravate decedent's underlying condition.

Dr. From testified that in order to really find out whether or not a person had sensitivity to something the substance should be taken in a vaporized form and the patient is to inhale the substance. If the patient suddenly experiences a drop in vital capacity and flow rates with the inhalation of the substance and then after removal from that offending agent in twenty to thirty minutes the patient returns to normal that would be evidence that agent must have caused that trouble. No such tests were performed at the University of Iowa. Dr. Grayson performed such testing, assuming that the tests were conducted under proper conditions, Dr. Grayson opined only to the possibility that the wax substance aggravated decedent's underlying condition.

After reviewing the evidence it is determined that claimant failed to prove by a preponderance of the evidence that it is

probable that decedent's work was a substantial factor in causing or aggravating decedent's asthmatic condition. It is possible that decedent's occupation may have aggravated her underlying predisposition to asthma. There are a variety of medical opinions that it is possible that decedent's work caused her asthma to manifest itself. However, there is insufficient evidence to conclude that decedent's work was the probable cause of her asthma. Claimant's burden of proof is a probability and not a possibility. Decedent, however, continued to be symptomatic for asthma after being transferred out of the area which Dr. Grayson opined could possibly aggravate claimant's problems. Decedent's work only temporarily aggravated her underlying asthmatic condition. Other things such as noxious fumes and emotional upsets also aggravated decedent's underlying asthmatic condition. These nonwork irritants may have caused her asthma to become symptomatic. Claimant failed to prove by a preponderance of the evidence that it is probable that decedent's work was a substantial factor in causing or aggravating decedent's asthmatic condition.

FINDINGS OF FACT

1. The decedent was afflicted with a predisposition towards asthma.

2. The decedent developed asthma during the time she was employed with the defendant.

3. Decedent's asthma was the primary factor responsible for her death.

4. Decedent died on September 7, 1985 of asthma while at her home.

5. Claimant was married to the decedent at the time of her death.

6. Drs. Ravreby and From testified that it was possible that decedent's underlying asthmatic condition could be aggravated by factors at work.

7. Dr. Grayson who tested decedent's reactivity to certain work placed substances opined that it was possible that decedent's work aggravated her underlying condition.

8. Dr. Heirholzer opined that decedent suffered from hyperactive airways disease, temporarily related to work exposure by history.

9. Dr. Merchant opined that decedent suffered from asthma caused by workplace exposure. Dr. Merchant performed a methacholine test but Dr. Merchant did not test decedent's reactivity to any workplace substances. Dr. Merchant's opinion is given less weight.

10. Decedent's asthmatic condition was temporarily aggravated by a number of factors such as strong fumes and odors, cold exposure and emotional upsets.

11. Decedent's occupation temporarily aggravated her asthmatic condition.

12. It is not probable that decedent's work for defendant caused her asthma.

CONCLUSIONS OF LAW

Claimant failed to prove by a preponderance of the evidence that it is probable that decedent's work was a substantial factor in causing or aggravating decedent's asthmatic condition. Decedent's occupation temporarily aggravated her asthmatic condition.

The second issue on appeal is moot and has not been considered.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That the costs of this remand shall be assessed to claimant pursuant to 343 IAC 4.33.

Signed and filed this 30th day of January, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JESSE W. JAMES,	:	
	:	File No. 747522
Claimant,	:	
	:	N U N C
vs.	:	
	:	P R O
SHELLER-GLOBE CORPORATION,	:	
	:	T U N C
Employer,	:	
Insurance Carrier,	:	O R D E R
Defendants.	:	

The remand decision filed in this matter January 30, 1992 is corrected to read as follows:

Page 8, the second full paragraph should read:

Dr. Heirholzer opined that decedent suffered from hyperactive airways disease, temporally related to work exposure by history. Dr. Heirholzer thought further tests should be conducted pending information being sent to the clinic. These tests were never conducted.

Page 9, Finding of Fact 8 should read:

8. Dr. Heirholzer opined that decedent suffered from hyperactive airways disease, temporally related to work exposure by history. He indicated that the decedent's history suggested occupational asthma and that completion of her evaluation was pending further information.

Signed and filed this 6th day of March, 1992.

Byron K. Orton

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FILED

MAR 6 1992

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JESSE W. JAMES,	:	
Claimant,	:	File No. 747521
vs.	:	DENIAL OF APPLICATION
SHELLER-GLOBE CORPORATION,	:	FOR REHEARING
Employer,	:	
Insurance Carrier,	:	
Defendants.	:	

Claimant has filed an application for rehearing of the remand decision in this case filed January 30, 1993. The defendant employer has filed a resistance to the application.

Claimant requests a rehearing for three reasons. The first reason is that claimant argues Dr. Grayson's opinion was disregarded. It was Dr. Grayson's October 26, 1983 opinion (Joint Exhibit 21, pages 5-6) that the decedent's underlying chronic bronchitis condition is probably worsened by exposure to noxious fumes. Dr. Grayson did not identify that the noxious fumes were fumes at claimant's workplace. There is no opinion by Dr. Grayson that the decedent's workplace exposure probably aggravated her underlying condition. Furthermore, if Dr. Grayson changed his opinion from his prior opinion (June 21, 1983, Jt. Ex. 21, pp. 1-4) there is no explanation why he changed his opinion. If in fact there was a change of opinion by Dr. Grayson, his opinions can be given little weight because of the unexplained change of opinions. Likewise, any other opinions based upon Dr. Grayson's opinions can be given little weight. Dr. Grayson's opinions were not disregarded. Claimant's first reason for a rehearing is rejected.

The second reason claimant urges for a rehearing is that there is no substantial evidence to support finding of fact number 8. Dr. Hierholzer opined that the "[h]yperactive airways disease, [were] temporally related to work exposure" (Jt. Ex. 22, p. 6). (Quoted on page 3 of the remand decision.) In certain instances the remand decision uses the word "temporarily" instead of "temporally" when referring to the medical evidence from Dr. Hierholzer. The scrivener's error that substituted the word "temporarily" for the word" temporally" will be corrected by means of a nunc pro tunc order.

The word "temporally" is defined in Webster's New World Dictionary, Ninth New Collegiate Edition, copyright 1983 at page 1214 to be: "1 a: of or relating to time as opposed to eternity b: of or relating to earthly life c: lay or secular rather than clerical or sacred: CIVIL <lords> 2: of or relating to grammatical tense or a distinction of time 3 a: of or relating to time as distinguished from space b: of or relating to the sequence of time or to a particular time." The word "temporally" is defined in Webster's New World Dictionary, Second Collegiate Edition, copyright 1976 at page 1464 to be: "1. lasting only for a time; transitory; temporary, not eternal 2. of this world; worldly, not spiritual 3. civil or secular rather than ecclesiastical 4. of or limited by time 5. *Gram.* that expresses time." (Emphasis added.) If the 1976 version of the definition of the word "temporally" is used, the decedent's condition would e considered temporary. If the 1983 version of the definition is used, decedent's condition coincided in time as distinguished perhaps from space with her work exposure. It is unclear what meaning of the word Dr. Hierholzer intended. Neither definition would require a determination that claimant's work exposure was anything other than a temporary aggravation.

Claimant argues that the definition of that should be used is coinciding in time. Assuming for the sake of argument that claimant's definition of the word "temporally" were to be accepted and Dr. Hierholzer's opinion meant that the decedent's condition related in time to her work exposure, the argument does not support claimant's contention that the decedent's condition was caused by her work. Merely because the decedent's condition coincided in time with workplace exposure does not mean that the workplace exposure was the cause of the condition. It is also worth noting that Dr. Hierholzer indicated in that same impression that further evaluation was pending. That evaluation was never conducted. Except for the scrivener's error which will be corrected, the remand decision properly considered the medical evidence of Dr. Hierholzer. Claimant's second reason for rehearing is rejected.

The third reason claimant urges for rehearing is that an improper standard of law was applied. The standard of law used was whether claimant proved by a preponderance of the evidence that it is probable that decedent's work was a substantial factor in causing or aggravating decedent's asthmatic condition. That is the proper standard of law. Claimant seems to argue that the industrial commissioner must rule out all other causes or make a determination what was the non-work cause of the decedent's asthma. It is claimant's burden of proof using the standard just cited to prove causal connection between her work and her alleged injury. Claimant's third reason for rehearing is rejected.

THEREFORE, claimant's request for rehearing is denied.

Signed and filed this 6th day of March, 1992.

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ARNOLD JANSSEN,	:	
Claimant,	:	File No. 907713
vs.	:	A P P E A L
ARCHER DANIELS MIDLAND,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed July 24, 1991 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 17th day of December, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS EDWARD JOHNSON,

Claimant,

vs.

ROCHESTER PRODUCTS,

Employer,

and

ROYAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 832378

A P P E A L

D E C I S I O N

FILED

AUG 29 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 February 28, 1990 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 29th day of August, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VERNE LARRY JOHNSON, Claimant, vs. FISHER CONTROLS INTERNATIONAL INC., Employer, and CIGNA, Insurance Carrier, Defendants.	File No. 865376 A P P E A L D E C I S I O N

FILED

FEB 28 1992

IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding temporary total disability benefits as the result of an alleged injury on October 23, 1987. The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 27. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. Whether or not claimant received a personal injury arising out of and in the course of his employment with Fisher Controls on or about October 23, 1985, including whether or not there is a causal relationship between an incident occurring on said date and claimed disability; and

2. Whether or not claimant is entitled to temporary disability benefits for time incapacitated as a result of a personal injury arising out of and in the course of his employment, if any.

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FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed September 19, 1989 are adopted as final agency action.

CONCLUSIONS OF LAW

Claimant bears the burden to show by a preponderance of the evidence that the condition that resulted in his temporary inability to work is causally connected to his work injury. The medical evidence consists largely of the testimony of Carl O. Lester, M.D., and John Grant, M.D. Dr. Lester testified that claimant's ulnar nerve dislocation was not temporarily aggravated by his work activity, although claimant states that Dr. Lester originally told him that it was. Nevertheless, Dr. Lester's testimony at the time of the hearing was clearly that there was no causal connection.

Dr. Grant more than once referred to a causal connection between claimant's condition and his work activity as "possible." A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). When pressed by claimant's attorney, Dr. Grant did describe the causal connection as "probable," but then immediately stated that he used the terms "possible" and "probable" interchangeably.

Dr. Lester is claimant's treating physician, and has more contact with claimant and his condition. Dr. Grant was an examining physician. Claimant bears the burden of proof. Dr. Grant's testimony, if read as merely opining that a causal connection is "possible," reinforces Dr. Lester's opinion as to a lack of causal connection. Even if Dr. Grant's testimony is read as stating that a causal connection is "probable," the opinion of Dr. Lester is given the greater weight in light of his greater familiarity with claimant's condition. Claimant has failed to carry his burden of proving a causal connection between his ulnar nerve dislocation and his work injury.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from these proceedings.

That claimant shall pay the costs of the appeal including the transcription of the hearing. Defendants shall pay all other costs.

Signed and filed this 28th day of February, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

E. KENNETH JONES,	:
Claimant,	:
vs.	: File No. 908648
CONTINENTAL BAKING COMPANY,	: A P P E A L
Employer,	: D E C I S I O N
and	:
AETNA CASUALTY & SURETY,	:
Insurance Carrier, Defendants.	:

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision filed April 24, 1990, awarding permanent partial disability benefits as the result of alleged injuries occurring in late summer, 1987, and on February 28, 1989. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 9; and defendants' exhibit A. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. The deputy erred in applying the discovery rule to claimant's traumatic injury of April 22, 1986 and concluding that the statute did not begin to run until late summer of 1987.

2. The deputy erred in applying the cumulative injury rule to claimant's traumatic injury of April 22, 1986 and concluding that the statute did not begin to run until February 28, 1989.

3. The deputy's finding that claimant could not reasonably have known of the seriousness of his injury until late summer of 1987 was not supported by substantial evidence when viewed as a whole.

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

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

ANALYSIS

On appeal, defendants urge that the deputy erred in finding dates of injury within the statute of limitations. The deputy found that claimant suffered an injury during the "late summer of 1987," and another injury date on February 28, 1989.

Essentially, claimant worked as a bread truck driver, and injured his right knee on April 22, 1986 when he stepped out of the truck onto a rock, twisted his knee and fell to the ground. Claimant sought medical attention, and x-rays were taken. Claimant was not given any restrictions. Claimant did not miss any work. Claimant's work required him to step in and out of his delivery truck up to 125 times per day.

Claimant continued to experience pain throughout the remainder of 1986, and in late summer of 1987, claimant began to experience a grinding sensation in his knee. In 1988, claimant developed a lump on his knee, and he returned to his physician at that time. Claimant then underwent surgery, which required him to leave work February 28, 1989.

Under the discovery rule enunciated in Orr v. Lewis Central School District, 298 N.W.2d 256, 261 (Iowa 1980), and Robinson v. Department of Transportation, 296 N.W.2d 809, 812 (Iowa 1980), the statute of limitations would not start to run until claimant recognized the nature, seriousness and probable compensable character of his injury. Thus, the deputy established April 22, 1986 as claimant's injury date but found that claimant could not have known of the seriousness of the injury until late summer 1987, when claimant began to experience the grinding pain in his knee.

The deputy also found an injury date of February 28, 1989, based on the cumulative injury rule. The deputy concluded that claimant suffered repetitive trauma from the daily actions of stepping into and out of the van that aggravated his prior knee injury. The testimony of Jerry L. Jochims, M.D., indicated that claimant's knee eventually "wore out."

Defendants argue on appeal that claimant's injury is not subject to the discovery rule, because claimant's condition flows from an identifiable, traumatic event. Defendants argue that there should be a distinction between "latent injuries" and "traumatic injuries with latent manifestation." Defendants cite LeBeau v. Dimig, 446 N.W.2d 800 (Iowa 1989). LeBeau is a tort case, dealing with the discovery rule in an automobile accident case. The plaintiff received a head injury, which appeared minor at first but later turned out to be the cause of epilepsy. However, the statute of limitations had expired by the time the epileptic condition was discovered.

In LeBeau, the Iowa Supreme Court used the "traumatic event latent manifestation" analysis. In the "latent manifestation" case the Court reasoned, the injured party is entitled to the discovery rule rather than charging him with facts which are "unknown and inherently unknowable." In the "traumatic event" case, however, the injured party has been injured by a noticeable, traumatic occurrence, where the injured party realizes both that he has been injured, and what is responsible for his injury, even though the full extent of the harm is not yet known.

The LeBeau court found that allowing the use of the discovery rule in traumatic event cases would result in an open-ended liability for defendants, multiple suits arising out of the same incident, and in effect would create two statutes of limitations for the same injury, one for the traumatic event itself and another for any latent effects. The court disallowed the claim filed beyond the statute of limitations.

Claimant, and the deputy, relied on Robinson, cited above. Robinson was a workers' compensation case. The Iowa Supreme Court in Robinson quoted 3 A. Larson, Workmen's Compensation Law §78.41 at 15-65 to 15-66 for the following proposition: "The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease."

Claimant, in essence, urges that, although he was clearly aware of his traumatic injury on April 22, 1986, and its compensable nature, he was not aware of its seriousness until late summer, 1987. It is noted that the Robinson decision holds that the determination of claimant's knowledge is a question of fact for the commissioner to decide. It is also noted that in Robinson, it was found that the claimant was aware of both the nature and seriousness of his offense at the time of his heart attack and benefits were denied.

In this case, claimant was aware of the work-related nature of his injury, and was also aware of its seriousness as indicated by the fact that he experienced considerable pain and felt compelled to seek medical treatment. Claimant's argument that the statute of limitations period should begin to run from the summer of 1987 is rejected. Claimant was aware of the seriousness of his April 22, 1986 injury immediately upon experiencing the injury. Claimant's action for the April 22, 1986 injury is barred by the statute of limitations.

However, claimant's activity of stepping in and out of the truck numerous times each day constituted a cumulative injury which aggravated his knee condition. The repetitive trauma of stepping in and out of the truck is a separate and distinct injury from the April 22, 1986 incident where claimant stepped on a rock and twisted his knee. Under McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985), the date of injury for a cumulative injury is the date on which claimant is compelled, due to pain from the injury, to leave work. In this case, claimant's activity of stepping into and out of his delivery truck was viewed by Dr. Jochims as "wearing out" claimant's knee. Claimant has established a cumulative injury in the form of repetitive trauma to his right knee, which constituted an aggravation of his April 22, 1986 injury. Claimant's right knee was made more susceptible to cumulative injury by the April 22, 1986 incident.

The cumulative injury would have its own period of limitation. The correct date of injury under McKeever would be the date claimant was compelled to leave work because of the injury. Claimant left work on February 28, 1989 to undergo surgery on his right knee for the effects of the cumulative aggravation of his knee condition. February 28, 1989 is the date of injury for claimant's aggravation injury. Claimant filed his action on May 8, 1989. Claimant's action is timely to the extent he seeks benefits for the aggravation of his April 22, 1986 injury, that has resulted from cumulative trauma following the April 22, 1986 incident.

If claimant's traumatic injury to his knee had caused disability separate and distinct from the disability caused by his cumulative injury caused by repeatedly stepping in and out of the truck, an apportionment between the two injuries would be necessary. However, the record indicates that the traumatic injury to the knee did not result in disability. Claimant was able to continue working without interruption or formal medical restriction until the grinding pain began in 1987, the result of months of stepping in and out of the truck over 100 times daily. It is found that all of claimant's present disability is caused by the cumulative injury. Bearce v. FMC Corporation, 465 N.W.2d 531 (Iowa 1991).

FINDINGS OF FACT

1. Claimant started to work for employer in May of 1967, continued to work for employer for 23 years and was still employed by employer at the time of the hearing on March 14, 1990.

2. Claimant stepped on a three inch rock in a parking lot which turned his ankle and twisted his knee while delivering bread for employer on April 22, 1986.

3. Claimant sustained an initial injury arising out of and in the course of the employment with employer on April 22, 1986.

4. Claimant was off work for surgery from February 28, 1989 to July 10, 1989.

5. Claimant's work following his April 22, 1986 injury required stepping in and out of a van approximately 125 times per working day.

6. Claimant experienced a "grinding sensation" and deterioration of his knee condition beginning in the summer of 1987.

7. Claimant suffered a cumulative injury to his knee as a result of stepping in and out of the van.

8. Claimant's original notice and petition was filed with the industrial commissioner on April 20, 1989.

CONCLUSIONS OF LAW

Claimant sustained an injury to his right knee arising out of and in the course of his employment on April 22, 1986.

Claimant's action for benefits based on the April 22, 1986 injury is barred by Iowa Code section 85.26(1).

Under the cumulative injury rule claimant sustained an injury that arose out of and in the course of employment on February 28, 1989.

Claimant's action for benefits based on the February 28, 1989 injury is not barred by Iowa Code section 85.26(1).

Claimant's April 22, 1986 injury did not result in permanent disability and an apportionment is not appropriate.

Claimant is entitled to 18 weeks and 6 days of temporary disability benefits for the period from February 28, 1989 to July 10, 1989.

Claimant is entitled to 77 weeks of permanent partial disability benefits for a 35 percent impairment to the right leg.

Claimant is entitled to the medical expenses enumerated above in the total amount of $7,048.72.

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

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant eighteen point eight five seven (18.857) weeks of healing period benefits at the rate of two hundred fifty-eight and 95/100 dollars ($258.95) per week as stipulated to by the parties in the total amount of four thousand eight hundred eighty-three and 02/100 dollars ($4,883.02) commencing on February 28, 1989.

That defendants pay to claimant seventy-seven (77) weeks of permanent partial disability benefits at the rate of two hundred fifty-eight and 95/100 dollars ($258.95) per week in the total amount of nineteen thousand nine hundred thirty-nine and 15/100 dollars ($19,939.15) commencing on July 10, 1989.

That defendants are not entitled to any credit for nonoccupational group health plan benefits or workers' compensation benefits paid to claimant prior to hearing.

That all accrued benefits are to be paid in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That defendants pay to claimant or the provider of medical services seven thousand forty-eight and 72/100 dollars ($7,048.72) in medical expenses itemized above.

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

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

That defendants file a first report of injury within twenty (20) days of the signing and filing of this decision.

Signed and filed this 24th day of September, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GILES JONES, Claimant, vs. A & M LAUNDRY, INC., Employer, and THE CINCINNATI INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 933505 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed August 14, 1991, 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 13th day of May, 1992.

Byron K. Orton
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL JONES, Claimant, vs. PLEASANT VALLEY PORK CORP., Employer, and GENERAL CASUALTY, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	:	FILED OCT 28 1991 IOWA INDUSTRIAL COMMISSIONER File No. 926289 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed May 23, 1991 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 October, 1991.

Byron K. Orton

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INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DANIEL L. KELLEY,	
Claimant,	
vs.	File No. 872737
SHEFFIELD CARE CENTER,	A P P E A L
Employer,	D E C I S I O N
and	
LIBERTY MUTUAL INSURANCE CO.,	
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.

FINDINGS OF FACT

The findings of fact of the decision of the deputy filed March 27, 1991 are affirmed and adopted.

CONCLUSIONS OF LAW

The claimant raises four issues on appeal. Two of those issues can be combined. The issues to be decided are:

1. Whether it was error not to grant a continuance in this case.

2. Whether it was error to exclude (proposed cx exhibit 1.) For the reasons discussed in the deputy's ruling on motion to exclude medical report or, in the alternative motion for continuance filed February 22, 1991, the exhibit in question should be excluded. There was no error in excluding proposed cx exhibit 1.

3. Whether claimant suffered an injury that arose out of and in the course of his employment.

The first issue to be addressed is whether it was error not to grant a continuance. Claimant argues it was error not to grant a continuance because claimant was unable to testify at the hearing and because certain medical evidence needed to be reviewed. Depositions of claimant are in the record. Claimant was present at the hearing but was, by his counsel's own statement, in no condition to testify (transcript, page 14, lines 14-15). Claimant's counsel also indicated that claimant would not be able to testify in the foreseeable future (Tr., p. 14, ll. 17-19; p. 20, ll. 4-12). No good purpose would have been served to allow a continuance because claimant was unable to testify at the time of the hearing. A prehearing order was filed February 2, 1990 which ordered that claimant complete discovery within 100 days of that order. The hearing in this matter was held on February 26, 1991. Claimant's failure to timely gain medical records in this case does not constitute good grounds for granting a continuance. There was no error in denying claimant's motion for continuance.

Claimant also alleges it was error to exclude certain medical evidence proposed claimant's exhibit 1.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on February 16, 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 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 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).

The Iowa Supreme Court has not yet determined whether stress, without accompanying physical injury, may constitute legal causation. Claimant's reliance upon Hanson v. Reichelt, 452 N.W.2d 164 (Iowa 1990) is misplaced. In that case the supreme court determined the standard for compensability in a heatstroke case. That standard is not applicable for an alleged mental-mental injury.

Claimant has not proved that his work or an event on February 16, 1988 was the factual cause of his condition. The findings of fact spell out the factual deficiencies and only a few need be repeated here. Claimant had previous difficulties maintaining prior employment. His condition degenerated during his employment with defendant employer. This progression took place prior to the alleged injury date of February 16, 1988 and is not attributable to any specific event or events. Some of claimant's problems with defendant employer's board of directors were a result of claimant's confrontational attitude. There is no reliable expert medical testimony that states that claimant's

employment was the probable cause of his condition. A mere possibility of causation does not meet claimant's burden of proof.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 16, 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 v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

It is worth noting that Dr. Olson was even hesitant to say that there was a possibility of a causal connection. It is also noteworthy that the diagnosis of Dr. Bethel was organic personality syndrome. Merely because claimant's employment was terminated does not mean that his employment was the factual cause of his mental condition.

When all the evidence is considered claimant has not proved that he suffered a mental injury that arose out of and in the course of his employment. Furthermore, claimant has not demonstrated that alleged employment stress constitutes legal causation for entitlement to workers' compensation benefits.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That all costs of this proceeding including transcription of the hearing are assessed to claimant.

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

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES KIMM, Claimant, vs. AMANA REFRIGERATION, INC., Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 823137 A P P E A L D E C I S I O N FILED DEC 4 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 April 3, 1990, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Defendants argue that Dr. LaMorgese's opinion that claimant fell 3-4 feet is mere speculation to which no weight should be given. We disagree. Where no one witnessed an event and the claimant has no recall of the event, the doctor is in the best position to offer opinion testimony as to the likely cause of the trauma that claimant received. Both Dr. LaMorgese and Dr. Caraway speak of a likely fall. Dr. LaMorgese speaks of a fall of from 3-4 feet; Dr. Caraway of a fall from 4-6 feet. Claimant was found at the bottom of the stairs with his broom leaning on the east side of the steps. The position of the broom and the proximity of claimant's body to the steps also support a finding that claimant had placed the broom at the steps, began to ascend the stairs and, in the course of doing so, fell.

Defendants argue claimant would not have sustained any loss of earnings had his employer not discharged him for reasons unrelated to the work injury. Had claimant remained employed with defendant employer, that fact might have had some bearing on claimant's ultimate industrial disability.

Certainly, defendants' willingness to retain claimant post-injury is commendable. Actual earnings and loss of earning capacity are not equivalent, however. An employer's willingness to tolerate a less than 100 percent capable employee after an injury and an employee's willingness to work with some discomfort after an injury may well reduce actual loss of earnings where an employee remains in an employer's employ subsequent to an injury. That fact, while entitled to due consideration, does not obviate the reality that claimant's ability to compete favorably in the open labor market has been reduced as a result of his work injury. The employee's inability to compete as favorably subsequent to an injury as the employee could compete prior to an injury is the loss of earning capacity for which fair compensation is awarded. The record supports the deputy's finding that conditions unrelated to claimant's work injury have impacted on his post-injury loss of earning capacity. The record also supports the deputy's finding that the work injury and its residuals, when coupled with claimant's education, training, experience and inherent abilities, have of themselves produced a loss of earning capacity equal to the 25 percent of the body as a whole awarded.

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

Signed and filed this 4th day of December, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHELLIE KISSNER (MRS. THOMAS), Claimant, vs. COMPOSITE TECHNOLOGIES, Employer, and UNITED FIRE & CASUALTY CO., Insurance Carrier, Defendants.	File No. 963058 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed August 28, 1991 is affirmed and is adopted as the final agency action in this case with the following additional analysis:

Claimant's Exhibit A was properly excluded. The hearing assignment order dated July 17, 1991 required that all exhibits be served on the opposing party no later than 15 days prior to the date of the hearing. Claimant's Exhibit A was not served until four days prior to the hearing which was less than 15 days before the August 17, 1991 hearing. The exhibit itself is irrelevant for purposes of determining whether the decedent may or may not have been a full-time employee for workers' compensation purposes. The decedent's alleged status for purposes of entitlement to life insurance benefits is irrelevant for purposes of determining the rate of compensation for workers' compensation benefits.

Claimant seeks weekly benefits pursuant to Iowa Code section 85.31 for the death of her spouse. The rate of compensation should be computed under Iowa Code section 85.36(10) for this claimant as the decedent was a part-time employee at the time of his death.

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

Signed and filed this 28th day of February, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWARD J. KOCAL, Claimant, vs. DEPT. OF NATURAL RESOURCES, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	FILED DEC 27 1991 IOWA INDUSTRIAL COMMISSIONER File No. 855809 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The proposed decision of the deputy filed April 30, 1990 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Defendants assert that Deputy Walshire erred in failing to recuse himself prior to the hearing. A prior agency decision exists which addresses this issue:

> Defendants filed a motion seeking a recusal of Deputy Walshire from hearing the case. Defendants pointed out Iowa Administrative Code section 343-4.38 (17A), which provides:
>
> > Any individuals presiding over contested cases before the industrial commissioner shall disqualify themselves from conducting a hearing on the merits or deciding any contested case in which such individual has substantial prior contact or interest or is so related to or connected with any party or attorney thereto so as to give, in the opinion of the person presiding, even the appearance of impropriety for such individual to conduct such hearing or decide such case.

Rule 4.38 was cited by defendants in their motion for recusal. However, 4.38 deals with self-disqualification by the hearing officer. By its language, the rule is invoked only when the deputy subjectively concludes that an appearance of impropriety exists. Deputy Walshire concluded that no appearance of impropriety existed.

The actual nature of the defendants' motion for recusal was a claim of bias. As a motion for involuntary disqualification, defendants' motion should not have been brought under rule 4.38, but under Iowa Code section 17A.17(4). That section states:

> A party to a contested case proceeding may file a timely and sufficient affidavit asserting disqualification according to the provisions of subsection 3, or asserting personal bias of an individual participating in the making of any proposed or final decision in that case. The agency shall determine the matter as part of the record in the case. When an agency in these circumstances makes such a determination with respect to an agency member, that determination shall be subject to de novo judicial review in any subsequent review proceeding of the case.

Iowa Code 17A.17(4) also refers to a timely affidavit alleging grounds for disqualification. A motion for recusal filed on the morning of the scheduled hearing cannot be viewed as timely, especially in light of the requirement of 17A.17(4) that the agency, presumably someone other than the deputy who is alleged to be biased, determine the matter. Deputy Walshire's union position and activities were known to the defendants well in advance of the date of the hearing. Regardless of the merits of the motion for recusal based on Deputy Walshire's union position, it was not properly raised in this instance, and will not be addressed on appeal.

Miller v. Woodard State Hospital School, Appeal Decision, filed May 31, 1990.

Next, the defendants contend that the deputy erred in awarding claimant permanent partial disability benefits as a result of his May 26, 1987 work injury. The deputy correctly points out in the statement of the facts that William Catalona, M.D., was claimant's treating physician. The opinions of Dr.

Catalona, claimant's treating physician, will be given greater weight.

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

Signed and filed this 27th day of December, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

JAN 31 1992

IOWA INDUSTRIAL COMMISSIONER

EDWARD J. KOCAL,

Claimant,

vs.

DEPT. OF NATURAL RESOURCES,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

File No. 855809

R U L I N G O N

M O T I O N F O R

R E H E A R I N G

Defendant, State of Iowa, filed a motion for reconsideration on January 15, 1992. There is not a timely resistance on file. The motion is considered to be a motion for rehearing pursuant to Iowa Code 17A.16.

Defendant offers three grounds for rehearing. Rehearing is denied on the recusal ground. Defendant had opportunity to ascertain which deputy would be presiding at the hearing prior to the hearing date. A motion for recusal made at the hearing is untimely.

Rehearing is granted on the ground of misapplication of Iowa Code 85.34(2)(f). Iowa Code 85.34(2)(f) places a limitation on any award where the injury is confined to the loss of the first or distal phalange of the thumb or any finger. The medical evidence establishes that the injury resulted in the loss of the first or distal phalange. Although defendant argues that the ratings provided limit any award to one-half of one-half of the thumb, taken as a whole the medical evidence indicates that although the actual amputation of the distal phalange may be limited to one-half, the ratings of impairment indicate that the loss of use of the distal phalange is greater than one-half. Claimant has lost the use of the first or distal phalange, and Iowa Code 85.34(2)(f) equates such a loss to one-half of the thumb.

Under Iowa Code 85.34(2)(a), the loss of a thumb results in weekly compensation for sixty weeks. Applying 85.34(2)(f) to 85.34(2)(a), any award for an injury confined to the first or distal phalange would be limited to a maximum of one-half of sixty weeks, or thirty weeks. The order of the deputy awarding

thirty-three weeks is hereby modified to award claimant thirty weeks of compensation.

Rehearing is also granted on the ground of improper rejection of a stipulation between the parties. At the time of the prehearing, the parties offered a series of stipulations, including a stipulation that the claimant's injury was limited to his thumb. This stipulation was later rejected by the deputy, and an award for injury to the middle finger was made.

There was no indication at the hearing by the deputy that the stipulation would be rejected. In fact, claimant was asked whether he was making a claim for the finger serving as the skin graft donor site and claimant denied this. Transcript, p. 30. Defendant had no opportunity to object to the rejection of the stipulation, or to offer evidence to meet the issue covered by the stipulation. The fact that claimant appeared pro se and apparently gave testimony contradicting his earlier stipulation was an inadequate reason to reject the stipulation. Absent a showing of undue coercion or misrepresentation, a stipulation by a pro se party is as binding as one offered by a party represented by an attorney. Rejecting the stipulation after the hearing without giving defendant an opportunity to resist violates due process.

That portion of the order awarding claimant benefits for injury to his middle finger is hereby stricken.

Signed and filed this 31st day of January, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONNA M. KOEHLER, Claimant, vs. MORRISON, LLOYD AND MCCONNEL, Employer, and IMT INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 874140 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed February 28, 1990, is affirmed and is adopted as the final agency action in this matter, with the following additional analysis:

The American Heritage Dictionary 301 (Second College Edition 1985), defines "compel" as follows: "1. To force, drive or constrain: . . . . 2. To necessitate or pressure by force; exact: . . . ."

The deputy in his analysis states that in another case, other than McKeever, the supreme court might decide a different event to be the injury date, that is, an event other than the employee being compelled to leave work on account of the injury. It is not necessary to speculate as to that in this matter, however. The record is replete with evidence demonstrating that claimant was compelled to leave work on account of her carpal tunnel syndrome.

Claimant testified that she believed quitting work would relieve her symptoms. She testified that, after it did not relieve her symptoms, she then felt it was necessary to seek treatment (transcript, page 25). Claimant testified she retired on account of "various circumstances and especially my carpal tunnel business, I guess I just decided I better hang it up while I was still ahead maybe." (Transcript, page 24) In response to a question as to

whether the carpal tunnel syndrome disabled her from continuing work, she stated: "Being uncomfortable at work I'm sure had quite a bearing on it." (Transcript, page 26) She expressed her concerns that her carpal tunnel syndrome was becoming more and more disabling (transcript, page 27). She also testified regarding her decision to retire. "I had been suffering through the carpal tunnel and I just thought I'll just terminate. Just terminate the problem." (Transcript, page 33)

Hence, it is clear that claimant's carpal tunnel syndrome was a substantial factor in her decision to quit work. That she and her spouse may have made other plans as to retirement does not mitigate that fact. The law does not require than an employee reach such a state of abject helplessness and disability as to be unable to function at work or otherwise without radical medical intervention before the individual employee may leave work on account of pain related to the disabling condition. Claimant's decision to attempt to alleviate her symptomatology by leaving the work place via retirement at age 60 was reasonable. It can properly be stated that she was compelled to leave work on account of her injury on her retirement date, that is, July 10, 1987.

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

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

Byron K. Orton
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

IN RE: JACK H. KOHLMEYER, a/k/a JACK KOHLMEYER, DEC.,

Claimant,

vs.

IOWA-ILLINOIS GAS & ELECTRIC, SELF-INSURED,

Employer,

and

JEANNINE MCINTIRE, a/k/a JEANNINE KOHLMEYER, SUSAN KOHLMEYER, Guardian, LARRY L. KOHLMEYER,

Defendants.

File No. 798651

A P P E A L

D E C I S I O N

Attorney, Thomas J. Currie, has appealed a decision by a deputy industrial commissioner filed September 23, 1991. The record in this matter shows the following, pertinent chronological sequence of events:

July 16, 1990 - Attorney Currie attempted to file a notice of attorney's lien.

July 30, 1990 - This agency informed Attorney Currie that the lien must be consented to by claimant and that if claimant did not consent to the lien, Attorney Currie could file a contested case to determine the appropriateness of the attorney's fees.

August 17, 1990 - Attorney Currie requested a contested case proceeding because claimant would not consent to the lien.

March 14, 1991 - Attorney Currie filed an affidavit in proof of delivery in response to orders from this agency filed January 15, 1991 and March 4, 1991.

July 22, 1991 - The hearing assignment order was issued and characterized this proceeding as an attorney fee dispute.

Attorney, Currie submitted evidence in the form of an affidavit and supplemental information as follows:

City National Bank loan principal paid by Tom Riley Law Firm	$2,500.00
City National Bank loan interest paid by Tom Riley Law Firm	318.07
Balance of expenses less payments received (including City National Bank loan proceeds)	131.37
Total	$2,949.44

(Exhibit A)

FINDINGS OF FACT

1. Attorney Currie initiated a contested case proceeding.

2. The contested case proceeding in this matter is an attorney fee dispute.

3. Attorney Currie claims reimbursement for alleged expenses in the amount of $2,949.44.

4. It is impossible to tell what expenses Attorney Currie has incurred.

CONCLUSIONS OF LAW

Iowa Code section 86.39 provides:

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

Attorney Currie who initiated this contested case proceeding has the burden of proving entitlement to the relief sought. Although it is not entirely clear from the appeal brief of Attorney Currie, it must be concluded that he seeks approval of certain legal expenses. The hearing assignment order in this matter characterized this case as a case for attorney fee dispute. Attorney Currie made no attempt to modify the hearing assignment order. He submitted no itemization supporting the alleged expenses totalling $2,949.44. The affidavit filed in this matter sheds no light on what the expenses were but merely gives an alleged total amount. The affidavit unsupported by any indication of what the alleged expenses were can be given little,

if any, weight. See Iowa Code section 17A.14. It is impossible to approve the alleged expenses in the amount of $2,949.44.

THEREFORE, it is ordered that:

Attorney Currie's claim for legal services in the amount of two thousand nine hundred forty-nine and 44/100 dollars ($2,949.44) is denied.

All costs of this proceeding are assessed to Attorney Currie.

Signed and filed this 24th day of February, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROY ALLEN KRAMER	:	
	:	
Claimant,	:	File No. 855418
	:	
vs.	:	A P P E A L
	:	
JOHN MORRELL & COMPANY,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed December 13, 1990 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 12th day of September, 1991.

Byron K. Orton
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUANITA A. KYLES,	:	
Claimant,	:	File No. 878944
vs.	:	A P P E A L
IBP, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding claimant 15 percent permanent partial disability to the foot as a result of claimant's May 6, 1988 work injury.

The record on appeal consists of the transcript of the arbitration; claimant's exhibits 1 through 9 and 11- 24; and defendant's exhibits F through K. Both parties filed briefs on appeal.

ISSUES

Defendant states the issues on appeal are:

1. Whether Claimant's exhibits 1 through 9 and 11 through 24 should be excluded for failure to serve the Exhibit List fifteen (15) days prior to Hearing.

2. Whether the causal relationship of the injury to permanent partial disability and temporary total disability disability [sic] were established to a reasonable degree of medical certainty.

3. Whether the May 6, 1988 injury resulted in temporary total disability or healing period and, if so, the amount thereof.

4. Whether the Deputy erred when she awarded 15% permanent partial disability to the foot.

PRELIMINARY MATTERS

Initially, it is necessary to determine whether the deputy erred in admitting claimant's exhibits which were not exchanged in a timely matter. Pursuant to the hearing assignment order filed on March 8, 1990, the parties were ordered to serve their respective witness and exhibit lists fifteen days prior to the hearing. The defendant timely served its exhibit list. Claimant's attorney stated at the time of the hearing that the exhibit list was not served upon the defendant until the day before the hearing.

The hearing assignment order contains the following language:

> 6. Witness and Exhibit Lists. A list of all witnesses to be called at the hearing and a list of all proposed exhibits to be offered into the evidence at the hearing along with copies of all written exhibits not previously served shall be served upon opposing parties no later than fifteen (15) days prior to the date of hearing. Only those witnesses listed will be permitted to testify at the hearing unless their testimony is clearly rebuttal or sur-rebuttal. Medical records, practitioners reports and all other written evidence shall not be admitted as exhibits at the hearing unless they have been timely served upon an opposing party as ordered herein. The service of witness lists pursuant to this Order does not modify the requirements of Iowa Rule of Civil Procedure 125c to supplement responses to discovery as to experts not less than thirty (30) days prior to hearing. (Emphasis in instrument.)

The defendant objected to claimant's exhibits on the grounds that the exhibit list was not exchanged in a timely matter. Claimant's attorney stated at the prehearing that he would be involved in three different trials in the same month as the arbitration hearing. Claimant contends that since the exhibits had been served and were fully known as potential exhibits to the employer, that the 15 days should be waived and that claimant's exhibits 1 through 24 should be allowed. The deputy ruled that all of claimant's exhibits but claimant's exhibit 10 would be admitted into evidence. Exhibit 10 had not been previously served upon the defendant.

> 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

P66

not complied with. Klass v. Commercial Services, Inc., IV Iowa Industrial Commissioner Report 205 (Appeal Decision, June 29, 1984).

....

The bounds of discovery are much broader than the matters which might be deemed admissible at the time of the hearing. The witness lists and the exhibit lists limit the areas of inquiry so that both sides can prepare their cases without surprises. Such rules and orders encourage settlement and make hearings simpler. The exchange of exhibit lists and witness lists eliminates the element of surprise by an opposing party. Such rules benefit claimants as well as defendants.

The deputy had discretion on what sanctions would be imposed. The deputy could have dismissed the action but instead imposed the sanction of closing the record to the evidence which was not in compliance with the prior order. The hearing deputy did not have the authority to change the pre-hearing order of another deputy industrial commissioner or, in this case, the industrial commissioner. The question before the hearing deputy was whether claimant had complied with the prehearing order.

Clousing v. Rosenboom Machine & Tool, Appeal Decision, 818236, May 15, 1989.

Claimant's attorney acknowledged that he did not serve the exhibit list upon the defendant until the day before the hearing. Clearly, claimant failed to comply with the hearing assignment order. Claimant's attorney stated that he informed the defendant at prehearing that he had a busy trial schedule prior to the arbitration hearing. The attorney for the defendant acknowledged that he was aware of claimant's counsel's busy schedule.

Claimant bears the burden of showing a good reason why he failed to comply with the hearing assignment order. In this case, claimant has failed to show good reason for failing to comply with the hearing assignment order. A busy trial schedule does not excuse claimant's failure to exchange an exhibit list until the day prior to the hearing. Those exhibits listed on both claimant's tardy exhibit list and defendant's timely exhibit list will be admitted into evidence. Those exhibits are claimant's exhibit 1, 3, 6, 7, 18, 20, 23, and 24. "It is held that when any party serves an exhibit list pursuant to a hearing assignment order, all parties may justifiably assume that sufficient notice has been given as to those exhibits." Mortimer

v. Fruehauf Corporation, Appeal Decision, 506116, September 12, 1991.

It is further determined that those exhibits listed on claimant's tardy exhibit list; namely, 2, 4, 5, 8, 9, 12, 13, 14, 15, 16, 17, 19, 21, and 22, do not form a part of this decision. The deputy did not have the authority to change the hearing assignment order of another deputy. In addition, claimant failed to show that a good reason existed for his failure to comply with the hearing assignment order. The deputy properly excluded exhibit 10 which claimant failed to serve upon the defendant.

In addition, the mere service of evidence does not comply with the hearing assignment order. Any number of exhibits may be served on the opposing party during the course of litigation, but that does not serve to identify which exhibits the party intends to offer as evidence. Mortimer v. Fruehauf Corporation, Appeal Decision, 506116, September 12, 1991.

The record, including the transcript of the hearing before the deputy and claimant's exhibits 1, 3, 6, 7, 18, 20, 23, and 24; and defendant's exhibits F through K, has been reviewed de novo on appeal.

FINDINGS OF FACT

Claimant testified that she began working for the defendant on either May 1 or 2, 1988. The first few days of employment entailed orientation classes. On May 3, 1988, claimant began to work on the line. At the time of her injury, claimant was in a department trimming jowls. The parties stipulated to the fact that claimant sustained a work-related injury on May 6, 1988. Claimant testified that a knife she was using slipped out of her hand and fell into her boot close to her ankle bone. Claimant reported her injury to her supervisor, but felt that she was able to continue working. Claimant completed her shift that day. After the shift was over, claimant removed her boot and noticed blood on her sock.

Claimant went to the nurse's station where her injury was cleaned and bandaged. In claimant's medical file, a nurse at the defendant's plant described the wound as a 1/4 centimeter, superficial cut. (Claimant's exhibit 23.) Claimant was told to soak her ankle and keep it elevated. Claimant described that cut as just a "little slice." (Transcript, page 26.)

Claimant was scheduled to work the next morning, but called in and reported that she would be absent because her foot was swollen. A nurse from the defendant's plant contacted claimant concerning her foot and requested that she report to the nurse's station to have the foot examined. Claimant went to the nurse's

station where the wound was cleaned and bandaged. The defendant's nurse reported in claimant's medical file that claimant's foot did not appear to be swollen, red or inflamed. (Cl. ex. 23.)

Claimant was scheduled to work on Monday, May 9. Claimant testified that she called in and reported that she would not be at work because her foot was still swollen. Claimant testified that she continued to soak the wound and kept it elevated. The defendant's records reflect that claimant called in and quit on May 9, 1988. This appears to be a misunderstanding between claimant and the personnel department.

On Wednesday May 11, claimant testified that her foot was swollen and it hurt. Claimant went to Immanuel Medical Center. Claimant called into the defendant's personnel and talked to Lisa Brockway. An appointment was made for the claimant at the Cogley Clinic. Claimant was told to come into the personnel office and talk with Tom Dunlop to straighten out her employment situation. Claimant testified that she went into the plant and waited to talk with Dunlop, but left after two hours of waiting.

Claimant was ultimately referred to James R. Rochelle, M.D. Dr. Rochelle noted that claimant was tender over the anterior tibial and extensor hallucis longus tendons of the left foot. Dr. Rochelle referred claimant to physical therapy where claimant was prescribed a TENS unit and crutches.

Claimant testified that Dr. Rochelle released her to return to work with no restrictions on July 7, 1988. (Cl. ex. 1, p. 2.) Dr. Rochelle noted that claimant's ankle had significantly improved. Claimant began working for Person's Enterprise on July 29, 1988. Claimant worked only three days for Person's Enterprise. Claimant testified that she worked only three to four hours a day and her job required her to stand.

Claimant went to Dr. Rochelle's office on August 4, 1988. Dr. Rochelle noted that claimant had a one centimeter cyst distal to the previous inflammation. (Cl. ex. 1, p. 1.) Dr. Rochelle provided treatment and noted that claimant should remain off work for the next two weeks.

On August 15, 1988 claimant underwent surgery for removal for her ganglion cyst. A second surgery was performed on November 30, 1988. Dr. Rochelle opined that claimant reached maximum benefit from the medical treatment on April 13, 1989. Claimant testified that Dr. Rochelle prescribed orthopedic shoes and a Gelcast to help relieve claimant's pain.

CONCLUSIONS OF LAW

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

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

The parties stipulated to the fact that claimant sustained an injury which arose out of and in the course of her employment with the defendant on May 6, 1988. It is determined that claimant proved by a preponderance of the evidence a causal connection between her May 6, 1988 work injury and her tenosynovitis of her left foot. Claimant reported that her left foot continued to be symptomatic after the injury. The treatment prescribed by Dr. Rochelle is consistent with the type of work injury which claimant described. Therefore, claimant proved a causal connection between the May 6, 1988 work injury and the tenosynovitis of her left foot.

Claimant proved entitlement to healing period benefits from May 7, 1988 through July 7, 1988 and from August 4, 1988 through April 13, 1989. Claimant had attempted to return to work at defendant's plant, but because of miscommunication, personnel believed claimant had voluntarily quit. Claimant tried to become reinstated, but Tom Dunlop of the personnel department was unavailable to her. Through no fault of her own, claimant was unable to participate in a light duty program. It is determined that claimant is entitled to healing period benefits from May 7, 1988 through July 7, 1988 and from August 4, 1988 through April 13, 1989.

Claimant failed to prove by a preponderance of the evidence entitlement to permanent partial disability benefits as a result of the injury to her left foot. There is no evidence in claimant's exhibits 1, 3, 6, 7, 18, 20, 23, and 24 which proves that claimant is entitled to permanent partial disability benefits. It is noted that a Claims Activity Report received by this office on March 26, 1990, indicates that the defendant voluntarily paid claimant permanent partial disability benefits for her left foot injury.

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

ORDER

THEREFORE, it is ordered:

That the defendant shall pay healing period benefits from May 7, 1988 through July 7, 1988 and from August 4, 1988 through April 13, 1989 at the stipulated rate of one hundred seventy-one and 43/100 dollars ($171.43) per week.

That the defendant shall receive full credit for all benefits previously paid.

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

That the defendant file claim activity reports pursuant to rule 343 IAC 3.1(2).

Signed and filed this 31st day of January, 1992.

Byron K. Orton
BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES LAFFOON, Claimant, vs. AUTOMATIQUE VENDING, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	FILED AUG 26 1991 IOWA INDUSTRIAL COMMISSIONER File Nos. 858643/858644 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed January 30, 1991 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 26th day of August, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DARLA M. LAMP,

Claimant,

vs.

M.A. FORD MANUFACTURING CO.,

Employer,

and

AETNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 855487

A P P E A L

D E C I S I O N

FILED

JUL 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 March 13, 1990 is affirmed and is adopted as the final agency action in this case except where inconsistent with the following language.

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).

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.

When all the relevant factors given above are considered, the claimant has met her burden of proving an industrial disability of 35 percent.

Defendants shall pay all costs of this case, including the preparation of the hearing transcript.

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

Clair R. Cramer

CLAIR R. CRAMER
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SCOTT LAUGHLIN, Claimant, vs. WATERLOO CONSTRUCTION COMPANY, INC., Employer, Defendant.	:	File No. 855440 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed February 4, 1991 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 20th day of September, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GREGORY A. LEWIS,	:	FILED
Claimant,	:	JUL 22 1991
vs.	:	File No. 797154
DEE ZEE MANUFACTURING,	:	IOWA INDUSTRIAL COMMISSION
Employer,	:	A P P E A L
and	:	D E C I S I O N
KEMPER INSURANCE,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants, Dee Zee Manufacturing, employer and Kemper Insurance, insurance carrier, appeal from an arbitration decision awarding claimant healing period benefits; permanent partial disability benefits; and medical benefits.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibit 1. Both parties submitted appeal briefs.

ISSUES

The issues on appeal are:

1. Whether the deputy industrial commissioner erred in finding a causal connection between claimant's injuries and his employment.

2. Whether the deputy industrial commissioner erred in the calculation of claimant's workers' compensation rate.

REVIEW OF THE EVIDENCE

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

In the report of the operation dated July 25, 1985, Martin S. Rosenfeld, D.O., stated:

> Examination of the medial compartment revealed the medial meniscus and compartment to the intact and satisfactory. Anterior cruciate was hidden by hypertrophic synovium, the lateral compartment was satisfactory. The posterior patellar surface was satisfactory. There was a medial synovial plica present. Using the shaver the hypertrophic synovium from the intercondylar notch was removed. Viewing of the cruciate was carried out which again showed that it was stable. The hypertrophic synovium in the medial compartment and then the synovial plica was excised with a shaver.

(Joint Exhibit I, page 43)

Dr. Rosenfeld stated in his deposition:

> Q. Even though you do those procedures is it possible that there is still an internal damage to the fibers or the structures of the anterior cruciate that is not immediately detectable even though you used standard medical technique with him?
>
> A. Yes. It can tear in continuity, still be intact but lose its strength.
>
> Q. If it tore in continuity, would your manual testing or manipulation of the anterior cruciate -- would it reveal that loss of continuity, or is it a hit-and-miss-type proposition depending on the extent of loss of continuity?
>
> A. No. It should have -- during awake testing -- during clinical testing you should be able to elicit instability from a torn anterior cruciate whether it's intact or not. If it's intact the fibers stretch and they don't hold. You can't see it, but you would test it and be able to find the problem or with a probe you would be able to tell that it doesn't have the taughtness that it ought to.

(Joint Ex. 2, p. 21)

APPLICABLE LAW

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

ANALYSIS

Claimant worked for Dee Zee Manufacturing during the time he sustained injuries to his right knee, on May 9, 1985; March 16, 1986; and July 1, 1986. The parties stipulated that the injury on May 9, 1985 arose out of and in the course of claimant's employment, and as a causal result, claimant sustained a temporary disability. Defendants claim benefits were paid for 6.143 weeks; claimant contends he received 2.143 weeks of benefits.

The focus on appeal is on the two subsequent events which caused claimant to lose additional time from work and to undergo additional medical treatment. The main point of contention is whether claimant's subsequent injuries to the right knee on March 16, 1986 and July 1, 1986 were causally connected to claimant's May 9, 1985 work-related injury. Defendants maintain that claimant's volleyball activities on March 16, 1986 caused a separate and distinct injury to his right knee, and broke the causal thread between claimant's employment and the injury and thereby renders time off work and medical treatment administered after August 20, 1985 not compensable. Additionally, defendants argue that claimant sustained another separate and distinct injury when claimant's right knee locked while claimant was moving an appliance in his home.

Martin S. Rosenfeld, D.O., was claimant's principle treating physician. Dr. Rosenfeld first performed arthroscopic surgery upon claimant's right knee on July 25, 1985 following the May 9, 1985 work-related injury. The preoperative diagnosis was internal derangement of the right knee which Dr. Rosenfeld explained included a meniscus tear or damage to the anterior cruciate ligament. No such damage was found upon surgery and Dr. Rosenfeld repaired claimant's synovial plica and noted that the meniscus and the cruciate were intact.

During his deposition, Dr. Rosenfeld testified that he closely examined the medial meniscus and the anterior cruciate ligament because of claimant's complaint of knee locking but Dr. Rosenfeld was unable to find any damage. Dr. Rosenfeld released claimant to return to work with no restrictions on August 20, 1985. Claimant did not seek medical treatment from August 26, 1985 to March 17, 1986, however, claimant testified that he continued to experience swelling in the knee and that his knee would lock up on occasion. Claimant testified that he subbed for a volleyball team in the summer following his work injury and prior to the March 1986 incident.

On March 16, 1986, claimant testified that he participated in a volleyball game when his knee locked up and he was unable to correct the problem. He was treated at the Ankeny EmergiClinic

and saw Dr. Rosenfeld on March 17, 1986. Claimant told Dr. Rosenfeld that his knee locked while he was standing and that he was not jumping. At the hearing, claimant testified that he jumped during the game.

> Q. ... Can you tell or describe for me what you did?
>
> A. The ball was hit over to our side, I reached and stepped at the same time, which would be, I supposed, six to eight inches off the ground, which would be slightly -- a slight jump.

(Transcript, p. 52)

Dr. Rosenfeld performed a second arthroscopic surgery on March 21, 1986 to repair a tear of the anterior horn of the medial meniscus. This condition was not present when the first surgery was performed and Dr. Rosenfeld opined that it occurred between the first and the second surgery. (Jt. Ex. II, p. 13) Claimant returned to Dr. Rosenfeld's office on three occasions, and was released to return to work on May 12, 1986 with no work restrictions. Dr. Rosenfeld, during his deposition, opined that claimant sustained a five to ten percent impairment to claimant's right lower extremity as a result of the repair of claimant's medial meniscus.

Dr. Rosenfeld opined that a causal connection existed between the work-related fall on May 9, 1985 and the torn medial meniscus which Dr. Rosenfeld observed during arthroscopic surgery on March 21, 1986. Dr. Rosenfeld based his opinion upon the fact that claimant was standing when his knee locked during the volleyball game. Dr. Rosenfeld opined that "the continued problems with the knee are related to the initial injury and that the second surgery was necessitated because of the initial injury as opposed to the separate and distinct second injury while playing volleyball." (Jt. Ex. I, p. 36) Dr. Rosenfeld opined that there was something internally wrong with claimant's knee to cause it to lock up while standing.

During his deposition, Dr. Rosenfeld opined that the medial meniscus could tear from the type of physical activity associated with volleyball in and of itself. Claimant testified to a different rendition of the volleyball incident then what he told his treating physician. When claimant returned to Dr. Rosenfeld after the volleyball incident, claimant told him that he was standing when his knee popped and gave out. But, at the hearing, claimant testified that he reached and stepped to hit a ball, and the knee gave out when he landed. (Tr., pp. 54-55) It is entirely possible that Dr. Rosenfeld's opinion would differ if he was aware that claimant's volleyball injury occurred as a result of reaching and jumping into the air and then landing on

the ground. The weight to be given to such medical opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965); and Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Claimant has failed to prove a causal connection between his May 9, 1985 compensable knee injury and the subsequent knee injury on March 16, 1986 and July 1, 1986. Claimant testified that he continued to have problems with his right knee but failed to seek medical care. Dr. Rosenfeld opined that a causal connection existed between the repair of the torn medial meniscus on March 21, 1986 and his fall on May 9, 1985, but Dr. Rosenfeld based his opinion upon false information, therefore, it should be given little weight. Claimant failed to prove causal connection between his May 9, 1985 compensable knee injury and the subsequent knee injuries on March 16, 1986.

Even more remote, both in time and causally, is the July 1, 1986 episode. Claimant was moving an appliance in his home when his knee locked up again. Claimant sought treatment from Robert F. Breedlove, M.D., who subsequently performed another arthroscopic surgery, and ultimately surgery to reconstruct claimant's right anterior cruciate ligament. Dr. Breedlove, who performed the third arthroscopic surgery and the subsequent repair of the cruciate, did not express an opinion on causal connection between the May 9, 1985 work-related right knee injury and the July 1, 1986 right knee injury.

Doerfer Division of CCA v. Nicol, 359 N.W.2d 428 (Iowa 1984), states that the statute is to be liberally construed in favor of the worker. It does not, however, stand for the proposition that the facts should be liberally construed. The statute, not the facts are construed liberally. While the facts in this case point to the possibility of a causal connection between the May 9, 1985 work-related injury and claimant's subsequent injuries on March 16, 1986 and July 1, 1986, a possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). Dr. Breedlove did not express an opinion on the issue of causal connection and Dr. Rosenfeld's opinion is given light weight due to the fact that his opinion was based upon false information. Therefore, it is determined that claimant has not met his burden of proving that the May 9, 1985 work-related injury is the cause of his alleged right knee disability which occurred on March 16, 1986 and July 1, 1986.

The issue of the proper rate of compensation is moot.

FINDINGS OF FACT

1. Claimant was employed by the defendant-employer on May 9, 1985, March 16, 1986 and July 1, 1986.

2. Claimant sustained an injury to his right knee on May 9, 1985 which arose out of and in the course of his employment.

3. As a result of the work injury claimant had surgery on July 25, 1985. The post operative diagnosis was excision of synovial plica. There was no damage to the medial meniscus and the anterior cruciate ligament at the time of the July 25, 1985 surgery.

4. Claimant was released to return to work on August 20, 1985 with no restrictions and no permanent impairment rating.

5. Claimant had continued complaints of right knee pain but did not seek medical treatment from the time he was released to return to work by Dr. Rosenfeld until March 17, 1986 when he injured his knee during a volleyball game.

6. Claimant told Dr. Rosenfeld that he injured his right knee while standing during a volleyball game on March 16, 1986. Claimant testified that he reached and stepped and injured his right knee when he landed after a six to eight inch jump.

7. Dr. Rosenfeld opined that a causal connection existed between the May 9, 1985 work-related right knee injury and the March 16, 1986 volleyball incident. Dr. Rosenfeld's opinion was based upon incorrect information given to him by claimant.

8. Claimant sustained a non work-related injury to his right knee on March 16, 1986 while playing volleyball.

9. Claimant had surgery on March 21, 1986. The post operative diagnosis was a tear of the anterior horn of the medial meniscus.

10. Claimant sustained a non work-related injury to his right knee on June 29, 1986 while moving an appliance at his home.

11. Claimant had surgery on July 1, 1986. The post operative diagnosis was a cleavage tear, right medial meniscus, with anterior cruciate ligament instability.

12. Claimant had surgery on September 12, 1986. The post operative diagnosis was right anterior cruciate ligament deficient knee.

13. The damage to claimant's medial meniscus and anterior cruciate ligament was not caused by claimant's work injury on May 9, 1985.

14. Dr. Rosenfeld opined that claimant sustained a permanent impairment of five to ten percent as a result of the March 21, 1986 surgery to repair the torn meniscus. Dr. Breedlove opined that claimant had a 24 percent permanent impairment of his right upper extremity. Dr. Breedlove assigned ten percent due to the meniscectomy, ten percent due to the reconstruction of the anterior cruciate ligament, and four percent as a result of lack of range of motion.

15. Dr. Breedlove did not express an opinion as to the causal connection between claimant's May 9, 1985 work-related right knee injury and his July 1, 1986 right knee injury.

CONCLUSIONS OF LAW

Claimant failed to carry his burden of proof to show that his present right knee condition is causally connected to his work-related right knee injury of May 9, 1985.

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 this proceeding including the costs of transcription of the arbitration hearing.

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

Clair R Cramer

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MELANIE K. LIGHT-PRIMASING, Claimant, vs. IOWA DEPARTMENT OF HUMAN SERVICES, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	FILED AUG 29 1991 File No. 825148 IOWA INDUSTRIAL COMMISSION A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed March 30, 1990 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

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 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, Robert E. Smith, M.D., had an accurate history and medical records available to him. It was his opinion that claimant's psychological symptoms were only minimally related to work stress. Claimant has the burden of proving the factual cause of her mental condition was her work. Claimant has not met her burden of proof that her work was the factual cause of her mental condition. Merely because her condition manifested itself during claimant's tenure of employment does not mean that claimant's work was the factual cause of her mental condition and that she suffered an injury that arose out of and in the course of her employment.

Even if claimant had proved that her work was the factual cause of her mental condition, claimant must also prove that it was the legal cause. The standard for making this determination is whether claimant proved that her condition resulted from a situation of greater dimensions than day to day mental stresses and tensions which all employees must experience. When all the

evidence, including claimant's coworkers' testimony, claimant's absences from work (250 hours of sick leave from May 20, 1985 through March 27, 1986), and claimant's lacking of ability to cope, is considered claimant has not proved that her work was the legal cause of her mental condition. Claimant has not proved that she suffered a mental injury that arose out of and in the course of her employment.

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

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

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS LILLY, Claimant, vs. STONE CONTAINER CORPORATION, Employer, and KEMPER GROUP, Insurance Carrier, Defendants.	:	File No. 861913 A P P E A L D E C I S I O N

FILED

FEB 13 1992

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 27, 1987. The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 72; and defendants' exhibit A. Both parties filed briefs on appeal.

ISSUE

Defendants state the following issue on appeal: The extent of claimant's industrial disability.

FINDINGS OF FACT

The findings of fact of the arbitration decision filed January 15, 1991 are adopted herein.

CONCLUSIONS OF LAW

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

Claimant has shown poor motivation to find substitute work. Claimant did not take advantage of a job offered to him by defendants. Claimant's age of 36 indicates an ability to retrain himself for work within his restrictions. Claimant's ratings of impairment are relatively low. Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 20 percent.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay unto claimant 53 weeks of healing period benefits at the stipulated rate of two hundred twenty-three and 36/100 dollars ($223.36) per week commencing March 27, 1987 and totalling eleven thousand eight hundred thirty-eight and 08/100 dollars ($11,838.08).

That defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the stipulated rate of two hundred twenty-three and 36/100 dollars ($223.36) per week commencing April 1, 1988 and totalling twenty-two thousand three hundred thirty-six and 00/100 dollars ($22,336.00).

That defendants shall have credit for all payments voluntarily made prior to hearing.

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

That the costs of this action shall be assessed to defendants including the cost of the transcription of the hearing.

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

Signed and filed this 13th day of February, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLENE (RUSHTON) LIPPINCOTT,

Claimant,

vs.

IBP, INC.,

Employer,
Self-Insured,
Defendant.

File No. 876911

A P P E A L

D E C I S I O N

FILED

AUG 30 1991

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals and claimant cross-appeals from an arbitration decision awarding claimant 15 percent industrial disability.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 21; and defendant's exhibits A through M. Both parties filed briefs on appeal.

ISSUES

The defendant states the issues on appeal are:

1. Whether the causal relationship of the injury to the disability were established to a reasonable degree of medical certainty.

2. Whether the September 14, 1987 injury resulted in industrial disability and, if so, the amount thereof.

3. Whether Claimant's subjective complaints of pain which cannot be verified by objective findings are a substitute for disability.

4. Whether the Deputy erred when he excluded hearsay evidence concerning an incomplete medical history.

Claimant filed a cross-appeal on the issue of interest.

REVIEW OF THE EVIDENCE

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

The first issue to be addressed is whether the deputy erred in excluding hearsay evidence. Pursuant to Iowa Code section 17A.14, the rules of evidence are not strictly enforced, however, that does not mean that the ordinary rules of evidence should be disregarded at an administrative hearing. In this case, defendant attempted to offer into evidence the contents of a conversation between defendant's employee and claimant's physician concerning claimant's job restrictions in order to impeach an exhibit. Claimant made a timely objection which was sustained. In reviewing the evidence, the conversation between defendant's employee and the physician was written down in joint exhibit H. The document was signed by the physician. The evidence contained in joint exhibit H is more reliable and better evidence then the testimony offered at the hearing. The deputy did not err in excluding the hearsay evidence.

The final issue to be addressed is the amount of claimant's industrial disability as a result of her September 14, 1987 work injury.

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 Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Claimant's date of birth is February 16, 1961. Claimant was twenty-six at the time of her September 14, 1987 work-related injury. Claimant's injury has less of an impact upon her earning capacity than it would an employee who has reached middle age.

The defendant worked with claimant by offering her light-duty work which was within her work restrictions. In addition, defendant offered claimant vocational rehabilitation. Claimant refused to participated in the defendant's rehabilitation program and voluntarily quit.

> Defendant made great efforts to accommodate claimant's needs and should not be penalized for claimant's refusal to accept the offered work. If employers are to be held accountable for their failure to accommodate an employee after an injury, they should not be held unduly liable when acceptable attempts at rehabilitation and reemployment are arbitrarily rejected. Claimant's loss of earning capacity or industrial disability is therefore diminished accordingly. Cf. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

Johnson v. Chamberlain Mfg. Corporation/Collis Division, I Iowa Ind. Comm'r Rep. 166, 168 (1980).

When all relevant factors discussed therein and in the arbitration decision are considered, it is determined that claimant proved by a preponderance of the evidence an industrial disability of five percent.

FINDINGS OF FACT

1. Claimant was born February 16, 1961.

2. Claimant obtained her GED in 1978 or 1979.

3. Claimant's employment history consists of work as a waitress, assembly of small electrical parts, and line work at a turkey processing plant.

4. Claimant began working for the defendant in 1985. Her job duties at the time of the injury were to inspect the head, jowl, and shoulder of carcasses as they passed by her on the line and to use a hook and knife to cut out any unacceptable portions.

5. Claimant's injury of September 14, 1987 is an overuse syndrome which affects the right side of her upper back, right shoulder and the upper right chest.

6. As a result of the overuse syndrome, claimant should not engage in excessive or repetitive use of her right arm. She is also restricted in lifting to 15 pounds.

7. Claimant has full range of motion and no functional impairment, however, she is limited by a loss of strength and loss of ability to perform repetitive motions.

8. Claimant rejected a light-duty stamping job which is clearly within her physical restrictions.

9. Claimant rejected the defendant's offer of vocational rehabilitation.

10. Claimant was not motivated to remain employed with the defendant and resigned her employment on July 19, 1989.

11. Claimant has sustained a five percent loss of earning capacity as a result of the overuse syndrome.

CONCLUSIONS OF LAW

Claimant proved by a preponderance of the evidence a causal relationship between her work-related injury on September 14, 1987 and the disability affecting claimant's right upper body and right upper extremity.

Claimant proved by a preponderance of the evidence that she sustained a five percent industrial disability as a result of her worked related injury on September 14, 1987.

Subjective complaints of pain which are not verified by objective evidence are not a substitute for disability.

The deputy did not err in excluding hearsay evidence at the arbitration hearing.

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

ORDER

THEREFORE, it is ordered:

That defendant shall pay unto claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of two hundred fourteen and 52/100 dollars ($214.52) per week payable commencing April 27, 1988.

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

That defendant shall receive credit against the award for weekly benefits previously paid.

That defendant shall pay the costs of the appeal, including the costs of transcription of the arbitration hearing.

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

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

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM J. LITTLE, Claimant, vs. IOWA POWER AND LIGHT COMPANY, Employer, Self-Insured, Defendant.	:	File No. 850409 A P P E A L D E C I S I O N

FILED

SEP 17 1991

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 September 26, 1989 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Claimant's request for a change in medical treatment was not required to be ruled on prior to the hearing. Claimant's request for medical evaluation, which is designed to produce evidence for use at the hearing, was granted prior to the hearing, but claimant delayed the scheduling of the evaluation until after the hearing. Claimant bears the burden of proving his entitlement to benefits. Claimant's lack of medical evidence in his favor is the product of his own misreading of the statutes and delay caused by himself.

Defendant raises as an issue on appeal an alleged error in the award of temporary total disability, contrary to the stipulation of the parties. However, defendant did not file a cross-appeal and therefore cannot raise issues on appeal. A review of the file also indicates that no request for an order nunc pro tunc was made after the decision was issued.

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

Signed and filed this 17th day of September, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL D. LONGFELLOW,

Claimant,

vs.

GREENFIELD EQUIPMENT CO.,

Employer,

and

FEDERATED INSURANCE,

Insurance Carrier,
Defendants.

FILED

SEP 17 1991

IOWA INDUSTRIAL COMMISSIONER

File No. 872842

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed May 10, 1990 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 17th day of September, 1991.

Byron K. Orton

BYRON K. ORTON
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STANLEY LUBBERT, Claimant, vs. MARVIN GRONWOLDT, SR., Employer, and IMT INSURANCE, Insurance Carrier, Defendants.	File No. 772835 A P P E A L D E C I S I O N FILED JUN 10 1992 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 26, 1990 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 10th day of June, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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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 A P P E A L D E C I S I O N

FILED

JUL 30 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 January 23, 1991 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Even if claimant's garden incident of back spasm and pain does not constitute an intervening cause of his present back condition, claimant's medical evidence fails to establish a causal connection between his work injury and his present condition. Most of claimant's physicians did not attribute his back condition to his work injury, including physicians who were unaware of the garden incident. In addition, claimant's fibrositis was cited as a possible cause of his condition. Claimant bears the burden of proof. Claimant has failed to carry his burden to show that his present condition was caused by his work injury.

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

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

Clair R. Cramer

CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KATHY MASELTER,	:	
Claimant,	:	File No. 774542
vs.	:	A P P E A L
WILSON FOODS CORPORATION,	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed January 31, 1990, 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 29th day of October, 1991.

Byron K. Orton
BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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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
AUG 26 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.

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

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

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. MCCLELLON,	:	
Claimant,	:	File No. 894090
vs.	:	A P P E A L
IOWA SOUTHERN UTILITIES,	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant permanent partial disability benefits as a result of an August 11, 1988 work-related injury.

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

ISSUES

The issues on appeal are:

I. Whether claimant proved a causal connection between his August 11, 1988 work injury and his permanent disability?

II. If claimant proved a causal connection between his work injury and his permanent disability, is claimant entitled to permanent partial disability benefits?

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed May 2, 1991 are adopted as set forth below. Segments indicated by asterisks (*****) indicate portions of the language from the proposed agency decision that have been intentionally deleted and do not form a part of this final agency decision. Segments designated by brackets ([ ]) indicate language that is in addition to the language of the proposed agency decision.

A credibility finding is necessary to this decision as defendant places claimant's credibility at issue

during hearing as to the nature and extent of the injury and disability. From his demeanor while testifying, claimant is found credible.

Claimant worked for ISUC from 1972 until the time of the injury herein on August 11, 1988. Claimant initially completed an apprenticeship program and began working as a journeyman gas fitter. This work required heavy lifting at times including digging ditches and the operation of a jackhammer in the construction and repair of pipelines. In October of 1987 pursuant to the recommendations of his treating physician, claimant transferred to a light duty job of meter reading.

On or about August 11, 1988, claimant injured his spine from a slip and fall while performing the job of meter reading. This injury arose out and in the course of employment. The injury consisted of an aggravation of a preexisting systemic inflammatory disease of the spine called alkylosing spondylitis (hereinafter referred to as AS). This disease affects the area of the body where tendons and ligaments attach to bone structures. These tendons and ligaments then turn into bone fusing the vertebra of the spine. Eventually, the entire spine is fused in the final stages of the disease. The underlying disease is progressive and unrelated to claimant's work. However, work activity including the fall which occurred on August 11, 1988, aggravated and markedly increased symptoms of back and neck pain and loss of range of motion.

Claimant was first diagnosed by a specialist that he suffers from AS by physicians at the Mayo Clinic in September 1987. Claimant has been treated by chiropractors and medical doctors since that time but the most recent treating orthopedic surgeon is Louise Sparks, M.D., an associate professor of medicine at the University of Iowa Hospitals and Clinics, rheumotology division. The above findings are based primary on the views of Dr. Sparks as set forth in her deposition of November 1989. According to Dr. Sparks, there is evidence to indicate that claimant had the early stages of AS in 1972 from her examination of x-rays taken of claimant at that time as a part of the pre-employment physical prior to starting with ISUC. Claimant admits in his deposition to back symptoms beginning in the mid 1970's. These symptoms gradually grew worse over time and claimant began extensive treatment with Raymond Hanks, D.C., in October of 1983. Dr. Hanks eventually referred claimant to Mayo in 1987 suspecting AS.

Defendant contends that claimant's increased symptoms following the fall in 1988 are the result of a progression of the disease and not the fall. Dr. Sparks testified that it would be unlikely for the AS disease process to change so dramatically after a single fall. Clearly the initial increase [of] symptoms were the result of the fall. There is little evidence in the record to controvert claimant's assertions that he suffered severe and lasting pain following the fall which required extensive medical treatment and evaluation.

As a result of the injury of August 11, 1988, claimant has been absent from his job at ISUC since the date of injury. On June 13, 1990, claimant reached the point of maximum healing from the fall. This finding of maximum of healing is based upon the views of Dr. Sparks. According to Dr. Sparks, the normal course of treatment for a person with AS after a fall is to assume that there was a fracture of the calcified structures of the spine. Such a fracture can radically increase the symptoms. If not correctly treated, a fracture can cause serious permanent injury. Therefore, a fall by a person suffering from AS requires a special course of therapy such as immobilization to correct any possible fracture. At the time of her deposition, Dr. Sparks could not render an opinion as to whether claimant had in fact suffered such a fracture. When asked whether claimant had achieved maximum healing from the November 1988 fall, Dr. Sparks stated that this would not occur until she had a chance to complete further radiographic studies of the spine to look for such a fracture. According to the medical records, Dr. Sparks eventually did schedule the studies which consisted of a MRI and CT scans. [Exhibit A-11. p. 159, is Dr. Sparks' Request for Procedure form sent to the Department of Radiology. On the request form, Dr. Sparks indicates that the reason for the CT scan was to see if there was any evidence of fractures. The results of the CT scan do not mention any old or new fractures. Jt. ex. A-11, p. 160.] These scans were reviewed and completed at the time of the examination of claimant on June 13, 1990. There is no mention of any fracture in Dr. Sparks' reports following this examination. Surely Dr. Sparks would have reported such a fracture had she made such a finding. Also, claimant's course of treatment did not change and claimant was not immobilized which Dr. Sparks would have done had she found a fracture.

[In a letter dated November 8, 1988, Dr. Sparks states, "I suspect the patient's increased pain since the falling in August, is due primarily to musculoskeletal components without evidence of nerve root compression."

During the deposition of Dr. Sparks, claimant's attorney posed the following question:

> Q. Let me rephrase that question, then, and say would those three factors, the fall, the meter reading and his job as a gas fitter, be a substantial cause of his condition?
>
> A. I think that if he sustained a fracture at the time of his fall, that it could certainly have exacerbated, it could account for the increase in pain and the development of the neurologic sequelae that we have seen since I followed him in October of '88.
>
> I don't think that his employment increased his disease activity. I think his disease activity goes on marching to its own drummer.

(Jt. Ex. B, p. 56.)]

It could not be found that the work injury of August 11, 1988 was a cause of permanent impairment. Claimant failed to show that the fall permanently altered or accelerated the progressive course of the AS disease process. Dr. Sparks stated that it was possible such a fall could do so especially if there was an untreated fracture but she could not state this with any reasonable degree of medical certainty. Dr. Sparks denied that there had been any acceleration of the progressive disease process over the four year period prior to her treatment. Claimant contends that the issue was one of apportionment and since Dr. Sparks could not apportion out the underlying disease process, all of the disability must be work related. This is a misreading of Dr. Sparks' opinions as set forth in her deposition. The only theory of an increased impairment or permanent exacerbation of the underlying disease process was based upon the possibility of fracture discussed above. According to Dr. Sparks, such a fracture would permanently alter the course of the disease process and subsequent treatment. At the time of the deposition however, Dr. Sparks had only a strong suspicion of such a fracture. This suspicion was the reason why she ordered further testing. It is apparent that she did not find such a fracture after those tests were performed. Admittedly, Dr. Sparks said that even

if she could not find such a fracture from the tests, this would not necessarily rule out the existence of a fracture given the limitations of the tests. However, her testimony that the existence of such a fracture is only a strong suspicion remains unchanged. Given the existence of a serious and progressive underlying disease process, this deputy commissioner must rely heavily upon medical opinion. A strong suspicion by a medical expert is not the type of evidence upon which a causal connection finding can be based.

With reference to the requested medical expenses, which consists of the treatment of a chiropractor, Dr. Hanks, claimant showed that such treatment after the fall of August 11, 1988 which lasted through the summer of 1990 is causally connected to the August 11, 1988 injury. However, claimant failed to show that the charges were fair and reasonable. Claimant offered no evidence whatsoever on the reasonableness issue and defendants in the prehearing report refused to stipulate to the reasonableness of these expenses.

CONCLUSIONS OF LAW

The conclusions of law contained in the proposed agency decision filed May 2, 1991 are adopted as set forth below. Segments indicated by astericks (*****) indicate portions of the language from the proposed agency decision that have been intentionally deleted and do not form a part of this final agency decision. Segments designated by ([ ]) indicate language that is in addition to the language of the proposed agency decision.

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active or dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960) and cases cited therein.

In the case sub judice, there was little question that claimant suffered an aggravation injury. Claimant's account of the fall is believable given the

medical reports and claimant was found to be a truthful person. The fighting issue, however, was whether or not this injury accelerated the underlying disease process.

II. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be awarded without a showing of a causal connection to a physical change of condition. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Asse Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or

disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

In the case sub judice, it could not be found that the injury was the cause permanent impairment. However, claimant is entitled to temporary total disability during the course of treatment as a result of a temporary aggravation of the underlying preexisting condition. Under Iowa Code section 85.33(1) claimant can be awarded temporary total disability benefits from the date of injury until he returns to work or until he is medically capable of returning to substantially similar work to the work he was performing at the time of injury. Although claimant is currently unable to return to work at any capacity, claimant failed to show that this was due to the fall of August 11, 1988. This is clearly due to the progression of the disease process which would have occurred regardless of the fall. Temporary total disability benefits extend from August 11, 1988 until Dr. Sparks completed review of the tests she requested to confirm or not whether claimant had a fracture. This occurred on June 13, 1990 which will be the last day of temporary total disability. The temporary total disability period totals 95 6/7 weeks. According to the prehearing report claimant has already been paid 130 weeks of temporary total disability benefits. Therefore, claimant is not entitled to further benefits.

III. Pursuant to Iowa Code section 85.27, claimant is entitled to payment of reasonable medical expenses incurred for treatment of work injury. *****

[Defendants disputed the reasonableness and necessity of claimant's medical bills. See hearing assignment order which indicates that 85.27 is a hearing issue and the prehearing report and order approving the same, item 8-(a). When the reasonableness of medical fees is clearly in dispute, as it is in this case, claimant bears the burden of proving that the medical fees are reasonable. See, Anderson v. High Rise Construction Specialist, Inc., (Appeal Decision filed July 31, 1990), File No. 850996. It is not defendant's burden to show that the medical expenses were excessive, it is claimant's burden to prove that medical charges are reasonable.

In order for claimant to prevail on the issue of reasonableness of medical bills, claimant must produce some evidence which proves that the bills are reasonable. Payment of

medical bills is not evidence that the bills are reasonable. The case, Lawson v. Fordcyce, 237 Iowa 28, 51 N.W.2d 69 (Iowa 1945), which the deputy cited is a tort case and is not directly applicable.

In addition, the reputation of a medical facility is not sufficient evidence to support a finding that the medical charges were reasonable. Nor is there an inference that medical treatment administered by a licensed and board certified physician is reasonable. Agency expertise is not sufficient evidence to support a finding that the medical charges were reasonable. Claimant must produce some evidence which proves that the medical charges are reasonable.

At the hearing claimant failed to introduce any evidence to establish that the fees were reasonable. Defendant will not be ordered to pay claimant's medical bills.]

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant's claim for disability and medical benefits is denied.

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

Signed and filed this 31st day of January, 1992.

Byron K. Orton

BYRON K. ORTON
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUDY McKILLIP,	:	
	:	
Claimant,	:	File No. 843449
	:	
vs.	:	A P P E A L
	:	
SHELLER-GLOBE CORPORATION,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed June 19, 1990, 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 29th day of June, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK F. McMULLIN,

Claimant,

vs.

DEPARTMENT OF REVENUE,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

File No. 698688

R E M A N D

D E C I S I O N

This case has been remanded to this agency by the Iowa Court of Appeals for further proceedings. The decision of the Iowa Court of Appeals, McMullin v. Department of Revenue, 437 N.W.2d 596 (Iowa App. 1989), held that claimant's injury did arise out of and was in the course of his employment.

Previously, a deputy industrial commissioner had issued a decision on claimant's case on September 28, 1984, concluding, among other things, that claimant's injury arose out of and in the course of his employment, and finding that claimant was permanently and totally disabled.

An appeal decision issued on October 7, 1985, concluded that claimant's injury did not arise out of and in the course of his employment with defendant employer. Thus, the extent of claimant's disability and other issues raised by the parties were not addressed in that decision.

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been re-reviewed as part of this remand decision. The decision of the deputy filed September 28, 1984, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

The extent of claimant's disability can scarcely be exaggerated. He is confined to a wheelchair. He has lost all of the use of the lower portion of his body, and most of the use of

the upper portion. Claimant cannot feed, clothe or bathe himself without assistance. Claimant needs constant care. The prospect of an employer hiring claimant is remote in the extreme. The fact that claimant is able to generate some income by managing a motel he owns does not preclude a finding that he is permanently and totally disabled. Claimant is permanently and totally disabled.

Defendants seek a credit pursuant to Iowa Code section 85.38(2). That section provides a credit against an award for amounts paid under a nonoccupational group plan. The record does not clearly establish which long-term disability plan defendants seek a credit for. Claimant was an employee of the state of Iowa. The State of Iowa's Employees' Long-term Disability Plan has been held to constitute a nonoccupational group plan entitling defendants to credit under Iowa Code section 85.38(2). Lowe v. Iowa State Penitentiary, Appeal Decision, December 16, 1988 (#673326, 776977, 805718).

Iowa Code section 85.38(2) does not contemplate a credit for defendants for social security benefits received by claimant. Social security disability is not a nonoccupational group disability plan under section 85.38(2).

Defendants have also objected to the award of medical benefits, specifically the purchase price of a van from Charles Gabus Ford, and the conversion costs of the van. A van for a paraplegic or quadriplegic is not a proper medical expense under Iowa Code section 85.27. Zanders v. City of Malvern, Appeal Decision, November 22, 1989. However, the costs to convert the van to the special needs of claimant resulting from his work injury are legitimate 85.27 expenses. Defendants will be ordered to pay the costs of converting the van, but not for the purchase of the van.

Claimant alleges that the deputy's arbitration decision erroneously omitted items of medical expense contained in exhibit N. Claimant is entitled to payment of all listed medical expenses, including those contained in exhibit N, with the exception of the purchase price of the van, as noted above.

Claimant also urges that he is entitled to future medical expenses resulting from his work injury, including personal care. Claimant is entitled under Iowa Code section 85.27 to all reasonable medical expenses necessitated by his work injury, including the costs of personal nursing care.

Finally, defendants urge they are entitled to an offset of the award under Iowa Code section 85.22 for amounts received by claimant as part of a third party settlement stemming from the work injury. Claimant urges that any indemnification must be

reduced by the amount of his attorney's fees. Iowa Code section 85.22(1) states:

> If compensation is paid the employee or dependent or the trustee of such dependent under this chapter, the employer by whom the same was paid, or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed, by the district court, to the injured employee's attorney or the attorney of the employee's personal representative, and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which the employer or insurer is liable. In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

Defendants shall be entitled to indemnification as set forth in Iowa Code section 85.22.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant permanent total disability benefits at the rate of two hundred twenty-eight and 40/100 dollars ($228.40) from November 23, 1981 and continuing during the period of his disability.

That defendants shall receive a credit pursuant to Iowa Code section 85.22. Defendants shall also receive a credit for any non-occupational group plan benefits contemplated by Iowa Code section 85.38(2). Defendants shall not receive a credit for social security benefits received by claimant.

That defendants shall pay claimant's listed medical expenses, except for the purchase price of the van. Defendants shall pay the future medical expenses of claimant necessitated by his work injury.

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

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

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

That defendants are to pay the costs of this action.

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

Signed and filed this 23rd day of August, 1991.

JON E. HEITLAND
CHIEF DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEAN MENSHING,

Claimant,

vs.

BALTZELL AGRI PRODUCTS, INC.,

Employer,

and

AETNA CASUALTY & SURETY,

Insurance Carrier,
Defendants.

FILED

DEC 19 1991

IOWA INDUSTRIAL COMMISSIONER

File No. 931190

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed February 8, 1991 is affirmed and is adopted as the final agency action in this case.

Defendants and claimant shall share the costs of the appeal equally, including the preparation of the hearing transcript.

Signed and filed this 19th day of December, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD LEE MEYERS,	:	
Claimant,	:	FILED
vs.	:	MAR 21 1992
HOLIDAY EXPRESS CORPORATION,	:	File Nos. 881251 913213 & 913214
Employer,	:	IOWA INDUSTRIAL COMMISSIONER A P P E A L
and	:	D E C I S I O N
LIBERTY MUTUAL INSURANCE CO.,	:	
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 September 30, 1991 is affirmed and is adopted as the final agency action in this case with the following additional analysis:

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).

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

Signed and filed this 24th day of March, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHERYL MILLEDGE, Claimant, vs. B.Q.C., INC.,, Employer, and WAUSAU INSURANCE, Insurance Carrier, Defendants.	:	File No. 858610 A P P E A L D E C I S I O N

FILED
SEP 9 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 10, 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 9th day of September, 1991.

Byron K. Orton
BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOYCE MILLER, Claimant, vs. LAURIDSEN FOODS, INC., Employer, and EMPLOYERS MUTUAL COMPANIES and HARTFORD INSURANCE COMPANY, Insurance Carriers, Defendants.	File Nos. 801804 837426 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on September 26, 1986. Defendants cross-appeal.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits A through J; and defendants' exhibits 1 through 7. All parties filed briefs on appeal. Defendants Lauridsen Foods and Employers Mutual Insurance and claimant filed reply briefs.

ISSUES

Claimant states the following issues on appeal:

Issue 1

Did the prehearing deputy err when she continued the second prehearing conference and allowed further discovery upon the oral request of the defendants and over the objections of the claimant?

Issue 2

Did the prehearing deputy err when she denied the claimant's motion for leave to amend her petition?

Issue 3

Did the hearing deputy err when at the commencement of the hearing he granted the defendants' motion to impose witness exclusion sanctions, which motion just had been served on claimant moments before?

Issue 4

Did the hearing deputy err by not permitting claimant and her spouse the allotted and/or required time in which to testify?

Issue 5

Did the hearing deputy err by excluding from evidence claimant's side of the correspondence between the parties?

Issue 6

Did the hearing deputy err by determining that neither any injury in 1985, nor a whole body injury at any time had been sustained and had arisen out of and in the course of employment?

Issue 7

Did the hearing deputy err by not providing payment of permanent partial disability compensation during the payment of temporary partial benefits?

Issue 8

Did the hearing deputy err by failing to award healing period compensation for 8/16/85-8/19/85 and 8/15/88-7/6/88?

Issue 9

Did the hearing deputy err by failing to find an 100% permanent partial disability?

Issue 10

Did the hearing deputy err by establishing the commencement date for payment of permanent partial disability compensation at October 19, 1987?

Issue 11

Did the hearing deputy err by determining that the weekly earnings were $350.47 and that the weekly compensation rate was $226.25?

Issue 12

Did the hearing deputy err by failing to specify the due dates for the payment of temporary partial benefits and healing perod [sic] compensation?

Issue 13

Did the hearing deputy err by failing to award §86.13 benefits?

Issue 14

Did the hearing deputy err by failing to fix and tax costs requested per §§622.69 and 622.72, Code of Iowa?

Defendants Lauridsen Foods and Employers Mutual state the following issues on cross-appeal:

1. Was the average weekly wage and rate of compensation for an injury date of September 26, 1986 calculated correctly?

2. Did the Arbitration Decision erroneously award "temporary partial" disability benefits "at the rate of $226.65"?

3. Was claimant entitled to healing period benefits for the period from 2/17/87 to 4/3/87?

4. Were the expenses of medical reports properly allowed as costs and reasonable?

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed April 26, 1991 are adopted as final agency action.

CONCLUSIONS OF LAW

The conclusions of law contained in the proposed agency decision filed April 26, 1991 are adopted as final agency action, with the following additional analysis:

Defendants Lauridsen Foods and Employers Mutual allege that an error was made in the calculation of claimant's rate, specifically that overtime hours were calculated at time and a half instead of "straight" time rate. Claimant appears to agree, although claimant does not accept the September 26, 1986 injury date. September 26, 1986 is the appropriate date of injury. Claimant's gross earnings at the time of the injury were $336.65 per week, which yields a rate of $219.27 for a married worker with four exemptions.

Defendants, as cross-appellants, challenge certain medical reports assessed as costs. Rule 343 IAC 4.33 contemplates assessing as costs the expense of obtaining two doctor's or practitioner's reports. However, under Iowa Code section 622.72, an expert witness's fee is limited to $150. It makes little sense to limit the costs of an in person appearance by a physician to $150, while compensating a written report by the physician at a higher rate. The charges for obtaining the reports of Dr. Meade and Dr. Bergman will be assessed as costs up to $150 for each physician.

Both claimant and defendants Lauridsen Foods and Employers Mutual agree on appeal that an error was made as to the calculation of claimant's temporary partial disability. In that there is no dispute on this issue which requires a determination by this agency, the parties will be ordered to calculate the rate at which temporary partial disability compensation will be paid as governed by Iowa Code section 85.33(4).

Defendants challenge claimant's entitlement to healing period benefits for the period February 27, 1987 through April 3, 1987, contending that claimant was off work during this period not as a result of her work injury, but due to the delivery of her child. If a claimant is otherwise entitled to healing period benefits under Iowa Code section 85.34(1) and none of the three events enumerated in that section have occurred to terminate the healing period, claimant is entitled to healing period benefits even if another factor would have prevented claimant from working as well. There is no reduction or apportionment of healing period benefits simply because claimant is concurrently disabled for other reasons or is entitled to other disability benefits for some other reason. Tarr v. John Deere Waterloo Works, Arbitration Decision, March 5, 1992. Also see Bertlshofer v. Fruehauf Corporation, Appeal Decision, April 14, 1988 (healing period not interrupted by layoff), and Harlow v. IBP, Inc., Arbitration Decision, April 29, 1991 (healing period payable even though claimant incarcerated).

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

ORDER

THEREFORE, it is ordered:

As to File No. 837426 (September 26, 1986 Cumulative Injury):

That defendants shall pay unto claimant healing period benefits at the rate of two hundred nineteen and 27/100 dollars ($219.27) beginning November 7, 1986 through October 18, 1987; February 4, 1988 through March 14, 1988; and May 16, 1988 through May 25, 1988.

That defendants shall pay unto claimant twenty (20) weeks of permanent partial disability benefits at the rate of two hundred nineteen and 27/100 dollars ($219.27) beginning October 19, 1987 until paid except that said permanent partial disability benefits shall be suspended during any subsequent healing period set out herein and continued again until the balance of the payments are paid.

That defendants shall pay unto claimant temporary partial disability benefits for the following periods.

10/19/87 - 10/25/87	4/11/88 - 4/17/88
10/26/87 - 11/1/87	4/18/88 - 4/24/88
11/2/87 - 11/8/87	4/25/88 - 5/1/88
11/9/87 - 11/15/87	5/2/88 - 5/8/88
11/16/87 - 11/22/87	5/9/88 - 5/15/88
11/23/87 - 11/29/87	5/26/88 - 5/29/88
3/15/88 - 3/20/88	5/30/88 - 6/5/88
3/21/88 - 3/27/88	6/6/88 - 6/12/88
3/28/88 - 4/3/88	6/12/88 - 6/14/88
4/4/88 - 4/10/88	

That claimant shall be compensated for temporary partial disability at the rate specified in Iowa Code section 85.33(4), to be determined by the parties.

That permanent partial disability benefits are not payable during those times in which temporary partial benefits or healing period benefits are being 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 benefits awarded herein as set forth in Iowa Code section 85.30.

That claimant takes nothing regarding File No. 801804 (alleged August 15, 1985 injury).

That defendants shall pay the costs of these actions, pursuant to rule 343 IAC 4.33, including the costs of obtaining the report of Dr. Bergman up to a maximum of one hundred fifty ($150) and for the costs of obtaining the report of Dr. Meade up to a maximum of one hundred fifty ($150).

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

That where defendants are referred to above in this order, it shall not be applicable to the Hartford Insurance Company in that there is no liability for any injury herein regarding said Hartford Insurance Company as their insurance coverage did not occur within the injury date determined herein. Therefore, defendants in this order shall only refer to Lauridsen Foods, Inc. and Employers Mutual Insurance Company.

Signed and filed this 8th day of June, 1992.

Byron K. Orton
BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOYCE MILLER, Claimant, vs. LAURIDSEN FOODS, INC., Employer, and EMPLOYERS MUTUAL COMPANIES and HARTFORD INSURANCE COMPANY, Insurance Carriers, Defendants.	:	File Nos. 801804 837426 O R D E R N U N C P R O T U N C FILED JUN 15 1992 IOWA INDUSTRIAL COMMISSIONER

The appeal decision filed June 8, 1992 is hereby amended as follows:

IT IS FURTHER ORDERED:

That claimant and defendants Lauridsen Foods, Inc. and Employers Mutual Insurance shall pay the costs of the appeal, including the transcription of the hearing, equally. Defendants Lauridsen Foods, Inc. and Employers Mutual Insurance shall pay all other costs.

Signed and filed this 15th day of June, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS E. MILLER, Claimant, vs. NEUMANN BROTHERS, INC., Employer, and BITUMINOUS INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 603095 A P P E A L D E C I S I O N

FILED
DEC 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 June 21, 1990, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

When two interpretations of a limitations statute are possible, the one giving the longer period to a litigant seeking relief is to be preferred and applied. John Deere Dubuque Works v. Meyers, 410 N.W.2d 255 (Iowa 1987), (citing Orr v. Lewis Cent. School Dist., 298 N.W.2d 256 (Iowa 1980) and Sprung v. Rasmussen, 180 N.W.2d 430 (Iowa 1970)).

Workers' compensation statutes are to be liberally construed in favor of the worker and the worker's dependents. Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980). Its beneficent purpose is not to be defeated by reading something into the statute that is not there. Cedar Rapids Community School v. Cady, 278 N.W.2d 298 (Iowa 1979).

While the record made at hearing is not altogether clear, it is apparent that claimant underwent an arthroscopic procedure in spring 1983 and had some period of temporary total disability related to that procedure. Had claimant not granted defendants the credit under the district court settlement, claimant clearly would have been

entitled to temporary total disability benefits during that period and, as credit amounts functioned in lieu of and in substitution for temporary total disability benefits during any such period, claimant de facto was receiving weekly benefits during such period and, under any fair reading of the statute of limitations in section 85.26(2), properly filed his petition in review-reopening on or about July 20, 1984.

Defendants would argue that, before workers' compensation weekly benefits can be deemed to have been made under a credit agreement such as this one, claimant must file notice with the insurer that claimant is actively utilizing the credit amount. We find nothing in the statute that supports defendants' position. Defendants would have us place an affirmative duty on claimant where the legislature has not placed such a duty. We believe that, had the legislature felt such duty appropriate, the legislature would have expressly so stated. Defendants' argument, therefore, is not adopted.

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

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

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SANDRA J. MORGAN,	:	
Claimant,	:	File No. 773761
vs.	:	A P P E A L
OSCAR MAYER FOODS CORP.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed October 23, 1989, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Expert testimony that the condition could be causally related to claimant's employment together with non-expert testimony tending to show causation may be sufficient to sustain an award, but does not compel an award. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974).

An expert's opinion based on an incomplete history is not necessarily binding on the commissioner, but must be weighed with other facts and circumstances. Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128, 133 (1967).

Defendant relies on deposition testimony of Dr. Von Gillern in which the doctor states that, "based primarily on history, the fact that she had a time interval during which she was basically free of symptoms, I think that is probably the most logical conclusion to arrive at . . ." for arguing the proposition that any present carpal tunnel syndromes are probably attributable to recurrence of carpal tunnel syndrome and not related to the original July 1984 incident. Defendant's reliance is ill founded in that the record does not show that claimant was ever free of symptoms. Dr. Sinning's medical notes of 1985 are replete with references to claimant continuing to have pain symptomatology. Indeed, Dr. Sinning referred claimant to Dr. Campbell, a psychiatrist for evaluation of pain complaints with long-term disability. Dr. Campbell then opined that claimant did

not suffer from any major nervous disorder. Such clearly tends to show that claimant's pain symptoms were physical in origin and, given the referral from Dr. Sinning who treated claimant and performed her original carpal tunnel surgeries, had their origins in the original carpal tunnel syndrome development and its sequelae.

Furthermore, Dr. Von Gillern's testimony overall clearly shows a possibility of the requisite causal connection, even given the fact that it is founded on incomplete medical history. His testimony, when considered with all other medical notes and records in evidence clearly supports the deputy's finding that claimant had experienced problems with her hands and wrists from July 1984 onward. Hence, the full medical history supports a finding of causation.

Likewise, defendant on appeal places great weight on the fact that claimant sought to have her medical restrictions lifted in arguing that claimant is not entitled to permanent partial disability benefits. Again, defendant's argument is ill founded. The record clearly demonstrates that claimant requested the lifting of her work restrictions in order to retain her livelihood and not primarily because she subjectively felt they were not necessary.

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

Signed and filed this 4th day of October, 1991.

Byron K. Orton

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INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES D. MORTIMER,

Claimant,

vs.

FRUEHAUF CORPORATION,

Employer,

and

CNA INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 506116

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed February 22, 1990 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 12th day of September, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JULIE MOSES,	:	
Claimant,	:	
vs.	:	File No. 900554
IOWA NORTHLAND REGIONAL COUNCIL OF GOVERNMENTS,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
AETNA CASUALTY & SURETY,	:	
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 July 8, 1991 is affirmed and is adopted as the final agency action in this case with the following additional analysis:

Claimant indicated in her testimony (transcript, pages 54 and 57) that she returned to work after her injury of April 23, 1987. Her eligibility for temporary total disability benefits would end when she returned to work. See Iowa Code section 85.33(1). Claimant returned to work prior to the time she eventually terminated her employment in September 1988. The question of entitlement to temporary total disability benefits is for the period subsequent to September 26, 1988. Because claimant had returned to work prior to that date she is not entitled to temporary total disability benefits after that date.

Claimant has the burden of proving entitlement to benefits for the alleged closed head injury and for the alleged aggravation of her preexisting psychological condition. The evidence in this case does not demonstrate that claimant had a closed head injury. Numerous medical reports made shortly after the injury of April 23, 1987 do not mention symptoms of a head injury.

Claimant must prove that an aggravation of a preexisting condition is a material aggravation if it is to be compensable. Doctors Boarini, Taylor, and Rizzo, all medical doctors, had

access to and reviewed the medical records of claimant. (Dr. Rizzo's deposition is Exhibit CCC.) These doctors were of the opinion that claimant's psychological problems were long standing. The opinions of Dr. Verduyn can be given little weight as he had an incomplete history. Neither Kenneth Wernimont nor John Bayless are medical doctors and therefore cannot give medical opinions. Dr. Akbar's statement that claimant's chronic depressive disorder started since the injury (see Exhibit CC, p. 20) appears to be a recitation of the history given to him rather than his opinion. In addition, it does not appear that Dr. Akbar was aware of the medical evidence which shows that claimant's psychological problems predated the fall of April 23, 1987. Therefore, Dr. Akbar's opinion, if any, can be given little weight. Claimant has not proved that the work incident on April 23, 1987 was a material aggravation of a preexisting condition. It should be noted that claimant's argument in her appeal brief indicates that this case involves an alleged psychological condition arising from a physical injury (the so-called physical-mental injury).

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

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

Byron K. Orton

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INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. MOSS,

Claimant,

vs.

BARNEY CARLSON d/b/a CARLSON MIDWEST CHIPPING,

Employer,

and

MISSOURI FOREST PRODUCTS ASSOC.,

Insurance Carrier,
Defendants.

File No. 757108

FILED

NOV 18 1991

IOWA INDUSTRIAL COMMISSIONER

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed April 22, 1991 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 18th day of November, 1991.

Byron K. Orton

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INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROGER L. MUILENBERG, Claimant, vs. PRINCE MANUFACTURING CO., Employer, and AETNA COMMERCIAL INSURANCE DIVISION, Insurance Carrier, Defendants.	File No. 872566 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

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.

FINDINGS OF FACT

The findings of fact of the decisions of the deputies filed December 20, 1989 and March 18, 1991 are affirmed and adopted.

CONCLUSIONS OF LAW

The conclusions of law in the deputies' proposed decisions are affirmed and adopted with the following modification as it relates to claimant's rate.

An error was made in calculating claimant's rate. The weeks of August 1, 1987, July 11, 1987 and February 28, 1987, are not representative of claimant's earnings and should be excluded from the calculation of claimant's earnings. Claimant was on sick leave three days during the week of August 1, 1987, on workers' compensation two days during the week of July 11, 1987 and on workers' compensation during the week of February 28, 1987. The weeks ending January 24, 1987, January 17, 1987 and January 10, 1987 are included as weeks representing claimant's earnings.

Week Ending	Regular Earnings	Incentive Pay
January 24, 1987	$364.80	$67.47
January 17, 1987	$364.80	$65.98
January 10, 1987	$364.80	$67.72

The actual thirteen weeks to be used in calculating claimant's rate are set forth in the deputy's decision of December 20, 1989 excluding August 1, 1987, July 11, 1987 and February 28, 1987. The weeks of January 24, 1987, January 17, 1987 and January 10, 1987 are included to calculate claimant's earnings. Thirteen weeks equal $5,619.60. This amount divided by thirteen and rounded to the nearest dollar is $432.00 which represents claimant's average gross weekly earnings. When injured, claimant was married and had three exemptions. Claimant's rate of weekly compensation is $274.60.

WHEREFORE, the decisions of the deputies are affirmed and modified.

ORDER

THEREFORE, it is ordered:

That defendants shall pay claimant temporary total disability benefits from his injury through May 6, 1988 at the rate of two hundred and sixty-four and 98/100 dollars ($274.60) per week.

That defendants shall receive credit for benefits previously paid.

That defendants shall pay interest pursuant to Iowa Code section 85.30.

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

Signed and filed this 23rd day of December, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK E. MULVEHILL,

Claimant,

vs.

BUNKER WELDING & STEEL, CONSTRUCTION, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 720875

FILED

OCT 21 1991

IOWA INDUSTRIAL COMMISSIONER

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed September 27, 1990 is affirmed and is adopted as the final agency action in this case.

The costs of the review-reopening proceeding are assessed to defendants and the costs of appeal shall be shared equally by defendants and claimant.

Signed and filed this 21st day of October, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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Des Moines, Iowa 50309-2421

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH LEROY NIELSEN, Claimant, vs. FREMONT-MILLS COMMUNITY SCHOOL, Employer, and EMPLOYERS MUTUAL INSURANCE, Insurance Carrier, Defendants.	File No. 779877 A P P E A L D E C I S I O N

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

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed January 11, 1991 are adopted as final agency action.

CONCLUSIONS OF LAW

On appeal, claimant asserts that the deputy erred in failing to apply the "discovery rule" set out in Orr v. Lewis Central School District, 298 N.W.2d 256 (Iowa 1980) to Iowa Code section 85.26 cases. Under the discovery rule, the statute of limitations would not start to run until claimant recognized the nature, seriousness and probable compensable character of his injury. Orr, 298 N.W.2d at 261.

Claimant allegedly sustained a work-related injury on or about December 15, 1981 when he slipped and fell at work. Claimant filed this action December 17, 1984. Claimant's cause of action would be barred by Iowa Code section 85.25(1) unless the discovery rule is applied. The discovery rule was discussed in Jones v. Continental Baking Company, Appeal Decision, September 24, 1991, File no. 908648.

Defendants argue on appeal that claimant's injury is not subject to the discovery rule, because claimant's condition flows from an identifiable, traumatic event. Defendants argue that there should be a distinction between "latent injuries" and "traumatic injuries with latent manifestation." Defendants cite LeBeau v. Dimig, 446 N.W.2d 800 (Iowa 1989). LeBeau is a tort case, dealing with the discovery rule in an automobile accident case. The plaintiff received a head injury, which appeared minor at first but later turned out to be the cause of epilepsy. However, the statute of limitations had expired by the time the epileptic condition was discovered.

In LeBeau, the Iowa Supreme Court used the "traumatic event latent manifestation" analysis. In the "latent manifestation" case the Court reasoned, the injured party is entitled to the discovery rule rather than charging him with facts which are "unknown and inherently unknowable." In the "traumatic event" case, however, the injured party has been injured by a noticeable, traumatic occurrence, where the injured party realizes both that he has been injured, and what is responsible for his injury, even though the full extent of the harm is not yet known.

The LeBeau court found that allowing the use of the discovery rule in traumatic event cases would result in an open-ended liability for defendants, multiple suits arising out of the same incident, and in effect would create two statutes of limitations for the same injury, one for the traumatic event itself and another for any latent effects. The court disallowed the claim filed beyond the statute of limitations.

In this case, claimant knew he had a traumatic work-related injury on or about December 15, 1981. Claimant knew he fell down and that his leg hurt. The leg pain after the December 15, 1981 incident was worse than in the past. In a letter dated March 11, 1982, claimant wrote to the defendant-employer that he was unable to work due to a work-related injury to his leg. Claimant contends that while he was aware of his leg problem which he believed to be work-related, he did not learn of his potentially compensable back problem until January 6, 1982. Claimant's back problem is not subject to the discovery rule. Claimant's condition flows from an identifiable, traumatic event. Claimant's cause of action is barred by Iowa Code section 85.26(1).

Even if the discovery rule were to be applied to claimant's back problem, claimant's claim would be barred by Iowa Code

section 85.26(1). The documentary evidence in this case supports the conclusion that claimant knew that he injured both his leg and back as a result of the work-related fall on December 15, 1981. Therefore, even if the discovery rule were applicable, claimant's cause of action would be barred.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

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

Signed and filed this 23rd day of December, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY ORIGER,

Claimant,

vs.

LEY MOTOR COMPANY,

Employer,

and

UNIVERSAL UNDERWRITERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 848639

A P P E A L

D E C I S I O N

LARRY ORIGER,

Claimant,

vs.

PIERSON FORD-LINCOLN-MERCURY,

Employer,

and

GENERAL CASUALTY COMPANIES,

Insurance Carrier,
Defendants.

File No. 848640

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.

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed May 29, 1990 are adopted as final agency action.

CONCLUSIONS OF LAW

The issues to be decided are whether claimant's claims are barred by the statute of limitations and whether claimant has met his burden of proving a causal connection between alleged injuries of April 24, 1984 and October 29, 1984 and the claimed disability.

Claimant filed this action on August 3, 1987. Claimant's claim would be barred by the provisions of Iowa Code section 85.26(1) unless the discovery rule is applied. The discovery rule was discussed in Jones v. Continental Baking Company, Appeal Decision, September 24, 1991, File No. 908648.

> Under the discovery rule enunciated in Orr v. Lewis Central School District, 298 N.W.2d 256, 261 (Iowa 1980), and Robinson v. Department of Transportation, 296 N.W.2d 809, 812 (Iowa 1980), the statute of limitations would not start to run until claimant recognized the nature, seriousness and probable compensable character of his injury....
>
> ....

Defendants argue on appeal that claimant's injury is not subject to the discovery rule, because claimant's condition flows from an identifiable, traumatic event. Defendants argue that there should be a distinction between "latent injuries" and "traumatic injuries with latent manifestation." Defendants cite LeBeau v. Dimig, 446 N.W.2d 800 (Iowa 1989). LeBeau is a tort case, dealing with the discovery rule in an automobile accident case. The plaintiff received a head injury, which appeared minor at first but later turned out to be the cause of epilepsy. However, the statute of limitations had expired by the time the epileptic condition was discovered.

In LeBeau, the Iowa Supreme Court used the "traumatic event latent manifestation" analysis. In the "latent manifestation" case the Court reasoned, the injured party is entitled to the discovery rule rather than charging him with facts which are "unknown and inherently unknowable." In the "traumatic event" case, however, the injured party has been injured by a noticeable, traumatic occurrence, where the injured party realizes both that he has been injured, and what is responsible for his injury, even though the full extent of the harm is not yet known.

The LeBeau court found that allowing the use of the discovery rule in traumatic event cases would result in an open-ended liability for defendants, multiple suits arising out of the same incident, and in effect would create two statutes of limitations for the same injury, one for the traumatic event itself and another for any latent effects. The court disallowed the claim filed beyond the statute of limitations.

Claimant, and the deputy, relied on Robinson, cited above. Robinson was a workers' compensation case. The Iowa Supreme Court in Robinson quoted 3 A. Larson, Workmen's Compensation Law §78.41 at 15-65 to 15-66 for the following proposition: "The time period for notice or claim does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease."

Claimant, in essence, urges that, although he was clearly aware of his traumatic injury on April 22, 1986, and its compensable nature, he was not aware of its seriousness until late summer, 1987. It is noted that the Robinson decision holds that the determination of claimant's knowledge is a question of fact for the commissioner to decide. It is also noted that in Robinson, it was found that the claimant was aware of both the nature and seriousness of his offense at the time of his heart attack and benefits were denied.

The Iowa Supreme Court has recently reviewed LeBeau, 446 N.W.2d 800, and stated: "Because we classified LeBeau's suit as a traumatic event/latent manifestation case, we refused to apply the discovery rule." Wilber v. Owens-Corning Fiberglass Corp., No. 333/90-882, Slip Op. at 6 (Iowa October 16, 1991).

In this case claimant had traumatic injuries on April 24, 1984 and October 29, 1984 and the claim is barred by Iowa Code section 85.26(1).

Even if the discovery rule were to be applied, claimant's case is one of inconsistency. While claimant may not have realized that he had a seizure disorder until the first seizure occurred in November 1986, it was claimant's testimony that he had loss of consciousness, blurred vision and headaches shortly after the work incidents. (Note this testimony had been rejected in the findings of fact.) If this testimony were accepted as true it could be found that claimant should have realized that his alleged injury was something more than a cut or a contusion shortly after the work incidents. Thus, even if the discovery rule were to be applicable, claimant's claim would be barred. If

the discovery rule were applicable and claimant's testimony were to be accepted, claimant should have known shortly after the traumatic events that his alleged loss of consciousness, blurred vision and headaches were serious and that it may have been compensable.

If claimant's claim were not barred by the statute of limitations, he would still have the burden of proving a causal connection between the alleged injuries and his claimed disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 24, 1984 or October 29, 1984, or both, is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

A cause is proximate if it is a substantial factor in bringing about the result. It need not be the only cause. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). As discussed in the findings of fact the credentials of Drs. Davenport and Dora are superior to Dr. Wolfe. The medical opinions of both Dr. Davenport and Dr. Dora are based upon incorrect history. There is no reliable medical testimony that demonstrates that either or both of claimant's injuries was the probable cause of claimant's disability.

WHEREFORE, the decision of the deputy is affirmed

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

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

Signed and filed this 18th day of November, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RON OSTLING, Claimant, vs. AUTO CONVOY COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILED JUN 30 1992 File No. 881044 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

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

ISSUES

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Defendant states the following issue on appeal: "Has claimant claimant [sic] proven that his industrial disability is greater than the 16.8 percent that defendants have already paid"?

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed September 24, 1991 are adopted as final agency action.

CONCLUSIONS OF LAW

The conclusions of law contained in the proposed agency decision filed September 24, 1991 are adopted as set forth below. Segments designated by asterisks (*****) indicate portions of the language from the proposed agency decision that

have been intentionally deleted and do not form a part of this final agency decision.

Due to the finding that the prior injury and disability was related to claimant's employment, apportionment is not proper in this case. ***** Prior existing impairment does not necessarily mandate a finding of a loss of earning capacity when there has been no loss of earnings or employment. Compare Bearce v. FMC Corporation, 465 N.W.2d 531 (Ia. App. 1991).

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant 250 weeks of permanent partial disability benefits at the rate of five hundred twenty-eight and 26/100 dollars ($528.26) per week from October 3, 1988.

That defendants shall pay the stipulated amount of healing period benefits pursuant to the correct rate of weekly compensation as set forth herein.

That defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against the award for all voluntary 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 matter including the transcription of 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 30th day of June, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

NANCY PATMAN,	:	
Claimant,	:	FILED
vs.	:	
	:	File No. 776700 NOV 18 1991
GLENWOOD STATE HOSPITAL,	:	
	:	A P P E A L IOWA INDUSTRIAL COMMISSIONER
Employer,	:	
	:	D E C I S I O N
and	:	
	:	
STATE OF IOWA,	:	
	:	
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 June 27, 1990, is affirmed and is adopted as the final agency action in this case, with the following additional analysis.

On September 22, 1986, the parties entered into an agreement for settlement. The agreement for settlement was based upon claimant's physical condition at the time of the settlement. James P. O'Hara, M.D., claimant's treating physician opined that claimant could anticipate the development of arthritis as a result of her right ankle injury. Basing an award on future possible developments of claimant's present condition would be engaging in speculation. Chapter 85, Code of Iowa, contemplates a review-reopening proceeding should claimant's condition deteriorate in the future. Schmitz v. Ahrens Construction Company, Appeal Decision, June 2, 1989, file number 834034.

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

Signed and filed this 18th day of November, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DON PATRO, Claimant, vs. IOWA FALLS ROOFING, Employer, and BITUMINOUS INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED OCT 21 1991 IOWA INDUSTRIAL COMMISSIONER File No. 758584 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed October 3, 1990, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Claimant contends that the deputy erred in failing to consider admissions made by the employer concerning the compensability of claimant's back injury. Claimant refers to the Joint Motion to Remove the Case from Docket filed on January 13, 1989 as evidence of defendants' admission of liability. Parties requested that the case be removed from the trial docket because claimant's treating physician recommended that claimant undergo back surgery. Defendants agreed to pay for the surgery and benefits for the prescribed surgery. The parties indicated that they would notify the agency when the matter was ready to proceed on the remaining issues. The motion was approved. At the hearing, defendants refused to stipulate that the motion for continuance is an admission of liability.

> A judicial admission is a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence, by conceding for purposes of litigation that the proposition of fact alleged by the opponent is true.

Hofer v. Bituminous Casualty Corp., 260 Iowa 81, 83, 148 N.W.2d 485 (1967).

The motion for continuance is not an admission of liability. A hearing assignment order was filed on April 4, 1990. The parties indicated that arising out of and in the course of employment; and causal relationship between the alleged injury and the disability, would be two of the hearing issues. The parties filled out the prehearing report and order approving the same prior to the hearing indicating that causal connection continued to be an issue at the hearing. Both parties represented to the deputy that causal connection continued to be a hearing issue. Clearly, the parties did not stipulate to the issue of liability prior to the hearing. The language in the motion for continuance is not considered an admission of liability.

Claimant failed to prove causal connection between his February 29, 1984 work-related injury and his back condition.

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

Signed and filed this 21st day of October, 1991.

Byron K. Orton
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INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN N. PATTEN,

Claimant,

vs.

H.J. HEINZ CORP.,

Employer,

and

LIBERTY MUTUAL,

Insurance Carrier,
Defendants.

File No. 824702

A P P E A L

D E C I S I O N

FILED

AUG 29 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 November 30, 1990 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 29th day of August, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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317

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBRA L. PECK, Claimant, vs. WILSON FOODS CORPORATION, Employer, Self-Insured, Defendant.	:	File Nos. 861960/913244 A P P E A L D E C I S I O N

FILE
AUG 26 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 April 12, 1990 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Claimant asserts one of the issues on appeal is whether the deputy industrial commissioner erred in failing to grant an extension of time to file claimant's arbitration brief. In addition to the above mentioned issue, claimant asserted other issues which were considered in this appeal decision. The arbitration decision itself is, by statute, reviewed de novo on appeal. Miller v. Woodward State Hospital, Appeal Decision, May 31, 1990 (#853647).

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

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

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD PEEK, Claimant, vs. SUPER VALU STORES, INC., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 784000 A P P E A L D E C I S I O N

FILED

AUG 29 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 18, 1990 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 29th day of August, 1991.

Byron K. Orton

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INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL PEERY,	:	
Claimant,	:	File No. 936578
vs.	:	A P P E A L
TRUCKERS EXPRESS, INC.,	:	D E C I S I O N
Employer, Defendant.	:	

FILED
SEP 9 1991
IOWA INDUSTRIAL COMMISSION

The record has been reviewed de novo on appeal. The ruling on motion for summary judgment filed October 15, 1990 is affirmed and is adopted as the final agency action in this case.

Claimant shall pay the costs of this action.

Signed and filed this 9th day of September, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELIZABETH PETERS,

Claimant,

vs.

SECOND INJURY FUND OF IOWA,

Defendant.

File No. 809600

A P P E A L

D E C I S I O N

Defendant, Second Injury Fund, appeals and claimant cross-appeals from an arbitration decision awarding claimant 15 percent permanent partial disability benefits. The defendant dismissed its appeal. Claimant did not submit a brief in support of her cross appeal. Therefore, the record has been reviewed generally for errors.

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 19, 1990, 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 20th day of November, 1991.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT A. PICKERING, Claimant, vs. SQUEALER FEEDS, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 913614 A P P E A L D E C I S I O N

FILED
DEC 24 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.

FINDINGS OF FACT

The findings of fact of the deputy's proposed decision filed April 30, 1991 are affirmed and adopted.

CONCLUSIONS OF LAW

The conclusions of law in the deputy's proposed decision are affirmed and adopted with the following modifications.

Claimant proved that he sustained an injury arising out of and in the course of his employment on December 16, 1988. Claimant's position as a sales person required him drive many miles. Claimant testified that he had been driving when he experienced low back pain. Claimant testified that he was unable to complete his route as a result of his back pain. Claimant's physicians opined that claimant's work which required him to drive from 500 to 800 miles in a month aggravated his preexisting back condition. Claimant proved that he sustained an injury arising out of and in the course of his employment on December 16, 1988.

Claimant proved a causal connection between his December 18, 1988 work injury and medical expenses incurred.

The final issue on appeal is the extent of claimant's industrial disability as a result of his December 16, 1988 work injury.

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 Co., 253 Iowa 285, 100 N.W.2d 660 (1961).

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 matter which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

Claimant was forty-two years old at the time of his work injury on December 16, 1988. Claimant is at the peak of his earning capacity, therefore his work injury has a greater impact upon him compared to a younger employee. Becke v. Turner-Busch, Inc., Thirty-forth Biennial Report of the Iowa Industrial Commissioner, 34 (Appeal Decision 1979).

Claimant has a high school education. Claimant testified that his work experience includes farming from 1964 until 1981. Claimant obtained his real estate sales license and a real estate brokers license after leaving farming. Claimant testified that he was a "million dollar" seller in his first year of real estate sales with Skogman Realty. Claimant left real estate and became a sales person selling feed for farm animals. The position as a sales person required claimant to drive many miles. Claimant's restrictions prohibit his return to his prior employment which required claimant to drive more than one hour.

Claimant had a preexisting back condition which required hospitalization in 1979 and September 1987. Claimant was released to return to full duty following the September 1987 injury and remained symptom free until his December 16, 1988 work

injury. Following the December 16, 1988 work injury, Richard F. Neiman, M.D., placed severe restrictions upon claimant's activities. Dr. Neiman opined that claimant sustained a 15 percent permanent impairment, five of which he apportioned to claimant's preexisting condition and the remaining 10 percent he attributed to the aggravation of claimant's preexisting condition. (Joint exhibit L, p. 14.) Apportionment is not applied in this case as claimant's preexisting back condition had no effect upon his earning capacity prior to the December 16, 1988 work injury. Defendants take claimant subject to any active or dormant health impairments incurred prior to employment. Defendants are liable for the entire result of the aggravation of claimant's preexisting back condition. Bearce v. FMC Corporation, 464 N.W.2d 531 (Iowa 1991). Zeigler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960).

All of claimant's physician's opined that claimant's weight affected his back condition. Claimant's physicians have repeatedly encouraged claimant to lose weight. Claimant's failure to loss weight as recommended by his physicians adversely impacts upon his motivation. In addition, claimant failed to exercise as directed, this also adversely impacts upon his motivation.

Claimant was terminated from his position with the defendant-employer as a result of low productivity. Claimant failed to apply for any employment or continue vocational rehabilitation. This factor impacts adversely upon claimant's motivation.

Based upon these facts and those set out in the deputy's proposed decision, it is determined that claimant proved entitlement to 35 percent permanent partial disability benefits as a result of his December 16, 1988 work injury.

Claimant waived the issue of the proper commencement date of benefits, therefore, it is not considered.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of two hundred eighty-five and 13/100 dollars ($285.13) per week commencing on July 6, 1989 as stipulated to by the parties.

That defendants shall pay healing period benefits from January 16, 1989 through July 5, 1989 as stipulated at the rate of two hundred eighty-five and 13/100 dollars ($285.13) per week.

That defendants shall pay medical bills in the sum of three thousand three hundred eighty and 50/100 dollars ($3,380.50) and medical mileage in the sum of one hundred forty-seven and 63/100 dollars ($147.63) per week.

That interest will accrue pursuant to Iowa Code section 85.30.

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

That defendant shall file a claim activity report pursuant to rule 343 IAC 3.1.

Signed and filed this 24th day of December, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANTHONY PIGNERI, Claimant, vs. RINGLAND-JOHNSON-CROWLEY, Employer, and ALLIED INSURANCE SERVICES, Insurance Carrier, Defendants.	FILED JUL 31 1991 IOWA INDUSTRIAL COMMISSIONER File No. 838742 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal and claimant cross-appeals from an arbitration decision awarding industrial disability benefits as the result of an alleged injury on November 10, 1986. The record on appeal consists of the transcript of the arbitration proceeding, claimant's exhibit 1, and defendants' exhibits 1 through 3. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issue on appeal: "Whether the Claimant has sustained a 40% industrial disability as set forth in the arbitration decision?"

Claimant states the following issues on cross-appeal:

I. Whether the claimant has sustained a more than 40 percent industrial disability as awarded by the deputy industrial commissioner.

II. Claimant is entitled to healing period compensation from January 20, 1988 to August 31, 1988.

REVIEW OF THE EVIDENCE

The arbitration decision filed December 15, 1989 adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. This is so as impairment and disability are not synonymous. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the latter to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision,

February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

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). Industrial disability may also be awarded when an employee is precluded from work because the employer believes the injury disqualifies the claimant from work. Blacksmith v. All American, Inc., 290 N.W.2d 348 (Iowa 1980).

Iowa Code section 85.34(1) states:

1. *Healing Period.* If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

ANALYSIS

Defendants urge as an issue on appeal the extent of claimant's industrial disability. Claimant was 60 years old, with a high school education. Claimant worked most of his life as a carpenter or carpenter foreman. Although there was considerable testimony on the extent of manual labor a carpenter foreman performs, it appears that although claimant did perform more physical labor than a superintendent, he performed less physical labor than a carpenter. One witness estimated that 20 percent of a carpenter foreman's duties were manual labor.

Claimant has a lifting restriction of not more than 20 pounds continuously and not more than 50 pounds occasionally. Claimant has a permanent impairment rating of ten percent of the body as a whole. Claimant showed good motivation to work by returning to his job after his injury in spite of continued pain, and, after leaving defendants' employment, claimant sought other jobs. Claimant also has generated income as a consultant. However, claimant is not now steadily employed. Claimant's earnings dropped drastically after his separation from defendant employer.

There was considerable dispute in the record as to whether claimant was laid off for economic reasons, or whether the employer failed to rehire claimant because of his injury. On or about January 20, 1988, claimant was told to go home and await a call for the next job. Claimant is still waiting. Claimant was never told he was laid off. (Transcript, pp. 59, 114-115.) A supervisor for the employer testified that although claimant was not formally told so, he was in fact laid off due to lack of work, and that seven other employees were laid off the same month, including another carpenter foreman performing the same duties as claimant. (Tr., pp. 106-107.) However, claimant disputes the statement that the carpenter foreman in question performed the same duties. (Tr., p. 82.)

The employer acknowledges that since claimant was "laid off," it has hired other carpenter foremen. A vocational rehabilitation worker contacted the employer on claimant's behalf, and was told that claimant would be treated as he had been in the past. Claimant contacted the employer, but never heard back from them. The record establishes that prior to claimant's injury, claimant was a valued employee, had received no complaints about his work, and in fact had been entrusted with overseeing significant projects, including one out of state project.

Defendants have not alleged that claimant was not recalled because he was not able to perform the duties of a carpenter foreman. On the contrary, defendants have introduced vocational rehabilitation evidence to show that claimant is employable in the construction industry, yet defendants have not rehired claimant. There is no explanation in the record as to why other carpenter foremen were hired over claimant, an existing employee with a proven record of performance. It is a fair presumption from these facts that claimant was not re-hired or recalled because of his injury. This conduct is a relevant factor in determining claimant's industrial disability. Claimant has a loss of earning capacity as evidenced by the failure of the employer to rehire him, and by the employer's conduct of hiring other carpenter foremen but not rehiring claimant.

On the other hand, claimant's age is also a factor. Claimant is near to the normal age of retirement. 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). Claimant's loss of earning capacity at age 60 is less than would be suffered by a younger worker with the same injury.

Claimant has shown good motivation to work by attempting to return to work more than once, but without success.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 30 percent.

Claimant raises as an issue on cross-appeal a claim for healing period benefits from January 20, 1988, until August 31, 1988 (although claimant appears to erroneously substitute "December" for "August" at one point in his brief). Defendants failed to address this issue in their appeal brief, and did not file a reply brief. January 20, 1988, was claimant's last day of work for defendants. Between January 20, 1988 and August 31, 1988, claimant did continue to receive medical treatment. The nature of this treatment appears to have been designed to improve claimant's condition, rather than mere maintenance. Ronald K. Bunten, M.D., in April of 1988 recommended that claimant attend the Iowa Methodist Low Back Institute and that a work-hardening program be instituted, and "[i]f that fails to bring him up to sufficient improvement to allow return to work, consideration for vocational retraining should be considered." (Claimant's exhibit 1, 8-2.) Claimant's attendance at the Iowa Methodist Low Back Institute in May of 1988 resulted in a recommendation that claimant undergo a work hardening program and physical therapy to improve his strength and tolerance to pain. Although claimant had returned to work and held himself out for recall by the employer, clearly claimant was considered by Dr. Bunten to still be in a healing period. Dr. Bunten opined that claimant was able to return to work in a supervisory capacity on August 31, 1988. Claimant is entitled to healing period benefits for the period January 20, 1988 to August 31, 1988.

FINDINGS OF FACT

1. Claimant received a work-related low back injury on November 10, 1986.

2. Claimant's work-related low back injury on November 10, 1986 resulted in a 10 percent permanent functional impairment to claimant's body as a whole.

3. Claimant was off work due to his work injury from November 13, 1986 through November 30, 1986; March 19, 1987 through May 27, 1987; July 6, 1987 through August 30, 1987; and January 20, 1988 to August 31, 1988.

4. Defendant employer refused to give any sort of continuing work to claimant after January 20, 1988.

5. Claimant has a reduction in earning capacity as a result of his November 10, 1986 injury.

CONCLUSIONS OF LAW

Claimant is entitled to healing period benefits for the period November 13, 1986 through November 30, 1986; March 19, 1987 through May 27, 1987; July 6, 1987 through August 30, 1987; and January 20, 1988 to August 31, 1988.

Claimant has incurred a 30 percent industrial disability as a result of his work injury on November 10, 1986.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay unto claimant healing period benefits at the rate of three hundred twenty and 58/100 dollars ($320.58) for the periods of November 13, 1986 through November 30, 1986; March 19, 1987 through May 27, 1987; July 6, 1987 through August 30, 1987; and January 20, 1988 to August 31, 1988.

That defendants shall pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of three hundred twenty and 58/100 dollars ($310.58) beginning August 31, 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. The parties stipulated that twenty-one point five seven one (21.571) weeks of temporary total disability or healing period benefits had been previously paid, and three hundred ninety-one and 59/100 dollars ($391.59) of temporary partial disability, and thirty-one (31) weeks of permanent partial disability benefits.

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

That defendants shall pay all costs of this action, 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 31st day of July, 1991.

Clair R. Cramer

CLAIR R. CRAMER
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANTHONY PIGNERI,

Claimant,

vs.

RINGLAND-JOHNSON-CROWLEY,

Employer,

and

ALLIED INSURANCE SERVICES,

Insurance Carrier,
Defendants.

File No. 838742

N U N C

P R O

T U N C

O R D E R

The appeal decision filed July 31, 1991 ordered defendants to pay healing period and permanent partial disability benefits. A typographical error in the rate of compensation is contained in the second paragraph of the order setting out the permanent partial disability benefits.

THEREFORE, paragraph 2 of the order of the decision is corrected to read as follows:

That defendants shall pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of three hundred twenty and 58/100 dollars ($320.58) beginning August 31, 1988.

Signed and filed this 2nd day of August, 1991.

Clair R. Cramer

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY PITZER,	:	
Claimant,	:	
vs.	:	
	:	File No. 766890
ROWLEY INTERSTATE,	:	
	:	A P P E A L
Employer,	:	
	:	D E C I S I O N
and	:	
	:	
HOME INSURANCE COMPANY,	:	
	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding temporary total disability benefits and permanent partial disability benefits.

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

ISSUES

Claimant states the issues on appeal are claimant's entitlement to medical benefits; whether he is an odd-lot employee; and the extent of his disability.

REVIEW OF THE EVIDENCE

The arbitration decision filed October 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 with the following additional analysis. Defendants informed claimant that his medical treatment by Dr. Galbraith at the pain clinic was unauthorized. Claimant proceeded to obtain the treatment. However, claimant was referred to Dr. Galbraith and the pain clinic by Dr. Schroeder, who was an authorized physician. Referral by an authorized physician to another physician constitutes authorization by the employer. Conte v. Heartland Lysine, Inc., Arbitration Decision, June 13, 1991. Defendants, by authorizing Dr. Schroeder, also authorized his referral to Dr. Galbraith. Defendants cannot, with the benefit of hindsight, pick and choose whether they will authorize the medical course of action their authorized physician has chosen. Defendants can choose the physician, but defendants cannot interfere with the physician's professional judgment on what treatment modalities the physician determines to be appropriate. Wright v. Super 8 Lodge of Des Moines, Arbitration Decision, February 20, 1990.

Claimant will be awarded medical benefits for the services of Dr. Galbraith and the Chronic Pain Management Program, Columbia Hospital, Milwaukee, Wisconsin.

FINDINGS OF FACT

1. Claimant sustained an injury which arose out of and in the course of his employment on May 3, 1984 when he slipped while exiting a tractor-trailer he was driving for defendant employer.

2. Claimant has been under the care of numerous physicians, underwent a diskectomy of C4-5 in January of 1985, and in October of 1985 was found to have a bone spur on the left side at C4-5 for which he underwent a foraminotomy.

3. Claimant has sustained a permanent partial impairment as a result of the injury.

4. As a result of the injury, claimant's capacity to earn has been hampered.

5. Although released to return to work by numerous physicians on more than one occasion, claimant has not returned to work and his one attempt to return to work with defendant employer was unsuccessful.

6. Claimant has not sought employment since that time.

7. Claimant has not participated to his fullest capabilities in recovering from this injury and has not

cooperated with medical and vocational personnel to overcome its effects.

8. As a result of the injury, claimant is not capable of returning to truck driving or to work which would require continual extension of the neck.

9. Claimant has expressed his desire not to return to work and not to retrain, but to have treatment.

10. Defendants have gone beyond the requirements of the law to provide treatment to claimant both medically and vocationally.

11. Claimant's condition reached a plateau on November 18, 1986.

12. Permanent partial disability benefits commenced November 19, 1986.

13. Penalty benefits are not appropriate in this case.

14. Claimant is not an odd-lot employee as claimant has not demonstrated that the services he can perform are so limited in quality, dependability and quantity that a reasonably stable labor market for them does not exist.

15. Claimant has sustained a permanent partial disability of 20 percent for industrial purposes entitling him to 100 weeks of permanent partial disability benefits.

CONCLUSIONS OF LAW

Claimant, as a result of the injury of May 3, 1984, has sustained a permanent partial disability of 20 percent for industrial purposes.

Claimant has failed to establish a prima facie case he is an odd-lot employee.

Claimant has failed to establish an entitlement to any further medical benefits pursuant to Iowa Code section 85.27 at this time.

The treatment provided by Dr. Galbraith is authorized.

Claimant has failed to establish entitlement to penalty benefits under Iowa Code section 86.13.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay unto claimant one hundred (100) weeks of permanent partial disability benefits at the stipulated rate of two hundred eighty-eight and 15/100 dollars ($288.15) per week commencing November 19, 1986.

That defendants shall pay unto claimant one hundred thirty-two point eight five seven (132.857) weeks of healing period benefits at the stipulated rate of two hundred and 15/100 dollars ($288.15) per week for the period from May 3, 1984 up to and including November 18, 1986.

That defendants shall pay the reasonable and necessary medical expenses of the Chronic Pain Management Clinic and Dr. Galbraith.

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

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

That the costs of this action are assessed against defendants 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 24th day of September, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHRIS POULA, Claimant, vs. SIOUXLAND WALL & CEILING INC., Employer, and IOWA MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 767411 A P P E A L D E C I S I O N

FILED

AUG 26 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 9, 1990 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 26th day of August, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GENE POUSH, Claimant, vs. TL ALLEN COMPANY, Employer, and ALLIED MUTUAL INS. CO., Insurance Carrier, Defendants.	FILED AUG 21 1991 IOWA INDUSTRIAL COMMISSIONER File No. 848302 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding healing period and industrial disability benefits as the result of an alleged injury on December 22, 1986. The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 10. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. Whether or not the condition of claimant's back is related to an injury arising out of and in the course of his employment with defendant-employer.

2. Whether or not claimant has industrial disability related to a job related injury to the extent of 80% of the body as a whole.

REVIEW OF THE EVIDENCE

The arbitration decision filed February 21, 1990 adequately and accurately reflects the pertinent evidence and it will not be set forth herein.

APPLICABLE LAW

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

ANALYSIS

On appeal defendants raise as issues the causal connection of claimant's condition to his work injury, and the extent of his industrial disability.

The opinion of David J. Boarini, M.D., that claimant's present back condition was caused by obesity and age is contradicted by the evidence that claimant had been at the same weight for approximately eleven years and had not experienced any back problems. Although other physicians encouraged claimant to lose weight as part of his recovery, only Dr. Boarini attributed claimant's weight as a cause of his condition. Claimant's work as an ironworker was described as physically strenuous. Although the exact date of injury is in dispute, the work claimant was doing during December 1986, was unusually strenuous, as the iron claimant worked with was heavier than usual, and claimant was not able to use cranes or other devices to help with lifting the iron. Claimant experienced pain immediately and was observed to be limping by his supervisor. Larry D. Hirschy, D.C., attributed claimant's condition to a traumatic work injury and not the wood unloading. It is concluded that claimant suffered a traumatic work injury during December 1986. It is also concluded that claimant's weight and age, although possibly making claimant more susceptible to injury, were not the cause of his injury. Claimant's work activity as an ironworker was a substantial cause of his work injury. It is not necessary that claimant's work activity be the only cause of his injury as long as his work is a substantial cause.

It is also concluded that the wood unloading incident was not the cause of claimant's back injury. Claimant had already experienced pain and reported the incident to a supervisor some two months before the wood incident. In addition, claimant urges that he merely told his doctor of several things he could no longer do, due to his back injury in December 1986, including vacuuming and other household chores. Claimant cited pain he experienced helping someone unload firewood as another example of activities that caused him pain. This does not rise to the level of a possible intervening injury. On the present state of the record, it is concluded that claimant has carried his burden to show by a preponderance of the evidence that his work activity of December 1986, was the cause of his present back condition.

Dr. Boarini has opined zero permanent functional impairment. Dr. Jones has opined three to five percent

functional impairment. Dr. Jones was able to examine claimant on more occasions than Dr. Boarini. In addition, Dr. Boarini based much of his opinion on claimant's obesity, without records of claimant's weight over any period of time. Dr. Boarini's finding of no impairment is contradicted by the tests showing a herniated disc. The opinion of Dr. Jones will be given the greater weight.

Claimant has a relatively low functional impairment rating. Claimant has not undergone surgery. Claimant has restrictions that prohibit him from returning to work as an ironworker. However, claimant's vocational rehabilitation worker indentified jobs claimant could perform with his restrictions.

Claimant has not worked for an extended period of time. All parties concede he is unable to return to his work as an ironworker, which is the work claimant has performed for most of his working life and for which he is trained. Claimant has lost a substantial amount of earnings as a result of his work injury. Claimant's education is limited to high school. Claimant is 48 years old. His back condition eliminates him from most occupations requiring physical labor. Claimant did display motivation to return to work. However, claimant's motivation was limited to returning to ironwork. This may be understandable in light of claimant's need to continue ironworking in order to eventually qualify for a pension, but claimant could have sought alternative employment in fields other than ironwork that were compatible with his physical limitations. Although other jobs would not have paid wages comparable to claimant's wages as an ironworker, claimant chose to not seek alternative employment and instead to collect a union disability pension. Claimant's disability is substantial, but claimant is not totally disabled. Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 60 percent.

FINDINGS OF FACT

1. Claimant injured his back while working as an ironworker on December 22, 1986.

2. As a result of his work injury, claimant has a herniated disc and a whole body permanent impairment rating of three to five percent.

3. Claimant's condition is not caused by his obesity or by the gardening incident.

4. Claimant has permanent medical restrictions and is unable to return to his work as an ironworker.

5. Claimant has not undergone surgery.

6. Claimant was approximately 47 years old at the time of the hearing.

6. Claimant is a high school graduate.

7. Claimant's work experience is limited to ironwork and similar occupations.

8. Claimant is motivated to return to ironwork, but has not shown motivation to return to other types of work consistent with his restrictions.

9. Claimant has experienced a substantial loss of earnings.

8. Claimant has a 60 percent loss of earning capacity as a result of his work related injury on December 22, 1986.

CONCLUSIONS OF LAW

1. Claimant's back condition was causally connected to his work injury of December 22, 1986.

2. As a result of his work injury, claimant has an industrial disability of 60 percent.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay unto claimant healing period benefits at the rate of two hundred forty-four and 56/100 dollars ($244.56) for the period beginning January 2, 1987 through October 15, 1987 minus credit for five point four two nine (5.429) weeks claimant worked in 1987, which leaves a total net healing period of thirty-five point five seven one (35.571) weeks.

That defendants shall pay unto claimant three hundred (300) weeks of permanent partial disability benefits at the rate of two hundred forty-four and 56/100 dollars ($244.56) per week.

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

That defendants shall pay claimant's medical expenses incurred as a result of the December 22, 1986 injury.

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

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

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

Signed and filed this 21st day of August, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CRAIG D. REMSBURG,	
Claimant,	
vs.	File No. 860994
AMERICAN NATIONAL CAN CORP.,	
Employer,	A P P E A L
and	D E C I S I O N
GALLAGHER BASSETT SERVICES,	
Insurance Carrier, Defendants.	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying claimant benefits for an alleged work-related injury on November 5, 1987. The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 32; and defendants exhibits A through F. Both parties filed briefs on appeal.

ISSUES

Claimant states the issue on appeal is: "The deputy commissioner erred in finding that claimant was not injured on November 5, 1987 and that his condition is not causally related to that incident."

FINDINGS OF FACT

The arbitration decision filed January 18, 1991 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

CONCLUSIONS OF LAW

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

The evidence in this case clearly establishes that claimant sustained an injury on November 5, 1987 which arose out of and in the course of his employment. Claimant testified that he was cleaning out the parts washer, a job which he had never performed

before, on November 5, 1987. Claimant testified that the odor was a very heavy type odor from solvents, ink and sludge. Claimant testified that he began to feel lightheaded and nauseated fifteen to twenty minutes after he began the task. The defendant employer's medical file indicated that at 9:15 a.m., S. Rierson R.N., took claimant out of the parts washer. Claimant stated that he was nauseated and had a headache. Claimant's exhibit 7E, p. 6. Ms. Rierson administered oxygen and sent claimant to Kevin F. Smith, M.D. on his way home that day.

Dr. Smith's impression of claimant's condition was that claimant suffered from acute exposure to hydrocarbons and solvents on November 5, 1987. Dr. Smith continued to treat claimant until December 10, 1987. Dr. Smith opined that claimant reached maximum medical recuperation and released claimant to return to work on December 3, 1987.

Claimant has proven by the greater weight of the evidence that he sustained an injury on November 5, 1987 which arose out of and in the course of his employment. Claimant is entitled to temporary total disability from November 5, 1987 through December 3, 1987 on which day he was released by Dr. Smith to return to work.

Claimant was referred by Dr. Smith to Mark Thoman, M.D. a toxilogist for further treatment. The record reveals a causal connection between the treatment claimant received from Dr. Thoman and the work-related accident on November 5, 1987. Claimant is entitled to payment of medical expense as set out in claimant's exhibit 8 and the prehearing report. Claimant is not entitled to further treatment as claimant failed to prove a causal connection between his work-related injury on November 5, 1987 and any permanent disability.

Claimant failed to prove that his work-related injury of November 5, 1987 caused any permanent disability.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay claimant temporary total disability benefits from November 5, 1987 through December 3, 1987 at the stipulated rate of three hundred and seventy-three and 65/100 ($373.65) dollars per week.

That defendants shall receive a credit for payment of benefits under a non-occupational group plan pursuant to Iowa Code section 85.38(2) in the amount of four thousand six hundred and eighty dollars ($4,680.00) as indicated on the prehearing report.

That defendants shall pay claimant's medical expenses requested in the prehearing report namely Dr. Thoman, one thousand five hundred and seven dollars ($1,148 + $349= $1,507). Defendants are ordered to pay the provider directly. Defendants shall pay claimant only if he has paid those bills.

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

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

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

That defendants shall file claim activity reports pursuant to rule 343 IAC 3.1(2).

Signed and filed this 3rd day of October, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SUSAN RHOADES,

Claimant,

vs.

COBBS MANUFACTURING COMPANY,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 890149

A P P E A L

D E C I S I O N

FILED

OCT 29 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 27, 1991 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 29th day of October, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LYLE RIDNOUR, Claimant, vs. CLARINDA MENTAL HEALTH TREATMENT, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	FILED DEC 16 1991 File No. 900513 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed August 2, 1991 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

The Iowa Supreme Court has recently interpreted Iowa Code section 85A.12.

> Iowa Code section 85A.12 does not yield to such an interpretation. This is because, although the claimant contends otherwise, we are not dealing with a statute of limitation. The provision does not list times within which claims must be brought, a routine ingredient of a statute of limitations. 51 Am. Jur. 2d Limitations of Actions § 2, at 592 (1970); 54 C.J.S. Limitation of Actions § 2, at 16 (1987). Rather it states conditions which must exist before a right of compensation arises. Under its provisions the disease must manifest itself within set periods (three years for pneumoconiosis--or one year for other occupational diseases). Otherwise the statute provides no recovery. Like a statute of limitations the section is grounded in time. Unlike a statute of limitations, however, it has nothing to do with when actions must be brought.

Meyer v. Iowa State Penitentiary, No. 334/90-1195, slip op. at 5-6 (Iowa Supreme Court Oct. 16, 1991).

The medical evidence in this case shows that claimant contracted tuberculosis sometime in 1985. The last injurious exposure of the tuberculosis, whether the exposure was at work or not, would have been before the January 9, 1986 diagnosis. Claimant's alleged disablement did not occur until November 1988. If claimant's alleged current disability has been caused by tuberculosis or any sequela, the disability was not within one year of claimant's last alleged injurious exposure. Therefore, Iowa Code section 85A.12 provides no recovery for claimant.

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

Signed and filed this 16th day of December, 1991.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THEODORE R. ROBERTS, Claimant, vs. AIR CON MECHANICAL CORP., Employer, and ALLIED MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 892153 A P P E A L D E C I S I O N

FILED

MAR 27 1992

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.

ISSUES

The issue on appeal is: Whether claimant has proved a causal connection between his July 6, 1988 work injury and an alleged permanent disability.

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed July 16, 1991 are adopted as final agency action.

CONCLUSIONS OF LAW

The conclusions of law contained in the proposed agency decision filed July 16, 1991 are adopted as set forth below. Segments designated by asterisks (*****) indicate portions of the language from the proposed agency decision that have been intentionally deleted and do not form a part of this final agency decision.

1. Whether a causal relationship exists between claimant's claimed injuries and the claimed disability and the nature and extent of any entitlement to benefits, if any.

The claimant has urged that the ultimate decision in this matter rests with the evidence given by the experts who have had the opportunity to treat the claimant's back and neck conditions over the years. More specifically, claimant urges that Dr. Kimelman has conclusively found that claimant has been further functionally impaired by five percent and that this additional impairment has caused claimant to qualify as an odd-lot employee thus entitling him to permanent total disability benefits. In the alternative, because claimant cannot return to his past occupation as a plumber or pipefitter, claimant is entitled to a high industrial disability benefit award. Defendants contend that claimant is not a credible witness and has not been credible for a significant period of time when it comes to workers' compensation claims. Defendants urge that claimant only temporarily aggravated his preexisting back condition on July 6, 1988 and is not entitled to any permanent disability benefits.

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

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

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-61 (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. Gosek v. Garmer and Stiles Co., 158 N.W.2d 731, 737 (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); Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812, 815 (1962); 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); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934). However, the supreme court has also indicated that in order for an aggravation of a preexisting condition to be compensable, the aggravation should be material. Yeager, 253 Iowa 369, 112 N.W.2d at 302. Finally, when an aggravation occurs in the performance of an employer's work and a causal connection is established, claimant may recover only to the extent of the impairment. Ziegler, 252 Iowa 613, 106 N.W.2d at 595; Barz, 257 Iowa 508, 133 N.W.2d at 707; Olson, 255 Iowa 1112, 125 N.W.2d at 256; Yeager, 253 Iowa 369, 112 N.W.2d at 302; Almquist, 218 Iowa 724, 254 N.W. at 38.

*****

The ***** question in this matter, is whether claimant has a temporary or permanent disability attributable to the injury of July 6, 1988. Claimant has failed to adduce sufficient evidence to support a finding that the injury of July 6, 1988, resulted in anything more than a temporary exacerbation of a chronic low back condition that resulted from prior injuries.

The medical evidence in this case has been reduced to possibilities rather than probabilities due to the actions of the claimant. The surveillance tapes led both Dr. Kimelman and Mr. Bower to question the validity of their functional capacity evaluations and the functional impairment rating Dr. Kimelman assigned. The functional impairment rating assigned by Dr. Kimelman was based on Mr. Bower's report which is not valid. Additionally, Dr. Kimelman thought that claimant's functional impairment rating would be modified if claimant had a prior injury at L4-5. Due to these uncertainties, there is insufficient evidence in the record to support a conclusion that claimant suffered a permanent disability as a result of his last back injury. Therefore claimant will take nothing with regard to a permanent partial disability benefit award.

Claimant did show that he was temporarily disabled however. Pursuant to Iowa Code sections 85.32 and 85.33 (1989), temporary total disability of more than 14 days is payable in effect from the injury until the employee has returned to work or is medically capable of returning to substantially similar employment, whichever first occurs. Dr. Kimelman testified that claimant was medically capable of returning to work six months after the date of the injury in this matter. Claimant did not return to work because he had no incentive to return to work. Claimant is currently receiving Social Security benefits, he is receiving long term disability benefits and workers' compensation benefits that total $1,750.00 per month. Additionally, claimant

will not work because his former spouse is intent on garnishing his wages in order to collect her entitlement pursuant to their divorce decree. Given these intervening factors and the testimony of Dr. Kimelman, claimant's period of temporary disability lasted from July 6, 1988 through February 19, 1989 as stipulated by the parties. Claimant will be awarded benefits on that basis.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That Air Con and Allied shall pay to claimant temporary total disability for the period of time beginning on July 6, 1988, and ending on February 19, 1989 at the rate of three hundred eighty-two and 96/100 dollars ($382.96). As these benefits have accrued, they shall be paid in a lump sum together with statutory interest thereon pursuant to Iowa Code section 85.30 (1991).

That Air Con and Allied shall have a credit in the amount of one hundred four (104) weeks against any amounts owed.

That claimant shall pay the costs of the appeal including the transcription of the hearing. Defendants shall pay all other costs.

That Air Con and Allied shall file claim activity reports as required by rule 343 IAC 3.1.

Signed and filed this 27th day of March, 1992.

Byron K. Orton
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FREDERICK ROBINSON, JR., Surviving Spouse of Diana Patricia Robinson, Claimant, vs. COVIA, Employer, and CHUBB GROUP OF INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 921019 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy, as well as the prior rulings on the motion for summary judgment and the motion to dismiss, are affirmed and are adopted as the final agency action in this case, with the following additional analysis:

At issue on appeal is whether a penalty should be assessed against defendants under Iowa Code section 86.13 for unreasonable delay in payment of benefits. The standard is whether defendants' claim is fairly debatable. Where defendants assert 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. In this case, however, there was no factual dispute over the fact that the decedent's death arose out of and was in the course of her employment, or that her death was causally related to the airline crash. Rather, the reason offered by defendants for their failure to voluntarily pay benefits was a constitutional argument that the state of Iowa did not have jurisdiction over the decedent's claim.

A challenge to the constitutionality of the statute itself differs from a fairly debatable factual dispute concerning the evidence. If challenges to the statutory scheme on constitutional grounds were to justify the withholding of voluntary payments, it would be an easy matter for any if not all defendants to avoid their obligations to make voluntary payments by raising attenuated arguments attacking the workers' compensation law itself. Such constitutional objections necessarily must be resolved at the judicial review levels, as an

administrative agency lacks the power to determine the constitutional validity of a statute. Salsbury v. Iowa Dept. of Environmental Quality, 276 N.W.2d 830 (Iowa 1979).

Defendants and insurance carriers are free to make whatever convoluted arguments their lawyers can create in hopes of changing or modifying the law, but in a workers' compensation context, they should do so only while paying benefits if penalties and interest assessments are to be avoided.

The statute clearly gives this agency jurisdiction over decedent's death. Defendants are free to challenge the constitutionality of the statute. However, when the statute on its face imposes liability and imposes a duty to make voluntary payments while the case is pending, defendants are obligated to do so and their failure to pay voluntary payments while the constitutional challenge progressed justifies the imposition of a penalty under Iowa Code section 86.13.

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

Signed and filed this 15th day of April, 1992.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CINDEE ROSSMANN, Claimant, vs. LOUIS RICH COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 847945 A P P E A L D E C I S I O N FILED OCT 16 1991 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant a running award of temporary total disability benefits and ordering defendants to provide medical care for claimant.

The record on appeal consists of the transcript of the arbitration hearing and of joint exhibits 1 through 20. Both parties filed briefs on appeal.

ISSUES

Issues on appeal are:

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

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

3. The extent of claimant's entitlement to weekly benefits for disability, if any; and,

4. The extent of claimant's entitlement to medical benefits, if any.

REVIEW OF THE EVIDENCE

The arbitration decision filed January 23, 1990 adequately and accurately reflects pertinent evidence and it will not be totally reiterated in this appeal decision. These additional facts are presented, however.

Claimant was off work on maternity leave from October 12, 1986 through November 24, 1986. Claimant gave notice of resigning her position with Louis Rich on November 26, 1986, stating that she was doing so in order to move to Illinois. Prior to claimant's November 26, 1986 job resignation, claimant last visited the Louis Rich nurse's station with right shoulder complaints on July 3, 1986. The record does not reflect any visits between July 3, 1986 and November 26, 1986 regarding right wrist or neck pain. Claimant visited the nursing station twice on December 2, 1986 with complaints of right wrist pain and once on December 12, 1986, her final work day, with complaints of tendonitis in the right wrist and thumb. Claimant had visited the nurse's station with complaints of right shoulder or right upper arm pain or both on June 18, 1984, January 22, 1985, March 22, 1985 (two times), March 25, 1985, and October 3, 1985, respectively. From April through August 1982, claimant had visited the nurse's station for right wrist pain on a number of occasions. Claimant was also pregnant at that time with a September 1982 delivery date.

Steve Palmer, M.D., treated claimant for right wrist pain on December 13, 1986.

Walter J. Hales, M.D., on February 22, 1987, stated that claimant related that her condition began at work in late fall (1986) when she began experiencing pain in the hand and shoulder, especially shoulder pain. Dr. Hales reported that claimant continued to have ongoing difficulty despite her work stoppage. Dr. Hales later characterized claimant's pain as having "worked into her neck."

On June 23, 1985, Dr. Hales reported a working diagnosis of C7 radiculopathy. He stated:

> . . . Whether this was caused in the work place or whether it would have happened in spite of work, I am not able to state.
>
> Certainly, there are many people that develop cervical discs whether they are working in a place like Louis Rich or whether they are an executive behind a desk or a housewife, etc., although we

> know there are certain medical conditions we see that are definitely work-related and have a high incidence in the work place. I am not aware of the particular work that she was doing being particularly associated with her present problem.

(Exhibit 11, page 1)

William A. Roberts, M.D., on February 23, 1987, reported that claimant developed right hand and forearm pain "last October while at work." Dr. Roberts re-evaluated claimant on November 16, 1987. His medical notes of that date reflect an impression of persistent neck, shoulder and upper extremity pain of unclear etiology. He stated:

> The presence of chronic neck, shoulder and upper extremity pain for greater than 1 year is quite an unusual presentation and it is difficult for me to ascertain the exact cause of her symptoms. Since I have evaluated the patient only 1 time since her injury over a year ago, I do not believe that I could render an accurate opinion as to whether her present condition may have been caused by her work at Lewis [sic] Rich, although I think the probability, judging by the exact description of her type of work, would be that it was extremely unlikely.

James B. Worrell, M.D., on May 23, 1989, reported that claimant's problems began while she was working at Louis Rich in 1986. He was unable to establish a clear-cut diagnosis regarding claimant's condition, but stated: ". . . I clearly think, however, it was related in one way or another to the type of work she did. . . ." In a consultation report of April 4, 1989, Dr. Worrell reported: "Her trouble started back when she was working at Louis Rich in 1985 and 1986. She eventually quit her job there because of this. . . ."

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it arose out of and in the course of employment. The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place and circumstances of the injury. Sheerin v. Holin Co., 380 N.W.2d 415, 417 (Iowa 1986); McClure v. Union, et al., Counties, 188 N.W.2d 283, 287 (Iowa 1971).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980); Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. The weight to be given to any expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts relied upon by the expert as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974); Anderson v. Oscar Mayer & Co., 217 N.W.2d 531 (Iowa 1974); Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

An expert's opinion based on an incomplete history is not necessarily binding on the commissioner, but must be weighed with other facts and circumstances. Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128, 133 (1967).

ANALYSIS

Our first concern is whether claimant received an injury which arose out of and in the course of her employment. Given the nature of claimant's alleged injury, that question is intertwined with the question of medical causation.

Initially, we note that claimant had only 13 recorded visits to the Louis Rich nurse's station regarding right upper extremity or shoulder pain from beginning work on November 2, 1981 to her end of work with Louis Rich on December 12, 1986. While claimant testified that not all visits to the nurse's station were recorded, that does not appear to accord with sound business practice. Likewise, claimant's supervisor did not recollect claimant routinely seeking permission to visit the nurse's station or presenting pass slips from the nurse's station. Such leads one to suspect that the 13 recorded visits were claimant's visits to the nurse's station regarding upper extremity or

shoulder pain from beginning work in 1981 to ending work in 1986. Thirteen visits for a variety of complaints related to the right shoulder, the right upper arm, and the right wrist and right thumb do not appear extremely unusual in over a five-year period. Likewise, the medical reports and notes of all physicians appear to accept the history given by claimant, that is, that claimant developed her complaints in late fall 1986 while working at Louis Rich. It is established that claimant did not work at Louis Rich for the greater part of fall 1986. She was off on pregnancy leave from October 12, 1986 through November 24, 1986. She resigned her position at Louis Rich on November 26, 1986. Her written notice of resignation did not in any way allude to resignation on account of pain related to work. Likewise, it appears highly unlikely that claimant would have developed pain so severe that it compelled her resignation from Louis Rich between November 25, 1986 and November 26, 1986, especially in light of the fact that claimant had apparently recorded no complaints with the nurse's station while actually working at Louis Rich from July 3, 1986 through October 11, 1986. The record likewise is devoid of any suggestion that claimant sought treatment from an outside source during that time. Hence, claimant's statement that she resigned her position on account of her pain on November 26, 1986 does not appear to comport with the facts presented when reviewed overall.

Likewise, the only doctor to expressly link claimant's condition to her work is Dr. Worrell, who states that he clearly thinks her condition is related in one way or another to the type of work she did. The doctor does not elaborate on what he means by one way or another, or how he arrives at this opinion. The only basis found for the opinion are the histories which Dr. Worrell gives, first on April 4, 1989 where he states claimant's trouble started when working at Louis Rich in 1985 and 1986 and eventually led to her quitting work, and his history of May 23, 1989 where he states her problems began when working at Louis Rich in 1986. As noted, claimant was off work for six weeks and two days in fall 1986 and resigned her position only one day after returning to work. Those facts clearly do not support claimant's described history of problems beginning at work at Louis Rich. Hence, Dr. Worrell's causation testimony is highly suspect. Dr. Hales has reported that he is unable to state whether claimant's injury was caused by her work place, but does state he is not aware of the particular work she was doing being particularly associated with claimant's condition. Dr. Roberts reports that, while he does not believe he could render an accurate opinion as to whether claimant's condition was caused by her work, he

does believe it extremely unlikely that such was so judging by the exact description of her type of work.

Dr. Hales' and Dr. Roberts' opinions are given the greater weight. Those physicians appear to have had a greater understanding of the mechanisms of claimant's work. Furthermore, their opinions that causation is not likely are more consistent with the actual facts presented in that claimant was not working for an extended period during that time in which she alleges her condition required that she cease working. For the above reasons, claimant has failed to establish an injury which arose out of and in the course of her employment.

As claimant has not prevailed on the threshold liability question, she is not entitled to either weekly or medical benefits.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant began work for the employer, Louis Rich, on November 2, 1981 and ended work with the employer on December 12, 1986.

From November 1981 through her last work day, claimant had 13 recorded visits to the Louis Rich nurse's station with complaints related to right shoulder, right upper arm or right wrist pain.

Accepted and appropriate business practice is that an employee's nursing station visits be recorded at the nursing station.

Claimant did not excessively request visits to the nursing station from her supervisor and did not excessively present her supervisor with passes on return from the nursing station.

Claimant's recorded visits to the nursing station regarding right shoulder upper extremity pain were claimant's visits to the nursing station regarding right shoulder and right upper extremity pain.

Thirteen visits to a nursing station for a variety of complaints relating to the right shoulder, the right upper arm and the right wrist and right thumb are not an unusual or excessive number in a five-year period.

Claimant last visited the nursing station with right shoulder pain complaints on July 3, 1986.

Claimant was off work at Louis Rich on maternity leave from October 12, 1986 through November 24, 1986.

Claimant resigned her Louis Rich position on November 26, 1986 in order to care for her children and move to Illinois to live with her grandparents during the course of a marital dissolution.

Claimant visited the Louis Rich nursing station two times on December 2, 1986 for right wrist pain and one time on December 12, 1986 for right wrist tendonitis and a right thumb complaint.

The December 1986 visits were subsequent to claimant's Louis Rich resignation and were not related to the resignation.

Claimant was not actually at work at Louis Rich for six weeks and two days in the fall of 1986.

Medical histories stating that claimant's symptoms developed in late fall 1986 while working at Louis Rich are inaccurate.

The type of work claimant did do at Louis Rich while actually working at Louis Rich is not particularly associated with claimant's medical condition.

It is extremely unlikely that claimant's medical condition resulted from her work at Louis Rich, given the exact description of her work.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established an injury arising out of and in the course of her employment, which injury is causally related to her alleged disability.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceeding.

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

Signed and filed this 16th day of October, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS W. RYAN, Claimant, vs. UNITED PARCEL SERVICE, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 915458 A P P E A L D E C I S I O N

FILED
JUL 10 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 April 16, 1990, is affirmed as modified below and is adopted as the final agency action in this case, with the following additional analysis:

Claimant was a part-time employee, earning less than the usual weekly earnings of a regular full time adult laborer in the line of industry in which he was employed when injured. Regardless of the fact that claimant had been so employed less than 12 months, Iowa Code section 85.36(10) is applicable. Claimant's gross earnings are therefore calculated based on one-fiftieth of the total earnings which the employee would have earned from all employment during the twelve calendar months immediately preceding the injury.

The record reflects that claimant's total earnings from all employment during the twelve months preceding his injury (his employment with defendant employer and from a summer job with a lawn service) equaled approximately $529.19. Divided by 50, this yields an average gross weekly wage of $10.58. However, Iowa Code section 85.34(2) provides a minimum rate of a full-time student under the age of twenty-five for permanent partial disability benefits. It was stipulated at the hearing that claimant was a full-time student. Claimant was under the age of twenty-five at the time he was injured. Under Iowa Code section 85.34(2), claimant's weekly benefit amount for permanent partial disability benefits is equal to the weekly benefit amount of a

person whose gross weekly earnings are thirty-five percent of the statewide average weekly wage. Thus, claimant's gross weekly wage for permanent partial disability as the result of an injury occurring in March of 1989 would be $116.00. (The state wide average weekly wage during this time was $333.01). Claimant, single with one exemption, would be entitled to a rate of $77.35 for his permanent partial disability benefits. Under Iowa Code section 85.37, claimant's healing period rate is not affected by his status as a full-time student. Thus, claimant's healing period benefits shall be paid at the rate of $10.17.

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

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

Signed and filed this 10th day of July, 1991.

Clair R Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL L. RYERSON,

Claimant,

vs.

O & W TRANSPORT, INC.,

Employer,

and

TRAVELERS INSURANCE COMPANY,

Insurance Carrier,
Defendants.

FILED

DEC 16 1991

File No. 916736

IOWA INDUSTRIAL COMMISSIONER

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed June 26, 1991, 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 16th day of December, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHEILA SAMPLE, Claimant, vs. WALGREENS, Employer, and TRAVELERS, Insurance Carrier, Defendants.	:	File No. 910533 A P P E A L D E C I S I O N FILED OCT 3 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 May 17, 1991, 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 3rd day of October, 1991.

Byron K. Orton

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Des Moines, Iowa 50309-2207

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

NANCY SANDERSON,

Claimant,

vs.

K-PRODUCTS, INC.,

Employer,

and

GENERAL CASUALTY INSURANCE,

Insurance Carrier,

and

SECOND INJURY FUND,

Defendants.

File Nos. 883564/910527

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed January 18, 1991 is affirmed and is adopted as the final agency action in this case.

Defendants, K-Products and General Casualty Insurance, shall pay the costs of the appeal, including the preparation of the hearing transcript.

Signed and filed this 21st day of October, 1991.

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WAYNE W. SCHANTZ, Claimant, vs. FRUEHAUF CORPORATION, Employer, and CNA INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	FILED NOV 26 1991 File No. 848614 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

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

ISSUE

The sole issue on appeal is the extent of claimant's industrial disability as a result of his May 5, 1987 work-related injury.

FINDINGS OF FACT

The findings of fact of the deputy's proposed decision filed January 16, 1991 are affirmed and adopted.

CONCLUSIONS OF LAW

The conclusions of law in the deputy's proposed decision are affirmed and adopted with the following additions.

Defendants appeal an award of permanent total disability. The conclusions of law in this case are limited to the facts herein. Claimant first underwent a laminectomy and discectomy on June 12, 1987 at L4-5 as a result of his May 5, 1987 work injury. Claimant failed to improve following surgery. Conservative treatment was prescribed, however, treatment did not relieve claimant's symptoms. Claimant underwent a second laminectomy and discectomy at L4-5 on November 16, 1987. Claimant returned to work following the second surgery. Again claimant's back

condition deteriorated resulting in claimant missing numerous work days. Claimant enrolled in a pain clinic on May 4, 1989 and has not returned to work.

Claimant's treating physician, William A. Roberts, M.D., opined that claimant had a nine percent impairment. After reviewing medical evidence and the Guides to the Evaluation of Permanent Impairment published by the AMA, Dr. Roberts' impairment rating does not appear to be consistent with claimant's two failed back surgeries and his work restrictions; therefore, it is given little weight. Claimant has undergone biofeedback and occupational and physical therapy which failed to relieve his low back pain. Claimant used a TENS unit, however, his skin became irritated by the electrodes. Even epidural blocks which initially provided relief have failed to provide claimant with lasting relief from his debilitating back pain. A greater permanent impairment rating would be expected in light of claimant's two failed back surgeries and his work restrictions.

Claimant's physical restrictions consist of no repetitive bending, stooping or reaching, no sitting for greater than 30 minutes at any one time, and no prolonged driving. The majority of claimant's work experience is in the area of heavy labor. Claimant can no longer perform heavy labor. Claimant's work restrictions appear to preclude employment even in sedentary markets as claimant is not allowed to sit more than 30 minutes at any one time. In light of the evidence in this case, it is determined that claimant has proven by a preponderance of the evidence that he is permanently totally disabled.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay unto claimant healing period benefits commencing on May 14, 1987 through March 20, 1988 at the stipulated rate of two hundred fifty-four and 30/100 dollars ($254.30) per week.

That defendants shall pay unto claimant permanent total disability benefits at the stipulated rate of two hundred fifty-four and 30/100 dollars ($254.30) per week commencing May 4, 1989 and continuing during such time as claimant shall remain totally disabled.

That defendants shall receive credit for all payments voluntarily.

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

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

That defendants shall file a claim activity report pursuant to rule 343 IAC 3.1.

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

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES SCHARPER, Claimant, vs. SUPER VALU STORES, INC., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 860288 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed February 23, 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 25th day of November, 1991.

BYRON K. ORTON
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES W. SCHERTZ,

Claimant,

vs.

J & J STEEL, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 845391

A P P E A L

D E C I S I O N

FILED

JUN 30 1992

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 September 5, 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 30th day of June, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TED SCHEUERMANN,	:	
Claimant,	:	File Nos. 773553/872707
	:	872708
vs.	:	
	:	A P P E A L
OSCAR MAYER FOODS CORPORATION,	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed August 16, 1989 is affirmed and is adopted as the final agency action in this case with the following additional analysis:

Claimant pled injury dates of January 1, 1985 or May 28, 1985 for an apparent cumulative injury that he alleges resulted in thoracic outlet syndrome. Claimant has failed to carry his burden to prove by a preponderance of the evidence that his present thoracic outlet syndrome condition is causally related to his work activity. The thoracic outlet syndrome was not diagnosed until some fourteen months after claimant quit working for defendant. In the interim, claimant worked as a construction laborer, and with farm work. The medical evidence acknowledges that these jobs would constitute possible intervening causes of his present condition, that were likely to aggravate a pre-disposition to thoracic outlet syndrome.

In addition, although the employer's records are replete with notations of claimant's complaints of hand and finger pain, there are no references to upper arm or shoulder pain except one reference to biceps pain. Claimant's testimony that he experienced arm and shoulder pain frequently during and shortly after working in the offal room is contradicted by the employer's records. It is reasonable to assume that since claimant's hand and finger complaints were noted, that if claimant had complained of shoulder and upper arm pain, those complaints would have been noted as well. Taken as a whole, the medical evidence fails to sustain claimant's burden of proof to show that his present thoracic outlet syndrome condition is causally connected to his work activity with this defendant.

Under McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985), the date of injury is when the claimant, due to pain or discomfort from the cumulative injury, leaves work. McKeever provides a method of determining a date of injury for cumulative injury cases. Leaving work due to the pain or discomfort from the cumulative injury is not necessarily part of the definition of a cumulative injury, or a prerequisite to a cumulative injury. A claimant may suffer a cumulative injury and never leave work due to the pain, such as when the plant closes or some other event intervenes. In those cases, claimant has suffered a cumulative injury even though another method of determining a date of injury must be found. See Koehler v. Morrison, Lloyd and McConnel, Arbitration Decision, February 28, 1990.

Claimant has not failed to show a cumulative injury because he was never compelled to leave work due to pain or discomfort. Claimant has failed to establish entitlement to benefits for the alleged January 1, 1985 and May 28, 1985 injuries because he has not shown his present condition is causally connected to his work.

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

Signed and filed this 20th day of December, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CALISTA E. SCHMELL, Claimant, vs. BRAMMER MANUFACTURING, Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	File No. 832843 A P P E A L D E C I S I O N

Defendants appeal from an arbitration decision awarding permanent total disability as the result of an injury on September 11, 1986. The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 13; and defendants' exhibits A through F. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. The Deputy Industrial Commissioner abused her discretion by ruling to allow claimant to amend her Petition one day prior to hearing to include the issue of odd-lot.

2. The Deputy Industrial Commissioner erred in applying the odd-lot doctrine where the only evidence presented regarding employment was that claimant could not find employment in southern Texas and there was no showing of her employability in Iowa, her residence at the time of injury.

3. The Deputy Industrial Commissioner erred in finding that claimant sustained her burden of proof with regard to her claims of odd-lot and permanent total disability

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

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

ANALYSIS

A hearing assignment order was issued on May 17, 1989. Paragraph 8 of that order reads: "Additional Amendments to Pleadings: No further amendments to a party's pleading which materially change the issues of the hearing will be allowed without a modification of this order."

On December 18, 1989, claimant filed a motion to amend her petition to include the issue of the odd-lot doctrine. The motion to amend indicated that a copy was sent to counsel for the defendants. Under rule 343 IAC 4.9(6), defendants were entitled to file a resistance to the motion, but did not. After the ten days contemplated by rule 4.9(6) had elapsed, a deputy industrial commissioner issued a ruling on January 2, 1990, the day before the hearing, sustaining the motion to amend the petition. At the hearing on January 3, 1990, defendants' counsel indicated he was not aware of the motion to amend.

The motion to amend was directed to the petition. Claimant did not seek to amend the hearing assignment order, as contemplated by paragraph 8 of the order. The ruling on the motion to amend granted an amendment of the petition only, and did not constitute an amendment of the hearing assignment order.

In order to avoid unfair surprise, the hearing assignment order controls the issues that can be considered at the hearing. Presswood v. Iowa Beef Processors, Inc., Appeal Decision, November 14, 1986; Chamberlain v. Ralston Purina, Appeal Decision, October 29, 1987; Marcks v. Richman Gordman, Appeal Decision, June 29, 1988.

Claimant waited until the eleventh hour to make her motion, then amended the petition only. If claimant desired to add odd-lot as an issue at the hearing, a motion to amend the hearing assignment order was necessary.

In addition, by waiting until December 18, 1989, to file the

motion to amend, claimant was allowing only a minimal amount of notice to defendants. The earliest a ruling could have been made on the motion under 343 IAC 4.9(6) would have been December 29, allowing ten days for the filing of a resistance. Taking into account the national holiday on January 1 and a reasonable delay to make sure the postal service had delivered to this agency any resistance mailed on the tenth day after the filing of the motion, at most defendants would have only one or two days between the ruling on the motion and the hearing in which to prepare a defense to this material issue.

Raising odd-lot as an issue differs from other amendments to pleadings. The odd-lot doctrine is a procedural device that contemplates, upon sufficient showing, a shifting of the burden of proof from claimant to defendants. In order to meet this shifting of the burden of proof, defendants must put on evidence that there are jobs available to claimant within her restrictions in order to defeat a finding of permanent total disability. This necessarily entails the gathering and calling of witnesses or the presentation of exhibits.

Thus, even though the deputy may have properly granted the motion to amend the petition, that ruling did not operate to amend the hearing assignment order to include the issue of odd-lot. In addition, even if the ruling had operated to amend the hearing assignment order, the timing of the motion and the ruling gave defendants insufficient time to prepare a defense on this issue to comply with the requirements of due process. Odd-lot should not have been considered as an issue at the hearing on January 3, 1990.

The above ruling makes a determination of defendants' second issue unnecessary. Since odd-lot was not properly an issue, the question of whether the proper standard is the availability of jobs in the area of claimant's residence at the time of the injury or at the time of the hearing is now moot.

The nature and extent of claimant's disability as a result of her work injury will be evaluated without regard to the odd-lot doctrine. Claimant was 50 years old at the time of the hearing. She had impairment ratings of 10 to 25 percent, along with numerous restrictions. Her restrictions prevent her from returning to any kind of work she has performed in the past. Her education is limited to the ninth grade.

In determining industrial disability, the fact that employment opportunities are temporarily restricted due to a local economic situation is not a factor, in that such conditions affect all workers in the area equally, regardless of claimant's

injury. Webb v. Lovejoy Construction Company, II Iowa Industrial Commissioner Report 430 (Appeal Decision 1984). The focus is on claimant's loss of earning capacity as a result of her work injury.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to be permanently and totally disabled.

FINDINGS OF FACT

1. As a result of her work injury on September 11, 1986, claimant has functional impairment ratings of up to 25 percent.

2. Claimant is 50 years old and she completed only the ninth grade.

3. Claimant has spent most of her working career in labor positions, waitressing and performing housekeeping.

4. Claimant is currently training to make and sell tamales in her home.

CONCLUSIONS OF LAW

Odd-lot was not properly raised as an issue at the arbitration hearing.

As a result of her work injury, claimant is permanently and totally disabled.

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 weekly benefits for the duration of claimant's period of permanent total disability with said benefits commencing on September 11, 1986 and running continuously at the stipulated rate of two hundred one and 77/100 dollars ($201.77) per week.

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

That defendants shall take credit for benefits previously paid claimant.

That costs are taxed to defendants pursuant to rule 343 IAC 4.33 including the cost of the transcription of the hearing.

Signed and filed this 29th day of January, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BERNARD SCHNEIDER, Claimant, vs. PRAIRIE CONTRACTORS, INC., Employer, and HOME INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 869747 A P P E A L D E C I S I O N FILED APR 20 1992 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 25, 1991, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Defendants challenged the reasonableness of a portion of the medical fees claimant is seeking. The record shows these fees were paid by claimant. There is no contrary evidence from defendants indicating the fees were unreasonable. Payment of medical fees can constitute evidence of their reasonableness and, in the absence of contrary evidence, is sufficient to carry claimant's burden of proof on this issue. To the extent McClellon v. Iowa Southern Utilities, Appeal Decision, January 31, 1992 (#894090) differs, that holding is hereby overruled on this limited ground.

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

Signed and filed this 20th day of April, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

OTTO SCHNEIDER,

Claimant,

vs.

PIEPER, INC.,

Employer,

and

CIGNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File Nos. 904873,
923601 & 923602

A P P E A L

D E C I S I O N

FILED

NOV 20 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 February 21, 1991 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 20th day of November, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SUSAN SCHOLL,

Claimant,

vs.

LIBBEY-OWENS FORD,

Employer,

and

WAUSAU INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 875684

A P P E A L

D E C I S I O N

FILED

JUL 30 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 September 4, 1990 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 30th day of July, 1991.

Clair R Cramer
CLAIR R. CRAMER
ACTING INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOYCE SCHROEDER,

Claimant,

vs.

WELLS' MANUFACTURING CORPORATION,

Employer,

and

CNA INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

FILED

JUN 30 1992

File No. 894119

INDUSTRIAL COMMISSIONER

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed August 10, 1990 is affirmed and is adopted as the final agency action in this case with the following additional analysis:

There is no statutory authority to order defendants to pay a late payment penalty or fee imposed by claimant's medical providers. That portion of the order contained in the arbitration decision filed August 10, 1990 which ordered defendants to pay a late penalty is reversed. All other aspects of the arbitration decision filed August 10, 1990 are affirmed.

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

Signed and filed this 30th day of June, 1992.

Byron K. Orton

BYRON K. ORTON
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY P. SHANK,	
Claimant,	
vs.	
MERCY HOSPITAL MEDICAL CENTER,	File No. 719627
Employer,	A P P E A L
and	D E C I S I O N
AETNA CASUALTY & SURETY CO.,	
Insurance Carrier,	
and	
SECOND INJURY FUND OF IOWA,	
Defendants.	

Claimant was previously determined to be permanently and totally disabled in an appeal decision filed August 28, 1989. A remand to the deputy was issued on the limited question of the amount of disability that was attributable to claimant's vision loss to determine the amount of "credit" the Second Injury Fund of Iowa is entitled to for claimant's prior vision loss due to congenital cataracts.

The deputy's decision on remand was issued July 16, 1990. An appeal from that decision has been taken by both claimant and the Second Injury Fund of Iowa. The Fund, claimant, and employer have filed briefs on appeal from the remand decision. The appeal brief of the Fund addresses five issues, only the last of which deals with the subject of the limited remand. Only that portion of the Fund's brief will be considered.

The issue in this appeal is the extent of impairment caused by claimant's congenital vision loss. Claimant was placed at the Iowa Braille and Sightsaving School at age five. Claimant is unable to read without glasses, and with corrective lenses his vision is 20/200. Claimant uses two pairs of glasses, one for close vision, another for distances. Claimant cannot obtain a driver's license because of his vision.

Claimant was able to work at a number of jobs prior to his work at Mercy Hospital in spite of his vision loss, including construction work, lumber yard work, and office work. Claimant was able to perform his duties at Mercy Hospital in spite of his vision loss.

The parties did not offer a rating under the AMA Guides to the Evaluation of Permanent Impairment for claimant's vision loss. It is improper to speculate as to a rating of impairment under the AMA Guides without evidence in the record from an expert medical witness that utilizes the Guides. However, the agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence to determine claimant's disability as a result of his vision loss. Iowa Code section 17A.14(5).

Based on the evidence in the record, it is concluded that claimant's congenital vision loss resulted in an impairment of 60 percent of the whole person.

It is therefore concluded that the compensable value of Larry P. Shank's preexisting loss of vision is 300 weeks under the provisions of Iowa Code sections 85.34(2)(s) and 85.64.

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

ORDER

THEREFORE, it is ordered

That the Second Injury Fund of Iowa pay Larry P. Shank weekly compensation for permanent total disability at the rate of one hundred sixty-five and 45/100 dollars ($165.45) per week payable commencing three hundred four point five (304.5) weeks after July 29, 1985 and continuing each week thereafter for so long as Larry P. Shank remains totally disabled.

That the costs of this action are assessed against the Second Injury Fund of Iowa pursuant to rule 343 IAC 4.33.

That the Second Injury Fund of Iowa file claim activity reports as requested by this agency pursuant to rule 343 IAC 3.1.

Signed and filed this 27th day of September, 1991.

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WAYNE SHELTON,	:	
Claimant,	:	
vs.	:	File No. 871201
METRO TRANSIT AUTHORITY,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
HARTFORD INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision filed January 26, 1990, awarding claimant healing period benefits, industrial disability benefits, and payment for certain medical care.

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

ISSUES

The issues on appeal are:

1. Whether claimant's alleged disability is causally connected to his November 12, 1987 injury;

2. The nature and extent of claimant's disability, if any; and,

3. Whether claimant is entitled to benefits under section 85.27.

REVIEW OF THE EVIDENCE

The arbitration decision filed January 26, 1990 adequately and accurately reflects the pertinent evidence and will not be reiterated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence with the following additional citation:

Expert testimony that condition could be causally related to claimant's employment together with non-expert testimony tending to showing causation may be sufficient to sustain an award, but does not compel an award. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974).

ANALYSIS

The analysis of the evidence in conjunction with the law in the arbitration decision relative to the issues of claimant's entitlement to healing period benefits and relative to the issue of claimant's entitlement to payment of medical costs pursuant to section 85.27 are adopted. The analysis of evidence in conjunction with the law in the arbitration decision relative to the issue of causation between claimant's work injury and alleged permanent disability and relative to claimant's entitlement to industrial disability is modified in the following regards:

Defendants argue that there is insufficient evidence of causal relationship between claimant's underlying disc disease and his activities as a bus driver to support the deputy's finding of a causal relationship between that activity and any permanent impairment to claimant. Defendants rightly state that Dr. Boulden assigned a five percent permanent partial impairment rating as relating to the underlying disc disease. Defendants overstate their case, however.

As the deputy set forth in the Review of the Evidence, Dr. Boulden indicated that claimant's underlying disc disease "may or may not" be related to his activities of bouncing and riding in a bus for 15 years. The doctor indicated that further testing would be necessary for a definitive [medical] answer as to that causation. Sufficient lay evidence exists to establish the requisite causation, however, when that lay evidence is coupled with Dr. Boulden's statement of a possibility of causation. Claimant apparently had no symptoms leading to a finding of degenerative disc disease until he began experiencing back problems in late 1986 and sought chiropractic care for those. That driving a bus involves jarring and bouncing motions is not disputed. Those facts support the deputy's finding that the greater weight of evidence indicates claimant had a preexisting degenerative disease, which

preexisting disease was materially worsened, aggravated and lighted up by claimant's years of bus driving.

We next consider the question of the nature and extent of claimant's permanent disability, if any.

The deputy found that claimant had a 15 percent industrial disability. That finding is not unreasonable given the overall circumstances presented. Claimant has a mild permanent partial impairment of his lower back. Claimant has restrictions relative to lifting over 35-40 pounds, and relative to bending, stooping, and sitting or standing for prolonged periods without breaks. Those restrictions preclude claimant from many heavy labor positions for which he would otherwise qualify. While claimant is a high school graduate and is bright enough to have developed some individual expertise as a computer operator and programmer, his only formal training is a truck driving course. His experience has all been in the driving industry. Without appropriate work hardening, it is doubtful that claimant will be able to work in that industry without aggravating his condition. Indeed, claimant was working as a trucker at time of hearing and had worked as a short-haul trucker and as a limousine driver subsequent to his termination with this employer. Claimant testified and it is accepted that claimant experienced pain and difficulties in those positions when he was required to drive for more prolonged periods or when he was required to lift without appropriate assistance.

It cannot be said that claimant is motivated, however. The record is replete with instances where claimant did not cooperate with his doctors nor with his employer relative to realistic attempts to improve claimant's physiological functioning and return him to the competitive labor market. Claimant had significant problems in his dealings with Drs. Boulden, Blessman, and Boarini. Claimant also had significant problems in his dealings with his vocational rehabilitation counselor, Ms. O'Brien. The record, taken as a whole, does not establish that any of these individuals dealt with claimant in any but the most professional manner and in any manner but a manner showing a sincere concern for claimant's well-being and a desire to assist claimant in realistically assessing his physical and economic condition and in taking responsibility for such condition. That claimant did not do so cannot be impugned to any of those individuals. [We note in passing that defendants did not refer to claimant to Mayo Clinic as Dr. Haag had suggested. That decision was reasonable under the circumstances. Claimant had at that time been examined by three experts: Dr. Boulden, an orthopaedic surgeon; Dr. Boarini, a

neurological surgeon; and, Dr. Blessman, a pain specialist. All three have found that claimant's subjective complaints were significantly greater than the objective findings warranted. Nothing in the record suggests that any of the three were biased or operating out of personal prejudice toward claimant in making those findings. Nothing in the record overall suggests that further evaluation at Mayo was warranted or that claimant would have received a more non-biased result should claimant have undergone evaluation at Mayo Clinic.

Likewise, the deputy found that defendants terminated claimant on account of his work injury and then refused to rehire claimant on account of his work injury. The record overall does not support that finding. Claimant's personnel file is replete with instances where claimant appeared to have placed his own immediate interests above the interests of his employer. While such instances may well not constitute misconduct that would disqualify the individual from receiving unemployment compensation, it was not unreasonable for this employer to interpret claimant's failure to more fully cooperate with the employer's attempts to return claimant to work and with the recommendations of the authorized physicians as part of a pattern of inappropriate conduct such that the employer chose to release claimant from employment, even should claimant qualify for unemployment compensation benefits. It is noted that neither claimant nor his union further appealed his termination subsequent to the final employer determination from Mr. Spade. Such suggests a private determination that the employer had sufficient basis for termination. Likewise, claimant sought re-employment with the employer subsequent to his termination. The employer advised claimant that claimant should demonstrate his ability to work in the field by working in a light capacity for at least one year before the employer would comfortably consider re-employing claimant. Such was not an unreasonable decision on the employer's part, given claimant's past work record and claimant's desire at the time of his termination not to return to work with the employer on account of his back condition.

Given the above, a McSpadden analysis which enhances claimant's industrial disability on account of employer termination or refusal of return to work subsequent to a work injury is not warranted. The employer's termination of claimant and its refusal to rehire had their basis in claimant's overall work history with the employer and not in the work injury and its sequelae per se. Similarly, claimant's industrial disability is not enhanced on account of claimant's motivation. Indeed, claimant's motivation is

a factor that substantially reduces his industrial disability. Had claimant demonstrated substantial limitations on his ability to compete in the job market after participating fully in recommended work hardening and vocational and physical rehabilitation, claimant's loss of earnings might well be substantially greater than the 15 percent the deputy proposed. Claimant has not demonstrated such.

On the other hand, given claimant's limited education, limited experience, mild physical impairment of the low back, and inability to engage in heavy labor on account of his restrictions, a finding of a loss of earning capacity of 15 percent is appropriate. Claimant is, therefore, found to have sustained a 15 percent permanent partial industrial disability on account of his injury of November 12, 1987.

FINDINGS OF FACT

WHEREFORE, it is found:

Claimant incurred a work-related cumulative injury to his low back on November 12, 1987.

Claimant's work-related low back injury is the result of his November 12, 1987 injury.

Claimant has a five percent permanent impairment to his back as a result of his work-related cumulative injury on November 12, 1987.

Claimant reached maximum healing on April 11, 1988.

Claimant incurred a healing period beginning November 12, 1987 to and including April 11, 1988, which involved 21.714 weeks.

The employer terminated claimant on May 18, 1988, after claimant brought in statements of Drs. Haag and Wignall that claimant should not return to work, which statements contradicted the statements of Drs. Boarini and Blessman that claimant could return to work.

Defendants refused to rehire claimant in May 1989 even though defendants were advertising for bus drivers.

Defendants' refusal to rehire claimant in May 1989 was not unreasonable nor directly related to claimant's work injury, given the overall pattern of claimant's relationship with the employer prior to his May 1988 termination and

given claimant's non-return to work in May 1988 on account of claimant's back condition.

Claimant was employed as an over-the-road trucker at time of hearing and was earning as much if not more money from that employment than he earned at time of his November 12, 1987 injury.

Claimant has restrictions on sitting, standing, bending, stooping and lifting which restrictions preclude him from heavy labor such as he might have performed prior to November 12, 1987.

Claimant's training and experience are in the driving industry.

Claimant was not cooperative with efforts to physically and economically rehabilitate him.

Claimant lacks motivation. Claimant's lack of motivation substantially reduces claimant's actual loss of earning capacity.

CONCLUSIONS OF LAW

THEREFORE, it is concluded:

Claimant's cumulative low back injury on November 12, 1987 arose out of and in the course of claimant's employment.

Claimant's low back injury and five percent permanent partial impairment to his back is causally connected to his cumulative work injury on November 12, 1987.

Claimant reached maximum recovery on April 11, 1988.

Claimant incurred a healing period beginning November 12, 1987 to and including April 11, 1988, which involved 21.714 weeks.

Claimant has a 15 percent industrial disability.

Defendants are responsible for claimant's medical bills in the amount of $521.19 with Hilltop Clinic (Dr. Haag), and a Mercy Hospital bill in the amount of $145.00.

Defendants are not responsible for claimant's chiropractor bill in the amount of $225.00 with Dr. Wignall.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant healing period benefits beginning November 12, 1987 through April 11, 1988, encompassing twenty-one point seven one four (21.714) weeks at the rate of two hundred sixty-four and 29/100 dollars ($264.29) per week.

Defendants shall pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of two hundred sixty-four and 29/100 dollars ($264.29) per week commencing April 12, 1988.

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

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

Defendants shall pay the medical bill of Hilltop Clinic (Dr. Haag) in the amount of five hundred twenty-one and 19/100 dollars ($521.19), and the Mercy Hospital bill in the amount of one hundred forty-five dollars ($145.00). Defendants are not responsible for Dr. Wignall's bill in the amount of two hundred twenty-five dollars ($225.00).

Defendants pay the costs of the appeal, including the preparation of the hearing transcript pursuant to rule 343 IAC 4.33.

Defendants file claim activity reports pursuant to rule 343 IAC 3.1(a).

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

Helenjean Walleser
HELENJEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES SHIVES, Claimant, vs. FARMLAND INDUSTRIES, Employer, and AETNA CASUALTY & SURETY, Insurance Carrier, Defendants.	:	File No. 879525 A P P E A L D E C I S I O N

FILED

SEP 12 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 May 22, 1990 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 12th day of September, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RITA SIEVERDING,

Claimant,

vs.

JOHN MORRELL & CO.,

Employer,

and

NATIONAL UNION FIRE INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 946365

A P P E A L

D E C I S I O N

FILED

JUN 30 1992

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 31, 1991 is affirmed and is adopted as the final agency action in this case.

Claimant attempts to raise for the first time on appeal the issue of whether discovery requirements were correct. Claimant did not raise the issue before the presiding deputy (see e.g., the prehearing report dated November 6, 1991) and the issue will not be considered on appeal.

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

Signed and filed this 30th day of June, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

NANCY SIMONSON,	:	
Claimant,	:	
vs.	:	File Nos. 798628/842007
	:	851960
SNAP-ON TOOLS,	:	
Employer,	:	A P P E A L
	:	D E C I S I O N
and	:	
ROYAL INSURANCE COMPANY,	:	
Insurance Carrier,	:	
Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding temporary total disability benefits in file number 842007 and healing period and permanent partial disability benefits in filed number 851960.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits A through D; and defendants' exhibits 1 through 33.

ISSUES

By previous ruling, claimant failed to timely file an appeal brief. Therefore, the appeal will be considered generally and without regard to specific issues.

FINDINGS OF FACT

The findings of fact contained in the arbitration decision is adopted herein.

CONCLUSIONS OF LAW

The conclusions of law contained in the proposed agency decision are adopted herein as set forth below. Segments indicated by asterisks (*****) indicate portions of the proposed agency decision that have been intentionally deleted and that do not form a part of this final agency decision:

As stipulated, an employment relationship existed between claimant and Snap-On Tools Corporation at all times relevant and that claimant sustained an injury arising out of and in the course of that employment, but dispute the date and manner of occurrence(s). This amounts to no stipulation at all. Accordingly, "arising out of" will be treated as a disputed issue, as will causal connection.

Claimant has the burden of proving by a preponderance of the evidence that she received an injury or injuries 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. Cent. Tel. Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. School Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Community School Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure v. Union, et al., Counties, 188 N.W.2d 283 (Iowa 1971); Musselman v. Cent. Tel. Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934) discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury....The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.
>
> ....

A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

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

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

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-61 (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 1985 injury occurred as the result of a traumatic incident while claimant was bending and lifting. Claimant was off work from July 5 through July 12 and returned to work effective July 15 with no medical restrictions whatsoever. She was voluntarily paid weekly benefits, receiving the last of those on July 19, 1985. Defendants have raised a limitations defense under Iowa Code section 85.26. The statute provides that an original proceeding for benefits shall not be maintained in any contested case where weekly compensation benefits have been paid unless the proceeding is commenced within three years from the date of the last such payment. Because the petition in this case was filed on December 29, 1988, further relief is barred under section 85.26. Claimant contends that the running of limitations under 85.26 was stopped by failure to file a commencement of payments notice pursuant to section 86.13. However, official notice of timely filing of that notice has been taken. Accordingly, other issues involved with this injury (e.g., interest and penalty) are rendered moot. However, because this decision finds that claimant is entitled to industrial disability for the 1987 injury, it is necessary to consider the extent of her 1985 industrial disability, because any such should be apportioned out from the award attributable to that later injury.

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).

Because claimant returned to her same job without medical restrictions and continued working for years thereafter, it is held that she sustained no permanent reduction in earning capacity as a result of the 1985 injury.

The 1986 injury did not result from an identifiable traumatic incident. Rather, it is in the nature of a cumulative injury. In cases of cumulative injury, the injury date is deemed to be when due to pain or physical inability claimant is no longer able to work. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa

1985). Expert testimony is of particular importance in determining whether a condition of disability is causally related to the work or "arose out of" the same. Dr. Drown, upon a diagnosis of spinal subluxation and strain, concluded that claimant's condition resulted from fatigue causally related to lifting at work. No contrary evidence appears of record. Claimant has clearly met her burden of proof in establishing the 1986 work injury and causal connection to, at least, a period of temporary disability.

Claimant was forced to miss work from November 6 through November 17 and was returned to work without restrictions on November 18, 1986. Once again, she returned to the same work and continued for at least some months in the absence of any medical restriction whatsoever. Claimant is entitled to temporary total disability benefits, but did not sustain industrial disability arising from any permanent impairment. Accordingly, no portion of claimant's current industrial disability is attributable to this injury.

Pursuant to Iowa Code sections 85.32 and 85.33, temporary total disability that does not extend beyond fourteen days is compensable beginning on the fourth day of disability and continuing until the employee has returned to work. Accordingly, claimant is entitled to nine days of temporary total disability benefits commencing November 9, 1986. The parties stipulated that claimant's gross weekly earnings as of November 6, 1986 averaged $404.80. Pursuant to the Guide to Iowa Workers' Compensation Claim Handling effective July 1, 1986, a married claimant entitled to five exemptions and those average earnings is entitled to a rate of $260.58 per week. Accordingly, claimant is entitled to an award of $335.11 with respect to the 1986 injury.

Since defendants voluntarily paid less than claimant's entitlement, it is necessary to consider their affirmative defenses under Iowa Code sections 85.23 and 85.26. Both fail.

Claimant's petition filed on December 29, 1988 was clearly within three years of the last payment of weekly benefits. Accordingly, the 85.26 defense fails.

Under Iowa Code section 85.23, no compensation will be allowed unless the employer or its representative shall have actual knowledge of the occurrence of an injury or be given notice by claimant or someone on her

behalf within 90 days from the date of the occurrence of the injury. Dr. Drown's letter of December 9, 1986 furnished actual knowledge. Accordingly, the 85.23 defense fails.

Claimant asserts entitlement to penalty under Iowa Code section 86.13, unnumbered paragraph 4. Under the statute, if a delay in commencement of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award benefits up to 50 percent of the amount unreasonably delayed. The word "shall" indicates a mandatory duty. The check compensating claimant for her temporary total disability during 1986 is dated January 12, 1987, a delay of nearly two months. No reasonable cause or excuse has been offered. As shall be seen, defendants have established a pattern of late payment of accrued benefits. Accordingly, defendants shall be ordered to pay a penalty of $167.55, a full 50 percent of the benefits unreasonably delayed.

Come at last we must to the 1987 injury. As shall be seen, this also is a cumulative injury, not one resulting from an identifiable specific trauma. Under McKeever, the date of injury is when claimant first left work. Claimant takes the position that this occurred on April 28, when she apparently missed 1.8 hours to see Dr. Kellenberger. However, claimant apparently worked at least three more days (April 29 through May 1) before being off on leave of absence commencing May 4, 1987. It is held that the injury occurred on May 4, 1987, when claimant missed five consecutive days, her first substantial lost time.

The primary treating physician, Dr. Nelson, has opined that claimant's condition was probably due to a cumulative injury relating to her work. Dr. Drown had previously rendered a similar opinion. The University of Iowa spine team found impairment and recommended restrictions, although not rendering an opinion as to whether the injury was work related.

Only Dr. Wirtz has opined otherwise. Dr. Wirtz saw claimant only once as an evaluating physician, as compared to the numerous times claimant was seen by Dr. Nelson for treatment. Dr. Wirtz's initial opinion appears internally inconsistent in that he finds no impairment, but recommends physical restrictions. Then, without seeing claimant again, he reversed even that opinion on the basis of testing performed by a physical therapist which the therapist himself thought

invalid. Dr. Wirtz's opinion is unpersuasive. Claimant has met her burden of proof in establishing an injury arising out of and in the course of her employment. Even if claimant had a preexisting condition (as apparently believed by Dr. Wirtz), it was clearly aggravated and lighted up by the subject cumulative work injury.

Pursuant to Iowa Code section 85.34(1), healing period is payable beginning on the date of injury and continuing until the employee has returned to work, it is medically indicated that significant improvement from the injury is not anticipated, or until the employee is medically capable of returning to substantially similar employment, whichever first occurs. Healing period can be interrupted or intermittent. Willis v. Lehigh Portland Cement Co., Vol. 2-1, State of Iowa Industrial Commissioner Decisions 485 (1984).

Beginning at the end, it is held that claimant's healing period ended May 25, 1988, when the treating physician opined that claimant had reached maximum recuperation. Although Dr. Nelson had rendered a similar opinion a month earlier, claimant had improved in the interim, thus indicating that the first opinion was premature. Although claimant attempted to work on a number of occasions during her interrupted healing period, each of these attempts proved unsuccessful. She never did return to work on any permanent basis and it is clear that she will for the foreseeable future be medically incapable of returning to employment substantially similar to that in which she was engaged at the time of injury (else why would defendant discharge her).

Claimant's healing period was intermittent through May 25, 1988 because of her attempted returns to work. In May 1987, claimant missed work on the 4th through 8th, 10th and 11th (seven days); in July, on the 21st through 24th and 27th through 31st (nine days). In August, claimant worked half-days on the 3rd through 6th, 10th, 11th and 13th (eight half-days) and temporary total benefits on the 17th through 21st, 24th through 28th, and 31st (eleven days). Except for a very few days and parts of days, claimant was subsequently off work from September 1, 1987 through May 25, 1988, the end of her healing period. This span totals 38 weeks, 2 days. However, defendants shall be given dollar-for-dollar credit for those scattered wages claimant earned during that span. Peterson v.

Gary Olson Constr., file number 858921 (Arb. Decn., March 29, 1989). Accordingly, claimant is entitled to 42 weeks, 5 days of healing period benefits counting the eight half-days.

Claimant has also sustained substantial industrial disability. She was age 35 at hearing and, although not having a high school diploma, appears to be of an intelligence very suitable for retraining. Dr. Nelson suggests that she should not work on an assembly line or any type of job which requires her to constantly bend, twist, pull, or lift. She can probably lift 35-40 pounds occasionally (according to the University of Iowa spine team, about half of that frequently) and can stand or sit for long periods of time. Claimant is clearly foreclosed from her work with Snap-On Tools and, due to the lifting restrictions, presumably could not function as a nurse's aide. However, there appears no reason why she could not act as a telephone solicitor or waitress, the other jobs she has previously held. Her ability to work long hours and to manage and run her own tavern/restaurant show commendable stamina and numerous transferrable skills.

Although both parties expended substantial energy developing evidence as to the success or lack thereof of the tavern business, this is of very limited relevance. Numerous factors go into the level of success of a privately operated business, including location, competition and the "business head" of the proprietor, all factors that do not directly relate to earning capacity as an employee. It is an apples and oranges comparison. On the other hand, defendants have failed to provide continued employment, which in and of itself can justify an award of industrial disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). Similarly, vocational rehabilitation services were precipitously withdrawn prior to the time claimant entered into self-employment.

Considering then these factors in specific and the record otherwise in general, it is held that claimant has sustained an industrial disability equivalent to 35 percent of the body as a whole.

Thirty-five percent of 500 weeks is 175 weeks. Claimant has creatively argued that an individual's projected life expectancy [as set forth in rule 343 IAC 6.3(1)] should be multiplied by the percentage of industrial disability; if the product exceeds 500 weeks, the award should be 500 weeks. In innumerable

cases, the industrial commissioner has calculated permanent partial disability to the body as a whole as a percentage of 500 weeks rather than as a percentage of the anticipated balance of life expectancy. Precedent from the industrial commissioner is binding in this office. Any such precipitous change as claimant suggests must be sought from a higher authority.

The parties stipulated to gross weekly earnings of $427.80 with respect to the 1987 injury. In their brief, defendants have sought to renege on that stipulation. This is patently unfair and shall not be allowed. Although the actual injury date has been found to be May 4, 1987, the record does not contain wage information between April 27 and that date. Therefore, the stipulation of the parties shall be adopted as establishing rate. The Guide to Iowa Workers' Compensation Claim Handling effective July 1, 1986 reflects that a married individual with those earnings and entitlement to five exemptions has a compensation rate of $273.47.

Defendants also assert affirmative defenses under sections 85.23 and 85.26. This action was clearly commenced within two years of the date of injury and defendants' own records reflect that it was promptly reported. Both defenses fail.

As set forth in the findings of fact, claimant shall also be awarded $133.87 in unreimbursed mileage. Defendants have stipulated agreement to reimburse claimant for section 85.39 expenses.

Claimant also asserts entitlement to penalty benefits under separate theories. She alleges that unreasonable delays occurred in processing weekly claims and further alleges that defendants' failure to pay voluntary benefits to the extent she believes appropriate was unreasonable. The undersigned has now concluded that he committed error by permitting evidence of settlement negotiations into the record. The proper standard should be the level of benefits actually paid, rather than the level of benefits offered during settlement negotiations. Accordingly, all evidence of settlement negotiations has been disregarded.

In determining entitlement to penalty benefits, the appropriate standard is whether defendants' claim is fairly debatable. Where defendants assert a claim that

is fairly debatable, denial of payment is not unreasonable. Stanley v. Wilson Foods Corp., file number 753405 (App. Decn., August 23, 1990).

With respect to the amount of benefits voluntarily paid, defendants' position is fairly debatable. Dr. Wirtz opined (eventually) that claimant had no impairment or restrictions. Results of a Minnesota Multiphasic Personality Inventory during claimant's treatment for an unrelated matter reflect the view of psychologist Daniel Davis that "exaggeration of symptoms is a possibility." Accordingly, no penalty benefits shall be awarded with respect to the degree of claimant's industrial disability.

*****

A review of voluntary benefits paid shows that in some cases there were delays in processing. In other cases, payments were prompt and, in 1988, often made before due (at the beginning of a week in which it was anticipated that claimant would be entitled to benefits). On balance, defendants' frequent delays in processing do not appear so unreasonable as to justify an award of penalty benefits.

However, it does appear that interest has not been paid on delayed benefits and on benefits paid at less than the rate found herein. Claimant correctly points out that payments should be applied first to accrued interest up to the date of payment, and then to principal amounts due. Huner v. Doolittle, 3 Greene 76-77 (Iowa 1851). The parties shall be left to calculate interest due pursuant to Iowa Code section 85.30. If further intervention by this agency is needed to resolve any dispute as to such calculations, the parties are warned in advance of the possibility that a certified public accountant might be retained as an expert and the cost thereof assessed to one or several parties as may seem just.

For purposes of determining the date upon which payments were made, it is held that payments shall be deemed "made" on the day deposited into the United States mail addressed to claimant, or, if not so mailed, on the date made available to claimant (not merely made available to Snap-On Tools in the case of checks issued by Royal Insurance Company).

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That in file number 798628:

Claimant shall take nothing.

That in file number 842007:

Defendants shall pay unto claimant one point two eight six (1.286) weeks of temporary total disability benefits at the rate of two hundred sixty and 58/100 dollars ($260.58) per week commencing November 9, 1986 and totalling three hundred thirty-five and 11/100 dollars ($335.11).

Defendants shall pay unto claimant penalty benefits of one hundred sixty-seven and 55/100 dollars ($167.55). Interest shall accrue on penalty benefits from the date of this decision.

That in file number 851960:

Defendants shall pay unto claimant forty-two point seven one four (42.714) weeks of healing period benefits beginning on May 4, 1987 and continuing intermittently as set forth in the body of this decision at the rate of two hundred seventy-three and 47/100 dollars ($273.47) per week and totalling eleven thousand six hundred eighty-one and 00/100 dollars ($11,681.00).

Defendants shall pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of two hundred seventy-three and 47/100 dollars ($273.47) per week commencing May 26, 1988 and totalling forty-seven thousand eight hundred fifty-seven and 25/100 dollars ($47,857.25).

Defendants shall pay unreimbursed mileage expenses totalling one hundred thirty-three and 87/100 dollars ($133.87).

Defendants shall have credit for all weekly benefits voluntarily paid prior to the filing date hereof, regardless of how they are denominated.

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

The costs of this action shall be assessed to defendants pursuant to rule 343 IAC 4.33 including the cost of 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 31st day of October, 1991.

Byron K. Orton

BYRON K. ORTON
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KAJ SINCLAIR, DANE SINCLAIR, and MAREN SINCLAIR, Claimant, vs. ELLSWORTH FREIGHT LINES, INC., Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED JAN 31 1992 IOWA INDUSTRIAL COMMISSION File No. 840779 A P P E A L D E C I S I O N

Defendants have appealed and claimants have cross-appealed from an arbitration decision. The parties have alleged error by the deputy in admission and exclusion of evidence. This decision will sort out the evidentiary problems caused, in part, by the parties' failure to timely comply with this agency's hearing assignment order.

ISSUES

This decision only deals with evidentiary issues raised by the parties.

Defendants state the following evidentiary issues on appeal:

I. Whether the Deputy erred in excluding the testimony of Steve Elston, the former personnel director of Ellsworth Freight Lines.

II. Whether the deputy erred in admitting exhibits of Claimant which were not relevant to the case, contained offers of compromise, and where Claimant's Exhibit List had not been timely served.

Claimants state the following evidentiary issue on appeal: "The deputy should have admitted and considered the testimony of Lillian Hill and Sally Sinclair."

RECORD

The record in this case reveals the following pertinent information.

AGENCY ORDER

An agency hearing assignment order filed November 30, 1988 set this matter for hearing February 23, 1989 and ordered the following:

> 6. Witness and Exhibit Lists. A list of all witnesses to be called at the hearing and a list of all proposed exhibits to be offered into the evidence at the hearing along with copies of all written exhibits not previously served shall be served upon opposing parties no later than fifteen (15) days prior to the date of hearing. Only those witnesses listed will be permitted to testify at the hearing unless their testimony is clearly rebuttal or sur-rebuttal. Medical records, practitioners reports and all other written evidence shall not be admitted as exhibits at the hearing unless they have been timely served upon an opposing party as ordered herein. The service of witness lists pursuant to this Order does not modify the requirements of Iowa Rule of Civil Procedure 125c to supplement responses to discovery as to experts not less than thirty (30) days prior to hearing. (Emphasis in instrument.)

Facts re: Exclusion of defendants' witness

Defendants' exhibit list carries on its face a service date of February 7, 1989. (See transcript, page 16, lines 15-16 and tr., p. 17, ll. 23-24.) The agency file has an unsigned copy with a February 7, 1989 proof of service date. Defendants' witness list carries on its face a service date of February 9, 1989. (See tr, p. 16, ll. 13-14; tr., p. 17, ll. 22-23; and exhibit B of claimants' appeal brief.)

Defendants' counsel stated both the exhibit list and witness list were mailed on the same day, February 7, 1989. (Tr., p. 17, ll. 9-11.) Claimants' counsel stated both lists were received in the same envelope on February 11, 1989. During an attempt to resolve whether defendants' and claimants' exhibit lists and witness lists were timely, claimants waived their objection to defendants' witness (Mr. Elston) testimony and the late filing of defendants' witness list (tr., p. 34; ll. 7-9 and ll. 14-15).

Facts re: Exclusion of claimants' exhibits

At the time of the hearing defendants requested the following:

> With respect to the witness list, Defendants request that, as required by the order, all witnesses to be called at the time of hearing and not having been listed according to the prehearing order be excluded or precluded from testifying here today, and with respect to the exhibit list, we'd make the same motion, that any exhibits which had not been served according to the prehearing order be also excluded.

(Tr., p. 13)

Later in the hearing defendants objected to exhibits II, JJ, KK, and LL on the basis of rule 343 IAC 4.2. (Tr., p. 41, ll. 15-20.) Defendants did not move to strike exhibits II, JJ, KK, LL, MM, NN, OO, and PP as being irrelevant. (See tr., p. 41, ll. 15-25 and p. 47, l. 1.)

Facts re: Exclusion of testimony of claimants' witnesses Lillian Hill and Sally Sinclair

The agency file copy of claimants' witness list listing Lillian Hill (hereinafter Hill) and Sally Sinclair and exhibit EEE do not carry a proof of service date on its face. The witness list listing Hill and Sally Sinclair as witnesses was mailed by claimants to defendants on February 16, 1989. (Tr., p. 13, ll. 12-14 and p. 14, ll. 6-9.)

RULINGS

Ruling Re: Testimony of defendants' witness Elston

Pursuant to the agency hearing assignment order, defendants' list of witnesses had to be served upon claimants no later than fifteen (15) days prior to the date of the hearing. The parties agree that the date for service of the witness list (also for the exhibit list to be discussed later), pursuant to the hearing assignment order, had to be on or before February 8, 1989. It is impossible to make a factual determination whether defendants' witness list was served timely. Defendants allege that both the witness list carrying a proof of service date of February 9, 1989 and the exhibit list carrying a proof of service date of February 7, 1989 were mailed on the same day. Claimants admit both lists were received the same day. Claimants state the date of receipt was February 11, 1989. It is equally likely that the witness list was mailed on February 7 as it was on February 9.

However, claimants did waive the objection to the testimony of defendants' witness Elston. There is nothing specific in the record that indicates claimants withdrew the waiver. Therefore, it is found that claimants withdrew their objection to the testimony of Elston and that Elston should be allowed to offer testimony as defendants' witness. It is noted that the depositional testimony of Elston is in the agency file apparently because it was listed on claimants' witness list.

Ruling re: Exclusion of claimants' exhibits II, JJ, KK, LL, MM, NN, OO and PP

Defendants preserved the right to object to the admission of exhibits II, JJ, KK, LL, MM, NN, OO and PP. Defendants objected to inclusion of these exhibits and raise the issue of whether the inclusion was proper in their appeal. As discussed previously, claimants' exhibit list had to be served by February 8, 1989. It was not served until February 16, 1989. The exhibits objected to and the properly having error preserved by raising the issue on appeal should not be admitted because they were not included on a timely exhibit list. (See Clousing v. Rosenboom Mach. & Tool, file No. 818236, appeal decision May 15, 1989 and Mortimer v. Fruehauf Corp., file No. 506116, appeal decision September 12, 1991.) There has been no good cause shown why claimants' exhibit list was untimely. Claimants' counsel argues in his appeal brief that he was sick the week of February 6. His letter to defendants' counsel, Jim Fitzgerald, on February 13, 1989 (ex. DDD) acknowledged that the exhibit list had not been served because he had missed "some time at work." The exhibit list was served on February 16, 1989. Claimants' counsel made no attempt to modify the hearing assignment order. His letter of explanation to defendants' counsel came after the exhibit list was to have been served. Therefore, claimants' exhibits II, JJ, KK, LL, MM, NN, OO and PP should not be evidence in this matter because claimants' exhibit list was not timely and defendants have properly objected to these exhibits.

Because these exhibits have been excluded because the exhibit list was untimely, it is unnecessary to make a specific ruling on the other grounds raised by defendants. However, it is noted that defendants did not raise an objection of irrelevance to these exhibits at the time of the hearing and therefore did not preserve error on the basis of relevance. It is also noted that rule 343 IAC 4.2 would not be a basis for exclusion of these exhibits as defendants allege.

Rulings re: Exclusion of claimants' witnesses Hill and Sally Sinclair

Claimants' witness list was not timely served and was in violation of the agency's hearing assignment order. There has

been no good cause shown why the witness list was untimely. For the same reasons as those discussed above in excluding claimants' exhibits, these witnesses should not be allowed to testify. It was proper to disallow their testimony.

THEREFORE, it is ordered that this matter be remanded to the deputy for the purposes of receiving the testimony of defendants' witness Steve Elston; excluding claimants' exhibits II, JJ, KK, LL, MM, NN, OO and PP; and issuing a proposed decision of the substantive issues in this case based on the evidence in the record.

Signed and filed this 31st day of January, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LYNN SITES,

Claimant,

vs.

DONALD LAHR TRUCKING,

Employer,

and

CIGNA,

Insurance Carrier,
Defendants.

File No. 910873

A P P E A L

D E C I S I O N

FILED

DEC 30 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 13, 1991 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 30th day of December, 1991.

Byron K. Orton

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4/21

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BASIL SKIDMORE, Claimant, vs. ALTER TRADING CORP., Employer, and LIBERTY MUTUAL INSURANCE COMPANIES, Insurance Carrier, Defendants.	FILED OCT 31 1991 File No. 844542 IOWA INDUSTRIAL COMMISSIO A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits as a result of an injury sustained on January 27, 1987.

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

ISSUES

Claimant states the issue on appeal is the nature and extent of claimant's disability.

REVIEW OF THE EVIDENCE

The arbitration decision filed March 14, 1991 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 with the following addition.

Claimant has an 18 percent of the body as a whole impairment as a result of his injury. Claimant has a substantial loss of earnings, in that claimant was making in excess of $26,000 per year, and now has no earnings. Claimant's present occupation is as a self-employed Realtor. Although it would be speculation to predict whether claimant's business will be profitable in the future, the record shows that to date claimant has not been able to replace the earnings he enjoyed at the time of his injury. Claimant has shown good motivation to work, having applied for over 200 jobs, and engaged in retraining to obtain his real estate license.

Claimant is not totally unemployable, however. Claimant has skills within his restrictions that he can offer an employer. The defendant employer did make some initial effort to accommodate claimant's injury, but the end result was that claimant cannot work for defendant employer because of his impairment, and defendant employer has not found a position for him to accommodate his restrictions. Defendants' eleventh hour statement that a job might be found for claimant is far outweighed by the many months claimant has been unemployed since his injury.

Based on claimant's age, education, impairment, past work experience, and all the other factors of industrial disability, it is determined that claimant has an industrial disability of 45 percent.

FINDINGS OF FACT

The findings of fact contained in the arbitration decision of March 14, 1991 is adopted herein.

CONCLUSIONS OF LAW

The conclusions of law contained in the arbitration decision of March 14, 1991 is adopted herein, except the conclusion of law as to claimant's percentage of industrial disability.

Claimant's industrial disability as a result of his work injury is 45 percent.

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

ORDER

THEREFORE, it is ordered:

That defendants pay to claimant two hundred twenty-five (225) weeks of permanent partial disability benefits at the stipulated rate of three hundred twenty-seven and 72/100 dollars ($327.72) commencing January 14, 1989.

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

That defendants shall pay interest on the 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 receive a credit of five hundred fifty-two and 00/100 dollars ($552.00) advanced to claimant for real estate school.

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

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

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT A. SLIFER, JR., Claimant, vs. SWIFT INDEPENDENT PACKING, COMPANY, Employer, and TRANSPORTATION INSURANCE, COMPANY/CNA, Insurance Carrier, Defendants.	File No. 814202 A P P E A L D E C I S I O N

FILED

AUG 19 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 June 27, 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 19th day of August, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT A. SLIFER, JR., Claimant, vs. MONFORT PORK, Employer, and CITY INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILED AUG 19 1991 IOWA INDUSTRIAL COMMISSION File No. 905122 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed February 19, 1991 is affirmed and is adopted as the final agency action in this case.

Claimant shall pay all costs of this proceeding, including the preparation of the hearing transcript.

Signed and filed this 19th day of August, 1991.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD SLOAN,	:	
Claimant,	:	File No. 900250
vs.	:	A P P E A L
NATIONAL OATS,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

STATEMENT OF THE CASE

Defendant, self-insured National Oats, appeals from an arbitration decision awarding claimant temporary total disability benefits from May 24, 1989 through June 18, 1989.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits A through I.

ISSUE

The sole issue is whether claimant has proven entitlement to temporary total disability benefits from May 24, 1989 through June 18, 1989.

REVIEW OF THE EVIDENCE

The arbitration decision filed November 15, 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 issues and evidence.

ANALYSIS

James R. LaMorgese, M.D., treated claimant for his back injury. In a letter dated April 21, 1989, Dr. LaMorgese indicated that claimant "is maximally healed." (Defendant's exhibit A, page 1.) Claimant contacted Dr. LaMorgese for a release to return to work and he was instructed to obtain the release from Joseph L. Quetsch, M.D., as he was the company

physician. (Def. ex. A, p. 9.) No further treatment was planned by Dr. LaMorgese. Claimant saw Dr. Quetsch on May 9, 1989. Dr. Quetsch did not release claimant to return to work but planned another WIRC evaluation. Claimant returned to work on June 19, 1989.

The language of Iowa Code section 85.33(1) is clear. It states that temporary total disability benefits continue until claimant returns to work or is medically capable of returning to employment. Neither Dr. LaMorgese or Dr. Quetsch released claimant to return to work until June 19, 1989.

Dr. LaMorgese indicated that claimant had reached maximum healing period, however, maximum healing period in not one of the triggering mechanisms which ends temporary total disability benefits. Claimant was not released to return to work until June 19, 1989, therefore, temporary total disability benefits in this case cease when claimant returned to work.

FINDINGS OF FACT

1. Claimant sustained an injury on October 20, 1988 when he slipped on a ladder at work.

2. Claimant was off work beginning on October 20, 1988 through June 18, 1989 when claimant was released to return to work by Dr. Quetsch.

3. Claimant returned to work on June 19, 1989.

4. Dr. LaMorgese did not release claimant to return to work but opined that claimant had reached maximum healing on April 17, 1989.

CONCLUSION OF LAW

Claimant proved by preponderance of the evidence entitlement to temporary total disability benefits from May 24, 1989 through June 18, 1989.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant shall pay claimant temporary total disability benefits from October 20, 1989 through June 18, 1989 at the rate of four hundred twenty-one and 41/100 dollars ($421.41) per week.

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

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

That defendant shall pay all costs of this action, including the preparation of the hearing transcript.

That defendant shall file an activity report pursuant to rule 343 IAC 3.1(2).

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

Clair R. Cramer
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID SMITH,	:	
Claimant,	:	File No. 810131
vs.	:	A P P E A L
FDL FOODS, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

STATEMENT OF THE CASE

Defendant, FDL Foods, Inc., self-insured, appeals from an arbitration decision awarding claimant industrial disability benefits on account of an alleged work-related injury.

The record on appeal consists of the transcript of the arbitration hearing, one joint exhibit with pages numbered 1 through 70 and claimant's exhibits B and C.

ISSUES

Defendant states the issues on appeal are:

ISSUE I. The hearing officer's holding that claimant sustained an injury arising out of and in the course of his employment on July 3, 1985 is not supported by substantial evidence and is error as a matter of law.

A. Claimant David Smith's left AC joint arthritis is a preexisting condition brought on by natural metabolic processes and was not aggravated or "lighted up" by his work.

B. The hearing officer's finding of fact that Smith sustained an injury arising out of and in the course of his employment on July 3, 1985 is arbitrary, capricious, and not supported by substantial evidence.

C. Smith's claim for worker's [sic] compensation benefits is barred by the statute of limitations.

ISSUE II. The hearing officer's grant of twenty percent permanent partial disability to Smith is excessive and not supported by substantial evidence.

REVIEW OF THE EVIDENCE

The arbitration decision filed July 31, 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 he received an injury which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Iowa Code section 85.3(1).

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934) discussed the definition of personal injury in workers' compensation cases as follows:

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

tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-61 (1956). If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812, 815 (1962).

When an aggravation occurs in the performance of an employer's work and a causal connection is established, claimant may recover to the extent of the impairment. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960).

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation sec. 555(17)a.

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

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

Expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732

(1955). The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id., at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

An injury to a scheduled member may, because of after effects (or compensatory change), results 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).

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W.2d 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term `disability' to mean `industrial disability' or loss of earning capacity and not a mere `functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963).

ANALYSIS

The first issue addressed is whether claimant has proven by a preponderance of the evidence that he sustained an injury which arose out of and in the course of his employment with the defendant. Medical evidence indicated that claimant first complained of sharp pain in his left shoulder on September 29, 1982. (Joint exhibit, p. 2.) An x-ray was taken of the left shoulder and cervical spine. No fractures, dislocations or joint abnormalities were observed. (Jt. ex., p. 1.) Claimant was working with Dubuque Packing Company at that time. Dubuque Packing Company closed on October 16, 1982 and claimant was hired by the defendant on November 8, 1982.

Claimant did not suffer a traumatic injury to his left shoulder. Claimant testified that he had problems with his power jeep jerking him when he started with the defendant. The jerking continued for a month and one-half until it was fixed. Claimant testified that after the steering collar was replaced, the power jeep ran smooth and claimant continues to use the jeep. There are no medical reports of claimant seeking medical treatment during the time claimant's jeep did not work. Claimant testified that he continues to hold his arm in the same position, at waist level, behind his back. Given the facts of this case, the pain claimant experienced is due to repetitive use rather than a traumatic incident.

On November 19, 1983, claimant went to the First Aid department of defendant's plant and sought treatment for his left shoulder pain. Claimant continued to seek treatment throughout 1984. L. C. Faber, M.D., the defendant's company doctor scheduled claimant for an arthrogram on June 15, 1984 which was negative. (Jt. ex. p. 5.) Claimant was taken off work from December 17, 1984 to December 27, 1984 as a result of his left shoulder pain.

Claimant was referred to J. F. Nemmers, M.D., by Dr. Faber. Dr. Nemmers examined claimant on July 24, 1985 and provided the following diagnosis:

> I believe his symptoms are due to two causes, namely, degenerative arthritis in the left acromial clavicular joint, and, a tendonitis of the rotator cuff, secondary to impingement between the head of the humerus and the acromion. I believe both of these causes are degenerative and that the activities have brought on the pain as a result of the two degenerative lesions. I do not believe the activities have accentuated the degenerative changes.
>
> Treatment: Since there is no specific injury, I do not know that this is compensible [sic] and I do not know that the employer is responsible for temporary aggravation of pain.

(Jt. ex., p. 3.)

The medical evidence clearly indicates that claimant has degenerative arthritic condition which preexisted his employment with the defendant. Claimant's work aggravated his degenerative arthritic condition. Claimant operates a power jeep which requires claimant to hold his arm above waist level to control the function of the power jeep. Dr. Nemmers opined that claimant's work activities have brought on claimant's left shoulder pain.

Ultimately, Dr. Nemmers performed excision of the outer end of the left clavicle and decompression of claimant's left shoulder joint on August 22, 1985. (Jt. Ex., p. 7.) Claimant made excellent progress with his recovery, until February 19, 1986. At that time Dr. Nemmers opined that claimant sustained a five percent permanent disability of the upper left extremity as a result of the resection of the distal end of the clavicle. (Jt. ex., p. 4.) The impairment rating provided by Dr. Nemmers did not include any impairment due to claimant's arthritic condition.

Claimant proved by a preponderance of the evidence that his work aggravated his underlying degenerative arthritic condition and resulted in five percent permanent impairment to his left upper extremity.

The second issue to determine is the date of claimant's injury. In this case the date of claimant's injury would be the date claimant's work aggravated his preexisting condition. The parties stipulated to three possible dates as the injury date, November 18, 1983, May 16, 1984, or August 22, 1985. The November 18, 1983 injury date is significant in that it was the first date claimant reported his left shoulder pain to the First Aid department of defendant's company. Claimant did not miss any work on that date. The August 22, 1985 date is significant as that date is when claimant had surgery to his left upper extremity. Claimant missed work as a result of the surgery. Finally, the May 16, 1984 date is the date specified on the Original Notice and Petition, however, claimant, testified that he did not know the significance of the May 16, 1984 date.

Although claimant testified that mechanical problems with the power jeep caused it to jerk, there was no specific incident of a jerk which caused claimant to report an injury or miss work because of a jerking incident. Claimant did not sustain a traumatic injury.

Claimant's left shoulder became painful which caused claimant to seek medical treatment and finally, to be taken off work. 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). Claimant was taken off work from December 17, 1984 to December 27, 1984. Therefore, it is determined that claimant's injury date is December 17, 1984, the first day claimant was off work as a result of the aggravation of the preexisting condition.

Claimant filed his original notice and petition on January 9, 1986. Pursuant to Iowa Code section 85.26, a contested case

proceeding must be commenced within two years from the date of injury. It has been determined that claimant's injury date is December 17, 1984. Therefore, claimant's petition is timely filed. It does not matter whether the deputy should have considered the section 85.26 issue, as claimant's cause of action is not barred since he filed his claim within two years of the date of injury.

Claimant did not present evidence as to claimant's rate on December 17, 1984. The parties stipulated that if the injury date was May 16, 1984, claimant's rate was $219.20. From the facts available in the record, it cannot be found that the stipulated rate is factually or legally incorrect and it will be used as the rate in this case.

The final issue to be considered is the extent of claimant's industrial disability. Claimant was evaluated by Dale Wilson, M.D., for the purpose of this litigation. Dr. Wilson is a semi-retired, general surgeon, whose current practice consists of seeing approximately eight patients a week for the purposes of providing disability evaluations. Dr. Wilson testified that he had assisted in performing a clavicle resection but not since 1982 and he never performed the follow-up care. Dr. Wilson examined claimant on June 24, 1986, nearly one year after Dr. Nemmers performed surgery on claimant's left shoulder. Dr. Wilson was unaware until his deposition that claimant had prior complaints of left shoulder pain. In light of Dr. Nemmers' expertise in orthopedic surgery and that he performed the surgery upon claimant, his opinions concerning claimant's shoulder condition will be given greater weight than Dr. Wilson's opinions. Dr. Nemmers provided claimant with a five percent permanent impairment as a result of surgery to claimant's left upper extremity. It is unclear as to what the basis for Dr. Nemmers' opinion of claimant's functional impairment. For the purposes of determining industrial disability, Dr. Nemmers' rating is converted into body as a whole. Surgery included excision of the outer end of claimant's left clavicle. Clavicle extends into the body as a whole, therefore, the five percent impairment rating is converted into the body as a whole using Guides to the Evaluation of Permanent Impairment, American Medical Association, third edition. The result of a five percent impairment to the upper left extremity is three percent impairment to the body as a whole.

Claimant was born January 5, 1944. Claimant is at the time in his life when he should be at the peak of his earning capacity. Claimant completed the ninth grade. Claimant obtained his GED in 1961. The majority of claimant's work experience is in the area of unskilled labor jobs. Claimant has degenerative arthritis. Claimant had surgery to his left upper extremity on August 22, 1985. Dr. Nemmers did not impose work restrictions

upon claimant nor prescribe medication for his left shoulder. Claimant returned to work on October 27, 1985 to the position that he occupied prior to surgery. Claimant testified that he is able to perform his job satisfactorily. Claimant has not sought additional medical treatment for his shoulder problem.

Claimant's overall condition improved following surgery but claimant testified that he is still experiencing pain. 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.

The greater weight of the evidence proves that claimant is entitled to ten percent permanent partial disability as a result of the aggravation of the preexisting degenerative arthritic condition.

FINDINGS OF FACT

1. Claimant was born January 5, 1944 and claimant completed the ninth grade and obtained his GED in 1961.

2. The majority of claimant's work experience is in the area of manual labor.

3. Claimant began working for the defendant on November 8, 1982. Claimant had been employed by Dubuque Packing Company until it closed in October of 1982 and defendant reopened the facility.

4. Claimant operated a power jeep which required claimant to hold his left arm behind him at waist level.

5. Claimant sustained an work-related injury on December 17, 1984 to his left shoulder caused by the operation of a power jeep with his left hand behind his back in an elevated position which aggravated his degenerative arthritis.

6. Claimant had problems with his power jeep a month and one- half after he started with defendant and lasted for a month and one-half until the steering collar was replaced. Claimant did not seek medical treatment during the time claimant's jeep was malfunctioning.

7. Claimant's injury is a cumulative injury as it developed over a period of time due to claimant holding his left arm behind his back. The cumulative injury is an aggravation of claimant's underlying degenerative arthritic condition.

8. Claimant was taken off work by Dr. Faber beginning on December 17, 1984 through December 27, 1984 as a result of claimant's left shoulder injury.

9. Claimant's injury date is December 17, 1984 and claimant's original notice and petition was timely filed on January 9, 1986.

10. Claimant was referred to Dr. Nemmers who opined that claimant had a degenerative arthritic condition. Dr. Nemmers opined that claimant's work activities aggravated claimant's preexisting degenerative arthritic condition.

11. Dr. Nemmers performed excision of the outer end of the left clavicle and decompression of claimant's left shoulder joint on August 22, 1985.

12. Claimant was off work from August 22, 1985 through October 27, 1985 as a result of the aggravation of claimant's preexisting condition which required surgery.

13. Dr. Nemmers opined that claimant had a five percent permanent impairment as a result of surgery to claimant's left upper extremity. For purposes of determining industrial disability, the five percent impairment rating is converted into the body as a whole using Guides to the Evaluation of Permanent Impairment, American Medical Association, third edition. The result of a five percent impairment to the left upper extremity is a three percent impairment to the body as a whole.

14. Claimant was evaluated by Dr. Wilson, a semi-retired, general surgeon, who opined that claimant sustained a 12 percent functional impairment of the left upper extremity.

15. Dr. Wilson's opinion is given little weight as he only saw claimant once. Greater weight is given to Dr. Nemmers who treated claimant for his left shoulder problem and performed surgery on claimant's left shoulder. Dr. Nemmers' rating of functional impairment is more reliable.

16. Dr. Nemmers did not place work restrictions upon claimant.

17. Claimant returned to the position which he held with the defendant prior to his surgery. Claimant testified that he is able to perform his job satisfactorily but his shoulder causes him pain.

CONCLUSIONS OF LAW

Claimant proved by a preponderance of the evidence that he sustained an injury on December 17, 1984 that arose out of and in the course of his employment with the defendant. The injury is an aggravation of a preexisting arthritic condition caused by claimant's work.

Claimant's original notice and petition was timely filed on January 9, 1986.

Claimant proved that the injury sustained on December 17, 1984 and is entitled to healing period benefits from December 17, 1984 through December 27, 1984 and from August 22, 1985 through October 27, 1985.

Claimant has a ten percent industrial disability as a result of the aggravation of claimant's preexisting degenerative arthritic condition on December 17, 1984.

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

ORDER

THEREFORE, it is ordered:

That defendant shall pay to claimant healing period benefits from December 17, 1984 through December 27, 1984 and from August 22, 1985 through October 27, 1985 at the rate of two hundred nineteen dollars and 20/100 ($219.20) per week.

That defendant shall pay to claimant fifty (50) weeks of permanent partial disability benefits at the rate of two hundred nineteen dollars and 20/100 ($219.20) per week commencing on October 28, 1985 as stipulated by the parties.

That defendant is entitled to a credit of one thousand two hundred ninety dollars ($1,290) in sick pay paid to claimant prior to hearing pursuant to the employee nonoccupational group health plan.

That defendant shall pay to claimant these amounts in a lump sum together with statutory interest pursuant to Iowa Code section 85.30.

That defendant shall pay to claimant or to the provider of services six hundred eighteen dollars ($618) in remaining unpaid medical expenses which were not paid by the employee nonoccupational group health plan prior to hearing.

That defendant shall pay all costs of this appeal including the costs of transcription of the arbitration hearing.

That defendant file claim activity reports pursuant to rule 343 IAC 3.1(2).

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

Byron K. Orton

BYRON K. ORTON
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ORLA JANE SMITH,	
Claimant,	
vs.	File Nos. 853642/773001
FLEETGUARD, INC.,	A P P E A L
Employer,	D E C I S I O N
and	
LIBERTY MUTUAL INSURANCE COMPANY,	
Insurance Carrier, Defendants.	

FILED
DEC 23 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 September 10, 1990 is affirmed and is adopted as the final agency action in this case with the following additional analysis:

Claimant has clearly suffered a change of condition since the prior award of benefits. Claimant's condition has worsened physically, as evidenced by medical testimony that she cannot perform clerical work now. At the time of the prior award, it was contemplated that claimant could and would perform clerical work. Claimant has suffered a physical change of condition since the prior award in that her condition has worsened or has failed to improve as anticipated.

The testimony of the vocational rehabilitation expert was properly admitted. Although vocational rehabilitation testimony that goes to claimant's condition and employability at the time of an arbitration decision cannot be admitted in a later review-reopening proceeding for the purpose of redetermining the claimant's disability at the time of the earlier award, such evidence can be admitted in review-reopening for the limited purpose of showing a change of condition or employability since the award. Such vocational rehabilitation evidence will not change the prior determination of claimant's disability at the time of the prior hearing; that has already been legally determined in the prior arbitration decision. But such testimony may shed light on events and changes occurring since the prior

award, which is the proper focus of a review-reopening proceeding. The testimony of the vocational rehabilitation expert in this case is viewed in that light and used for that purpose only.

In addition, it is noted that the vocational rehabilitation assessment in this case was not actually performed until after the prior hearing. Certainly evidence coming into existence after the prior award is not barred by an argument that the assessment could have been conducted prior to the hearing. However, the weight to be given the evidence is lessened by the fact that it was accumulated after the prior determination. The evidence is only relevant in review-reopening to the extent it shows a change of condition since the prior award. If the vocational rehabilitation assessment seeks to compare claimant's present condition with her condition as the time of the prior hearing, but the claimant did not begin working with the expert until a point in time after the prior hearing, the value of such evidence is diminished. The expert's statements as to claimant's employability at the time of the prior hearing would not be based on actual knowledge of her condition at that time, but would be based on an assessment after the fact. It is also noted that in this case, claimant has shown a change of condition primarily by medical, rather than vocational, evidence.

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

Signed and filed this 23rd day of December, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEWEY D. SMITHWICK, Claimant, vs. CLOVERLEAF COLD STORAGE CO., Employer, and THE HARTFORD COMPANIES, Insurance Carrier, Defendants.	File No. 735926 A P P E A L D E C I S I O N FILED MAY 29 1992 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 29th day of May, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RANDY SNIDER,

Claimant,

vs.

SUPER VALU STORES, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

FILED

NOV 18 1991

IOWA INDUSTRIAL COMMISSIONER

File No. 888077

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed June 25, 1991 is affirmed and adopted as the final agency action in this case with the following additional analysis.

Claimant failed to prove by a preponderance of the evidence a causal connection between his low back injury on August 8, 1988 and his current condition. Michael J. Makowsky testified that it was possible that claimant's herniated disc diagnosed in August 1990 was causally related to claimant's August 8, 1988 work-related injury. A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). Claimant asserts that he was not afflicted with low back pain prior to his August 8, 1988 work injury and continued to be afflicted with the same condition afterward. Therefore, sufficient evidence exists to warrant an inference that claimant's present condition resulted from his August 8, 1988 work injury. In a letter dated April 20, 1990, Dr. Makowsky opined that claimant reaggravated his preexisting back condition. (Claimant's exhibit 1, p. 2) This reaggravation occurred after he quit working for the defendant-employer. Defendants are not liable for claimant's low back problems as Dr. Makowsky testified to a number of possible causes of claimant's low back problems other than claimant's August 8, 1988 work injury. Claimant failed to prove by a preponderance of the evidence that his August 8, 1988 work-related injury caused his current back condition.

Administrative agencies are not bound by the technical rules of evidence. "Findings shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial." Iowa Code section 17A.14(1). Evidence that claimant had been convicted of burglary in the second degree in 1980 is relevant and was properly admitted into evidence. On appeal, however, little weight is given to the conviction as it occurred ten years prior to the hearing.

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

Signed and filed this 18th day of November, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DARYL R. SNOW,

Claimant,

vs.

MARK THOMPSON d/b/a THOMPSON FURNITURE,

Employer,

and

CITIZENS INSURANCE,

Insurance Carrier,
Defendants.

File No. 878916

A P P E A L

D E C I S I O N

FILED

OCT 29 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 8, 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 29th day of October, 1991.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEORGE SNYDER,

Claimant,

vs.

IOWA STATE PENITENTIARY,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

File No. 846731

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed November 27, 1990, 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 17th day of October, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES SNYDER,	:	
Claimant,	:	File No. 827297
vs.	:	A P P E A L
WILLIAMS PIPE LINE COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendants.	:	

STATEMENT OF THE CASE

Claimant appeals from a ruling dismissing claimant's original notice and petition filed on November 14, 1990 seeking section 86.13 penalty benefits. Both parties filed briefs on appeal. Claimant filed a reply brief.

ISSUES

Claimant states the issues on appeal are:

1. Whether [the] deputy [industrial] commissioner erred in finding that there was no resistance filed by Snyder to defendant's motion to dismiss.

2. Whether the deputy industrial commissioner erred in dismissing Snyder's petition for section 86.13 benefits.

FINDINGS OF FACT

This cause of action arises out of a work-related injury which claimant sustained on July 2, 1986. Claimant filed his first original notice and petition on October 24, 1986. A hearing assignment order was filed on December 14, 1989 which set the day for the hearing as May 14, 1990. In addition to setting the time for hearing, the hearing assignment order indicated which issues would be litigated at the hearing. The issue of section 86.13 benefits was not listed on the hearing assignment order.

On April 26, 1990 claimant filed a motion for continuance and a motion for change of venue which was granted. The

arbitration hearing was set for September 13, 1990. On September 10, 1990, claimant attempted to amend his petition to include the issue of section 86.13 benefits. Claimant asserted that the event which triggered the claimant's right to section 86.13 penalty benefits was a permanent impairment rating of March 23, 1989. Deputy Industrial Commissioner Helenjean Walleser denied claimant's motion to amend his petition on September 13, 1990.

An arbitration hearing was held on September 13, 1990. On October 9, 1990, an arbitration decision was filed awarding claimant permanent partial disability benefits as a result of the July 2, 1986 work-related injury. No appeal was taken from the arbitration decision nor the ruling of the deputy denying claimant's motion to amend his petition to include section 86.13 benefits.

Claimant filed an original notice and petition on November 16, 1900 seeking section 86.13 penalty benefits. Defendant filed a motion to dismiss on January 28, 1991 and claimant's filed a resistance to defendant's motion to dismiss on February 15, 1991.

CONCLUSIONS OF LAW

The record has been reviewed de novo on appeal.

Pursuant to rule 343 IAC 4.27 the proper time to file an appeal from a decision, order or ruling of a deputy industrial commissioner in a contested case proceeding is within twenty days of the filing of the decision, order or ruling which disposes of the contested case. Claimant's failure to appeal the decision or ruling within twenty days made it a final decision of the agency. Claimant now seeks to avoid the effect of the final judgment by filing a new original notice and petition. "We have held that, because of the doctrine of claim preclusion, a final decision of an agency is not subject to collateral attack in a subsequent matter." Walker v. Iowa Dept. of Job Service, 351 N.W.2d 802, 805 (Iowa 1984). Claimant could have timely appealed the deputy's decision and any interlocutory rulings but failed to do so. Claimant is not entitled to submit a new original notice and petition seeking section 86.13 penalty benefits for the July 2, 1986 work-related injury.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant's petition filed on November 16, 1990 seeking section 86.13 penalty benefits is dismissed.

That claimant shall pay the cost of this action.

Signed and filed this 2nd day of October, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES H. SOPPE, Claimant, vs. ENERGY MANUFACTURING COMPANY, Employer, and HOME INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 796271 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed February 15, 1990, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

A cause is proximate if it is a substantial factor in bringing about the result. It need be only one cause of the result; it need not be the only cause. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

The work incident or activity need not be the sole proximate cause if the injury is directly traceable to the work incident or activity. Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974).

Defendants make much ado out the fact that the opinions of Drs. Turner and LaMorgese relating claimant's condition to his work activities was based on the history claimant gave each physician. They speculate that nonwork activities might well have contributed to claimant's condition and that the doctors had no awareness of any such activities. Defendants offer no evidence of any nonwork activities which might have caused claimant's injury, however. Given the lack of evidence of such activities, it cannot be presumed that they existed.

Furthermore, our experience is that physicians, in taking a history, ask about a variety of claimant's life activities. Certainly, had nonwork activities existed which the physicians felt on questioning claimant while taking his history were possible contributing causes, the physicians would have recorded such activities. Hence, defendants' contention appears to be factually unfounded.

Furthermore, the record clearly shows that the physicians believed claimant's work activities were a substantial factor in producing claimant's injury and subsequent disability. Therefore, even had nonwork activities existed, the work activity as a substantial factor would still be a proximate cause of claimant's injury and of defendants' ensuing liability.

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

Signed and filed this 25th day of November, 1991.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT SOUKUP,

Claimant,

vs.

D and S SHEET METAL, INC.,

Employer,

and

SECURA INSURANCE CO.,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File Nos. 927412/946025

A P P E A L

FILED

DEC 13 1991

IOWA INDUSTRIAL COMMISSIONER

ROBERT SOUKUP,

Claimant,

vs.

MARESH SHEET METAL WORKS,

Employer,

and

HAWKEYE SECURITY,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 858701

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed May 1, 1991 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 19th day of December, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TIMOTHY D. STOEVER,

Claimant,

vs.

LEE HOLT MOTORS,

Employer,

and

UNIVERSAL UNDERWRITING GROUP,

Insurance Carrier,
Defendants.

File No. 817316

A P P E A L

D E C I S I O N

FILED

OCT 21 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 May 24, 1991 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 October, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA A. SUTTON, Claimant, vs. GLENWOOD STATE HOSPITAL SCHOOL, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 896346 A P P E A L D E C I S I O

FILED
DEC 27 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.

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

Signed and filed this 27th day of December, 1991.

Byron K. Orton

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457

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN L. SWANK, Claimant, vs. DRS TRANSPORT, INC., Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	FILED MAR 26 1992 File No. 910780 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed January 23, 1991 is affirmed and is adopted as the final agency action in this case with the following additional analysis:

Although claimant maintains his loss of earnings that resulted when he went from being a truck owner-operator to an employee are due to his inability to work as hard because of his injury, the medical evidence shows that claimant is under no medical restrictions on truck driving. Claimant has not carried his burden to show that the loss of earnings that resulted was in fact caused by his work injury. Rather, the greater weight of the evidence shows that claimant's financial decision not to buy a new truck was primarily responsible for his loss of earnings. Claimant's self-perceived inability to work the hours necessary to pay the financial obligations of a new truck are not supported by the medical evidence, and in fact are contradicted by it.

As to claimant's rate, claimant relies on his 1988 income tax return, representing a period of time when he was an owner-operator. The proposed arbitration decision erroneously refers to truck rental. Claimant does urge inclusion of depreciation and interest costs in that portion of his truck revenue representing his wages. However, depreciation and interest on equipment are not wages. The Iowa Supreme Court adopted district court language in D & C Express v. Sperry, 450 N.W.2d 842 (Iowa 1990), saying: "Many factors, such as interest paid,

depreciation....enter into a determination of taxable income that would not be applicable to determine wages." The evidence indicates that the employer and insurance carrier considered 33 percent of claimant's revenue as wages. There was also evidence that 33 percent is the industry standard. When claimant's interest and depreciation are not considered, claimant's actual revenue from the truck after deducting expenses is approximately 30 percent. It is found that one third of claimant's revenue represented claimant's wages.

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

Signed and filed this 26th day of March, 1992.

Byron K. Orton

BYRON K. ORTON
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEONARD SWEET,

Claimant,

vs.

CARNEY BRIDGE AND DEMOLITION, INC.,

Employer,
Self-Insured,
Defendant.

File No. 850439

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed May 11, 1990, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Defendant argues that the deputy engaged in improper speculation in stating that no guarantee exists that his employer will remain in business or that his employer will retain claimant as an employee. See Knight v. Prince Mfg. Co., File No. 733994 (App. Decn., June 2, 1989). We agree with defendant that the determination of industrial disability must be made on claimant's current condition and not on what may or may not occur in the future. Current ability or inability to secure and maintain alternate employment should claimant desire to do so for either personal, professional, or economic reasons is a legitimate factor to consider in assessing actual loss of earning capacity, however. As the deputy notes, claimant has limited education and has work experience almost wholly in heavy industry. He has a significant back injury. All of such make claimant less able to competitively reenter the job market should he choose or be required to do so. That current inability to competitively seek employment reflects an actual loss of earning capacity for which the deputy has appropriately compensated claimant by maintaining an industrial disability benefit award of 30 percent of the body as a whole.

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

Signed and filed this 19th day of December, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD W. TESCH, Claimant, vs. SIEH FARM DRAINAGE COMPANY, Employer, and EMPLOYERS MUTUAL CASUALTY COMPANIES, Insurance Carrier, Defendants.	File No. 860672 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent total disability benefits as the result of an alleged injury on June 5, 1987. Claimant cross-appeals.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 49; and defendants' exhibits A through F. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

(A) whether Deputy Industrial Commissioner Trier erred in concluding that claimant's failure to relate "a long history of back problems" did not invalidate the causation opinions of Drs. Donohue, Hacker, and Woodward; (B) whether Deputy Industrial Commissioner Trier erred in failing to determine the extent of claimant's disability caused by the accident of June 5, 1987, and in concluding that a permanent total disability cannot be apportioned between an injury and a pre-existing condition which the Deputy finds to be "the major factor in producing the current disability"; and (C) whether the record, when viewed as a whole, supports Deputy Commissioner Trier's conclusions with

regard to the occupational causation of claimant's present condition, and that claimant is permanently and totally disabled within the provisions of Iowa Code Section 85.34(3). (Emphasis by author.)

Claimant states the following issue on cross-appeal: "Claimant is entitled to an order awarding medical expenses and the deputy erred in determining the prehearing order prevented him from making such an award."

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed March 27, 1990 are adopted as final agency action.

CONCLUSIONS OF LAW

The analysis concerning the issue of causal connection between claimant's current condition and his work injury contained in the arbitration decision filed March 27, 1990, is adopted herein. Although claimant clearly had preexisting back problems, those back problems were not disabling. The degenerative nature of claimant's back condition would have been apparent to his numerous doctors even without claimant relating his many years of chiropractic visits to his physicians. The work injury aggravated his preexisting back condition to the point where surgery was necessary, and claimant was unable to work. Although not the only cause of his present condition, and perhaps not the primary cause of his present condition, nevertheless claimant's work injury is a significant cause of his present condition.

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. To establish compensability, the injury need only be a significant factor, not the only factor, causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980); Langford v. Kellar Excavating, 191 N.W.2d 667, 670 (Iowa 1971). Claimant has shown a causal connection between his work injury and his present back condition.

The analysis contained in the arbitration decision in regard to the extent of claimant's disability is adopted herein with respect to all factors of industrial disability except claimant's age. In addition, that portion of the arbitration decision referring to claimant's ability to earn a living after his work injury as a factor of industrial disability is specifically not adopted herein.

Claimant was 64 years of age 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., Thirty-fourth Biennial Report of the 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's loss of earning capacity as a result of his work injury is not as great as would be the case for a younger worker. It is also noted that claimant did not exhibit motivation to find alternative work. Based on these and all other appropriate factors for determining industrial disability, as set forth in the analysis section of the arbitration decision filed March 27, 1990, claimant is determined to have an industrial disability of 70 percent.

Defendants also argue on appeal that apportionment for claimant's prior disability is appropriate. However, claimant was able to continue working at his job in spite of his back condition for many years. A prior condition that is not disabling is not subject to apportionment. Bearce v. FMC Corporation, 465 N.W.2d 531 (Iowa 1991).

The parties asserted healing period as an issue at the hearing. This issue was not addressed in the arbitration decision, as the deputy concluded that claimant was permanently and totally disabled and thus healing period was not appropriate. Because healing period was not awarded in the arbitration decision, it does not appear as an issue on appeal. However, in that claimant is awarded herein permanent partial disability, a determination of entitlement to healing period is necessary.

Claimant's injury occurred on June 5, 1987. Claimant underwent his first surgery on July 24, 1987. On April 13, 1988, J. Michael Donohue, M.D., assigned a rating of permanent impairment. It appears that Dr. Donahue felt that claimant had not yet reached maximum medical improvement and that further surgery might be required, but that a rating was being given in the event claimant opted not to undergo surgery. However, claimant continued to complain of symptoms, and underwent surgery again on August 5, 1988. Although Dr. Hacker stated at his deposition in 1989 that claimant still had not reached maximum medical improvement, claimant appears to have actually reached maximum medical improvement earlier. Following surgery, claimant underwent a program of physical therapy that ended on October 15, 1988. Claimant's treatment essentially ended at that point, and further medical visits appear to be maintenance in nature. It

appears that claimant actually reached maximum medical improvement at the conclusion of his physical therapy program. Claimant is entitled to healing period benefits from June 5, 1987 through October 15, 1988.

As to claimant's medical expenses, the deputy who presided at the hearing ruled that since the hearing assignment order did not list this as an issue to be decided at the hearing, he could not consider it. As a deputy industrial commissioner does not have the authority to overrule a ruling by another deputy, and the hearing assignment order constitutes an order of a deputy, this determination was correct. However, the industrial commissioner on appeal does have the authority to overrule the hearing assignment order if good cause exists to do so. It appears from the record that the parties did identify the medical benefits issue at the time of the prehearing conference as a contested matter between them. The parties also listed this issue in the prehearing report. Both parties conducted the hearing as though medical benefits were an issue, and evidence on this issue was put into the record.

Defendants were not prejudiced or surprised by this issue at hearing, and in fact defendants agreed it was an issue at the hearing. Although the hearing assignment order is controlling on the question of what issues can be considered at a hearing, from a review of the record and the file, it appears that the absence of the medical benefits issue from the hearing assignment order was a mere scrivener's error. It was the obligation of the parties, upon receiving the hearing assignment well in advance of the hearing, to bring the omission of a contested issue to this agency's attention so that the hearing assignment order could be amended. This was not done. However, in light of the absence of prejudice to defendants, prohibiting consideration of this issue would work a manifest injustice to claimant. The issue of entitlement to medical benefits will be considered in this de novo review. Although properly raised as an appeal issue by claimant as cross-appellant, defendants have not addressed this issue in an appeal brief.

Claimant requested, and received, authorization to consult Dr. Hacker. However, the authorization by defendants was limited to an evaluation, not treatment, and was conditioned on claimant seeking a second opinion from Dr. Donahue prior to any surgery recommended by Dr. Hacker. Claimant declined to travel to see Dr. Donahue, but instead sought a second opinion from an unauthorized Omaha physician. Claimant then underwent surgery by Dr. Hacker.

Claimant's refusal to see Dr. Donahue for a second opinion was unreasonable. The distance involved was not prohibitive, and claimant would have been entitled to reimbursement for his travel

expenses under Iowa Code section 85.27. Claimant's visit to the Omaha physician for a second opinion is clearly unauthorized, and the costs of that second opinion will not be awarded to claimant.

The question remains whether the costs of the surgery and other subsequent procedures performed by Dr. Hacker are compensable. In that defendants conditioned their approval of Dr. Hacker upon a second opinion by Dr. Donahue prior to surgery, which did not take place, the surgery by Dr. Hacker was not authorized.

However, unauthorized treatment which improves an employee's condition and which ultimately may mitigate the employer's liability may subsequently be found reasonable and necessary for treatment of an injury. Butcher v. Valley Sheet Metal, IV Iowa Industrial Commissioner Report 49 (Appeal Decision 1983); Rittgers v. United Parcel Service, III Industrial Commissioner Report 210 (Appeal Decision 1982); Hutchinson v. American Freight Systems, Inc., I-1 Iowa Industrial Commissioner Decisions 94 (Appeal Decision 1984). There is an indication that the surgery by Dr. Hacker was beneficial to claimant; there is no evidence it was medically inappropriate. The medical expenses of Dr. Hacker will be awarded to claimant. Claimant is not entitled to interest on unpaid medical benefits as such is not provided for in the law.

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

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant healing period benefits from June 5, 1987 until October 15, 1988, at the rate of two hundred eighteen and 61/100 dollars ($218.61) per week.

That defendants are to pay unto claimant 350 weeks of permanent partial disability benefits at the rate of two hundred eighteen and 61/100 dollars ($218.61) per week from October 16, 1988.

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

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

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

That defendants shall pay claimant's medical expenses, except as stated in the conclusions of law. Defendants shall pay the future medical expenses of claimant necessitated by his work injury.

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

Signed and filed this 31st day of March, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HAROLD DEAN THOMPSON, Claimant, vs. SHENANDOAH GATE COMPANY, Employer, and EMPLOYERS MUTUAL INSURANCE, Insurance Carrier, Defendants.	FILED AUG 30 1991 IOWA INDUSTRIAL COMMISSIONER File No. 883575 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants, Shenandoah Gate Company and Employers Mutual Insurance, appeal and claimant cross-appeals from an arbitration decision which held that claimant received a cumulative injury to his left and right upper extremities as a result of his employment with the employer.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 86. Neither party filed a brief on appeal.

ISSUES

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

REVIEW OF THE EVIDENCE

The arbitration decision filed December 21, 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 issues and evidence.

ANALYSIS

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted except where inconsistent with the following language.

The deputy industrial commissioner's determination that the defendants are liable for the entire result of claimant's cumulative trauma is adopted. 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).

Next, claimant's date of injury must be determined. 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. The parties indicated on the pre-hearing report that if claimant proved entitlement to healing period benefits that it ran from January 1, 1988 through September 6, 1988. Claimant was laid off by the employer on December 31, 1987. Claimant bears the burden of proving that he was not able to work as a result of his work injury rather than the layoff. Although claimant had been experiencing carpal tunnel symptoms while working with the defendant employer, claimant had been able to work despite his symptoms until the general layoff. In addition, claimant testified that had it not been for the layoff, he would have continued to work for the defendant employer. (Joint Exhibit 84, page 35.) Claimant failed to prove that he was unable to work as a result of the work injury on January 1, 1988. Claimant was unable to work as a result of the work injury on February 24, 1988 when he was hospitalized to undergo surgery on his right hand. Therefore, it is determined that claimant's date of injury is February 24, 1988.

The parties stipulated that this injury is a simultaneous injury pursuant to Iowa Code section 85.24(2)(s) and the record clearly supports the stipulation. Claimant was diagnosed with bilateral carpal tunnel syndrome. Claimant's injury date is February 24, 1988 despite the fact that claimant's subsequent surgery did not occur until May 16, 1988.

Healing period ends when claimant reaches maximum medical improvement, Iowa Code section 85.34(1). In a letter dated September 6, 1988, Maurice P. Margules, M.D., states:

> Mr. Harold Dean Thompson was seen for a final evaluation on August 15, 1988. It was our opinion, at this time, that the patient had reached maximum medical improvement following the cervical fusion at C6 and C7 performed on March 3, 1988.

> The patient also had reached maximum medical improvement as to the decompression of both Median Nerves, performed on the Right on February 26, 1988, and, on the Left on May 16, 1988.

(Joint exhibit 3.)

It is determined that claimant's healing period ended on August 15, 1988. The reference by Dr. Margules to "at this time" in his letter is to August 15, 1988, the date of the evaluation and not September 6, 1988 the date of Dr. Margules' letter.

Charles Taylon, M.D., evaluated claimant and opined that claimant sustained a four percent impairment of the body as a whole as a result of his bilateral carpal tunnel syndrome. Since Dr. Taylon provided an impairment rating to the body as a whole there is no need to convert the impairment to an impairment of each upper extremity using the Guide to the Evaluation of Permanent Impairment, third edition, published by the American Medical Association. Furthermore, it is unclear whether Dr. Taylon based his opinion of claimant's functional impairment by using the Guides.

In addition to Dr. Taylon's four percent impairment rating, Dr. Margules, claimant's treating physician, provided claimant with a rating. Dr. Margules opined that claimant sustained a 15 percent "partial permanent physical disability" of each hand as a result of the compression of the median nerves. Functional disability or impairment is limited to loss of physicological capacity of the body. Whereas, industrial disability is a determination of claimant's loss of earning capacity of which functional impairment is one factor. Bearce v. FMC Corp., 465 N.W.2d 531 (Iowa 1991). A determination of whether claimant sustained an industrial disability is within the province of the industrial commissioner, not a physician. Therefore, it is determined that Dr. Margules' reference to disability is to functional disability or impairment rather than industrial disability.

Dr. Margules performed surgery on claimant's bilateral carpal tunnel syndrome. Dr. Margules had the opportunity to observe the internal disorder while performing surgery and provided follow-up care. Dr. Taylon, an assistant professor of neurosurgery at Creighton University, evaluated claimant on August 21, 1989. Dr. Taylon testified that a neurological evaluation would take between thirty and sixty minutes. While Dr. Taylon's qualifications are impressive, he evaluated claimant more than a year after he had been released to return to work by Dr. Margules. Dr. Margules had the opportunity to internally view claimant's condition. Therefore, Dr. Margules' impairment rating of 15 percent of each hand which is converted into 15

percent of the body as a whole using the AMA Guides is given greater weight.

It is true that a double recovery of benefits is avoided in workers' compensation cases for a single injury. Claimant entered into a special case settlement with his former employer, a portion of that settlement was allocated to claimant's bilateral carpal tunnel syndrome. Iowa Code section 85.35 states that parties may enter into a special case settlement if a bona fide dispute exists. A special case settlement is not to be constructed as the payment of weekly compensation. In this case it is determined that claimant sustained a cumulative injury which arose out of and in the course of his employment with the defendant employer. The defendant employer is liable for the entire amount of claimant's disability and any medical treatment necessitated by claimant's February 24, 1988 work injury. The defendants are not entitled to a credit for a claimed injury which allegedly arose out of and in the course of his employment with another employer. While it appears that claimant is receiving a double recovery for his bilateral carpal tunnel syndrome, that is not the case. Claimant has not received weekly benefits for his February 24, 1988 injury. The defendant employer's liability for claimant's injury is not reduced by the amount of the special case settlement.

On the issue of medical benefits, "claimant is not entitled to reimbursement for medical bills unless he shows that he paid them from his own funds." See Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890 (Iowa App. 1983). The defendant employer obviously is not liable for any medical expenses incurred prior to claimant's employment with the defendant employer on August 26, 1987. Claimant is entitled to reimbursement for the following medical expenses set out in joint exhibit 86A:

2-24-88	125.00
2-24-88	200.00
2-25-88	15.00
2-26-88	500.00
5-15-88	25.00
5-16-88	500.00
5-20-88	15.00
Total	$1,380.00

Claimant failed to prove a causal connection between his bilateral carpal tunnel syndrome and the treatment to his shoulders set out in exhibit 86D, therefore, claimant is not entitled to reimbursement for those charges.

FINDING OF FACTS

1. Claimant reported symptoms of bilateral carpal tunnel syndrome following a work-related injury at claimant's former employer. Claimant did not miss work because of his bilateral carpal tunnel syndrome while working with his former employer.

2. Claimant terminated his employment with his former employer in May 1986 and performed odd jobs for friends and relatives until he starting working for the defendant employer. Claimant testified that he continued to have symptoms of bilateral carpal tunnel while he was unemployed.

3. Claimant was employed by the defendant employer from August 26, 1987 through December 31, 1987 when he was laid off by the defendant employer.

4. While employed by the defendant employer, claimant operated a chop saw, nibbler, sorted gates in the paint room, bent metal on the stamp machine and cut flat steel. Claimant testified that his hands continued to bother him while working for the defendant employer.

5. Dr. Taylon opined that claimant's carpal tunnel syndrome was developing during his job with the former employer but became more severe as a result of his job with the defendant employer.

6. Dr. Margules performed a median nerve decompression on claimant's right hand on February 26, 1988; and on May 15, 1988, Dr. Margules performed the same procedure on claimant's left hand.

7. Claimant sustained a cumulative work injury on February 24, 1988 when claimant was unable to work as a result of the work injury.

8. Dr. Margules opined that claimant reached maximum medical improvement of his right and left hands on August 15, 1988.

9. Dr. Taylon opined that claimant sustained a four percent impairment of the body as a whole as a result of his work-related injury.

10. Dr. Margules opined that claimant sustained a 15 percent impairment of each hand as a result of his work-related injury. A 15 percent impairment of each hand converts to 15 percent impairment of the body as a whole using the Guide to the Evaluation of Permanent Impairment, third edition, published by the American Medical Association.

11. Permanent partial disability benefits are computed pursuant to Iowa Code section 85.34(2)(s).

12. Claimant incurred $1,380.00 of medical expenses as a result of his work injury.

13. Claimant's special case settlement with his former employer was not for the work injury which arose out of and in the course of claimant's employment with the defendant employer on February 24, 1988. The defendant employer is not entitled to a credit for claimant's special case settlement of a different claim with a different employer.

CONCLUSIONS OF LAW

Claimant sustained an injury which arose out of and in the course of his employment with the defendant employer on February 24, 1988 when claimant was unable to work as a result of his work injury.

A causal connection exists between claimant's bilateral carpal tunnel syndrome and his employment with the defendant employer.

Claimant reached maximum medical improvement on August 15, 1988.

Claimant has met his burden of proving that he has a 15 percent functional impairment of the body as a whole attributable to his bilateral carpal tunnel syndrome pursuant to Iowa Code section 85.34(2)(s).

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay claimant healing period benefits starting on February 24, 1988 through August 15, 1988 at the stipulated rate of one hundred seven and 15/100 dollars ($107.15) per week.

That defendants shall pay claimant seventy-five (75) weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(s) at the stipulated rate of one hundred seven and 15/100 dollars ($107.15) per week beginning on August 16, 1988.

That defendants shall pay claimant one thousand three hundred and eighty dollars for medical expenses incurred in treatment of his work injury.

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

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

That defendants shall file claim activity reports pursuant to 343 IAC 3.1(2).

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

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLENE C. TITUS, Claimant, vs. HUSH PUPPY SHOES, a/k/a TODD'S NATURALIZERS, Employer, and AMERICAN MOTORISTS INSURANCE, Insurance Carrier, Defendants.	File No. 916954 926960 A P P E A L D E C I S I O N FILED MAR 20 1992 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 25, 1991, 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 20th day of March, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELMER TOLSON,	:	
Claimant,	:	File No. 894134
vs.	:	A P P E A L
JOHN DEERE DES MOINES WORKS,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed January 28, 1991, 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 27th day of September, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MIKE TOMLINSON, Claimant, vs. MANAGEMENT SERVICES PERSONNEL, Employer, and CITY INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILED MAR 3 0 1992 File No. 930818 IOWA INDUSTRIAL COMMISSIONER A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed May 20, 1991 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 30th day of March, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MIKE TREINEN, Claimant, vs. PACKERS SANITATION SERVICE, Employer, and LIBERTY MUTUAL, Insurance Carrier, Defendants.	FILED JUN 3 0 1992 IOWA INDUSTRIAL COMMISSIONER File No. 859406 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent total disability benefits as the result of an alleged injury on May 27, 1987.

ISSUES

Defendants state the following issues on appeal:

1. Whether substantial evidence supports a finding of permanent total disability.

2. Whether the medical evidence supports a finding of 6-13-88 as the date claimant reached maximum medical improvement.

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed August 21, 1990 are adopted as final agency action.

CONCLUSIONS OF LAW

The conclusions of law contained in the proposed agency decision filed August 21, 1990 are adopted as final agency action, with the following additional analysis:

Claimant was 27 years old at the time of the hearing in this case. Claimant's work injury resulted in a relatively low functional impairment of eight percent of the body as a whole. There are jobs available in claimant's community that claimant could perform, and employers willing to hire him. Claimant is not permanent totally disabled.

Claimant has less than a high school education, and little practical prospect of obtaining a G.E.D. Claimant has no work experience beyond the type of physical labor he can no longer perform. The range of jobs available to claimant is limited. However, claimant has also shown poor motivation to find substitute work within his capabilities. A substantial period of time, nearly two years, elapsed between claimant's initial rating of impairment by his physician and his first attempt to find employment. In addition, there is testimony in the record from claimant's physician that claimant attempted to enhance his rating of impairment by not fully cooperating with the physical tests performed on him.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 65 percent.

Iowa Code section 85.34(1) states:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Claimant received a rating of permanent functional impairment on January 18, 1988. His physical therapy ended on February 22, 1988. Claimant was not released to return to work until June 13, 1988. A rating of permanent impairment is an indication that further significant improvement from the injury is not anticipated, one of three events that concludes the healing period under section 85.34(1). That section states that the first of the events to occur ends the healing period. Claimant's healing period ended on January 18, 1988.

The portion of the deputy's arbitration decision filed August 21, 1990 pertaining to vocational rehabilitation witnesses giving less than impartial testimony due to their need to obtain further work from employers and insurance companies is not adopted in this appeal decision.

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

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant healing period benefits from May 27, 1987 until January 18, 1988, at the rate of one hundred seventy-three and 85/100 dollars ($173.85) per week.

That defendants are to pay unto claimant 325 weeks of permanent partial disability benefits at the rate of one hundred seventy-three and 85/100 dollars ($173.85) per week from January 19, 1988.

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

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

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

That defendants shall pay claimant's medical expenses. Defendants shall pay the future medical expenses of claimant necessitated by his work injury.

That defendants shall pay the costs of this matter including the transcription of the hearing.

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 June, 1992.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

JUL 23 1991

IOWA INDUSTRIAL COMMISSION

DEAN TUSSING,	
Claimant,	File Nos. 734985/750400
vs.	
GEO. A. HORMEL & CO.,	A P P E A L
Employer,	D E C I S I O N
and	
LIBERTY MUTUAL INSURANCE CO.,	
Insurance Carrier, Defendants.	

STATEMENT OF THE CASE

This case has been remanded by an Iowa Supreme Court decision filed October 17, 1990. The supreme court remanded this case "for a determination of the extent of the claimant's permanent partial disability of the body as a whole and related benefits." Tussing v. George A. Hormel & Co., 461 N.W.2d 450, 453 (Iowa 1990).

The record on remand consists of the transcript of the arbitration proceeding, claimant's exhibits 1 through 10, and defendants' exhibits A through J.

ISSUE

The issue on remand is the extent of claimant's permanent partial disability of the body as a whole as a result of claimant's May 9, 1983 work-related injury to his right shoulder.

REVIEW OF THE EVIDENCE

The appeal decision filed March 27, 1986 adequately and accurately reflects the pertinent evidence and will not be totally reiterated herein.

Claimant started working for defendant employer on October 5, 1954 and was employed in various positions throughout the defendant's company. Prior to the May 9, 1983 work injury, claimant sustained numerous work-related injuries while employed

by the defendants. The most relevant injury occurred on June 10, 1970 when claimant sustained a work injury to his right shoulder. Herbert H. Kertsen, M.D., treated claimant for this injury and opined that claimant sustained a rupture of the right biceps muscle.

Claimant testified that he injured his right shoulder while attempting to move a hand truck on May 9, 1983. The hand truck became jammed and claimant gave the hand truck a jerk to free it when he felt something in his arm hurt. Claimant saw a medical aide on June 14, 1983 who gave claimant pain pills and took him off work. Claimant continued to have pain in his right shoulder.

Claimant was treated by Kenton L. Moss, M.D., starting on June 14, 1983 for right shoulder pain. Dr. Moss prescribed anti-inflammatory medication and placed claimant on a twenty pound weight restriction. Claimant returned two months later with continued right shoulder pain and Dr. Moss instructed claimant to return in ten days for a follow-up appointment. Claimant did not return to Dr. Moss until December 8, 1983. Dr. Moss referred claimant to another physician.

Claimant was seen by Horst G. Blume, M.D., on August 2, 1983 for the pain in his right biceps. In a letter dated May 29, 1984 Dr. Blume opined that:

> [T]he patient's right biceps muscle has been injured on several occasions and the recent injury on May 9, 1983, is an aggravation of a pre-existing condition. The disability to the right arm is permanent and is about 20-25% to the arm. This is the result of a number of accidents as I see the end result now.

(Claimant's Exhibit 5.)

Claimant was first seen by Robert J. Weatherwax, M.D., on February 20, 1984. Claimant complained of bilateral shoulder pain. Claimant underwent arthroscopic surgery which confirmed Dr. Weatherwax's opinion that claimant sustained a rotator cuff tear in the right shoulder area. Claimant underwent anterior acromioplasty, resection distal clavicle and coracoacromial ligament, and repair of the massive rotator cuff pathology on July 20, 1984. (Claimant's exhibit 3, page 3.)

In a letter to claimant's attorney, dated September 20, 1984, Dr. Weatherwax was asked to provide claimant with an impairment rating on account of the right shoulder injury. Dr. Weatherwax stated:

> I anticipate he has continued improvement regards to his right shoulder in particular which has been

operated on as you know. I will say, though, that either criteria established by the American Academy of Orthopaedic Surgery as well as those established by the American Medical Association for evaluating impairment, loss of the biceps tendon on one side represents approximately 10% upper limb impairment and resection of the distal clavicle part of the surgical procedure carried out represents another 5%. Additional impairment on the right shoulder would then be based on loss of motion and strength that can only be determined at least 4 to 6 months in the future.

(Cl. Ex. 2.)

APPLICABLE LAW

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W.2d 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term `disability' to mean `industrial disability' or loss of earning capacity and not a mere `functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson 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 injury to claimant's right shoulder on May 9, 1983 was an aggravation of a preexisting right shoulder injury. The supreme court determined that:

> It is not possible to establish what, if any, portion of his present disability is attributable to the prior condition of that shoulder. Consequently, this situation is similar to that presented in Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407, 410-11 (Iowa 1984), where it was not possible to attribute a correlative measure of disability to two or more distinct injuries.
>
> ....
>
> In the present case, the claimant's prior injury was related to the employment. In addition, as we have noted, it has not and cannot be established that some ascertainable prior industrial disability existed from the earlier injuries. (Emphasis by the Court.)

Tussing, 461 N.W.2d at 453.

Two physicians provided claimant with impairment ratings. Dr. Blume opined that claimant sustained a functional impairment of 20 to 25 percent of his right upper extremity on account of his right shoulder injury. Dr. Blume's rating was provided prior to claimant's right shoulder surgery. Dr. Weatherwax performed the surgery and had the opportunity to observe claimant's injury. Dr. Weatherwax opined that claimant had a 15 percent functional impairment to his right upper extremity, but that the impairment was incomplete as it did not include claimant's loss of motion or strength. There is no evidence as to claimant's final impairment rating from Dr. Weatherwax. Dr. Blume's functional impairment rating will be used as a basis to determine that claimant had a 20 percent functional impairment of the right upper extremity.

While the physicians who provided impairment ratings to claimant's right arm, it has been held several times that an injury to a shoulder is not an injury to an arm. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (Appeal Decision, February 24, 1982); Godwin v. Hicklin G.M. Power, II Iowa Industrial Commissioner Report 170 (Appeal Decision, August 7, 1981). These cases held that the shoulder is not included in Iowa Code section 85.35(2)(m), which refers to the arm and that the shoulder is not described as a scheduled member in any of the other scheduled member paragraphs in Iowa Code section 85.35(2). Therefore, it is determined that claimant sustained an injury to the body as a whole. Claimant's functional impairment rating of the right upper extremity is converted to an impairment of the body as a whole using the Guides to the Evaluation of the Permanent Impairment, third edition, published by the American Medical Association. A 20 percent impairment of the right upper extremity converts to 12 percent functional impairment of the body as a whole.

Claimant was in healing period from June 14, 1983 through June 19, 1983. Claimant was also in healing period from June 7, 1984 through June 10, 1984 and from July 17, 1984 through January 8, 1985, the date of the hearing.

Claimant was employed with the defendants for more than 30 years. His work experience prior to his employment with the defendant employer is limited to agricultural work. Claimant is a high school graduate. The majority of claimant's work experience is limited to manual labor. Dr. Weatherwax testified that claimant is limited to work in sedentary positions as a result of work-related injury.

Claimant was born October 7, 1924 and was 58 years old when he sustained the injury to his right shoulder. Claimant was seen by D. E. Fisher, M.D., for his shoulder. In his office notes dated April 23, 1984, Dr. Fisher stated that claimant hoped to

retire in another two years if he could maintain his work status from a medical standpoint. (Cl. Ex. 6, p. 2.) Claimant had not returned to work at the time of the arbitration hearing. A recent appeal decision stated:

> 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.

Boyd v. Western Home, Appeal Decision, filed June 29, 1991.

Claimant's work-related right shoulder injury has caused only a slight reduction in claimant's earning capacity. Therefore, it is determined that claimant has an industrial disability of 15 percent of the body as a whole as a result of the May 9, 1983 work-related injury to his right shoulder.

FINDINGS OF FACTS

1. Claimant was born October 7, 1924 and was a high school graduate.

2. Claimant started working for the defendant employer on October 5, 1954. Claimant held various positions throughout the company. The majority of claimant's work was manual labor.

3. Claimant sustained numerous work-related injuries while employed by the defendant employer. The most relevant injury occurred in 1970 when claimant sustained a rupture of the long head biceps tendon.

4. On May 9, 1983, claimant sustained a work-related injury to his right shoulder when he attempted to free a hand truck which had become stuck.

5. The May 9, 1983 right shoulder injury necessitated surgery to repair a right rotator cuff tear.

6. As a result of the work-related injury, claimant sustained a 20 percent functional impairment of the right upper extremity. This converts to a 12 percent functional impairment of the body as a whole.

7. Claimant was off work June 14, 1983 through June 19, 1983 and from June 7, 1984 through June 10, 1984 and from July 17, 1984 through January 8, 1985, the date of the arbitration hearing.

8. Claimant is near retirement age and experienced only a slight reduction of earning capacity as a result of the May 9, 1983 work-related shoulder injury.

9. At the time of the hearing, claimant was restricted to sedentary work by Dr. Weatherwax.

10. Claimant sustained 15 percent reduction in earning capacity as a result of the work-related shoulder injury.

CONCLUSION OF LAW

Claimant sustained a 15 percent permanent partial disability of the body as a whole as a result of claimant's May 9, 1983 work-related injury to his right shoulder.

ORDER

THEREFORE, it is ordered

That defendants shall pay unto claimant healing period benefits for the periods from June 14, 1983 through June 19, 1983 and from June 7, 1984 through June 10, 1984 and from July 17, 1984 through January 8, 1985 at the stipulated rate of two hundred ninety-eight and 01/100 dollars ($298.01) per week.

That defendants shall pay unto claimant seventy-five weeks of permanent partial disability benefits at the stipulated rate of two hundred ninety-eight and 01/100 dollars ($298.01) per week.

That defendants shall pay to claimant or the provider of the medical service all the unpaid medical and hospital bills that claimant has sustained as a result of the May 9, 1983 work-related injury to his right shoulder.

That defendants shall pay these amounts in a lump sum and receive credit against the award for any amounts previously paid.

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

That defendants file a claim activity reports as requested by this agency pursuant to rule 343 IAC 4.1.

That claimant and defendants shall equally pay the cost of this action on remand.

Signed and filed this 23rd day of July, 1991.

Clair R. Cramer
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ACTING INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WENDELL WAYNE VENENGA,	:	
Claimant,	:	File Nos. 858662/858663
vs.	:	A P P E A L
JOHN DEERE COMPONENT WORKS,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
AUG 29 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 April 24, 1990 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 29th day of August, 1991.

Byron K. Orton

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Mr. John W. Rathert
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That claimant and defendants shall equally pay the cost of this action on remand.

Signed and filed this 23rd day of July, 1991.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WENDELL WAYNE VENENGA,	:	
Claimant,	:	File Nos. 858662/858663
vs.	:	A P P E A L
JOHN DEERE COMPONENT WORKS,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
AUG 29 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 April 24, 1990 is affirmed and is adopted as the final agency action in this case.

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

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRANCE D. VOSBERG, Claimant, vs. A. Y. McDONALD, Employer, Self-Insured, Defendant.	:	File No. 906860 A P P E A L D E C I S I O N

FILED
FEB 27 1992
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding permanent partial disability benefits as the result of an alleged injury on January 8, 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.

ISSUES

Those portions of the proposed agency decision pertaining to issues not raised on appeal are adopted as a part of this appeal decision.

Defendant states the issues as:

I. Whether substantial evidence supports the finding that the claimant has a 60% industrial disability.

II. Whether substantial evidence supports the finding that the healing benefit period ran through September 22, 1989.

Claimant states the issues on cross-appeal as:

I. The finding of the hearing officer that claimant has a 60% industrial disability is supported by substantial evidence.

II. Healing period benefits should have been awarded from January 8, 1989, through January 11, 1990.

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed September 14, 1990 are adopted as final agency action.

CONCLUSIONS OF LAW

Claimant's proper healing period is an issue on appeal. R. Scott Cairns, M.D., predicted that claimant's permanent condition might not be known until a year after the injury of January 8, 1989. Claimant's condition continued to change after April 1, 1989, as noted in Dr. Cairns' reports. Although claimant last saw Dr. Cairns on January 11, 1990, Dr. Cairns stated in his deposition that claimant's condition stabilized and further improvement was not expected after November 7, 1989. (Joint exhibit 1, page 36.) Claimant's healing period ended on November 7, 1989.

Claimant's industrial disability is the second issue on appeal. Claimant has shown good motivation to return to work or find alternative work. However, claimant's instructions to the vocational rehabilitation worker to stop looking for jobs for claimant has possibly increased his disability through no fault of the employer.

Claimant has not been rehired. Defendant argued that a union contract prevented defendant from rehiring claimant. Normally an employer's refusal to rehire an injured worker may increase a claimant's industrial disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). However, this contemplates willful employer conduct that increases the disability. In this case, the record indicates that the employer's refusal to rehire claimant was not the employer's decision, but was mandated by a union contract. It would be unfair to penalize the employer for its compliance with a binding contract. The employer's failure to rehire claimant in this case is not the kind of employer conduct envisioned by McSpadden.

The fact remains that claimant is still unemployed because of the union contract. Loss of earnings is a factor of industrial disability. Claimant has lost substantial earnings and continues to do so as a result of his work injury.

Claimant was 30 years old at the time of the hearing. He has a high school diploma. Claimant has an impairment rating of 10 percent. Claimant's work activity is limited to manual labor

jobs. Based on these and all other factors of industrial disability, claimant has an industrial disability of 35 percent.

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

ORDER

THEREFORE, it is ordered:

That defendant shall pay unto claimant healing period benefits at the rate of two hundred sixty-two and 16/100 dollars ($262.16) for the period beginning January 8, 1989 to and including November 7, 1990, which amounts to ninety-five point five seven one (95.571) weeks.

That defendant shall pay unto claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of two hundred sixty-two and 16/100 dollars ($262.16) beginning November 8, 1990.

That defendant shall pay accrued weekly benefits in a lump sum and shall receive credit against the award for weekly benefits previously paid. The parties stipulated that claimant has been paid eighty-four (84) weeks of benefits.

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

That defendant shall pay the costs of this matter including the transcription of the hearing.

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

Signed and filed this 27th day of February, 1992.

Byron K. Orton

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INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRANCE D. VOSBERG,	:	
Claimant,	:	File No. 906860
vs.	:	O R D E R
A. Y. McDONALD,	:	N U N C
Employer,	:	P R O
Self-Insured,	:	T U N C
Defendant.	:	

FILED
MAR 27 1992
IOWA INDUSTRIAL COMMISSIONER

The appeal decision filed February 27, 1992 contained a typographical error. The order of the appeal decision is amended to read as follows:

That defendant shall pay unto claimant healing period benefits at the rate of two hundred sixty-two and 16/100 dollars ($262.16) for the period beginning January 8, 1989 to and including November 7, 1989, which amounts to forty-three point four two nine (43.429) weeks.

Signed and filed this 27th day of March, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

M. J. WALSH, Claimant, vs. SCHNEIDER NATIONAL CARRIERS, Employer, and CIGNA INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 890185 A P P E A L D E C I S I O N

FILED
OCT 28 1991
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a ruling on motion for dismissal of claimant's cause of action based upon claimant's failure to comply with a May 1, 1991 order of a deputy industrial commissioner. Both parties filed briefs on appeal. The record on appeal consists of the agency's file in this matter.

ISSUES

Claimant states the following issues on appeal:

1. The decision of the deputy was arbitrary and capricious.

2. The deputy's was ultra vires.

FINDINGS OF FACT

The agency's file reveals the following facts:

January 6, 1989	An original notice and petition was filed by claimant's first attorney alleging a work-related injury on July 17, 1988.
February 14, 1989	Defendants filed an answer.

May 5, 1989	A second attorney filed an appearance on claimant's behalf and claimant's first attorney was allowed to withdraw.
June 22, 1989	Claimant's second attorney filed an application to withdraw which was granted.
July 6, 1989	A third attorney entered an appearance on claimant's behalf.
October 25, 1989	A prehearing conference was rescheduled as a result of a schedule conflict with defendants' attorney.
March 20, 1990	Claimant filed an application for additional payment for attendance vocational rehabilitation program.
March 28, 1990	Defendants filed a resistance to application for additional payment for attendance of vocational rehabilitation program.
April 4, 1990	The prehearing conference was held.
April 16, 1990	Claimant filed an application to amend her original notice and petition.
April 30, 1990	Ruling was entered denying claimant's application for additional payments.
May 29, 1990	Claimant telephoned this office and indicated that she was no longer represented by counsel and request a postponement of her prehearing conference.
June 13, 1990	An order of rescheduling claimant's second prehearing conference was filed.
July 31, 1990	Claimant's third attorney filed an application to withdraw which was approved.
August 24, 1990	Defendants filed a motion to compel discovery.
September 6, 1990	An order was entered granting claimant "twenty days in which new counsel may appear or to advise the agency, in writing, of an intention to pursue the prosecution of this matter." Claimant was ordered to supply her current address and telephone number if she intended to proceed pro se.

September 17, 1990	Claimant filed a letter indicating that she intended to pursue her claim and has been attempting to obtain new counsel. She provided a current address and telephone number.
October 5, 1990	A ruling on a motion to compel was entered by this agency sustaining defendants' motion to compel discovery specifically because defendants are entitled to an unrestricted patient's waiver form and to discoverable matters. Claimant was given twenty days to comply with the order and failure to comply could result in sanctions pursuant to rule 343 IAC 4.36.
October 24, 1990	Claimant filed a letter constituting a release of medical information. The release was restricted to left shoulder, left arm, left hand, left collar area, left upper back shoulder blade or any back, neck injury or disease. "Any other and all other conformities not relevant to my claim is denied."
March 6, 1991	Claimant filed a letter indicating that she was without counsel and requesting a continuance of her March 22, 1991 prehearing conference.
March 22, 1991	Prehearing conference held. Deputy industrial commissioner was unable to contact claimant via telephone.
March 25, 1991	Prehearing order was filed ordering claimant to file a current address and telephone number within thirty days. Failure to comply with this order shall result in dismissal of claimant's claim pursuant to rule 343 IAC 4.36.
March 25, 1991	Defendants filed an application for sanctions- requesting dismissal of claimant's cause of action. Asserting that claimant failed to comply with the October 5, 1990 order requiring claimant to supply an unrestricted patient waiver and to comply with defendants' discovery requests.

April 1, 1991	Claimant filed a letter indicating that she was now represented by counsel.
April 5, 1991	A fourth attorney filed an appearance on claimant's behalf. Claimant's attorney also filed a motion for extension of time within which to respond to defendants' motion for sanctions.
April 16, 1991	Claimant filed a letter with her new address but she indicated she has no telephone.
April 19, 1991	Defendants' filed a response to claimant's motion for extension of time within which to respond to defendants' motion for sanctions.
April 24, 1991	Claimant's resistance to motion for sanctions.
May 1, 1991	A deputy industrial commissioner issued a ruling denying defendants' request for sanctions and ordering that claimant comply with discovery within twenty days of the signing and filing of the order. Failure to comply with this order will result in the dismissal without prejudice.
July 11, 1991	Defendants filed a motion for sanctions and motion for dismissal asserting that claimant failed to fully comply with the deputy's ruling on the motion to compel.
July 18, 1991	Defendants filed a reply to claimant's resistance to defendants' motion for sanctions.
July 19, 1991	Claimant filed a resistance to defendants' motion for sanctions and motion for dismissal.
July 24, 1991	Claimant filed a supplemental resistance to motion for dismissal/sanctions.
July 30, 1991	A deputy ordered claimant's claim dismissed without prejudice as a result of claimant's disregard of all ruling and orders of this agency.

APPLICABLE LAW

Rule 343 IAC 4.36 provides:

If any party to a contested case or an attorney representing such party shall fail to comply with these rules or any order of a deputy commissioner or the industrial commissioner, the deputy commissioner or industrial commissioner may dismiss the action. Such dismissal shall be without prejudice. The deputy commissioner or industrial commissioner may enter an order closing the record to further activity or evidence by any party for failure to comply with these rules or an order of a deputy commissioner or the industrial commissioner.

CONCLUSIONS OF LAW

Claimant asserts that the deputy's order dismissing claimant's cause of action was ultra vires. Rule 343 IAC 4.36 clearly gives a deputy authority to dismiss a claim for failure to comply with ruling and orders of this agency. See also, Konz v. University of Iowa, ___ N.W.2d ___ (Iowa No. 89-1648, July 17, 1991).

Next, claimant asserts that the decision of the deputy was arbitrary and capricious. In an action for judicial review of an agency action, a court may reverse, modify or grant other appropriate relief if substantial rights of claimant have been prejudice because the agency action is "unreasonable, arbitrary or capricious." Iowa Code section 17A.19(8). The real issue on appeal is whether the deputy correctly dismissed this matter because claimant failed to comply with rulings and orders of this agency.

Rule 343 IAC 4.36 allows this agency to require that parties prosecute contested cases within the jurisdiction of the agency in a timely and orderly manner. In this case, it is clear from the record that claimant has failed to comply with the orders and rulings of this agency and that dismissal without prejudice is proper.

On October 5, 1990 claimant was ordered to comply with discovery and to provide defendants with an unrestricted medical release. Claimant failed to comply with this order. Claimant did file a medical release, however, claimant expressly limited its applicability to specific body parts. There is no evidence that claimant provided defendants with discovery information requested in a timely matter.

On March 25, 1991, defendants filed a motion for sanctions and a request for dismissal of claimant's claim on the grounds that claimant failed to comply with the October 5, 1990. On May 1, 1991, the deputy industrial commissioner's ruling on the motion stated:

Claimant, it seems, has disregarded all rules and orders of this division. However, in fairness to her present attorney, claimant is provided one last 20 day opportunity to comply with the October 5, 1990 ruling on motion to compel. If claimant does not comply within this 20 day period, her case will be dismissed without prejudice, upon motion by defendants.

On July 11, 1991, defendants filed another motion for sanctions and a motion to dismiss asserting that claimant again failed to comply with an order of this agency. In support of the motion to dismiss, defendants attached claimant's response to defendants' request for production of documents. Claimant's response failed to produce any documents. Rather it directed defendants to obtain the information through the releases claimant provided or stated that the information would be provided in the future. Claimant provided defendants tax returns in June 1991. Proof of service on claimant's response to defendants' request for production of documents indicates that it was served on May 30, 1991, more than twenty days beyond the May 1, 1991 order. Claimant was warned on May 1, 1991 that she had twenty days to comply with the order of this agency and failure to comply would result in dismissal. Claimant failed to demonstrate that she complied with the May 1, 1991 order of the deputy within twenty days.

Therefore, this matter should be dismissed without prejudice because claimant failed to comply with an order of a deputy industrial commissioner.

WHEREFORE, the decision of the deputy is affirmed.

THEREFORE, it is ordered:

That this matter is dismissed without prejudice.

That claimant's application for reinstatement is denied.

That claimant pay all costs of this proceeding.

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

Byron K. Orton

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INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSICNER

HAYDEN WATTS (DEC) by JOLIENE WATTS-wife, Claimant, vs. IBP, INC., Employer, Self-Insured, Defendant.	:	File No. 898366 A P P E A L D E C I S I O N

FILED
OCT 21 1991
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a Ruling on a Motion for Summary Judgment dismissing claimant's cause of action for failing to file an original notice and petition within the two years statute of limitations.

ISSUE

The sole issue on appeal is whether defendant's motion for summary judgment should be granted.

FINDINGS OF FACT

Claimant's cause of action allegedly arises from the death of her husband on August 31, 1988 while employed by the defendant.

Claimant's original notice and petition was filed by claimant's first attorney on January 25, 1989, but the $65 filing fee was not paid. An order was filed giving claimant 14 days to pay the fee. Claimant complied with the order on February 9, 1989. This action was subsequently dismissed without prejudice by claimant on July 27, 1990.

Claimant refiled the original notice and petition, pro se, on August 30, 1990, but failed to enclose the $65.00 or in the alternative, failed to file an application for deferral of the filing fee at the time the original notice and petition was filed pursuant to rule 343 IAC 4.8(2). The filing was denied on September 7, 1990 by a deputy industrial commissioner for failure to comply with rule 4.8(2). Claimant filed an application to defer the payment of the filing fee, along with a financial

statement on September 24, 1990. An order allowing the deferral was entered on October 4, 1990. Claimant's original notice and petition was considered filed on September 24, 1990 at the time the motion for summary judgment was considered by the deputy.

The defendant filed a motion for summary judgment on February 1, 1991 and claimant filed a resistance on February 15, 1991.

APPLICABLE LAW

To be successful on a motion for summary judgment, the moving party must demonstrate the absence of any genuine issue of material fact and show that he or she is entitled to judgment as a matter of law. Iowa R.Civ.P. 237(c); Trumbo v. Morris, No. 0-400/89-1736, slip op. at 3 (Iowa Ct. App. Nov. 29, 1990); Hall v. Barrett, 412 N.W.2d 648, 650 (Iowa Ct. App. 1987); Suss v. Schmmel, 375 N.W.2d 252, 254 (Iowa 1985).

The burden of showing that there is no genuine issue of material fact is upon the party moving for summary judgment. Sparks v. Metalcraft, Inc., 408 N.W.2d 347, 350 (Iowa 1987); Northrup v. Farmland Industries, Inc., 372 N.W.2d 193, 195 (Iowa 1985). The resisting party, however, must set forth specific facts showing there is a genuine issue for trial. Iowa R.Civ.P. 237(e); Iowa Civil Rights Commission v. Massey-Fergusen, Inc., 207 N.W.2d 5, 8 (Iowa 1973); McCollough v. Campbell Mill & Lumber Co., 406 N.W.2d 812, 813 (Iowa Ct. App. 1987); Pappas v. Hughes, 406 N.W.2d 459, 460 (Iowa Ct. App. 1987). The resisting party may not rely solely on legal conclusions to show there is a genuine issue of material fact justify denial of summary judgment. Id. at 460; Byker v. Rice, 360 N.W.2d 572, 575 (Iowa Ct. App. 1984).

When confronted with a motion for summary judgment, the undersigned is required to examine, in the light most favorable to the party opposing the motion, the entire record including the pleadings, admissions, depositions, answers to interrogatories and affidavits, if any, to determine whether any genuine issue of material fact is generated thereby. Sparks v. Metalcraft, Inc., 408 N.W.2d at 350 (Iowa 1987); Drainage District No. 119, Clay County v. Incorporated City of Spencer, 268 N.W.2d 493, 499-500 (Iowa 1978). A fact question is generated if reasonable minds can differ on how the issue should be resolved. Northrup v. Farmland Industries, Inc., 372 N.W.2d 193, 195 (Iowa 1978); Henkel v. R & S Bottling Co., 323 N.W.2d 185, 187-188 (Iowa 1982). If upon examination of the entire record the undersigned determined no such issue is present, and the movant is entitled to judgment as a matter of law, entry of summary judgment is proper. Sparks v. Metalcraft, Inc., 408 N.W.2d at 350.

Rule 343 IAC 4.8 governs the commencement of action before the Division of Industrial Services. Rule 343 IAC 4.8(2) states:

> a. On or after July 1, 1988, for all original notices and petitions for arbitration ... seeking weekly benefits filed on account of each injury, ... alleged by an employee, a filing fee of $65 shall be paid at the time of filing....
>
> ....
>
> If no filing fee is paid at the time of filing of the original notice and petition, the industrial commissioner shall return the original notice and petition to the party filing it. Filing an original notice and petition without paying the fee shall not toll the state of limitations. Tendering an amount less than $65 will be considered failure to pay a filing fee.
>
> ....
>
> h. The industrial commissioner may accept for filing an original notice and petition without prepayment of the filing fee if in the discretion of the industrial commissioner the petitioner is unable to pay the fee at the time of filing. A deferral of payment of the filing fee shall only be granted upon written application by the petitioner. The application shall be filed at the same time of the original notice and petition is filed. The application shall be in the form required by the industrial commissioner and shall include an affidavit signed by the petitioner.

Also pertinent is rule 343 IAC 2.1 which states, "For good cause the industrial commissioner or the commissioner's designee may modify the time to comply with any rule."

CONCLUSIONS OF LAW

A genuine issue of material fact exists in this case which makes summary judgment improper. Claimant filed an affidavit which accompanied her resistance to defendant's motion for summary judgment. In her affidavit, claimant attests that she filed her original notice and petition on August 30, 1990. Defendant asserts that claimant's original notice and petition was not filed until September 24, 1990. If claimant filed her petition on August 30, 1990 it was timely filed. On the other hand, if claimant filed her original notice and petition on September 24, 1990 it was not timely filed. Therefore, a genuine issue of material fact exists which would make summary judgment

improper. For the sake of judicial economy, the issue of when claimant's original notice and petition was filed will be determined at this time.

In this case, one deputy industrial commissioner ruled that claimant's original notice and petition was denied on September 7, 1990, for failure to include a filing fee or in the alternative, an application for deferral of filing fee pursuant to rule 343 IAC 4.8(2). As a result, claimant's original notice and petition was not considered filed until September 24, 1990, the date claimant's application for deferral was received. The deputy industrial commissioner ruling on the summary judgment had no authority to overrule the prior ruling of another deputy industrial commissioner and therefore, is bound by the prior ruling denying claimant's original notice and petition on September 7, 1990. The industrial commissioner, however, under rule 343 IAC 2.1 may modify the time to comply with any rule of this agency if good cause is shown.

It is apparent from looking at the file that claimant, while proceeding pro se, had very little resources at her disposal. On the back of claimant's original notice and petition, claimant writes that she lives on social security benefits of two hundred and fifty-six dollars per month and cannot afford to pay the filing fee. This appears to be a request for a deferral of the filing fee. This request for deferral did not, however, comply with rule 343 IAC 4.8(2)(h) which states that the request for deferral shall be filed in the form required by the industrial commissioner. Claimant complied with rule 4.8(2)(h) on September 24, 1990 when she filed her request for deferral which was approved by a deputy industrial commissioner.

Claimant attempted to comply with rule 4.8(2)(h) on August 30, 1990 when she wrote on the back of her original notice and petition that she was unable to pay the filing fee. Under the circumstances presented here, a rigid interpretation of rule 4.8(2)(h) does nothing to further the purpose of the rule, rather it traps a pro se claimant. "Courts to do not favor the defense of statute of limitations." Sprung v. Rasmussen, 180 N.W.2d 430, 433 (Iowa 1970), Vermeer v. Sneller, 190 N.W.2d 389, 394 (Iowa 1971).

It is determined that claimant has shown good cause why the industrial commissioner should modify the time to comply with rule 4.8(2)(h) which requires claimant's application for deferral to accompany claimant's original notice and petition. In this case, claimant's original notice and petition is considered timely filed on August 30, 1990, the date which claimant's original notice and petition was received.

WHEREFORE, the decision of the deputy is reversed and remanded.

THEREFORE, it is ordered that this case is placed back into assignment for prehearing.

Signed and filed this 21st day of October, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL WEINZWEIG, Claimant, vs. WEINZWEIG FOOD PRODUCTS, INC., Employer, and ALLIED INSURANCE GROUP, Insurance Carrier, Defendants.	File No. 785837 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed January 18, 1990, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

As the deputy stated, claimant suffered his infarction while lifting approximately 90 pounds, the first lifting he had done that day. The deputy considered a lift of that weight to be close to borderline of what is unusual to the average person, but still over the line; that is to say, the lift was sufficiently "unusual" to constitute an exertion greater than that of nonemployment life of the employee or any other person.

By way of further analysis, it is noted that whether an exertion is unusual is relative to the overall characteristics of the individual exclusive of the fact that the individual has a preexisting diseased heart. Claimant was a 43-year-old male on December 10, 1984. His height is variously described as five feet eleven inches and five feet seven inches. His weight is described as 165 pounds on February 1, 1985; 154 pounds on September 14, 1987; and, 153 pounds on October 27, 1987. Medical reports in evidence from December 10, 1984 to on or about February 1, 1985 do not reflect either a substantial weight loss or gain immediate subsequent to claimant's December 10, 1984 infarction. It is reasonable to assume that claimant's

physicians would have noted any substantial change. It then can fairly be stated that claimant weighed approximately 165 pounds on December 10, 1984. Claimant's lifting and carrying of a weight of 90 pounds on that date then would have represented a lifting and carrying of approximately 54 percent of his body weight. Persons do not generally lift and carry weights of one-half or more than one-half of their body weight in the routine course of their nonemployment life. The carrying of that amount of weight, regardless of the actual numerical poundage, would constitute an unusual exertion for an employee or any other person.

Therefore, even if 90 pounds might be close to a borderline, were some concrete standard possible, it certainly represents an unusual exertion when it exceeds 50 percent of that individual's body weight.

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

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRUCE WELCH, Claimant, vs. STONE CONTAINER CORPORATION, Employer, and AMERICAN MOTORISTS INSURANCE, Insurance Carrier, Defendants.	File No. 911226 A P P E A L D E C I S I O N

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant 35 percent permanent partial disability benefits as a result of a February 27, 1989 work-related injury.

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

ISSUE

Defendants states the issue on appeal is: "There is not substantial evidence in the record to support the deputy's determination that claimant sustained a thirty-five percent industrial disability."

FINDINGS OF FACT

The findings of fact contained in the proposed agency decision filed February 11, 1991 are adopted as set forth below. Segments indicated by asterisks (*****) indicate portions of the language from the proposed agency decision that have been intentionally deleted and do not form a part of this final agency decision. Segments designated by brackets ([ ]) indicate language that is in addition to the language of the proposed agency decision.

Bruce Welch is a 32-year-old married man who dropped out of high school during the tenth grade. Subsequent to the injury in this case, he obtained a GED. At the time of hearing, he was attending Hamilton School of Business studying the fields of data processing, travel and tourism. He was maintaining excellent grades and was scheduled to complete the course in December 1990. It was anticipated that, with this training, he would be able to obtain employment which would provide a starting wage in the range of $4.50 to $5.50 per hour (exhibit 1, page 139). Those projections are found to be correct.

Prior to obtaining work with Stone Container Corporation, Bruce had worked as an auto mechanic, stock boy, machine operator, assembly line worker, painter, welder, brake press operator, truck driver and had also performed several functions at the Firestone Tire plant. In his work for Stone Container, claimant had initially worked collecting and banding scrap paper. He then worked as a temporary stacker in the pressroom. At the time of injury, he worked as a back tender in the tuber department. All of the jobs claimant performed during his life have required substantial physical activity, agility and strength. At the time of injury, claimant was earning approximately $8.00 per hour (exhibit 10, page 214). Other than for Firestone, claimant's earnings with Stone Container were the highest he had ever achieved.

Bruce was injured on February 27, 1989 while walking across a catwalk which was approximately 18 inches above the floor. He fell, landing on his back. It is unclear with regard to which part of his body first struck the concrete floor when he fell. It might have been his head or it might have been his buttocks. Bruce was stunned by the fall. It is found that he did black out and subsequently vomited. He was taken to Mercy Hospital where he remained until being discharged on March 3, 1989. He was diagnosed as having a cerebral contusion, nonhemorrhagic and a severe myofascial strain and sprain of his lumbosacral, dorsal and cervical spine (exhibit 1, page 21). [Neurologist, George Makari, M.D., prepared a consultant report on February 28, 1989 at the request of Dennis Straubinger, D.O., Dr. Makari opined that claimant only suffered a mild concussion and he doubted that claimant suffered a brain contusion. Dr. Makari was under the impression that claimant fell three feet from the catwalk, rather than eighteen inches.]

James L. Blessman, M.D., was claimant's initial treating physician. On March 21, 1989, he entered in his notes that claimant's final diagnosis was a myofascial strain of the cervical and lumbosacral spine and status post-cerebral contusion (exhibit 1, page 19). Nerve blocks were employed to treat claimant's continued complaints, but with only limited success. A note dated April 6, 1989 indicated that Dr. Blessman had contacted Stone Container to request that Bruce be allowed to return to work at limited duty. The note indicates that the request was denied. When testifying at hearing, Tom Riggs, the Stone Container Corporation Human Resources Manager, testified that in the past the company had problems when placing injured employees back to work. He related that with claimant's 40-pound lifting restriction, there was no work available for claimant within the company as all require at least 50 pounds of lifting ability.

Bruce entered the Mercy Hospital Pain Center program on May 26, 1989 in order to seek relief from his complaints of headaches and back pain. He was found to have degenerative disease in his lumbar spine. During the work capacity evaluation, it was noted that Bruce demonstrated considerable symptom magnification (exhibit 1, page 95; exhibit 13, page 17). At the time of discharge, Dr. Blessman indicated that he felt it would be safe to restrict claimant's work activities to lifting no more than 40 pounds from floor to shoulder level and from lifting no more than 15 pounds above shoulder level. He also recommended that Bruce be allowed a break every hour which would allow him to sit for five minutes (exhibit 1, pages 5 and 95).

Bruce Welch has been extensively tested and treated by a number of medical service providers. He was treated by psychiatrist Walter E. Thompson, M.D., for depression and an impulse control disorder (exhibit 1, pages 32-35).

A number of psychologists have evaluated Bruce. Michael Oliveri, Ph.D., found claimant to be of average general intelligence and to also have a learning disability which probably preexisted his injury (exhibit 12, pages 19-21; exhibit 1, page 40). Dr. Oliveri found some indications that claimant may be affected by residuals from a mild head injury, but he was unable to characterize the likelihood of any permanent head injury as being any more certain than merely possible (exhibit 12, pages 39, 48 and 57).

Psychologist Eva Christensen, Ph.D., tested claimant and found the tests compatible with claimant having a pre-injury learning disability (exhibit 12, pages 52 and 53; exhibit 1, pages 134-136; exhibit 17).

Psychologist Dianne Alber, Ph.D., conducted an MMPI and interpreted the results as being consistent with a psychophysiological or neurotic diagnosis. The results were interpreted to indicate that claimant may complain of headaches, back pain, nausea, numbness of extremities and sleep disturbance. It indicated a likelihood of secondary gain being associated with the symptomatology (exhibit 1, pages 46-49).

Psychologist Daniel Tranel, Ph.D., found claimant to have a developmental learning disability. He found no indication of brain injury (exhibit 1, page 59).

Claimant was also treated by Steven R. Adelman, D.O., a neurologist. On May 17, 1989, Dr. Adelman indicated that he was surprised by the fact that claimant's symptoms had continued. His impression at that time was that claimant had a cervical strain with muscle contraction headaches and also some lumbar and thoracic strain (exhibit 1, page 50). Dr. Adelman reviewed the CT scans of claimant's brain which had been conducted shortly following the injury. He concluded that there was not an actual cerebral contusion, but only a concussion. It was unclear from the record with regard to whether Dr. Adelman made that determination based upon a medical history which involved claimant landing first on his buttocks, rather than landing on his head and also upon a history showing no loss of consciousness (exhibit 16, pages 8-13). Dr. Adelman examined claimant and found a normal neurological examination, except for limited neck range of motion and what was characterized as demonstrated pain behavior. He diagnosed claimant as having a cervical strain and muscle contraction headaches and also lumbar and thoracic strain. He found no evidence of a serious intracranial injury (exhibit 16, page 16).

Claimant has also been evaluated by orthopaedic surgeon Scott B. Neff, D.O., and physical therapist Thomas W. Bower, L.P.T. Dr. Neff concurred with the activity restrictions recommended by Dr. Blessman. He went on to indicate that claimant had a five percent permanent impairment, but was not significantly impaired [other than because of subjective symptoms. Dr. Neff noted that claimant had minimal restriction of motion in his lumbar spine. Dr. Neff opined that

claimant's MRI of the lumbarsacral spine showed degenerative changes consistent with claimant's age.] He did not address the issue of a head injury (exhibit 1, pages 1-4).

[On September 17, 1990, claimant returned for a recheck of his low back. The medical report of September 1990 is in the medical reports of Dr. Blessman, but the initials following the report are "DTB", Dr. Blessman's initials are JLB. The author of the report is presumed to be David T. Berg, M.D., a physician in Dr. Blessman's group. Dr. Berg opined that claimant could try to return to his regular duties (exhibit 1, p. 6).]

Based on all the evidence in the record, it is found that claimant does have a chronic strain of his back as a result of the February 27, 1989 injury. That strain has produced a five percent permanent impairment of the body as a whole *****.

It is found that it is possible, though not probable, that claimant suffered any permanent head injury as a result of the February 27, 1989 fall. The general consensus of the evaluating psychologists and physicians is that there is no clear indication of a permanent head injury. In the absence of a clear indication of such an injury, the existence of any such injury can be deemed only possible, rather than probable.

It was not unreasonable for Bruce Welch to devote his attention to his academic studies rather than to also hold employment during the time he has been attending Hamilton Business College. In view of his well-established preexisting learning disability, his decision to devote full attention to his studies rather than compromise his academic achievement with a part-time job was prudent. It certainly does not indicate any lack of motivation. The course of study which he has selected seems appropriate in view of his capabilities and limitations. The decision was made with the concurrence of the Iowa Division of Vocational Rehabilitation (exhibit 1, pages 133-137). It is also noted that private vocational consultation services were provided by Crawford Health & Rehabilitation Services as early as June 1989. Their reports issued over the course of a year did not indicate that they had found any actual job openings for claimant which he could likely obtain and which would be more appropriate for him than the course of study and career fields which claimant adopted with the assistance of the state

vocational rehabilitation division (exhibit 1, pages 138-155).

*****

[The disputed bill with Mercy Hospital was incurred on May 26, 1989. Claimant received treatment from both Dr. Blessman and John Dooley, M.D. at the Mercy Pain Center on that date. Claimant testified that he did not receive treatment for other conditions while at the pain center. The only reason claimant was under treatment and in the pain center was for treatment of the February 27, 1989 work injury. A causal connection exists between the medical bill incurred on May 26, 1989 and claimant's February 27, 1989 work injury.]
***** It is found that the charges at Mercy Hospital and for the exercise bicycle were all incurred at the express direction of an authorized physician in providing treatment to claimant for the results of the February 27, 1989 work injury.

CONCLUSIONS OF LAW

The sole issue on appeal is the extent of claimant's industrial disability as a result of his February 27, 1989 work injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 27, 1989 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hosp., 251 Iowa 375, 101 N.W.2d 167 (1960).

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

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W.2d 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term `disability' to mean `industrial disability' or loss of earning capacity and not a mere `functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Barton, 253 Iowa 285, 110 N.W.2d 660.

A finding of impairment to the body as a whole found by a medical evaluator does not equate to industrial disability. This is so as impairment and disability are not synonymous. Degree of industrial disability can in fact be much different than the degree of impairment because in the first instance reference is to loss of earning capacity and in the latter to anatomical or functional abnormality or loss. Although loss of function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

A defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Claimant was born March 3, 1958 and was thirty-one years old at the time of his February 27, 1989 work injury. Claimant obtained his GED and at the time of the hearing was enrolled in Hamilton Business College studying in the areas of data processing, and travel and tourism. Claimant testified that he is maintaining an excellent grade point at Hamilton. It is speculation to consider claimant's probable future earnings as a result of his education. Stewart v. Crouse Cartage Co., file number 738644 (App. Decn., February 20, 1987); Meier v. John Kirby, Inc., file number 826937 (App. Decn., March 31, 1989). Claimant's enrollment in business school indicates that claimant is motivated. Despite the fact that claimant may have a learning disability, he has good intellectual capacity as displayed by his success in school.

The majority of claimant's work experience is in the area of heavy labor. Claimant worked as an auto mechanic, machine operator, assembly line worker and truck driver. Claimant's job with the defendant-employer required heavy lifting, and twisting. Claimant was earning approximately $8.00 an hour when he sustained his work injury on February 27, 1989.

There is no evidence that claimant had any injuries prior to his February 27, 1987 work injury. Claimant sustained an injury to his back injury on February 27, 1989 when he fell 18 inches and landed on his back. Dr. Blessman imposed work restrictions upon claimant in 1989. In September 1990, Dr. Berg released claimant to return to his regular duties with no comment about claimant's work restrictions. Dr. Blessman opined that

claimant's back strain produced a five percent permanent impairment of the body as a whole. Dr. Neff confirmed claimant's five percent permanent impairment of the body as a whole.

When all the pertinent factors of industrial disability are considered, it is determined that Bruce Welch experienced a 20 percent reduction of his earning capacity as a result of the February 27, 1989 injury. This entitles him to recover 100 weeks of compensation for permanent partial disability under Iowa Code section 85.34(2)(u).

The employer's right to choose the medical treatment is the right to select the provider, not the right to invade the province of medical professionals or to substitute the judgment of an insurance adjuster for that of a physician when determining what tests or treatment should be employed. Pote v. Mickow Corp., file number 694639 (Review-Reopening Decn., June 17, 1986); also see Martin v. Armour-Dial, Inc., file number 754732 (Arb. Decn., July 31, 1985).

It has been previously found that the expenses in the amount of $300.75 at Mercy Hospital and in the amount of $276.64 for an exercise bicycle were all proximately caused by the February 27, 1989 injury and were reasonable treatment provided by an authorized physician (exhibit 2). The employer is therefore responsible for payment of those expenses under the provisions of Iowa Code section 85.27.

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

ORDER

THEREFORE it is ordered:

That defendants shall pay claimant one hundred (100) weeks of compensation for permanent partial disability at the stipulated rate of two hundred thirty-eight and 42/100 dollars ($238.42) per week payable commencing July 28, 1989.

That defendants are entitled to credit for the twenty-five (25) weeks of permanent partial disability compensation previously paid.

That accrued but unpaid balance of the award shall be paid to claimant in a lump sum, together with interest pursuant to Iowa Code section 85.30 computed from the date each payment came due until the date of its actual payment.

That defendants pay claimant's bill with Mercy Hospital in the amount of three hundred and 75/100 dollars ($300.75) and that

defendants reimburse claimant for the cost of the prescribed exercise bicycle in the amount of two hundred seventy-six and 64/100 dollars ($276.64).

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

That defendants file claim activity reports pursuant to rule 343 IAC 3.1(2).

Signed and filed this 24th day of December, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERESA R. WEST, Claimant, vs. IBP, INC., Employer, Self-Insured, Defendant.	:	File No. 877049 A P P E A L D E C I S I O N

FILED
SEP 17 1991
IOWA INDUSTRIAL COMMISSION

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying benefits. The record on appeal consists of the transcript of the arbitration hearing, joint exhibits 1 through 24 and 27.

ISSUES

Neither party filed an appeal brief. The appeal will be considered generally and without regard to specific issues.

FINDINGS OF FACT

The arbitration decision filed February 7, 1991 adequately and accurately reflects the pertinent evidence and it will not be reiterated herein.

CONCLUSIONS OF LAW

The analysis of the evidence in conjunction with the law in the arbitration decision is adopted with the following additional analysis. Claimant was examined by several physicians, many of them specialists in neurology. Only one physician, Dr. Golnick, diagnosed reflex sympathetic dystrophy. Dr. Sundell and Dr. Cooper, both neurologists, specifically disputed this finding. All objective tests were negative or within normal limits. Claimant's tendinitis was seen as temporary or resolving.

Claimant bears the burden of proof. Claimant has failed to carry that burden. The greater weight of the medical evidence indicates that claimant does not suffer from a permanent condition as a result of her work injury. Claimant's condition appears to be tendinitis, which resolves once claimant is removed from repetitious work. Claimant has failed to establish entitlement to permanent disability benefits.

However, the parties stipulated that claimant has suffered an injury arising out of and in the course of her employment. Although claimant's work injury did not cause permanent disability, claimant's medical expenses incurred in connection with treating and evaluating her tendinitis is compensable.

Iowa Code section 86.27 provides: "Notwithstanding the terms of the Iowa administrative procedure Act, no party to a contested case under any provision of the 'Workers' Compensation Act' may settle a controversy without the approval of the industrial commissioner."

The settlement agreement had not been approved by the industrial commissioner and therefore was not an enforceable settlement.

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

ORDER

THEREFORE, it is ordered:

That defendant shall pay claimant's medical expenses incurred as a result of her tendinitis.

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

Signed and filed this 17th day of September, 1991.

Byron K. Orton

BYRON K. ORTON
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUDITH A. WICKS,

Claimant,

vs.

LETICA CORPORATION,

Employer,

and

COMMERCE & INDUSTRY INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 850470

A P P E A L

D E C I S I O N

FILED

SEP 26 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 June 5, 1991, 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 26th day of September, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MAURICE WISECUP,	
Claimant,	
vs.	
RTC TRANSPORTATION,	File No. 865047
Employer,	A P P E A L
CRUM & FORSTER INSURANCE,	D E C I S I O N
Insurance Carrier,	
and	
SECOND INJURY FUND OF IOWA,	
Defendants.	

FILED
DEC 16 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 June 25, 1991, 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 16th day of December, 1991.

Byron K. Orton
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WARREN E. WISTE, Claimant, vs. CITY OF IOWA FALLS, Employer, and EMPLOYERS MUTUAL COMPANIES, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 827887 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed jANUARY 23, 1991, 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 18th day of September, 1991.

Byron K. Orton
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA J. WOLFE, Claimant, vs. IOWA MEAT PROCESSING, Employer, and CHUBB GROUP OF INSURANCE CO. and ARGONAUT INSURANCE CO., Insurance Carriers, and SECOND INJURY FUND, Defendants.	FILED AUG 30 1991 File Nos. 730638/775865 IOWA INDUSTRIAL COMMISSION A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed November 3, 1989 is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Claimant's cross-appeal in this case is not considered as it was dismissed by an appeal ruling filed February 14, 1990. The defendant insurance company, Argonaut, states that one of the issues on appeal is that "[c]laimant is not entitled to any additional benefits from Argonaut Insurance Companies." The parties entered into a stipulation prior to the hearing which stated that claimant had been paid compensation for healing period of 40 3/7 weeks and permanent partial disability benefits of 37.5 weeks. Defendant Argonaut contends that the stipulations are binding upon the parties. A recent appeal decision states:

> 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.

Weishaar v. Snap-On Tools Corporation, File #847903, 848681, 848682, Appeal Decision, June 28, 1991.

In accordance with the deputy's order, defendants shall file a claimant activity report within thirty (30) days of the filing date of this decision. Defendants shall receive credit for any or all voluntary payments paid. If the amount of benefits paid by the defendants exceeds the amount of claimant's award, claimant shall take nothing. Claimant is not entitled to the full amount of the stipulated benefits which have not been paid if those benefits exceed the amount of claimant's award.

Argonaut Insurance Company shall pay the costs of the appeal, including the preparation of the hearing transcript.

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

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BERTHA WOODRUFF, Claimant, vs. SEARS, ROEBUCK & CO., Employer, and ALLSTATE INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 862183/852177 864966/923653 923654 A P P E A L D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed September 27, 1991 is affirmed and is adopted as the final agency action in this case with the following additional analysis:

Claimant has appealed and raises as an issue on appeal the extent of claimant's industrial disability resulting from injuries on January 21, 1988 and August 1, 1989. Defendants did not cross-appeal and other issues that they attempt to raise in their appeal brief will not be considered on appeal.

Claimant did not have surgery following her January 21, 1988 injury. It was her recollection that she missed no work and had no physical therapy because of this injury. She has impairment ratings of five and seven percent. When all factors of industrial disability are considered claimant sustained a five percent industrial disability as a result of her January 21, 1988 injury.

Claimant did have surgery following her August 1, 1989 injury to her neck. She attempted to return to work with the same employer. Her rate of earnings appear to be the same after the injury as the rate before the injury. Prior to this injury, claimant worked approximately 20 hours a week (See Joint Exhibit Q, #2, page 12 and #3, p. 66). Donald Koontz, M.D., on March 4, 1991, opined that she could work two days a week for four or five hours a day and eventually work back into "full time." Her prior job appears to be within her restrictions. Claimant's inability

to perform her prior job would seem to be more the result of self-imposed limitations than medical restrictions. When all factors of industrial disability are considered claimant sustained a 16 percent industrial disability as a result of her August 1, 1989 injury.

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

Signed and filed this 24th day of March, 1992.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RAY WORDEN,	:	
Claimant,	:	File Nos. 846991/846992
vs.	:	A P P E A L
FRENCH & HECHT,	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed March 11, 1991, is affirmed and is adopted as the final agency action in this case, with the following additional analysis:

Claimant's enrollment in a community college program designed to lead to a position in drafting is indicative of claimant's motivation and intellectual capacity, but it would be speculative to predict claimant's future earnings upon graduation in the future. See, Meier v. John Kirby, Inc., Appeal Decision, file no. 826937, March 31, 1989. Claimant's present industrial disability is based upon various factors utilized in determining industrial disability as it presently exists.

Based on these, and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 30 percent as a result of the February 4, 1987 work-related injury.

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

Signed and filed this 21st day of October, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

AUG 22 1991

IOWA INDUSTRIAL COMMISSIONER

SIN CHA YI,

Claimant,

vs.

GENERAL MILLS, INC.,

Employer,

and

LIBERTY MUTUAL,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File Nos. 845677, 888710
888553, 888709

A P P E A L

D E C I S I O N

The record, including the transcript of the hearing before the deputy and all exhibits admitted into the record, has been reviewed de novo on appeal. The decision of the deputy filed March 6, 1991 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 22nd day of August, 1991.

Byron K. Orton

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RALPH ZECK,

Claimant,

vs.

GEETINGS, INC.,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier,
Defendants.

File No. 808538

A P P E A L

D E C I S I O N

FILED

SEP 12 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 12, 1990 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 12th day of September, 1991.

Byron K. Orton

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