# Iowa Industrial Commissioner

# Decisions

## 1987

## Vol. 1

DECISIONS OF THE IOWA
INDUSTRIAL COMMISIONER
1987

0000001

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

| | | |
|---|---|---|
| ROBERT ABBOTT, JR., | : | |
| | : | |
| Claimant, | : | File No. 784996 |
| | : | |
| vs. | : | |
| | : | A R B I T R A T I O N |
| IOWA STATE UNIVERSITY, | : | |
| | : | D E C I S I O N |
| Employer, | : | |
| | : | |
| and | : | FILED |
| | : | |
| STATE OF IOWA, | : | NOV 10 1987 |
| | : | |
| Insurance Carrier, Defendants. | : | IOWA INDUSTRIAL COMMISSIONER |

---

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Robert Abbott, Jr., and Eric Peterson, claimants, against Iowa State University, employer and State of Iowa, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury occurring December 27, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner October 9, 1987, and was considered fully submitted at the close of the hearing. The record in this case consists of the testimony of the claimants and Eugene S. Lund, Jr., and joint exhibits A through L, inclusive.

## ISSUES

Pursuant to the prehearing reports submitted and approved October 9, 1987, the issues that remain for determination are whether or not the claimants' injuries are the cause of any permanent disability and, if so, the nature and extent of the disability.

## FACTS PRESENTED

Claimant, Robert Abbott, Jr., testified he has been employed by Iowa State University at the power plant for about nine and one-half years as an electrician. On December 27, 1984, he explained he was working on a volt switch gear when it exploded causing burns to his face, arms, neck and left thigh. He was hospitalized until January 4, 1985, and remained off work until he was released to return February 25, 1985. He admitted to

000002

being paid workers' compensation benefits during this period of time. The only medical restrictions placed on him at the time of his release to return to work was that he was to keep the wounds as clean as possible and avoid dust, dirt, and fly ash until the wounds were completely healed. Claimant returned to his regular job and shortly thereafter was promoted to a high voltage electrician.

Claimant (Abbott) testified to scarring on his left and right arms, and a slight discoloration around the temples of his forehead. He presents that he is now sensitive to heat, cold and sun and that his skin at the places of scarring is sensitive to irritation, particularly when the fly ash in the plant mixes with his sweat. Claimant admitted to no lack of strength in his arms, that he has missed no further work as a result of his burns since he returned and that he has been able to perform all the responsibilities of his job. Claimant testified his skin now has a susceptibility to blemishes and that he has an occasional recurring nightmare of a ball of fire exploding. Claimant revealed he has also engaged in farming and maintains that the because of his sensitivity to cold and sun he has had to somewhat curtail his farming activities. However, claimant acknowledged that the state of the farming economy has also impacted his agricultural endeavors. Claimant admitted he fully intends to continue in his employment with Iowa State University and that physically he can do all that he is supposed to do.

Claimant Eric Peterson testified he was involved in the same accident as Robert Abbott but was burned only on the left side of his face and the left arm and hand. He was hospitalized until December 31, 1984, and released to return to work March 4, 1985, with the same restrictions as Robert Abbott. He returned to his regular job but advised his supervisor that he no longer wanted to work on high voltage electricity because of a lack of training.

Claimant (Peterson) presented scarring on his left hand and knuckles with no scarring on his face. He believes there is a loss of strength in his left hand and that he cannot grip things with it as he once could. Claimant identified he is right hand dominant. He, too, explained sensitivities to heat, cold, and sun, with some irritations from the fly ash and other particles in the air at the power plant. Claimant acknowledged he has not missed any work nor seen any physician since he returned after his injury. He explained that while he did not feel his scarring prevented him from doing his job, he believes it makes his job more difficult, but acknowledged he, too, intends to continue working at the Iowa State University power plant.

Eugene Lund, Jr., testified he is the electricity maintenance and controls manager at the power plant and was the supervisor of both claimants at the time of the accident. He attested to

000003

the fact that neither claimant had missed any work as a result of their injuries since their return, both are doing their prior jobs and duties and that neither have complained of any inability to do the work assigned. He recalled complaints when both claimants first returned to work about fly ash irritations, heat and cold, but could not recall any recent complaints of the same nature. Mr. Lund did not dispute both claimants' allegations of skin irritations from the fly ash, explaining fly ash contains sulphur which, when mixed with a liquid such as sweat, will cause a burning sensation. He acknowledged that he has suffered from it also. Mr. Lund expressed no dissatisfaction with either claimants' job performance.

Dr. Ronald S. Bergman saw both claimants for evaluation in February 1987. Of claimant Robert Abbott, Jr., he wrote: "I can not see any evidence of post burn of the face, however he does have scarring of the left arm. As far as functional impairment, he does not have any." (Joint Exhibit I) Of claimant Eric Peterson, he wrote: "[N]o evidence of any scarring of the facial areas. There is evidence of scars on the left arm and dorsum of the hand. However, they have healed excellently, and there is no impairment of any range of motion. I do not feel that Mr. Peterson has sustained any permanent injury." (Jt. Ex. D)

APPLICABLE LAW

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

The claimants have the burden of proving by a preponderance of the evidence that the injuries of December 27, 1984 are causally related to the disabilities on which they now bases their claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

The 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 fact that neither claimant had missed any work as a result of their injuries since their return, both are doing their prior jobs and duties and that neither have complained of any inability to do the work assigned. He recalled complaints when both claimants first returned to work about fly ash irritations, heat and cold, but could not recall any recent complaints of the same nature. Mr. Lund did not dispute both claimants' allegations of skin irritations from the fly ash, explaining fly ash contains sulphur which, when mixed with a liquid such as sweat, will cause a burning sensation. He acknowledged that he has suffered from it also. Mr. Lund expressed no dissatisfaction with either claimants' job performance.

Dr. Ronald S. Bergman saw both claimants for evaluation in February 1987. Of claimant Robert Abbott, Jr., he wrote: "I can not see any evidence of post burn of the face, however he does have scarring of the left arm. As far as functional impairment, he does not have any." (Joint Exhibit I) Of claimant Eric Peterson, he wrote: "[N]o evidence of any scarring of the facial areas. There is evidence of scars on the left arm and dorsum of the hand. However, they have healed excellently, and there is no impairment of any range of motion. I do not feel that Mr. Peterson has sustained any permanent injury." (Jt. Ex. D)

APPLICABLE LAW

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

The claimants have the burden of proving by a preponderance of the evidence that the injuries of December 27, 1984 are causally related to the disabilities on which they now bases their claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

The 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).

000005

ANALYSIS

Of first concern is the determination of whether or not claimants' injuries are the cause of any permanent disability. It is claimants' contention that, as a result of the injuries giving rise to the claim, each claimant has sustained a permanent partial disability and is entitled to an industrial disability award in the case. It is claimants' argument that, because of the injury sustained December 27, 1984, they have been medically restricted in a number of job capacities and industrially impaired. Defendants, on the other hand, allege that claimants have sustained no permanent impairment or industrial disability as a result of the work injuries. Defendants argue that both claimants have been paid the entire amount of the healing period benefits during the time in which they recuperated from their injuries and that they are not entitled to anything further in this proceeding.

It is not disputed that both claimants went through a traumatic ordeal. However, both have returned to work in their regular jobs and have been able to perform those jobs. The employer, likewise, has not been dissatisfied with either's job performance and has noted no inability or difficulty on the part of either claimant to carry out their responsibilities. Neither claimant has had to seek any further medical treatment nor have they missed any further work as a result of the accident. While both have asserted a sensitivity to heat, cold, and sun, it has not been shown that this has, in any way, impaired their ability to work. Claimant Robert Abbott, Jr., asserts he has had to curtail his farming. However, in light of his own admissions concerning the farm economy, it is difficult, at best, to attribute this curtailment to the accident or injuries. Claimant Eric Peterson does not want to work on high voltage electricity. He candidly attributes this, however, to his lack of training not to his accident. Both claimants are electricians by training and qualification. The record fails to establish their injuries, in any way, have interfered with their ability to continue in this vocation. Indeed, both completely admit to an intention to remain in their employment at the power plant.

Both claimants have scarring of the skin. By observation, claimant Peterson's scarring on his left hand and knuckles is extensive while claimant Abbott's is barely noticeable particularly on his face. Claimants' own evaluating physician could not rate either as having any functional impairment. While claimants argue they have been medically restricted in a number of job capacities, no such evidence exists. Claimants were released to return to work with only the restrictions that they keep the affected areas as clean as possible until healing was complete. No further restrictions are found in the evidence. Both claimants attest to a sensitivity to the fly ash particularly when it mixes with sweat and causes a burning sensation. However,

000006

Eugene Lund, who did not sustain the injuries, attests to the same burning sensation from the fly ash.

On review of the evidence, the question of whether or not the injuries have caused any permanent disability to either claimant must be answered in the negative. Neither claimant has sustained an injury which has permanently affected their ability to perform or obtain work compatible with their qualifications or training. Claimants, therefore, will take nothing from this proceeding having already been paid all benefits to which they are entitled.

## FINDINGS OF FACT

THEREFORE, based on the evidence presented, the following facts are found:

1. Claimant sustained an injury which arose out of and in the course of his employment when a volt switch gear exploded causing burns to his face, arm, neck, and left side.

2. Claimant was hospitalized and under medical care until released to return to work.

3. Claimant was paid temporary total disability during his period of recuperation.

4. Claimant has returned to work in his regular job, has missed no further work and has sought no further medical attention as a result of his injury.

5. Claimant has been able to satisfactorily perform all of his job responsibilities.

6. Claimant is an electrician by trade and his injury has not affected his ability to pursue this vocation.

7. Claimant was evaluated by Dr. Ronald S. Bergman and was found to have no impairment as a result of the injury.

8. Claimant has sustained no permanent disability as a result of his injury.

## CONCLUSIONS OF LAW

WHEREFORE, based on the principles of law previously stated, the following conclusion of law is made:

Claimant has failed to establish his injury of December 27, 1984, has caused any permanent disability.

000007

ORDER

THEREFORE, IT IS ORDERED:

Claimant takes nothing from this proceeding having been paid all benefits to which he is entitled.

Costs of this action are assessed against the defendants pursuant to the Division of Industrial Services Rule 343-4.33.

Signed and filed this 10th day of November, 1987.

Deborah A. Dubik

DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Thomas M. Werner
Attorney at Law
1150 Polk Boulevard
Des Moines, Iowa 50312

Mr. Charles S. Lavorato
Assistant Attorney General
Hoover Building
LOCAL

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| BRUCE A. ANDERSEN,<br><br>Claimant,<br><br>vs.<br><br>FARMLAND FOODS,<br><br>Employer,<br><br>and<br><br>AETNA CASUALTY & SURETY CO.,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 795220<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

FILED
DEC 11 1987
IOWA INDUSTRIAL COMMISSIONER

This is a proceeding in arbitration brought by Bruce Andersen, claimant, against Farmland Foods, employer, and Aetna Casualty & Surety Co., insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained May 24, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner November 30, 1987. The record was considered fully submitted at the close of the hearing. The record in this case consists of the testimony of the claimant and joint exhibits A through J, inclusive.

## ISSUES

For purposes of clarity, it must be noted at the outset that claimant has been paid temporary total disability/healing period benefits for the periods from May 25, 1985 through September 19, 1985 and November 14, 1985 through December 22, 1985 (21.429 weeks, $5,108.88) and April 7, 1987 through June 12, 1987 (9.571 weeks, $1,952.61) in the total amount of $7,061.49. Claimant has also been paid $8,688.59 or 38.143 weeks of permanent partial disability benefits based on a 14 percent permanent partial disability. Under that rating, claimant was entitled to receive 35 weeks of benefits.

Pursuant to prehearing report and order approved November 30, 1987, the issues which remain for decision are:

1. Whether claimant is entitled to additional permanent partial disability benefits;

2. Whether claimant is entitled to the section 85.70

000009

vocational rehabilitation benefits awarded by Deputy Michael Trier; and

3. If claimant is not entitled to any further permanent partial disability benefits and is entitled to the section 85.70 benefits, whether defendants are entitled to a credit against the 85.70 benefits from their overpayment of permanent partial disability benefits.

FACTS PRESENTED

Thirty-eight year old claimant testified to eight years experience as a meat cutter prior to beginning employment with defendant Farmland Foods in June 1979. Claimant explained he worked with various knives and at a variety of jobs at Farmland before securing a bid job on the hind foot saw. Claimant described his job as lining the feet of a ham to the saw blade in order to remove them.

Claimant testified he was doing his regular job May 24, 1985 when he was injured. He explained the hams were coming down the line and were bunching up. As he was straightening them, one ham slid out. Claimant then reached across the table to bring it back in line when "something" pushed him from the left side causing him to fall into the saw. Claimant stated his hand was almost completely severed aproximately half way between the wrist and elbow. He said the saw cut through the muscle, tendon, one bone in the arm and into the other bone of the right forearm.

Claimant was hospitalized and, after surgery, was in a cast for the next ten weeks. On removal of the cast, he found his arm stiff from the elbow down, red, swollen and that he could not move his fingers. Claimant underwent physical therapy and was eventually released for one arm duty in September 1985, even though claimant felt his arm was still swollen, hurt and was hard to use. Claimant returned to work, did the jobs assigned to him, but continued to have swelling in his arm and pain at the site of the injury.

In November 1985, claimant testified he returned to his physician for an operation on the fifth finger of his right hand which was troublesome to extend and which "stuck out." One month post-operation, claimant returned to work and continued until another operation in April 1987 for the same finger problem. Claimant did not return to work after the second procedure asserting he had been told by his physician to find a different type of work.

Claimant explained he is currently pursuing a tool and dye course of study at Iowa Western Community College where he is in the third quarter of a seven quarter program. Claimant applied

000010

for weekly vocational rehabilitation supplement under Iowa Code section 85.70. Defendants resisted claimant's application. On August 5, 1987, Deputy Industrial Commissioner Michael Trier approved claimant's application. (Joint Exhibit E)

Claimant identifies the current problems he has with his arm as pain, even when it is not in use, an inability to open the hand completely, swelling, limited movement at the wrist, an inability to turn the hand around and a feeling of "sharp pain out of nowhere." Claimant also has difficulty extending the little finer of the right hand and does not feel the surgeries have helped.

When claimant was transferred from Denison, Iowa to Clarkson Hospital in Omaha, he began treating with Thomas P. Ferlic, M.D., orthopedic surgeon. Dr. Ferlic performed the initial surgery on claimant's arm as well as the two subsequent joint contracture releases on the small finger of the right hand. (Jt. Ex. A, pp. 3, 4-5,7) A review of the medical records contained in Joint Exhibit A reveals Dr. Ferlic has expressed a number of opinions on claimant's impairment. In December 1985, he states: "I believe that the patient has a 20 percent loss of his hand on the right side secondary to the injury proximal to his wrist and to the resultant tightness in the small joints of his right hand. I believe that this is permanent." Dr. Ferlic, however, did not believe claimant's injury should be limited to the hand due to the situs of the laceration. In March 1987, Dr. Ferlic repeats his opinion claimant has a disability rating of 20 percent of the right hand but adds: ."If a disability of the upper extremity were needed using the AMA guideline for permanent evaluation and extrapolating back, one could use an evaluation of 18% of the upper extremity." On August 6, 1987, Dr. Ferlic stated the impairment is 15 percent of his hand and on August 10, 1987, stated "I would rate him at 14% of his upper extremity." (pp. 2, 1).

Claimant was seen for evaluation purposes only by Horst G. Blume, M.D., on March 31, 1986, who opined the injury "rendered a permanent partial disability to the right hand and lower arm of approximately 25%." (Jt. Ex. A, p. 10)

APPLICABLE LAW

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

The 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

000011

provided by the statute. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Iowa Code section 85.34(2) provides in part:

For all cases of permenant partial disability compensation shall be paid as follows:

....

m. The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall equal the loss of an arm and the compensation therefor shall be weekly compensation during two hundred fifty weeks.

Iowa Code section 85.70 provides:

An employee who has sustained an injury resulting in permanent partial or permanent total disability, for which compensation is payable under this chapter, and who cannot return to gainful employment because of such disability, shall upon application to and approval by the industrial commissioner be entitled to a twenty-dollar weekly payment from the employer in addition to any other benefit payments, during each full week in which he is actively participating in a vocational rehabilitation program recognized by the state board for vocational education. The industrial commissioner's approval of such application for payment may be given only after a careful evaluation of available facts, and after consultation with the employer or the employer's representative. Judicial review of the decision of the industrial commissioner may be obtained in accordance with the terms of the Iowa administrative procedure Act and in section 85.26. Such additional benefit payment shall be paid for a period not to exceed thirteen consecutive weeks except that the industrial commissioner may extend the period of payment not to exceed an additional thirteen weeks if the circumstances indicate that a continuation of training will in fact accomplish rehabilitation.

ANALYSIS

I. The parties have stipulated claimant sustained an injury which arose out of and in the course of his employment May 24, 1985 which is the cause of a permanent partial disability (scheduled member) to the upper extremity. What is in issue is the extent of claimant's permanent partial disability entitlement.

000012

The Iowa Supreme Court in Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983) explained the two methods for evaluating a disability--functional and industrial:

> Functional disability is assessed soleby by determining the impairment of the body function of the employee; industrial disability is gauged by determining the loss to the employee's earning capacity. Functional disability is limited to the loss of physiological capacity of the body or body part. Industrial disability is not bound to the organ or body incapacity, but measures the extent to which the injury impairs the employee in the ability to earn wages....A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability.

See also Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983).

Claimant has been paid 38.143 weeks of permanent partial disability benefits based on a 14 percent rating from Dr. Ferlic. Claimant argues, however, he is entitled to further benefits in that the functional rating of Dr. Blume should be used as the basis for any award. Defendants assert claimant is entitled to no further permanent partial disability benefits in that claimant has been overpaid by 3.143 weeks and, further, that Dr. Ferlic's (the treating physician) impairment opinion should be used to calculate claimant's entitlement to permanent partial disability.

In Rockwell Graphic Systems, Inc. v. Prince, 336 N.W.2d 187 (Iowa 1985), the Iowa Supreme Court stated at 192:

> We think a rule of law would be unwise that a treating physician's testimony should be given greater weight than that of a later physician who examines the patient in anticipation of litigation. The employer should and does have the right to develop the facts as to a latter physician's employment in connection with litigation, his examination at a later date and not when the injuries were fresh, his arrangement as to compensation, the extent and nature of his examination, his education, experience, training, and practice, and all other factors which bear upon the weight and value of his testimony. The claimant may similarly develop such information as to the treating physician. Both parties may press all of this information to the attention of the fact finder, as either supporting or weakening the physician's testimony and opinion. All these factors, however, go to the value of the physician's testimony as a matter of fact, not as a matter of

000013

law. [Citations omitted.]

An evaluation of impairment is not necessarily limited to the use of a standardized guide for evaluating permanent impairment. The claimant's testimony and demonstrated difficulties may also be considered in determining the actual impairment which is compensable so long as loss of earning capacity is not considered. See e.g., Soukup, supra. That is to say, in making a determination of functional impairment, a deputy's own personal observations may be relied upon in addition to medical opinions. Claimant, during the course of his testimony, demonstrated to the undersigned the difficulties he continues to have: he cannot open his hand completely, he has marked limited wrist movement in all directions; swelling; an extended fifth finger when the hand is closed. Considering, therefore, the opinions of Doctors Ferlic and Blume, as well as personal observation of claimant at the hearing, it is determined claimant has a 25 percent permanent partial disability to his upper right extremity entitling him to 62.5 weeks of permanent partial disability benefits.

II. On August 5, 1987, Deputy Trier approved claimant's application for vocational rehabilitation supplement benefits under Iowa Code section 85.70 despite defendants' resistance. Defendants assert error thereto arguing Deputy Trier failed to follow the "clear and specific mandates of section 85.70" when he granted claimant the benefits and now request this finding should be reversed.

Division of Industrial Services rule 343-4.1(8) dictates an application for vocational rehabilitation benefits (section 85.70 is a contested case proceeding before the industrial commissioner. As such, it is subject to the same rules and provisions as any other contested case proceeding. Defendants thus argue to the wrong body. As a deputy industrial commissioner, on a par with the individual who allowed 85.70 benefits, I have no authority to affirm, reverse, modify or in any way change another deputy industrial commissioner's decision, ruling or order. Consequently, there is a complete absence of jurisdiction to so much as comment on the appropriateness of the approval of benefits.

III. Because defendants have paid claimant 38.143 weeks of permanent partial disability benefits and by this decision he is entitled to 62.5 weeks, claimant has not been overpaid any benefits and the issue of defendants' entitlement to a credit is moot.

## FINDINGS OF FACT

THEREFORE, based on the evidence presented, the following facts are found:

000014

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

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

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

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

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

6. Claimant has been rated from 14-25 percent impaired by treating and evaluation physicians.

7. Claimant has a 25 percent permanent partial disability to his upper right extremity entitling him to 62.5 weeks of permanent partial disability benefits.

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

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

10. Claimant's application for section 85.70 vocational rehabilitation supplemental benefits was approved by Deputy Industrial Commissioner Michael Trier August 5, 1987.

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

## CONCLUSIONS OF LAW

WHEREFORE, based upon the principles of law previously stated, the following conclusions of law are made:

1. Claimant has established a twenty-five percent (25%) impairment of the upper extremity.

2. The award of section 85.70 vocational rehabilitation benefits to claimant by Deputy Trier is not subject to affirmance, reversal or modification by the undersigned.

3. Claimant has not been overpaid benefits.

000015

ORDER

THEREFORE, IT IS ORDERED:

Defendants are to pay until claimant sixty-two point five (62.5) weeks of permanent partial disability at a rate of two hundred twenty-seven and 79/100 dollars ($227.79) per week commencing September 17, 1987.

Defendants shall receive full credit for all permanent partial disability benefits previously paid.

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

A final report shall be filed upon payment of this award.

Costs of this action are assessed against the defendants pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 11th day of December, 1987.

Deborah A. Dubik
DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

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

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

CCCC16

FILED

NOV 16 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| SHELLIE ANDERSON, | : | |
| Claimant, | : | File No. 673653 |
| vs. | : | R E V I E W - |
| J. I. CASE COMPANY, | : | R E O P E N I N G |
| Employer, Self-Insured, Defendant. | : | D E C I S I O N |

## INTRODUCTION

This is a proceeding in review-reopening brought by Shellie E. Anderson against J. I. Case Company, his self-insured former employer.

The case was heard at Davenport, Iowa on May 13, 1987 and was fully submitted on conclusion of the hearing. The record in this proceeding consists of testimony from claimant, claimant's exhibits 1 through 36 and defendant's exhibits A through TT. Official notice was taken of the pleadings and of documents which are part of the Agreement for Settlement which the parties entered into on May 17, 1984 and which was finally approved on May 29, 1984.

## ISSUES

Claimant seeks compensation for an increased amount of permanent disability over and above the 20% permanent partial disability which was established by the Agreement for Settlement. The issues for determination are whether there has been a change in condition from the date of that Agreement for Settlement which would permit reopening of the award in accordance with Code section 86.14(2). If reopening is permitted, the extent of permanent disability is the ultimate issue.

## STATEMENT OF THE CASE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case even though it may not necessarily be referred to in this decision.

Shellie E. Anderson is a 44-year-old man who was injured on June 22, 1981 when he fell from a fork lift. He was treated,

000017

returned to work briefly with restrictions and has not been employed since October of 1981.

Claimant testified that he currently experiences low back pain and pain in his legs that is present at all times, but increases with activity.

Claimant testified that, at the time of the settlement, he understood his medical restrictions to be a lifting limit of 15-20 pounds and also that he limit bending and stooping. Claimant testified that, to his knowledge, the doctors that originally imposed those restrictions have not changed them, but that Dr. Sinning, who has subsequently been designated as claimant's treating physician, has relaxed the lifting restriction to where it is 50 pounds.

Claimant testified that, at the time he entered into the settlement, he considered himself to still be an employee of the J. I. Case Company and that he had presented himself at the company seeking employment, both before and after the 1984 settlement was made. Claimant testified that a hassle occurred on one occasion when he was at the plant and that the employer has directed that he not return to the plant. Claimant testified that, at the time of the settlement, he was off work due to the restrictions from his physicians and that no work was available in the plant within those restrictions. Claimant testified that, approximately three months prior to the date of this hearing, he went to the union hall to see about returning to work, turned in the report from John E. Sinning, Jr., M.D., but was not allowed to go to the plant. Claimant testified that he spoke with the employer's industrial relations manager and was told they would get back to him, but they have not. Claimant feels that, based upon the relaxed restrictions in Dr. Sinning's report, the employer should have returned him to work. Claimant testified that there are jobs at the plant within the limits imposed by Dr. Sinning.

Claimant testified that, shortly after entering into the settlement, a week at most, his condition started getting worse and that, for approximately a month, he could hardly get around. Claimant testified that, in October, 1984, Eugene Collins, M.D., performed another CT scan which disclosed another disc problem.

The medical records indicate that, on April 6, 1982, a CT scan showed evidence of a central herniated disc at the L5-S1 level (defendant's exhibit A). On October 11, 1982, a lumbar myelogram showed evidence of a herniated disc at the L4-5 level (defendant's exhibit KK). A CT scan performed May 29, 1984 showed a bulging disc at the L4-5 level and a possible herniated disc on the right side at the L5-S1 level (claimant's exhibit 23). A CT scan performed October 30, 1984 again showed abnormalities at the L4-5 and L5-S1 levels which were similar to those seen on

000018

May 29, 1984 (claimant's exhibit 24).

Claimant's exhibit 28 is identified in the exhibit list as office notes from Dr. Anthony D'Angelo dated May 24, 1984. The notes indicate that claimant complained of a recent exacerbation of low back and right lower extremity pain which had begun approximately three weeks earlier, but had been of acute intensity since the preceding Thursday. In his testimony, claimant indicated that the exacerbation did eventually clear and that he has had other exacerbations since 1984.

Claimant testified that his back condition is now pretty much the same as it was in May, 1984 when he entered into the settlement agreement. He stated that he was having the same problems, at time of hearing, as he had at the time of the settlement.

Richard T. Beaty, D.O., was one of claimant's treating physicians. In a report dated June 2, 1983, Dr. Beaty indicated that diagnostic tests had showed evidence of a herniated disc at the level of L5-S1 and also at the level of L4-5. He rated claimant as having a 5-10% permanent partial disability. Dr. Beaty indicated that claimant's condition would not substantially deteriorate unless he was reinjured (defendant's exhibit K). Dr. Beaty subsequently evaluated claimant on August 6, 1986. He formed the impression that claimant was showing signs and symptoms of an S1 radiculopathy. He rated claimant as having a 5-10% permanent partial disability and recommended a 25-30 pound lifting restriction. He also recommended that claimant avoid repetitive bending and twisting as well as prolonged periods of standing or sitting, as he had in the past. Dr. Beaty had no CT scans or x-rays available for review at the time of the 1986 examination. One of the conclusions he reached, however, states:

> In reviewing the previous charts, it becomes apparent that the patient has had an apparent increase in size of the disc herniation. This probably accounts for his increased medical symptomatology. (Claimant's exhibit 16).

Another physician who has been involved in claimant's treatment is John T. Johnson, D.O. Dr. Johnson indicated that claimant is totally disabled and has a poor prognosis (claimant's exhibit 4). The evidence from Dr. Johnson is not particularly enlightening with regard to the issue of change of condition.

Claimant's authorized treating physician was changed to Dr. Sinning. After examining claimant and performing additional diagnostic tests, Dr. Sinning issued a report on June 16, 1986 which contains the following information:

On review of the myelogram and CT scans from 1982 to the present time, expected changes have taken place. All this is part of the expected evolution of degenerative disc disease. In October 1982 Mr. Anderson had evidence of two bulging discs at L4-5 and L5-S1. Clinical examinations by Mr. Anderson's attending doctors in 1981 and 1982 showed no signs of any neurological deficit. No matter what name is attached to these x-ray findings, that is a herniated disc, a bulging disc or a ruptured disc, the fact remains that Mr. Anderson had no documented nerve damage. He had degenerative disc disease.

The CT scans performed in 1984 showed the same bulging of the 4th lumbar disc at L4-5 and the same obliteration of the fat around the S1 root at L5-S1 on the right side, suggesting a disc herniation or bulge at that level. This was reported by Dr. Picchiotti, the radiologist.

In 1986 the bulge of the disc at L4-5 very marked in 1984 is now minor. The obliteraion of the right S1 nerve root is similar to what it was in 1984. The L5-S1 or 5th lumbar disc now shows a vacuum sign, a further sign of progression of degeneration.

In summary then the sequence of myelograms and CT scans show significant resolution of the 4th lumbar disc bulging, no change in the impingement on the first sacral root at the L5-S1 disc and further expected degeneration by the appearance of a vacuum sign in the 5th disc.

All these x-ray changes however must be taken in perspective. These same changes occur in the majority of our population as we age from age 20 through the 50's. Frequently these changes occur in asymptomatic people. Therefore it is important to look for objective signs of impairment to substantiate the findings on x-ray. In Mr. Anderson's situation there are no objective signs of impairment to substantiate any sign of dysfunction. (Defendant's exhibit DD).

Dr. Sinning also identified a lack of sensation in claimant's legs which apparently had not previously existed. He attributed that change to claimant's underlying diabetic condition rather than to the effects of the 1981 injury (defendant's exhibit TT, pages 22-25).

## APPLICABLE LAW AND ANALYSIS

Res judicata or preclusion applies in administrative proceedings. Board of Supervisors, Carroll County v. Chicago and North Western Transportation Co., 260 N.W.2d 813 (Iowa 1977). Code section 86.14(2) permits reopening of an award, however, when warranted and is therefore an exception to the normal rule of preclusion. The exception applies only when the claimant makes the required showing of a change of condition.

In a review-reopening proceeding, the claimant has the burden of establishing that, subsequent to the date of the award or agreement for settlement, he suffered an impairment or lessening of his earning capacity as a proximate result of his original injury which thereby entitles him to additional compensation. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 457 (Iowa 1969). An increase in industrial disability may occur without a change in physical condition. A change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change in condition under sections 85.26(2) and 86.14(2). Blacksmith v. All American, Inc., 290 N.W.2d 348, 350 (Iowa 1980). Cause for allowance of additional compensation exists on proper showing that facts relative to an employment connected injury existed, but were unknown and could not have been discovered by the exercise of reasonable diligence. Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968).

The original settlement documents, particularly the Agreement for Settlement signed May 17, 1984, indicate that the parties agree that there was no work available at the employer's plant within the restrictions that had been placed upon claimant by his physicians.

Unexpected deterioration or the lack of expected improvement can be a basis for reopening. Meyers v. Holiday Inn of Cedar Falls, Iowa, Iowa App., 272 N.W.2d 24 (1978). A mere difference of opinion among experts or other competent observers is not, however, sufficient to support reopening. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). Reopening has been allowed where an employee was found to be unable to work in the manner that was expected or anticipated at the time of the initial determination of his disability. White v. Jimmy Dean Meat Co., III Iowa Industrial Commissioner Report 278 (App. Decn. 1983). A long-term layoff, which was not anticipated, can support reopening. Hankins v. Phil Hunget d/b/a Friends & Neighbors Supper Club, IV Iowa Industrial Commissioner Report 156 (1983).

The record presented shows that, at the time of the settlement agreement in May, 1984, claimant's condition was not expected to substantially change, that no work was available at the employer's plant under the restrictions which then existed and that there

appeared to be no promise or indication that suitable work would become available in the future. From the record made, it is apparent that the disputes between Shellie Anderson and the J. I. Case Company run much deeper than the extent of his entitlement to workers' compensation benefits. The Iowa Division of Industrial Services is not, however, a proper form for determining those other disputes. Claimant urges that, under the restrictions issued by Dr. Sinning, positions exist in the employer's workforce which he could perform and that the employer should place him in one of those positions. Claimant urges that the lack of opportunity for reemployment with the J. I. Case Company constitutes a change in condition since he had an expectation of reemployment, should he improve, at the time of entering into the Agreement for Settlement.

The physicians who seem to be most familiar with claimant's case are Drs. Beaty and Sinning. When comparing Dr. Beaty's assessments made prior to the Agreement for Settlement and in 1986, there is no material change. Dr. Beaty feels, apparently based upon claimant's complaints, that the size of the herniated disc had enlarged. He did not, however, alter his impairment rating or the physical restrictions which had been imposed years earlier. He expressly disagreed with a 50-pound weight limit.

Dr. Sinning, with the assistance of radiographic studies, concluded that claimant's condition had not worsened and that, if it had changed in any manner since 1984, it had actually improved. Dr. Sinning imposed a 5% impairment rating, but also a 50-pound regular lifting restriction. Dr. Sinning's assessment of a loss of sensation being due to a diabetic condition is accepted as correct.

When viewed in its totality, the evidence from both Drs. Beaty and Sinning shows no significant change in claimant's physical condition having occurred since the time the case was settled in 1984. Claimant himself testified that his condition was about the same as it had been all along. The exacerbation that occurred in May, 1984, and the subsequent ones, were simply exacerbations and did not change the long-term course of claimant's condition. Claimant has, therefore, failed to prove, by a preponderance of the evidence, that there has been any change in earning capacity, subsequent to the original settlement, which was proximately caused by the original injury.

## FINDINGS OF FACT

1. Claimant has failed to establish, by a preponderance of the evidence, that there has been any unanticipated material change in his earning capacity or in his physical condition that has occurred, from any cause, subsequent to May 17, 1984.

2. Any change in claimant's condition, particularly with

regard to the sensation in his legs, is more likely a result of his underlying diabetic condition than of the 1981 injury.

CONCLUSIONS OF LAW

1. Having failed to show any unanticipated material change in his earning capacity that was proximately caused by the 1981 injury, claimant is therefore not entitled to have his prior award reopened or reviewed.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding.

IT IS FURTHER ORDERED that each party herein is assessed the costs of this proceeding that were incurred by the party and that the employer shall also remain responsible for the costs of providing a court reporter at the hearing.

Signed and filed this 16th day of November, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. John H. Westensee
Attorney at Law
1703 Second Avenue
Rock Island, Illinois 61201

Mr. Larry L. Shepler
Attorney at Law
600 Union Arcade Building
111 East Third Street
Davenport, Iowa 52801

FILED

SEP 30 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

CHET BALLENGER,

Claimant,

vs.

LITHCOTE COMPANY,

Employer,
Self-Insured,
Defendant.

File No. 755986

A R B I T R A T I O N

D E C I S I O N

---

## INTRODUCTION

This is a proceeding in arbitration brought by Chet Ballenger against Lithcote Company, his self-insured employer. The case was heard at Davenport, Iowa, on March 3, 1987, and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Chet E. Ballenger (the claimant), Chester L. Ballenger (claimant's father), Sharon K. Ballenger (claimant's wife), Joe E. Canas, Mitchell Miller, William Fusco, Dena R. Garvin and Richard F. Neiman, M.D. The record also contains joint exhibits 1 through 15, 18, 19 and 20 and claimant's exhibits 21 through 26.

## ISSUES

Claimant seeks compensation for healing period and permanent partial disability based upon the injury that is stipulated to have occurred on January 16, 1984. In connection therewith an issue exists regarding the existence of a causal relationship between the alleged injury and the disability. In particular, whether the injury was limited to claimant's L4-5 disc level or whether it also included the L5-S1 disc level. The duration of the healing period is contested and the extent of permanent partial disability is likewise contested. It was stipulated that the correct rate of compensation is $177.88 per week and that 107.571 weeks of compensation have been paid prior to the date of hearing.

It was stipulated that claimant was off work from January 19, 1984 until August 26, 1985 except for a period of four and one-half days beginning April 29, 1985 and ending at midday on May 3, 1985. The dispute involves whether the healing period ended on August 6, 1984. Claimant seeks healing period compensation until August 26, 1985. It was explained that claimant did not cease working until January 19, 1984.

000024

## REVIEW OF THE EVIDENCE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case.

Chet Ballenger is a 27-year-old married man whose formal education is limited to the eighth grade. Since quitting school he has engaged in a number of occupations including commercial fishing, clamming, carpentry, painting, masonry work, plumbing, electrical work and bartending. Many of his work activities required a great degree of physical strength, particularly clamming and commercial fishing, where he would perform repetitive lifting of weights of as much as 80-100 pounds and occasional lifting of up to 200 pounds. Prior to the time claimant commenced employment with Lithcote Company, the record shows only one physical problem involving his back, which problem was apparently resolved by a chiropractic treatment.

Claimant commenced employment with Lithcote Company on April 14, 1983. His employment duties consisted of inspecting, cleaning and painting railroad cars. One of the functions involved grinding out grooves in the metal in preparation for painting. Claimant testified that on January 16, 1984 he was grinding with a 10-14 pound grinder working overhead and fell. He testified that he skinned his leg, but that it really didn't hurt until a couple of days later when he began noticing numbness in his feet. He testified that he reported the injury. He stated that the loss of feeling spread up the back of his legs and that he had pain on the inside of his legs, but no pain in his back.

Claimant consulted Mark O'Dell, M.D., on January 19, 1984. Dr. O'Dell noted complaints of pain in claimant's back and left gluteal area and numbness in his calf and left foot. Upon examination, Dr. O'Dell found claimant's left Achilles reflex to be absent, the straight leg raising test to be positive and tenderness at the right sciatic notch. Dr. O'Dell recommended bed rest for three days and that claimant remain off work. Dr. O'Dell diagnosed claimant as having an S-1 radiculopathy related to a herniated disc. A follow-up examination on January 25, 1984 showed that no significant improvement had occurred and claimant was referred to David C. Naden, M.D. (joint exhibit 3, page 9). Dr. Naden's initial diagnosis was that claimant had a probable herniated nucleosis pulposis at either the L4-5 or L5-S1 level and also with either a free fragment from the above level or a large free fragment at the L5-S1 level compromising the first sacral nerve root on the left (joint exhibit 1, page 1; joint exhibit 13, page 9). A myelogram was performed on January 27, 1984 which was interpreted as showing:

000025

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

Richard Kundel, M.D., who interpreted the myelogram, concluded that it showed a herniated intervertebral disc at the L4-5 level with probable free fragment with nerve root compression (joint exhibit 1, page 24). Dr. Naden agreed with the diagnosis of a herniated disc at the L4-5 level with a free fragment just below the L4-5 level encroaching on the L5 nerve root (joint exhibit 1, pages 15 and 17). He suggested chemonucleolysis. A second opinion was obtained from Dr. Jersild who concurred with that diagnosis, but he indicated that there was a good possibility that the suggested chemonucleolysis would be ineffective since the enzyme might not reach the fragment (joint exhibit 2, page 1).

Intradiscal chemonucleolysis at the L4-5 level was performed on February 21, 1984. In performing the procedure, Renografin dye was injected into the disc which showed a bulge. The report does not indicate that there was any escape or leakage of the dye from the disc. The chymopapain was then injected without any apparent abnormal reaction (joint exhibit 1, page 16).

Claimant thereafter went through an extended period of recuperation without attaining a complete recovery. Dr. Naden's notes indicate that on June 25, 1984 he indicated to claimant that the free fragment that he had diagnosed was a foreign body that was still present and that the only option was further surgery. He also indicated that the surgery would be compromised because of fibrosis that had developed. On July 10, 1984, Dr. Naden indicated that claimant did not want surgery and that claimant would get along as well without surgery as he would with it (joint exhibit 1, page 3).

On June 6, 1984, claimant was again evaluated by Dr. Jersild who indicated that he would be inclined to continue under the present program of rehabilitation exercise (joint exhibit 2, page 2).

On October 26, 1984, claimant was seen by Drs. Lehmann and Tozzi at the University of Iowa Hospitals and Clinics. They interpreted the radiographic studies as showing a myelographic defect at the L4-5 interspace bilaterally with amputation of the L5 nerve root bilaterally and also a large extradural defect on the left, ventrally, behind the body of L-5. They concluded that claimant most likely had a free fragment which could be the

000026

cause of his persistent symptomatology. They also concluded, however, that due to what was perceived as gradual improvement, it was reasonable that he forego surgery. They also indicated that the healing period was over and that claimant should search for some other source of employment. They recommended that he undergo vocational rehabilitation and assigned a 20% impairment rating with a notation that deterioration in the future was possible, but that continued improvement was most likely (joint exhibit 5, pages 1 and 2).

Dr. Naden indicated that claimant had attained the maximum improvement that he would attain without surgery on July 23, 1984 (joint exhibit 13, page 22). He went on to state, however, that there was some additional improvement in claimant's condition subsequent to July 31, 1984 and up to April of 1985 when claimant actually returned to work (joint exhibit 13, pages 24, 25, 38 and 74). He indicated that he did not release claimant to return to work until April of 1985 (joint exhibit 13, pages 23 and 74).

Claimant was examined on January 21, 1985 at the Mayo Clinic by Raul E. Espinosa, M.D., and Steven D. Stein, M.D. Their review of claimant's radiographic studies was felt to show a large lumbosacral (another term for L5-S1) disc protrusion and a midline disc protrusion at the L4 level. The neurological examination was entirely normal except for diffuse percussion tenderness in the low back, difficulty in lumbar flexion and pain with the straight leg raising test at 70 degrees on the right and 50 degrees on the left (joint exhibit 4, pages 1-3).

After claimant's brief return to work in early 1985, he returned to Dr. Naden on May 28, 1985. A myelogram was again performed on June 4, 1985 which indicated:

> There is nerve root amputation on the left side at the L4-5 level and pressure effect on the nerve root on the right side at this level. In addition there appears to be nerve root amputation on the left at the L5-S1 level.

It was interpreted by Dr. Kundel as showing probable disc herniation on the left side at the L4-5 and L5-S1 levels (joint exhibit 1, page 13).

Claimant was again hospitalized and a laminectomy was performed at the L4-5 and L5-S1 levels with extraction of a herniated disc and intradiscal material (joint exhibit 6, pages 22 and 23). Thereafter, claimant experienced a relatively unremarkable recovery, was released to return to work and did so on August 26, 1985 (joint exhibit 13, page 35).

Dr. Naden indicated that the L5-S1 level of claimant's spine

was normal at the time of the 1984 myelogram and he could not say when or why the problem at that level developed (joint exhibit 13, pages 49 and 50). He indicated that the claimant's L4-5 disc problem was related to his work, but declined to make such a causal connection with regard to the L5-S1 level (joint exhibit 13, page 65). Dr. Naden indicated that, during surgery, he observed a difference between the discs at the L4-5 and L5-S1 level which indicated that the L4-5 injury had existed longer than the L5-S1. He attributed the fibrosis and scarring which he found to degredation of the free fragment (joint exhibit 13, pages 46-48).

Claimant's radiographic studies have been evaluated by Donald C. Young, M.D., who is board certified in radiology and nuclear medicine. Dr. Young interpreted the 1984 myelogram as showing bilateral L4-5 disc protrusion and a free fragment overlying the L5 intervertebral body on the left displacing the S1 nerve root. Dr. Young interpreted the 1985 myelogram as showing a defect at the L4-5 interspace which was less pronounced than on the first examination. He was unable to identify the free fragment from the previous examination and indicated that it could have moved. He indicated that, at the L5-S1 level, a little asymmetry existed on the left, possibly due to a free fragment. He found no indication of a herniated disc, but felt that it could show a protruding disc. Dr. Young also noted the development of degenerative osteoarthritis (joint exhibit 20, pages 6 and 7, 9-13).

David W. Beck, M.D., a board certified neurosurgeon, examined claimant on May 20, 1986. Dr. Beck expressed the opinion that claimant injured both the L4-5 and L5-S1 discs in the fall that occurred on January 16, 1984 (joint exhibit 15, pages 10, 28, and 29). Dr. Beck stated that the 1985 myelogram showed L5-S1 disc level herniation and that the 1984 myelogram also showed that the S1 nerve root did not fill (joint exhibit 15, pages 20-22). He explained that both myelograms were identical except that the L5-S1 bulge was slightly smaller in the 1985 (joint exhibit 15, page 30).

Dr. Beck indicated that the clinical indications of ankle reflex impairment and plantar weakness indicate an S1 nerve root problem (joint exhibit 15, pages 12, 19 and 20).

Dr. Beck concluded that, on February 7, 1984, all indications were consistent with either a herniated disc at the L4-5 level with a free fragment or with a herniated disc at both the L4-5 and L5-S1 levels (joint exhibit 15, pages 31, 32, and 41-44). He noted that the Mayo Clinic neuroradiologist had made an interpretation of disc herniation at the L5-S1 (also referred to as lumbosacral) area (joint exhibit 15, page 51).

Dr. Beck explained that chymopapain is contraindicated for a

free disc fragment, but that it is used for treating bulging discs (joint exhibit 15, page 15).

Dr. Beck felt that there never was a free fragment in claimant's back and that what was thought to be a free fragment was actually the bulging L5-S1 disc (joint exhibit 15, page 45). He stated that if there was a fragment, it had to come from the L5-S1 disc because the Renografin injection showed that there was no hole in the L4-5 disc (joint exhibit 15, pages 16-19). He stated that if a free fragment had existed, it would have been present at the time of surgery (joint exhibit 15, pages 29-31). He stated that a free fragment is not absorbed, rather it is surrounded by scar tissue (joint exhibit 15, page 54).

Dr. Beck noted that claimant is developing degenerative arthritis and spurring which he felt was related to the original injury (joint exhibit 15, page 35). He rated claimant as having a 30% impairment (joint exhibit 15, page 34). He felt that the surgery at the L5-S1 level compromised the disc due to scarring and the hole made in the disc, the same as was done at the L4-5 level (joint exhibit 15, page 32). Dr Beck recommended that claimant follow a 20-25 pound lifting limit, use very limited motion and avoid doing a job if it aggravates his back (joint exhibit 15, pages 33 and 48).

Richard F. Neiman, M.D., a board certified neurologist, testified by deposition (joint exhibit 14) and also in person at hearing. Dr. Neiman had reviewed records from Drs. Naden, Jersild and O'Dell, the Mayo Clinic, the University of Iowa, Muscatine General Hospital, Dr. Wettach and all x-rays and myelograms taken between the periods of January 16, 1984 through October 30, 1986. Dr. Neiman felt that at the time the chymopapain injection was performed, there was some indication of a free fragment as well as L4-5 herniation. He stated that there has to be a tear in the annulus fibrosis of a disc for there to be a free fragment. He stated that chymopapain is not indicated if there is a free fragment because if chymopapain escapes from the disc into the spinal canal it damages nerves and surrounding soft tissues. Dr. Neiman noted that the chymopapain operation report by Dr. Naden showed that there was no tear in the L4-5 disc from which a free fragment could have resulted. Dr. Neiman also indicated that the laminectomy showed that two disc levels were involved and that nothing in Dr. Naden's reports indicates the existence of a tear or defect in either the L4-5 annulus or the L5-S1 annulus. Dr. Neiman disagreed with the physicians who had diagnosed a free fragment.

Dr. Neiman testified that an Achilles reflex impairment is an indication of S1 nerve root involvement and that, since there was no free fragment, there had to be some other cause for the S1 nerve root involvement, namely, the bulging L5-S1 disc. Dr. Neiman expressed the opinion that the L5-S1 disc was injured in

claimant's fall together with the L4-5 disc.

Dr. Neiman testified that a free fragment can migrate but does not dissolve and that if it had existed and had migrated, claimant's continuing problems would be more severe than what claimant has exhibited. Dr. Neiman testified that the surgeon has the best opportunity to observe and make an accurate diagnosis and that no free fragment was found during surgery.

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

Dr. Neiman felt that claimant had a 25% permanent partial impairment of the whole person and recommended that he restrict his lifting to 15-20 pounds and avoid excessive extension, flexion and lateral rotation.

Claimant testified that Dr. Naden waivered in his recommendations regarding whether or not additional surgery should be performed following the chymopapain injection. Claimant stated that he was making progress and continuing to improve into the fall and early winter of 1984. Claimant testified that, in March, 1985, Dr. Naden indicated that he felt he was still improving and claimant then sought and received a release to return to work. Claimant testified that he was assigned to work in the crib and gradually developed pain. He denied having any accidents during the four and one-half days he worked. Claimant testified that his condition worsened and he decided to undergo the surgery. Claimant testified that, following the additional surgery, he was authorized to return to work and did so on August 16, 1985.

Claimant testified that, when he returned to work, his back was weak and that it has since strengthened. He works as a stenciler which he described as one of the easiest jobs. He stated that he still has pain in his low back and a little numbness in his feet. He estimated his activity level as approximately one-half of what it was prior to injury. Claimant testified that he cannot easily bend over and pick up as little as 30 or 40 pounds. He stated that if Lithcote were to leave Iowa, his work opportunities would be quite limited. He felt that he was physically unable to do any of the other jobs he has held in the past. He stated that he is currently unable to mow his lawn or do heavy lifting for home repairs. He is able to lift his children for a short time if he does so carefully.

Claimant currently earns more than $8.00 per hour. He stated that all other people with more seniority have jobs that require heavy work and provide higher pay than his current job as a stenciler. He stated that there is no one with more

seniority who has a lower paying job and could bump him out of his current position. Claimant testified that, if he had kept working at his prior position without injury, he would now be an inspector earning the same rate of pay as he currently earns.

Chester L. Ballenger, claimant's father, and Sharon K. Ballenger, claimant's wife, corroborated claimant's testimony of his preinjury activities and abilities and of the reduction in his activities and physical capabilities which have followed since the injury.

Joe E. Canas, claimant's supervisor, testified that claimant does a very good job and is one of his best employees. Canas agreed that the stenciler position is the lightest and that all higher-paying jobs, namely welder and interior sprayer, require bending, climbing, crouching and handling more weight than the stenciler position.

Mitchell Miller, claimant's supervisor in his prior position, testified that claimant's current job requires mental planning whereas his former job as a helper was more physical.

William Fusco, the plant manager, testified that, during 1984, there were discussions and concerns regarding whether claimant would be able and willing to return to work. Fusco indicated that claimant's education may be a problem for him with regard to entering some other jobs, but that the stenciling job is complicated and claimant is able to do it. He characterized claimant as a very good employee.

Claimant stated that the book he uses in stenciling railroad cars involves the use of only one page from the entire book.

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

## APPLICABLE LAW AND ANALYSIS

The purpose of all adjudicatory forms is to arrive at the truth. A workers' compensation hearing is essentially a nonjury, civil trial. If the adversary system fails to bring out material facts, a judge has a duty to supply the omission by further examination. McCormick evidence section 8, pages 12 through 13. It is certainly proper for a judge to ask questions. Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550 (Iowa 1980). The only caveat is that, in asking questions, a judge should not influence a jury by asking questions which attack the credibility

of a witness or contain prejudicial inferences. Biercamp v. Beuthien, 173 Iowa 436 155 N.W. 819 (1916). Counsel was given ample opportunity to object to the questions asked, but did not do so and the matter is therefore effectively waived. Lessenhop v. Norton, 261 Iowa 44 153 N.W.2d 107 (1967). Even if it were not waived, a deputy commissioner is clearly permitted to question witnesses. It is a common practice in the courts and in administrative proceedings under Chapter 17A. It is consistent with the statutory duties imposed by section 86.17(1) which in part states:

> The deputy commissioner...may make such inquiries and investigation in contested case proceedings as shall be deemed necessary, consistent with the provisions of section 17A.17.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 16, 1984 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). 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).

Agency experience may be utilized in evaluating evidence. (Code section 17A.14). In evaluating the medical evidence in this case, reliance is placed upon what experience has shown to be customary medical practice as demonstrated in a number of other cases. There is a great deal of irreconcilably conflicting opinions from the physicians in this case. The opinions regarding causation and the extent of the original January, 1984 injury as expressed by Drs. Beck and Neiman are adopted as correct for the following reasons. A free fragment is a term applied to a fragment of an intervertebral disc. For such a fragment to exist, it is necessary that there be a tear, break or rent in the annulus of the disc. If such a tear existed in the L4-5

disc at the time the chymopapain injection was performed, some of the Renografin dye would have leaked from the disc into surrounding tissues. If such had occurred, the chymopapain enzyme would not have been used due to its propensity to act upon and dry out whatever body tissue it contacts. Accordingly, chymopapain is contraindicated at the disc level from which a free fragment originated. Chymopapain is commonly used in treating discs which are merely bulging. Medical terminology is often imprecise with regard to distinguishing among discs that are bulging, herniated or ruptured. A disc which has been injured to the extent that it has been torn or broken and a free fragment released is most commonly referred to as a ruptured or herniated disc and is seldom referred to as a bulging disc.

The myelographic studies conducted in January, 1984, have been reviewed by a number of presumably capable practitioners. Approximately half have characterized it as showing a free fragment, while the other half have characterized it as showing or possibly showing a bulging L5-S1 disc. Drs. Beck and Neiman have indicated that the Achilles reflex impairment is highly specific for an S-1 nerve root problem (the root which is affected by an L5-S1 disc lesion). Both the 1984 and the 1985 myelograms certainly show an abnormality at the level of the S1 nerve root. The primary difference is that the 1984 was characterized as showing a free fragment while the 1985 has been almost uniformly interpreted as showing a bulging disc at the L5-S1 level. Claimant's symptoms changed little prior to the time the laminectomy was performed, even though the chymopapain injection had been employed. His symptoms improved following the laminectomy. Most importantly, the 1985 myelogram and the laminectomy itself clearly revealed a bulging L5-S1 disc and neither revealed a free fragment. The laminectomy did not reveal a tear or hole in the annulus of either disc or a free fragment. The difference in the appearance of the discs is readily explained by the chymopapain injection and is not necessarily an indication of the order in which the bulging discs occurred. Finally, trauma to the spine is seldom limited to one disc level. The discs are located approximately two inches apart and any impact which would have traumatized the L4-5 disc to the point of injury would have also traumatized the L5-S1 disc. Subsequent to the original injury, claimant's activities appear to have been quite sedentary and were certainly not the type of thing which is commonly seen as precipitating a bulge in a previously healthy disc. If the L5-S1 disc bulge somehow appeared during the course of claimant's recuperation from the chymopapain injection, it is likely that it was merely a delayed reaction to the original trauma rather than a result of some subsequent trauma. The assessment of the case as made by Drs. Beck and Neiman is wholly consistent with the objective evidence and fully explains the lack of recovery following the chymopapain injection, the persistent symptoms and the apparent recovery that has resulted since the laminectomy was performed. It is therefore found that

the injuries sustained on January 16, 1984 included injury to the L5-S1 disc as well as the L4-5 disc. That fall is therefore a substantial factor in producing the chymopapain injection, the laminectomy, the recuperation periods following each surgery and the entire disability which currently exists in claimant's spine.

A substantial question exists regarding the termination of claimant's healing period. Under the findings previously made, even if terminated in 1984, further healing period would have been warranted commencing with the hospitalization in 1985 and running until the return to work on August 26, 1985. It appears from the evidence that Dr. Naden did, in fact, waiver regarding his recommendations to claimant. The records indicate that, at times, he recommended surgery and that, at other times, he indicated claimant's condition would not be improved by surgery. Early on, he expressed the expectation that a laminectomy would be necessary, but it was not until April of 1985 that he discharged claimant from his care or authorized claimant to return to work in any capacity. During the summer of 1984, Dr. Naden indicated that claimant had reached the maximum medical improvement that he would attain without further surgery, but at no point was the surgery specifically declined. Rather, claimant continued to seek other opinions on what is certainly a serious matter. He did so with the consent of Dr. Naden. In fact, Dr. Naden indicated in his deposition that claimant continued to improve, albeit minimally, following the time in July, 1984 when an impairment rating was assigned. It was only the physicians at the University of Iowa Hospitals and Clinics who recommended that claimant seek retraining and enter a different occupation. All the others that were consulted concurred with claimant's desire for continued conservative treatment with hopes of improvement.

When the healing period is ended by maximum medical improvement, it is determined by the time at which the physicians determine that all significant improvement has occurred. It is not a decision that is made by hindsight. The healing period ends at the time when the physician speaks that it has ended, not at some date in the past when, through hindsight, the physician finds that improvement ceased to occur. Armstrong Tire and Rubber Company v. Kubli, 312 N.W.2d 60, 65 (Iowa App. 1981). Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984). It is therefore determined that claimant's healing period commenced January 19, 1984 and ended August 26, 1985 with an interruption from April 29, 1985 through May 3, 1985 for the dates he actually worked.

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to

mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

Claimant has a very limited education. This is often an indication of limited intellectual capacity. There is some indication in the record that his use of the book for stenciling railroad cars in his current employment may indicate intellectual functioning of a level higher than his eighth grade education. Nevertheless, the record does not show any evidence upon which to determine that claimant has the aptitude for academic pursuits. His prior work history is devoid of any indication that he used substantial intellectual exertion. Claimant has had surgery at two levels of his spine. The impairment ratings assigned by physicians range from 15% to 30%. The physical restrictions are less divergent in that those who have assigned a weight limit have generally indicated that it should be in the range of 20-25 pounds and those who have spoken to the issue have indicated that claimant should avoid repetitive bending, stooping, twisting and other activities which typically aggravate a spinal condition. He is clearly developing degenerative arthritis at the injured spinal levels. When all the factors of industrial disability are considered, it is clear that claimant is seriously impaired in his ability to be gainfully employed. A relatively high disability award would be appropriate in this case were it not for the fact that claimant has suffered no actual loss of earnings. While actual earnings are only one element to be considered in determining loss of earning capacity, they are most certainly a very substantial element. Anthes v. Anthes, 258 Iowa 260, 139 N.W.2d 201 (1965). Raney v. Honeywell, Inc., 540 F.2d 932 (C.A. Iowa 1976). The evidence indicates that claimant's employment with Lithcote Company is reasonably secure and can be expected to continue without interruption due to business closing or a lack of work within his physical capabilities. Should such occur in the near future, the remedy of review-reopening would be available. In assessing the disability in this case, however, it is recognized that there is no guarantee that Lithcote Company will continue to employ claimant indefinitely in the future throughout his working life. When all the material factors of industrial disability are considered, it is determined that claimant has a 30% permanent partial disability.

## FINDINGS OF FACT

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

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

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

4. Following the injury, Ballenger was medically incapable of performing work in employment substantially similar to that he performed at the time of injury from January 19, 1984 until August 26, 1985 when claimant returned to work, except for an interruption of five days running from April 29, 1985 through May 3, 1985 when he made an unsuccessful attempt to return to work.

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

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

7. Chet E. Ballenger is a 27-year-old married man who dropped out of school during the ninth grade and has no further formal education. His entire work history is devoid of any employment that utilized substantial intellectual capabilities and he has no demonstrated aptitude for successfully completing academic or intellectual pursuits.

8. Ballenger presently has approximately a 20% functional impairment of the body as a whole due to the condition of his spine that resulted from the fall on January 16, 1984 and the condition of the spine renders his physical capabilities such that he is medically advised to avoid lifting more than 25 pounds and to avoid physical activities which require flexion, twisting or extension of the spine.

9. Ballenger is well-motivated to be gainfully employed.

10. All witnesses who testified at hearing are found to be credible witnesses to the extent of their personal knowledge.

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

12. Ballenger has sustained a 30% permanent impairment of his earning capacity.

## CONCLUSIONS OF LAW

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

2. The injury Ballenger sustained to his back on January 16, 1984 is an injury which arose out of and in the course of employment with Lithcote Company.

3. Ballenger is entitled to receive healing period compensation under the provisions of section 85.34(1) commencing January 19, 1984 and running until August 26, 1985 when claimant returned to work, except for a period of five days running from April 29, 1985 until May 3, 1985 when he made an unsuccessful attempt to work. The total amount of healing period compensation is 83 4/7 weeks.

4. Healing period is not terminated by a physician's impression that improvement will not occur without further surgery for so long as the patient remains off work under the directions of the authorized treating physician, has not been released to return to work by the authorized treating physician, continues to seek additional medical opinions regarding the advisability of further surgery and continues to make actual improvement in his condition.

5. Claimant has a 30% industrial disability under the provisions of section 85.34(2)(u).

6. In considering the impairment of earning capacity and industrial disability, the matter is determined, not alone by earnings before and after the injury, but is rather the assessment of the difference in the value of the claimant's services as if he had not been injured in comparison to the value of his services as an injured person.

ORDER

IT IS THEREFORE ORDERED that the employer pay claimant eighty-three and four-sevenths (83 4/7) weeks of compensation for healing period at the stipulated rate of one hundred seventy-seven and 88/100 dollars ($177.88) per week commencing January 19, 1984 and interrupted by five (5) days commencing April 29, 1985.

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

IT IS FURTHER ORDERED that the employer shall pay interest on all past due, unpaid amounts in accordance with section 85.30.

IT IS FURTHER ORDERED that the employer pay the costs of this action pursuant to Division of Industrial Services' Rule 343-4.33.

IT IS FURTHER ORDERED that the employer shall file Claim Activity Reports as required by the agency pursuant to Division of Industrial Services' Rule 343-3.1.

Signed and filed this 30th day of September, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. J. Nicholas Russo
Attorney at Law
615 Iowa State Bank Building
Iowa City, Iowa 52240

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

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| JOHN R. BAST,<br><br>Claimant,<br><br>vs.<br><br>SCHNEIDER METAL MANUFACTURING COMPANY,<br><br>Employer,<br><br>and<br><br>U.S.F. & G.,<br><br>Insurance Carrier,<br>Defendants. | : | FILE NO. 736651<br><br>R E V I E W -<br><br>R E O P E N I N G<br><br>D E C I S I O N<br><br>FILED<br><br>DEC 17 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by John R. Bast, claimant, against Schneider Metal Manufacturing Company, employer (hereinafter referred to as Schneider), and U.S.F. & G., insurance carrier, defendants, for recovery of additional workers' compensation benefits as a result of an injury on June 14, 1983. A prior settlement under Iowa Code section 86.13 for this injury was filed on October 10, 1984 and approved by this agency on October 15, 1984. On October 29, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and Dixie Bast. The exhibits received into the evidence at the hearing are listed in the prehearing report. According to the prehearing report, the parties have stipulated to the following matters:

1. Claimant is only seeking additional healing period benefits for the period of time extending from December 13, 1986 through February 9, 1987.

2. The medical bills submitted by claimant at the hearing were fair and reasonable and causally connected to the medical condition upon which claimant herein is basing his claim but

000039

that the issue of their causal connection to the 1983 work injury remains an issue to be decided herein.

## ISSUES

The parties submitted the following issues for determination in this proceeding:

I. Whether there is a change of condition since the prior settlement entitling claimant to additional weekly disability benefits; and,

II. The extent of claimant's entitlement to medical benefits under Iowa Code section 85.27.

## SUMMARY OF THE EVIDENCE

The following is a summmary of the evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary all of the evidence received at the hearing was considered in arriving at this decision. Furthermore, this summarization, by necessity, may contain certain conclusions regarding the evidence. To the extent the following material contains conclusionary statements, such statements should be considered as preliminary findings of fact.

Pursuant to the request of the parties, official notice was taken of the prior settlement and supporting documentation filed in October of 1984. According to these settlement papers, claimant was paid weekly benefits for a 30 percent permanent partial disability as a result of a compensable injury on June 14, 1983 in which claimant injured his low back while lifting at work. Claimant also suffered a low back injury from a fall after slipping on ice in January, 1984, but in the settlement agreement, claimant agreed that this fall was not compensable. In a report dated July 20, 1984, claimant's primary treating physician and orthopedic surgeon at the time of the October, 1984, settlement, Timothy C. Mead, M.D., relates the following history:

Mr. Bast's current history starts on June 14, 1983. At that time, while working for Schneider Metal, patient relates that he was running a shear machine when he was lifting to twist a piece of metal and he had pain in the lower back region. On that same day, he presented himself to the Emergency Room. He was seen initially by Dr. Ki Song. At that time, he was complaining of lower back pain and also some discomfort in the right leg. I first saw Mr. Bast on July 14, 1983. My initial impression was that the patient had low back pain without evidence of radiculopathy. I gave him a light duty

000040

work release on that date. He was working at this light duty evidently until August 19, 1983. He was off work until September 26, 1983, at which time he went back to light work. He worked approximately two and part of a third day and then returned to the Clinic because of recurrent low back pain. On October 17 he was, again, given a trial back at light duty, but was told there was no light duty available for him. On January 12, 1984 the patient was returned to work without any specific restrictions. He evidently was doing light sweeping at work and then was laid off on January 16, 1984. On the way out to the parking lot, Mr. Bast relates to me that he slipped on the ice and fell, landing solidly on his left hip.

In the same report Dr. Mead describes claimant's complaints to him at that time as follows:

> Currently, Mr. Bast states that he has nearly continuous low back discomfort. He states that he can do some light gardening around the home. When he sits for any prolonged period of time, which he feels is greater than forty-five minutes to one hour, he develops low back pain of an increasing amount. He states that he does have some numbness in the toes of the left foot. This does not appear to be particularly positional, but he states that it tends to get more when he stands on his feet for long periods of time. He denies any bowel or bladder dysfunction. He states currently that he has very limited activity at home. He does work part-time at a self-serve gas station. He states that he only has to push some buttons there. He does not do any heavy lifting or carrying there and tolerates it fairly well, but must get up and change his position several times during an approximately four hour shift.

Dr. Mead rated claimant in this report as suffering from a 10 percent permanent partial impairment to the body as a whole due to the June, 1983, work incident. Dr. Mead did not feel that the January, 1984 fall contributed to this permanent impairment. Also, Dr. Mead did not feel that he should lower this rating as a result of claimant's prior existing degenerative arthritis condition because claimant had no restrictions on his physical activity before June, 1983. According to his report in February, 1984, Dr. Mead believes that claimant will have to avoid, in the future, jobs involving repetitive bending or lifting of heavy objects.

In April, 1984, claimant had been examined by another

000041

orthopedic surgeon, John R. Walker, M.D. Dr. Walker, at that time, noted four complaints noted to him by claimant:

1.) He has a constant low back ache, in the midline and low down.

2.) He has sharp pain in the low back if he makes any sudden turns.

3.) He has pain down the left leg posteriorly to the back of the knee.

4.) He has numbness in the four small toes of the left foot.

Dr. Walker felt that claimant has a 60 percent permanent partial impairment, 10 percent of which was attributable to claimant's prior existing condition and the balance due to the June, 1983 and January, 1984 injuries. Dr. Walker felt that claimant had a herniated disc at the L4-5 level of claimant's spine and recommended a CT scan and myelogram tests along with possible surgery. This course of treatment was rejected as unnecessary by Dr. Mead as claimant was not a good candidate for surgery in part due to his obesity. Dr. Walker, however, replied that claimant may not be a good candidate but he was a candidate nonetheless for surgery after further tests and absence such treatment claimant would continue to have problems in the future.

The medical reports indicate that claimant had serious back problems in 1979 and 1980 while working for a different employer. The diagnosis for these injuries were consistently low back strain/sprain and claimant was treated with medication and physical therapy. Claimant lost work for a few days after these incidents. However, claimant was returned to full duty after each episode.

At the time of the settlement, claimant was working for Warner Oil Company as a cashier at a gas station. Claimant was paid minimum wage of $3.35 per hour and worked two four hour shifts per week. Claimant quit this job in September, 1986, to accept employment as a school bus driver. This driving job required claimant to work a total of 10 hours per week but at a higher rate of pay then what he received at the oil company.

Claimant testified at hearing that he never was pain free after the settlement but received no treatment between July, 1984 and November, 1986. However, approximately two weeks before the settlement benefits were to end, he sought further evaluation and treatment from Dr. Walker in November, 1986. Dr. Walker noted at the time that claimant was still having severe problems. He rated claimant's permanent impairment at that time

000042

as constituting 22 percent of the body as a whole. Dr. Walker did not explain in this report the difference between this evaluation and the evaluation he had conducted previously.

In December, 1986, claimant began to have severe right leg pain and sought treatment from a hospital located in Mason City, Iowa. Physicians at the hospital felt that claimant could have a herniated disc and was admitted for conservative care and bed rest. A few days later on December 19, 1986, claimant was referred for further treatment to the Sister Kenny Institute for Low Back Care in Minneapolis, Minnesota. After his admission to the institute and after tests, including a CT scan, revealed a herniated disc at the L4-5 level, claimant underwent "decompression" surgery on December 24, 1986 from Charles D. Ray, M.D. On February 9, 1987, claimant was released by Dr. Ray to return to his school bus driving job. At that time Dr. Ray noted an 80 percent improvement over claimant's preoperative condition but claimant still had some numbness in his left foot.

In a report dated March, 1987, Dr. Mead opines that after his re-examination of claimant and review of the medical records to date, he believes that claimant suffered an acute change from the condition claimant exhibited during his treatment of claimant and that this sudden herniation of the disc was not causally related to the June, 1983, work incident. On the other hand, after his review of all of claimant's past records, Dr. Ray opined in a report dated May 4, 1987, that claimant's back problems were "not of recent origin" and that the hospitalization and surgery he performed were causally related to the work injury of June 14, 1983.

Claimant testified that his current difficulties stem from constant low back pain and pain in both legs, although the pain is more severe in the left leg. Claimant states that the pain is the same that he had before in October, 1984. Claimant said that he was told by Dr. Mead that if he did his exercises and lost weight he would experience improvement but after doing so this improvement did not materialize. Claimant testified that he has pain after prolong standing and sitting and that he is only able to tolerate limited walking. Claimant's wife, Dixie, testified that she believes claimant's condition has worsened but states that the severe right leg pain which precipitated the surgery has now subsided.

Claimant testified that he is 50 years of age and has an eleventh grade education. He has not received any other formal schooling or special education or training since high school. Claimant's educational qualifications have not changed since the October, 1983, settlement. Claimant's work history of primarily manual labor, truck driving and sheet metal fabrication work has not changed since the settlement. Claimant's change of employment in 1986 is described above.

000043

## APPLICABLE LAW AND ANALYSIS

I. In a review-reopening proceeding, claimant has the burden of establishing by a preponderance of the evidence that he suffered a change of condition or a failure to improve as medically anticipated as a proximate result of his original injury, subsequent to the date of the award or agreement for compensation under review which enables him to additional compensation. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa 1969); Meyers v. Holiday Inn of Cedar Falls, Iowa, Iowa App. 272 N.W.2d 24 (1978). Such a change of condition is not limited to a physical change of condition. A change in earning capacity subsequent to the original award which was approximately caused by the original injury also constitutes a change of condition under Iowa Code section 85.26(2) and 86.14(2). 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).

In the case sub judice, claimant has established that the December, 1986, surgery by Dr. Ray was causally connected to the work injury. The views of Dr. Mead, the former treating physician, were outweighed in the record by the views of the current treating physician who performed the surgery and who was most familiar with claimant's clinical condition at the time of surgery. Also, claimant's case was further supported by the views of Dr. Walker who had diagnosed the herniated disc at the L5 level back in 1984. Dr. Walker had recommended surgery at that time. Unfortunately, Dr. Ray's views, which support the causal connection finding, do not support claimant's case for a change of condition as he found that claimant's condition was not of "recent origin" but stemmed from the original injury. The fact that surgery was eventually performed was simply a confirmation of Dr. Walker's original views and surgery alone does not constitute a change of condition. Claimant's testimony and that of his wife's was certainly considered but claimant's self description of his complaints are not much different than the description of his complaints back in 1984. Finally, a change of medical condition is largely a matter of expert opinion and such supporting opinion was certainly lacking in claimant's case.

As claimant has not established a change of condition causally connected to the work injury, he is not entitled to permanent partial disability benefits. As he is not entitled to permanent partial disability benefits, he likewise is not entitled to further healing period benefits under Iowa Code section 85.34(1).

II. Claimant is entitled to the reasonable costs of necessary medical treatment of his work injury under Iowa Code section 85.27. Defendants in this case do not seriously contend that the 1986 surgery was unnecessary or that the treatment and

000044

expenses were unreasonable. Defendants have stipulated in the prehearing report that the providers of the treatment would testify that these expenses were reasonable and that they are not offering contrary evidence. Defendants, however, state that the expenses were for medical care that was not authorized by them and that they, not the claimant, have the right to chose the care under section 85.27. However, section 85.27 applies only to injuries compensable under Chapters 85 and 85A of the Code and obligates the employer to furnish reasonable medical care. This agency has held that it is inconsistent to deny liability and the obligation to furnish care on one hand and at the same time claim a right to chose the care. Kindhart v. Fort Des Moines Hotel, (Appeal Decision filed March 27, 1985); Barnhart v. MAQ, Inc., I Iowa Industrial Commissioner Report 16 (1981).

The right to control the medical care must be conditioned upon the establishment of liability for an injury either by admission or final agency decision. Iowa Code section 85.27 does not give an employer the right to choose the care without affording claimant the right to petition the commissioner to resolve disputes concerning such care. However, this agency does not have authority to order an employer to furnish any particular care unless the employer's liability for such care has been established. Therefore, the right to control the care must be coincided with the agency's jurisdiction over the matter.

Defendants in this case have throughout these proceedings and paragraph eight of the prehearing report denied the causal connection of the condition treated by Dr. Ray to a work injury. For that reason and absent a future change in defendants' legal position on the issue of liability, defendants will not have the right to chose the medical care for claimant's current condition until a decision of this agency establishing the compensability of such a condition becomes final.

Defendants in the prehearing report stipulated that the expenses listed in the prehearing report (those requested by claimant) are causally connected to the back condition upon which claimant is basing his claim and therefore in light of the finding of causal connection in this decision, all of the expenses listed totaling $13,783.06 are reimburseable and such will be awarded in this decision.

Claimant requested an award of penalty benefits under Iowa Code section 86.13 for an unreasonable delay in commencing benefits in this case and for failure to pay the medical expenses. Claimant has not established a case for such penalty benefits. First, the penalty provisions of 86.13 are not applicable to the payment of medical expenses. Klein v. Furnas Elec. Co., 384 N.W.2d 370 (Iowa 1986). Second, defendants have the right to rely on the views of Dr. Mead who specifically opines that the 1986

000045

surgery was not causally connected to the work injury in this case. Furthermore, claimant is not entitled to interest on medical benefits as well. Id. at 370.

Although they stipulate as to the reasonableness of the charges for the medical reports of Drs. Ray and Walker which were submitted into the evidence, defendants contend that claimant is not entitled to reimbursement for such costs under Division of Industrial Services Rule 343-4.33 because this is a review-reopening proceeding. The undersigned can find no authority which limits the application of the cost provisions of this agency rule to only arbitration proceedings. Therefore, the cost totaling $125 for the two medical reports shall be taxed against defendants in this decision.

## FINDINGS OF FACT

1. As a result of the June 14, 1983 work injury, claimant was compelled to undergo back surgery in December, 1986, as a result of a herniated disc at the L4-5 level of his spine.

2. The medical expenses listed in the prehearing report are fair and reasonable and were incurred by claimant for reasonable necessary treatment of the work injury on June 14, 1983.

It could not be found that claimant suffered any physical or non-physical change in condition or change in earning capacity since the October 8, 1984 settlement which was not contemplated at the time of settlement. Claimant remains in constant pain from his low back and both legs which is more severe on the left. Claimant remains unable to engage in employment requiring repetitive bending or lifting of heavy objects and suffers pain from prolonged standing, sitting and walking. Claimant's only change in employment since October, 1984, is to move to a higher paying position as a school bus driver.

## CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to medical benefits as awarded below. Claimant has not shown entitlement to additional weekly benefits or to interest or additional benefits under Iowa Code section 86.13.

## ORDER

1. Defendants shall pay the sum of thirteen thousand seven hundred eighty-three and 06/100 dollars ($13,783.06) to claimant as reimbursement for medical expenses as more particularly itemized in the prehearing report filed in this case.

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

000046

3. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and shall be specifically taxed the sum of one hundred twenty-five and no/100 dollars ($125.00) in favor of claimant.

4. Defendants shall file an activity report on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 17 day of December, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert S. Kinsey, III
Attorney at Law
214 N. Adams
P. O. Box 679
Mason City, Iowa 50401

Mr. Richard R. Winga
Attorney at Law
300 American Federal Bldg.
P. O. Box 1567
Mason City, Iowa 50401-8567

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| LARRY J. BEARCE, | : | |
| Claimant, | : | FILE NO. 782809 |
| vs. | : | A R B I T R A T I O N |
| FMC CORPORATION, | : | D E C I S I O N |
| Employer, | : | FILED |
| Self-Insured, | : | |
| Defendant. | : | OCT 21 1987 |

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Larry J. Bearce, claimant, against FMC Corporation, a self-insured employer (hereinafter referred to as FMC), for workers' compensation benefits as a result of an alleged injury on August 31, 1984. On September 3, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Kathryn Bearce, Richard Bliss, William Holtz, Allen Vikdal and Cynthia Gratias. The exhibits received into the evidence at the hearing are listed in the prehearing report.

The prehearing report contains the following stipulations:

1. Claimant seeks temporary total disability or healing period benefits from October 15, 1984 and claimant has been off work since that time;

2. If an injury is found to cause permanent disability, the disability is an industrial disability to the body as a whole;

3. Claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $321.10; and,

4. With reference to the requested medical expenses, it was stipulated that the provider of the services would testify that the fees were reasonable and defendant is not offering contrary evidence. It was also stipulated that the medical expenses are

000048

connected to treatment for a neck and back condition upon which claimant is now basing his claim but that the causal connection of these expenses to a work injury remains an issue to be decided. It was disputed that the medical treatment offered by John Walker, M.D., was reasonable and necessary treatment of a work injury.

At hearing the defendant objected to claimant raising any issue of entitlement to workers' compensation benefits for a neck or cervical back condition. Defendant argued that claimant initially did not complain of neck problems, only low back and leg problems and received treatment only for those problems. It was not until the latter part of 1986 and early 1987 that claimant began to receive anything more than conservative treatment for the neck problem allegedly caused by the August, 1984, work injury. Also, claimant in his deposition in April, 1987, denied that he was claiming benefits for this neck condition. Defendant stated that they are not prepared for any issue dealing with a neck condition.

Although defendant's objections may have merit, the matter is moot as the undersigned has not found a causal connection between the neck condition set forth in the record of this case and anything that may have happened on August 31, 1984, the subject of this proceeding.

Claimant filed a motion to amend the prehearing report subsequent to the hearing to submit additional travel expenses for reimbursement under Iowa Code section 85.27. Defendant filed a resistance to this motion. Division of Industrial Services Rule 343-4.31 states that no evidence shall be taken after the hearing. In light of this rule, claimant's application must be and is denied.

Claimant's attorney stated at the start of the hearing in this case that he questioned the assignment of this matter for hearing at the time of the prehearing conference because claimant is still recovering from the alleged work related back condition and recent surgery performed on his neck. However, it should be noted that this matter was set for hearing at the personal demand of claimant for action of his claim which was expressed to this agency and also through the Iowa governor's office.

## ISSUES

The parties submitted the following issues for determination in this proceeding:

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

II. Whether there is a causal relationship between the

000045

work injury and the claimed disability;

III. The extent of claimant's entitlement to weekly disability benefits;

IV. The extent of claimant's entitlement to medical benefits under Iowa Code section 85.27; and,

V. The extent of claimant's entitlement to penalty benefits under Iowa Code section 86.13.

## SUMMARY OF THE EVIDENCE

The following is a summary of evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision.

There was little dispute among the parties as to the nature of claimant's employment at FMC. Claimant testified that he was employed by FMC from 1968 until October, 1984. Claimant stated that he worked at the same manufacturing facilities in Cedar Rapids, Iowa since March, 1966. Originally the facilities were owned by Link Belt Speeder Corporation who sold out to FMC Corporation in 1968. Claimant initially was a sweeper performing janitorial work but later became an overhead crane operator. Eventually, claimant moved into the machine shop operating various drill and lathe machines. Although each job varied as to physical requirements, most involved at least some repetitive heavy lifting, bending, twisting, and stooping along with prolonged standing.

Following a car accident in 1977 which precipitated physician imposed work restrictions, claimant returned to the overhead crane operator job. Claimant testified that this job was eventually abolished in the latter part of 1983. Claimant then obtained a removal of his work restrictions from his family physician allowing him to return to the machine shop. At the time of the alleged injury in this case, claimant was performing a job called a radial drill operator. Claimant said at hearing that he was required to stand on this job and occasionally lift up to 70 pounds. For weights above 70 pounds or other heavy objects, a crane operated by hand was available for his use.

Claimant testified that he injured his neck and low back on Friday, August 31, 1984, while at work. He testified that at the time of the injury he was performing the drill press operator job requiring him to operate an overhead crane from floor level using a control box suspended down from the crane. This control box hung approximately four feet off the floor. Claimant stated that while he was walking backwards at a time he was operating

the crane, he tripped on a skid and fell backwards, catching himself by grasping the control box before hitting the floor. Claimant said at the hearing that he twisted his back during this fall and immediately felt a burning sensation in his low back which persisted not only that day but over the ensuing Labor Day weekend. Claimant stated that upon his arrival at work the following Tuesday morning, he immediately experienced severe pain in his low back after getting out of his car. Claimant could barely walk and reported to the nurse upon entering the plant. Claimant then reported the events of the previous Friday to company officials.

Claimant stated at hearing that he did not report the fall at the time because he did not think the injury was "a big deal." However, claimant admitted that he actually attempted some sort of self-traction after the August 31, 1984 incident using a device attached to his back to hang off the floor to help alleviate some of the discomfort. Claimant testified that his condition deteriorated on August 31, 1984 with increasing pain in his back and legs. Claimant states that he had to take it easy over the weekend.

Claimant testified that on Monday, upon the insistence of a customer, he reset a grave monument that had been overturned by vandals. Claimant and his wife operated a monument business in addition to his employment at FMC. Claimant stated that he used a skid steer, a four wheel drive self-propelled hydraulically controlled end loader, to lift and reset the monument. He stated he had to initially use a pry bar to place a two-by-four under the monument. He then used the skid steer to push the two-by-four under the monument in order to attach the lifting strap. Claimant also had to load and unload the skid steer for this job and position the two ramps used to drive the skid steer onto the trailer which weighed approximately 60 pounds each.

Defendant contends that if he injured himself at all, claimant's injury on August 31, 1984 was very minor. Claimant contends that two supervisors observed the fall incident. William Holtz, the personnel director at FMC at the time of the alleged injury testified that he talked to both supervisors. According to Holtz, one denied observing the incident and the other indicated that the incident did not appear to be serious enough to cause injury. Direct testimony was not obtained from any of these supervisors. Histories of claimant's complaints contained in medical reports from treating physicians after the incident are inconsistent. Claimant was initially treated by William R. Basler, M.D., on September 4, 1984. Dr. Basler reports that claimant said he was "okay" over the Labor Day weekend. Dr. Basler diagnosed muscle strain and referred claimant to James R. LaMorgese, M.D., a neurosurgeon. Dr. LaMorgese had seen claimant previously for low back and neck pain. Dr. LaMorgese diagnosed muscle strain "in a setting of a patient who has had

000051

previous problems with back surgery." Dr. LaMorgese testified in his deposition that claimant complained to him of low back pain radiating into his legs and feet. Dr. LaMorgese reports that claimant told him that he felt "tightening" after the fall incident and experienced no difficulty with pain over the Labor Day weekend until returning to work on Tuesday. In his deposition taken in December, 1985, claimant testified while handling the ramps for the skid steer on Labor Day weekend he could not recall any burning sensation in his back. Later on in the deposition claimant indicated that the burning sensation was continuous over the weekend. The first reference to the term "burning sensation" in the medical reports from physicians in the record is a report from Alexander Lifson, M.D., an orthopedic surgeon at the Sister Kenny Institute in Minneapolis, Minnesota dated April 15, 1985. This was also the first time there was any mention by claimant of chronic neck and shoulder pain following the injury.

Dr. LaMorgese placed claimant on light duty following his first examination of claimant and claimant remained on light duty work at FMC for five weeks. FMC then laid claimant off stating that there was no more light duty work available in the plant. Claimant testified that his condition has deteriorated during this time and since that time.

There is no question from claimant's testimony and the medical reports presented that claimant had very serious problems with low back pain, leg pain and pain in the cervical neck and shoulder area prior to the events of August 31, 1984. In December, 1977, claimant testified that he was involved in a motor vehicle accident in which he was struck from the rear and pushed off the roadway while traveling home from work. Although the medical records show that he was released from the hospital emergency care after the accident without evidence of injury, claimant experienced low back pain, neck and shoulder pain, dizziness and nausea after he returned to work the following day. Claimant was initially treated conservatively by his family physician but later was referred to an orthopedic surgeon, W. J. Robb, M.D., and Earl Bickel, M.D., who likewise treated claimant's symptoms of low back and neck pain conservatively.

After a few unsuccessful attempts to return to work over the next several months and upon continued persistent pain complaints, claimant was admitted to the hospital in December, 1978, by Eugene Hertzberger, M.D., and a myelogram was performed which revealed only mild problems at the L4-5 level of claimant's lower spine.

Claimant briefly returned again to work but upon continued low back pain he was eventually referred in February of 1980 by his treating physicians to the Sister Kenny Low Back Institute in Minneapolis, Minnesota. At this center he was treated and

000052

underwent therapy under the direction of Alexander Lifson, M.D., an orthopedic surgeon at the institute. Claimant received initial conservative care but eventually underwent surgery in May, 1980, called a decompression laminotomy in the low back. According to the reports of Dr. Lifson, after receiving pain therapy treatment following the surgery, claimant responded quite well to the surgery by the spring of 1981. However, he still suffered disability which Dr. Lifson opined as constituting a 20 percent disability to the lumbar spine as a result of the auto accident. Dr. Lifson on March 3, 1981, permanently restricted claimant's physical activities to only occasional bending, squatting, crawling, climbing, reaching above shoulder, kneeling, and lifting under 24 pounds. Claimant was to never lift or carry over 25 pounds.

It should be noted that claimant, during his recovery from the 1980 surgery by Dr. Lifson, developed chronic pain syndrome behavior which was diagnosed and treated in 1981 at the Sister Kenny Institute Pain Center following a MMPI psychological test which indicated the following:

> GREAT NUMBER OF CHRONIC PHYSICAL COMPLAINTS AND PREOCCUPATION WITH BODILY FUNCTIONS. MUCH FUNCTIONAL PAIN, FATIGUE AND WEAKNESS LIKELY. VERY IMMATURE, DEMANDING AND EGOCENTRIC. FIXED NOTIONS AS TO ORGANIC BASIS FOR COMPLAINTS. THESE COMPLAINTS, WHICH PROBABLY FIT NO ORGANIC PATTERN ARE LIKELY BE PRESENTED IN A HISTRIONIC MANNER. LACKS INSIGHT AND IS UNLIKELY TO ACCEPT A PSYCHOLOGICAL EXPLANATION OF SYMPTOMS. EVEN THOUGH PATIENTS WITH THIS TYPE OF PROFILE ARE PRONE TO DEVELOP FUNCTIONAL COMPLAINTS THE POSSIBILITY OF ORGANIC DISEASE CANNOT BE EXCLUDED.
> SEVERELY DEPRESSED, WORRYING, AND PESSIMISTIC. PROBABLE FEELINGS OF UNREALITY. BIZARRE OR CONFUSED THINKING AND CONDUCT.
> HAVE STRANGE ATTITUDES AND FALSE BELIEFS. PROBABLY FEELS SEVERELY ALIENATED AND WITHDRAWN....

In March, 1981, claimant could not return to the machine shop and drill press operator job under the restrictions imposed by Dr. Lifson and he was placed on a light duty job as an overhead crane operator. Claimant testified that he also at that time severely restricted his prior extensive farming operation as a result of his disability following the auto accident. Claimant was then laid off in June, 1982, because the overhead crane operator job was abolished and there was no other light duty available in the plant. Claimant then stated that he attempted and successfully built up his physical condition and returned to his family physician, John Meyer, D.O., who issued the following statement to FMC:

000053

To Whom It May Concern --

LARRY BEARCE WAS EXAMINED TODAY. I HAVE ADVISED HIM THAT ALL PREVIOUS WEIGHT LIFTING RESTRICTIONS HAVE BEEN DISCONTINUED. HIS ACTIVITIES ARE AT HIS DISCRETION.

As a result of this medical statement by Dr. Meyer, claimant was allowed in November of 1983 to return to his former drill press operator job, the job that he held at the time of the 1977 auto accident. Claimant worked approximately 11 months in this job prior to the work injury in this case.

Furthermore, in March, 1982, while attempting to climb a ladder to change a light bulb at the FMC plant, claimant struck his head on a gear box and injured his neck. Claimant received treatment consisting of medication and physical therapy from Dr. LaMorgese for cervical strain involving neck and shoulder pain with headache and numbness and tingling in his hands for approximately two months prior to his layoff. From what can be deciphered from the evidence submitted, claimant did not miss any work as a result of this incident.

The medical records submitted show that claimant's initial medical treatment by Dr. LaMorgese following the August 31, 1984 injury remained conservative. However, this treatment did not improve claimant's condition. In February and March, 1985, claimant was examined by Martin Roach, M.D. Dr. Roach agreed that claimant should not return to heavy repetitive work at the plant. In April, 1985, Dr. LaMorgese referred claimant back to Dr. Lifson who had performed the surgery on claimant in 1980. According to reports from Dr. Lifson, claimant's pain complaints were many and varied and extended from his head in the form of headaches, to his feet. Claimant complained of neck pain, mid-back pain and low back pain along with upper and lower extremity pain. Dr. Lifson felt that claimant displayed a continuation of his former pain behavior. CT scans of claimant's back indicated nothing new since 1980. Claimant was then treated by the Sister Kenny Institute conservatively with physical therapy. Claimant at this time attempted to obtain some relief of his pain using an electric device called a TENS unit. Claimant was discharged and returned home with a prescription for home exercises. On May 22, 1985, Dr. Lifson felt that claimant's condition had remained unchanged and offered nothing further as far as treatment for claimant's pain complaints.

In August claimant began to see John R. Walker, M.D., another orthopedic surgeon. Dr. Walker believed that claimant's chronic low back difficulties were due to scarring in the area of the previous surgery and from the August 31, 1984 back strain at work. Dr. Walker recommended that claimant undergo exploratory surgery and fusion of vertebras in the low back. Claimant

000054

sought out and received a second opinion from Earl Bickel, M.D., who stated that claimant should try a back support first, but Dr. Bickel stated that if a support does not relieve the pain, the fusion may be appropriate but that he would like to see a CT scan before surgery was performed. Claimant then underwent the surgery by Dr. Walker in August, 1985. Claimant testified that the surgery substantially reduced the pain in his lower back but did not eliminate it. Dr. Lifson in April, 1986, questions Dr. Walker's views on scarring in the necessity of the low back surgery. However, Dr. Lifson concludes that claimant "probably was a candidate for lumbosacral fusion surgery" although he would have performed several additional tests on claimant before actually performing the surgery. Dr. Lifson states that if claimant has improved he could not argue with success.

According to Dr. Walker, claimant improved greatly from the surgery and reached maximum healing from the surgery on October 22, 1986. However, claimant continued to experience residual low back and low lumbar pain. Claimant also showed evidence of mid-dorsal spine strain and it appeared to Dr. Walker that claimant had signs of disc ruption at the C-5 level of claimant's cervical neck. Despite reaching maximum healing, Dr. Walker expressed doubt that claimant would ever return to work as a machinist.

In March, 1987, Dr. Walker reported that claimant was doing quite well with the low back and leg pain but failed to improve in the cervical area. Upon a diagnoses of cervical disc problems after a myelogram, Dr. Walker surgically fused vertebras in the area of claimant's neck in May, 1987. At the time of hearing, claimant was still recovering from this surgery and continuously wore a cervical collar.

Claimant admitted in his various testimonies in the record that he operated his skid steer and a larger end loader in various snow removal jobs during the winter of 1984. Claimant denied that he performed any heavy work in his monument business, farm operations, gardening or snow removal operations during this time although he admitted to performing some work in all of these areas on a limited basis.

Claimant described his current medical condition as follows:

1. After the myelogram test for the next surgery, claimant has had a bladder problem.

2. Claimant has difficulty standing for prolonged periods of time due to hip and lower back pain.

3. Claimant can only comfortably sit for 20 to 30 minutes at a time and experiences leg pain while sitting.

000055

4. Claimant cannot lift over 20 pounds without experiencing significant problems.

5. Upon the advice of his physicians, claimant does not bend, stoop or twist.

6. Claimant can only walk up to two blocks before his legs begin to bother him.

Claimant states that he is never totally pain free and he experiences occasional burning pain. He is compelled to lie on the floor two to three times a day and has difficulty sleeping. Claimant stated that he can no longer mow the lawn, go fishing or work on his car as he did before. Claimant testified that he can no longer farm or work in the monument business as he did before. Claimant testified that he could not return to overhead crane type of work as he did after the auto accident because he cannot climb a ladder. Claimant believes that he will eventually return to work if he is able to build himself back up again as he did after the auto accident.

Only two physicians have rendered opinions as to the extent of claimant's permanent impairment which may have resulted from the August 31, 1984 incident. Dr. Lifson opines that claimant's disability to his spine is 20 percent, five percent of which was attributed to the August 31, 1984 injury. Dr. Lifson did not rate claimant's neck problems. Dr. Walker opines that claimant's chronic neck difficulties consist of a six percent impairment to the body as a whole and that claimant's lumbar spine problems constitute a 24 percent impairment to the body as a whole, 10 percent of which preexisted the August 31, 1984 injury. All of claimant's physicians restrict claimant's activities to light duty work in a manner similar to claimant's self description of his limitations. In his deposition, Dr. Walker believes that the surgery was necessary due to the additional scarring from the strain of the August, 1984, fall even though the fall was relatively minor given claimant's past scarring in these areas from prior injuries and surgery. Dr. Walker stated in his deposition that his causal connection opinions are largely based upon the histories provided to him by claimant. He states that in order to arrive at a causal connection opinion you have to believe claimant.

Claimant testified that his past employment primarily consists of trucking requiring heavy lifting and prolonged sitting and machinist work at FMC requiring heavy lifting, repetitive bending, stooping and prolonged standing. At the time of the alleged work injury in this case, claimant was earning approximately $12.00 per hour. Prior to the 1977 auto accident, claimant was extensively involved in grain and livestock farming operations but this activity virtuely ended following the auto accident. Claimant states that what farming operations

000056

he is now engaged in are performed by family members. Claimant testified that he and his wife have been in the grave monument business since 1967. Claimant states that this is a business consisting of selling and setting the monuments. The setting of the monuments involves digging three and one-half foot frost footings for each monument which is done by hand. Claimant stated that before the 1977 auto accident he performed this digging by himself. After the auto accident he could not do so but eventually built himself back up to where he could perform this type of digging again before the August, 1984, alleged work injury in this case. Claimant states that all heavy work at the present time and subsequent to the FMC alleged injury is now being performed by family members or he hires the work done. Claimant admits that he occasionally drives the skid steer and other equipment in his various activities.

Claimant stated at the hearing that he is 48 years of age and has a high school education. Claimant appeared articulate and intelligent at the hearing. Claimant is currently serving a second term as mayor of a small community in which he lives. Claimant testified that his current activities are quite limited as he still is recovering from the neck surgery. Claimant is receiving social security disability benefits. Claimant has not applied for work since leaving FMC's employ. Claimant said that he intends to seek out rehabilitation through the state in the future.

Richard Bliss, a vocational counselor from Illinois Job Service, opined in February, 1987, that claimant is not gainfully employable. He believes that claimant cannot return to his former work due to his physical limitations. Claimant is only able to perform sedentary work and should be retrained. However, he questions claimant's ability to complete retraining due to his chronic pain. Bliss did not perform any testing upon claimant and his only personal contact with claimant has been at the hearing and a brief encounter before his deposition.

Allen Vikdal, a rehabilitation consultant retained by defendant, testified that after his examination of claimant's background, he believes that claimant possesses a tremendous amount of transferable skills such as machine operation, trucking, management and planning, organization, supervisory and the ability to manage a private small business. Vikdal also felt that claimant was a good communicator and still young enough to do what he wants. Vikdal believes that if claimant were to complete a pain management program at Iowa Methodist Hospital which he apparently has been accepted into, that he would be able to find suitable employment at a higher level than entry level. Vikdal admits that claimant possesses negative employment factors such as being off work for a long period of time and that there is a limited labor market in the Wyoming area, the place of his residence. However, Vikdal states that if claimant

000057

were willing to commute as he did before when he worked for FMC, there would be a number of opportunities for employment available to him. Vikdal concludes that claimant is indeed employable.

Finally, Cynthia Gratias, the risk management supervisor for the defendant's adjusting company, testified that she denied claimant's claim of a work injury based upon the fact that claimant had failed to immediately report the injury and that he had worked at his residence over the weekend. She stated that she concluded that claimant had only suffered a temporary aggravation from reports submitted to her by Dr. Basler and Dr. LaMorgese.

Claimant's appearance and demeanor at the hearing indicated that he was testifying truthfully.

## APPLICABLE LAW AND ANALYSIS

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960) and cases cited therein.

In the case sub judice, as pointed out in claimant's brief, claimant's account of the August 31, 1984 incident has always been consistent in histories provided to physicians. The failure of his supervisors to remember the incident which they supposedly witnessed does not appear to be important. What may be a minor incident in the minds of his superiors was certainly not minor given claimant's past back problems. What was not consistent was claimant's description of symptoms after the incident. However, all of the symptoms were subjective type of complaints. Obviously, Dr. Basler and Dr. LaMorgese were reporting on what they perceived claimant was telling them. Differences in discrepancies of subjective complaints in medical reports are not that surprising to this agency. In his deposition claimant appeared to be inconsistent when he denied any recollection of discomfort when asked to describe his pain complaints at the time he was handling the ramps to load the skid steer. However, in response to a clear question by his attorney later in the deposition he stated that the burning sensation was indeed continuous. When someone states to a doctor that he was okay or not having difficulties with pain, this does not mean that claimant was free of discomfort or pain. Also, the activity of

000058

resetting the monument does not appear to be overwhelmingly damaging to claimant's case. Claimant has always been an active person and to do nothing but reset a monument over the weekend was in his mind "resting." Clearly the facts support a finding that claimant aggravated a preexisting condition in his low back. All of the physicians in this case diagnosed a low back strain following the tripping incident and most of them indicate a recurrence of chronic low back pain subsequent to the incident.

With reference to claimant's neck problems, the facts are not so clear. Claimant's first complaints of head, neck, shoulder and arm pain did not begin until April, 1985, seven months after the incident. The records of Dr. Basler and Dr. LaMorgese who treated claimant immediately after the August, 1984, incident, do not reflect any complaints of neck or shoulder pain. The complaints were limited at that time to low back and lower extremity pain. Claimant himself did not describe any problems with his neck immediately after the August, 1984, incident during his testimony at the hearing. The only doctor to attribute claimant's neck difficulties to the August, 1984 incident is Dr. Walker. Dr. Walker gave a detailed explanation in his deposition as to how scarring affected his low back but no such explanation was offered by Dr. Walker in any report or testimony concerning the neck problems. Also, there is no mention of the 1982 neck injury in Dr. Walker's reports. These problems with Dr. Walker's reports puts a fatal flaw in his causal connection opinion regarding the neck problems. Therefore, Dr. Walker's opinions were not accepted in this decision. Therefore, claimant only established by the greater weight of the evidence that he suffered an injury to his low back on August 31, 1984, which constituted an aggravation of a preexisting back condition.

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

000059

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

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 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, claimant contends that he suffered disability as a result of a work injury in August of 1984 which caused him additional permanent impairment to that which existed before the work injury. The evidence established that claimant had significant permanent impairment prior to the 1984 work injury as a result of the 1977 car accident. This deputy commissioner is quite skeptical of claimant's claim that claimant fully recovered from this injury when he returned to the drill press operator job in 1983. Clearly, claimant was motivated to return to employment because his light duty job was abolished. Also, the restrictions were not removed by an orthopedic surgeon but by a family physician. However, no records were offered by defendant to show that claimant sought out medical treatment for any pain that he might have experienced while working in his drill press operator job before August of 1984 or that he had performed the job unsatisfactorily in the almost 11 month period before the work injury. The job clearly required claimant to exceed many of the physical restrictions imposed by Dr. Lifson in March of 1981.

Both Dr. Lifson, who extensively treated claimant after the 1977 auto wreck and Dr. Walker opined that claimant suffered additional permanent impairment following the August, 1984, work injury. Claimant had always described in detail what this injury constituted. The improvement claimant had made to overcome some of his physical limitations after the auto accident appears to have been nullified by this injury. Claimant appears to be somewhat worse than he was in March of 1981 when he

000660

returned to light duty work at FMC. Most physicians agree that claimant cannot perform the same type of work that he performed in March of 1983 and this was concluded by his physicians before claimant received extensive surgery on his non-work related neck problems. From the evidence presented it is found that claimant has suffered additional significant impairment as a result of the work injury despite the existence of an extensive prior existing back problem.

III. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment or limitation upon activity involving the body as a whole, the degree of permanent disability must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity resulting from the work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physical impairment or restriction on work activity may or may not result in such a loss of earning capacity. The extent to which a work injury and a resulting medical condition has resulted in an industrial disability is determined from examination of several factors. These factors include the employee's medical condition prior to the injury, immediately after the injury and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

In the case sub judice, claimant's medical condition before the work injury was certainly not excellent and he did have prior permanent functional impairment and permanent disability. However, claimant was able to fully perform his job as a drill press operator involving heavy lifting, repetitive lifting, bending, twisting and stooping and prolonged standing. The work injury in this case took almost two years before reaching maximum healing. Claimant has experienced almost continuous pain in varying degrees since the date of injury.

Due to the fact that claimant had an ascertainable prior

000061

existing disability, apportionment of this prior disability must be made. Apportionment also must be made to separate out any disability caused by a neck condition which is unrelated to the August, 1984, injury. Apportionment of the disability between a prior existing injury and a non-work related injury is proper when there is some ascertainable disability which existed independently before the work injury occurred. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984).

Claimant's physicians have restricted claimant's work activities by prohibiting tasks such as heavy lifting, repetitive lifting, bending, twisting and stooping and prolonged sitting and standing. However, most of these restrictions existed well before the August, 1984, work injury.

Apart from his lost earnings during his healing period which will be compensated by healing period benefits, claimant has suffered a significant permanent loss in actual earnings as a result of his disability. Claimant has not returned to work.

Claimant is 48 years old and in the middle of his working career which should be the most productive of his life. Claimant has not looked for work in the past and is currently hampered from doing so by current neck problems. Although claimant argues that there should be an application of the "odd-lot doctrine" and that he should be entitled to permanent total disability benefits under the doctrine, such a doctrine cannot be applied without some effort to look for suitable work. Claimant must demonstrate a reasonable effort to secure employment in the area of his residence as a part of his prima facie showing that he is odd-lot. Guyton v. Irving Jensen Company, 373 N.W.2d 101, 105 (Iowa 1985); Emshoff v. Petroleum Transportations Services, File No. 753723, Appeal Decision by the Iowa Industrial Commissioner filed March 31, 1987.

The vocational rehabilitation consultants in this case clearly disagree as to claimant's future employment prospects. What was not done by either consultant was to assess the availability of sedentary or light duty work in the area of claimant's residence or within reasonable commuting distance. However, the opinions from the vocational consultants demonstrate a severe permanent disability much of which, however, existed before August 31, 1984.

After examination of all of the factors, it is found as a matter of fact that claimant has suffered a mild or 10 percent additional loss in earning capacity from his work injury over that which existed before August 31, 1984. Based on such a finding, claimant is entitled under Iowa Code section 85.34(2)(u) which is 10 percent of the 500 weeks allowable for an injury to the body as a whole in that subsection. As it will be found that claimant reached maximum healing on August 22, 1987, benefits will be awarded from that date.

000062

As claimant has established entitlement to permanent partial disability benefits, claimant may be entitled to weekly benefits for healing period under Iowa Code section 85.34 from the date of injury until he returns to work; until claimant is medically capable of returning to substantially similar work to the work he was performing at the time of injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first. The evidence shows that claimant has not returned to work and is not able to return to similar work he was performing at the time of the work injury. Claimant has been in virtual constant treatment from the date he left his light duty employment at FMC which was stipulated to be August 15, 1984 and the time Dr. Walker, the last treating physician, opined that he reached maximum healing which is October 22, 1986. It is concluded that this period of time is the appropriate period of healing from the aggravation work injury of August 31, 1984. Although the defendant contends that the surgery by Dr. Walker was unnecessary, no physician actually supports such a theory and Dr. Walker has been shown to be a board certified surgeon who's surgery actually improved claimant's condition.

IV. With reference to the medical expenses sought by claimant, the parties stipulated that the expenses listed in the prehearing report are related to claimant's back and neck conditions. None of these expenses appear to have been for treatment only for a neck injury but for both the low back and neck injury and such treatment cannot be really separated. The expenses requested by claimant were incurred before he began to receive extensive treatment on his neck. It is concluded that the work injury was at least one factor although it may not be the only factor in precipitating these expenses. The reasonableness and necessity of Dr. Walker's treatment is discussed above and again Dr. Lifson does not opine that such a treatment was unreasonable or unnecessary.

V. With reference to claimant's claim that he is entitled to penalty benefits for an unreasonable delay in commencing payments, the claim is denied. The testimony of the persons involved in the decision to deny claimant's claim established that the denial of claim had a rationale basis considering the extensive low back problems claimant experienced before the alleged 1984 injury and given the views of Dr. Basler and Dr. LaMorgese following the incident.

## FINDINGS OF FACT

1. Claimant was a credible witness.

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

000063

3. On August 31, 1984, claimant suffered an injury to the low back in the form of an aggravation of a preexisting condition which arose out of and in the course of employment with FMC.

4. The work injury of August 31, 1984 was a cause of a period of disability from work beginning on October 15, 1984 and ending on October 22, 1986, at which time claimant reached maximum healing.

5. The work injury of August 31, 1984 was a cause of a significant permanent partial impairment to the body as a whole and resulted in a reimposition of permanent restrictions upon claimant's physical activity consisting of no lifting over 20 pounds, no prolong standing, bending, stooping, or climbing or sitting.

6. The work injury of August 31, 1984 and the resulting permanent partial impairment was a cause of only a 10 percent loss of earning capacity, a much larger loss of earning capacity had been previously caused by the 1977 auto accident.

7. The medical expenses in the amount of $629.23 and medical travel expenses of $914.28 are fair and reasonable and were incurred by claimant for reasonable and necessary treatment of the work injury on August 31, 1984.

## CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to permanent partial disability benefits and healing period benefits as ordered below.

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

Claimant is not entitled to additional penalty benefits under Iowa Code section 86.13.

## ORDER

1. Defendant shall pay to claimant fifty (50) weeks of permanent partial disability benefits at the rate of three hundred twenty-one and 10/100 dollars ($321.10) per week from October 23, 1986.

2. Defendant shall pay to claimant healing period benefits from October 15, 1984 through October 22, 1986 at the rate of three hundred twenty-one and 10/100 dollars ($321.10) per week.

3. Defendant shall pay to claimant the sum of one thousand five hundred forty-three and 51/100 dollars ($1,543.51) for medical expenses.

000064

4. Defendant shall pay accrued weekly benefits in a lump sum and shall receive a credit against this award for all benefits previously paid and previous payment of benefits under a non-occupational group insurance plan under Iowa Code section 85.38(2) as stipulated by the parties in the prehearing report.

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

6. Defendant shall pay the costs as set forth in Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 21 day of October, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

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

Mr. James E. Shipman
Mr. James M. Peters
Attorneys at Law
1200 MNB Bldg.
Cedar Rapids, Iowa 52401

000065
FILED
DEC 29 1987
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| JACOB O. BEEH,<br><br>Claimant,<br><br>vs.<br><br>MILLER ICE CREAM COMPANY,<br><br>Employer,<br><br>and<br><br>BITUMINOUS INSURANCE COMPANIES,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 741202<br><br>C O M M U T A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This is a proceeding for full commutation of all remaining periodic benefits brought by the claimant pursuant to Code sections 85.45 and 85.47. The petition also requests that section 85.27 benefits be maintained even though a full commutation is requested.

## ISSUE

The only issue to be determined is whether or not it is in claimant's best interest to grant the commutation that has been requested.

## STATEMENT OF THE CASE

This case follows from two previous decisions issued by the undersigned. The first, filed January 24, 1986, found claimant to have sustained injury on August 11, 1983 which was a proximate cause of his disability and awarded weekly healing period compensation benefits. That decision also determined that medical care, which claimant had received under the direction of John R. Walker, M.D., was unauthorized within the meaning of Code section 85.27 and that defendants were therefore not responsible for payment of those expenses. A subsequent decision, filed November 17, 1986, awarded claimant permanent total disability benefits. Both prior decisions were not appealed and became final agency decisions. Both prior decisions are incorporated herein by this express reference.

Material facts which have been established in the previous decisions include the following:

000066

Jacob O. Beeh is a 33-year-old married man with three dependent sons, two of which are of preschool age. Claimant is severely limited in his ability to walk, stand, sit, read, concentrate, bend, squat, kneel, climb, reach, push, pull and carry. His memory is impaired. He experiences continuing pain of a degree that is so substantial as to interfere with his ability to perform physical and mental tasks. Claimant exhibits a speech defect and does not communicate well. He has a physical impairment in the range of 70% of the body as a whole.

Defendants were not held responsible for paying certain medical expenses incurred by claimant which totaled in excess of $20,000. At the commutation hearing, claimant testified that, when he chose to seek out medical care on his own, he did so with the knowledge that there was a risk the insurance carrier would not be responsible for payment of the expenses he incurred. Claimant testified that Blue Cross/Blue Shield has paid some of those expenses, but that a balance of approximately $3,446.38 remains unpaid. Claimant testified that he also has received a notice that the total amount remaining unpaid on the medical expenses is $10,302.56. Claimant did not introduce evidence which appeared to be sufficiently reliable to determine the actual amount of medical expenses which remain unpaid.

Claimant testified that, while the litigation in this case has been pending, he incurred a debt with the Peoples' State Bank in Elkader, Iowa, in the amount of $2,300 and that he had incurred a debt in the amount of $10,200 with the Union Bank at Strawberry Point, Iowa, prior to the time of his accident. Claimant related that he also owes $700 to Montgomery Ward and $500 to his brother and father.

Claimant testified that he has been awarded social security disability benefits which he believes provide an entitlement of somewhere in the range of $780 or $790 per month before any reduction or offset for workers' compensation benefits. Claimant also testified that the portion of workers' compensation benefits which are used to pay medical and legal fees do not reduce the social security benefit.

The actual amount of claimant's medical expenses was not established with any reasonable degree of certainty. The amount of claimant's social security disability benefits and/or the offset that would be appropriate was likewise not established with any reasonable degree of certainty. The petition also alleges that claimant owes legal fees of approximately $28,000 which he desires to pay.

Claimant testified that he received a lump sum workers' compensation payment for past due benefits in the amount of approximately $15,000 and that he used all of it to pay medical bills, attorney fees and his bank debts. Claimant related that, up to the time of hearing, he has not received a single dime for

his own use from the workers' compensation benefits and that all benefits have been applied to his medical bills and legal fees. Claimant testified that the largest amount of money that he has ever had was $18,000, which he had approximately 10 years ago. He related that he invested it in farming and lost his investment.

Claimant testified that, presently, he is broke and has no money. He testified that, if he receives the full commutation, he will still be able to get by on "nickel and dime" as he has done for the last four years. He stated that his Blue Cross/ Blue Shield medical insurance costs $380 per month and that the medication he takes for his seizures has more than doubled in cost. Claimant's only sources of income are workers' compensation benefits and social security disability.

Claimant testified that, if the commutation was granted, he would pay off his bills with the banks and medical service providers. He testified that, after doing so, he would have approxiately $35,000 remaining and that he would use part of those funds to purchase a home at a cost which he estimated to run from $10,000 to $30,000. He stated he would place the rest of it in a safe investment. Claimant felt that, if he was debt free, it would take $900-$1,000 per month for him and his family to live.

Claimant is adamantly opposed to any relief under the bankruptcy laws or to any other action to avoid full payment of his bank debts, medical bills or other debts.

Claimant expressed concern for what might happen if he should die prematurely. He indicated it was his understanding that workers' compensation benefits would terminate, unless it could be established that his death resulted from the injuries sustained in the accident of August 11, 1983. He testified that he has attempted to purchase life insurance, but is unable to do so and that he does not have money to pay the premium, even if the insurance was available to him.

Connie Beeh, claimant's wife, testified that she feels a commutation would be in their best interests because it would get rid of the headache of the bills. She desires to have a home of their own in which to live and is also concerned about the problems if Jacob should die. Mrs. Beeh related she is 26 years of age, healthy, capable of working and willing to work. She indicated that their oldest child will soon be in the first grade. Mrs. Beeh would also like to have the security of a home.

Fred Abraham, an associate professor of economics at the University of Northern Iowa, testified that, in his opinion, it is not in claimant's best economic interest to have a commutation and that such would be true even if claimant should survive for only one-half of his normal life expectancy.

## APPLICABLE LAW AND ANALYSIS

First and foremost, claimant seeks a full commutation which also keeps the section 85.27 benefits available to him. While the parties could contractually enter into such an arrangement, the law of this state does not permit the undersigned to compel it. (Code section 85.47). Clearly, it is not legally possible to grant claimant the relief that he requests in his petition.

> When the commutation is ordered, the industrial commissioner shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized at their present value and upon the basis of interest at the rate provided in section 535.3 for court judgments and decrees. Upon the payment of such amount the employer shall be discharged from all further liability on account of the injury or death, and be entitled to a duly executed release, upon filed which the liability of the employer under any agreement, award, finding, or judgment shall be discharged of record. (Code section 85.47).

Even if the law did permit a full commutation without loss of future section 85.27 benefits, the standard for whether or not a commutation should be granted is the best interest of the person entitled to the compensation. (Code section 85.45(2); Dameron v. Neumann Bros., Inc., 339 N.W.2d 160 (Iowa 1983); Diamond v. Parsons Co., 256 Iowa 915, 129 N.W.2d 608 (1964). A benefit-detriment analysis must be made.

Workers' compensation benefits are exempt from garnishment, attachment and execution. (Code section 627.13). Exemption statutes exist to protect debtors and their families from deprivation of those things essential for sustaining life. In Re Bagnall's Guardianship, 238 Iowa 905, 29 N.W.2d 597 (Iowa 1947). The reason the exemption statute exists is in order to prevent those who are dependent upon disability compensation from being made destitute as a result of creditors enforcing payment of debts. The exemption statutes were designed to prevent what has happened with the Beeh family in this case. Namely, creditors have been given a priority higher than that of the family itself. Claimant made it clear that he has more regard for his creditors than he apparently has for his family. Clearly, the creditors are in business and expect some uncollectable accounts. The creditors are not dependent upon any single individual for their continued livelihood. The Beeh family, however, has only one source upon which it can rely for its livelihood, namely, the disability benefits provided by social security and workers' compensation. If those benefits were commuted and used unwisely, the family would be destitute.

Claimant refused to use the authorized physicians provided

in this case by the insurance carrier and employer. Instead, he knowingly incurred many thousands of dollars in medical expenses from an unauthorized source. It appears from the record that he did so on his own with full knowledge that it was very probable the workers' compensation insurance carrier would not be held liable for payment of those expenses. The circumstances that existed at the time were such that services of the University of Iowa Hospitals and Clinics were being offered to claimant, yet he went elsewhere. He presumably did so contrary to the recommendations of his attorney, since it was quite clear at the time that the employer and insurance carrier were fulfilling their statutory obligation of providing reasonable care. The facilities and physicians at the University of Iowa Hospitals and Clinics are well regarded and often utilized as the care of choice by many individuals. Claimant's conduct in acting contrary to the recommendations of his attorney by going to Dr. Walker was clearly rash and reckless conduct, engaged in without apparent regard for the quite foreseeable economic impact it would have upon him. Such conduct is indicative of a lack of sound judgment and a lack of proper appreciation for serious economic matters. It indicates that claimant could not be expected to do a good job of conserving resources, if a commutation was awarded. Further, claimant's adamant refusal to seek any type of debt adjustment through bankruptcy or otherwise and his actual waiver of the exempt status of the workers' compensation benefits that have been paid is likewise an indication that claimant could not be relied upon to conserve the resources which would result from a commutation. In fact, he has indicated that he would not conserve them, but rather would use them to pay debts which could not lawfully be enforced against him, all to the detriment of his family.

It appears that Blue Cross/Blue Shield has paid part of claimant's medical expenses. The record is silent with regard to whether or not the providers of the medical services were subscribers to the Blue Cross/Blue Shield program. If they were, they are, of course, limited to recovering fees equal to the usual customary charges for the services, even though they may, in fact, actually bill a higher amount. The record is silent with regard to whether or not claimant seeks to pay medical bills in excess of the usual and customary charges for the services which he received. The undersigned takes official notice, however, that it is a common practice in the medical profession to charge in excess of the usual and customary charge in order to provide a basis for increasing the usual and customary charge in future years, even though the physician has no intent of attempting to enforce payment of the excess if the patient refuses to pay it. Since approxiately $10,000 of claimant's medical expenses was not paid by Blue Cross/Blue Shield, it would appear that, even under an 80-20 type of insurance plan, an amount more than 20% of the total medical charges is still being billed to claimant. It would not be in claimant's best interest to commute his workers' compensation benefits in order

to pay medical bills which are in excess of the usual and customary charges and which, in any event, would not otherwise be enforced against him.

Of additional concern is the relationship of the workers' compensation benefits to the social security disability benefits. The record is again essentially silent with regard to what the outcome will be if a full or partial commutation was entered. Under some circumstances, it is possible to arrange matters in such a way as to lawfully and properly avoid a major portion of the social security offset, however, no showing of any such arrangement or plan was made in this case. In the absence of such, it cannot be determined that it would be in claimant's best interest to commute his workers' compensation benefits since the impact upon the social security benefits is not shown in the record.

Finally, it is true that there is some risk of termination of benefits should claimant die prematurely. The evidence, however, does not show that risk to be so severe as to offset the other factors which indicate against granting a full commutation, even if the loss of section 85.27 benefits could somehow be avoided. Claimant is still under medical care. It would not be in his best interest to grant a full commutation and extinguish his right to employer-paid medical care in the future.

In summary, it is found that a full commutation would not be in claimant's best interest. While he cannot be prevented from making a series of periodic waivers of the exempt nature of his compensation benefits as they are paid to him, he can be effectively prevented from irrevocably waiving that exemption as he could do if a full commutation was awarded. Should that happen, he would be without future medical care and without any future recourse against the employer and insurance carrier.

The undersigned would favorably consider, in this case, a partial commutation in order to purchase a home for the Beeh family, but only under such terms and conditions as would make it impossible for claimant to either directly or indirectly avoid the transaction and pay the commuted funds to one of his creditors. Such an arrangement would have to make it impossible for claimant to purchase the home and then sell it in order to obtain funds to pay creditors. Extraordinary safeguarding of the assets would be required.

## FINDINGS OF FACT

1. It is not in claimant's best interest, nor is it in the best interest of his family, to grant a full commutation.

2. It would be in claimant's best interest, and in the best interest of his family, to grant a partial commutation to enable

them to purchase a home if sufficient safeguards could be employed to make it impossible for claimant to misappropriate the commuted funds to payment of those debts which could not otherwise be enforced against him and also to prevent him from converting the home, if purchased, to cash and using the funds to satisfy those debts which could not otherwise be enforced against him.

3. Claimant has demonstrated a lack of sound judgment in dealing with matters of serious financial consequence.

CONCLUSIONS OF LAW

1. If a full commutation is granted, all right to future benefits under the provisions of Code section 85.27 is extinguished.

2. The burden is on the claimant to show that a full commutation is in his best interest.

3. Even if a full commutation did not cause the loss of future section 85.27 benefits, a full commutation should not be granted since it would not be in the best interest of claimant or his family.

4. While payment of just debts is an admirable goal, such a goal should not be given a higher priority than the goal of providing support and sustenance for a totally disabled worker and his family.

ORDER

IT IS THEREFORE ORDERED that the petition for full commutation be and hereby is denied.

IT IS FURTHER ORDERED that each party pay its own costs incurred in litigating this matter.

Signed and filed this 29th day of December, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. E. Michael Carr
Attorney at Law
117 South Franklin Street
P.O. Box 333
Manchester, Iowa 52057

Mr. Bruce L. Gettman, Jr.
Mr. James E. Walsh, Jr.
Attorneys at Law
River Plaza Building
10 West Fourth Street
Waterloo, Iowa 50704

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY BELLIS,

Claimant,

vs.

FIRESTONE TIRE & RUBBER COMPANY,

Employer,

and

CIGNA/INA,

Insurance Carrier,
Defendants.

File No. 706072

R E V I E W -

R E O P E N I N G

D E C I S I O N

FILED

JUL 24 1987

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in review-reopening (a memorandum of agreement was filed herein on September 2, 1982) brought by Larry Bellis, claimant, against Firestone Tire & Rubber Company, employer, and Cigna/INA, insurance carrier, for benefits as a result of an injury of June 16, 1982. A hearing was held in Des Moines, Iowa, on April 9, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant, and defendants' exhibits A through K. Defendants filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $292.07; that healing period benefits are not at issue; that defendants have paid 75 weeks of permanent partial disability benefits (15 percent industrial disability); that permanent partial disability benefits commence on September 17, 1984; and that claimant's injury is a body as a whole injury. The hearing deputy stated on the record at time of hearing that he was not requiring claimant to show a change of condition in this review-reopening proceeding. Specifically, the hearing deputy concluded that the mere filing of a memorandum of agreement does not require a change of condition showing by a claimant.

000072

## ISSUES

The contested issues are:

1) Whether there is a causal relationship between claimant's work-related injury of June 16, 1982 and his asserted disability; and

2) Nature and extent of disability.

## SUMMARY OF THE EVIDENCE

Claimant testified that he was born on October 16, 1939. He graduated from Des Moines Technical High School in 1958, and while attending high school took general studies and a sheet metal course. Claimant ultimately had a four year sheet metal apprenticeship and then got a journeyman card. Claimant obtained on-the-job training by working with other journeymen. A journeyman card entitled claimant to perform work by himself; an apprentice cannot work by himself or herself. Claimant ultimately obtained employment at Corn States Sheet Metal and did pattern making in the shop for this employer. The pattern making portion of sheet metal work requires physical exertion. This activity requires standing all day long and some stooping is required.

Claimant stated that he started the apprenticeship program in 1958 and became a journeyman in 1962. In 1972, claimant started working for Firestone as a sheet metal person. When claimant initially started working for Firestone, he built chain guards and belt guards and worked with air pipes. The Firestone work was a little bit lighter than the work he had previously done. He lifted objects by himself at Firestone and the weight of these objects would vary. Claimant's job duties changed in January 1982 when Firestone went to a multicraft system and this resulted in claimant doing less sheet metal work and he started to do a lot of mechanical work such as replacing belts and chains. Claimant had no training in mechanical work when he started performing these functions. He stated that the sheet metal work duties at Firestone were heavier than the mechanical work he was required to do.

Claimant testified that he is currently employed by Firestone, and that he "does the best he can" at this job. Some aspects of his current job require a lot of lifting, and he is unable to perform these lifting duties by himself.

Claimant then described how his injury of June 16, 1982 occurred. He then described the course of medical treatment that ensued after his work-related injury. Claimant mentioned that he ultimately had surgery that helped him. This surgery reduced his pain.

Claimant testified that he returned to work on September 17, 1984 as a machinery care person. Claimant testified that walking currently causes him to have pain in his back. Claimant currently has another employee help him perform his job.

000075

Claimant currently has back problems as well as problems with one of his legs and hip. Claimant testified that prior to June 1982, he did not have problems with his low back, legs or hips.

Claimant testified that he could not now do sheet metal work because the lifting required to do this function is too heavy for him.

Claimant testified on cross-examination, that the "consolidation of the trades" occurred in 1982. He further acknowledged that since 1982 he has worked forty to forty-eight hours per week. Claimant stated that he hopes to continue his current job. He works within a 30 pound weight restriction and acknowledged that he needs the assistance of a coworker.

Exhibit A contains claimant's W2's for tax years 1982 through 1985. Exhibit B is claimant's deposition taken on September 16, 1986. On page 12, claimant stated that he now constantly works with a coworker and is able to do his job. Claimant stated on page 13 that he cannot now do production jobs without assistance. Claimant's current job title is machine repairman. The coworker that assists him is also a machine repairman. Claimant was classified as a machine repairman after the job title of steel metal worker was eliminated. Claimant was placed in the machine repairman category prior to his "physical problems" and the imposition of medical restrictions. On page 21, claimant testified that he now makes $15.20 per day less than he did one and one-half years ago. On page 38, claimant described his hip surgery.

Page 1 of exhibit H contains a 10 percent whole body rating. On page 2 of exhibit H the manner in which claimant was injured in June 1982 is described as claimant being run down by a forklift. Exhibit H, page 8, reads in part under the entry dated July 24, 1985: "He is on light duty, and I think he is going to be there permanently. He says even this seems to be too much for him." Exhibit H is the records and reports of Kent M. Patrick, M.D., and Peter D. Wirtz, M.D. Exhibit H, page 9, has an entry dated December 16, 1986 that states claimant's left knee continues to be symptomatic. Exhibit I is a discharge summary from Mercy Hospital Medical Center, Des Moines, Iowa, and it reads in part: "Low back pain extending to the left hip and sometimes the left thigh and leg." The primary diagnosis set forth on page 1 of exhibit I is lumbar disc syndrome.

## APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the injury of June 16, 1982 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A

000076

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).

It is concluded that claimant's testimony on this issue is persuasive. Also, the medical evidence of record supports claimant's position that there is a causal connection between his work-related injury and his asserted disability. The primary fighting issue in this case will now be addressed, and that is the issue of the appropriate amount of permanent partial disability benefits owing to claimant.

II. As claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

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

Factors to be considered in determining industrial disability include the employee's medical condition prior to the injury, immediately after the injury, and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and

000077

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 Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985); Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

As mentioned above, a threshold question in this case is whether claimant needs to show a change of condition in order to be awarded permanent partial disability benefits in excess of the 75 weeks paid to him by defendants. It is concluded that such showing is not required under the circumstances of this case as there has not been a prior award or agency approved settlement in this case. The filing of a memorandum of agreement leaves the question of extent of disability open for adjustment in accordance with the facts of a particular case. See Shoemaker v. Adams Door Company, et al., (Appeal Decision filed August 30, 1985). This change of condition question was argued to the Iowa Supreme Court on July 14, 1987 in a case entitled Caterpillar Tractor Company v. Mejorado. Regarding the degree of industrial disability in this case, a showing that a claimant has no actual loss of earnings does not preclude a finding of industrial disability. See Michael v. Harrison County, 34 Biennial Report, Iowa Industrial Commissioner, 218, 220 (Appeal Decision 1979 and the cases discussed therein). However, claimant's current employment with Firestone is a consideration in assessing his industrial disability; his current employment lessens his industrial disability and defendants resulting liability.

Claimant argues in this case that his industrial disability exceeds 15 percent because he is not currently able to perform his job without assistance, and because he is not able to do the metal trade work that he is best suited for. Claimant, at time of hearing, argued that the concept of industrial disability focuses on the loss of earning capacity and not on actual loss

000078

of earnings. I agree with claimant's argument in this regard as it applies to the facts of this case and determine that an award of 25 percent industrial disability is therefore appropriate. Claimant is currently doing what could be characterized as light duty work because of his work-related injury of June 16, 1982 and is unable to perform his job without assistance. Claimant's physical impairment is permanent and he will continue experiencing difficulty doing his job as a result of the impairment that resulted from his work-related injury. Also, claimant's testimony that he cannot do his work by himself is believed. It is also believed that claimant cannot do any production job without assistance from a coworker. In addition, claimant is now unable to perform his trade of sheet metal working without assistance. Taking all appropriate factors into account, it is determined that claimant is entitled to 125 weeks of permanent partial disability benefits based on an industrial disability of 25 percent. The benefits commence on September 17, 1984, and defendants are entitled to a credit for benefits already paid.

FINDINGS OF FACT

1. Claimant was born on October 16, 1939.

2. Claimant graduated from high school in 1958.

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

4. Claimant obtained his journeyman card in 1962.

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

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

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

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

9. Claimant cannot currently do any production job at Firestone without the assistance of a coworker.

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

11. Claimant has had hip surgery.

12. Claimant's industrial disability is 25 percent.

13. Claimant is not currently able to do his trade of sheet

000079

metal worker without assistance because of the physical impairment resulting from his work-related injury of June 16, 1982.

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

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

## CONCLUSIONS OF LAW

1. Claimant need not show a change of condition in this case in order to receive more than seventy-five (75) weeks of permanent partial disability benefits.

2. Claimant's work-related injury of June 16, 1982 is causally connected to his whole body permanent partial impairment.

3. Claimant is entitled to one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on September 17, 1984 at a weekly rate of two hundred ninety-two and 07/100 dollars ($292.07), and that defendants are entitled to a credit for the seventy-five (75) weeks of such benefits already paid.

## ORDER

THEREFORE, IT IS ORDERED:

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

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

Defendants be given credit for benefits already paid.

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

Defendants shall file claimant activity reports pursuant to Division of Industrial Services Rule 343-3.1(2) as requested by the agency.

Signed and filed this 24th day of July, 1987.

T. J. McSweeney

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

000080

Copies to:

Mr. David D. Drake
Attorney at Law
P.O. Box 367
2141 Grand Avenue
Des Moines, Iowa 50302

Mr. Marvin Duckworth
Attorney at Law
Terrace Center, Suite 111
2700 Grand Avenue
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| BRENDA BENSON,<br><br>Claimant,<br><br>vs.<br><br>GOOD SAMARITAN CENTER,<br><br>Employer,<br><br>and<br><br>ZURICH-AMERICAN INS. COS.,<br><br>Insurance Carrier,<br>Defendants. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | FILE NO. 765734<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>FILED<br><br>AUG 28 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Brenda Benson, claimant, against Good Samaritan Center, employer (hereinafter referred to as Good Samaritan), and Zurich-American Insurance Companies, insurance carrier, defendants, for benefits as a result of an alleged injury on May 6, 1984. On May 19, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Cuddy Bernau, Thomas Benson, Sue Gibbs and Linda Dodson. The exhibits received into the evidence at the hearing are listed in the prehearing report. All of the evidence received at the hearing was considered in arriving at this decision except claimant's exhibits 4 and 5. These exhibits are affidavits from co-workers. Although heresay evidence is generally admissible, admissibility alone does not entitle the evidence to equal weight with other evidence. It is obvious defendants had no opportunity to cross-exam the authors of these exhibits. None of these witnesses were properly identified in the prehearing answers to interrogatories and the affidavits were obtained only a few days before the hearing. DeAnna Crain Settje was identified as only DeAnna Crain in the answers to interrogatories and there apparently was no supplementation of this answer before hearing. Furthermore, the affidavits contained additional heresay from third persons. Consequently, this is

280000

not the type of evidence a reasonable person would rely upon in the conduct of their important affairs as envisioned under Iowa Code section 17A.14(1). Therefore, no weight was given to these affidavits in determining the issues of this case.

The prehearing report contains the following stipulations:

1. Claimant is not seeking temporary total disability or healing period benefits in this proceeding;

2. Claimant's rate of compensation in the event of an award of benefits from this proceeding shall be $71.84 per week; and,

3. The medical expenses for which claimant seeks reimbursement in this proceeding are fair and reasonable and causally connected to the condition upon which claimant is basing her claim in this proceeding but that the issue of their causal connection to a work injury was an issue to be decided herein.

The prehearing report submits the following issues for determination in this decision:

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

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

III. The extent of claimant's entitlement to weekly disability benefits; and,

IV. The extent of claimant's entitlement to medical benefits under Iowa Code section 85.27.

## FINDINGS OF FACT

1. Claimant was a credible witness.

From her demeanor while testifying, claimant appeared to be truthful.

2. Claimant was employed by Good Samaritan from February, 1984 to May, 1984 as a certified nurse's aide.

There was little dispute among the parties as to the nature of claimant's part-time employment with Good Samaritan. Claimant testified that her duties consisted of care and feeding of elderly patients in a nursing home environment. This regularly involved the physical handling and lifting of patients. Linda Dodson, a co-worker, and Sue Gibbs, the bookkeeper, testified that it was the policy of Good Samaritan to provide assistants to nurse's aides in the moving of patients.

000083

3. On or about May 6, 1984, claimant suffered an injury to her back which arose out of and in the course of her employment with Good Samaritan.

Claimant testified that she injured her back on two occasions during the night shift at Good Samaritan on May 6, 1984. While lifting two patients early in the evening she felt a dull pain in her back but the problem "seemed insignificant" at the time. Later that evening claimant said that she needed to transfer a male patient from his wheelchair. She tried to find assistance but none was available. Therefore, claimant stated that she attempted to lift the patient by herself and when his knees buckled, she experienced the patient's full weight on her back and felt a pull in the area of her back. After a period of time, she told her supervisor that she could not lift anymore that evening because her back was stiff and sore. She asked to fill out a report of injury but was told that everyone has sore backs and her symptoms were not unusual. Claimant then went home. Both claimant and her husband testified that she woke up in the middle of that night with excuriating pain in her back. Claimant stated that she tried various body positions to relieve the pain but these efforts were not successful.

4. As a result of her work injury, claimant was absent from work from May 6, 1984 through October 25, 1984, the date she reached maximum healing.

Claimant testified that she never returned to work at Good Samaritan. After approximately six days she sought treatment from Susan Urbatsch, M.D. Claimant was initially examined by Dr. Urbatsch's physician's assistant who reported a history that claimant injured her back during routine lifting of patients one week previous. This history also states that claimant did not feel that the pain was significant enough to be seen but had encountered difficulties in receiving workers' compensation benefits without a doctor's examination. Dr. Urbatsch's records also indicate they were not able to perform a complete examination due to claimant's pain complaints. They were also not able to take x-rays of claimant as claimant refused to lay down on her back due to her pain complaints.

Claimant takes issue to some extent with Dr. Urbatsch's assistant's history. She stated that her delay in seeking treatment was caused by the fact that she felt she would improve and that she could not afford medical treatment. Claimant stated that she did not realize that workers' compensation benefits and medical treatment at the expense of the employer were possible until after she had discussed her back problems with a former employer a few days after the incident. Claimant also states that she attempted to lay down for the x-ray but could not do so only because of her pain. Claimant also refused an orthopedic consultation immediately after claimant's examination

000084

by Dr. Urbatsch because she had no money and that Good Samaritan did not offer to pay for such a consultation. The explanations provided by claimant for her actions appear reasonable.

Dr. Urbatsch and her physician's assistant both diagnosed that claimant was suffering from back strain after receiving complaints from claimant of pain in both the upper and lower back extending up to her shoulders. Dr. Urbatsch prescribed rest, medication and back exercises. Claimant eventually did receive an orthopedic consultation approximately two weeks after her initial injury from John W. Hayden, M.D., from the Gundersen Clinic. Dr. Hayden likewise diagnosed muscle strain after his examination of claimant and prescribed exercises and moist heat. Claimant then was examined by a chiropractor, W. D. Bigler, D.O., who took x-rays of claimant"s spine. After the examination by Dr. Bigler, claimant returned to the Gundersen Clinic and saw R. J. Gall, M.D. Dr. Gall reports that claimant had related to him a personality conflict with the chiropractor and the chiropractor had refused to provide her with copies of the x-rays or examination by Dr. Hayden without payment of her bill. Dr. Gall gave a note to claimant asking Dr. Bigler for the x-rays. Claimant then reported back to Dr. Hayden a few days later with the x-rays taken by Dr. Bigler. Dr. Hayden, after reviewing these x-rays, found no abnormalities and continued to prescribe heat, massage and strengthening exercises. Claimant then sought another evaluation of the x-rays from Dr. Meyer (first name unknown). Dr. Meyer declined to render an opinion or to examine the x-rays. Dr. Meyer advised claimant that seeking out non-orthopedic surgeons would not be appropriate for her future treatment.

Finally, on October 25, 1984, claimant reached maximum healing and was discharged from treatment by Dr. Hayden. Although Dr. Hayden indicated that claimant was continuing to have some stiffness, he felt that continuation of exercises would resolve the problem without disability.

Claimant testified that she never returned to Good Samaritan due to the lifting requirements of the job. She first attempted to return to work as a waitress after being discharged by Dr. Hayden in October, 1984 with a former employer, Cuddy Bernau. Bernau testified that claimant had difficulties with bending and lifting activities during the period she was employed by him. He stated that claimant had no such difficulties in 1980 when she worked for him. Claimant then worked for a Ben Franklin Department Store as a part-time cashier and clerk. Claimant was required to regularly "put out stock" in this job which required bending and lifting. Claimant stated that she was off work for two days following one incident of back pain at Ben Franklin while lifting a box. Claimant subsequently moved her residence approximately six miles and started working as a part-time motel maid. Claimant testified that this work was very difficult for her due to her back problems. She said that her back problems

000085

were so bad and she had to make the beds on her knees because she could not reach or bend. Claimant left the motel employment in October, 1985 because, according to claimant, the work was simply too much for her. Since leaving the motel, claimant has been working as a part-time waitress.

A co-worker of claimant, Linda Dodson, testified that she was present during the night claimant was allegedly injured but she could not recall claimant reporting any back pain that evening and that if claimant had told her of such back pain she would have told her to report the incident to her supervisor. Sue Gibbs, the secretary/bookkeeper who handles all of the forms for workers' compensation at Good Samaritan, stated that after her review of the personnel file there was no report of a work injury by claimant to anyone at Good Samaritan on the day of the alleged incident. Gibbs further testified that it was the policy of Good Samaritan that employees are to notify their supervisors of all injuries and that this policy was made known to claimant when she was hired. Although the testimony of Dodson and Gibbs were important, their testimony is based primarily on a lack of recollection and does not overcome claimant's credible testimony that she had a work injury and that she did notify her supervisor of such an injury.

5. The work injury of May 6, 1984 was a cause of significant permanent partial impairment to claimant's body as a whole.

Claimant returned to Dr. Hayden in April, 1986, with continued complaints of low and upper back pain, inability to bend or lift and difficulty standing and sitting for prolonged periods of time. Claimant also complained that these symptoms became worse in cold weather. Dr. Hayden noted that he did not feel that claimant had suffered permanent disability in October, 1984, but stated claimant's continuing difficulties could possibly be related to the original work injury of May, 1984. Dr. Hayden referred claimant to the Physical Medicine and Rehabilitation Department at the Gundersen Clinic to regain her range of motion.

Claimant then began to receive treatment from Susan K. Halter, M.D., a specialist in the field of physical medicine and rehabilitation. After her examination of claimant, Dr. Halter diagnosed myofascial pain syndrome and felt that claimant's problems were attributable to the original work injury in this case. Although Dr. Halter felt that the prognosis is good, claimant will continue to have chronic intermittent pain. Dr. Halter felt that claimant has suffered a five percent permanent impairment to the body as a whole as a result of the May, 1984 work injury. Dr. Halter recommends that claimant continue under her care but noted that claimant was unable to do so because of the cost.

Claimant stated that she has no previous medical history of any chronic back problems and no functional impairment or

000086

disability due to back problems before the work injury herein. Claimant was involved in a car accident in 1962 which injured her cervical spine but she testified that she fully recovered from this incident which primarily involved a broken nose. X-rays of the cervical spine after this accident revealed no abnormalities.

In February, 1987, claimant was examined by C. H. Strutt, D.C., who opined that claimant has permanent impairment due to the work injury but that it would be reduced upon further treatment. Dr. Strutt also felt that claimant has some prior existing disability arising from the 1962 car accident when she was 12 years old.

The greater weight of the evidence presented set forth above demonstrates that claimant has significant permanent impairment as a result of the original work injury in May, 1982, due to her chronic pain from bending, lifting, standing and sitting for prolonged periods of time. Dr. Hayden states that claimant's current condition is possibly work related. Dr. Halter definitely opines that claimant's current symptoms are causally connected to the original work injury. Dr. Strutt likewise found permanent impairment as a result of the work injury. Regardless of the existence of the car accident, claimant has shown that the work incident of May 6, 1984 was at least one contributing substantial factor, if not the only factor, which precipitated her chronic back problems.

6. The work injury of May 6, 1984, is the cause of a 25 percent permanent loss of earning capacity.

Claimant's past employment primarily consists of unskilled work requiring either heavy lifting, repetitive lifting, bending, twisting, or stooping along with prolonged sitting and standing. Claimant has worked as a nurse's aide, short order cook, waitress, factory worker, and retail store clerk. The injury in this case prevents claimant from returning to work as a nurse's aide and most other jobs she has held in the past. Such fact is evidence of a substantial permanent loss of earning capacity as a result of the work injury.

Claimant testified that she has made reasonable efforts to find suitable replacement employment. She has shown no desire to voluntarily leave the labor market and in fact has demonstrated a substantial financial need to remain in the work force. However, the type of jobs that she is able to perform are limited due to her chronic back problems.

Claimant has suffered a significant permanent loss in actual earnings from employment due to the work injury. However, the loss is less than would be expected of a person who is unable to return to heavy physical labor. Claimant's past employment

000087

history involves only unskilled or semi-skilled jobs at or near minimum wage. Her job since the work injury have similarly involved positions at the unskilled or semi-skilled level at or near minimum wage. However, the part-time jobs which pay the best in claimant's past history has involved heavier work which a claimant can no longer perform.

Claimant is 36 years of age, has a high school education with an above average grade level. Claimant appears to have high potential for successful vocational rehabilitation but she is financially unable to pursue such efforts and no opportunity for such vocational rehabilitation has been offered by defendants.

Finally, the award herein was reduced because there was a consensus among physicians in this case that claimant's disability will improve with further treatment. If defendants, however, fail to provide such reasonable treatment in the future, especially the treatment envisioned by Dr. Halter, or if she fails to improve following such treatment, this agency is available to review the matter at a later date.

7. Claimant has not demonstrated that the two expenses for which she desires reimbursement constitutes reasonable medical treatment of her work injury.

In the prehearing report, defendants stipulated that the expenses at the Gundersen Clinic, exhibit 1, in the amount of $22.65 were causally connected to the condition upon which she was basing her claim in this proceeding. Claimant testified that this treatment was for a kidney condition which she felt was related to the original work injury. The only physician rendering an opinion on the matter, Dr. Halter, stated that she does not know if these problems are work related. Therefore, claimant has not shown that the kidney or urinary tract condition was related to the original work injury.

Claimant also requests reimbursement for the evaluation by Dr. Strutt. Claimant has not shown that this evaluation by a non-orthopedic surgeon constitutes reasonable treatment of the work injury. Dr. Strutt was apparently only asked to evaluate disability for the purposes of this litigation.

## CONCLUSIONS OF LAW

The foregoing findings of fact were made under the following principles of law:

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.

000088

See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960) and cases cited therein.

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. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 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, although a finding was made causally

000089

connecting the work injury to claimant's permanent functional impairment to her body as a whole, such a finding does not, as a matter of law, automatically entitle claimant to benefits for permanent disability. The extent to which this physical impairment results in disability was examined under the law set forth below.

Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment or limitation upon activity involving the body as a whole, the degree of permanent disability must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity resulting from the work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physical impairment or restriction on work activity may or may not result in such a loss of earning capacity. The extent to which a work injury and a resulting medical condition has resulted in an industrial disability is determined from examination of several factors. These factors include the employee's medical condition prior to the injury, immediately after the injury and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

No apportionment of loss of earning capacity between claimant's preexisting condition and the work injury is made in the findings of fact because such an apportionment is proper only when there was some ascertainable disability which existed independently before the injury occurred. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). There was no showing that claimant had suffered a disability prior to the alleged work injury in this case.

At the prehearing conference in this case, claimant indicated that she was not relying upon the so-called "odd-lot" doctrine under the holding in Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985). It is the policy of this agency that such a theory cannot be invoked by claimant without prior notice to defendants at the prehearing conference.

000090

Based upon a finding of a 25 percent loss of earning capacity or industrial disability as a result of an injury to the body as a whole, claimant is entitled, as a matter of law, to 125 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 25 percent of the 500 weeks allowable for an injury to the body as a whole in that subsection.

It was found that claimant had reached maximum healing on October 25, 1984. Healing period benefits terminate and permanent partial disability benefits begin at that time pursuant to Iowa Codes section 85.34(1).

Reports submitted to this agency contained in the agency file for this injury indicate that claimant has not been paid permanent partial disability benefits. Claimant is not seeking additional healing period benefits.

III. Employers are obligated to furnish all reasonable medical services for treatment of work injuries under Iowa Code section 85.27.

Although claimant may be provided a second opinion as to disability from a physician of claimant's own choice under Iowa Code section 85.39, such an issue was not presented to the undersigned in the prehearing report or in the hearing assignment order prepared subsequent to the prehearing conference in this case. The question submitted to the undersigned is whether the evaluation by Dr. Strutt was reasonable medical treatment. Dr. Strutt's report clearly states that his examination was made for the sole purpose of evaluating claimant's disability rather than for treatment.

ORDER

1. Defendants shall pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of seventy-one and 84/100 dollars ($71.84) per week from October 26, 1984.

2. Defendants shall pay accrued weekly benefits in a lump sum.

3. Defendants shall pay interest on benefits awarded herein from October 26, 1984.

4. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

5. Defendants shall file activity reports upon payment of this award as requested by this agency pursuant to Division of

000091

Industrial Services Rule 343-3.1.

Signed and filed this 28th day of August, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. James Burns
Attorney at Law
301 West Broadway
P. O. Box 28
Decorah, Iowa 52101

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

000092

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| LARRY BEYER,<br><br>Claimant,<br><br>vs.<br><br>IOWA BEEF PROCESSORS, INC.,<br><br>Employer,<br>Self-Insured,<br>Defendant. | : | FILE NO. 759698<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

FILED
DEC 03 1987
IOWA INDUSTRIAL COMMISSIONER

## INTRODUCTION

This is a proceeding in arbitration brought by Larry Beyer, claimant, against Iowa Beef Processors, Inc., employer, self-insured defendant for benefits as the result of an alleged injury that occurred on or about December 5 or 7, 1983. A hearing was held at Fort Dodge, Iowa on February 10, 1987 and the case was fully submitted at the close of the hearing. The record consists of the testimony of Larry Beyer (claimant), Diane Beyer (claimant's wife), Richard Taylor (former co-worker), Jim Spencer (former part-time employer) and Gail Leonhardt (rehabilitation consultant); claimant's exhibits 1 through 4; and, defendant's exhibits A through L. Official notice was taken of the first report of injury in the industrial commissioner's file at the beginning of the hearing. Iowa Administrative Procedure Act, section 17A.14(4). Both attorneys submitted excellent briefs.

## STIPULATIONS

The parties stipulated to the following matters:

That an employer-employee relationship existed between claimant and employer at the time of the alleged injury.

That one of the periods of time claimant was off work and for which claimant now seeks temporary disability benefits is from March 21, 1984 to July 9, 1984.

That the type of permanent disability, if the injury is found to be a cause of permanent disability, is industrial disability to the body as a whole.

That the weekly rate of compensation in the event of an award is $236.51 per week.

000093

That defendants are entitled to a credit under Iowa Code section 85.38(2) for the previous payment of medical expenses made under an employee non-occupational group plan in the amount of $3,529.19.

That there is no credit for workers' compensation benefits paid prior to hearing.

That there are no bifurcated claims.

## ISSUES

The issues presented by the parties for determination at the time of the hearing are as follows:

Whether employer had actual knowledge of the injury or whether the employee gave timely notice of the injury as required by Iowa Code section 85.23.

Whether claimant sustained an injury on or about December 5 or 7, 1983 that arose out of and in the course of employment with employer.

Whether the alleged injury is the cause of any temporary or permanent disability.

Whether claimant is entitled to any temporary disability benefits and, if so, the nature and extent of benefits.

Whether claimant is entitled to any permanent disability benefits and, if so, the nature and extent of benefits.

Whether claimant is entitled to medical expenses under Iowa Code section 85.27.

## SUMMARY OF THE EVIDENCE

All of the evidence was examined and considered. The following is a summary of the pertinent evidence:

Prior to the instant injury claimant had previously alleged a back injury under an injury date of January, 1982 (File No. 692024). Claimant made a special case settlement of that case under Iowa Code section 85.35 in the amount of $15,000.00. The settlement was approved by the industrial commissioner on November 17, 1983 (Exhibits E, F, H and I). Claimant now alleges that he injured his back again on December 5 or 7, 1983 (original notice and petition).

Claimant was age 39 at the time of the alleged injury and age 42 at the time of hearing. He is married and he has one stepdaughter in college and one stepson living at home. Claimant

000094

graduated from high school on June 2, 1962. After high school he reconditioned used cars for a few months then started to work for employer at age 18 on October 1, 1962. This employer has been claimant's only adult employment for 22 years until the plant closed in December of 1984, except for one year they were out on strike around 1975. Claimant's various jobs over the years included night cleanup, kill floor, second legging, shrouder, second butter, rossettes, gutting, trim out, maintenance, refrigeration, electrician, scale man, plumber and knife sharpener (Exhibit D; Exhibit 2-13). Most of these jobs involved strenuous work. The scaling job in particular required lifting 100 pounds or more on a regular basis and pushing a cart which weighed 1,300 pounds. Claimant testified and medical evidence indicated that claimant first encountered back problems in 1981.

The first injury which was settled involved a lumbar laminectomy performed on September 2, 1982. After the surgery the doctor told claimant to be more careful about how much weight he lifted and how he lifted it. As a result claimant gave up the scale job, took a cut in pay and bid into the plumbing job. He testified that he performed the plumbing job without problems even though it was strenuous work and required a lot of lifting (Ex. D, pages 35 through 37). Claimant said that he missed no time from work due to back pain after he returned to work from the September 2, 1982 surgery.

At the time of this alleged injury claimant was working from 7:00 a.m. until 3:00 p.m. In the first part of December of 1983, sometime in the morning, as claimant was leaving the building by way of a dimly lit area on the dock, he slipped on an ice covered ramp and slid about 20 feet on his back. The dock door was closed, but the weight of his body sliding down the ramp forced the door open and he slid outside. When he slipped, a roll of electrical tape on his belt flew off and he lit on it with his back. When he stopped sliding outside the building Bob Standberg and Dick Taylor were standing there. Bob said go tell the foreman. Dick helped him get up.

Dick Taylor testified that in December of 1983 he saw the big stainless steel door open and "Larry come feet first out that door on his back." Taylor stated that he picked claimant up and also stated that he told him to report the fall. Taylor said that claimant left him to go and report the fall. He also confirmed that Bob Standberg was there and saw it happen too.

Claimant testified that he found Jack Eastman, his foreman. They went to Eastman's office and Eastman made out a written accident report. Other evidence revealed that Eastman put this occurrence in the daily log. Eastman asked claimant if he wanted to go home, but claimant declined and worked until the end of the shift at 3:00 p.m. Claimant testified that he had difficulty with his 1982 claim because he did not report it to

000095

his foreman. Therefore, he made sure that he told his foreman this time.

Claimant testified that he continued to work as a plumber but had pain in his back. In particular he had trouble lifting and getting into tight places. Claimant told Eastman about his difficulties from time to time, but Eastman did not do anything about it. Finally, claimant told Eastman he was going to see Robert A. Hayne, M.D., who had performed the earlier first surgery on September 2, 1982. Dr. Hayne prescribed medications. When this did not work he set up a CT scan. The foreman then told claimant to see Jim Johnson, the personnel manager. Johnson said why didn't you tell me about the fall? Claimant replied that the last time you told me to tell the foreman. Claimant said that he told Johnson it was a workers' compensation claim. However, Johnson said that initially he preferred to handle it as a group insurance claim. They would figure it out later. Claimant said he also talked to Mike Watson, the plant manager, in his office a couple of times. At first Watson said go ahead and have a CT scan and we will see what it says. Claimant then testified that when he told employer that Dr. Hayne said he needed surgery, employer refused to pay for it. Claimant stated that he had the surgery anyway. Claimant testified that employer was concerned about the number of accident reports and incidents at work. Claimant alleged that accidents would be reported by employees, but then employer would deny the claims later stating that the accident was not reported.

Claimant testified that employer refused to file a first report of injury for his accident. As a result claimant wrote a letter to the Industrial Commissioner in Des Moines on March 5, 1984 describing his accident in detail and the difficulties he had in getting the employer to make out and file a first report of injury (Ex. 4). Claimant said he asked Eastman to find out and tell him the date that he reported this fall. Eastman checked it out and came back and told him it was December 5 or 7, 1983.

In the medical evidence Dr. Hayne continually referred to November, 1983, as to when the fall occurred. Therefore, it is not possible to determine whether it actually occurred on December 5 or 7, 1983 as reported by Eastman or whether it occurred in November of 1983 as reported by Dr. Hayne. However, it is clear that Dr. Hayne is referring to this incident. The petition alleged December 5 or 7, 1983 and the parties were agreeable to using this injury date at the time of hearing. It was not suggested that November, 1983, was a separate or distinct incident of its own. Therefore, this decision will proceed using December 5 or 7, 1983 as the injury date even though Dr. Hayne refers to it as the fall in November of 1983.

Claimant's first surgery was performed on September 2, 1982.

000096

He was released by Dr. Hayne on December 10, 1982. He was feeling well. His neurological examination was normal. Dr. Hayne awarded claimant a nine percent permanent partial "disability [sic]" of the body as a whole. Dr. Hayne testified in his deposition that in his opinion there was "some limitation in his lifting capacity" after this surgery. However, Dr. Hayne did not specify nor was he asked to quantify it (Ex. 1, p. 6). No formal working restrictions of any kind appear in the medical reports following this first surgery (Exhibits 2-1, 2-4, 2-8, 2-9 and 2-12).

When claimant saw Dr. Hayne on February 8, 1984 for a follow-up examination after the September 2, 1982 surgery, claimant reported that he had been feeling great until he fell on his left sacroiliac area at work in November of 1983. A CT scan on February 24, 1984 disclosed what appeared to be a calcified disc fragment on the left that was believed to be impinging on the dural sac and L-5 nerve root on the left (Ex. 2-2 and 2-4). On March 21, 1984, claimant was admitted to the hospital. On March 22, 1984, Dr. Hayne performed a second lumbar laminectomy and found a markedly protruded intervertebral disc at the fourth interspace on the left. Claimant was discharged on March 26, 1984 (Ex. 2-3; 2-10, pp. 6 & 7; 2-11, p. 3; 2-12, p. 2). Dr. Hayne stated he last saw claimant on June 29, 1984 for this second surgery. He stated that claimant was released to return to work on July 9, 1984 (Ex. 1, p. 16). Dr. Hayne testified that there was a causal relationship between the fall in November of 1983 and the symptoms that required the second laminectomy on March 22, 1984. He awarded an additional nine percent total body "disability [sic]" over and above the original nine percent which was awarded which gave claimant a total "disability [sic]" of 18 percent. Although not phrased as a restriction, Dr. Hayne recommended that claimant curtail lifting weights over 40 pounds and that this included pushing and pulling of these weights (Ex. 2-4). Claimant testified that as a result of Dr. Hayne's recommendation that he be more careful about lifting and bending, he then gave up his plumbing job and took a job maintaining knives at a cut in pay. Claimant performed the knife maintenance job until the plant closed in December of 1984.

After the second surgery claimant's left sacroiliac pain persisted and pain also ran down his left lower extremity. A low back brace was prescribed (Ex. 2-7, p. 6). An enhanced CT scan on December 2, 1985 again showed a protruded calcified disc at L-4, L-5 on the left side (Ex. 2-11, p. 2). Claimant was admitted to the hospital again on January 6, 1986. A third lumbar laminectomy was performed on January 7, 1986. A lip of bone was extruding and encrouching on the fourth lumbar nerve root on the left. The lip and fragments were removed (Ex. 2-12, pp. 4 & 5). Claimant was discharged on January 10, 1986. Dr. Hayne said that this surgery was carried out because of the continuation

of symptoms that date back to the fall of 1983. He anticipated a healing period of six to eight weeks (Ex. 2-6). However, he changed this healing period in his deposition testimony.

In his deposition given on September 6, 1986, Dr. Hayne, a board certified neurosurgeon, testified that he reviewed claimant's medical history (Ex. 1). He reaffirmed the nine percent impairment rating as a result of the first surgery on September 2, 1982 (Ex. 1, pp. 6 & 7). He reaffirmed that the fall in November of 1983 was the cause of the complaints that necessitated the second surgery on March 22, 1984 (Ex. 1, p. 8). He indicated that claimant's continued complaints after the March 22, 1984 surgery were sequellae of his earlier condition and that the findings of the third surgery would account for the pain that claimant was having after the second surgery (Ex. 1, p. 12). Dr. Hayne estimated that claimant's healing period would extend for two to three months beyond when he saw the claimant on February 17, 1986 (Ex. 1, pp. 12 & 13, 17, 26, 27 & 28).

Dr. Hayne added another five percent of impairment after the third surgery on January 7, 1986 (Ex. 1, p. 25). He added that the total impairment after all three surgeries was 23 percent (Ex. 1, p. 13). He testified that claimant's formal restrictions then after the third surgery were no more repetitive forward bending of the spine and claimant's lifting should be limited to 40 pounds. He should also be concerned about the length of time he stands or sits (Ex. 1, pp. 13 & 14). The doctor added again that the second surgery of March 22, 1984 and the third surgery of January 7, 1986 were related to the fall in November of 1983 (Ex. 1, pp. 14 & 16). He related also that claimant's recovery after the March 22, 1984 surgery was not good; but it was good after the January 7, 1986 surgery (Ex. 1, p. 16).

Dr. Hayne conceded that he only uses the AMA Guides as a guide. Even though the Guides may strive for objective uniformity, he nevertheless still felt that a physician's opinion needed to be based on a certain amount of subjective observations, especially in back cases where it is not possible to examine for passive range of motion satisfactorily (Ex. 1, pp. 18-22). Dr. Hayne justified his increases of impairment rating after each surgery, even though each surgery was at the L-4 level by stating as follows:

> A. I think that with the repeated operative procedures on the same intervertebral disc, there is a progressive impairment of the function of that particular interspace as being on the basis of progressive narrowing of the interspace secondary to removal of the contents of the interspace; namely, the intervertebral disc, with this resulting in greater stress and strain on the adjacent facet joints with progressive productive changes in the

000098

adjacent jonts and as a consequence a greater degree, generally speaking, of the disability. (Ex. 1, pp. 21 & 22)

Dr. Hayne insisted that the third surgery increased claimant's impairment by another five percent even though claimant felt better after the third surgery than he did after the second surgery (Ex. 1, p. 25).

In his medical reports and in his deposition testimony, Dr. Hayne used the term disability instead of impairment when referring to a rating. When confronted for an explanation by defendant's counsel, Dr. Hayne said that he thought that to a degree there was a similarity between the two terms. He stated that he used the two terms almost synonymously. He admitted that he was including age, education and experience in his rating (Ex. 1, pp. 22 & 23). But he qualified this by saying that even though he considered age and experience he endeavors to stipulate what he thinks the patient's limitations are insofar as physical activities are concerned based on his experience as a neurosurgeon for several years (Ex. 1, pp. 25 & 26).

Claimant was examined and evaluated for defendant by Michael J. Morrison, M.D., an orthopedic surgeon in Omaha, Nebraska on October 21, 1986. On October 29, 1986, Dr. Morrison reported that claimant is five foot nine inches tall and weighs 240 pounds. He reviewed claimant's medical history and mentioned that after the last surgery that certain working restrictions were imposed. X-rays revealed all three prior surgeries. Dr. Morrison said there was no evidence of nerve root irritation in the form of muscle weakness or atrophy, reflex changes or straight leg raising at the time of his examination. He stated that claimant had reached maximum medical recovery. His job restrictions would consist of no frequent bending over or heavy lifting. He concluded by saying: "His permanency from the injury in September of 1982, which apparently caused a herniated disc at L4-L5, on the right would be 10-15%, whole body." (Ex. J).

Dr. Morrison wrote a follow-up letter to defendant's counsel on November 13, 1986, which reads as follows:

I'm writing you in response to your letter concerning Larry Beyer. The surgery in September of 1982, was at L4-L5, on the right. His second surgery because of a November 19, 1983, in March of 1984, consisted of a lumbar laminectomy at L4-L5, on the left. Unless there was evidence on Cat scan or myelogram of nerve root irritation on the left in 1982, we would have to assume that this was a new injury or new disc herniation in November of 1983, which required his surgery in March of 1984. In January of 1986, this same area was re-explored on the left at L4-L5.

000099

The permanency would be the same consisting of 15%, whole body for the L4-L5 disc removal on the left in March of 1984, and in January of 1986. His restrictions in the future would be the same regardless of the 2nd or 3rd surgeries. (Ex. K)

Gail Leonhardt, a Certified Rehabilitation Counselor (CRC) and also a Certified Insurance Rehabilitation Specialist (CIRS), testified that he received this referral on October 2, 1986 and contacted claimant on October 17, 1986. He interviewed claimant at his home for the purpose of a vocational evaluation at the request of employer. Witness testified that he reviewed the medical reports of Dr. Hayne, the first report of injury and the letter from claimant's counsel. His job was to develop a plan to get claimant back to work. Leonhardt made a written report on October 27, 1986 (Ex. 2-13).

Leonhardt stated that at the time of this industrial injury the injured worker was a plumber earning $8.00 per hour. Leonhardt related that claimant said that he knew all 63 jobs on the kill floor. Claimant told Leonhardt that he periodically took pay cuts to learn a new job, but soon he was at a pay advantage. Many of these meat packing industry skills were not transferable. The few that were are mentioned in his conclusion quoted below. At the time Leonhardt interviewed claimant, claimant had already sought out on his own initiative and voluntarily enrolled in a two year electronics course after his surgery of January 7, 1986. Claimant was enrolled at the Iowa Central Community College in Fort Dodge. Iowa State Vocational Rehabilitation pays his tuition and the Job Training Placement Act pays for books and transportation expenses. Leonhardt concluded his written report as follows:

> CONCLUSIONS: Considering the injured worker's initiative and motivation in getting his training program under way utilizing state vocational rehabilitation and the job training placement act to cover the expenses, it is felt that his re-habilitation needs are probably appropriate. In terms of Transferable Skills the injured worker had performed electrical work, plumbing and work with scales. The injured worker described his study schedule as reasonably arduous. He stated that he enjoys his course of study, even though it is quite demanding. Mr. Beyer states that his grades are all over 90 percent at this point.
> (Ex. 2-13, p. 2)

At the hearing Leonhardt testified that claimant was cooperative,

000100

helpful, cordial and self-motivated. He stated that the electronic course could lead to a dozen new fields of employment such as field service technician for copy machines, microwaves, computers and other instruments at a salary range of between $14,000 to $15,000 in the Fort Dodge area; $18,000 to $20,000 in the Omaha area; and $20,000 to $25,000 on the west coast. He added that these are entry level figures. A small raise could be anticipated at the end of six months. The electronics field is growing like crazy. The meat industry by comparison is undergoing wage cuts. Therefore, Leonhardt felt that claimant could find comparable wage rates in the electronic industry as compared to the meat packing industry. Some of the electronic jobs, however, might require some prolonged sitting. Leonhardt did not think that a 40 pound weight restriction was an impediment for a technical or craftsman type of job. He considered the restrictions of Dr. Hayne and Dr. Morrison as basically the same. Leonhardt denied that three prior surgeries would impair claimant's ability to find a job, provided a person's back condition was not pertinent to the job duties. The fact claimant litigated a workers' compensation claim would be a variable depending upon the circumstances. Leonhardt conceded that claimant could not get a job in a meat plant with his back condition and current restrictions. He said claimant could make more money outside of the Fort Dodge area and indicated that claimant was willing to relocate when he completed his electronic course.

Claimant testified that after the third surgery Dr. Hayne told him that his back was real brittle. Claimant was told not to do heavy lifting or heavy maintenance work. Dr. Hayne told him to see the vocational rehabilitation office and the social security office. Claimant testified that he could no longer perform all of the previous duties of the jobs of plumbing, maintenance, refrigeration, electrician and scale man because these jobs either required heavy lifting or repetitive bending or walking that he could no longer do. He could do some of the duties of these jobs but not all of them. Claimant testified that if he lifts two eight packs of pop he feels it in his back. He used to do home remodeling as a sideline but he cannot do that now without help. He used to recondition cars as a sideline, but now he can only do the easy things. Claimant admitted that he does shovel snow sometimes. He goes hunting, but cannot walk for long distances because it hurts his back. He can no longer row a boat on the lake. He testified that he had not worked at a regular job since the plant closed in December of 1984. He did work as a cashier and watched the store for his friend, Jim Spencer, on an occasional and part-time basis. He also granted that he detasseled corn for a short time in the summer of 1985.

Claimant said he has applied for jobs every place in town. He said that he applied for jobs as a janitor, maintenance man, production worker, cold storage and refrigeration worker, and for electrical compressor work. He did not exclude any kind of

000102

job. He said that he was turned down at the hospital because of the 40 pound weight restriction. Another prospective employer inquired about his surgeries and he did not get that job. He is currently enrolled in a two year electronics course which is a basic course to learn about electrical equipment. He testified that he was not getting any vocational rehabilitation assistance or workers' compensation benefits from employer. He hopes to graduate from the electronic course with an associate degree in May of 1988. His homework schedule is too heavy to allow him to work at a part-time job. His grades are good. He received an A and four B's.

Claimant testified that the last full year he worked for employer without any surgeries he made $23,000. In his lowest year he earned $12,000. Last year's electronic school graduates were hired at approximately $15,000 per year.

Diane Beyer, claimant's wife, testified that claimant recovered well from the first surgery on September 2, 1982. Then he fell on the ice at work in the dimly lit dock. Since the second and third surgeries he has been very inactive around the house inside and out. He cannot walk or lift or stand for very long. He cannot carry groceries. Claimant studies every day and night and all weekend. She works one full time job and all of the odd jobs that she can get in order to support the family. She testified that claimant tried very hard to find employment but was unable to do so. They sold their horses which they had raised during the nine years of their marriage because claimant can no longer ride or take care of them. She confirmed his back problems first began in 1981 and that much of claimant's job problem was the Fort Dodge economy. Claimant presented the following itemized medical bills in exhibit 3.

| | |
|---|---|
| Robert A. Hayne, M.D. | $ 3,270.00 |
| Associated Anesthesiologist | 814.00 |
| Iowa Orthotic Corporation | 200.50 |
| Iowa Methodist Medical Center | 5,513.39 |
| Walgreen Drug | 10.39 |
| Mileage | 305.76 |
| TOTAL | $10,114.04 |

In response to claimant's request for admissions, defendant admitted that the bills submitted were true and correct copies of the actual bills and that the expenses were fair and reasonable for the services rendered. However, defendant denied that they were incurred by plaintiff as a result of this injury on December 5 or 7, 1983 (Ex. 3-1 & 3-2).

## APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on December 5 or 7, 1983

000102

which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 5 or 7, 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, 261 Iowa 352, 154 N.W.2d 128 (1967).

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

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience

000103

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).

Iowa Code section 85.23 requires an employee to give notice of an injury within 90 days of its occurrence if employer does not have actual knowledge of it. The issue of failure to give timely notice is an affirmative defense. Defendants are required to sustain the burden of proof by a preponderance of the evidence. DeLong v. Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940); Mefferd v. Ed Miller & Sons, Inc., Thirty-Third Biennial Report of the Industrial Commissioner 191 (1977). Defendant did not introduce any evidence on the issue of failure to give notice. Jim Johnson, IBP personnel manager, was present in the court room part of the time but did not testify as a witness in this case. Claimant testified that he told Eastman shortly after he fell and that Eastman made out an accident report. Later Eastman was able to retrieve the information that claimant reported the injury to him on December 5 or 7, 1983. Claimant's testimony was not controverted, contradicted or rebutted. Moreover, the first report of injury, which was prepared by defendant's counsel of record in this case, states at line 31 that employer first knew of his condition on December 5 or 7, 1983. Therefore, it is determined that defendant did not sustain the burden of proof by a preponderance of the evidence that claimant failed to give proper notice as required by Iowa Code section 85.23. On the contrary, claimant proved that he did give proper notice on the day that he fell.

Claimant did sustain the burden of proof by a preponderance that he sustained an injury on December 5 or 7, 1983 which arose out of and in the course of his employment with employer. He further sustained the burden of proof by a preponderance of the evidence that the injury was the cause of both temporary and permanent disability. In the evidence summarized above Dr. Hayne testified that both the second and third surgeries were causally connected to the fall on December 5 or 7, 1983. He stated that both surgeries required a healing period. On these points claimant's testimony and Dr. Hayne's testimony was not contradicted, controverted or rebutted by defendant. Defendant presented no evidence and made no argument in their brief that claimant did not sustain an injury that arose out of and in the course of his employment on December 5 or 7, 1983. Nor did they dispute that it was the cause of temporary disability after both surgeries for a period of recovery.

The parties stipulated that the time off work from the surgery which occurred on March 22, 1984 is from March 21, 1984 to July 9, 1984. Claimant was admitted to the hospital on March 21, 1984. He was released to return to work by Dr. Hayne on July 9, 1984. Therefore, it is determined that claimant is entitled to healing period benefits from March 21, 1984 to July

9, 1984 which is a period of 15 weeks and six days. After the surgery which occurred on January 7, 1986, Dr. Hayne's amended opinion was that the healing period would be approximately two to three months from February 17, 1986. Two months from February 17, 1986 would be April 17, 1986, a period of 14 weeks and three days. Three months from February 17, 1986 would be May 17, 1986, a period of 18 weeks and five days. The period of recovery after the March 22, 1984 surgery when Dr. Hayne specified exact dates resulted in 15 weeks and two days of healing period. Therefore, it is determined that due to the similarity of the two surgeries which were performed by the same surgeon that the reasonable period of recovery from the January 7, 1986 surgery should be the same as the earlier surgery. Therefore, it is determined that claimant is entitled to healing period benefits from January 7, 1986 to April 27, 1986, a period of 15 weeks and six days from January 7, 1986.

The amount of permanent impairment is first considered in determining the amount of permanent partial disability. Dr. Hayne attributed nine percent impairment to the first surgery of September 2, 1982; nine percent impairment to the second surgery which took place on March 22, 1984; and five percent impairment to the third surgery which was performed on January 7, 1986. He then totaled these numbers and arrived at a permanent impairment rating of 23 percent. Subtracting nine percent for the first surgery from 23 percent overall impairment, leaves 14 percent impairment attributable to the second and third surgeries which are the subject of this decision. Dr. Hayne explained the progressively increased percentages on the basis of progressive narrowing of the interspace with resultant stress and strain on the adjacent facet joints and progressive productive changes in the adjacent joints (Ex. 1, pp. 21 & 22).

Dr. Morrison said that the overall impairment is 15 percent and that it all occurred after the first surgery. He did not believe the second or third surgery increased the impairment. Defendant's counsel explained that this was because the subsequent two surgeries were at the same level of the spine. The rationale then is that repeated surgeries at the same level of the spine do not increase impairment. If the impairment is nine percent or 15 percent after the first surgery, then a second, third or even additional surgeries at the same level, even though they are on the other side of the spine, do not increase the impairment rating. Dr. Morrison gives no additional explanation for this opinion. On its face, it is contrary to reason. It is a rule which is too obsolute to be true. A more reasonable approach would be that the facts of each case would necessarily require an independent evaluation after each separate surgery. Reason alone dictates that a person could be more impaired after a subsequent surgery than from an earlier surgery even though it occurred at the same level.

000105

Defendant's counsel argues that Dr. Morrison's position is supported by page 57 of the AMA Guides to Evaluation of Permanent Impairment, Second Edition, which assigned a disability rating for a disc removal, but does not assign additional disability to subsequent surgeries at the same level. However, at page 58 in the example in the left hand column this treatise allows a six percent impairment for an L1 fracture with 50 percent compression of the body and then allows an additional three percent impairment for an L1 fracture with fracture of the transverse process. Therefore, if two or more conditions occur at the same level, then additional measureable impairment may be taken into account. Dr. Hayne has explained why additional impairment did occur; whereas Dr. Morrison did not explain why additional impairment did not occur. Therefore, Dr. Hayne is adopted as the better evidence in this case. It might also be mentioned that he is the only treating physician and that Dr. Morrison is a one time evaluating physician. Rockwell Graphics Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Defendant's counsel correctly argued that Dr. Hayne incorrectly used the term impairment and disability interchangeably. This seems to be a common inadvertance of both doctors and attorneys and others in the workers' compensation area. Defendant's counsel himself used the term disability instead of impairment when referring to page 57 of the AMA Guides in his brief, whereas the Guides refer to impairment. The Supreme Court did the same thing in Olson, 255 Iowa 1112, 125 N.W.2d 251 (1963). The court used the term disability although it was obvious that they were discussing impairment ratings.

Defendant's counsel also correctly demonstrated that Dr. Hayne was incorrectly including some industrial disability factors of age, education and experience into his impairment ratings as well as physical factors. Defendant also correctly demonstrated that Dr. Hayne was not respecting the distinction between disability and impairment as delineated in the prefix to the AMA Guides. However, in this case the ratings of nine percent, nine percent and five percent for the three respective surgeries are all Dr. Hayne's figures. These numbers are comparable because Dr. Hayne's rating is compared only with Dr. Hayne's rating. Furthermore, impairment, or disability as the Supreme Court called it in Olson v. Goodyear, cannot be fixed with mathematical certainty, but rather a fair approximation is acceptable in dealing with an impairment rating. Id. at 251.

This discussion is somewhat academic, however, because the permanent disability in this case is to be evaluated industrially. There is no direct relationship between the physical impairment rating and the industrial disability award.

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability

000106

was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

Claimant is age 42. His entire adult working career from age 18 until the plant closed in December of 1984 has been spent in the meat packing industry. He learned all 63 jobs on the kill floor plus several other important jobs in the plant. He should be at the peak of his earnings career with a bright future until retirement in the meat packing industry where he has devoted all of his adult time, energy and effort. Instead, he can no longer perform these jobs due to the restrictions of a 40 pound weight restriction, no repetitive bending, and limitations on sitting and standing due to a work related injury which caused two lumbar laminectomies. In addition, the plant closed in December of 1984. In determining industrial disability and loss of earning capacity the words of the industrial commissioner in Michael v. Harrison County, Thirty-Fourth Biennial Report of the Industrial Commissioner 218, 219 (1979) apply to this case: "It is clear from claimant's testimony and that of the medical experts who testified that claimant's earning capacity has been impaired in that certain employment opportunities will be foreclosed to claimant."

In this case all packinghouse work has been foreclosed, which is claimant's chosen career field.

Claimant lost a little over one year's income after the plant closed until his third surgery on January 7, 1986. After the surgery he prudently enrolled in the electronics course at the Area Community College. It will be two years more before this course is completed. During this period claimant will be without employment income. Claimant is married, one stepdaughter is in college and one stepson is at home. Claimant testified to a sincere and comprehensive effort to find work after the plant closed. Cory v. Northwestern States Portland Cement Company, Thirty-Third Biennial Report of the Iowa Industrial Commissioner 104 (1976).

000107

Consideration should be given to the fact that claimant voluntarily initiated his own vocational rehabilitation effort. Curtis v. Swift Independent Packing, IV Iowa Industrial Commissioner Report 88 (1984). Consideration should also be given to the fact that employer did nothing to vocationally rehabilitate claimant except to hire a vocational rehabilitation consultant to make an evaluation two months prior to the hearing. Schelle v. Hygrade Food Products, Thirty-Third Biennial Report of the Industrial Commissioner 121, (1977). Claimant took a voluntary wage cut after the second surgery when he gave up plumbing to sharpen knives because Dr. Hayne told him he should be more careful about lifting and bending.

Leonhardt painted a bright picture of claimant's future employability provided he finishes the electronics course and provided he can find a job. Leonhardt also suggested that it might be necessary for claimant to relocate in order to find a job. The words of the industrial commissioner in the case of Stewart v. Crouse Cartage Company, File No. 738644 (Appeal Decision, February 20, 1987) again are pertinent.

> ...Defendants argue that if claimant finishes college and chooses business as a career, there are a multitude of career choices and the opportunities are limitless. However, it is claimant's present earning capacity which is relevant to determine claimant's industrial disability. At this point in time it is pure speculation to say what the earning potential of claimant would be if he indeed does complete college particularly considering his age.

It is true that the economy and employment situation in Fort Dodge, Iowa is very bad. Defendant is not liable for the fact that the earning capacity of the entire work force has been decreased. Webb v. Lovejoy Construction Company, II Iowa Industrial Commissioner Report 430, 435 (1981), District Court affirmed, Supreme Court appeal dismissed.

Nevertheless, claimant has sustained a severe industrial disability due to his loss of earning capacity. Based upon claimant's physical restrictions as a result of two lumbar surgeries, claimant's age of 42, his high school education, the qualifications and experience in the meat packing industry which he can no longer use, and his inability to engage in employment for which he is fitted such as home remodeling work and reconditioning cars, it is determined that claimant has sustained a 40 percent industrial disability to the body as a whole as a result of the injury that occurred on December 5 or 7, 1983. Permanent partial disability benefits are to commence on July 9, 1984 when his first healing period ended and Dr. Hayne released him to return to work. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). The permanent partial disability period is to be interrupted by the second period of healing period benefits.

000108

## FINDINGS OF FACT

Based upon the evidence presented, the following findings of fact are made:

That claimant fell at work on December 5 or 7, 1983.

That claimant reported the fall to his immediate supervisor, Jack Eastman.

That the fall was the cause of a lumbar laminectomy on March 22, 1984.

That claimant was off work from March 21, 1984 to July 9, 1984 on account of the March 22, 1984 surgery.

That claimant continued to have problems and required another lumbar laminectomy on January 7, 1986.

That the surgery of January 7, 1986 was caused by the fall on December 5 or 7, 1983.

That a reasonable recovery period for claimant's time off work after the January 7, 1986 surgery would be 15 weeks and six days, which is the same length of time that Dr. Hayne allowed for the earlier surgery of March 22, 1984.

That claimant sustained an impairment of approximately 14 percent to the body as a whole as a result of these two surgeries according to Dr. Hayne, his treating physician.

That claimant is age 42; spent his entire adult working career in the meat packing industry; learned all 63 jobs on the kill floor, plus several other important jobs in the plant; and that he is now foreclosed from performing these jobs due to the restrictions imposed as the result of his two lumbar laminectomies.

That claimant made a sincere effort to find work.

That claimant voluntarily initiated his own vocational rehabilitation effort.

That defendant did not assist claimant in his vocational rehabilitation effort or pay any workers' compensation benefits of any kind prior to hearing.

That when claimant should be at the peak earnings point in his meat packing industry career, he has been forced to learn a new career field in which he has worked very hard and is doing quite well, but there is much to be accomplished before claimant is reestablished as a competitor in the competitive labor market.

000109

That claimant sustained a 40 percent industrial disability to the body as a whole as a result of the December 5 or 7, 1983 fall.

That claimant incurred medical expenses in the amount of $10,114.04 as shown in exhibit 3.

That defendants are entitled to a credit for medical expenses paid by a non-occupational group health plan prior to hearing in the amount of $3,529.19 as stipulated.

## CONCLUSIONS OF LAW

WHEREFORE, based upon the evidence presented and the principles of law previously discussed, the following conclusions of law are made:

That defendant failed to sustain the burden of proof by a preponderance of the evidence that claimant failed to give notice as required by Iowa Code section 85.23.

That claimant did sustain the burden of proof by a preponderance of the evidence that he sustained an injury on December 5 or 7, 1983 which arose out of and in the course of his employment with the employer.

That the injury was the cause of a healing period for 15 weeks and six days following each of his surgeries.

That the injury was the cause of permanent partial disability commencing on July 9, 1984 but interrupted by the second period of healing period benefits.

That claimant is entitled to healing period benefits for 15 weeks and six days after the surgery on March 22, 1984 and 15 weeks and six days following the surgery on January 7, 1986.

That claimant is entitled to 200 weeks of permanent partial disability benefits based upon a 40 percent industrial disability to the body as a whole.

That claimant is entitled to payment of medical expenses in the amount of $10,114.04 as shown in exhibit 3.

That defendant is entitled to a credit under Iowa Code section 85.38(2) for medical expenses paid prior to hearing under an employee non-occupational group plan in the amount of $3,529.19.

## ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant fifteen point eight-five-seven (15.857) weeks of healing period benefits for the period March 21, 1984 to July 9, 1984 at the rate of two hundred thirty-six and 51/100 dollars ($236.51) per week in the total amount of three thousand seven hundred fifty and 34/100 dollars ($3,750.34).

That defendant pay to claimant fifteen point eight-five-seven (15.857) weeks of healing period benefits for the period from January 7, 1986 to April 27, 1986 at the rate of two hundred thirty-six and 51/100 dollars ($236.51) per week in the total amount of three thousand seven hundred fifty and 34/100 dollars ($3,750.34).

That defendant pay to claimant two hundred (200) weeks of permanent partial disability benefits at the rate of two hundred thirty-six and 51/100 dollars ($236.51) per week in the total amount of forty-seven thousand three hundred two and no/100 dollars ($47,302.00) based upon a forty percent (40%) industrial disability to the body as a whole.

That defendant pay to claimant ten thousand one hundred fourteen and 04/100 dollars ($10,114.04) in medical expenses as shown in exhibit 3.

That defendant is entitled to a credit under Iowa Code section 85.38(2) for three thousand five hundred twenty-nine and 19/100 dollars ($3,529.19) of medical benefits paid prior to hearing under an employee non-occupational group plan as stipulated.

That interest will accrue under Iowa Code section 85.30 on workers' compensation weekly benefits.

That all accrued benefits be paid in a lump sum.

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

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

Signed and filed this 3rd day of December, 1987.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

000111

Copies To:

Mr. Robert L. Ulstad
Attorney at Law
1031 Central Ave.
P. O. Box 1678
Fort Dodge, Iowa 50501

Mr. R. Ronald Pogge
Mr. Helmut A. Mueller
Attorneys at Law
Terrace Center, STE 111
2700 Grand Avenue
Des Moines, Iowa 50312

Mr. Bryan J. Arneson
Mr. E. S. Bikakis
Attorneys at Law
340 Insurance Centre
507 7th St.
Sioux City, Iowa 51101

1106; 1108.50; 1401; 1402.20
1402.30; 1402.40; 1402.50
1402.60; 1403.30; 1802; 1803
2401; 2801; 2802; 2803
Filed December 3, 1987
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| LARRY BEYER,<br><br>Claimant,<br><br>vs.<br><br>IOWA BEEF PROCESSORS, INC.,<br><br>Employer,<br>Self-Insured,<br>Defendant. | : | FILE NO. 759698<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

1106; 1108.50; 1401; 1402.20; 1402.30; 1402.40; 1402.50; 1402.60; 1403.30; 1802; 1803; 2401; 2801; 2802; 2803

Claimant sustained the burden of proof by a preponderance of the evidence of (1) injury arising out of and in the course of employment; (2) causal connection to temporary and permanent disability; and, (3) entitlement to healing period and permanent partial disability benefits.

Claimant gave proper notice.

Claimant, age 39, career packinghouse employee, who could perform all of the jobs on the kill floor and several other jobs was foreclosed from this kind of work due to his restrictions after two laminectomies. Also, plant closed. Claimant initiated his own vocational rehabilitation effort. Employer paid no workers' compensation benefits and made no attempt to assist claimant with his vocational rehabilitation. Claimant made a serious effort to find work. When he could not, he enrolled in a 2 year electronics course. Claimant awarded 40 percent industrial disability.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

| | | |
|---|---|---|
| ROBERT A. BIRD,<br><br>Claimant,<br><br>vs.<br><br>T.H.I. COMMAND HYDRAULICS,<br><br>Employer,<br><br>and<br><br>UNITED STATES FIDELITY & GUARANTY,<br><br>Insurance Carrier,<br>Defendants. | : | FILE NO. 692179<br><br>R E V I E W -<br><br>R E O P E N I N G<br><br>D E C I S I O N<br><br>FILED<br><br>DEC 21 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

---

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Robert A. Bird, claimant, against T.H.I. Command Hydraulics, employer (hereinafter referred to as T.H.I.), and United States Fidelity & Guaranty, insurance carrier, defendants, for additional workers' compensation benefits as a result of an alleged injury on January 18, 1982. A prior settlement for this injury under Iowa Code section 86.13 was filed on June 30, 1983 and approved by this agency on July 26, 1983. On December 15, 1987, a hearing was held on claimant's petition in this proceeding and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Kathryn Schrott, Connie Bird and Pricilla Waitek. The exhibits received into the evidence at the hearing are listed in the prehearing report. According to the prehearing report, the parties have stipulated to the following matters:

1. On January 18, 1982, claimant received an injury which arose out of and in the course of employment with T.H.I. and was a cause of a period of total disability during a period of recovery from the injury and of permanent disability.

000113

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $143.28 per week.

3. All requested medical benefits have been or will be paid by defendants.

## ISSUE

The only issue submitted by the parties is whether there has been a change of condition causally connected to the original work injury warranting an additional award of weekly disability benefits.

## SUMMARY OF THE EVIDENCE

The following is a summary of evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision. Furthermore, any attempted summarization of evidence will inevitability contain conclusions regarding the evidence. To the extent any of the foregoing statements are conclusionary, they should be considered as preliminary findings of fact for purposes of this decision.

At the request of the parties, official notice was taken of the 1983 settlement papers and supporting documentation. The settlement agreement contained the following stipulation:

> That following the injury of October 14, 1981 Claimant sought medical attention and returned to work prior to the minimum time loss necessary to recover temporary/total disability benefits and worked continuously with the Employer herein until the subsequent injury of January 18, 1982; that following the injury of January 18, 1982 Claimant sought medical attention and was ultimately referred to Dr. Robert McCoy of Surgical Associates of North Iowa, P.C. and that Dr. McCoy made various efforts to try to return Claimant to his employment without success until he finally released him to return to work on May 20, 1982 after which Claimant worked for approximately one and one-half weeks and then was terminated by the Employer as a result of a dispute relating to vacation time; Claimant was thereafter unemployed until he obtained employment with Crabtree Construction Company on or about September 3, 1982; Claimant suffered a temporary exacerbation or aggravation of his physical condition on or about September 4, 1982 while an employee of Crabtree Construction and remained temporarily/totally

000114

disabled until November 27, 1982 at which time the period of temporary/total disability relating to the September 4 episode terminated. That Claimant continued to heal from the most significant injury of January 18, 1982 following November 27, 1982 and reached maximum medical recuperation on or about March 18, 1983;...

Claimant testified that in October, 1981, he injured his back while he was handling gas cylinders at work. Claimant stated that he suffered low back pain and missed work for two or three days. Claimant testified that he recovered from this episode and returned to full duty at work. In January, 1982, claimant testified that he slipped on the floor at work which was covered with hydraulic fluid. Claimant stated that he fell twisting his back. Claimant further testified that despite several attempts by his treating physicians to return him to work after this incident he was not able to do so on a permanent basis. Claimant testified that he believes that T.H.I. terminated him in the summer of 1982 because they were getting upset over his absences from work. Claimant also testified that he considered resigning anyway due to his back problems.

After leaving T.H.I., claimant worked for Crabtree Construction. Claimant testified that he left this job due to his back pain. Claimant then agreed to a special case settlement of his compensation claims against Crabtree in which Crabtree denied the compensability of any alleged injury while working at Crabtree. Claimant was unemployed at the time of the 1983 settlement with T.H.I.

After the January, 1982 incident, claimant was under active treatment for low back pain primarily with Robert E. McCoy, M.D., an orthopedic surgeon in the Mason City area. This treatment remained conservative over several months with little objective evidence of radiculopathy. The treatment consisted primarily of bed rest, physical therapy exercises and prescription medications. During the summer of 1982, claimant was treated with epidural injections or nerve blocks at the Sister Kenny Institute for Low Back Care in Minneapolis, Minnesota under the direction of Alexander Lifson, M.D., the assistant medical director. According to Dr. Lifson, claimant improved from such therapy.

Claimant's past medical history includes several injuries before 1982. In 1964, claimant underwent a resection of a necrotic lymph gland. In 1969, claimant fractured his left clavical and was treated without subsequent complications. In 1975, claimant drove an automobile into an embankment while he was intoxicated and received multiple contusions and a laceration in the left forehead. On two occasions in 1975, claimant complained to physicians of soreness in his back and was treated by physicians. In 1979, claimant was involved in a fight and received contusions and lacerations about the right eye. There

000115

is no indication from any of this evidence that claimant suffered any permanent incapacities or was permanently limited in his physical activity by any treating physician following any of these injuries.

Prior to the settlement in 1983, four physicians rendered percentage opinions as to the extent of claimant's impairment following the January, 1982 work injury. The primary treating physician, Dr. McCoy, finally opined in March, 1983, that claimant suffered from a 10 percent permanent partial impairment to the body as a whole as the result of the January, 1982 injury. Dr. McCoy stated at that time that claimant would not be able to maintain employment which required "forceful" use of his back with heavy lifting, twisting or working in a bent over position. Dr. McCoy restricted claimant's lifting activities to 15 to 20 pounds. Dr. McCoy did indicate that claimant could tolerate prolonged sitting, standing and walking although this opinion had changed from earlier statements made by Dr. McCoy. Also in March, 1983, claimant was evaluated by John R. Walker, M.D., another orthopedic surgeon from Waterloo, Iowa. Dr. Walker opined that claimant suffered from a 15 percent permanent partial impairment, 12 percent of which was attributable to the January, 1982 incident. Dr. Walker indicated that claimant would be able to lift up to 25 pounds if there were no bending or lifting involved. A. J. Wolbrink, M.D., orthopedic surgeon, opined in May, 1983, that claimant suffered from a 15 percent permanent partial impairment. Dr. Wolbrink did not describe claimant's physical limitations. Thomas A. Carlstrom, M.D., a neurosurgeon rated claimant's impairment in January, 1983, as constituting a six-seven percent permanent partial impairment, 70 percent of which was attributable to the January, 1982 work injury. Dr. Carlstrom also described claimant's physical limitations as consisting of lifting no more than 15 to 25 pounds and no heavy excertion, prolonged sitting, standing or forward bending.

However, at the time of his deposition, Dr. McCoy stated that he believed that claimant should return to the Sister Kenny Institute for further injection treatment and expected claimant's permanent impairment rating to improve from this therapy. Claimant underwent this therapy and was greatly improved at the time of the June and July T.H.I. settlement. Dr. Lipson, who was claimant's primary physician at the time, released claimant for full duty without restrictions despite a diagnosis of a bulging disc at the L4-5 level of claimant's spine and a small herniated disc at the L5, S1 level. Claimant also was released for full duty by Dr. McCoy's associate, R. Emerson, M.D., who stated in June, 1983, that Dr. McCoy would concur in a full release as claimant was asymptomatic at the time.

Claimant testified that at the time of the 1983 settlement he felt good and fully expected to return to welding work.

000116

Claimant then returned to work in 1985 as a welder at Harvest Trailers. Claimant described the physical requirements of this job as medium and he earned approximately $5.50 per hour from such work. However, claimant's employment at Harvest Trailers did not last and claimant testified that he eventually quit after two or three months because the work simply involved too much bending. During this employment claimant had sought further treatment from Dr. McCoy in July, 1985. Dr. McCoy at that time referred claimant back to the Sister Kenny Institute for further injections. This time the procedure failed to alleviate claimant's symptoms.

Claimant testified that since the 1983 settlement his back has gradually become worse. Claimant states that his back is now more susceptible to injury. After only minor lifting or physical activity such as lifting a 10 pound piece of lumber, it takes two to three weeks to recover from the resulting pain. Claimant testified that his ability to tolerate sitting, standing and walking has deteriorated. Finally, claimant stated that the length of time it takes for him to recover from his episodes of back pain is now much longer than it was at the time of the settlement.

Dr. McCoy states in his report of October, 1986, that claimant's failure to improve from the Sister Kenny Institute therapy was not anticipated by him when he rated claimant in 1983 and that claimant is now suffering from a 20 percent permanent partial impairment. Dr. McCoy also imposes the same physical restrictions on claimant's activity as he had in March, 1983, except that claimant is now prohibited from prolonged standing and sitting. The only other physician to render an opinion as to any change of condition since 1983 is Dr. Wolbrink who now states that claimant's condition is unchanged "over the past few years." Dr. Wolbrink fully expected claimant to continue to have difficulty in the future. Claimant's care at the present time remains conservative with occasional visits to Dr. McCoy. No treating physician at present has recommended surgery.

Claimant testified that he really has not had steady employment since leaving T.H.I. Currently he welds on occasion for one of his acquaintances on a part-time basis. Claimant has applied at various places in the Mason City area but has received no offers of employment. Claimant is currently working on obtaining his GED and has passed two portions of this test and is working on passing the remaining three.

Claimant is 36 years of age and has an eighth grade formal education. Claimant has no other formal schooling or training since the eighth grade. Claimant currently possesses certificates in welding but all certificates were obtained from on-the-job training. Since grade school, claimant has worked as a carpenter,

000117

forklift driver, grain elevator laborer, punch press operator, truck driver, assembly line builder of campers and as a skill welder in a manufacturing environment. His most skilled employment has been as a welder over the last few years and he became a welding supervisor for one employer before working for T.H.I. Most of claimant's work in the past has required heavy lifting and repetitive lifting and bending. Claimant plans to continue his efforts to require a GED and he would like to go to a machinist school in the future.

Claimant's wife testified that claimant has a very poor memory and has difficulty reading and writing. She explains that claimant had to study all day long to pass the two parts of the GED test. She testified that she helped claimant look for work and that claimant's employment is important to her and her family for financial reasons and that she desires claimant to return to work.

Kathryn Schrott, a qualified vocational rehabilitation counselor opined from her discussions with claimant and review of claimant's medical and vocational records that claimant is not employable. Although she stated she was familiar with the local labor market, she did not perform a labor market job availabilities survey. Schrott describes several limiting factors for any vocational rehabilitation effort on behalf of claimant. Claimant's intelligence on the standard Wexler IQ test is only 80, the low end of the dull normal range. Claimant has below average visual motor coordination. Claimant can read only at the fourth to sixth grade level and is a "slow reader." Despite a varied work history claimant has no transferable skills due to his physician imposed restrictions and the unpredictability of claimant's flare-ups and back pains which require extensive recuperation. She believes that claimant will have a difficult time in any attempt at retraining. Although claimant desires to attend machinist school, Schrott expresses doubts as to the success of any such endeavor due to claimant's low intellectual abilities and lack of hand and eye coordination.

Pricilla Waitek, another qualified vocational rehabilitation counselor retained by defendants, opines that claimant is employable. She points out that Dr. McCoy does feel that claimant could return to supervisory welding work and that occasionally such jobs do open up in the Mason City area. She also identified five light duty jobs from the dictionary of occupational titles that claimant could perform according to Dr. McCoy's restrictions given claimant's past transferable skills. These jobs consist of cable maker/assembler, welding machine operator, welding inspector, offset press operator, and dry cell tester/storage battery inspector/battery assembler. Waitek admitted that she has not contacted any local employers to determine the availability of these jobs in the Mason City area, the area of claimant's residence. Waitek plans to continue

000118

working with claimant to obtain his GED and she will then enroll claimant in a job training course to improve claimant's job seeking skills.

From his demeanor and appearance while testifying, claimant appeared to be testifying in a candid and truthful manner.

## APPLICABLE LAW AND ANALYSIS

In a review-reopening proceeding, claimant has the burden of establishing by a preponderance of the evidence that he suffered a change of condition or a failure to improve as medically anticipated as a proximate result of his original injury subsequent to the date of the award or agreement for compensation under review, which entitles him to additional compensation. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa 1969); Myers v. Holiday Inn of Cedar Falls, Iowa, Iowa App. 272 N.W.2d 24 (1978). Such a change of condition is not limited to a physical change of condition. A change in earning capacity subsequent to the original award which is proximately caused by the original injury also constitutes a change of condition under Iowa Code section 85.26(2) and 86.14(2). See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled as a result of any alleged change of condition. As the claimant has shown that the work injury was a cause of a permanent physical impairment or limitation upon activity involving the body as a whole, the degree of permanent disability must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity resulting from the work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physical impairment or restriction on work activity may or may not result in such a loss of earning capacity. The extent to which a work injury and a resulting medical condition has resulted in an industrial disability is determined from examination of several factors. These factors include the employee's medical condition prior to the injury, immediately after the injury and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is

000113

fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

In the case sub judice, claimant first has established a change of physical condition or a deterioration of his condition since the July, 1983, settlement. At the time of the settlement, claimant was significantly improved from his condition as had been rated in early 1983 by Drs. McCoy, Walker, Wolbrink and Carlstrom. Claimant was actually released to full duty without restrictions in June, 1983, by Dr. Lipson, an associate of Dr. McCoy, his primary treating physicians at the time. Claimant credibly testified that he was feeling good and given the releases by his physicians, he reasonably expected to return to welding work. However, after attempting such work in 1985, claimant soon learned that this was not possible and what improvement he made in July, 1983, was very short lived. Claimant's chronic low back problems reappeared and this time the injections at the Sister Kenny Institute did not help. Claimant's condition has remained essentially stable since 1985 with frequent flare-ups in back pain requiring extensive periods of recovery. Claimant now, unlike before, has considerable difficulty with prolonged sitting and standing which is devastating for a welder in a manufacturing environment.

Admittedly, Dr. McCoy's views are somewhat inconsistent in that he supposedly rated claimant in 1983 before his expectations as to the success of the treatment at the Sister Kenny Institute. However, the fact remains that he finds claimant now to be 20 percent permanently partially impaired and the views of Dr. Wolbrink cannot be given greater weight over those of the treating physician who was most familiar with claimant's clinical symptomatology. Also, Dr. Wolbrink's views are really not that clear because one does not know what Dr. Wolbrink meant by "over the last few years" and whether or not this included the time of the settlement.

As contended by claimant in this proceeding, claimant's change of condition since the 1983 settlement which has resulted in his inability to return to welding work places claimant into the so-called "odd-lot" category. It is clear from the evidence presented that claimant is capable of light duty work. However, there is no presumption that merely because the worker is physically able to perform certain work, such work is available. Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985). Claimant has shown that he is not physically able to return to the work to which he is best suited given his past experience and training as the result of his disability. Claimant has further shown that he has made a reasonable effort albeit unsuccessful to locate suitable replacement employment in the area of his residence. Therefore, claimant has established a

000120

prima facie case of total disability by producing substantial evidence that he is not employable in the competitive labor market under the so called "odd-lot" doctrine. Id. at 101.

A worker becomes an "odd-lot" employee when an injury makes the worker incapable of obtaining employment in any well known branch of the labor market. Id. at 105. An odd-lot worker can only perform services that are so limited in quality, dependability or quantity that a reasonable stable market for them does not exist.

The Guyton court ultimately held that when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence of availability of employment shifts to the employer. If the employer fails to produce such evidence and if the trier of fact finds that the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Id. at 106.

In the case at bar, defendants did attempt to go foreward with the evidence by retaining a vocational rehabilitation consultant who testified that claimant was employable at the hearing. However, defendants did not offer evidence of the actual availability of employment to claimant in the geographical area of his residence, the Mason City area. The vocational consultant only identified light duty jobs that claimant was able to perform without performing a labor market survey to determine the availability of any of the jobs in or near claimant's residence. As stated in Guyton, there is no longer a presumption that light duty jobs do in fact exist.

Claimant is further found to be in the odd-lot category. Claimant's treating physician, Dr. McCoy, has given claimant a 20 percent permanent partial impairment rating to the body as a whole. Any impairment prior to the work injury is not important as the record did not indicate that such impairment resulted in any form of work disability. Apportionment of a disability between a preexisting condition and an injury is proper only when there is some ascertainable disability which existed independently before the injury occurred. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984).

Claimant's physicians have restricted claimant's work activities by prohibiting tasks such as heavy lifting, repetitive lifting, bending and twisting and prolonged sitting and standing. Claimant's medical condition prevents him from returning to his former work or any other work which requires claimant to violate his work restrictions.

Claimant is 36 years of age and in the middle of his working career. His loss of future earnings due to his disability is

000121

much more severe than would be the case for an older or younger individual. See Becke v. Turner-Busch, Inc., Thirty-Fourth Biennial Report of the Iowa Industrial Commissioner 34 (1979); Walton v. B. & H Tank Corp., II Iowa Industrial Commissioner Report 426 (1981).

Claimant only has an eighth grade education and exhibited below average intelligence at the hearing and in the previous testing of his IQ. Claimant has limited intellectual skills and reading abilities. His chance for successful vocational rehabilitation through retraining appear very bleak.

After examination of all of the factors of industrial disability, it is found as a matter of fact that claimant has suffered a total loss of earning capacity from his change of condition since July, 1983. Based on such a finding, claimant is entitled as a matter of law to permanent total disability benefits under Iowa Code section 85.34(3) during the period of disability.

Defendants contend that claimant is not entitled to the costs of obtaining medical reports described in the prehearing report in a review-reopening proceeding. The undersigned can find no authority which limits the award of costs under Division of Industrial Services Rule 343-4.33 to arbitration proceedings. Therefore, the $85.00 requested by claimant in the prehearing report for two reports from Dr. McCoy will be taxed against defendants.

## FINDINGS OF FACT

1. Claimant was a credible witness.

2. Claimant was in the employ of T.H.I. at all times material herein.

3. On July 26, 1983, the work injury of January 18, 1982, was a cause of less than a 10 percent permanent partial impairment to the body as a whole and did not result in any permanent restrictions upon claimant's physical activities.

4. Since July 26, 1983, claimant's physical condition has deteriorated and the work injury of January 18, 1982 is now a cause of a 20 percent permanent partial impairment to claimant's body as a whole and of permanent restrictions upon claimant's physical activities consisting of no lifting over 15 to 20 pounds, no repetitive lifting, bending, twisting, or prolonged sitting or standing. Claimant currently experiences episodes of pain which are much more frequent and more severe than those in June, 1983, which requires a much longer time of recovery.

000122

5. The work injury of January 18, 1982 and the change of condition since July 26, 1983, along with the additional permanent partial impairment, is a cause of a total loss of earning capacity. Claimant is 36 years of age and only has an eighth grade education. Claimant intellectually performs at the low end of the dull normal range. Claimant has a very poor memory and has difficulty reading and writing. Claimant's past employment had been primarily in heavy manual labor and in skilled welding work. Claimant has attempted to return to welding work but cannot do so because of his disability. Claimant has not returned to full time work and only occasionally welds within his physical limitations for a personal friend and acquaintance. Claimant has made a reasonable and unsuccessful effort to find suitable gainful work within the geographical area of his residence. Claimant has little or no potential for vocational rehabilitation either through retraining or on-the-job training. Claimant is only currently able to perform services which are so limited in quality, dependability or quantity that a reasonable stable market for them does not exist. Claimant is not employable in the competitive labor market within the geographical area of his residence.

## CONCLUSIONS OF LAW

Claimant has established entitlement to permanent total disability benefits as awarded below.

## ORDER

1. Defendants shall pay to claimant weekly benefits for permanent total disability during the period of his disability at the rate of one hundred forty-three and 28/100 dollars ($143.28) per week beginning on March 19, 1983 with defendants receiving credit for weekly benefits paid under the previous settlement approved by this agency on July 26, 1983.

2. Defendants shall pay accrued weekly benefits in a lump sum.

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

4. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and specifically defendants shall be taxed the sum of eighty-five and no/100 dollars ($85.00) in favor of claimant for the reports of Dr. McCoy as set forth in the prehearing report.

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

000123

Signed and filed this 21st day of December, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert S. Kinsey, III
Attorney at Law
214 North Adams
P. O. Box 679
Mason City, Iowa 50401

Mr. Richard R. Winga
Attorney at Law
300 American Federal Bldg.
P. O. Box 1567
Mason City, Iowa 50401-8567

000124

FILED

NOV 25 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| RICHARD L. BITTNER,<br><br>Claimant,<br><br>vs.<br><br>WILSON FOODS CORPORATION,<br><br>Employer,<br>Self-Insured,<br><br>and<br><br>SECOND INJURY FUND OF IOWA,<br><br>Defendants. | : | File Nos. 742180<br>757672<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This proceeding involves two actions in arbitration brought by Richard L. Bittner against Wilson Foods Corporation and the Second Injury Fund of Iowa. The injury dates in question are August 19, 1983 and February 14, 1984. The files were consolidated for purposes of hearing and the hearing was conducted on June 23, 1987.

The record in the proceeding consists of testimony from Richard L. Bittner and Gail Leonhardt. The record also contains claimant's exhibits 1 through 15 and exhibits from the Second Injury Fund identified as exhibits A, B, C and D.

## ISSUES

The issue presented by the parties at the time of hearing is determination of claimant's entitlement to compensation for permanent partial disability, including permanency from the Second Injury Fund.

It was stipulated by the parties that Bittner had sustained injury which arose out of and in the course of his employment on or about July 7, 1968 and on or about August 19, 1983. The claimed injury of February 14, 1984 was disputed.

Claimant stipulated that section 85.26 barred any further recovery from the employer based upon the 1968 injury.

Claimant is making no further claim for additional temporary

total disability or healing period based upon either the 1983 or the 1984 injuries.

It was stipulated by the parties that, in the event of an award, the rate of compensation for the 1983 injury is $203.82 per week and for the 1984 injury, $212.38 per week.

It was stipulated that the employer has not paid any permanent partial disability compensation for any injury to claimant's knees.

It is claimant's claim that he injured his left knee in 1968 or 1970, the right knee in 1983 and the left knee again in 1984. The employer contends that all of the permanency in claimant's left leg resulted from the 1968-1970 injury and that the 1984 injury did not cause any permanent disability. The employer further contends that any permanent disability in the claimant's right knee is a result of degenerative arthritis and did not result from the injury that occurred on August 19, 1983. The Second Injury Fund contends that, where two injuries occur, while the employee is in the employment of the same employer, the Second Injury Fund has no liability as a matter of law. The Fund also disputes the nature and existence of permanent disability affecting claimant's knees.

## SUMMARY OF THE EVIDENCE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case even though it may not necessarily be referred to in this decision.

Richard L. Bittner is a 40-year-old married man who has been employed by Wilson Foods Corporation since September 16, 1968. Prior to commencing employment with Wilson Foods, he engaged in construction work. He was trained as a bricklayer. Claimant also has worked at an elevator where he drove a truck and mixed feed. Bittner has served in the army reserve since 1966. Most recently, he has worked in field artillery and in the military police.

Claimant testified that he had no health problems or serious accidents while growing up. He related that he was examined when he commenced employment at Wilson Foods and that he has had several physical examinations while in the army reserve.

Claimant testified that he has held a number of different positions at Wilson Foods, but that all of the jobs were performed while standing on a concrete floor.

Claimant testified that in December, 1970, he slipped and injured his left knee by striking it on the floor. He related

that he was off work for a couple of months, had surgery that was performed by D. G. Paulsrud, M.D., in which cartilage was removed, and then returned to work. Claimant related that he received workers' compensation while he was off work from that injury.

Claimant testified that, after his return to work, he continued to have problems with his left knee and that it has worsened with the passage of each year bringing more pain and aching.

Bittner testified that he injured the left knee again on February 14, 1984 when he jumped off a stool backwards. He testified that, the next day, he was treated by Keith Garner, M.D., but was not taken off work due to that 1984 injury. He related that the knee remained sore and tender for at least two weeks following the incident.

Bittner testified that, on August 19, 1983, he was pulling a conveyor that had stuck and that, in doing so, his foot slipped and he hyperextended his right knee. Claimant was treated briefly by Dr. Garner and then referred to M. E. Wheeler, M.D., an orthopaedic surgeon (exhibit 13, page 2). Arthroscopic surgery performed on September 6, 1983 revealed an acute fracture of the lateral femoral condyle and also disclosed chronic, degenerative changes in other parts of the knee. A fragment of articular cartilage was removed and the edges were trimmed (exhibit 11, page 5). After a period of recovery, claimant was released to return to work on October 3, 1983 (exhibit 11, page 3).

Bittner continued to complain of his knees and Dr. Wheeler indicated that a valgus tibial osteotomy should be considered. Claimant was scheduled for the procedure on July 23, 1985, but was found to have advanced degenerative changes in the knee and the osteotomy surgery was cancelled (exhibit 11, pages 3 and 6-9). After a period of recovery, claimant was released to return to work on December 2, 1985 (exhibit 11, page 10).

Dr. Wheeler has indicated that claimant clearly has degenerative arthritis that has impaired both claimant's knees. In exhibit 2, a report dated December 2, 1985, Dr. Wheeler states:

> In regards to my letter on Richard Bittner in October of 1985, I am afraid I was not very clear. As I stated Mr. Bittner has degenerative arthritis in both of his knees. The left knee degenerative arthritis is due to the meniscectomy he had in 1970 following a work accident. It has been well documented that total meniscectomies lead to degenerative arthritis ten or fifteen years later. Regarding his right knee he has had multiple

smaller injuries while at work and he has been working on concrete for fifteen years. I feel this does lead to degenerative arthritis in joint and has probably lead [sic] to the degenerative arthritis in his right knee.

In the October letter, which was being clarified (exhibit 3), Dr. Wheeler had stated:

In regards to your inquiries on Richard Bittner, he has impairment rating on both knees. At this time it is due to the degenerative arthritis present in the knees. The injuries he sustained aggravated this condition but did not cause it. The patient did relate to me that his meniscectomy in 1971 was because of a work injury. I believe the degenerative changes in his left knee can be related to that meniscectomy.

The impairment rating arrived at by Dr. Wheeler was 30% of each leg (exhibits 4 and 5).

Dr. Wheeler recommended that claimant restrict his activities according to the pain and discomfort he experienced. He felt that claimant would not be able to tolerate working on concrete or standing for an extended length of time (exhibits 4, 6 and 7).

Bittner, as a member of the army reserve, has undergone regular, periodic physical examinations. In those examinations, he has not disclosed any particular problems with his knees. He has, however, on occasion received medical restrictions which have enabled him to avoid activities such as running, jumping, military drills or other vigorous use of his knees (exhibits 1, 8, 9, 10, A and C).

## APPLICABLE LAW AND ANALYSIS

The parties stipulated that too much time had elapsed for claimant to attempt to reopen based upon the 1963-1970 injury even though it appears to have been a precipitating cause for the degenerative arthritis in claimant's left knee which Dr. Wheeler has rated as having a 30% impairment.

Claimant testified to an acute incident occurring on February 14, 1984. The incident is corroborated by exhibit 13 which shows that claimant sought care for his left knee on February 15, 1984. Claimant has carried the burden of proving that he sustained an injury to his left knee which arose out of and in the course of employment on February 14, 1984. Claimant has not, however, introduced any evidence to show that he is entitled to any benefits, other than payment of the expenses of medical treatment. Claimant testified that he missed no work on account

of that injury. There is no evidence from any source in the record to indicate that claimant sustained any temporary or permanent disability to his left knee as a result of the February 14, 1984 injury. No further benefits can be awarded based upon that injury.

The injury of August 19, 1983 was clearly a substantial injury. Claimant was off work, underwent surgery and objective evidence of recent injury was found in the course of that surgery. The employer has stipulated that claimant sustained injury which arose out of and in the course of employment on August 19, 1983. The issue is whether or not that injury produced any permanent disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 19, 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).

The only medical evidence regarding compensation comes from Dr. Wheeler. He indicated in exhibit 2 that degenerative arthritis in the left knee is due to the 1970 meniscectomy. He indicated that multiple smaller injuries while at work and while working on concrete for fifteen years have probably led to degenerative arthritis in claimant's right knee (exhibit 2). In exhibit 3, Dr. Wheeler indicates that the impairment in claimant's knees is due to degenerative arthritis and that the injuries he sustained aggravated the condition, but did not cause it. In exhibit 7, Dr. Wheeler indicated that arthritis in the right knee was definitely aggravated by claimant's work in a standing position. At no point in the record does Dr. Wheeler indicate why standing on concrete and multiple small injuries would lead to degenerative arthritis in the right knee, but that the same

activities of standing on concrete for years would not lead to degenerative arthritis in the left knee which was apparently weakened by the 1970 meniscectomy. In exhibit 2, Dr. Wheeler refers to "...multiple smaller injuries while at work..." The doctor does not specify the injuries to which he is referring. The doctor continues on from that statement "...and he has been working on concrete for fifteen years. I feel this does lead to degenerative arthritis in joint and has probably lead [sic] to the degenerative arthritis in his right knee." The only rational meaning which can be ascribed to that statement is that the doctor feels that working on concrete led to the degenerative arthritis in the right knee. The doctor rates claimant as having a 30% impairment of the right leg attributable to degenerative arthritis. He does not, however, provide any separate or distinct impairment rating for the fractured femoral condyle or for the cartilage removal that was performed in the 1983 surgery. Normally, a surgery of that type, following an acute injury, results in an impairment rating of approximately 10-15% of the leg, even in the absence of any degenerative condition being observed. No such rating was made, however, in this case. The record provides no basis for apportioning any of the disability in the right leg between the August 19, 1983 injury and the degenerative condition. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984).

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

When an aggravation occurs in the performance of an employer's work and a causal connection is established, claimant may recover to the extent of the impairment. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960).

Since none of the current disability had been related to the 1983 injury, claimant has failed to establish that the acute injury of August 19, 1983 was a proximate cause of any of the permanent disability that currently exists in his right knee.

Claimant's only remaining potential for a recovery in this case is under a cumulative trauma doctrine as recognized by the Iowa Supreme Court in McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). One significant part of the McKeever case is that it held the date of injury to be the date at which the effects of the cumulative trauma became disabling. The court seemed to adopt what could be characterized as an occupational

disease type of process for cumulative trauma injuries. (See sections 85A.4 and 85A.5). In the case now under consideration, the degenerative arthritis has apparently not yet resulted in disablement in the sense of preventing Bittner from performing his normal work. All of the times for which claimant has sought and received temporary total disability compensation were initiated by an identifiable incident of acute trauma.

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.

Injury from cumulative trauma is not easily distinguished from changes in the human body incident to the general processes of nature, even though such natural change may come about because the life has been devoted to labor and hard work. Dr. Wheeler does not provide any guidance on whether the degenerative condition is a personal injury rather than natural changes resulting from a life of hard work. Therefore, any attempt to

recover based upon a cumulative trauma theory must be denied.

Since the evidence fails to show a second injury producing permanent partial disability in one of the members designated in section 85.64, the Second Injury Fund has no liability in this case.

Claimant's petition alleged an injury to the right elbow. Exhibit 13 contains notes of claimant having problems with his elbow commencing on June 11, 1984 and running through March 20, 1985. The note indicates that claimant returned to work with medication. The record is otherwise silent, particularly with regard to whether the elbow condition resulted in any temporary or permanent disability or in any absence from work. No award for the right elbow can be made under the record.

## FINDINGS OF FACT

1. On August 19, 1983, Richard L. Bittner was a resident of the state of Iowa and was employed by Wilson Foods Corporation within the state of Iowa.

2. Bittner sustained an injury to his right knee which arose out of and in the course of his employment with Wilson Foods Corporation on August 19, 1983.

3. The injury caused Bittner to be medically incapable of performing work in employment substantially similar to that he performed at the time of the injury and he has been paid weekly compensation for temporary total disability for all of that period of disability.

4. The injury of August 19, 1983 is not shown to have produced any permanent disability.

5. The degenerative condition in claimant's right knee resulted from years of working while standing on concrete.

6. Bittner has failed to introduce evidence which establishes that the degenerative arthritis in his knees, or in either of them, is a result of personal injury resulting from cumulative trauma or that he has become disabled from performing the normal duties of his employment due to the degenerative condition.

7. Claimant's testimony regarding the occurrences of injury and his symptoms is accepted as accurate and correct. His credibility is not impaired by his military medical records.

8. Claimant injured his left knee on February 14, 1984 in an event which arose out of and in the course of his employment, but that injury produced no incapacity from performing his normal work and produced no identifiable permanent disability.

## CONCLUSIONS OF LAW

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

2. Wilson Foods Corporation is liable for payment of all benefits available under Chapter 85 of The Code for the injuries which occurred on August 19, 1983 and February 14, 1984. The employer has, to date, fulfilled its obligation and no further amount is due claimant based upon either of those injuries.

3. Wilson Foods Corporation has no liability for payment of benefits at this time based upon a cumulative trauma theory of recovery.

4. Where an injury to a specified scheduled member fails to produce any degree of permanent disability, such an injury does not trigger any liability on the part of the Second Injury Fund.

## ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding.

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against the employer, Wilson Foods Corporation, pursuant to Division of Industrial Services 343-4.33.

Signed and filed this 25th day of November, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

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

Mr. David Sayre
Attorney at Law
223 Pine Street
Cherokee, Iowa 51012

Mr. Robert D. Wilson
Assistant Attorney General
Tort Claims Division
Hoover State Office Building
Des Moines, Iowa 50319

1402.20, 2206, 2209
Filed November 25, 1987
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| RICHARD L. BITTNER,<br><br>Claimant,<br><br>vs.<br><br>WILSON FOODS CORPORATION,<br><br>Employer,<br>Self-Insured,<br><br>and<br><br>SECOND INJURY FUND OF IOWA,<br><br>Defendants. | File Nos. 742180<br>757672<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

1402.20, 2206, 2209

Claimant, with a degenerative arthritic condition in his knees, failed to prove permanent disability resulting either from cumulative trauma or from acute injury. He had been paid temporary total disability benefits. Where no permanency was established, there was no liability on the part of the Second Injury Fund.

000134

FILED

DEC 23 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| JOHN F. BLANCHARD,<br><br>Claimant,<br><br>vs.<br><br>GIESE CONSTRUCTION,<br><br>Employer,<br><br>and<br><br>IOWA CONTRACTORS WORKERS' COMPENSATION GROUP,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 811621<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This is a proceeding in arbitration brought by John F. Blanchard, claimant, against his former employer, Giese Construction, and the employer's insurance carrier, the Iowa Contractors Workers' Compensation Group, to recover benefits as a result of an injury sustained on October 31, 1985.

The record in this case consists of testimony from John F. Blanchard and Kelly Blanchard, claimant's exhibit A with subparts one through seven, and defendants' exhibits 2, 3 and 4.

## ISSUES AND STIPULATIONS

It was stipulated that the injury arose out of and in the course of claimant's employment with the employer and that, in the event of an award, claimant is entitled to a weekly compensation rate of $181.32. It was agreed that all medical bills have been paid by the employer and insurance carrier and that claimant was paid weekly healing period benefits until May 13, 1986, which the parties have stipulated is the appropriate healing period in this case.

The issue to be determined in this proceeding is the nature and extent of permanent disability sustained by claimant as a result of his work-related injury of October 31, 1985.

000135

## SUMMARY OF EVIDENCE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case even though it may not necessarily be referred to in this decision.

The claimant, John F. Blanchard, age 24, was, on October 31, 1985, an employee of the employer, Giese Construction. At the time of his injury, claimant was a laborer for Giese Construction and was lifting a paving form when he suddenly felt pain in his low back. The paving forms weigh approximately 125 pounds each. Claimant tried to continue working, but was unable to do so. Claimant told his foreman that he had injured himself and was told to see a doctor.

Claimant was first seen by a local chiropractor for what claimant then believed to be a pulled muscle. Claimant had pain in his low back and into his legs. He was later referred to Gary LeValley, M.D. Dr. LeValley prescribed physical therapy, which claimant took on an outpatient basis. Claimant was subsequently hospitalized by Dr. LeValley at Trinity Regional Hospital (claimant's exhibit A-2).

The discharge summary by Dr. LeValley reads as follows:

> This is 23 year old admitted for treatment of a back strain and after failure of therapy at home. He was started on analgesics and anti-inflammatories and sent to physical therapy, continued to have an extreme amount of pain in spite of the fact that x-rays were normal. A CT of the lumbosacral spine was interpreted as normal. Consultation was obtained with Dr. Wahby who felt a myelogram was indicated. Myelogram was performed and was also negative. It is the feeling that he had lumbosacral spasm. It is going to require time to improve. He elected to treat this at home and was discharged to outpatient management, with analgesics and muscle relaxants. He is to return to see Dr. Wahby in 1 week for followup.
>
> FINAL DIAGNOSIS: Acute lumbosacral strain.

Following his release from the hospital, claimant received treatment from Samir Wahby, M.D., an orthopaedic surgeon in Fort Dodge. In his letter report dated May 5, 1986 (claimant's exhibit A-3), Dr. Wahby noted the following:

> He was followed in my office on several occasions. In the beginning there was no improvement and towards the end of February patient started improving

some, however, he continued to have pain and discomfort. During that time there was still no neurological findings.

The patient was seen in the beginning of March, he was doing better and had improved a lot than previously. The patient was last seen on April 7, 1986. At the time his back pain and discomfort had completely subsided. There were no neurological findings noted. Mr. Blanchard was given a slip to return to work. He was advised not to do heavy lifting for a period of time.

Dr. Wahby went on to state in his report that claimant might have a recurrence of low back pain, particularly with his type of work, and that, because of that, claimant would have approximately a five percent permanent partial disability.

Claimant testified that he never told Dr. Wahby he was "pain free," but only asked Dr. Wahby for a release to return to work since he was having a hard time making ends meet on his weekly workers' compensation benefit checks. Claimant testified he had improved "a little" from his hospitalization until seen by Dr. Wahby in April, 1986.

After claimant obtained his work release from Dr. Wahby, he commenced employment, in May, 1986, as a driver for a trucking business in Fort Dodge. However, this work was painful for claimant and he worked at this job for only approximately one month. He then applied unsuccessfully for several jobs. Claimant found a new job in July, 1986 working as a regular laborer for Fort Dodge Asphalt Company. That job was extremely strenuous and taxing on claimant. He was required to get on and jump off an end loader most of the day. In addition, he helped load bags of cement and drove company trucks. He was paid at the rate of $5.00 per hour.

In September, 1986, claimant began working for Decker Truck Lines in Fort Dodge. At the time of hearing, claimant was still employed with Decker as an over-the-road truck driver in the flat bed division. This job requires claimant to haul steel and wallboard to various locations in the Chicago area. Claimant makes five trips every two weeks.

Currently, claimant earns approximately $900 in gross earnings every two weeks. His net pay is approximately $675 every two weeks. When claimant first began his employment with Decker in September, 1986, he was given a route that required a lot of physical exertion. This resulted in pain and discomfort for claimant so he accepted an "easier" route at the beginning of 1987.

Claimant described his present employment as extremely strenuous and difficult. It also involves tying down tarps and unloading trucks. He stated that his present job involves eight hours of driving per day with approximately five hours of sitting and waiting for new loads. He stated that, due to family obligations and the press of outstanding bills, he has no choice but to continue working, despite his continued low back pain.

Claimant's present symptoms include inability to sleep for any extended period of time. On days off, he rests at home in order to build up enough energy and to relieve the pain to the point he can return to his truck driving job. He normally gets Sundays off. Claimant continues to work for Decker Truck Lines and is making approximately $450 per week in gross income. He stated that he cannot make ends meet for his family on the weekly compensation of $181.32 and thus, he has had no choice but to continue working for Decker.

Claimant was seen in April, 1987 by Dr. Wahby. According to a letter report dated June 19, 1987, Dr. Wahby stated that claimant is still complaining of pain in his lower back. There were no neurological findings and x-rays of the lumbosacral region were normal. Once again, Dr. Wahby estimated that claimant had sustained a five percent permanent partial disability as a result of his October 31, 1985 accident. Dr. Wahby provided claimant with a back brace which claimant still uses.

On November 17, 1986, claimant was examined by William Boulden, M.D., a Des Moines orthopaedic surgeon. In his report, Dr. Boulden indicated that, at the time of his examination, claimant was doing another type of truck driving and was tolerating it better, although he had occasional back pain. X-rays taken by Dr. Boulden were normal, although claimant complained of pain in his low back. Dr. Boulden stated as follows:

> Impression: Status post lumbar strain with residual tightness.
>
> Discussion: At this point in time, I discussed with him that his main problem is that he is still stiff and that is probably what is causing most of his discomfort. I also discussed that driving a truck is hard on his back, so therefore he needs to keep his back in tip-top shape. I discussed with him the importance of proper biomechanics of the back. I have also discussed with him that he needs to exercise his back twice a day, rather than twice a week. Therefore, I feel, from an orthopedic standpoint, he has not sustained any structural damage and can continue working.

Claimant is married and has one child. His wife does not work outside the home. Claimant still complains of lower back pain and stiffness and cannot do many of the things that he used to do previously, such as ride a motorcycle or mow the law. This testimony was supported by claimant's wife.

APPLICABLE LAW AND ANALYSIS

As noted earlier in this decision, defendants have conceded the issue of employer-employee relationship, as well as the issue of arising out of and in the course of employment. Therefore, the only issue remaining is causation as well as the nature and extent of disability.

Claimant has the burden of proving by a preponderance of the evidence that the injury of October 31, 1985 is a cause of the disability on which he now basis his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1956). A question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

There can be no question from the evidence that there is a causal relationship between claimant's work-related injury and his resulting industrial disability. Inasmuch as this injury involves the back, this case involves an injury to the body as a whole as defined under Iowa Code section 85.34(2)(u).

Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

A defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Claimant has been examined by two qualified orthopaedic

surgeons, Dr. Wahby and Dr. Boulden. Dr. Wahby indicated in his written report that, although he could find no abnormalities, due to the possibility of recurrent symptoms, claimant has sustained a permanent disability in the amount of five percent. Dr. Boulden did not give a rating, but felt that claimant should be able to do well on a long-term basis.

Claimant's entire work history is in the areas of truck driving and general manual labor. There are clearly jobs which are no longer available to him due to his ailment. His education is limited to the ninth grade and he is not qualified for most jobs which require a good educational background. He is generally limited to jobs which call for physical, rather than mental, exertion.

Claimant is now working as a truck driver for Decker Truck Lines, although with difficulty. Fortunately, claimant has been able to find a job that pays well and claimant intends to continue working for Decker. In fact, he earns more now than he has earned at any other job he has held. Post injury earnings create an inference of earning capacity commensurate with them, but they are rebuttable by evidence showing them to be an unreliable basis for estimating earning capacity. 2 Larson Workmen's Compensation Law, section 57.21(d). Post injury earnings are not synonymous with earning capacity. 2 Larson, sections 57.21, 57.31.

Industrial disability, or loss of earning capacity, in a workers' compensation case is quite similar to impairment of earning capacity, an element of damages in a tort case. Impairment of physical capacity creates an inference of lessened earning capacity. The basic element to be determined, however, is the reduction in value of the general earning capacity of the person rather than the loss of wages or earnings in a specific occupation. Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa App. 1977) 100 A.L.R.3rd 143; 2 Larson, sections 57.21, 57.31.

Based upon the record as a whole, claimant has sustained an industrial disability to the extent of 10% of the body as a whole.

## FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury to his back on October 31, 1985 in Webster County, Iowa.

2. As a result of that incident, claimant has a permanent functional impairment of five percent of the body as a whole as determined by Dr. Wahby.

3. Defendants failed to provide claimant with any employment in accordance with his impairment and limitations.

4. Claimant has found substitute employment with another employer with higher earnings than his earnings with the defendant employer.

5. Claimant has a 10% loss of earning capacity as a result of the injuries sustained on October 31, 1985, primarily due to his reduced access to heavy labor types of employment.

## CONCLUSIONS OF LAW

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

2. On October 31, 1985, claimant sustained an injury to his low back which arose out of and in the course of his employment with the defendant, Giese Construction.

3. The work-related injury of October 31, 1985 is a proximate cause of claimant's disability.

4. Based upon the record as a whole and taking into consideration the industrial disability considerations as set out in the case law previously cited, it is concluded that claimant has sustained a permanent partial disability to the extent of 10% of the body as a whole which entitles claimant to 50 weeks of benefits under section 85.34(2)(u).

## ORDER

IT IS THEREFORE ORDERED that defendants pay claimant fifty (50) weeks of permanent partial disability compensation at the stipulated rate of one hundred eighty-one and 32/100 dollars ($181.32) per week payable commencing May 13, 1986. The entire amount is accrued and shall be paid in a lum sum.

IT IS FURTHER ORDERED that defendants also pay interest on all past due amounts to the date of payment pursuant to section 85.30, with the interest computed from the date each payment came due.

IT IS FURTHER ORDERED that costs are assessed against defendants pursuant to Division of Industrial Services Rule 343-4.33.

IT IS FURTHER ORDERED that defendants file Claim Activity Reports pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 23rd day of December, 1987.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Tito Trevino
Attorney at Law
Suite 503, Snell Building
P.O. Box 1680
Fort Dodge, Iowa 50501

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

1402.40, 1803
Filed December 23, 1987
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| JOHN F. BLANCHARD, | |
| Claimant, | File No. 811621 |
| vs. | |
| GIESE CONSTRUCTION, | A R B I T R A T I O N |
| Employer, | |
| and | D E C I S I O N |
| IOWA CONTRACTORS WORKERS' COMPENSATION GROUP, | |
| Insurance Carrier, Defendants. | |

1402.40, 1803

Twenty-three-year-old claimant awarded 10% permanent partial disability based on five percent impairment, a ninth grade education, and a work history of truck driving and manual labor, even though he now earns more than he earned at the time of injury.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| SUZANNE BLUME f/k/a SUZANNE LENZ f/k/a SUZANNE LITTLE,<br><br>Claimant,<br><br>vs.<br><br>FARMLAND FOODS, INC.,<br><br>Employer,<br><br>and<br><br>AETNA CASUALTY & SURETY COMPANY,<br><br>Insurance Carrier,<br>Defendants. | FILE NOS. 653710 & 719256<br><br>A R B I T R A T I O N<br><br>A N D<br><br>R E V I E W -<br><br>R E O P E N I N G<br><br>D E C I S I O N |

FILED
SEP 9 1987
IOWA INDUSTRIAL COMMISSIONER

## STATEMENT OF THE CASE

This is a combined proceeding both in arbitration and review-reopening brought by Suzanne Blume, f/k/a Suzanne Lenz and Suzanne Little (these name changes are due to a divorce and remarriage during the pendency of these proceedings), claimant, against Farmland Foods, Inc., employer (hereinafter referred to as Farmland), and Aetna Casualty & Surety Company, insurance carrier, for workers' compensation benefits as a result of alleged injuries on November 1, 1980 and October 12, 1982. A memorandum of agreement for the November 1, 1980 injury was filed on November 24, 1980. On July 7, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant. The exhibits received into the evidence at hearing are listed in the prehearing report. All of the evidence received at the hearing was considered in arriving at this decision.

The prehearing report contains the following stipulations:

1. On November 1, 1980 and October 12, 1982 claimant received injuries which arose out of and in the course of her employment with Farmland;

000143

2. Claimant is not seeking additional temporary total isability or healing period benefits in this proceeding;

3. Claimant's rate of compensation in the event of an award f weekly benefits from this proceeding shall be $217.37 per eek for the November 1, 1980 injury and $225.78 for the October 2, 1982 injury; and,

4. The fees charged for an evaluation by Horst G. Blume, M.D., or which claimant seeks reimbursement in this proceeding is air and reasonable and causally connected to the work injury.

The prehearing report submits the following issues for etermination in this decision:

I. Whether there is a causal relationship between the ork injuries and the claimed disabilities;

II. The extent of claimant's entitlement to weekly benefits or permanent disability; and,

III. The extent of claimant's entitlement to medical enefits under Iowa Code section 85.39.

FINDINGS OF FACT

1. Claimant was a credible witness.

From her demeanor while testifying, claimant appeared to be ruthful. Claimant's testimony was consistent with histories rovided to physicians during treatment and evaluation of her njuries.

2. Claimant has been employed by Farmland since 1977 and ontinues to work for Farmland at the present time.

There was little dispute among the parties as to the nature f claimant's employment with Farmland. Claimant testified that er duties consisted of general meat packing work. Claimant has orked on the bacon line, belly table and in butt skinning. laimant regularly used a wizard knife, an electrically powered ircular knife, during her Farmland employment in 1980 and 1981. hroughout claimant's employment at Farmland, she has used her ands, arms and shoulders on a repetitive basis.

3. Between September 1980 and continuing at the present ime, claimant has suffered and continues to suffer gradual and ccumulative traumas to her right hand, wrist, arm and shoulder hich arises out of and in the course of her employment at armland.

In September, 1980, claimant sought treatment from the

company doctor, James Flood, M.D., for tendinitis of the right upper forearm and she was placed on light duty for one week. As stipulated, on November 16, 1980, claimant left work and sought treatment from Dr. Flood because her ring finger of her right hand became locked. She was referred by Dr. Flood at that time to an orthopedic surgeon, Timothy C. Fitzgibbons, M.D. Dr. Fitzgibbons diagnosed stenosing tenosynovitis and performed surgery to release the ring finger. Claimant's pain complaints after the surgery also involved the right shoulder and swelling and numbness of the right hand. Despite a negative EMG test, claimant had a positive Tinel's sign and numbness of the hand and wrist indicating a nerve entrapment according to the records of Dr. Fitzgibbons. Dr. Fitzgibbons continued to prescribe physical therapy and medication. Claimant improved after this treatment and was released for light duty on January 26, 1981. In February, 1981, she was discharged by Dr. Fitzgibbons who noted that if symptoms persist, claimant should consider alternative work and vocational rehabilitation. In May, 1981, claimant returned to Dr. Fitzgibbons with complaints of continued pain in the right hand, wrist and forearm when using the wizard knife during her employment at Farmland. Dr. Fitzgibbons took claimant off work especially the wizard knife job for a couple of weeks and prescribed physical therapy and medication. Again Dr. Fitzgibbons noted that if claimant's difficulties persist, she should be taken off a packinghouse type of job.

In August, 1981, claimant again returned to Dr. Fitzgibbons with a recurrence of symptoms and Dr. Fitzgibbons diagnosed right deQuervain's tenosynovitis. At this time, Dr. Fitzgibbons took claimant off work and tried to relieve claimant's hand, wrist and arm symptoms with steroid injections. This treatment proved ineffective and he performed another release surgery in August, 1981. This surgery did not help alleviate claimant's symptoms of pain and numbness in the right wrist and hand. Dr. Fitzgibbons indicated in October, 1981, that there was nothing else he could do and released claimant to return to light duty work on November 2, 1981 for six weeks and regular work after that. In December, 1981, Dr. Fitzgibbons again stated that there was nothing he could offer and referred claimant to Richard Murphy, M.D., a hand surgeon. There is little evidence in the record of Dr. Murphy's treatment at that time.

In October, 1982, claimant experienced right shoulder pain and discomfort which was treated by Dr. Flood, Clifford M. Danneel, M.D., and William R. Hamsa, Jr., M.D., who all diagnosed that claimant had right shoulder bursitis but no particular form of treatment was recommended. According to claimant, she was placed on light duty for approximately a month following this bursitis pain.

On March 8, 1983, claimant left work again and returned to Dr. Fitzgibbons who noted claimant's persistent complaints of

000145

discomfort up and down the forearm and wrist on the right side, referred symptoms into the right shoulder and some shoulder bursitis. Dr. Fitzgibbons opined at that time that all of these symptoms were exacerbations of claimant's previous problems. He again stated that claimant will continue to experience difficulty doing the type of work she has done in the past. Dr. Fitzgibbons returned claimant to light duty work on March 27, 1983 and continued treatment through April.

Claimant began treating with another physician, Thomas P. Ferlic, M.D., in June, 1983. Dr. Ferlic felt that claimant was suffering from scarring of the radial nerve and that she was in need of further release of various tendons and nerves in the right hand. Dr. Ferlic like Dr. Fitzgibbons initially tried injections of medication but eventually performed exploratory surgery in August of 1983. It is unclear in the reports submitted into the evidence what exactly Dr. Ferlic did in this third surgery but Dr. Ferlic felt that claimant would be able to return to full duty after recovery from the surgery. Dr. Ferlic's diagnosis was the same as Dr. Fitzgibbons, stenosing tenosynovitis, right wrist.

Although there are varying complaints extending from the fingers to the right shoulder, the views of Dr. Fitzgibbons, who appears to be the primary treating physician, are the most convincing. He believes that claimant is suffering from a series of exacerbations of a single injury process arising from overuse of her hands, arms and shoulders during her work at Farmland. The greater weight of evidence demonstrates that this injury process was continuous over a period of time and is probably continuing at the present time. Furthermore, there are several dates of injury as claimant has been compelled by her pain to be temporarily absent from work to receive treatment of her condition on several occasions: November 16, 1980; May 5, 1981; August 31, 1981; November 17, 1982; March 8, 1983 and August 29, 1983. These dates of injury coincide with the first day of each extended absence from work (as stipulated in the prehearing report) as a result of her right hand, wrist and arm condition.

4. The work injury of August 31, 1981 to claimant's right hand, arm and shoulder was a cause of a seven percent permanent partial impairment to claimant's right upper extremity.

It is rather clear that early on in the gradual injury process, Dr. Fitzgibbons felt that claimant's condition was permanent and that her persistent difficulties would only be corrected by a change in jobs. On November 5, 1981, Dr. Fitzgibbons stated in a report to Farmland's insurance carrier that although he could not give an exact rating, he was sure "there will be some permanency."

000146

Claimant stated that she had no previous medical history of any right hand, arm or shoulder problems and no prior functional impairment or disability due to such problems before working at Farmland. This testimony is uncontroverted by any other testimony or evidence.

In a report submitted into the evidence, claimant's primary treating physician, Dr. Fitzgibbons opined in March, 1983, that claimant is suffering from a seven percent permanent partial impairment to her right upper extremity as a result of her work injuries at Farmland.

Dr. Ferlic's views are somewhat confusing. He stated in September, 1983, that he did not feel that claimant would suffer permanent disability after she reaches maximum healing from the third surgery but stated that it was too early to give such an opinion at that time. A month later he stated that claimant had "returned to her preoperative status." He also stated that as far as he knows, "no permanent disability should result as a result of the surgery." One can reasonably interprete these statements as indicating that claimant's surgery had little or no influence on claimant's condition. If she had permanency before she would have permanency after the surgery. In May, 1987, claimant was examined by a neurosurgeon, Horst Blume, M.D., who opines that claimant suffers from a 13 percent permanent partial impairment to the right hand. Dr. Blume was not shown in the record to possess such extensive experience with orthopedic problems with the hand to warrant giving his views greater weight over those of the primary treating physician, Dr. Fitzgibbons.

As claimant has chosen to endure the pain and not to permanently leave her employment at Farmland, the injury date of August 31, 1981 was chosen as the injury date for permanency purposes for reasons that will be discussed in the conclusions of law section of this decision. This injury date is the most recent injury date that bore a relationship to the time Dr. Fitzgibbons finally concluded that claimant's condition was permanent.

It is also concluded from the evidence that claimant's permanent impairment does not extend into the shoulder or to the body as a whole. It would appear from the medical records that only soft tissues of the arm have had continuing problems. Dr. Fitzgibbons in his rating did not believe that the injury extended beyond the arm but definitely extended beyond the right hand.

6. After receiving a disability evaluation by an employer authorized and paid physicians namely, Dr. Fitzgibbons and Dr. Ferlic, claimant secured an evaluation of her right sided disability in May, 1987, from Horst Blume, M.D., and paid the sum of $200 for this evaluation.

000147

## CONCLUSIONS OF LAW

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960) and cases cited therein.

It is not necessary that claimant prove that her disability results from a sudden, unexpected traumatic event. It is sufficient to show that the disability developed gradually or progressively from work activity over a period of time. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

The McKeever court also held that the date of injury in gradual injury cases is the time when pain prevents the employee from continuing to work. In McKeever the injury date coincided with the time claimant was finally compelled to give up his job. This date was then utilized in determining the rate of compensation. By adopting this rule, Iowa joins the majority of other states by placing full liability upon an insurance carrier or employer covering the risk at the time of the most recent injury that bares a causal relationship to the disability.

In the case sub judice, the rule concerning the injury date in McKeever could not be strictly applied as claimant has not permanently left her employment. However, it is found that claimant's pain has caused claimant to temporary leave work on several occasions for treatment of her injuries. The undersigned believes that the logic of the McKeever rule requires that each temporary absence from work has its own precipitating injury date which coincides with the time claimant was compelled by her pain to leave work and seek treatment of her condition.

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

000148

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. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 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, a finding was made causally connecting a work injury of August 31, 1981 to claimant's permanent functional impairment to her arm. This injury date was chosen from among almost limitless alternatives in the continuous injury process. As discussed above, the rule in McKeever could not be strictly applied as claimant has chosen to "tough it out" at least at the present time and has not permanently left her employment despite the existence of permanent impairment. The above particular injury date was chosen because it was the most recent injury date prior to the time claimant's condition first became permanent, in the opinion of Dr. Fitzgibbons. Dr. Fitzgibbons first found permanency in November, 1981, when she completed her third extended period of absence from work to recover from her cummulative injuries.

III. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the

000142

industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

Based upon a finding of a seven percent loss of use to the upper extremity, claimant is entitled as a matter of law to a 17.5 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(m) which is seven percent of the 250 weeks allowable for an injury to the arm in that subsection. These permanent partial disability payments were due when she completed the healing period following the August 31, 1981 injury date and returned to work on November 2, 1981. This was also the time that the defendants were first informed that there would be some permanency from her condition. Therefore, permanent partial disability benefits shall be ordered from November 2, 1981.

Unfortunately, the parties never stipulated as to a rate of compensation for the injury date found in this case that caused the permanent partial disability to occur and no evidence was offered to determine the rate for such an injury date. It is rather clear that claimant is entitled to at least the rate for the 1980 alleged injury and due to the fact that claimant has the burden of proof, she must suffer the consequences of any difficiency in the evidence. Therefore, only the stipulated rate for the early injury on November 1, 1980 in the amount of $217.37 will be used in awarding permanent partial disability benefits in this decision.

The parties stipulated that all of the healing period benefits requested by claimant have been paid.

IV. Employers are obligated to furnish an independent disability evaluation of a work injury subsequent to an adverse evaluation by an employer retained physician under Iowa Code section 85.39.

Given the findings in this case, claimant is entitled under law to reimbursement for the evaluation by Dr. Blume and such will be ordered herein.

000150

ORDER

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

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

3. Defendants shall pay accrued weekly benefits in a lump sum.

4. Defendants shall pay interest on benefits awarded herein from November 2, 1981.

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

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

Signed and filed this 9th day of September, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

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

Mr. Thomas M. Plaza
Attorney at Law
200 Home Federal Bldg.
P. O. Box 386
Sioux City, Iowa 51102

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| STEVEN L. BOYD, | : | |
| Claimant, | : | |
| | : | FILE NO. 785933 |
| vs. | : | |
| | : | A R B I T R A T I O N |
| SILVEY REFRIGERATED CARRIERS, INC., | : | |
| | : | D E C I S I O N |
| Employer, | : | |
| Self-Insured, | : | NOV 20 1987 |
| Defendant. | : | |

FILED
IOWA INDUSTRIAL COMMISSIONER

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Steven L. Boyd, claimant, against Silvey Refrigerated Carriers, Inc., employer (hereinafter referred to as Silvey), for workers' compensation benefits as a result of an alleged injury on January 28, 1985. On August 27, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record in this case at the time of hearing. Oral testimony was received during the hearing from claimant and Vicky Muncilo, formerly Cano. The exhibits received into the evidence at the hearing are listed in the prehearing report. According to the prehearing report, the parties have stipulated to the following matters:

1. On January 28, 1985, claimant received an injury which arose out of and in the course of employment with Silvey.

2. It was stipulated that the evidence will show that claimant's rate of weekly compensation is $200.00.

3. The injury was a cause of both temporary and permanent disability, the extent at which is at issue in this proceeding.

4. All requested medical benefits have been or will be paid by defendants.

## ISSUES

The parties submit the following issues for determination of this proceeding in the prehearing report:

000152

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

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

## SUMMARY OF THE EVIDENCE

The following is a summary of evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision.

Claimant testified that he was injured while working as an over-the-road truck driver for Silvey. On January 28, 1985, claimant's truck was involved in a motor vehicle accident in the State of Illinois with another truck while claimant was sleeping in the rear sleeping compartment. The truck was driven by a fellow driver who drove his truck into the rear of another truck in the accident. Claimant said that he fell out of the truck after the collision striking the median. Claimant testified that he awoke in the median ditch and felt immediate pain in his hip and right side. Claimant was then transported to Illinois Valley Community Hospital and upon his arrival treated for multiple abrasions and what was eventually diagnosed as a subtrochanteric fracture of the upper end of the right femur or thigh bone. Claimant underwent a surgical reduction of this fracture two days later. In this surgery, the surgeons fasten a plate and screws in the area of the fracture to assist in healing. Claimant was discharged from the hospital on February 16, 1985 and he returned to Iowa for follow-up treatment by a local physician.

Claimant then began treatment with William R. Boulden, M.D., an orthopedic surgeon. Dr. Boulden in his reports and oral deposition testimony states that he treated claimant very conservatively, only gradually allowing more and more stress to be placed on the right leg over time. According to Dr. Boulden, by April, 1985, claimant's pain had subsided and he was told to begin to place full weight on the leg. By June, 1985, Dr. Boulden reported that claimant was no longer using his cane and on August 22, 1985, claimant was released to return to work effective September 3, 1985. At that time Dr. Boulden reported that claimant had only mild limp which he expected to end entirely. Claimant, during this time, was receiving physical therapy but due to a personality conflict between him and the physical therapist and later with Dr. Boulden, this physical therapy was transferred to in-home exercises. In his deposition, Dr. Boulden opined that claimant suffered a 15 percent permanent partial

000153

impairment to the right leg as a result of the injury according to guidelines published by the American Academy of Orthopedic Surgeons. Dr. Boulden told claimant at the time he released him for work that the bone was fully healed and that it could take the stress of work but that he should avoid twisting his right leg. Dr. Boulden told claimant to return in May, 1986, to schedule surgery to remove the hardware in his right leg.

Claimant testified that he continued to have pain and sought treatment at the Veterans Administration Hospital. Veterans Administration records indicate that claimant was seen in September, 1985, with complaints of right leg pain. In January, 1986, claimant returned to VA doctors complaining of stomach "burning" and that his ears were plugged up. He also at that time complained that he could not sleep because of aching in his right leg. Claimant returned again in March and in April of 1986 to the VA with right leg and hip pain.

In June, 1986, claimant began treating with Richard Miller, M.D., another orthopedic surgeon. Dr. Miller attempted to treat claimant's pain conservatively initially with rigorous physical therapy. At that time claimant began to complain of low back pain and he was referred to another orthopedic surgeon who ordered a myelogram test performed on his back. This myelogram failed to show any abnormalities in claimant's spine and no further treatment was indicated by this orthopedic surgeon.

Eventually, the hardware in claimant's right leg was removed by Dr. Miller in December, 1986, the exact date of which cannot be deciphered from the evidence presented. Claimant then continued to treat with Dr. Miller after the surgery. Very few reports were offered into the evidence from Dr. Miller concerning his treatment and prognosis. However, according to a report from Midlands rehabilitation consultants, claimant indicated that Dr. Miller had told him that he was released to return to work on March 16, 1987 after the second surgery. Dr. Miller imposed restrictions at that time against heavy lifting.

Claimant testified that he became worse after the second surgery and now must use his cane to avoid walking "like Donald Duck." He testified that he continues to have chronic leg and back pain and has difficulty walking and sitting for long periods of time.

On August 12, 1987, claimant was evaluated by Oscar M. Jardon, M.D., an associate professor in the Department of Orthopedic Surgery of the University of Nebraska Medical Center. According to Dr. Jardon, claimant suffers from a 27 percent permanent partial impairment to the right lower extremity which converts to a 11 percent body as a whole impairment under the AMA Guides.

000154

No opinion was offered into the record from any physician dealing with the causal connection of claimant's alleged back problems to the alleged work injury in this proceeding.

APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be awarded without a showing of a causal connection to a physical change of condition. 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. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 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, claimant contends that he suffered permanent disability as a result of a work injury due to permanent impairment to the body as a whole arising from his hip and back difficulties. However, the evidence presented establishes only

000155

that he suffers a permanent partial impairment to his right leg, not to the body as a whole. Admittedly, there is a conceptual problem in determining whether an injury is to be measured functionally as a scheduled member or industrially as a body as a whole injury. A shoulder or hip injury can be a loss of an arm or a leg respectively as oppose to a loss of use to the body as a whole and the determination depends on the extent of the injury. However, it is anotomical situs of the permanent injury not the situs of the permanent impairment or the chronic pain caused by the injury or impairment which determines whether or not to apply the schedules in Iowa Code section 85.34(2)(a-t). See Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); 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 (1982); Godwin v. Hicklin G.M. Power, II Iowa Industrial Commissioner Report 170 (1981).

In the case of Mr. Boyd, his only anotomical injury lies below the hip socket on the upper part of the right femur. The hip joint or socket was not actually involved either in the fracture or subsequent surgeries. There is some indication of a loss of range of motion in the hip joint but its anotomical cause was not discussed by any physicians in this case. Therefore, it must be found as a matter of fact that claimant has only suffered an injury to his right lower extremity and not an injury to the body as a whole. Although claimant complains of back pain, these complaints began almost a year and a half after the original work injury and no physician causally relates these complaints to the original work injury in January, 1985.

II. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

Although Dr. Boulden opined in 1985 that claimant only suffers from a 15 percent permanent partial impairment of the

000156

right leg, Dr. Jardon opined in August, 1987, that claimant has a 27 percent permanent partial impairment. Dr. Jardon has not been shown to possess fewer qualifications than Dr. Boulden and the rating by Dr. Jardon is much more recent and subsequent to the second injury. Consequently, the rating by Dr. Jardon is given the greater weight in this decision.

It is therefore found that as a matter of fact the work injury is a cause of a 27 percent loss of use of the right leg. Based on such a finding, claimant is entitled as a matter of law to 59.4 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(o) which is 27 percent of 220 weeks, the maximum allowable number of weeks for an injury to a leg in that subsection.

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

Claimant actually has two periods of healing. First, claimant was totally disabled, according to Dr. Boulden, from the date of injury until the effective date of his release to return to work on September 3, 1985. Although claimant complained of continuing problems after that time, claimant actually worked on a few occasions after this time and no physician has indicated that he was totally disabled from all work until he was readmitted to the hospital for the second surgery in December, 1986. Unfortunately, the evidence does not indicate when this admission to the hospital for the second surgery actually occurred. Claimant was then released according to the only available evidence in the record after the surgery by Dr. Miller for work on March 16, 1987. It will be found as a matter of fact that claimant was unable to work for a period of time extending from December 15, 1986 through March 15, 1987 as a result of the second surgery.

## FINDINGS OF FACT

1. Claimant was in the employ of Silvey at all times material herein.

2. On January 28, 1985, claimant suffered an injury to the right leg which arose out of and in the course of his employment with Silvey. The injury consisted of a subtrochanteric fracture of the upper end of the right femur or thigh bone.

3. The work injury of January 28, 1985 was a cause of a

000157

period of disability from work beginning on January 28, 1985 and ending on September 3, 1985 and again beginning on December 15, 1986 and ending on March 15, 1987 at which time claimant reached maximum healing. The initial surgery was performed to reduce the fracture and the second surgery in December, 1986, was to remove the hardware installed in the first surgery.

4. The work injury of January 28, 1985 was a cause of a 27 percent permanent partial impairment to the right leg. Claimant has permanent restrictions against heavy lifting and twisting of this leg. Claimant continues to experience chronic pain from the January 28, 1985 injury.

5. Given the parties' stipulation, claimant's rate of compensation is $200.00.

(No finding could be made that claimant suffered a back injury or any other injury to the body as a whole as a result of the January 28, 1985 injury.)

## CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to permanent partial disability benefits and healing period benefits as ordered below.

## ORDER

1. Defendant shall pay to claimant fifty-nine point four (59.4) weeks of permanent partial disability benefits at the rate of two hundred and no/100 dollars ($200.00) per week from March 16, 1987.

2. Defendant shall pay claimant healing period benefits from January 28, 1985 through September 3, 1985 and from December 15, 1986 through March 15, 1987 at the rate of two hundred and no/100 dollars ($200.00) per week.

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

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

5. Defendant shall pay the cost of this action pursuant to Division of Industrial Services Rule 343-4.33.

6. Defendant shall file activity reports upon payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

000158

Signed and filed this 20 day of November, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Gregory Landry
Attorney at Law
700 West Towers
1200 35th St.
West Des Moines, Iowa 50265

Mr. Sheldon M. Gallner
Attorney at Law
803 3rd Ave.
P. O. Box 1588
Council Bluffs, Iowa 51502

Mr. R. Jeffrey Lewis
Mr. David L. Charles
Attorneys at Law
2600 Ruan Center
Des Moines, Iowa 50309

000159

FILED

OCT 19 1987

IOWA INDUSTRIAL

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| DONALD E. BRADLEY, | : | |
| | : | |
| Claimant, | : | File No. 813384 |
| | : | |
| vs. | : | |
| | : | A R B I T R A T I O N |
| J. I. CASE COMPANY, | : | |
| | : | |
| Employer, | : | D E C I S I O N |
| Self-Insured, | : | |
| Defendant. | : | |

INTRODUCTION

This is a proceeding in arbitration brought by Donald E. Bradley against J. I. Case Company, his self-insured employer. The case was heard at Burlington, Iowa on May 27, 1987 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Donald E. Bradley, Marjorie Bradley, Roger Kromphardt and David L. Erie. The record also contains claimant's exhibits 1 through 10 and defendant's exhibit E.

ISSUES

The only issue identified by the parties is the extent of permanent partial disability which resulted from the injury claimant sustained on May 30, 1984. The occurrence of injury which arose out of and in the course of employment was established by stipulation. The rate of compensation was stipulated to be $361.92 per week. It was stipulated that all healing period compensation had been fully paid and that compensation for any permanent partial disability would be due commencing April 15, 1985. A claim for additional benefits under the provisions of section 86.13 had been bifurcated for a separate proceeding and will not be determined in this decision.

SUMMARY OF THE EVIDENCE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case even though it may not necessarily be referred to in this decision.

Donald E. Bradley testified that he is a married, 48-year-old man who completed approximately 11 1/2 years of formal education, but did not graduate from high school and has no GED. He has not served in the military and his principal occupation has been

a driver of trucks and buses. Bradley commenced employment with J. I. Case on April 30, 1979 and remains employed by Case at the present time working as an over-the-road semi driver. His typical work involves hauling machinery to a destination and hauling parts on the return trip.

Bradley testified that, on May 30, 1984, he slipped while standing on the fuel tank of the truck, but caught himself on the trailer with his left arm while he was falling. He testified that, within one-half hour of the incident, his arm was hurting badly and he experienced numbness and tingling. He reported the incident, was sent to J. J. Kivlahan, M.D., who in turn referred him to Donald Mackenzie, M.D. Claimant was off work thereafter for a period of time under the treatment of Dr. Mackenzie. EMG tests by E. Shivapour, M.D., produced findings interpreted as being compatable with a C6-C7 nerve root lesion on the left side (exhibit 5, page 7). Dr. Mackenzie initially diagnosed a C6/7 nerve root lesion that was caused by the fall of which claimant testified (exhibit 1, page 8). He subsequently revised his definition to a C6/7 spondylosis with nerve root impingement on the left (exhibit 1, page 9). Claimant gradually improved under Dr. Mackenzie's treatment and returned to work on October 1, 1984 after taking two weeks of vacation.

Claimant continued to work until mid-November, 1984 when he testified that he was unable to endure the pain in his shoulder and was again taken off work by Dr. Mackenzie until April 15, 1985. Claimant has continued to work regularly since that date. Claimant testified that Dr. Mackenzie recommended he restrict his lifting to no more than 30 pounds and avoid stress, exertion and other strenuous work. Claimant testified that, when he returned to work in April, 1985, he obtained his assignments by a seniority bid system. He stated that he got along well while he was on a regular run from August, 1985 to August, 1986, but that he lost it through seniority bidding. He stated that, with his driving job, he has problems with handling tarps which weigh 100-150 pounds and which must be lifted overhead. He also expressed difficulty tightening chains on loads. He stated that the regular run involved little or no tarping and also one less day of work per week than the current open board bid system. Claimant testified that he has worked more since August, 1986 and averages 55-60 hours per week. In 1986, he earned $32,000 from Case. In 1985, his earnings were approximately $22,700, not including workers' compensation benefits.

Claimant testified that his shoulder seems to be getting worse from a pain and strength standpoint. He complained of constant pain from the shoulder blade to the elbow which sometimes runs into his forearm. He stated that, when it is bad, he is unable to sleep and then unable to drive. He stated that he did remodeling on his home before the accident, but that he is now unable to do so because he cannot lift, cannot use a hammer with the right hand since it aggravates his left shoulder, and cannot

do a lot of the work since it is overhead. Claimant testified that he uses his weekends to rest and is generally not fully recovered by the time he returns to work on Monday. Claimant demonstrated the movement of his left arm and raised it to what appeared to be approximately 120 degrees from the lower portion of his body.

Claimant feels his condition has now deteriorated to nearly what it was when he was first injured and questions whether he will be able to continue in his current job.

Claimant recalled injuries to his back, but stated that he had no previous injuries to his neck or shoulder and denied having any substantial problems with his back at the current time.

Claimant discussed the desirability of a city driver job with Case. He stated that it pays approximately $12.00 per hour and that he would take an annual cut in pay of approximately $7,000 to accept the job.

Claimant indicated that, if he were to be reassigned as a city driver, he would have the least seniority among the city drivers.

Marjorie Bradley, claimant's spouse, confirmed his testimony that he uses his weekends for recuperation. She confirmed his testimony of deterioration of his condition since he has returned to work.

David Erie, director of corporate fleet operations for Case, testified that the company is willing to make a city driver job available to claimant. Erie testified that a road driver's earnings typically range from $26,000-$34,000 per year, but that there is no guarantee of any particular amount of work and that individual earnings vary according to the individual's initiative. Erie testified that a city route driver is guaranteed 40 hours per week, but that they normally work from 40-50 hours per week with the excess over 40 hours being overtime, paid at time and one-half. Erie testified that, when road expenses are considered, a city driver takes home more money than an over-the-road driver. Erie testified that, as a city driver, claimant would be able to avoid tarping and chaining activities.

Claimant has been evaluated by four well-qualified specialists, namely Dr. Mackenzie, W. J. Robb, M.D., Byron Rovine, M.D., and Michael Wilson, M.D. In general, there is no substantial difference in their assessments of claimant's injury and his residual problems resulting from the injury. Some differences do, however, exist. Dr. Wilson diagnosed a cervical radiculopathy, left side, resolving, probably a traction neuropathy (exhibit 3).

Dr. Rovine assessed claimant's case as follows:

> The history, previous findings and present findings strongly suggest that Mr. Bradley did have a significant traction injury with cervical radiculopathy and his present symptoms and findings on examination are residual. I do not believe, after two and a half years, that there is very much probability of further improvement. Mr. Bradley is working. I believe that over strenuous work will risk deterioration in his condition. The nerve root injury may have been a direct traction injury to the root, but may have been the result of protrusion of a disc, and if the latter is true the disc is still there. Therefore, it would be useful for him not to have to do any kind of heavy lifting or other strenuous work.
>
> I believe that Mr. Bradley's injuries were real and that he has real residuals from them. I have not made an attempt to calculate a permanent-partial disability, but I certainly believe that a significant one exists. (Claimant's exhibit 7).

Dr. Mackenzie initially assigned a 10% impairment rating (exhibit 5, page 5), but later raised the rating to 20% because he felt that claimant had experienced a loss of strength in his left hand and arm (exhibit 1, pages 23-25). Dr. Mackenzie recommended that claimant avoid activities that cause pain, as opposed to those which cause mere aching or discomfort. He recommended that claimant follow a 50-pound lifting limit (exhibit 1, page 27).

W. J. Robb, M.D., diagnosed claimant's condition as a traction injury to the sixth and seventh cervical nerve roots of the left arm. He stated that claimant would have residual loss of strength in abduction or in raising the arm above shoulder level. Dr. Robb felt that claimant need not restrict his activities in regards to lifting in positions below shoulder level, but agreed that he should avoid strenuous activities at or above shoulder level. Dr. Robb evaluated claimant as having an eight percent permanent impairment of the body as a whole due to the condition in his shoulder (exhibit 2, pages 14-18).

Claimant's employability has been evaluated by two qualified vocational consultants, namely, G. Brian Paprocki and Roger Kromphardt. Their respective assessments of claimant are not greatly divergent, except in regards to the final conclusions they reach. Essentially, Paprocki felt that claimant had sustained an industrial disability of approximately 65% because, if claimant were forced out of driving positions, he could be expected to earn only approximately $10,000-$18,000 per year (exhibit 8). Kromphardt concluded that claimant had suffered no industrial disability because he has been able to continue in

his occupation as an over-the-road driver without any loss of earnings and also because he felt that the employer would provide accomodations in order to maintain claimant's employment as a driver (exhibit E).

## APPLICABLE LAW AND ANALYSIS

The parties have correctly stipulated that claimant's injury is to be evaluated industrially since the disability clearly extends beyond the arm into the body as a whole, even though most of the symptoms manifest themselves in claimant's arm. The physiological injury involves nerves at a point proximal to that at which they become part of the left arm.

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

Industrial disability, or loss of earning capacity, in a workers' compensation case is quite similar to impairment of earning capacity, an element of damages in a tort case. Impairment of physical capacity creates an inference of lessened earning capacity. The basic element to be determined, however, is the reduction in value of the general earning capacity of the person rather than the loss of wages or earnings in a specific occupation. Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa App. 1977) 100 A.L.R.3rd 143. The fact that claimant earns more now than he did at the time of injury does not establish that his earning capacity has been increased as a result of the injury. It is evidence, however, that the impairment of earning capacity is relatively small, due to a large degree to the employer's conduct of keeping claimant gainfully employed. The testimony from David Erie regarding expected earnings for an over-the-road driver in comparison to a city driver is accepted as being essentially correct. When comparing earnings per hour actually worked, the city driver probably makes at least as much as an over-the-road driver. The evidence establishes that claimant's recent level of income involved work averaging 55-60 hours per week. If claimant had been forced out of his employment

000164

with the Case company, the degree of industrial disability awarded would be substantially larger than that which is awarded herein. When all the appropriate factors of industrial disability are considered, it is found and concluded that Donald E. Bradley has a 10% industrial disability as a result of the injuries he sustained on May 30, 1984.

Since claimant has been successful in his case, he is entitled to recover costs of the proceeding as set forth in the pre-hearing report. In making this determination, the physical restrictions imposed by Dr. Mackenzie are adopted as being the most accurate and Dr. Mackenzie's original 10% functional impairment rating is likewise adopted as the most accurate.

## FINDINGS OF FACT

1. As a result of the injury that occurred on May 30, 1984, Donald E. Bradley has a permanent functional impairment located in his left shoulder that is equivalent to a 10% permanent functional impairment of the body as a whole.

2. The injury has left claimant with residual functional impairment, particularly in activities in which his hand is at shoulder level or higher. His lifting should not exceed 50 pounds.

3. Claimant has not suffered any actual loss of rate of earnings as a result of the injury, but his earning capacity is, nevertheless, impaired due to his physical restrictions.

4. Claimant's earnings as a city driver would not be substantially less than his earnings as an over-the-road driver when comparing the number of hours of work which would generally be available in both assignments and also when considering the absence of road expenses for city drivers.

5. Claimant is a credible witness.

6. Claimant has suffered a 10% loss of earning capacity as a result of the injuries sustained on May 30, 1984.

## CONCLUSIONS OF LAW

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

2. When evaluated in industrial terms, claimant has sustained a 10% industrial disability compensable by 50 weeks of compensation under the provisions of section 85.34(2)(u) of The Code.

3. Claimant is entitled to recover costs in the amount of $292.40 in accordance with Division of Industrial Services' Rule 343-4.33.

000165

ORDER

IT IS THEREFORE ORDERED that defendant pay claimant fifty (50) weeks of compensation for permanent partial disability at the stipulated rate of three hundred sixty-one and 92/100 dollars ($361.92) per week payable commencing April 15, 1985 as stipulated by the parties.

IT IS FURTHER ORDERED that defendant pay all past due amounts in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendant pay the costs of this action pursuant to Division of Industrial Services' Rule 343-4.33 in the amount of two hundred ninety-two and 40/100 dollars $292.40.

IT IS FURTHER ORDERED that this file be assigned for pre-hearing conference on the claim made by claimant under the fourth unnumbered paragraph of Code section 86.13.

IT IS FURTHER ORDERED that defendant file Claim Activity Reports as requested by this agency pursuant to Division of Industrial Services' Rule 343-3.1.

Signed and filed this 19th day of October, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. William Bauer
Attorney at Law
6th Floor Burlington Building
P.O. Box 517
Burlington, Iowa 52601

Mr. Steven S. Hoth
Attorney at Law
200 Jefferson Street
P.O. Box 1105
Burlington, Iowa 52601

FILED

OCT 26 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| JANET BRAGG, | : | |
| Claimant, | : | File No. 720285 |
| vs. | : | |
| RALSTON PURINA COMPANY, | : | R E V I E W - |
| Employer, | : | R E O P E N I N G |
| and | : | |
| AETNA CASUALTY & SURETY, | : | D E C I S I O N |
| Insurance Carrier, Defendants. | : | |

## INTRODUCTION

This is a proceeding in review-reopening brought by the claimant, Janet Bragg, against her employer, Ralston Purina, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained November 24, 1982. This matter came on for hearing before the undersigned deputy industrial commissioner in Davenport, Iowa on July 23, 1987. A first report of injury was filed December 6, 1982. The parties stipulated that claimant has received temporary total or healing period benefits which were causally related to her injury for 50 4/7 weeks. The record in this case consists of the testimony of claimant and of James Bragg as well as of claimant's exhibits A and B and defendants' exhibits one through five.

## ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant's rate of weekly compensation is $263.12; that claimant received an injury which arose out of and in the course of her employment; that claimant received temporary total disability or healing period benefits from November 24, 1982 through November 13, 1983; and, that claimant's commencement date for any permanent partial disability due was November 13, 1983. The issues remaining for resolution are:

Whether claimant's injury is causally related to alleged permanent partial disability; and,

The extent of any permanent partial disability entitlement.

## REVIEW OF THE EVIDENCE

Claimant testified that she is a 33-year-old high school graduate who was injured on November 24, 1982 when a bale bag containing ten five-pound bags of oatmeal fell on her head. Medical records indicate that claimant was wearing a hard hat when injured. Claimant initially saw J. Sunderbruch, M.D., th company physician. She also apparently received a number of chiropractic manipulations from a Dr. Troxell. Ultimately, claimant was treated by her family physician, Gerald H. Goetts D.O., by Anthony D'Angelo, Jr., D.O., and by John E. Sinning, M.D. Dr. Sinning and Dr. D'Angelo are orthopaedic surgeons. Claimant's treatment consisted of x-rays, muscle relaxants, anti-inflammatories, physical therapy and a TENS unit. In October, 1983 Drs. Sinning and D'Angelo released her from care and for work. Claimant indicated that she did not attempt a work return in October, 1983 as she was not feeling that good.

In January, 1984, claimant and her family moved from the Davenport area to the Ottumwa area. Upon referral of Dr. Goetts claimant saw Gary Davis, D.O. Claimant reported that, throughou this time, she had severe headaches, back and neck pain, constip sleeplessness and irritability. She reported that these symptom as well as nervousness continue to the present. Claimant reported that she has seen Dr. Davis approximately two times monthly or more since March or April, 1984 and that he has administered osteopathic manipulation, prescribed medicine and performed medication reviews for her.

Claimant reported that she now has more frequent and unprecip headaches and that these produce pain which is not localized but can be found at the back of the head, the side of the neck and the base of the skull. She reported that, at their worst, her headaches could "keep her down" for three days. Claimant testified that she continues to take pain medication, but no longer does daily exercises which Dr. Sinning had prescribed. She indicated that she had become "very dependent" upon exercises Claimant reported that she has lifted a six-month-old baby and rocked him for approximately 15 minutes. She opined that the child weighed approximately 20 pounds. She reported that she could carry a sack of groceries.

Claimant is now employed as a process assistent in a corn sweetener plant. She indicated that she collects product samples and tests them. Claimant reported that climbing four flights of stairs, as she is required on her job, produces back and leg pain and that she tires easily. Claimant works a rotational shift on which she works two days, is off three days, works three days, and then is off two days. She opined that she could not do factory work requiring her to work a 40-hour week over a five-day period. Claimant expressed her belief that she could not return to a number of her pre-injury employments. She

stated that she would get too stiff if she were to sort coupons, that cashiering, if such required her to move boxes, would not be possible and that inventorying would not be appropriate employment as she could possibly be assigned to a position where she would be required to move heavy boxes. Claimant agreed that she had never been so assigned in five years of working on an inventorying job.

James Bragg, claimant's husband of 16 years, reported that, prior to her injury, claimant had played softball and tennis and had run. He reported that she no longer does those activities and no longer mows lawn or shovels snow. He reported that claimant continues to clean house unless she is having a day in which she literally can do nothing. He characterized his wife as having less endurance than she had prior to the accident. Mr. Bragg agreed, however, that he does not know if claimant is having neck or low back pain. He reported that he assumes claimant is trying not to complain and stated that claimant has "real, real bad headaches" approximately every one and one-half months.

A January 3, 1983 report of Dr. Sinning indicates that, at the time of her injury, claimant had considerable pain in her face and initially thought she had broken her teeth. She did not lose consciousness, but was dizzy and felt her balance had been affected. He reported that claimant had developed occipital headaches and numbness in her right arm. Headaches were most severe upon awakening in the morning, although claimant experienced a pulling sensation in her neck most of the time. Her thumb, index and little fingers were tingly and numb, especially at night; she was awakened with this feeling. Strength and gross feeling appeared normal to claimant. On physical examination, claimant's sternomastoids and posterior cervical muscle masses were remarkably irritable with the interscapular muscles irritable and tender as well. Motion was mildly limited in rotation, lateral flexion and extension. Passively with claimant at rest in the supine position, motion could be carried out through a complete range indicating that the restriction was protective. Dr. Sinning then believed that claimant's headache was part of her neck strain problem. Dr. Sinning reexamined claimant on September 29, 1983. In a report issued October 4, 1983 he reported that claimant was still aware of headaches with some occasional pain in the middle and low back. He reported that claimant could point out areas of soreness in her back at the base of the skull and junction of the neck and the upper back. She had full range of motion of the neck, upper back and shoulders and did not have muscle irritability or spasm. He reported, however, that she tended almost automatically to tighten her neck and upper back muscles and hold her head and neck in a rigid position, all of which made relaxation very difficult. Strength was adequate and appropriate for her size and musculature. No neurological abnormalities were present. Claimant had no

palpable interscapular muscle spasm.

New x-rays were taken and reviewed. All x-rays were normal with no evidence of developmental or acquired abnormalities and with no change as a result of trauma when compared with x-rays taken in December (1982). Dr. Sinning opined that claimant could return to full, regular activities including work at Ralston. He opined that claimant may have some recurrence of minor symptoms as she increases her activity and returns to work, but that, based on claimant's then present status, she would have full recovery without permanently impaired function. He reported that it was important for claimant to review instructions received relative to relaxation. He indicated she seemed to fully understand that some part of her neck soreness was secondary to her almost automatic tightening of her neck muscles. He reported that she was going to use gentle stretching of her neck and active range of motion as a means of combating that phenomenon.

In a report of June 16, 1983, Dr. D'Angelo reported that claimant had been under his care from April 7, 1983. He reported that the initial history and physical exam was consistent with cervical sprain and strain secondary to a flexion/extension type injury. He indicated that when last evaluated on May 19, 1983, claimant stated she would not be able to perform duties of her job secondary to neck pain, but he opined that symptoms would continue to improve and that a return to light duty activity could be anticipated within 6-8 weeks from May 19, 1983 with a gradual return to full, unrestricted activity.

In a report of February 3, 1984, Dr. Goettsch reported that claimant had been treated on a regular basis since her November 24, 1982 accident with slow but steady improvement. He did not believe that she would have any permanent impairment, but that occasional symptoms may interfere with her increase in activities.

Dr. Davis, a family practitioner, testified in his deposition that he first saw claimant on April 1, 1984 when she had complaints of neck pain. His diagnosis was myofibrosis. Dr. Davis next saw claimant on April 24, 1984 when she had complaints of a headache and ear pain. He then diagnosed an upper respiratory tract infection. Manipulative therapy was also performed. Dr. Davis also saw claimant twice in May, 1984, once each in June, July and August, 1984, and several times in November, 1984. Dr. Davis reported that, on November 8, 1984, he referred claimant to a Dr. McMillan, an ear, nose and throat specialist. Davis reported that Dr. McMillan opined that claimant had shown TMJ syndrome upon examination and that claimant may have hypoglycemia. Dr. Davis subsequently reported that marked complaints of headache can be a TMJ symptom and that hypoglycemia is a systematic problem which is not induced traumatically. Dr. Davis opined, however, that he did not believe claimant was hypoglycemic, but stated he had no objective findings to support that opinion. Dr.

Davis testified that claimant had had paravertebral spasm from her low back into her neck throughout his evaluations of claimant.

On February 28, 1985, Dr. Davis again examined claimant and found symptoms of carpal tunnel syndrome. He referred claimant to a Dr. Berg for evaluation. Dr. Berg apparently performed a carpal tunnel release on February 6, 1986.

Dr. Davis stated that he suspected an arthritic component in claimant's condition as of September 17, 1985.

Dr. Davis did not see claimant from April 29, 1986 to July 31, 1986 or from November 12, 1986 to March 31, 1987. As of July 8, 1987, he had not seen claimant since March 31, 1987.

At various times Dr. Davis had prescribed Valium, Tolectin DS, Midrin, Percodan and Darvocet for claimant. He opined that claimant's drug intolerance made accurate diagnosis of her condition difficult in that he was, therefore, unable to ascertain to which drugs claimant might positively respond.

Dr. Davis apparently performed what he characterized as a disability evaluation on November 12, 1986. He reported that he found claimant had a 7% permanent partial impairment of the cervical and thoracic spine as a result of limited range of motion. He indicated that, when added to findings of Marc E. Hines, M.D., a neurologist, her overall permanent partial impairment would be from 10-12%. Dr. Davis indicated that the additional impairment, added as a result of Dr. Hines' evaluation, related to claimant's pain.

Dr. Davis opined that claimant's condition would not improve further and that she would now sustain chronic changes with arthritis worsening her condition. Dr. Davis stated there was an 80% chance that claimant would develop arthritic degeneration with increased impairment. He subsequently stated, however, that he was hesitant to diagnose arthritis now without objective studies.

Dr. Davis opined that claimant's symptoms were consistent with her described injury.

Dr. Davis stated he had not had access to Dr. Sinning's report, but had reviewed one report of Dr. D'Angelo. Dr. Davis stated that, had claimant had full range of motion as described in Dr. Sinning's October, 1983 report, her condition had changed as of his April, 1984 evaluation. He reported that muscle guarding, that is, holding the neck in a rigid fashion, could induce muscle tension and that, with such guarding, six months would be sufficient to allow fibrosis or muscle foreshortening to develop. He reported that use of, and subsequent discontinuation of, non-steroidal anti-inflammatories could produce inflammation

and reduced range of motion. He agreed, however, that he was unaware of whether claimant was on anti-inflammatory medication in October, 1983.

Marc Edward Hines, M.D., a neurologist, reported in his deposition that he initially saw claimant for EMG and velocity studies on December 16, 1985. He then concluded that claimant had mild residual radiculopathy in the area supplied by the eighth cervical and first thoracic nerve roots which he thought related to the original neck injury. He found that claimant also had carpal tunnel syndrome of mild to moderate severity. Dr. Hines testified that it is easier for a person with neck problems in the C-8 and T-1 nerve roots to develop carpal tunnel syndrome or like problems because the nerves are already not functioning perfectly and are easily impaired further. He also stated, however, that it was not possible to make an opinion as to the causation of claimant's carpal tunnel syndrome without knowledge of claimant's intervening activities.

Dr. Hines again saw claimant on December 16, 1986 upon Dr. Davis' referral for a permanent partial impairment evaluation. He reported that he assigned claimant a 10% permanent partial impairment as the result of her loss of forward extension and backward and lateral flexion to the left in the neck. He reported that claimant had a 20% loss of low back, forward flexion and a loss of ability to perform activities of daily living. He stated that he included claimant's headache symptoms in the loss of ability to perform daily living activities and that 5% of the overall impairment related to activities of daily living.

Dr. Hines reported that he had never reviewed claimant's prior medical records. He reported that it was possible on several grounds to explain discrepancies between the findings of Dr. Sinning in October, 1983 and his findings upon examination of claimant in December, 1986. He stated it was possible that claimant's impairment might have worsened as a result of her developing an arthritic condition in the neck or that it was possible that claimant's condition was ascerbated as the result of work performed or a second injury. He agreed that no arthritic studies had been done.

Dr. Hines reported that he had not thoroughly explored whether claimant was having muscle contraction/tension headaches. He stated it is possible that constant tightening of the neck (muscles) could induce near-chronic or permanent neck soreness.

APPLICABLE LAW AND ANALYSIS

We consider whether claimant's injury is causally related to alleged permanent partial disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 24, 1982 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

An award of benefits cannot stand on a showing of a mere possibility of a causal connection between the injury and claimant's employment. An award can be sustained if the causal connection is not only possible, but thoroughly probable. Nellis v. Quealy, 237 Iowa 507, 21 N.W.2d 584 (1946).

A cause is proximate if it is a substantial factor in bring 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 injury or activity need not be the sole proximate cause if the injury is directly traceable to it. Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974).

Drs. Sinning, D'Angelo and Goettsch, who were claimant's initial treating physicians following her injury, all felt, by late 1983 or early 1984, that claimant should have no permanent partial impairment as a result of her injury, albeit she might have occasional symptoms as she increased her activities. Dr. Sinning had examined claimant on September 29, 1983 and had then found she had full range of motion of the neck, upper back and shoulders and did not have muscle irritability or spasm. Her strength was adequate and appropriate for her size and musculature and no neurological abnormalities were present. X-rays then

taken were normal with no evidence of developmental or acquired abnormalities and no changes as the result of trauma in the nine-month interval from x-rays taken in December, 1982. Dr. Sinning did note that claimant had almost automatic tightening of the neck and upper back muscles with a rigid holding of her head and neck, all of which produced neck soreness. He reported that claimant was to use neck stretching and active range of motion to combat this tendency. Claimant testified that she ceased the exercise program Dr. Sinning prescribed as she had become "dependent" upon it. Dr. Davis initially examined claimant in April, 1984. He then diagnosed myofibrosis. While Dr. Davis stated in his deposition that he believed claimant's symptoms were consistent with her described injury, he also opined that six months of neck guarding might be sufficient to produce the muscle foreshortening or myofibrosis he had found in April, 1984. Dr. Hines opined that claimant has mild residual radiculopathy in the C8-T1 nerve roots related to her original injury. He has also stated that it is possible that constant tightening of the neck muscles could produce near-chronic or permanent neck soreness. He indicated that he had not explored the possibility that claimant was having muscle contraction tension headaches. Diagnosis of temporomandibular joint syndrome and hypoglycemia are also contained in the record. Claimant has had a diagnosed and treated carpal tunnel syndrome and release. Dr. Hines expressed his belief that persons with existing nerve injuries are more susceptible to carpal tunnel syndrome, but agreed it was not possible to relate claimant's carpal tunnel condition to her injury given his lack of knowledge of her intervening activities. Both Drs. Hines and Davis have suggested that claimant may have an arthritic component to her condition at this point. That appears inconsistent with the lack of degenerative findings on x-rays as of October, 1983, however. Neither Dr. Hines nor Dr. Davis has instituted testing for arthritis. Dr. Davis has indicated that claimant has an intolerance to many medications which has made diagnosis of her condition most difficult. Relatedly, he has treated claimant for and referred her to a specialist for ear, nose and throat problems. Such, while possibly contributing to claimant's headache condition and general malaise, could not be easily related back to her original injury. Given claimant's absence of symptoms in October, 1983, the optimistic outlook of her treating physicians as of that time, claimant's described contribution to her condition by way of muscle tightening, claimant's voluntary cessation of the exercise program Dr. Sinning prescribed to counteract such and the variety of possible diagnoses for claimant's condition, it is not possible to say claimant's current condition can probably be attributed to her original November 24, 1982 injury. Claimant has not sustained her burden of showing a causal connection between the injury and the claimed permanent partial disability.

Because claimant has not prevailed on the causal connection issue, we need not consider the permanent partial disability

entitlement question. However, even had claimant prevailed, any disability entitlement would likely have been small. Claimant is now working at a job which is apparently within her capacities. No medical restrictions on claimant's activities are within the record. Claimant, at hearing, restricted herself from a number of prior employments. Claimant's self-restrictions are not supported by the record as a whole. Claimant did not appear motivated to seek work beyond that which she presently holds. The only permanent partial impairment ratings in the record relate to a mild to moderate disability and are not such as would preclude claimant from continuing her present job or from working, albeit with some modification, at other jobs she has held. Hence, claimant's permanent partial disability, had defendants' had liability for such, would likely not have exceeded her functional impairment rating.

## FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

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

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

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

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

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

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

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

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

Claimant chose not to continue that program.

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

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

Claimant has had diagnosis of possible temporomandibular joint syndrome and hypoglycemia.

Temporomandibular joint syndrome may account for headaches.

Hypoglycemia is a systematic and not a traumatic disorder.

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

Claimant has had diagnosis and treatment for carpal tunnel syndrome.

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

## CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established a causal relationship between her November 24, 1982 injury and her present claim to permanent partial disability.

## ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing further from these proceedings.

Claimant and defendants bear equally the costs of these proceedings.

Signed and filed this 26th day of October, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. David A. Millage
Attorney at Law
1989 Spruce Hills Drive
Bettendorf, Iowa 52722

Mr. Larry L. Shepler
Attorney at Law
600 Union Arcade Building
111 East Third Street
Davenport, Iowa 52801

000177

FILED

DEC 2 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| ELDON BRITTAIN,<br><br>Claimant,<br><br>vs.<br><br>FISHER CONTROLS,<br><br>Employer,<br><br>and<br><br>INSURANCE COMPANY OF NORTH AMERICA,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 669180<br><br>R E V I E W -<br><br>R E O P E N I N G<br><br>D E C I S I O N |

## STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Eldon Brittain, claimant, against Fisher Controls, employer, hereinafter referred to as Fisher, and Insurance Company of North America, insurance carrier, for workers' compensation benefits as a result of an alleged injury on May 6, 1981. On September 22, 1987, hearing was held on claimant's petition and the matter was considered fully submitted at the close of the hearing.

The parties have submitted a pre-hearing report of contested issues and stipulations which was approved and accepted at the time of hearing as a part of the record in this case. Oral testimony was received during the hearing from claimant and from Ronald Allen. The exhibits received into evidence at hearing are listed in the pre-hearing report. According to the pre-hearing report, the parties have stipulated to the following matters:

1. On May 6, 1981, claimant received an injury which arose out of and in the course of employment with Fisher.

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $226.72.

3. Claimant is not seeking further healing period benefits and the parties agreed that the injury was cause of both a period of total disability during a healing period and some extent of permanent industrial disability.

4. All requested medical benefits have been or will be paid by defendants.

000178

## ISSUES

The only issue submitted by the parties involves the extent of claimant's entitlement to weekly benefits for permanent disability.

## SUMMARY OF THE EVIDENCE

The following is a summary of evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision.

Claimant was born on November 11, 1921 and is currently a 65-year-old man who has only an eighth grade education. In 1939, he completed a welding course at North Kansas City High School in Kansas City, Missouri and became a certified welder. In 1943 or 1944, he attended aviation school while in the U. S. Navy and learned to overhaul engines. In addition, he received some certification and training while working for Fisher in the areas of welding and plumbing.

Claimant's past employment includes jobs as a welder, aviation mechanic and machinist. Claimant has worked for Fisher since 1963. While at Fisher, he was initially a welder, but eventually became a plumber. The job of plumber required claimant to climb and lift weights of up to 60 pounds.

Claimant testified that, on May 6, 1981, he fell 12 feet from a ladder and hit a concrete floor. At the time, he reported to his physician that he heard his neck "crack" and a crunching of his spine. The company doctor placed a cervical collar on him, an ambulance was called and he was then transferred to the emergency room at Marshalltown Area Community Hospital. X-rays were taken of the lumbar spine which revealed a compression fracture at the L-1 level of claimant's spine. Claimant complained of pain in the neck and low back. Claimant was admitted to the hospital on that date and was eventually discharged on May 17, 1981.

Claimant was initially treated by E. L. Keyser, M.D., but was later referred to Robert A. Hayne, M.D., a neurosurgeon. Upon the direction of Dr. Hayne, claimant returned to work during the third week of August, 1981 following his recuperation from the injury and continued in his job as a plumber without loss of income until taking early retirement in December, 1984.

After returning to work in August, 1981, claimant testified that he continued to experience pain on occasion and, also on occasion, he would report this pain to the medical department at Fisher. Fisher's records indicate that, on January 5, 1982,

000179

claimant reported to the medical department complaining of pain in his low back region in the same general area as his vertebra fracture.

> Most of the discomfort seems to be a little bit to the right of the mid-line but this area has always been uncomfortable since his fractured vertebra from the fall in May of 1981.

Claimant was seen again on November 3, 1982 for low back pain.

> Employee states his back has 'never been right' since the compression fracture he suffered in a fall on 5/6/81.

On December 6, 1982, claimant was again seen in the medical department.

> Slipped and fell off of just one step, landing on his right forearm and states that he had some tools in his right hip and this part of his back has continued to bother him every [sic] since his injury in May of 1981.

Finally, on October 30, 1984, claimant felt a snap in his back and reported this to the medical department which stated:

> ...he has asked about a CAT scan in the past but since none was available locally he decided to put up with it and his back did get better for a while but he states 'it never has been right' since the fall on about 5/6/81.

Furthermore, the medical report stated at the time:

> ...although he wanted to work until he is 65 he is afraid if he continues to work that long his back may cause him more problems.

Claimant testified at hearing that he retired on December 21, 1984, two years before he had planned to do so because he could no longer put up with the pain he experienced in his low back and neck. Claimant testified that this retirement resulted in a $50 per month reduction in retirement benefits and loss of wages over a two-year period.

Claimant further testified concerning his medical condition prior to the fall of May 6, 1981. He stated that he had a cervical fusion in 1977, but, following appropriate recuperation, he returned to work and was able to do his job without any difficulties. Claimant testified that he did not receive medical treatment for his neck or back between August 1, 1977

and May 6, 1981. Dr. Hayne had performed claimant's cervical fusion in March, 1977. Dr. Hayne had released claimant to return to work in June, 1977, and claimant was not seen by Dr. Hayne between August, 1977 and August, 1981. As expressed in his deposition, it was Dr. Hayne's opinion that the pain in the back of claimant's neck was due to degenerative changes in his cervical spine region which were aggravated by the fall from the ladder sustained on May 6, 1981. Dr. Hayne further opined that the cause of claimant's vertebra L-1 fracture was from the fall from the ladder occurring on May 6, 1981.

Dr. Hayne testified that, at the time of the examination of June 24, 1985, he felt claimant's impairment was in the neighborhood of four percent of the total as a result of the events which took place since May, 1981. This included the neck symptoms. The doctor felt that claimant's total or combined disability was approximately 13-14% of which four percent would be related to events occurring after the 1981 injury. This was based mainly upon the doctor's estimate of pain. However, as of March 19, 1986, the doctor indicated there was an increase in claimant's disability to six percent. This was a combination of two factors including:

> ...irritation or aggravation of the condition by the fall which he had in May of 1981 but with the symptomatology and subsequently resting on the degenerative changes which were present in the neck before and after that particular fall.

Dr. Hayne did not use any guide to arrive at his impairment ratings.

Dr. Hayne also testified as to what constituted degenerative arthritis. He indicated that, in claimant's case, the events from May 6, 1981 accelerated the degenerative process. Dr. Hayne, however, also characterized the aggravation injury of May, 1981 as temporary, rather than permanent. Dr. Hayne also stated in his deposition as follows:

> I think that the fall was the significant factor in his complaints that he registered to me in the examination of June 8th and November '85.

With reference to restrictions, Dr. Hayne indicated that claimant's limitations would be dependant upon the pain and suffering that he would incur while engaging in various activities. He indicated: "In other words, [it] would be a trial and error type of process." Dr. Hayne also stated that: "Generally speaking of the limitation around forty to fifty pounds of weight lifting."

Jerome G. Bashara, M.D., an orthopaedic surgeon, examined

claimant in October, 1986. Dr. Bashara testified in his deposition that, with reference to claimant's neck, claimant suffers from a 25% permanent partial impairment to the body as a whole. Five percent of this impairment is due to a preexisting condition of his neck called spondylosis. Ten percent of the impairment is due to the herniated cervical disc which was surgically repaired in 1977 by Dr. Hayne. The remaining ten percent impairment was the result of the fall at work in 1981. With reference to claimant's lower back, Dr. Bashara gave an opinion that claimant sustained a 15% permanent partial impairment to the body as a whole related to the compression fracture which claimant suffered in the fall. Dr. Bashara would impose restrictions on the use of claimant's neck consisting of no rotating or tipping of the head such as looking up at a ceiling or driving a car. Dr. Bashara stated that he would not impose any restrictions on the use of claimant's low back.

Claimant complains at the present time of headaches, pain in the base of the head, right shoulder pain, numbness in the arm, pain in the lower back and right-sided pain, and pain in his hips down to his legs. Most of the pain is aching, but at times his pain becomes severe.

Claimant testified that he has not sought other employment, but admits that he is not totally incapable of performing any type of work. Claimant has not sought any further treatment for his neck or his back as he feels that further treatment would be to no avail. Claimant's activities at the present time are limited to light household work and to working a little bit around his yard. Claimant formerly constructed motorcycles as a business and as a hobby, but he has since terminated this endeavor in light of his back pain. Claimant is able, however, to ride his motorcycle on occasion and has recently taken an extensive road trip with his motorcycle, but he pointed out that he stopped frequently to rest his back.

## APPLICABLE LAW AND ANALYSIS

Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment or limitation upon activity involving the body as a whole, the degree of permanent disability must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity resulting from the work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physical impairment or restriction on work activity may or may not result in such a

000183

loss of earning capacity. The extent to which a work injury and a resulting medical condition has resulted in an industrial disability is determined from examination of several factors. These factors include the employee's medical condition prior to the injury, immediately after the injury and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

In the case sub judice, claimant's neck and back condition before the work injury was certainly not excellent due to the prior fusion surgery, but, according to claimant's testimony and the available evidence, claimant was able to fully perform physical tasks involving heavy lifting, repetitive lifting, bending, twisting, stooping, climbing and prolonged standing and sitting. Claimant was simply able to perform his job as a plumber with little or no problem.

All of the physicians rendering opinions in this case opine that claimant suffers permanent impairment from the May, 1981 fall. The greater weight must be given to the opinions of Dr. Hayne and Dr. Bashara, who are specialists in the fields of neurosurgery and orthopaedic surgery, respectively. The views of Dr. Hayne admittedly are very confusing. On the issue of causal connection, he states, on one hand, that the fall accelerated claimant's deteriorating arthritis condition, but then later states that the aggravation was temporary. However, his permanent ratings demonstrate, in the final analysis, that he believes a significant portion of claimant's total impairment is due to the May, 1981 fall. Unfortunately, Dr. Hayne did not use an impairment rating guide to make his ratings. On the other hand, Dr. Bashara, who used available guidelines, arrived at a much higher rating of 10% for the neck and 15% for the low back compression fracture. Dr. Hayne, likewise, recognized that claimant had a prior existing impairment.

More important from an industrial disability standpoint, is the permanent physical activity restrictions imposed by physicians. Again, the evidence is confusing as Dr. Hayne imposed only a "trial and error" type of restriction, whereas Dr. Bashara indicated that claimant should restrict his activities to endeavors which do not require extensive movement of his neck and head. The greater weight of such evidence demonstrates

that, although claimant is able to perform light-duty work, he can no longer perform the heavy lifting type of work or the type of work involved in his job at Fisher. Claimant is probably unable to perform most of the jobs he has held in the past, all of which have involved heavy lifting. Apart from his lost earnings during the healing period, which was compensated by healing period benefits, claimant has suffered a permanent loss in actual earnings as a result of his early retirement which was caused by the work injury. This retirement was two years before he would have normally done so and due primarily because of claimant's inability to tolerate pain in his neck and back which increased after the May, 1981 fall.

Claimant is 65 years of age and certainly was close to the end of his working career when he was forced to leave his employment at Fisher in 1984. His loss of future earnings from employment due to disability is, however, not as severe as would be the case for a younger individual. Becke v. Turner-Busch, Inc., Thirty-fourth Biennial Report of the Industrial Commissioner, 34 (App. Dec. 1979).

Claimant has only an eighth grade education and, given his age, he does not appear to be a likely candidate for vocational rehabilitation.

Claimant's age and retirement plans before the work injury and claimant's failure to look for work after his retirement from Fisher also adversely impact on claimant's earning capacity for reasons unrelated to the work injury in this case. This fact substantially reduces the amount of permanent disability caused by the work injury in this case. Certainly, claimant's age alone does not prevent a substantial award of industrial disability benefits, given the teachings of Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935). In Diederich, a 59-year-old streetcar motorman was awarded permanent total disability benefits because he was precluded by a work injury from further gainful employment. However, it was not found in the Diederich case that claimant had already planned to retire within a few years at the time of the work injury. Most certainly, age is one of the factors to be considered in assessing industrial disability or loss of earning capacity. On the other hand, each case is different and early retirement from one employer does not terminate an individual's earning capacity. In this case, claimant's age and retirement plans did not show that he was planning on retiring entirely from the work force when he retired from Fisher. Claimant had engaged in business endeavors in the past outside his employment at Fisher and, absent his back condition, would probably have done so in the future.

Defendants point out that claimant should be precluded from disability benefits as he has not looked for work since retiring. This aspect is certainly important, but must be offset somewhat

as Fisher has not attempted to locate suitable employment for claimant as well.

After examination of all the factors, it is found, as a matter of fact, that claimant has suffered a 30% loss of earning capacity from his work injury. Based upon such a finding, claimant is entitled, as a matter of law, to 150 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 30% of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection. According to the pre-hearing report, claimant has already been paid 25 weeks of permanent disability benefits. Therefore, claimant will be awarded in this decision an additional 125 weeks.

There is little question in this case that claimant's healing period ended on August 16, 1981 when he returned to work after the May 6, 1981 fall. Therefore, permanent disability benefits shall be awarded from August 17, 1981 taking into account the 25 weeks already paid.

## FINDINGS OF FACT

1. Claimant was a credible witness.

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

3. On May 6, 1981, claimant suffered an injury to the upper and lower back which arose out of and in the course of his employment with Fisher.

4. The work injury of May 6, 1981 was a cause of a period of disability from work from May 6, 1981 until August 16, 1981 at which time claimant returned to work.

5. The work injury of May 6, 1981 was a cause of a significant permanent partial impairment to the body as a whole from an industrial disability standpoint which prevented claimant from returning to heavy work or extensive use of his neck and back.

6. The work injury of May 6, 1981 and resulting permanent partial impairment was a cause of a 30% permanent loss of earning capacity. Claimant was 63 years of age at the time of his early retirement from Fisher. The work injury was a substantial cause of his early retirement from Fisher. Claimant can no longer work at the job which he was performing at the time of the work injury nor at most other heavy work claimant has performed in the past. Prior to the work injury, however, claimant had planned to retire from Fisher at the age of 65. Claimant has not looked for suitable employment since his retirement, but Fisher has likewise made no effort to return

claimant to the work force following his early retirement. Claimant's retirement plans before the work injury did not evidence a plan to entirely leave the workforce or to end his earning capacity.

## CONCLUSIONS OF LAW

1. Claimant has established, by a preponderance of the evidence, entitlement to permanent partial disability benefits as ordered below.

## ORDER

IT IS THEREFORE ORDERED that defendants shall pay to claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of two hundred twenty-six and 72/100 dollars ($226.72) per week from twenty-five (25) weeks after August 17, 1981.

IT IS FURTHER ORDERED that defendants shall pay accrued weekly benefits in a lump sum and shall receive credit for benefits previously paid.

IT IS FURTHER ORDERED that defendants shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

IT IS FURTHER ORDERED that defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

IT IS FURTHER ORDERED that defendants shall file Claim Activity Reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 2nd day of December, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

000187

Copies To:

Mr. Mark T. Hedberg
Attorney at Law
840 Fifth Avenue
Des Moines, Iowa 50309

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

000188

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| DAVIS BUDDENBERG,<br><br>Claimant,<br><br>vs.<br><br>REILLY CONSTRUCTION COMPANY,<br><br>Employer,<br><br>and<br><br>IOWA CONTRACTORS WORKERS' COMPENSATION GROUP,<br><br>Insurance Carrier,<br>Defendants. | FILE NO. 734858<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>FILED<br><br>AUG 14 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Davis Buddenberg, claimant, against Reilly Construction Company, employer (hereinafter referred to as Reilly), and Iowa Contractors Workers' Compensation Group, insurance carrier, defendants, for benefits as a result of an alleged injury on June 6, 1983. On May 18, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing only from claimant. The exhibits received into the evidence at the hearing are listed in the prehearing report. All of the evidence received at the hearing was considered in arriving at this decision. The prehearing report contains the following stipulations:

1. On June 6, 1983, claimant received an injury which arose out of and in the course of his employment with Reilly;

2. The injury of June 6, 1983 was a cause of both temporary disability during a period of recovery and permanent disability;

3. Claimant seeks healing period benefits for the period from June 6, 1983 through March 4, 1983 and claimant was off work for this period of time;

000185

According to Dr. Marchiando's letter report of December 23, 1985, the doctor felt that claimant was able to perform light duty work on October 11, 1983 but not his full mechanical duties. Claimant did not return to work at that time. Also, according to this letter, Dr. Marchiando saw claimant on November 29, 1983 and gave claimant a permanent impairment rating. Dr. Marchiando felt that claimant was able to return to work duties at that time. Claimant did not actually return to work until after March, 1984. Claimant did not return to Dr. Marchiando after he was discharged in November, 1983 until November, 1984. No other reports from Dr. Marchiando or another doctor were submitted to contradict Dr. Marchiando's views contained in the December, 1985, letter report. Claimant testified that he had returned to Dr. Marchiando during the winter of 1983 and complained that he could not return to work as the cold weather bothered his hands. Claimant stated that Dr. Marchiando wrote a letter to Reilly authorizing his continued absence from work. No such letter was produced into the evidence.

Regardless of whether Dr. Marchiando authorized claimant's absence from work during the winter of 1983, claimant reached maximum healing in the opinion of Dr. Marchiando when he rated his permanent impairment on November 29, 1983. Claimant's complaints of inability to tolerate cold weather is a part of his permanent disability which essentially has not changed since being released for work. Although Dr. Marchiando did rate claimant a second time in November, 1985, and provided claimant with a higher impairment rating, his findings during this second examination did not change as will be explained below.

5. The work injury of June 6, 1983 was a cause of a 44.5 percent permanent partial impairment to claimant's right hand.

Claimant testified and demonstrated at the hearing that he lost much of his grip as a result of the injury. He can only touch his first or index finger with his thumb. Claimant complains of general weakness and an inability to grab wrenches and equipment. Claimant testified that he has lost some feeling in all of his fingers. Claimant also states that he is very susceptible to cold weather and is unable to work in cold weather. Claimant also said that he experiences pain in the palm of his hand but there is no loss of feeling in the palm.

In November, 1983, Dr. Marchiando opined that claimant suffered a 40 percent permanent partial impairment to the right hand as a result of the work injury. In November, 1985, claimant returned to Dr. Marchiando with additional complaints concerning his ability to perform his work. Although Dr. Marchiando's findings did not change, he did increase the permanent partial rating to 45 percent "in light of his occupation and how he has to use his hands for his occupation." Claimant received a second evaluation of his impairment from Wayne Janda, M.D.,

000190

another orthopedic surgeon. According to Dr. Janda, claimant suffers from a 49 percent permanent partial impairment to the right hand as a result of his work injury.

The above finding of a 44.5 percent permanent partial impairment was arrived at in the following manner. First, for the reasons that will be discussed in the conclusions of law section, the second evaluation by Dr. Marchiando must be rejected as the rating of functional loss must be based upon findings independent of the occupation of the patient being rated. Second, the finding of 44.5 percent is an average of Dr. Marchiando's and Dr. Janda's ratings. An average was used because the two physicians appear in the record to possess equal qualifications.

6. Claimant's gross rate of weekly compensation for workers' compensation purposes at the time of the work injury herein was $395.61 per week.

The gross rate was found in the following manner. Claimant testified that he was receiving at the time of the injury $9.75 per hour plus an additional $1.10 per hour. Unfortunately, claimant was not very clear as to what the extra $1.10 per hour represented. Claimant testified that he thought it might be for insurance because he received few if any fringe benefits. Although there was a hint in the testimony that this figure might represent extra pay for expenses for working at locations far from his residence, claimant also testified that he received reimbursement for meals when he was working away from home in addition to his hourly rate of pay. Also, claimant could not remember if he received the $1.10 per hour when he worked closer to his residence.

Most telling on the issue of claimant's rate of compensation was a letter dated March 18, 1986 from Reilly to its attorneys describing claimant's actual earnings over the 13 weeks prior to the accident (Joint Exhibit 3). This letter calculated claimant's weekly gross earnings for workers' compensation purposes using a "regular rate" of $10.85 per hour. Although there is a second letter in the evidence (Defendants' Exhibit A) providing figures using gross earnings at the rate of $9.75 per hour, the additional figures were added to the letter by defendants' attorney. The undersigned believes that the preponderance of the evidence indicates that the $1.10 per hour was considered by claimant and his employer to be his regular wages and not premium pay or pay for reimbursement of travel expenses.

Therefore, using the "regular rate" of $10.85 per hour, as will be explained in the conclusions of law section, we must average earnings over a 13 week period prior to the accident because claimant's hours each week varied greatly depending upon weather conditions. From the letter, exhibit 3 referred to above, claimant's gross earnings for workers' compensation

000191

purposes was a total of $5,142.88 (overtime was calculated at the regular rate) during the 13 week period prior to the June 6, 1983 work injury. This figure calculates to an average of $395.61 per week.

## CONCLUSIONS OF LAW

The foregoing findings of fact were made under the following principles of law:

I. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

In the case sub judice, Dr. Marchiando gave a higher rating after taking into account claimant's occupation and the type of use claimant was making of his hands. This is not proper for a functional impairment rating. See Lawyer & Higgs, Iowa Workers' Compensation Law and Practice, section 13-4 and cases cited therein. Only in industrial disability cases do we take into account the effect a functional impairment may have upon a claimant's ability to perform his work and his loss of earning capacity. Simbro, 332 N.W.2d 886 (Iowa 1983).

Based upon a finding of a 44.5 percent loss of use to the right hand claimant is entitled, as a matter of law, to 84.55 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(l) which is 44.5 percent of the 190 weeks allowable for an injury to the hand in that subsection.

As claimant has established entitlement to permanent partial disability, claimant may be entitled to weekly benefits for healing period under Iowa Code section 85.34(l) from the date of injury until he returns to work; until he is medically capable of returning to substantially similar work to the work he was performing at the time of the injury; or, until it is indicated

000192

that significant improvement from the injury is not anticipated, whichever occurs first.

Given the findings pertaining to the time claimant reached maximum healing, claimant is entitled under law to healing period benefits from June 6, 1983, the time of the work injury, through November 29, 1983, the time he reached maximum healing or a total of 25 2/7 weeks.

II. Claimant has the burden to establish a rate of compensation. In Iowa, the basis of compensation is the weekly earnings of the injured employee at the time of the injury. Iowa Code section 85.36. Weekly earnings is defined as follows in Chapter 85:

> ...Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed... Iowa Code section 85.36.

Section 85.36 provides various methods of computing weekly earnings depending upon the type of earnings and employment. If an employee is paid on a weekly basis, the weekly gross earnings shall be the basis for compensation. Iowa Code section 85.36(1). If an employee is paid on a daily or hourly basis or the amount of work each week varies, the weekly earnings are computed by dividing by 13 the earnings over the 13 week period before the work injury. See Lawyer & Higgs, Iowa Workers' Compensation--Law and Practice, section 124, pages 97-98.

Finally, although claimant's employment was seasonal, his occupation was not seasonal. Claimant is a maintenance mechanic and such occupation is not seasonal for all employers nation wide. Therefore, you do not annualize claimant's income to arrive at a gross rate of compensation under 85.36(9). See Lawyer & Higgs, Iowa Workers' Compensation--Law and Practice, section 126, page 99.

Based upon a finding of a gross rate compensation for workers' compensation purposes of $395.61 per week, and given his marital status with entitlement to four exemptions as stipulated by the parties, claimant is entitled under law pursuant to the commissioner's benefit schedule published July 1, 1982 to a rate of compensation in the amount of $249.37 per week.

ORDER

1. Defendants shall pay to claimant eighty-four point fifty-five (84.55) weeks of permanent partial disability benefits

000193

at the rate of two hundred forty-nine and 37/100 dollars ($249.37) per week from November 30, 1983.

2. Defendants shall pay to claimant healing period benefits from June 6, 1983 through November 29, 1983 at the rate of two hundred forty-nine and 37/100 dollars ($249.37) per week.

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

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

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

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

Signed and filed this 14 day of August, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Dennis G. Larson
Attorney at Law
112 West Main
Decorah, Iowa 52101

Mr. John M. Wharton
Attorney at Law
Suite 300, Fleming Bldg.
518 Sixth Avenue
Des Moines, Iowa 50309

000194

FILED

OCT 15 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| NORMA CALDERON,<br><br>Claimant,<br><br>vs.<br><br>H. J. HEINZ COMPANY,<br><br>Employer,<br><br>and<br><br>LIBERTY MUTUAL INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 803223<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This is a proceeding in arbitration brought by Norma Calderon against H. J. Heinz Company, employer, and Liberty Mutual Insurance Company, insurance carrier. The case was heard at Davenport, Iowa on May 12, 1987 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Norma Calderon and exhibits 1 through 19.

## ISSUES

Claimant alleges that she fell at her place of employment on March 26, 1985, producing injury to her right leg and also to her low back. Claimant seeks compensation for temporary total disability or healing period and permanent partial disability or permanent total disability, including that under the odd-lot doctrine. Claimant seeks to recover medical expenses incurred with David Naden, M.D. It was stipulated that the times claimant was off work were from July 10, 1985 through September 15, 1985 and again from June 3, 1986 through August 31, 1986. It was stipulated that, in the event of an award, the rate of compensation is $245.82 per week and that group benefits under section 85.38(2) have been paid in the amount of $1,399.56 for the 1985 absence from work and in the amount of $1,850.38 for the 1986 absence from work. It was further stipulated that the employer is entitled to credit for those payments. It was further stipulated that any compensation for permanent disability is payable commencing September 1, 1986.

The issues thus presented by the parties are whether claimant sustained injury arising out of and in the course of her employment to either her back, her right leg, or both on March 26, 1985; determination of her entitlement to weekly compensation for temporary total disability or healing period; determination of her entitlement to compensation for permanent disability; liability for medical expenses and costs of the action.

## SUMMARY OF THE EVIDENCE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case even though it is not referred to in this decision.

Norma Calderon testified that she is a 40-year-old married lady with three children whose ages range from 21 through 4. She was born in Mexico where she attended ten years of formal schooling, an education which she described as being like junior high in the United States. She worked in a bank for approximately three months, married and then moved directly from Mexico to Muscatine, Iowa. Since coming to the United States, she testified that she has worked only at Heinz.

Claimant testified that, prior to March 26, 1985, she was working every day and having no problem with her back or right leg. She denied sustaining any serious injuries to her leg or back prior to March 26, 1985. Claimant could not recall injuring her back in a fall at home, but related that a May 1, 1983 injury referred to by William Catalona, M.D., occurred while pushing a pallet at work and that his records are incorrect.

Claimant testified that, when she went in to work on the morning of March 26, 1985, there was a lot of steak sauce in the area where she worked as a palletizer operator. Claimant testified that, while cleaning the area, she fell a distance of four or five feet striking her back and leg. Claimant testified that she saw the company nurse, but continued working for two or three days and then saw Dr. Catalona. Claimant testified that her back continued to hurt and that Dr. Catalona authorized her to take off work from July 10, 1985 through September 15, 1985.

Claimant related that she was sent to David C. Naden, M.D., by an insurance company and that he eventually performed surgery on her right knee. Claimant testified that she was referred to Thomas Lehmann, M.D., at the University of Iowa Hospitals and Clinics in order to obtain a second opinion regarding the advisability of surgery on her back. Claimant testified that she has decided to decline the suggested surgery on her back until the symptoms give her no other choice.

Claimant testified that she is currently working for Heinz and that she earns more money than she did at the time of injury.

She testified that she can use a fork truck for lifting and gets along well with the other people at work. She stated that she can lift if she watches how she does it. Claimant testified that her back will be okay for a couple weeks, then it will bother her for a week. She stated that sometimes she can stoop and climb, but that she is unable to twist. She stated that extended sitting or extended walking bothers her back.

Exhibit 6, at the Answer to Interrogatory #3, contains what appears to be the nurse's notes from the Heinz plant. An entry dated March 26, 1985 indicates that claimant reported falling at her work station landing on her back and butt. An entry of April 2, 1985 indicates that she made complaints of continuing pain in her lower back. A notation appears which seems to indicate that she walked without a limp.

Exhibit 8 is identified by the exhibit list as Dr. Catalona's office notes. A note dated May 31, 1983 reports claimant injuring her low back in a fall at home. It also indicates that x-rays showed a grade-one spondylolisthesis of L4 on L5. The next entry is dated April 2, 1985 and indicates that claimant reported falling at work on March 26, 1985 and presented herself with complaints of low back pain. She exhibited restricted range of motion. Dr. Catalona indicates that x-rays showed no worsening of the previously diagnosed spondylolisthesis (exhibit 4, page 8). The note indicates that he advised her that she should restrict her activity, but that surgery could be considered if she has constant pain. A note dated April 9, 1985 indicates that Dr. Catalona informed claimant that her pain level should subside to the previous level that preexisted her fall at work. He also referred her for a second opinion. Subsequent notes over the following months indicate that claimant initially desired back surgery, but then changed her mind (exhibit 8). In his deposition, Dr. Catalona indicated that, when he examined claimant in 1985, she made no complaints regarding her knee and that he found nothing which would indicate that the fall aggravated her knee. He agreed that she had degenerative arthritis in the knee, but expressed the opinion that her knee problems were not in any way connected with the fall that she had at Heinz in March of 1985 (exhibit 4, pages 16-20).

Dr. Catalona indicated that, when he examined claimant in early 1985, x-rays of her low back showed a grade-one spondylolisthesis of L4 on L5. He indicated that the condition is one in which he would expect claimant to have intermittent episodes of low back pain and pain radiating into her buttocks and thigh (exhibit 4, pages 6 and 7). Dr. Catalona characterized claimant's injury as an aggravation of her spondylolisthesis and a flare-up of pain from that condition (exhibit 4, page 9). He opined that she had no permanent partial disability of her back as a result of the March 26, 1985 fall (exhibit 4, page 20). Dr. Catalona did relate claimant's absence from work from July 10, 1985 until

000197

August 19, 1985 to the fall that claimant sustained on March 26, 1985 (exhibit 4, page 13). He stated that the restrictions he recommended with reference to bending, stooping, twisting, climbing, jumping and lifting were those that he would normally recommend for anyone with symptomatic spondylolisthesis and that they were not imposed as a direct result of claimant's fall (exhibit 4, pages 26, 27, 35 and 36).

Dr. Catalona indicated that, at one point, claimant related to him she would be agreeable to disclaiming any work relationship of her back condition (exhibit 4, pages 28-30).

Thomas R. Lehmann, M.D., examined claimant on May 15, 1985. His clinical notes are in the record as exhibit 19. Dr. Lehmann indicated that claimant did not seem to be exaggerating her symptoms (exhibit 2, pages 6 and 7). Based upon x-rays and his examination, he found claimant to have a spondylolisthesis at the L4, L5 level (exhibit 2, pages 10 and 11). Dr. Lehmann indicated that a person can go through life with a spondylolisthesis and be free from symptoms, but that an injury can cause the condition to become symptomatic. He indicated that it is quite likely that a fall of the type which claimant described could cause the condition to become symptomatic (exhibit 2, pages 15 and 16). Dr. Lehmann indicated that he would expect that claimant has some permanent impairment, but that he was unable or unwilling to express an opinion within a reasonable degree of medical certainty since he had not examined her recently in order to determine whether or not she has continued to have symptoms (exhibit 2, page 17).

Commencing September 5, 1985, claimant began treatment with David C. Naden, M.D. He initially evaluated her condition as a grade-two spondylolisthesis of L4 on L5 with a chronic lumbar strain and sacralization of the fifth lumbar vertebrae. Dr. Naden indicated that claimant's condition would not preclude her from working, but that she would have symptoms intermittently. He indicated that, if the symptoms were persistent and severe, surgery was available. He rated her as having a 15% permanent partial disability of the whole body (exhibit 7). In the report, Dr. Naden indicates that claimant described a radiating type of pain in her right leg. It is not until his notes of February 24, 1986 that there is any indication of claimant making complaints regarding the functioning of her right knee. In the note, he assesses the condition as degenerative arthritis. Dr. Naden eventually performed a surgical repair of claimant's right knee (exhibit 7).

In his deposition, Dr. Naden indicated that claimant aggravated a preexisting condition in her back at the time she fell at work and that it progressed to the point that she could not continue working and took time off work (exhibit 3, page 6). Dr. Naden indicated that surgery for claimant's condition is usually quite

successful, but that the natural history of the condition is that it tends to become less symptomatic as the patient ages (exhibit 3, pages 7-10). Dr. Naden indicated that he would rate claimant's back disability as approximately 10% of the whole body at the present time since she seems to be getting along better (exhibit 3, page 12). He advised that she avoid frequent stooping, twisting, climbing and lifting more than 20 pounds (exhibit 3, pages 12 and 13).

Dr. Naden opined that, in the fall of which claimant testified, it aggravated a preexisting condition in her right leg (exhibit 3, page 13). Dr. Naden apportioned the disability in claimant's back and the disability in her leg at 50% to the preexisting conditions and 50% to the incident of March 26, 1985 (exhibit 3, pages 6, 20 and 21).

## APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on March 26, 1985 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

Claimant testified at hearing, where her appearance and demeanor were observed. Her testimony of falling at work on March 26, 1985 is accepted as correct. The injuries to her back that occurred in the fall are well corroborated by the plant nurse's notes and by the records of Dr. Catalona. Claimant's knee condition, however, lacks corroboration. The first entry in the record of knee complaints which appear to be something other than radiating pain down the leg is found in Dr. Naden's note of February 24, 1986, nearly a year after the time when she actually fell. It is therefore found that claimant did sustain injury to her back which arose out of and in the course of her employment on March 26, 1985, but that she has failed to prove, by a preponderance of the evidence, that she injured her knee in that incident. The stipulation of the parties as to the dates claimant was off work is consistent with the medical records and, in particular, supported by Dr. Catalona. It is therefore found and concluded that claimant was in a period of recovery and medically incapable of performing work in employment substantially

similar to that in which she was engaged at the time of injury from July 10, 1985 through September 15, 1985, a period of nine and five-sevenths weeks. The healing period ended by her return to work [Code section 85.34(1)].

The record establishes that claimant had complaints regarding her low back at the time of her last pregnancy and also from an injury in 1983. She testified that she was having no problems with her back until she fell on March 26, 1985. That testimony, taken in light of the indications of prior problems in the record and the nature of her condition, is, nevertheless, found to be essentially credible. Claimant's condition is one which is expected to have intermittent flair-ups. From the record, it appears that all of the prior flair-ups cleared in a relatively short time. The injury of March 26, 1985 did not resolve promptly and, according to claimant's testimony, it appears that her symptoms are now more frequent than those which preexisted the injury. Claimant clearly had a preexisting impairment and disability in her low back as a result of the spondylolisthesis. The apportionment made by Dr. Naden of a 50-50 breakdown is accepted as correct. Defendants are, accordingly, liable only for the worsening of the condition which was caused by the March 26, 1985 fall. Varied Enterprises v. Sumner, 353 N.W.2d 407 (Iowa 1984). According to Dr. Naden's ratings, this would be somewhere in the range of a five to seven and one-half percent impairment of the body as a whole. Dr. Naden's assessment of permanent disability is adopted as being correct since it is corroborated by Dr. Lehmann and by claimant's testimony, even though it is contradicted by Dr. Catalona.

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

Industrial disability or loss of earning capacity in a workers' compensation case is quite similar to impairment of earning capacity, an element of damages in a tort case. Impairment of a physical capacity creates an inference of lessened earning

000200

capacity. The basic element to be determined is the reduction in value of the general earning capacity rather than the loss of wages or earnings in a specific occupation. Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516, (Iowa App. 1977) 100 A.L.R.3rd 143. The fact that claimant earns more now than she did at the time of injury does not establish that her earning capacity has been increased as a result of the injury. It is evidence, however, that the impairment of earning capacity is relatively small, due primarily to the employer's conduct of keeping her gainfully employed. If she were forced to seek other employment, it can be reasonably anticipated that her now-diagnosed back condition and the restrictions suggested by the physicians would limit her access to a large portion of the job market which was previously available to her. When all the appropriate factors of industrial disability are considered, it is found and concluded that Norma Calderon has a 10% industrial disability as a result of the injuries she sustained on March 26, 1985.

One stipulation made in the pre-hearing report must be rejected. It is assumed, based upon the dates stipulated in paragraph 4, that if the knee problem had been found to be work-related, the commencement of permanent partial disability for that injury would have been September 1, 1986. Since the knee problem was not work-related, the commencement date for permanent partial disability must be specified as September 16, 1985 in accordance with section 85.34(2) of The Code and Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

Claimant seeks payment under section 85.27 for expenses she incurred with Dr. Naden. In her testimony at hearing, she spoke of an unpaid bill with Dr. Catalona. The record presented clearly shows that any amounts owed to Dr. Catalona were incurred in his capacity as employer-retained physician and are the responsibility of the defendants. The bulk of Dr. Naden's bill is related to treatment of claimant's right knee which is not the employer's responsibility. A review of his bill, deposition exhibit 2 in exhibit 3, shows charges on October 15, 1985 and October 22, 1985 in the total amount of $65.50. The office notes contained in exhibit 7 on page 3 clearly show that the treatment on those two occasions was for claimant's back and not for her knee. This is part of the same evidence that was relied upon in determining that the knee condition was not work-related. Accordingly, the employer and insurance carrier are responsible for payment of $65.50 of Dr. Naden's bill.

Since claimant has been successful in this case, she is entitled to recover costs as set forth in her attachment to the pre-hearing report. The only limitation is that the expert witness fee for Dr. Naden is limited by Code section 622.72 to $150 rather than the $200 charged. Accordingly, the total costs to be recovered by claimant are $362.26.

## FINDINGS OF FACT

1. On March 26, 1985, Norma Calderon was a resident of the state of Iowa employed by the H. J. Heinz Company within the state of Iowa.

2. Calderon was injured on March 26, 1985 when she slipped and fell down steps at the employer's place of business.

3. Following the injury, claimant received medical treatment from William Catalona, M.D., but continued to work until July 10, 1985 when she became medically incapable of performing work in employment substantially similar to that she performed at the time of the injury until September 15, 1985, a span of nine and five-sevenths weeks, when she returned to work.

4. The injury claimant sustained in the fall aggravated a preexisting spondylolisthesis in her lumbar spine.

5. The injuries sustained in the fall are not shown to have aggravated a preexisting degenerative condition in claimant's right knee.

6. The evidence fails to establish that any trauma sustained by claimant's right knee in the fall that occurred on March 26, 1985 produced any temporary or permanent disability in the knee or that it produced any need or requirement for medical treatment to claimant's right knee.

7. Norma Calderon is a 40-year-old married lady who was born in Mexico, came to the United States during early adulthood and speaks English moderately well. Claimant's significant work background for the previous 15-20 years is her work with H. J. Heinz Company. She worked briefly in a bank prior to coming to the United States.

8. Claimant's formal education was obtained in Mexico and is the equivalent of a junior high education in the United States.

9. Claimant has not sustained any actual loss of earnings as a result of the injury.

10. Claimant has a functional impairment in her back in the range of five to seven and one-half percent of the body as a whole due to injuries sustained in the fall.

11. Claimant's physical capabilities are limited to some degree by her underlying preexisting condition.

12. Claimant's underlying preexisting condition has been made more symptomatic as a result of the fall.

13. Claimant has sustained a 10% loss of earning capacity as a result of the injuries sustained in the fall that occurred on March 26, 1985.

14. Claimant is entitled to recover $65.50 in section 85.27 benefits for the treatment of her back that she received under Dr. Naden.

15. Claimant had a preexisting impairment which was ascertainable prior to the fall she sustained on March 26, 1985.

## CONCLUSIONS OF LAW

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

2. The injury claimant sustained to her back on March 26, 1985 was an aggravation of a preexisting condition which arose out of and in the course of her employment with H. J. Heinz Company.

3. Claimant has failed to prove by a preponderance of the evidence that the injury sustained in the fall on March 26, 1985 involved her right knee.

4. Claimant's healing period under the provisions of section 85.34(1) of The Code runs from July 10, 1985 through September 15, 1985, a span of nine and five-sevenths weeks.

5. Claimant sustained an industrial disability of 10% as a result of injuries sustained in the fall that occurred on March 26, 1985 which entitles her to receive 50 weeks of compensation under the provisions of section 85.34(2)(u), after apportioning out preexisting disability.

6. The compensation for permanent partial disability becomes payable commencing September 16, 1985.

7. Defendants are entitled to a credit under section 85.38(2) in the amount of $1,399.56 against the healing period entitlement.

8. Defendants are responsible under section 85.27 for $65.50 of the medical expenses claimant incurred with Dr. Naden.

9. Defendants are responsible for payment of costs in the amount of $362.26.

## ORDER

IT IS THEREFORE ORDERED that defendants pay claimant nine and five-sevenths (9 5/7) weeks of compensation for healing

period at the stipulated rate of two hundred forty-five and 82/100 dollars ($245.82) per week commencing July 10, 1985, less credit in the amount of one thousand three hundred ninty-nine and 56/100 dollars ($1,399.56).

IT IS FURTHER ORDERED that defendants pay claimant fifty (50) weeks of compensation for permanent partial disability at the stipulated rate of two hundred forty-five and 82/100 ($245.82) per week payable commencing September 16, 1985.

IT IS FURTHER ORDERED that all past due unpaid amounts after allowance of the credits as provided herein are to be paid in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants pay claimant sixty-five and 50/100 dollars ($65.50) for her medical expenses incurred with David Naden, M.D.

IT IS FURTHER ORDERED that costs of this action are assessed against defendants in the amount of three hundred sixty-two and 26/100 dollars ($362.26).

IT IS FURTHER ORDERED that defendants file Claim Activity Reports as requested by this agency pursuant to Division of Industrial Services' Rule 343-3.1.

Signed and filed this 15th day of October, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Albert J. Stafne, Jr.
Attorney at Law
Suite 200, Commerce Exchange Building
2535 Tech Drive
Bettendorf, Iowa 52722

Mr. Greg A. Egbers
Attorney at Law
600 Union Arcade Building
Davenport, Iowa 52801

1402.30 1701, 1806, 2206
Filed October 15, 1987
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

| | | |
|---|---|---|
| NORMA CALDERON, Claimant, | : | |
| vs. | : | File No. 803223 |
| H. J. HEINZ COMPANY, Employer, | : | A R B I T R A T I O N |
| and | : | |
| LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants. | : | D E C I S I O N |

---

1402.30, 1701, 1806, 2206

Claimant fell at work. She made immediate, prompt complaints of discomfort in her back, but none regarding her knee. Several months later she began complaining of her knee and a degenerative condition was found. Claimant's back condition was a spondylolisthesis. It was held that the employer was responsible for treatment of the back condition and claimant was awarded healing period and a 10% permanent partial disability due to increased symptomatology and based upon an apportionment of disability from a treating physician.

The knee condition was found to not be work-related and all benefits with regard to the knee were denied.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| DENNIS CAPPS, | : | |
| | : | |
| Claimant, | : | File No. 779672 |
| | : | |
| vs. | : | |
| | : | A R B I T R A T I O N |
| FIRESTONE TIRE & RUBBER CO., | : | |
| | : | D E C I S I O N |
| Employer, | : | |
| | : | FILED |
| and | : | |
| | : | OCT 29 1987 |
| CIGNA INSURANCE, | : | |
| | : | IOWA INDUSTRIAL COMMISSIONER |
| Insurance Carrier, Defendants. | : | |

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Dennis Capps, claimant, against Firestone Tire & Rubber Co., employer, and Cigna Insurance, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained May 15, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner October 16, 1987. The record was considered fully submitted at the close of the hearing and consists of the testimony of the claimant and Judy Steenhoek; claimant's exhibits 1 and 2 inclusive; and defendants' exhibits 1 through 9, inclusive. It should be noted here that many of the exhibits submitted are duplicate. The parties are directed to section 10(2) of the prehearing order which states: "Every reasonable effort should be made to avoid duplication." Compliance with this order is not optional.

## ISSUE

Pursuant to the prehearing report and order submitted and approved October 16, 1987, the only issue remaining for decision is the extent of claimant's entitlement to weekly compensation for permanent disability stipulated to be an industrial disability.

## FACTS PRESENTED

Claimant, both at hearing and by deposition, testified: He is 45 years old and graduated from high school in 1961. One month later he entered the army where he worked in truck main-

000205

tenance and mechanics after approximately two months training. He recalled working for a short period of time on the Rock Island Railroad in 1964 as a hostler's helper at $2.70 per hour and then going to Pittsburgh-Des Moines Steel as an assistant press operator earning $2.47 per hour for the next eighteen months. He explained he then worked for about a year at Dyko Manufacturing Co. as a receiving clerk followed by work as a mechanic apprentice at an automobile dealer. Claimant also has some experience working for the post office. He recalled that in 1976 he began working for Brady Manufacturing doing a variety of jobs including welding, assembly and shipping work until the plant closed and he secured work with Firestone. Except for intermittent periods of layoff, claimant testified he was employed at Firestone from March of 1977 until laid off in November of 1984. Claimant acknowledged he has not worked since the layoff, and, although he has attempted to return to work with Firestone, has been advised the company has no work within his medical restrictions.

Claimant recalled he initially worked for Firestone in the compounding department mixing rubber and then bid into the tire room as a tire builder where he worked from 1978 until November 1984. On May 15, 1984, claimant explained he was working on a loading machine when he pulled an inner liner out and felt a hot burning sensation in his neck. He reported to the nurse, saw the company doctor, was referred to Dr. Patrick and eventually came under the care of Dr. Jones who became the treating physician and performed anterior cervical fusion at C5-6 on claimant December 3, 1984. Between the time of his injury and date of layoff, claimant acknowledged he missed no work due to the injury.

Claimant was not released to return to work after surgery until November 1985. In September 1985, claimant admitted he had been robbed and beaten over the head and neck in a local tavern. Claimant acknowledged he began working with a rehabilitation counselor in approximately March 1986. In June 1986, while receiving TRA benefits, claimant enrolled at DMAAC in the Agriculture Power Equipment Program. He explained he has completed three semesters earning better than average grades and that he has or will receive a one year degree diploma. He has two terms left to be eligible to receive an Associate of Applied Science degree in Agriculture/Technician Equipment. He asserted he wants to complete the course but did not return for the fall 1987 term because of lack of funds. On cross-examination, claimant revealed a dispute with the program instructor but denied this contributed to his decision not to return. He expressed a desire to return to complete the program, possibly in January 1988, as he did not feel just learning the first year basics could qualify him for much more than a job in the parts phase of the business. Claimant asserts his only other training has come from two correspondence classes in auto mechanics

000206

(1973) and air conditioning (1978).

Claimant describes his current symptoms as limited movement in his neck (both side to side and forward and back) with occasional shooting pains and headaches. He describes a constant aching in his neck which at times extends to his back and arms. He feels his condition is aggravated by weather and fatigue. He also describes feelings that his neck "locks" on him.

Judy Steenhoek testified she is a rehabilitation specialist with International Rehabilitation Associates who, upon the request of defendant insurance carrier, worked with claimant. She admitted to following claimant's progress in school and talking to him in late summer 1987, about returning to finish the two year degree program. She expressed her belief that it is the claimant's best vocational alternative to finish the two semesters of the Agriculture/Technician program since he had successfully demonstrated his abilities in this field.

Ms. Steenhoek opined claimant is currently employable and if he completed the degree program would also be employable in that field. She testified to excellent placement/salary statistics provided to her by DMAAC. She admitted no attempts have been made to place claimant in employment because all parties were working toward his education goals. Although she felt claimant could do some jobs in manufacturing, she was unable to identify what those might be.

David J. Boarini, M.D., testified by deposition he examined claimant for evaluation purposes on September 3, 1987 and rated claimant as "5 to 7% permanently impaired....4 to 5% based upon the fact he's had a cervical fusion, and...1 to 2% based upon his limited motion in the neck and some pain with that." (Defendants' Exhibit 7, page 12.) He opined claimant is capable of returning to gainful employment without specific restrictions although it was believed claimant would not tolerate something that would involve continuous, repetitive rotation or extension of his neck. (Def. Ex. 1)

An anterior cervical interbody fusion at C5-6 was performed on claimant by Robert C. Jones, M.D., December 3, 1984, who reported claimant did well with relief of left arm pain subsequent to the surgery. Claimant's treating physician wrote on April 1, 1986: "On examination, there was a 20% decrease in extension of his neck.... I would estimate a physical impairment figure of 10 to 15% on the neck and very little, if any, in the case of the left carpal tunne...." (Def. Ex. 6, p. 3; Cl. Ex. 1, No. 16) On May 7, 1986, he wrote: "[S]ince he does have about a 20 percent decrease in range of motion of the neck, I feel there might be some limitation as far as restrictions in a job which might require excessive use of the neck such as looking backwards while driving a truck or forklift or other type of work in which

the neck is used extensively." (Def. Ex. 6, p. 2; Cl. Ex. 1, No. 17) On September 9, 1986, Dr. Jones states: "I gave him a 20% physical impairment figure because of decreased range of motion of the neck." (Def. Ex. 6, p. 1; Cl. Ex. 1, No. 18)

## APPLICABLE LAW

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1). Permanent disability means a disabling that is lasting rather than temporary. Wallace v. Brotherhood of Locomotive Firemen & Enginemen, 230 Iowa 1121, 1130 (1941).

In Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden, (Iowa 1980).

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. Id.

## ANALYSIS

A person with a "permanent disability," by the very meaning of the phrase, can never return to the same physical condition he or she had prior to the injury. Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 65 (Iowa 1981). It is accepted claimant can never return to the same physical condition he was in prior to his injury and has, therefore, sustained a permanent disability. As the claimant has an impairment to the body as a whole, an industrial disability has been sustained.

000208

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

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

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

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985); Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Claimant is 45 years old. His primary work experience has been that of a laborer. He has, at this time, no unique or specialized skills. Until he began attending DMAAC in the summer of 1986, his formal education was limited to a high school diploma. Claimant also has completed two correspondence classes but has never utilized by practice any knowledge he may have garnered from the courses. Claimant has completed one year of an agricultural equipment program and, although he has not returned to finish what could be his most likely vocational alternative, this speaks well for his motivation.

Although his medical restrictions may not be onerous, they prohibit him from engaging in his former occupation of a tire builder. Claimant clearly appears able to work and concerned over his not working. Yet, defendant employer has failed to offer claimant any type of work. Claimant's demeanor easily establishes his bitterness over the employer's failure to give him any opportunity to work within the plant. It is undisputed in the record that claimant was recalled from layoff in May 1987; took and passed a medical exam and was told no job was available to him because of his condition. Defendants' own expert, Judy Steenhoek, acknowledged claimant is capable, in her opinion, of working in some manufacturing position.

Slightly greater weight is given to the functional impairment rating of Dr. Boarini although neither impairment rating is without questions. Dr. Boarini rates claimant as five to seven percent permanent partially impaired without specifying what has been impaired. Dr. Jones, on the other hand, refers to both a 20 percent decrease in extension; a 20 percent physical impairment, and 10 to 15 percent on the neck. Functional impairment is, however, but one component part of industrial disability.

Claimant had a lengthy healing period and does not appear to have had any substantive medical history prior to this injury. Claimant has not been able to secure employment although it is admitted that while he was attending classes, he did not look for it. It is clear, however, that even if claimant completes the two year degree program (which he should be encouraged to do) his earnings will fall short of previous wages. His capacity to earn has been hampered by his injury. His layoff status for non-economic reasons attests to that.

Weighing all of these factors and after a complete review of the evidence, it is found claimant has an industrial disability of 25 percent. No review is taken of claimant's carpal tunnel release as it is not alleged as an injury in the petition.

## FINDINGS OF FACT

THEREFORE, based on the evidence presented the following facts are found:

000210

1. Claimant is 45 years old with one year of specialized training in agricultural equipment maintenance.

2. Claimant suffered an injury May 15, 1984, while working on a loading machine and, in December 1984, as a result had an anterior cervical fusion at C5-6.

3. Claimant was released to return to regular work in November 1985, with the restriction that he not work in a position that would require extensive use of the neck.

4. Claimant was laid off from his employment with Firestone in November 1984, and when recalled, was not offered any position in the plant for non-economic reasons.

5. Claimant has limited movement in his neck and a functional impairment.

6. Claimant has a permanent partial disability to the body as a whole.

7. Claimant has a twenty-five percent (25%) industrial disability as a result of his injury.

## CONCLUSIONS OF LAW

WHEREFORE, based upon the principles of law previously stated, the following conclusions of law are made:

1. Claimant has met his burden of establishing he sustained a permanent partial disability to the body as a whole as a result of his injury of May 15, 1984.

2. Claimant has established a twenty-five percent (25%) disability for industrial purposes as a result of his injury of May 15, 1984.

## ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at a rate of three hundred twenty and 48/100 dollars ($320.48) per week commencing December 2, 1985.

Defendants shall receive full credit for the eighty-five and six-sevenths (85 6/7) weeks of permanent partial disability benefits previously paid.

Payments that have accrued shall be paid in a lump sum together with statutory interest thereon pursuant to Iowa Code

section 85.30.

A final report shall be filed upon payment of this award.

Costs of this action are assessed equally against claimant and defendants pursuant to Divison of Industrial Services Rule 343-4.33.

Signed and filed this 19th day of October, 1987.

Deborah A. Dubik

DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Robert W. Pratt
Attorney at Law
1913 Ingersoll Avenue
Des Moines, Iowa 50309-3320

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

1402.40; 1803
Filed 10-29-87
Deborah A. Dubik

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

| | | |
|---|---|---|
| DENNIS CAPPS, | : | |
| | : | |
| Claimant, | : | File No. 779672 |
| | : | |
| vs. | : | |
| | : | A R B I T R A T I O N |
| FIRESTONE TIRE & RUBBER CO., | : | |
| | : | D E C I S I O N |
| Employer, | : | |
| | : | |
| and | : | |
| | : | |
| CIGNA INSURANCE, | : | |
| | : | |
| Insurance Carrier, | : | |
| Defendants. | : | |

---

1402.40; 1803

Claimant, 45 years old at time of injury, underwent a cervical laminectomy which restricted his ability to accept or return to the same type of manual labor employment he previously held. Employer made no effort to reemply claimant after his release even though his work restrictions were not onerous and claimant felt capable of performing some type of work in the plant. Claimant awarded 25% industrial disability.

000212

FILED

OCT 15 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| LLOYD CHABAL,<br><br>Claimant,<br><br>vs.<br><br>MCCOMAS LACINA CONSTRUCTION,<br><br>Employer,<br><br>and<br><br>BITUMINOUS INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 744909<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This is a proceeding in arbitration brought by Lloyd Chabal against McComas Lacina Construction, his former employer, and Bituminous Insurance Company, the employer's insurance carrier. The case was heard at Cedar Rapids, Iowa on April 16, 1987 and the evidence was closed at the conclusion of the hearing. The record in the proceeding consists of claimant's exhibits 1 through 45. The record also contains testimony from Lloyd Chabal, David Lacina and Jack Reynolds.

## ISSUES

It was stipulated that claimant sustained injury on September 16, 1983 which arose out of and in the course of his employment; that the injury required a period of recuperation for healing; and, that the injury produced a 16% permanent partial disability of claimant's left arm. It was further stipulated that the rate of compensation is $285.44 per week and that 173 3/7 weeks of compensation had been paid prior to hearing. It was further stipulated that claimant has been off work since April 9, 1984.

The issues presented for determination include causal connection between the fall and any permanent disability and the nature and extent of permanent disability. Claimant also seeks payment of unpaid medical expenses and reimbursement for travel expenses.

000213

## SUMMARY OF THE EVIDENCE

The following is only a brief summary of pertinent evidence. ll evidence received at hearing was considered when deciding he case even though it may not be specifically referred to in his decision.

Lloyd Chabal is a 50-year-old man who resides in Lone Tree, owa. His principle occupation during his adult life has been arpentry. He has been self-employed, operating his own construction ompany, a lumber yard and a hardware store. He left self-employment n approximately 1980 due to lack of profitability and returned o work as a union carpenter. His work history includes supervisory xperience as a working foreman.

On September 16, 1983, Chabal was employed as a working oreman for McComas Lacina Construction, assigned to a project n Coralville, Iowa. He was near the top of a ladder, approximately 2 feet from the ground, when the feet of the ladder slipped out llowing the ladder to fall. Claimant landed on his outstretched rms and face. He was taken by ambulance to the University of owa Hospitals and Clinics where he has since received the rimary portion of his medical care.

The injuries initially diagnosed included a fracture of the eft ulna styloid process; left colles fracture with a triangular racture of the distal left radius (exhibit 1, page 175); a eForte I fracture (separation of the upper teeth and dental rch from the bone above it); fracture of the septum; nasal racture (exhibit 35, pages 8-11); maxillary fracture (exhibit , pages 181 and 187); and other relatively less serious injuries hich produced no apparent long-term or continuing effect exhibit 1, pages 95-98).

The left arm fractures were treated by closed reduction and cast. The final result of healing left claimant with irregularity f the distal surface of the radius, degenerative changes, loss f grip strength and a restricted range of motion (exhibit 1, age 163). The parties have stipulated that a 16% permanent artial disability of the left arm resulted based upon evaluations y William Catalona, M.D., and William F. Blair, M.D. (exhibits 5; 19; 33, pages 10-16; and 34, pages 40-43). None of the rthopaedic physicians has found any impairment in claimant's ight hand or arm (exhibits 11 and 15).

Closed reduction, disimpaction and fixation of the maxillary nd LeForte I fractures was performed on September 17 and 23, 983 (exhibit 1, pages 193 and 198). The fixation hardware was emoved on November 21, 1983 (exhibit 1, page 191; exhibit 4). adiographic studies performed December 19, 1983 showed the axillary fracture to have healed in good anatomical position, ut the studies also showed thickening of the mucosal membrane

000214

and a retention cyst in the left maxillary sinus (exhibit 1, page 162).

During the initial period of recovery, claimant complained of facial pain and problems with his teeth (exhibit 1, pages 211 and 212). He also complained of tinnitus (exhibit 1, page 128). An audiogram had previously shown a mild high-frequency hearing loss which is one of a type commonly observed in persons who have experienced long-term high noise level exposure and also consistent with presbycusis (exhibit 1, page 61). On October 5, 1983, claimant made complaint of experiencing blurred vision. The ophthalmology department physicians found no evidence of intraocular damage (exhibit 1, page 185). A subsequent eye examination on June 5, 1985 found no evidence of eye damage from any accident (exhibit 18).

Claimant was authorized to return to work on January 17, 1984. A progress note dated February 27, 1984 indicates that claimant actually returned on approxiately January 30, 1984 (exhibit 1, page 124).

David Lacina, one of the managers and owners of the business entity which employed claimant, testified that, during the period claimant returned to work, he made complaint of facial pain. Claimant testified that he experienced facial pain, vision problems, and blacking out while working. He stated that he was unable to make much use of his left hand. Claimant related that lifting, straining and using vibrating tools gave him headaches. He testified that he was given pain medication by Dr. Blair which made him walk around in a daze (exhibit 1, page 124). Claimant testified that he reported his problems to Lacina and requested a job in the office. He testified that, when he did so, the result was that no work was available for him. He enrolled in an estimating course at Kirkwood Community College, but stated that he discontinued the course due to pain which made him unable to participate fully.

During his return to work, claimant was assigned to a job at Hawkeye Wholesale where he worked on scaffolding. He testified that, on one occasion, he dropped a ramset (impact nailer). He stated that, on the following day, he fell from a sawhorse while using a cement saw to cut a window in a block wall. He sustained a puncture wound on his right elbow which developed a persistent infection. He apparently continued to work until April 8, 1984 when he sought treatment at the University of Iowa Hospitals and Clinics (exhibit 1, pages 1 and 2). The infection cleared, but claimant has not since returned to work.

Robert M. Bumstead, a board certified otolaryngologist, began treating claimant in the summer of 1984. Claimant voiced complaints of facial pain, nasal obstruction and recurrent nose bleeds. He exhibited marked nasal deformity, a severely deviated

septum and dilated blood vessels in the area of the anterior nasal septum (exhibit 35, pages 6-9). Septorhinoplasty surgery was performed on August 8, 1984 to correct the nasal deformity (exhibit 1, page 63; exhibit 35, pages 10 and 11). Following the surgery, claimant continued to complain of facial pain and headaches. Dr. Bumstead has used a nerve block procedure to conclude that claimant's complaints of pain are true (exhibit 35, pages 28 and 29; exhibit 42, pages 14-16). Dr. Bumstead felt that claimant has developed a vasomotor reaction which was a source of his pain (exhibit 35, pages 17 and 18). Dr. Bumstead initially indicated that claimant had a chance of improvement, but that, if the pain had not resolved by August, 1986, it would likely be permanent (exhibit 35, pages 14 and 15). The doctor indicated that claimant could not return to construction work due to the exposure to temperature changes and the exertion involved, since both tend to cause claimant's pain to manifest itself (exhibit 35, pages 14, 15, 29 and 30).

Since the surgery, claimant has remained under the care of Dr. Bumstead without any appreciable change in his complaints. Claimant has continued to complain of spells where he experiences a loss of vision. He continues to complain of chronic headaches which he can tolerate and frequent severe headaches which he finds to be disabling. His treatment has consisted of medications, chemical cauterizations to temporarily block nerve ends and cryotherapy to destroy the nasal mucosa responsible for the vasomotor reaction (exhibit 35, pages 26-28; exhibit 36, pages 5 and 6). Dr. Bumstead felt that the cryotherapy treatment was partially effective at resolving the sinus headaches (exhibit 36, pages 6-10 and 14-16).

Dr. Bumstead characterized claimant's condition as posttraumatic headache or posttraumatic neuropathic pain (exhibit 36, pages 6, 24 and 25). He stated that the etiology is unknown, but it simply means that someone has smashed their brain a little bit and is having pain even though the physiological basis for the pain is unknown (exhibit 42, page 21).

Dr. Bumstead referred claimant to the neurology department where he was evaluated and treated by John Sand, M.D., a neurologist. Dr. Sand diagnosed claimant's condition as posttraumatic headache syndrome and made changes in claimant's medication (exhibit 22; exhibit 37, pages 13 and 27). Dr. Sand found slight blunting of the left nasolabial fold of claimant's brain. He could find no anatomical cause for claimant's complaints of headache pain. He found no definable neurologic abnormality (exhibit 37, page 30; exhibit 38, page 14).

When deposed in August, 1986, Dr. Bumstead indicated that claimant was still totally disabled by chronic pain and unable to return to full-time employment (exhibit 36, pages 11 and 14). Dr. Bumstead indicated, however, that claimant could be employed

000216

in a job which did not involve moving equipment, climbing or a clear mind and one which permitted claimant to lie down when severe headaches developed (exhibit 36, pages 27 and 28). The doctor felt that claimant's condition had plateaued (exhibit 36, page 9).

Due to the impairment of claimant's left hand grip, the orthopaedic physicians, Drs. Catalona and Blair, have indicated that claimant should not be required to climb ladders, work at heights, work on roofs or use tools that require a hard, sustained or repetitive grip with the left hand. A 10-pound lifting restriction for the left hand has been recommended (exhibits 11; 15; 24; and 34, pages 44-46).

Dr. Bumstead currently feels that claimant is unable to be employed due to chronic headache pain and the narcotics used for pain relief. He indicated claimant could work at a job that provided no risk from moving machinery, that required no regular hours or routine and that would not require a clear mind when pain medication was used. He stated that the job should avoid exertion and temperature variation (exhibit 42, pages 11, 12 and 28). He felt that an indoor, sedentary job such as construction drafting might be suitable for claimant if he would be able to lie down whenever a severe headache developed (exhibit 42, page 20).

Dr. Sand has concluded that claimant is able to be gainfully employed, but should not work at heights (exhibit 38, page 30).

Claimant was evaluated by Eugene Collins, M.D., who concluded that it would be difficult for claimant to engage in an occupation that involved outdoor activity, lifting, pulling, pushing and driving such as carpentry. He indicated that, in the future, claimant could possibly perform an indoor, sedentary occupation, such as a manager, where he could set his own hours and avoid the things that exacerbate his headaches. Dr. Collins felt that the problem in claimant's left wrist would restrict his ability to perform a manual job, but would not restrict him from performing a sedentary occupation (exhibit 24).

Claimant testified that, when he returned to work in early 1984, he worked hanging doors, putting up an I-beam and from scaffolding and stepladders. He testified that he was unable to use his left hand and that lifting, straining or use of vibrating tools gave him headaches. He stated that, on one job, he used a jackhammer which bothered alot and which also bothered his vision.

Claimant testified that, after the 1984 injury to his elbow, he was released from care in the month of June. He stated that he began receiving dental work in May, 1984. He stated that he commenced consulting with Orville Townsend in April, 1984 and

commenced his coursework at Kirkwood in August, 1984.

Claimant has completed courses at Kirkwood Community College which are related to business management and construction. He has carried a "B" average (exhibit 30). He is continuing to further his formal education and has indicated that he may go into civil engineering if he is unable to find employment with the training he receives at Kirkwood.

Claimant's current career plans are to get into supervision or management. He declined to apply for a job as a city inspector for Iowa City because he feels unable to deal with the stress that accompanies such a position and because he understands it to require climbing and outdoor work.

Claimant testified that he obtained his degree in management development in the fall of 1986. He stated that he checked the job market in the Iowa City area and found none. Since claimant was unable to find work, he decided to pursue a four-year degree in construction technology. He indicated that he feels there is a market and a need for someone to work as a consultant and manager for construction in the Iowa City area. He indicated that he would be able to work as a consultant out of his own home using his own funds. Claimant testified that, as long as he has pain, he will continue with education. He stated that, if he had no pain, he would be working.

Claimant described his current complaints as constant headaches, breathing problems and vision interruptions. He stated that his pain is increased by any vibration, sharp movement, high humidity, rain, cold weather, going from warm to cold or riding in a vehicle. He stated that, when riding in a vehicle, he sometimes loses vision. He stated that, in the really severe headaches, he experiences a "shooting" pain and feels as if he is going to black out. He stated that, when he has severe headaches, he has trouble with words and has trouble concentrating. He takes Tylenol with codeine. He testified that he is not restricted from driving, but that his wife does most of it. Claimant testified that he does not attend school every day and has scheduled his classes so that he can rest between them. He expressed difficulty driving to and from school and stated that, on occasion, he needs to stop and rest while enroute. Claimant stated that he attends Kirkwood four quarters per year and carries 10-12 hours per quarter.

Claimant testified that he does some chores, taking care of animals at his home, but that it takes twice as long to do as it did before he was injured. He stated that he has tried to do carpentry work in his shop at his home and found that it takes several times as long to complete a project as it did before he was injured. He stated that it took him two days to rake a 20-foot by 40-foot front yard. He stated that he is unable to

mow his one-acre lawn due to the noise and vibration.

Jack Reynolds, a vocational consultant, evaluated claimant's employability. He felt that, if claimant were to actually seek employment with the services of a good vocational rehabilitation counselor, claimant would be employable. He also related, however, that claimant needed to be able to manage his pain. Reynolds relied upon Dr. Sands' recommendation in determining claimant's ability to be employed. Reynolds felt that claimant was reluctant to enter any employment that did not pay as well as his occupation as a carpenter. Claimant described himself as a true craftsman-carpenter. He feels that he needs to maintain his prior level of earnings. He earned approximately $30,000 in the nine months he worked during 1983. Claimant indicated that he is ambidextrous, although prior to the injury, he was primarily left-handed.

Claimant was referred to relaxation therapy where he was taught various relaxation techniques, but he indicated that the treatment did not affect his headaches (exhibit 40, pages 8, 19-22).

Orville Townsend, a senior consultant with the Iowa Division of Vocational Rehabilitation Services, indicated that claimant's best opportunity for employment is to be a construction supervisor (exhibit 41, page 18). Townsend stated:

> Lloyd does have a disability. He does have vocational limitations. You know, my professional judgment is that if we got Lloyd to a level where he could manipulate his schedule and have control of his schedule and not have as much physical activity that, you know, he would most likely be employable. But at the same time there is another factor in here, and that factor is that Lloyd is still receiving medical treatment. And, you know, what would happen there is--is, you know, that the end of our program if Lloyd's medical situation has deteriorated and it is such that his physician and he have concerns about his being employable, then he still has the training. It's just a matter of when he's going to be ready for it. (Exhibit 41, page 22).

Claimant has incurred certain medical expenses in treatment of his injuries as follows:

| | |
|---|---|
| Accounts Receivable Management | $ 11.90 |
| Travel to Dr. Bumstead | 192.00 |
| Stress Clinic | 540.00 |
| Mileage to Dr. Thayer | 9.66 |
| University of Iowa Hospitals/Clinics | 48.50 |

000219

## APPLICABLE LAW AND ANALYSIS

The facts and circumstances of the injury-producing events are well established by claimant's testimony and corroborated by the other evidence in the record. The bulk of claimant's medical expenses have been paid. The employer has acknowledged liability for the permanent disability in claimant's left arm. In the pre-hearing report, the employer acknowledged responsibility for claimant's dental treatment under Dr. Thayer. Exhibit 44 provides an estimate made by Dr. Thayer. An ultimate decision on the cost cannot be made until Dr. Thayer has completed his treatment. Dr. Bumstead was initially authorized to treat claimant and did so. In view of the fact that claimant's current contact with Dr. Bumstead is relatively infrequent, it is not unreasonable for claimant to continue under treatment with Dr. Bumstead and the employer is responsible for the expenses of transportation incurred in obtaining that treatment. An employer may not summarily withdraw authorization from a physician where the worker does not consent to the change. Dye v. Safway Steel Scaffolds Company, III Iowa Industrial Commissioner Report 75 (1983). Smith v. Carnation Company, II Iowa Industrial Commissioner Report 366 (1981). 2 Larson Workmen's Compensation section 61.12a-e.

With regard to the Stress Clinic, Dr. Williamson states:

> The presenting problem was a suicide gesture by Kim Chabal. This effort brought the family, subsequent to Lloyd Chabal's construction accident, stress and therefore into treatment.

From this statement, it appears that the stress for which therapy was provided was the suicide gesture, not the construction accident. Therefore, the claim for $540 as shown in exhibit 27 is denied. The remaining medical expenses sought by claimant are found to be related to the injury and the employer is responsible for them.

The primary issue in this case is determining whether or not the healing period has ended and, if it has, the extent of permanent disability resulting from the injury. As a practical matter, the healing period ended on January 30, 1984 and then recommenced on April 8, 1984. Claimant should have commenced receiving permanent partial disability upon his return to work on February 1, 1984. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). That permanent partial disability compensation should have continued until he reentered the healing period for the 1983 injury on April 8, 1984. The fall from the sawhorse in April, 1984, and the injuries sustained are found to have been caused by the original 1983 injury. It is therefore a continuation of the 1983 injury.

000220

When deposed on August 19, 1986, Dr. Bumstead indicated that claimant's condition had plateaued (exhibit 36, page 9). This marks the end of the healing period. August 19, 1986 is the first true indication from Dr. Bumstead that further significant improvement from the injury was not anticipated. It is consistent with his earlier statements as found in exhibit 13. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60, 65 (Iowa 1981). All of claimant's subsequent medical treatment has been maintenance in nature and does not appear to be improving his condition. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124 (Iowa App. 1984). Claimant's entitlement to compensation for permanency therefore recommences on August 20, 1986. A worker cannot receive both healing period and permanency benefits at the same time for the same injury.

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

As indicated by Dr. Bumstead, claimant's condition is one which is not appropriately evaluated using the AMA guides. Claimant certainly had a sufficiently severe trauma to his head to substantiate complaints of continuing headaches and facial pain. His complaints of sensitivity to temperature changes and vibration are not incredible. Dr. Bumstead's testing corroborates the credibility of claimant's complaints. The fact that medical science cannot pinpoint a physiological cause for complaints of pain does not mean that the pain is nonexistent or somehow conjured up for secondary gain purposes. It is found that claimant does experience pain in the areas of which he testified. It is also found, however, that claimant's motivation to return to employment is severely limited by his feeling that he should not have to accept employment that is less rewarding financially or emotionally than his work as a carpenter. This does affect the credibility of claimant's complaints. Claimant did work for several weeks in early 1984. He has attended schooling. These are all indications that he has the capacity to do the things he desires to do. Claimant has done well in his academic pursuits.

Such is a strong indication that he will be able to perform sedentary employment should he desire to pursue it. While the severity of claimant's complaints is not well established, they are considered to be sufficient to render him incapable of performing construction work as a carpenter, the trade in which he has been engaged for his lifetime. Upon successful completion of the training in which he is currently enrolled, it is anticipated that he will still suffer a severe reduction of earnings in comparison to the earning level he enjoyed as a carpenter. When all the material factors of industrial disability are considered, it is determined that claimant has sustained a 65% permanent partial disability as a result of the injury he sustained on September 16, 1983.

The only provision in the workers' compensation law for training or vocational rehabilitation is the benefit provided by section 85.70, which has a maximum of $520. Claimant is clearly entitled to receive such a benefit and the evidence shows that it has previously been paid. The employer and insurance carrier are not responsible for any further retraining or educational expenses.

Claimant's exhibit 1 is 404 pages of randomly amassed information. It is not organized by author, in chronological order or in any other rational manner as was ordered in paragraph 9 of the Hearing Assignment Order. As a sanction for violation of the order, the costs of this action are assessed against claimant. Since this results from counsel's actions, counsel shall adjust his fees accordingly in order to insulate claimant from the impact of this portion of this ruling.

## FINDINGS OF FACT

1. Lloyd Chabal is a resident of the state of Iowa who was employed by McComas Lacina Construction Company within the state of Iowa. On September 16, 1983 he was injured when a ladder fell.

2. Following the injury, claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of injury from September 16, 1983 until February 1, 1984 when he returned to work. Claimant was again similarly disabled commencing on April 8, 1984 and continuing until August 19, 1986 when claimant reached the point of recovery that it was medically indicated that further significant improvement from the injury was not anticipated.

3. As a result of the injury, claimant has a 16% permanent partial disability of his left arm. He also suffers headaches, impaired vision and facial pain as a result of the facial fractures and trauma.

4. Robert Bumstead may remain as claimant's authorized treating otolaryngologist.

5. Defendants have previously paid all vocational rehabilitation benefits provided by section 85.70.

6. Defendants are responsible for payment of the following medical expenses:

| | |
|---|---|
| Accounts Receivable Management | $ 11.90 |
| University of Iowa Hospitals/Clinics | 48.50 |
| Mileage for travel to Dr. Bumstead | 192.00 |
| Mileage for travel to Dr. Thayer | 9.66 |

7. The expenses in the Stress Clinic were not shown to have been caused by the accident and the employer and insurance carrier are not responsible for payment of the charges from that facility.

8. Dr. Thayer is the authorized source of treatment for claimant's dental care and the employer and insurance carrier are responsible for payment of whatever portion thereof Dr. Thayer deems related to the 1983 injury.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant one hundred forty-two and six-sevenths (142 6/7) weeks of compensation for healing period at the stipulated rate of two hundred eighty-five and 44/100 dollars ($285.44) per week with nineteen and four-sevenths (19 4/7) weeks thereof payable commencing September 16, 1983 and with one hundred twenty-three and two-sevenths (123 2/7 weeks) thereof payable commencing April 8, 1984.

IT IS FURTHER ORDERED that defendants pay claimant three hundred twenty-five (325) weeks of compensation for permanent partial disability at the stipulated rate of two hundred eighty-five and 44/100 dollars ($285.44) per week with nine and four-sevenths (9 4/7) weeks thereof payable commencing February 1, 1984 and with the remaining three hundred fifteen and three-sevenths (315 3/7) weeks thereof payable commencing August 20, 1986.

IT IS FURTHER ORDERED that defendants pay all past due amounts in a lump sum together with interest at the rate of ten percent (10%) per annum pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants pay claimant two hundred one and 66/100 dollars ($201.66) for transportation expenses.

IT IS FURTHER ORDERED that defendants pay the following medical bills:

| | |
|---|---|
| Accounts Receivable Management | $11.90 |
| University of Iowa Hospitals/Clinics | 48.50 |

IT IS FURTHER ORDERED that Robert Bumstead, M.D., remain as claimant's authorized treating physician and that Keith E. Thayer, D.D.S., be authorized to provide treatment for claimant's dental injuries resulting from the September 16, 1983 injury.

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against claimant pursuant to Division of Industrial Services' Rule 343-4.33.

IT IS FURTHER ORDERED that defendants file Claim Activity Reports as requested by this agency pursuant to Division of Industrial Services' Rule 343-3.1.

Signed and filed this 15th day of October, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Bruce L. Walker
Attorney at Law
321 Market Street
P. O. Box 2150
Iowa City, Iowa 52244

Mr. C. Peter Hayek
Attorney at Law
120 1/2 East Washington
Iowa City, Iowa 52240

1402.40, 1802, 1803, 4100
Filed October 15, 1987
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

| | | |
|---|---|---|
| LLOYD CHABAL, | : | |
| | : | |
| Claimant, | : | |
| | : | File No. 744909 |
| vs. | : | |
| | : | |
| MCCOMAS LACINA CONSTRUCTION, | : | |
| | : | A R B I T R A T I O N |
| Employer, | : | |
| | : | |
| and | : | |
| | : | D E C I S I O N |
| BITUMINOUS INSURANCE COMPANY, | : | |
| | : | |
| Insurance Carrier, | : | |
| Defendants. | : | |

---

1402.40, 1802, 1803, 4100

Claimant, a 47-year-old carpenter at the time of injury, fell and sustained serious injuries to his face and left arm which made him unable to resume carpentry work. He had a permanent impairment of his left arm and complained of severe, disabling headaches. Claimant awarded 65% permanent partial disability and an extended healing period.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| MMETT R. CHAPIN,<br><br>Claimant,<br><br>s.<br><br>IRESTONE TIRE AND RUBBER OMPANY,<br><br>Employer,<br><br>nd<br><br>IGNA,<br><br>Insurance Carrier,<br>Defendants. | : | FILE NO. 781694<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>FILED<br><br>DEC 23 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Emmett R. Chapin, laimant, against Firestone Tire and Rubber Company, employer hereinafter referred to as Firestone), and CIGNA, insurance arrier, defendants, for workers' compensation benefits as a esult of an alleged injury on June 13, 1984. On November 18, 987, a hearing was held on claimant's petition and the matter as considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested ssues and stipulations which was approved and accepted as a art of the record of this case at the time of hearing. Oral estimony was received during the hearing from claimant. The xhibits received into the evidence at the hearing are listed in he prehearing report. According to the prehearing report, the arties have stipulated to the following matters:

1. On June 13, 1984, claimant received an injury which rose out of and in the course of his employment with Firestone.

2. Claimant's rate of weekly compensation in the event of n award of weekly benefits from this proceeding shall be $339.34 er week.

3. Claimant is only seeking additional healing period enefits in this proceeding from May 31, 1985 through September , 1985 and defendants agree that claimant was not working uring this period of time.

000226

## ISSUE

The only issue presented to the undersigned for determination n this proceeding is whether claimant is entitled to the dditional healing period benefits requested.

## SUMMARY OF THE EVIDENCE

The following is a summary of evidence presented in this ase. For the sake of brevity, only the evidence most pertinent o this decision is discussed. Whether or not specifically eferred to in this summary, all of the evidence received at the earing was considered in arriving at this decision. Furthermore, ny attempted summarization of evidence will inevitability ontain conclusions regarding the evidence. Such conclusions hould be considered as preliminary findings of fact.

Claimant in his brief recited a very good summary of the acts presented in this case and the following is largely a estatement of this summary with, however, some modifications to mprove its clarity and objectivity.

Claimant worked for approximately 10 years for Firestone in he curing tire room. The claimant's job duties included riving a jeep (forklift), building tires, moving stock, and ifting finished tire products. He testified at the hearing hat this work was heavy repetitive work that involved a large se of the arms and hands.

The claimant testified that he did not receive any specific njury, but suffered his problems as a result of the repetitive se. He first reported the complaints and problems to his arm o Firestone on or about June 13, 1984, which is the date tipulated by the parties to be the date of injury. He was eferred by the company physician to Douglas S. Reagan, M.D., an rthopedic surgeon located in Des Moines, Iowa. Dr. Reagan laced restrictions on the claimant and prescribed some medications n an attempt to help the claimant's pain and symptoms of umbness and tingling in his arm. The claimant continued to ork on a limited duty basis with Firestone during this period f time.

On April 9, 1985, Dr. Reagan performed an ulnar nerve elease on the left elbow. It should be noted that claimant was ff work from Firestone in the fall of 1984 into early January, 985, as a result of an ulnar nerve release procedure on the ight elbow. This time off work and procedure are not part of laimant's application for benefits herein. The claim for ealing period benefits has to do only with the left elbow rocedure and the time off work following that procedure.

000227

On April 22, 1985, the claimant returned to Dr. Reagan for follow-up care and the doctor, in his notes, states that the claimant would be released in two weeks to one-handed duty. On May 6, 1985, the claimant returned to work at Firestone doing one-handed work. The claimant testified at the hearing that the work he performed upon his return to duty was not similar to any of the work that he had previously performed for Firestone. He said that he was assigned such tasks as wipping down machines, wipping off tables and picking up paper in the break-lunch room.

On May 20, 1985, the claimant again saw Dr. Reagan who felt that the claimant continued to do fairly well. At this time, claimant was placed on five pound weight lifting restriction on the left arm. On May 31, 1985, the claimant was laid off as a part of a general plant economic layoff. His workers' compensation benefits had ended on May 5, 1985 when he returned to one-handed duty at Firestone. Firestone and their workers' compensation insurance carrier refused to reinstate the benefits after the layoff. The claimant testified that at the time of the layoff he continued to experience tingling and numbness and the loss of strength in his arm. Claimant testified that at the time of layoff he felt he was improving but still had some problems. The claimant testified that he saw Dr. Reagan on a regular and ongoing basis after the layoff and the doctor's office notes reflect that the claimant saw Dr. Reagan on June 17, 1985; July 29, 1985; and September 9, 1985.

Dr. Reagan's notes for June 17, 1985, indicate that claimant was doing fairly well, that the pain had decreased in the elbow but that claimant continued to have occasional sharp elbow pain radiating into the ulnar two fingers. The doctor at that time recommended ultrasound and hydrocortisone cream. Despite his continued treatment of claimant, the doctor also on June 17, 1985 rated claimant as having a five percent permanent partial impairment of each upper extremity. This rating has not changed since this time.

Claimant's next visit to Dr. Reagan was on July 29, 1985. He had continued to improve with less numbness and tingling. The doctor recommended that claimant continue the range of motion exercises and come back to see him in four to six weeks. The claimant again saw Dr. Reagan on September 9, 1985 and was released. The doctor stated as follows:

September 9, 1985

Since last being seen, Mr. Chapin has continued to do fairly well as far as his elbow is concerned. Numbness and tingling are completely gone from the left side. However, on the right side he still has some mild pain and complaints. He is increasing his activity. I feel at this time he has made a significant enough improvement that he can be released.

We will see him back on a PRN basis.

000228

On April 29, 1985, Dr. Gustafson, the company doctor, saw he claimant for the purpose of releasing claimant to return to work on May 6, 1985. In his release to work Dr. Gustafson placed claimant into a limited medical classification group. During the claimant's subsequent examinations with Dr. Gustafson on May 29, 1985; June 18, 1985; and July 30, 1985, Dr. Gustafson continued claimant in the limited medical classification group. The physical examination notice prepared on September 10, 1985, by Dr. Gustafson shows that the claimant was at that time medically reclassified and placed into the unlimited group and all restrictions were lifted.

Claimant testified that he signed up for unemployment benefits on approximately September 10, 1985, as he felt that he was now ready, able, and willing to work. He testified that he did not sign up for unemployment prior to that time because he did not feel that he was able to work with a five pound restriction on his hand and with the pain and other problems in his arm. The claimant also testified that he felt that he had reached his maximum improvement on September 9, 1985. He stated that he had made progressive improvement over the entire summer.

Claimant's demeanor while testifying indicated that he was testifying truthfully.

## APPLICABLE LAW AND ANALYSIS

There is no dispute that claimant is entitled to permanent partial disability benefits. Consequently, claimant is entitled to weekly benefits for healing period under Iowa Code section 85.34(1) from the date of injury until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work he was performing at the time of the work injury; or, until it is medically indicated that significant improvement from the injury is not anticipated, whichever occurs first.

Defendants argue that claimant's healing period benefits ended when he returned to work, albeit light duty, on May 5, 1985. Defendants argue that once there is a return to work, healing period ends and cannot be reinstituted. This agency has not adopted such a rule. Willis v. Lehigh Portland Cement Co., I-1, Iowa Industrial Commissioner Decisions 485 (1985); Clemens v. owa Veterans Home, I-1, Iowa Industrial Commissioner Decisions 5 (1984); Van Gundy v. Meredith Corporation, III Iowa Industrial ommissioner Report 268, (1983); Riesselman v. Carroll Health Center, II Iowa Industrial Commissioner Report 209 (1982).

000229

Defendants also argue that since claimant was laid off for economic reasons, he is not entitled to healing period benefits and cites Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430 (1981). However, in Webb the commissioner was referring to the effect of economic conditions upon determination of permanent disability, not temporary total disability or healing period determinations. Indeed, defendants' reliance on Webb is quite unfounded as the commissioner in that case held that if claimant has not as yet reached maximum recuperation and remains unable to return to regular duty, an offer of light duty employment can only terminate healing period benefits when claimant actually returns to such work. The reason(s) why claimant did not return to work did not appear important to the commissioner's analysis in Webb. Id. at 433.

Finally, although Dr. Reagan rated claimant earlier in June, 1985, the time of rating is not always a time when claimant reaches maximum healing, especially if treatment continues and claimant's condition actually improves from such treatment. Therefore, claimant is entitled to the healing period benefits requested.

## FINDINGS OF FACT

1. Claimant was a credible witness.

2. On June 13, 1984, claimant suffered an injury which arose out of and in the course of his employment with Firestone.

3. The work injury of June 13, 1984, was a cause of permanent disability.

4. The work injury of June 13, 1984, was a cause of a period of total disability from work beginning on May 31, 1985 through September 9, 1985, at which time claimant reached maximum healing. After returning to light duty employment on May 5, 1985, claimant was laid off in a general plant wide economic layoff on May 31, 1985, but was not at that time medically able to return to the type of work he was performing at the time of the injury and had not as yet reached maximum healing from medical treatment. Claimant continued to receive treatment and improve until September 9, 1985.

## CONCLUSIONS OF LAW

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

## ORDER

1. Defendants shall pay to claimant healing period benefits from May 31, 1985 through September 9, 1985 at the rate of three hundred thirty-nine and 34/100 dollars ($339.34) per week.

000230

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

3. Defendants shall pay the costs of this action pursuant :o Division of Industrial Services Rule 343-4.33.

4. Defendants shall file activity reports on the payment of :his award as requested by this agency pursuant to Division of :ndustrial Services Rule 343-3.1.

Signed and filed this 23rd day of December, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

opies To:

r. David D. Drake
ttorney at Law
est Towers Office Complex
200 35th St., Suite 500
. O. Box 65355
est Des Moines, Iowa 50265

r. E. J. Kelly
ttorney at Law
700 Grand Ave., Suite 111
es Moines, Iowa 50312

000231

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| AN CHODA, | : | |
| Claimant, | : | File No. 737114 |
| s. | : | A R B I T R A T I O N |
| EMPUTER, INC., | : | |
| Employer, | : | D E C I S I O N |
| nd | : | FILED |
| RAVELERS INSURANCE COMPANY, | : | JUL 8 1987 |
| Insurance Carrier, Defendants. | : | IOWA INDUSTRIAL COMMISSIONER |

## INTRODUCTION

The case was heard in Des Moines, Iowa on February 17, 1987 nd was fully submitted upon conclusion of the hearing. The ecord in the proceeding consists of testimony from Jan Choda nd Mary Crispin, claimant's exhibits 1, 2 and 3 and defendants' xhibits A, B and C.

## ISSUES

Choda was injured on June 23, 1983 when the employer's van, n which he was a passenger, overturned. Weekly compensation as paid during a period of recovery. The only disputed issue n the case is the nature and extent of permanent partial isability. Contained within that issue is whether or not the ccident was a proximate cause of any disability with which hoda is currently afflicted.

## SUMMARY OF EVIDENCE

Choda was injured when the van in which he was riding verturned. He was taken by ambulance to Iowa Methodist Medical enter in Des Moines, Iowa where he remained until June 30, 1983. laimant was diagnosed as having a posterior cervical strain and a lumbosacral strain (claimant's exhibit 1, page 12). While ospitalized, x-rays showed him to have congenital or other evelopmental abnormalities in his neck and in his lumbar spine. he lumbar abnormality was thought to be a result of Scheuermann's isease (claimant's exhibit 1, pages 12, 18, 41 42, 43 and 44).

laimant was released to return to work on approximately
t 31, 1983, but he did not return to his employment with
ter, Inc. The evidence is conflicting on the precise
n. Claimant attributed the lack of return to the employment
o problems with his arms and neck.

he business of Temputer, Inc. is selling and installing
erature monitoring systems in grain elevators and storage
olities. Claimant's work involved the actual installation
maintenance of the systems. He testified that he climbed at
hts of as much as 120 feet on a daily basis, even when he
working as a crew chief. Claimant testified that the
lems in his neck and arms caused him to lose faith in his
ity to rely upon his body to work at heights.

In December of 1983, claimant obtained employment inspecting
alarms, fire extinguishing and burglar alarm systems. He
subsequently assigned to installing the systems. He testified
erning portions of the job which required lifting a 90-pound
ere overhead which produced symptoms in his arms. Other
ions of the work, such as removing and replacing covers on
m units, also produced symptoms. Claimant held the job for
roximately four months, but felt incapable of continuing in
position and resigned. Claimant obtained a job with Meredith/
da and a second job in the supply department of Bankers Life
urance Company. He found himself unable to hold two full-time
s and left the Meredith job for the one at Bankers Life which
felt was somewhat easier, even though it paid slightly less.

In September, 1984, claimant obtained his present job at the
nut Creek YMCA where he is the assistant building superintendent.
starting wages were $6.50 per hour and at time of hearing he
earning $7.50 per hour. The job duties involve making sure
building is working properly and include painting, repairing
ors, replacing bearings and seals, dry wall work and other
tine repair and maintenance functions. Claimant testified
at he is allowed to work at his own pace and that when physical
tivity brings on symptoms, he is permitted to take a break.

Choda testified that his main problem at the present time
sults from working with his hands overhead such as when
inting or pruning trees. He stated that he experiences
mbness, but that he generally does not allow it to stop him.
also complained of a pain that pulls the shoulder blades back
d is more severe and does cause him to stop working.

Claimant also performs part-time work installing furnaces.
pies of claimant's income tax returns show that in 1983 he
arned $7,062.00; in 1984 he earned $15,753.00; in 1985 he
arned $13,827.00. His stipulated rate of compensation indicates
verage weekly earnings of $260.00 per week or $13,500.00 per
ear.

The record also reflects that, on July 12, 1980, claimant was in an auto accident which resulted in complaints that included neck pain (claimant's exhibit 1, pages 51-53). He was also involved in a second accident on August 17, 1980, but whether or not his neck was substantially injured in that accident is uncertain from the records (claimant's exhibit 1, page 54). Claimant denied having any residual problems with his neck following either of those accidents.

Martin S. Rosenfeld, D.O., an orthopaedic surgeon, has evaluated claimant and diagnosed his condition as a cervical and myofascial strain which is resolving. He felt that claimant had previously had a lumbar strain that is now resolved. He recommended that claimant avoid working with his hands above shoulder level and that he also avoid heavy lifting, pushing, pulling and prolonged sitting or standing. He expressed the opinion that the condition in claimant's cervical spine is related to the injury of June 23, 1983 (claimant's exhibit 1, pages 1-5). Dr. Rosenfeld, in the report which is dated September 20, 1984, indicated that claimant has a 10% permanent partial impairment.

Robert A. Hayne, M.D., a neurosurgeon, was responsible for part of claimant's care while he was hospitalized immediately following the accident and also provided follow-up care. In a report dated December 20, 1984, Dr. Hayne related that a recent CT scan of claimant's cervical spine was normal. He felt that claimant had no severe permanent disability resulting from the injury, but did assign a 2-3 percent of the body as a whole impairment rating. Dr. Hayne recommended that claimant avoid activity which places stress and strain on his shoulders and neck and that he curtail his lifting to no more than 40 or 50 pounds (claimant's exhibit 1, page 8).

Mary Crispin, the general manager of Temputer, Inc., testified that claimant could have returned to work with the company following his release from medical care after the accident, but that he declined to do so. She stated that he was a good employee, learned quickly and worked efficiently. Crispin indicated that the company would still have some part-time work in the shop available for claimant if he desired to do it.

## APPLICABLE LAW AND ANALYSIS

As previously stated, the only disputed issues in this case are causation and permanent partial disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 23, 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.

00023

Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

An 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 preexisting abnormalities in claimant's spine were not symptomatic and were not shown to be disabling prior to June 23, 1983. Claimant's lumbar spine complaints have resolved and the lumbar spine does not currently appear to be symptomatic. The cervical spine complaints may be due, in part, to the congenital abnormality, but to the extent that they are, this case still presents an aggravation of a preexisting condition for which the employer is, nevertheless, responsible.

Dr. Rosenfeld provides a medical opinion of causation. Claimant denied prior problems with his neck. The complaints upon which his claim is based originated at the time of the accident. It is found that the injury of June 23, 1983 is a proximate cause of the symptoms and disability which claimant currently experiences related to his neck and cervical spine.

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

Claimant has a GED, is 29 years of age, married and appropriately trained for his current position as assistant building superintendent. In view of his physical limitations, education and general background, he is appropriately employed. Claimant's current rate of earning is approximately equal to that which he experienced with Temputer, Inc., but it is uncertain what his wages would currently be if he were still employed at Temputer, Inc. Some

increase would normally be expected from year to year. Claimant does have physical limitations as indicated by both Drs. Rosenfeld and Hayne. This makes him unable to perform in certain portions of the job market which were available to him prior to June 23, 1983. He has sustained some disability from an industrial standpoint. When all the applicable factors are considered, it is determined that Choda has a 10% permanent partial disability in industrial terms as a result of the injuries sustained on June 23, 1983.

## FINDINGS OF FACT

1. As a result of the accident of June 23, 1983, Choda is limited in his ability to work with his hands higher than shoulder level and also in his ability to lift, push and pull.

2. Choda has an impairment of the body as a whole related to the condition of his cervical spine which is in the range of 2-10 percent of the body as a whole.

3. Choda is a 29-year-old man who dropped out of school after the tenth grade, but subsequently obtained a GED. He is trained in boiler room operation and maintenance.

4. Choda is appropriately employed as an assistant building superintendent when consideration is given to his training, education, background, experience and physical limitations.

5. Claimant's injury has been diagnosed as a cervical strain which has not resolved completely. The lumbar strain which resulted from the injury has resolved.

6. Claimant has a 10% loss of earning capacity as a result of the injuries of June 23, 1983.

7. The preexisting abnormalities in claimant's spine were relatively asymptomatic prior to the injury of June 23, 1983.

## CONCLUSIONS OF LAW

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

2. The injury claimant sustained on June 23, 1983 in the vehicle accident is a proximate cause of the disability which he currently experiences relating to his cervical spine and symptomatology in his arms.

3. When evaluated industrially claimant has a 10% permanent partial disability as a result of the injury of June 23, 1983.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant fifty (50) weeks of compensation for permanent partial disability at the stipulated rate of one hundred fifty-eight and 99/100 dollars ($158.99) per week payable commencing September 1, 1983.

IT IS FURTHER ORDERED that the entire amount thereof is past due and owing and shall be paid in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants pay the costs of this action pursuant to Division of Industrial Services' Rule 343-4.33.

IT IS FURTHER ORDERED that defendants file Claim Activity Reports as requested by the agency pursuant to Rule 343-3.1.

IT IS FURTHER ORDERED that the case be returned to prehearing for assignment on the claim for additional section 86.13 benefits.

Signed and filed this 8th day of July, 1987.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. James R. Lawyer
Attorney at Law
2141 Grand Avenue
P.O. Box 367
Des Moines, Iowa 50302

Mr. Terry Monson
Attorney at Law
300 Liberty Building
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| BRIAN CHURCH,<br><br>Claimant,<br><br>vs.<br><br>JOHN MORRELL & CO.,<br><br>Employer,<br><br>and<br><br>NATIONAL UNION FIRE INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | FILE NO. 826904<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>FILED<br><br>SEP 23 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Brian Church, claimant, against John Morrell & Company, employer (hereinafter referred to as Morrell), and National Union Fire Insurance Company, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on July 22, 1986 (claimant amended his petition as to the injury date at the time of hearing). On July 9, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and Rexanne Smith. The exhibits received into the evidence are listed in the prehearing report. All of the evidence received at the hearing was considered in arriving at this decision.

The prehearing report contains the following stipulations:

1. Claimant last worked for Morrell on July 22, 1986;

2. Claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $191.99 per week;

3. If it is found that the alleged work injury has caused

00023

permanent disability, the disability is an industrial disability to the body as a whole; and,

4. The medical expenses for which claimant seeks reimbursement in this proceeding are fair and reasonable and causally connected to the back condition upon which claimant is basing her claim herein but that the issue of their causal connection to any work injury remains an issue to be decided.

The prehearing report submits the following issues for determination in this decision:

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

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

III. The extent of claimant's entitlement to weekly disability benefits; and,

IV. The extent of claimant's entitlement to medical benefits under Iowa Code section 85.27.

## FINDINGS OF FACT

1. Claimant was employed by Morrell from November, 1985 through July 22, 1986 in labor jobs within Morrell's meat packing plant in Sioux City, Iowa.

There was little dispute among the parties as to the nature of claimant's employment. Claimant testified that he held various jobs within the plant from working on the dock to meat cutting. At the time of the alleged work injury claimant was working on a job called "grading bellies" in which he hooked, lifted and threw onto a nearby table bellies at shoulder height weighing from 10 to 30 pounds on a repetitive basis over an eight hour day. Claimant testified that he moved to this job approximately one to one and a-half months after being involved in an automobile accident in April, 1986, which will be further discussed later in this decision. According to claimant, at the time of this car accident, claimant was assigned to trimming bellies using an electrically powered wizard knife.

2. On July 22, 1986, claimant suffered an injury which arose out of and in the course of his employment at Morrell consisting of a temporary aggravation of a preexisting back and neck condition.

Claimant suffered significant back and neck injuries as a result of an automobile accident in April, 1986. Claimant was a passenger in the front seat of an auto driven by one of his

000239

friends when the car in which he was riding left the roadway and struck an embankment head-on. Claimant testified that he was not wearing a seatbelt at the time and struck his head and face on the dashboard. Claimant stated that he initially experienced neck and shoulder pain and stiffness following the accident. He also admitted in cross-examination that he experienced mid-back difficulties as well. After initial treatment at a hospital, claimant was treated by his family physician, Edward Pierce, M.D. After tests and studies, Dr. Pierce and other physicians at the hospital believed that claimant had suffered a cervical strain and a possible "wedge fracture of the vertebrae at the D12, L-1 level of claimant's spine." However, Dr. Pierce treated claimant conservatively with rest and medication. Claimant was released for work three days after the accident by Dr. Pierce without restrictions.

When claimant returned to work he began a new job grading bellies as discussed above. Claimant stated in cross-examination that he experienced some mid-back pain at the time of Dr. Pierce's release and for a short time thereafter. However, claimant did not seek medical attention for his back again until May 7, 1986 at which time he reported to the company medical department seeking pills for back pain. These complaints of back pain along with numerous references by claimant to the April, 1986, auto accident to medical department personnel compelled the company to consider claimant's problem as related to the car accident and they referred claimant back to his family physician, Dr. Pierce. Dr. Pierce reexamined claimant on July 23. Dr. Pierce stated as follows concerning the diagnosis of claimant's problems at that time: "I think this is probably an exacerbation of this back pain related to the car wreck and the work is just exacerbating that." Dr. Pierce then prescribed medication and absence from work. Claimant returned with the same complaints of back pain on July 29 and Dr. Pierce referred claimant for evaluation by an orthopedist, John Dougherty, M.D. On August 1, 1986, Dr. Pierce reported in his notes that Dr. Dougherty felt that claimant had a congenital defect at the D12 level rather than a fracture and believed that claimant had aggravated this congenital problem in the car accident.

Without deciding whether the underlying permanent back condition claimed herein was caused by claimant's work, claimant has at least shown by the above evidence that he suffered back pain after performing the grading bellie job at Morrell which required his absence from work and for medical treatment. Claimant consistently made complaints during such work activity to the Morrell medical personnel in May, June and most of July and at least an aggravation injury is verified by the views of Dr. Pierce. The injury date chosen to be plead by claimant does coincide with the time claimant was compelled by his back pain to leave work.

3. Claimant has failed to show by a preponderance of the evidence that the work injury of July 22, 1986 was a cause of permanent impairment or disability.

What is unclear in the record presented and especially from claimant's testimony is the exact nature of claimant's current complaints and the specific nature of claimant's impairments. He testified that he wears a back brace but did not identify what area of the back causes him the most problems. We must assume from the medical records presented that claimant's primary problems is chronic pain in his mid-back, rather than his shoulder or neck.

As mentioned above, Dr. Pierce, claimant's own family physician, believes that claimant suffered only an aggravation injury of the back condition caused by the April, 1986, auto accident. Dr. Pierce also reveals another possible cause, that being a congenital problem in claimant's mid-back which was first raised as a possibility by Dr. Dougherty.

In February, 1987, after another examination of claimant, Dr. Dougherty stated in a report that claimant probably did not have a significant problem after the April, 1986, auto accident. He also does not believe that claimant suffered a fracture of the D12 level in this accident because claimant was able to return to work after only three days. As aptly pointed out by defense counsel in his brief, Dr. Dougherty was given a history by claimant that he had no problems for six to eight weeks after the accident. Claimant did not state to Dr. Dougherty (as he did at hearing) that he continued to suffer mid-back pain at the time of Dr. Pierce's release for work and for a few days thereafter. After review of more records from the hospital that treated claimant after the auto accident, Dr. Dougherty appeared to back off somewhat on his views concerning problems caused by the auto accident and those arising from claimant's work activity. Dr. Dougherty states that he is not sure if he could "really separate one from the other." Dr. Dougherty also was unaware that claimant assumed a new job after the auto accident which appeared to be more physically demanding on his upper back than the one he had at the time of the auto accident. This aspect would support a causal connection finding.

Claimant has received more recent treatment of his back from Horst Blume, M.D., a Sioux City neurosurgeon. However, no reports were submitted from Dr. Blume. Defense counsel in his brief states that the conspicuous absence of such reports from a traditional "liberal" doctor should bare some weight in this proceeding. The undersigned disagrees. Nothing can be concluded from the absence of reports from this doctor. Although one could speculate that Dr. Blume's views are not favorable to claimant if they were not offered by him one could also speculate that they were not favorable to defense because defense chose

000241

not to offer this evidence. Defense cannot contend that they were surprised by Dr. Blume's involvement because the involvement of Dr. Blume was first made aware to defense counsel in January, 1987, by Dr. Dougherty.

Therefore, we have only two doctors submitting causal connection opinions. Given the extent of the prior injuries, this agency must look to the opinions of experts to find causal connection more than would be the case otherwise. Dr. Pierce's views only support a theory of temporary aggravation of a preexisting condition caused by the auto accident. The views of Dr. Dougherty are confused. Dr. Dougherty suggests that there are three possible causes of claimant's problems: congenital, the auto accident or the work activity. In his last report Dr. Dougherty states that he could not identify which event was the cause of claimant's current problems. Consequently, to the extent that claimant does have persistent back problems, the evidence submitted in this case does not establish (one way or another) that the pain or aggravation injury he experienced while working for Morrell from May until July, 1986, was the cause of his current chronic problems. Claimant has simply failed to carry his burden of proof.

However, aside from causal connection, another problem with claimant's case for permanent disability is that claimant failed to establish the precise nature of his current physical limitations. His current physical limitations were not discussed in detail by him at hearing other than the fact he wears a back support four to five times a week. No physician has imposed restrictions upon his activity. Claimant testified that he recently "rolled" his automobile in another auto accident without apparent injury. Whether or not he wore a seatbelt in this latest auto accident, the undersigned finds it unlikely that he could suffer no problems from such a severe auto accident if he truely had persistent back problems. Although Dr. Dougherty opined that claimant has a three percent permanent partial impairment to his body as a whole due to the persistent complaints, Dr. Dougherty had serious questions about "how much trouble he is having."

4. The work injury was a cause of a temporary period of total disability while claimant was recovering from the aggravation injury from July 23, 1986 through November 15, 1986.

Dr. Pierce treated claimant for the aggravation injury until mid-November at which time he released claimant for light duty work according to claimant's testimony. Claimant then returned to Morrell seeking work but was told no light duty was available and he would have to have a full release before returning to work at Morrell. Claimant has not obtained such a release and has not returned to Morrell. However, by releasing claimant for work, Dr. Pierce apparently felt that claimant was medically able to do so and had reached maximum healing from the aggravation injury.

000242

5. Claimant has incurred reasonable medical expenses for treatment of his work injury in the amount of $31.25.

In the prehearing report, claimant seeks the above amount of money as reimbursement for medication prescribed by the company doctor, Milton D. Grossman, M.D., before the time claimant left Morrell. Why the defendants are objecting to payment of these bills is not explained in the record. Defendants stipulated that they are fair and reasonable and are causally connected to the back condition upon which claimant is basing his claim herein. Both of these prescriptions were prescribed for treatment of the aggravation work injury.

## CONCLUSIONS OF LAW

The foregoing findings of fact were made under the following principles of law:

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960) and cases cited therein.

It is not necessary that claimant prove his disability results from a sudden unexpected traumatic event. It is sufficient to show that the disability developed gradually or progressively from work activity over a period of time. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). The McKeever court also held that the date of injury in gradual injury cases is a time when pain prevents the employee from continuing to work.

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. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 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, although a finding that the work injury was causally connected to a permanent disability could not be made, there was a finding that the injury was a cause of temporary disability during a period of recovery.

III. Pursuant to Iowa Code section 85.33(1) claimant is entitled to temporary total disability benefits from the first day of his absence from work until claimant returns to work or until claimant is medically capable of returning to substantially similar work to the work he was performing at the time of the injury. Due to the fact that it was found that claimant had a prior condition that rendered him incapable of heavy work before being assigned to grading bellies at Morrell, claimant can never return to substantially similar work. However, the temporary total disability period should end when claimant reached a state of maximum healing or when he returned to the same condition as existed before the work injury. It was found as a matter of fact that his maximum healing occurred on November 15, 1986 at the time Dr. Pierce released claimant for light duty work.

000244

Therefore, claimant is entitled as a matter of law to temporary total disability benefits from July 23, 1986 through November 15, 1986.

IV. Employers are obligated to furnish all reasonable medical services for treatment of a work injury under Iowa Code section 85.27.

Given the findings of fact, claimant is entitled to reimbursement for medical expenses in the amount of $31.25 and defendants will be ordered to reimburse claimant this amount.

ORDER

1. Defendants shall pay to claimant temporary total disability benefits from July 23, 1986 through November 15, 1986 at the rate of one hundred ninety-one and 99/100 dollars ($191.99) per week.

2. Defendants shall pay claimant the total sum of thirty-one and 25/100 dollars ($31.25) for medical expenses.

3. Defendants shall pay interest on benefits awarded herein from July 23, 1986.

4. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 23rd day of September, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

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

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

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| JAMES CLARK,<br><br>Claimant,<br><br>vs.<br><br>PULLEY FREIGHT LINES,<br><br>Employer,<br><br>and<br><br>NATIONAL UNION FIRE INSURANCE,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 764457<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

FILED
JUL 9 1987
IOWA INDUSTRIAL COMMISSIONER

## INTRODUCTION

This is a proceeding in arbitration brought by James Clark against Pulley Freight Lines, his former employer, and National Union Fire Insurance Company. The case was heard in Des Moines, Iowa on January 20, 1987 and was fully submitted upon conclusion of the hearing. The record in this proceeding consists of claimant's exhibits 1, 2 and 3; defendants' exhibits A through TT; joint exhibits 1 through 10; and testimony from Barbara J. Clark, Denise Morrison, James R. Clark, Larry W. Larsen, Alan Hellenthal, Marlene Smedema, Kathryn Bennett and Mark Wiederin.

## ISSUES

Claimant alleges that he injured his shoulder on January 19, 1984 when he fell from the trailer of his employer's truck following making a delivery in St. Joseph, Missouri for his employer. Claimant seeks compensation for healing period and permanent disability. Defendants deny the occurrence of any such injury, and deny that any alleged fall was a proximate cause of any disability. Defendants further urge that claimant has unreasonably refused to submit to surgery and that such should constitute a forfeiture of any entitlement he may have. Defendants further assert that claimant's refusal to undergo invasive diagnostic testing should likewise forfeit or suspend his right to benefits. Defendants assert that the Iowa Workers' Compensation Act does not apply to this case because the alleged injury, if it occurred at all, occurred in Missouri and that this case does not fall under any of the provisions of Code section 85.71 which would give Iowa subject matter jurisdiction.

ANALYSIS

The jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings belong. Green v. Sherman, 173 N.W.2d 843, 846 (Iowa 1970). When a court acts without legal authority to do so, it lacks jurisdiction of the subject matter. In Re Adoption of Gardiner, 287 N.W.2d 555, 559 (Iowa 1980). Jurisdiction of the subject matter cannot be conferred by waiver, estoppel or consent. It can therefore be raised at any time and need not be pled. Steffens v. Proehl, 171 N.W.2d 279 (Iowa 1969). The issue of subject matter jurisdiction is not a typical affirmative defense. In Federal practice, a plaintiff is required to specifically plead the statutory basis for the court's subject matter jurisdiction of the case. No such rule exists in the Iowa courts or before this agency. The lack of a pleading requirement, however, does not relieve the claimant from the burden of proving that the agency has subject matter jurisdiction to determine his claim. The proposition that the burden of proving an entitlement to anything rests on the proponent is so well settled that Rule 14(f)(5) of the Rules of Appellate Procedure provides that the citation of authority for that proposition is not necessary. The same rule regarding burden of proof applies in administrative proceedings. Wonder Life Company v. Liddy, 207 N.W.2d 27 (Iowa 1973). If the facts necessary to establish subject matter jurisdiction are absent, an order dismissing the petition is the only appropriate disposition. Lloyd v. State, 251 N.W.2d 551, 558 (Iowa 1977).

The Iowa Industrial Commissioner has subject matter jurisdiction over all injuries suffered by employees within the geographical boundaries of the state of Iowa. [Code section 85.3(2)]. Where an employee is injured outside the territorial limits of this state, the Iowa Industrial Commissioner has subject matter jurisdiction only if one of the four criteria established in Code section 85.71 is present. Those four criteria provide as follows:

> 1. His employment is principally localized in this state, that is, his employer has a place of business in this or some other state and he regularly works in this state, or if he is domiciled in this state, or
>
> 2. He is working under a contract of hire made in this state in employment not principally localized in any state, or
>
> 3. He is working under a contract of hire made in this state in employment principally localized in another state, whose workers' compensation law is not applicable to his employer, or

4. He is working under a contract of hire made in this state for employment outside the United States.

Subsections 3 and 4 are clearly not applicable in this case. Claimant's employment was not outside the United States as provided by subsection 4. His injury was covered by Missouri workers' compensation and therefore subsection 3 is not applicable. Whether jurisdiction exists under subsections 1 or 2 turns upon a determination of where claimant's employment was principally localized.

In 1957 James Clark was hired in Des Moines, Iowa to work for Pulley Freight Lines (defendants' exhibit V, exhibit SS, pages 16 and 17). He remained employed by Pulley until his retirement following the alleged injury. Claimant testified that he resided in Des Moines, Iowa during most of the years he was employed by Pulley, but moved to Amity, Missouri. The date of the move appears to have been in 1978 (defendants' exhibit SS, pages 17 and 18). Clark thereafter resided in the state of Missouri continuously until moving to Centerville, Iowa after the alleged injury.

Mark Wiederin, the executive vice-president for Pulley Freight Lines since August of 1983, testified that Pulley is an interstate motor carrier of specified commodities over irregular routes which operates heavily in a 15-state area, but also to some extent in other states. Wiederin testified that there is no state in which 50% or more of Pulley's activities occur, but that all of the company equipment is maintained out of the Des Moines terminal. Wiederin testified that several years ago the company set up locations where drivers were hired and from where they worked. He referred to the location as a "domicile" and stated that one is located at Kearney, Missouri. Wiederin described a domicile as a place where a driver begins and ends his work week. He testified that claimant's official domicile was at Kearney, Missouri and that for income tax and withholding purposes, claimant was treated as a Missouri resident. Wiederin testified that a driver usually resides near his official domicile. Wiederin testified that, when an employee is at home, he is considered to be available for dispatch if he is eligible to drive additional hours under the applicable administrative regulations. Wiederin also testified that, if an employee desires to move to a different residence, he is required to notify the company.

Wiederin testified that in 1983 a special agreement was entered into between the company and claimant. In general, it provided that claimant would always be assigned to haul bones from the Swift plant in Des Moines to the Swift plant in St. Joseph, Missouri rather than having the run be up for bids according to the usual seniority system. Wiederin felt that the arrangement

was advantageous to the company because claimant gave up or waived three hours of pay in order to have the bone run. He felt that it was advantageous to claimant because it permitted him to be home every night, to avoid working on weekends, to limit his on-the-road expenses, to give claimant the predictability of knowing what he would be doing from day to day, and also to have an assignment that carried no responsibility for loading or unloading. Wiederin testified that some other drivers were discontent over claimant having the regularly scheduled run, but that it was allowed because it was convenient for both claimant and the company. Wiederin also testified that claimant's seniority was high enough that, on most occasions, he would have had a good chance of bidding the run through the regular system.

Wiederin testified that in late 1983 it became apparent that the bone runs which claimant regularly performed would be ending in early 1984 and that they did, in fact, end in March of 1984. A meeting was held with claimant in December, 1983 where the topic of ending the bone runs was discussed. Wiederin acknowledged that claimant had made bone runs to Chicago shortly before that meeting.

Wiederin testified that bones were hauled on a flat rate fee which was not based on weight. He stated that there were overloads on occasion, but not continuously and that a driver had the ability to decline an overload.

James Clark testified that all load assignments came out of Des Moines and that the satellite office in Kearney, Missouri was a place where some drivers parked their trucks but that he usually parked his truck at his home over the weekends (defendants' exhibit SS, pages 23 and 24). Clark testified that when he lived in Missouri, he came to Des Moines using Highway 6 and Interstate 35. He testified that the normal route from Des Moines to St. Joseph was Interstate 35 and Highway 36, but that when overloaded, he sometimes used alternate routes in order to avoid scales. He stated that he was overloaded 90% of the time (defendants' exhibit SS, pages 28-31).

Claimant testified that his assigned run involved picking up bones at the terminal in Des Moines and then hauling them to Swift Chemical Company in St. Joseph, Missouri. He stated that he had done so on a consistent basis for two or three years (defendants' exhibit SS, pages 21 and 22).

Marlene Smedema, a legal assistant for the Nyemaster Law Firm, testified concerning the number of miles which claimant would have driven in both Iowa and Missouri on a typical run and also on the number of hours claimant spent in the respective states while in a duty status according to the log books. Her testimony with regard to the number of miles between Des Moines and the Iowa-Missouri state line is totally inconsistent with

the mileage shown on defendants' exhibit FF, the state maps which were received into evidence. The evidence from the state maps is accepted as correct over her testimony. Defendants' exhibit L is a copy of claimant's weekly pay cards covering the weeks of November 14, 1983 through May 24, 1984. The first 12 pages deal with the times pertinent to the injury. The pay cards show that claimant was paid for traveling 179 miles each way between the Des Moines terminal and the St. Joseph, Missouri Swift plant. Exhibit L shows that claimant made 82 of such runs during the time covered by the exhibit. The pay card also shows him to have been paid for 14 hours of time in St. Joseph, Missouri and one-fourth of an hour in Des Moines, Iowa. The exhibit further shows that claimant was paid, on two occasions, for traveling to Chicago, Illinois, a distance which the pay card shows to be 345 miles each way. Reference to the Iowa map, which is in evidence as part of exhibit FF, shows the distance from the Pulley terminal, which exhibits show to be located at 405 SE 20th in Des Moines, Iowa, to the Iowa-Missouri state line to be approximately 82 miles. The Missouri portion of exhibit FF shows the distance from the Iowa-Missouri state line to the intersection of Highway 36 and Interstate 29 at the east edge of St. Joseph, Missouri to be approximately 90 miles. The exhibits in evidence show the address of the Swift plant to be 4800 Packers Avenue in St. Joseph (exhibit 3, page 1). Exhibit FF contains a small city map of St. Joseph, Missouri, but the map does not show the location of Packers Avenue. It does show the location of the stock yards and it is quite common for packing houses to be located adjacent to stock yards. Trucking companies typically do not pay the drivers for more miles than what are actually traveled. When 82 miles in Iowa and 90 miles to the east edge of St. Joseph are added the sum is 172 miles. The additional seven miles needed to total 179 miles is most likely the distance from the east edge of St. Joseph to the Swift plant. Although the Swift plant is not necessarily located near the stock yards, seven miles would be approximately the distance from the east edge of St. Joseph on Highway 36 to the stock yards. The result would be that for each one-way trip on the normal bone run, claimant would travel 82 miles in the state of Iowa and 97 miles in the state of Missouri. Reference to the Iowa map portion of exhibit FF shows the distance from the Des Moines terminal to the Iowa-Illinois state line to be approximately 164 miles. Such is almost precisely one-half of the total of 345 miles paid for the runs claimant made to Chicago. According to exhibit L claimant was paid for driving 82 trips between St. Joseph and Des Moines for a total of 14,678 miles and four trips between Des Moines and Chicago for a total of 1,380 miles. The sum of his driving during the period covered by exhibit L is 16,058 miles. Of those total miles traveled 7,954 were traveled in the state of Missouri as shown by 82 trips of 97 miles each. If it is assumed that the miles were traveled at an average speed of 50 mph, it would provide a total of 159 hours. If a slower average speed were used the amount of time would, of

course, be greater. From those same 82 runs to St. Joseph claimant would have traveled 6,724 miles in Iowa. The two runs to Chicago would have provided claimant with 600 additional miles for a total of 7,414 miles in the state of Iowa. The runs to Chicago provide 690 miles in the state of Illinois. Due to the Chicago runs, slightly less than one-half of claimant's driving miles were driven in the state of Missouri. Assuming the same 50 mph average speed for the miles traveled in Iowa and in Illinois, claimant would have 162 hours of driving time in states other than Missouri. Exhibit L shows claimant to have spent eight hours in Illinois for pay, one quarter of an hour in Iowa for pay, and 14 hours in St. Joseph, Missouri for purposes of pay. When combined with the estimated driving times, it would appear that, by a small margin, the majority of claimant's paid, on-duty time in the service of his employer, was spent in the state of Missouri.

The summary of claimant's expenditures of nondriving time while on duty as allocated between Des Moines and St. Joseph, Missouri appears correct under exhibit M. Exhibit M does not show any on-duty nondriving time while in the state of Illinois or elsewhere. If off-duty hours are considered in any fashion whatsoever, the proportion of claimant's time allocable to the state of Missouri is even greater than if the consideration is limited to driving time and on-duty nondriving time as is done for purposes of this decision.

Exhibit M, claimant's driver's daily log which was made and maintained by him, covers the entire year of 1983 and through most of January of 1984.

A review of exhibit M, claimant's daily logs, shows that his normal work activity was in fact travel between Des Moines and St. Joseph. With regard to the issue of mileage or time in such activity, the deviations through Amity, claimant's home, would not have any effect on the overall number of miles traveled. The only other destinations to which claimant drove, according to exhibit M, during the 13 months it covers, are six trips to East St. Louis, Illinois and four trips to Chicago. The trips to East St. Louis would, if using the normal traveled routes between Des Moines, Iowa and East St. Louis, provide an even greater amount of miles and time in the state of Missouri than would the normal runs to St. Joseph. Exhibit M shows the normal travel time between Des Moines and East St. Louis to have been seven hours, while the time typically used to drive between Des Moines and St. Joseph was three and one-half to four hours.

The test for determining whether or not the Iowa statute applies to an out-of-state injury is whether Iowa has sufficient interest based upon its statutes. George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495, 498 (Iowa 1982). In that case the Iowa Supreme Court stated, "...a state where the employment is

principally localized...is the state where the employee spends most of his time while on the job." In Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa 1981), the court seemed to rule that the employee's performance of the primary portion of his work in a state is the test and that the location of the employer's place of business or the employee's domicile is of no effect. There is some authority to the effect that the job of an over-the-road trucker, by its very nature, is not principally localized in any state. Albertson v. I-29 Country Diesel, IV Iowa Industrial Commissioner Report, 5 (1984). In this case, however, claimant was not working as a typical over-the-road trucker. He traveled a regular route. In the period of 13 months covered by defendants' exhibit M, his logs show him to have hauled loads to locations other than St. Joseph, Missouri on only 10 occasions. Four of those were to Chicago, the other six to East St. Louis, Illinois, which is a location that would be reached primarily by driving through the state of Missouri. It is found that the employment of James Clark was principally localized in the state of Missouri. Accordingly, subsections one and two of code section 85.71 do not give Iowa jurisdiction of this case.

IT IS THEREFORE CONCLUDED that the Iowa Industrial Commissioner does not have subject matter jurisdiction over James Clark's claim that he was injured in St. Joseph, Missouri on or about January 19, 1984 as presented in this case.

## FINDINGS OF FACT

1. On January 19, 1984 James Clark was an employee of Pulley Freight Lines and a resident and domiciliary of the state of Missouri.

2. On January 19, 1984, and for several months prior thereto, claimant's primary work activity had been hauling bones between Des Moines, Iowa and St. Joseph, Missouri.

3. The distance claimant drove for the employer in making that regular assignment was a total of 179 miles of which approximately 82 miles were in the state of Iowa and approximately 97 miles were in the state of Missouri.

4. The majority of claimant's on duty working time from and after January 1, 1983 and running up to the date of the alleged injury was spent in the state of Missouri.

5. When claimant was off duty, he spent most of his time at his residence in the state of Missouri.

6. James Clark's employment was principally localized in the state of Missouri on January 19, 1984.

## CONCLUSIONS OF LAW

1. Where subject matter jurisdiction is an issue, the burden of showing that the industrial commissioner has subject matter jurisdiction rests upon claimant.

2. The Iowa Industrial Commissioner does not have subject matter jurisdiction over an injury alleged to have occurred to James Clark on January 19, 1984 in St. Joseph, Missouri.

## ORDER

IT IS THEREFORE ORDERED that this claim is dismissed for lack of subject matter jurisdiction.

Each party is ordered to pay their own respective costs incurred in prosecuting this action.

Signed and filed this 9th day of July, 1987.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. William L. Kutmus
Mr. Mark S. Pennington
Attorneys at Law
620 Fleming Building
Des Moines, Iowa 50309

Ms. Sara J. Sersland
Attorney at Law
1900 Hub Tower
699 Walnut
Des Moines, Iowa 50309

1106; 1108.50; 1402.20
1402.30; 1402.40; 1402.60
1703; 1802; 1803; 2209; 3002
Filed November 16, 1987
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| ROBIN CRAWFORD,<br><br>Claimant,<br><br>vs.<br><br>WABASH TRANSFORMER CO.,<br><br>Employer,<br><br>and<br><br>NATIONAL UNION FIRE INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | FILE NO. 769290<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

1106; 1108.50; 1402.20; 1402.30; 1402.40; 1402.60; 1703; 1802; 1803; 2209; 3002

Claimant did repetitive work on an assembly line with her fingers, hands and arms.

She had two surgeries for bilateral carpal tunnel but failed to prove impairment and therefore no permanent partial disability was allowed for the hands.

Claimant did not prove an injury arising out of and in the course of employment with respect to her right elbow.

Claimant did prove an injury arising out of and in the course of her employment with respect to her right shoulder, causal connection of temporary and permanent disability, and was awarded five percent permanent partial disability of the right upper extremity. Her treating physician awarded a five percent impairment rating. Claimant's counsel said he was not asking for body as a whole benefits. Medical benefits were also awarded for the shoulder injury.

Credit allowed for benefits paid prior to hearing.

000253

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| ROBIN CRAWFORD,<br><br>Claimant,<br><br>vs.<br><br>WABASH TRANSFORMER CO.,<br><br>Employer,<br><br>and<br><br>NATIONAL UNION FIRE INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | FILE NO. 769290<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>FILED<br><br>NOV 16 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

## INTRODUCTION

This is a proceeding in arbitration brought by Robin Crawford, claimant, against Wabash Transformer Company, employer, and National Union Fire Insurance Company, insurance carrier, for benefits as a result of an injury which occurred on June 21, 1984. A hearing was held in Davenport, Iowa on January 8, 1987 and the case was fully submitted at the close of the hearing. The record consists of the testimony of Robin Crawford (claimant); Paul Campbell (plant manager); and joint exhibits 1-13 with subparts, except that joint exhibit 7 was withdrawn by the parties prior to the hearing. Joint exhibit 13 is a video tape of assembly line operations. It was ordered by the deputy to be held in custody by defendants until all appellate periods have been exhausted in this case. Both attorneys submitted outstanding briefs.

## STIPULATIONS

The parties stipulated to the following matters:

That claimant is claiming an injury to both hands for bilateral carpal tunnel to both hands and that she is also claiming an injury to her right elbow and right shoulder.

That an employer/employee relationship existed between claimant and employer at the time of all of the alleged injuries.

That the weekly rate of compensation in the event of an

award is $114.78 if the rate of compensation is to exclude shift differential.

That the rate of compensation in the event of an award is $117.87 if the rate of compensation is to include shift differential.

That claimant sustained an injury to her hands for bilateral carpal tunnel on June 21, 1984 which arose out of and in the course of her employment with employer.

That the injury to the hands was the cause of temporary disability.

That the extent of entitlement to weekly compensation for temporary total disability or healing period disability for the injury to the hands has been fully paid to claimant and is not an issue at this time.

That all medical expenses for the injury to the hands have been or will be paid and are no longer in dispute.

That defendants are entitled to a credit for benefits paid at the rate of $127.10 per week for 24 weeks for temporary disability to the hands. The amount of the credit is to include the amount that $127.10 exceeds the rate actually determined to be a proper rate in this decision.

That if it is determined in this decision that claimant sustained an injury to the right upper extremity that arose out of and in the course of employment with employer, then it is stipulated: (1) that this injury was the cause of temporary disability during the period of recovery of 14 3/7 weeks from October 1, 1985 to January 9, 1986; and, (2) that claimant is entitled to temporary disability benefits for that period of time for the injury to the right upper extremity.

## ISSUES

The parties submitted the following issues for determination at the time of the hearing:

Whether the injury to both hands was the cause of any permanent disability to the hands.

Whether claimant is entitled to permanent disability benefits for the injury to the hands and, if so, the extent of entitlement.

Whether claimant sustained an injury on June 21, 1984 to the right elbow and right shoulder which arose out of and in the course of her employment with employer.

Whether the injury to the right elbow and right shoulder was

000255

the cause of any permanent disability.

Whether claimant is entitled to any permanent disability benefits for the injury to the right elbow and right shoulder and, if so, the nature and extent of entitlement.

Whether claimant's rate of compensation is to include shift differential pay or to exclude shift differential pay.

Whether claimant is entitled to medical benefits for treatment to the right elbow and shoulder as follows:

| | |
|---|---|
| Dr. Richard Kreiter | $ 635.00 |
| Mercy Hospital | 1,547.36 |
| Mercy Hospital (Pathology) | 17.75 |
| Anesthesiology Associates | 297.00 |
| Total | $2,497.11 |

## SUMMARY OF THE EVIDENCE

All of the evidence was examined and considered. The following is a summary of the pertinent evidence:

Prior to this employer, claimant worked for Oscar Mayer for approximately two years from June of 1979 to June of 1981. Then she worked as a mother and homemaker for approximately two years. She started to work for this employer on or about August 18, 1983. All of her jobs with this employer have been repetitive assembly line types of work that required a repetitive use of her hands and arms. She first worked as a laminator for a few weeks. Then she transferred to what was sometimes called the taping job. The plant manager called it line connecting. The particular taping job that led to these injuries began in January of 1984.

A video of this job was shown at the hearing. It was marked as exhibit 13. It has been ordered to be held in custody by defendants until the expiration of all appellate periods in this case. Claimant testified that the video was generally representative of this taping or line connecting job. However, the video showed a much slower rate of operation. In the video the demonstrator had to wait for bobbins and this was not the case when she did that job. Also claimant had to hold onto a pair of wire cutters in her right hand all of the time (due to the fast pace of the line) and clip off loose wires that the machine missed. The demonstrator in the video did not do that. Also, claimant testified that she was required to neatly pack the finished bobbins in a box; whereas the demonstrator in the video only dropped them into a box. Furthermore, in the video the bobbins came off easy. Claimant testified that when she performed this work the bobbins stuck on the arbors when she first pulled on them. Then when they came loose they came off with a sudden

000256

jerk. Paul Campbell, plant manager, explained that this demonstration was a staged demonstration because the company no longer performed this operation at this plant. When this plant was purchased by a new owner this operation was transferred to a plant in Mexico.

Claimant described her job of taping or line connecting as follows: The assembly line is approximately waist to chest high. Six to eight ounce bobbins that look like spools of thread come down the line. She usually performed this job while sitting. Her job was to push down two soddered wires with her right and left thumb; wrap the wires tightly with a six to eight inch strip of tape; clip off loose wires that were missed by the machine by squeezing the wire cutters with the right hand; then pull the bobbins off of the arbor; and neatly pack the bobbins in a box beside her chair. When she pulled on a bobbin to remove it from the arbor she had to pull very hard with her right hand because there was resistance at first. Then when the bobbin came loose it came off with a sudden jerk all at once. Claimant testified that she performed this operation at the rate of 450 pieces per hour for eight hours a day which totals 3,600 pieces per day. Campbell testified that the rate of production for this job was 140 pieces per hour per employee. Three employees performed this job at the same time and together they produced 420 per hour. In an eight hour day the three employees then produced 3,360 finished items. He testified that the video line rate was set at 140 pieces per minute which was the rate used when claimant performed this job.

Claimant denied any prior problems with her hands or arms. She denied any prior injuries or accidents with her hands or arms. There was no evidence of any prior problems in any of the medical evidence.

Claimant testified that she first experienced difficulty in approximately March of 1984 when she noticed that her hands would swell. The fingers fell asleep on both hands and her right arm hurt. Her difficulties in the left hand were in her ring, middle and index fingers. Her difficulties on the right were in her hand, elbow and shoulder. The pain would start in the morning and got worse as the day progressed. The stipulated date of injury is June 21, 1984. Claimant testified that on the following day, June 22, 1984, her fingers did not wake up and so she went to see her personal physician, Samuel Sandberg, M.D. His notes show that he saw claimant on June 22, 1984 for shoulder pain and muscle strain aggravated by lifting packages and her work. His examination revealed tenderness in the right trapezius radiating down to the elbow. Dr. Sandberg saw claimant again on July 2, 1984 for shoulder strain and deltoid weakness. His records show that he saw claimant again on July 16, 1984 as follow-up on a shoulder injury. He commented that she now has numbness in the hands and that she still works on an assembly line apparatus for employer. Examination of her shoulder showed

000257

diffuse tenderness. She had positive Tinel's sign and Phalens sign in the right wrist. He diagnosed shoulder strain with developing carpal tunnel syndrome. He took her off work and referred her to Richard A. Kreiter, M.D., an orthopedic surgeon (Exhibit 5, page 1; Exhibit 12, page 1). Dr. Sandberg's release from work on June 22, 1984 stated that she was unable to work due to shoulder injury (Ex. 5, p. 2). Dr. Sandberg's release from work dated July 16, 1984 was worded as follows: "Unable to work due to job related arm & shoulder injury this entire week." (Ex. 5, p. 3).

Dr. Sandberg wrote a letter to the insurance adjusting bureau on August 10, 1984 in which he said that he felt that claimant's initial problems to her neck and right shoulder muscles that radiated down into her hands with carpal tunnel syndrome were work related (Ex. 5, p.4; Ex. 12, p. 11).

Dr. Kreiter first saw claimant on July 19, 1984. He recorded that her chief complaint was numbness to the right hand but that she was an employee of employer and has had a one month history of gradually increasing pain in her whole right arm (Ex. 4, p. 2; Ex. 12, p. 8). Dr. Kreiter quickly diagnosed carpal tunnel syndrome. He performed a carpal tunnel release with neurolysis of the median nerve on the left wrist on August 27, 1984 (Ex. 3, p. 6; Ex. 12, p. 15). He performed a carpal tunnel release on the right wrist on October 15, 1984 (Ex. 3, p. 15; Ex. 12, p. 14). Claimant was off work for her carpal tunnel surgery from July 17, 1984 to January 2, 1985. During that time Dr. Kreiter recorded right elbow complaints which he diagnosed as lateral epicondylitis (tennis elbow) and possible ulnar nerve entrapment (Ex. 4, pp. 3 & 4; Ex. 12, pp. 2 & 3; Ex. 4y, pp. 14-16 & 20). Repeat electrodiagnostic studies on February 11, 1985 (Ex. 3, p. 26; Ex. 12, p. 24) were negative for ulnar nerve entrapment and showed no change from the earlier electrodiagnostic test on August 1, 1984 which also were negative. (Ex. 3, p. 1; Ex. 12, p. 9; Ex. 4y, pp. 20-23).

When claimant returned to work on January 2, 1985, she only worked that one day and was laid off on January 3, 1985 until May of 1985.

Dr. Kreiter testified that his notes showed that claimant did not complain of her right shoulder until February 25, 1985 (Ex. 4y, p. 24). Claimant testified that she had complained about her right shoulder several times and that the doctor did not make a record of it. The right shoulder complaint of February 25, 1985 did occur during a period of layoff (Ex. 4y, pp. 25 & 26). However, Dr. Kreiter testified that if claimant had right shoulder complaints dating back to July 16, 1984, then that would be an important factor in determining whether there was a causal connection between her right shoulder and her work (Ex. 4y, p. 40).

000258

After the carpal tunnel surgeries Dr. Kreiter said on January 17, 1985 and again on March 4, 1985 that claimant should be able to perform the type of work that she had done in the past for her employer (Ex. 4, p. 13; Ex. 12, p. 23; Ex. 4, p. 17; Ex. 12, p. 26; Ex. 4y, p. 20). He did not believe that she suffered any impairment from the carpal tunnel surgery. However, Dr. Kreiter conceded that he did not perform any grip strength tests or range of motion tests, but he did put in his notes that there was a little weakness in the right hand (Ex. 4y, pp. 41 & 42).

Claimant did return to work again in May of 1985 and worked until June of 1985. At this time she put wires in a housing. She testified that her hands were numb but that she could do the job. Claimant was laid off again then from June of 1985 until May of 1986. She continued to see Dr. Kreiter for right elbow and right shoulder complaints (Ex. 4, pp. 14-16; Ex. 12, pp. 3 & 4). Then on September 30, 1985, Dr. Kreiter performed a resection of the right clavical and release of the right coracoacromial ligament (Ex. 3, p. 42; Ex. 12, p. 32). Claimant returned to work again in May of 1986 and has been performing a job as a laminator since that time on the assembly line. She last saw Dr. Kreiter in March of 1986. She has not seen any other doctors for treatment since then.

At the time of the hearing claimant testified that she laminates bobbins. She puts a bobbin in the machine, takes it out, and puts it in a box. Claimant testified that she performs well at this job. Her efficiency from August 25, 1986 to October 17, 1986 averaged 100.5 percent of what was expected of an employee doing this job (Ex. 11). She testified that she has a quota of 960 parts a day. She testified that she makes the same quota as the other employees, but she has trouble doing it.

Claimant testified about numerous subjective complaints in her left hand and right hand. It is difficult for her to reach and lift with her right shoulder. She gets a burning and pulling sensation. It feels like it is tearing. She can only lift her arm one-half of the way up. She cannot reach straight up. It is painful to put her right hand in her right rear pocket. She takes aspirin every two hours to relieve the pain. She takes six to eight aspirins per day. She uses ice or heat almost every night. She cannot sleep on her right side due to pain. The shoulder is somewhat improved since the surgery. It does not hurt as much and it does not hurt as long as it did formerly. Claimant made no particular complaints about her right elbow in her testimony at the hearing. Dr. Kreiter commented to both attorneys in separate letters that claimant's subjective complaints were greater than his objective findings (Ex. 4, p. 17; Ex. 12, p. 26; Ex. 4, p. 18; Ex. 12, p. 27). Claimant conceded in her testimony that she did use her right arm in bass fishing and to brush her horse. She admitted that

000259

she told her foreman that it hurt her arm when she brushed her horse.

Campbell, the plant manager, testified that claimant was paid a shift differential of $.20 per hour which was a premium for accepting work at night. He stated that claimant's work is heavier now than it was before the injury, but her work record shows that her efficiency and productivity are better now than before her injuries.

Dr. Kreiter wrote to defendants' attorney on July 10, 1985 and stated that repetitive movements that claimant did in her job may cause the shoulder problem. It could also be the result of what she does at home or when she goes bass fishing (Ex. 4, p. 22; Ex. 12, p. 30). Dr. Kreiter wrote to claimant's attorney on October 22, 1985 and stated that the shoulder problem can come from repeated pulling and pushing from overhead work that one might do in any type of job (Ex. 4, p. 24; Ex. 12, p. 35).

Dr. Kreiter wrote to defendants' counsel on January 31, 1986 as follows:

> ...At the time of surgery I did find that she had degenerative osteoarthritis developing in the joint around the clavicle and acromion. This area was resected. She also had a tendinitis and some impingement from the coracoacromial ligament. Find [sic] the findings at surgery I would state that such changes in the shoulder are usually related to trauma or to activities which require repeated pulling, pushing, lifting, etc. According to my records Dr. Sandberg had seen Ms. Crawford with shoulder complaints while she was working for Wabash Transformer. I do believe the type of activity that she was doing could be related to such findings at the time of surgery.
>
> In any event she is doing well and having minimal pain and is back to near normal activity. In regard to a disability rating, resection of the distal end of the clavicle would give her a 5% permanent physical impairment loss of physical function to the whole arm.
> (Ex. 4, p. 27; Ex. 12, p. 38)

Dr. Kreiter wrote to claimant's counsel on January 31, 1986 as follows:

> As you know, at the time of surgery we found that she did have some degenerative arthritic changes in the acromioclavicular joint and a significant tendinitis of the rotator cuff but no tear of that

000260

cuff. We resected the lateral clavicle and excised the bursa around the tendons and did release the coracoacromial ligament. I would say the findings that were noted at the time of surgery would be compatible with someone who has done work requiring repetitive type of maneuvers such as pulling, pushing, lifting, etc. It would be my opinion that if she was seen initially by Dr. Sandberg with shoulder complaints that seemed to be related to her work, then I do feel there is a causal relationship of her work activity and my findings at the time of surgery.

I would state that resection of the distal end of the clavicle would give her a 5% permanent physical impairment and loss of physical function to the arm as a result of that surgery.
(Ex. 4, p. 28; Ex. 12, p. 37)

Claimant saw Bruce L. Sprague, M.D., an orthopedic surgeon who specializes in surgery of the hand and upper extremity on July 21, 1986. Dr. Sprague did not make a direct statement on causal connection, however, he did report a history of numbness and tingling in both hands as well as pain involving the right shoulder for which he gave a work history. Dr. Sprague concluded as follows:

On examination today, the patient was not fully cooperative and resisted full flexion and abduction of the right shoulder. She also did not cooperate with muscle testing examination. The patient had very little crepitous involving the motion of the right shoulder, but I did feel that she probably lacked the last 10 degrees of full flexion and abduction. She appeared to have good internal and external rotation. She demonstrated weakness throughout both upper extremities, more on the right than left. She had decreased sensation involving all distributions involving the right hand. There was negative Tinel's signs and negative Phalen's tests.

I feel she has no permanent impairment concerning her carpal tunnel releases. Concerning the right shoulder, using the AMA Guides to Permanent Physical Impairment, I feel the patient has a 4% impairment involving her right upper extremity.
(Ex. 6; Ex. 12, pp. 39 & 40)

F. Dale Wilson, M.D., a general surgeon, evaluated claimant on April 29, 1985. This was after the carpal tunnel surgeries but before the right shoulder surgery. He performed a very

000261

extensive and detailed examination. Dr. Wilson concluded that all of claimant's injuries were the result of her work with employer from the job which began on January 1, 1984 (Ex. 1, p. 5). Dr. Wilson arrived at the following permanent functional impairment ratings: (1) right hand 35 percent; (2) left hand 20 percent; (3) right elbow 2 percent; (4) right shoulder 9 percent (Ex. 1, p. 7). Dr. Wilson further stated in a letter dated June 28, 1985 as follows:

> After consultation with Mrs. Robin Crawford's attorney, Harrison H. Kavensky and a discussion with her orthopedic surgeon, Dr. Richard L. Kreiter, we are in agreement concerning treatment of her right shoulder.
>
> The opinion is that the shoulder defect may require a surgical procedure and is indeed casually related to the injury she sustained on January 21st, 1984. (Ex. 1, p. 8)

Dr. Kreiter remembered this telephone conversation but he could not remember what he said about causal connection at that time (Ex. 4y, p. 34). Dr. Kreiter made this statement about causal connection in his deposition dated September 9, 1985. However, he made later statements about causal connection in letters to both counsel dated January 31, 1986 (Ex. 4, p. 27; Ex. 12, p. 38; Ex. 4, p. 28; Ex. 12, p. 37) quoted above.

## APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on June 21, 1984 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 21, 1984 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist

000262

Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

A cause is proximate if it is a substantial factor in bringing about a result. It only needs to be one cause; it does not have to be the only cause. Blacksmith v. All-American, Inc., 290 N.W.2d 38, 354 (Iowa 1980).

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

Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

The first issue is whether the carpal tunnel injury to the right and left hand is the cause of any permanent disability and, if so, the extent of entitlement to benefits. Claimant failed however, to sustain the burden of proof by a preponderance of evidence that the injury to the hands was the cause of any permanent disability. Dr. Sandberg, claimant's personal physician, did not give an opinion on this point. Dr. Kreiter, the orthopedic surgeon, and claimant's treating physician stated claimant could perform her past employments and did not give an impairment rating (Ex. 4, p. 13; Ex. 12, p. 23; Ex. 4, p. 17; Ex. 12, P. 26; Ex. 4y, p. 20). Dr. Sprague, a hand surgeon and upper extremity specialist, stated she had no permanent impairment concerning her carpal tunnel releases (Ex. 6, Ex. 12, p. 39 & 40). Dr. Kreiter said he did not take measurements of grip strength or range of

000263

motion (Ex. 4y, pp. 41 & 42). There is no evidence that Dr. Sprague did so either. Both doctors, however, did examine claimant. Both doctors said there was some weakness in the right hand. Nevertheless, they gave no impairment rating for this weakness. Therefore, it is concluded that the weakness did not rise to the level of being rateable with a numerical impairment rating. Dr. Wilson, a general surgeon who only saw claimant once for the purpose of an evaluation awarded a 35 percent permanent functional impairment of the right hand and a 20 percent permanent functional impairment of the left hand. These ratings are so markedly disparate from Dr. Kreiter, Dr. Sprague and ratings commonly seen in other cases for similar injuries that the accuracy of these ratings is placed in question. Moreover, Dr. Kreiter is an orthopedic surgeon and the treating physician. Dr. Sprague is a hand surgeon and specializes in upper extremity matters. Rockwell Graphic Systems, Inc., v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). A doctor's expertise and board certification may accord his testimony greater weight. Reiland v. Palco, Inc., Thirty-Second Biennial Report of the Industrial Commissioner 56 (1975); Dickey v. IIT·Continental Baking Company, Thirty-Fourth Biennial Report of the Industrial Commissioner 89 (1979). In addition, claimant testified that she was able to perform her present repetitive duties of laminating bobbins with her hands. She claimed it caused her a lot of subjective problems, but she could do the job. In this respect Dr. Kreiter commented to each attorney that claimant's subjective symptoms exceeded his objective findings of physical findings. Furthermore, Campbell testified that claimant's efficiency now is greater than her efficiency before the three surgeries. Therefore, it is determined that claimant did not sustain the burden of proof by a preponderance of the evidence that she sustained any permanent disability to her hands as a result of her bilateral carpal tunnel syndrome and these two surgeries on her hands. Consequently, claimant is not entitled to permanent partial disability benefits for the hands.

The next issue is whether claimant sustained an injury to her right elbow. Claimant did not sustain the burden of proof by a preponderance of the evidence that she sustained an injury to her right elbow. Dr. Sandberg made only glancing mention of her elbow. He primarily treated her for right shoulder and hand complaints and referred her to Dr. Kreiter. Dr. Kreiter had electrodiagnostic studies performed twice and could not establish a provisional clinical diagnosis of ulnar nerve entrapment at the elbow. He called her condition lateral epicondylitis and tennis elbow. After intense examination in his deposition he stated that he could not determine if it was caused by her work or not. He had no specific opinion (Ex. 4y, pp. 21-23).

Dr. Sprague did not mention the elbow. Therefore, his testimony lends no support to claimant's position (Ex. 6; Ex. 12, pp. 39 & 40). Dr. Wilson did not specifically comment on

000264

whether the elbow complaints were caused by work but only made a general statement that all of these injuries were caused by her work (Ex. 1, p. 5). His numerical rating of impairment for the elbow was two percent (Ex. 1, p. 7). Claimant did not make any specific complaints about her right elbow in her testimony at the hearing. Therefore, claimant failed to sustain the burden of proof by a preponderance of the evidence that she suffered an injury to her right elbow which arose out of and in the course of her employment with employer on June 21, 1984. Consequently, she is not entitled to any benefits for the right elbow.

The next issue is the right shoulder. Claimant did sustain the burden of proof by a preponderance of the evidence that she sustained an injury to her right shoulder which arose out of and in the course of her employment with employer on June 21, 1984 which was the cause of both temporary and permanent disability. Claimant testified that she began having trouble in March of 1984. She first consulted her family physician, Dr. Sandberg, on June 22, 1984. His office records verify that she saw him on June 22, 1984, July 2, 1984 and July 16, 1984 for a right shoulder pain and injury related to her work on the assembly line with employer (Ex. 5, p. 1; Ex. 12, p. 1). Dr. Sandberg gave her a slip stating she was unable to work due to shoulder injury on June 22, 1984 (Ex. 5, p. 2). Again he took her off work on July 16, 1984 and he specifically stated that she was unable to work due to job related arm and shoulder injury (Ex. 5, p. 3). In a letter to the adjustment bureau dated August 10, 1984, he plainly stated that he felt these initial shoulder problems were work related (Ex. 5, p. 4).

Dr. Kreiter reported after claimant's initial interview on July 19, 1984, that she had increasing pain in her whole right arm (Ex. 4, p. 2; Ex. 12, p. 8). It is true that the right shoulder is not mentioned in Dr. Kreiter's notes until February 25, 1985 (Ex. 4y, p. 24). Nevertheless, claimant insisted in her testimony that she did complain about her right shoulder but that Dr. Kreiter did not write it down. Dr. Kreiter acknowledged in his deposition that if claimant had complained of her right shoulder when she first saw Dr. Sandberg, then that would be a significant factor in determining whether there was a causal connection between her work and the right shoulder (Ex. 4y, p. 40).

After February 25, 1984, claimant continued to treat with Dr. Kreiter for her right shoulder until the clavical resection and release of the coracoacromial ligament on September 30, 1985 (Ex. 3, p. 42; Ex. 12, p. 32). Dr. Kreiter told defendants' counsel that he did believe the type of activity she was doing could be related to his findings at the time of surgery (Ex. 4, p. 27; Ex. 12, p. 38). Dr. Kreiter told claimant's counsel that claimant's shoulder condition was compatible with her work. He added that if claimant was seen initially by Dr. Sandberg with shoulder pain, that seemed to be related to her work, then he felt there

000265

was a causal connection between her work activity and his findings at the time of the shoulder surgery. Then he stated that the resection of the distal end of the clavical would give her a five percent permanent physical impairment and permanent loss of function to the right arm (Ex. 4, p. 28; Ex. 12, p. 37).

Dr. Sprague did not comment specifically on causal connection between work and the right shoulder. However, he cited her work in the history portion of his evaluation. He awarded claimant a four percent impairment of her right upper extremity (Ex. 6; Ex. 12, pp. 39 & 40). Dr. Wilson stated that all of her injuries were caused by work and awarded nine percent impairment for the right shoulder (Ex. 1, p. 7).

Claimant testified that her shoulder began to hurt back in March of 1984 and continued to hurt up until the time of surgery on September 30, 1985. The fact that she may have bowled, gone bass fishing and casted with a rod and reel, canned tomatoes, and even brushed her horse was not demonstrated by the evidence to have made any significant contribution to her shoulder condition nor was there any evidence that her prior employment with Oscar Mayer ever caused any hand, wrist, elbow or shoulder problems.

In summary then claimant, the plant manager, and the video established the repetitive nature of claimant's work. Dr. Sandberg felt that the work caused her shoulder pain. Dr. Kreiter said it could be related to her work and if Dr. Sandberg thought it was work related than there was a causal relationship. Dr. Sprague proceeds on the basis that her work history is related to the shoulder injury and Dr. Wilson said it was work related. Consequently, Dr. Sandberg, Dr. Kreiter and Dr. Wilson indicated that there was a causal connection. Dr. Sprague proceeded on the basis that there was a causal connection. Neither one of the two lay witnesses in this case and none of the four medical doctors said or seriously suggested that the shoulder injury was not work related. Thus, the preponderance of the evidence, the greater weight of all of the evidence, is that there is a causal connection between claimant's work and the right shoulder condition. Therefore, it is determined that claimant has sustained the burden of proof by a preponderance of the evidence that she sustained an injury which arose out of and in the course of her employment with employer on June 21, 1984 to her right shoulder which was the cause of both temporary and permanent disability.

The parties stipulated that claimant is entitled to healing period benefits from October 1, 1985 to January 9, 1986.

It is now determined that claimant is entitled to permanent partial disability benefits of five percent of the right upper extremity based upon the evaluation of the orthopedic surgeon

000266

and treating physician, Dr. Kreiter, who had the greatest opportunity to make an accurate evaluation. There is much authority for the proposition that shoulder disabilities should be evaluated industrially, but since claimant's counsel specifically stated that he was only seeking disability for the arm, this award is made accordingly under section 85.34(2)(m).

The next issue is the proper rate of compensation. Iowa Code section 85.36(6) provides that the basis of computation of the rate in the case of an employee paid daily, hourly or by the output does not include overtime or premium pay. Campbell testified that claimant was paid a shift differential of an additional $.20 per hour as a premium to work at night. Shift differential pay, which is paid to the employee to work at night, is premium pay, and as such must be excluded from the weekly earnings computation. Burmeister v. Iowa Beef Processors, Inc., II Iowa Industrial Commissioner Report 59, 64 (1982). The parties stipulated that the proper rate of compensation without shift differential pay included in the computation is $114.78 per week.

The final issue is whether claimant is entitled to certain medical expenses shown in the issues section of this decision which are agreed to between the parties as the medical expenses necessitated by the right shoulder treatment and surgery. It is now determined that claimant is entitled to these medical expenses as follows:

| | |
|---|---|
| Dr. Richard Kreiter | $ 635.00 |
| Mercy Hospital | 1,547.36 |
| Mercy Hospital (Pathology) | 17.75 |
| Anesthesiology Associates | 297.00 |
| Total | $2,497.11 |

## FINDINGS OF FACT

WHEREFORE, based upon the evidence presented, the following findings of fact are made:

That Dr. Kreiter stated that claimant could perform all of her employment tasks after the carpal tunnel surgeries on the right hand and the left hand.

That Dr. Kreiter awarded no permanent functional impairment for either the right hand or the left hand.

That claimant did in fact return to work and has done a repetitive job in a very efficient and productive manner now for several months after the accident.

That Dr. Sprague found no permanent impairment to either the right hand or the left hand.

000267

That the plant manager testified that claimant's efficiency and productivity is greater now than before her three surgeries.

That Dr. Sandberg, Dr. Kreiter, and Dr. Sprague did not establish a causal connection between claimant's work and her right elbow complaints.

That claimant did not testify about any right elbow complaints at the hearing.

That the electrodiagnostic studies of the right elbow on two different occasions ruled out the provisional clinical diagnosis of Dr. Kreiter of a possible ulnar nerve entrapment at the right elbow.

That claimant did complain of right shoulder injury the first time she saw Dr. Sandberg.

That Dr. Sandberg treated claimant for right shoulder injury and took her off work twice on account of it.

That Dr. Sandberg stated that the right shoulder problem was work related.

That Dr. Kreiter treated the right shoulder problem from February of 1985 until he performed surgery on the right shoulder on September 30, 1985.

That Dr. Kreiter stated that he believed that claimant's work was compatible with his findings at the time of surgery and that if claimant was seen initially by Dr. Sandberg for right shoulder pain, then he felt there was a causal connection between her work and his findings at the time of the right shoulder surgery.

That Dr. Kreiter awarded a five percent permanent functional impairment for the right shoulder.

That Dr. Sprague awarded a four percent permanent functional impairment for the right shoulder.

That Dr. Wilson awarded a nine percent permanent functional impairment for the right shoulder, however, Dr. Wilson made his evaluation prior to the right shoulder surgery.

That claimant sustained a five percent permanent partial impairment to the right shoulder.

That claimant's shift differential pay is premium pay for working nights and therefore the proper rate of compensation should exclude the shift differential.

That the proper rate of compensation is $114.78 per week as stipulated by the parties if shift differential is not to be included.

That claimant incurred $2,497.11 in medical expenses for treatment and surgery of her right shoulder.

## CONCLUSIONS OF LAW

WHEREFORE, based upon the evidence presented and the principles of law previously discussed, the following conclusions of law are made:

That claimant did not sustain the burden of proof by a preponderance of the evidence that the carpal tunnel injury to her right and left hand or the subsequent carpal tunnel surgeries were the cause of any permanent disability.

That claimant is not entitled to permanent partial disability benefits for the injury to her hands.

That claimant did not sustain the burden of proof by a preponderance of the evidence that she sustained an injury which arose out of and in the course of her employment on June 21, 1984 to her right elbow.

That claimant did sustain the burden of proof by a preponderance of the evidence that she did sustain an injury which arose out of and in the course of her employment on June 21, 1984 to her right shoulder.

Claimant did sustain the burden of proof by a preponderance of the evidence that the injury to her right shoulder was the cause of both temporary and permanent disability.

That claimant is entitled to healing period benefits from October 1, 1985 to January 9, 1986 as stipulated by the parties.

That claimant is entitled to permanent partial disability benefits for a scheduled member injury of five percent of the right upper extremity for the injury to the right shoulder.

That the proper rate of compensation should not include shift differential pay because it is premium pay and therefore $114.78 per week which is the amount stipulated to by the parties is the proper rate of compensation.

That claimant is entitled to medical benefits for the treatment and surgery of the right shoulder injury in the amount of $2,497.11 which is the amount stipulated to by the parties.

000270

Copies To:

Mr. Allan Hartsock
Attorney at Law
4th Floor Rock Island Bldg.
P. O. Box 428
Rock Island, Illinois 61201

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

000271

FILED

SEP 18 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| IRWIN CUNNINGHAM, | : | |
| | : | |
| Claimant, | : | File No. 815189 |
| | : | |
| vs. | : | |
| | : | A R B I T R A T I O N |
| THATCHER PLASTICS, | : | |
| | : | D E C I S I O N |
| Employer, | : | |
| | : | |
| and | : | |
| | : | |
| U. S. INSURANCE GROUP, | : | |
| | : | |
| Insurance Carrier, | : | |
| Defendants. | : | |

## INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Irwin Cunningham, against his employer, Thatcher Plastics, and its insurance carrier, U.S. Insurance Group, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained July 25, 1985. This proceeding was held before the undersigned deputy industrial commissioner at Davenport, Iowa on May 21, 1987. A first report of injury was filed January 31, 1986. The record was considered fully submitted at close of hearing. The record consists of the testimony of claimant, of Roberta Cunningham and of Keith Herrick, as well as joint exhibits A through I and defendants' exhibits J through O, all as identified on the exhibit lists submitted at hearing and part of the official file in this matter.

## ISSUES

Pursuant to the prehearing report filed by the parties, the parties stipulated that claimant's rate of weekly compensation is $275.93, and that the provider of medical treatment would testify that the fees were reasonable and that treatment provided was reasonable and necessary treatment for the condition. The issues remaining for resolution are:

1. Whether claimant received an injury which arose out of and in the course of his employment;

2. Whether a causal relationship exists between the claimed

000272

njury and the claimed disability;

3. Whether claimant is entitled to benefits and the nature nd extent of any benefit entitlement;

4. Whether claimant is entitled to payment of certain ıedical costs pursuant to section 85.27; and,

5. Whether notice of claimant's injury was appropriate ınder section 85.23.

REVIEW OF THE EVIDENCE

Claimant is 55 years old and a high school graduate who has also taken a community college math course. Claimant served in the air force. Claimant worked for the employer Thatcher Plastics from June 1954 through late 1985. He testified that he had worked thirty-one years as an auto trim setup and machine maintenance worker until that department closed in June 1985. Claimant reported that he was happy with that job and that it required no further retraining although he stated that he was always learning something new on the job. He reported that his employer was satisfied with his performance. Apparently, claimant was hired into that position as a swing shift worker, but routinely only worked the department one shift per five day week. Claimant's department was closed as part of a general shutdown of Thatcher Plastics' original production line. The department closing was posted in January 1985. Thatcher was a union employer and claimant was approximately 13th or 14th on the whole plant seniority list. He had approximately thirteen jobs from which he could bid as a result of his seniority. Claimant chose a new position as a tube department code printer. He characterized that position as entirely different. It involved a seven-day swing shift and six weeks on-the-job training. Claimant reported that he was learning his job "okay" and had no complaints from his supervisors. He indicated that his foreman said he was doing okay and that he himself didn't mind the job, but did feel under a strain learning to do it right. Claimant reported that the seven-day swing shift interfered with his life, that his friends were off when he was working, and that he was unable to attend church more than one Sunday per month. He reported that he could not sleep while working the 11:00 p.m. to 7:00 a.m. shift and that he would "cry all the way home."

Claimant agreed that he had worked a five-day week 7:00 to 3:00 shift from May 20, 1985 to May 25, 1985 and that he had then worked the 11:00 p.m. to 7:00 a.m. shift. The Thatcher plant was shut down from June 29, 1985 through July 16, 1985. At that time claimant was then scheduled to return to work on

the 3:00 p.m. to 11:00 p.m. shift. He was off work through July 22, 1985 for an upset stomach. Claimant returned to work on July 24, 1985 on the 3:00 to 11:00 shift. On July 25, 1985, claimant experienced pain at approximately 10:00 a.m. while at home. He reported that he had an uptight, hurting feeling in his chest and into his arm. He was admitted to the hospital intensive care unit between 1:00 and 2:00 p.m. Claimant was hospitalized under the care of William J. Chen, M.D., for approximately one week. Dr. Chen continued to care for claimant after his discharge and referred him to Philip A. Habak, M.D., a cardiologist.

Dr. Chen released claimant for work on an eight hour work day on October 16, 1985. Claimant characterized that release as Dr. Chen stating he thought claimant should try to work. Claimant testified that he called Keith Herrick, Director of Industrial Relations at Thatcher Plastics, and questioned him concerning a work return. Claimant reported that he was offered the tube department code printer position with an offer of additional retraining. Claimant chose to take a voluntary layoff. Claimant apparently was subsequently offered a recall on a job "in molds." Claimant refused that position, and pursuant to Thatcher's union contract, was voluntarily terminated. Claimant's exit interview, defendants' exhibit O, states that claimant's reason for leaving was poor health due to stress caused by seven-day swing. As to whether working conditions are satisfactory, claimant further stated that he did not like to work the seven-day swing shift. Under comments, claimant stated: "After all those years I worked at Thatcher I think you could have found me a job I could have done, or gave me a leave of absence. I feel I was forced out."

Claimant testified that he has not applied for work at Thatcher's since it returned to five-day shifts. He indicated that he might have tried to stay on his Thatcher job if he had known Thatcher was going to return to regular shifts. Subsequent to his voluntary termination, claimant apparently received a medical restriction from Dr. Chen that he work five-day weeks only. Claimant was awarded unemployment compensation benefits on that basis. Claimant reported that he looked for work that had no physical restrictions except he stated that he did not wish to work 11:00 p.m. to 7:00 a.m. Claimant found work as an exterminator. He earns $5.00 per hour in that employment and stated that he had earned $10.86 per hour at Thatcher. Claimant reported that he now tires easily although the physical exertion required on his current position is less than on his previous position.

Claimant testified that he was unaware that Dr. Chen had diagnosed him as hypertensive prior to January or February 1985.

Notes of Dr. Chen in evidence indicate the doctor noted that claimant had hypertension in May, August, and November, 1984. Claimant reported that Dr. Chen prescribed "LO-Pressor", as a medication to treat his hypertension in February 1985 and that the hypertension subsequently resolved. Claimant reported that prior to his job changes, he had no life stresses which might have created his high blood pressure or any other health problems. He reported that he neither smoked nor drank, but agreed that he had had previous problems with stomach pain and a potential ulcer.

Claimant claims $40 in loss wages and $20 in expenses and mileage for a section 85.39 exam which Paul From, M.D., performed. He claims $25 in mileage expenses for his treatment by Philip A. Habak, M.D.

Claimant testified that his wife had told Thatcher Plastics' nurse that claimant had had a heart attack. Claimant testified that he felt [his employers] knew he wasn't at work and knew why. He testified that Mr. Herrick had stated he knew something like this would happen when the plant closed.

Roberta Cunningham, claimant's wife, testified that she was also unaware of claimant's hypertension prior to January 1985. She reported that after January 1985, claimant was nervous, uptight, restless, and had trouble sleeping. She testified that nothing in the family's home situation accounted for those conditions. She characterized claimant as tired after his July 25, 1985 hospitalization.

Keith Herrick testified that Thatcher Plastics employees are paid on an hourly and not a piece-work basis. He reported that the training period for any job is a function of the job itself, but that effort is made to accommodate workers who are trying to learn the job albeit with some difficulty. He characterized claimant as a little slower at learning, but as someone who would have learned his job in time. Mr. Herrick indicated that all jobs available as of April 23, 1985 required work on a seven-day [swing] shift. Herrick stated that the company anticipated that sixty-year-old, long-term employees, would have some difficulties adjusting to the change, but that the company was willing to work with its employees although it did not anticipate health problems. Herrick reported that claimant received weekly disability following July 25, 1985 and that paperwork for such disability did not indicate that the condition was work-related. He reported that Thatcher Plastics would consider claimant for a job if claimant were to apply.

William Chen, M.D., reported on December 31, 1985 that claimant's blood pressure readings from his records were:

10-18-83, blood pressure 128/98; 2-1-84, blood pressure 120/90; 8-10-84, blood pressure 138/92; 2-4-85, blood pressure 144/100; 5-8-85, blood pressure 145/90; and 7-17-85, blood pressure 150/100. When Dr. Chen had last seen claimant on October 28, 1985, claimant's blood pressure was 104/70.

Robert Weis, M.D., examined claimant on July 25, 1985, reporting that he was presented at the Muscatine General Hospital with the onset of right-sided anterior chest pain with some radiation into his upper arm and to the right side of his neck. Claimant denied dyspnea, palpations, syncope, but may have had some nausea and was diaphoretic. Dr. Weis reported that claimant's social history included that he had been employed for thirty-one and one-half years at the same company and had a job change six months ago which had caused claimant some severe stress.

Philip A. Habak, M.D., reported on August 14, 1985 that claimant's electrocardiograms as well as cardiac enzymes performed on his Muscatine Hospital admission were all negative. He reported that a PYP infarction scan performed was interpreted as being positive. He reported that a treadmill stress test performed following claimant's discharge was negative. He indicated that claimant apparently had an episode of hyperventilation after his discharge for which he required an emergency admission on an outpatient basis. Claimant's symptoms subsided after fifteen minutes of breathing deeply in a bag. Arterial blood gases obtained showed significant abnormalities and, thereby, confirmed the diagnosis of hyperventilation.

A cardiac examination of August 14, 1985 by Dr. Habak revealed no overaccessibility or thrills. The left border was inside the mid-clavicular line and the first sound was split. The second sound was physiologically split. No murmurs were heard.

Dr. Habak reexamined claimant on April 8, 1986. Claimant's blood pressure was then 130/84. Cardiac examination showed no overaccessibility or thrills, the first sound was split and the second sound was single. No murmurs were heard. Dr. Habak then opined that the data available appeared to be conflicting but it did not appear claimant had suffered any significant coronary event. He opined that a myocardial infarction had not occurred or was extremely minimal. He stated that the relationship between the event claimant had in July and his employment at that time was doubtful.

Paul From, M.D., reviewed medical data concerning claimant submitted to him and examined claimant in his office on January 19, 1987. In a report of March 3, 1987, he stated that upon review of the medical data and his own examination, his impression

was that claimant may have had a myocardial infarction in the past, but that he now had essentially no residuals. Dr. From indicated that a thallium stress test indicated a persistent perfusion defect of the posterior wall of the left ventricle as seen on exercise scans and on delayed scans. He reported that this was not an ischemic area which reperfused but was a fixed area of decreased perfusion most likely representing scarring involving the posterior wall of the left ventricle. Isotope ventriculogram had indicated a normal ejection fraction and normal ejection wave. Dr. From reported that as of the March 3, 1987 report, claimant had a completely normal electrocardiogram and that claimant was medically capable of returning to his usual employment. He further stated that there may have been some cardiac event in the past, as very sophisticated studies in the form of the PYP scan and the thallium treadmill scans suggest some scarring, but that there was no certainty as to when this might have occurred. He reported that even if claimant did have some problems, he did not appear to have any impairment as of March 3, 1987. He characterized claimant as capable of returning to the same work with Thatcher Plastics as he did before.

## APPLICABLE LAW AND ANALYSIS

Of first concern is whether claimant received an injury which arose out of and in the course of his employment.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on July 25, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe v. DeSoto Consol. Sch. 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 Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971), Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Claimant has the burden of establishing causal connection between the employment and the injury. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). A mere possibility is insufficient, a probability is necessary. A causal connection must exist. The injury must be a rational consequence of the hazard connected with the employment. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955); Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). 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).

Additionally, the court stated the following in Sondag at 905:

> II. In this jurisdiction a claimant with a pre-existing circulatory or heart condition has been permitted, upon proper medical proof, to recover workmen's compensation under at least two concepts of work-related causation.
>
> In the first situation the work ordinarily requires heavy exertions which, superimposed on an already-defective heart, aggravates or accelerates the condition, resulting in compensable injury. See Littell v. Lagomarcino Grupe Co., 235 Iowa 523, 17 N.W.2d 120 (1945). Claimant in such a case is aided by our liberal rule permitting compensation for personal injury even though it does not arise out of an 'accident' or 'special

incident' or 'unusual occurrence.' Olson v. Goodyear Service Stores, 255 Iowa 1112, 1116 125 N.W.2d 251, 254 (1963); Jacques v. Farmers Lumber & Supply Co.242 Iowa 548, 552 47 N.W.2d 236, 239 (1951); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 729, 254 N.W. 35, 38 (1934).

Iowa's Littell rationale is paralleled in a portion of Professor Arthur Larson's attempt to fashion a logical working rule in heart cases. See 1A Larson's Workmen's Compensation Law § 38.83, p. 7-172:

> But when the employee contributes some personal element of risk--e.g., by having...a personal disease--we have seen that the employment must contribute something substantial to increase the risk...
>
> In heart cases the effect of applying this distinction would be forthright:
>
> If there is some personal causal contribution in the form of a previously weakened or diseased heart, the employment contribution must take the form of an exertion greater than that of nonemployment life. ... Note that the comparison is not with this employee's usual exertion in his employment but with the exertions of normal nonemployment life of this or any other person.

See also Beck v. State, 184 Neb. 477, 168 N.W.2d 532 (1969).

Claimant's claim apparently is that the change in his job responsibilities and the accompanying change from work on a day shift only to swing-shift employment produced his July 25, 1985 hospitalization. Initially, we note that under Sondag principles, work on a swing shift as opposed to work during regular daytime hours only might well result in exertions beyond those of normal nonemployment life of this claimant or of any other person. We note, also, that we have no expressed medical diagnosis as to what actual condition claimant was treated for on his alleged injury date. Dr. Habak has indicated that while, claimant had a

positive PYP infarction scan, he had a negative treadmill test and it did not appear that a significant coronary event had occurred. He further opined that claimant had either had no myocardial infarction or an extremely minimal infarction. He expressed the opinion that any relationship between the July, 1985 event and claimant's employment was doubtful. Dr. From, who examined claimant only, opined that, based upon findings in the medical record, claimant may have had a myocardial infarction in the past, but that he essentially had no residuals and that there would be no certainty as to when that infarction may have occurred. Dr. Weis examined claimant on his hospital admission and noted that he had had the onset of right-sided anterior chest pain with some radiation into his upper arm and to the right side of his neck. He reported that claimant's social history did include a job change six months earlier which had caused claimant some severe stress. Dr. Weis' assessment was of atypical chest pain. He reported that it seemed unlikely that it would be a myocardial infarction given claimant's relatively few risk factors. Dr. Chen's medical records also do not reveal any conclusive diagnosis of a myocardial infarction. Hence, claimant has not shown that he received a myocardial infarction on July 25, 1985 which arose out of and in the course of his employment. Further, claimant has not established that, whatever the nature of the incident of that date, the incident, of itself, arose out of and in the course of his employment. Dr. Chen's records do show inconsistent increases in claimant's blood pressure readings from an October 18, 1983 examination through July 17, 1985. Claimant's blood pressure subsequently had dropped to 104/70 as of October 28, 1985. Dr. Chen had prescribed "LO-Pressor" for claimant's hypertension in February, 1985. Claimant was apparently taking that medication in October, 1985 as well. Claimant and his wife reported that, prior to his job change, claimant had had no life stresses which might have created his high blood pressure or any other health problems. However, no physician has opined that claimant's increases in his blood pressure to July 17, 1985 related to the change in his working conditions. Causal relationship is in the realm of expert testimony and is a question "with respect to which only a medical expert can express an intelligent opinion." Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). Consequently, we do not accept claimant's and his spouse's lay opinion testimony as sufficient to establish that a causal connection existed and the claimant's injury was a rational consequence of the hazard connected with the employment.

We note also that the time, place and circumstances of claimant's alleged injury do not suggest an injury occurring in the course of the employment. Claimant's onset of chest pains was at home at approximately 10:00 a.m. That time was both considerably after claimant had ended his previous evening's

work shift and considerably prior to when claimant would begin working the 3:00 p.m. to 11:00 p.m. shift to which he was apparently assigned for July 25, 1985. Claimant had only worked July 24, 1985 after an absence from work from June 29, 1985 through July 22, 1985 either because of unrelated illness or because of a plant shutdown. That fact also suggests that claimant, as of the morning of July 25, 1985, was not under such significant stress related to his working conditions that those conditions would have causally contributed to the incident of that date. We do not find that claimant has established an injury arising out of and in the course of his employment.

We note that, had claimant so established an injury, his claim would have failed on other grounds. The record does not establish that claimant gave notice to his employers. Claimant testified that his wife told the company nurse that claimant had had a heart attack. Claimant further testified that he felt his employers knew he was not at work and that they knew why. Keith Herrick testified that the company had anticipated that long-term, older employees would have some difficulties adjusting to the change, but had not anticipated health problems. He reported that claimant received weekly disability following the July, 1985 incident and that paper work for such disability did not indicate that the condition was work related. Although an employer may have actual knowledge of an injury, the actual knowledge requirement under section 85.23 is not satisfied unless the employer has information putting him on notice that the injury may be work related. Robinson v. Department of Transportation, 296 N.W.2d 809, 811 (Iowa 1980). Claimant's employer did not have sufficient information to suggest that claimant's condition resulted from his employment. Hence, the actual knowledge requirement under section 85.23 was not satisfied.

Likewise, as is noted above, no physician has conclusively stated that claimant had a myocardial infarction or that claimant had any condition resulting in either permanent physical impairment or permanent disability. Dr. From, who last examined claimant, indicated that claimant could return to his usual duties with Thatcher Plastics. The record suggests that claimant left work with Thatcher Plastics because he did not choose to work swing shifts. The only medical opinion suggesting that working those shifts would not be in claimant's physical best interests was the opinion of Dr. Chen rendered after claimant left work and rendered in relationship to claimant's unemployment compensation benefit appeal. We do not believe that that alone would have been sufficient to establish any industrial disability resulting from claimant's decision to leave Thatcher Plastics' employ.

## FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant is 55 years old.

Claimant worked 31 years as an auto trim setup and machine maintenance worker with Thatcher Plastics.

Claimant received notice from Thatcher Plastics in January, 1985 that that department would close in June, 1985.

Claimant was 13th or 14th on the plant's seniority list and was able to select a new position as a tube department code printer.

That job involved a seven-day swing shift and six weeks of on-the-job training.

Claimant learned the job okay and had no complaints from the supervisors.

Claimant had difficulty adjusting to the swing shifts.

Claimant's blood pressure increased inconsistently from October 18, 1983 through July 17, 1985.

Dr. Chen presribed "LO-Pressor" for claimant's hypertension in February, 1985.

Claimant did not work from June 29, 1985 through July 22, 1985 on account of either a plant shutdown or due to medical reasons.

Claimant returned to work July 24, 1985 on the 3:00 p.m. to 11:00 p.m. shift.

On July 24, 1985, claimant experienced pain at approxiately 10:00 a.m.

Claimant was admitted to the Muscatine General Hospital between 1:00 and 2:00 p.m. on July 25, 1985. Claimant then had right-sided anterior chest pain with some radiation into his upper arm and to the right side of his neck.

Any myocardial infarction which claimant sustained was an insignificant coronary event and cannot be placed with certainty as to time of occurrence.

Medical testimony relating claimant's increased hypertension to work-related stresses is lacking.

000282

## CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established an injury of July 25, 1985 which arose out of and in the course of his employment.

## ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceeding.

Claimant is assessed costs of this proceeding.

Signed and filed this 13th day of September, 1987.

Helen Jean Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. David W. Newell
Attorney at Law
323 East Second Street
P.O. Box 175
Muscatine, Iowa 52761

Ms. Dorothy L. Kelley
Attorney at Law
1000 Des Moines Building
Des Moines, Iowa 50309

000283

FILED

NOV 2 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| JERRY CURRENT,<br><br>Claimant,<br><br>vs.<br><br>MIDWEST MOVING & STORAGE,<br><br>Employer,<br><br>and<br><br>COMMERCIAL UNION INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 797000<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This is a proceeding in arbitration brought by Jerry Current against Midwest Moving & Storage, his former employer, and Commercial Union Insurance Company, insurance carrier.

The case was heard at Davenport, Iowa, on May 15, 1987, and was fully submitted on conclusion of the hearing. The record in this proceeding consists of testimony from Jerry Current, claimant's exhibits 1 through 13 and defendants' exhibits A, B and C. Claimant's exhibits one through six are parts of depositions.

## ISSUES

Claimant alleges that he sustained permanent partial disability to the body as a whole as a result of an injury to his back sustained on June 22, 1983. The parties stipulated that claimant sustained an injury on June 22, 1983 which arose out of and in the course of employment with the employer, but an issue exists with regard to whether that injury is a proximate cause of any temporary or permanent disability. Claimant also seeks section 85.27 benefits in the stipulated amount of $7,576.49, but an issue exists regarding causal connection between those expenses and the stipulated injury. It was stipulated that, at the time of injury, claimant was married with no other dependents and is entitled to two exemptions, but the rate of compensation is in dispute.

000284

## SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence. All of the evidence received at the hearing was considered when deciding the case.

Jerry Current is a 31-year-old man whose education is limited to the tenth grade. Except for a brief period of employment as a truck tire salesman, his entire work history has involved truck driving. Since approximately 1980, he has worked in the moving van industry. Claimant recalled one injury to his back that occurred in 1977 or 1978 for which he received two or three chiropractic adjustments and then had no further problems.

Claimant testified that he injured his back while unloading cement blocks in Denver, Colorado, on June 22, 1983. He related that he spent the remainder of that day under chiropractic treatment, returned to the chiropractor the following day and then went on to continue with his work.

Claimant complained that, over the following months and years, he experienced low back pain, pain down the back of his right leg and a tingling in his foot. Claimant testified that he worked on a commission basis and earned no pay if he did not work. He received intermittent chiropractic care and eventually consulted his family physician, Paul Beckman, M.D. Claimant was referred to John Sinning, M.D., an orthopaedic surgeon. Claimant testified that he continued to drive throughout all of that time, but took time off frequently due to back pain.

Claimant testified that Dr. Sinning advised him that he had a herniated disc, recommended treatment in the form of chemonucleolysis injection, advised him to get his affairs in order and advised him to get off the road. Claimant testified that he quit driving in June, 1985 because he could no longer endure going to work.

Claimant testified that he underwent the chemonucleolysis procedure in December, 1985. He indicated that, following the surgery, his pain continued for quite a while and then progressed to where his condition was not nearly as bad as it had been before surgery. Claimant testified that, in 1986, Dr. Sinning told him that he was free to lift 25 pounds, but that weights of as much as 75 pounds could be handled only occasionally.

Claimant feels that he is unable to return to the moving industry because it requires continuously lifting things which weigh more than 75 pounds. He testified that he has not resumed driving and that most companies will not let anyone with a lifting restriction work as a moving van driver. Claimant stated that he still has a problem with tight muscles and occasional pain down his leg, but that he is improved. Claimant

testified that, in order to work, he would need to hire a laborer to load and unload even if a company would allow him to drive. Claimant related that many truck driving jobs, other than in the moving industry, also require lifting of more than 75 pounds.

Claimant testified that he operated under an oral agreement with Midwest Moving & Storage which required him to pay all of his operating expenses and that, in return, he received a percentage of the fees for hauling the merchandise and 100% of the fees for packing. Claimant related that Midwest had no salaried drivers and that all were owner-operators. He characterized the arrangement as being standard within the industry.

Claimant related that the income varies by the season and that work is generally slow in the winter and busy in the summer.

Claimant testified that exhibits 7 and 8 reflect his income and expenses from 1982 and 1983 and that all of it is from Midwest. Claimant testified that the expenses of depreciation, sales tax and loan interest would arise even if the truck was not being operated, but that the other expenses are due to operation of the truck. Claimant testified that the truck-tractor cost $65,000 when he purchased it new, that it loses value due to mileage and wear and that it depreciates with the passage of time even if it is not being driven. He testified that there is incentive to become an owner-operator because it is possible to earn more money than that earned by a salaried driver.

Claimant testified that he depreciated the truck over three years on his income tax returns, but that the truck is now six years old and is still not completely paid off.

Exhibits B and C indicate that the weighted average wage for a tractor-trailer truck driver in the state of Iowa is $12.54 per hour, that the absolute range of earnings is $6.00-$14.21 per hour and that the median wage is $14.21 per hour.

Claimant testified that exhibit 9 is a collection of bills that he incurred for treatment as the result of the 1983 injury.

Exhibit 10 is the deposition of John E. Sinning, Jr., M.D. Dr. Sinning testified that he first saw claimant on April 12, 1985 as a result of a referral from Dr. Beckman. He received a medical history of claimant injuring his back while unloading cement blocks in Colorado in April [sic], 1983, and that claimant continued to have pain in the right leg since that incident (exhibit 10, pages 6 and 7). After attempts at physical therapy proved unsuccessful, a CT scan was taken and Dr. Sinning diagnosed claimant as having a herniated intervertebral disc at the L5-S1 level on the right side (exhibit 10, page 13). Dr. Sinning

performed an injection of a chemical into the fifth lumbar disc on December 23, 1985. He felt that claimant has progressed well since that procedure, but that claimant still has occasional residual pain in his right leg and low back (exhibit 10, pages 15 and 16). Dr. Sinning opined that claimant's herniated disc problem was a result of the injury that claimant described as occurring in April [sic], 1983 (exhibit 10, page 17).

Dr. Sinning indicated that claimant would have some permanent difficulties with his back (exhibit 10, pages 21 and 22). He rated claimant as having a seven percent impairment of the whole body. He indicated that claimant could lift 25 pounds on a regular basis and occasionally lift up to 75 pounds, but that he would not be limited with regard to walking or standing. Dr. Sinning emphasized the importance that claimant perform bending and lifting using proper back mechanics. The doctor felt that claimant could return to operating his truck if he did so with someone else to perform the heavy loading and unloading (exhibit 10, pages 22-26). Dr. Sinning authored a report on October 31, 1986 in which he indicated claimant's impairment rating and lifting restrictions (exhibit 3). On April 12, 1985, Dr. Sinning indicated that claimant needed to be off work in order to begin evaluation of his back (exhibit 2, page 1). Dr. Sinning's notes indicate that on June 19, 1985 he made a disability report to Aetna Insurance Company (exhibit 2, page 3).

Exhibits 6, 11 and 12 provide testimony from Patrick D. Doherty, a qualified vocational consultant. Doherty tested and evaluated claimant. He found claimant to exhibit average intelligence, a reading ability at the ninth grade level and math aptitudes at the 6.9 grade level. Doherty reviewed claimant's medical restrictions as imposed by Dr. Sinning. Doherty performed a labor market analysis using the Dictionary of Occupational Titles and concluded that, as a result of the physical restrictions, he had lost access to 21% of those occupations that exist in the labor market to which he had access prior to the injuries which are the subject of this proceeding.

## APPLICABLE LAW AND ANALYSIS

The parties stipulated that claimant received injury on June 22, 1983 which arose out of and in the course of his employment with Midwest Moving & Storage. The consequences of that injury are disputed.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 22, 1983 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d

732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Claimant testified to the onset of symptoms on June 22, 1983 while lifting cement blocks unloading the truck. Claimant testified that the symptoms continued and eventually led him to the care of Dr. Sinning. Dr. Sinning expressed the opinion that the injury while lifting cement blocks in April [sic], 1983 caused claimant's herniated disc. Dr. Sinning's testimony is not contradicted by any medical evidence in the record. It is therefore found and concluded that the injury claimant sustained on June 22, 1983 is a proximate cause of the herniated disc, the expenses of treatment and the residual disability with which claimant is afflicted.

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963) cited with approval a decision of the industrial commissioner for the following proposition:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered . . . In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because of the injury, to engage in employment for which he is fitted. * * * *

Impairment of physical capacity creates an inference of impairment of earning capacity. Holmquist v. Volkswagon of America, Inc., 201 N.W.2d 516 (Iowa App. 1977) 100 A.L.R.3d 143.

Claimant has not been able to return to his prior occupation of truck driver. He has a seven percent impairment rating and significant lifting restrictions. When the foregoing are considered in light of claimant's limited education and limited academic skills, it is clear that he has sustained a significant degree of disability. The record provides little guidance as to claimant's occupational activities since he ceased driving the truck. The absence of any showing with regard to attempts to obtain employment or what employment has been obtained makes assessment of the degree of disability more difficult. Nevertheless, the record clearly shows a loss of access to 21% of the jobs which claimant was formerly capable of performing. It shows lifting and activity restrictions which limit him to work with exertion requirements which are classified as no more than medium. Claimant is no longer qualified for many truck driver positions which, according to exhibits B and C, pay wages which average in the range of $12.50 per hour. When all the applicable factors of industrial disability are considered, it is found and concluded that Jerry Current has a 25% permanent partial disability in industrial terms as a result of the June 22, 1983 injury.

The healing period is disputed. The record contains no compelling indications of when the healing period started or ended. Section 85.34(1) of The Code provides that the healing period is that time when the employee is not medically capable of returning to employment substantially similar to that in which he was engaged at the time of injury. It ends when the employee returns to work, when the employee is medically capable of returning to work substantially similar to that in which he was engaged at the time of injury, or when further significant improvement from the injury is not anticipated, whichever occurs first. It has been held that it is at the point at which a disability can be determined that the healing period ends. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984). Claimant testified that he ceased driving the truck in June, 1985 because he was under treatment from Dr. Sinning and also because he felt physically unable to continue performing the work. At page 3 of exhibit 2 (Dr. Sinning's notes), it is indicated that Dr. Sinning submitted a disability report to Aetna Insurance Company on June 19, 1985. Since claimant was off work and the disability report was submitted, such is an indication that Dr. Sinning considered claimant medically incapable of performing his normal work at that time. Accordingly, June 19, 1985 is fixed as the start of the healing period. From that date on, it appears claimant continued off work under the care and treatment of Dr. Sinning and has not since returned to work as a moving van operator. Since it appears that he is not capable of returning to work as a moving van operator, the

healing period ends at the time when Dr. Sinning concluded that further significant improvement would not be forthcoming. That time is determined to be October 31, 1986, when Dr. Sinning assigned an impairment rating as shown in exhibit 3.

A third major issue in the case is the rate of compensation. The rate of compensation, when the employee is an owner-operator truck driver, has been a frequent source of litigation. The issue is a difficult one because the owner-operator functions much like an independent business person, but is treated as an employee for purposes of workers' compensation. Workers' compensation weekly benefits are paid to replace lost wages, but are not intended or designed to replace losses of revenues that result from equipment rental or reimbursement of expenses. In some occupations, such as carpenters or mechanics, employees furnish their own tools, but when injured, no amount of their earnings is allocated as equipment rental to effectively reduce their rate of compensation. A different result frequently occurs with owner-operator truck drivers. There seems to be a "de minimus" rule that prevents deductions from earnings where the rental value of the tools or equipment provided is not specified and is relatively insignificant in comparison to the value of the personal services. The value of a truck-tractor and the expenses incurred in operating such a vehicle cannot, however, be considered to be "de minimus" or insignificant. Accordingly, it is concluded that a reduction from the total revenues received is appropriate in order to pay compensation for the portion of the revenues which represents wages or earnings and to avoid payment of compensation for the portion of the revenues which represents reimbursement of expenses and rental fees for the truck itself. Equipment depreciation is one of the expenses to be considered. Florida Timber Products v. Williams, 459 So.2d 422 (Fla. App. 1984); Herrin v. Georgia Casualty & Surety, 414 So.2d 1323 (La. App. 1982). The burden of establishing the portion by which the revenues are to be reduced for expenses and equipment rental rests on the employer. Alterman Transportation Lines, Inc. v. Goetzman, 430 So.2d 486 (Fla. App. 1983); McCarty v. Freymiller Trucking, Inc., file numbers 729340 and 729341 (Appeal Decision, February 25, 1986); 2 Larson Workmen's Compensation, sections 60.12(a)(b).

Since claimant's income was based upon the revenues he produced, his rate of compensation should be determined under section 85.36(6). The first unnumbered paragraph of Code section 85.36 provides that the basis of compensation shall be the weekly earnings to which the employee would have been entitled had he worked the customary hours for the full pay period in which he was injured as was regularly required for the employment in which he was engaged. Agency precedent provides that weeks which are not representative of normal or typical earnings are excluded when computing earnings under section 85.36(6). Lewis v. Aalf's Manufacturing Co., I Iowa Industrial Commisioner

Report 206 (1980). The rationale is to base the rate of compensation upon earnings that are fairly representative of normal or typical earnings. The period of 13 weeks is one-fourth of a year. According to exhibit 7, claimant's total annual receipts in 1983 were $81,568. When considering the period of 13 weeks preceeding June 22, 1983, in light of exhibit 13, it is found that, in order to obtain a representative amount of earnings, it is appropriate to include from March 8, through June 23, 1983. In doing this, it is noted that there is a span of more than one month running from March 22, through April 26, 1983 when there were no earnings whatsoever. Considering the earnings shown on exhibit 13, gaps of a few days or as much as two weeks between work are not uncommon, but a gap of a month is certainly unrepresentative. This method shows total revenues for the base period to be $20,680.36. These revenues are approximately one-fourth of the total revenues for the entire year and therefore do appear to be fairly representative.

Claimant's total deductions for the year, as shown in exhibits 7 and 13, were $80,087. These include $28,042 in depreciation and $7,636 for interest expense. Whether or not an individual pays interest as a business expense is determined by the individual's underlying financial situation. The interest expense deals with the business of owning the truck, but not with operating the truck. Accordingly, interest expense should not be directly considered.

Depreciation is an allowance made for the wear and obsolescence of a capital asset. The rules for depreciating a capital asset under the internal revenue code are not necessarily representative of the actual rate at which the asset wears out or becomes obsolete. In this case, claimant testified that he depreciated the truck over a period of three years, but that the truck was six years old at the time of hearing. It is found that depreciation over a period of ten years would be more representative of the actual wear and obsolescence of the vehicle, rather than over a period of three years. Claimant testified that the truck cost $65,000, one-tenth of which would be $6,500 per year.

As the owner of a capital asset which is rented to others, it would normally be expected that there would be some return on that investment. While investment rates vary greatly, it is found that an investment rate of six percent per annum on the $65,000 investment would not be inappropriate. This computes to $3,900 per year.

It is not explained in the record as to why sales tax would be considered a non-operating expense since sales tax is not paid on either depreciation or on interest. It would most likely have been incurred in connection with repairs or the purchase of supplies. Accordingly, sales tax should be considered as an operating expense. Under the foregoing analysis, it is

found that claimant's operating expenses incurred in operating the truck were $44,409 per year after deducting depreciation and interest from the expenses shown on exhibit 7. Of the total revenues received during the year, $44,409 is deemed to have been reimbursement of expenses.

The rental value of the truck tractor is determined to be an amount equal to the sum of $6,500 in depreciation and $3,900 in return on investment for a total of $10,400. The remainder of the revenues, after deducting operating expenses and rental of the truck, are deemed to be the earnings of the driver.

Twenty-five percent of the total revenues for the year is approximately $20,680.36. Accordingly, 25% of the operating expenses and 25% of the amount allocated to truck rental should be deducted from the $20,680.36 in revenues to arrive at the figure to be used as 13 weeks of earnings for determining the rate of compensation. The 13-week earnings are therefore determined to be $6,978.10. When divided by 13, the gross weekly earnings are $536.78. When applied to the benefit schedule, using a marital status of married with two exemptions, the rate of compensation is $314.14 per week. It should be noted that, when based upon a 40-hour work week, the total earnings of $536.78 computes to $13.42 per hour, an amount consistent with typical earnings for tractor-trailer truck drivers as shown by exhibits B and C.

## FINDINGS OF FACT

1. On June 22, 1983, Jerry Current was a resident of the state of Iowa employed by Midwest Moving & Storage.

2. Jerry Current was injured on June 22, 1983 while unloading cement blocks in the course of his employment as a moving van driver.

3. Following the injury, claimant continued to work, but experienced pain and discomfort. On June 19, 1985 he became medically incapable of performing work in employment substantially similar to that he performed at the time of injury and remained similarly disabled until October 31, 1986, when he reached the point that it was medically indicated that further significant improvement from the injury was not anticipated.

4. Claimant's appearance and demeanor were observed and he is a credible witness.

5. At the time of injury, claimant's earnings for the 13 full weeks he worked immediately prior to the injury were $20,680.36. Of that amount, $11,102.25 represented reimbursement of expenses and $2,600 represented rental for the truck-tractor which he provided. The actual amount of earnings for his

personal services during the 13-week base period was $6,978.10.

6. The injury of June 22, 1983, which is the subject of this proceeding, was a proximate cause of claimant's herniated lumbar disc, of the medical care and expenses he incurred as shown in exhibit 9, of the medical treatment from Dr. Sinning, of the disability from employment for the period of June 19, 1985 through October 31, 1986, of the residual physical impairment as rated by Dr. Sinning and of claimant's resulting industrial disability.

7. Claimant has suffered a 25% impairment of earning capacity as a result of the injuries sustained on June 22, 1983.

## CONCLUSIONS OF LAW

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

2. The injury of June 22, 1983 is a proximate cause of claimant's healing period, medical expenses and industrial disability as awarded herein.

3. In determining the rate of compensation for an owner-operator truck driver, it is appropriate to deduct from the total receipts an amount that represents reimbursement of operating expenses and also an amount that represents the rental value of the truck.

4. Expenses of merely owning the truck, such as depreciation and interest on a purchase-money loan, should not be considered as reimbursable operating expenses.

5. In determining the rental value of the truck, it is appropriate to consider actual depreciation over the lifetime of the truck, as opposed to being limited to the method of depreciation selected for income tax purposes.

6. In determining the rental value of the truck, it is appropriate to consider a reasonable rate of return on the investment made in the truck.

7. Claimant's rate of compensation is $314.14 per week.

8. Claimant's healing period begins on June 19, 1985 and runs through October 31, 1986.

9. Claimant's disability, when evaluated industrially, is a 25% permanent partial disability.

10. Defendants are responsible under the provisions of section 85.27 for payment of claimant's medical expenses in the amount of $7,576.49 as shown in exhibit 9.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant seventy-one and three-sevenths (71 3/7) weeks of compensation for healing period at the rate of three hundred fourteen and 14/100 dollars ($314.14) per week payable commencing June 19, 1985.

IT IS FURTHER ORDERED that defendants pay claimant one hundred twenty-five (125) weeks of compensation for permanent partial disability at the rate of three hundred fourteen and 14/100 dollars ($314.14) per week payable commencing November 1, 1986.

IT IS FURTHER ORDERED that defendants pay all past due amounts in a lump sum together with interest pursuant to section 85.30 from the date each payment came due.

IT IS FURTHER ORDERED that defendants pay claimant the sum of seven thousand five hundred seventy-six and 49/100 dollars ($7,576.49) under the provisions of section 85.27 of The Code.

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against defendants pursuant to Division of Industrial Services' Rule 343-4.33.

IT IS FURTHER ORDERED that defendants file Claim Activity Reports as requested by this agency pursuant to Division of Industrial Services' Rule 343-3.1.

Signed and filed this 2nd day of November, 1987.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. William E. McNally
Attorney at Law
617 Brady Street
Davenport, Iowa 52803

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

900234
FILED
NOV 24 1987
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| MICHAEL S. CURTIS,<br><br>Claimant,<br><br>vs.<br><br>J & J STEEL, INC.,<br><br>Employer,<br><br>and<br><br>LIBERTY MUTUAL INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 797835<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Michael S. Curtis, against his employer, J & J Steel, Inc., and its insurance carrier, Liberty Mutual Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as the result of an injury sustained May 31, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner at Cedar Rapids, Iowa, on August 24, 1987. A first report of injury was filed June 27, 1985. The parties stipulated that claimant has received 36.857 weeks of benefits as of date of hearing. The parties were not able to stipulate as to whether and as to the extent to which such benefits should be characterized as temporary total disability or as permanent partial disability benefits. The parties did stipulate that claimant's injury was a scheduled member to the upper extremity.

The record in this case consists of the testimony of claimant and of James Earl Wasson as well as of claimant's exhibits 1A, 3, 4 and 5 and defendants' exhibit 1.

## ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant's rate of weekly compensation is $263.59 and that claimant received an injury which arose out of and in the course of his employment which was the cause of temporary total disability. The issues remaining for resolution are:

000295

Whether a causal relationship exists between claimant's injury and claimed permanent partial disability;

Whether claimant is entitled to permanent partial disability benefits and the extent of his temporary total disability entitlement including the commencement date for any permanent partial disability; and,

Whether claimant is entitled to benefits under section 86.13 for unreasonable denial or delay in payment of benefits.

## REVIEW OF THE EVIDENCE

Claimant, a 36-year-old journeyman iron worker, reported that he sustained his injury when he fell 10-12 feet to the ground on his right side. He characterized his injuries as involving a bruised rib and a chipped bone in the wrist. Claimant was subsequently seen by William R. Basler, M.D., and by L. C. Strathman, M.D., an orthopaedic physician. Dr. Strathman apparently performed manipulation on the wrist. Claimant reported that Dr. Strathman released him for limited work in July, 1985 with a full-duty release on August 19, 1985. Claimant was unable to return to work until September 22, 1985 as no work was available upon his work release. Claimant continues to perform iron worker duties when work is available. Claimant reported that he currently has soreness with the use of electric impact drills, albeit he is doing the same job as preinjury. He reported that he has limited range of motion in the wrist, that he has problems with damp, cold weather and that he notices limited strength when he clenches his fist. Claimant indicated that he no longer bowls or plays softball or raquetball. He reported that it is necessary to use a splint immobilizer on his hand after using impact equipment. Claimant agreed that he never told anyone at J & J Steel that he could not perform his iron worker duties and that he has worked eight hours per day, five days per week since his injury welding, grinding, and setting iron.

James Earl Wasson, area superintendent and job foreman for J & J Steel, reported that, in the summer of 1985, claimant was on a skywalk job and that he saw claimant whenever J & J had work. He characterized claimant as a noncomplainer and as a good worker who does above average work.

Claimant agreed that he saw John Walker, M.D., one time for examination only, spending approximately 4.5 hours in Dr. Walker's office.

By way of exhibit 5, claimant reported transportation expenses of 42 miles related to three roundtrips of 14 miles each with Dr. Basler; of 182 miles related to 12 roundtrips of

15.2 miles to see Dr. Strathman; of 100 miles related to one roundtrip to see Dr. Walker; and of 15.6 miles related to one roundtrip to Mercy Hospital on June 14, 1985. All of the mileage was accrued prior to June 1, 1986, except for one visit to Dr. Strathman.

Claimant's exhibit 4 indicates that the first compensation check due claimant was mailed on June 27, 1984. Correspondence of that date by Eugene L. Wulf to J & J Steel regarding claimant indicates that payment was late because the injury was not reported to the insurer in time to make prompt payment. Claimant's exhibit 4 also reveals that, on October 30, 1986, Wendy Frangenberg, a claims adjustor for the insurer, reported that the insurer had received the medical reports of Dr. Strathman, had reviewed claimant's file at its medical conference and had determined that claimant has sustained a permanent partial disability of 10% of the upper extremity. As of that date, no permanent partial disability payments had been made to claimant and the insurer's representative stated the entire balance of 25 weeks would be forthcoming.

An x-ray report of J. V. Connell, M.D., of May 31, 1985 reports that a tiny chip fracture appears to be arising from the triangular bone of the right wrist, but that the right forearm otherwise appears normal. A June 13, 1985 x-ray report of R. L. Kundel, M.D., reports that the right wrist examination reveals that the lunate bone is dislocated anteriorally with a small chip fracture presumably arising from the lateral proximal base of the right triquetrum, but that the remainder of the right wrist exam is unremarkable.

As of July 22, 1985, Dr. Strathman reported in progress notes that claimant had made good progress with just a little fullness about the wrist and with about 10 degrees flexion and extension. He reported that claimant had discomfort with forceful gripping, but that claimant made a good fist and that x-rays showed acceptable position of the lunate. Some osteoporosis was noted of the triquetrum. Claimant was characterized as making satisfactory progress; as possibly ending up with some residual impairment; but as having a reasonably good outlook at that point considering his injury.

Dr. Strathman reported that claimant could return to limited work, but should wear a lock up splint and should not be doing any forceful gripping or movements with his wrist. He advised claimant to avoid jack hammer, hammering and repetitive vibratory type motion with a recheck in one month.

On August 19, 1985, Dr. Strathman reported that physical examination showed extension of 30-35 degrees and flexion of 35-40 degrees on the right with extension of 80 degrees and

flexion of 70-75 degrees on the left. Ulnar deviation was about 50% on the right as compared with on the left with radial deviation reduced on both sides and slightly reduced on the right. There was no particular swelling about the wrist, but a little right over the dorsum of the wrist with nothing over the distal arm. Grip on the right was improving, but was still reduced as compared to the left.

On physical examination of December 18, 1985, there is no swelling above the right wrist, but there was reduced motion with extension of 45 degrees compared to 60 or 65 degrees on the left and flexion of about 45 degrees compared to 60-65 degrees on the left. Ulnar and radial deviation were not restricted. Claimant had good grip, good thenar musculature and no particular tenderness except with passive extension and flexion. Claimant reported that, at work, frequently when he is holding items with his wrist extended, he experienced pain. Claimant was aware of some numbness and tingling in the long and ring fingers on the right. There was no Tindel's sign. Grip strength on the right was about 45 and on the left 53. There was no evidence of aseptic necrosis. An EMG of the right hand of December 20, 1985 revealed no evidence of median nerve damage. As of December 20, 1985, Dr. Strathman advised that it would be wise to defer a permanent partial disability (rating) until June (1986), a year from the injury, as such would be a more stable endpoint. On December 30, 1985, he estimated permanent partial "disability" as 15% of the right upper extremity on the basis of reduced strength and reduced motion.

On March 19, 1986, Dr. Strathman reported that claimant had reduced extension of about 50 degrees on the right with flexion also of about 50 degrees and with discomfort with further attempts at motion, but no swelling. Claimant reported that numbness had improved, but that he was still aware of a little decreased sensation at times over the median distribution. Dr. Strathma opined that claimant had reached a plateau with estimated impairment of 15% of the right upper extremity on the basis of reduced strength, reduced motion, discomfort with use and a possibility of degenerative changes over time.

A note of Dr. Strathman of November 10, 1986 indicates that copies of the doctor's December 30, 1985 and March 19, 1986 office notes were given to claimant to present to his attorney regarding his dispute with the insurance company over the disability rating which company reported they were given a rating of 10%, not 15%.

On July 18, 1985, Wendy Frangenberg, claims adjustor for the insurance carrier, had asked Dr. Strathman to forward a copy of all office notes and medical reports concerning claimant's May 31, 1985 injury.

A medical conference note of Donald W. Blair, M.D., of September 24, 1986 reports that claimant had some limitation of complete extension amounting to 2% impairment for the upper extremity and residual limitation of flexion equivalent to 3% of the upper extremity. He reported that, in addition, claimant's type of injury would be subject to some arthritic changes in the future which he "would estimate another possible 5%" making a total of 10% (impairment) of the right upper extremity.

John R. Walker, M.D., examined claimant and issued a report on July 17, 1987. Wrist extension on the right was limited to 69 degrees with 80 degrees on the left; flexion on the right was 75 degrees with 90 degrees of flexion on the left. Ulnar deviation was possible to 32 degrees on the right and to 40 degrees on the left. Radial deviation on the right was 12 degrees and on the left 15 degrees. No crepitation was present. Grip was reported as fairly markedly reduced on the right side. Claimant is right-handed. Grip measured 68 kiloponts on the right and 114 kiloponts on the left. Pinch between thumb and forefinger measured 6 kilograms on the right and 9.5 kilograms on the left. Dr. Walker reported the following as regards x-rays:

> We have taken AP & lateral and radially and ulnarly deviated views of both wrists and there is a rather marked difference. There is still a good deal of bone atrophy and the trabeculae are coarser on the right wrist than they are on the left. There also seems to be some dis-association as has been termed by others between the scaphoid, the lunate and the triquetrum. There is already a calcific shadow between the lunate and the triquetrum with what appears to be calcification in the synovial membrane between these two articular surfaces. This appears to be already a post-traumatic arthritis. On another view there is obvious roughening of the carpus dorsally as well as particularly again between the lunate and the triquetrum. Changes are already occurring.

The doctor opined that claimant was already developing a post-traumatic arthritic change, quite obvious in the entire carpus and the wrist and also in the radial, carpal joint as well. He indicated he believed claimant's impairment would come closer to 25% of the right upper extremity than to 10%. The doctor expressed his believe that "the wrist is going to break down in the next few years" and that it was possible that claimant would need an arthrodesis of the wrist in years to come.

## APPLICABLE LAW AND ANALYSIS

Our first concern is whether a causal relationship exists between claimant's injury and claimed permanent partial disability.

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

Drs. Strathman, Blair and Walker all discuss permanent changes in claimant's right wrist and relate those to his work-related injury. Nothing in this record suggests another cause for claimant's restrictions of motion on the right and diminishment of grip strength on the right. Neither does there appear to be any other cause apparent for the subjective reports of diminished sensation about the median nerve on the right. Claimant has established the requisite causal connection between his work injury and his current, permanent right wrist impairment.

We consider the nature and extent of benefit entitlement question.

As it is apparent that claimant has a permanent disability we shall first address the issue as to the end of the healing period or the commencement date for permanent partial disability.

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).

This section further provides that it is the first to occur of the enumerated events which is generally controlling of the end of healing period and the commencement date for permanent partial disability. It has also been stated, however, that the healing period generally terminates at the time the attending physician determines that the employee has recovered as far as possible from the effects of the injury. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60, 65 (Iowa 1981). Stated another way, it is only at the point at which the disability can be determined that the disability award can be made. Until such time, healing period benefits are awarded the injured worker. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984).

Claimant's apparent position is that claimant should be entitled to healing period benefits until March, 1986 when Dr. Strathman reported that claimant had reached a plateau regarding his condition. Dr. Strathman released claimant for full-duty work as of August 19, 1985, however. That is the first to occur of the events enumerated above. Healing period should terminate as of that date with permanent partial disability to commence on August 20, 1985. Such ruling is consistent with the overall purposes of the workers' compensation law in that healing period benefits are intended to compensate a claimant for time actually off work on account of his injury. While claimant may not have reached full maximum medical improvement as of August 19, 1985, and while claimant may not have actually returned to work as of that date, claimant was not actually off work after that date on account of his injury. The record reveals that claimant was off work until September 22, 1985 because no work was available and not because claimant could not have returned to his regular duties.

We reach the extent of permanent partial disability question.

Dr. Strathman, claimant's treating physician and apparently an orthpaedic surgeon, has opined that claimant has a 15% permanent partial impairment of the right upper extremity. Dr. Blair, who as best as can be determined examined claimant at the insurer's request, has opined that claimant has a 10% impairment of the right upper extremity. Dr. Walker, who examined claimant on behalf of claimant and who is also an orthopaedic surgeon, has opined that claimant has a permanent partial impairment of around 25%.

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; the 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 may be considered. Both parties may bring all this information to the attention of the factfinder as either supporting or weakening the physician's testimony and opinion. All factors go to the value of the physician's testimony as a matter of fact not as a matter of law. Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

We have no evidence before us concerning Dr. Blair's involvement with claimant. We know that claimant saw Dr. Walker once for examination only. Dr. Strathman treated claimant on a regular basis for a prolonged period. His notes in evidence reveal a great familiarity with claimant's overall progress and prognosis as regards his right wrist. Furthermore, unlike Drs. Blair and Walker, his opinion as to claimant's impairment appears to rest on conditions as they now exist and not on conditions as they may develop in the future. Therefore, we will accept Dr. Strathman's opinion that claimant has a 15% permanent partial impairment of the right upper extremity, more properly characterized under Iowa law as an impairment of the right arm of 15%.

We consider the question of entitlement to additional benefits under section 86.13, unnumbered paragraph 4. The unnumbered paragraph provides that additional benefits up to 50% of the amount of benefits that are unreasonably delayed or denied may be awarded if a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse. Again, we are not altogether certain on what claimant bases his claim of unreasonable delay or denial of benefits. Claimant's commencement of benefits following his work injury was apparently delayed for approximately four weeks on account of the insurer's not being properly notified of the work injury. Benefits were apparently promptly commenced upon notification, however. That delay, while potentially creating some hardship for claimant, was not so far outside the normal events of life that we will characterize it as an unreasonable delay in commencement of benefits. Claimant also has submitted evidence that defendants determined claimant to have a permanent partial disability of 10% of the upper extremity and not 15% as Dr. Strathman advised. As noted above, the law permits, but does not compel, a finding that the opinion or the impairment rating of the treating

physician be accepted, either by the undersigned or by the insurer. Hence, we do not find the insurer's acceptance of Dr. Blair's medical opinion over that of Dr. Strathman to be an unreasonable delay or denial of benefits. Likewise, we note that the letter indicating the 10% permanent partial disability assessment by the insurer is dated October 30, 1986. Dr. Blair made his report on September 24, 1986. While Dr. Strathman rendered his opinion regarding permanent partial disability on March 19, 1986, we do not find the period from March 19 to October 30, 1986 such a substantial time frame before determination by the insurer of its assessment of permanent partial disability as to constitute unreasonable delay or denial of permanent partial disability benefits. Claimant's section 86.13 claim has failed.

Claimant has submitted a claim for medical mileage costs. The issue of payment of mileage costs related to medical treatment was not identified either on the Pre-hearing Assignment Order or on the pre-hearing notes. Therefore, that issue is not before us. Defendants, of course, are required to compensate claimant for reasonable mileage expenses related to treatment for his work injury. The expenses submitted appear to be such. The parties are encouraged to work together to resolve this matter without further intervention of the agency.

## FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant received an injury on May 31, 1985 when he fell 10-12 feet to the ground landing on his right side.

Claimant received bruises to his ribs and a chip fracture of the right wrist arising from the triangular bone.

L. C. Strathman, M.D., treated claimant's right wrist injury with closed reduction of a dislocation of a lunate and manipulation with a short arm cast subsequently applied.

Dr. Strathman released claimant to return to work on August 19, 1985.

Claimant has permanent reduction in range of motion of the right wrist as compared with the left, reductions in grip strength on the right as compared with the left, subjective complaints of pain and swelling with hard work and subjective complaints of insensitivity about the median nerve on the right.

Claimant continues to perform the duties of an iron worker.

Dr. Strathman treated claimant over a prolonged period.

Dr. Blair examined claimant for the insurance carrier.

Dr. Walker examined claimant on behalf of claimant.

Dr. Strathman's opinion regarding claimant was based on claimant's current condition and did not speculate as to conditions which may develop in the future.

Dr. Walker and Dr. Blair both speculate as to arthritic changes in the future.

The insurer did not commence payments to claimant until June 27, 1985 as the employer had not informed the insurer of a work injury. Payments were promptly commenced upon the insurer's awareness of a work injury.

Dr. Strathman determined that claimant had plateaued and issued a permanent partial impairment rating on March 19, 1986.

The insurer offered its assessment of claimant's permanent partial disability on October 30, 1986 subsequent to obtaining the September 24, 1986 impairment rating of Dr. Blair.

The insurer did not unreasonably delay commencement of either permanent partial or healing period benefits to claimant.

## CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that a causal relationship exists between his May 31, 1985 injury and his claimed permanent partial disability.

Claimant has established an entitlement to permanent partial disability of 15% of the right arm with such benefits to commence on August 20, 1985.

Claimant has not established that he is entitled to additional benefits pursuant to section 86.13 on account of unreasonable delay or denial of benefits.

## ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for thirty-seven point five (37.5) weeks at the rate of two hundred sixty-three and 59/100 dollars ($263.59) per week with such benefits to commence on August 20, 1985. Defendants receive credit for weekly compensation benefits paid claimant subsequent to August 19, 1985.

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30.

Defendants pay costs pursuant to Division of Industrial Services Rule 343-4.33.

Defendants file Claim Activity Reports as required by the agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 24th day of November, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert R. Rush
Attorney at Law
526 2nd Avenue SE
P.O. Box 2457
Cedar Rapids, Iowa 52406

Mr. Ralph W. Gearhart
Attorney at Law
500 MNB Building
P.O. Box 2107
Cedar Rapids, Iowa 52406

000305

FILED

NOV 18 1987

BEFORE THE IOWA INDUSTRIAL COMMISSIONER IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| GLADYS D. DANIELS,<br><br>Claimant,<br><br>vs.<br><br>MIDWEST BISCUIT COMPANY,<br><br>Employer,<br><br>and<br><br>WAUSAU INSURANCE COMPANIES,<br><br>Insurance Carrier,<br>Defendants. | File No. 771945<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This is a proceeding in arbitration brought by Gladys D. Daniels against Midwest Biscuit Company, employer, and Wausau Insurance Companies, insurance carrier.

The case was heard at Burlington, Iowa on May 26, 1987 and was fully submitted on conclusion of the hearing.

The record in the proceeding consists of testimony from Gladys D. Daniels, Michael Daniels and Gladys Malloy. The record also contains claimant's exhibits one through seven and defendants' exhibits A through C.

## ISSUES

Claimant seeks compensation for additional permanent partial disability beyond the 50 weeks of compensation which she has previously received. The only issue identified by the parties for determination is assessment of the degree of claimant's permanent disability that was proximately caused by the injury she sustained on June 25, 1984.

## SUMMARY OF EVIDENCE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case even though it may not necessarily be referred to in this decision.

Gladys D. Daniels is a 48-year-old lady with five children whose ages range from 23 through 29. Her husband died approximately 12 years ago and she has not remarried. At the time of hearing, claimant lived in Carthage, Illinois, but indicated that she was planning to move to Fairfield, Iowa in the near future. Claimant dropped out of high school, but obtained a GED in May, 1985. She has recently completed a one-year course in accounting at the Karl Sandberg Extension Center in Carthage, Illinois.

Claimant's work experience consists primarily of work as a waitress and of work in a number of different light assembly line or factory type occupations. Claimant has held a number of different employments. She has interrupted her work career on a number of occasions to care for her children, with the most recent interruption being in 1979 when she left work to care for her son who had been injured in an auto accident.

Claimant commenced employment with Midwest Biscuit Company in September, 1982. She was injured when she tripped and fell backwards onto a box. She continued to work for approximately two weeks, believing she was just sore from falling, but eventually was referred to Duane K. Nelson, M.D., an orthopaedic surgeon, by the employer. Claimant testified that Dr. Nelson told her she had a fracture in her back. Claimant was treated with a lumbar support and subsequently attended a back school at Burlington Medical Center. Claimant has not undergone surgery as she indicated that Dr. Nelson had recommended against it. Claimant understands her physical restrictions to include avoidance of lifting more than 10-15 pounds, bending and stooping. She indicated that she has been advised to perform work that is at bench level or sedentary.

Claimant returned to work in approximately January, 1985 and continued to work in a light-duty status until March or April, 1985. Claimant testified that the employer tried to accommodate her condition for a period of time, but then indicated that no further light duty would be available. She testified that her doctor advised her she could no longer perform factory work and that she then resigned in accordance with her doctor's recommendation. Claimant has not been employed since that date. She testified that she was earning $4.67 per hour when she was injured.

Claimant testified that, prior to June 25, 1984, she was in good general health, able to perform her assigned job and her housework and able to care for her home without problem. She testified that she has planted trees, climbed ladders, painted her home and engaged in a number of similar activities. She denied having any problems with her back prior to June 25, 1984 which were similar to those she now experiences.

Claimant described her current pain as a constant pain in her lower back and left hip which sometimes runs down the back of her left leg. She stated that it worsens with activity. Claimant testified that she requires help with cleaning her

house and with carrying groceries. She testified that she is unable to run, but can walk comfortably for approximately one mile and can sit or stand in one spot comfortably for approximately one hour. She stated that the longest comfortable automobile ride she can endure is approximately one hour.

Claimant testified that she went back to school on her own and that the only assistance she received from the employer was $520, an amount less than the cost of the schooling. Claimant attended school four days per week. Her coursework included composition, accounting, business math, office machines and a brief introduction to computers.

Claimant testified that she has never met G. Brian Paprocki and that he has never tried to place her in employment. Claimant testified that, when she first met Clark H. Williams, he started off by telling her what was wrong with Paprocki. She stated that she was not favorably impressed with Williams. Claimant testified that the efforts by Williams to place her consisted primarily of mailing her a copy of the Des Moines Register classified ads and in providing her with a list of employers in the Fairfield and Ottumwa, Iowa area. Claimant testified that she did not seek any of the jobs in Des Moines because she could not afford to move and live there while she was job hunting. She testified that she has contacted all of the employers on the list sent her by Williams, either by mailing a resume or by telephone. Claimant testified that all of the potential employers who responded have indicated that the position was filled or that they had no open positions. She testified that she has received no response whatsoever from the others. Claimant related that most of her job hunting has been conducted since she completed her accounting course. She stated that she has been making a good faith effort to obtain employment and that she plans to continue doing so.

Michael Daniels, claimant's son, testified that, prior to this injury, claimant did not have any back problems, even as recently as when she took care of him following his auto accident. Michael testified that, prior to the injury, claimant enjoyed working in her yard and playing with her grandchildren. He testified that claimant did a lot of the maintenance on her home prior to the injury. Michael indicated that, since she was injured, he has seen his mother at least once per month. He stated that she is unable to bend over to pick up anything and walks like every step is an effort.

Gladys Malloy, claimant's mother, testified that, prior to the time of injury, claimant worked, took care of children, performed yard and garden work and appeared to have no restrictions or limitations. Malloy stated that, currently, claimant has restrictions on activities such as moving, lifting, extended sitting and house cleaning. Malloy stated that claimant lives with her, without paying rent, and, at times, helps by answering the phone in the trailer court which Malloy manages.

Claimant's exhibit 4 is a narrative report from Donald Mackenzie, M.D., dated October 30, 1984. Dr. Mackenzie indicated that claimant's x-rays demonstrated bilateral pars interarticularis defects compatible with acute fractures. Dr. Mackenzie indicated that, if claimant continued to be symptom-free, of which there was an approximately 50-50 chance, she should continue to experience no recurrence of symptoms as long as she avoided sitting, bending and stooping movements and observed a lifting limit of approximately 25 pounds. The doctor indicated that, if she did not respond to conservative therapy, a lumbosacral fusion should be considered.

Claimant's exhibit 5 is a collection of records and reports from Dr. Nelson. Dr. Nelson initially diagnosed a pars interarticularis fracture but, based upon further studies, he later reversed himself. A CT scan performed in October of 1984 was interpreted as normal. After examining claimant on June 24, 1986, Dr. Nelson concluded that claimant has chronic low back pain secondary to degenerative changes in the lumbar spine that is probably localized at the facet joints at L4-S1 and also at claimant's partially sacralized vertebra. He felt that her condition was static and that she had a 10% impairment rating. He recommended that she not perform any job that involved heavy lifting or repetitive bending, lifting, stooping or twisting. He indicated that she is employable for sedentary work. He recommended against surgery (claimant's exhibit 5, pages 5 and 6). In a note of April 3, 1985 found at page 4 of claimant's exhibit 5, Dr. Nelson indicated that claimant is not able to do factory work. That is approximately the time when claimant resigned. It was at that time that Dr. Nelson issued a written release and initially assigned her 10% impairment rating. On June 6, 1985, he specified restrictions that she engage in no bending or twisting, that she be allowed to change positions from sitting to standing, that work should be at bench level and that she follow a weight restriction of from 10-15 pounds. In a report dated July 9, 1986, found in defendants' exhibit A, Dr. Nelson attributed all of claimant's 10% impairment rating to her work-related injury. He stated that she was asymptomatic with degenerative changes before the injury and that it was only with injury that she became symptomatic.

Defendants' exhibit A contains a collection of medical and vocational rehabilitation records and reports, organized by tabs. Clark H. Williams, a qualified vocational consultant, in a report dated May 20, 1987, expressed his opinion that claimant's motivation will determine her success in finding employment (page 3). In a report dated April 29, 1987, Williams provided a list of clerical positions for claimant's career exploration. He provided information on job openings in the area of claimant's current and anticipated residence. The exhibit shows a number of openings which would appear to be consistent with claimant's abilities and restrictions. Williams stated that claimant could expect to earn at a level of from minimum wage to $1.50 per hour over minimum wage in the entry level clerical positions he

identified.

Defendants' exhibit A also contains results of intellectual and psychological testing. They generally show claimant to be in the high average range of intelligence and to not exhibit any significant psychological abnormalities.

Claimant was evaluated by G. Brian Paprocki. Paprocki concluded that claimant had no significant difficulty attending school and that, with the accounting training she has completed, she was desirable as a potential employee. He indicated that, even with her additional training, her earning potential was not likely to rival the levels available in factory work for individuals who are physically unimpaired. Paprocki indicated that claimant had lost access to a large portion of the jobs that had been available to her prior to the injury and that it may take a substantial amount of time for her to find employment.

APPLICABLE LAW AND ANALYSIS

Defendants raised proximate cause as an issue.

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 25, 1984 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

There is no direct evidence in the record which disputes a causal connection. Based upon the events and their sequence as they occurred, it would appear that a causal connection exists between the injury and claimant's complaints. Dr. Nelson clearly stated that the injury is the cause of claimant's disability. The doctor's assessment is accepted as correct.

If claimant has an impairment to the body as a whole, an

industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

This injury caused claimant to become physically unqualified for essentially all the jobs which she had previously held and for similar types of employment. It was necessary for her to return to school, with little economic assistance from the defendants, in order to regain her employability. Gladys Daniels is obviously a highly motivated individual. Fortunately, she has the intellectual aptitude to successfully engage in academic pursuits and to enter into entirely new fields of occupations at the age of 48. It appears that the employer initially made accommodations to permit her to be gainfully employed through providing a light-duty type of work. Even that did not work out, however, and claimant resigned from that position upon the recommendation of her physician. The employer offered no other work to her, even though it would be assumed the employer had some type of an office staff. Refusal to employ is strong evidence of lack of employability. Sunbeam Corp. v. Bates, 609 S.W. 102 (Ark. App. 1980).

Prior to the time that claimant obtained her recently completed educational training, her prospects for employment were bleak. She expended a great deal of effort, significant economic resources and a year of her life in order to obtain that training. Defendants now seek to become the beneficiaries of her efforts asserting that her earning capacity now, since she has been retrained, is essentially the same as it was prior to the time of her injury. Were it not for federal programs and programs administered by the state of Illinois, it probably would not have been possible for claimant to obtain her current level of employability. When assessing industrial disability, it is to be assessed with the claimant in the position that the employer left him or her, not with the enhanced employability which has occurred only as a result of extraordinary efforts on the part of the claimant, such as the educational achievement in this case. Stewart v. Crouse Cartage Co., file number 738644 (App. Dec. filed February 20, 1987). When all the applicable factors of industrial disability are considered, it is determined that claimant has a 35% loss of earning capacity as a result of

the injuries she sustained on June 25, 1984 in the employ of Midwest Biscuit Company. This determination accepts the opinions of Paprocki regarding job availability and pay scales. It also assumes that claimant will, in fact, be successful in obtaining employment as indicated by Clark Williams, should she make bona fide, good faith efforts to do so.

## FINDINGS OF FACT

1. The injuries that claimant sustained in her fall that occurred on June 25, 1984 are a proximate cause of the disability with which she is currently afflicted.

2. Claimant's physical capabilities are as specified by Dr. Nelson.

3. Subsequent to the injury, claimant has obtained a GED and has completed a one-year course in accounting and other related business courses.

4. The education that claimant has obtained, through her own efforts, since making her maximum medical recovery from the injury, greatly reduced the loss of earning capacity that she sustained as a result of the injury.

5. The number of positions for which claimant is presently qualified, physically and educationally, are less abundant than the number for which she was qualified prior to the time of her injury.

6. The wage scales in the employments for which claimant is currently qualified are lower than the scales in many of the employments that were available to her at the time of injury.

7. Claimant has suffered a 35% loss of earning capacity as a result of the injuries she sustained on June 25, 1984.

8. Claimant's appearance and demeanor were observed as she testified. Her credibility is corroborated by the extraordinary motivation she has exhibited. Claimant is found to be an impeccably credible witness on her own behalf and her testimony regarding her symptoms, complaints and abilities is accepted as true.

## CONCLUSIONS OF LAW

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

2. An injured worker's extent of disability is to be evaluated based upon the circumstances that exist following maximum medical recovery from the injury. Aptitudes and abilities are to be considered, but the disability should not be substantially reduced where extraordinary efforts by the worker enable the

worker to regain some of his or her lost earning capacity, particularly where the employer and insurance carrier played no significant role in enabling the worker to successfully rehabilitate himself or herself.

3. Claimant has a 35% permanent partial disability, when the same is evaluated industrially, which entitles her to receive 175 weeks of compensation under the provisions of Code section 85.34(2)(u), payable at the stipulated rate of $111.46 per week commencing May 17, 1985.

4. Defendants are entitled to credit for the 50 weeks of permanent partial disability previously paid at the stipulated rate.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant one hundred twenty-five (125) weeks of compensation for permanent partial disability at the stipulated rate of one hundred eleven and 46/100 dollars ($111.46) per week commencing May 17, 1985.

IT IS FURTHER ORDERED that defendants pay all past due amounts in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

IT IS FURTHER ORDERED that defendants file Claim Activity Reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 18th day of November, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. William Bauer
Attorney at Law
Sixth Floor, Burlington Building
P.O. Box 517
Burlington, Iowa 52601

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

000002
000312a

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| JOSEPH V. DOYLE,<br><br>Claimant,<br><br>vs.<br><br>LAND O' LAKES, INC.,<br><br>Employer,<br><br>and<br><br>TRAVELERS INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 618155<br><br>A P P E A L<br><br>D E C I S I O N<br><br>FILED<br><br>NOV 30 1987<br><br>INDUSTRIAL SERVICES |

## STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding claimant further permanent partial disability benefits based on 35 percent industrial disability and further healing period benefits.

The record on appeal consists of the transcript of the review-reopening hearing; claimant's exhibits 1 through 7; and defendants' exhibits A through Q. Both parties filed briefs on appeal.

## ISSUES

Defendants state the following issues on appeal:

1. Claimant failed to show a material or substantial change in condition to support an increased award of disability in the Review-Reopening.

2. The Deputy incorrectly concluded that Claimant did not suffer a separate fall or injury on September 10, 1982.

## REVIEW OF THE EVIDENCE

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

000003
000312a

In an arbitration decision filed December 16, 1980 it was found that on January 12, 1978 claimant sustained a work injury resulting in a subdural hematoma. In that decision the deputy stated:

> After the operation and while in the hospital, claimant had what he described as a seizure. Claimant indicated he continues to have these seizures 2 or 3 times a week and sometimes every day. Claimant described a seizure as follows:
>
> Q. And how do these seizures happen to you? How do they appear to you? How do you feel when it happens?
>
> A. Well, when I have it, I become weak and I -- it's almost like the person that's talking, I can just about say what he's going to say before he says it. It's like I have lived it before in my life. After it's over, I can't remember anything about it. I can remember it, but I can't remember what was said or --
>
> Q. Do you feel that you are totally in control of yourself when you are having these seizures?
>
> Well, I don't know whether it's from -- what do you call it, practice, or what, but I can continue to do what I am doing or -- but I don't know as I am fully in control of myself.
>
> Q. Can you think clearly?
>
> A. No.

Claimant revealed that his seizures sometimes only last a matter of seconds. Claimant takes Dilantin and Phenobarbital to prevent his seizures. Claimant also complains of a numbness in his left hand and foot since the injury.

(Arbitration Decision, page 2)

The medical reports and testimony of Samuel P. Durr, M.D.; H. W. Miller, M.D.; and John C. VanGilder, M.D., were received as evidence at the arbitration hearing.

In the analysis section of the arbitration decision the

000312a

deputy stated:

> Based on the evidence presented and the principles of law previously stated, claimant has met his burden in proving a causal connection between his injury and his craniotomy and seizures. Although Dr. Durr testified that as a result of his examination of claimant he did not think a subdural hematoma resulted from claimant's injury, Dr. Durr disclosed that something could have shown up later. The greater weight of medical evidence causally connects claimant's injury with his problems. Dr. VanGilder clearly states a causal connection in his report of March 20, 1980.
>
> Although the record does not disclose if all the doctors were questioned regarding permanent disability, Dr. VanGilder using the AMA Guide indicated a permanent disability of "5% to 15% impairment of the whole man." As disclosed by the principles of law previously stated, functional disability is only one of the factors in determining industrial disability. Claimant is 51 years old and a high school graduate. The evidence reveals that claimant has been employed as a route man driving a truck most of his life. The evidence also disclosed that claimant went right back into the same job as before his injury and has been able to continue working the same job without restriction. Although claimant states he is tired all the time, has an insecure feeling, and doesn't know how long he will be able to continue in his employment, he reveals that his performance at work has not changed. It is found that as the result of his injury, claimant has an industrial disability of 15 percent of the body as a whole.

(Arb. Dec., P. 7)

No appeal was taken from the arbitration decision filed December 16, 1980.

At the review-reopening hearing on January 7, 1986 claimant indicated that the nature of his seizures has not changed significantly; however, he testified that the frequency of the seizures has changed:

> Q. Okay. You stated the frequency has changed. Has it changed recently?
>
> A. I think maybe in the last, maybe, year they're more frequent.

000013
0003129

Q. Okay. How many did you have say a year and a half, two years ago? How many were you having, say, in a week's time or month's time?

A. That's hard to say. I would say maybe I might go a week and didn't have any, and then when I started having them I'd have them frequently; two or three or more a day.

Q. So you'd go for a week, two weeks?

A. Could be, yeah.

Q. And in the last year how often have you been having them?

A. There isn't very many days that go by that I don't have them anymore.

Q. Is it the same phenomenon that you have the one after another or soon following another once they start during a day?

A. Well, it's -- they're usually not very close together. I mean, like maybe, you know, it's sometimes like -- maybe it's something that's happening or something that -- where I -- you know, then I don't know whether it makes me nervous or what but I feel it coming.

Q. But you'll have more than one during a day?

A. If I start having them, yeah.

(Review-reopening Transcript, pp. 9-10)

Claimant opines that his disposition has changed; that he is more irritable; that he has more problems maintaining his balance; and that he must urinate more frequently. Claimant states that he usually has to get up once or twice during the night to urinate and that he has never had to do this before. Claimant also states that he now has memory problems which affect his work and his ability to speak with others.

Margaret Doyle, claimant's wife, testified that claimant's memory is getting worse; that he is more irritable; that he urinates more often; and that he socializes less. On cross-examination Mrs. Doyle admits that she has actually seen very few of claimant's spells or seizures and that claimant's motivation to do work around the house and desire to socialize had diminished considerably at the time of the arbitration hearing.

000312

On September 10, 1982 claimant fell backwards in a milk cooler landing on his buttocks and hitting his head. Two days before this fall claimant's medication had been changed by Byron Rovine, M.D. Dr. Rovine's notes reflect this change in medication:

9-8-82 Still having 3-4 minor or z psycomotor sequences /week. No majors. Will continue Dilantin & substitute Tegretol for Depakena. Schedule given him for medication

| | | AM | PM |
|---|---|---|---|
| changeover to | (Dilantin | 200 - | 300 |
| CBL4 SMA in 2 wks | (Tegretol | 400 - | 400 |
| & return | | | |

(Claimant's Exhibit 3, p. 5)

Claimant testified that the change in medication made him unsteady and that after his fall in 1982 he experienced double vision. Claimant states that Dr. Rovine cut his medication back. Claimant testified that he missed 13 days as a result of the fall.

Dr. Rovine's notes, for the period immediately after the 1982 fall, indicate the following:

9-13-82 Diplopia & unsteady since change in Rx
Fell - but z no head injury
Now no longer double but blurred.
Exam ok. No work this week.
Ret for recheck on Fri 9/17.

/s/_____

9-17-82 Symptoms have subsided. Back to work 9/20
Continue Dilantin 500/day
400/day
CBC & Ret 3mo

/s/_____

(Cl. Ex. 3, p. 6)

Claimant was examined by Daniel B. Johnson, M.D., on February 1, 1984. Dr. Johnson states his impression: "My impression at this time is that Mr. Doyle suffers from partial complex seizures secondary to head trauma and subdural hematoma. It is also clear that he has experienced considerable emotional and cognitive changes secondary to the brain injury." (Cl. Ex. 5) —.

Frank S. Gersh, Ph.D., clinical psychologist, has examined claimant and in his deposition he opines that claimant suffers

000014
000312a

complex seizures. Let's assume for the moment that the doctor saw that type of before-and-after change. Does that suggest to you at all that Mr. Doyle's blood sugar and how it relates to his bodily functions may be playing a role in the frequency or occurrence of his seizures?

A. That's what the letter suggests.

....

Q. All right. Is there at last a distinct possibility, if we accept Dr. Miller's observations as accurate, that Mr. Doyle might not only be suffering from the various syndromes and disorders that you have described, but he may also be suffering from some imbalance in his body's ability to process sugar which could be playing some role in triggering these complex seizures that he's had?

A. Well, it's possible. It's also possible that because of the brain damage his brain is simply more sensitive to normal changes in sugar that we all have due to the fact that we eat episodically and the sugar gets processed out of our bodies and we eat different amounts of sugar at different times and so forth. So the brain just could be more sensitive. It is not necessarily an imbalance in the body's processing of sugar.

(Gersh Dep., pp. 32-34)

Claimant has also been examined by Vernon P. Varner, M.D. At his deposition Dr. Varner opined that his deposition was premature because he had not completed his neurological assessment of claimant's consideration. Dr. Varner does opine that claimant's condition has worsened since 1980.

Claimant testifies that he has worked for Land O' Lakes for the last 11 years. Claimant reveals on cross-examination that he bid into his current position which pays an additional two hundred dollars per month over the job he was doing at the time of his injury. Claimant opines that although his current job requires him to work more hours it is lighter work. Claimant discloses that he is 56 years of age.

APPLICABLE LAW

In a review-reopening proceeding in which the claimant is seeking additional compensation after a previous award of disability, he must show a change of condition since the previous award which would entitle him to an additional award. Stice v.

000312A

Consolidated Coal Co., 228 Iowa 1031, 291 N.W. 452 (1940). Claimant has the burden of showing by a preponderance of the evidence his right to compensation in addition to that awarded by a prior adjudication. Deaver v. Armstrong Rubber Co., 170 N.W.2d 55 (Iowa 1969). Unless there is more than a mere scintilla of evidence of increased incapacity of the employee, a mere difference of opinion of experts as to the percentage of disability arising from the original injury would not justify a finding of change of condition. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957).

## ANALYSIS

Defendants initially argue that claimant has not shown a change of condition which supports an award of additional benefits. Claimant testifies the frequency of his spells has increased. Claimant feels that there are not many days that he does not have seizures now. Comparing this to the deputy's statement in the arbitration decision that claimant experiences seizures two to three times a week and sometimes every day reveals that some change in frequency may have occurred. Claimant also opines that he has memory problems, that he urinates more frequently, and that he is more irritable. Mrs. Doyle confirmes these complaints. Neither Dr. Gersh nor Dr. Varner examined or treated before the 1980 arbitration hearing as such they have no basis on which to offer an opinion as to whether claimant's condition has changed. Moreover, Drs. Gersh and Varner admit that the only basis which they have for opining that claimant's condition has worsened is from the statements that claimant and Mrs. Doyle have made to them. The greater weight of evidence would indicate that claimant has had a slight change in his physical condition.

Claimant has failed, however, to show a change in his industrial disability. The slight change in claimant's physical condition does not appear to have placed any new restrictions on claimant's employment. In fact it appears that claimant has now successfully bid into a better paying position. Taking all the factors of industrial disability into consideration, it is determined that claimant presently has an industrial disability of 15 percent.

Defendants also argue that claimant's fall on September 10, 1982 was not related to the January 12, 1978 work injury. Claimant's testimony, together with Dr. Rovine's notes, establish that claimant's fall on September 10, 1982 resulted from the unsteadiness claimant was experiencing due to the change in medication for his seizures. Claimant testified that he missed 13 days of work as a result of this injury. He is entitled to an additional 13 days of healing period benefits.

000016
000312A

## FINDINGS OF FACT

1. Claimant sustained a work injury resulting in a subdural hematoma on January 12, 1978.

2. Claimant sustained an injury on September 12, 1982 when he slipped and fell backwards in a milk cooler.

3. The injury on September 12, 1982 resulted fom the unsteadiness claimant was experiencing due to the change in his seizure medication.

4. Claimant missed 13 days of work as a result of the September 12, 1982 injury.

5. The September 12, 1982 injury resulted in no additional permanent disability.

6. Claimant continues to be employed by defendant-Land O' Lakes.

7. Claimant's present job for Land O' Lakes is lighter work than the job he was doing in 1980; this job does allow claimant to work more hours and earn more money.

8. Claimant's weekly rate of compensation is stipulated to be $196.12.

## CONCLUSIONS OF LAW

Claimant has not established a change of condition affecting his earning capacity.

Claimant is entitled to an additional 13 days of healing period benefits commencing September 11, 1982 and ending on September 24, 1982 at the weekly rate of $196.12.

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

## ORDER

THEREFORE, it is ordered:

That defendants pay claimant thirteen (13) days of healing period benefits commencing September 11, 1982 and ending September 24, 1982 at the weekly rate of one hundred ninety-six and 12/100 dollars ($196.12).

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

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

000017
000312A

That defendants shall file claim activity reports pursuant o Division of Industrial Services Rule 343-3.1(2), as requested y the agency.

Signed and filed this 30th day of November, 1987.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. James P. Hayes
Mr. Paul J. McAndrew, Jr.
Attorneys at Law
122 South Linn Street
Iowa City, Iowa 52240

Mr. Larry L. Shepler
Attorney at Law
111 East Third Street
600 Union Arcade Building
Davenport, Iowa 52801-1550

000313

FILED

OCT 19 1987

IOWA INDUSTRIAL

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| MICHAEL DRAY, | : | |
| Claimant, | : | File No. 776847 |
| vs. | : | A R B I T R A T I O N |
| SHELLER GLOBE CORPORATION, | : | |
| Employer, Self-Insured, Defendant. | : | D E C I S I O N |

## INTRODUCTION

This is a proceeding in arbitration brought by Michael Dray against his self-insured employer, Sheller Globe Corporation. The case was heard at Burlington, Iowa on May 26, 1987 and was fully submitted upon conclusion of the hearing. The evidence in the case consists of testimony from claimant and exhibits A through E.

## ISSUES

Claimant seeks compensation for temporary total disability based upon an alleged injury of September 27, 1984 to his right foot. The only issues identified for determination are those necessarily related to the claim, namely, whether claimant sustained injury which arose out of and in the course of his employment; whether the alleged injury was a proximate cause of any disability; and, determination of his entitlement to compensation for temporary total disability. Claimant stated that there was no evidence to support a claim for permanent partial disability. He specifically made no claim for section 85.27 benefits. It was stipulated that, in the event of an award, claimant's gross weekly earnings were $428.49 per week and that the rate of compensation should be based upon five exemptions.

## SUMMARY OF THE EVIDENCE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case.

Michael Dray testified that, on September 27, 1984, he injured his right foot while transferring covers from a cart onto line 3. Claimant testified that he worked the following day, but was unable to continue and went to the first aid

department where he reported the injury. He testified that he was sent to Dr. Kemp, the company physician, and was instructed to wrap the ankle and to stay off it. Claimant testified that he was off work for a period of time and then returned to work two or three weeks later at which time Dr. Kemp released him to light duty. Claimant testified that he received sick leave while he was off work.

Claimant testified that his first treatment was received on September 29, 1984 at the Keokuk Area Hospital. He testified that it has been so long since the incident that he remembers little except that he had pain in his right foot. In response to exhibit E, page 15, claimant acknowledged that he went off work due to his shoulder and remained off work until November, 1984.

On page one of exhibit A, near the middle of the page, it indicates that, when claimant sought medical treatment, he reported that he hurt his heel on Thursday. Reference to a calendar shows September 27, 1984 to have been a Thursday and September 29, 1984 to have been a Saturday.

Exhibit B, at an entry dated October 1, 1984, indicates that claimant was authorized to perform light work. The same exhibit, at an entry of October 4, 1984, confirms the light-work assignment, but also indicates that claimant's arm was immobilized because of a dislocated right shoulder. Reference to a calendar shows October 1 to have been a Monday and October 3 to have been a Wednesday.

Defendant's exhibit C shows that claimant missed no work whatsoever in September and that he missed no work in October until October 3, 1984.

Exhibit E, page 15, is a group accident and sickness claim form which appears to bear claimant's signature. It indicates that he was injured on October 3, 1984 while trying to shake out a car mat and his shoulder went out. It further indicates at the bottom of the page, that claimant last worked at Sheller Globe on October 2, 1984.

## APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on September 27, 1984 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Having examined the records and heard claimant's testimony, the testimony that he injured his right foot or ankle on September 27, 1984 is accepted as correct. It is corroborated by the

medical records found in exhibits A and B.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 27, 1984 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

A worker is entitled to temporary total disability benefits only until the employee has returned to work or until the employee is medically capable of returning to employment substantially similar to that in which he was engaged at the time of injury, whichever occurs first. (Code section 85.33). Claimant's evidence fails to establish, by a preponderance of the evidence, that the injury to his right foot ever rendered him incapable of working. To the contrary, exhibit B shows that he was permitted to perform light duty work and exhibit C shows that he did not miss any work until October 3, 1984, when he injured his shoulder in a nonoccupational accident.

Claimant has, therefore, failed to establish an entitlement to any benefit under the workers' compensation law, except for the costs of medical treatment which were not in issue.

## FINDINGS OF FACT

1. Michael Dray injured his right foot on September 27, 1984 in an injury that arose out of and in the course of his employment with Sheller Globe Corporation.

2. The injury to claimant's foot was not a substantial factor in causing Dray to be unable to be employed.

3. Dray suffered an intervening trauma to his shoulder, which was not a work-related injury, on October 3, 1984, which rendered him unable to be gainfully employed.

## CONCLUSIONS OF LAW

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

2. Claimant has no entitlement to any benefits under the workers' compensation laws.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding.

IT IS FURTHER ORDERED that costs of this action are assessed against claimant.

Signed and filed this 19th day of October, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

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

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

000015
000316A

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDNA DUCE,

Claimant,

vs.

TEXTRON, INC.,

Employer,

and

AETNA CASUALTY & SURETY COMPANY,

Insurance Carrier,
Defendants.

File No. 776806

A P P E A L

D E C I S I O N

FILED
NOV 25 1987
IOWA INDUSTRIAL COMMISSIONER

## STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant permanent partial disability benefits for a 25 percent impairment to her left hand.

The record on appeal consists of the transcript of the arbitration hearing and defendants' exhibits A and B. Claimant's exhibit 1 is an offer of proof. Both parties filed briefs on appeal.

## ISSUES

Defendants state the following issues on appeal:

1. Did the deputy industrial commissioner err in determining claimant sustained her burden of proof to show her current complaints and disability are causally connected to her work injury?

2. Did the deputy industrial commissioner err in awarding claimant a 25% permanent partial disability of her left hand?

## REVIEW OF THE EVIDENCE

Claimant testified at the arbitration hearing that she is 59 years old, left-handed and that she had worked for defendant, Textron, for nine years before the injury alleged in this claim. At the time of her injury she states she was a light production operator.

000020
000316A

On December 26, 1982 claimant states she injured her left hand while she was changing ink color in a machine which packaged ink cartridges at Textron's plant. Claimant states she was removing a card from the machine when another person turned on the machine; claimant's left hand became caught between two bars which are operated by air pressure. Someone had to turn off the machine before she could remove her hand. She estimates that her hand was caught in the machine for about a minute.

Claimant was then taken directly to the company doctor, Bernard Helling, M.D., at the Valley Clinic, who cleaned, stitched and x-rayed claimant's hand. Dr. Helling also gave claimant a tetanus shot.

Claimant reported to work the following day; however, for three weeks she worked in inspection which only required the use of her right hand. She continued to receive her regular salary for those three weeks. After the three weeks in inspection claimant resumed her regular duties which she was performing at the time of the injury.

Claimant states she saw Dr. Helling at least twice following the injury; once he removed her stitches following the injury and once he x-rayed her hand and sent her to a physical therapist. Claimant states that she went to the physical therapist for about two weeks and that the therapist put heat packs on her hand and exercised it. Claimant states that following the physical therapy the top of her hand didn't swell but her fingers continued to swell, even today.

Claimant states that in January 1984 she was examined by Bruce Sprague, M.D. She says that this examination took no more than five minutes and that Dr. Sprague took no x-rays but simply tested the flexibility of movement of her fingers and of her wrist. She states that at that time some days her hand felt okay and other days it did not. She felt she could not do as much work as before the injury but she admits she did do the same kind of work.

She also states she experiences difficulty with her ability to grip objects with her left hand. Some times she would drop things.

In January and February of 1985 claimant went to see Donald Mackenzie, M.D. Dr. Mackenzie examined her and prescribed medications to which claimant opines she was allergic. Dr. Mackenzie also recommended that claimant see William Blair, M.D., a hand specialist in Iowa City but claimant did not go because she felt that she could not afford it.

ANALYSIS

Defendants contend that claimant has failed to establish a causal connection between her injury and any disability that she now suffers. The only medical reports received as evidence are defendants' exhibits A and B. As already indicated, Dr. Sprague opines that claimant suffers no permanent impairment as a result of the laceration to her hand. Although Dr. Mackenzie concedes that he can detect no impairment of range of motion, sensation or strength, he opines that based on claimant's alleged difficulty in performing her job that claimant suffers 25 percent permanent impairment to the hand. Dr. Sprague's opinion is adopted. Dr. Sprague's examination took place nearer in time to claimant's injury. No deterioration of claimant's hand condition is alleged to have occurred since Dr. Sprague's examination. Dr. Mackenzie's determination that claimant suffers permanent impairment to her hand based on claimant's complaints of difficulty in performing her job is actually an opinion of industrial disability rather than functional impairment. Nothing in Dr. Mackenzie's report indicates that he is aware of the type of work that claimant does. Dr. Mackenzie was not shown to be an expert on industrial disability or what other factors he used in making his conclusion. Claimant continues to work, and the record indicates that she has lost no time from work due to the 1982 injury. Although claimant testified that she has difficulty at work picking up small objects, she admits that she voluntarily bid into her current job which requires working with small objects such as pen caps and barrels. These facts lessen the weight which may be accorded Dr. Mackenzie's opinion.

Dr. Sprague also notes that claimant shows signs of early carpal tunnel syndrome. Although he gives a two to three percent impairment for the carpal tunnel syndrome, he does not opine that it is related to the work injury that claimant sustained on December 26, 1982.

FINDINGS OF FACT

1. Claimant sustained a laceration to her left hand on December 26, 1982 when it was caught in a machine at defendant-Textron's plant.

2. Claimant lost no time from work as a result of this injury.

3. Claimant continues to be employed with defendant-Textron.

4. Claimant suffers no permanent impairment as a result of the laceration to her hand.

000024
000316

5. Claimant has early carpal tunnel syndrome.

6. Claimant's carpal tunnel syndrome was not caused by her December 26, 1982 injury.

## CONCLUSIONS OF LAW

Claimant sustained an injury arising out of and in the course of employment on December 27, 1982.

Claimant failed to prove any permanent impairment as a result of her December 26, 1982 injury.

Claimant suffers no permanent disability as a result of that injury.

WHEREFORE, the decision of the deputy is reversed.

## ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

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

Signed and filed this 23rd day of November, 1987.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

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

Mr. Craig A. Levien
Mr. Larry L. Shepler
Attorneys at Law
600 Union Arcade Bldg.
111 E. 3rd St.
Davenport, Iowa 52801

000317

FILED

JUL 9 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| KEITH ECKARD,<br><br>Claimant,<br><br>vs.<br><br>LEFEBURE CORPORATION,<br><br>Employer,<br><br>and<br><br>NATIONAL UNION FIRE INSURANCE COMPANY,<br><br>Cross-Petitioner,<br><br>vs.<br><br>WAUSAU INSURANCE COMPANIES,<br><br>Defendant to Cross-Petition. | File No. 815928<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This is a proceeding in arbitration wherein National Union Fire Insurance Company, hereinafter referred to as National Union, cross-petitioner, seeks recovery from Wausau Insurance Companies, hereinafter referred to as Wausau, cross-petitioned, defendant, for the recovery of certain medical expenses and weekly benefits paid to Keith Eckard, claimant, as a result of an alleged injury on January 22, 1986. This matter comes before the undersigned on a stipulated record consisting of a stipulation of the parties with attached exhibits A through O.

## ISSUES PRESENTED

The issues presented in this case are which insurance carrier is responsible for payment to claimant as a result of his alleged injury of January 22, 1986. The parties, in their stipulation, do not stipulate that the claimant received an injury arising out of and in the course of his employment on January 22, 1986 or at any other time. It is noted, however, that the parties did submit as exhibits the medical records of the claimant together with the deposition transcript of the claimant's testimony for consideration. As a consequence of the issues raised by the parties, it is necessary to make a determination

is to whether or not the claimant did receive an injury arising out of and in the course of his employment and, if so, the date of such injury.

EVIDENCE PRESENTED

The stipulations of the parties in paragraphs one through ten are accepted and found as facts. The exhibits submitted in support of those stipulations have been reviewed and considered. The stipulations as set forth in paragraphs one through ten of the stipulation are hereby incorporated into this review of the evidence by this reference.

A review of the claimant's testimony as reflected in exhibit 1 discloses the following: Claimant is 44 years old and is presently employed by the defendant, LeFebure Corporation. He has been so employed for six years and his job with that company is that of a service technician which involves the repair and installation of service bank equipment. Claimant recalled that on January 22, 1986, he was hooking up an automatic teller machine to an alarm system. As he put rollers on the machine to move it away from the wall, the rollers came out from underneath the machine and he attempted to place the machine back on the rollers. Claimant was able to accomplish this with the use of a pry bar. After completing work on the machine that day, claimant left through the door and got into his truck. At that time, claimant experienced a severe pain in his anal area because of an external hemorrhoid. Claimant said the pain associated with the hemorrhoid was most evident when he sat down. Claimant revealed that the weight of the machine he was moving with a pry bar was approximately 3,000 pounds and involved a considerable strain.

Claimant said that after he got into his truck and began experiencing the pain, he returned home since it was approximately 4:30. Claimant described in detail the physical symptoms of the condition from which he was suffering at that time. Claimant said he tried to call his doctor, but since the doctor was not in, he got into the bathtub and soaked that night. Claimant said the first thing he did on the following morning was to contact the doctor and schedule an appointment. Claimant stated he never experienced anything of this nature before and had, in fact, been to the doctor on January 21, 1986 for a routine examination which disclosed no hemorrhoidal problem. Claimant stated that January 23, 1986 was the first occasion he had to be treated for hemorrhoids.

Claimant stated that the doctor told him on January 23, 1986 that he was going to need surgery, but that he resisted this proposal until more conservative methods had been tried. Claimant said he returned to work and continued working until he returned to the doctor on January 29, at which time an appointment

was scheduled for him to see a surgeon. Claimant said that, after consulting the surgeon, it was determined that the hemorrhoid would need surgical repair. Claimant said he continued to work, however, from January 24 through February 7, 1986. After that, on February 10, he was taken to the hospital and underwent surgery. Claimant stated that, after his recovery from the surgery, he has not required further treatment for the hemorrhoidal problem. Claimant stated that, from the date of his initial injury through his recovery from surgery, he had suffered pain as a result of the hemorrhoid.

On cross-examination, claimant explained in greater detail the nature of his work. Claimant contended that his condition remained approximately the same between January 22 and February 10. Claimant again denied any problem with hemorrhoids prior to January 22, 1986.

A review of claimant's medical records indicates that claimant's primary treating physician, A. J. Herlitzka, M.D., is of the clear opinion that claimant's condition arose as the result of the severe straining that he was involved in on January 22, 1986. According to Dr. Herlitzka, claimant's hemorrhoidal condition initially arose as a result of the lifting incident, slowly began to subside and then became ulcerated necessitating surgery. The clinical notes of a Dr. Taylor reflect the progression of claimant's condition from January 22 through March 22, 1986.

## APPLICABLE LAW AND ANALYSIS

Neither of the parties briefed this matter, however, it is apparent from the petition that it is the contention of National Union that this is a case of cumulative trauma arising within the meaning of the case called McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). It must be noted preliminarily that, based upon the review of the claimant's testimony and the medical records, that claimant did receive an injury arising out of and in the course of his employment on January 22, 1986.. This is, of course, contrary to the decision in McKeever which defined the injury date of a cumulative trauma case as the date upon which the condition first became disabling as opposed to the date medical treatment was first required. Under this theory, the position taken by National Union may indeed be correct. This would appear to be somewhat to similar to the proposition outlined in the occupational disease case of Doerfer Division of CCA v. Nicol, 359 N.W.2d 428 (Iowa 1984) which indicated that the carrier or employer who caused the last injurious exposure in an occupational disease case is responsible for all disability arising therefrom without any attempt to apportion responsibility between previous insurance carriers or employers. Such an approach, while having the tendency to be perhaps harsh in any given situation, nevertheless spreads the

risk over a period of time in a fair and appropriate manner. This approach also avoids lengthy and complex factual determinations as to the source of a particular condition.

The instant case, however, is not appropriately analyzed under the McKeever doctrine. It is clear, based upon the claimant's testimony and that of his treating physician, that this is not a condition which arose as a result of a series of minute trauma over a period of time. It is the result of a clear, single, traumatic episode involving extremely heavy lifting which resulted in an immediate physical injury. The complex issues sought to be avoided in cases of occupational disease and cumulative trauma are simply not present on a record of this nature. The factual situation presented in this case is more appropriately determined under the theory set forth in DeShaw v. Energy Manufacturing Company, 192 N.W.2d 777 (Iowa 1971). In that case, it was held that in a review-reopening proceeding predicated upon an injury occurring earlier that the claimant must prove either that the disability for which he or she seeks additional recovery was proximately caused by the first injury or that the second injury was proximately caused by the first injury. In the instant case, it would appear that the injury which occurred on January 22, 1986 was the proximate cause of the surgery which was necessitated on February 10, 1986. To the extent that the surgery was the result of the ulceration of the hemorrhoidal tissue, it is clear that, but for the initial injury, no such ulceration would have occurred and thus the proximate relationship between the first injury of January 22 and the subsequent development of ulcerated tissue is present. Thus, under the factual situation set forth in the deposition and medical records, it is apparent that the full liability for claimant's injury and temporary disability rests with National Union who was the insurance carrier at the time of the injury on January 22, 1986. Accordingly, it will be found that National Union Insurance Company is not entitled to reimbursement or contribution from Wausau for any monies paid on behalf of LeFebure Corporation for the treatment of claimant's injury.

## FINDINGS OF FACT

WHEREFORE, based upon the record submitted, the following facts are found:

1. On January 22, 1986, claimant suffered an injury arising out of and in the course of his employment in the form of an acute hemorrhoidal condition.

2. The facts stipulated by the parties in paragraphs one through ten of their stipulation are supported by the record and are hereby incorporated in and made findings in this decision by this reference.

CONCLUSIONS OF LAW

IT IS THEREFORE CONCLUDED that National Union Fire Insurance Company has failed to prove by a preponderance of the evidence that it is entitled to reimbursement or contribution from Wausau Insurance Company pursuant to the provisions of section 85.21 and/or the order of March 27, 1986.

ORDER

IT IS THEREFORE ORDERED that National Union Fire Insurance Company take nothing from these proceedings.

IT IS FURTHER ORDERED that all costs are taxed to National Union Fire Insurance Company.

Signed and filed this 9th day of June, 1987.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Keith Eckard
RR 2 Box 216
Sheffield, Iowa 50475

Mr. Michael Hoffmann
Attorney at Law
1000 Des Moines Building
Des Moines, Iowa 50309

Mr. Marvin Duckworth
Attorney at Law
Suite 111, Terrace Center
2700 Grand Avenue
Des Moines, Iowa 50312

000322

FILED

AUG 31 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| GENE M. ELLIS,<br><br>Claimant,<br><br>vs.<br><br>HOLMAN ERECTION COMPANY, INC.,<br><br>Employer,<br><br>and<br><br>THE HOME INSURANCE,<br><br>Insurance Carrier,<br>Defendants. | File No. 763257<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This is a proceeding in arbitration brought by Gene M. Ellis, claimant, against Holman Erection Company, Inc., employer, and The Home Insurance Company, insurance carrier. The case was scheduled for hearing on April 15, 1987 at Cedar Rapids, Iowa, but was submitted on a written record consisting of claimant's exhibits 1 and 2, defendants' exhibits A and B, and claimant's deposition. In the pre-hearing report, the parties stipulated that claimant sustained an injury on April 10, 1984 which arose out of and in the course of employment, that the injury is a cause of permanent disability of some degree, that claimant's entitlement to compensation for temporary total disability or healing period is from April 11, 1984 to September 26, 1984, a period of 24 1/7 weeks for which compensation at the stipulated rate has been paid, that the disability is to be evaluated industrially as a disability to the body as a whole and that the rate of compensation is $249.93 per week. The only matters in dispute are the degree of permanent disability and the date upon which interest for the award accrues.

## SUMMARY OF EVIDENCE

All evidence submitted was considered when deciding the case even though it may not necessarily be referred to in this decision.

Gene M. Ellis is a 64-year-old retired iron worker. His educational background is the tenth grade in high school. He has been an iron worker ever since leaving high school. As an

iron worker, he welded, worked at heights of as much as 400 feet above the ground and carried welding equipment and reinforcing bars. He stated that nothing in the line of work as a construction iron worker is light duty in nature. His employment chiefly came out of the union hiring hall in Cedar Rapids. In order to be referred out of the hall to a job, it is necessary for the worker to have the physical ability to do all types of iron work (dep. pages 5-8).

Ellis was injured on April 10, 1984 while in the employ of Holman Erection Company. He testified that he had been hooking onto precast concrete, got between two of them, and one tipped over. He estimated the pieces to weigh a ton and a half. Ellis testified that it struck him on the right shoulder and pinned him between two pieces of concrete (dep. page 8).

Claimant was treated at the University Hospital in Iowa City where his injuries were diagnosed as a separation of the acromio-clavicular joint and fractured ribs. After a period of recovery, claimant was released to return to work by his doctor in approximately September, 1984 (dep. page 10).

Claimant did not return to work, however. He testified that he had no power in his shoulders and lacked the ability to lift and carry things. Claimant testified that it bothers him to lift and that, when he does, his shoulder snaps and pops. He stated that it hurts even if he shrugs his shoulders. He felt that he was able to lift 10 pounds repetitively, but felt unable to carry 50 pounds for any distance. He stated that he did not trust himself to work at heights because he could not trust his ability to grip (dep. pages 10-13). Claimant testified that he retired because of this injury and, in doing so, received a reduced union pension and reduced social security benefits (dep. page 14-16).

Claimant testified that a surgical treatment for his shoulder had been considered, but that the physicians did not advise it (dep. page 11). Claimant stated that he had not returned to work as an iron worker, that he had not attempted to return to the work and that, from helping neighbors and friends, he was convinced he would not be able to work in his trade (dep. page 20).

Claimant testified that, to his knowledge, the first permanent impairment rating was the one performed by John R. Walker, M.D., in Waterloo.

Claimant's exhibit 1 is a report from Dr. Walker dated January 14, 1987. Dr. Walker noted that claimant's rib pain has disappeared, but that any lifting or shrugging of his shoulders causes pain and a snapping in the shoulder. He observed a bony lump on claimant's shoulder. Dr. Walker concluded that claimant

has atrophy in the supraclavicular area and also involving the lateral neck muscles on the right. He found claimant to have decreased grip strength on the right and a loss of 10 degrees of abduction. X-rays taken revealed calcification in the areas of the coracoclavicular and the acromioclavicular ligaments which the doctor felt was new bone that had formed in the healing process. He noted that there was elevation of the right clavicle at the sternoclavicular articulation. Dr. Walker opined that claimant has a permanent partial impairment of 12% of the body as a whole based upon those injuries.

Claimant was also examined by John E. Sinning, Jr., M.D. (defendants' exhibits A and B). The results of Dr. Sinning's examination and assessment of claimant's medical records led him to agree with the diagnosis of the injury which had been previously made and with the fact that the rib fractures healed with no residual problems. He found claimant to have only minor limitation of internal rotation of the right shoulder, perhaps 20 degrees. He found thickening of the acromioclavicular joint as a reasonable residual of the healing process at that joint. At page 5 of exhibit B, Dr. Sinning stated:

> Recognizing that the distal end of the clavicle is prominent, then the complaint of Mr. Ellis about carrying the loads on his shoulder seems reasonable. The clavicle is prominent and a heavy load bears on the prominence and causes discomfort. Other than discomfort with direct pressure however, there is no indication of any limitation in the use of his shoulder.
>
> In conclusion this man did sustain a significant injury and he has made an excellent recovery.

In exhibit A dated March 25, 1987, Dr. Sinning rated claimant as having a 5% functional impairment of the right upper extremity which he converted to a 2% impairment of the body as a whole.

## APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 10, 1984 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

Drs. Walker and Sinning both related claimant's current

shoulder problems to the injury. No conflicting medical evidence is in the record. It seems to be a logical and readily apparent result. The injury of April 10, 1984 is found to be a proximate cause of the difficulties Gene M. Ellis currently experiences in his right shoulder area.

The actual area of injury is the acromioclavicular joint. Such is not a part of the arm, even though Dr. Sinning rated it as part of the upper extremity. Those familiar with medical terminology are aware that the term "upper extremity" includes several structures proximal to the shoulder joint. Claimant's injury is therefore an injury to the body as a whole as stipulated by the parties.

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

Compensation benefits are geared to weekly wage loss and it is permissible to consider the fact that a worker will at some point retire when assessing industrial disability. Brecke v. Turner-Busch, Inc., 34th Biennial Report, 34 (Appeal Decision 1979). As concluded by Dr. Sinning, claimant's injuries were significant, but he has made a good recovery. Nevertheless, he is left with impairments which would not necessarily severely affect many people, but they are sufficient to take claimant out of his lifelong trade of an iron worker due to the physically demanding nature of the trade. Claimant's rate of compensation is an indication that he was probably earning in the range of $13.00 per hour at the time of injury. A person with his age and employment background could not expect to readily find work that would pay much more than half of that $13.00 per hour if he were to enter into a new occupation or other line of work. Claimant was approximately 61 years of age, however, at the time of injury. His decision to retire is not unreasonable. The early retirement, however, not only caused claimant to lose income for a few years, it also resulted in a decrease in his retirement income. When all the applicable factors of industrial

disability are considered, it is found that claimant sustained a 25% permanent partial disability.

The next issue to be determined is the date upon which that compensation, and interest for lack of payment thereof, commences. Section 85.34(2) of the Code provides that compensation for permanent partial disability begins at the termination of the healing period. In this case the parties stipulated that it ended on September 26, 1984. Code section 85.30 provides that interest is due on all compensation payments which are not paid at the time they become due. The Iowa Supreme Court has consistently given a literal construction to those sections. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979). Section 85.27 of the Code gives the employer the right to choose and direct the medical care. Exhibit 2, the progress notes, indicates that in September of 1984 claimant still had symptoms and complaints with regard to his shoulder. He clearly had not recovered to his preinjury strength and status. This case is like Teel in the sense that reasonable diligence would have shown that some degree of permanency could be expected to result, even though the precise degree thereof might not have been determinable at that time. Interest is nothing more than compensation for the loss of the time value of having prompt payment and a vehicle by which to avoid intentional delay of justly due payments. It is not a penalty for unreasonable, illegal or wrongful action as is the penalty provision found in the fourth unnumbered paragraph of Code section 86.13. Claimant's entitlement to healing period compensation, and interest on unpaid amounts thereof, therefore runs from September 27, 1984, the end of the healing period.

## FINDINGS OF FACT

1. The injury of April 10, 1984 is a substantial factor in producing the complaints, symptoms and disability which currently affect Gene M. Ellis with regard to his right shoulder.

2. The disability affects claimant's body as a whole and is not limited to his right arm.

3. Gene M. Ellis has suffered a 25% loss of earning capacity as a result of the injuries sustained on April 10, 1984.

4. Claimant's shoulder suffers from weakness and pain to the extent that he is unable to perform the normal duties of an iron worker, his only trade since leaving high school.

5. Claimant has no significant experience or training in any occupation other than that of an iron worker.

6. Claimant has residual earning capacity, but he reasonably chose to retire rather than to enter into a new line of work at

000327

greatly reduced earnings.

CONCLUSIONS OF LAW

1. The injury of April 10, 1984 is a proximate cause of claimant's current disability as exists in his right shoulder.

2. Claimant's injury is an injury to the body as a whole and compensation should be computed under the provisions of section 85.34(2)(u) of the Code.

3. Claimant's disability, in industrial terms, is a 25% permanent partial disability which entitles him to receive 125 weeks of compensation at the stipulated rate.

4. Claimant's entitlement to compensation for permanent partial disability begins at the end of the healing period, namely, September 27, 1984, and interest on the award accrues from such date on all amounts which were not paid when the same became due.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant one hundred twenty-five (125) weeks of compensation for permanent partial disability at the stipulated rate of two hundred forty-nine and 93/100 dollars ($249.93) per week commencing September 27, 1984.

IT IS FURTHER ORDERED that all amounts thereof are past due and owing and shall be paid to claimant in a lump sum together with interest from the date each weekly payment came due at the rate of ten percent (10%) per annum to be computed until date of payment.

IT IS FURTHER ORDERED that defendants file Claim Activity Reports as requested by the Division of Industrial Services pursuant to Rule 343-3.1.

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against defendants.

Signed and filed this 31st day of August, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert F. Wilson
Attorney at Law
810 Dows Building
Cedar Rapids, Iowa 52401

Mr. Michael W. Liebbe
Attorney at Law
116 East Sixth Street
Davenport, Iowa 52803

000329

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| HOWARD C. ENGELHART,<br><br>Claimant,<br><br>vs.<br><br>MID-AMERICA TANNING CO., INC.,<br><br>Employer,<br><br>and<br><br>ROCKWOOD INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | FILE NO. 803205<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>FILED<br><br>AUG 13 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

## INTRODUCTION

This is a proceeding in arbitration brought by Howard C. Engelhart, claimant, against Mid-America Tanning Company, Inc., employer, and Rockwood Insurance Company, insurance carrier, for benefits as a result of an alleged injury on January 17, 1985. A hearing was held in Sioux City, Iowa on December 17, 1986 and the case was fully submitted at the close of the hearing. The record consists of joint exhibits 1 through 6; the testimony of Howard C. Engelhart (claimant), Grace Engelhart (claimant's wife), Philip Osborne (vocational rehabilitation consultant), Everett L. Shelton (employer's environmental consultant), and Tom Rohen (plant manager).

## STIPULATIONS

The parties stipulated to the following matters:

That an employer/employee relationship existed between claimant and employer at the time of the alleged injury.

That the time off work for which claimant now seeks temporary disability benefits is March 28, 1985 to March 4, 1986.

That the commencement date for permanent partial disability in the event such benefits are awarded is March 4, 1986.

That the weekly rate of compensation in the event of an award is $280.40 per week.

That there are no bifurcated claims.

ISSUES

The issues presented by the parties for determination at the time of the hearing are as follows:

Whether claimant sustained an injury on January 17, 1985 which arose out of and in the course of his employment with employer.

Whether the alleged injury is the cause of any temporary disability.

Whether the alleged injury is the cause of any permanent disability.

Whether claimant is entitled to any temporary disability benefits.

Whether claimant is entitled to any permanent disability benefits.

Whether claimant is entitled to any medical benefits.

Whether defendants have sustained the burden of proof by a preponderance of the evidence that claimant failed to give notice as required by Iowa Code section 85.23.

SUMMARY OF THE EVIDENCE

All of the evidence was examined and considered. The following is a summary of the pertinent evidence.

Claimant is 44 years old and married. He worked for employer for approximately five and one-half years. He started on October 17, 1979 and resigned on March 28, 1985. At the time of his alleged injury he worked in the pollution control department mixing chemicals and taking care of pumps. His past employments have all been laboring types of work. In this job he sometimes handled 50 pound bags of chemicals and 700 pound barrels of acid (Transcript pages 12-14). Claimant is five feet nine inches tall and weighs approximately 230 pounds (Tr. p. 50).

Claimant testified that on January 17, 1985, at approximately 3:00 p.m. in the afternoon, he was coming out of the maintenance shop carrying a roll of insulation in front of him that was about 30 inches in diameter and weighed approximately 20 pounds. He had trouble seeing where he was going. As he came out of the door he slipped on some ice on a slope and twisted his back which caused pain in the lower part of his hips (Tr. pp. 14 & 15). He did not fall to the ground but just slipped and twisted

is back (Joint Exhibit 3; Tr. p. 14). There were no witnesses o the incident (Tr. p. 44).

Claimant worked in the pollution control building alone (Tr. . 91). He usually reported directly to Tom Rohen, plant anager (Tr. p. 16). Rohen testified that for quite some time laimant did not have a maintenance supervisor and claimant came o him for just about everything (Tr. p. 100). Claimant did not ake an accident report on the day of the injury but continued o work the rest of the day until 4:30 p.m. He went home, told is wife he twisted his back, took a hot shower and received a assage from his wife who has training as a masseuse. Claimant estified that he reported the incident the next morning at work o Larry Shelton. Shelton was not actually an employee of mployer, but claimant testified that he thought Shelton was an employee and a supervisor because he gave claimant directions. ctually, Shelton was a private consultant who spent 30 to 40 ours per month at employer's plant working on a pollution ontrol problem (Tr. pp. 15 & 16; 41 & 42; 45 & 46; and 89).

Shelton testified that he is a self-employed consultant on nvironmental affairs retained by employer to assist them on a aste water problem (Tr. pp. 80-84). He did not supervise nyone. Shelton usually gave instructions on major changes to om Rohen, plant manager, but occasionally gave recommendations directly to claimant to turn off the chemical feed (Tr. p. 85) r to turn a pump on or off or to change the chemical mix (Tr. p. 0). Shelton denied any recollection that claimant reported hat injury to him. Shelton further testified that if claimant ad reported an injury to him he would have told claimant that e was not an employee and that he should report an injury to om Rohen, plant manager (Tr. pp. 86 & 87). Shelton knew and bserved claimant from January 17, 1985 to when claimant left in March of 1985. During that period claimant made no complaints f pain to Shelton (Tr. p. 87). Claimant did not report to Shelton that he was leaving or why (Tr. p. 88). Rohen testified that claimant knew Shelton was a consultant (Tr. p. 101).

Claimant testified that after January 17, 1985 his pain continued to get worse but he continued to work and treated at home with hot showers, heating pad, aspirin and Tylenol, and massages from his wife. He further testified that approximately in early March of 1985 he asked David LaFleur (actually David Fuehrer), a supervisor out in the maintenance shop which was in another building, if he could go to the company doctor. Claimant said that LaFleur called the office and then told claimant that he could not authorize it because claimant could not prove it happened on the job. Claimant then chose to see a chiropractor on his own (Tr. pp. 18 & 19). Claimant never inquired at the office himself to see if he could go to a company doctor (Tr. pp. 40 & 41). Claimant then saw John P. McCarthy, D.O., a chiropractor, on March 5, 1985 (Tr. pp. 18 & 19; Jt. Ex. 1).

000332

Neither party called David Fuehrer as a witness. However, Rohen testified that he was plant manager. The company only has about 30 employees and everybody reports to him. He testified that claimant never notified him that he was injured on January 17, 1985 nor did anyone in the company, including Larry Shelton, notify him that claimant was injured on January 17, 1985. Rohen testified that he did not know of the alleged injury until the workers' compensation carrier called to say that a claim had been filed later in September of 1985 (Tr. pp. 92-95). In mid-March of 1985, claimant notified Rohen that he would be leaving in two weeks. Claimant did not say he was quitting due to pain, but indicated that he was going to retire and move to Arizona (Tr. pp. 97-99). Rohen stated that David LaFleur was actually an employee named David Fuehrer (Tr. p. 100). Rohen testified that claimant came into his office about every morning to talk about what he was going to do and to discuss his problems (Tr. p. 101). Claimant did not mention that he was quitting because he could not take the walking or the lifting. When Rohen first learned of the injury in September of 1985 he talked to David Fuehrer and Pat Schurdevin, the office girl, and they had no recollection or any record of an injury on January 17, 1985 (Tr. pp. 101 & 102). Rohen did say David Fuehrer or any immediate supervisor in the plant would be a proper person to report an injury to (Tr. p. 103). Rohen testified that even though he talked to claimant probably every day claimant never complained of pain or discomfort to him (Tr. p. 104 & 105).

Claimant testified that Dr. McCarthy took x-rays and said that his injuries were too bad to treat but suggested that he stay off work for a week. Claimant saw Dr. McCarthy on March 5, 1987. Joint exhibit 2 is a release from Dr. McCarthy to return to work on March 13, 1985 without restrictions. The release does not specify whether claimant was off work due to a work related injury or to some non-work related problem (Jt. Ex. 2). Dr. McCarthy's clinical notes are not in evidence. However, he reported by letter to claimant's attorney on September 24, 1985 that he saw claimant on March 5, 1985 for a mild spasm of the lumbar paravertebral musculature. The report says claimant told the doctor he slipped at work in January of 1985. Dr. McCarthy's diagnosis as to the lumbar spine was segmental dysfunction and myofascial fibrosis of the lumbar spine and associated soft tissues. Contrary to claimant's testimony the report says manipulative treatment was administered to the lumbar spine. The report concludes as follows:

> Manipulative treatment was administered to the lumbar spine with immediate relief. The patient was then referred to a company medical doctor for approval of further care. He was told that a week of no work would be very beneficial. On April 12th, 1985 he was again seen with persistant low back pain. He was again treated and instructed

000333

that he must be careful and work within himself. (Jt. Ex. 1, p. 2)

Dr. McCarthy concluded by saying that claimant's condition is chronic and that his prognosis is poor (Jt. Ex. 1, p. 2). Dr. McCarthy did not specifically state whether the fall that claimant related to him was the cause of his present symptoms; he did not state that the alleged injury was the cause of any permanent impairment; he did not assess an impairment rating for this alleged injury; and Dr. McCarthy did not state that he advised claimant to quit his job. The recommendation to take a week off from work appears to be optional rather than mandatory (Jt. Ex. 1).

Claimant testified that he took the return to work form and turned it in to the office personnel. Dr. McCarthy sent the bill to the group medical insurance carrier and claimant let them take care of the doctor bill (Tr. p. 20). Claimant testified that he then continued to work from March 13, 1985 to March 28, 1985. He notified Rohen two weeks before March 28, 1985 that he was quitting because of his back. He was having problems with his back and he could not take it (Tr. pp. 41 & 43). Two weeks prior to March 28, 1985 would have been approximately March 14, 1985.

Claimant stated that the reason he kept working was because he knew he would have difficulty trying to get workers' compensation and he needed money so he continued to work (Tr. pp. 20 & 39).

Claimant then went to see Horst G. Blume, M.D., a neurologist and a neurosurgeon at the Headache and Pain Control Center, P.C., on March 28, 1985 for heat treatments, injections and other treatments (Jt. Ex. 3; Tr. p. 20). Dr. Blume's itemized statement shows 99 treatment dates between March 28, 1985 and March 3, 1986 with total charges in the amount of $2,187 (Jt. Ex. 5).

Claimant testified (Tr. pp. 22 & 40) and Dr. Blume confirmed that he treated claimant for a very serious injury that occurred on July 17, 1975. At that time claimant fell off a catwalk and sustained very serious injuries including his thoracic spine. These injuries kept claimant off work for approximately four years from 1975 until 1979. Claimant started to work then for the current employer on October 17, 1979 (Jt. Ex. 3). Claimant gave Dr. Blume a history that on January 17, 1985, he twisted his back when he slipped on the ice, but did not fall, and the pain has not diminished but only gotten worse. Dr. Blume reported that claimant has an aggravation of both his thoracic and lumbar preexisting conditions (Jt. Ex. 3). In a letter to claimant's counsel dated March 4, 1986, Dr. Blume stated that as a result of the accident on January 17, 1985, claimant aggravated his preexisting thoracic spine condition and his preexisting lumbar spine condition. He concluded his report as follows:

"It is my opinion within reasonable medical probability that the partial permanent functional disability to the body as a whole is around 15-20%." (Jt. Ex. 4).

Dr. Blume did not distinguish how much of the impairment was due to the injury of July 17, 1975 and how much was due to the injury of January 17, 1985 (Jt. Ex. 4). Dr. Blume did not recommend in either report that claimant quit working (Jt. Ex. 3 & 4).

Claimant testified that Dr. Blume told him to try to find a real light duty job. He filled out an application at Job Service. They investigated and agreed that he should only do light work. However, with no educational training it was not likely that he would be able to do that kind of work (Tr. pp. 23 & 24).

Claimant testified that he went to Iowa Vocational Rehabilitation and talked to Philip Osborne. Osborne checked claimant's educational and medical background and determined that it would not do any good for claimant to go to Des Moines for training. That was the end of Osborne's services (Tr. pp. 24 & 25).

Claimant testified that when he attempted to get his GED he took tests and was told that he had a second grade reading level. It would take two years, if not longer, to get his reading up to where there is a possibility that he could get a GED (Tr. p. 25).

Claimant testified that he graduated from eighth grade. He attended freshman and sophmore years but got F's. Since he would not have graduated he quit school when he was 16 years old (Tr. pp. 25 & 26). Since then he has performed a number of laboring type jobs to include hanging turkeys in a turkey plant, loading and unloading steel and farm machinery, running a punch press, working as a section laborer on the railroad, pushing and lugging beef and he worked at the hide plant which was the predecessor of the current employer from 1970 until his serious injury on July 17, 1975 which kept him off work until the spring of 1979 (Tr. pp. 26 & 27). Claimant received workers' compensation benefits for this earlier injury (Tr. p. 28).

Also, two years prior to the alleged injury of January 17, 1985, claimant testified that he twisted his mid-back and went to the company doctor. According to the testimony, this was sometime in 1982 or 1983 (Tr. pp. 32, 48 & 52-54). Also a breaker box exploded in May of 1984 and claimant burned his eyes, face and hair and the company sent him to Marian Health Center (Tr. p. 36). In 1980 claimant also strained his back and the company doctor took care of that (Tr. p. 37). Claimant testified that it was not necessary to fill out any forms for the prior injuries (Tr. pp. 36 & 37).

Claimant conceded that he was aware of a sign that notified employees that if they got hurt, no matter how minor, you should report it to your supervisor as soon as possible (Tr. p. 37). He stated that he thought he did that in this case. In other testimony, claimant acknowledged that the first time he or his representative asked for workers' compensation benefits was in September of 1985 (Tr. p. 48).

Claimant testified that he has not improved any since March 28, 1985. He cannot walk more than a block and a-half and he cannot sit very long. At home he washes dishes and vacuums the floor. The landlord takes care of the yard. He gets up in the morning and watches television and reads the newspaper. In the afternoon he takes a nap and watches TV. In the evening he watches television. He drives a car but not very far because it hurts his back and legs (Tr. pp. 30-32). Claimant testified that he thought he was worse now than he was in 1979 after the 1975 injury (Tr. p. 49). Claimant testified that he has applied for work at Willards, Cargill and Goodwill Industries but was not successful in obtaining employment (Tr. pp. 34 & 35).

Grace Engelhart, claimant's wife, testified that claimant told her on January 17, 1985 that he slipped at work and hurt his lower back and she helped him treat it at home with heat and massage (Tr. pp. 69 & 70). He put off going to the doctor because she was in school at that time and his income was their only income (Tr. p. 70). She corroborated his testimony on his current walking, sitting and driving limitations (Tr. pp. 72-74). She disagreed with Osborne that claimant was mentally retarded or borderline mentally retarded (Tr. p. 80).

Philip Osborne testified that he has been a vocational rehabilitation counselor for the State of Iowa for 15 years. He saw claimant in October of 1985. He obtained his employment and medical history (Tr. pp. 57-60). The psychological report from the Social Security Administration indicated that claimant had an IQ of 73 which by Iowa Vocational Rehabilitation criteria is mental retardation (Tr. p. 60). Witness did not obtain educational records or perform any more tests (Tr. p. 61). In making a vocational handicap determination he found that claimant was not able to work and that there was no training that could assist him (Tr. p. 61). As a result his office was not able to give him any assistance in finding employment (Tr. p. 62). The witness estimated that possibly 50 percent of claimant's vocational handicap was due to physical limitations and 50 percent was due to mental retardation (Tr. p. 63). Osborne had no explanation for how claimant was able to hold a full time job for several years as a laborer at $7.10 per hour until he resigned from it in March of 1985 (Tr. pp. 65 & 66).

Claimant testified that he applied for social security disability benefits but he was denied. He appealed and the appeal was denied (Tr. p. 46).

000336

Joel T. Cotton, M.D., a neurologist examined and evaluated claimant for the defendants on June 9, 1986. Dr. Cotton stated that claimant's neurological examination was essentially unremarkable. Claimant complained of impotence since the injury but Dr. Cotton thought it was a result of diabetes rather than the back. Dr. Cotton concluded as follows:

> ...I can demonstrate specifically no evidence of damage to this man's spinal cord, lumbar nerve roots, sacral nerve roots, or peripheral nerves as a result of the injury he describes in 1985. There is specifically in this individual no evidence of neurological impairment. I am unable to explain his continued symptoms of pain in the absence of any objective abnormalities on his current neurological examination. I can document no evidence of a neurological impairment in this individual. In the absence of neurological impairment, I do not feel there is any disability in this individual either temporary or permanent as a result of the injury which he describes. From a neurological standpoint this individual could pursue his usual and customary activity without restriction.
> (Jt. Ex. 6)

## APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on January 17, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 17, 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, 261 Iowa 352, 154 N.W.2d 128 (1967).

Claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained an injury that arose out of and in the course of his employment with employer on January 17, 1985. It is noted that the alleged injury was not one with a severe traumatic onset. Claimant did not fall, fall to the ground or hit anything. He allegedly merely slipped on ice while walking on a slope and carrying a 20 pound roll of insulation and twisted his back (Tr. pp. 14 & 15; Jt. Ex. 3). There were no witnesses to the injury (Tr. p. 44). Claimant did not seek emergency or immediate medical care for his injury. In fact he did not seek medical treatment until approximately a month and a-half after the alleged injury of January 17, 1985 when he went to see a chiropractor of his own choice on March 5, 1985 (Jt. Ex. 1). Claimant did not make a report of the accident on the day it occurred (Tr. p. 15). He thinks he mentiond it to a co-employee while changing clothes but produced no corroboration on this point. Claimant testified that he reported it to Shelton the following day and that he thought Shelton was an employee and his supervisor (Tr. pp. 15 & 16). Rohen testified that claimant knew that Shelton was a consultant (Tr. p. 101). Shelton denied that claimant reported the incident to him. Furthermore, if he had, Shelton would have informed the claimant that he was not an employee and that claimant should report it to Rohen (Tr. pp. 86 & 87). Rohen testified that for quite some time claimant did not have a supervisor and claimant came to him for just about everthing (Tr. p. 100).

Claimant testified that he asked David Fuehrer if he could go see the doctor. Claimant testified that he was told that since the company did not have an injury report they would not let him go to the company doctor. It should be noted that claimant did not contact the office himself which he could have done if he chose to do so (Tr. pp. 40 & 41). Rohen first learned of the injury when claimant filed his petition in September of 1985. At that time he talked to Fuehrer and Pat, the office girl (Tr. pp. 92-95). Neither one of them had any recollection or record of any injury to claimant on January 17, 1985 (Tr. pp. 101 & 102). Rohen testified that claimant came into the office and talked to him practically every morning

000338

about what he was going to do or to discuss his problems (Tr. pp. 101, 104 & 105). Claimant alleged that he resigned due to his pain, but Rohen testified that claimant did not mention pain or injury to him, but rather indicated that he was going to retire and move to Arizona. The company had a retirement party for claimant when he quit (Tr. pp. 97-99).

Claimant stated that Dr. McCarthy did not give him an adjustment because his injury was too bad. Dr. McCarthy on the contrary said that a manipulative treatment was administered with immediate relief (Jt. Ex. 1). Although Dr. McCarthy recorded the history that claimant gave him, he did not specifically state that the claimant's symptoms were caused by this alleged injury. It is just as likely that the symptoms are the result of the chronic degenerative problems described by Dr. McCarthy in his report. Dr. McCarthy did not find that claimant was either temporarily or permanently impaired but simply indicated that a week of no work would be beneficial. This phrasing indicates that it was optional rather than mandatory (Jt. Ex. 1).

Dr. Blume found that the alleged injury of January 17, 1985 aggravated claimant's thoracic and lumbar preexisting conditions (Jt. Ex. 3 & 4). However, Dr. Blume did not see claimant until over two months after the alleged injury. Dr. Blume did not give a statement declaring that claimant had suffered any temporary impairment or disability which rendered him unable to work. He did not distinguish how much of the permanent impairment rating of 15 to 20 percent was due to the alleged January 17, 1985 injury and how much was due to the preexisting conditions (Jt. Ex. 3 & 4).

Dr. Cotton found no evidence of temporary or permanent impairment or disability from the alleged injury of January 17, 1985. He found that claimant could pursue his usual and customary activities without restriction (Jt. Ex. 6).

Osborne's opinion that claimant was unable to work at all because of mental retardation and physical disability is not supported by the medical evidence from the doctors. Furthermore, it is not a reasonable conclusion considering that claimant voluntarily quit a laboring job that he had held for several years at $7.10 per hour just shortly before he saw Osborne. Neither Dr. McCarthy or Dr. Blume, both doctors of the claimant's own choosing, told him to quit his job (Jt. Ex. 1, 3 & 4).

Claimant's injury reporting as he described it in his testimony was not reasonable. He saw Rohen everyday and never mentioned an injury or back pain. Furthermore, if Shelton was notified of the injury but failed to tell Rohen or the office then claimant should have confronted Shelton and/or protested to the office that he did report the injury to Shelton, but Shelton did not report it to them. However, claimant did not do so.

000339

Defendants pointed out that when it came to reporting important matters such as his resignation, claimant did not tell Shelton, but rather told Rohen direct. Furthermore, Dr. McCarthy said that he told the claimant on March 3, 1985, to see the company medical doctor for approval of medical care (Jt. Ex. 1). However, claimant did not follow Dr. McCarthy's advice or attempt to see a company doctor for approval of further medical care. Instead claimant went to see Dr. Blume on his own without any approval and incurred charges totalling $2,187 for 99 office visits (Jt. Ex. 5). When claimant went to the office in person to give them the return to work slip from Dr. McCarthy on March 13, 1985, it would have been an ideal opportunity to report the injury of January 17, 1985; or to make sure that Shelton had reported it to them; or to reconfirm it if he believed that it had already been reported. Claimant did not explain why he allowed Dr. McCarthy to bill the group insurance carrier if in fact he thought he was entitled to workers' compensation benefits for this claim. For the foregoing reasons it is found that claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained an injury on January 17, 1985. It is gratuitously added that claimant did not sustain the burden of proof by a preponderance of the evidence that the alleged injury was the cause of any temporary or permanent disability.

Defendants did sustain the burden of proof by a preponderance of the evidence that claimant failed to give notice within 90 days as required by Iowa Code section 85.23 and that they did not have actual knowledge of the injury. The injury allegedly occurred on January 17, 1985. The preponderance of the evidence is that the first knowledge that employer had about the injury was when claimant filed his petition on September 20, 1985. Consequently, claimant is not entitled to disability or medical benefits.

## FINDINGS OF FACT

WHEREFORE, based upon the evidence presented, the following findings of fact are made.:

That claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained an injury on January 17, 1985 by slipping on the ice and twisting his back on that date.

That there were no eye witnesses to the incident.

That claimant did not report the injury at the time it occurred to Shelton, the office, or any other supervisor.

That claimant did not report the injury to the plant manager, Rohen, that he saw everday in the office and who directly supervised his work.

That claimant's testimony that he reported the accident to Shelton and Fuehrer was contradicted by evidence of the defendants.

That claimant did not seek medical treatment for the alleged injury of January 17, 1985 until March 5, 1985, which was approximately one and one-half months after the injury allegedly occurred.

The claimant did not follow the admonition of Dr. McCarthy to get approval from the company medical doctor for further care.

Neither Dr. McCarthy and Dr. Cotton found that the alleged injury of January 17, 1985 was the cause of either temporary or permanent disability or impairment.

That Dr. Blume's impairment rating is not entirely clear and was controverted by Dr. McCarthy and Dr. Cotton.

That no doctor recommended that claimant quit his job.

That claimant voluntarily quit his job on March 28, 1987.

## CONCLUSIONS OF LAW

WHEREFORE, based upon the evidence presented and the principles of law previously mentioned, the following conclusions of law are made:

That claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained an injury on January 17, 1985.

That claimant did not sustain the burden of proof by a preponderance of the evidence that the alleged injury was the cause of any temporary or permanent disability.

That claimant did not establish his entitlement to either compensation benefits or medical benefits.

That the defendants did sustain the burden of proof by a preponderance of the evidence that claimant did not give notice as provided by Iowa Code section 85.23 and that they did not have actual knowledge of the injury.

## ORDER

THEREFORE, IT IS ORDERED:

That no amounts are due from defendants to claimant for compensation benefits or medical benefits.

000341

That the cost of this action are taxed to claimant pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 13th day of August, 1987.

Walter R. McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Paul A. Mahr
Attorney at Law
318 Insurance Centre
Sioux City, Iowa 51101

Mr. Michael J. O'Bradovich
Attorney at Law
4535 Leavenworth
Suite 22
Omaha, Nebraska 68106

000342

FILED

DEC 23 1987

BEFORE THE IOWA INDUSTRIAL COMMISSIONER IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| LARRY EPPLING, | : | |
| | : | |
| Claimant, | : | File No. 816146 |
| | : | |
| vs. | : | |
| | : | A R B I T R A T I O N |
| IBP, INC., | : | |
| | : | |
| Employer, | : | D E C I S I O N |
| Self-Insured, | : | |
| Defendant. | : | |

## INTRODUCTION

This is a proceeding in arbitration brought by Larry Eppling against IBP, Inc., his self-insured former employer. Claimant alleges that he sustained a hernia injury, either directly or as an aggravation of a preexisting hernia, while in the employ of IBP, Inc., on or about February 13, 1985. Claimant seeks compensation for temporary total disability, payment of medical expenses and mileage.

The evidence in this case consists of testimony from Larry Eppling, Elaine Eppling, Robert Sorenson and Maxine Brisbois. The evidence also consists of joint exhibits 1 through 23.

## ISSUES AND STIPULATIONS

The issues identified by the parties are: Whether claimant sustained an injury which arose out of and in the course of his employment; whether the alleged injury is a cause of any temporary disability; and, determination of the employer's liability under section 85.27. The employer affirmatively asserts that claimant failed to give notice of injury as required by section 85.23.

## SUMMARY OF EVIDENCE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case even though it may not necessarily be referred to in this decision.

When receiving the evidence in this case, the undersigned observed the appearance and demeanor of both claimant and his wife. The demeanor they exhibited was in line with what the undersigned would have expected from individuals approximately half the age of claimant and his wife. They appeared to be

extremely immature. The undersigned suspected that they were affected by severe learning disabilities. At the conclusion of the hearing, the undersigned was informed by claimant's counsel that claimant and his wife are both affected by a condition which lay individuals commonly refer to as retardation. When considering the evidence in this case, most of the apparent inconsistencies and conflicts were considered to be manifestations of their underlying disabilities, rather than intentional misrepresentation or deceit.

Claimant began working for IBP, Inc. on January 25, 1985, shortly after he had been given a preemployment physical. He worked on the ham trim for several days and became a leaf lard puller on February 9, 1985. On that day, he went home from work early due to diarrhea and vomiting (exhibits 1 and 2). On February 11, 1985, claimant returned to work and worked pulling leaf lard until February 13, 1985. On February 13, 1985, claimant went to the hospital emergency room with complaints of upper abdominal pain, which had been present for approximately two weeks (exhibit 4). The diagnostic tests showed claimant to have some mild irritability of the duodenal bulb of his gastro-intestinal tract (exhibit 5) and a small tear in the proximal stomach (exhibits 7, 9 and 10).

Claimant's employment was terminated on or about February 25, 1985, even though Thomas L. Duncan, M.D., had indicated that claimant's absenteeism from work was justified medically (exhibit 9).

Claimant was subsequently seen by David VanGorp, M.D., on June 28, 1985. Dr. VanGorp diagnosed claimant as having a large right inguinal hernia. Claimant was referred to K. M. Johannsen, M.D., who performed a surgical repair of the hernia on July 5, 1985 (exhibit 12). Claimant recovered from the surgery uneventfully and was released to return to work without restrictions effective August 19, 1985 (exhibits 14 and 15).

Claimant testified that the thirteenth of February is the day when he was hurt. He testified that he experienced pain, mostly in his chest, and described it as a kind of pain that he had not previously felt at any time in his life. Claimant testified that he treated with Thomas L. Duncan, M.D., for quite a while, but that his pain continued to worsen to the extent that he sought treatment from K. O. Garner, M.D., in Cherokee, Iowa. When claimant was refused hospitalization at Cherokee, he saw Dr. VanGorp. Claimant testified that the pain for which he went to see Dr. VanGorp was the same pain that had started while he was pulling leaf lard.

Claimant testified that Dr. Duncan had examined his chest and stomach, but had not examined his groin area. Claimant testified that he had not complained to Dr. Duncan of pain in the groin area and that he was not, at that time, having pain in

his groin. Claimant testified that the bulge in his groin had not been present when he had physical examinations prior to the time he began working for IBP. He testified that no one else in his family has had a hernia. Claimant related that the hernia operation relieved his pain.

Elaine Eppling, claimant's wife of three years, testified that claimant had never had stomach pain before he began working for IBP and that the treatment from Dr. Duncan did no good. Mrs. Eppling testified that, after February 13, 1985, claimant complained of pain all the time and that it did not go away. She related that the continuing pain led them to Dr. VanGorp.

Robert Sorenson, safety director at IBP, Inc., testified that the leaf lard is removed from the inside of a hog carcass by reaching down to a height of approximately mid-thigh level and then pulling up. He stated that the lard weighs approximately one to two pounds and that pulling it is like lifting an eight- to ten-pound weight. Sorenson denied having knowledge of anyone ever developing a hernia while pulling leaf lard.

Maxine Brisbois, the IPB plant nurse during 1985, testified that a typical preemployment physical consists primarily of asking questions and testing individuals' hands, but that it does not involve any objective tests for hernias.

Regarding the cause of claimant's hernia, Dr. Johannsen stated, "I have no knowledge of any injury that would have caused his hernia" (exhibit 16). Dr. Johannsen indicated that the origin of an inguinal hernia is considered to be hereditary and that, while heavy lifting and straining can hasten the development of the hernia, the underlying basis is a hereditary weakness (exhibit 13). Dr. VanGorp also indicated that a hernia is an inherited defect and that it was not a direct result of claimant's employment (exhibit 12).

## APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on or about February 13, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 13, 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).

For an injury to arise out of employment, the employment must be a proximate cause of the injury. A cause is proximate if it is a substantial factor in bringing about the result; in need not be the only cause. Blacksmith v. All American, Inc., 290 N.W.2d 348 (Iowa 1980).

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 only references in claimant's treatment records from February, 1985 speak of claimant's upper abdomen. At no point is there any reference to his groin area as a source of pain. Dr. VanGorp and Dr. Johannsen do not relate the hernia to claimant's employment. Claimant's burden of proof is to show a probability, rather than a mere possibility. In this case, it is possible that his condition was misdiagnosed by Dr. Duncan. It is possible that the employment either caused the hernia to develop or aggravated and worsened a preexisting hernia. The record lacks sufficient definiteness concerning the timing and sequence of events to support a finding that claimant's hernia is an injury which arose out of and in the course of employment with IBP, Inc. It will not be found, under the record made, that Dr. Duncan misdiagnosed the condition. The record indicates that the condition continued to worsen after claimant left employment with IBP, Inc. It is therefore concluded that claimant has failed to prove, by a preponderance of the evidence, that he sustained injury which arose out of and in the course of his employment with IBP, Inc. on or about February 13, 1985.

FILED
DEC 4 1987

## FINDINGS OF FACT

1. Larry Eppling suffered from a hernia which was diagnosed on June 28, 1985 and which was surgically repaired on July 5, 1985.

2. It cannot be determined, from the evidence presented in this case, whether or not any of claimant's work activities with IBP, Inc. were a substantial factor in either causing or aggravating the hernia.

## CONCLUSIONS OF LAW

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

2. Claimant has failed to prove, by a preponderance of the evidence, that he sustained injury which arose out of and in the course of his employment with IBP, Inc. on or about February 13, 1985.

## ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding.

IT IS FURTHER ORDERED that each party pay the costs incurred by that party in participating in this proceeding.

Signed and filed this 23rd day of December, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Marvin Miller
Attorney at Law
216 West Main Street
Cherokee, Iowa 51012

Mr. Marlon Mormann
Attorney at Law
IBP, Inc.
P.O. Box 515, Hwy. 35
Dakota City, Nebraska 68731

000347

FILED

DEC 4 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| JAMES FERRELL,<br><br>Claimant,<br><br>vs.<br><br>J. I. CASE COMPANY,<br><br>Employer,<br>Self-Insured,<br>Defendant. | : | File No. 830446<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by James Ferrell, claimant, against J. I. Case Company, employer, hereinafter referred to as Case, which is self-insured, for workers' compensation benefits as a result of alleged injury on April 16, 1985. On October 5, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of the hearing.

The parties have submitted a pre-hearing report of contested issues and stipulations which was approved and accepted at the time of hearing as a part of the record in this case. Oral testimony was received during the hearing from claimant. The exhibits received into evidence at the hearing are listed in the pre-hearing report. According to the pre-hearing report, the parties have stipulated to the following matters:

1. Claimant's rate of weekly compensation, in the event of an award of weekly benefits from this proceeding, shall be $382.50 per week.

2. Claimant is seeking temporary total disability or healing period benefits only for the period of April 17, 1985 through October 20, 1985 and the defendant agrees that claimant was not working during this time. Permanant partial disability benefits, if awarded herein, shall begin on October 21, 1985.

3. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

## ISSUES

The parties submitted the following issues for determination in this proceeding:

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

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

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

## SUMMARY OF THE EVIDENCE

The following is a summary of the evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision.

Claimant testified that he has worked for Case continually for almost 15 years as a welder. Claimant continues to work for Case, but has been transferred to the Burlington, Iowa plant where he remains a welder at Case at the present time.

The facts surrounding the work injury are not in real dispute. Claimant testified that, on April 16, 1985, while reaching into a tub from a bent-over position to pick up a 30-40 pound door, he felt a "pop" in his lower back, felt immediate pain and was unable to move his legs for a few seconds. After regaining control of his legs, he reported to the plant nurse, who advised him to see his own doctor. Claimant worked the rest of the day welding lighter objects. Claimant said he sought medical treatment the next day from William D. Reinwein, M.D., a board-certified orthopaedic surgeon.

Claimant had seen Dr. Reinwein the day before the alleged injury for further treatment following an auto accident on December 28, 1984, after which claimant had complained of chronic upper and lower back pain. Claimant had been initially treated after this accident at the hospital and was released with continuation of care thereafter by claimant's long-time chiropractor, T. J. Kennedy, D.C. The adjustment failed to improve claimant's condition and he then sought out Dr. Reinwein on his own who, after his examination on April 15, 1985, ordered a CT scan for what Dr. Reinwein diagnosed as a lumbar radiculopathy. According to Dr. Reinwein's report of June 9, 1986, claimant's symptoms, as of April 15, 1985, consisted of continued presence

of low back pain radiating into the left lower extremity. Claimant had complained to him that, despite chiropractic adjustments, there was no improvement in his symptoms since the auto accident.

Claimant testified that he did not have leg pain before the April 16, 1985 incident. Dr. Reinwein did note an increase in symptoms upon his next examination of claimant on April 27, 1985. Claimant had indicated that he returned to Dr. Reinwein immediately after the incident. According to Dr. Reinwein, on April 27, 1985, claimant exhibited a marked amount of spasm and other findings suggestive of a recent injury to the low back. When claimant returned on April 27, 1985 after the alleged work incident herein, the CT scans, which were actually conducted on April 19, 1985, revealed a herniated disc at the L5,S1 level and some bulging at the L5 and L4 levels of claimant's spine. Dr. Reinwein continued treating claimant conservatively until a second CT scan, in June, 1985, indicated "possible extrusion of the disc material...into the canal." In July, 1985, Dr. Reinwein performed surgery on claimant consisting of a discectomy of the L4,L5 and L5,S1 discs and a laminectomy at those levels. According to Dr. Reinwein, claimant's left leg pain ended after the surgery and claimant made substantial improvement until he returned full-time to his welding job at Case on October 21, 1985, without work restrictions imposed upon his physical activities. Claimant testified that he was advised by Dr. Reinwein to not lift over 30 pounds, but did not advise Case of this restriction for fear of losing his job.

At the hearing, claimant complained of continuing pain in his low back, especially after performing physical activities such as repetitive lifting of 40-50 pounds and repetitive bending at the waist. Claimant testified that he now has a limited range of motion of his torso and demonstrated this limited range at the hearing. Claimant complained of pain after prolonged standing, sitting or walking. Claimant described several heavy tasks in his current job which he has difficulty performing or cannot do at all. Claimant, however, is able to adjust at the present time to his physical limitations and he continues in this job. Claimant is not longer receiving treatment from Dr. Reinwein.

Dr. Reinwein rated claimant as suffering from a 15% permanent partial impairment to the whole man. Dr. Reinwein causally connected this impairment to both the December, 1984 auto accident and the April 16, 1985 incident at work. However, Dr. Reinwein, in his reports, made no attempt to describe the extent to which the April 16, 1985 injury contributed to the problem. He mentioned the history of the auto accident, but none of claimant's prior back injuries. Also, Dr. Reinwein made no

attempt to apportion his rating between the two injuries. In June, 1987, claimant was evaluated by F. Dale Wilson, M.D., a semi-retired "practicing surgeon." Claimant related to him a history of occasional backaches for three or four years prior to the December, 1984 auto accident. Dr. Wilson rated claimant as suffering from a total permanent partial impairment of 29% due to the April 16, 1985 work incident. Despite claimant's prior back problems, Dr. Wilson stated in his deposition testimony that the April, 1985 injury was the "final blow" which precipitated claimant's problems.

Actually, claimant has a much longer history of back problems than is reflected in the reports of either Dr. Reinwein or Dr. Wilson. In October, 1977, claimant was off work for approximately three months following the onset of a sore neck and low back pain for which claimant received chiropractic treatments. In November, 1978, claimant was off work for approximately 11 days for "back strain" and again received chiropractic treatments. In 1979, claimant missed approximately a week of work for low back pain after shoveling snow and likewise received chiropractic treatments. In October, 1980, claimant was involved in an auto accident and suffered severe upper back and neck strain for which he received chiropractic treatments from Dr. Kennedy. In October, 1982, claimant suffered cervical and upper thoracic subluxations and received treatment from Dr. Kennedy. In June, 1984, claimant was diagnosed by Dr. Kennedy as suffering from acute low back strain following a volleyball injury. Claimant testified that he always recovered from these injuries and was able to return to work without restrictions. According to his employee health record, while at work claimant complained of back or low back pain as opposed to neck pain in January, 1978, May, 1978, November, 1978, September, 1981, and September, 1984.

Dr. Reinwein did not mention any of these prior injuries or complaints in his reports and Dr. Wilson testified in his deposition that claimant did not mention any of these prior injuries or back problems to him, except for occasional backaches four years prior to the alleged work injury. After being fully informed as to claimant's prior problems, Dr. Wilson stated, in his deposition, that his causal connection opinion in his report was based upon the history presented to him at that time and that he would now need more information about claimant's condition prior to April 16, 1985 before he could render another opinion.

Claimant is 33 years of age and a high school graduate. Claimant has apparently worked for Case most of his working life. In order to become a welder, claimant successfully completed a vocational education course in welding. According to Dr. Wilson's report, claimant is only a few hours short of receiving an "associate degree." Claimant has no plans at the present time

other than to remain at Case. However, claimant complains that his current work is bothersome to him and he feels that vocational rehabilitation may be necessary in the future.

APPLICABLE LAW AND ANALYSIS

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960) and cases cited therein.

Claimant's testimony as to the facts and circumstances surrounding the specific events of April 16, 1985 are uncontroverted and substantiated by histories he gave to his physicians. Dr. Reinwein found specific evidence of a recent back injury after the incident. Consequently, there is little question that claimant suffered some sort of injury to his lower back on April 16, 1985.

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. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 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, there is little question that claimant has a permanent disability to his body as a whole as a result of his low back condition. Although the ratings differ among the medical experts, the fact that claimant has a permanent partial impairment to the body as a whole which restricts his physical activity at the present time is uncontroverted. This permanent partial impairment is the result of the herniation of two discs in claimant's lower spine and resultant fusion surgery.

The fighting issue in this case is the causal connection of claimant's permanent partial impairment and current chronic difficulties to the April 16, 1985 work injury in light of claimant's past history of back complaints and the December, 1984 auto accident. Two physicians have rendered opinions in this matter. Dr. Reinwein opined that claimant's impairment rating is causally connected to both the auto accident and the work injury. Unfortunately, his report discussed only the December, 1984 accident. No mention is made of claimant's long history of chiropractic treatments from Dr. Kennedy. Likewise, Dr. Wilson was not aware of specific injuries and appeared to retreat from his original causal connection opinion during cross-examination by defense attorneys. Claimant contended at hearing that he did not have leg pain before April 16, 1985, but this was clearly refuted by Dr. Reinwein, who stated in his June 9, 1986 report that claimant continued to have leg pain after the accident, which led to his examination the day before the alleged work injury.

In the final analysis, we are left only with the causal connection opinion of Dr. Reinwein. He opined that what impairment he found was caused by both the auto accident and the work

injury. Unfortunately, he made no further explanation. Given the history of chronic problems on the day before the work injury, this type of opinion is simply not enough to sustain a finding that the injury was a significant factor in causing claimant's current problems. Had Dr. Reinwein mentioned all of claimant's prior injuries and had he more clearly pointed out the extent to which the second injury contributed to the problem, his opinions would be given greater weight, but this is not the case.

As claimant has not shown that the work injury was a cause of the herniated disc problems, he likewise is not entitled to temporary total disability or healing period benefits. The period of temporary disability precipitated by the fusion surgery was caused by these herniated disc problems.

## FINDINGS OF FACT

1. On April 16, 1985, claimant was in the employ of Case as a welder.

2. On April 16, 1985, claimant suffered an injury to his low back which arose out of and in the course of his employment with Case. Claimant suffered severe pain while bending over at work in an attempt to lift a 30-40 pound door.

3. Claimant had prior low back difficulties before April 16, 1985 and, specifically, a serious injury to his low back in an auto accident approximately four months before the work injury.

4. Claimant suffers from a permanent partial impairment as a result of chronic low back difficulties rated by claimant's physicians as constituting a 15-29% permanent partial impairment to the body as a whole.

5. It could not be deciphered from the greater weight of the evidence presented whether the April 16, 1985 work injury was: 1) a cause of permanent impairment, 2) only a brief temporary aggravation of a prior existing low back injury which occurred as a result of an auto accident four months previously or, 3) only a temporary aggravation of long-standing prior existing low back condition.

## CONCLUSIONS OF LAW

1. Claimant has failed to establish, by a preponderance of the evidence, entitlement to disability benefits.

ORDER

IT IS THEREFORE ORDERED that claimant shall take nothing from this proceeding.

IT IS FURTHER ORDERED that claimant shall be assessed the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 4th day of December, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Allan Hartsock
Attorney at Law
Rock Island Bank Building
Fourth Floor
P.O. Box 428
Rock Island, Illinois 61201

Mr. Larry L. Shepler
Attorney at Law
600 Union Arcade Building
111 East Third Street
Davenport, Iowa 52801

1402.30
Filed December 23, 1987
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| LARRY EPPLING,<br><br>Claimant,<br><br>vs.<br><br>IBP, INC.,<br><br>Employer,<br>Self-Insured,<br>Defendant. | : | File No. 816146<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

1402.30

Claimant failed to produce evidence sufficient to establish that his hernia was an injury which arose out of and in the course of employment.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| THOMAS FINGALSEN,<br><br>Claimant,<br><br>vs.<br><br>LEHIGH PORTLAND CEMENT CO.,<br><br>Employer,<br><br>and<br><br>THE TRAVELERS INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 797497<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>FILED<br><br>NOV 4 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

STATEMENT OF THE EVIDENCE

This is a proceeding in arbitration brought by Thomas Fingalsen, claimant, against Lehigh Portland Cement Co. (Lehigh), employer, and The Travelers Insurance Company, insurance carrier, for benefits as a result of an alleged injury of May 21, 1985. The alleged injury date of May 21, 1985 was assigned file number 797497. A hearing was held in Mason City, Iowa, on April 2, 1987 for file 797497 in which claimant alleged a low back injury. Claimant has alleged in file number 661945 that he sustained a back injury on January 30, 1981. A memorandum of agreement is on file in number 661945.

The record consists of the testimony of claimant and Marian S. Jacobs; claimant's exhibits 1, 2 and 3; and defendants' exhibit A. Claimant filed a letter brief on April 16, 1987.

The parties stipulated that claimant's weekly rate of compensation is $329.62; that claimant was off work from May 21, 1985 through May 31, 1986; and that permanency benefits, if awarded, would commence on June 1, 1986.

ISSUES

The contested issues are:

1) Whether claimant received an injury on May 21, 1985 that arose out of and in the course of claimant's Lehigh employment;

2) Whether there is a causal relationship between the alleged injury of May 21, 1985 and claimant's asserted disability; and

3) Nature and extent of disability. Claimant asserts the odd-lot doctrine in this regard.

SUMMARY OF THE EVIDENCE

Claimant testified that he was born on November 23, 1940. He graduated from high school in 1959 and characterized himself as an average student. He mentioned that he has served in the U.S. Air Force.

Claimant testified he started working for Lehigh on August 26, 1969. His starting wage at Lehigh was $2.78 per hour. Claimant separated from Lehigh in August 1985 and was making $13.43 at the time of his separation. Claimant described the various job functions he performed while employed at Lehigh. He stated that jobs are posted at Lehigh and they are obtained on a seniority basis.

Claimant testified that on May 21, 1985, he experienced low back pain after positioning or moving a fan at work. He told his foreman about this back injury and then saw a doctor. Exhibit 1, page 3, documents he saw a doctor in late May 1985. Claimant testified that on May 24, 1985, he saw a company doctor. Claimant was sent back to work on light duty. Claimant saw the company doctor again on May 31, 1985. Claimant was ultimately given a back brace at Mercy Hospital. On June 12, 1985, the company doctor took claimant off work. The company doctor then referred claimant to S. J. Laaveg, M.D. Claimant first saw Dr. Laaveg on July 22, 1985. (Ex. 1, p. 41) Dr. Laaveg did an examination and took a history regarding the injury of May 21, 1985. Claimant was told by Dr. Laaveg not to return to work at Lehigh. Claimant has been prescribed antidepressant medication by J. K. Coddington, M.D. In August 1985, Dr. Laaveg thought claimant could return to light duty; however, claimant's back bothered him "quite a bit" when he attempted to return to work. Claimant tried to work with and without a back brace. Claimant was hospitalized for a myelogram in November 1985. (Ex. 1, p. 56)

Claimant testified that he was released by Dr. Laaveg to return to work on February 14, 1986 to do light duty work, but no such work was available given his restrictions. (Ex. 1, p. 62) Claimant then stated his medical restrictions. Claimant testified that he left Lehigh on August 16, 1985. In the fall of 1986, claimant went to a vocational rehabilitation service. Claimant sought retraining through the Job Training Partnership Act. (Ex. 2, pp. 2-6) After separating from Lehigh, claimant did snow removal work. Claimant testified that he does not believe he can perform any job at Lehigh because all the jobs at Lehigh

have labor "attached to them." Claimant gets a disability pension from Lehigh in the amount of $450 per month. Claimant got his first disability pension check in September 1986. Claimant described the "very good" fringe benefits at Lehigh.

Claimant described his current back condition as causing daily pain and that the weather affects his back. Claimant is still receiving medical treatment. Claimant is also receiving medical attention because of problems with depression. He stated during the last few months his depression has gotten worse. Claimant has been attempting to secure employment driving a truck for a private owner-operator hauling sand, gravel or fertilizer; this would pay approximately $6 per hour and would involve no fringe benefits. Claimant had been denied social security disability benefits.

Claimant testified on cross-examination that he likes beer and drinks three to four bottles of beer a day. Claimant testified that he does not think he has a problem with alcohol. Claimant testified that he has not sustained any other injuries after leaving Lehigh. However, claimant was questioned about an auto accident in which he injured his shoulder and a tooth. He stated that he did not reinjure his back in this auto accident. Claimant has not had back surgery.

On redirect examination, claimant characterized his attendance and work record as good to excellent. Claimant testified that on July 14, 1986, he had an appointment with a physician in Des Moines. Claimant testified that the outcome of the report generated by this examination would determine whether or not he could return to work at Lehigh. In February 1986, Dr. Laaveg released claimant to return to work, but Lehigh did not have any work available for him at that time due to his medical restrictions.

Marian S. Jacobs testified that she assists injured workers in finding employment. Jacobs testified that she evaluates job opportunities and then assists people to find specific jobs. Jacobs testified that she interviewed claimant for one hour and learned of his medical limitations. Jacobs then described the various exertional job classifications as light work, medium work, heavy work, and very heavy work. She then characterized jobs as unskilled, semi-skilled, and skilled. She described claimant's past work activities and categorized them as unskilled and semi-skilled. Jacobs described her understanding of claimant's medical limitations imposed by Dr. Laaveg. Jacobs stated her opinion that claimant could not do his "past relevant work" given his medical restrictions imposed by Dr. Laaveg. Jacobs testified that she has reviewed defendants' exhibit A. Jacobs then described the various positive and negative factors operating in claimant's case regarding his securing future employment.

000358

Jacobs testified as to possible jobs for claimant and stated he could probably work at a Walmart stocking shelves part of the day. She stated this would pay about $3.65 per hour and that it would probably be a twenty-hour week. She stated that claimant could perhaps work for Winnebago Industries making $5.40 per hour. Jacobs stated that claimant could perhaps do light assembly work at Alexanders in Mason City making $4 per hour for a forty-hour week. Jacobs described other jobs that claimant could perhaps do including some type of driving job, night clerk job, clerk in a convenience store, and a nonunion security job of some sort. When asked if there is a regularly stable job market for claimant's services in the Mason City area, Jacobs replied that there are probably jobs for claimant in the Mason City area, but could not say how often these jobs would become available. Jacobs testified that forty-hour per week jobs are not available for claimant. Jacobs was asked if claimant could reasonably compete for employment given his orthopedic problems. Jacobs replied that he probably can compete. Jacobs was then asked to take into account claimant's psychological problems. Jacobs replied that the impact of the psychological problem would depend on the degree of the problem.

Exhibit 1, page 3, describes a fall in July 1979. Exhibit 1, page 5, describes claimant's injury of January 30, 1981 (the injury alleged in file 661945). Exhibit 1, page 14, reads in part regarding the injury of January 30, 1981:

> The patient's symptoms in his cervical spine area are improving. He is presently in a state of healing. I agree that the progress to this date is slow. I do not think that there is permanent impairment and I would expect him to gradually improve with time. I am scheduled to see him back in approximately a month as you can see and at that time I will better be able to project for you a work date return. (Emphasis added.)

Exhibit 1, page 29, reads in part under the April 29, 1982 entry: "A final physical impairment rating has been done, 15% of the cervial [sic]." Exhibit 1, page 37, reads in part under the June 7, 1985 entry: "Recheck - since the last visit he states that his low back pain has subsided completely. He is able to do most of his usual daily activities without pain or discomfort. The numbness in the left leg has resolved completely also. He denies pain, numbness, weakness, tingling into either leg now." Exhibit 1, page 67 (dated April 11, 1986), contains a seven percent whole body impairment rating because of claimant's back; this rating was given by Dr. Laaveg. Exhibit 1, page 70 (dated April 16, 1986), contains claimant's permanent weight restrictions. Exhibit 1, page 74 (dated July 15, 1986), contains a three to four percent whole body impairment rating from David J. Boarini, M.D. Exhibit 1, page 75 documents that claimant has

not worked on a regular basis since May 1985. Exhibit 1, page 83, states that alcoholism may be claimant's problem. On Exhibit 1, page 87 (dated March 3, 1987), Dr. Laaveq states that his seven percent whole body impairment is a result of the work incident of May 21, 1985.

Exhibit 2, page 4, describes "two separate disabling conditions, one involving his lower back, and the other involving his neck." It states that claimant's primary problem is his back condition.

## APPLICABLE LAW AND ANALYSIS

I. Claimant has the burden of proving by a preponderance of the evidence that he received an injury on May 21, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

I am convinced from the evidence of record that claimant sustained a work-related back injury on May 21, 1985. Claimant was a credible witness at hearing.

II. The claimant has the burden of proving by a preponderance of the evidence that the injury of May 21, 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).

A finding of fact will be made that claimant did not sustain any permenant partial impairment as a result of his work injury of January 30, 1981 (file 661945). However, it will be found that the work injury of May 21, 1985 did cause some permanent impairment. (Exhibit 1, p. 87) Dr. Laaveq's opinion in this regard is determined to be persuasive. 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; the 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 may be con-

sidered. Both parties may bring all this information to the attention of the factfinder as either supporting or weakening the physician's testimony and opinion. All factors go to the value of the physician's testimony as a matter of fact not as a matter of law. Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

III. As claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

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

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

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985); Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

First of all, it is determined that claimant is not an odd-lot worker. Ms. Jacobs' testimony has persuaded me that claimant has not made a prima facie showing under Guyton v. Irving Jensen Co., 373 N.W.2d 101, 103-06 (Iowa 1985).

The Iowa Supreme Court stated in Guyton v. Irving Jensen Co., 373 N.W.2d 101, 103-06 (Iowa 1985):

> Industrial disability means reduced earning capacity. Bodily impairment is merely one factor in gauging industrial disability. Other factors include the worker's age, intelligence, education, qualifications, experience, and the effect of the injury on the worker's ability to obtain suitable work. See Doerfer Division of CCA v. Nicol, 359 N.W.2d 428, 438 (Iowa 1984). When the combination of factors precludes the worker from obtaining regular employment to earn a living, the worker with only a partial functional disability has a total industrial disability. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980).
>
> ....
>
> The question is the extent to which the injury reduced Guyton's earning capacity. This inquiry cannot be answered merely by exploring the limitations on his ability to perform physical activity associated with employment. It requires consideration of all of the factors that bear on his actual employability. See New Orleans (Gulfwide) Stevadores v. Turner, 661 F.2d 1031, 1042 (5th Cir. 1981) (are there jobs in the community that the worker can do for which he could realistically compete?)....

In determining the correct rule of law to be

applied to this record we must address Guyton's contention that Iowa recognizes the "odd-lot doctrine." He argued this contention before the commissioner and in district court. The commissioner believed that doctrine is implicit in the industrial disability standard enunciated in our cases, and we agree. We now formally adopt the doctrine.

Under that doctrine a worker becomes an odd-lot employee when an injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. An odd-lot worker is thus totally disabled if the only services the worker can perform are "so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist...." Lee v. Minneapolis Street Railway Co., 230 Minn. 315, 320, 41 N.W.2d 433, 436 (1950). A person who has no reasonable prospect of steady employment has no material earning capacity. Id. at 320, 41 N.W.2d at 436-37. This concept was recognized in McSpadden, 288 N.W.2d at 192 ("a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief should be granted"). It is recognized in virtually every jurisdiction. See 2 A. Larson, The Law of [Workers'] Compensation, § 57.51 at 10-164-24 (1983). The evidence in the present case would permit the finder of fact to find Guyton is an odd-lot employee.

....

We adopt the burden of proof allocation enunciated in Professor Larson's statement of the general rule. We emphasize that this rule merely allocates the burden of production of evidence. It is triggered only when the worker makes a prima facie case for inclusion in the odd-lot category:

> It is normally incumbent upon an injured [worker], at a hearing to determine loss of earning capacity, to demonstrate a reasonable effort to secure employment in the area of... residence. Where testimony discloses that a reasonable effort was made, the burden of going forward with evidence to show the availability of suitable employment is on the employer and carrier.

Employers Mutual Life Ins. Co. v. Industrial Commission, 25 Ariz. App. 117, 119, 541 P.2d 580, 582 (1975). The evidence allocation is justified

000363

on the ground that the employer ordinarily is in a better position than the worker to determine whether the labor market offers opportunities to persons in the odd-lot category. See Ham v. Chrysler Corp., 231 A.2d 258, 262 (Del. 1967). The overriding reason for requiring evidence of employment opportunities is because there is no presumption that merely because the worker is physically able to do certain work such work is available. See Niles Police Dept. v. Industrial Commission, 83 Ill.2d 528, 534-345, 416 N.E.2d 243, 246 (1981). (Emphasis supplied)

I am convinced, however, that claimant will not be able to return to full-time employment as a laborer. Claimant is in his mid-forties and has suffered a significant loss of earning capacity. Taking all appropriate factors into account, it is determined that claimant's industrial disability is 35 percent. Claimant's psychological problems were taken into account in making this determination; it is concluded that these problems did not effect claimant's loss of earning capacity.

FINDINGS OF FACT

1. Claimant was born on November 23, 1940.

2. Claimant is a high school graduate.

3. Claimant injured his back on May 21, 1985 while working for Lehigh and this injury caused some permanent partial impairment.

4. On January 30, 1981, claimant injured his back, but this injury did not cause any permanent partial impairment.

5. Claimant is not an odd-lot employee.

6. Claimant is well motivated to find full-time employment.

7. Claimant is presently receiving a disability pension from Lehigh in the amount of $450 per month.

8. Claimant has not secured full-time employment after his separation from Lehigh.

9. Claimant's industrial disability is 35 percent.

10. Claimant's stipulated rate of weekly compensation is $329.62.

000364

CONCLUSIONS OF LAW

1. Claimant established by a preponderance of the evidence that on May 21, 1985 he sustained an injury which arose out of and in the course of his Lehigh employment and also established by a preponderance of the evidence that the injury of May 21, 1985 caused some whole body permanent partial impairment.

2. Claimant established that he is entitled to one hundred seventy-five (175) weeks of permanent partial disability benefits based on an industrial disability of thirty-five percent (35%) with such benefits commencing on June 1, 1986. Defendants are entitled to a credit for benefits already paid.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at a rate of three hundred twenty-nine and 62/100 dollars ($329.62) with such benefits commencing on June 1, 1986.

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

That defendants be given credit for benefits already paid.

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

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

Signed and filed this 4th day of November, 1987.

T. J. McSweeney

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Robert W. Pratt
Attorney at Law
1913 Ingersoll
Des Moines, Iowa 50309-3320

Mr. Mark A. Wilson
Attorney at Law
P.O. Box 1953
30 Fourth Street NW
Mason City, Iowa 50401

000365

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| VIOLA FUGARINO, | : | |
| Claimant, | : | File No. 754230 |
| vs. | : | |
| IOWA CITY COMMUNITY SCHOOLS, | : | A R B I T R A T I O N |
| Employer, | : | D E C I S I O N |
| and | : | |
| EMPLOYERS MUTUAL COMPANIES, | : | |
| Insurance Carrier, Defendants. | : | |

FILED
JUL 16 1987
IOWA INDUSTRIAL COMMISSIONER

## INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Viola Fugarino, against her employer, Iowa City Community Schools, and its insurance carrier, Employers Mutual Casualty Companies, to recover benefits under the Iowa Workers' Compensation Act, as a result of an injury sustained October 20, 1983. This matter came on for hearing before the undersigned deputy industrial commissioner in Des Moines, Iowa, on April 21, 1987. A first report of injury was filed January 10, 1984. The parties stipulated that claimant has been paid 85 weeks of temporary total disability from November 7, 1983 to June 23, 1985, and that claimant has been paid ten weeks of permanent partial disability. The record was considered fully submitted at close of hearing.

The record in this proceeding consists of the testimony of claimant, of Joseph Fugarino, and of Patricia McCollom, as well as of defendants' exhibits 1 through 25.

## ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant's rate of weekly compensation is $116.50; that claimant received an injury on October 20, 1983 which arose out of and in the course of her employment; that that injury is causally related to temporary total disability; and that the commencement date for any permanent partial disability award is June 24, 1985. Issues remaining to be decided are:

1) Whether a causal relationship exists between the injury claimed permanent partial disability or claimed permanent al disability; and

2) Whether claimant is entitled to benefits and the nature extent of such benefit entitlement, including the related stion of whether claimant is an odd-lot worker under the ton doctrine.

REVIEW OF EVIDENCE

Claimant was born June 2, 1947, is married and has three ldren. She has completed the eleventh grade and has obtained ED. She also has taken, but did not complete, a bookkeeping rse. Claimant has worked as a factory assembly worker, a ck processor at the Iowa Regional Check Processing Center, a puter operator, and a school bus driver for special education dents, as well as department store lingerie clerk before inning work as an educational aide with severe to profoundly ndicapped preschoolers. Claimant initially characterized all her preinjury employment as requiring lifting of thirty to fty pounds or more at times. She indicated that the check ocessing, as well as the computer operator courses, required od math skills. On cross-examination, she agreed that she had aracterized the store clerking and check processing as light rk in her deposition.

Claimant testified that she was injured on October 20, 1983 en she fell backwards in a hallway between the school adminis- tative offices and the nurse's office at approximately 12:45 n. after being tripped by a nine year old emotionally disturbed ild. She reported that she lost consciousness for approximately n to fifteen minutes, but that the child, described as unruly, mained in the hall throughout that time and was laughing when e regained consciousness. Claimant reported that she reported e incident to the school secretary several days after it ppened. She denied that she had ever reported that she fell her left side, that she had struck her left shoulder, or that e had fell on top of the child. Claimant stated that she was tremely nauseous and had headaches and pain on the day follow- g the injury with vomiting and vision problems, as well as iffness and difficulty walking and difficulty getting out of d. She reported that she did not see a physician until seven ys after the incident, however. Claimant testified that she s had no improvement in her condition in the past two and e-half years and that she continues to have severe pain roughout her body as well as severe headaches. She reported at she has increased pain in her neck, back, and hips, and at she has one-sided headaches, occurring either on the left the right side approximately every five to ten days and sting three to five days. Claimant stated that her only lief from these headaches is to lie down and wait them out,

000367

and that they make her nauseous and cause her to vomit. Claimant described her muscles as "like rocks" and stated that she has shooting, stabbing pains in her joint. She reported that she is very weak some days and cannot lift even a toothbrush. Claimant described herself as having balance problems and body tremors which cause her to shake. She reported memory problems, very poor concentration, and using words out of context as well as misspelling words. Claimant self-described as having very limited range of motion and as walking in very short steps. She stated that she felt she was unable to work in any job she had previously held. Claimant reported that she no longer socializes, travels, plays ball, or picnics with her family as she had done preinjury. She reported that she is no longer able to do crafts or hand work on account of tremors. She reports that she cooks when she feels well enough to do so, but otherwise does very little housework and does not grocery shop or balance her checkbook. Claimant testified that she no longer flower gardens or mows her lawn and goes nowhere alone as she fears she will fall. Claimant agreed that she had rode to California in 1985, however. Claimant takes Naprosyn two times daily as well as Extra Strength Tylenol. She reported that she had submitted a $12 charge for Tylenol and a $14 charge for an office business to the Oelwein Valley Practice Clinic. She reported that visit was to permit a refill of her Naprosyn prescription.

Claimant could not recall having a conflict with Dr. Tegler regarding his treatment and recommendations, but agreed that she generally rejected physicians' suggestions that she seek psychiatric help. Claimant testified that she is not adverse to psychiatric treatment, but reported that she had never communicated to the insurer her desire to now seek psychiatric care. She agreed that she rejected an offer of pain center treatment. Claimant denied that she had had family or marital problems in 1984. She agreed that she had seen vocational rehabilitation nurse Patricia McCollom in 1984 and 1985. Claimant stated she has not sought work since then and feels she is not able to work. She reported that she would have told any physician releasing her to work that the physician did not know of what he was talking.

Claimant agreed that the insurer had provided a whirlpool, and exercise bike and payment for fitness center on her request. She stated that if the insurer really cared, the insurer would have stayed on top of things and not left her stranded. She characterized the insurer as "not there for her as it should have been" and stated that she felt neglected.

Joseph Fugarino, claimant's husband since August 1966, corroborated claimant's testimony regarding her pre and post injury physical and emotional condition and her activity restrictions following the injury. He agreed that there have been substantial periods in the couple's marriage in which claimant has not been employed.

Patricia McCollom, a rehabilitation nurse consultation, initially met with claimant and her husband on April 10, 1984 and followed claimant through June 26, 1985. She reported that claimant's husband was present at interviews generally throughout this period, even taking off from work to be present. Ms. McCollom reported that because of claimant's symptoms, she initially suggested a referral to Mayo Clinic for neurological evaluation. She reported that that evaluation was not completed, but that the Mayo physicians suggested psychiatric care for claimant which claimant and her husband resisted. Ms. McCollom then recommended that claimant be referred to W.C. Koenig, M.D., whom Ms. McCollom characterized as a physical medicine and rehabilitation specialist. McCollom stated that she suggested referral to Dr. Koenig as she had felt claimant had symptoms consistent with multiple sclerosis. She reported that Dr. Keonig subsequently diagnosed claimant as having a myofascial pain syndrome, but that tests for multiple sclerosis were negative. Dr. Keonig apparently subsequently referred claimant to Thomas Carlstrom, M.D. Tests of Dr. Carlstrom for arterial venous malformation were negative. Ms. McCollom also arranged for a psychiatric consultation with Michael Taylor, M.D. Ms. McCollum opined it might have been helpful had claimant participated in some of the counseling recommended for her. She reported that claimant had had a decrease in her complaints in the first two months [apparently when she worked with claimant] but that her symptoms had increased as weather had become colder with claimant having observable increased tremors, facial paralysis, and difficulty with speech. Ms. McCollom indicated that she had conducted a job search in the Oelwein area where claimant was then living and had located potential jobs as a cosmetics counter clerk and as a receptionist for claimant. She indicated that during this period, claimant volunteered for one hour per week in parenting classes sponsored by claimant's church.

A clinical note of Wayne Tegler, M.D., of November 9, 1983, reports that claimant stated she was tripped by a handicapped child approximately three weeks ago and fell backwards striking her head, shoulders, arms, left hip, and knee. He reports claimant as having increased pain in the neck and shoulder area and as having aggravated her neck and shoulder pain on the morning of the examination when two youngsters were fighting and she tried to pull them apart. The doctor noted that on examination, claimant appeared to be a little depressed, but in no acute distress. She was ambulating quite well and had some discomfort in the neck and shoulders when she flexed and rotated her head. Claimant had tenderness in the upper cervical dorsal junction. Reflexes were 1/1 with good hand grip and good back range of motion of the back. Dr. Tegler reported on November 22, 1983, that on examination, motion of the entire spine was guarded, but not restricted with crepititis in both shoulders and no scapular grading. He reported that x-rays of the total spine revealed a completely normal skeletal structure with no fractures, no

arthritis, and no congenital abnormalities.

On January 6, 1984, James P. Worrell, M.D., reported that claimant's neck movements were guarded but not really painful. Range of motion of the back was limited. The [back area] was diffusely tender albeit in a rather nonspecific way. Range of motion of the hips and straight leg raising were negative. Arms and legs were strong with normal tone. Claimant was somewhat tremulously with outstretched hands, with the tremor very rapid and of low aptitude. Reflexes were brisk and symmetrical without pathological reflexes. Sensory exam was normal, and hop, gait, Romberg, and tandem were all performed okay. Dr. Worrell reported that claimant is depressed at times, but feels she is more angry than anything else with the anger directed at the injury more than any one thing. The doctor reported that claimant's husband was equally concerned with [her] state, but both were very unwilling to accept a psychiatric cause [for any of her problems]. Dr. Worrell characterized claimant as having a rather severe injury syndrome of rather nonspecific nature and stated there was almost certainly an extremely severe, if not entire, functional overlay to the problem.

G. M. Vandervelde, M.D., reported that a CT scan of the head of March 27, 1984 was negative.

On May 1, 1985, S. M. Cook, M.D., reported that he had last examined claimant on March 11, 1985 and was seeing her approximately every three months. He reported his diagnosis as remaining myofascial, pain syndrome and affective disorder, depressed type, but difficult to control due to intolerance of side effects of antidepressant medications. He then reported claimant remained on Naprosyn 250 mg. BID which allowed her to function at home with limitation to strenuous activities such as vacuuming, lifting heavy objects, and washing windows, etc. On November 28, 1984, Dr. Cook had opined that claimant continued to have symptoms of discomfort and findings of tenderness of the paraspinus musculature of the thoracic spine. In addition, she had prominant symptoms of depression. He reported that claimant's passive-aggressive personaltiy make treating her rather difficult. He anticipated that claimant would continue to have similar problems at varying degrees for years. He stated it was impossible to say that she had suffered any permanent functional impairment as she had been unable to accept or tolerate the recommended treatment. On June 25, 1984, Dr. Cook had diagnosed claimant's problems as possible post traumatic syndrome, possible vascular headaches, rule-out degenerative neurologic disorder, that is, multiple sclerosis, and psychiatric disorder questionable, depressive illness secondary to diagnosis number 1 and number 2. He reported that he could not say with certainty whether her injury caused all of her problems, but that it would not difficult to "describe" many of them to her injury.

arthritis, and no congenital abnormalities.

On January 6, 1984, James P. Worrell, M.D., reported that claimant's neck movements were guarded but not really painful. Range of motion of the back was limited. The [back area] was diffusely tender albeit in a rather nonspecific way. Range of motion of the hips and straight leg raising were negative. Arms and legs were strong with normal tone. Claimant was somewhat tremulously with outstretched hands, with the tremor very rapid and of low aptitude. Reflexes were brisk and symmetrical without pathological reflexes. Sensory exam was normal, and hop, gait, Romberg, and tandem were all performed okay. Dr. Worrell reported that claimant is depressed at times, but feels she is more angry than anything else with the anger directed at the injury more than any one thing. The doctor reported that claimant's husband was equally concerned with [her] state, but both were very unwilling to accept a psychiatric cause [for any of her problems]. Dr. Worrell characterized claimant as having a rather severe injury syndrome of rather nonspecific nature and stated there was almost certainly an extremely severe, if not entire, functional overlay to the problem.

G. M. Vandervelde, M.D., reported that a CT scan of the head of March 27, 1984 was negative.

On May 1, 1985, S. M. Cook, M.D., reported that he had last examined claimant on March 11, 1985 and was seeing her approximately every three months. He reported his diagnosis as remaining myofascial, pain syndrome and affective disorder, depressed type, but difficult to control due to intolerance of side effects of antidepressant medications. He then reported claimant remained on Naprosyn 250 mg. BID which allowed her to function at home with limitation to strenuous activities such as vacuuming, lifting heavy objects, and washing windows, etc. On November 28, 1984, Dr. Cook had opined that claimant continued to have symptoms of discomfort and findings of tenderness of the paraspinus musculature of the thoracic spine. In addition, she had prominant symptoms of depression. He reported that claimant's passive-aggressive personaltiy make treating her rather difficult. He anticipated that claimant would continue to have similar problems at varying degrees for years. He stated it was impossible to say that she had suffered any permanent functional impairment as she had been unable to accept or tolerate the recommended treatment. On June 25, 1984, Dr. Cook had diagnosed claimant's problems as possible post traumatic syndrome, possible vascular headaches, rule-out degenerative neurologic disorder, that is, multiple sclerosis, and psychiatric disorder questionable, depressive illness secondary to diagnosis number 1 and number 2. He reported that he could not say with certainty whether her injury caused all of her problems, but that it would not difficult to "describe" many of them to her injury.

J. M. Kiely, M.D., of the Mayo Clinic, reported on May 31, 1984 that claimant was tremulous and obviously very anxious during examination with considerable local tenderness in the musculoskeletal area on deep palpation. She had some slight limitation of the internal rotation of the right shoulder girdle suggesting a mild tendinitis but the musculoskeletal examination otherwise showed no restriction of motion and no evidence of synovial thickening or intra-articular fluid formation. He reported that an automated version of the Minnesota Multiphasic Personality Inventory was obtained and that the inventory "certainly fits the fact that the patient has a multitude of physical symptoms which seem to be due basically to nervous tension and musculoskeletal stress and strain." He reported that claimant was unable to come up with any obvious precipitating emotional or psychological problems to account for the onset of her symptoms following the injury. He indicated that a Dr. Gordon Moore of Mayo's psychiatry department felt that claimant would benefit from a comprehensive in-patient psychiatric treatment program.

Thomas A. Carlstrom, M.D., admitted claimant to the Iowa Methodist Medical Center from January 28, 1985 through January 30, 1985. On February 12, 1985, he reported that on examination he was unable to find any significant abnormalities which he would describe as organic. He stated claimant appeared depressed and had a generalized tremor which he believed reflected a rather high anxiety level. Detailed motor and sensory examinations were performed with no difficulty whatsoever. Both myelographic and CT scan studies of claimant's head were entirely normal as was an EEG. Dr. Carlstrom reported that he saw no evidence for organic disease in the patient whatsoever, but that there was an extremely significant psychological overlay to all her symptoms. He believed that any regimen would need to include some type of psychiatric or psychological evaluation and treatment which most likely would need to be performed independently and in some type of setting where claimant was separated from family and other influential persons close to her. On March 5, 1985, Dr. Carlstrom opined that claimant had a myofascial injury with an extremely significant psychological component which seemed to be work related. On May 28, 1985, Dr. Carlstrom rated claimant's permanent partial impairment as one to two percent of the body as a whole.

A report of Richard A. Dill, Ph.D., a clinical psychologist, states that on July 12, 1984, claimant was administered portions of the Luria-Nebraska Neuropsycholical Test Battery and received a brief neuropsychological screening. During the assessment interview, claimant did not evidence any significate receptive or expressive deficits and was capable of following three to five set commands without difficulty. She related in a pleasant manner, being cooperative in all the various tests administered to her. There was no evidence of any significant thought or

000371

affective disturbance. She did evidence some blunted affect and was generally unresponsive unless prompted by the evaluator to perform an activity, however. Neuropsychological examination indicated slowing of fine motor activities bilaterally, which became significantly worse as claimant was required to perform more sequential types of activities. She had extreme difficulties performing more complex sequential activities involving both hands and performed much better in a slow manner on unilateral motor tasks. Cognitive assessment indicated that claimant performed in the borderline range on tests requiring abstract reasoning and interpretation of proverbs. She also had difficulty concerning similarities and differences among common objects. Dyscalculia was in evidence on more complex verbal arithmetic tasks. Her estimated full scale IQ score of 99 placed claimant within the average range of intellectual functioning. Memory testing indicated slow acquisition rates of seven word lists and difficult recall of sequential words when an interference was added. There was a significant impairment in both short term and delayed recalls for auditorially presented short stories. Visual memory was grossly intact and reproductions were essentially normal. It was not felt that claimant was suffering from any significant central organic brain deficits. Peripheral deficits were ruled out since claimant's history indicated a decreased, as opposed to an increase, in finding motor tremor activity.

Charles F. Denhart, M.D., interpreted brain stem auditory evoked response and visual evoked response examinations of July 11, 1984 as normal.

Vernon P. Varner, M.D., saw claimant on October 9, 1985. On October 15, 1985, he recommended that claimant be completely "worked up" as he did not have a complete neuropsychological assessment and understood that one had never been done. His presumptive diagnosis was status, post head injury with change in personality, depressive syndrome, and and typical pain syndrome. His formal diagnosis was organic personality disorder, organic affective disorder, and residual pain syndrome, all secondary to head injury. He opined that he did not believe claimant was able to work until her disability was better and more completely defined and that he did not believe she would be able to work in the foreseeable future. In a clinical note of October 9, 1985, Dr. Varner wrote that claimant evidences depressive symptoms as follows:

> She does evidence the following depressive symptoms including initial sleep disorder, hypersomnia without rest. She had crying spells in the past but none now. No blue spells and no dry crying spells. There is a marked increase in irritability, agitation, and anxiety. There is a fluctuating appetite with about a 35 pound weight gain. At

000372

times she is nauseated. Her libido has dropped. There is a diurnal variation with the a.m. being the worst part of the day. She denies significant social withdrawal or social paranoia, although some are present. There is a decreased concentration, decreased short term memory. She denies olfactory hallucinations, macropsia, micropsia, deja vu, jamais vu, changes in colors or autoscopia. She admits to word finding problems and inability to phrase her words the way she used to before the accident. She is distressed at her pain and her inability to cope.

An Allen Memorial emergency treatment record of February 26, 1984 indicates that claimant's subjective history of her injury is that in October 1983 she fell at work and tripped over a child and fell to the floor striking her head. An employee's report signed by the claimant and dated January 6, 1984 indicates that Deb Lisgum did not see Leon "the student" trip me, that is, claimant, but did see claimant on the floor.

A Schuchmanns' Pharmacy statement of March 31, 1987 reports a balance of $12.22.

The balance of the evidence was reviewed and considered in the disposition of this matter.

## APPLICABLE LAW AND ANALYSIS

We consider the question of whether claimant has an injury causally related to either permanent partial or permanent total disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 20, 1983 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

While claimant has various symptoms, the generally accepted diagnosis for her conditions are myofascial pain syndrome and depressive illness. Dr. Carlstrom relates her myofascial pain syndrome to her injury and opines that it has resulted in a one or two percent permanent partial disability. He considers the psychological component extremely significant and reports claimant's condition seems to be work related. He does not separate the physical from the psychological component in making that statement, however. Dr. Stone indicates that it would not be difficult to attribute claimant's depressive condition as well as her other diagnoses to the injury. Dr. Tegler's November 9, 1983 office note indicates that claimant appears to have a depressed affect as of that time, however. As Dr. Tegler's note was made on claimant's initial visitation following her injury, the notes suggests that claimant's depressed affect might well have preceded her work incident. While an aggravation of a preexisting condition is compensable, we have no medical opinion testimony on this record suggesting that claimant's work injury significantly increased depressive or other psychological symptomology other than Dr. Carlstrom's and Dr. Stone's ambiguous statements. Claimant's physicians variously have described her as generally angry or as having a passive aggressive personality. Claimant's MMPI was interpreted as consistent with a multitude of physical symptoms which seem basically due to nervous tension and musculoskeletal stress and strain. These factors would suggest that claimant's personality problems relate to a long-term pattern of interaction more than to the effects of her injury per se. Therefore, without more than claimant's and her husband's testimony that claimant has undergone a significant personality change since her injury date, we are not able to say that claimant's injury either produced, or aggravated her psychological condition. We note that Dr. Varner has opined that claimant has symptoms consistent with a post head injury syndrome. We find that the neuropsychological assessment conducted by Dr. Dill generally would not support Dr. Varner's tentative diagnosis. We find that claimant has a myofascial syndrome related to her injury with preexisting significant psychological overlay.

We consider the benefit entitlement question.

Initially, we note that claimant is not an odd-lot worker under the Guyton doctrine. Claimant has not actively sought employment since her injury, but rather has self-assessed as being unable to do so. See Emshoff v. Petroleum Transportation and Great West Casualty, appeal decision file number 753723, filed March 31, 1987. Nor has claimant effectively assisted in her own rehabilitation by taking steps recommended by her

000374

physicians, namely, that she considers psychiatric consulation and treatment. See Beemblossom v. Tindal Farm Supply Co. and Allied Mutual Insurance, f/k/a Aid Insurance arbitration decision file number 727594, filed January 29, 1987.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

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

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

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment relate 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.

000375

See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Claimant is a relatively young worker. She is of average intelligence, and has worked in a number of positions in which she was able to use clerical skills, computer skills, and social interactive skills. While claimant self-describes as unable to uitilize any those skills or to engage in heavy manual labor, no physician has imposed restrictions on claimant. Her permanent partial impairment rating is minute, at best. Claimant appeared to exaggerate both her symptoms and her lack of abilities at hearing. Consequently, her self-described restrictions are not found to be credible and assessment of claimant's overall residual earning capacity is made more difficult. Ms. McCollum did not render an opinion relative to claimant's residual earning capacity, indicating that at the time that she ceased involvement with claimant's case, claimant was as yet medically unable or unwilling to consider employment. Ms. McCollum did identify two positions within claimant's skill level in claimant's then local vicinity, namely, cosmetics clerk, and receptionist. We find it not unreasonable that claimant should be able to be employed in like positions in the future. Nor do we accept claimant's belief that she could not return to work as a lingerie clerk, education aide, check processor, or computer operator. We find that each of these might well be within claimant's remaining capacities were she to attempt work. While claimant stressed that many positions required math skills, Dr. Dill only found dyscalculia with more complex arithmetic tasks. It is doubtful that problem would affect claimant's ability to perform the jobs outlined. Likewise, we have no substantial evidence that claimant could not at least attempt factory assembly work. We find that the credible evidence, at most, indicates that claimant has sustained a loss of earning capacity of ten percent.

## FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant fell backwards in a hallway while working in a school as an education aide after being tripped by a nine year old emotionally disturbed child.

Claimant has had headache, fatigue, weakness, tremor and pain throughout her body as well as anxiety and a depressed affect.

Claimant's depressed affect was apparent on initial examination following the injury.

Claimant's depressive condition likely predated the injury.

Claimant appears angry and has a passive aggressive style of relating as described by her physicians.

Claimant's Minnesota Multiphasic Personality Inventory was consistent with an individual having a multitude of physical symptoms which seem due basically to nervous tension and musculoskeletal stress and strain.

Claimant has rejected suggested pain center treatment.

Claimant had rejected suggested psychiatric treatment from her injury until time of hearing.

Claimant's tremor is a very rapid and of low aptitude and relates to her anxiety.

Claimant has a myofascial injury with an extremely significant psychological component.

Claimant does not have significant central organic brain deficits and peripheral deficits.

Claimant's personality problems relate to a long-term pattern of interaction more than to the effects of her injury per se.

Claimant was 40 years old on June 2, 1947.

Claimant has completed eleventh grade and has obtained a GED.

Claimant began, but did not complete, a bookkeeping course.

Claimant has past work experience as a factory assembly worker, a check processor, a computer operator, a lingerie sales clerk, and a school bus driver and education aide for profoundly and severely handicapped children.

Claimant has not sought employment since her injury.

Claimant has not effectively assisted in her own rehabilitation.

Claimant has no physician imposed work restrictions.

Claimant's dyscalculia is present only with more complex arithmetic tasks.

Claimant's dyscalculia would not impact on her ability to hold positions held prior to her injury.

Claimant's self-described life and work limitations were not a credible assessment of her post injury work restrictions.

000377

Positions as a receptionist and cosmetics sales clerk were located for claimant and are within her physical, intellectual, and educational abilities.

Many of claimant's preinjury work positions likely remain within claimant's post injury physical, intellectual, and educational abilities.

Claimant has a one to two percent permanent partial impairment to the body as a whole.

Claimant has a loss of earnings capacity of ten percent (10%).

## CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that her injury of October 20, 1983 is the cause of the permanent partial disability on which she now bases her claim.

Claimant is entitled to permanent partial disability resulting from her October 20, 1983 injury of ten percent (10%).

## ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for an additional forty (40) weeks at the rate of one hundred sixteen and 15/100 dollars ($116.15). Those payments are to commence September 2, 1985.

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30.

Defendants pay costs pursuant to Division of Industrial Services Rule 343-4.33.

Defendants file claim activity reports as required by the agency.

Signed and filed this 16th day of July, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Thomas M. Wertz
Attorney at Law
P.O. Box 998
4040 First Avenue NE
Cedar Rapids, Iowa 52406-0998

Mr. Larry D. Spaulding
Attorney at Law
1100 Des Moines Building
Des Moines, Iowa 50307

000379

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| DAVID A. FRANCIS,<br><br>Claimant,<br><br>RYDER TRUCK RENTAL,<br><br>Employer,<br><br>and<br><br>OLD REPUBLIC INSURANCE CO.,<br><br>Insurance Carrier,<br>Defendants. | : | FILE NO. 686450<br><br>D E C I S I O N<br><br>O N<br><br>A T T O R N E Y<br><br>F E E S<br><br>JUL 16 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

FILED

The parties waive formal proceedings, formal findings and formal decision and ask for a brief decision. From a review of the materials and professional statements presented to the undersigned on July 14, 1987, attorney, Channing Dutton, is entitled to the sum of three thousand one hundred eighty and 60/100 dollars ($3,180.60) from the proceeds of the 85.35 settlement in this matter currently held in trust by attorneys, Cable and Payton, who shall pay said sum to Dutton accordingly.

Signed and filed this 16 day of July, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Channing L. Dutton
Attorney at Law
2141 Grand Avenue
P. O. Box 367
Des Moines, Iowa 50302

Mr. Ronald G. Cable
Mr. Patrick H. Payton
Attorneys at Law
414 E. Grand
Des Moines, Iowa 50309

000380

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| VAN S. GARRETT,<br><br>Claimant,<br><br>vs.<br><br>CATERPILLAR TRACTOR COMPANY,<br><br>Employer,<br>Self-Insured,<br>Defendant. | : | FILE NO. 777583<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

FILED
DEC 08 1987
IOWA INDUSTRIAL COMMISSIONER

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Van S. Garrett, claimant, against Caterpillar Tractor Company, employer (hereinafter referred to as CAT), a self-insured defendant, for workers' compensation benefits as a result of an alleged injury on October 3, 1984. On October 5, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Malvin G. Hightower and Cora March. The exhibits received into the evidence at the hearing are listed in the prehearing report. According to the prehearing report, the parties have stipulated to the following matters:

1. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $304.79 per week.

2. Claimant is only seeking temporary total disability or healing period benefits from October 3, 1984 through January 20, 1985 and from November 3, 1985 through January 28, 1986 (a total of 24 5/7 weeks) and defendant agrees that claimant was not working during these periods of time.

3. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

4. If permanent partial disability benefits are awarded herein, they shall begin as of January 29, 1986.

000381

5. The medical bills referred to in the prehearing report for which claimant seeks reimbursement in this proceeding are fair and reasonable and causally connected to the medical condition upon which claimant's claim herein is based but that the issue of their causal connection to any work injury remains an issue to be decided herein.

## ISSUES

The parties submit the following issues for determination in this proceeding:

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

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

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

IV. The extent of claimant's entitlement to medical benefits under Iowa Code section 85.27.

## SUMMARY OF THE EVIDENCE

The following is a summary of evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision.

Claimant testified that he worked for CAT from either 1978 or 1979 until he was laid off as a part of a plant wide economic layoff on January 20, 1985. During his CAT employment, claimant was initially a machine operator but at the time of the work injury, he was an assembler. Claimant received $480.27 in gross weekly earnings at the time of the alleged injury.

The facts surrounding the work injury are in dispute. Claimant testified that while bending over to remove a "yoke" weighing approximately 60 to 65 pounds from a tub near his work station he felt a snap in his low back and sharp pain "down his legs." Claimant said that he felt as if something stabbed him. Claimant said that a fellow employee, Cora March, helped him sit on the floor and he sat for 10 to 20 minutes until his foreman came over. Claimant then said that he reported the incident to the staff at the plant medical department who told him to see his own doctor. However, Cora March testified that she could not recall helping claimant but did recall claimant telling her at some time that he had hurt his back picking up something and she told him to see the company doctor, J. Donahue, M.D. Claimant's supervisor, Malvin Hightower, testified that he could

000382

not recall any such incident as described by claimant and that he would normally have remembered such an incident if it were reported to him. Hightower also testified that normally heavy "yokes" are handled with a hoist available in the work area. March testified that CAT management frowned on the use of such hoists as such activity would slow down production. According to Dr. Donahue's office notes in joint exhibit 1, the doctor stated that claimant had not reported the injury to his foreman or to the medical department until October 10, 1984. However, in a company medical report, joint exhibit 2(i) signed by Dr. Donahue and D. Haack, R.N., which was dated October 3, 1984, the following is noted with reference to claimant: "Bent over in tub to pick up piece part hurt back."

Following the alleged injury, claimant testified that the medical records show that he was off work at the direction of William Reinwein, M.D., claimant's orthopedic surgeon, from October 3, 1984 until January 20, 1985. Claimant first saw Dr. Reinwein after the alleged work injury on October 5, 1984 when he reported a "twisting injury while lifting heavy weight." Claimant was treated conservatively at first with physical therapy, rest and medication including "epidural flood injections." On January 20, 1985, Dr. Reinwein released claimant to return to light duty work. Claimant was then immediately laid off by CAT as a result of a plant wide reduction in force. Claimant has not returned to CAT and apparently remains on layoff status at the present time. Claimant testified that he began working as a bookkeeper for his brother-in-law but continued treating with Dr. Reinwein after being laid off. This treatment ended in March, 1985, but claimant testified his back problems continued. Claimant eventually returned to Dr. Reinwein in October, 1985, and upon noting a persistence in claimant's symptoms and the ineffectiveness of continued conservative care, Dr. Reinwein ordered a myelogram test which to him revealed sufficient evidence of herniated disc at the L4-5 and L5-S1 levels of claimant's spine to warrant surgery. Claimant was then hospitalized and Dr. Reinwein performed surgery on November 4, 1985 called a discectomy and laminectomy. By January, 1986, claimant had improved and claimant was released for work by Dr. Reinwein on January 28, 1986, with a permanent physical restriction against lifting over 35 pounds.

After Dr. Reinwein released claimant in January, 1986, claimant found other work. For six months he worked as a car salesman and since March, 1987, he has been a full-time household and electric appliance salesman. No evidence was offered as to claimant's current income. Claimant testified that in his current job he is unable to lift the heavier appliances or stock shelves as other salesmen are expected to do. Apparently, claimant is able, at least at the present time, to make accommodations in his current employment for his physical limitations.

000383

Claimant said that he continues to have daily low back pain in the area of the surgical incision but no leg pain. Prolong standing in his job precipitates severe back pain requiring him to rest. Claimant expresses difficulty in driving or riding long distances in an automobile. Claimant complained that his back does not have the strength that it had before the alleged work injury. Claimant states that he has difficulty lifting over 25 pounds and with foreward bending. Claimant continues to see Dr. Reinwein on occasion but is not taking medication or receiving constant treatment. However, claimant states that his back is getting worse.

Claimant admitted at hearing to back difficulties prior to the alleged work injury. According to his medical records, claimant has had low back difficulties as early as 1979 requiring extended absences from work. Also, in the year previous to the alleged work injury, claimant had what he describes as muscle spasms. Claimant pointed out at hearing that the only physical restrictions imposed by treating physicians when these muscle spasms occurred were temporary and claimant was able to return to full duty at work after each episode. Also, claimant testified that his muscle spasms after October, 1984, were much more severe than before.

In an extensive written report dated March 25, 1986, Dr. Reinwein only discusses his treatment of claimant but offered no causal connection opinions or percentage ratings as to the extent of claimant's permanent impairment. However, in a brief report to CAT dated November 13, 1985, Dr. Reinwein refers to claimant's illness as a "herniated nucleus pulposus" requiring laminectomy surgery. In this report, Dr. Reinwein responded "yes" to a form question as to whether the patient's disability was caused by an injury at work. Also, on this same form the doctor notes the date of the initial visit for this "illness" as October 5, 1984, the first time he saw claimant following the alleged work injury.

Claimant has been examined on three occasions by Byron Rovine, M.D., a neurosurgeon. On October 16, 1984, Dr. Rovine reported a history that claimant had no radiation of pain into his legs or neurological symptoms when Dr. Reinwein first saw claimant. This is contrary to the reports of Dr. Reinwein. On November 12, 1984, Dr. Rovine notes claimant's continued pain but attributes the pain to excessive exercising and opines that claimant should be able to return to work after two weeks. On April 29, 1987, Dr. Rovine again evaluated claimant. This time, Dr. Rovine felt that claimant was malingering and faking the extent of his impairment. Dr. Rovine felt that claimant was disabled but did not know whether this was functional or organic. Dr. Rovine was very critical that conservative care was not first attempted before surgery. What is most noteable about Dr. Rovine's report is that he apparently became confused as to the

000384

actual injury date and felt that claimant was reinjured on October 5, 1985, less than a month before the surgery. In a subsequent report, Dr. Rovine reported that he had overlooked claimant's previous visits to him but insisted claimant reported to him a new injury on October 3, 1985. He did not indicate how the change in injury dates would effect his evaluation conclusions.

In January, 1985, claimant was evaluated by a neurologist, Daniel Johnson, M.D. From his EMG tests and examination of claimant, Dr. Johnson diagnosed that claimant suffers from low back pain without clear evidence of radiculopathy.

F. Dale Wilson, M.D., a general surgeon, examined claimant in November, 1986. Dr. Wilson causally connects a 14 percent permanent partial impairment to the October 3, 1984 work injury in his written report following the exam. Dr. Wilson noted in his report that claimant had previous back problems in March, 1983, while working for CAT. Dr. Wilson also reports that claimant was involved in an automobile accident in March, 1983, requiring sutures to his lip. He notes that claimant complained of back pain within three weeks after this accident and was treated by Dr. Reinwein. The records of Dr. Reinwein do not reflect any treatment of claimant in the spring of 1983. According to the billing sheet of October 12, claimant was treated by Dr. Reinwein for complaints of lumbar problems in March, 1984 and May, 1984. There is no record of any other treatment by Dr. Reinwein until October, 1984. In his deposition, Dr. Reinwein testified that his causal connection opinions were based upon an assumption that claimant was pain free in the year prior to the alleged work injury.

Claimant testified that before working for CAT he was employed in various jobs such as laborer, grinder, warehouseman and assembler in a manufacturing environment. Claimant also worked for approximately 10 months as a meat packer. All of this work required heavy or repetitive lifting and bending. For a short time claimant was a manager/trainee at a McDonald's hamburger franchise but claimant testified that this attempted employment proved unsuccessful after two or three months.

Claimant currently is in his early thirties and has a high school education. Claimant was articulate at the hearing and appeared to possess at least average intelligence.

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

## APPLICABLE LAW AND ANALYSIS

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to

000385

the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active of dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960) and cases cited therein.

In the case sub judice, claimant's testimony was not really controverted by the testimony of March and his supervisor. Defendant's witnesses only testified that they could not remember the specific events as described by claimant. Due to the lapse of time since the injury, a failure to recall the specific events is not significant. What is significant, however, is that March did remember that claimant had informed her of the injury. Also, the medical department records verify claimant's story that he reported to the medical department after the injury. As claimant is found to be credible, this deputy commissioner will accept claimant's account of the incident. Therefore, claimant has established that he suffered a work injury to his low back on October 3, 1984.

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).

000386

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 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 at bar, the medical evidence certainly was conflicting on the issue of the causal connection of claimant's herniated disc problems and resultant surgery to the October 3, 1984 incident. However, on the whole record, claimant must prevail.

First, the reports of Dr. Rovine are confusing and based upon inaccurate information. For that reason, his views cannot be given much weight. Likewise, the causal connection views of Dr. Wilson cannot be given much weight. Dr. Wilson is not a specialist in back problems and appears to retreat from his original causal connection opinion because claimant was not pain free in the spring of 1984. It also appears to the undersigned that Dr. Wilson like Dr. Rovine simply got his facts confused.

The only other causal connection opinion in the record is the rather simple but straight forward opinions of Dr. Reinwein in his November 13, 1985 form report in which he simply responded to questions posed to him. Dr. Reinwein's answers in this report demonstrates that he believes that the symptoms he found on October 5, 1984 constituted the same illness which he eventually diagnosed as a herniated disc in claimant's lower spine requiring surgery. Dr. Reinwein also believes that the condition is work related. These opinions are uncontroverted in the record and must be given considerable weight in light of the fact that Dr. Reinwein is an orthopedic surgeon and the primary treating physician. Only Dr. Reinwein treated claimant both before and after the October 3, 1984 incident. Consequently, he is in the best position to render a causal connection opinion. Therefore, the greater weight of the evidence submitted establishes that the work injury of October 3, 1984 was a significant factor in causing permanent impairment to claimant's lower spine and precipitating the 35 pound weight restriction imposed by Dr. Reinwein after the surgery.

Dr. Wilson is the only doctor who has placed a percentage rating on claimant's impairment and this rating should be given

sitting. Even if claimant had permanent impairment prior to October 3, 1984, the evidence fails to show that claimant had a loss of earning capacity or industrial disability before October 3, 1984. Apportionment of disability between a preexisting condition and an injury is proper only when there is some ascertainable disability which existed independently before the injury occurred. Varied Enterprises Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984).

Dr. Wilson has given claimant a 14 percent permanent impairment rating and Dr. Reinwein has imposed permanent physical restrictions against heavy lifting. Claimant's credible testimony establishes that despite a successful result from surgery, he continues to experience difficulty with heavy lifting, repetitive lifting, bending and prolonged sitting and standing. Claimant's current medical condition prevents him from returning to most of the work he performed in the past for which he is best suited. Claimant's current medical condition also limits his ability to perform his current job.

To the great dismay of the undersigned, the evidence was not presented by claimant as to claimant's current earnings as a salesman. However, it is the experience of this agency and a matter of common knowledge that appliance salesmen such as claimant earn considerable less than $480 per week. If defendant disputes this aspect, this deputy commissioner will certainly consider an application for rehearing on the matter. However, a showing that claimant had no loss of actual earnings does not preclude a finding of industrial disability. See Michael v. Harrison County, Thirty-Fourth Biennial Report of the Iowa Industrial Commissioner 218, 220 (1979).

Claimant is relatively young, approximately 30 years of age. His loss of future earnings from employment due to his disability is not as severe as would be the case for an older individual. See Walton v. B & H Tank Corp., II Iowa Industrial Commissioner Report 426 (1981).

Claimant has shown motivation to remain employed and so long as his current employer is able to tolerate claimant's inability to perform all of his assigned tasks, retraining is unnecessary. Claimant complains that his condition is deteriorating and that he will have to seek retraining in the future. However, disability award cannot be based upon what may happen in the future.

Claimant has a high school education and exhibited average intelligence at the hearing. However, little was shown to indicate claimant's potential for vocational rehabilitation.

Claimant raised the application of a so-called "odd-lot" doctrine in this case. This doctrine requires an award of permanent total disability benefits if defendants fail to go

000389

forward with evidence as to the availability of suitable work to claimant after claimant demonstrates a prima facie case that he has "odd-lot" or a person incapable of securing suitable and stable employment. Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). This doctrine is not applicable to this case as claimant has shown that he is capable of finding suitable and stable employment because he has done so.

After examination of all the factors, it is found as a matter of fact that claimant has suffered a 40 percent of loss of his earning capacity from his work injury. Based upon such a factual finding, claimant is entitled as a matter of law to 200 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 40 percent of the 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in the subsection. The parties stipulated that these benefits will begin as of January 29, 1986.

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

Claimant has established entitlement to healing period benefits for the two periods of time set forth in the prehearing report. Claimant was not able to return to regular duty when he was first released by Dr. Reinwein on January 20, 1985 and clearly was not able to work during the hospitalization for surgery and during his recovery time. The parties stipulated that these benefits would end as of January 28, 1986.

IV. Claimant is also entitled to reimbursement for medical expenses incurred for treatment of a work injury under Iowa Code section 85.27. Defendant stipulated that the expenses requested in the prehearing report are reasonable and causally connected to claimant's low back condition. Given the finding that the low back condition is causally connected to the work injury found in this case a finding that the medical expenses are causally connected to the work injury is virtually automatic.

Defendant contends that these expenses were not authorized but they have denied the causal connection of the back condition treated to a work injury. This agency has held that it is inconsistent to deny liability and the obligation to furnish care on one hand and at the same time claimant's right to choose the care. Kindhart v. Fort Des Moines Hotel, (Appeal Decision 1985); Barnhart v. MAQ, Inc., I Iowa Industrial Commissioner Report 1 (1981). Therefore, claimant shall be awarded all the expenses requested in the prehearing report.

000390

## FINDINGS OF FACT

1. Claimant was a credible witness.

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

3. On October 3, 1984, claimant suffered an injury to his low back which arose out of and in the course of his employment with CAT. The injury consisted of a herniated disc at two levels in claimant's lower spine which was not accurately fully diagnosed until November, 1985, at which time disectomy surgery was deemed necessary to treat the injury.

4. The work injury of October 3, 1984, was a cause of a period of disability from work beginning on October 3, 1984 through January 20, 1985 and again from November 3, 1985 through January 28, 1986, at which time claimant reached maximum healing following the surgery.

5. The work injury of October 3, 1984 was a cause of a 14 percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no lifting over 35 pounds and no repetitive lifting or bending or prolonged sitting or standing. Claimant had no permanent physical impairments before October 3, 1984 despite recurrent episodes of back pain.

6. The work injury of October 3, 1984 and the resulting permanent partial impairment was a cause of a 40 percent loss of earning capacity. Claimant is a little over 30 years of age and has a high school education with average intelligence. Claimant is unable to return to most types of physical labor employment he has held in the past. Claimant has suffered a loss of earnings from his inability to return to manufacturing labor type work. Claimant is currently working as a salesman of household and electrical appliances but cannot fully perform many of the physical tasks of the job such as lifting appliances and stocking shelves. Claimant had no loss of earning capacity before October 3, 1984.

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

## CONCLUSIONS OF LAW

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

000391

ORDER

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

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

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

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

5. Defendant shall receive credit for previous payments of benefits under a non-occupational group insurance plan, if applicable and appropriate under Iowa Code section 85.38(2) as set forth in the prehearing report.

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

7. Defendant shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 8th day of December, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

000392

Copies To:

Mr. Allan Hartsock
Attorney at Law
4th Floor Rock Island Bank Bldg.
P. O. Box 428
Rock Island, Illinois 61201

Mr. Larry L. Shepler
Attorney at Law
600 Union Arcade Bldg.
111 East Third Street
Davenport, Iowa 52801-1550

000393

FILED

NOV 13 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| ORIN F. GILLESPIE, | : | |
| | : | |
| Claimant, | : | File No. 812403 |
| | : | |
| vs. | : | |
| | : | A R B I T R A T I O N |
| J. I. CASE, A TENNECO COMPANY, | : | |
| | : | |
| Employer, | : | D E C I S I O N |
| Self-Insured, | : | |
| Defendant. | : | |

## INTRODUCTION

This is a proceeding in arbitration brought by Orin F. Gillespie against J. I. Case Company, his self-insured employer. The case was heard at Davenport, Iowa on May 13, 1987 and was fully submitted on conclusion of the hearing. The record in the proceeding consists of testimony from Orin F. Gillespie, claimant's exhibits one through nine and joint exhibits A through DD.

## ISSUES

Claimant seeks benefits based upon an alleged injury of October 9, 1985. Claimant asserts injury occurring both acutely and also through cumulative trauma, or in the alternative.

The issues presented by the parties are:

1. Whether claimant sustained an injury arising out of and in the course of employment;

2. Whether the alleged injury is a cause of temporary or permanent disability;

3. Determination of claimant's entitlement to compensation for healing period and permanent disability; and,

4. Determination of claimant's entitlement to section 85.27 benefits.

The employer seeks credit under section 85.38(2) against any award that may be made to the claimant.

The parties stipulated that claimant's gross weekly earnings were $554.00 per week and that he was married and entitled to two exemptions. This would compute to a rate of compensation of $328.66 per week.

000394

## STATEMENT OF THE CASE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case even though it may not necessarily be referred to in this decision.

Orin F. Gillespie is a 45-year-old man who obtained a GED while he was in the Marines. He was honorably discharged in 1964.

Claimant's employment history before joining the J. I. Case Company includes jobs as a maintenance worker, as a clean-up worker in a foundry consisting primarily of shoveling sand, as a machinist and as a welder.

Gillespie commenced employment with Case on September 18, 1972 as a production mig welder. He testified that, prior to hiring, he was examined by C. R. Fesenmeyer, M.D. Claimant testified that he has performed a number of different welding positions. For the last four or five years, he has assembled and welded cabs on the assembly line. Claimant testified that his most recent job required welding seams in a variety of positions ranging from head high at the top of the cab to the floor of the cab. He testified that the job requires much stooping, bending, twisting, squatting and moving about.

Claimant testified that, on October 9, 1985, he was climbing steps carrying a 60-pound roll of welding wire when he slipped on weld splatter. Claimant testified that he dropped the roll and caught himself, but also felt the onset of tremendous pain.

Claimant went to the first aid department and was sent to Dr. Fesenmeyer where he was examined and then released to return to work with a 20-pound weight restriction and also with directions to avoid climbing. Claimant saw Dr. Fesenmeyer again on October 11 and the same restrictions were continued.

Claimant testified he felt Dr. Fesenmeyer was not doing any good for him and he went to Duane L. Manlove, D.O., on October 17, 1985 (exhibit 9, page 6; exhibits K and L). Since October 17, 1985, claimant has not returned to work for any substantial period of time.

Claimant testified that he presently experiences a great deal of discomfort in his left leg with pain that runs from his hip to his knee. He stated that he is unable to sit or walk for extended periods. Claimant testified that he has applied for work through Job Service, but has not found any.

Gillespie is afflicted with degenerative disc disease, a condition also sometimes referred to as osteoarthritis. Dr.

Manlove characterized the condition as one which is progressive and the nature of the disease is that the individual experiences a succession of flare-ups in its symptomatology (exhibit 9, pages 22 and 29). Dr. Manlove also indicated that the condition is one which arises from abuse of the back. He indicated that, based upon the history claimant presented, the condition would almost have to be work-related, but that it certainly could be from something else (exhibit 9, pages 31-33).

Claimant testified that, prior to October 9, 1985, he had been seeing L. L. Wilken, D.C., primarily for neck and left arm problems, but that the treatment included his low back. The records from Dr. Wilken show that claimant was seen on October 1, 1985 with parascapular and low back pain and was treated. The records indicate that claimant was seen on October 3, 1985 with low back spasms, that he complained of being sore and that he was again treated. The records further indicate that claimant was seen on October 8, 1985 when the same complaints and observations were apparently made.

Claimant has been evaluated by F. Dale Wilson, M.D. The history of events as summarized in Dr. Wilson's report is not consistent with other evidence in the record regarding those events, particularly as to claimant's work activities after October 11, 1985. At page two of his report, Dr. Wilson indicates that claimant's condition has worsened since October 9, particularly during the winter. Dr. Wilson diagnosed claimant as having a lumbosacral strain on a degenerative lumbosacral spine. He felt that the injury of October 9, 1985 was the cause of claimant's disability as manifested on January 15, 1987, when the examination occurred. Dr. Wilson made no recommendations for further medical care, but did recommend a 25-pound weight limit and that claimant otherwise avoid stress to his spine.

Claimant has been evaluated by G. Brian Paprocki, a qualified vocational consultant. Paprocki concluded that most of claimant's vocational skills are primarily utilized in work which he is no longer physically capable of performing and that the lighter jobs which are within his physical capabilities are less available and less remunerative than his previous types of employment.

## APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on October 9, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The 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.

Injury resulting from cumulative trauma has been recognized in this state as being compensable. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). The distinction between cumulative trauma injury and the general processes of nature which come about because the life has been devoted to labor and hard work is not readily apparent. In this case, it is clear that Gillespie has been afflicted with his degenerative condition for a long period of time. The first notation of it appears in the employer's record of medical treatments at an entry dated October 21, 1975 found at exhibit B, page 5. From that point on, the record is replete with a series of periods of exacerbation and of periods when the problem seemed relatively asymptomatic. The record shows a substantial flare-up commencing during the winter of 1980-81 (exhibits T-Z; exhibit B, pages 12 and 13). The record reflects problems arising from off-work incidents as well as on-the-job injuries. Claimant has a congenital condition of unequal leg lengths which could aggravate his degenerative condition (exhibit 9, page 46). The condition is one which can

become symptomatic on its own without any identifiable precipitating cause (exhibit 9, page 35). It is progressive in nature (exhibit 9, page 29). It is manifested by a succession of periods of exacerbation, followed by periods when it is relatively asymptomatic (exhibit 9, page 22).

According to Dr. Manlove, degenerative disc disease is a condition which is due to abuse of the back and repetitive injuries. It is difficult to attribute it to any particular event (exhibit 9, pages 15 and 31-33). Claimant's description of his employment history indicates that his employments prior to the J. I. Case Company were physically strenuous. Even though he was examined by Dr. Fesenmeyer at the time of hiring, the record does not indicate whether or not x-rays of claimant's spine were taken at the time of hiring and it cannot be determined whether or not the disease could have been detected without x-rays at that time. It was, however, identified in 1975. One would intuitively expect that claimant's work activities played some part in the progression of his disease. However, claimant also appears to have engaged in strenuous activities outside the work environment, such as remodeling his home, pouring cement, gardening and the normal events of day-to-day life. The record in this case fails to show that claimant's employment, through either cumulative trauma or an acute occurrence, was a substantial factor in initially causing the degenerative condition, in affecting the rate of progression of the degenerative disc disease or in producing anything other than the succession of flare-ups which manifest the disease. This case is, therefore, viewed as one in which the degenerative disc disease is treated as a preexisting condition.

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

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

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).

000238

If claimant aggravated his back on October 9, 1985, he would certainly be entitled to a period of temporary total disability and to medical treatment at the employer's expense. Claimant's credibility is an essential part of establishing any entitlement. When he was deposed, he denied having any injuries to his back, which occurred while he was off work, that caused him to miss any time from work (exhibit DD). When he testified at hearing, he recalled off-work incidents which caused him to miss work. Claimant was under the care of Dr. Wilken for slightly more than one week prior to October 9, 1985. Dr. Wilken noted the existence of back spasms and complaints of low back pain (exhibit CC). According to Dr. Manlove, the existence of spasms indicates an exacerbation or flare-up (exhibit 9, pages 24, 34 and 35). The record contains no explanation for the apparent flare-up which had already occurred prior to October 9, 1985. Claimant has, therefore, failed to prove, by a preponderance of the evidence, that any event, arising out of and in the course of employment, occurred on October 9, 1985 which produced injury to his back.

## FINDINGS OF FACT

1. Orin F. Gillespie is afflicted with degenerative disc disease, a condition which is progressive and which is manifested by recurrent exacerbations.

2. Claimant's degenerative disc disease probably preexisted the commencement of his employment with the J. I. Case Company.

3. During the years that claimant was employed by the J. I. Case Company, he experienced a number of exacerbations of his condition, many of which were the result of on-the-job injuries, but some of which arose from incidents which were not connected with his employment.

4. Having observed claimant's demeanor and considering it in light of the evidence in the case, claimant has failed to prove that any event occurred on October 9, 1985 which exacerbated his condition; to the contrary, the evidence shows that the exacerbation occurred prior to October 9, 1985.

5. The evidence fails to establish that the normally progressive course of claimant's degenerative disc disease was in any way altered or accelerated by the employment activities in which he engaged during the years he was employed by the J. I. Case Company.

## CONCLUSIONS OF LAW

1. Claimant has failed to prove, by a preponderance of the evidence, that he sustained injury which arose out of and in the course of his employment on or about October 9, 1985, either through an acute incident or from cumulative trauma.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding.

IT IS FURTHER ORDERED that costs of this action are assessed against defendant pursuant to Division of Industrial Services' Rule 343-4.33 as follows:

| | |
|---|---|
| Linda Faurote-Wilson, transcript | $ 36.40 |
| G. Brian Paprocki, expert witness fee | 150.00 |
| F. Dale Wilson, M.D., report | 150.00 |
| Duane L. Manlove, D.O., expert witness fee | 150.00 |
| Reporting Services | 167.20 |
| Total Costs | $653.60 |

A written demand was made on January 29, 1986 directing the employer to file a first report of injury. More than twenty (20) days have since passed and the report has not been filed. J. I. Case Company is therefore ordered, pursuant to Code section 86.12, to appear within ten days and show cause why it should not be subject to a civil penalty of one hundred dollars ($100.00) for failure to timely file a first report of injury pursuant to Code section 86.11.

Signed and filed this 13th day of November, 1987.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Albert J. Stafne, Jr.
Attorney at Law
Commerce Exchange Building, Suite 200
2535 Tech Drive
Bettendorf, Iowa 52722

Mr. Larry L. Shepler
Attorney at Law
600 Union Arcade Building
111 East Third Street
Davenport, Iowa 52801

1402.20, 1402.30, 2206, 2209
Filed November 13, 1987
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

| | | |
|---|---|---|
| ORIN F. GILLESPIE, | : | |
| | : | |
| Claimant, | : | File No. 812403 |
| | : | |
| vs. | : | |
| | : | A R B I T R A T I O N |
| J. I. CASE, A TENNECO COMPANY, | : | |
| | : | |
| Employer, | : | D E C I S I O N |
| Self-Insured, | : | |
| Defendant. | : | |

---

1402.20, 1402.30, 2206, 2209

Claimant's credibility was not sufficient to establish a work-place injury. There was evidence of the same complaints in the days preceeding the injury.

Claimant clearly had degenerative disc disease of long standing origin. The evidence did not show claimant's work over the years of his employment to have either caused the condition or accelerated its normally progressive course.

Held for the employer.

000400

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| JOHN WENDELL GLENNEY,<br><br>Claimant,<br><br>vs.<br><br>TIM HILDRETH COMPANY, INC.,<br><br>Employer,<br><br>and<br><br>AMERICAN MUTUAL LIABILITY INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 791041<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

FILED
NOV 23 1987
IOWA INDUSTRIAL COMMISSIONER

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by John Wendell Glenney, claimant, against Tim Hildreth Company, Inc., employer, hereinafter referred to as Hildreth, and American Mutual Liability Insurance Company, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on February 11, 1985. On August 11, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which is approved and accepted as a part of the record in this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses called: David Earl Glenney, Donald Hildreth, Jr., Donald Graham, Rosemary Glenney, and Timothy Hildreth. The exhibits received into the evidence at the hearing are listed in the prehearing report. According to the prehearing report, the parties have stipulated to the following matters:

1. On February 11, 1985, claimant received an injury which arose out of and in the course of employment with Hildreth and the injury is a cause of at least a period of temporary total disability.

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $194.11 per week.

3. If an injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as whole.

4. If permanent disability benefits are awarded herein, they shall begin as of February 23, 1986.

5. The medical bills submitted by claimant at the hearing were causally connected to the medical condition upon which the claim herein is based, but the issue of their causal connection to any work injury remains and issues to be decided herein.

ISSUES

The parties submitted the following issues for determination in this proceeding:

1) Whether there is a causal relationship between the work injury and the claimed disability;

2) The extent of weekly disability benefits to which claimant is entitled; and

3) The extent of claimant's entitlement to medical benefits under Iowa Code section 85.27.

SUMMARY OF THE EVIDENCE:

The following is a summary of the evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision.

The claimant is 41 years of age, married, has five dependents, and has a tenth grade education.

Claimant testified that his work history consisted of regular employment in various labor and truck driving jobs, mostly requiring strenuous work and heavy lifting. Claimant's work consisted primarily of boiler type work, truck driving, welding, and general labor. All of his training was while on the job. Even though he worked for numerous employers for the last twenty years, all of the job changes that he made were for him to obtain better paying employment, or to allow him to stay at home more with his family. There was no evidence of any termination or problems that the claimant had with any of his employers prior to the date of this incident.

In 1965 or 1966, claimant entered a federal reformatory in El Reno, Oklahoma. There, he received vocational training and worked in the reformatory's power house doing boiler work.

000402

Claimant's work experience after El Reno is quite varied and extensive. In 1966, claimant testified he began work for H. A. Peterson in their Marshalltown, Iowa, welding shop. He worked as a welder for two years, then went to work as an engine mechanic for Chuck and Vern Sinclair, earning $3.00 per hour. He was employed there for about two months, leaving to go to work for Lennox Furnace Company as a welder. There, he earned upwards of $13.00 per hour, and stayed for about one and one-half to two years.

Claimant said that he then worked for Davis Welding in Kansas City, Missouri, leaving after two months to move to Des Moines, Iowa, for employment with Pittsburgh-Des Moines Steel Company. There, he performed duties as a welder's helper, earning about $4.50 per hour. Claimant testified that his job with Pittsburg-Des Moines lasted five to six months, when he quit to work for Tacko Welding in Bondurant, Iowa. He quit again after six months with Takco to work for Eaton Petroleum, again quitting four to six months later to take a welding job with Woodford Manufacturing in Des Moines. He was with Woodford until it closed six months later, and he then went to work for AMF. Claimant stayed with AMF for two and one-half years performing a variety of duties, including welding and truck driving.

Claimant said that he left AMF in 1974 or 1975 to drive over the road for Mickow. He stayed with Mickow for five months, going next to work for Neuroth Trucking in 1975. In about 1978 or 1979, claimant began driving for R. J. Elliott. This job lasted seven or eight months. In February 1980, claimant testified he returned to welding by taking a position with Mid-America Truck Body in West Des Moines, Iowa. There, he earned about $6.00 per hour and stayed with Mid-American for one and one-half years. Claimant stated that he left the Des Moines area in 1982 to work for ten to twelve days on an oil rig in Oklahoma City, Oklahoma. Claimant brought with him his own truck, equipped with welding equipment. After the oil rig job was finished, claimant returned to Des Moines and opened a business on Southeast Sixth Street repairing automobiles.

Claimant stated during the hearing that he "lost money just repairing cars," so six months later he moved his repair garage to Second Avenue and combined it with a used car sales lot. Later, the whole operation was moved to Southeast Fourteenth Street, where he "sold more cars than he had time to repair." Claimant's 1984 federal income tax return indicates Glenney's car lot grossed $90,000 that year. However, claimant testified that he lost money and suffered a net loss of income. Overall, claimant's tax returns from 1968 through 1985 indicate that he was capable of making moderate income in those areas that he has experience.

Claimant began working for Hildreth in November 1984. His duties consisted of working with pipes and boilers which required strenuous work. Claimant had a good work record with Hildreth and according to Hildreth he was a good worker but not a "craftsman." Claimant testified that he earned $2,266 in 1985 with Hildreth for employment from January 1 through the middle of February 1985.

The facts surrounding the work injury are in dispute. The claimant testified that on February 11, 1985, in the process of getting out of a company pickup truck, he twisted and injured his back. As the claimant was getting out of the vehicle and onto the ground, he experienced considerable pain in his low back, but was able to complete working that day. However, his condition deteriorated during the day and he made complaints to both Don Hildreth and Don Graham, fellow workers. Don Graham testified that he did not see the claimant getting out of the vehicle, but heard him make an exclamation concerning back pain after he got out of the truck, and that he was bent over. Don Hildreth does not recall observing the incident, but acknowledged that shortly after arriving the claimant began complaining of pain in his low back area and difficulty with working, a problem that he did not have at any time prior to this incident.

After the initial injury, claimant said that he continued to work the rest of that day and part of the following day. His problem progressively became worse until the owner, Tim Hildreth, came to Webster City and took claimant back to Des Moines.

Claimant at first sought assistance by going to a chiropractor in Webster City by the name of Dr. Frank Elliott. Dr. Elliott indicated that the history given to him at that time was that... "he went to get out of the truck, I believe he said there was three people in the truck and when he went to get out of the truck, he twisted himself and kind of slid out, and immediately he had the condition...." Dr. Elliott believed that claimant had sustained a strain and sprain of the lumbar spine. Dr. Elliott gave him chiropractic manipulations and a back brace. Dr. Elliott initially reported that claimant has suffered a "lift" injury but later changed his report to reflect the injury as stated by claimant. Dr. Elliott explained that he was simply in error in the first report.

After claimant returned to Des Moines he sought medical attention with Robert D. Connor, D.O. Conservative management was undertaken with no relief of the symptoms. On the Friday following the injury, claimant stated that he first noticed leg involvement and made arrangements to see a Des Moines chiropractor, Dr. Daniel Keat. Before seeing Dr. Keat, claimant returned to work for the employer and worked the week of February 18th. During this time period, claimant's condition continued to deteriorate. On February 23, 1985, Dr. Keat was

seen for the first time and claimant gave Dr. Keat the same history as he had given Dr. Elliott and had further indicated that he felt pain in the right buttock with aching and numbness in the right leg and foot. Claimant returned to work on February 25 and that was the last day that he worked for Hildreth. He continued to be treated by Dr. Keat on a conservative basis. During the end of February 1985, he went with a friend on a truck trip. Claimant testified that this had no effect on the injury. Dr. Keat agrees and had suggested the trip to get claimant out of the house. When he saw Dr. Keat again the doctor referred him to Dr. Martin S. Rosenfeld, D.O., an orthopedic surgeon. Dr. Rosenfeld saw him for the first time on March 5, 1985. Once again, claimant's history was the same as it was with the earlier doctors.

Based upon his examination, Dr. Rosenfelt felt that claimant had ruptured a disc at the L4-5 level, and that he needed to be hospitalized for a myelogram and, if positive, decompresive surgery. This was then performed at Des Moines General Hospital. According to Dr. Rosenfeld, claimant reached maximum healing on February 10, 1986. In his deposition, Dr. Rosenfeld causally connects a 30 percent permanent partial impairment to the body as a whole to the back injury at work in February 1985. Dr. Rosenfeld also indicated that he did not think that claimant could do a normal day's work as he did before. Dr. Rosenfeld was familiar with claimant's prior work experience consisting of primarily manual labor, driving and delivering or unloading of trucks. Dr. Rosenfeld felt that he would be substantially limited in carrying out those types of jobs that he had before.

Claimant was also examined at defendants' request by Jerome G. Bashara, M.D., another orthopedic surgeon, who basically agreed with the findings of Dr. Rosenfeld as to the nature and extent of claimant's impairment. Dr. Bashara also agreed with Dr. Rosenfeld and the other doctors that the twisting incident while getting out of the truck on February 11, 1985 was the cause of the injury sustained by claimant. Dr. Bashara also testified that the claimant would have limitations insofar as bending, stooping, twisting, climbing and lifting. The doctor opined that claimant suffered a 15 percent permanent partial impairment as a result of the February 11, 1985 injury and had a prior existing 5 percent permanent partial impairment.

Claimant testified that the surgery initially helped his pain, but most of the chronic back and leg pain has returned. He continues to regularly take pain medication. Claimant further testified that he cannot walk for prolonged periods of time. Claimant stated that he is unable to sit for prolonged periods of time. His difficulty with pain was apparent from his demeanor at the time of hearing.

Claimant has not worked in any real employment since leaving

the employer on February 25, 1985. He testified that after participating in a Missouri vocational rehabilitation evaluation in the State of Missouri he did some volunteer work in the spring of 1987 in some type of a supervisory capacity for no wage. Claimant testified that after working in that position for a short period he had to quit because of the stress and strain it placed on his physical condition. This fact was confirmed by reports from the vocational rehabiliation staff.

During the spring of 1986, claimant contacted the Iowa Department of Public Instruction, Vocational Rehabilitation Department. He participated in an initial interview and while the department was in the process of obtaining medical records and reports, claimant's wife obtained a job in Missouri. Because of their financial condition the family moved. After arriving in Missouri, claimant contacted the State of Missouri Vocational Rehabilitation Department and during the later part of 1986 went through an evaluation and testing. The counselor advised claimant that before the department could provide any further assistance, claimant would have to manage the pain he was suffering. Claimant was then referred to C. Norman Shealy, M.D., Ph.D., for pain management. After going through approximately a week of treatment with Dr. Shealy, claimant testified that he stopped the same because he was only gaining temporary relief and because he could no longer afford the treatments.

At the time of the hearing, claimant testified that he had made efforts to apply for employment during the spring and summer of 1987 in the Springfield, Missouri area. He was not successful for either the reason that they were not hiring, or the positions would not be available for individuals with his physical condition. These job appliations were made at employers ranging from counter work at auto parts stores to sales in used car lots.

Claimant testified that it was his intention to follow up with the Missouri Vocational Rehabilitation Department in order for them to assist him in either obtaining employment or further training in areas that would be available to him with his current physical condition. However, the department has removed claimant's name from its active list as they feel that at the present time claimant cannot be helped by their services.

Statements made by claimant on November 20, 1984 job application to Hildreth were also brought to light during the hearing. Claimant denied on the application that he had any handicaps or serious illnesses and he failed to state that he had a history of back problems. However, a listing of past injuries other than workers' compensation claims was not asked. Tim Hildreth testified he relied on the statements made by claimant on the application, and that he would not have hired him if he had disclosed his prior problems.

Claimant also had other health problems in his past. In early 1962, claimant was involved in an automboile accident while attempting to allude police when he was seventeen years old. This accident caused him to be hospitalized at University of Iowa Hospitals for an occlusion of an artery in his neck. Claimant has suffered mild symptoms in his right extremity since that time according to a state rehabilitation counseler

Claimant's physicians have noted and are aware of the several back strains claimant has had since 1969. However, all of the physicians distinguish the prior back strains from the work injury in this case on the basis of claimant's complaints of radicular pain and leg pain and the fact that claimant had no pain indicative of herniated disc. Dr. Bashara opined that it was his opinion that the prior injuries may have weakened the disc which ruptured in February 1985, but no doctor, including Dr. Bashara, changes their opinion as to the causal connection of claimant's low back dificulty to the February 1985 injury after discussing claimant's prior strains.

Claimant, since March 1985, has complained of neck and shoulder pain. Dr. Rosenefeld wishes to treat this condition in the future. No physician in this case gives an opinion concerning the causal connection of claimant's neck and shoulder difficulties to the February 11, 1985 work injury.

Testimony was also heard during the hearing of an incident five weeks before the alleged February 11, 1985 back problem where claimant experienced sharp back pain while unloading a welding tank at Camp Dodge during his employment at Hildreth's. A fellow employee, Donald Graham, testified that claimant told him he had "slipped a disc in his back" and after leaning over but said it was back in place. Apparently, claimant resumed his work after this incident.

Tim Hildreth testified that claimant told him that he injured his back a week before the alleged injury on February 11, 1985 while lifting a bathtub during a weekend remodeling project for one of his friends. Claimant denied any such injury at hearing stating that he did suffer an injury in the remodeling project by accidently swallowing a nail which required treatment at a local hospital. On cross-examination, Hildreth was asked why he stated in the deposition of May 27, 1986 that he could not remember who told him of the bathtub incident. Hildreth explained that his payroll records refreshed his recollection after the deposition. When asked why such records would refresh his recollection when they only reflect hours worked and amounts paid, Hildreth simply restated that they refreshed his memory. Hildreth also testified that on the morning of the alleged injury claimant appeared stiff when he arrived at work and that he had asked claimant if he was fit for work to which claimant replied that he was.

000407

Additional reports from a vocational rehabilitation firm were offered into evidence by defendants, but such evidence was excluded from consideration as it was not served in a timely fashion pursuant to the hearing assignment order issued in this case. A motion for continuance was denied by the prehearing deputy, Tom McSweeney, prior to the hearing.

## APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be awarded without a showing of a causal connection to a physical change of condition. 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. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 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 pre-existing 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 sub judice, claimant contends that he has suffered disability as a result of the work injury herein due to a permanent impairment to the body as a whole. First, the evidence established that he has suffered such a permanent impairment. All physicians rendering opinions in this case opine that claimant has a permanent partial impairment to the body as a whole as a result of his low back condition subject to the surgery.

No evidence was offered concerning any permanency from the alleged neck condition or no physician has opined as to the cause of such a condition. Claimant certainly never complained of any incident involving his neck during the February 11, 1985 incident. Therefore, claimant has failed to establish that he has either a permanent neck condition or injury or that it was resulted from his employment at Hildreth.

Next, the evidence shows the requisite causal connection between the work injury and the permanent impairment from the low back condition. All of the physicians rendering opinions in this case causally connect claimant's permanent partial impairment from the low back condition to the February 11, 1985 incident, despite being aware of claimant's prior back injuries extending back to 1969. Admittedly, these physicians were not aware of any injury a week prior to the alleged work injury while lifting a friend's bathtub. However, it is found that no such injury occurred.

Claimant and his witnesses are found to be be credible from their appearance and demeanor while testifying. The same cannot be said of the employer, Tim Hildreth. Admittedly, claimant has had a past criminal record which his attorney attempted to exclude from the consideration and from the evidence, but the evidence of his past incarceration did creep into the record. Despite this evidence, claimant was so very young when he was in trouble with the law. Claimant has had no trouble since. Claimant has been a hard working citizen since his difficulties with the law.

On the other hand, Tim Hildreth appeared at this hearing to be very interested in the outcome of the hearing. His explanation that his memory about who had told him of the bathtub incident was refreshed by the payroll records he reviewed prior to hearing is simply not believable and this lack of credibility extends to his comments regarding claimant's physical condition when he reported for work on the morning of the alleged work injury in this case.

II. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment

000409

or limitation upon activity involving the body as a whole, the degree of permanent disability must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity resulting from the work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physical impairment or restriction on work activity may or may not result in such a loss of earning capacity. The extent to which a work injury and a resulting medical condition has resulted in an industrial disability is determined from examination of several factors. These factors include the employee's medical condition prior to the injury, immediately after the injury and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Claimant's medical condition before the work injury was excellent and he had no functional impairments or ascertainable disabilities. Claimant was able to fully perform physical tasks involving heavy lifting, repetitive lifting, bending, twisting and stooping along with prolonged standing and sitting. As a result of painful injuries the function of his whole body has been affected. This injury took several months to heal. Claimant has experienced almost continuous pain in varying degrees since the date of injury.

Claimant's treating physician, Dr. Rosenfield, has given claimant a significant permanent impairment rating to the body as a whole. Any impairment prior to that work injury is not important as the record does not indicate that such an impairment resulted in any industrial disability. Apportionment of a disability between a preexisting condition and an injury is proper only when there is some ascertainable disability which existed independently before the injury occurred. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). Claimant's positions have restricted claimant's work activities by prohibiting tasks involving heavy work, heavy lifting, bending, sitting and standing. Claimant's medical condition prevents him from returning to his former work or any other work which requires claimant to violate his work restrictions.

Apart from his lost earnings during his healing period which will be compensated by healing period benefits, claimant has suffered a significant permanent loss in actual earnings as a result of his disability due to his inability to return to work.

Claimant is 41 years of age and in the middle of his working life. This period of time for claimant should be the most productive time of his life. His disability, therefore, is more severe than would be the case for a younger or older individual. See Becke v. Turner-Busch, Inc., 34 Biennial Report, Iowa Industrial Commissioner 34 (Appeal Decision 1979); Walton v. B & H Tank Corp., II Iowa Industrial Commissioner Report 426 (Appeal Decision 1981).

Although claimant had a shown a motivation to seek other employment and attempted vocational rehabilitation counseling, these efforts in Missouri and at the pain center were cut short due to lack of financial resources. Defendants have not assisted in claimant's attempted vocational rehabilitation.

Although claimant has only a tenth grade school education and exhibited average intelligence at the hearing, claimant has demonstrated in tests performed by vocational rehabilitation that he is intellectually able to be retrained. However, his pain and physical limitations prevent such a retraining through formal education or on-the-job training. Claimant is unemployed at the present time and probably will continue in such status in the foreseeable future as claimant's vocational rehabilitation counselors have virtually given up on claimant's employability.

Claimant has raised the so-called odd-lot doctrine, which is a procedural device designed to shift the burden of proof and in respect to employability to the employer in certain factual situations. Klein v. Furnas Electric Company, 384 N.W.2d 370, 375 (Iowa 1986). Due to the fact that claimant is not currently employed, an inquiry into the availability of suitable employment to claimant is necessary to measure the extent of his loss or incapacity. It is clear from the evidence presented that claimant is capable of light duty work. However, there is no presumption that merely because a worker is physically able to do certain work, such work is available. Guyton v. Irving Jensen Company, 373 N.W.2d 101, 105 (Iowa 1985).

Claimant has shown that he was not returned to work by his employer as a result of his disability. Claimant has further shown that he has made a reasonable effort albeit unsuccessful, to locate suitable replacement employment in the area of his residence. Therefore, claimant has established a prima facie case of total disability by producing substantial evidence that he is not employable in the competitive labor market under the so-called odd-lot doctrine. Id.

A worker becomes an odd-lot employee when his injury makes the worker incapable of obtaining employment in any well-known branch of the labor market. Id. An odd-lot worker can only perform services that are so limited in quality, dependability or quantity that a reasonable stable market for them does not exist. Id.

The Guyton court ultimately held that when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence shifts to the employer. If the employer fails to produce such evidence, and if the trier of facts finds that the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Id.

In the case sub judice, defendants did not go forward with the evidence despite the prima facie showing by claimant and it is found that claimant does fall into the odd-lot category. Therefore, claimant shall be awarded permanent total disability benefits accordingly from the date of injury.

III. Claimant is entitled to reimbursement of his reasonable medical expenses as a result of treatment of a work injury under Iowa Code section 85.27. Claimant requests in this proceeding the expenses listed in the attachment to the prehearing report. The medical providers who charged these fees all indicated in the evidence presented in this case that the charges were reasonable and were incurred for reasonable and necessary treatment. Claimant is entitled therefore to the amounts listed, which total $6,900.

Costs of this action listed in attachment to the prehearing report, which totals $1,190.53, appear reasonable under agency rules and shall be taxed against defendants.

## FINDINGS OF FACT

1. Claimant and his wife were found to be credible witnesses from their appearance and demeanor on the stand. Claimant's employer, Timothy Hildreth, was not found to be credible from his demeanor.

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

3. On February 11, 1985, claimant suffered an injury to his low back which arose out of and in the course of his employment with Hildreth. This injury consisted of a herniated disc at the L4-5 level of claimant's lower spine, which eventually required surgery.

4. The work injury of February 11, 1985 was a cause of a 15 to 30 percent permanent partial impairment of the body as a whole, and permanent restrictions upon claimant's physical activity consist of no heavy work or lifting, bending, or sitting or standing for prolonged periods of time.

5. The work injury of February 11, 1985 and the resulting permanent partial impairment is a cause of a permanent and total loss of earning cacacity. Claimant is 41 years of age. He has only a tenth grade education. Claimant is unable to return to work he was performing at the time of the work injury in this case and any other heavy labor employment to which claimant is best suited. Claimant had no ascertainable permanent physical impairment or permanent disability prior to February 11, 1985. Claimant has suffered significant permanent loss of actual earnings as a result of the work injury because he has not returned to work. Claimant has little or no potential for vocational training due to his pain and physical limitation, despite his intellectual ability to do so. Claimant is unemployed at the present time. Claimant has made every reasonable attempt to locate employment within the geographical area of his residence and has made a reasonable attempt to seek vocational rehabilitation counseling. There is no suitable or stable employment available to claimant within the geographical area of his residence. Claimant can only perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.

6. The medical expenses totaling $6,900 listed in the prehearing report are fair and reasonable and were incurred by claimant for reasonable and necessary treatment of his low back condition as a result of his work injury of February 11, 1985.

(No finding could be made that claimant suffered a neck or shoulder injury from employment at Hildreth or that any such injury was a cause of either permanent impairment or disability.)

## CONCLUSIONS OF LAW

Claimant has established entitlement to permanent total disability benefits and the medical benefits awarded below.

## ORDER

1. Defendants shall pay to claimant permanent total disability benefits at the rate of one hundred ninety-four and 11/100 dollars ($194.11) per week from February 12, 1985 during the period of his disability.

2. Defendants shall pay to claimant the sum of six thousand nine hundred dollars ($6,900.00) as reimbursement for medical

expenses.

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

4. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and, specifically, defendants are directed to pay claimant the costs set forth in the prehearing report, which total one thousand one hundred ninety and 53/100 dollars ($1,190.53).

5. Defendants shall file activity reports in the payment of this report as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

6. In accordance with the prehearing deputy's order at the beginning of the hearing in this case, the matter of claimant's entitlement to additional benefits for an alleged violation of Iowa Code section 86.13 shall be set back into assignment for prehearing and hearing.

Signed and filed this 23rd day of November, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Larry D. Krpan
Attorney at Law
3100 Ingersoll Avenue
Des Moines, Iowa 50312

Mr. W.N. Bump
Mr. Michael D. Blazek
Attorneys at Law
2829 Westown Parkway, Suite 100
West Des Moines, Iowa 50265

000414

FILED

NOV 2 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| DARRELL GOLDERMANN,<br><br>Claimant,<br><br>vs.<br><br>VALLEY BEVERAGE CO., SCOTT DIST.,<br><br>Employer,<br><br>and<br><br>WESTERN FIRE INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 778698<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This is a proceeding in arbitration brought by Darrell Goldermann against Valley Beverage Company, Scott Distributing, his former employer, and Western Fire Insurance Company, insurance carrier. The case was heard at Davenport, Iowa, on May 13, 1987, and was fully submitted upon conclusion of the hearing. The record in this proceeding consists of testimony from Darrell Goldermann, Daniel P. Congreve, M.D., and Donald Herzberg. The record also contains exhibits 1 through 49.

## ISSUES

Claimant seeks benefits related to a hernia which was surgically repaired on January 24, 1984. The issues include whether the hernia is an injury which arose out of and in the course of employment; whether there is a causal connection between the hernia and any alleged injury which arose out of and in the course of employment; determination of entitlement to compensation for temporary total disability or healing period; and, determination of entitlement to compensation for permanent partial or permanent total disability. It was stipulated that, in the event of an award, the rate of compensation is $208.64 per week and that the employer is entitled to credit in the amount of $1,300.00 under section 85.38(2) for group disability income plan payments. Defendants urge that the claim is barred under the provisions of sections 85.23 and 85.26.

## SUMMARY OF THE EVIDENCE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case.

Darrell Goldermann is a 53-year-old man who had been employed by Valley Beverage Company for approxiately five years as a warehouseman. His prior work experience had been somewhat varied and included jobs as a roofer, general foundry laborer, automotive service station attendant, truck driver, furniture assembler and delivery truck and fork lift operator. Claimant has an eleventh grade education and no formal vocational training or education beyond the high school level.

Claimant's health history, prior to the events which are the subject of this proceeding, included two hernia surgeries.

This claim revolves around a hernia which was surgically repaired on January 24, 1984 by Daniel P. Congreve, M.D. Claimant's testimony regarding the onset of his symptoms is somewhat vague. On direct examination, claimant testified that the pain gradually came on and that he did not know when it started. He recalled a 1980 incident of a strain while handling a beer keg which caused a pulling sensation the he felt ran to his toes. Claimant testified that other routine incidents, such as cleaning the floor, aggravated the hernia. Claimant testified that, when he consulted the doctor in January, 1984, the pain had become so unbearable that he could not endure it. Claimant related that his job involved lifting full kegs of beer which weigh 185 pounds.

Claimant testified that, on one Saturday, he mentioned to his employer, Donald Herzberg, that he was experiencing pain in his groin. He testified that, after seeing Dr. Congreve on January 16, 1984, he phoned Herzberg and informed him that he needed surgery. Claimant testified that, when released with lifting restrictions by his physician following the surgery, Herzberg told him no work was available because claimant was unable to lift.

On cross-examination, claimant testified that he had the bulging associated with his third hernia prior to the incident with the beer keg in 1980. He could not identify what had started the bulging, but stated that it increased from the 1980 incident. Claimant testified that he knew in 1980 he had a hernia and that he felt it was work-related and aggravated by the 1980 incident with the beer keg. Claimant testified that he may have mentioned the hernia to Jeff McIntyre, but was uncertain. He testified that he did not complain about it at work. Claimant testified that, in 1980, he hoped the hernia would not require surgery. Claimant testified that all of the bulge occurred

subsequent to 1979 and that it appeared a month or so before the incident of loading the beer keg in 1980.

Claimant testified that, in August, 1982, he saw his family physician, Mark Hermanson, M.D., with hernia complaints. He was unsure if the doctor recommended surgery, but understood at that time that he would probably need surgery. Claimant stated that the doctor wanted to get his blood pressure under control before performing surgery. Dr. Hermanson's office notes of August 5, 1982 are consistent with claimant's testimony (exhibit 2).

On cross-examination, claimant testified that he told Donald Herzberg that he was going to have hernia surgery approximately one week before the surgery was performed. Claimant thought he told Herzberg that the hernia was due to heavy lifting at work, but could not recall if he discussed the cause of the hernia with Herzberg.

Claimant testified that, when at the hospital, group medical insurance forms were provided. He denied obtaining the forms from his employer. Claimant testified that the first time he claimed his hernia was work-related was when he applied for social security disability. Claimant testified that a union representative told him to file for workers' compensation, but claimant was unsure if that occurred before or after the heart attack which he had on December 12, 1984. Claimant testified that he phoned the employer and talked with Sid Herzberg, a co-owner of Valley Beverage Company, who informed him that he had filed for workers' compensation a year earlier. Claimant testified that his employer told him he was not eligible for workers' compensation or unemployment. Claimant stated that he first contacted an attorney in December, 1985.

Claimant testified that, according to exhibit 48, the time he filed for workers' compensation must have been around November, 1984.

Donald Herzberg, president of Valley Beverage Company, Scott Distributing, a wholesale beer and wine distributor, testified that the only time claimant would lift beer kegs was on Saturdays or for a customer. Herzberg denied ever being told that claimant was having trouble with his abdomen and stated that his first knowledge of a claimed work injury from the hernia was a communication from the Iowa Industrial Commissioner's office dated November 28, 1984 which appears in the record as exhibit 49.

Herzberg testified that the group insurance claim form found at page 8 of exhibit 47 was filled out by the office manager and submitted to the group carrier at the claimant's request.

Herzberg testified that, even with a 50-pound lifting restriction, there was work available for claimant, although it

might not necessarily be full-time employment.

Herzberg testified that none of his other employees have suffered hernias and that, when claimant initially told him about having a hernia, it never crossed his mind that it might be work related.

Daniel P. Congreve, M.D., claimant's surgeon, testified that he first examined claimant in January, 1984 at which time claimant gave a history of increasing problems over a period of 18 months. At that time, Dr. Congreve diagnosed claimant as having a recurrent left inguinal hernia. The doctor stated that a direct inguinal hernia, either primary or recurrent, can be related to cumulative trauma or to a single trauma. Dr. Congreve stated that, when claimant first presented himself, he could not relate the hernia to any specific incident, but that, if there was an incident of pain in 1980 while lifting a beer keg into a car, it would not change his opinion on causation. It was noted, however, that, in his deposition, Dr. Congreve testified that, if the facts of which claimant testified as occurring in 1980 did occur and no surgery was performed subsequent thereto, he assumed the hernia had been present since 1980. Dr. Congreve stated that, when a person can feel a bulge in the abdomen, the hole in the muscular layers has become of sufficient size that portions of the intra-abdominal contents can be felt. He stated that other manifestations of a hernia can include pain in the abdomen or in a testicle, but that the absence of a bulge does not prove that a hernia does not exist. Dr. Congreve stated that even sedentary people can develop an inguinal hernia and normal daily activities can increase the size of a hernia.

Exhibit 12 indicates that, when claimant first saw Dr. Congreve, he related a five-year history of having the inguinal hernia.

## APPLICABLE LAW AND ANALYSIS

Section 85.23 of The Code requires an employee to provide the employer with notice that the employee has received an injury, within 90 days from the date of occurrence of the injury, unless the employer has actual knowledge of the occurrence. Section 85.26 of The Code requires that an action be commenced within two years from the date of occurrence of the injury. The file in this case shows that claimant's petition was filed on December 23, 1985 and that the petition was served on the employer on December 17, 1985 as shown by the Proof of Service in the file. Exhibit 49 establishes that the employer received notice on or about November 28, 1984. It appears undisputed from the evidence that claimant last worked on January 16, 1984 when he first saw Dr. Congreve.

Claimant asserts that this claim is not barred by section 85.23 or by section 85.26 due to the application of the cumulative

trauma theory as explained by the Iowa Supreme Court in McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). It is well established that the discovery rule applies to both sections 85.23 and 85.26. Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256 (Iowa 1980); Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980). In Robinson, Id., which dealt with section 85.23, the court stated:

> 'The time period for notice of a 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.' This statement accurately delineates when the employee's duty to give notice arises. The reasonableness of the claimant's contact is to be judged in the light of his own education and intelligence. He must know enough about the injury or disease to realize it is both serious and work connected, but positive medical information is unnecessary if he has information from any source which puts him on notice of its probable compensability.

With regard to the actual knowledge exception to giving notice, the court in Robinson, Id., at page 811 stated:

> 'It is not enough, however, that the employer through his representatives, be aware [of claimant's malady]. There must in addition be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.'

An employer's actual knowledge can arise from many sources. It requires the existence of some facts indicating a relationship between the affliction and the employment. Prior claims for a similar affliction may provide the basis. Mere surmise or conjecture is not, however, enough. Claimant's testimony does not include any definite statement that he gave timely notice. His testimony is vague and uncertain. The president of the employer business definitely denied any form of notice prior to November 28, 1984.

McKeever, Id., dealt with circumstances wherein there were two identifiable incidents of acute trauma and evidence of cumulative trauma from day-to-day activities. It can be interpreted to indicate that a statute of limitations does not begin to run until the injury produces inability to perform the normal duties of employment. The Iowa Supreme Court, in McKeever, indicated that it is a part of the discovery rule. McKeever is interpreted as simply holding that a worker is not necessarily held to

recognize the seriousness of injury that results from cumulative trauma until it produces disability from performing the normal duties of employment. It should be noted that, in McKeever, the medical ailment was not diagnosed until less than a month prior to the time Smith ceased working. Claimant's own testimony, however, establishes that he knew he had a hernia in 1980 and that he expected it to require surgery at least as early as August 5, 1982 when he saw Dr. Hermanson. This case is somewhat like Mousel v. Bituminous Material & Supply Co., 169 N.W.2d 763 (Iowa 1969) where the Iowa Supreme Court refused to toll the running of the statute of limitations, even though the employee had not been disabled from performing his employment, but the employee delayed seeking medical care for his condition for approximately six years.

This case is like Robinson in the sense that the employer knew of claimant's affliction, one which may or may not be work-related, but there were no particular indications that it was in fact work-related. The employee, at the onset of the affliction, believed it to be work-related, but the employee did nothing to give the employer notice that claim was being made until approximately the time of obtaining legal representation. This case is like Mousel in the sense that the claimant knew he had a medical condition which needed treatment, but he did not promply seek treatment for the condition.

Statutes of limitations are not favored. When two possible interpretations can possibly be applied, the one giving the longer period to a litigant is to be preferred. Sprung v. Rasmussen, 180 N.W.2d 430, 433 (Iowa 1970). A statute generally does not begin to run until circumstances have evolved to the point that the injured party is entitled to a remedy. Stoller Fisheries, Inc. v. American Title Ins., 258 N.W.2d 336 (Iowa 1977). In spite of these precedents, McKeever is not interpreted as a precedent which relieves an employee from exercising reasonable diligence when dealing with the nature, seriousness and probable compensable character of an injury.

Darrell Goldermann had two prior hernias. It would be assumed that he would recognize the symptoms of a hernia and that the condition would not heal or go away without surgery. Any abdominal surgery should be considered a serious matter by anyone.

It is therefore found that Darrell Goldermann, as early as 1980 and in no event later than August 5, 1982 when he saw Dr. Hermanson, had actual knowledge of the fact that he had a hernia and, therefore, knew the nature of his physical affliction.

Claimant testified that he expected surgery would be forthcoming at the time when he consulted with Dr. Hermanson in 1982. This establishes that claimant knew the seriousness of his condition.

Claimant testified that he felt the condition was work-related as far back as 1980 when the incident with the beer keg occurred. This establishes the third part of the discovery rule test, namely, that he realized the probable compensable character of the condition. Thus, this case presents a claimant who knew that he had a condition which was serious and work-related, but did not give notice to his employer in any manner until several months after he underwent surgery for the condition, such surgery being performed approximately one and one-half years after the condition was diagnosed. The cumulative trauma rule of McKeever is not a device for avoiding the running of a statute of limitations where the employee, with full knowledge of his condition, fails to give notice to the employer and continues working in spite of the condition. It is important to note that surgery was contemplated by Dr. Hermanson in 1982. There is no evidence, other than claimant's objective testimony, that the condition worsened between August 5, 1982 and January 16, 1984. An individual's description of his physical complaints is not a particularly accurate means of determining small differences in those symptoms.

It is therefore found and concluded that the date of occurrence of injury in this case is August 5, 1982, the date when Dr. Hermanson diagnosed claimant's hernia condition and the date upon which claimant testified that he understood he would probably need surgery. It is therefore concluded that defendants have met the burden of proving that claimant failed to give notice as required by section 85.23 of The Code. It is further found and concluded that claimant failed to commence this proceeding within two years from the date of occurrence as required by section 85.26 of The Code. Claimant's claim is therefore barred.

If the cumulative trauma rule from McKeever is applied to establish the date of injury as the last day Goldermann worked, the date of injury would be January 16, 1984. For notice to have been timely under section 85.23, it would need to have been given by April 15, 1984. Even if the McKeever rule is applied to this case, the claim would still be barred by section 85.23. The employer did not have actual knowledge and the first notice of a claimed work relationship to the hernia was given on or after November 28, 1984 by the communication from the Iowa Industrial Commissioner's office.

## FINDINGS OF FACT

1. On or prior to August 5, 1982, Darrell Goldermann realized that he was afflicted with a hernia.

2. On or prior to August 5, 1982, Darrell Goldermann understood that his hernia would probably require surgery.

3. On or prior to August 5, 1982, Darrell Goldermann

believed that his hernia had been caused or aggravated by his employment.

4. Claimant's employer knew that claimant had a hernia in January of 1984, but was not given notice that the condition was claimed to be related to his employment until November 28, 1984.

5. Darrell Goldermann did not give his employer notice that his hernia was alleged to be work-related prior to November 28, 1984.

6. There was nothing which occurred prior to November 28, 1984 which a reasonably conscientious manager, in the employer's line of business, should have recognized as indicating that a potential existed for a workers' compensation claim to be made for the hernia.

7. Claimant's petition was filed on December 23, 1985.

8. Claimant's evidence fails to establish that his condition worsened in any way subsequent to August 5, 1982.

## CONCLUSIONS OF LAW

1. The date of occurrence of injury for purposes of sections 85.23 and 85.26 is August 5, 1982.

2. Claimant's claim is barred by the provisions of sections 85.23 and 85.26 of The Code.

## ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding.

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against defendants pursuant to Division of Industrial Services' Rule 343-4.33.

Signed and file this 2nd day of November, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

000422

Copies To:

Mr. Harold J. DeLange II
Attorney at Law
705 Kahl Building
Davenport, Iowa 52801

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

1402.50, 2401, 2402, 2800
Filed November 2, 1987
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| DARRELL GOLDERMANN,<br><br>Claimant,<br><br>vs.<br><br>VALLEY BEVERAGE CO., SCOTT DIST.,<br><br>Employer,<br><br>and<br><br>WESTERN FIRE INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 778698<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

1402.50, 2401, 2402, 2800

Claimant developed a hernia in 1980. He continued to work in spite of it. In August of 1982, he sought medical treatment for the injury, but continued working. Surgery was deferred due to blood pressure problems. In January, 1984, claimant underwent hernia surgery. The first notice to the employer that claimant claimed his hernia to be work-related was given in November, 1984. His petition was filed in December, 1985. Claimant testified that, at or prior to the time he sought medical care in August, 1982, he knew he had a hernia because he had two prior hernias. He felt that the condition was caused by his employment and that it would probably require surgery. The date that claimant saw the physician in August, 1982 was fixed as the date of occurrence of injury. Claimant's attempt to apply the cumulative trauma rule from McKeever was rejected because the date of occurrence under the discovery rule had clearly occurred prior to the time claimant chose to undergo surgery, approximately 18 months after the condition had been initially medically confirmed by a physician.

000423

FILED

OCT 26 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| JOAN B. GONYIER,<br><br>Claimant,<br><br>vs.<br><br>HANSALOY HOWDEN CORPORATION,<br><br>Employer,<br><br>and<br><br>WAUSAU INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File Nos. 821629<br>821630<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Joan B. Gonyier, against her employer, Hansaloy Howden Corporation, and its insurance carrier, Wausau Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as the result of an injury which the parties stipulated was sustained on April 5, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner in Davenport, Iowa, on July 20, 1987. Neither first reports nor other filings have been made in either file. The parties stipulated that claimant's rate of weekly compensation is $164.91 and that claimant has already received healing period benefits from May 30, 1984 through June 5, 1984 and from December 13, 1984 through March 19, 1985 as well as having already received 15 weeks of permanent partial disability benefits. The parties also stipulated that commencement date for any permanent partial disability additionally awarded would be July 15, 1986.

The record in this case consists of the testimony of claimant and of joint exhibits 1 through 17.

ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant did receive an injury which arose out of and in the course of her employment and that there is a causal relationship between that injury and claimed disability. The issue remaining for resolution is:

000424

The nature and extent of claimant's disability, the dispute being characterized by parties as whether claimant is entitled to payment under section 85.34(2)(s).

REVIEW OF THE EVIDENCE

Fifty-three-year-old claimant testified that she began work at Hansaloy Howden Corporation in 1977 making emery board-sized scalloped knife blades on a punch press. Claimant reported that she was required to pull steel off a coil with her left hand. She reported grasping the steel between her thumb and forefinger while apparently pushing a safety device and indicator with her right hand in order to move the steel into the machine. Claimant reported that, after approxiately a year to a year and one-half, she started noticing problems. She indicated that she broke bones in her right wrist and that subsequently, the safety buttons on the machine were removed and replaced with push and pull buttons. She stated that she then operated the machine for approximately another eight months after which her left hand began hurting badly. She reported that her left wrist hurt and burned and that her thumb ached and swelled. She indicated she could neither grip nor pull. Claimant reported that she had swelling in her right wrist as well with her thumb problem extending one to two inches back into the wrist area. Claimant had surgical treatment of both her left and right hands.

Claimant reported that she continues to experience pain and swelling and that she has had difficulty with peeling potatoes, sewing, vacuuming, crocheting, scrubbing, removing and replacing jar lids and pulling the clutch and brake levers on her motorcycle as well as twisting the throttle on her motorcycle. She agreed that she wears a splint to vacuum and reported that, while that assists in heavy chores, it does not really work very well. Claimant reported that she takes Clinoril two or three times daily.

Claimant agreed that she is not considering further surgery which William R. Irey, M.D., proposed as she did not believe it would improve the condition of her right wrist.

Clinical notes of the Davenport Clinic of March 10, 1984 indicate that claimant reported pain in the left hand and under the arm with swelling, tenderness and some crepitation of the MP joint. An x-ray of the left hand of that date demonstrated degenerative arthritic changes of the carpal-first metacarpal joint as well as a small bony fragment which was smooth in the soft tissues lateral to the area, possibly related to old trauma. No recent bony disease was seen.

Richard L. Kreiter, M.D., saw claimant on April 16 and 17, 1984. He reported that claimant had a six- to eight-month history of increasing pain at the base of her thumbs, although

000425

there had been no injury or trauma. Claimant was tender with some swelling overlying the first metacarpal carpal joint with some crepitation actually more pronounced on the right than on the left. Claimant otherwise had a good range of motion. The doctor's impression was a probable degenerative osteoarthritis of the first metacarpal carpal joint. Dr. Kreiter referred claimant to Dr. Irey.

Dr. Irey performed a resection implant arthroplasty of claimant's left thumb with a silastic prosthesis on May 31, 1984. In history taken that date, he reported that claimant had bilateral carpal metacarpal arthritis of the thumbs and that, as she had failed at medical management, she elected to proceed with the left hand first. On November 13, 1984, Dr. Irey reported that claimant was having pain in both wrists and that she was unable to perform her normal work duties. On December 14, 1984, Dr. Irey performed a resection implant arthroplasty of the right thumb carpal metacarpal joint. Flexor carpi radialis was used to reenforce the capsule. On January 25, 1985, Dr. Irey reported that claimant was six weeks post the right resection implant and continued to have problems on the right hand which he believed related to subluxation of the implant. The doctor opined that the implant needed further stabilization and probably needed a tenodesis of the MP joint of the thumb.

While the exhibit list indicates medical reports of Dr. Irey of June 18, 1985 and December 13, 1985, none were included in the exhibits submitted. On April 22, 1986, Dr. Irey evaluated claimant's permanent physical impairment. He reported that such rating was based on an exam of April 9, 1986. As of the latter date, the doctor reported that, upon measuring with the goneometer, no decrease in her first and second metacarpal abduction could be detected although clinically the doctor believed there was some slight decrease. Claimant was having pain at the carpal metacarpal joint and the doctor was concerned that she may also have pain at the scaphotrapezoidal joint. On April 22, 1986, the doctor reported that claimant's abduction was decreased to a mild extent and that she had continued pain, especially on the right. He felt that she had lost from 10-20 degrees of extension of the carpal metacarpal joint corresponding to a 10% impairment of her thumb on the right. He indicated that, based on continued pain and probable instability of the joint, that figure should be increased to 20% impairment of her thumb corresponding to an eight percent impairment of her right hand. The doctor reported that claimant's left hand motion was actually quite good and that she had lost only approximately 10 degrees extension of the thumb representing a five percent impairment of her thumb corresponding to a two percent impairment of her hand using values obtained from the AMA guides, page 4, using tables 3 and 4.

On August 26, 1986, Dr. Irey advised the employer that

claimant had reached a point where she was having too much pain to continue her current job. He reported that she might be suited to much lighter duty work, if available. On October 16, 1986, Dr. Irey opined that it would be reasonable to proceed with the revision arthroplasty of claimant's thumbs if her symptoms dictated, but that as long as claimant elected to not proceed with such further surgery, more limited activity, including quitting (her job), would be the most reasonable course for claimant. On December 16, 1986, Dr. Irey reported that claimant stated pain about the base of her right thumb was minimal with the main location of her pain being the dorsal ulnar aspect of her hand and central dorsal aspect of her wrist. Review of previous x-rays revealed no abnormalities in those areas, but only mild lateral subluxations of the trapezial prosthesis on the scaphoid. Dr. Irey then told claimant that he would not recommend revision arthroplasty of her right thumb although such would be beneficial on the left. He reported that revision arthroplasty would be unpredictable in decreasing her right ulnar-sided wrist pain and recommended continued splinting only. On April 8, 1987, Dr. Irey reported that claimant was having some mild wrist pain located on the central aspect of the right wrist which he suspected in some way related to her thumb joint problems. He reported that it did not seem serious and that it did not add to claimant's permanent partial impairment rating.

On February 27, 1986, Dr. Irey saw claimant because of pain in the central portion of the dorsum of her left hand overlying the third ray. On March 26, 1986, Dr. Irey reported that the left hand symptoms were decreased. On April 22, 1987, Dr. Irey reported that the pain noted was obscure and that he did not recommend surgery for such.

On March 11, 1987, the employer advised claimant that the employer could not find claimant work given her limited ability to use her hands.

The balance of the evidence was reviewed and considered in the disposition of this matter.

APPLICABLE LAW AND ANALYSIS

Our sole concern is whether claimant is entitled to payment under section 85.34(2)(s). That section provides that loss of both hands in a single accident shall equal 500 weeks and shall be compensated as such. Claimant first complained to medical personnel of left hand pain on March 10, 1984. When Dr. Crider saw her on April 16 and 17, 1984, claimant reported a six- to eight-month history of increasing pain at the base of both her thumbs. She apparently then had swelling overlying the first metacarpal joint with some crepitation, both on the left and on the right. As of May 31, 1984, Dr. Irey reported that claimant

had bilateral carpal metacarpal arthritis of the thumbs and had elected to proceed with resection implant arthroplasty of the left thumb first. The doctor's note of that date suggests that claimant's condition was simultaneously present in both thumbs even though it was appropriate to then only proceed with invasive medical treatment as regards the left thumb. That claimant only had complaints of pain in the left thumb on March 10, 1984 is not incompatible with this analysis. For, claimant's history to Dr. Crider of a six- to eight-month period of increasing pain at the base of her thumbs April 16 and 17, 1984 is compatible with simultaneous development of a bilateral arthritic condition. Further, claimant's work duties were such that simultaneous bilateral development of her condition would not be inconsistent with the use of her hands which she described at hearing.

Before claimant can recover under section 85.34(2)(s), however, claimant must show that her loss of use extends beyond each thumb and into each hand.

Operative reports are not in evidence; therefore, it is difficult to ascertain the exact nature and extent of claimant's invasive surgical procedure. Notes of Dr. Irey are of some help, however. Dr. Irey reported on December 14, 1984 that the right resection implant arthroplasty was then performed and that the flexor carpi radialis was used to reinforce the capsule. On December 16, 1986, Dr. Irey indicated that claimant had pain about the base of her right thumb, minimal, with main location of such being the dorsal ulnar aspect of her hand and central dorsal aspect of her wrist. No abnormalities were revealed on x-ray but for mild lateral subluxations of the trapezial prosthesis on the scaphoid. From the above, we conclude that claimant's invasive procedure on the right extended beyond the thumb joint into the area of the hand. Since substantially the same procedure was used on the left, we believe it appropriate to assume that the invasive procedure on the left also extended into the area of the hand. Claimant has also had indications of or recorded complaints of pain at the scaphotrapezoidal joint, at the dorsal ulnar aspect of her right hand, at the central aspect of her right wrist and in the central portion of the dorsum of her left hand. While Dr. Irey has reported that claimant's mild right wrist pain was not serious and did not add to claimant's permanent partial impairment and that her left dorsum pain was obscure, the existence of such complaints further demonstrates that claimant's disability extends beyond her thumb and into her hand. 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).

Claimant has established that her injury is a loss of use of both hands in a single accident for which she is entitled to compensation under section 85.34(2)(s). Dr. Irey has opined

that claimant has a 20% impairment of her right thumb representing an eight percent impairment of her right hand and that she has a five percent impairment of her left thumb representing a two percent impairment of her left hand. Eight percent of the hand equals seven percent of the upper extremity; two percent of the hand equals two percent of the upper extremity. Seven percent of the upper extremity equals four percent of the whole person; two percent of the upper extremity equals one percent of the whole person. Under the combined values charts of the AMA guides, four percent of the whole person and one percent of the whole person equals a combined value of five percent of the whole person. Five percent of 500 weeks equals 25 weeks. Claimant is entitled to total permanent partial disability compensation of 25 weeks. Defendants are entitled to credit for 15 weeks of permanent partial disability benefits already paid claimant.

## FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant began working for defendant employer in 1977 making scalloped knife blades on a punch press.

Claimant was required to pull steel off a coil with her left hand, grasp steel between her thumb and forefinger, and push a safety device and indicator with her right hand.

On March 10, 1984, claimant complained at the Davenport Clinic of pain in the left hand with swelling, tenderness and some crepitation of the MP joint.

On April 16 and 17, 1984, claimant reported a six- to eight-month history of increasing pain at the base of her thumbs.

Claimant then was tender with some swelling over the first metacarpal joint with crepitation more pronounced on the right than on the left.

On May 31, 1984, Dr. Irey diagnosed claimant's condition as bilateral carpal metacarpal arthritis of the thumbs.

On May 31, 1984, Dr. Irey performed a resection implant arthroplasty of claimant's left thumb.

On December 14, 1984, Dr. Irey performed a resection implant arthroplasty of the right thumb with the flexor carpi radialis used to reinforce the capsule.

As of December 16, 1986, claimant had mild lateral subluxation of the trapezial prosthesis on the scaphoid on the right.

Claimant's surgical procedures were substantially similar on

the right and on the left.

Claimant has had indications of pain at the scaphotrapezoidal joint on the right, the dorsal ulnar aspect of her right hand and the central dorsal aspect of her right wrist, and the central portion of the dorsum of her left hand.

Claimant's disability extends beyond her thumbs and into her hands.

Claimant has had a loss of use of both hands in a single accident.

Claimant has an eight percent loss of use of the right hand which equals a seven percent loss of use of the upper extremity which equals a four percent loss of use of the body as a whole; claimant has a two percent loss of use of the left hand which equals a two percent loss of use of the upper extremity which equals a one percent loss of use of the body as a whole.

The combined value of a four percent body as a whole loss and a one percent body as a whole loss is five percent of the body as a whole.

## CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that her disability related to her April 5, 1984 injury is most appropriately compensated under section 85.34(2)(s).

Claimant is entitled to permanent partial disability of five percent of the body as a whole. Defendants are entitled to credit for permanent partial disability benefits of 15 weeks already paid.

## ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant an additional ten (10) weeks of permanent partial disability benefits at the rate of one hundred sixty-four and 91/100 dollars ($164.91) with such benefits to commence July 15, 1986.

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30.

Defendants pay costs pursuant to Division of Industrial Services Rule 343-4.33.

Defendants file claim activity reports as required by the agency.

Signed and filed this 26th day of October, 1987.

Helen Jean Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. J. E. Tobey III
Attorney at Law
512 East Locust Street
Davenport, Iowa 52803

Mr. Larry L. Shepler
Attorney at Law
600 Union Arcade Building
111 East Third Street
Davenport, Iowa 52801

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| DENNIS W. GRAFF,<br><br>Claimant,<br><br>vs.<br><br>LEHIGH PORTLAND CEMENT COMPANY,<br><br>Employer,<br><br>and<br><br>TRAVELERS INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 733834<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

FILED
OCT 20 1987
IOWA INDUSTRIAL COMMISSIONER

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Dennis W. Graff, claimant, against Lehigh Portland Cement Co. (Lehigh), employer, and Travelers Insurance Company, insurance carrier, for benefits as a result of an alleged injury on May 17, 1983. This action was filed by claimant and was numbered 733834. On April 9, 1987, claimant filed a second action that alleged an injury in May 1985, or aggravation of the May 1983 injury in May 1985, and this case was assigned number 844421. A hearing was held on file 733834 on April 2, 1987 and that case was submitted on that date. File No. 844421 was filed in part to prevent defendants from arguing that the statute of limitations had run on the May 1985 incident. The record on April 2, 1987 consisted of the testimony of claimant and Clark Borland; claimant's exhibits 1 and 2; and defendants' exhibit A. Neither party filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $333.50; that all healing period benefits have been paid; that defendants have voluntarily paid permanent partial disability benefits based on a 12 percent physical impairment rating; and that permanent partial disability benefits commence on April 16, 1986.

## SUMMARY OF THE EVIDENCE

Claimant testified that he was born on March 23, 1952. He

graduated from high school in 1970 in Forest City, Iowa, and characterized himself as an average student. He started working right after he graduated. He then described his employment after graduation from high school. Some of his jobs included aerial spraying, cabinetmaker at Winnebago Industries, working at Cashway Lumber in Mason City, Iowa, working at Iowa Beef Processors in Mason City, and working at Lehigh Portland Cement Company in Mason City. Claimant starting working at Lehigh Portland Cement Company on August 24, 1973 and started at about $4 per hour. His wage when he separated from Lehigh Portland Cement was $13.51 per hour. He is currently on a disability pension.

Claimant's first job at Lehigh was working as a laborer in a yard gang doing things such as shoveling. He then bid into another job doing mechanical work. Claimant's third job at Lehigh Portland was in an electrical shop and he was in a training program there. Claimant's fourth job at Lehigh Portland Cement was in the sheet metal department. Claimant was working in the sheet metal department on May 17, 1983. Claimant characterized his attendance at Lehigh Portland Cement from 1973 until the time he separated from them as "basically good."

Claimant then testified regarding his back injury that allegedly occurred on May 17, 1983. He characterized his health prior to this incident as good. He reported this incident to the foreman and plant manager at Lehigh Portland. He told them he was experiencing sharp pain in his back. He then saw a company doctor (see Exhibit 1, page 9). Claimant was taken off work from the date of the incident on May 17, 1983 through August 2, 1983. He was told to do exercises and was given medication. In August 1983, he resumed work at Lehigh Portland Cement as a laborer but at a different job than he was employed at on May 17, 1983. In late August 1983, claimant was hospitalized at Mercy Hospital in Mason City for four or five days and was given traction and other remedial measures because of his back problem. Claimant did not immediately return to work. He does not recall when he returned to work. Claimant was ultimately examined by William R. Boulden, M.D., with the initial visit on October 24, 1983. See Exhibit 1, page 18. Claimant was treated conservatively and was told to lose weight. Claimant ultimately went back to work at Lehigh Portland Cement on October 1, 1984. See Exhibit 1, page 33. He worked there for about two weeks but had to stop because his back was continuously getting worse. Claimant testified that in May 1985 he aggravated the original back injury of May 17, 1983. After the May 1985 incident, claimant went off work again and has not returned to work at Lehigh Portland Cement.

Claimant testified regarding an August 22, 1986 incident at his home when he was going upstairs to the bedroom. He fell backwards down the stairs and experienced back pain as a result.

He was in the hospital for four or five days. Claimant stated that on August 22, 1986, he did fracture a vertebra.

Claimant testified that he has sought job retraining. He stated that he has looked for numerous jobs. Claimant stated his restrictions as not lifting over 25 pounds from the floor and carrying over 40 pounds. He also said that he is supposed to avoid frequent bending, twisting and no standing in one position for over two hours. See Exhibit 1, page 55.

Claimant testified that after separating from Lehigh, he secured a plumbing job and stated that one-half of his salary was from government funds. He started this job in November 1986. He was given training to be a serviceman and would make house calls. He would perform activities such as fixing faucets. He worked a forty-hour week in November 1986 and worked in the capacity of a helper with an older person showing claimant how to perform his tasks. Claimant was laid off from this job in March 1987. He was paid $6.50 at the time of his layoff in early March 1987. Claimant was able to do his plumbing/helper job even with his restrictions. Claimant testified that given his medical restrictions he could not return to Lehigh Portland because lifting 50 pounds is normal at Lehigh and there are extreme temperature variations. Claimant then described the numerous benefits he had at Lehigh Portland Cement such as medical benefits and retirement benefits. Claimant received his first disability pension check in February 1987 from Lehigh and is paid $450 per month. His monthly benefit would drop at age 65 to $220 per month. Claimant has been denied social security disability benefits. Claimant stated that the $450 per month is not sufficient to live on with his five children and that he needs a job.

On cross-examination, claimant stated he has taken night courses at North Iowa Area Community College in such things as welding and small motors. He did not complete the welding course, but did complete the small motors course. Claimant acknowledged that his weight is a problem.

Claimant testified that he has not had back surgery to date. Claimant is currently taking the position that he will not have back surgery. Claimant has been advised that fusion surgery may cause him to have less pain and discomfort. Claimant was shown Exhibit A which describes in the first paragraph his L-1 compression fracture that occurred as a result of his fall at home on August 22, 1986. Claimant testified that in his opinion he fell at home in August 1986 because of the pain resulting from his injury at work in May 1985. On redirect examination, claimant also stated his opinion that the May 1985 incident occurred as a direct result of the May 17, 1983 incident.

Clark Borland testified that he works for the Iowa Depart-

ment of Vocational Rehabilitation as a field counselor. He interviews people who apply for vocational rehabilitation and gathers information from these interviews. He then sets up an education and placement program. Borland interviewed claimant initially on March 7, 1987. Claimant's cognitive ability was tested by the vocational rehabilitation staff. Claimant scored in the average range of learning ability. Claimant has the following positive employment factors, according to Borland:

1) his age of 35; 2) his education, which includes a high school diploma; and 3) his work ethic. Borland said the negative factors working against claimant are 1) the limited labor market; 2) limited transferable work skills because of his heavy labor background; 3) that high technology jobs would be difficult for him to enter; and 4) his medical condition. Borland then described the various job categories as sedentary, light, medium, heavy and very heavy. He stated that from 1973 to 1986, claimant's Lehigh job was heavy at times and at times very heavy. He stated his opinion that claimant could not return to heavy labor because of his medical condition, including the restrictions imposed by Sterling J. Laaveg, M.D. He then talked about jobs as being classified as unskilled, semi-skilled, skilled, technical, and professional. He stated that during the thirteen years that claimant worked at Lehigh Portland, he performed skilled, semi-skilled, and skilled functions. The skills were welding, some electrical skills, and some small engine repair skills. He stated his opinion that due to claimant's medical restrictions, he is limited to sedentary and light work. He added that claimant might be able to do medium work if an employer would accommodate claimant and regulate the pace of the work and activities such as lifting. He stated that claimant could do a job such as an electrical assembler, office clerk, or a security job.

Borland stated that claimant's personality will help him in securing employment. However, Borland added that blue collar/ manufacturing-type work is no longer available to claimant because of his medical condition.

Borland stated on cross-examination that claimant would ultimately gain employment but with some difficulty and that he will need advocacy in order to gain employment. He noted that vocational rehabilitation efforts resulted in a plumbing job. Borland acknowledged on redirect examination that part-time or short-time jobs are now quite common in the national economy; this trend would work to claimant's disadvantage.

Exhibit 1, page 7, discusses a back injury in late February 1982; this page of the exhibit describes the claimant lifting an auger that weighed about 200 pounds with a resulting muscle tear. Exhibit 1, page 8, states that claimant did quite well until May 17, 1983. Exhibit 1, page 9, described the incident of May 17,

1983 and claimant's resulting physical problems. Exhibit 1, page 12, states that claimant returned to work on August 3, 1983. Exhibit 1, page 26, reads in part: "Dr. Janda attempted to have him return to work in August but after working one week and two days his pain increased and he did not return to work again." Exhibit 1, page 17, reads in part: "Should be able to return to work Monday the 17th of October, 1983." Exhibit 1, page 27, reads in part: "IMPRESSION: Chronic mechanic back pain due to degenerative disc disease, presumably at L5-S1 with facet impingement as well probably." Exhibit 1, page 32, is authored by William R. Boulden, M.D., dated August 30, 1984, and reads in part: "I do not feel that he has caused any structural damage to his spine. Therefore, I would not rate him out with any permanent impairment." Exhibit 1, page 36, (under entry of June 21, 1985) reads:

> He was doing reasonably well with only intermittent pain until the later part of May. On the week prior to that he had been shifted to a new job on the sheet metal welding crew which is also the repair gang. This meant not only an increase in frequency of lifting but an increase in the volume of weight of the lifting as well. The patient began to have pain in his back. The pain became severe enough that he was having spasm.

Exhibit 1, page 36, reads under the impression paragraph: "Acute musculoskeletal back pain exacerbating previous injury." Exhibit 1, page 41, is authored by Dr. Laaveg, dated August 7, 1985, and reads in part: "The patient's being overweight is making his rehabilitation difficult and therefore I think it is extremely important that he lose weight as part of his overall process of his back rehabilitation." Exhibit 1, page 43, documents that neither defendant would pay for a weight loss program. Exhibit 1, page 49, reads in part: "There is no spondylolysis or spondylolisthesis. There is no acquired or congenital spinal stenosis." Exhibit 1, page 50, reads in part under the March 5, 1986 entry: "[H]e still has stiffness with any bending, lifting or prolonged sitting. He can stand for only a short period of time before he gets pain in the low back area radiating into the hips." Exhibit 1, page 51, documents that Travelers would not pay for swimming at the YWCA. Exhibit 1, page 52, documents that Dr. Boulden has not seen claimant since January 1984. Exhibit 1, page 52, documents claimant's injury of May 22, 1985 or the aggravation of his injury of May 17, 1983 in May 1985. Exhibit 1, page 53, also states Dr. Laaveg's opinion that it is doubtful whether claimant can return to his "regular job." Exhibit 1, page 56, has Dr. Laaveg's 12 percent impairment rating. On page 56, Dr. Laaveg also states that claimant "reinjured his back" while at work in the latter part of May 1985. On page 57 of exhibit 1, Dr. Laaveg states that the initial injury of May 1983 caused 5 percent whole body

000436

impairment and that the aggravation of May 1985 caused 7 percent whole body impairment with a resulting total of 12 percent whole body impairment.

APPLICABLE LAW AND ANALYSIS

I. Claimant has the burden of proving by a preponderance of the evidence that he received an injury on May 17, 1983 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The hearing on April 2, 1987 concerned only claimant's alleged injury of May 17, 1983 (file No. 733834). The alleged injury or aggravation of May 1985 (file No. 844421) was not tried on that date. I am convinced that claimant sustained a work-related back injury on May 17, 1983 as claimant's testimony on this issue was credible. A finding of fact will be made that in May 1985 claimant temporarily aggravated the injury of May 17, 1983, and that he may therefore be awarded temporary total disability benefits in #844421. Therefore, permanency benefits are appropriate regarding the May 17, 1983 injury only (#733834).

II. The claimant has the burden of proving by a preponderance of the evidence that the injury of May 17, 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).

Dr. Laaveg's opinion that claimant sustained some permanent partial impairment because of the May 17, 1983 is believed. It is not necessary for this agency to determine the exact degree of permanent partial impairment in order to make an award of industrial disability benefits in this jurisdiction. If this was a scheduled member case an exact determination of degree of impairment would, of course, be necessary. Given the determination above that no permanent partial impairment was caused by the incident in May 1985, any sort of apportionment is also unnecessary.

As claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal

000437

man."

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

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

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

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985); Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

In a whole body case, the degree of functional impairment does not necessarily equate with an individual's loss of earning capacity. Taking all appropriate factors into account in this case, it is determined that claimant's industrial disability is 40 percent. Claimant was able to secure a plumbing job after separating from Lehigh and his assertion that he is an odd-lot employee is not found to be persuasive. However, he obviously will not be able to return to Lehigh due to his medical problems caused by his work-related injury of May 17, 1983. Claimant is well motivated to find employment and any assertion that he simply wishes to rely on his $450 pension and workers' compensation benefits to merely survive is not believed. Claimant could be better motivated to lose weight.

At time of hearing, claimant asserted that the May 17, 1983 injury was a substantial factor in bringing about the May 1985 injury or that the claimant fully recovered from the May 17, 1983 injury prior to the May 1985 injury. For the reasons stated above, it is unnecessary to address either of these theories. Specifically, it will now be found that only the May 17, 1983 incident caused any permanent partial impairment with the May 1985 incident causing only a temporary aggravation of claimant's back condition.

FINDINGS OF FACT

1. Claimant was born on March 23, 1952.

2. Claimant is a high school graduate.

3. Claimant injured his back on May 17, 1983 while working for Lehigh and this injury caused some permanent partial impairment.

4. In May 1985, claimant temporarily aggravated his back problems that were caused by the work-related injury of May 17, 1983.

5. Claimant is not an odd-lot employee.

6. Claimant is well motivated to find full-time employment, but claimant could be better motivated to lose weight.

7. Claimant is presently receiving a disability pension from Lehigh in the amount of $450 per month.

8. Claimant secured full-time employment from November 1986 through March 1987, which was after his separation from Lehigh.

9. Claimant's industrial disability is 40 percent.

10. Claimant's stipulated rate of weekly compensation is $333.50.

000439

## CONCLUSIONS OF LAW

1. Claimant established by a preponderance of the evidence that on May 17, 1983 he sustained an injury which arose out of and in the course of his Lehigh employment and also established by a preponderance of the evidence that the injury of May 17, 1983 caused some whole body permanent partial impairment.

2. Claimant established that he is entitled to two hundred (200) weeks of of permanent partial disability benefits based on an industrial disability of forty percent (40%) with such benefits commencing on April 16, 1986. Defendants are entitled to a credit for benefits already paid.

## ORDER

IT IS THEREFORE ORDERED:

That defendants pay claimant two hundred (200) weeks of permanent partial disability benefits at a rate of three hundred thirty-three and 50/100 dollars ($333.50) with such benefits commencing on April 16, 1986.

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

That defendants be given credit for benefits already paid.

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

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

Signed and filed this 20th day of October, 1987.

T. J. McSweeney

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Robert W. Pratt
Attorney at Law
1913 Ingesoll Avenue
Des Moines, Iowa 50309-3320

000440

Mr. C. Bradley Price
Mr. Mark A. Wilson
Attorneys at Law
P.O. Box 1953
30 Fourth St, NW
Mason City, Iowa 50401

1402.30; 1402.40
Filed 10-20-87
T. J. McSweeney

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| DENNIS W. GRAFF,<br><br>Claimant,<br><br>vs.<br><br>LEHIGH PORTLAND CEMENT COMPANY,<br><br>Employer,<br><br>and<br><br>TRAVELERS INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 733834<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

1402.30; 1402.40

Held in arbitration that claimant sustained work-related back injury on May 17, 1983. Claimant's industrial disability was determined to be 40%. The medical evidence supported a finding that claimant could not return to heavy labor and most of his work experience was in the category of heavy labor.

000441

FILED

JUL 27 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

| | | |
|---|---|---|
| ROY L. GRAVES,<br><br>Claimant,<br><br>vs.<br><br>CROUSE CARTAGE COMPANY,<br><br>Employer,<br><br>and<br><br>LIBERTY MUTUAL INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 723352<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

---

## INTRODUCTION

This is a proceeding in arbitration brought by Roy L. Graves against Crouse Cartage Company, his former employer, and Liberty Mutual Insurance Company, its insurance carrier.

The case was heard at Des Moines, Iowa on March 17, 1987 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of claimant's exhibit 1, an exhibit which has 65 pages, and testimony from Roy L. Graves and Gary Walljasper.

## ISSUES

The claimant seeks authorization to have surgery performed as recommended by William R. Bouldon, M.D. Claimant seeks additional healing period and an award of permanent partial disability if surgery is not authorized. The issues presented by the parties include whether the stipulated injury of January 7, 1983 is a proximate cause of permanent disability of any degree; whether claimant is entitled to additional healing period over and above the 36.85 weeks which the parties stipulated have been paid at the rate of $305.08 per week, which rate is stipulated to be the correct rate in this case; and, determination of claimant's entitlement to compensation for permanent partial disability, should claimant not be authorized to have surgery recommended by Dr. Boulden.

000442

SUMMARY OF EVIDENCE

All evidence received at hearing is considered when deciding this case even though it may not necessarily be referred to in this decision.

Roy L. Graves is a married, 32-year-old man with two minor children. He is a graduate of Pleasantville High School and lives in Knoxville, Iowa.

Graves was injured on January 7, 1983 while unloading large truck tires. There is no evidence in the record of prior back problems and claimant denied having any prior back problems.

Following the injury of January 7, 1983, Graves was off work for several weeks and treated under the direction of Thomas B. Summers, M.D. The treatment was generally in the nature of physical therapy (exhibit 1, pages 23-37). Dr. Summers diagnosed claimant's condition as a herniated lumbar disc (exhibit 1, page 22). Following the treatment, claimant returned to work with Crouse Cartage Company in the same position as he had occupied at the time of injury. He continued to work until laid off in October, 1983, drew unemployment and then found work driving a coal truck in March, 1984. After approximately one and one-half years, claimant was laid off from the coal truck position.

Claimant subsequently returned to Dr. Summers and voiced complaints consistent with those he expressed at hearing. Namely, he indicated that he had gotten along reasonably well while off work and while receiving physical therapy, but that when he returned to work for Crouse Cartage Company, his symptoms returned. He expressed discomfort with extended walking, standing on cement or sitting in a truck for a long period of time. Dr. Summers found no evidence of a neurological deficit and no evidence of any muscle spasm. He suspected that claimant may have a lumbar radicular syndrome, but recommended against surgery. He advised that claimant obtain a second opinion and expressed no objection to having claimant examined by Dr. Boulden (exhibit 1, page 40-41).

Under the direction of Dr. Boulden, a CT scan of claimant's lumbar spine was performed which was interpreted as showing marked lateral foraminal stenosis at the L4-L5 level on the left and also a bulging disc at that same level (exhibit 1, page 7). A discogram was also performed and interpreted by Dr. Boulden as being abnormal. Dr. Boulden recommended that claimant undergo discectomy and posterior lumbar interbody fusion and felt that there was an 80% chance that the surgery would be effective at relieving claimant's symptoms (exhibit 1, page 11). Claimant was agreeable to having surgery, but Liberty Mutual Insurance Company, in accordance with its normal procedures, sought a second opinion on the advisability of surgery and sent claimant to Thomas A. Carlstrom, M.D. Dr. Carlstrom recommended against the performance of an anterior fusion or any other surgery. He did state, however, "...a myelography may indicate a large central herniated disc that could possibly be excised for

improvement of his symptoms." Dr. Carlstrom said he would recommend surgery if a myelogram were to indicate the existence of a large central herniated disc. He felt that claimant had reached maximum healing, had a 3-5 percent permanent functional impairment and should be restricted to lifting a maximum of 50 pounds or 20 to 25 pounds repetitively (exhibit 1, pages 1-3).

Claimant was also evaluated at the University of Iowa Hospitals and Clinics by Thomas R. Lehmann, M.D. The report states, "Our opinion is that it seems reasonable that if he has an abnormal discogram and Dr. Bowden [sic] feels this is the cause of his pain, then it is reasonable to do an interbody fusion. It is also reasonable that further diagnostic studies might be done to possibly to [sic] look for any other abnormality being a myelogram followed by a CT scan." (Exhibit 1, page 9)

Based upon the history given to them, Drs. Carlstrom and Boulden both opined that the injury of January, 1983 was a cause of claimant's symptoms and complaints (exhibit 1, pages 1 and 10). Dr. Boulden went on to state, however, that if claimant were symptomatic subsequent to recovery from the 1983 injury, that some new causative factor would be responsible for the symptoms. From the record it is clear that claimant did improve through treatment in early 1983. The final therapy note (exhibit 1, page 35) states, "During final treatment patient had very little muscle spasm or discomfort in the low back." The concluding report from Dr. Summers in 1983 states that claimant was "... essentially symptom free..." It concludes with the statement, "Seemingly, Mr. Graves has enjoyed complete and satisfactory recovery" (exhibit 1, page 44). It should be noted that claimant had not yet returned to work at the time the statements from the therapist and Dr. Summers were made. Claimant testified that he was never completely symptom free.

## APPLICABLE LAW AND ANALYSIS

The occurrence of the injury in January, 1983 was stipulated by the parties. Proximate cause is, however, at issue.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 7, 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).

The opinions expressed by Drs. Carlstrom and Boulden depend upon the accuracy of claimant's history. He testified concerning ongoing symptoms and complaints commencing with his return to work in early 1983. The notes of physical therapy and from Dr. Summers showing improvement were made at a time when claimant had not yet returned to work. Close reading of those reports does not show complete recovery although they do indicate substantial improvement. Claimant's demeanor was observed at hearing. There is nothing in the record which contradicts his testimony of continuing complaints and that testimony is accepted as correct. Dr. Summers diagnosed a herniated lumbar disc in 1983 and that diagnosis remains in effect at the present time. The injury of January 7, 1983 is found and determined to be a proximate cause of claimant's current symptoms and condition in regards to his low back.

Claimant seeks authorization for surgery. Code section 85.27 gives the employer the obligation to furnish reasonable services and supplies to treat an injured employee and the right to choose the care. The statute also gives the employee, if dissatisfied with that care, the option to apply to the industrial commissioner for a change of care. If an employer denies compensability of an injury, it cannot guide the medical treatment. Barnhart v. MAQ, Inc., I Iowa Industrial Commissioner Report 16 (Appeal Decision 1981). It could be held that, since the employer denied liability due to an alleged lack of causation, the employer has no right to select the care. Choice of physician is not, however, the ultimate issue in this case. It appears from the record that Dr. Boulden, whom claimant wishes to have provide his treatment, was authorized by the insurance carrier. The real issue is whether or not surgery is to be performed by Dr. Boulden at the employer's expense. The general rule is that once an employee has justifiably engaged a physician, a belated attempt by the employer to control the care will not cut off the right of the employee to continue with that care in the absence of a change of condition or evidence that the treatment is defective (2 Larson Workmen's Compensation, section 61.12(d), pages 10-821 to 10-823).

What is meant by the provision in section 85.27 giving the employer "...the right to choose the care" is sometimes misunderstood. Section 61.12(b) of 2 Larson Workmen's Compensation indicates that the reason for giving the employer choice of the medical care is as follows, "If the injured employee has completely unlimited free choice of his doctor, in some cases he may select

a doctor, because of personal relationship or acquaintance, who is not qualified to deal with the particular kind of case, or who at any rate is incapable of providing service of the quality required for the optimum rehabilitation process." It has previously been held that section 85.27 gives the employer, and its insurance carrier, the right to choose a treating physician, but does not give them the right to invade the province of medical professionals in determining what diagnostic tests and/or methods of treatment are to be utilized. Pote v. Mickow Corp., #694639 (Review-reopening decision June 17, 1986); Martin v. Armour Dial Inc. #754732 (Arbitration decision July 31, 1985). Drs. Carlstrom, Boulden, Lehmann and Summers are all known to this agency as specialists who are well regarded and recognized as excellent physicians. This case is not one which presents a claimant who is seeking care by a physician who will accommodate unreasonable claims of disability. It likewise is not a case where the employer seeks to authorize only a physician who takes the position that a complete recovery has occurred and that no further treatment is warranted.

Two Larson section 61.12(e) deals with the issue of differing diagnoses. It suggests that one approach is to let the result be determined by which diagnosis was eventually proven to be correct. It also indicates, however, that it is not improper to permit a change of medical care, upon petition, where there is a legitimate professional dispute as to the proper method of treatment for the injury. Southwestern Bell Telephone Co. v. Brown, 256 Arkansas 54, 505 S.W.2d 207 (1974). It appears in this case that the insurance carrier, acting on behalf of the employer, has authorized treatment by Dr. Boulden, Dr. Summers and Dr. Carlstrom.

Claimant is permitted to obtain treatment, at the employer's expense, from whichever of those three physicians he chooses. The employer and its insurance carrier are not permitted to withdraw authorization for treatment by any of those three physicians and further, are not permitted to dictate to any of the physicians how the physician should practice medicine in providing treatment to Roy L. Graves. Neither the employer nor the insurance carrier has been shown to possess the expertise necessary to tell highly-regarded medical professionals how to practice medicine.

Drs. Lehmann and Carlstrom have both indicated that a myelogram would be advisable prior to performing any surgery. It is difficult to understand how claimant can be willing to undergo surgery, but is not willing to undergo a myelogram for diagnostic purposes in order to be more certain with regard to whether or not surgery is required.

Claimant seeks a running award of healing period compensation. There is no evidence in the record which indicates that claimant has been disabled subsequent to April 4, 1983. It has been stipulated in paragraph 10 of the pre-hearing report that

claimant has been paid 36.85 weeks of compensation at the correct rate. Reports filed by defendants show payment of 11.857 weeks. The difference between the Claim Activity Reports and the pre-hearing report is unexplained. Claimant's entitlement to healing period at this time is found to be 11.857 weeks running from January 8, 1983 through January 23, 1983 and from February 7, 1983 through April 4, 1983 in accordance with the records from Drs. Foley and Summers. Claimant's entitlement to future compensation for healing period will commence at such time as it is medically indicated that he is unable to engage in employment substantially similar to that in which he was engaged at the time of the injury in January, 1983. It will certainly commence upon hospitalization if such should occur.

## FINDINGS OF FACT

1. The injury of January 7, 1983 is a substantial factor in bringing about the herniated disc in claimant's spine and the symptoms referable to his spine with which he is now afflicted and for which he seeks treatment from William R. Boulden, M.D.

2. William R. Boulden, M.D., is a physician who has been authorized by the employer and its insurance carrier to treat claimant.

3. The treatment recommended by Dr. Boulden is reasonable.

4. Claimant has not shown that, at any time subsequent to April 4, 1983, he has been medically incapable of performing work substantially similar to that in which he was engaged at the time of the injury.

## CONCLUSIONS OF LAW

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

2. The injury of January 7, 1983 is a proximate cause of the low back condition which currently afflicts Roy L. Graves.

3. Defendants are responsible for expenses of treatment performed by or under the direction of William R. Boulden, M.D.

4. Section 85.27 of the Code gives the employer and its insurance carrier the right to select the physician or physicians who will treat an injured worker (and also other choices of selection such as selection of hospital, therapist, source of prosthetic devices, etc.), but it does not give them the right to direct or control the physician in matters involving the exercise of professional medical judgment such as determining what methods or diagnosis or treatment are to be employed in any particular case.

5. Claimant is not entitled to additional healing period

000447

over and above that which has been paid at this time.

ORDER

IT IS THEREFORE ORDERED that claimant may obtain medical care from William R. Boulden, M.D., and that the employer and its insurance carrier may not direct Dr. Boulden with regard to the methods of diagnosis or treatment to be employed. All treatment performed by Dr. Boulden will be at defendants' expense under the provisions of code section 85.27.

IT IS FURTHER ORDERED that claimant has, as of date of hearing, an entitlement to eleven point eight five seven (11.857) weeks of compensation for healing period at the rate of three hundred five and 08/100 dollars ($305.08) per week, which entitlement has been previously fully satisfied by defendants.

IT IS FURTHER ORDERED that defendants are not permitted to withdraw authorization for treatment from Drs. Boulden, Carlstrom or Summers without first obtaining an order from this agency permitting them to do so.

IT IS FURTHER ORDERED that costs of this proceeding are assessed against defendants.

Signed and filed this 27th day of July, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Jim Lawyer
Attorney at Law
2141 Grand Avenue
P.O. Box 367
Des Moines, Iowa 50312

Mr. W.C. Hoffmann
Attorney at Law
1000 Des Moines Building
Des Moines, Iowa 50309

000448

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MELVIN GREVING,

Claimant,

vs.

FARMLAND FOODS,

Employer,

and

AETNA CASUALTY & SURETY CO.,

Insurance Carrier,
Defendants.

FILED
NOV 20 1987
IOWA INDUSTRIAL COMMISSIONER

File No. 785983

A R B I T R A T I O N

D E C I S I O N

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Melvin Greving, claimant, against Farmland Foods, employer, and Aetna Casualty & Surety Co., insurance carrier, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury occurring on or about November 1, 1984. This matter was to come on for hearing November 19, 1987 at the Webster County Courthouse in Fort Dodge, Iowa, at 1:00 p.m.

The undersigned was present. Neither claimant nor defendants appeared.

Claimant failed to present any evidence in support of the allegations found in his original notice and petition. Neither an agreement for settlement nor a request for continuance are on file with the industrial commissioner.

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).

WHEREFORE, IT IS FOUND:

1. Neither claimant nor defendants appeared at the scheduled time and place of hearing.

2. The undersigned deputy industrial commissioner was present and prepared to proceed to hearing.

3. Neither an agreement for settlement nor a request for continuance are on file with the industrial commissioner.

4. Claimant failed to present any evidence to support allegations of a compensable work injury.

THEREFORE, IT IS CONCLUDED:

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

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceeding.

Costs are taxed to the claimant. Division of Industrial Services Rule 343-4.33.

Signed and filed this 20th day of November, 1987.

Deborah A. Dubik
DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

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

Mr. R. Todd Gaffney
Attorney at Law
404 Equitable Building
Des Moines, Iowa 50309

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| MARVIN D. GRIFFIN,<br><br>Claimant,<br><br>vs.<br><br>FIRESTONE TIRE & RUBBER COMPANY:<br><br>Employer,<br><br>and<br><br>CIGNA/INA,<br><br>Insurance Carrier,<br>Defendants. | FILE NO. 699642<br><br>R E V I E W -<br><br>R E O P E N I N G<br><br>D E C I S I O N<br><br>FILED<br><br>AUG 6 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

## STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Marvin D. Griffin, claimant, against Firestone Tire & Rubber Company, employer (hereinafter referred to as Firestone), and CIGNA/INA, insurance carrier, defendants, for the recovery of further benefits as a result of an injury on August 24, 1981. A memorandum of agreement for this injury is filed on April 9, 1982. On April 21, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and Jim Allpress. The exhibits received into the evidence at the hearing are listed in the prehearing report. All of the evidence received at the hearing was considered in arriving at this decision.

The prehearing report contains the following stipulations:

1. On August 24, 1981, claimant received an injury which arose out of and in the course of employment with Firestone.

2. Claimant is entitled to temporary total disability or healing period benefits for the periods of time set forth in the Form 2A attached to the prehearing report and claimant is not seeking further healing period benefits.

3. The commencement date for permanent partial disability benefits, if awarded in this decision, shall be March 31, 1983.

4. Claimant's rate of compensation in the event of an award of weekly benefits in this proceeding shall be $258.98.

The prehearing report submits the following issues for determination in this decision:

I. Whether there is a causal relationship between the work injury and the claimed permanent disability;

II. The extent of claimant's entitlement to weekly benefits for permanent disability; and,

III. The extent of claimant's entitlement to further treatment under Iowa Code section 85.27.

## FINDINGS OF FACT

1. Claimant was a credible witness.

From his demeanor while testifying, claimant appeared to be truthful. Claimant's testimony was consistent with histories provided to physicians during treatment and evaluation of his injury.

2. Claimant was employed by Firestone from April, 1971 to November, 1985 as a laborer and machine operator in the production of automobile and truck tires.

There was little dispute among the parties as to the nature of claimant's employment with Firestone. Claimant testified that he held various jobs in the tire plant located in Des Moines, Iowa. Claimant said that he worked for a while in the scrap, bead service and passenger final departments. Claimant also worked as in inspection, trimming tires, loading a "ban bury", and re-rolling liners. Most of these jobs except the "re-rolling liner" position involved strenuous work and lifting from 20 to 60 pounds on a repetitive and continuous basis. Since November, 1982, claimant has been restricted against lifting in excess of 30 pounds. At the time of the work injury herein, claimant was operating a tug machine. In November, 1985, claimant accepted an offer by Firestone to take early retirement and he was paid the sum of $10,000 as severance.

3. On August 24, 1981, claimant suffered an injury consisting of an incisional hernia in the left upper quadrant of his abdomen which arose out of and in the course of his employment with Firestone.

The medical records indicate that claimant has had a long

000452

history of problems in the left upper quadrant of his abdomen beginning in March, 1980. In July, 1980, upon a diagnosis of a hiatal hernia, claimant underwent corrective surgery by William E. Stanley, D.O. Most doctors in this case agree along with Dr. Stanley that this hiatal hernia is not work related. Approximately a month later, upon lifting at work, claimant experienced pain in the area of the surgical incision made at the time of the hiatal hernia repair. At that time, he underwent a second surgery consisting of an exploration of the incision area by Bryce Wilson, D.O. Dr. Wilson did not find evidence of any incisional hernia but found and removed a lipoma or fatty tumor in the incisional area. Claimant then returned to work.

Approximately a year later on August 24, 1981, claimant again experienced pain in the area of the surgical hiatal hernia incision while picking up tires to load the tog machine. Claimant said that he felt a big lump in the area where the pain was located. After seeing the plant nurse and company doctor, claimant was placed on light duty and reported back to Dr. Wilson. Dr. Wilson again could not find objective evidence of any problem in the area and referred claimant to Louis Rodgers, M.D. After his examination of claimant, Dr. Rodgers diagnosed that claimant had an incisional hernia in the area of the surgical scar caused by the July, 1980 hernia repair and he surgically repaired the problem. Dr. Rodgers treated claimant after this corrective surgery until March, 1982, at which time the doctor released claimant for full duty without restrictions.

4. The work injury of August 24, 1981, was a cause of significant permanent partial impairment to claimant's body as a whole.

Claimant returned to work following the incisional hernia repair but continued to experience pain in the incisional area of the July 1980, September 1980, and September 1981, surgeries. Claimant was then sent to Dr. Stanley in March, 1983, the doctor who performed the original hiatal hernia repair. Dr. Stanley felt that it was possible for the incisional hernia problem to be work related and recommended the imposition of a 30 pound weight restriction. Claimant was also examined by a Tom Throckmorton, M.D., in March, 1983. Dr. Throckmorton felt that the lingering pain in the left upper quadrant was due to adhesions and scar tissue formation from all of claimant's surgeries in the left upper abdominal quadrant. Dr. Throckmorton stated that claimant would simply have to live with the problem but he felt that these problems would be minimal if claimant restricted his lifting to 30-50 pounds.

Claimant testified that he continued to work on light duty despite chronic pain. He said that he was told by either the union or management that if he complained one more time he would be "out the door." In November, 1985 claimant, along with other

000453

employees, were offered a chance to retire early with a cash payment of $10,000. Claimant testified that he accepted this offer because he did not want to hurt his body anymore.

Claimant testified that he continues to have problems since leaving the employ of Firestone. Claimant complains of pain while lifting, tugging and pulling. Claimant also states that the pain develops after sitting for long periods of time. Claimant was sent by the insurance carrier in this case in April, 1986, to Robert Stickler, M.D., for an examination. After his examination Dr. Stickler could not find evidence of any recurrence of an incisional hernia and also opined that claimant has no permanent impairment from his abdominal problems and that he would not impose any work restrictions. Claimant was then examined in August, 1986, by a physician at the University of Iowa Hospitals and Clinics who likewise found no recurrence of an incisional hernia and no cause for the chronic abdominal pain. In September, 1986, claimant experienced an increase in symptoms but denied any strenuous activity at the time. Claimant was then examined by John Zittergruen, D.O. Dr. Zittergruen also did not find any objective evidence of an incisional hernia but made a diagnosis of such a hernia based upon claimant's subjective complaints. Dr. Zittergruen also stated that he believed that claimant's problems were "secondary to adhesions from his previous two surgeries." Dr. Zittergruen felt that claimant has permanent impairment due to recurring incisional hernias. Claimant was then sent to Walter Riley, M.D. In his report of March 18, 1987, Dr. Riley states that the hernia "appeared again at work" in 1986. He then states as follows: "Since the patient has had a spontaneous hernia at the site followed by repair and then a recurrent hernia, changes are high it may reoccur." Dr. Riley recommends further surgery to install a prosthesis to decrease the chance of recurrence.

Noting the reference by Dr. Riley to a work injury of 1986 and the history of an increase in symptoms in September, 1986, over a two week period in the reports of Dr. Zittergruen, Dr. Stickler opines in his deposition taken in this case that claimant must have suffered some intervening episode between April, 1986, and September, 1986, to cause a recurrence of the hernia found by Dr. Zittergruen and Dr. Riley. However, he has not examined claimant since April, 1986, and could not render an opinion as to whether claimant's condition has changed from his original findings.

The medical opinions since Dr. Stickler's examination in April, 1986, does not demonstrate by a preponderance of the evidence that claimant's condition has markedly changed since 1983. There is no concensus among examining physicians that claimant has an incisional hernia. Even Dr. Zittergruen failed to find objective evidence of such a hernia. The preponderance of the evidence does however show that claimant's chronic

000454

problems are probably due to adhesions caused by all of his prior surgeries. This was the concensus of claimant's doctors in 1983 and the view of Dr. Zittergruen. Claimant's physicians in 1983 must be given the greater weight as they were the treating physicians in this case and the physicians who performed the surgeries on claimant as opposed to the most recent physicians who are simply one time evaluators of claimant's disability. Admittedly, not all the 1980 and 1981 surgeries were work related. However, the surgeries since the initial hiatal hernia repair were motivated by claimant's pain complaints after lifting at work. Also, the incisional hernia repair in 1981 was directly related to claimant's work. As will be explained in the conclusions of law section of this decision, claimant only has to demonstrate that the work injury is a significant cause, not the only cause, of permanent impairment. Of great importance to the finding that claimant has suffered significant impairment was the imposition by claimant's physicians in 1983 following the incisional hernia repair of permanent work restrictions that claimant not lift over 30 pounds. A significant motivation for this restriction was the surgeries in 1980 and 1981, one of which was directly work related and claimant's chronic pain complaints since those surgeries which have not appreciably changed since 1983. After this restriction was imposed claimant was given light duty work at Firestone.

5. The work injury of August 24, 1981, is a cause of a 20 percent permanent loss of earning capacity.

This finding is based upon the following evidentiary factors. Claimant's employment prior to Firestone primarily consisted of unskilled physical labor. Claimant has worked as a laborer on a concrete construction crew, an assembly line worker and as a sheet metal worker all of which required heavy lifting, repetitive lifting, bending, twisting and stooping, and, prolonged sitting and standing. Most of claimant's past employment in jobs at Firestone before 1983 required the same type of strenuous work. Therefore, the evidence presented demonstrates that as a result of claimant's functional impairment and physician imposed physical restrictions following the initial incisional hernia repair, claimant is impaired as to his ability to return to the work he was performing at the time of the 1981 work injury and most other jobs claimant has held in the past. Such a circumstance is evidence of a permanent loss of earning capacity.

Claimant testified that he has made reasonable efforts to find suitable replacement employment since leaving Firestone. Claimant stated he has applied two or three times per week after taking early retirement without success. Claimant has completed heating and air conditioning training since leaving Firestone. However, this training did not lead to employment. Claimant is now attending a community college taking courses in building maintenance. Obviously, claimant is a person who is retrainable and is making attempts at such retraining.

000455

Claimant, however, has not demonstrated that he suffered a significant loss in actual earnings from employment due to his work injury. Although claimant accepted the retirement offer at least in part due to his abdominal problems, claimant was able to perform the light duty job he held at the time of his retirement. The workers' compensation coordinator at Firestone testified that Firestone attempted to accommodate injured employees and claimant would be working in a light duty status today at Firestone if he had stayed. Claimant apparently never asked for lighter work before his decision to leave Firestone. His explanation that he was fearful of reprisal is not satisfactory.

Claimant is 45 years of age, has a high school education and exhibited average intelligence at the hearing. Claimant has reasonable potential for successful rehabilitation. On the other hand, claimant is middle age and should be in the more productive years of his life. His loss of earning capacity due to disability is more severe than would be the case for a younger or an older individual.

6. A finding could not be made as to the need for further surgery as no finding could be made from the evidence presented that claimant's current problems are the result of a recurrence of an incisional hernia rather than scar tissue development and adhesions from all of the previous surgeries. If indeed claimant's physicians in 1983 are correct and that claimant's chronic difficulties are the result of his numerous prior surgeries, additional surgery may worsen claimant's condition.

## CONCLUSIONS OF LAW

The foregoing findings of fact were made under the following principles of law:

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be awarded without a showing of a causal connection to a physical change of condition. 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).

000456

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 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 although a finding was made causally connecting the work injury to significant permanent functional impairment to claimant's body as a whole, such a finding does not, as a matter of law, automatically entitle claimant to benefits for a permanent disability. The extent to which this physical impairment results in disability was examined under the law set forth below.

II. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment or limitation upon activity involving the body as a whole, the degree of permanent disability must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity resulting from the work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physical impairment or restriction on work activity may or may not result in such a loss of earning capacity. The extent to which a work injury and a resulting medical condition has resulted in an industrial disability is determined from examination of several factors.

000457

These factors include the employee's medical condition prior to the injury, immediately after the injury and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

At the prehearing conference in this case, claimant indicated that he was not relying upon the so called odd-lot doctrine under the holding in Guyton v. Irving Jensen Company, 373 N.W.2d 101, 105 (Iowa 1985). It is the policy of this agency that such a theory cannot be invoked by claimant without prior notice to defendants at the prehearing conference.

In this decision, it was found that claimant suffered a loss of earning capacity despite the lack of a showing of a loss of actual earnings as a result of the work injury. A showing that claimant had no loss of actual earnings as a result of a work injury does not preclude a finding of industrial disability. See Michael v. Harrison County, Thirty-four Bienniel Reports, Iowa Industrial Commissioner, 218, 220 (App. Decn. 1979).

Based upon a finding of a 20 percent loss of earning capacity or industrial disability as a result of an injury to the body as a whole, claimant is entitled as a matter of law to 100 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 20 percent of the 500 weeks allowable for an injury to the body as a whole in that subsection. According to the prehearing report, claimant has not been paid permanent partial disability benefits by defendants.

ORDER

1. Defendants shall pay to claimant 100 weeks of permanent partial disability benefits at the rate of two hundred fifty-eight and 98/100 dollars ($258.98) per week from March 31, 1983.

2. Defendants shall pay accrued weekly benefits in a lump sum.

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

4. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

5. Defendants shall file activity reports upon payment of this award as required by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 6th day of August, 1987.

Larry P Walsh

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. David D. Drake
Attorney at Law
2141 Grand Ave.
P. O. Box 367
Des Moines, Iowa 50302

Mr. E. J. Kelly
Attorney at Law
Terrace Center, STE 111
2700 Grand Ave.
Des Moines, Iowa 50312

000459

FILED

SEP 8 1987

BEFORE THE IOWA INDUSTRIAL COMMISSIONER IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| THOMAS R. GRIFFITH,<br><br>Claimant,<br><br>vs.<br><br>SMITH'S TRANSFER, INC.,<br><br>Employer,<br><br>and<br><br>TRANSPORT INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 710847<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This is a proceeding in arbitration brought by Thomas R. Griffith, claimant, against Smith's Transfer Corporation, employer, and Transport Insurance Company, insurance carrier. Claimant seeks additional permanent partial disability compensation and also section 85.27 benefits based upon the injury that occurred on July 26, 1982. The case was heard at Des Moines, Iowa on September 2, 1987 and was considered fully submitted upon conclusion of the hearing. The record in the proceeding consists of joint exhibits 1 through 16, claimant's exhibits 17 and 18, and defendants' exhibit B. The record also contains testimony from Thomas R. Griffith and from William E. Caldwell.

## ISSUES

The issues presented for determination are the extent of claimant's permanent partial disability and the employer's liability for the two medical bills which claimant submitted. The occurrence of injury arising out of and in the course of employment was stipulated and the stipulated rate of compensation is $436.08 per week. It was further stipulated that all healing period compensation has been paid, that 25 weeks of permanent partial disability compensation have been paid and that the stipulated date for commencement of permanent partial disability compensation is December 12, 1985.

000460

## SUMMARY OF EVIDENCE

The following is a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding this case.

Thomas R. Griffith was an over-the-road truck driver who was injured in an accident that occurred in the state of Minnesota on July 26, 1982. He injured his head and elbow and had stitches in his forehead and elbow. There was a possible loss of consciousness and retrograde amnesia concerning the accident (joint exhibit 1). Following the accident claimant continued to experience pain in the cervical region and headaches. Various treatments were administered including hot packs, traction, a TENS unit and prescription medications (joint exhibit 2). Claimant experienced blackout spells as well as a continuing problem with headaches. Evaluations were performed by a number of physicians. A report dated October 14, 1983 from Richard T. Beaty, D.O., the primary treating physician, concluded that claimant had probably stabilized with regard to his diagnosed post concussion syndrome, that he may continue to improve and should not deteriorate, that he had a 5% permanent partial disability based upon recurrent cephalgia for which Fiorinal Tabs were prescribed (joint exhibit 8). The last report from Dr. Beaty is an office note dated March 23, 1984 in which he indicated that he does not believe that claimant would be able to return to his previous job activity as an over-the-road truck driver (joint exhibit 10).

Claimant was evaluated by Eugene Collins, M.D., in late 1982 and early 1983. A CT scan was interpreted as being negative and claimant's headache symptoms were reported as improving at that time (joint exhibit 11).

Claimant was evaluated by Stuart R. Winston, M.D., a neurosurgeon, in mid-1984. Dr. Winston felt that claimant suffered from a chronic myofascial strain and associated muscle contraction headache. He recommended further dianostic testing in the form of an EEG performed with nasopharyngeal electrodes. Dr. Winston did relate claimant's complaints to the accident of July, 1982 (joint exhibit 12). When the testing was completed, Dr. Winston indicated that claimant should be able to return to over-the-road truck driving (joint exhibit 13).

The testing contemplated by Dr. Winston was performed at the University of Hospitals and Clinics, Department of Neurology, in mid-1984. The EEG was abnormal due to occasional left-right shifting sharp temporal transients weakly suggestive of a convulsive tendency. T. Yamada, M.D., a staff physician in the Department of Neurology, concluded that claimant may have a convulsive disorder secondary to a post concussion syndrome and recommended further testing (joint exhibit 14). Upon conducting the further testing, similar results were obtained, but Dr. Yamada did not considered the abnormalities to be convincing evidence

of a seizure disorder. Since claimant had not had any blackout spells for a period of time, anticonvulsant medication was not administered (joint exhibits 15 and 16).

Claimant currently works primarily on the dock loading and unloading trailers. He does some city delivery driving and short runs to other cities within a sixty-mile radius. Claimant testified that he has not returned to over-the-road truck driving because of a number of factors including Dr. Beaty's recommendation that he refrain from over-the-road driving, his uncertainty regarding whether he would be able to perform the job, the fact that simply driving a car for extended distances brings on headaches and the fact that he has a family and prefers to be at home with them. Claimant testified that he earned an average of approximately $800 per week when working as an over-the-road truck driver in 1982 and that he now earns an average of approximately $750 per week as a dock worker for Smith's Transfer. Claimant indicated that pay raises have occurred since 1982 in both the driving and dock worker positions. In 1986, claimant earned $31,884.95 from his employment (defendants' exhibit B).

Griffith testified that he is 39 years of age, married and has one child. He holds a B.A. degree in sociology and education from Drake University which he obtained in 1972, but has never worked in the field. His prior employment history includes working as a local delivery driver for a welding supply company and also as a rental manager for a truck rental company. He has been with Smith's Transfer for approximately 10 years and is 53rd in seniority out of 82 or 83 other employees. The future security of his employment with Smith's Transfer appears somewhat uncertain due to a recent purchase of the company by another business.

Claimant's current complaints are essentially headaches of two varieties. Claimant testified that he experiences severe incapacitating headaches on a frequency of approximately one per week. He also complained of regular headaches which he described as a nuisance or bothersome but which do not prevent him from functioning. He stated that Tylenol is effective for treating the regular headaches, but that even prescription medication did not help control the severe headaches which come on without any known cause and which normally last for four to eight hours.

William E. Caldwell, the Smith's terminal manager at Davenport, Iowa where claimant is employed, is acquainted with claimant. Caldwell testified that claimant is currently qualified as an over-the-road driver and that such is a requirement for being employed as a driver or as a dock worker. He testified that claimant had missed five days from work due to illness in 1986 and 1987. Caldwell confirmed that both dock workers and drivers had experienced pay raises since 1982. He would not disagree

with a rate increase of from $.31 to $.34 per mile in over-the-road driver compensation since 1982.

APPLICABLE LAW AND ANALYSIS

Claimant's injury involved his head. His continuing complaints and the disabilities rated by the physicians deal with headaches and problems other than those located in scheduled members. As stipulated by the parties, the disability should be evaluated industrially.

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

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

The stipulated rate of compensation is consistent with claimant's testimony that he earned an average of approximately $800 per week at the time of injury. Defendants' exhibit B shows claimant's 1986 earnings to have been an average of approximately $615 per week. Exhibit B also shows that, by August of 1987, claimant had earned $21,251.00. When averaged over the 32 completed weeks of 1987, the average is approximately $665 per week. When compared to his 1982 average of $800 per week, and considering approximately a 10% increase in over-the-road driver income as would accompany a rate increase of from $.31 to $.34 per mile, it is clear that claimant has experienced a substantial reduction in actual earnings. Since he is not driving over the road, however, claimant also does not have the expenses for meals and other road expenses that are commonly absorbed by over-the-road drivers.

Claimant's complaints regarding his headaches and their aggravation by driving an automobile are accepted as true and correct. His testimony that trucks typically provide a less comfortable ride than an automobile is also accepted as correct. The medical authorities are in some disagreement regarding whether or not claimant is medically capable of returning to over-the-road driving. The primary piece of objective evidence

in this regard is the EEG results from the University of Iowa Hospitals and Clinics which did in fact produce abnormal results, even though they were interpreted as not providing convincing evidence of a seizure disorder. Where objective evidence of some abnormality exists, even though it may not be convincing or compelling, the fact of a history of blackouts following the injury and continuing severe headaches is sufficient to warrant a conservative attitude on the issue of claimant's returning to over-the-road driving. The consequences of a blackout could be quite severe for claimant and for other users of the highways. Claimant's decision to remain in a dock-worker position is certainly reasonable even though well-respected medical authorities have indicated that it is probably not necessary for him to refrain from over-the-road driving. Even though he is probably capable of performing over-the-road driving, that type of activity is something which Dr. Winston indicated would be likely to produce discomfort (joint exhibit 12). Claimant's testimony regarding his recurrent headaches, both regular and severe, is accepted as being true and correct. It is further found that driving a rough-riding truck would be likely to produce significant discomfort and would aggravate the injuries suffered on July 26, 1982. While claimant probably could actually work as an over-the-road driver, it is found that he could do so only by enduring increased discomfort and with some, albeit minimal, risk to himself and to others through blackouts. When claimant's 1982 earnings are compared with the 1986 earnings as a dock worker, there appears to be approximately a 25% loss of actual earnings. When computed in comparison to the average 1987 earnings to date, the result is a 20% reduction in actual earnings. When compared to the claimant's estimated average earning level of $750 per week, the result is a 7% reduction in earnings. If the over-the-road earning level is increased by approximately 10%, as would seem appropriate according to Caldwell's testimony, the weekly gross would be $880 per week. When viewed in comparison to $750 per week, the result is a 17% loss of actual earnings. Even this amount, however, is probably a much smaller loss of earning capacity than what would have resulted if claimant had been forced to seek other employment, even when it is considered that he holds a B.A. degree. It is also recognized, however, that a number of factors not related to the injury have played some part in claimant's decision to not return to over-the-road trucking. It cannot be said, however, that those are the only reasons or that the results of the injury played no significant part in his failure to return to over-the-road driving. When all the applicable factors of industrial disability are considered, it is found and concluded that claimant has a 12 1/2% permanent partial disability in industrial terms as a result of the injury of July 26, 1982.

Claimant seeks payment of medical expenses in the amount of $165.00 with C. F. Andrews, D.O., and $26.00 with Osteopathic Radiology Associates (claimant's exhibits 17 and 18). Claimant

testified that he was referred to both of those providers of care by Dr. Seitz, the company physician, and such is confirmed on exhibit 18. Claimant testified that the services performed were related to his continuing complaints following the 1982 accident. No evidence is in the record conflicting with claimant's testimony regarding the referral and reason for the referral. It is well established that referral by an authorized physician is authorization for the treatment that is provided. Limoges v. Meier Auto Salvage, I Iowa Industrial Commissioner Report, 207 (1981). Defendants are therefore responsible for payment of the bills in the total amount of $191.00.

## FINDINGS OF FACT

1. Both witnesses who testified at hearing are found to be fully credible.

2. Thomas R. Griffith is a 39-year-old married man who suffers from continuing headaches as a result of a truck accident that occurred on July 26, 1982.

3. EEG tests performed at the University of Iowa Hospitals and Clinics identified some abnormality, but it was not of a sufficient degree to be considered as convincing evidence of a seizure disorder.

4. Claimant is not, medically speaking, prohibited from working as an over-the-road truck driver.

5. For claimant to work as an over-the-road truck driver it would exacerbate his continuing symptoms that resulted from the 1982 accident.

6. For claimant to work as an over-the-road truck driver there would be some slight risk of him developing a blackout seizure which could have severe consequences on himself and on other users of the highways.

7. It is not unreasonable that claimant chooses to remain a dock worker rather than returning to over-the-road truck driving, even though he is medically and legally qualified to work as an over-the-road driver.

8. Claimant's medical expenses incurred with C. F. Andrews, D.O., and Osteopathic Radiology Associates were proximately caused by the accident of July 26, 1982 and that accident was a proximate cause of the services provided. The services were authorized by the employer acting through its company physician, Dr. Seitz.

9. Claimant continues to suffer from headaches, some severe and incapacitating, others of a lesser level.

000465

10. Claimant is a college graduate with a B.A. degree in sociology and education, but he has never worked in that field.

11. Claimant is well motivated to be gainfully employed, of above average intelligence and emotionally stable.

12. Most of claimant's work experience is in the trucking industry.

13. Personal reasons, as well as the results of the 1982 injury, have played a part in claimant's decision to not return to over-the-road trucking.

14. Claimant's actual loss of earnings had been in the range of 20%.

15. Claimant has a 12 1/2% loss of earning capacity when all the appropriate factors of industrial disability are considered.

## CONCLUSIONS OF LAW

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

2. Claimant's disability in industrial terms under section 85.34(2)(u) is a 12 1/2% permanent partial disability of the body as a whole.

3. Defendants are responsible for payment of claimant's medical expenses under the provisions of section 85.27 of the Code in the amount of $191.00.

## ORDER

IT IS THEREFORE ORDERED that defendants shall pay claimant sixty-two and one-half (62 1/2) weeks of permanent partial disability at the rate of four hundred thirty-six and 08/100 dollars ($436.08) per week commencing December 12, 1985. Defendants are entitled to full credit for the twenty-five (25) weeks previously paid and shall pay the remaining thirty-seven and one-half (37 1/2) weeks in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants shall pay claimant one hundred ninety-one dollars ($191.00) for his medical expenses incurred with Osteopathic Radiology Associates and C. F. Andrews, D.O.

IT IS FURTHER ORDERED that costs of this action are assessed against defendants in accordance with Division of Industrial Services' Rule 343-4.33.

IT IS FURTHER ORDERED that defendants shall file Claim Activity Reports as requested by the agency pursuant to Division of Industrial Services' Rule 343-3.1.

Signed and filed this 8th day of September, 1987.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Larry L. Shepler
Attorney at Law
600 Union Arcade Building
111 East Third Street
Davenport, Iowa 52801

Mr. Paul C. Thune
Attorney at Law
Suite 300, Fleming Building
218 Sixth Avenue
Des Moines, Iowa 50309

000035
0004664

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| JANINE A. GRONBACH, | : | |
| Claimant, | : | File Nos. 759380/771093 |
| vs. | : | 771093 |
| IOWA BEEF PROCESSORS (I.B.P.), | : | A P P E A L |
| Employer, Self-Insured, | : | D E C I S I O |
| Defendant. | : | |

FILED
NOV 24 1987
IOWA INDUSTRIAL COMMISSIONER

## STATEMENT OF THE CASE

Defendant appeals from a consolidated arbitration decision awarding permanent partial disability benefits based on a 75 percent industrial disability.

The record on appeal consists of the transcript of the arbitration hearing; joint exhibits 1 through 17, 24, 25, 26A, and 34 through 37; claimant's exhibits 18 through 23, 26, 27 through 33, and 38 through 40; and employer's exhibits A through K. Both parties filed briefs on appeal.

## ISSUES

Defendant states the following issues on appeal:

I. Did the deputy commissioner err in determining that the claimant sustained a 75% industrial disability arising out of and in the course of her employment with IBP, Inc.?

II. Did the deputy commissioner err in determining that the medical services rendered by and at the direction of Dr. John Walker were reasonably necessary and causally connected to any injury of claimant and thus were required to be paid by the employer, IBP, Inc., pursuant to section 85.27?

III. Did the deputy commissioner err in determining that the healing period extended to October 1, 1985?

IV. Did the deputy commissioner err in determining that the applicable rate of compensation for all three files was $159.98?

000664

V. Did the deputy commissioner err in determining that Dr. Walker's billing for his September 7, 1984 examination constituted the reasonable cost for performance of an 85.39 examination?

REVIEW OF EVIDENCE

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

Claimant testifies that on December 3, 1984 she sustained an injury to her neck, left shoulder, and low back when her foot broke through a wooden pallet while she was lifting an 81 pound box of jowls. Claimant indicates that she was sent to W. E. Erps, M.D., for x-rays. Dr. Erps diagnosed left shoulder girdle strain and released claimant for return to work on December 12, 1983.

Claimant states that on February 23, 1984 she experienced a great deal of pain in her back, shoulder and neck while she was "skinning picnic hams." Claimant opines that skinning picnics is a heavy job involving twisting and bending. Claimant states that she informed her foreman, Jeff Lorenz, that she was hurting but that he did nothing. She also spoke with the personnel director, Tom Dunlop, but he did not schedule a doctor's appointment for her. Eventually, after a conversation with a union representative, she went to see Jonathan J. Hruska, M.D. Dr. Hruska diagnosed back strain and excused claimant from work on February 24, 1984. Dr. Hruska recommended that claimant do different work.

Claimant testified that on March 1, 1984 she sustained a work injury to her neck and shoulder when she was struck by two hams falling from a conveyor belt. Claimant initially saw Dr. Erps on March 2 and was off work until March 6. She worked March 6, 7, and 8 but left work on March 9 and did not return until June 20, 1984. Dr. Erps referred claimant to John J. Dougherty, M.D., on March 20, 1984.

Dr. Dougherty admitted claimant to the hospital on April 3, 1984. In his report Dr. Dougherty states:

> The above patient was admitted to the hospital 4-3-84 with complaints of pain in her left shoulder, back and neck, and left side of her body. Apparently was injured on 3-1-84 when two hams fell on her shoulder. She is kyphotic. The patient was treated conservatively. Seen by Dr. Krysztofiak who recommended continued conservative treatment. I don't think a myelogram was indicated. EMG showed no evidence of cervical radiculopathy.

000037
000466A

Patient was also tried with a stimulator. Gradually seemed to be improving, although certainly slow. Subsequently dismissed on 4-14-84 to be followed in the office.

FINAL DIAGNOSIS:

Previous contusion of the upper dorsal spine on the left with probably traumatic myositis of the periscapular area and cervical spine superimposed upon a scoliosis to the right in the dorsal spine with an increased kyphosis and old epiphysitis.

(Joint Exhibit 8, unnumbered page 5)

An MMPI was administered by Marcie Moran, M.A., a psychologist. Moran opines in her report that "[t]he test results indicate an elevation of the Hypochondriasis and the Hysteria scales with significant lowering of the Depressive scale." (Joint Ex. 8, unnumbered p. 1)

Claimant's continued complaints of pain prompted Dr. Dougherty to readmit claimant to the hospital for myelographic testing on June 5, 1984. The myelogram report indicates:

Myelography was performed following introduction of Metrizamide into the lumbar subarachnoid space by Dr. Dougherty at the L2-3 lumbar interspace.

There was good outline of the lumbar subarachnoid space without evidence of abnormality. The nerve roots are well outlined.

Under fluoroscopy, opaque media was passed through the dorsal region without evidence of abnormality.

In the cervical region, there is good outline of the subarachnoid space without evidence of abnormality. The nerve roots are well outlined.

(Joint Ex. 13, unnumbered p. 2)

Based on these results Dr. Dougherty opines:

The above patient was admitted to the hospital on 6-5-84. She continued to complain of pain in her neck and upper back, some in the lower back and left leg. Myelogram was carried out. The myelogram was felt to be within normal limits. Her sed rate was 25. Spinal fluid was normal. Bone scan was normal. Patient was subsequently dismissed on

000038
000466A

6-8-84. She has a back support, dorsal lumbar. Home on exercise program. We will follow her in the office.

FINAL DIAGNOSIS:

Same as before.
Contusion of the upper dorsal spine.
Probably traumatic myositis left trapezius superimposed upon a scoliosis on the right in the lower dorsal and upper lumbar spine. Possible old epiphysitis with increased kyphosis.

(Joint Ex. 13, unnumbered p. 4)

Dr. Dougherty released claimant to return to work on June 20, 1984. Claimant states that she worked for a few days with pain until she went to see Dr. Erps on June 26, 1984. Dr. Erps diagnosed muscle spasms of the back and left shoulder and released claimant for return to work on June 29, 1984. Claimant terminated her employment with defendant on June 29, 1984.

Dr. Dougherty opines in a letter to claimant's attorney dated July 19, 1984:

Patient was last seen by me on 6-18-84. I felt we could let her go back to work, stay on the exercises, try to lose some weight, see on a prn basis. Overall, I did not feel she sustained a serious injury. I felt she aggravated probably some pre-existing conditions in her back plus the fact the patient is somewhat overweight.

As far as any permanent disability, I would not feel she sustained any permanent partial disability, and I think her prognosis is good although I do feel that with the old epiphysitis and some of the curvature in her spine which I mentioned above which I feel is old, may continue to give her some difficulty with her back if she overuses her back. However, I would also feel that this is not directly related to her accident.

(Joint Ex. 17)

Claimant testified that after she left IBP she worked as a receptionist at $3.50 per hour until September 1984. On September 6, 1984 claimant saw John R. Walker, M.D., for an examination pursuant to section 85.39, The Code. Dr. Walker opines in a letter to claimant's attorney dated September 13, 1984:

I read your September 13, 1984 inquiry with

000039

0004664

interest and I have also reviewed this patient's records and chart. In one of the latter paragraphs, I stated that the probable answer to her low back problem would be a surgical arthrodesis of the lumbosacral joint. If this were done, we would end up with a permanent, partial impairment of 20% of the body as a whole and adding to this, for the cervical and dorsal spine pain and discomfort, I would estimate after proper treatment that this would be reduced to some degree. To the 20% permanent, partial impairment involving the low back I would add another 8% of the body as a whole which would bring it up to 28% of the body as a whole. At this point, it is probable that her temporary, partial impairment is higher than the above figures.

(Claimant's Ex. 19)

Dr. Walker admitted claimant to the hospital on October 19, 1984. A myelogram performed on November 2, 1984 indicated no evidence of disc protrusion. Nevertheless, Dr. Walker proceeded to inject chymopapase in the L3, 4 and 5 disc interspaces. In a letter to claimant's attorney dated November 13, 1984 Dr. Walker explains:

> I repeated the myelogram on November 1, 1984 and reviewed it personally and it was reported as negative. Unfortunately the radiologists tend to report everything negative unless there is a huge defect. This, at least, is my experience here in Waterloo. In my review of the myelogram I found that there were some peculiarities of the nerve root on the right and the left both but it was difficult to really say anything, however, the patient did have a very high spinal fluid protein, 66 mg.% which of course is extremely high for a disc problem. I thought, after reviewing everything, that the 4th lumbar disc showed a definite midline bulge on slice 10 of the CT scan and I felt that the L-4 disc was definitely herniated. I felt that the nerve root involved was under an irritative situation and I did not believe that she had true axonal degeneration and felt that the EMG would be noncontributory because of this. This, of course, is a known fact to all concerned.
>
> I felt, we should definitely do discograms at L-4 and L-5 and inject chymopapase or chymodiactin as indicated. On October 20, 1984 we did indeed do the Saline acceptance test at the 3rd and 4th and 5th lumbar interspaces and at the 3rd and the 5th

500040
000466A

> interspaces the disc would not accept any Saline, therefore we knew these were negative. However, at the 4th interspace, as I had suspected, 4 to 5 cc. of Saline was readily accepted by the disc and we are speaking now of the ruptured area. We then proceeded, after a short wait, to inject chymopapase in to the area. The patient went home a few days later feeling quite well and fairly asymptomatic.

(Cl. Ex. 21)

Claimant opines that the chymopapase injections helped her. Claimant discloses that she returned to see Dr. Walker December 24, 1984 because she was in pain and could hardly move. Claimant also reveals that Dr. Walker gave her a shot and then she felt better. Claimant testified that she returned to see Dr. Walker in February 1985.

Dr. Walker admitted claimant to the hospital on February 6, 1985 and performed a fusion of the left sacroiliac joint on February 7. Dr. Walker's admitting discharge diagnoses were "painful sacroiliac joint, left post-traumatic arthritis, instability." See Cl. Ex. 22, unnumbered page 4.

In a letter dated April 1, 1985 Dr. Walker opines that claimant will require another six months of healing at least. See Cl. Ex. 26. In an April 8, 1985 letter Dr. Walker opines:

> Basically, as I review the information on this patient, it is my final opinion that the patient's injuries, suffered at the Iowa Beef Product's were the cause of her coming to me and my treatment of her and the resultant problems that she may still have at this particular time. I certainly do not relate it to any accidents or injuries that she had in 1979 or in the era of chiropractic treatment.

(Cl. Ex. 27)

In a June 4, 1985 letter Dr. Walker states that claimant's permanent partial impairment is 28 percent of the body as a whole. See Cl. Ex. 28. Finally, in an August 31, 1985 letter Dr. Walker indicates the following about claimant's condition:

> 1.) In my opinion Janine Gronbach at this time, is not able to do light work on a regular basis.
>
> 2.) I believe Janine Gronbach might well do sedentary work, although I would certainly state that she should use her head and neck and shoulders on a limited basis. Basically, she should not have to extend her neck looking upward or do work with

000043

000466A

her arms above her head.

3.) See number two.

4.) Janine cannot sit or stand for any length of time. She should not do any heavy lifting at all. She can carry perhaps 5 lbs. from table top to table top infrequently. Bending and crawling are out. She cannot do these.

In reviewing the regulations #4, sub-part P of the regulations, I note that this patient has had an ankylosis of the sacroiliac joint on the left, however, she needs one on the right as well, so she falls in to this category fairly easily. Of course she has had an anterior disc excision of the 5th cervical disc with interbody fusion of Cloward performed on 2-11-85. Certainly these problems are capable of rendering her just about incapable of almost anything except for the most sedentary work. In reviewing the qualifications consisting of two hours per day standing and two hours per day walking, I don't believe that she would qualify at this point. Perhaps later on, in another 12 to 14 months she might.

(Cl. Ex. 30)

Claimant testified that she sustained a back injury in November 1979 while she was working for Marlo Molded Products. Claimant discloses that she received workers' compensation benefits for this injury. Claimant states that she was treated by Kenneth L. Zelm, D.C. Dr. Zelm's diagnosis and prognosis are set out in Joint Exhibit 26A as follows:

DIAGNOSIS:

1. An acute cervical strain
2. An acute lumbar strain
3. An acute thoracic strain

PROGNOSIS:

The patient has responded well to Chiropractic care and has relief from all symptoms. She was dismissed on January 21, 1980, asymptomatic. These injuries can cause problems in later years due to weakening of these areas. As I told her she will probably need some Chiropractic care periodically to maintain the correction that we achieved. (Emphasis added.)

Claimant revealed that she was involved in an accident in

000042
0004166A

1979. Claimant states that she saw M. L. Northup, M.D., for treatment of injuries resulting from that accident. Claimant denies having pain relating to her neck, left shoulder or any portion of her back as a result of the car accident. Dr. Northup opines in a letter to claimant's counsel dated March 8, 1985:

> According to my records Janine Gronbach had an automobile accident on 6/23/79 and she was seen by Dr. Bagon at that time. She had some swelling of the frontal region and was nauseated. X-ray of the skull was negative and was given Compazine 10 mg IM for her nausea and prescription for Tylenol #3 for headache. She was not seen again until 10/1/79 when she had a left otitis media infection. I have no other records concerning her automobile accident, although I certainly do not feel, according to the records, that she injured her back in any way on this accident.

(Joint Ex. 25)

Claimant testified that she is 25 years old; that she is a high school graduate; and that she has experience in restaurant work, bartending, wall papering and other part-time jobs.

## APPLICABLE LAW

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

## ANALYSIS

The first issue that defendant states on appeal encompasses three separate issues: Whether claimant sustained injuries arising out of and in the course of employment; whether claimant currently suffers any disability which is causally related to the alleged injuries; and what is the nature and extent of any disability which claimant allegedly suffers.

1. Arising out of and in the course of employment.

Defendant presented testimony and evidence attempting to show that claimant could not have stepped through the wooden pallets at IBP; that claimant could not have been struck by falling hams; and that the work performed by claimant at IBP was not as strenuous as she testified it to be. The deputy correctly rejected this evidence and correctly found claimant to be a credible witness. Claimant's account of the injuries she sustained has been consistent throughout this proceeding and is supported by the medical record. Claimant has established by a preponderance of the evidence presented that the injuries alleged arose out of and in the course of her employment.

0004668

2. Causal connection.

Dr. Walker opines that claimant suffers a 28 percent permanent partial disability to the body as a whole as a result of the work injuries. Dr. Dougherty, however, maintains that claimant suffers no permanent disability. Alexander Kleider, M.D., has examined claimant and his medical records. He opines that claimant suffers an 11 percent permanent partial impairment to the body as a whole as a result of the Chymopapain injections administered by Dr. Walker. (See pp. 27-28, Kleider's deposition)

The deputy adopted the opinions of Dr. Walker over those of Drs. Dougherty and Kleider. The greater weight of evidence supports the conclusions of Dr. Walker. Therefore, we find that the disability claimant now suffers is causally connected to the work injuries she sustained on December 3, 1983, February 23, 1984 and March 1, 1984.

3. Nature and extent of claimant's disability.

Claimant has sustained an injury to the body as a whole as such she is entitled to benefits for industrial disability. Claimant suffers functional impairment; however, functional impairment is only one factor considered in evaluating industrial disability. Claimant is 25 years old and a high school graduate. Her work experience is limited to manual unskilled labor. Claimant's age and education indicate that she is a good candidate for further education and retraining. Claimant's motivation appears to be good based upon her work history. Taking all these factors into account it is concluded that claimant's industrial disability is 75 percent.

Contrary to defendant's second argument on appeal claimant did not need defendant's authorization to recover the expenses for medical treatment she received at Dr. Walker's direction. Defendant has denied liability throughout this proceeding. The agency has consistently held that Iowa Code section 85.27 does not allow the defendant to deny liability and at the same time direct the course of claimant's medical treatment. See Barnhart v. MAQ Incorporated, I Iowa Industrial Commissioner Report 16, 17 (Appeal Decision 1981); Kindhart v. Fort Des Moines Hotel, (Appeal Decision March 27, 1985).

The evidence does indicate that the medical treatment rendered by Dr. Walker was reasonable and necessary. It appears that claimant did receive at least some temporary relief from the surgery. The fact that the surgery may have been less than successful does not make it unreasonable or unnecessary. Furthermore, the fact that another doctor would not have done the same thing does not render the treatment unreasonable or unnecessary.

000044
000466A

If, in receiving treatment for a problem, claimant's condition gets worse because of natural consequences or poor medical practice, defendant's liability for all disability related thereto remains.

Defendant contends that claimant's healing period ended in June 1984 when Dr. Erps and Dr. Dougherty released claimant for return to work. The record reveals that she continued to experience pain which required treatment after she was released for work. Therefore, Dr. Walker's opinion is more persuasive in determining the date claimant's healing period ended. We find that claimant's healing period ended on October 1, 1985 based on Dr. Walker's April 1, 1985 letter.

Defendant contends that the deputy erred in his determination of the applicable rate. The analysis set out in the arbitration decision of the rate issue is accurate and adopted herein. The applicable rate for all three injuries is $159.98 per week.

Defendant's final contention is that Dr. Walker's charges for the examination pursuant to section 85.39 include items not necessary for the evaluation of permanent impairment. It is unnecessary to consider this argument since it has already been concluded that Dr. Walker's treatment was reasonable and necessary. If the section 85.39 examination included items which defendant considers are for treatment, defendant is nevertheless obligated to pay those charges.

## FINDINGS OF FACT

1. Claimant was born on July 20, 1960.

2. Claimant graduated from high school in 1978 and has no other formal education.

3. After graduation from high school, claimant worked at a number of manual labor and service jobs.

4. Claimant worked as a manual laborer for IBP.

5. Claimant was injured on December 3, 1983 when she stepped on a wooden pallet which broke causing her to sustain permanent partial impairment to her body as a whole.

6. On February 21, 1984, claimant aggravated the injury she sustained on December 3, 1983; this aggravation caused additional permanent partial impairment to her body as a whole.

7. On March 1, 1984, while working for IBP, two hams fell on claimant and this series of events caused claimant to sustain additional permanent partial impairment to her body as a whole.

000045
0004664

8. Claimant suffers a 28 percent permanent partial impairment of the body as a whole.

9. After claimant separated from IBP in June 1984, she worked as a receptionist until about September 1984 at which time she quit this employment because she was physically unable to sit for more than one-half hour; she has not worked after September 1984 nor has she looked for work because of the condition of her health.

10. The medical treatment provided by Dr. Walker was reasonably necessary from a medical standpoint.

11. Claimant's healing period ended on October 1, 1985.

12. Claimant cannot now perform manual labor jobs.

13. Claimant's health was good prior to starting work for IBP.

14. Claimant's industrial disability is 75 percent.

## CONCLUSIONS OF LAW

Claimant sustained injuries on December 3, 1983, February 23 and March 1, 1984 arising out of and in the course of employment.

Claimant suffers a 75 percent industrial disability as a result of the work injuries she sustained on December 3, 1983, February 23, 1984 and March 1, 1984.

The treatment claimant received from John R. Walker, M.D., from September 6, 1984 through August 31, 1985 was reasonable and necessary to treat the disability claimant suffers as a result of the work injuries.

The weekly rate of compensation for injuries involved is $159.98.

WHEREFORE, the decision of the deputy is affirmed.

## ORDER

THEREFORE, it is ordered:

That defendant pay claimant healing period benefits commencing December 3, 1983 through October 1, 1985 (except for the days claimant worked) at the weekly rate of one hundred fifty-nine and 98/100 dollars ($159.98).

That defendant pay claimant permanent partial disability benefits for three hundred seventy-five (375) weeks commencing

000046
000466A

October 3, 1985 at the weekly rate of one hundred fifty-nine and 98/100 dollars ($159.98).

That defendant pay claimant for medical services rendered by John R. Walker as set out in claimant's exhibits 31 and 32 and for mileage set out in claimant's exhibit 33.

That defendant pay accrued benefits in a lump sum together with interest pursuant to section 85.30.

That defendant be given credit for benefits already paid.

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

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

Signed and filed this 24th day of November, 1987.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Marlon D. Mormann
Attorney at Law
P.O. Box 515
Dakota City, NE 68731

Mr. Robert S. Kinsey III
Attorney at Law
214 N. Adams
P.O.Box 679
Mason City, Iowa 50401

000467

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| SCOTT GRUIS,<br><br>Claimant,<br><br>vs.<br><br>BOMGAARS SUPPLY,<br><br>Employer,<br><br>and<br><br>LUMBERMEN'S MUTUAL CASUALTY COMPANY (KEMPER GROUP),<br><br>Insurance Carrier,<br>Defendants. | : | File No. 767894<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>FILED<br><br>OCT 13 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Scott Gruis, claimant, against Bomgaars Supply (Bomgaars), employer, and Lumbermen's Mutual Casualty Company (Kemper Group), insurance carrier, for benefits as a result of an injury on June 20, 1984. A hearing was held in Sioux City, Iowa, on May 5, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant; joint exhibit 1; and defendants' exhibits A through F. Defendants argue that claimant's exhibits 1, 2 and 3 should be excluded because claimant failed to serve an exhibit list in a timely manner as required by the clear language of paragrpah 6 of the hearing assignement order. Defendants filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $128.66; that claimant was paid weekly benefits from June 21, 1984 through August 12, 1984 (7 4/7 weeks which defendants characterize as healing period benefits); that claimant has been paid 22 weeks of permanency benefits based on a 10 percent rating for his left lower extremity; that the contested medical bills are reasonable in amount; and that claimant's injury arose out of and in the course of his employment with Bomgaars.

000468

## ISSUES

The contested issues are:

1) Whether there is a causal relationship between claimant's stipulated work injury of June 20, 1984 and his asserted disability;

2) Nature and extent of disability; specifically, whether claimant is entitled to additional healing period benefits for a period of about thirteen months; and

3) Whether defendants should pay the contested medical bills; defendants assert an authorization argument, causal connection argument, and reasonable and necessary argument in this regard.

## SUMMARY OF THE EVIDENCE

Claimant testified that he is 27 years of age and is currently employed in Ohio, but "no physical labor is involved." Claimant "got out of school" in May 1986.

Claimant testified that on June 20, 1984, he was employed by Bomgaars Supply and had been employed by this employer for about one year prior to that date. He characterized his job at Bomgaars as a heavy labor job. Claimant testified that on June 20, 1984, he twisted his left knee and tore the cartilage while delivering a lawn mower for his employer. Claimant was treated by M. E. Wheeler, M.D., of Sioux City, Iowa, and ultimately had surgery on his left knee. Two or three months after the surgery his left knee still hurt. Claimant testified that he couldn't feel much of a difference between how his knee felt the day before the surgery and the day Dr. Wheeler released him. In other words, claimant testified that the surgery made no difference in that he was not able to perform heavy labor. In August 1985, claimant had a second surgery on his left knee. He did not sustain a new left knee injury prior to the second surgery (new in the sense it was different from the June 20, 1984 injury).

Claimant testified that after his second surgery, his "knee is fine now." He went back to work about a month after the second surgery. This second surgery made his knee feel better than the Wheeler surgery. When claimant walked after the Wheeler surgery his knee would swell up. After the second surgery "things were fine." The cost of the second surgery was $1,100. See deposition of Peter K. Rodman, M.D., (Joint Exhibit 1, page 10). Other bills resulted from claimant's second surgery.

Claimant testified on cross-examination that after the Wheeler surgery in July 1984, he worked for Davidson Oil Company. Claimant does not remember when he went to Davidson Oil Company or how long he worked there. See claimant's exhibit 1, page 3

000469

for a list of employers. Claimant worked for Younglove Constructon from July 1985 to April 1986 as a draftsman.

Claimant testified that he went to Dr. Rodman because Dr. Rodman works on college football players around Sioux Falls, South Dakota. School friends told claimant about Dr. Rodman. Claimant testified that he "more or less picked Dr. Rodman himself." Claimant also talked with his attorney about going to Dr. Rodman. Claimant does not remember talking to anyone at Bomgaars or Kemper Group about going to Dr. Rodman. Claimant started getting bills in the mail for his second surgery. Exhibit B is a letter written by claimant's counsel to Kemper Group and it has a notation on it "no, if medical care needed he should return to authorized doctor." Claimant acknowledged on cross-examination that he had gone to Morningside Family Practice after his injury of June 20, 1984 and that defendants had paid the bill. He also acknowledged that all of Dr. Wheeler's charges were paid by defendants. He also acknowledged that all expenses regarding the first surgery were paid by defendants. Claimant couldn't remember when he last saw Dr. Wheeler. He did acknowledge that Dr. Wheeler told him (claimant) that he could come back to see Dr. Wheeler. Claimant testified that he didn't remember asking Bomgaars or Kemper Group if he could go to a physician other than Dr. Wheeler.

Interrogatory No. 17 states when claimant was off work. See claimant's exhibit 1, page 10. Claimant had his second surgery during a summer vacation. This is the time he was out of school.

Claimant's exhibit 1 is his answers to interrogatories filed in this matter. Page 2 of this interrogatory gives his age and education. Page 3 states his former employers and details about his alleged work-related injury of June 20, 1984. Interrogatory 16, page 9, reads in part: "The cartilege [sic] (25%) was torn in my left knee and the ligaments were stretched." Page 26 of claimant's exhibit 1 is a letter from Dr. Wheeler dated August 16, 1985 and reads as follows: "We have your letter regarding permanent impairment for the above mentioned. I have reviewed my records and I would rate his impairment of 10% of the lower extremity." Page 27 of claimant's exhibit 1 is a letter from Dr. Rodman, dated December 27, 1985, and reads in part:

> Thank you for your request for information on Scott Gruis. I feel the patient's knee has plateaued and at this stage I would anticipate no significant further change in his status.
>
> Historically, I feel the injury and subsequent surgery were the result of his injury in June of 1984 and I feel there is a definite cause and effect relationship.

000470

Defendants' exhibit D contains the "impression" of Dr. Wheeler and reads as follows:

> Ligamentous instability of left knee which I believe is old in nature. He has no effusion and do not feel he's had an acute disruption of the anterior cruciate ligament. Feel this is probably from his injury eight years ago, as well as a slight medial laxity. He may have torn the lateral meniscus with his more acute injury or slightly strained the lateral structures. Would not recommend arthroscopy at this time. Have placed him in a knee immobilizer and instructed him in quadriceps setting exercises. Will also start him on Motrin 400 mg. QID and reevaluate him in one weeks time. He should be non-working for this period of a week. He will return to my office for evaluation. If it is not improved at that time would possibly consider arthroscopy.

Joint exhibit 1 is the deposition of Doctor Peter K. Rodman, taken on December 8, 1986. He is an orthopedic surgeon and saw claimant on April 20, 1985. Dr. Rodman discusses claimant's first surgery on his left knee. Additional surgery was performed on August 7, 1985. On page 7 of his deposition, Dr. Rodman describes claimant's restrictions. On page 10, Dr. Rodman states his opinion as to the percentage of claimant's disability as "Eight percent of the affected knee."

On cross-examination, Dr. Rodman stated that claimant's attorney referred claimant to him (Dr. Rodman). On page 11, Dr. Rodman said he was not told by claimant about a football injury. This football injury is further discussed on pages 16 and 17 of Dr. Rodman's deposition.

## APPLICABLE LAW AND ANALYSIS

I. All of claimant's exhibits were reviewed in arriving at this decision because it is unnecessary to reach the question of whether they should be excluded from the record due to the fact that in any event claimant is not entitled to an award of weekly benefits or medical benefits for the reasons stated below.

II. Defendants' exhibit E reads in part: "[M]ay return to work as of Monday, 8/13/84." Defendants argue on pages 2 and 3 of their brief filed on May 14, 1987: "Claimant has the burden of establishing entitlement to temporary total or healing period benefits. Defendants contend that claimant has failed to identify a period for which he should receive benefits." I agree; therefore, no further healing period benefits are awarded.

III. The contested medical treatment was clearly unauthorized

000471

and therefore no award of medical benefits will be made.

FINDINGS OF FACT

1. Claimant was released to return to work on August 13, 1984 after a work-related injury to his left knee on June 20, 1984.

2. Claimant's permanent partial impairment as a result of this work-related injury is ten percent (10%) and he has been paid twenty-two (22) weeks of permanency benefits.

3. The contested medical treatment was not authorized by either defendant.

CONCLUSIONS

1. Claimant's exhibits were considered in this case even though he did not comply with the clear language of the hearing assignment order regarding service of possible or proposed exhibits.

2. Claimant failed to establish entitlement by a preponderance of the evidence to additional temporary total or healing period benefits.

3. The contested medical treatment was not authorized and therefore reimbursement for or payment of these bills will not be ordered.

ORDER

IT IS THEREFORE ORDERED:

That claimant take nothing from these proceedings.

That the costs of this action are taxed to claimant.

Signed and filed this 13th day of October, 1987.

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Frank Cosgrove
Attorney at Law
400 Frances Building
Sioux City, Iowa 51101

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

1402.60; 1802
Filed 10-13-87
T. J. McSweeney

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| SCOTT GRUIS,<br><br>Claimant,<br><br>vs.<br><br>BOMGAARS SUPPLY,<br><br>Employer,<br><br>and<br><br>LUMBERMEN'S MUTUAL CASUALTY COMPANY (KEMPER GROUP),<br><br>Insurance Carrier,<br>Defendants. | : | File No. 767894<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

1402.60; 1802

Held in arbitration that claimant failed to prove entitlement to additional healing period benefits because he failed to identify a period for which he should receive such benefits. The hearing deputy declined to speculate for the claimant and as a result additional healing period benefits were denied. It was also determined that the contested medical bills would not be ordered paid because the treatment generating these bills was clearly unauthorized. In fact, claimant testified that he made absolutely no effort to seek authorization for the care or treatment at issue.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| RONALD V. HALBLOM,<br><br>Claimant,<br><br>vs.<br><br>CRST, INC.,<br><br>Employer,<br><br>and<br><br>CARRIERS INSURANCE,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 722617<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

FILED
NOV 30 1987
IOWA INDUSTRIAL COMMISSIONER

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Ronald V. Halblom, claimant, against CRST, Inc., employer, and Carriers Insurance Company, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained December 6, 1982. This matter came on for hearing before the undersigned deputy industrial commissioner November 9, 1987. The record was considered fully submitted at the close of the hearing. The record in this case consists of the testimony of the claimant and Judith Halblom, his wife; and exhibits 1 through 4, inclusive.

## ISSUES

Pursuant to the prehearing report and order appoved November 9, 1987, the sole issue presented for determination is the nature and extent of claimant's permanent disability.

## FACTS PRESENTED

Forty-seven year old claimant testified he is a high school graduate with no other formal training or education. With the exception of brief periods of employment as a "grease monkey" and construction laborer, claimant defined his work experience as exclusively devoted to driving a truck either as a company employee or as an independent contractor under a lease arrangement. Claimant explained he was employed by defendant CRST, Inc., for approximately twelve years last earning at $.2165 per mile.

Claimant testified he injured himself when he fell while stepping down from the back of a trailer he was inspecting. He indicated he felt immediate pain and that he has been in pain ever since. Claimant testified he continued with his trip since he did not think he could find a replacement driver, but on returning home, he contacted his family physician (John Kuncaitis, M.D.) who referred him to Stephen G. Taylor, M.D.

Claimant was treated with rest and exercise until his release to return to work in January 1983. Claimant recalled he returned to work at that time, but in April 1983, took another five weeks off under the direction of Dr. Taylor. He returned to work again in May 1983, and worked through March 1984, when he again saw Dr. Kuncaitis who counseled him on the importance of bedrest. Claimant recalled he remained off work for about two weeks at that time and then worked steadily until he decided, in September 1984, to quit his employment with CRST, Inc. Claimant explained that while he was able to perform his normal freight job, he also felt it was harder to do than before his accident. He did not believe he was doing a good job, and finally, he felt that if he continued, he would have to repeatedly take time off every few weeks for rest and recuperation. After quitting, claimant acknowledged he purchased his own tractor and resumed drivng on a contract relationship. He disclosed that he did so in order to be home every night, to soak in a tub, to sleep in a good bed, and to have weekends off. By returning to contract driving, claimant was making shorter run deliveries within the state. Claimant was paid 80 percent of the receipts for the load out of which he paid his own expenses. In approximately the fall of 1986, claimant's wife began training with him as a driver and she has done a goodly part of the driving and loading.

In January 1987, claimant stated he began contracting with another trucking firm which provided him with longer hauls and the opportunity to earn more money. He testified he is paid 75 percent of the load receipts and pays all his own expenses. Claimant felt he was able to once again accept longer hauls because of the assistance of his wife. He estimated his 1985 and 1986 gross receipts to be in excess of $50,000 and his 1987 net receipts to be in the area of $25,000-$30,000.

Claimant acknowledged that he is not currently taking any prescribed medications, but regularly uses aspirin and follows an exercise program. Claimant has rejected, at this time, a surgical option to his back problem because of a lack of any guarantee attached to it. Claimant has curtailed the amount of driving time he can put in in any one stretch asserting that after driving for an hour or two, it is necessary for him to lie down. Claimant also asserts that he performs no lifting because of an inability to bend and stoop.

000475

Judith Halblom testified she began working with the claimant in approximately June 1986. She described she is involved in the driving, loading, unloading and that she "can do it all." She explained she can lift approximately sixty pounds, that the claimant does no lifting, and that the work is hired out if she would be unable to do the lifting herself.

On December 16, 1982, claimant was diagnosed by Dr. Stephen Taylor as having grade II spondylolithesis which he described as a result of a developmental abnormality of the lower lumbar spine which had probably been present for many years. (Exhibit 1, unnumbered page 2) An August 22, 1985 examination of claimant by Dr. Taylor revealed "lumbar spine motion is nearly normal with just slight restriction of flexion. Neurologic exam including reflexes and motor strength are normal." (Ex. 1, unnumbered p. 7)

William R. Boulden, M.D., saw claimant at the request of defendants for evaluation in February 1986. In his report (Ex. 1, unnumbered p. 11) Dr. Boulden agrees with the diagnosis of symptomatic spondylolisthesis, stating "At this time, I feel he has a 20% impairment of the lumbar spine with 10% of this pre-existing, and 10% of it based on the fact of trauma and being symptomatic at this point in time." (Ex. 1, p. 12)

## APPLICABLE LAW

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Iowa Code section 85.34(2) provides that compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code section 85.34(2)(u) provides that

000476

compensation for a nonscheduled or body as a whole injury shall be paid in relation to 500 weeks that the disability bears to the body as a whole.

ANALYSIS

The parties have stipulated that claimant sustained an injury on December 6, 1982 which arose out of and in the course of his employment and that the injury is the cause of permanent disability. There is no question that claimant has sustained an injury to his back which is a nonscheduled injury and that, therefore, the industrial method of evaluating disability is applicable.

Neither Dr. Taylor, who was claimant's treating physician, nor Dr. Kuncaitis, claimant's family physician, have expressed an opinion as to whether the claimant has any impairment as a result of his injury. Dr. Boulden opines claimant has a 20 percent impairment of the spine, only one-half of which is attributable to the December 6, 1982 accident.

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

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

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

000477

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 to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985); Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Claimant is a 47 year old high school graduate with no specialized training and no significant work experience outside of driving a truck. Claimant had an unremarkable medical history prior to his accident in December 1982. It has been almost five years since the injury and still claimant continues to suffer consequences. While it is undisputed he has returned to driving a truck, claimant has curtailed his driving activities as he has found he can now only drive for a short and limited periods of time before requiring rest. Claimant obviously places great reliance on his wife's assistance and capabilities who was very forthright in her testimony with regard to her responsibilities as part of the driving team.

There has been a change in claimant's earnings. However, it is difficult to attribute this solely to this accident. Claimant returned to work for CRST, Inc. and, although he found the work harder to do, he was able to do his job. He voluntarily left that position as no evidence in the record exists that the employer had any dissatisfaction with his job performance, that the employer had any intention to discharge him, or that claimant was advised to leave by any medical professional. Claimant's reasons for leaving included outside influences--an ability to be home in the evening, to sleep in a "good" bed, to be home on weekends. The fact his self-employment may be economically less beneficial than his employement with CRST cannot be solely attributed to defendants. While claimant's wife testified that were it not for the injury he would still be employed at CRST, the fact remains that the claimant is working as a long distance truck driver at this point, the same type of position he held at CRST. Therefore, claimant's lack of employment with CRST at this time cannot be attributed solely to his injury but is also a result of his own personal concerns.

Claimant is under no current medical restrictions and has not been under medical supervision due to his injury since he was released to return to work by Dr. Kuncaitis March 19, 1984. Claimant did return to see Dr. Taylor in August 1985 for recurrent back pain. Surgery was again discussed with the claimant but no further treatment was recommended. Claimant takes no prescriptive medications but does depend frequently each day on aspirin for pain relief. Claimant still is following an exercise routine.

A person with a "permanent deisability" by the very meaning of the phrase, can never return to the same physical condition he or she had prior to the injury. Armstrong Tire & Rubber Company v. Kubli, 312 N.W.2d 60, 65 (Iowa 1981). It is accepted claimant can never return to the same physical condition he was in prior to his injury. Claimant's capacity to earn has been affected by his injury. Applying the principles of industrial disability stated above to the case at hand, it is determined that claimant has sustained an industrial disability of 15 percent.

Iowa Code section 85.34(1) provides that if an employee has suffered a personal injury causing permanent partial disability, the employer shall pay compensation for a healing period from the day of the injury until (1) the employee returns to work; or (2) it is medically indicated that significant improvement from the injury is not anticipated; or (3) until the employee is medically capable of returning to substantially similar employment.

It is determined that claimant's healing period ended when he was released to return to work without restriction effective March 19, 1984. Therefore, pursuant to Iowa Code section 85.34(2), permanent partial disability benefits shall commence March 19, 1984.

## FINDINGS OF FACT

Therefore, based on the evidence presented, the following facts are found:

1. Claimant is a 47 year old high school graduate with no specialized training and no significant work experience outside of driving a truck.

2. Claimant sustained an injury to his back which arose out of and in the course of his employment December 6, 1982.

3. Claimant was released to return to work without restrictions effective March 19, 1984.

4. Claimant returned to work with CRST in his regular job but quit in September 1984.

5. Claimant left his employment because of complications from his injury and other personal reasons.

6. Claimant is currently self-employed as a truck driver but has had to curtail his driving and does not do any lifting since his accident.

7. Claimant had an unremarkable medical history with regard to his back prior to his injury.

8. Claimant has a permanent impairment of 10 percent of the body as a whole as a result of his injury.

9. Claimant's capacity to earn has been affected by his injury.

10. Claimant has a 15 percent industrial disability as a result of his injury.

## CONCLUSIONS OF LAW

Wherefore, based upon the principles of law previously stated, the following conclusions of law are made:

1. Claimant has met his burden of establishing he sustained a permanent partial disability to the body as a whole as a result of his injury on December 6, 1982.

2. Claimant has established a fifteen percent (15%) disability for industrial purposes as a result of his injury of December 6, 1982.

3. Claimant has established his healing period ended March 18, 1984.

## ORDER

THEREFORE, IT IS ORDERED:

Defendants are to pay unto claimant healing period benefits for the periods from December 13, 1982 through January 9, 1983, inclusive; April 4, 1983 through May 8, 1983, inclusive; and March 5, 1984 through March 18, 1984, inclusive.

Defendants are to pay unto claimant seventy-five (75) weeks of permanent partial disability at the stipulated rate of three hundred forty-nine and 20/100 dollars ($349.20) per week commencing March 19, 1984.

Defendants shall receive full credit for all disability benefits previously paid.

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

A final report shall be filed upon payment of this award.

Costs of this action are assessed against the defendants pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 30th day of November, 1987.

Deborah A. Dubik
DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Thomas Henderson
Attorney at Law
1300 First Interstate Bank Bldg.
Des Moines, Iowa 50309

Mr. David L. Brown
Mr. John E. Swanson
Attorneys at Law
8th Floor, Fleming Building
Des Moines, Iowa 50309

060482

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| JUDY HARRIS, | : | |
| | : | |
| Claimant, | : | |
| | : | FILE NOS. 688326 & 808325 |
| vs. | : | |
| | : | A R B I T R A T I O N |
| WILSON FOODS CORPORATION, | : | |
| | : | D E C I S I O N |
| Employer, | : | |
| Self-Insured, | : | |
| | : | FILED |
| and | : | |
| | : | JUL 29 1987 |
| SECOND INJURY FUND, | : | |
| | : | IOWA INDUSTRIAL COMMISSIONER |
| Defendants. | : | |

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Judy Harris, claimant, against Wilson Foods Corporation, a self-insured employer (hereinafter referred to as Wilson) and the Second Injury Fund for benefits as the result of alleged injuries on September 14, 1981, October 7, 1983 and other gradual injuries. On April 9, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which is approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Mary Ann Remington and Jack Harris. The exhibits received into the evidence at the hearing are listed in the prehearing report. All of the evidence received at the hearing was considered in arriving at this decision.

The prehearing report contains the following stipulations:

1. An employer/employee relationship existed between claimant and Wilson's at the time of the alleged injuries;

2. Claimant seeks temporary total disability or healing period benefits for various periods of time she was off work in 1985 and 1986 and that it was stipulated that claimant was indeed off work for these periods of time (see prehearing report, paragraph four);

000482

3. Claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $402.00 for the September 4, 1981 alleged injury date; $326.80 for the October 17, 1983 alleged injury date; and, $326.80 for a gradual injury, and;

4. The charges for the medical expenses for which claimant seeks reimbursement in this proceeding are fair and reasonable.

The prehearing report submits the following issues for determination in this decision:

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

II. Whether there is a causal relationship between the alleged injuries and the claimed disabilities;

III. The extent of claimant's entitlement to weekly disability benefits, and;

IV. The extent of claimant's entitlement to medical benefits under Iowa Code section 85.27.

## FINDINGS OF FACT

1. Claimant was a credible witness.

From her demeanor while testifying, claimant appeared to be truthful. Claimant's testimony was consistent with histories provided to physicians during treatment and evaluation of her injuries. Consequently, claimant was found to be credible.

2. Claimant has been continuously employed at the packing plant in Cedar Rapids from 1980 to the present time formerly owned by Wilson's and now owned by Farmland Foods.

There was little dispute among the parties as to the nature of claimant's employment at Wilson's prior to or after the time Wilson's sold the packing plant in July, 1984, to Farmland. Claimant testified that her duties consisted of various labor jobs as a meat packer. Claimant has held jobs such as splitting hog heads, ruffling, skulling, loin converting, spleen cutting, separating guts, and saving lungs. It was clearly demonstrated by her uncontroverted testimony that all of claimant's jobs at the plant involved the extensive use of both of her hands in pulling and grasping of animal parts and using knives and other manual or electrically powered cutting devices (such as scissors and a wizard knife) on a repetitive basis. Claimant testified that most of her hand problems occurred during the ruffling and loin converting jobs.

000483

3. On December 17, 1981 and October 5, 1983, claimant suffered two separate injuries to her right and left arm respectively which arose out of and in the course of her employment with Wilson's.

As will be explained in the conclusions of law section of this decision, the injury dates found above were arrived at by using a gradual injury theory. These dates coincided with the time claimant was compelled by a wrist pain to leave work for the purpose of receiving medical treatment. As far as the location of the injury, the medical records clearly indicate injurious involvement of the median nerve extending from the hand through the carpal tunnel and into the wrist.

According to claimant's uncontroverted testimony, in early 1981, while performing the ruffling job and other jobs consisting of extensive pulling of animal internal organs on a continual basis, claimant developed pain and swelling in both of her wrists, except that the pain was more severe on the right. Claimant was treated by the plant nurse with wrist wraps. During the summer of 1981, claimant was off work to give birth to one of her children. Upon her return to ruffling work in August, 1981, claimant's wrist problems worsened and she began to experience tingling and numbness along with night pain in her wrist, again more on the right than on the left. Claimant also developed a ganglion on the right wrist. She then sought treatment on November 24, 1981 from Warren Verdeck, M.D., an orthopedic surgeon who diagnosed bilateral carpal tunnel syndrome. After an EMG test revealed objective evidence of carpal tunnel syndrome on the right side, Dr. Verdeck performed a surgical release of the carpal tunnel tendon in the right wrist on December 17, 1981. The only work release slips submitted by Dr. Verdeck in the record indicates that claimant was first off work for this condition on December 17, 1981. The EMG test in 1981 on the left hand failed to reveal any positive finding of left carpal tunnel syndrome. There was no evidence submitted in either written or oral form as to whether claimant was off work prior to the time she had her surgery in December, 1981. Claimant testified that she was off work approximately a month as a result of the right carpal tunnel syndrome surgery.

On January 8, 1982, claimant returned to full duty performing work similar to the work she was performing in the fall of 1981. Claimant's right wrist pain improved with the surgery but according to claimant the pain never subsided completely. Claimant stated that following her return to loin converting her left hand began to cause her more difficulties and both wrists continued to cause problems in 1982 and 1983. Claimant was on strike for a portion of 1983 but upon a return to work, claimant's left hand problems became more severe and she started to have night pain. Claimant then went to L. C. Strathman, M.D., another orthopedic surgeon. Dr. Strathman ordered another EMG

test and after the test was positive on the left side he performed a release surgery for carpal tunnel syndrome on the left wrist on October 5, 1983. Claimant was off work from October 5, 1983 until November 21, 1983 for this second surgery according to the records submitted in this case. Dr. Strathman, in his work release slip, plainly opines that the condition was work related.

Following her return to full duty on November 22, 1983, again to the same work as before, claimant continued to experience pain in both wrists although the night pain subsided. Claimant worked through the summer of 1984 but was laid off in the fall for approximately one month.

No specific findings are made as to the extent of claimant's temporary disability for each surgery as claimant indicated in the prehearing report that she was not seeking temporary total disability or healing period benefits for these times off work. Presumably, claimant was paid for these periods of time.

Dr. Verdeck, in his opinion rendered in 1986, opined that there was not two separate injuries. However, Dr. Verdeck may very well be correct as to the medical injury processes occurring on claimant's wrists since 1981. However, the actual injury date in gradual injury cases is a legal rather than a medical question as will be explained later in this decision.

4. The work injury of December 17, 1981, was a cause of a six percent permanent partial impairment to the right upper extremity and the injury of October 5, 1983 was a cause of a three percent permanent partial impairment to the left upper extremity.

Two physicians have rendered opinions regarding the extent of claimant's impairment following the two carpal tunnel release surgeries. In November, 1984, claimant returned to Dr. Strathman for a disability evaluation. Additional EMG's were ordered at that time but no evidence of neurological pathology was found from these tests. However, the physician who tested claimant at the time, B. R. Nichols, M.D., in a later report in 1986 stated that it was possible to compress a nerve in a manner sufficient to cause symptoms yet insufficient to result in any positive finding on the EMG test. Dr. Strathman, in December, 1984, stated as follows:

> Recent examination was essentially normal. Her EMG's are normal and although she offers some complaints there is no objective evidence of impairment. In view of this, disability certainly would be minimal and could be related only to her subjective complaints.
>
> In February, 1985, the doctor states in addition:

000485

As we have stated in previous correspondence, this lady's findings are essentially negative although she continues to complain of difficulty opening fruit jars, etc. We repeated her EMGs in November, 1984 and they were reported as normal. Her wound is well healed and there is no restriction of motion about the wrist.

As you see from the above there is no objective evidence of permanent impairment except for the scar associated with the volar carpal ligament release. The complaints are subjective and at this time I do not feel that numerical impairment rating is indicated.

Another orthopedic surgeon, John R. Walker, M.D, examined claimant on October 12, 1984. His examination revealed some loss of strength and from her pain complaints he opined that claimant has a 12 percent permanent partial impairment of the right upper extremity and a six percent permanent partial impairment of the left upper extremity.

Normally, the views of the treating physician, Dr. Strathman, would be given greater weight due to the treating physician's greater familiarity with claimant's treatment and symptoms. However, in this case, although Dr. Strathman may have greater familiarity with claimant's symptoms, he does not have greater familiarity with the appropriate manner of rating functional impairments in a workers' compensation context. From the language quoted above, Dr. Strathman apparently believes that a numerical impairment rating can only be given when there is objective findings of loss of strength, loss of range of motion or a positive EMG finding. He makes no attempt to rate the subjective pain complaints. Dr. Strathman's views may have some support in the old AMA Guidelines for rating impairments. These guidelines did not mention pain as a criteria for such ratings. However, under the new guidelines published in 1984, there is extensive guidance given to physicians for the rating of impairments caused by subjective loss of sensation, pain or discomfort. See AMA Guides to the Evaluation of Permanent Impairment, 2nd Edition, pages 73-83. The AMA Guidelines have long been recognized by this agency as a valid tool for rating functional impairments. See Division of Industrial Services Rule 343-2.4. Therefore, it would appear that Dr. Strathman's views are contrary to recognized guidelines. However, Dr. Walker's views are likewise not entirely satisfactory. He did not explain his methodology in arriving at his ratings or what if any guidelines he used. As both Dr. Strathman or Dr. Walker appear in this record to be equally qualified orthopedic surgeons, their views were given equal weight and the ratings averaged for the purposes of these findings of fact.

With reference to the issue of causation, the ownership of the packing plant in Cedar Rapids changed from Wilson to Farmland Foods on July 2, 1984. As claimant has experienced considerable hand and wrist difficulties since July 2, 1984 and she continues to work as a meat packer in the same plant, it is likely that claimant has suffered and continues to suffer additional injuries from her employment at Farmland. Despite these subsequent injuries, claimant has sufficiently demonstrated by a preponderance of the credible evidence presented that her permanent partial impairment, as found herein, occurred before July 2, 1984. First, claimant testified that her hands and arms did not change much between July 1, 1984 and November, 1984, the time of the ratings. Secondly, Dr. Walker based his opinion upon symptoms essentially identical to the description of her condition on July 1, 1984 given by claimant at the hearing. Also, claimant was absence from work for a few weeks prior to Dr. Walker's examination. Consequently, the effects of her job at Farmland at that time would have been minimal.

Again, the medical records and claimant's testimony demonstrate that claimant has suffered new injuries or at least new aggravations of prior injuries from her current work at Farmland. However, her current physician for these difficulties since the summer of 1985, Walter Hales, M.D., opines that none of her current problems are related to the original carpal tunnel releases. For that reason, none of the absences from work in 1985 and 1986 can be found to relate to the 1981 and 1983 carpal tunnel injuries found in this case.

6. Claimant suffered three additional gradual work injuries on August 13, 1985, November 12, 1985 and April 28, 1986, while working for Farmland Foods, which were a cause of significant permanent partial impairment to claimant's left and right hands and arms.

Although Farmland Foods is not a party in this finding and is not binding upon it, this finding was necessary in light of the Second Injury Fund's involvement in this case. These additional gradual injuries constitute further second injuries and increase the Second Injury Fund's liability.

As stated above, it is clear that claimant has suffered and is continuing to suffer recurrent arm and hand injuries from her work since July 2, 1984, at Farmland Foods. Beginning on August, 1985, Dr. Hales began treatment for claimant for teno-synovitis in the joints of her hands and in particular flexor synovitis. There is also a reoccurrence of a ganglion in the right wrist and another on the left hand. The left hand shows signs of recurrent carpal tunnel syndrome. These problems according to Dr. Hales are all attributable to her work at Farmland and, in particular, in using a powered "wizard" knife. Again new EMG tests were taken and as before do not provide

000487

objective evidence of nerve damage. In November, 1985, Dr. Hales stated that it was his advice to claimant that she and the company find work for her less stressful on her hands so that she could remain working for Farmland Foods. Dr. Hales, in his work release slips, consistently indicates that claimant's current problems are work related but as stated above does not feel that the problems are related to the original carpal tunnel problems in 1981 and 1983. The opinion that claimant should find different work as a result of her current problems is clear evidence of a significant permanent impairment. Since 1986, claimant has had thumb difficulties in her right hand but the medical records do not indicate whether or not this thumb condition is permanent.

Dr. Walker examined claimant again in July, 1986, and found the following new injuries caused by her work at Farmland Foods:

> This patient is going to end up really a cripple as far as work is concerned. I have seen this before and she is going to have extreme problems. I have tried to warn them at Farmstead to get her on something she can handle and not to push it. At the present time she has the following diagnoses:
>
> 1.) Recurrent ganglion, right wrist.
>
> 2.) Tenosynovitis of both forearm flexor musculature, particularly on the right.
>
> 3.) Trigger fingers, involving the right third and fourth digits.
>
> 4.) Trigger fingers, involving the left third and fourth digits.
>
> 5.) Probable, bilateral recurrence of carpal tunnel syndrome, involving the median nerve of both hands.
>
> 6.) Probable early ulnar nerve entrapment syndrome of both wrists.
>
> All of the above are due to the repetitive work that this patient is doing at Farmstead now.
> JRW/vw

The injury dates while working at Farmland Foods were again arrived at under a gradual injury theory and coincide with the times she was off work because of her pain and wrist problems pursuant to the stipulation of the parties in the prehearing report.

7. The work injuries of December 17, 1981 and the following

000488

second injuries both at Wilson's and at Farmland Foods on October 5, 1983, August 13, 1985, November 12, 1985 and April 28, 1986 are a cause at the present time of a 20 percent permanent partial loss of earning capacity.

Claimant's past employment primarily consists of unskilled physical labor requiring repetitive use of her hands and arms and any physical impairment of her hands and arms has a serious impact on her future earning capacity. Since 1985 all of her doctors have recommended that claimant leave her current occupation in order to prevent further physical damage to her hands. Claimant simply for apparent monetary reasons continues to work despite this advice.

Claimant has only a ninth grade education and possesses low potential for successful vocational rehabilitation. Claimant is 43 years of age and should be in the most productive years of her life. Her loss of earning capacity is much more severe than would be the case for a younger or an older individual.

Admittedly, claimant has not, as yet, suffered a significant loss in actual earnings from employment at this time due to her return to work against the advice of her physicians but her future loss of earnings is largely dependent upon the availability of claimant's current job and her willingness to put up with her pain. Claimant is an unskilled physical laborer who has been significantly impaired in her ability to perform unskilled physical labor. Should she not be able to continue her current employment, she probably will experience great difficulty in finding replacement employment. Claimant testified that she has not been able to locate other more suitable work outside of Farmland Foods.

9. A finding could not be made as to the causal connection between claimant's medical expenses listed in the prehearing report which were incurred in 1985 and the 1981 or 1983 work injuries. Both Dr. Walker and Dr. Hales believe that claimant's current difficulties are the result of her current work at Farmland Foods, not from work at Wilson's.

## CONCLUSIONS OF LAW

The foregoing findings of fact were made under the following principles of law:

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

63 (1955). An employer takes an employee subject to any active of dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960) and cases cited therein.

It is not necessary that claimant prove her disability results from a sudden unexpected traumatic event. It is sufficient to show that the disability developed gradually or progressively from work activity over a period of time. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). The McKeever court also held that the date of injury in gradual injury cases is the time when pain prevents the employee from continuing to work. In McKeever, the injury date coincided with the time claimant was finally compelled to give up his job. This date was then utilized in determining the rate and the timeliness of the claim under Iowa Code section 85.26 and notice under Iowa Code section 85.23.

In this case, Harris, the claimant, has not been compelled as yet to finally leave her employment at Farmland Foods. However, she was compelled to leave work on several occasions to seek medical treatment to correct her pain and under the rationale of McKeever, this time appears to be the most logical as the injury date for her gradual injuries. Obviously, this gradual injury process is continuing and there are many injury dates for the various times of disability which appears to be growing progressively worse. Essentially, under McKeever, each disability is causally connected to the most recent work experience causing the disability. If claimant ever is eventually compelled to finally leave her work, there would be new injury date under McKeever which would be causally related to additional disability.

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

000490

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

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 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).

Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

Based upon a finding of a total of nine percent loss of use to the upper extremities, claimant is entitled as a matter of law to a total of 22.5 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(m) which is nine percent of the 250 weeks allowable for an injury to the arm in that subsection.

000491

Claimant also seeks additional disability benefits from the Second Injury Fund under Iowa Code sections 85.63-85.69. This Fund was created to compensate an injured worker for a permanent industrial disability resulting from the combined effect of additional injuries to two scheduled members. The purpose of such a scheme of compensation was to encourage employers to hire or retain handicapped workers. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (1978). There are three requirements under the statute to invoke Second Injury Fund liability. First, there must be a permanent loss or loss of use of one hand, arm, foot, leg or eye. Secondly, there must be a permanent loss or loss of use of another such member or organ through a compensable subsequent injury. Third, there must be permanent industrial disability to the body as a whole arising from both the first and second injuries which is greater in terms of relative weeks of compensation than the sum of the scheduled allowances for those injuries.

Unlike scheduled member disabilities, the degree of industrial disability to the body as a whole under Iowa Code section 85.34(2)(u) is not measured solely by the extent of a functional impairment or loss of use of a body member. An industrial disability is a loss of earning capacity resulting from a work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physicial impairment or restriction on a work activity may or may not result in such a loss of earning capacity. The extent to which a work injury and a resulting medical condition in an industrial disability is determined from examination of several factors. These factors include the employee's medical condition prior to the injury, immediately after the injury and presently; the cite 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 to 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.

In the case sub judice, claimant established several "second injuries", qualifying him for Second Injury Fund benefits. These second injuries were the result of various gradual injuries to claimant's hands and arms at various times since 1981. Although the employer at the time of these injuries is not a party, extensive evidence was offered as to claimant's second injuries in 1985 and 1986. The most recent injuries were the most serious from an industrial disability standpoint.

The assessment of industrial disability in this case is based in part upon the well known fact of modern economic life that the demand for unskilled and semi-skilled labor has been rapidly declining in this country with the advant of the age of

000492

mechanization and automation, and that the great bulk of the persistent hardcore unemployment of the United States is in these categories. Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985).

At the prehearing conference in this case, claimant indicated that she was not relying upon the so called "odd-lot" doctrine under the holding in Guyton, Id. However, by virtue of her current employment, claimant is not, in any event, an odd-lot employee. An odd-lot employee is a worker who cannot find employment in any well known branch of the labor market. In Iowa there is no presumption that suitable work is available to an odd-lot employee. An injured worker who establishes by substantial evidence that she is not employable in the competitive labor market, after exhibiting a reasonable effort to secure suitable employment, is entitled to a finding of permanent total disability in the absence of a showing by the employer that suitable work is available. Guyton at 106. Although claimant's return to work in this case prevents the application of this odd-lot doctrine, at least at this time, a significant loss of earning capacity remains which should be compensated.

In this decision it was found that claimant suffered a loss of earning capacity despite the lack of a showing of a loss of actual earnings. A showing that claimant had no loss of actual earnings does not preclude a finding of industrial disability. See Michael v. Harrison County, Thirty-four Bienniel Reports, Iowa Industrial Commissioner 218, 220 (Appl. Decn. 1979).

Based upon a finding of a 20 percent loss of earning capacity or industrial disability as a result of an injury to the body as a whole, claimant is entitled, as a matter of law, to 100 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 20 percent of the 500 weeks allowable for an injury to the body as a whole in that subsection. However, credit should be given for the previous payment of disability by the employer as ordered herein. Therefore, the Second Injury Fund will be ordered to pay only 77.5 weeks beginning 7.5 weeks following the first second injury on October 5, 1983.

Due to the fact that no fundings could be made as to causally connecting the times off work contained in the prehearing report to any work injuries in this case, claimant could not be awarded weekly benefits for temporary total disability or healing period for these periods of time. Again, Farmland Foods was not a party to this proceeding. Also, because no findings could be made as to the causal connection of requested medical benefits, such benefits could likewise not be awarded. The rate of compensation used in the award below was the stipulated rate for a gradual injury contained in the prehearing report. This was utilized because the theory of gradual injuries was used to arrive at all of the injuries found in this case.

000493

ORDER

1. Defendant, Wilson, shall pay to claimant fifteen (15) weeks of permanent partial disability benefits at the rate of three hundred twenty-six and 80/100 dollars ($326.80) per week from January 18, 1982 and seven point five (7.5) weeks of permanent partial disability benefits at the rate of three hundred twenty-six and 80/100 dollars ($326.80) per week from November 21, 1983.

2. Defendant, Second Injury Fund, shall pay seventy-seven point five (77.5) weeks of permanent partial disability benefits at the rate of three hundred twenty-six and 80/100 dollars ($326.80) from November 26, 1983.

3. All defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid, if any.

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

5. Defendants, Wilson and the Second Injury Fund, shall equally pay the cost of this action pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 29th day of July, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Thomas J. Currie
Mr. Tom Riley
Mr. Thomas M. Wertz
Attorneys at Law
3401 Williams Blvd. S.W.
P. O. Box 998
Cedar Rapids, Iowa 52406

000494

Mr. John M. Bickel
Attorney at Law
500 Merchants National Bank Bldg.
P. O. Box 2107
Cedar Rapids, Iowa 52406-2107

Mr. Robert D. Wilson
Assistant Attorney General
Hoover State Office Bldg.
Des Moines, Iowa 50319

FILED

NOV 24 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| SHIRLEY HEATON,<br><br>Claimant,<br><br>vs.<br><br>SWIFT INDEPENDENT PACKING COMPANY,<br><br>Employer,<br><br>and<br><br>NATIONAL UNION FIRE INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | File No. 794672<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

## INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Shirley Heaton, against her employer, Swift Independent Packing Company, and its insurance carrier, National Union Fire Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained April 4, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner at Des Moines, Iowa, on June 29, 1987. A first report of injury was filed May 21, 1985. The parties stipulated that claimant has been paid 11 5/7 weeks of healing period benefits.

The record in this case consists of the testimony of claimant, of claimant's spouse, Jack Martin Good, and of Tony P. Harris and of joint exhibits A through M.

## ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant's rate of weekly compensation is $194.78; that claimant's healing period would run from May 1, 1985 through May 6, 1985, from June 27, 1985 through June 30, 1985 and from September 16, 1985 through November 24, 1985 with a commencement date for any permanent partial disability awarded being November 24, 1985. The parties further stipulated that claimant's medical bills were fair and reasonable. The issues remaining to be decided are:

Whether claimant received an injury which arose out of and in the course of her employment;

Whether a causal relationship exists between the alleged injury and the claimed disability;

Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement; and,

Whether claimant is entitled to payment of certain medical costs as causally related to the alleged injury.

REVIEW OF THE EVIDENCE

Forty-six-year-old claimant testified that she has completed tenth grade and has received training as a nurse's aide. She opined that she could not now work as a nurse's aide as it involves lifting which would be outside her current restrictions. Claimant has prior work experience as a waitress, audit machine operator, convenience store clerk/cashier and factory worker. Following her alleged injury, she worked part-time as a shoe salesperson and currently works as a companion for an elderly lady. Claimant began work at Swift Independent Packing Company on June 23, 1982. She testified that, on April 4, 1985, she was working the reject line using a hook to remove chuck from combo on a chest-high conveyor line while in a bent-over position. She reported that she began to experience low-back pain which she reported to her general foreman. Claimant apparently received a hot pack treatment at the nurse's station. Claimant testified that, on May 1, 1985, she experienced pain in her right leg and hip and subsequently saw K. E. Check, M.D., her personal physician. Claimant was subsequently off work apparently until May 6, 1985. She was referred to the company physician, R. W. Hoffmann, M.D. Dr. Hoffmann apparently prescribed physical therapy and restrictions as to bending, twisting and lifting. Claimant reported that she was returned to light-duty work, but that she was subsequently placed on regular-duty work. Claimant reported a fall at work in June, 1985, which she alleged increased her back pain. Peter D. Wirtz, M.D., apparently removed her from work until July 1, 1985.

Claimant was terminated on September 26, 1985 as a result of three unexcused absences within one year. Claimant had had an unexcused absence on July 6, 1985 for personal reasons and an unexcused absence on July 8, 1985, also for personal reasons. In each instance, claimant did not receive prior approval of the absence. On September 16, 1985, claimant called Swift Independent Packing and reported that she would not be at work, but indicated that, on that day, she was too dopey to contact a physician for a medical excuse for her absence. Claimant had apparently mixed two medications and taken a double dosage of such medications on the evening of September 15, 1985 and in the early morning of

September 16, 1985. Tony P. Harris, Swift Independent Packing Company personnel manager, reported that claimant's discharge resulted from the belief that her additional medication intake was an intentional and reckless act which precluded her from following prescribed employer procedures as to reporting and confirming a work absence.

Claimant opined that revealing her back injury harmed her in subsequent job searches. Claimant obtained a part-time job with Payless Shoes working from 13-16 hours per week and earning $3.60 per hour. She reported that another employee did any heavy lifting involved, but that she had to unpack shoes and put (price) stickers on them. Claimant testified that, on April 26, 1986, Dr. Wirtz advised her to no longer work at Payless Shoes. Claimant has not seen Dr. Wirtz since that date. Claimant actually left Payless Shoes in November, 1986 to take her current job which she characterized as a better paying job. Claimant agreed that she was seen at the Mercy Hospital Emergency Room in June, 1986 for low back pain. Claimant could not remember reporting that such back pain resulted from too much bending and twisting while working at Payless or that she had heard a "pop" with pain since such a "pop." Claimant does not wear a back brace which Dr. Wirtz prescribed for her on November 18, 1985.

Claimant now works for an 89-year-old woman as a companion. Claimant works 40 hours per week and earns $8.00 per hour working from 11:00 p.m. until 7:00 a.m. The work involves no lifting or strenuous activity. Claimant reported that the individual is in good health and that claimant enjoys her work. Claimant receives no employer-provided benefits.

Claimant testified that she currently has constant pain in the low back, buttocks and hip to below the right knee. She subsequently reported that she had no pain in the right leg as of hearing, however. Claimant reported that she can no longer exercise, ride long distances or do vacuuming and house cleaning.

Jack Martin Good, claimant's spouse, who met claimant in mid-October, 1986 and married claimant on December 6, 1986, substantiated claimant's testimony regarding her current life activity restrictions.

Tony P. Harris, personnel manager for Swift, testified that claimant's alleged work injury and her back pain were not factors in her discharge. He indicated that, on September 10, 1985, claimant was disqualified from her bid job with claimant's consent because, by so doing, claimant could be placed on restricted or alternate duty which would permit her to take a position within her restrictions regardless of seniority if such a position was available. Harris testified that, but for claimant's termination, she could have remained on alternate

duty work and that jobs involving no bending, twisting or lifting were available. He further testified that individuals may be tried on a job and, if the company physician feels that position is not suitable for the individual because the individual is developing problems in performing the job, other work will be considered.

Harris testified that claimant did not complain either personally or through the Swift union that her light-duty restriction was not being honored. Harris indicated that claimant's termination would not preclude her from working for Swift in the future, but he indicated that claimant has not applied for subsequent work with the company. Harris characterized the company as having an active hiring process which includes employing persons with previous conditions and disabilities. He indicated that most of such persons are hired to do light-duty work in the packaging area. Harris further stated, however, that it was fair to say that persons with significant restrictions might have greater difficulty being hired in a labor capacity than would perfectly healthy individuals.

M. J. Quinn, M.D., interpreted x-rays of claimant's lumbosacral spine taken May 2, 1985 as revealing narrowing of the L4-L5 interspace with a degenerative disc at that level. Mild hypertrophic changes in the remainder of the lumbar spine were also found, but the lumbar spine x-ray was otherwise negative.

Peter D. Wirtz, M.D., an orthopaedist, saw claimant on or about May 9, 1985. Upon examination, claimant had straight leg raising in the supine position to 90 degrees bilaterally; in the sitting position to 90 degrees bilaterally. She could flex her back to 80 degrees with pain in the right sciatic notch area. She had pain to pressure in the right sciatic notch and pain to pressure over the posterior superior iliac spine muscle attachments. Lateral flexion was to 45 degrees and extension to 15 degrees. Extremes of lateral flexion gave her pain in the hip area on the right and reverse straight leg raising was positive bilaterally. Knee jerks were 1/3 and ankle jerks were 1/2. There was no foot sensory deficit or muscle weakness. She had decreased feeling over the right thigh in relationship to the left on touch. The diagnosis was of disc degeneration at L4-5 and of radiation of pain and reflex abnormality indicating that an L3-4 radicular nerve irritation should be ruled out. Dr Wirtz elected to treat claimant with exercise, medication and restriction of activities of lifting, bending and twisting of the back area. He reported that claimant was capable of functioning within those restrictions.

In June, 1985, Dr. Wirtz opined that claimant's injury of April 4, 1985 was an aggravation of preexisting problems, which aggravation was temporary in nature and would not result in any permanent impairment. As of June 3, 1985, he anticipated claimant could continue her regular work status although she may

have symptoms that would require further physical therapy or medical evaluation. On June 19, 1985, Dr. Wirtz reported that claimant called regarding symptoms in her back that had been recently exacerbated with a fall. Dr. Wirtz reported that "this back condition" will limit claimant's abilities of bending, twisting, pulling, pushing and rotating her back. Dr. Wirtz released claimant for work on July 1, 1985 and advised limited leaning and twisting of the back. On September 6, 1985, Dr. Wirtz reported he had seen claimant on June 27, 1985 because of a June 18, 1985 injury. At that time he reported her diagnosis as musculoskeletal strain of the lower back related to the June 18, 1985 incident. He characterized the June 18, 1985 injury as a new injury, temporary in nature, but severe enough to warrant extensive medical care. On October 7, 1985, Dr. Wirtz opined that claimant's condition continued to be the same with a restriction of motion upon examination. He reported that that, with her disc degeneration, resulted in a restriction of work capacity and that claimant was restricted as to bending, lifting, pushing and pulling of 30 pounds.

On November 4, 1985, Dr. Wirtz reported that claimant had reached maximum orthopaedic benefit as related to her back condition. Back restrictions imposed included heavy lifting, pushing, pulling and twisting of pressures and weights of over 50 pounds. He reported that such could be done intermittently, but not regularly. He indicated that claimant would have a restriction for another 8-12 weeks for lifting abilities such as 25 pounds. Dr. Wirtz opined that claimant's back condition developed in the spring of 1985. He described her back condition as a musculoskeletal strain superimposed on disc degeneration. He reported that the condition clears with inactivity and no further trauma. He characterized the condition as not causing a permanent aggravation of her problem or as entailing an impairment.

On April 23, 1986, Dr. Wirtz indicated that claimant continued to have lower back pain with throbbing noted on occasions. She had no leg pain, but did have calf cramping. Examination showed knee jerks 2/2; ankle jerks 1/2. Straight leg raising was 90/90 in the sitting position as well as 80/80 with tight hamstrings in the supine position. The doctor opined that claimant continued to have low back pain with radicular symptoms in the right leg from her original injury. On June 4, 1986, Dr. Wirtz reported that, when claimant was last seen on April 23, 1986, she continued to exhibit, by her history, symptoms of lower back ache. He reported that physical examination was as noted. He indicated that the diagnosis was of disc degeneration of the lumbar spine with neurological (deficit) in the right ankle jerk which would be best managed by medications and by restriction from activities that strained the lumbar spine. He reported that claimant may develop discomfort in the lower back requiring a temporary restriction from work that would entail anything from two days to two weeks. He indicated that any aggravation was only

temporary and may limit work capacity, but that it would not entail any permanent impairment. He reported that claimant's condition had not worsened from her original injury to her April 23, 1986 examination. Dr. Wirtz reported that A. Socarras, M.D., had found no abnormality upon electromylographic study, in that such study did not show permanent muscle or nerve damage in claimant's lower extremities as related to her disc degeneration.

On June 26, 1986, Dr. Wirtz reported that claimant gave a history of doing some bending and twisting activities at part-time work at Payless and developed lower back pain. He indicated that claimant went to Mercy Hospital on June 22, 1986. Examination showed flexion of the back to 10 degrees, extension to 10 degrees, lateral flexion 10/10, straight leg raising, sitting position 90/90, knee jerks 2/2 and ankle jerks 1/2. Tenderness was located in the right lower back area and to the right side. Diagnosis was musculoskeletal strain upon lumbar disc degeneration.

Walter B. Eidbo, M.D., saw claimant on July 29, and on August 12, 1986. He reported a history of claimant lifting heavy boxes and placing them on a conveyor line when she hurt her lower back. He reported that claimant had reduced motion of the lower spine with flexion to only about 70 degrees. He indicated that x-rays of the lumbosacral spine showed wedging of the L2 vertebrae and a narrow disc space at L4-5 with hypertrophic spurs. His impression was of a compression fracture of L2 with degenerative disc disease with spur formation at L4-5 and nerve root compression of the right sciatic nerve with associated sciatica. The doctor reported that claimant also had a neuritis of the upper limbs with a very slight widening of the acromio-clavicular joint, though right shoulder x-rays were normal. He reported that all of claimant's conditions, including the neuritis of the upper limbs, would result in a considerable disability in the range of 15-25%, but tempered to some extent in that the changes in claimant's lumbosacral spine could possibly have existed prior to her injury date. The doctor reported he would be hesitant to say that claimant's back condition was totally related to the injury at Swift in that the spurs and degenerative changes she had in her spine possibly were there prior to the injury at work. He characterized claimant's back condition as permanent.

An injury information data form of an accident of April 4, 1985 indicates that claimant started complaining about severe back pain on April 4, 1985 while working on the whiz line throwing neck bones into combo. It reports claimant was unable to give a specific time or reason for the injury.

The balance of the evidence was reviewed and considered in the disposition of this matter.

## APPLICABLE LAW AND ANALYSIS

Claimant claims an injury which arose out of and in the course of her employment.

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on April 4, 1985 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

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

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe v. DeSoto Consol. Sch. 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 Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971), Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury....The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such

result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.

....

A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

Claimant began to experience low back pain on April 4, 1985 while working the reject line. She reported that she was working in a bent-over position while using a hook to remove chuck from combo on a chest-high conveyor line. That report is consistent with the injury information data. Claimant received hot pack treatments following that incident, but did not seek treatment from her physician until May 1, 1985. The long interval between claimant's onset of pain at work and her actual attempt at medical care from a physician raises some question as to whether the May 1, 1985 need for treatment was related to the work duties performed on April 4, 1985. Nevertheless, the work duties described as of April 4, 1985 were such that one could reasonably believe they would produce symptoms in a susceptible individual. Claimant's medical records reveal that she has degenerative disc disease. Her treating physician, Dr. Wirtz, has opined that claimant aggravated that preexisting problem on April 4, 1985. Claimant has established an injury which arose out of and in the course of her employment on April 4, 1985.

We next consider whether a causal relationship exists between claimant's claimed injury and her current disability.

An award of benefits cannot stand on a showing of a mere possibility of a causal connection between the injury and claimant's employment. An award can be sustained if the causal connection is not only possible, but thoroughly probable. Nellis v. Quealy, 237 Iowa 507 21 N.W.2d 584 (1946).

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 4, 1985 is causally

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

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

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

When an aggravation occurs in the performance of an employer's work and a causal connection is established, claimant may recover to the extent of the impairment. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960).

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

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.

As noted above, Dr. Wirtz opined in June of 1985 that claimant's April 4, 1985 injury was an aggravation of a preexisting problem. However, he characterized that aggravation as temporary

in nature and as not likely to result in permanent impairment. Claimant fell at work on June 18, 1985. Dr. Wirtz characterized that injury as a new injury, temporary in nature, but severe enough to warrant extensive medical care. On October 7, 1985, Dr. Wirtz opined that claimant's condition continued to be the same with restriction of motion. He reported that that restriction of motion with claimant's disc herniation would result in a restriction of work capacity and he restricted claimant as to bending, lifting, pushing and pulling of 30 pounds. As of November 4, 1985, Dr. Wirtz reported that claimant had reached maximum orthopaedic benefit as related to her back condition and he raised her lifting restriction to 50 pounds. He then opined that claimant's back condition developed in the spring of 1985 and characterized such as a musculoskeletal strain superimposed on disc degeneration. He reported that the condition clears with inactivity and with no further trauma. He again characterized the condition as not causing a permanent aggravation of claimant's back problem and as not entailing a (permanent) impairment. Dr. Wirtz reexamined claimant on April 23, 1986 and reported that she continued to exhibit, by her history, symptoms of lower backache. He reported that claimant had signs of neurological (deficit) in the right ankle jerk, but later reported that such was not substantiated by electromylographic study. He reported that claimant's condition had not worsened from her original injury to April 23, 1986 and indicated that claimant may develop discomfort in the low back requiring a temporary restriction from work which would entail anything from two days to two weeks. He again characterized any aggravation as temporary in nature and as limiting claimant's work capacity, but as not entailing any permanent impairment. In June 1986, Dr. Wirtz reported that claimant had given a history of developing low back pain while doing bending and twisting activities at a part-time job at Payless Shoes. Claimant herself testified that Dr. Wirtz had advised her to leave Payless as such was aggravating her back pain. Dr. Wirtz is an orthopaedist.

Dr. Eidbo, who is apparently not a medical specialist, saw claimant on July 29 and on August 12, 1986. Claimant apparently gave Dr. Eidbo a history of lifting heavy boxes and placing them on a conveyor line as causing the onset of her back pain. Dr. Eidbo described claimant as having a variety of conditions beyond the back pain which is the subject of this claim. He reported he would be hesitant to say that claimant's back condition was totally related to the injury at Swift in that she had spurs and degenerative changes in her spine that possibly were present prior to the injury. Dr. Eidbo, however, characterized claimant's back condition as permanent.

The overall tenor of Dr. Wirtz's remarks suggests that claimant has a permanent preexisting back condition by way of degenerative disc disease. It further suggests that that condition may well be temporarily aggravated by various activities,

but not substantially changed by such activities. The incidents testified to and revealed in the medical records suggest that claimant had a number of temporary aggravations of her condition from April 4, 1985 through June, 1986, none of which was responsible for any permanent aggravation of the underlying condition. Dr. Eidbo concedes that he cannot say that claimant's back condition was totally related to an injury at Swift as the spurs and degenerative changes she had could possibly have been there prior to the injury at work. A May 2, 1985 x-ray had revealed narrowing of the L4-L5 interspace with degenerative disc at that level. Such a finding as of that date is consistent with Dr. Wirtz's opinion that claimant's degenerative disc disease preexisted April 4, 1985. For that reason, as well as on account of Dr. Wirtz's greater level of expertise and specialization and on account of the substantial difference between Dr. Eidbo's understanding of claimant's April 4, 1985 incident of injury at Swift and the actual work claimant was performing as of that date, Dr. Wirtz's opinion is accepted over that of Dr. Eidbo. Claimant is found to have temporarily aggravated her preexisting degenerative disease in the course of her activities at Swift on April 4, 1985. She is found to have had further temporary aggravations of such condition in subsequent work at Swift and in subsequent other activities. She is not found, however, to have any permanent partial disability or impairment which may be causally related to the April 4, 1985 temporary aggravation.

Because claimant has not established the requisite causal relationship between her injury and her claimed disability, we need not consider the benefit entitlement question beyond the question of entitlement to temporary total disability on account of the April 4, 1985 work incident. Section 85.33(1) provides:

> Except as provided in subsection 2 of this section, the employer shall pay to an employee for injury producing temoporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

While some question arises as to whether claimant's time off work from May 1, 1985 through May 6, 1985 related to the April 4, 1985 work incident given the substantial period prior to claimant's seeking of physician treatment for that incident, we have no evidence of any intervening cause of claimant's need for medical care as of May 1, 1985 and we therefore award temporary total disability benefits for that period. It is questionable whether claimant would be entitled to temporary total disability benefits from June 27, 1985 through June 30, 1985 and from September 16, 1985 through November 24, 1985 on account of any

April 4, 1985 incident as Dr. Wirtz's reports would suggest that any need for claimant to be off work during those periods resulted from the June 18, 1985 incident and not from the April 4, 1985 incident. We do not need to make a finding in that regard, however, as claimant has been paid 11 5/7 weeks of benefits characterized as healing period benefits and, hence, has received any and all temporary total disability benefits to which she is entitled on account of the April 4, 1985 incident.

Claimant apparently seeks payment of certain medical costs under section 85.27 permitting payment of medical costs for compensable injury. While it is somewhat difficult to ascertain the exact services for which claimant seeks payment, it appears claimant would be entitled to payment of costs for physical therapy rendered from May 9, 1985 through May 31, 1985. The record would suggest that payment has been made regarding those costs, however, we are unable to ascertain whether such payment was made by claimant or by the employer. It is questionable whether claimant would be entitled to payment of physical therapy costs after June 18, 1985 as such may well relate to the June 18, 1985 work incident and not to the April 4, 1985 incident. Payment for such is, therefore, not ordered.

## FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant experienced the onset of low back pain on April 4, 1985 while working the reject line using a hook to remove chuck from combo on a chest-high conveyor line while in a bent-over position.

Claimant was unable to give a specific time or reason for her complaints of severe pain as of that date.

Claimant received hot pack treatments at the nurse's station following her pain complaints, but did not seek physician treatment until May 1, 1985.

Claimant was off work from May 1, 1985 until May 6, 1985.

Claimant received physical therapy and was returned to work on May 6, 1985 with restrictions on bending, twisting and lifting.

Claimant fell at work on June 18, 1985.

The June 18, 1985 work incident was a new injury, temporary in nature, but severe enough to warrant extensive medical care.

Claimant had degenerative disc disease as revealed by narrowing of the L4-L5 interspace shown on an x-ray of May 2, 1985.

Claimant's degenerative disc disease predated the April 4, 1985 onset of complaints of back pain at work.

The incident of April 4, 1985 was an aggravation of claimant's preexisting back problems which aggravation was temporary in nature and did not result in permanent impairment.

Claimant will continue to have temporary aggravations of her permanent nonwork-related degenerative disc disease.

Such aggravations will temporarily limit claimant's work capacity, but will not entail any permanent impairment.

As of April 23, 1986, claimant's condition had not worsened from her original April 4, 1985 injury.

Claimant apparently also experienced lower back pain while performing bending and twisting activities while working at Payless Shoes after leaving Swift's employ.

Claimant was off work from May 1, 1985 through May 6, 1985 on account of the April 4, 1985 temporary aggravation of her preexisting degenerative disc disease.

Claimant was off work from June 27, 1985 through June 30, 1985 and from September 6, 1985 through November 24, 1985, but it cannot be ascertained whether such related to the April 4, 1985 work incident or to the subsequent new injury of June 18, 1985.

Claimant received physical therapy related to the April 4, 1985 work incident prior to June 18, 1985.

Claimant received physical therapy subsequent to June 18, 1985 which likely related to the new injury of that date.

## CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established an injury which arose out of and in the course of her employment on April 4, 1985.

Claimant has established that the April 4, 1985 injury was causally related to temporary total disability on which she bases her claim.

Claimant has not established that the April 4, 1985 injury is causally related to permanent partial disability on which she bases her claim.

Claimant is entitled to payment of medical costs related to physical therapy rendered prior to June 18, 1985.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant temporary total disability benefits at the rate of one hundred ninety-four and 78/100 dollars ($194.78) from May 1, 1985 through May 6, 1985. Defendants receive credit for benefits previously paid.

Defendants pay claimant the costs of physical therapy rendered from May 1, 1985 to June 18, 1985. Defendants receive credit for payments previously made for physical therapy.

Claimant and defendants pay equally the costs of this action.

Defendants file a Final Payment Report when this award is paid.

Signed and filed this 13th day of November, 1987.

Helen Jean Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Thomas M. Werner
Attorney at Law
1150 Polk Boulevard
Des Moines, Iowa 50311

Mr. Richard G. Book
Attorney at Law
1000 Des Moines Building
Des Moines, Iowa 50309

000503

FILED

NOV 20 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| RANDY B. HENDERSON, | : | |
| | : | |
| Claimant, | : | File No. 825137 |
| | : | |
| vs. | : | |
| | : | A R B I T R A T I O N |
| JOHN MORRELL & COMPANY, | : | |
| | : | |
| Employer, | : | D E C I S I O N |
| Self-Insured, | : | |
| Defendant. | : | |

## INTRODUCTION

This is a proceeding in arbitration brought by Randy B. Henderson, claimant, against John Morrell & Company, self-insured employer, for benefits under Chapter 85B, Code of Iowa. The hearing was held in Storm Lake, Iowa on June 25, 1987 and the case was fully submitted on that date.

The record consists of testimony from Randy B. Henderson and Jack Poulos and joint exhibits one through seven. The parties have stipulated that the applicable rate of compensation in the event of an award is $215.00 per week and that any compensation for permanent partial disability should commence April 27, 1985.

## ISSUES

The contested issues in this case are:

Whether this action is barred by Iowa Code section 85.23;

Whether this action is barred by Iowa Code section 85.26;

Whether claimant sustained an occupational hearing loss in the employment of John Morrell & Company;

The nature and extent of any permanent hearing disability which arose out of claimant's employment with John Morrell & Company; and,

Whether the employer is responsible for the cost of a hearing aid.

SUMMARY OF EVIDENCE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case even though it may not necessarily be referred to in this decision.

Randy B. Henderson is a 39-year-old high school graduate. He commenced employment with John Morrell & Company in approximately 1968. After working one year, he was drafted into the United States Army where he served as a medic in Viet Nam and was exposed to artillery fire and other battlefield noise. Henderson was wounded and awarded the Bronze Star for valor. Claimant testified that he was informed that he exhibited some hearing loss at the time he was honorably discharged from the army, but was advised that it was less than 10% and did not entitle him to a pension.

After his discharge from the army, Henderson returned to the Morrell plant kill floor where he worked until it closed in approximately June, 1982. Henderson testified that he worked near the head table and in the saw area. He stated that many of the tools were operated by an air compressor and made a noise so loud that you could not talk to someone next to you. He stated that the saws made a screaming noise when they cut into the bones. Exhibits 3 and 4 show that excessive noise levels were present at several places in the pork plant, particularly on the kill floor.

Claimant testified that he worked in the beef plant kill floor until it closed in 1982 and then moved to the pork plant in 1983, a little more than a year later. Claimant testified that he remained employed with Morrell until the pork plant closed in 1985. He stated that noise levels on the kill floors in both plants were approximately equal.

Claimant testified that he had no hearing problem and passed a physical when he was initially hired in 1968. He passed an army physical when he was drafted.

Claimant testified that, in 1982, the plant nurse notified him that he would have his hearing tested, but that the test was never conducted. Claimant related that his hearing disappeared between 1971 and 1985. Claimant related that he is unable to hear a speaking voice with his left ear and that it was that way when he left employment in 1985. Claimant testified that he never noticed a sudden loss of hearing. He related that hearing protection became available in 1983 and that he wore ear plugs approximately 70% of the time, but that, when he was running the switch at the cooler in the pork plant, the foreman told him to take them out.

Claimant testified that he does not hunt nor does he own a gun, chain saw, snowmobile, motorcycle or speed boat. He denied having any significant noise exposure other than that at his employment and that which he experienced while in the military.

John Poulos, another former Morrell employee who also claims to have sustained an occupational hearing loss, testified that he has worked in both the pork and beef plants and that the kill floor noises are very comparable in both plants. Poulos stated that hearing protective ear plugs were not offered until late 1983. He felt that the sources of the noise were the metal tables and small air compressors which produced a high-pitched screaming noise. Poulos stated that the cooler is less noisy than the kill floor, but does have large, noisy refrigeration units. Poulos is a friend of Henderson and also has a pending workers' compensation claim for hearing loss.

Claimant's hearing was evaluated by Daniel Jorgensen, M.D., a qualified otolaryngologist, on August 20, 1986. Dr. Jorgensen concluded that Henderson has a dead left ear, one which fails to respond at the highest threshold on the audiometer (exhibit 1, page 6). Dr. Jorgensen stated that hearing in most ears is symmetric for noise-induced hearing losses, that he has never seen a case where noise has killed an ear and that some insult, other than noise, is the cause of the hearing loss in the left ear (exhibit 1, pages 15-18).

Dr. Jorgensen also stated that claimant has a hearing loss in his right ear which is due to noise and that claimant's noise exposures in the service and also in his employment are the largest contributors to that loss. He stated that noise-induced hearing loss is an additive type of problem and that continued exposure to noise will cause further hearing damage (exhibit 1, pages 7-9 and 16). Dr. Jorgensen's audiogram showed claimant's hearing loss to be 10 decibels at 500 hertz, 25 decibels at 1000 hertz, 45 decibels at 2000 hertz and 50 decibels at 3000 hertz for a total of 130 decibels and an average of 32.5 decibels (exhibit 1, page 9; deposition exhibit 1). Dr. Jorgensen did not compute a binaural hearing loss for Henderson.

Claimant's hearing was also tested by R. David Nelson, M.A., an audiologist, on June 16, 1986. Nelson's test results compute to a total loss of 140 decibels, at the aforementioned frequencies, with an average of 35 decibels (exhibit 5).

Claimant's hearing was also evaluated by Charles B. Carignan, Jr., M.D. Dr. Carignan attributed claimant's loss of hearing in his left ear to his military service and indicated that claimant had a 16 1/2% binaural hearing impairment based upon the complete loss of hearing in the left ear, but with normal hearing in the right ear. Dr. Carignan calculated claimant's current binaural hearing impairment as 30%, based upon the audiogram conducted by

R. David Nelson. Dr. Carignan then subtracted and concluded that claimant presently has a 13 1/2% binaural hearing impairment which resulted from occupational noise exposure at the John Morrell packing plant (exhibit 6).

## APPLICABLE LAW AND ANALYSIS

### NOTICE -- SECTION 85.23

There is some question as to whether or not section 85.23 applies to Chapter 85B claims, particularly in light of the employer's duty to inform an employee whenever the employee is exposed to noise levels which are termed as "excessive" under section 85B.5 of The Code and the six-month delay prior to the time when a claim can be filed under section 85B.8. Even if section 85.23 is applicable, however, the report from Jerry Dawson, M.D., of July 19, 1983, issued in connection with claimant's physical examination of July 14, 1983, coupled with the employer's knowledge of plant noise levels, certainly gave the employer actual notice of the potential for an occupational hearing loss claim from Randy B. Henderson. The section 85.23 defense raised by the employer is without merit. There is certainly no duty for a worker to give notice until such time as the date of injury has occurred. Jacques v. Farmers Lbr. & Sup. Co., 242 Iowa 548, 47 N.W.2d 236 (1955). Giving notice before the actual date of occurrence of the injury is, however, sufficient to satisfy the provisions of section 85.23. Dillinger v. City of Sioux City, 368 N.W.2d 176 (Iowa 1985).

### COMMENCEMENT -- SECTIONS 85.26 AND 85B.8

Section 85.26 provides a two-year statute of limitations for filing claims. Section 85B.8 sets out four different occurrences which can constitute the date of occurrence of the injury. Those which are arguably applicable to this case are: Transfer from excessive noise level employment by an employer; termination of the employer-employee relationship; or, six months after the date of a layoff, since claimant's layoff between the beef and pork plant positions exceeded one year. The discovery rule is applied to claims under Chapter 85B. John Deere Dubuque Works of Deere & Co. v. Meyers, 410 N.W.2d 255 (Iowa 1987). Section 85B.8, while listing four occurrences, does not state whether the statute of limitations is to run following the first or the last of such occurrences or whether a failure to file upon a layoff that continues for more than one year prohibits a subsequent filing upon retirement or termination of the employer-employee relationship. When decreeing that the discovery rule does apply to Chapter 85B, the Iowa Supreme Court confirmed that 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. Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 257 (Iowa 1980); Sprung v. Rasmussen, 180 N.W.2d 430, 433

(Iowa 1970). The court likewise acknowledged that use of the four events enumerated in section 85B.8, while unrelated to injury, is an easy basis for both the employer and the employee to identify and that the scheme is consistent with what the court acknowledged to be the prevailing view that a permanent hearing loss cannot be accurately measured until approximately six months separation from the noisy environment. The facts of the case in Meyers, summarily stated, were that the employee had been laid off on November 29, 1981, had his hearing loss diagnosed on March 18, 1982, was recalled to work in a much quieter area of the plant in June, 1982 and filed his petition on March 7, 1984. The case is one in which the parties agreed that Meyers was not employed in an excessively noisy work environment after the layoff. The layoff lasted less than one year.

The instant case, while similar, has a layoff of more than one year, but the claimant's claim is that the excessive noise level employment continued following his recall from the layoff. The action was commenced by filing a petition on July 23, 1986. Simply stated, if the layoff or the date of the evaluation by Dr. Dawson constitutes the date of occurrence of injury, the claim is barred. If the date of occurrence is fixed at the termination of employment in April, 1985, the case was timely commenced. The agency had adopted a rule that the first of the four events enumerated in section 85B.8 controls. In Re Declaratory Ruling of John Deere Dubuque Works of Deere & Company, Volume III Iowa Industrial Commissioner Report 147 (1983). Such ruling was, however, overruled by the Meyers case which confirmed the applicability of the discovery rule. The preference for applying the longer of the possibly applicable limitations and also the general judicial rule of construing the workers' compensation statutes in the light most favorable to the worker, all as cited in the recent Meyers case, are in direct irreconcilable conflict with the declaratory ruling. Further, 1B Larson Workmen's Compensation Law, section 41.50, et. seq., contains a lengthy discussion of how and why the six-month waiting period for the filing of claims, as contained in section 85B.8, developed. Larson concludes that the hearing loss award should not be made until the worker has been away from the noisy job long enough to obtain an accurate assessment of the degree of permanent impairment. It also indicates that the six-month rule developed in order to delay litigation and payment of benefits until removal from the noisy environment had been made in order to avoid multiple claims between the same parties. The delay is considered relatively fair to both employers and employees since the employee does not suffer any economic hardship or loss of wages and the employer pays no compensation for hearing loss for so long as the employee remains employed. The question of transfers becomes exceedingly complex where an employer has a work assignment or job rotation system that provides frequent transfers between noisy and relatively less noisy work environments.

It is concluded that the rule stated in John Deere Dubuque Works of Deere & Co. v. Meyers, 410 N.W.2d 255 (Iowa 1987), which states that "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," is the proper rule to follow and, in this case, the limitations of section 85.26 should be applied based upon the termination of the employer-employee relationship in April, 1985. The claim is, therefore, timely.

EXTENT OF OCCUPATIONAL HEARING LOSS

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 27, 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).

Neither Dr. Jorgensen nor Dr. Carignan attibutes the loss of hearing in claimant's left ear to his employment. Agency expertise, pursuant to Code section 17A.14(5), is consistent with the statements from the two physicians. It is therefore found that noise exposure in claimant's employment with John Morrell & Company was not a substantial factor in producing the hearing loss in his left ear and that no compensation is payable based upon the hearing loss in the left ear.

Section 85B.9, in particular the second sentence thereof, provides that Dr. Jorgensen's audiogram should be the one used for assessing claimant's occupational hearing loss. Section 85B.11 provides that an employer is not liable for the hearing loss that existed prior to the employment, provided that it is established by audiometric examination or other competent evidence. In this case, it is found that Henderson was exposed

000515

to noise levels which exceed the table of 85B.5 for substantially all of the time he was employed by John Morrell & Company as established by testimony from claimant and Poulos and by exhibits 3 and 4. Section 85B.11 goes on to state that the employer is liable only for the difference between "the percent of occupational hearing loss determined as of the date of the audiometric examination used to determine occupational hearing loss and the percentage of loss established by the pre-employment audiometric examination."

The normal rules regarding aggravation of a preexisting condition apply to claims under Chapter 85B. Likewise, the normal rules regarding burden of proof and apportionment of disability apply to claims under Chapter 85B. Varied Industries v. Sumner, 353 N.W.2d 407 (Iowa 1984); Becker v. D & E Distributing Co., 247 N.W.2d 727, 731 (Iowa 1976). The employer therefore has the burden of establishing the extent of any preexisting hearing loss. The proposition that the burden of proving anything rests on the proponent thereof is so well settled that Rule 14(f)(5) of the Iowa Rules of Appelate Procedure provide that no citation of authority for that proposition is necessary. The same rule has been applied in administrative proceedings. Wonder Life Co. v. Liddy, 207 N.W.2d 27 (Iowa 1973).

The record made in this case does not establish the extent of any preexisting hearing loss in claimant's right ear and, therefore, any preexisting loss cannot be excluded. In making this determination, it should be noted that the definition of occupational hearing loss, as provided in section 85B.4, refers only to the loss that exceeds an average of 25 decibels. The reason for the 25 decibel threshold is that it is not until the loss is in the range of 25 decibels that there is an impairment of the ability to hear normal speech. It is at that point that a hearing disability is considered to exist. The computation system found in section 85B.9 shows that the hearing disability starts at 25 decibels and is considered to be complete or total at approximately 92 decibels. It is the percentage of hearing disability rather than actual decibels of hearing loss, which is compensated by Chapter 85B. Even section 85B.11 speaks of percent and percentage. The percentage figures are arrived at under section 85B.9 only after deducting the 25-decibel threshold from the average decibel loss.

Employment can produce a hearing loss of several decibels without producing any actual hearing disability so long as the total does not exceed an average of 25 decibels. If, however, an employee has a preexisting hearing loss of an average of, for example, 20 decibels, and the employment causes an additional 10 decibels of loss, then the employer is responsible for compensating a 5 decibel loss which is actually a 7 1/2% disability. Any other application of the chapter would result in individuals who have sustained hearing disability and have a need for a hearing

aid going without compensation. Such a result would be highly inconsistent with the judicial directive that the chapter be interpreted to benefit the worker. John Deere Dubuque Works of Deere & Co. v. Meyer, 410 N.W.2d 255 (Iowa 1987).

Chapter 85B does not speak to the method of computing a binaural hearing loss where there is a total hearing loss of one ear which is not employment-related. The normal method of computation provides that the hearing in the better ear is given five times as much weight in reaching the final disability rating as is the hearing in the worse ear. In a case such as this, the indication from Dr. Jorgensen should be recognized which stated that, in noise-induced hearing losses, the extent of the loss is generally relatively equal bilaterally. The net result is that it is unnecessary to go through detailed computations once the loss of the right ear is determined. Dr. Jorgensen's audiogram is the correct one. Accordingly, claimant has a 32.5 decibel average loss in his right ear. After deducting the 25-decibel threshold, the result is a 7.5 decibel average loss. When the 7.5 decibel average loss is multiplied by the statutory factor of 1.5, the result is an 11.25% occupational hearing loss or hearing disability. The claimant is therefore entitled to 19.688 weeks of compensation for permanent partial disability under section 85B.6. When applied to the stipulated rate of $215.00 per week, the amount of compensation due is $4,232.92.

## HEARING AID -- SECTION 85B.12

The employer is liable for providing the employee with a hearing aid unless it will not materially improve the employee's ability to communicate. This is similar to section 85.27. The employer is entitled to select the source of the hearing aid and is responsible for paying the expenses incurred in obtaining the aid, including any fees to the physician or audiologist and any travel expenses to the employee. Since the employee has not obtained a hearing aid, there is no basis for awarding any particular sum based upon the anticipated cost of the aid. The employer is responsible for the actual cost if an aid is medically prescribed.

## FINDINGS OF FACT

1. Randy B. Henderson is a resident of the state of Iowa who was employed by John Morrell & Company within the state of Iowa from approximately 1968 through 1985 with an interruption of approximately two years from 1969 through 1971 for military service and a layoff of slightly more than one year in 1982 and 1983.

2. Henderson has a complete loss of hearing in his left ear.

3. The loss of hearing in Henderson's left ear is not shown

000517

to have resulted from noise exposure at the John Morrell & Company plants.

4. Henderson has a loss of hearing in his right ear which resulted from exposure to excessive noise levels.

5. The two largest contributors to the loss of hearing in claimant's right ear are the noise to which he was exposed in the army and also the noise to which he was exposed in his employment with John Morrell & Company.

6. Claimant likely had some preexisting hearing loss in his right ear which resulted from the noise exposure when he was in the military service, but the degree of that loss cannot be ascertained or reasonably estimated from the record made in this case.

7. Noise-induced hearing loss is a cumulative type of injury which progresses with additional exposure to injurious noise levels.

8. Henderson was exposed to excessive noise levels as defined in section 85B.5 throughout the term of his employment with John Morrell & Company.

9. The noise to which Henderson was exposed in his employment with John Morrell & Company is a substantial factor in producing the hearing loss which presently exists in his right ear.

10. The loss of hearing in claimant's right ear is 10 decibels at 500 hertz, 25 decibels at 1000 hertz, 45 decibels at 2000 hertz and 50 decibels at 3000 hertz for average of 32.5 decibels.

11. The report of July 19, 1983 from Jerry Dawson, M.D., is sufficient to give the employer, as a reasonable manager, a basis for suspecting the possibility of a potential for a compensation claim for occupational hearing loss.

12. Henderson's employment with John Morrell & Company was terminated in April, 1985.

## CONCLUSIONS OF LAW

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

2. The employer had actual notice of Henderson's hearing loss, within the purview of Code section 85.23, no later than July 19, 1983.

3. A claim for occupational hearing loss can be filed when

a layoff continues for a duration of more than one year, but the failure to bring a claim based upon such a layoff does not bar a later claim based upon termination of the employer-employee relationship where the employer recalled the employee to work from the layoff and the work was in a position which exposed the employee to excessive noise levels.

4. Where a worker has a complete loss of hearing in one ear that is not a result of employment-related noise exposure, the binaural hearing loss is equal to the monaural hearing loss in the better ear.

5. Section 85B.11 creates an affirmative defense. The burden of producing evidence to establish the existence and the extent of any previous hearing loss which is to be excluded under section 85B.11 rests upon the employer. In the event of a failure to do so, the normal rules of apportionment which deal with the aggravation of a preexisting condition apply and the employer is responsible for compensation for the entire amount of hearing disability.

6. Chapter 85B provides compensation for occupational hearing loss or hearing disability, rather than for simple hearing loss, and no reduction under section 85B.11 of the employer's liability is appropriate where any preexisting hearing loss was less than an average of 25 decibels at the levels of 500, 1000, 2000 and 3000 hertz.

7. Randy B. Henderson has an 11.25% occupational hearing loss or hearing disability which entitles him to receive 19.688 weeks of compensation payable at the stipulated rate of $215.00 per week for a total of $4,232.92 plus applicable interest.

8. An employer's obligation under section 85B.12 to provide a hearing aid does not require the employer to make payment of the estimated cost of a hearing aid to the employee prior to the time that the hearing aid is purchased or contracted to be purchased.

9. The provisions of section 85.27 apply to section 85B.13 and give the employer the right to choose the source of the hearing aid.

ORDER

IT IS THEREFORE ORDERED that the defendant pay Randy B. Henderson nineteen point six eight eight (19.688) weeks of compensation for permanent partial disability at the stipulated rate of two hundred fifteen dollars ($215.00) per week commencing on the stipulated date of April 27, 1985.

IT IS FURTHER ORDERED that the entire amount thereof is past

due and that the defendant shall pay interest from the date each payment came due until the date of actual payment at the rate of ten percent (10%) per annum pursuant to Code section 85.30.

IT IS FURTHER ORDERED that the defendant provide claimant with a hearing aid at such time as it is medically indicated that a hearing aid is likely to materially improve Henderson's ability to communicate.

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against the defendant pursuant to Division of Industrial Services Rule 343-4.33.

IT IS FURTHER ORDERED that the defendant file Claim Activity Reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 20th day of November, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. E. W. Wilcke
Attorney at Law
826 1/2 Lake Street
P.O. Box 455
Spirit Lake, Iowa 51360

Mr. Dick H. Montgomery
Attorney at Law
Professional Building
P.O. Box 7038
Spencer, Iowa 51301

1108.50, 1402.30, 1403.30
1702, 1803, 1806, 2208
2501
Filed November 20, 1987
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

| | | |
|---|---|---|
| RANDY B. HENDERSON, | : | |
| | : | |
| Claimant, | : | File No. 825137 |
| | : | |
| vs. | : | |
| | : | A R B I T R A T I O N |
| JOHN MORRELL & COMPANY, | : | |
| | : | |
| Employer, | : | D E C I S I O N |
| Self-Insured, | : | |
| Defendant. | : | |

---

1108.50, 1402.30, 1403.30, 1702, 1803, 1806, 2208, 2501

Claimant was found to have suffered an occupational hearing loss. The record disclosed no basis for determining the extent of any prior hearing loss under section 85B.11. It was held that 85B.11 is an affirmative defense and the burden of proving an entitlement to a reduction rests on the employer.

It was held that a reduction is appropriate only when the previous loss was of a magnitude that the employee would have been entitled to compensation under the formula of section 85B.9 if the loss had in fact been employment-related. An average loss of less than 25 decibels provides no basis for reducing compensation to be awarded.

Where there is a layoff of more than one year, without termination of the employer-employee relationship, and the employee is recalled, a claim is not barred by the layoff if the employee returns to employment, with the same employer, which exposes the employee to excessive noise levels.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| JOSEPH J. HESSE,<br><br>Claimant,<br><br>vs.<br><br>MAYTAG COMPANY,<br><br>Employer,<br><br>and<br><br>TRAVELERS INSURANCE COMPANY,<br><br>Insurance Carrier,<br>Defendants. | FILE NOS. 736110 & 702793<br><br>A R B I T R A T I O N<br><br>A N D<br><br>R E V I E W -<br><br>R E O P E N I N G<br><br>FILED<br><br>AUG 14 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

## STATEMENT OF THE CASE

This is a combined proceeding in review-reopening and arbitration brought by Joseph J. Hesse, claimant, against Maytag Company, employer (hereinafter referred to as Maytag), and Travelers Insurance Company, insurance carrier, defendants, for the recovery of further benefits as a result of injuries on April 22, 1982 and June 9, 1983. A memorandum of agreement for the April 22, 1982 injury was filed on June 4, 1982. On May 15, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: James Duncan, William Martin and Mary Cobbs. The exhibits received into the evidence at hearing are listed in the prehearing report. All of the evidence received at the hearing was considered in arriving at this decision.

The prehearing report contains the following stipulations:

1. On April 22, 1982, and again on June 9, 1983, claimant received injuries which arose out of and in the course of his employment with Maytag;

2. Claimant is not seeking additional temporary total disability or healing period benefits in this combined proceeding;

000521

3. If the 1982 injury is found to cause permanent disability, the disability is a scheduled member disability to the right hand. If the 1983 injury is found to cause permanent disability, the disability is a scheduled member disability to the left elbow;

4. The commencement date for permanent partial disability benefits if awarded herein shall be December 18, 1984 for the 1982 injury and October 3, 1983 for the 1983 injury;

5. Claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $273.74 for the 1982 injury and $294.60 for the 1983 injury; and,

6. All requested benefits have been or will be paid by defendants.

The prehearing report submits the following issues for determination in this decision:

I. Whether there is a causal relationship between the work injury and the claimed disability.

II. The extent of claimant's entitlement to weekly benefits for permanent disability.

FINDINGS OF FACT

1. Claimant was a credible witness.

From his demeanor while testifying, claimant appeared to be truthful. Claimant's testimony was consistent with histories provided to physicians during treatment and evaluation of his injuries.

2. Claimant has been employed by Maytag since July, 1971, and remains employed at Maytag at the present time.

There is little dispute among the parties as to the nature of claimant's employment at Maytag. Claimant has been a utility operator of many machines and since January of 1982, an operator of a "Buhr" machine. Claimant testified his duties on the Buhr machine consist of placing parts with his right hand into the machine approximately 1,000 to 1,600 times per day. Some parts had to be lightly pushed into the machine in order for the machine to operate properly.

3. On April 22, 1982, claimant suffered an injury consisting of carpal tunnel syndrome of the right hand which arose out of and in the course of his employment with Maytag.

Claimant testified that soon after his assignment to the

000522

Buhr machine, claimant began to experience difficulties with numbness and tingling in conjunction with pain in his right hand and fingers and that he started to lose his grip in his right hand. This problem persisted for several months and he eventually began to have difficulty sleeping. After reporting to Maytag's medical department several times with these complaints, he was referred to Albert Clemens, M.D., a board certified general surgeon. After a diagnosis of carpal tunnel syndrome on the right, Dr. Clemens performed a surgical release to correct the problem in May, 1982. Claimant then returned to work without restrictions but experienced a recurrence of symptoms in June, 1984, of the right hand. Thomas Sumners, M.D., examined claimant in June, 1984, and stated that he could not identify any active ongoing neurologic disorder but noted claimant's continued symptoms and suggested further evaluation by an orthopedic hand surgeon. In July, 1984, claimant was examined by Scott Neff, M.D., an orthopedic surgeon who diagnosed recurrent right carpal tunnel syndrome and, despite a normal EMG test, recommended surgery.

After his diagnosis of recurrent right carpal tunnel syndrome, Dr. Clemens performed a second surgery on claimant in October, 1984. This was described by Dr. Clemens in his reports as "right recurrent carpal tunnel release and right transection of the volar carpal ligament." From the history of claimant's work provided to him by claimant, Dr. Clemens opined that the original carpal tunnel syndrome and recurrence in 1984 was work related. In December, 1984, claimant was examined by Bruce Sprague, M.D., another hand surgeon, but he did not render a causal connection opinion subsequent to this examination.

In January, 1987, three physicians from the Iowa Foundation for Medical Care, an organization whose purpose and function was not shown in the record, opined in a "consensus" report that there were "insufficient facts upon which to conclude that the carpal tunnel syndrome was work related." These physicians did not examine claimant. They base their opinions on the review of claimant's past medical records. These physicians did, however, make a reference to a description of claimant's job at Maytag. Unfortunately, they did not include in their reports their understanding of claimant's work. This report is somewhat confusing as earlier reports from two members of the panel had stated that there was a causal connection between claimant's work and his right carpal tunnel syndrome.

The consensus views of the three physicians from the Iowa Foundation were given little weight. The consensus report was inconsistent with prior reports by individuals on that panel without sufficient explanation as to the change in opinions. The consensus report does not fully describe the physicians' understanding as to the type of work claimant was performing. The treating physician's views must be given the greater weight

000523

due to greater clinical familiarity with claimant's symptoms. Consequently, the preponderance of the evidence established that claimant's right carpal tunnel syndrome in 1982 and the recurrence in 1984 were work related.

4. The work injury of April 22, 1982 was a cause of a 10 percent permanent partial impairment to claimant's right hand.

Claimant stated that he had no previous medical history of any hand problems before the work injury herein. This testimony is uncontroverted. Despite two surgeries to alleviate the problem, claimant complains of persistent tingling and numbness in his hands and fingers; loss of strength in his hands; and, severe pain after certain types of hand activity. After his last examination of claimant, Dr. Clemens opined that due to these complaints and his objective findings using his Dynamometer, claimant has suffered a 20 percent permanent partial impairment to his right hand as a result of the 1982 and 1984 carpal tunnel syndromes.

After his single examination of claimant in December, 1984, Dr. Sprague opined initially that claimant has a five percent permanent partial impairment to the right hand due to a loss of sensation but he could not identify a loss of grip strength. There is no mention as to whether or not Dr. Sprague utilized an objective device to measure grip strength. Dr. Sprague later stated without explanation that under AMA Guidelines, claimant would have no measureable functional impairment. It is not clear from the evidence why Dr. Sprague feels that this agency only recognizes impairments measured under the AMA Guidelines. It was the view of the three physicians from the Iowa Foundation referred to above that claimant's impairment was "less than 10 percent of the right hand" due to a loss of sensation.

All of the various impairment opinions set forth above establish by a preponderance of the evidence that claimant suffered a 10 percent permanent partial impairment to the right hand. Dr. Sumners and Dr. Neff did not examine claimant subsequent to the second surgery on the right hand and did not render an impairment opinion.

5. On June 9, 1983, claimant suffered an injury to the left arm which arose out of and in the course of his employment with Maytag.

After the October, 1983, surgery on the right hand, claimant began to notice difficulties with his left hand and arm consisting of numbness and pain extending from the elbow to the fingers. Claimant returned to Dr. Clemens who diagnosed early ulnar nerve neuropathy and left carpal tunnel syndrome and prescribed an elbow pad and medication. Dr. Clemens also discussed with claimant the possibility of undergoing an ulnar nerve transplant

000524

in the area of the left elbow. However, an EMG study in May, 1983, found no objective evidence of left sided neuropathy and no surgery was scheduled as a result. Claimant continued working during this period of time and claimant testified that his condition improved after the treatment he received from Dr. Clemens.

Claimant testified that on June 9, 1983 a conveyor near his work station accidently moved turning a crank which repeatedly struck claimant on the left arm in an area extending from just above the elbow to six inches below the elbow on the inside portion of the forearm. Claimant testified that he immediately experience pain and swelling in the area of the forearm and elbow and reported it to the Maytag medical department. The physician assistant and nurse at the department testified that they treated claimant for bruises and contusions on the left forearm approximately two inches below the elbow, not in the area of the elbow. Claimant's pain and swelling complaints continued and claimant was referred to Dr. Clemens. After his examination of claimant, Dr. Clemens again diagnosed ulnar nerve neuropathy but felt that claimant's current aggravated symptoms were attributable to the crank incident of June 9, 1983. According to Dr. Clemens' deposition testimony this causally connection opinion was based upon his observations of claimant's bruising, claimant's description of the incident and a positive EMG performed after the crank incident. The physician assistant testified at the hearing that he believed that the extensive bruising which extended to the claimant's elbow was natural enlargement of bruising beyond the original trauma site which occurs in any injury.

Dr. Sprague did not render a causal connection opinion as to claimant's left elbow difficulties. The three physicians from the Iowa Foundation referred to above felt that the left elbow and hand problems were not work related in their consensus report which again differed from their individual reports. This difference again was not fully explained in the consensus report. In the report of the chairman, Dr. Gilson, the panel did not give much weight to claimant's description of the incident and they stated in the report that claimant's account of the incident was "suspect with all due courtesy." Also, none of the physicians actually examined claimant. For these reasons, the views of the treating physician, Dr. Clemens, must be given the greater weight over the views of the panel. Dr. Clemens' views as to the significance of claimant's bruising after he examined claimant following the crank injury must be given more weight than the views of a physician assistant. The panel's views were confusing and unlike the panel members, this deputy commissioner felt that claimant's account of the incident was truthful. Furthermore, claimant's story was buttressed to some extent by the testimony of a fellow employee who likewise indicated that he observed injuries close to the elbow after the incident.

000525

6. The work injury of June 9, 1983 was a cause of a three percent permanent partial impairment to claimant's left arm.

Claimant, at the present time, complains of continuing problems with his left arm and hand consisting of numbness, tingling, pain and weakness. After tests of grip strength again using a Dynamometer, Dr. Clemens opined that claimant has a 10 percent permanent partial impairment to the "left forearm" due to persistent pain, loss of sensation, loss of grip strength and the need to be careful when using his left hand and arm. Dr. Clemens did not feel this was directly convertable to a permanent impairment to the left arm but did not attempt to make a conversion of his rating to the upper extremity. Claimant's attorney, in his brief, suggests that the conversion should be from 10 percent to nine percent using the AMA Guidelines for converting a hand impairment to an upper extremity impairment. This, however, would not be appropriate as Dr. Clemens testified that he did not base his impairment rating entirely upon AMA Guidelines. Therefore, his actual permanent partial impairment to the arm would be somewhat less than 10 percent.

Dr. Sprague again could not identify any loss of grip strength and only opined that under AMA Guidelines claimant has no impairment. When you consider Dr. Sprague's earlier statements concerning the right hand impairment, one is left with the thought that Dr. Sprague is again of the opinion that this agency only recognizes impairments measured under the AMA Guidelines. This is not the case as will be explained in the conclusions of law section.

The panel of the three doctors from the Iowa Foundation again found no impairment despite the lack of an examination of claimant. These views were given weight but not as much as those of the examining physician.

The preponderance of the evidence described above demonstrates that claimant's actual impairment is probably three percent of the left arm giving greater weight to the views of Dr. Clemens but giving as well, adequate weight to the views of the other qualified physicians rendering opinions in this case.

## CONCLUSIONS OF LAW

The foregoing findings of fact were made under the following principles of law:

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the

000526

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. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 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).

II. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code

000527

section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

It should be noted that although this agency recognizes the AMA Guidelines for the Evaluation of Permanent Impairments as a valid tool for measuring impairment, it is not the only method to measure such impairment. Views of qualified physicians are valuable in the determination. See Division of Industrial Services Rule 343-2.4.

Based upon a finding of a 10 percent loss of the use of the right hand, claimant is entitled as a matter of law to 19 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(l) which is 10 percent of the 190 weeks allowable for an injury to the hand in that subsection.

Based upon a finding of a three percent loss of use to the left upper extremity, claimant is entitled as a matter of law to seven point five weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(m) which is three percent of the 250 weeks allowable for an injury to the arm in that subsection.

According to the prehearing reports submitted by the parties, no permanent disability benefits have been paid by defendants prior to the hearing.

ORDER

1. Defendants shall pay to claimant nineteen (19) weeks of permanent partial disability benefits at the rate of two hundred seventy-three and 74/100 dollars ($273.74) per week from December 18, 1984 and seven point five (7.5) weeks of permanent partial disability benefits at a rate of two hundred ninety-four and 60/100 dollars ($294.60) per week from October 3, 1983.

2. Defendants shall pay accrued weekly benefits in a lump sum.

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

4. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

5. Defendants shall file activity reports upon the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

000528

Signed and filed this 14th day of August, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Roger P. Owens
Mr. Mark T. Hedberg
Attorneys at Law
840 Fifth Avenue
Des Moines, Iowa 50309-1398

Mr. Terry L. Monson
Attorney at Law
300 Liberty Bldg.
Des Moines, Iowa 50309

000523

1803; 3001; 4100
Filed: March 19, 1987
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

| | |
|---|---|
| WILMA HINGTGEN,<br><br>Claimant,<br><br>vs.<br><br>MARY GOODMANN,<br><br>Employer,<br><br>and<br><br>ECONOMY FIRE & CASUALTY,<br><br>Insurance Carrier,<br>Defendants. | File No. 737771<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

---

1803; 3001; 4100

A sixty-two year old, domestic aide for an elderly person was found to have suffered a thirty percent industrial disability as a result of a work injury to her back and she was awarded permanent disability benefits accordingly. The award of benefits was lowered due to claimant's failure to seek suitable replacement employment.

Citing agency precedent, an argument of claimant was rejected which contended that this agency is not required to use subsection 10 of Iowa Code section 85.36 in computing rates for part-time persons if the resulting rate was not reflective of claimant's actual loss of earnings. However, that subsection was not applied to claimant despite the fact that she only worked twenty hours per week because it was held that defendants had the burden of proof if they wish to utilize that subsection in rate computation. It was held that there was insufficient evidence to find that claimant was earning less than other domestic aides or helpers of elderly persons in the Dubuque metropolitan area. Given the prevalence of part-time help in many industries within this state such as in the grocery, fast food, and general service businesses, it could not be assumed that a twenty hour work week was "per se" part-time for all industries within the state.

000530

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| WILMA HINGTGEN,<br><br>Claimant,<br><br>vs.<br><br>MARY GOODMANN,<br><br>Employer,<br><br>and<br><br>ECONOMY FIRE & CASUALTY,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 737771<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>FILED<br><br>MAR 19 1987<br><br>INDUSTRIAL SERVICES |

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Wilma Hingtgen, claimant, against Mary Goodmann, employer, and Economy Fire and Casualty, insurance carrier, defendants, for benefits as the result of an alleged injury on April 12, 1983. On January 21, 1987 a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

Claimant is alleging in this proceeding that she injured her low back from a fall while working for Goodmann. Claimant seeks temporary total disability or healing period benefits during the times she was off work for treatment of the claimed injury and permanent disability benefits for alleged permanent physical impairment.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Connie McCoy, Colleen Payne, Connie Moran, Daniel Goodmann, and Shirley Johnson. The exhibits received into the evidence at the hearing are listed in the prehearing report except for claimant's exhibit C, a decision by a social security administrative law judge which was excluded as irrelevant to this proceeding. All of the evidence received at the hearing was considered in arriving at this decision.

The prehearing report contains the following stipulations:

1. On April 12, 1983 claimant received an injury which arose out of and in the course of employment with Goodmann;

2. The period of time off work for which claimant seeks either temporary total disability or healing period benefits is from April 12, 1983;

3. The injury was a cause of permanent disability and the type of disability is an industrial disability to the body as a whole;

4. Claimant was single at the time of the injury; and,

5. All requested medical benefits had been or will be paid by defendants.

The prehearing report submits the following issues for determination in this decision:

I. The extent of claimant's entitlement to weekly disablity benefits; and,

II. The rate of weekly compensation to which claimant is entitled.

FINDINGS OF FACT

1. Claimant was a credible witness.

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

2. Claimant was employed by Mary Goodmann from either the latter part of November or early December 1982 until April 12, 1983 as a domestic helper and aide.

Claimant testified that her duties consisted of routinely giving Mrs. Goodmann, an elderly lady confined to a wheelchair, a morning bath which included washing her hair. Claimant would then dress Goodmann and fix lunch for both Goodmann and herself. She would then "take her hair down" and leave for the day. Claimant also performed other tasks including taking Goodmann to the doctor on occasion. All of claimant's duties were accomplished within a four hour period during a five day work week.

3. On April 12, 1983 claimant suffered an injury which arose out of and in the course of her employment with Goodmann.

Claimant's credible testimony and the histories she provided to treating physicians in this case establishes that claimant injured her back from a fall while she was attempting to pull Goodmann and her wheelchair up an incline. Claimant felt

immediate severe low back pain and was immediately transported to the hospital where she received treatment consisting of bed rest and medication from a board certified orthopedic surgeon, James A. Pearson, M.D. After initial x-rays of the lower spine revealed nothing unusual, claimant was discharged from the hospital on April 24, 1983 with a diagnosis of muscle strain. After only one day, claimant was readmitted because of severe back pain. After further x-rays of claimant's thoracic area in her mid back, claimant was diagnosed as suffering from a compression fracture of the T11 or T12 vertebra and she was fitted with a Jewett back brace. Using this brace along with medication improved claimant's condition and she was discharged from the hospital the second time on April 27, 1983.

4. The work injury was a cause of a temporary period of total disability while claimant was recovering the injury from April 12, 1983 through November 10, 1983.

Claimant's testimony and the medical reports submitted into the evidence established that claimant was off work following the injury at the direction of her physicians beginning on April 12, 1983 as a result of her hospitalizations. Following her last discharge from the hospital on April 27, 1983, claimant continued under the care of Dr. Pearson over the next several months and pursuant to Dr. Pearson's instructions, she never returned to work as a domestic aide. Claimant continued throughout this time to wear her back brace and to take medication in the evenings for sleeping. Claimant has not returned to work in any capacity since April 12, 1983. Despite some ambiguous verbage in his clinical notes, Dr. Pearson clearly states in his deposition testimony, exhibit 12, that he did not expect claimant to improve medically after his examination of claimant on November 10, 1983 and he gave his first "disability" rating at that time.

5. The work injury of April 12, 1983 was a cause of significant permanent partial impairment to claimant's body as a whole.

Claimant had a previous medical history of back difficulties on two occasions. In 1978 she attempted to lift her invalid son and experienced back pain. Later in 1981 she fell on some ice and again experienced back pain. Claimant established by her testimony that she recovered from these injuries and experienced no chronic back pain until after her injury of April 12, 1983. Consequently, it is found that she had no functional impairment as a result of back difficulties before the work injury in this case. Claimant's past medical records and claimant's credible testimony established that claimant was in excellent health for a woman of fifty-nine years of age at the time of the work injury except for hypertension and being mildly overweight.

As a result of the work injury in this case, claimant currently has permanent functional impairment to her body as a

whole and is restricted by her physicians from heavy lifting, repetitive lifting, bending, twisting, and stooping; and, prolonged sitting and standing. Claimant's primary treating physician, Dr. Pearson, has rated claimant as suffering from a thirty-five percent permanent partial impairment (whether this is to the body as a whole or to the spine is unclear from his deposition testimony). Dr. Field, another board certified orthopedic surgeon rates claimant as suffering from a twenty percent permanent partial impairment to her body as a whole. Both physicians profess to base their opinions on the Manual of Orthopaedic Surgeons for rating physical disability. However, a finding as to the exact percentage of impairment is unnecessary in an industrial disability case.

In his report submitted into evidence, claimant's primary treating physician, Dr. Pearson, opines that claimant's current difficulties and the permanent impairment are the result of the work injury in this case. This testimony is not controverted by Dr. Field.

6. The work injury of April 12, 1983 was a cause of a thirty percent permanent loss of claimant's earning capacity.

As a result of her functional impairment and, more importantly from an industrial disability standpoint, physician imposed physical restrictions, claimant is unable to return to the work she was performing at the time of the work injury and most other jobs she has held in the past. Claimant's past employment primarily consists of unskilled or semiskilled physical labor jobs such as factory work or nurse's aide positions which require either heavy lifting or repetitive lifting, bending, twisting, and stooping, prolonged sitting and prolonged standing. Claimant and Dr. Pearson testified that claimant would not be able to remain either standing or sitting for more than ten minutes at any one period of time. Dr. Pearson, however, felt that if claimant were allowed to move about or change positions periodically she could tolerate clerical type work.

It is important to find that claimant has not made a reasonable effort to find suitable employment and to a limited extent her current unemployment is in part due to this lack of effort and apparent withdrawal from the work force. Claimant has not shown by the greater weight of evidence that she is so disabled that any attempt to locate work would be unsuccessful. Claimant was working only twenty hours per week at the time of the injury and suitable replacement work for the loss of her job in April 1983 would likewise only amount to twenty hours per week. Therefore, claimant has not demonstrated, prima facie, that the services she can perform are so limited in quality, quantity, and dependability that a reasonably stable market for them does not exist within the Dubuque metropolitan area.

Claimant has suffered a significant loss in actual earnings from employment due to a work injury but again this is in part the result of her lack of effort to seek suitable work.

Claimant is sixty-three years of age (fifty-nine years of age at the time of the injury). Given her age, claimant's loss of earning capacity is not as great as that of a younger person.

Claimant has only a tenth grade education and exhibited average intelligence at the hearing. However, her limited formal education and age indicates that she has low potential for successful vocational rehabilitation.

7. Claimant's gross rate of weekly compensation was $79.50 per week at the time of the April 12, 1983 injury and she had no dependents other than herself at the time of the injury.

Claimant established by her credible testimony that the customary work she performed for Goodmann was accomplished over four hours per day, five days per week at the rate of $3.35 per hour. Claimant also said that she was paid on Friday of each week. Defendants offered considerable testimony as to the fact that Mrs. Goodmann's records did not verify claimant's contentions as to her rate of pay. Goodmann herself was not available as she is now incompetent. The fact that records including Goodmann's checks to claimant did not always reflect a constant amount of money was effectively explained by claimant's testimony that she received both cash and checks from Goodmann as payment of her salary. Claimant also testified that she received a free lunch while working for Goodmann valued at $2.50 each. The value of this free lunch was uncontroverted.

Claimant contends that her son was her dependent at the time of the work injury but she did not establish that she paid at least fifty percent of his support nor did she list him as a dependent on her 1982 tax return. Therefore, claimant has not established by the greater weight of the evidence that she is entitled to an additional exemption in calculating the rate of compensation.

The parties stipulated that claimant was single at the time of the work injury.

## CONCLUSIONS OF LAW

The foregoing findings of fact were made under the following principles of law:

I. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment

000535

or limitation upon activity involving the body as a whole, the degree of permanent disability must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity resulting from the work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physical impairment or restriction on work activity may or may not result in such a loss of earning capacity. The extent to which a work injury and a resulting medical condition has resulted in an industrial disability is determined from examination of several factors. These factors include the employee's medical condition prior to the injury, immediately after the injury and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Claimant claims to be an odd-lot employee and entitled to permanent total disability benefits under the odd-lot theory expressed in Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). A worker becomes an "odd-lot" employee when an injury makes the worker encapable of obtaining employment in any well known branch of the labor market. Id. An odd-lot worker can only perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. Id. In Guyton at page 105 the supreme court quoted the following language from an Arizona case, Employers Mutual Life Ins. Co. v. Industrial Commission, 25 Ariz. App. 117, 119, 541 P.2d 580, 582 (1975):

> It is normally incumbent on an injured [worker], at a hearing to determine loss of earning capacity, to demonstrate a reasonable effort to secure employment in the area of ... residence. Where testimony discloses that a reasonable effort was made, the burden of going forward with evidence to show the availability of suitable employment is on the employer and carrier.

The Guyton court ultimately held that when a worker makes a prima facie case of total disability by producing substantial

evidence that worker was not employable in the competitive labor market, the burden to produce evidence shifts to the employer; if the employer fails to produce such evidence and the trial of fact finds that the worker does fall into the odd-lot category, the worker is entitled to a finding of total disability. Id., at 106.

In the case sub judice, although claimant demonstrated that she has not returned to work, she made no reasonable effort to locate suitable replacement employment in the area of her residence. The other evidence offered by claimant in support of her disability did not demonstrate a prima facie case that suitable work is not available to her. Therefore, claimant cannot rely upon the Guyton case to show entitlement to permanent total disability.

However, it was found that claimant suffered a serious loss of earning capacity. Based upon a finding of a thirty percent loss of earning capacity or an industrial disability as a result of an injury to the body as a whole, claimant is entitled as a matter of law to 150 weeks of permanent disability benefits under Iowa Code section 85.34(2)(u) which is thirty percent of the 500 weeks allowable for an injury to the body as a whole in that subsection.

As claimant has established entitlement to permanent partial disability, claimant may be entitled to weekly benefits for healing period under Iowa Code section 85.34(1) from the date of injury until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work she was performing at the time of the injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first.

Based upon the findings pertaining to times off work because of the work injury and the time she reached maximum healing, it is concluded that claimant is entitled under law to healing period benefits from April 12, 1983 through November 10 1983 or a total of thirty and three-sevenths (30 3/7) weeks.

II. Claimant has the burden to establish a rate of compensation. In Iowa, the basis of compensation is the weekly earnings of the injured employee at the time of the injury. Iowa Code section 85.36. Weekly earnings is defined as follows in chapter 85:

> Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed,.... (Section 85.36, Code)

Section 85.36 also provides various methods of computing weekly earnings depending upon the type of earnings and employment. If an employee is paid on a weekly basis, the weekly gross earnings shall be the basis of the compensation. Section 85.36(1), Code. If an employee is paid on a daily basis or hourly basis or by output, the weekly earnings are computed by dividing by thirteen the earnings over the thirteen week period prior to the work injury. Section 85.36(6), Code.

In the case sub judice, it was found that claimant customarily was paid $3.35 per hour for twenty hours per week and she was paid on Friday of each week. In addition to cash payment, it was found that claimant also received a lunch valued at $2.50. The value of this lunch must be included in the computation of gross weekly earnings. See Hoth v. Eilors, I Iowa Industrial Commissioner Report 156 (Appeal Decision 1980). Therefore, under the above cited provisions of 85.36, and applicable case law, claimant's gross weekly earnings for the purpose of computing the rate of compensation was found to be $79.50.

Defendants argue that subsection 10 of section 85.36, applies because claimant was only "part-time." That subsection reads as follows:

> If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fifieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

Claimant responds to this argument by stating that it would be unfair to apply that subsection to claimant and that this agency has discretion in applying the various alternative methods of compensation in 85.36 to arrive at "the most accurate measure of an employee's loss of earnings." It must be conceded that in many instances weekly earnings computed in this matter would not be truly representative of an injured part-time worker's weekly earnings. See Lawyer & Higgs, Iowa Workers' Compensation Law and Practice, §12-8, page 100. However, it is apparent from a reading of subsection 9 in Iowa Code section 85.36, which annualizes the income of seasonal employees, that the legislature intended to adversely discriminate against seasonal and part-time employees who only work part of a year. In addition, the commissioner has held that subsection 10 of 85.36 may adversely affect an injured worker if the worker is found to be earning less than a regular full-time worker and this decision is an agency precedent binding upon this deputy commissioner.

Winters v. Te Slaa I Iowa Industrial Commissioner Report 367 (Appeal Decision 1981).

In the alternative, claimant argues in her brief that defendants have not shown that she was earning less than "a regular full-time adult laborer in the line of industry...in that locality." This argument was much more persuasive. In every case that I have read where the agency has applied subsection 10, there was a specific finding that claimant was earning less than a full-time adult laborer. Clearly, a proponent of a proposition has the burden of proof. If defendants desire to apply subsection 10 to claimant's situation which is an exception to the customary method of computing weekly benefits, defendants assume the burden of demonstrating that she was earning less than the average full-time adult laborer in the Dubuque metropolitan area who performs the type of work claimant was performing at the time of her injury. Although claimant admitted that she only worked twenty hours per week, there is no evidence that there were other employees in the Dubuque area performing domestic care who earned more than claimant on a weekly basis. Given the numerous industries in this state in which part-time employment is the customary type of "full-time employment," e.g., grocery,, fast food, and general service businesses, this agency cannot assume, per se, that a forty hour work week is full time in every industry or that a twenty hour work week is part-time. Claimant was not engaged in nursing home care as her duties were limited to care of the elderly in the elderly person's own home. However, even if you could consider nursing home care as the same "line of industry," there was no evidence submitted by defendants of what the normal wage or hours are for such an industry. It is this deputy commissioner's experience that nursing home aides frequently work less than forty hours per week. Therefore, given the failure of defendants to carry their burden of proof, claimant is entitled to a computation of her rate under the customary method applicable to full-time employees.

Based upon a finding of a gross weekly compensation of $79.50 per week, single status with one exemption, claimant is entitled under law pursuant to the commissioner's benefit schedule published July 1, 1982 to a rate of compensation in the amount of $64.91 per week.

ORDER

IT IS THEREFORE ORDERED AS FOLLOWS:

1. Defendants shall pay to claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of sixty-four and 91/100 dollars ($64.91) per week from November 11, 1983.

2. Defendants shall pay to claimant healing period benefits from April 12, 1983 through November 10, 1983 at the rate of sixty-four dollars and 91/100 dollars ($64.91).

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

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

5. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 (formerly Industrial Commissioner Rule 500-4.33).

6. Defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1 (formerly Industrial Commissioner Rule 500-3.1).

Signed and filed this 19 day of March, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. David A. Lemanski
Attorney at Law
200 Security Building
Dubuque, Iowa 52001
Mr. Brendan T. Quann
Attorney at Law
200 CyCare Plaza
Dubuque, Iowa 52001

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| KENNETH HOLLEY, | : | |
| Claimant, | : | File No. 660793 |
| vs. | : | |
| DAVIS CONSTRUCTORS, | : | R E V I E W - |
| Employer, | : | R E O P E N I N G |
| and | : | D E C I S I O N |
| UNITED STATES FIDELITY AND GUARANTY COMPANY, | : | FILED |
| Insurance Carrier, Defendants. | : | DEC 30 1987 |
| | : | IOWA INDUSTRIAL COMMISSIONER |

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Kenneth Holley, claimant, against Davis Constructors, employer, and USF&G, insurance carrier, to recover additional benefits under the Iowa Workers' Compensation Act as a result of an injury sustained February 4, 1981. This matter came on for hearing before the undersigned deputy industrial commissioner October 2, 1987. The record was considered fully submitted at the close of the hearing. The record in this case consists of the testimony of the claimant, joint exhibits 1 through 4, 5a through 5c, and 6 through 9; defendants' exhibits A and B, and claimant's exhibits 1a and 1b, 2, 3, 4a and 4b, 5, and 6a through 6f.

ISSUES

The issues presented for determination are:

1) Whether there has been a change of claimant's condition to warrant review-reopening and, if so, whether claimant's industrial disability has changed;

2) The amount and allocation of credit defendants are entitled to against any additional weekly or medical benefits which may be awarded herein for claimant's recovery in a third party action against the owner of the premises upon which he was working at the time of his injury; and

3) Whether claimant's attorney is entitled to additional

attorney fees under Iowa Code section 85.22.

FACTS PRESENTED

Claimant testified he was working at Clinton Corn Processing for defendant employer at the time of his injury on February 4, 1981, and was assigned to the feed house as a pipefitter. He recalled a Johnson joint needed immediate replacement and therefore went to the warehouse to get the joint where he was told workers would load it. After securing a truck, claimant was advised the workers could not assist in loading and he therefore proceeded to load the joint. Claimant explained he had one foot on the truck and one foot on the loading dock when his foot slipped and he caught the weight of the joint. He recalled feeling immediate pain, went to the nurse and thereafter to a doctor and was hospitalized.

Claimant, after a ten day stay at Jane Lamb Memorial Hospital in Clinton, Iowa, was transferred to Alabama to be closer to home. Once back in Alabama, a myelogram was performed. Following the procedure, claimant had what he called a "reaction to the dye used." He described sweating, a feeling like floating and passing out. He admitted the health care provider felt his conduct was the result of fear. Surgery was recommended but rejected by claimant. He elected more conservative treatment.

Claimant recalled he had been treated by David Khoo, M.D., and was eventually referred to Keith Langford, M.D., a neuro-surgeon. He was sent to rehabilitation services for fourteen days to assist him in coping with pain. He testified to seeing therapists, doctors, psychiatrists, and a "pain team." He was also provided with occupational therapy. Claimant felt that, although his pain had not dissipated, he was better able to cope with it. Claimant admitted he was aware at this time that the pain was and would remain chronic and that it affected his outlook on life. Claimant also acknowledged that although he was periodically examined by mental health professionals, he was never treated by any of them for any length of time.

Claimant testified that in July of 1982, his back was constantly painful, he could not secure work, and he was nervous. Between July 1982, the time of the first hearing in this matter, and February 1985, claimant testified he did not return to work. He had attended the Alabama State Rehabilitation Program for six weeks, but did not return thereafter because he was advised the program would do him no good. Claimant offered that he had been evaluated and had found to be hostile, suffering from anxiety and depression. Claimant continued to see physicians and was evaluated by Thomas Sannito, Ph.D., Psychologist, in Dubuque, in March 1984 and felt all the while he was getting "more wrung out," easily aggravated and that he was unneeded by his family.

000542

Claimant, since the last hearing, has attempted without success to maintain regular employment. After five weeks of work as a pipefitter, his son had to bring him home. After two days of working for Exxon in Baton Rouge, he described feeling back and stomach pain, nervousness, being jumpy, and that his chest and arm hurt. Claimant last worked in approximately September 1987, as a pipefitter/welder. He stated he quit after four days because of leg swelling, back pain, and because he felt his "chest walls were swollen."

Claimant testified to chronic back pain and anxiety and depression from it. He recalled a few incidents of reporting to the emergency room because he felt he was having a heart attack. He was diagnosed, however, as having a panic/anxiety attack. Claimant explained it is difficult to sleep and that he is often up at night. He stated occurrences of sweating, which start in the palms, are now more frequent than before. He offered that he is currently more jittery and nervous, wrung out, aggravated, feels diminished energy, has headaches and difficulty urinating. On the drive from Alabama to Iowa for this hearing, claimant explained he felt it necessary to stop every 75 to 100 miles in order to get out of the car. He would not, however, allow his traveling companion to drive. He testified to numbness in his legs, which is sometimes better and sometimes worse. Claimant also feels his judgment has been impaired and would not trust his own decision-making. He asserted his back continues to bother him, particularly when bending, climbing after only, for example, a couple of steps, lifting, walking and sitting. Claimant acknowledged he is under the same medical restrictions currently with regard to lifting, stooping, crawling, and climbing as he was at the time of the first hearing.

Keith H. Langford, M.D., who practices in the specialty of neurosurgery, first saw claimant November 10, 1981, with complaints of pain in his back, legs, and nervousness "as though he was coming apart," that it was impossible to do more than the simplest of things, that even walking aggravated his pain and a tingling sensation in his arms and legs. Following hospitalization and testing, Dr. Langford concluded claimant suffered from a low back injury that was considered a severe strain rather than a torn up disc and, in addition to persistent pain, that claimant had "a severe anxiety depression which was quite evident...at the very beginning....It was clear that he did have quite a severe psychological companion to his chronic pain." (Joint Exhibit 5b, page 22) Dr. Langford opined traumatic neurosis was a reasonable term to apply in claimant's particular case. He subsequently saw claimant August 12, 1982, November 5, 1982, February 11, 1983, June 6, 1983, and October 5, 1983. When he was last seen on October 5, 1983 (or possibly December 1983, as the deposition is unclear. See Jt. Ex. 5b, p. 18, l. 16), Dr. Langford stated "he (claimant) had several complaints but was not much different than what I had seen him in the past." (Jt. 5b, p. 18)

Claimant was seen by Thomas Sannito, Ph.D., Clinical Psychologist, March 1, 1984, for purposes of evaluation. Dr. Sannito's diagnosis was post-accident neurosis, severe and chronic. He described claimant as having a "full blown neurotic condition" involving anxiety, acute anxiety, depression, worry, tension, and edginess. When asked how the symptoms of post-accident neurosis developed, Dr. Sannito stated "they develop, typically, very gradually, in contrast to posttraumatic neurosis. A posttraumatic neurosis occurs right away, and it's severe, and there is numbness. With postaccident neurosis, the symptoms emerge slowly and gradually and they're tied to the debilitating effect of the injury." (Jt. Ex. 8, p. 28) Dr. Sannito described the cyle of pain/neurosis by stating:

> "[L]ets say you start with an organic pain, the organic pain demoralizes you after a while and lowers your tolerance, so it works in a cycle. Your pain lowers your tolerance and reduces your ability to cope, which then causes the pain to grow, and the pain gets larger, and further reduces your coping ability. And it's one of these ex-calating things. So the neurosis is certainly causing - exacerbating the pain, as well as the pain bringing on the neurosis. Its an inter-action --.

(Jt. Ex. 8, p. 46)

Dr. Sannito's final opinion was "from his psychic injury, he would have a 90% disability rating, unable to carry on normal functions and completely incapable of working." (Ex. 1-a, p. 4)

Claimant was also seen for evaluation by Claude M. Holland, Jr., M.D., a psychiatrist, on March 29, 1985 who diagnosed claimant as having a chronic adjustment disorder with mixed emotional features.

## APPLICABLE LAW

Iowa Code section 86.14(2) mandates:

> In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to diminishment of, or increase of compensation so awarded or agreed upon.

The case law relating to review-reopening proceedings is rather extensive.

The opinion of the Iowa Supreme Court in Stice v. Consolidated Indiana Coal Co., 228 Iowa 1031, 1035, 291 N.W. 452 (1940) stated: "That the modification of...[an] award would depend upon a change in condition of the employee since the award was made." The court cited the law applicable at that time which was "if on such review the commissioner finds the condition of the employee warrants such action, he may end, diminish, or increase the compensation so awarded" and stated at 1038:

> that the decision on review depends upon the condition of the employee, which is found to exist subsequent to the date of the award being reviewed. We can find no basis for interpreting this language as meaning that the commissioner is to re-determine the condition of the employee which was adjudicated by the former award.

The court in Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957) at 69, cited prior decisions and added a new facet to review-reopening law by stating:

> But it is also true that unless there is more than a scintilla of evidence of the increase, a mere difference of opinion of experts or compentent observers as to the percentage of disability arising from the original injury would not be sufficient to justify a different determination by another commissioner on a petition for review-reopening. Such is not the case before us, for here there was substantial evidence of a worsening of her condition not contemplated at the time of the first award. (Emphasis added.)

A major pronouncement came in the case of Gosek v. Garmer & Stiles Co., 158 N.W.2d 731, 732 (Iowa 1968). The opinion there said that "[o]n a review-reopening hearing claimant has the burden of showing by a preponderance of the evidence his right to compensation in addition to that accorded by a prior agreement or adjudication." The opinion went on to discuss the common understanding that "if a claimant sustained compensable injuries of which he was fully aware at time of prior settlement or award, but for some unexplainable reason failed to assert it [sic], he cannot, for the first time on subsequent review proceedings, claim additional benefits." The opinion continued at 733 "[b]ut according to the apparent majority view, if a claimant does not know of other employment connected injuries or disability at time of any prior agreement or adjudication, he is not ordinarily barred from later asserting it [sic] as a basis for additional benefits." The court went on to hold at 735 that "cause for allowance of additional compensation exists on proper showing that facts relative to an employment connected injury existed but were unknown and could not have been discovered by

the exercise of reasonable diligence, sometimes referred to as a substantive omission due to mistake, at time of any prior settlement or award."

ANALYSIS

It is first necessary to examine claimant's condition at the time of the last award and his condition at present to see if there has been a change which, under Iowa case law, would warrant claimant's requested increase in compensation.

With regard to claimant's back problems, the deputy who first ruled on this matter found as a fact that "claimant has limited ability to stand and sit for extended periods." Claimant is still limited in his ability to stand and sit for extended periods of time. In discussing claimant's testimony, Deputy Higgs wrote, "claimant estimated his ability to sit at ninety minutes and his ability to stand in one position at some sixty to seventy-five minutes." Claimant did not testify in the proceedings at hand quite as specifically but indicated that it was necessary to stop every seventy-five the one hundred miles when making the drive from Alabama to Iowa for the hearing. It is concluded claimant's ability to sit and stand has not substantially changed between July of 1982, the time of the first hearing, and October 1987, the time of this proceeding.

Claimant argues his physical condition has deteriorated and that he now suffers from more pain and discomfort in his back and legs. Deputy Higgs found as fact claimant "perceives persistent pain" and referred in her analysis to chronic pain. It is difficult, at best, to imagine anything stronger than persistent pain. Claimant's pain is still persistent. Claimant has failed to establish his current pain has changed from the persistent pain established at the first hearing.

Deputy Higgs also found as fact that "claimant carries restrictions from heavy or frequent lifting; continuous stooping, twisting or bending; crawling; kneeling; climbing and squatting." Claimant has failed to establish any change in his restrictions which might show a change in his condition. In fact, there has been no subsequent medical evaluation of claimant's back impairment.

It appears as though claimant is currently stressing a deterioriation of a psychological condition. Claimant argues he is subject to more frequent panic attacks and that as a result of the chronic pain from the back and leg conditions, claimant has developed post-accident neurosis which has, in turn, lowered his tolerance toward the organic pain which, in turn, has reduced his ability to cope with his emotional problems. That is to argue that claimant has become involved in a degenerative cycle where the organic pain and the neurosis work upon each

other detrimentally.

Applying the Iowa case law cited above to the facts presented herein does not result in finding a change of condition. Stice v. Consolidated Indiana Coal Co., 228 Iowa 1031, 291 N.W.2d 452 (1940), makes it clear that in a review-reopening proceeding, a deputy is not to predetermine what has gone on before.

It is believed the determination in this case is governed by Gosek v. Garmer & Stiles Co., 158 N.W.2d 731 (1968). Claimant's neurotic condition is not new, it is not additional and was not undiscovered at the time of the first hearing. Dr. Langford is the only health care provider who treated claimant both before and after the first hearing in this matter. Dr. Sannito and Dr. Holland both evaluated claimant subsequent to July of 1982 and neither saw him for any reason before that time. Dr. Langford clearly identified his psychological problem with the claimant. He spoke of claimant having severe anxiety depression which was evident from the very beginning. Dr. Langford further spoke of claimant having quite a severe psychological companion to his chronic pain. As with claimant's persistent pain discussed above, a question is presented as to whether or not a psychological problem may be more than severe. Perhaps an affirmative response is possible; however, claimant has failed to establish that that is the case here. Dr. Langford, claimant's treating physician for a lengthy period of time, did not see any change in the claimant's condition between when he first saw him and when he last saw him in 1983. Dr. Sannito opines that claimant is 90 percent disabled. It is not Dr. Sannito's responsibility to determine disability. However, there is no evidence in the record to show that Dr. Sannito may not have had this same opinion had he evaluated claimant prior to the first hearing. Therefore, he cannot testify as to any change in claimant's condition. Claimant was aware of his nervousness, his attack immediately after the myelogram, and his feelings of impending doom. Claimant was seen by psychiatrists, therapists, and a pain team. The testimony at the first hearing in the prior deputy's decision shows claimant was suffering emotional difficulties at that time. Indeed, many of the medical records offered during this proceeding predate the first hearing. During the first hearing, it is apparent claimant elected to emphasize his back injury. He now chooses to emphasize a psychological injury. Since claimant was aware of the neurosis, or at least a psychological component to his physical injury at the time of the prior hearing, and for some unexplainable reason failed to assert it or diligently pursue its ramifictions, he cannot now claim entitlement to additional benefits.

Finally, claimant's inability to retain gainful employment does not necessitate a finding of change of condition. As previously stated, claimant's medical restrictions have not changed. It is not disputed he is still unable to return to his

000547

heavy labor jobs and that he would thus be suited to positions that would allow him some freedom of movement which would comply with his doctor's advice. Charles Wright, vocational consultant who testified at the first hearing, cited to positions such as salesperson, shipping and receiving clerk, invoice clerk, welder-setter, safety inspector, machine operator, pattern maker, troubleshooter, timekeeper, invoice clerk, safety inspector, estimator and labor foreman as positions which might well suit claimant's current abilities. Yet, in spite of his awareness that he cannot do the kind of work he did before, claimant consistently attempts to return to that type of work. The claimant accepted positions as pipefitter, welder, and in a trailer court. He has not attempted any of the jobs considered by the vocational consultant to be suitable. In her decision of October 16, 1982, Deputy Higgs stated "This deputy industrial commissioner does not believe claimant has the functional capacity to do all his former work, but he is not precluded from all work." Claimant has not established that has changed in that he is still not precluded from doing all work. Claimant has failed to show a change in condition since the last hearing which would entitle him to additional compensation and, therefore, is entitled to nothing further from the proceedings. Accordingly, the other issues raised will not be discussed since they are considered moot.

## FINDINGS OF FACT

WHEREFORE, based on the evidence presented, the following facts are found:

1. On February 4, 1981, claimant suffered an injury arising out of and in the course of his employment when he was loading a replacement part on a truck.

2. Claimant was hospitalized and had a myelogram.

3. Claimant suffered a reaction to the myelogram because of his fear which was characterized as a panic/anxiety attack.

4. Claimant's injury was diagnosed by Dr. Keith Langford as a severe strain rather than a torn up disc.

5. Claimant was diagnosed as having severe anxiety depression and a severe psychological companion to this chronic pain.

6. Claimant was found as a result of the last hearing to have limited ability to stand and to sit for extended periods.

7. Claimant was found as a result of the last hearing to perceive persistent pain.

8. Claimant was found as a result of the last hearing to

carry restrictions from heavy or frquent lifting; continuous stooping, twisting or bending; crawling; kneeling; climbing and squatting.

9. Since the claimant was last seen by Dr. Langford by the end of 1983, claimant's back impairment has not been evaluated by any physician.

10. Claimant filed an original notice and petition August 12, 1981.

11. Following a hearing held July 28, 1982, claimant was found to have a 25 percent permanent partial disability.

12. Claimant had a psychological component to his injury of which he was aware at the time of the first hearing.

13. Claimant still has limited ability to stand and sit for extended periods, still perceives persistent pain, and still carries restrictions from work.

14. Claimant's psychological component to his injury is not new, additional, or newly discovered.

15. Claimant's treating physician saw no change in his condition between November 1981 and the end of 1983.

16. Claimant's condition has not changed between July 1982 and October 1987.

## CONCLUSIONS OF LAW

THEREFORE, based on the principles of law previously stated, the following conclusions of law are made:

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

## ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing further from these proceedings.

Each party is assessed their own costs with defendants assessed the cost of the court reporter. Division of Industrial Services Rule 343-4.33.

Signed and filed this 30th day of December, 1987.

Deborah A. Dubik
DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

James L. Pillers
Attorney at Law
1127 North Second Street
Clinton, Iowa 52732

Patricia Rhodes Cepican
Attorney at Law
3432 Jersey Ridge Road
Davenport, Iowa 52807

000550

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES T. HOSKINS,

Claimant,

vs.

CATERPILLAR TRACTOR CO.,

Employer,
Self-Insured,
Defendant.

FILE NOS. 735118 & 792721

A R B I T R A T I O N

D E C I S I O N

FILED

OCT 26 1987

IOWA INDUSTRIAL COMMISSIONER

## INTRODUCTION

This is a proceeding in arbitration brought by James T. Hoskins, claimant, against Caterpillar Tractor Company, employer and self-insured defendant, for benefits as a result of an injury which occurred on May 27, 1983 and an injury which occurred on August 23, 1983. A hearing was held in Davenport, Iowa on January 8, 1987 and the case was fully submitted at the close of the hearing. The record consists of the testimony of James T. Hoskins (claimant), claimant's exhibits 1 through 18 and defendant's exhibits A through KK. Both parties were requested to file a brief but neither party filed a brief. Claimant, however, did provide a transcript of the hearing on his own volition.

## DATE CORRECTION

Although the petition on claim file 792721 alleges an injury date of August 25, 1983, the parties agreed at the hearing that this injury date was probably August 23, 1983 based upon the testimony of claimant. Therefore, that date will be used as the injury date on file number 792721 instead of August 25, 1983.

## PRELIMINARY MATTER

Defendant objected to claimant's exhibit 16 for the reason that it was not timely served as provided in the hearing assignment order. Paragraph six of the hearing assignment order provides that all written exhibits not previously served shall be served upon opposing parties no later than 30 days following the signing and filing of this order. The order was signed and filed July 21, 1986. Thirty days later would be August 20, 1986. The case was originally scheduled to be heard on October 23, 1986. However, on motion of defendant which was not resisted, the hearing was continued until January 8, 1987. Claimant's exhibit 16 is a written letter from a doctor dated December 4,

000551

1986. It was served on defendant a few days later and within the 10 day rule of Division of Industrial Services Rule 343-4.17. Defendant's counsel asserted prejudice. He contended that he relied on this rule to exclude this document. Otherwise he probably would have deposed this doctor prior to the hearing (Transcript, page 17). Since: (1) the letter was not even generated until more than three months after the August 20, 1986 deadline; (2) since defendant only received the exhibit approximately 30 days prior to the hearing; and, (3) since this 30 day period covered the Christmas and New Year holiday seasons, then defendant's objection is sustained. Claimant's exhibit 16 is excluded from evidence, but remains in the file as an offer of proof.

## STIPULATIONS

The parties stipulated to the following matters:

That an employer/employee relationship existed between claimant and employer at the time of the alleged injuries.

That claimant sustained an injury on May 27, 1983 which arose out of and in the course of his employment with employer.

That the times off work for which claimant now seeks either temporary total disability or healing period benefits are May 31, 1983 to June 8, 1983; June 16, 1983 to July 3, 1983; and, August 23, 1983 to September 18, 1983.

That the rate of weekly compensation in the event of an award of weekly benefits is $304.14 per week.

That all requested medical benefits have been or will be paid.

That defendant is entitled to a credit under Iowa Code section 85.38(2) for disability income benefits paid under an employee non-occupational group plan for 23 weeks and four days in the total amount of $5,300.00

That defendant is entitled to a credit for workers' compensation benefits previously paid for seven and six-sevenths weeks of compensation at the rate of $304.14 for the three periods of time off work stipulated to above.

## ISSUES

The parties submitted the following issues for determination at the time of the hearing:

Whether claimant sustained an injury on August 23, 1983 which arose out of and in the course of employment with employer.

000552

Whether the injury of May 27, 1983 and the alleged injury of August 23, 1983 were the cause of either temporary or permanent disability.

Whether claimant is entitled to temporary or permanent disability benefits and, if so, the nature and extent of benefits.

## SUMMARY OF THE EVIDENCE

All of the evidence was examined and considered. The following is a summary of the pertinent evidence:

Claimant is approximately 32 years old. He graduated from high school. In prior employment he worked three and one-half years as a machine operator and as a lead man. Then he started to work for employer in 1972 as a mill operator. About a year later he became a tape machine operator and has done that job for approximately 13 years.

After swimming and diving extensively on Saturday, August 7, 1982, claimant experienced low back pain on Sunday, August 8, 1982. It worsened to the point where he was unable to stand or walk because of pain and he went to the hospital on Monday, August 9, 1982. Claimant denied striking anything while diving and he denied any radicular pain. The emergency room nurse noted that the pain did not radiate (Exhibit 3). X-rays showed no abnormalities (Ex. 10). Claimant was admitted to the hospital on August 9, 1982 with a diagnosis of severe low back pain (Ex. 3). Michael Gimbel, M.D., examined claimant throughly and his neurologic and orthopedic examination was essentially normal. Dr. Gimbel diagnosed probable bilateral paraspinous muscle spasm and strain. He said he doubted that there was herniated inter-vertebral disc disease (Ex. 5). After medication and physical therapy claimant was discharged by his personal physician, William McCabe, M.D., six days later on August 15, 1982, significantly improved, with a final diagnosis of acute traumatic lumbar myocitis (Ex. 4).

Claimant testified that he returned to work with no restrictions and worked approximately five weeks. Then the plant was out on strike for about seven and one-half months which would be approximately from October of 1982 until May of 1983. During the strike claimant did remodeling work and put on a roof with a friend (Tr., pp. 38-41).

Then on May 27, 1983, shortly after returning to work, claimant was bending over and was lifting a 30 pound part out of a tub when he felt a sharp pain in his lower back. He had never experienced a pain like this before (Tr., pp. 41 & 42). Claimant reported this and he was seen by J. Donahue, M.D., the in-house plant physician who treated all employees for both occupational and non-occupational medical problems as an employee fringe benefit.

000553

Dr. Donahue's clinical notes mention two prior incidents before the injury of May 27, 1983. Back on February 18, 1977, claimant reported that he was standing at his machine using a hoist, not lifting, and felt a sudden pain in his left back. There was no history of trauma, slip or twist. In the margin is the notation "doubt occupational relation." Dr. Donahue also noted the non-occupational diving incident by a note dated August 30, 1982. He noted that claimant could do no lifting or pushing after that incident. Then on May 27, 1983, Dr. Donahue recorded that claimant encountered left lumbar muscle spasm and backache while running a radial drill (Ex. B, p. 1). This injury is file number 735118.

Claimant was off work from May 31, 1983 to June 8, 1983 and again from June 16, 1983 to July 3, 1983 as a result of this injury. These dates were stipulated to by the parties in the stipulations. During the same period claimant was also complaining of chest pain under his ribs. Dr. Donahue commented that claimant appeared anxious and manifested anxiety symptoms (Ex. B, p. 2).

Claimant testified that on August 23, 1983, he was running a tape machine. He was putting a 30 to 40 pound steel part called a swinglink into an inspection fixture. He felt a sharp pain in his lower back and his back just gave out. This injury is file number 792721. This pain was more severe than the May 27, 1982 pain because it was harder for him to walk (Tr., pp. 45 & 46). Claimant testified that he also had pain and numbness in his left leg for the first time after this injury (Tr., p. 82). Dr. Donahue made a notation of seeing claimant for this incident but his note is dated August 22, 1983. The company doctor recorded that claimant was lifting which resulted in acute spasm on the right side in the lumbosacral area. Dr. Donahue did not mention any left leg radicular pain. However, on August 29, 1987, Dr. Donahue wrote that claimant was still tender in the lumbosacral area and he sent claimant to see John E. Sinning, M.D., for an orthopedic consultation (Ex. B, p. 3).

Dr. Sinning reported that he saw claimant on August 29, 1983. Claimant was concerned about why this happened to him and whether the August 23, 1983 incident was related to the May 27, 1983 incident and the diving incident on August 7, 1982. Claimant's physical examination revealed tenderness at the lumbosacral and sacroiliac levels. Claimant had difficulty straightening up after flexion and hyperextension hurt him. Five x-rays of the lumbosacral spine showed no abnormalities, normal disc space relationships, no hypertrophic changes, and no developemental abnormalities. Dr. Sinning's stated diagnosis was hyperextension back strain. He added that he told claimant he had muscle strain and expected a full recovery in the next

000554

month. He expected no more recurrence. He thought the last incident of August 23, 1983 was happenstance. Dr. Sinning prescribed an exercise program under the direction of Dr. Donahue (Ex. 17, EE & FF).

Claimant was off work from August 23, 1983 to September 18, 1983 as shown in the stipulations. He worked then from September 19, 1983 to September 23, 1983. Then on the weekend of September 24, 1983 and September 25, 1983 he was home playing cards and encountered all kinds of pain in his back. He saw Dr. Donahue on Monday, September 26, 1983. Dr. Donahue commented that claimant's back had tightened up Saturday evening while sitting in a chair playing cards; however, claimant had no known injury that day. This time the discomfort was on the left side. Dr. Donahue continued to diagnose muscle spasm and anxiety (Ex. B, p. 4).

Dr. McCabe ordered a CT scan performed on September 29, 1983 (Ex. 6). E. L. Johnson, M.D., reported that he examined the CT scan of claimant's lumbar spine which was taken on account of back pain. He found a hypertrophic spur extending cephalad and posteriorly from the body of S-1 impinging on the left nerve root of S-1 (Ex. 7).

Dr. McCabe then referred claimant to Henry Honda, M.D., a neurosurgeon (Tr., pp. 51 & 52). Dr. Honda examined claimant on October 10, 1983. He admitted claimant for a myelogram on October 12, 1983 (Ex. Q). Dr. Honda reported that the myelogram was essentially negative, but comparing the CT scan he did expect a disc. Cross-wise the disc seemed located in the axilla of the nerve root (Ex. 11). A second CT scan, this one performed by Dr. Honda, confirmed a large enough disc to complicate his back pain and occasional left leg pain (Ex. R).

On October 14, 1983, Dr. Honda performed a hemilaminectomy of L-5 on the left side. He found a large bulging disc which was calcified compressing the nerve roots anteriorly and medially. He excised and removed this hard bulging disc material eliminating the pressure on the nerve root (Ex. 12). Claimant was released to return to work on January 23, 1984 with restrictions not to lift more than 40 pounds and to avoid excessive bending and stretching (Ex. U, V & W). On January 18, 1984, Dr. Honda wrote:

> ...The patient claims that he incurred his back injury at work and went to the Medical Department three or four times and this is well-documented in the records and was considered as compensation. If there is record that he had an injury, I am sure we will have to depend on that and he most likely injured his back at work which then will be compensation. (Ex. U).

000555

Dr. Honda again examined and evaluated claimant for an impairment rating on December 1, 1986 at the request of claimant's counsel. Claimant had no loss of range of motion, no weakness, no loss of sensation and no pain. Dr. Honda concluded by saying that claimant was doing extremely well at his current job. He said it was difficult to award a percentage of impairment and did not give a percentage impairment rating (Ex. 14). As an addendum to this report he added the following:

> This patient apparently had a diving accident in August of 1982. The patient developed back pain but apparently got better. In May of 1983 he was injured at work and again aggravated the condition in August of 1983. It is possible that the work injury aggravated his condition which would lead to laminectomy and excision of disc. The patient had excellent results and he has no problems since the surgery and returned to work. He should not lift heavy objects.
> (Ex. 15).

Claimant testified that even though the parts that he was handling at the time of his two injuries were not heavy, he did move larger parts up to 1,500 pounds with a hoist. These were hard to push even with the hoist (Tr., p. 56) and it bothered him to push them around (Tr., pp. 57, 62 & 63). Claimant testified that he did not apply for higher paying jobs of $.30 per hour more because of his lifting restrictions (Tr., p. 58). Claimant said he could do about the same things after the surgery as before the surgery, but he gets tired easier at work and he has to schedule less activities on his duties at home (Tr., pp. 59-61, 63-65). However, he had to reduce his athletic activities of racketball and softball (Tr., pp. 60 & 65).

Claimant testified that he thought he injured his back on the job but he had some doubts about it (Tr., pp. 92, 93, 98 & 114). Claimant completed and signed a weekly disability benefits form (Ex. KK) on October 11, 1983 which stated that he had been disabled because of sickness or injury off and on since May 27, 1983 and had returned to work three times. In reply to question 6, "was an accidental injury involved" claimant answered, "maybe". In providing the date and place of accident claimant entered, "May 27, 1983" and "Caterpillar (maybe)." In answer to question 6d, "did accident happen while you were on the job at Caterpillar" claimant printed, "maybe." Claimant printed in the following words with his own hand on the form, "I'm not sure if work related!" (Ex. KK).

## APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on August 23, 1983 which

arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 27, 1983 and August 23, 1983 are causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

Claimant did sustain the burden of proof by a preponderance of the evidence that he sustained an injury on August 23, 1983. Claimant testified that he felt a sharp pain in his back and his back just gave out when he was putting a 30 to 40 pound steel part called a swinglink into an inspection fixture. Dr. Donahue recorded an office visit on August 22, 1983 in which he reported that claimant was lifting and experienced acute back spasm on the right side. Claimant could have been in error one day when he said the injury occurred on August 23, 1983. Claimant had a great deal of difficulty recollecting many facts accurately and defense counsel demonstrated that claimant's recollection was incorrect on a number of points. It is also possible that the doctor's notes could be in error by one day. In any event the attorneys were satisfied to treat the injury date as August 23,

000557

1983 in their questioning of the witness. Furthermore, there is no evidence that claimant did not receive such an injury as he described on or about this date. Therefore, claimant's testimony is uncontroverted. Moreover, it is corroborated by Dr. Donahue and Dr. Sinning who also saw claimant for this injury. Therefore, it is found that claimant did receive an injury which arose out of and in the course of his employment with employer on August 23, 1983.

It was stipulated that claimant was temporarily disabled from August 23, 1983 to September 18, 1983. Therefore, claimant is entitled to and was paid temporary disability benefits for this period of time prior to hearing.

Claimant did not sustain the burden of proof by a preponderance of the evidence that either the injury of May 27, 1983 or the injury of August 23, 1983 was the cause of any permanent disability. Nor did claimant sustain the burden of proof by a preponderance of the evidence that either injury was the cause of his laminectomy that was performed by Dr. Honda on October 14, 1983.

Claimant was treated by four doctors. There was no evidence from his personal physician, Dr. McCabe, that either of these two injuries caused or aggravated the hypertrophic spur that impinged on the left nerve root (Ex. 7) or the bulging calcified disc that was compressing his nerve roots (Ex. 12) that resulted in the laminectomy. There is no evidence from Dr. Donahue (the plant physician and also a personal physician who treated claimant for both of these injuries) that either one of them caused or aggravated the spur or calcified disc that predisposed the laminectomy. There is no evidence from Dr. Sinning, the orthopedic surgeon, that claimant's work caused or aggravated any permanent disability or resulted in his laminectomy. On the contrary the records of Dr. Donahue (Ex. B) and Dr. Sinning (Ex. 17) indicated that they treated a back strain with some anxiety overlay. Dr. McCabe did not give any diagnosis for either one of these injuries, but instead referred claimant to Dr. Honda. Dr. Honda declined to give his own personal, individual, professional, medical opinion on causation on January 18, 1984. Rather he deferred this decision to what the employer's records would show (Ex. U). When confronted for an opinion on causal connection by claimant's counsel on December 1, 1986, Dr. Honda added an addenda to his report which stated as follows: "It is possible that the work injury aggravated his condition which would lead to laminectomy and excision of disc" (Ex. 15). In considering the evidence, it is recognized that spur formation and calcification of a disc are conditions which develop over a period much longer than a few weeks or months. Section 17A.14(5).

As stated previously 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).

000558

Three of the possible expert witnesses gave no opinion whatsoever on causal connection. The only doctor who gave an opinion said only that a causal connection was 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). However, the Burt case also stands for the proposition that causal connection can be established when a medical expert states that a causal connection is possible and when all of the other evidence in the case is considered, the other facts and inferences support such a conclusion. In this case the only other possible witness on the subject of causal connection was claimant himself and he testified that he had some doubts about it himself (Tr., pp. 92, 93, 98 & 114). In fact, when he filled out a claim form for disability income payments he wrote in his own hand and apparently of his own volition, "I'm not sure if work related!" (Ex. KK). Therefore, based upon the absence of medical evidence to establish a causal connection and the claimant's own doubts about a causal connection which he expressed in his testimony at hearing as well as on the claim form it must be found that claimant failed to sustain the burden of proof by a preponderance of the evidence that either injury was the cause of any permanent disability or the laminectomy.

The question of entitlement then is moot. However, it is noted that when claimant was sent to Dr. Honda for an impairment rating, Dr. Honda could not find enough impairment to award claimant a numerical rating (Ex. 14).

## FINDINGS OF FACT

WHEREFORE, based on the foregoing evidence the following findings of fact are made:

That claimant sustained an injury on August 23, 1983 when he lifted a 30 to 40 pound steel part called a swinglink into an inspection fixture and experienced pain in his back.

That this injury was the cause of temporary disability from August 23, 1983 to September 18, 1983 as stipulated and that claimant has been paid worker's compensation benefits for this period of temporary disability.

That Dr. McCabe, Dr. Donahue and Dr. Sinning gave no opinion on causal connection of either injury to any permanent disability or the laminectomy.

The injury was a temporary aggravation of a preexisting condition.

That Dr. Honda said it was possible that the work injury or injuries aggravated his condition which would have led to a laminectomy.

000559

That claimant testified that he had doubts about whether his job related back injuries were the cause of his laminectomy.

That claimant stated when he applied for income disability benefits on account of the laminectomy "I'm not sure if work related!".

## CONCLUSIONS OF LAW

WHEREFORE, based upon the evidence presented and the principles of law previously discussed, the following conclusions of law are made:

That claimant sustained an injury on August 23, 1983, that arose out of and in the course of his employment with employer.

That claimant is not entitled to any additional temporary disability benefits for this injury.

That claimant did not prove that the injury of May 27, 1983 or the injury of August 23, 1983 was the cause of his laminectomy or of any permanent disability.

That claimant is not entitled to any permanent disability benefits.

## ORDER

THEREFORE, IT IS ORDERED that no further payments are due to claimant from defendant as a result of either of these injuries.

That each party pay their own respective costs of this proceeding and defendant is to pay the cost of the attendance of the court reporter at the hearing pursuant to Division of Industrial Services Rule 343-4.33(1).

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

Signed and filed this 26th day of October, 1987.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

000560

Copies To:

Mr. Michael W. Liebbe
Attorney at Law
116 East 6th Street
Davenport, Iowa 52805

Mr. Larry L. Shepler
Attorney at Law
600 Union Arcade Bldg.
Davenport, Iowa 52801

1106; 1108.50; 1402.20
1402.30; 1402.40; 1803
Filed October 26, 1987
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

| | | |
|---|---|---|
| JAMES T. HOSKINS, | : | |
| | : | |
| Claimant, | : | |
| | : | FILE NOS. 735118 & 792721 |
| vs. | : | |
| | : | A R B I T R A T I O N |
| CATERPILLAR TRACTOR CO., | : | |
| | : | D E C I S I O N |
| Employer, | : | |
| Self-Insured, | : | |
| Defendant. | : | |

---

1106; 1108.50; 1402.20; 1402.30; 1402.40; 1803

Lifting a 30 to 40 pound part at work that caused a back strain was found to be an injury arising out of and in the course of employment that caused temporary disability only for which claimant had already received benefits prior to hearing. This strain, and an earlier strain, were found not to be the cause of any permanent disability or the cause of a subsequent laminectomy. Claimant had a history of chronic back problems that flared up unpredictably both at work and away from work for some time. Claimant testified and wrote on a claim form that he had his own doubts whether it was caused by work or not. No doctor gave claimant a numerical impairment rating and the surgeon said he had no loss of motion, strength, or sensation and that he had no residual pain.

000561

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

Doris Howell
Claimant,

vs.

Iowa Veterans Home
Employer,

and

State of Iowa
Insurance Carrier,
Defendants.

File No. 742690

RULING

ON

Nunc Pro Tunc.

Order

FILED

NOV 16 1987

IOWA INDUSTRIAL COMMISSIONER

The decision file 11/3/87 is Amended
As per the State's application. filed 11/12/87

Signed and filed this 16 day of Nov, 1987.

DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Robert Scott
Attorney(s) at Law

Shirley Steffes
Attorney(s) at Law

280-0088
6/85

000562

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DORIS A. HOWELL,

Claimant,

vs.

IOWA VETERAN'S HOME,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

FILE NO. 742690

R E V I E W -

R E O P E N I N G

D E C I S I O N

FILED

NOV 03 1987

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Doris A. Howell, claimant, against Iowa Veteran's Home, an agency of the State of Iowa, employer (hereinafter referred to as IVH), for the recovery of further workers' compensation benefits as a result of an injury on August 15, 1983. A settlement for this injury pursuant to Iowa Code section 86.13 was filed and approved by this agency on January 18, 1985. On August 4, 1987, a hearing was held on claimant's petition for review-reopening and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and Van C. Owens, a clinical psychologist. The exhibits received into the evidence at the hearing are listed in the prehearing report. According to the prehearing report, the parties have stipulated to the following matters:

1. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall remain at $161.06 per week.

2. Entitlement to temporary total disability or healing period benefits or any credit under Iowa Code section 85.38(2) was not at issue.

000563

## ISSUES

The parties have submitted the following issues for determination of this proceeding:

I. Whether the claimant has suffered a change of condition, since the settlement, causally connected to the original work injury which entitles claimant to additional disability benefits; and,

II. The extent of claimant's entitlement to additional medical benefits under Iowa Code section 85.27.

## SUMMARY AND ANALYSIS OF THE EVIDENCE PRESENTED

The following is a summary and analysis of the evidence presented in this case. For the sake of brevity, only the evidence most pertinent to the decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision.

At the request of the defendants and without objection from claimant official notice was taken of the settlement papers pertaining to the January 18, 1985 settlement consisting of the application, the order approving the settlement and attached supporting documentation. In this settlement agreement, claimant and the defendants agreed that claimant suffered a compensable injury on August 15, 1983; claimant's entitlement to healing period benefits ended on March 5, 1986; and, that claimant sustained a 25 percent permanent partial disability to her body as a whole as a result of this work injury. It was also stipulated that defendants had paid all authorized and documented medical bills to date which were related to the injury except for one bill from Kent M. Patrick, M.D. It was also agreed that the medical bill from Pradeep Sarswat, M.D., and Larry F. Phipps, D.C., were not authorized and that claimant would be responsible for payment of these bills. The agreement was signed by claimant on December 24, 1984 and approved by this agency on January 18, 1985. The medical reports attached to the application indicated that claimant suffered an injury to her low back while attempting to lift a patient during her job as a nurse's aid at IVH.

Claimant contends that she suffered a change of condition since the time of the settlement as a result of the worsening of her physical and mental condition. With reference to her physical condition, claimant testified that her back is "the same as it has been" and "it has never got any better." She states that she is in quite a bit of pain and cannot take medication due to stomache problems. She said that she is unable to walk long distances and has problems lifting, sitting, stooping and bending.

000564

According to reports and deposition testimony from Kent Patrick, M.D., concerning claimant's condition before the settlement, who was claimant's primary treating physician after the work injury, claimant suffered a five percent permanent partial impairment to her body as a whole as a result of the August 15, 1983 injury. Dr. Patrick testified that he does not use any impairment guidelines in arriving at this rating. Upon reaching maximum healing Dr. Patrick, in a report, December, 1984, imposed work restrictions upon claimant's activities consisting of no lifting over 25 pounds or any repetitive bending, stooping, turning, or lifting. There were other evalutions of claimant during that period of time by other physicians but none appeared to be a useful evaluation of claimant's permanent partial impairment. There was an evaluation in August, 1984, by Pradeep Sarswat, M.D., that claimant has chronic low back pain but stated that this should not effect claimant's ability to perform gainful employment. This appears to be an opinion of industrial disability by a physician who is not qualified to render such opinions. Consequently, that opinion was not helpful.

Claimant was evaluated in 1986 by John A. Grant, M.D., another orthopedic surgeon. Dr. Grant opines that claimant suffered a 10 percent body as a whole impairment but he used guidelines set forth in the manual for rating impairments published by the American Academy of Orthopedic Surgeons. Dr. Grant imposed work restrictions similar to those imposed by Dr. Patrick in 1984. Although there are differences between a CT scan performed on claimant in February, 1984, and another at the direction of Dr. Grant in October, 1986, Dr. Grant states that the difference consists of only a minor abnormality. He found no significant difference in the diagnostic x-rays taken of claimant in August, 1983 and in June, 1986. Finally, Dr. Grant concludes that claimant's condition has been "static" since the August, 1984 injury.

William Boulden, M.D., another orthopedic surgeon, had examined claimant in September, 1986, and found low back pain of unknown etiology.

The above evidence demonstrates that claimant simply has not undergone a change of physical condition. Claimant even testified that there was no such change. It is true that claimant has not improved, however, this cannot form the basis of a change of condition because there is no evidence in the record that claimant's physicians in 1984 believed that claimant would improve beyond the physical limitations they found at that time. The difference in the ratings by Dr. Grant and Dr. Patrick appear to be caused by the fact that Dr. Grant used a rating guide to arrive at his rating and Dr. Patrick's rating was subjective and based upon his "knowledge of her injury."

000565

With reference to her mental state, claimant has been recently evaluated by Van D. Owens, PhD., whose reports and oral testimony were submitted into the evidence at hearing. Dr. Owens, a well qualified clinical psychologist, opines that claimant suffers from psychogenetic pain disorder and dependent personality traits as a result of the August 15, 1983 injury. He explains that claimant was predisposed to suffer these conditions prior to the work injury due to the death of her mother and of marital difficulties. The injury provided a method of escape and caused a tendency to be addicted to medication. He recommends a multi-varied psychotherapy approach to claimant's problems as would be offered at the Mercy Pain Clinic. He believes that claimant is not capable, at the present time, of employment because of her mental problems but that she would be employable after approximately a two year therapy period.

Claimant has not been evaluated by a psychologist or a psychiatrist either before or after the evaluation by Dr. Owens. However, in his deposition testimony in December, 1984 and in his office notes of December 3, 1984, Dr. Patrick expressed familiarity with depression symptoms in his orthopedic practice and felt that claimant was suffering from depression and "non-organic" back pain causally related to the injury and that she was in need of help from a psychologist. He actually prescribed an anti-depressant drug called Elavil.

The above evidence fails to establish that claimant suffered any change in her mental condition as well. The need for treatment for mental difficulties was noted by Dr. Patrick in December, 1984. Before the settlement, as noted by Dr. Owens, the condition will persist if untreated. As claimant did not seek treatment of her mental problems at the time of the 1984 settlement, they continue to the present day. Such a fact is not evidence of any change of mental condition.

Claimant testified that she is now working 26 hours a week for a newspaper as a telephone solicitor of advertising. She complains that this job bothers her back. She has reapplied to return to some form of work at IVH and states that she has been told by people at IVH that they will consider her when an opening occurs.

Finally, claimant testified that all of the medical mileage expenses listed in the attachment to the prehearing report are related to treatment for her back. This testimony is uncontroverted. However, the issue of whether they were authorized by defendants must be dealt with. Claimant stated that four of the trips to Mercy Hospital in the list were for authorized treatment by Dr. Grant. She testified that she was referred to see Drs. Greenberg and Jagiello by Dr. Patrick when he left town. She discontinued seeing them after she received notice that they were not authorized. She admitted that her visits to Dr. Phipps were not authorized.

000566

She did not testify as to the causal connection of treatment by Dr. Sarswat. Therefore, claimant has established a causal connection of the medical mileage listed in the prehearing report to the work injury except for one visit to Mercy Hospital. However, claimant has not established that the treatment by Drs. Phipps and Sarswat were authorized or causally connected to the injury.

Claimant's appearance and demeanor at the hearing indicated that she was testifying truthfully. However, it is noted that claimant has been diagnosed as suffering from a functional disorder.

## FINDINGS OF FACT

Claimant's physical condition remains unchanged since the settlement in December, 1984.

Claimant continues to be significantly physically impaired and unable to lift over 25 pounds or perform repetitive lifting, bending, stooping or twisting, nor can she sit or stand for prolonged periods of time without pain.

As a result of her work injury, claimant suffers from psychogenetic pain disorder and dependent personality traits, a condition which will require extensive long-term psychotherapy before claimant will be able to return to gainful employment.

No finding could be made that the claimant's mental condition has changed since December, 1984.

As a result of her work injury claimant has traveled a total of 1,735 miles by automobile to receive authorized and reasonable medical treatment.

## CONCLUSIONS OF LAW

I. In a review-reopening proceeding, claimant has the burden of establishing by a preponderance of the evidence that she suffered a change of condition or a failure to improve as medically anticipated as a proximate result of her original injury, subsequent to the date of the award or agreement for compensation under review, which entitles her to additional compensation. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa 1969); Meyers v. Holiday Inn of Cedar Falls, 272 N.W.2d 24 (Iowa Court of Appeals 1978). Such a change of condition is not limited to a physical change of condition. A change in earning capacity subsequent to the original award which is approximately caused by the original injury also constitutes a change in condition under Iowa Code section 85.26(2) and 86.14(2). See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

In the case sub judice, the findings do not reflect a change of mental, physical or any other change of earning capacity since the settlement in 1984. Claimant is therefore not entitled to a reopening of the settlement.

II. Pursuant to Iowa Code section 85.27, claimant is entitled to reimbursement for expenses for traveling to receive medical treatment of a work injury. However, if liability is established, defendants have the right to control the care and claimant cannot be reimbursed for expenses to receive unauthorized medical care. Barnhart v. Mag., Inc., I Iowa Industrial Commissioner Report 60 (App. Decn. 1981).

Pursuant to Division of Industrial Services Rule 343-8.1, claimant is to receive $.21 per mile for use of a private automobile to receive treatment. Given the findings that claimant drove a total of 1,735 miles, claimant is entitled as a matter of law to reimbursement in the amount of $364.35.

Although claimant, for the most part, did not prevail in this proceeding, her claim for additional disability benefits was at least argueable and she was cooperative at the hearing. Consequently, she will be awarded the costs of this action.

ORDER

1. Defendants shall pay to claimant the sum of three hundred sixty-five and 35/100 dollars ($365.35) as reimbursement for medical expenses with interest as set forth in Iowa Code section 85.30.

2. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

3. Defendants shall file activity reports on payment of this medical expense award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 3rd day of November, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

000568

Copies To:

Mr. Robert W. Pratt
Attorney at Law
1913 Ingersoll
Des Moines, Iowa 50309

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

000569

FILED

SEP 21 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| BETTY LOU HURLEY, Surviving spouse of DARRELL WAYNE HURLEY, Deceased,<br><br>Claimant,<br><br>vs.<br><br>LINT VAN LINES,<br><br>and<br><br>TRANSPROTECTION SERVICE CO.,<br><br>Insurance Carrier,<br>Defendants. | : | File No. 825126<br><br>D E C I S I O N<br><br>O N<br><br>D E A T H<br><br>B E N E F I T S |

INTRODUCTION

This is a proceeding for death benefits brought by Betty Lou Hurley, administrator of the estate of Darrell Wayne Hurley, deceased, against his alleged employer, Lint Van Lines, and its insurance carrier, Transprotection Service Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an alleged injury of May 1, 1986 with death ensuing in the alleged injury. This matter came on for hearing before the undersigned deputy industrial commissioner in Des Moines, Iowa, on May 7, 1987. But for the briefs of the parties, the record was considered fully submitted at close of hearing. A first report of injury was filed August 26, 1986.

The record in this case consists of the testimony of Betty Lou Hurley and of Donald Lint, as well as of exhibits 1 through 9. Exhibit 1 is a a certificate of marriage; exhibit 2 is birth certificates; exhibit 3 is an obituary and death certificate for decedent; exhibit 4 is a statement of funeral costs for decedent; exhibit 5 is a deposition of Betty Lou Hurley; exhibit 6 is a deposition of Gerald Mastin; exhibit 7 is the deposition of Donald Lint; exhibit 8 is the income tax filings for Darrell and Betty Lou Hurley for the years 1984 and 1985; and exhibit 9 is an employer's record of trips of Gerald Mastin in April 1986.

ISSUES

Among other stipulations submitted with the prehearing report, the parties stipulated that the cost of decedent's

funeral was fair and reasonable and exceeded the statutory amount of $1,000 allowed under section 85.28. The issues remaining for resolution are:

1) Whether decedent was an employee of the named employer at the time of the fatal incident;

2) Whether decedent received an injury which arose out of and in the course of his employment;

3) Whether decedent's surviving spouse is entitled to death benefits on account of decedent's death; and,

4) Decedent's rate of weekly compensation.

REVIEW OF THE EVIDENCE

On May 1, 1986, claimant was the spouse of decedent, Darrell Hurley. Decedent had three dependent children at the time of his death, the children having been born January 17, 1972, March 11, 1975, and June 29, 1979, respectively. Decedent was killed on May 1, 1986 in a motor vehicle accident on U.S. Highway 63 in Randolph County, Missouri. The motor vehicle accident involved a tractor-trailer which Gerald Mastin was driving to a St. Louis furniture warehouse for unloading. Decedent and Michael Mastin, Gerald Mastin's son, were accompanying Gerald Mastin in the tractor. Gerald Mastin was an employee of Lint Van Lines, which is the Des Moines franchisee for United Van Lines. Trucks in the Lint Van Lines fleet had United Van Lines identification on them with further identification as operated by Lint (Van Lines) in small print as well. Trailers on permanent lease to United Van Lines did not have any Lint identification on them. Gerald Mastin wore a shirt bearing the United logo. Mike Mastin had been a payroll employee of Lint Van Lines prior to May 1, 1986, but was not a payroll employee of Lint as of May 1, 1986. Both Mike Mastin and decedent had accompanied Gerald Mastin in a Lint Van Lines tractor-trailer to Sioux Falls, South Dakota, on April 6 an 7, 1986. Each apparently then assisted with unloading furniture and each apparently received payment under an independent contractor agreement which reads as follows:

INDEPENDENT CONTRACTOR AGREEMENT

This agreement made this _____day of _____19__ between _____party of the first part and, _____ party of the second part. The party of the second part, an independent contractor, agrees to load-unload a certain trailer at his discretion, but commencing with the execution of this agreement, and continuing without interruption until completion for the sum of $_____, receipt of which sum is hereby acknowledged, it being understood that the relationship existing between

the parties is that of an independent contractor and specifically not employer-employee. The party of the second part also understands that under this contract agreement he also agrees to pay his own FICA, Withholding and Social Security, and any other State and Federal taxes required by law and does not hold party of the first part responsible for such.

| | |
|---|---|
| Party of the First Part | Party of the Second Part |
| Address | Address |
| Social Security Number | Social Security Number |

Mike Mastin and decedent used the names Ted Ducan and Tom Gone on submitted independent contractor agreements following the April 6 and 7 haul. They used false social security numbers as well on those agreements. Gerald Mastin received forty percent of the load as his payment from Lint Van Lines. Of that amount, Gerald Mastin was required to pay his expenses including labor, fuel, and weight tickets. Gerald Mastin had authority to hire helpers. Donald Lint denied that Mastin's authority extended to hiring Lint Van Lines employees. Decedent received payment of $50 for the Sioux Falls trip and Gerald Mastin testified decedent was to receive $50 plus his meals for the St. Louis trip when it was completed. No payment for the St. Louis trip was ever made. Gerald Mastin testified that decedent would not have been paid for postponements in trips or at other times when not actually working. Gerald Mastin also reported that claimant could have worked as a furniture unloader for him one or two times per week. Don Lint stated that furniture movers generally are paid $4.50 per hour. Decedent's death certificate identified him as a laborer whose profession was furniture mover. Decedent's obituary identified him as a furniture mover for Lint Van Lines. Claimant supplied the obituary data.

Claimant, Betty Lou Hurley, testified that she had met decedent in 1972 when decedent was then working for Des Moines Steel as a laborer. Decedent subsequently worked for Orkin Exterminator and Midwest Distribution Center. He was laid off at Midwest in November 1981 and then worked briefly for Vitalis Truck Lines. Claimant testified that on all identified jobs, decedent had received his wages by check with taxes and social security withholdings made. He received a W-2 wage statement from each named employer. Following his Vitalis employment, decedent worked on vehicles at home. He was paid in cash for

such work with no withholdings made. Claimant agreed that those payments were only reported for income tax purposes in 1986 and had not been so reported in prior years. She agreed that the 1986 tax return submitted reported income of $200 for vehicle work and $50 for the Sioux Falls trip. Ms. Hurley works for the state of Iowa.

Claimant testified that she observed Gerald Mastin pay decedent $50 in cash from Mr. Mastin's wallet following the Sioux Falls trip. Claimant testified that decedent told her that Gerald had advised him that it was preferred that he wear dark pants and shirt [when working]. She reported that Mike Mastin had told her decedent was wearing a Lint Van Lines shirt at the time of the fatal incident. She agreed that decedent had never otherwise brought home a Lint Van Lines shirt and that she had never seen decedent wear a Lint Van Lines shirt. She agreed that she had not seen decedent leave on May 1, 1986 and was unaware of what items he had taken with him. She assumed claimant at least would have taken a shirt, however.

Claimant testified that decedent had told her he would be going out with Gerald and Mike Mastin from May 1, 1986 onward. She reported that he told her another worker did not wish to continue to go on the road. She did not personally know if decedent had ever applied for work with Lint Van Lines. Claimant understood that Lint was to pay decedent for work performed. She testified that she felt Gerald Mastin had authority to hire decedent although Mastin did not say he had authority to hire decedent. Claimant testified she assumed that Mike Mastin was a Lint employee although she was not told that. Claimant testified that she did not know the names Tom Gone and Ted Ducun but for information obtained in Gerald Mastin's deposition. She was not aware of decedent having used social security numbers other than the stated social security number. She did not recognize the handwriting on exhibit 9, page 7.

Gerald Mastin testified in his deposition of February 24, 1987 that he did not own the tractor-trailer that he was driving on May 1, 1986. He testified he owned his personal tools, but not the other equipment on the trailer. Mastin stated that he personally loaded and unloaded the truck and denied having any physical impairment that kept him from working. Claimant had earlier testified that decedent was to help Mike Mastin because Gerald Mastin had had heart surgery. Gerald Mastin testified that the only Lint employees who help with loading and unloading were employees whom Don Lint had hired. Mastin characterized such employees as "steady employees of Mr. Lint." Gerald Mastin stated that when decedent worked for Gerald Mastin, Gerald Mastin was the "boss" and supervised decedent's activities as well as told decedent when to report to work and when work was completed. Mastin agreed that no payroll taxes were withheld when the independent contractor form was used. Mastin indicated

that Lint Van Lines personnel did not know that decedent was accompanying Mastin on May 1, 1986. He stated that the only reason for decedent and Mike Mastin to accompany him on May 1, 1986 was that St. Louis warehouse personnel preferred that furniture haulers "hire a man" for loads of greater than 3000 pounds. Gerald Mastin estimated the weight of the load he was hauling on May 1, 1986 as between 8,000 and 9,000 pounds. He reported that by taking Mike "or anybody" along he could get by cheaper because labor rates were so high at the warehouse.

Don Lint, owner of Lint Van Lines as well as a number of other trucking companies through the past twenty-nine years, testified that Lint Van Lines currently has fifty employees with over one hundred employees in its peak season. He indicated he is familiar with Lint employees and carries workers' compensation insurance on those employees. Income tax and social security withholdings are made on payroll employees and those employees are given W-2 forms at year's end. Mr. Lint denied that decedent was on the Lint Van Lines payroll and stated that he did not know decedent. He reported that he had not hired decedent and that, to his knowledge, no other Lint Van Lines personnel had hired decedent. He denied knowing that decedent had accompanied Gerald Mastin on May 1, 1986 or on the earlier Sioux Falls trip. Lint agreed that Gerald Mastin had authority to hire helpers, but in his deposition stated that such authority did not include authority to hire Lint employees. Lint stated that if Lint drivers hire spot laborers, the driver pays the cost of the laborer from the "driver's pocket." Lint stated that spot laborers, whom he characterized as "lumpers," are available throughout the country and that it would be cheaper for a driver to hire a "lumper" in St. Louis than to take decedent along on a load. In his deposition, Mr. Lint stated the following regarding the practice of hiring "lumpers":

Q. Mr. Lint, one question. You told Mr. Moranville that Gerald had authority to hire helpers. Did he have authority to hire employees for Lint Van Lines?

A. No, sir.

MR. HARRISON: That is all I have.

REDIRECT EXAMINATION

Q. I guess I do not understand the distinction between the authority to hire helpers and the authority to hire employees. Could you tell me what the difference is?

A. Well, in our line of business a driver is assigned a movement that could go from Des Moines

to Chicago to New York to California. The man is an employee of mine. I don't deny that fact. He is paid a percentage to hire labor, et cetera. He hires an independent contractor which are throughout the United States. We have drivers that have names and phone numbers of guys at any place in the country. He calls them. He hires them. He pays them. He gets the receipt. We don't know them. We never see them. We have nothing to do with them. No contact whatsoever. It's strictly a contract between the driver who we employ and his outside helper.

Lint agreed that Lint Van Lines records "lumper" costs of its drivers on independent contractor forms which Lint supplies. Mr. Lint agreed that furniture pads and refrigeration carts on Lint trucks are Lint Van Lines supplies. He agreed that the "lumper" supplies no tools and works under the driver's direction. He stated, however, that the "lumper" can decide when to work and when to leave work although the driver can then decide whether he wishes to pay the "lumper." Lint agreed that the names and social security numbers on the forms which Mastin submitted after the April 6 and 7, 1987 run were such that he could not have identified decedent as having been on that haul. Lint stated he had had no intention of forming an employer-employee relationship with decedent.

Decedent's funeral cost was $4,750.60.

## APPLICABLE LAW AND ANALYSIS

Of initial concern is with whether claimant's decedent was an employee of the named employer at the time of his injury and resulting death.

Iowa Code sections 85.61(1) provides in part:

2. "Worker" or "employee" means a person who has entered into employment of, or works under contract of service, express or implied, or apprenticeship, for an employer....

The Iowa Supreme Court stated in Nelson v. Cities Service Oil Co., 259 Iowa 1209, 1213, 146 N.W.2d 261 (1967):

> This court has consistently held it is a claimant's duty to prove by a preponderance of the evidence he or his decedent was a workman or employee within the meaning of the law....
>
> And, if a compensation claimant establishes a prima facie case the burden is then upon defendant to go

forward with the evidence and overcome or rebut the case made by claimant. He must also establish by a preponderance of the evidence any pleaded affirmative defense or bar to compensation. (Citations omitted.)

Given the above, the court set forth its latest standard for determining an employer-employee relationship in Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981). The court stated in part:

I. The employer-employee relationship. As defined in section 85.61(2), The Code, an "employee" is a "person who has entered into the employment of, or works under contract of service...for an employer." Factors to be considered in determining whether this relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. McClure v. Union, et al., Counties, 188 N.W.2d 285 (Iowa 1971). (Emphasis added).

The test of control is not the actual exercise of the power of control over the details and methods to be followed in the performance of the work, but the right to exercise such control. Lembke v. Fritz, 223 Iowa 261, 266, 272 N.W. 300, 303 (1937).

The general belief or custom of the community that a particular kind of work is performed by employees can be considered in determining whether an employer-employee relationship exists. Nelson v. Cities Serv. Oil Co., 250 Iowa 1209, 1216, 146 N.W.2d 261, 265 (1966).

Where both parties by agreement state they intend to form an independent contractor relationship, that stated intent is ignored if the purpose is to avoid the workers' compensation laws. Funk v. Bekins Van Lines Company, I Iowa Industrial Commissioner Report, 82, 84 (appeal dec. 1980).

In cases of doubt, the workers' compensation statute is to be liberally construed to extend its beneficient purpose to every employee who can fairly be brought within it. Usgaard v. Silver Crest Golf Club, 256 Iowa 453, 459, 129 N.W.2d 636, 639 (1964).

Additionally, we considered the following:

We are cognizant of the fact that the compensation

> law is for the benefit of workers and is to be liberally administered to that end. But it must be administered by the application of logical and consistent rules or formulas notwithstanding its benevolent purpose. It cannot be made to depend on the whim or sympathetic sentiment of the current administrator or presiding judge. We apprehend every member of this court is sympathetic to claimant in the instant case. But the compensation statute is not a charity. It is a humanitarian law to be administered, not by sympathy, but by logical rules, evolved from the determination of many cases under literally countless factual variations. Compensation is to be paid by the employer (or his insurer) as a matter of contract, not as a gratuity. It is payable only when the facts show the injury is within the contract--that it 'arose out of and in the course of the contracted employment.' Bulman v. Sanitary Farm Dairies, 247 Iowa 488, 494, 495 73 N.W.2d 27 (1955).

We do not find that claimant has established that decedent was an employee of the named employer at the time of his injury and ensuing death. Initially, the named employer had no right of selection or responsibility for payment of wages to decedent. Both Mr. Lint and Mr. Mastin testified that that right rested with Mr. Mastin. Mastin had the freedom to elect or to not elect to hire furniture unloaders (known by industry-wide colloquialism as "lumpers"). Mastin testified that he paid any unloaders he hired from his own wages and that election to hire such "lumpers" reduced his own overall monetary return from any given haul. Likewise, the right to discharge or terminate the relationship also rested with Mastin and not with the named employer. Mr. Lint testified that a "lumper" could choose to begin or end work at his liking, but that the driver could then choose whether he wished to pay the "lumper." Similarly, the right to control the work appears to have rested with Mastin and not with the named employer. Telling in this regard is the fact that Mastin was apparently free, not only to elect to not hire "lumpers," but also to either hire his helpers at the delivery site or to take any helper with him from Des Moines. Additionally, the intermittent nature of the work which decedent performed as an unloader also suggests that decedent himself had some control over the nature of his relationship with both Mastin and the named employer. While Ms. Hurley testified that claimant understood that he would be going out with Gerald Mastin on a regular basis after the May 1, 1986 trip, to that point, decedent had worked as an unloader with Mastin on only one other occasion. Mastin's own deposition testimony indicates that Mastin agreed to take decedent along on the May 1 trip as an act of compassion for decedent who had not had a regular income for a prolonged

period. Mastin stated he would be "going in the hole" in accepting decedent's services. Mastin denied he had physical problems that kept him from unloading furniture. Mastin's testimony generally is not consistent with Ms. Hurley's understanding that decedent would be regularly unloading for Gerald Mastin in the future. Overall, it appears that decedent could choose to not work any given load with Mastin. Likewise, there is nothing in the record to suggest that Lint Van Lines could have directed claimant to work with any of its drivers other than Mastin. Such freedom to determine the nature and type of one's work with an employer is generally inconsistent with a contractual employer-employee relationship. Likewise, the method of payment of decedent for work performed was not consistent with the existence of an employer-employee relationship between claimant and the named employer and was not such as to identify the named employer as the authority in charge of the work or as the entity for whose benefit the work was performed. Ms. Hurley testified that she observed Mr. Mastin pay claimant $50 in cash following the April 6 and 7 trip. She agreed that traditional withholdings of FICA and income tax were not made from that amount which she understood as payment for the load. She agreed that in all of decedent's regular employment during the course of their relationship, he had been paid a regular wage, generally by check, with appropriate income tax and FICA withholdings. She also testified that W-2 wage statements were received by decedent on each such regular job. Ms. Hurley is herself employed. Nothing in the record indicates that, in her own employment, she is not subject to statutory provisions regarding taxation withholdings and receipt of W-2 wage statements. Given all the above, one could not reasonably identify the named employer as the authority in charge of the work decedent was to perform or as the entity for whose benefit that work as to be performed given the informal method by which decedent received payment from Mastin. We believe that the overall circumstances of the method of payment and Ms. Hurley's awareness of that method of payment make short shift of claimant's argument that, under the principles of agency, the named employer should be held as decedent's employer in that Mastin was an employee of that named employer who could be held to have had apparent authority to hire another employee. It appears inconsistent with Ms. Hurley's own familiarity with common employment and wage practices for Ms. Hurley to have believed that Mastin had apparent authority to hire employees for Lint and not as assistants for Mastin himself. Additionally, the independent contractor contract in evidence suggests the decedent himself did not intend to become an employee of Lint. The evidence establishes that decedent falsely reported his name and his social security number on the independent contractor contract submitted to Lint after the April 6 and 7 haul. While we may well understand why a person in limited circumstances might engage in such conduct, the conduct itself is inconsistent with the intent to establish, either expressly or implicitly, a formal employer-employee relationship with the party from whom

one is concealing one's actual identity. Finally, the general belief or custom of the community must be considered. Both Mr. Mastin and Mr. Lint testified that it is the driver who hires the "lumper" at the driver's own choice and it is the driver who pays the "lumper." Mr. Lint outlined the industry-wide practice in this regard. The nature of the business and the nature of the hiring practices themselves suggest that it would be extremely difficult for the named trucking company or any trucking company to either identify which "lumpers" had been hired by any given driver or to exercise any true authority over such "lumpers." For that reason, the current industry custom of identifying such spot laborers as independent contractors appears reasonable and in keeping with the practicalities of the overall industry. We find no compelling reason in this case for disturbing that practice. Claimant has not established that the decedent was an employee of the named employer at the time of his May 1, 1986 injury and ensuing death.

As claimant has not prevailed on the threshhold jurisdictional issue of whether or not decedent was an employee of the named employer, we need not decide the other issues raised by her petition.

## FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Gerald Mastin selected decedent to ride with him to Sioux Falls, South Dakota on April 6 and 7 to unload furniture which Mastin was hauling for Lint Van Lines as the Des Moines area franchisee of United Van Lines.

Gerald Mastin was an employee of Lint Van Lines as a long-haul furniture driver.

Gerald Mastin wore clothing identifying him as a United Van Lines worker and drove a Lint Van Lines truck identified with both Lint Van Lines and United Van Lines by logos and other insignia contained on the truck.

Under industry-wide practice, drivers hauling furniture hire spot laborers, colloquially known as "lumpers," to load or to unload furniture at a given location.

The driver pays any unloader hired from the driver's own compensation for the haul.

The driver can elect to hire or to not hire an unloader to assist the driver.

Gerald Mastin had authority to hire "lumpers," but was not compelled to hire "lumpers."

Gerald Mastin would have paid any "lumper" he hired from proceeds which he otherwise would have received for the haul.

Gerald Mastin hired decedent to assist him on the Sioux Falls haul and paid decedent $50 in cash for his assistance on that haul.

No FICA or income tax withholdings were made from the $50 cash payment.

Decedent did not receive a W-2 statement from Lint Van Lines for any work performed in 1986.

While decedent had been essentially unemployed for several years prior to May 1, 1986, decedent had held a number of regular full-time employments.

In his regular full-time employments, decedent had been paid by check and had had FICA and income tax withholdings made.

In his regular full-time employments, decedent had received W-2 wage statements for tax purposes.

Claimant was aware that decedent had had appropriate withholdings made in his regular full-time employments, that decedent had been paid by check, and that decedent had received W-2 wage statements.

Claimant herself is employed.

Decedent used a false name and a false social security number on the independent contractor contract completed and submitted to Lint Van Lines as regards the April 6 and 7 haul.

The right of selection of decedent did not rest with the named employer.

Responsibility for payment of wages to decedent did not rest with the named employer.

A "lumper" could perform his work as he wished, subject to withholding of pay or termination of relationship by the driver.

The right to discharge or terminate decedent's work relationship did not rest with the named employer.

The right to control work decedent performed did not rest with the named employer.

The named employer could not reasonably be identified as the authority in charge of the work decedent performed or as the entity for whose benefit such work was performed.

## CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established that the decedent was an employee of the named employer at the time of his May 1, 1986 injury and ensuing death.

## ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceeding.

Defendants shall pay costs of this proceeding.

Signed and filed this 21st day of September, 1987.

Helen Jean Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. D. Barry Moranville
Attorney at Law
974 73rd Street, Suite 16
Des Moines, Iowa 50312

Mr. Verne Lawyer
Attorney at Law
427 Fleming Building
Des Moines, Iowa 50309

Mr. Frank T. Harrison
Attorney at Law
Suite 111, Terrace Center
2700 Grand Avenue
Des Moines, Iowa 50312

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| ROBERT E. HUSS, SR., | : | |
| Claimant, | : | |
| vs. | : | File No. 780796 |
| BLUE STAR FOODS, INC., | : | A R B I T R A T I O N |
| Employer, | : | D E C I S I O N |
| and | : | |
| MARYLAND CASUALTY COMPANY, | : | |
| Insurance Carrier, Defendants. | : | |

FILED
OCT 15 1987
IOWA INDUSTRIAL COMMISSIONER

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Robert E. Huss, Sr., claimant, against Blue Star Foods, employer, and Maryland Casualty Co., insurance carrier, under the Iowa Workers' Compensation Act seeking benefits for an alleged injury occurring November 12, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner September 23, 1987. It was considered fully submitted at the close of the hearing.

The record in this case consists of the testimony of the claimant and Carmella Hively, for the claimant; Jacqueline Osbahr, line foreman, Clifford Osbahr, area manager, Harry Anderson, cart puller, and Patrick Daley, Director of Human Resources for the defendants; exhibits 1 through 24, inclusively; and claimant's answers to interrogatories.

## ISSUES

The hearing assignment order lists the following issues for decision:

1. Whether the claimant received an injury which arose out of and in the course of employment;

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

3. Whether claimant is entitled to any benefits and the

nature and extent of any benefit entitlement;

4. Whether claimant is entitled to payment of certain medical expenses pursuant to Iowa Code section 85.27; and

5. The appropriate rate in the event of an award.

REVIEW OF THE EVIDENCE

Both at the hearing and by deposition (Exhibit 15), claimant testified: He began his last period of employment with defendant employer in approximately November 1983. He was last working as a retort cart puller which he described as pulling a metal cart filled with canned pork products away from the production line.

He recalled that after working a short time on November 12, 1984, he slipped on something on the floor while he was pulling a cart away from the line. The cart came towards him and a wheel rolled on his toe. After he put his hands out and pulled himself up, he pushed the cart to the oven room. As he went back to his position, he was limping. He thought this accident might have been observed by co-employees, Harry Anderson and "Walleye."

He recalled he then went to see Connie, the plant nurse, who, after a conversation with Bob Towers, sent him home, although she had not inspected the injured area. On arriving home, he was met by Carmella Hively, with whom he has lived for approximately nine years. After explaining his injury, claimant instructed her to contact the physician who was treating him for gastritis. The claimant recalled her phoning Dr. Quinlan and going to the hospital November 12, staying until Saturday November 17 for treatment of gastritis. The claimant also testified he repeatedly advised these health care providers of his accident at work. He was given the name of a "foot doctor", Robert J. Hilkemann, D.P.M. He recalled being first seen by Dr. Hilkemann November 19. After submitting to x-rays, claimant was told it would be necessary to have surgery. He had surgery on the fourth toe of his right foot November 28, 1984, and was last seen by Dr. Hilkemann November 11, 1985, when he was released to return to work.

Carmella Hively testified she is the claimant's common law wife. She recalled claimant returning home from work early on November 12, 1984, and being told of his injury in essentially the same way claimant testified. She recalled going to claimant's mother's house to use a phone and going to the emergency room. She could not recall any further details asserting the events took place "too far back."

Harry Anderson testified he has been employed by defendant

000583

employer for about nine years and has worked as a cart puller. He did not recall working with the claimant asserting claimant was a cart catcher not a cart puller. He testified he had no knowledge of any injury to the claimant but that, as he was not a supervisor, claimant had no duty to report to him.

Jacqueline Osbahr testified she has been employed by defendant employer for about twenty years. She works as a line foreman and is responsible for staffing and running the production line and training employees. Although claimant had worked under her supervision, she could not recall whether or not this was so in November 1984. She testified, however, that she had no knowldge of any injury he may have incurred.

Mrs. Osbahr explained that after an injury occurs, it is generally first reported to the line foreman. It is her practice to send all employees asserting injury to the plant nurse, regardless of the severity of the injury so that a record of the injury can be made. She maintained if claimant had been working under her supervision on November 12, 1984, she would have noticed if he had been injured since, if an employee is sent home, the line foreman has to get someone to find a replacement. She did not recall having to find a replacement for claimant.

Clifford Osbahr testified he has worked for defendant employer for about twenty-two years and is an area manager. He described his responsibilities as ensuring the lines are set up and ready to go and supervising any problems. He testified that when an injury occurs and is reported to the nurse, the nurse, in turn, will contact him to advise what action is being taken on the injury and he is routinely given copies of the medical day log.

He testified to a complete lack of knowledge to any injury to claimant.

Patrick Daley testified that as Director of Human Resources for defendant employer he oversees all company personnel functions as well as safety and health. He testified claimant was not at work on November 12, 1984, but last worked during the week ending November 10, 1984, a total of 18.02 hours (see also Exhibit 22) and that the company had a request for vacation from claimant for the period from November 7 to November 13, 1984.

By deposition (Ex. 14), Dr. Hilkemann testified he first saw claimant November 19, 1984, after his release from Immanuel Hospital. He explained no notation was made in the records of any job related accident as he did not recall claimant saying anything about an injury to that foot, but rather, had spoken of vague pain throughout the whole foot (pp. 5, 11, 16, 21). See also exhibit 4. Hilkemann opined that claimant's condition had existed for a longer period of time than what claimant represented

000584

and possibly had existed for as long as a month or two before surgery (pp. 11-13). He explained:

> "If you have a -- a real -- a real recent subluxation, you won't see really many changes around the joint other than some initial swelling...[I]f you -- if you had a joint that had not been functioning for a while, the base of the toe, or the part that's dislocated, where it's not functioning properly, will have a tendency to get -- will have a tendency to get greyer. (Dep. Ex. 14, pp. 11-12)
>
> He continued:
>
> I would not say it was -- it was a degenerated joint at this point, but there were certainly changes that had occurred around the joint. (Dep. (Dep. Ex. 14, P. 12)

On the application for benefits filed November 26, 1984 (Ex. 1, p. 7), claimant lists defendant employer as his last employer and his last period of employment as beginning November 1, 1983 and last day as November 6, 1984.

The Immanuel Hospital chart (Ex. 3) indicates claimant entered the hospital November 13, 1984, with symptoms suggestive of a peptic ulcer. It refers to claimant's complaint "of a great deal of difficulty with pain in his feet" but makes no mention of any report of job injury or specific injury to his foot or feet.

The report of operation (Ex. 5) states, in part: "The cartilage itself was in good condition on the fourth metahead. The proximal base appeared that it certainly had been subluxed for a longer period of time than what the patient had initially presented in our office."

The file of the Social Security Administration (Ex. 7) shows claimant disabled beginning November 13, 1984, with a primary diagnosis of paranoid schizophrenia. By psychiatric review dated January 31, 1985, claimant was rated 5, a rating which precludes engaging in gainful activity (Exhibit 8). His reality contact was rated as follows:

C. REALITY CONTACT:

1. Delusions. . . . . 5

2. Hallucinations . . . . . 2

3. Paranoid Tendencies. . . . . 5

000585

4. Confusion (non-organic). . . . . 5

5. Hyperactivy/Excitement . . . . . 4

6. Mood Swings/Emotional Liability. . . . . 4

7. Emotional Withdrawal/Seclusiveness . . . . 4

8. Bizarre, Unusual Behavior. . . . . 5

Overall Degree of Impairment in this Area . . 5

This form. . .attempts to measure a person's ability to engage in gainful activity. On a scale of 0 to 5- 5 is the most impaired.

--- 1 - Normal
1 - mild
3 - moderate
4 - moderately severe
5 - Precludes engaging in gainful activity.

The day logs for the medical department of defendant employer for the 5th, 6th, 12th and 20th of November, 1984 reveal no mention of any accident involving claimant on any of those days. (Ex. 10)

Dr. Hilkemann also acknowledged it was possible claimant had a partially subluxed toe which could have been aggravated.

Exhibit 17 is claimant's calendar of November 1984. In the space provided for November 12, are written the words "Broken toe."

A first report of injury was filed November 21, 1984. (Ex. 18.) In response to question 17, "What was the employee doing when injured or exposed?," it is written: "First report of injury 11-20-84: Claims dislocation 4th toe, right----claims 'happened at BSF some time in the last year.'"

## APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on November 12, 1984 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

000586

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 initial issue for determination in this case is whether claimant sustained an injury which arose out of and in the course of his employment with defendant employer, Blue Star Foods.

ANALYSIS

On review of all of the evidence presented, it can be seen that claimant's testimony to his personal recollections of what occurred is completely at odds with both the recollections of the other parties involved as well as with the written records of the case. The greater weight of the evidence does not compel a finding in claimant's favor.

Claimant first alleges he was at work on November 12, 1984. Yet, defendant employer's payroll records show he was last paid for work performed the previous week--that week ending November 10, 1984. Further, Patrick Daley, custodian of such records, testified claimant filed a request for vacation for the period from November 7 through November 13. This testimony is consistent with other testimony that claimant did not work the rest of the week after November 6 (for personal/medical reasons) and with the medical records of Creighton Memorial St. Joseph Hospital (Ex. 11, p. 2) showing claimant was seen November 9, 1984. It is also consistent with the Job Service of Iowa documents (Ex. 1) which show claimant's last day of work to have been November 6, 1984. The application for job insurance benefits was filed by claimant November 26, 1984 when his memory with regard to dates may have been better.

Claimant asserted the accident was observed by other employees with whom he was working including Harry Anderson. Yet, Harry Anderson testified to a complete lack of knowledge of any accident or injury. It seems more likely than not an accident, such as the one claimant describes, would be remembered.

Claimant maintained he, almost immediately thereafter and on the advice of a co-employee, reported the incident to the plant nurse. There is no written record of any such incident occurring at, or even near, the time the claimant alleges. Clearly, the company follows a usual course of action when an employee is injured and sent home. Yet, none of the participants recalled or made any record that claimant was sent home on the morning of November 12. There is no notation of the alleged incident in the medical daily log maintained by the plant nurse and distributed

to supervisors; neither the line foreman nor the area supervisor, who would have had to have found a replacement worker for claimant's position, could recall having to do so.

Claimant alleges he advised subsequent health care providers of the injury. Yet, none of the medical histories taken from claimant refer to it. The histories do refer to complaints of pain in both feet. Dr. Hilkemann was adamant that claimant never mentioned a work related injury. The first report of injury refers to claimant's claim that it happened some time in the last year. It cannot be coincidence that all of the individuals making record of claimant's history would neglect or ignore recording such an essential fact as a particular incidence of trauma to the area. More likely than not such a fact was not recorded because it had not been conveyed.

Dr. Hilkemann, who by qualification may be considered an expert in the field of podiatric medicine, when operating on claimant for subluxation opined that the injury had been present for a much longer period of time--as much as a month or two--than what claimant here represents. While Dr. Hildemann acknowledged an accident such as the claimant describes may have aggravated a previously existing condition, no plausible evidence of that occurring has been presented.

Claimant's history of mental illness cannot go without comment as it certainly bears a direct relationship to his credibility.

On request of Disability Determination Services, Social Security Administration, claimant was sent to Michael Egger, M.D., for comprehensive psychiatric evaluation. Excerpts from Dr. Egger's report (Ex. 7, pp. 3-5) show claimant being described as "a poor historian" who gave such a "garbled, rambling psychotic account that it was possible only to obtain the briefest history"; "grossly bizzarre and psychotic to an extreme degree"; as one whose interests are "largely devoted to his psychotic delusions" and whose ability to "relate to others" is "grossly impaired"; and as one whose judgment is imagined by Dr. Egger to be "grossly impaired."

Claimant's replies to the interviewer's questions were described as "frequently irrelevant" producing "a torrent of loose associations," "accusatory," "disjointed," "innappropriate," "angry" and "hostile." Claimant's behavior at the hearing and while being deposed was identical.

Claimant was diagnosed paranoid schizophrenic and placed on disability beginning November 13, 1984.

It is possible claimant sincerely believes an accident and injury took place at Blue Star foods November 12, 1984, which he

reported to the plant nurse. However, after reviewing all of the evidence presented, the greater weight of evidence can lead only to a contrary conclusion. Claimant's testimony is simply not corroborated by any other evidence in the record. When all the evidence is considered, it is determined claimant has failed to prove by a preponderance of the evidence that he sustained an injury which arose out of and in the course of his employment.

Since claimant has failed to establish an injury arising out of and in the course of his employment, the other issues raised need not be discussed.

## FINDINGS OF FACT

WHEREFORE, based on the evidence presented, the following facts are found:

1. Claimant began his last period of employment with Blue Star Foods in November 1983, and last worked during the week ending November 10, 1984.

2. Claimant's allegation that he slipped and the cart he was pulling ran over his toe is not corroborated by any other evidence in the record.

3. There is no nurse's report that claimant was injured on November 12, 1984.

4. Defendant employer Blue Star Foods has customary procedures of notice to follow in the event of any injury to employee.

5. None of the individuals who would have been notified under that policy were aware of any injury to claimant without any specific mention of a job related injury.

6. A first report of injury filed November 21, 1984 states that claimant claims the injury occurred sometime during the last year.

7. Claimant was hospitalized November 13, 1984 for treatment of gastritis and complained of pain in his feet.

8. Claimant's treating physician referred claimant to Robert J. Hilkemann, D.P.M., for treatment of pain in his feet.

9. Claimant first saw Dr. Hilkemann November 19, 1984, presenting vague complaints of pain over the dorsum of the toes in both feet, particularly the fourth of the right foot.

10. Claimant did not convey to Dr. Hilkemann any information on a work related injury.

000589

11. Claimant was diagnosed as having a subluxed and contracted fourth digit of the right foot and was operated on for same November 28, 1984.

12. Claimant's condition had been present for significantly longer than since November 12 by as much as a month or more.

13. Claimant did not sustain an injury as a result of any accident occurring on the premises of defendant employer Blue Star Foods on November 12, 1984.

## CONCLUSIONS OF LAW

THEREFORE, based on the principles of law previously stated, the following conclusions of law are made.

Claimant failed to sustain his burden of establishing that he sustained an injury which arose out of and in the course of his employment with Blue Star Foods.

## ORDER

IT IS THEREFORE ORDERED:

That claimant take nothing from this proceeding.

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

Signed and filed this 15th day of October, 1987.

Deborah A. Dubik
DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Don M. Peterson
Attorney at Law
3220 Chippewa Lane
Council Bluffs, Iowa 51501

Mr. Philip Willson
Attorney at Law
P.O. Box 249
370 Midlands Mall
Council Bluffs, Iowa 51502

1402.20; 1402.30
Filed 10-15-87
Deborah A. Dubik

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

| | | |
|---|---|---|
| ROBERT E. HUSS, SR., | : | |
| Claimant, | : | |
| vs. | : | File No. 780796 |
| BLUE STAR FOODS, INC., | : | A R B I T R A T I O N |
| Employer, | : | D E C I S I O N |
| and | : | |
| MARYLAND CASUALTY COMPANY, | : | |
| Insurance Carrier, Defendants. | : | |

---

1402.20; 1402.30

Claimant failed to establish his injury arose out of and in the course of his employment. Because of claimant's mental state, his testimony was unreliable and could not be reconciled with the greater weight of evidence which showed claimant was not at work on the day he alleged injury.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| JOHN E. HUSTON,<br><br>Claimant,<br><br>vs.<br><br>THE WALDINGER CORPORATION and NATIONAL SHEET METAL CO.,<br><br>Employers,<br><br>and<br><br>FIREMAN'S FUND INSURANCE COMPANIES and ARGONAUT INSURANCE COMPANIES,<br><br>Insurance Carriers,<br>Defendants. | FILE NOS. 794131 & 774965<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

FILED
MAR 3 1987
IOWA INDUSTRIAL COMMISSIONER

## INTRODUCTION

This involves two arbitration proceedings brought by John E. Huston, the first against Waldinger Corporation and Fireman's Fund, its insurance carrier; the second is against National Sheet Metal and Argonaut, its insurance carrier. Claimant seeks benefits based upon an injury that occurred September 6, 1984 and an alleged injury of April 16, 1985.

The case was heard in Des Moines, Iowa on November 13, 1986 and was fully submitted upon conclusion of the hearing. The record in this proceeding consists of testimony from John E. Huston, claimant's exhibits 1 through 3, defendant Waldinger's exhibits B, F and G and defendant National Sheet Metal's exhibits A and B.

## ISSUES

The issues presented by the parties are determination of whether claimant sustained an injury that arose out of and in the course of his employment on April 16, 1985. Further issues deal with whether claimant is entitled to compensation for permanent partial disability based upon either or both of the alleged dates of injury, claimant's entitlement to benefits under section 85.27 from either of the respective defendants and costs. The rate of compensation is an issue with regard to the September 6, 1984 injury but it is stipulated to be $309.29 per

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| JOHN E. HUSTON,<br><br>Claimant,<br><br>vs.<br><br>THE WALDINGER CORPORATION and NATIONAL SHEET METAL CO.,<br><br>Employers,<br><br>and<br><br>FIREMAN'S FUND INSURANCE COMPANIES and ARGONAUT INSURANCE COMPANIES,<br><br>Insurance Carriers,<br>Defendants. | FILE NOS. 794131 & 774965<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

FILED
MAR 3 1987
IOWA INDUSTRIAL COMMISSIONER

## INTRODUCTION

This involves two arbitration proceedings brought by John E. Huston, the first against Waldinger Corporation and Fireman's Fund, its insurance carrier; the second is against National Sheet Metal and Argonaut, its insurance carrier. Claimant seeks benefits based upon an injury that occurred September 6, 1984 and an alleged injury of April 16, 1985.

The case was heard in Des Moines, Iowa on November 13, 1986 and was fully submitted upon conclusion of the hearing. The record in this proceeding consists of testimony from John E. Huston, claimant's exhibits 1 through 3, defendant Waldinger's exhibits B, F and G and defendant National Sheet Metal's exhibits A and B.

## ISSUES

The issues presented by the parties are determination of whether claimant sustained an injury that arose out of and in the course of his employment on April 16, 1985. Further issues deal with whether claimant is entitled to compensation for permanent partial disability based upon either or both of the alleged dates of injury, claimant's entitlement to benefits under section 85.27 from either of the respective defendants and costs. The rate of compensation is an issue with regard to the September 6, 1984 injury but it is stipulated to be $309.29 per

000592

week with regard to the April 16, 1985 injury.

SUMMARY OF EVIDENCE

The following is only a brief summary of pertinent evidence. All evidence received at hearing was considered when deciding the case.

John E. Huston is a construction supervisor for the State of Iowa who was formerly employed as a sheet metal worker through the union. On September 6, 1984, while working for the Waldinger Corporation, a punch press was accidently activated and punctured claimant's left hand at a point between and proximate to the knuckles. X-rays showed a spiral fracture of the midshaft of the fifth metacarpal without displacement, angulation or other deformity (Exhibit 1, page 7). Surgical debridement, irrigation, exploration and closure of the laceration was performed by John Ganske, M.D., (Ex. 1, p. 4). Claimant went through a relatively unremarkable period of recovery. On October 29, 1984, Dr. Ganske noted claimant to have a grip strength in his left hand that was about 10 to 15 percent less than the right hand. On that date claimant still had some impairment in flexion of his little finger at the M.P. joint. On November 30, 1984, Dr. Ganske noted that claimant had almost complete return of motion, no external deformity and a normally maturing scar. He felt that the grip strength in claimant's left hand was probably back to normal. Claimant was then released from treatment (Ex. 1, pp. 12 & 13).

Claimant testified that he went back to perform light duty work after having been released by Dr. Ganske. Defendant Waldinger's exhibit F indicates that claimant returned to work December 12, 1984.

After returning to work claimant returned to Dr. Ganske on December 26, 1984 and January 11, 1985. He voiced complaints of decreased strength and pain in his left hand (Ex. 1, p. 13). Claimant testified that he had experienced increasing problems with the hand in early 1985 and saw Dr. Pakiam on one occasion when Dr. Ganske was out of town. Claimant testified that he left Waldinger for a period of time and then obtained employment with National Sheet Metal. Claimant did not disagree with an entry on Waldinger exhibit G which indicated that he was laid off from Waldinger on March 29, 1985. Claimant testified that he obtained employment with National Sheet Metal on April 3, 1985 through the union hall. Defendant National exhibit B confirms that testimony. Claimant stated that he had pain and loss of strength in the hand when he began working for National. He stated that his job involved bench work cutting out lines and fitting metal from sheets. He testified that while using both hands to cut through three thicknesses of metal material it felt as though his left hand popped and he experienced the onset of

000593

pain. Claimant drove to the Mercy Medical Center Emergency Room where he was treated by Dr. Bell and advised to place ice packs on the hand and see Dr. Ganske on the following day. Claimant testified that he was unable to see Dr. Ganske for two or three days and that he was then sent to Lutheran Hospital for additional x-rays. Claimant testified that he incurred and paid expenses in the amount of $35 with Dr. Bell, $43 for the Lutheran Hospital x-rays, $23 from the Mercy Hospital Emergency Room.

Claimant testified that after reviewing the x-rays from Lutheran, Dr. Ganske told him to return to work. Claimant related that he told Dr. Ganske that he was unable to do so and Dr. Ganske then advised that claimant obtain a second opinion. The x-ray report, Waldinger exhibit B, shows the x-ray to have been taken on April 19, 1985. Dr. Ganske's office notes found at exhibit 1, page 14 show claimant to have been seen by Dr. Ganske on April 19, 1985. A report from Dr. Ganske which is undated but appears to have been issued in late April, 1985, states that he examined claimant on April 18 and obtained x-rays on April 18, 1985. The date of this report is believed to be incorrect since it is inconsistent with the other records concerning those activities (Ex. 1, p. 18). Dr. Ganske indicated in the report that he felt claimant was capable of performing substantially the same work that he was doing in September, at the time of injury. The progress note of April 19, 1985, indicates that Dr. Ganske felt no new injury had occurred.

Claimant testified that he knows something happened to his hand on April 16, 1985 because that night it became swollen. He felt that the Waldinger injury was serious, very painful and characterized it as more serious than any injury he had previously suffered. He stated that the sensation loss and pain in the left hand started at the time of the Waldinger injury but that the complaints worsened and became more severe when he returned to work following the injury.

The claimant testified that he left employment with National Sheet Metal on April 26, 1985 due to lack of work and the fact that layoffs were starting. This is confirmed by defendant National's exhibit B. Claimant testified that two to three months later he commenced employment with the State of Iowa. This is confirmed by Waldinger exhibit G which shows payment of unemployment benefits through July 23, 1985.

Claimant sought a second opinion from Arnis B. Grundberg, M.D. Dr. Grundberg, upon examining x-rays, appeared to be uncertain with regard to the age of the fracture of the fifth metacarpal neck but in his impression indicates that it is healed. He diagnosed claimant as having compression of the ulnar nerve in his left wrist and left carpal tunnel syndrome (Ex. 1, pp. 21 & 22). Dr. Grundberg indicated that claimant should be off work from May 17, 1985 until Friday, May 24, 1985 (Ex. 1, p. 19). Dr.

Ganske concurred with Dr. Grundberg's diagnosis and recommendation for surgery for left carpal and cubital tunnel syndromes (Ex. 1, pp. 14 & 23). Claimant testified that the charges in the amount of $135 with Physiatry Associates were for nerve conduction tests used in diagnosing the carpal tunnel syndrome.

On March 19, 1986, claimant underwent left carpal tunnel surgery performed by Dr. Ganske. On April 16, 1986, Dr. Ganske indicated that claimant would be totally healed in approximately two additional weeks. Reference to a calendar shows that date to be April 30, 1986 (Ex. 1, p. 49).

Claimant testified that after the surgery had been performed it seemed to have provided improvement but that now the two small fingers on his left hand still lose sensation, become numb and are more sensitive to cold than his right hand. He complained that he has difficulty feeling and gripping with his left hand. He complained of pain in the long finger on his left hand. Claimant stated that the carpal tunnel surgery was paid by the state group insurance plan, Share.

In the report from late April, 1985 (Ex. 1, p. 18) Dr. Ganske indicated that any impairment in claimant's left arm or hand would be minimal. In a report dated April 16, 1986, issued following the carpal tunnel surgery, Dr. Ganske indicated that he did not expect claimant to have any permanent impairment. The record does not reflect ratings from any other physicians on the issue of permanent impairment.

Claimant testified that the hours worked as shown in Waldinger exhibit F were abnormal. He stated that work was slow and the number of hours he had worked were unusually low during that period.

Claimant testified that he was married and has four daughters and one step-son but that none of the children were dependent on him at the time of the injury.

## APPLICABLE LAW AND ANALYSIS

The employer, Waldinger, admits the occurrence of the punch press injury. National Sheet Metal does not, however, admit that any injury occurred on April 16, 1985.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on April 16, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Claimant's appearance and demeanor were observed when he testified. He is found to be a credible witness. It is found

000595

that he did sustain an injury that arose out of and in the course of his employment with National Sheet Metal on April 16, 1985 in the manner which claimant described.

The Waldinger Corporation urges that claimant's healing period ran from the date of injury through December 11, 1984. This computes to a span of 13 5/7 weeks. Review of the evidence shows that claimant did return to work on December 12, 1984 which therefore terminates the healing period provided by section 85.34(1). Claimant's brief period of layoff between his employments with Waldinger and National Sheet Metal is not shown to be related to disability.

Claimant was then injured while employed by National Sheet Metal on April 16, 1985. He was off work under medical authorization until seen by Dr. Ganske on April 19, 1985. The injury with National Sheet Metal is found to have simply been a temporary aggravation of the preexisting condition that resulted from the punch press injury. Accordingly, claimant's compensation is limited to one day of temporary total disability. Since the claimant was injured while employed by National Sheet Metal he is also entitled to the expenses of treatment for that injury. These include the expenses incurred with Lutheran Hospital ($49), Dr. Bell ($35) and Mercy Hospital ($23). In accordance with exhibit 3, National Sheet Metal and Argonaut are likewise responsible for payment of 20 miles in transportation expenses for the travel to Methodist Hospital on April 16, 1985 and the travel to Dr. Ganske on April 19, 1985. This amounts to $4.80. The total medical expenses are therefore $111.80.

As previously indicated the injury at National Sheet Metal was found to be only a temporary aggravation of the preexisting condition that resulted from the punch press injury. The only evidence in the record that suggests that the injury of April 16, 1985 was a significant injury is found at Waldinger exhibit B, an x-ray report which states that the irregularity of the head of the fifth metacarpal probably represents an acute or recent fracture. Dr. Ganske, who is found to be the most familiar with claimant's hand injuries, was of a contrary opinion. Dr. Ganske's impression of the injury of April 16, 1985 as being quite minor is accepted as correct. Dr. Ganske expressed the opinion that the carpal tunnel syndrome was related to the punch press injury (Ex. 1, pp. 24 & 50). The record contains no conflicting opinions. Dr. Ganske's opinion is reasonable and is accepted as correct. The expenses claimant incurred with Dr. Pakiam and Younkers Rehabilitation (also referred to in the record as Physiatry Associates), are the responsibility of Waldinger and Fireman's Fund. The total of those charges is $144.49. The record shows claimant to have been off work from the date surgery was performed on March 19, 1986 and that healing would have been substantially completed on April 30, 1986. This is a span of six and one-seventh weeks for

000596

which Waldinger and Fireman's Fund are responsible for payment of healing period compensation.

During the time claimant was having the carpal tunnel syndrome diagnosed, Dr. Grundberg indicated that he should be off work from May 17 through May 24, 1985. This is an additional span of one and one-seventh weeks from which the defendant Waldinger and Fireman's Fund are responsible. The services provided by Dr. Grundberg are found to be related to the carpal tunnel syndrome rather than the National Sheet Metal injury.

Claimant seeks compensation for permanent partial disability involving his left hand. He suggests a rating of 10 percent. The only evidence in the record which supports his contention must be gleaned from the statement of Dr. Ganske found at exhibit 1, page 18 which states that "...there should be minimal, if any, impairment of the function of his hand or arm." On April 16, 1986 (Ex. 1, p. 49), Dr. Ganske indicated "I do not expect that he will have any permanent impairment." It is uncertain whether the second statement from Dr. Ganske refers only to the carpal tunnel syndrome for which treatment had just been completed or whether it referred to the condition of the entire left hand.

Division of Industrial Services Rule 343-2.4 makes the Guides to the Evaluation of Permanent Impairment published by the American Medical Association a prima facie indication of permanent partial disability for scheduled member disabilities. The Guides are not, however, the exclusive method of rating disabilities. The claimant's testimony and demonstrated difficulties may be considered in determining the actual loss of use which is compensable so long as loss of earning capacity is not considered. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). Claimant left the sheet metal trade for lower paying work with the state. When claimant's credibility and demonstrated difficulties are considered it is found that he has a permanent partial disability of five percent of the left hand. As previously indicated, that disability is found to be related to the punch press injury and not the injury of April 16, 1985. He is therefore entitled to receive nine and one-half weeks of compensation for permanent partial disability of the left hand payable commencing December 12, 1984.

Defendant Waldinger exhibit F shows claimant's earnings during the 13 weeks preceeding the week that contained September 6, 1984 to be $6,194.83. This computes to an average of $474.22 per week. When applied to the appropriate benefit schedule and considering claimant to be married with two exemptions, the rate of compensation for the Waldinger injury is found to be $288.45 per week.

In accordance with claimant's testimony Waldinger and Fireman's Fund are also responsible for payment of transportation

000597

expenses which claimant described as 20 to 24 miles each for two trips to see Dr. Grundberg and one trip each to Lutheran Hospital, Mercy Hospital and Methodist Hospital. This computes to 100 miles and allowance of $24. Claimant's testimony at hearing is adopted over the mileage statements shown in exhibit 3. It should also be noted that the employer, Waldinger, stipulated that claimant was entitled to $36 in mileage payments in addition to the $24 which is hereby awarded. The total would therefore be $60.

The rule of law announced in McKeever v. Smith Custom Cabinets, 379 N.W.2d 368 (Iowa 1985) is not applicable to the injury of April 16, 1985. It has not been shown to have been a cumulative trauma injury. To the contrary, claimant testified regarding a specific event of trauma. He had not been asymptomatic immediately prior to the time of that trauma. His symptoms stemmed from the punch press injury of September 6, 1984.

## FINDINGS OF FACT

1. On April 16, 1985, claimant was injured while cutting sheet metal in the employ of National Sheet Metal Company.

2. Following the injury claimant was medically incapable of performing work in employment substantially similar to that he performed when insured until April 19, 1985 when Dr. Ganske released claimant to return to work.

3. The injury of April 16, 1985 was a temporary aggravation of a preexisting condition that had its origin in the punch press injury claimant suffered while employed by the Waldinger Corporation on September 6, 1984.

4. In obtaining care for the injury of April 16, 1985, claimant traveled 20 miles and incurred expenses for treatment in the total amount of $107. The treatment claimant received is found to be reasonable and necessary treatment for the injury and the charges made therefore are found to be fair and reasonable.

5. The injury claimant sustained while employed by the Waldinger Corporation on September 6, 1984 made claimant incapable of performing work in employment substantially similar to that he performed at the time of injury from the date of injury through December 11, 1984. Thereafter, he was again being medically incapable of performing such substantially similar work from May 17 through May 24, 1985. He was similarly disabled a third time from March 19, 1986 through April 30, 1986.

6. Claimant currently experiences pain, discomfort, numbness,

loss of strength and loss of motion in his left hand. The punch press injury with the Waldinger Corporation is a substantial factor in bringing about that condition. The condition constitutes a five percent loss of use of claimant's left hand.

7. Claimant obtained care from Dr. Pakiam and Younkers Rehabilitation (also referred to as Physiatry Associates), where he incurred charges in the amount of $144.49. The treatment is found to be reasonable and necessary and the charges made are fair and reasonable.

8. In obtaining treatment for the injury claimant travled 100 miles for which he is entitled to recover $24 in addition to the $30 which Waldinger and Fireman's Fund stipulated was due. The total is therefore $60.

9. Claimant has previously been paid $6,415.53 in weekly compensation by the Waldinger Corporation and Fireman's Fund.

## CONCLUSIONS OF LAW

1. The injury claimant sustained on September 6, 1984 is a proximate cause of the carpal tunnel syndrome for which he has been treated and of a five percent permanent partial disability of his left hand for which he is entitled to receive nine and one-half weeks of compensation under the provisions of section 85.34(2)(1).

2. Claimant is entitled to receive 21 weeks of compensation for healing period from the Waldinger Corporation and Fireman's Fund with 13 5/7 weeks thereof payable commencing September 7, 1984, with one and one-seventh weeks thereof payable commencing May 17, 1985 and with six and one-seventh weeks thereof payable commencing March 19, 1986.

3. Claimant is entitled to recover benefits under section 85.27 from the Waldinger Corporation and Fireman's Fund in the amount of $204.49.

4. Claimant's rate of compensation with regard to the injury of September 6, 1984 is $288.45 per week.

5. Claimant is entitled to receive from National Sheet Metal Company and the Argonaut Insurance Company one-seventh week of compenstion for temporary total disability at the stipulated rate of $309.39 per week and section 85.27 benefits in the total amount of $111.80.

## ORDER

IT IS THEREFORE ORDERED that the defendant National Sheet Metal Company and the Argonaut pay claimant one-seventh (1/7)

week of compensation for temporary total disability commencing April 19, 1985 at the rate of $309.29 per week.

IT IS FURTHER ORDERED that the defendant National Sheet Metal and Argonaut pay claimant section 85.27 benefits in the total amount of one hundred eleven and 80/100 dollars ($111.80).

IT IS FURTHER ORDERED that the Waldinger Corporation and Fireman's Fund pay claimant twenty-one (21) weeks of compensation for healing period at the rate of two hundred eighty-eight and 45/100 dollars ($288.45) with thirteen and five-sevenths (13 5/7) weeks thereof payable commencing September 7, 1984, with one and one-seventh (1 1/7) weeks thereof payable commencing May 15, 1985 and with six and one-seventh (6 1/7) weeks thereof payable commencing March 19, 1986.

IT IS FURTHER ORDERED that defendants Waldinger Corporation and Fireman's Fund pay claimant nine and one-half (9 1/2) weeks of compensation for permanent partial disability at the rate of two hundred eighty-eight and 45/100 dollars ($288.45) payable commencing December 12, 1984.

IT IS FURTHER ORDERED that defendants Waldinger Corporation and Fireman's Fund receive credit in the amount of six thousand four hundred fifteen and 53/100 dollars ($6,415.53) for weekly benefits previously paid and that all past due amounts which were not paid as ordered herein be paid in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants Waldinger Corporation and Fireman's Fund pay claimant two hundred four and 49/100 dollars ($204.49) in medical expenses and travel expenses under section 85.27.

IT IS FURTHER ORDERED that the costs of this proceeding in accordance with Rule 343-4.33 are assessed equally among the defendants.

Defendants are ordered to file claim activity reports as requested by this agency.

Signed and filed this 3rd day of March, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert W. Pratt
Attorney at Law
1913 Ingersoll Avenue
Des Moines, Iowa 50309-3320

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

Ms. Dorothy L. Kelley
Attorney at Law
1000 Des Moines Bldg.
Des Moines, Iowa 50309-2462

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| BRENDA K. HUTT,<br><br>Claimant,<br><br>vs.<br><br>LUTHERAN HOME FOR AGING,<br><br>Employer,<br><br>and<br><br>INSURANCE COMPANY OF NORTH AMERICA,<br><br>Insurance Carrier,<br>Defendants. | : | FILE NO. 752425<br><br>A R B I T R A T I O N<br><br>D E C I S I O N<br><br>FILED<br><br>NOV 25 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

## STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Brenda K. Hutt, claimant, against Lutheran Home for Aging, employer (hereinafter referred to as Luthern Home), and Insurance Company of North America, insurance carrier, for workers' compensation benefits as a result of an alleged injury on December 6, 1983. On September 9, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which is approved and accepted as a part of the record in this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Harry Hutt and Elizabeth Barstead. The exhibits received into the evidence at hearing are listed in the prehearing report. According to the prehearing report, the parties have stipulated to the following matters:

1. On December 6, 1983, claimant received an injury which arose out of and in the course of her employment with Lutheran Home.

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $129.41 per week.

3. Claimant is only seeking temporary total disability or

000602

healing period benefits from December 6, 1983 which is the last day claimant worked for Lutheran Home.

4. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

5. The medical bills submitted by claimant at the hearing in the prehearing report were fair and reasonable but that the issue of their causal connection to a work injury remains an issue to be decided.

## ISSUES

The parties submitted the following issues for determination in this proceeding in the prehearing report.

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

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

III. The extent of claimant's entitlement to medical benefits under Iowa Code section 85.27.

## SUMMARY OF THE EVIDENCE

The following is a summary of the evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision.

Claimant testified that she worked for Lutheran Home from 1978 until the alleged work injury in this case as a nurse's aid. She stated that her duties consisted of taking care of elderly persons on the night shift. During her employment, claimant attended and successfully completed a med-aid course at an area community college to assist in giving medication to patients. Claimant earned approximately $9,000 to $10,000 per year in this job prior to the alleged work injury. Claimant testified that she was considered a good worker during her Lutheran Home employment.

The facts surrounding the work injury are not in real dispute. Claimant testified that on or about December 6, 1983, she slipped and fell on ice adjacent to an exit from the Lutheran Home while leaving her shift. Claimant stated that she lost consciousness briefly after the fall and awoke on her back. Claimant said that she had pain in her back, neck and head after the fall. Claimant was initially treated by Robert L. Bender, II, M.D., after the injury. Dr. Bender only saw claimant once

000603

and prescribed at that time Indocine. In a report submitted into the evidence, Dr. Bender states that he considered the injury as minor.

Claimant then sought treatment from her family physician, John L. Beattie, M.D., a general practitioner with a specialty in general surgery. Dr. Beattie first saw claimant on December 9, 1983 with complaints of cervical and thoracic pain and head pain. Dr. Beattie diagnosed a cerebral concussion and ordered x-rays which revealed nothing abnormal. Claimant also complained of dizziness and vertigo. Dr. Beattie prescribed muscle relaxants, pain medication and anti-vertigo medicine at this time along with physical therapy. The complaints persisted over the next several weeks and claimant was referred by Dr. Beattie to Michael J. Kitchell, M.D., an neurologist. Dr. Kitchell examined claimant in January, 1984. Claimant complained to him of neck, back and head pain along with dizziness and difficulty in concentrating and sleeping. Dr. Kitchell reports that his neurological examination of claimant revealed nothing abnormal and Dr. Kitchell concluded that claimant has symptoms typical of post-concussive syndrome. He prescribed Amitriptyline (trademade Elavil) to prevent headaches and muscle spasms. Claimant then returned to Dr. Beattie in February, 1984, with additional complaints of cold sweats, shakes, nausea, depression symptoms and crying easily. Dr. Beattie increased the level of Amitriptyline, which is normally an anti-depressant medicine. On February 27, 1984, claimant was admitted to the hospital for a short period of time after passing out in the bathroom of her home upon awakening one morning. No diagnosis was made at the time except that the hospital doctors reported that the episode was probably due to post-concussive disorder. In March, 1980, claimant complained to Dr. Beattie that an increase in physical activity causes tremors, weakness, headaches, nausea and rapid heartbeats. Dr. Beattie felt that claimant's problems were related to depression but referred claimant back to Dr. Kitchell in April, 1984. Upon his reexamination of claimant, Dr. Kitchell felt that due to the fact that an EKG of claimant's heart proved to be normal, the rapid heatbeat and tremors were caused by the Elavil medication and recommended a different anti-depressant drug. Dr. Kitchell also concluded at the time that claimant's problems were functional or mentally induced and attributable to anxiety attacks. Dr. Kitchell recommended that claimant return to work as soon as possible.

Claimant apparently did not like what Dr. Kitchell had to say and she had Dr. Beattie refer her to another neurologist, Michael J. Steine, D.O. After his examination of claimant in June, 1984, Dr. Steine essentially concurred with the views of Dr. Kitchell and felt that claimant's problems were probably emotional. Claimant then returned to Dr. Beattie who admitted in his deposition that the persistence of claimant's symptoms were unusal in the normal post-concussive syndrome case. In

000604

September, 1984, Dr. Beattie stated that claimant should undergo education to teach her how to live with her difficulties. In October, 1984, Dr. Beattie prescribed an addictive pain medication to help eleviate claimant's pain complaints. Claimant at that time was complaining of headaches lasting four to seven days. Dr. Beattie continued to treat claimant for the rest of 1984 and into 1985.

In a treatment and referral process which Dr. Beattie labels in his deposition testimony as "musical doctors" in an attempt to arrive at a diagnosis of claimant's symptoms, Dr. Beattie referred claimant to the neurological department of the University of Iowa Hospitals and Clinics in April, 1985. Rodney Quinn, M.D., the staff neurologist at the University of Iowa reports that his diagnosis was again a post-concussive syndrome. Dr. Quinn goes on to rate claimant as suffering from a permanent impairment in the following manner:

| | |
|---|---|
| For complex intergrated cerebral function disturbance | 5% |
| Emotional disturbance | 5% |
| Episodic neurological disorder | 5% |

Dr. Quinn combines these ratings into an overall permanent rating of 14 percent for her problems. There was no explanation from Dr. Quinn as to the nature of a condition which he termed as complex intergrated cerebral function disturbance. Dr. Quinn had reported that claimant's neurological exam was normal.

According to Dr. Beattie in his deposition testimony, Dr. Quinn's diagnosis changed his views in that he felt before that the symptoms were only functional and caused by depression. However, this new diagnosis caused Dr. Beattie to believe that there was a dysfunction of claimant's brain. Dr. Beattie continues to treat claimant at the present time primarily with medication. At the present time claimant continues to complain of chronic headaches (lasting days at times requiring bed rest), a sore back, shoulder and neck problems, periodic dizziness, hot flashes, shakiness, crying episodes, faintness, weakness and rapid heartbeating which she claims occurs after even light physical activity such as washing dishes or other light household work. Dr. Beattie opines that claimant is unable to work and is totally disabled primarily because of her mental dysfunction and headaches.

In November, 1985, claimant was examined by Thomas A. Carlstrom, M.D., a board certified neurosurgeon. Dr. Carlstrom states in his deposition testimony that from his examination of claimant, review of past medical records and examination of CT scans and EMG tests he ordered, he could not arrive at a diagnosis of claimant's symptoms. He did not find any evidence to support the types of conditions rated by Dr. Quinn. Dr. Carlstrom initially felt that claimant's symptoms would be due to either

temporal seizures or hyperventilation from anxiety. He has since ruled out temporal seizures as a possible cause. He also opines that claimant suffers from no permanent impairment from the symptoms and could not detect any mental impairment or memory loss upon his examination of claimant. Claimant had related to the doctor many things in her past history which indicated a normal memory. Dr. Carlstrom states as follows in his last report: "I think basically this is a patient whose motivation is low enough that any symptoms, however mild, will result in a lack of interest in pursuing occupational goals."

Claimant is currently working part-time in a nursing home wheeling patients in wheelchairs to the dining room and assisting in their feeding. Claimant works approximately two hours per day at the rate of $4.00 per hour. Claimant stated that she tried to work three hours but her back and neck hurt so much that it was impossible for her to walk. She has not applied for other employment and she states that she does not know what she can do.

Claimant is 44 years of age and has completed high school. Claimant testified that she was a homemaker for a number of years after high school. As stated above, claimant completed a med-aid course at a local area community college. Claimant indicates that she received high grades in this course. Claimant's past employments have been as a waitress and in various clerical positions.

Claimant denies any physical or mental problems before December, 1983. According to Dr. Beattie, claimant has complained to him of headaches as far back as 1979. Dr. Beattie's office records also show a continuation of headache complaints both in 1980 and 1981. However, claimant was not treated by Dr. Beattie for these headaches in the past. Claimant admits in her testimony that she had headaches in the past before the work injury and labels them as tension headaches. She states that now her headaches are "migraine" and much more severe than in the past. No physician makes the same type of distinction as claimant in the type of headaches she is having. It should be noted that Dr. Quinn, at the University of Iowa Hospitals and Clinics, did not mention any prior headache problems in his reports and neither does Dr. Carlstrom. Dr. Kitchell, however, specifically notes claimant's history of headaches before the alleged work injury in this case.

In February, 1985, a vocational rehabilitation specialist, Elizabeth Barstead, was retained by the defendant's insurance carrier. Barstead initially talked with Dr. Beattie who apparently indicated to her that claimant was not employable. Barstead attempted to work with Lutheran Home and with Dr. Kitchell who approved a plan to gradually return claimant to work. Claimant however did not cooperate and wrote Barstead that she was unable

000606

to return to work. At hearing Barstead testified that claimant has skills that are marketable in the geographical area of her residence and that there are jobs in the Des Moines area available to claimant in the clerical and medical assistant field. She notes that no doctor has imposed physical restrictions upon claimant's activity.

APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be awarded without a showing of a causal connection to a physical change of condition. 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. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 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).

000607

In the case sub judice, claimant contends that she suffered a permanent disability as a result of a work injury due to permanent impairment to the body as a whole. This body as a whole impairment is allegedly caused by chronic neck and shoulder problems as well as chronic headaches, vertigo and other symptoms allegedly attributable to a brain disorder or emotional problems. The preponderance of the evidence fails to demonstrate such a permanent impairment despite a showing by the greater weight of evidence that her emotional problems were apparently precipitated by the December, 1983, work injury.

All of the claimant's physicians agree that claimant certainly has considerable symptomatology and the concensus of the medical opinion in claimant's case is that the symptoms are due to depression and anxiety. Although claimant had headaches before, there is no evidence that she experience any sort of symptoms such as dizziness, vertigo, severe chronic headaches, nausea or rapid heart rate before the work injury. It does not matter whether these symptoms are functional or mentally induced as they were clearly either induced or significantly aggravated by the work injury.

However, the question of whether claimant's symptoms have resulted in permanent disability is another matter. First, claimant's testimony cannot be solely relied upon as most of the doctors believe that her complaints far exceed objective evidence. Claimant has not otherwise established that she suffers from permanent impairment either due to her physical or mental problems. With reference to claimant's physical complaints, no physician including Dr. Beattie has opined that claimant suffers from permanent impairment due to her back or neck problems. Dr. Beattie indicates that claimant's primary difficulties is not with her back or neck but with her headaches, dizziness and what other physicians describe as depression or anxiety symptoms.

With reference to claimant's depressive symptoms or headaches, Dr. Beattie felt that claimant is totally disabled. Aside from the fact that he does not adequately explain what precise activities claimant is unable to perform, his views cannot be given the greater weight in this proceeding. He is not a specialist in neurological problems and his views as to the permanency of any neurological condition cannot be given more weight than those of neurological specialists. Of the four specialists in the field of neurology who have rendered opinions in this case, only one at the University of Iowa gives impairment ratings for the persistence of post-concussive syndrome. This opinion appears to have limited value as no mention is made of claimant's prior headaches before 1983. On the other hand, the three remaining specialists, Drs. Kitchell, Steine and Carlstrom, agree that claimant's problems are primarily functional and do not result in permanent impairment or an inability to work. Finally, no physician, including Dr. Beattie, has imposed

000608

physical restrictions on activity due to claimant's mental difficulties. The fact that claimant's symptoms persist today was certainly considered in this decision but claimant has not established that the persistence of symptoms is due to a permanent condition rather than a lack of proper treatment by health care practitioner with a specialty in the field of neurology or mental illness.

Although claimant has not established permanent impairment or entitlement to permanent disability benefits, she is entitled to weekly benefits for temporary total disability under Iowa Code section 85.3(1) from the date of injury until she returns to work or until she is medically capable of returning to substantially similar work to the work she was performing at the time of injury.

On May 23, 1984, Dr. Kitchell opined it was now time for claimant to return to work. His opinions were supported by Dr. Steine and later Dr. Carlstrom. Therefore, claimant has established a period of temporary total disability beginning on the date of injury until Dr. Kitchell's examination on May 23, 1984. According to the prehearing report, claimant has already been paid 69 weeks of weekly benefits and therefore, claimant is not entitled to further benefits.

II. Claimant is entitled to reimbursement for reasonable medical expenses incurred as a result of a work injury under Iowa Code section 85.27. According to the prehearing report, claimant seeks reimbursement for $128 for treatment by Dr. Beattie from August 17, 1984 to August 27, 1987. The medical records show that claimant was treated for the conditions found causally connected to the December, 1983 injury above. Defendants' contentions with reference to these expenses is not clear. Although defendants may claim that the treatment was not authorized, defendants have denied liability for the claimant's symptomatology treated by Dr. Beattie and therefore have no right to chose the care. Barnhart v. MAQ, Inc., I Iowa Industrial Commissioner Report 16 (1981).

## FINDINGS OF FACT

1. Due to her demeanor and history of functional pain complaints, claimant was not found to be a credible witness with reference to her extent and nature of disability.

2. Claimant was in the employ of Lutheran Home at all times material herein.

3. On December 6, 1983, claimant suffered an injury to the upper back, neck and head in a fall which arose out of and in the course of her employment at Lutheran Home. The injury resulted in post-concussive syndrome with persistent complaints of headaches, dizziness and depression and anxiety symptoms.

000609

4. The work injury of December 6, 1983 was a cause of a period of disability from work beginning on December 6, 1983 and ending on May 23, 1984 at which time claimant was able to return to substantially similar work she was performing at the time of the work injury.

5. Although claimant suffers from depression and anxiety symptoms which may require additional treatment in the future, claimant is not disabled from work as a result of these symptoms and it could not be found from the evidence presented that she suffers from permanent impairment as a result of the December 6, 1983 injury.

6. The medical expenses listed in claimant's exhibit 4 which, according to the prehearing report are the expenses which claimant seeks reimbursement in this proceeding, are fair and reasonable and were incurred by claimant for reasonable and necessary treatment of her work injury on December 6, 1983.

## CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to the medical benefits as awarded below. Claimant has not established entitlement to any further weekly benefits.

## ORDER

1. Defendants shall pay to claimant the sum of one hundred twenty-eight and no/100 dollars ($128.00) in medical expenses.

2. Each party shall pay their own costs of this action under Division of Industrial Services Rule 343-4.33 except that claimant and defendants will equally divide the cost of the court reporter at hearing.

3. Defendants shall file activity reports on payment of this award as requested by this agency.

Signed and filed this 25th day of November, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

000610

Copies To:

Mr. Gregory L. Kenyon
Attorney at Law
930 Grand
West Des Moines, Iowa 50265

Mr. Frank T. Harrison
Attorney at Law
Suite 111, Terrace Center
2700 Grand Ave.
Des Moines, Iowa 50312

000611

FILED

JUL 31 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | |
|---|---|
| RITA M. HUTTIG,<br><br>Claimant,<br><br>vs.<br><br>YOUNKERS,<br><br>Employer,<br><br>and<br><br>AETNA CASUALTY,<br><br>Insurance Carrier,<br>Defendants. | File No. 762852<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Rita M. Huttig, against her employer, Younkers, and its insurance carrier, Aetna Casualty, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained April 13, 1984. This proceeding was held before the undersigned Deputy Iowa Industrial Commissioner at Davenport, Iowa, on May 22, 1987. A first report of injury was filed April 23, 1984. Claimant has been paid 6/7 weeks of temporary total disability benefits. The record was considered fully submitted at the close of hearing.

The record consists of the testimony of claimant as well as of joint exhibits A through P and claimant's exhibits 1 through 9 as identified on the exhibit lists which are a part of the official file in this matter.

ISSUES

Pursuant to the pre-hearing report filed by the parties, the parties stipulated that claimant's rate of weekly compensation is $121.42; that claimant was off work on account of her injury from April 14, 1984 to April 22, 1984 with temporary total disability or healing period benefits through that period; and, that claimant received an injury arising out of and in the course of her employment on April 13, 1984. The issues remaining for resolution are:

1. Whether there is a causal relationship between the

injury and claimant's claimed disability; and,

2. Whether claimant is entitled to permanent partial disability benefits.

REVIEW OF THE EVIDENCE

Claimant is 56 years old and has had one year of college. She was injured on April 13, 1984 when, while acting as head of the accessory sales department at Younkers, she caught her shoe toe in a marble square in the department and fell face-forward hitting the left side of her face and both knees. Claimant was taken to St. Lukes Hospital emergency room where her facial cut was sutured and an ace bandage was applied to the left knee. Claimant reported that the left knee would not "unlock." Claimant returned to work on April 23, 1984 and worked until December, 1984 when she left her Younkers employment for reasons not related to the injury. Claimant testified that she has had trouble with her knees on squatting and on descending stairs with more problems with the left knee than with the right. She reported she has pain and swelling in the evenings and after activities and stiffness upon waking. She indicated that humid weather increases her difficulty. She stated she no longer bowls or plays tennis, walks only in moderation, and takes aspirin as needed for knee pain.

Claimant saw John Sinning, M.D., an orthopaedic surgeon, on February 19, 1985. Dr. Sinning prescribed physical therapy consisting primarily of extremity strenthening and stretching exercises. Claimant reported she does prescribed exercises. Claimant denied having told Dr. Sinning, when she again saw him on May 19, 1985 for an evaluation the insurer requested, that she no longer had knee pain. She denied knowing that Dr. Sinning had stated her gait problem was unrelated to her work injury.

Vijay Verma, M.D., evaluated claimant on September 12, 1986. She did not know why she had not told Dr. Verma she had a problem descending stairs. Claimant agreed that she had had two prior right knee injuries when her knee had either given out or she had fallen in 1973 and 1977 and that she had seen Dr. Sinning for those problems. She testified she had had no problems with her left knee prior to April 13, 1984 and stated that no surgery or other medical treatment was scheduled for the left knee.

An emergency room report of April 13, 1984 stated that the right leg is negative and that the left leg has swelling, tenderness, and discoloration over the medial aspect of the left knee with the left knee being very painful with attempted range of motion. A surgeon's report of April 30, 1984 diagnoses claimant's condition as a left lid laceration and as left knee bursitis.

A medical report of Dr. Sinning dated April 4, 1986 reported,

as regards a February, 1985 examination, that claimant walked with a normal gait, had stable ligaments, but was consistently quite tender at the insertion of the patellar tendon. The report also stated that claimant had patellofemoral crepitus in the terminal 20° of extension, but that patellofemoral compression was not painful. Rotary testing was considered unremarkable. X-rays were entirely normal with no evidence of degenerative changes when compared with x-rays taken in 1977. The doctor's impression was of chronic patellar tendonitis with some chondromalacia of the patella which may contribute. He reports that there does not appear to be any significant permanent impairment.

Dr. Sinning reported on May 19, 1986 that there was no indication of any gait problem related to claimant's work injury and that claimant appeared to have reached maximum recovery from her work injury. He reported there was full range of motion of both knees with good strength and without the complaints of pain which claimant had had previously. He recommended no further treatment.

A note of Dr. Sinning of September 12, 1973 reported that claimant has had a right knee giving way at home upon getting out of bed and that the diagnosis is an internal derangement of the right knee, type unknown. An arthrogram of the knee performed at that time was normal. A note of Dr. Sinning, apparently of September 16, 1977, reported that claimant's right knee is swollen and painful after a fall at home, but that the knee is stable without ligamentous instability. X-rays taken were normal.

A report of Dr. Verma dated September 12, 1986 stated that no symptoms of chondromalacia of the patella are found, but that claimant has moderate crepitations palpable during knee range of motion. He reported that there are no restrictions and no locking of the knee. Claimant's gait is reported as adequate, but with complaints of weakness of the left lower extremity after walking. Range of motion is normal on the right and normal on the left as far as the hip and knee, but dorsiflexion of the left ankle is barely to 5°. The doctor's impression then was of light lower extremity chronic mild weakness and inconsistent pain. He stated that claimant's permanent partial "disability" was 10% and as a result of the medical history and the information obtained from claimant, the disability could "possibly" be related to the April 13, 1984 fall.

In a report of October 20, 1986, Dr. Verma stated that the permanent partial "disability" related to the whole person. He characterized the word "possibly" as "a typographical error" and restated that claimant's condition was "probably" related to the fall of April 13, 1984.

In a November 26, 1986 report, Dr. Verma stated that claimant's left lower extremity impairment under the AMA guides would be

35% of the left lower extremity as a result of chronic mild weakness of the left lower extremity and restricted ankle range of motion on dorsiflexion.

APPLICABLE LAW AND ANALYSIS

Of first concern is the causal relationship question.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 13, 1984 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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; the 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 may be considered. Both parties may bring all this information to the attention of the factfinder as either supporting or weakening the physician's testimony and opinion. All factors go to the value of the physician's testimony as a matter of fact not as a matter of law. Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The only practitioner's opinion relating claimant's current complaints to her fall at work is that of Dr. Verma who saw

claimant only once on September 12, 1986. He relies upon claimant's medical history and information claimant gave him to relate her lower extremity complaints and the objective finding of restricted ankle range of motion on dorsiflexion to the April 13, 1984 fall. He appears to have had great difficulty determining whether claimant's condition is possibly or probably related to the fall. He does report that claimant has no restrictions during knee range of motion as well as no locking of the knee and an adequate gait. Those findings are consistent with findings of Dr. Sinning who saw claimant and prescribed physical therapy in February, 1985 and who reexamined claimant in May, 1986. In April, 1986, Dr. Sinning reported that, when examined in 1985, claimant did not appear to have significant permanent impairment. After reexamining claimant in May, 1986, he reported that claimant then had full range of motion of the knees with good strength and without the pain complaints she had had previously. Dr. Sinning's diagnosis of claimant's condition as chronic patellar tendonitis is consistent with the surgeon's report diagnosis of left knee bursitis of April 30, 1984. We accept Dr. Sinning's evaluation of claimant and his statement made in April, 1986 that there does not appear to be significant permanent impairment over claimant's self-described complaints and over Dr. Verma's opinions. The statement of Dr. Sinning appears to have been arrived at more objectively. We note that the medical evidence does not reveal any left ankle injury in claimant's fall. We do not find that claimant has established a causal relationship between her April, 1984 work incident and the claimed disability to her left knee. We also do not find that claimant has shown a causal connection between her injury and her right knee complaints. The evidence does not indicate that claimant's right knee was ever considered or diagnosed as injured in the April 13, 1984 incident. Further, the evidence clearly shows that claimant had had prior long existing problems with the right knee.

As we have not found the requisite causal relationship between claimant's claimed disability and her injury, we need not reach the benefit entitlement question.

## FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. Claimant fell at work on April 13, 1984 and was then medically treated for a left-sided facial laceration and for swelling, tenderness and discoloration over the medial aspect of the left knee.

2. Claimant's right leg was negative for evidence of injury on April 13, 1984.

3. Claimant's right knee had given out and she had fallen with the right knee in non-work incidents in 1973 and 1977.

4. Claimant's gait problem does not relate to her work injury.

5. Claimant had bursitis of the left knee on April 30, 1984.

6. Claimant had chronic patellar tendonitis with some chondromalacia of the patella when examined in February, 1985.

7. As of May 19, 1986, claimant had full range of motion of both knees, good strength and no longer had complaints of pain.

8. Claimant did not injure her left ankle in her fall at work.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established a causal relationship between her injury of April 13, 1984 and her claimed disability.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceeding.

Claimant pay the costs of this proceeding.

Signed and filed this 31st day of July, 1987.

Helen Jean Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. John H. Westensee
Attorney at Law
1703 Second Avenue
Rock Island, Illinois 61201

Mr. Larry L. Shepler
Attorney at Law
600 Union Arcade Building
111 East Third Street
Davenport, Iowa 52801-1550

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| GARY JONES,<br><br>Claimant,<br><br>vs.<br><br>ALUMINUM COMPANY OF AMERICA,<br><br>Employer,<br>Self-Insured,<br>Defendant. | : | File No. 798447<br><br>A R B I T R A T I O N<br><br>D E C I S I O N |

FILED
OCT 26 1987
IOWA INDUSTRIAL COMMISSIONER

## STATEMENT OF THE CASE

This is a proceeding in arbitration filed by Gary Jones, claimant, against Aluminum Company of America, employer, self-insured, for benefits under the Iowa Workers' Compensation Act as a result of an injury sustained June 27, 1985. The matter came on for hearing before the undersigned deputy industrial commissioner September 29, 1987, and was considered fully submitted at the close of hearing.

The record in this case consists of the testimony of the claimant, George Pratt, and Harry Ney; and exhibits 1 through 19, inclusive.

## ISSUES

The issues presented for resolution are:

1. Whether a causal connection exists between the claimant's asserted disability and the accident in question;

2. Claimant's entitlement to temporary total disability/ healing period benefits; and

3. Claimant's entitlement to compensation for permanent disability.

## FACTS PRESENTED

Thirty-five year old claimant, Gary Jones, testified: He was hired by defendant employer in March 1984, after having also worked at Deere & Company as a manual laborer. Claimant presented that he was working in the foil mill as a helper on June 27, 1985 when one of the mills exploded causing burns to his face,

000618

neck, head, torso, and upper extremities. After some attempts at first aid, he recalled he was taken to Franciscan Hospital and was admitted to the burn unit under the care of Antonio F. Bernas, M.D., and had been visited by Thomas P. Dhanens, Ph.D., Clinical Psychologist. Claimant described his care as daily debridement with new dressings applied and that he was discharged to recuperate at home after his 17 or 19 day hospital stay.

Claimant recalled he returned to his regular job in the foil mill September 15, 1985, with uneasy feelings. He was stationed on a different machine and worked without incident until approximately September 23, 1985, when another mill caught fire. Although he was not burned, claimant described feeling symptoms associated with an anxiety attack. He reported to the medical department and was sent home. The following day he recalled he saw Dr. Bernas and was referred to another psychologist, Joseph S. Maciejko, Ph.D. Claimant acknowledged he returned to work again but asked for a transfer away from the mills. He worked until the end of the shift September 28 and determined that he could not return to work.

Claimant offered he began treating with Dr. Maciejko September 30, 1985, for stress management, relaxation, and fear therapy. On about September 15, 1986, claimant asserted he advised Dr. Maciejko that he was capable of returning to work or looking for work. He recalled being released to return to work with restrictions that he not work in the same department or with flames or heat producing equipment which might tend to remind him of the accident. He returned to work November 17, 1986, initially to the cold mill department but complained he did not feel he could safely work there. He was then transferred to the shear room and acknowledged he was still working there as of the time of the hearing. As a comparison of the two jobs, claimant testified that when in the foil mill, he was labor grade 7 and his maximum level of advancement was a labor grade 18; in the shear room, he is a labor grade 2 with a maximum level of advancement to a labor grade 15.

Claimant offered his health before the accident was excellent both physically and mentally but since, he is sensitive to cold, sun, and is bothered by anything to do with fire from camping to the furnace or stove in his home to watching TV to bright flashes such as that from a camera. He admitted to a fear of getting skin cancer and of self-consciousness over his scarring. On cross-examination, he revealed he has not missed any work since his return November 17, 1986, as a result of his accident, has not reported to the medical department at work, has not seen any health care provider for any accident-related problems, has not left the work premises during work because of anxiety, and has been able to deal with all aspects of his job. Claimant also acknowledged that he has been able to work all of the hours required of him (alternate 40 and 56 hour weeks) and his scarring

does not cause any physical impairment to his job, although he is sensitive to solvents and has trouble with overhead lifting.

George Pratt, Jr., testified he is the safety, health and environmental manager for the Davenport Works and had administered the claimant's claim. He explained that at the time of his injury, claimant was a foil mill operator helper (servicer) working about 45 hours per week at a base rate of $12.083 per hour and that there has been no change in that base rate since that time. He offered that the claimant is still considered a helper in the shear room and although he assists on a different machine both jobs require the same kind of skills. He identified claimant's current rate of pay as $12.21 per hour with an average of 47 to 48 hours work per week. He denied receiving any reports claimant could not do his job. He further explained that at about the same time the claimant left work in September 1985, a reduction in force took place at the plant. Based on his seniority, the claimant would be affected by the layoff. Workers' compensation benefits had ceased when the claimant originally returned to work earlier in September and were reinstituted only after further information from Dr. Maciejko advised claimant was still under treatment.

Harry Ney testified he is the employment supervisor and hourly wage administrator. He affirmed the wage information provided by George Pratt and offered that although the maximum pay grade in the foil mill (grade 19) was higher than in the shear department (grade 16) claimant's chances for advancement in the shear department (43 pay grade 16 positions out of 173 total department employees) were greater than in the foil mill (39 pay grade 19 positions out of 200 employees). He identified the employer's promotion policy as seniority based.

Claimant was referred to Dr. Maciejko by Dr. Bernas in September 1985, under a diagnosis of post-traumatic stress disorder. (Exhibit 2) By October 1985, Maciejko felt claimant had "shown a visible reduction in anxiety level" but much of this was likely due to the fact of his layoff status. (Ex. 5) By May 1986, claimant was on maintenance level therapy but could not "be said to have fully recovered from his stress disorder in the absence of contact with the work environment..." (Ex. 17, p. 7.) Claimant continued in active treatment until October 1986, when, according to Maciejko, "it was apparent that he had achieved maximum benefit under the present circumstances in his recovery..." (Ex. 7) Maciejko last saw claimant September 29, 1986 and on October 17, 1986 opined "on the whole, he has achieved functional recovery....I am, therefore, considering his case closed as recovered." (Ex. 8)

Claimant was last seen by Dr. Bernas November 6, 1986 who felt his burns had healed very well with no obvious scar contractures. Bernas opined that claimant "sustained 5% impairment

000620

based on reduced sensation of...burned skin." (Ex. 11) In July 1986, claimant indicated he was not hearing well and was referred to Robert D. Lelonek, M.D., for an audiogram which showed normal hearing in the right ear and minimal loss in the left ear. Lelonek stated "it is impossible for me to say...that the patient's hearing loss is definitely due to the recent accident." (Ex. 12) No treatment was recommended. (Ex. 17, p. 8) Claimant was seen on two occasions for the purpose of evaluation by Barry Lake Fischer, M.D. In November 1985, (Ex. 1) Dr. Fischer opined claimant sustained injuries resulting in permanent partial impairment of the person as a whole of 25 percent. Seen again one year later, his opinion did not change. (Ex. 9) Claimant was also seen by Thomas P. Dhanens, Ph.D., Clinical Psychologist, for psychological evaluation on October 17, 1986, who made a "professional judgment that the total loss is around 25% of the whole man." (Ex. 6)

APPLICABLE LAW

An employee is entitled to compensation for any and all personal injuries which arise out of and in the course of the employment. Section 85.3(1).

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 27, 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).

The term injury includes mental ailments or a nervous conditions which arise as a consequence of physical trauma. Deaver v. Armstrong Rubber Company, 170 N.W.2d 455, 466 (Iowa 1969).

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899, 902 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional disability is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the

000621

injured employee's age, education, qualifications, experience and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

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

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

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985); Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Iowa Code section 85.34(1) provides that if an employee has suffered a personal injury causing permanent partial disability, the employer shall pay compensation for a healing period from

000622

the day of the injury until (1) the employee returns to work; or (2) it is medically indicated that significant improvement from the injury is not anticipated; or (3) until the employee is medically capable of returning to substantially similar employment.

> By the very meaning of the phrase, a person with a "permanent disability" can never return to the same physical condition he or she had prior to the injury.....See, 2 A. Larson, The Law of Workmen's Compensation § 57.12 (1981). The healing period may be characterized as that period during which there is reasonable expectation of improvement of the disabling condition," and ends when maximum medical improvement is reached. Boyd v. Hudson Pulp & Paper Corp., 177 So.2d 331, 330 (Fla.1965). That is, it is the period "from the time of the injury until the employee is as far restored as the permanent character of his injury will permit." Winn Drilling Company v. Industrial Commissioner, 32 Ill.2d 144, 145-6, 203 N.E.2d 904, 905-6 (1965). See also W. Schneider, Schneider's Workmen's Compensation, § 2308 (1957). Thus, the healing period generally terminates "at the time the attending physician determines that the employee has recovered as far as possible from the effects of the injury. Winn, 203 N.E. at 906.

Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 65 (Iowa 1981).

A healing period may be interrupted by a return to work. Riesselman v. Carroll Health Center, 3 Iowa Industrial Commissioner Reports 209 (Appeal Decision 1982).

Iowa Code section 85.34(2) provides that compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code section 85.34(2)(u) provides that compensation for a nonscheduled or body as a whole injury shall be paid in relation to 500 weeks that the disability bears to the body as a whole.

ANALYSIS

With the exception of the alleged hearing loss, claimant has shown a causal connection between his disability on which he now bases his claim and his injury of June 27, 1985. Reviewing the opinion of Dr. Lelonek, along with the audiograms performed both before and after the accident as well as the claimant's testimony, it cannot be found that the claimant first, has any definable hearing loss and second, that any perceived hearing loss can be attributed to the injury of June 27, 1985. However, claimant

000623

attests to excellent health, both mental and physical, prior to the injury and it cannot be disputed his injury has caused him disability.

The question of particular importance to be resolved is the amount of permanent partial disability had by the claimant. Claimant is 35 years old and has made his way as a manual laborer. He has no apparent specialized training in any other field and appears to be of average intellectual ability.

It is accepted that the claimant currently possesses an inability to withstand being near to or working with heat producing equipment. As a result, his chances of advancement at his present employment are somewhat limited, in that he is restricted from working in all parts of the plant. However, he is currently employed in a position paying a higher wage with a greater potential for promotion than the position he held at the time of his accident. It is obvious his employer is willing to work with the claimant within his employment restrictions. He appears motivated, thoroughly able to perform all of the responsibilities of his job and has missed no further work as a result of the injury since November 17, 1986. There is no question he has an increased sensitivity of his skin as a result of the burns. However, he is not currently under any continued medical care and there appears to be minimal interference with his activities as a result of the scarring. While claimant testified extensively how his psychological trauma has interfered with his personal and family life, industrial disability relates to the loss of earning capacity not the loss of lifestyle. The latter is only relevant as it affects the former. While claimant may have had to make adjustments in his lifestyle, the adjustments have not significantly affected his earning capacity.

Claimant was regularly seen by Drs. Bernas and Maciejko throughout his recuperation. He was seen for evaluation only by Drs. Fischer and Dhanens. Dr. Fischer opined claimant's impairment to be 25 percent of the person as a whole. Dr. Dhanens, in his report of psychological evaluation, states "there being a lack of established professional guidelines for determining psychological disability, such as there is for orthopedic disability, for example, I would make a professional judgement that the total loss is around 25% of the whole man." It is troubling that Dr. Dhanens refers to "disability"--which is for the trier of fact to determine--rather than "impairment"--which is the domain of the witness. It appears Dr. Dhanens is invading the province of the industrial commissioner when rating claimant's industrial disability rather than evaluating only his functional impairment. Wright v. Walter Kidde Company, 33 Biennial Report of the Industrial Commissioner 237 (Appeal Decision 1977). For this reason, the opinion of Dr. Dhanens is given little weight. Dr. Bernas opined that claimant sustained a five percent impair-

ment based on reduced sensation of the burned skin and Dr. Maciejko has rated the claimant as functionally recovered.

The opinions of Drs. Bernas and Maciejko will be accepted as being entitled to greater weight than Drs. Fischer and Dhanens. Dr. Bernas regularly treated and last saw the claimant and had a greater opportunity to evaluate claimant's impairment over a longer period of time. Likewise, Dr. Maciejko had the opportunity to take the claimant from his lowest point in post-traumatic stress to his ability to return to work. Considering then, the elements of industrial disability, it is found that claimant sustained an eight percent disability for industrial purposes as a result of his injury of June 27, 1985.

The last question for resolution then becomes the determination of the healing period. Claimant prays for a healing period from June 27, 1985 through September 15, 1985, inclusively, and September 30, 1985 through November 16, 1986. Defendants assert claimant reached maximum healing as of May 22, 1986, but, at the latest, the period should end September 29, 1986.

It is recognized there are three possible dates healing period could end: May 22, 1986, when Dr. Maciejko wrote "present plans are to continue periodic, maintenace level therapy, with further therapeutic adjustments as necessary when he returns to work." (Ex. 17, p. 7); October 1, 1986, when claimant was released from care after his last appointment with Dr. Maciejko September 29, 1986; and November 17, 1986 when claimant returned to work. The industrial commissioner has repeatedly held that healing period does not continue when a claimant is receiving treatment that is maintenance in nature. Derochie v. City of Sioux City, II Iowa Industrial Commissioner Report 112 (Appeal Decision 1982). While argument could be made that the claimant's treatment from May 22 through October 1 was maintenance level, when consideration is given to Dr. Maciejko's later statements and claimant's own testimony on his treatment during that period of time, it is evident that the treatment given after May 22 was more than maintenance level. However, by October 1986, claimant was considered functionally recovered and his case closed. Maciejko opined that by this time, the claimant achieved maximum benefits in his recovery from his post-traumatic disorder. It is, therefore, found that the claimant's healing period includes the period from June 22, 1985 through September 15, 1985, inclusive, and September 30, 1985 through October 1, 1986, inclusive. In accordance with Iowa Code section 85.34(2), permanent partial disablity benefits shall commence October 2, 1986.

## FINDINGS OF FACT

WHEREFORE, based on the evidence presented, the following facts are found:

000625

1. Claimant is a 35 year old manual laborer with no specialized training.

2. Claimant suffered an injury June 27, 1985, when a foil mill exploded causing burns to his face, neck, head, torso, and upper extremities requiring hospitalization and medical treatment.

3. Claimant was released from medical care, returned to work September 15, 1985, and worked until September 28, 1985, at which time he came under the care of Joseph S. Maciejko, Ph.D., Clinical Psychologist, for treatment of post-traumatic stress disorder and was unable to work.

4. Claimant was last seen by Dr. Maciejko September 29, 1986, and was termed functionally recovered as of October 1986.

5. Claimant was released to return to work with the restrictions that he not be placed in a work setting similar to that where he was injured.

6. Claimant returned to work November 17, 1986 and is working in an environment compatible with his medical restrictions.

7. Claimant's wages have increased since his injury and his chances for promotion are greater currently than before his injury.

8. Claimant is able to perform all the responsibilities of his job, has missed no work as a result of his injury since November 17, 1987, has not been under the care of any health care provider since his return to work, has not complained to company medical personnel, and has been working more hours per week on the average since his injury than before.

9. Claimant is sensitive to cold, sun, heat producing equipment, solvents and has some difficulty with overhead lifting and arm fatigue.

10. Audiograms show any loss of hearing to the claimant is minimal and not requiring treatment.

11. Claimant has an eight percent (8%) industrial disability as a result of his injury.

## CONCLUSIONS OF LAW

WHEREFORE, based upon the principles of law previously stated, the following conclusions of law are made:

1. Claimant has established by a preponderance of the evidence a causal connection between his injury and the disability

on which he now bases his claim except he has not met his burden of establishing a causal connection between his perceived hearing loss and his injury.

2. Claimant is entitled to healing period benefits from June 27, 1985 through September 15, 1985, inclusive, and September 30, 1985 through October 1, 1986, inclusive.

3. Claimant has met his burden of proving an industrial disability of eight percent (8%) as a result of his June 27, 1985 injury.

ORDER

THEREFORE, IT IS ORDERED:

Defendant is to pay unto claimant sixty four (64) weeks of healing period benefits at the stipulated rate of three hundred thirty-seven and 78/100 dollars ($337.78) per week.

Defendant is to pay unto claimant forty (40) weeks of permanent partial disability benefits at a rate of three hundred thirty-seven and 78/100 dollars ($337.78) per week commencing October 2, 1986.

Defendant shall receive full credit for the ninety-five point 247 (95.247) weeks of compensation previously paid.

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

A final report shall be filed upon payment of this award.

Costs of this action are assessed against the defendant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 26th day of October, 1987.

Deborah A. Dubik
DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Peter M. Soble
Attorney at Law
505 Plaza Office Building
Rock Island, Illinois 61201

000627

Mr. Thomas N. Kamp
Attorney at Law
600 Davenport Bank Bldg.
Davenport, Iowa 52801

000048

000627A

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

---

DARLENE JUNGE,

Claimant,

vs.

CENTURY ENGINEERING,

Employer,

and

FIREMAN'S FUND INSURANCE COMPANY, and EMPLOYERS INSURANCE OF WAUSAU,

Insurance Carriers,
Defendants.

File Nos. 618141/662314

O R D E R

N U N C

P R O

T U N C

FILED

FEB 10 1987

IOWA INDUSTRIAL COMMISSIONER

---

Review of the appeal decision filed February 4, 1987 reveals the following errors which need correction:

On page 5, in the second paragraph, the second sentence should read: David W. Johnson, D.C., who has examined claimant, opines in a medical report dated July 20, 1982 that claimant's back problems in May 1979 were the result of physical instability from her foot/work-related injury.

On page 9, the first sentence in the last paragraph should read: Finally claimant argues that the ruling of February 11, 1986 denying claimant expenses following defendants' cancellation of Dr. Coates' deposition on March 16, 1983 is in error.

On page 11, following the second paragraph, this sentence should appear: WHEREFORE, the decision of the deputy as to file no. 662314 is affirmed.

On page 11, the first paragraph of the order should read: That defendants Century Engineering/Wausau pay unto claimant two hundred sixteen dollars ($216.00) for a section 85.39 examination (exhibit 4, item 5) and thirty-three and 84/100 dollars ($33.84) for mileage incurred in the section 85.39 examination (141 miles at $.24/mile) (exhibit 2).

On page 11, an additional paragraph of the order should read: That each party shall bear the costs of producing their own evidence and the cost of the attendance of the shorthand reporter and the transcript shall be shared equally.

000043
000627A

Signed and filed this 10 day of February, 1987.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert R. Rush
Attorney at Law
526 Second Avenue, S.E.
P.O. Box 2457
Cedar Rapids, Iowa 52406

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

Mr. Steven Udelhofen
Attorney at Law
1000 Des Moines Bldg.
Des Moines, Iowa 50309

000056

000627A

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

| | | |
|---|---|---|
| DARLENE JUNGE,<br><br>Claimant,<br><br>vs.<br><br>CENTURY ENGINEERING,<br><br>Employer,<br><br>and<br><br>FIREMAN'S FUND INSURANCE COMPANY, and EMPLOYERS INSURANCE OF WAUSAU,<br><br>Insurance Carriers,<br>Defendants. | : | File Nos. 618141/662314<br><br>A P P E A L<br><br>D E C I S I O N<br><br>FILED<br><br>FEB 24 1987<br><br>IOWA INDUSTRIAL COMMISSIONER |

STATEMENT OF THE CASE

Defendants Century Engineering/Wausau appeals and claimant cross-appeals from a proposed consolidated, review-reopening and arbitration decision awarding certain medical expenses, costs, mileage, 31 3/7 weeks of healing period benefits, and 18 weeks of permanent partial disability under Iowa Code section 85.34(2). Claimant also appeals from a ruling in this matter filed February 11, 1986. As the ruling of February 11, 1986 is an integral part of this proceeding, its resolution on appeal can best be expedited by consideration at the same time as the main appeal.

The record on appeal consists of the transcript of the consolidated proceeding; claimant's exhibits 1 through 5 and 7 through 9; defendants' exhibits A through J; and the transcript and exhibits of the prior proceeding in file 618141 which are contained in the Industrial Commissioner's file. All parties filed briefs on appeal and cross-appeal.

ISSUES

Defendants Century Engineering/Wausau contend that claimant must prove by a preponderance of the evidence a change of condition since September 2, 1980 and that this change of condition is proximately caused by the industrial injury and not to other conditions found not to be related.

Defendants Century Engineering/Wausau further contend that

000051

000627

claimant is not entitled to healing period benefits.

Defendants Century Engineering/Wausau further contend that claimant has failed to establish that certain costs and expenses incurred by the claimant were the result of an employment-related injury.

Defendant Wausau contends that the costs of this consolidated proceeding should be apportioned between the two cases.

Claimant states the issues on cross-appeal as:

1. The deputy erred in his rulings of February 25, 1985 and March 13, 1985 which denied claimant the opportunity to depose John Bickel and obtain documents

2. The deputy erred in his ruling of July 17, 1985, excluding the medical report of Dr. David E. Naden

3. The deputy erred in his ruling of July 17, 1985, July 18, 1985 and August 8, 1985, denying a motion for continuance sought by claimant and Century/Fireman's Fund

4. The deputy erred in his ruling of September 13, 1985, in failing to find claimant sustained an injury to her her [sic] body as a whole

5. The deputy applied incorrect weekly rates in awarding benefits to claimant

6. The deputy erred in his September 13, 1985 ruling in the expenses awarded for the section 85.39 examination

7. The deputy erred in admitting exhibit K (Dr. Coates' Deposition of June 11, 1984)

8. The deputy erred in his ruling by failing to award medical expenses in accordance with section 85.27

9. The deputy erred in failing to award claimant the full cost of the deposition of Dr. Albert Coates on July 23, 1984

10. The deputy erred in failing to admit claimant's exhibit 6 (Dr. Naden's Report)

11. It was prejudicial error to receive into

000052

0006274

evidence respondent's exhibit B ("Medical Report" prepared by Attorney John Bickel)

12. It was prejudicial error to receive into evidence exhibit A (Dr. Pilcher's letter of July 12, 1983)

13. Errors preserved

14. The Deputy Erred In His Ruling of February 11, 1986 Denying Claimant Expenses Following Respondent Cancellation of Dr. Albert Coates Deposition on March 16, 1983.

REVIEW OF THE EVIDENCE

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

Briefly stated, claimant sustained a work-related aggravation of a preexisting congenital foot problem for which she was awarded temporary total disability benefits but was not found to have sustained any permanent disability in an appeal decision filed August 18, 1981. With regard to her congenital problems the following findings of fact were made:

7. Claimant is predisposed to form callus. (Coates, page 8-9)

8. Claimant has a cavus foot, an unusually high arch, which is a congenital condition. (Coates, page 9-10)

9. By March 1977, claimant had virtually no pain in her left heel. (Coates, page 29)

10. The tendency to form callus and the cavus foot are the geneses of the claimant's problems. (Coates, page 10)

11. The full weight-bearing upon the left foot was a probable irritation to her foot problem. (Coates, page 11)

12. Dr. Coates saw claimant December 6, 1978 for pain between the third and fourth toes caused by a neuroma and for a painful bunion. (Coates, page 15-16)

13. The neuroma and bunion were not caused by her employment. (Coates, page 16-17)

000055
0006274

14. The neuroma was aggravated by the work. (Claimant's exhibit 8, Coates report 1-2-79)

15. Claimant had a bunionectomy, a realignment of the great toe and excision of the neuroma. (Coates, 16-17)

16. Claimant was treated by Dr. Coates on September 5, 1979 for a continuation of her left foot problems and also treated in December 1979. (Coates, page 19)

17. Claimant was hospitalized in January 1980 to correct a hammertoe condition on the second, third and fourth toes and to do an osteotomy of the second metatarsal. (Coates, page 20)

18. The callus under the metatarsal head was aggravated by chronic weight-bearing. (Coates, page 20)

19. The hammertoes were caused by the cavus foot. (Coates, page 20)

20. The major reason for the January 1980 hospitalization was to correct the hammertoe conditions. (Coates, page 23)

21. The treatment of the plantar callus during the January 1980 hospitalization was coincidental to the treatment of the hammertoes conditions. (Coates, page 23,26)

22. The recuperation period after treatment by metatarsal osteotomy is two months. (Coates, page 23)

23. Claimant has not returned to work since the January 1980 hospitalization. (Coates, page 23)

24. On May 27, 1980, claimant had an oblique osteotomy of the third metatarsal and a tendolysis to the left foot. (Coates, page 24)

25. The necessity for the surgery on May 27, 1980 arose subsequent to the January 1980 surgery. (Coates, page 25)

26. The surgery of May 1980 was not caused or aggravated by the employment but was to correct congentital anomalies. (Coates, page 25,26)

500054
0006274

In this proceeding claimant presents evidence concerning a subsequent surgery and further time off work. The surgery which was performed on January 19, 1981 by Albert R. Coates, M.D., was a p.i.p. fusion of the left great toe. Prior to this surgery claimant had a temporary flare-up of her foot problems on October 28, 1980. Dr. Coates subsequently released claimant to return to lighter work on October 31, 1981. He opines that this flare-up resulted in no permanent disability or change in her preexisting condition. He also states that the surgery of January 17, 1981 is not specifically related to her flare-up on October 28, 1980.

Claimant has also experienced some back problems; however, the record does not reflect that these back problems are related to claimant's work. David W. Johnson, D.C., who has examined claimant, opines in a medical report dated July 20, 1982 that claimant's back problems at that time were the result of physical instability from her foot/work-related injury. However, it should be noted that claimant's disability prior to September 2, 1980 is res judicata as a result of the appeal decision filed August 18, 1981.

Finally, claimant states in exhibit 3 that she has been off work for a total of 31 weeks and 3 days in 1980, 1981, 1983, and 1984.

## APPLICABLE LAW AND ANALYSIS

The deputy in the proposed decision stated that claimant need not establish a change of condition to recover additional disability benefits as the appeal decision filed in this case on August 18, 1981 left open the question of whether the claimant sustained any permanent impairment or disability. However, the following portions of that decision and the subsequent appeal ruling September 28, 1982 clearly indicate that the issue of permanent disability was considered in the August 1981 appeal decision and it was determined that claimant had not made a showing of permanent partial disability related to the work injury.

Thus, there was an injury which is compensable under the Iowa Workers' Compensation Law. The extent of the disability caused by the injury, however, is temporary only because there is no showing that claimant's work injury prevented her from returning to work after March 1980. The evidence showed two surgeries in 1980, one in January and one in May, and most conclusively showed that the May 1980 surgery was not work-connected and was not the cause of claimant's extended disability.

000055
000627A

Finally, there was no showing of any permanent partial disability which was caused by the work injury.

(Appeal Decision, August 18, 1981, page 2)

The decision of August 18, 1981 conclusively established that the claimant's injury, as of September 2, 1980, the date of hearing, produced only a disability that was temporary. If the claimant now experiences permanent disability or even additional temporary disability as the result of industrial injuries previously found, she is able to reopen the previous award under Iowa Code section 85.26(2).

It is noted that the extent of claimant's disability before September 2, 1980 is res judicata by virtue of the August 18, 1981 decision. It is therefore claimant's burden to prove that her condition has changed since September 2, 1980 and that this change in condition is proximately caused by the industrial injury and not to other conditions found not to be related. Insofar as the claimant has not had an opportunity to present any evidence as to this contention, a genuine issue of fact remains and dismissal is not proper.

(Ruling on Appeal, September 28, 1982, pp. 2-3)

Therefore, for claimant to reopen this matter for award of additional disability she must first establish a change of condition causally related to her industrial injury.

The record in this case does not show that claimant has sustained a change of condition proximately caused by the prior industrial injury. The record shows that although claimant has had continuing foot problems, those problems are related solely to claimant's congenital foot defects and not her prior work aggravation of those congenital defects. With regard to the alleged injury of October 28, 1980, Dr. Coates, claimant's treating physician, states the following:

30 Oct 80: Recheck. Darlene's foot has flared up again. She was having to do some carrying and lifting at work. This is simply over-use on an otherwise abnormal. There's no other treatment other than to get her switched back into lighter work and I've given her a work release to that effect.

(Claimant's Exhibit 5, 7-18-85)

000056
000627 A

Dr. Coates further states in a letter dated May 5, 1982 the following:

> A specific question was asked as to the aggravation of any permanency secondary to aggravation of her foot condition on October 28, 1980. I saw this patient on October 30, 1980 with aggravation of her foot condition which I felt was an overuse syndrome from carrying and lifting objects at work. I did not find any specific increase in her deformity nor problems at that time and had given her a work release as of October 31, 1980 for lighter work. I had placed that work restriction on her on a permanent basis because I felt that she did have a chronic problem. She subsequently went on to a p.i.p. fusion of the left greater toe which was because of aggravation of her pre-existing condition and not specifically related to any flareup which she had sustained on the 28th of October, 1980. I don't feel that there is any change in her permanency nor specific change in her pre-existing condition because of her insult on October 28, 1980.

(Cl. Ex. 5, 7-18-85)

The preceding statement when considered with the record as a whole indicates that if any injury at all occurred on October 28, 1980 that injury resulted in temporary disability of a two day duration and therefore, it is not compensable. As claimant has shown no new injury or change in condition proximately related to her prior work aggravation injury she is not entitled to any temporary total disability benefits nor is she entitled to any medical expenses.

Claimant has raised a number of issues on cross-appeal which will be considered here. The first concerns a ruling of February 27, 1985 denying claimant the opportunity to depose defendant Century Engineering/Wausau attorney, John Bickel and obtain documents. That ruling correctly found that the information sought by claimant was privileged by the work product rule set out in Hickman v. Taylor, 329 U.S. 495 (1947). Claimant argues that defendants' exhibit 3 was prepared by John Bickel; however, claimant does not deny that exhibit was signed by Dr. Coates. Therefore, defendants' exhibit B is the statement of Dr. Coates and not Mr. Bickel. The ruling of February 25, 1985 is affirmed.

Claimant also argues that a ruling of July 17, 1985 excluding the medical report of David E. Naden, M.D., is in error and that the hearing deputy in the July 18, 1985 proceeding also erred in failing to admit that report (Cl. Ex. 6) The ruling of July 17, 1985 also denied a motion for continuance sought by claimant and Century Engineering/Fireman's Fund which claimant also contests

000052
000627A

on cross-appeal. With regard to the exclusion the medical report of Dr. Naden it is noted that this report was not served prior to the prehearing conference as required by Division of Industrial Service Rule 343-4.17, formerly Industrial Commissioner Rule 500-4.17:

> Service of doctors' and practitioners' reports. Each party to a contested case shall serve all reports of a doctor or practitioner relevant to the contested case proceeding in the possession of the party upon each opposing party. The service shall be received prior to the time for the prehearing conference. Notwithstanding 4.14(86), the reports need not be filed with the industrial commissioner; however, each party shall file a notice that such service has been made in the industrial commissioner's office, identifying the reports sent by the name of the doctor or practitioner and date of report. Any party failing to comply with this provision shall be subject to 4.36(86).
>
> This rule is intended to implement sections 86.8 and 86.18, The Code.

There was no demonstration of emergency to justify a continuance in this case. Therefore, the ruling of July 17, 1985 is affirmed.

Claimant cross-appeals arguments concerning impairment to the body as a whole, proper weekly rate, and medical expenses under section 85.27 need no further consideration as claimant has not shown a change of condition to reopen the award in file 618141 or a compensable injury for file No. 662314.

Claimant contests the deputy's award of $216.00 for her examination by Dr. Naden pursuant to section 85.39. Claimant argues that she is entitled to an additional $400 for Dr. Naden's "legal evaluation" as stated in claimant's exhibit 4. The record shows that this charge is for a four-page medical report by Dr. Naden which is excluded from the evidence in this case. Claimant is not entitled to recover costs of medical reports not admitted into evidence.

Claimant further contests the admission of deposition of Dr. Coates taken July 11, 1984. (Defendants' Ex. J) Claimant argues that this exhibit should not be admitted because the defendants did not give her notice that any witnesses would be called. However, this deposition was taken at claimant's request and claimant was present and participated in the examination of Dr. Coates on July 11, 1984. Claimant can hardly claim surprise in the admission of deposition in which she had an opportunity to participate. Moreover, the following stipulation appears on page 2 of Dr. Coates deposition taken July 11, 1984.

000058
000627

S T I P U L A T I O N

MR. RUSH: Gentlemen, may we agree the deposition of Dr. Coates is being taken at this time and place by agreement of counsel, it may be used as provided for in the Rules of Civil Procedure and in conformance with the Industrial Commissioner's Rules.

MR. BICKEL: That's agreeable.

MR. UDELHOFEN: So agreed.

(Dr. Coates Deposition, July 11, 1984)

It is apparent from this stipulation that claimant has waived any right to object to the use of this deposition at the hearing held on July 18, 1985. Claimant's objection is overruled.

Claimant further contests the award of $150.00 for the cost of taking Dr. Coates deposition on July 11, 1984. Claimant argues she should be allowed the full $375.00 which she was charged as stated in claimant's exhibit 4. Expert witness fees are covered by Iowa Code section 622.72, (1985) which states:

> Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed one hundred fifty dollars per day while so employed.

Therefore, the deputy was correct in allowing claimant $150.00 for the taking of Dr. Coates deposition.

Claimant further contests the admission into evidence of defendants' exhibits A and B. Claimant's objections to these exhibits go to the weight they should be given and not their admissability as evidence. There is no indication that these exhibits were given improper weight in the consolidated review-reopening decision of September 13, 1985 nor are those exhibits given substantial weight in reaching this decision. Claimant's objections are overruled.

Finally claimant argues that the ruling of February 11, 1986 denying claimant expenses following defendants' cancellation of the Dr. Coates deposition on March 16, 1983. That ruling found that the problems which led to cancellation were a result of claimant's actions in not allowing a free flow of medical

000053

000627A

information and that claimant's actions were in violation of section 85.27. Review of the record and the appeal decision filed March 13, 1984 supports the deputy's analysis in the ruling of February 11, 1986.

FINDINGS OF FACT

1. Claimant is predisposed to form callus.

2. Claimant has a cavus foot, an unusually high arch, which is a congenital condition.

3. Claimant's present foot and back problems are not related to any prior work aggravation she may have sustained.

4. Claimant sustained a temporary flare-up of her foot problem on October 28, 1980 which resulted in only a temporary disability of a two day duration.

5. Claimant's surgery on January 19, 1981 was the result of claimant's congenital problems and not her temporary flare-up of October 28, 1980.

6. Claimant's back problems are not related to her work.

7. The time claimant was off work from September 15, 1980 to June 19, 1984 was related to her congenital problems.

8. The medical expenses and transportation expenses set out in claimant's exhibits 1 and 2 are the result of claimant's congenital problems.

9. Defendants' exhibit B is signed by Dr. Coates and is his medical statement concerning the claimant's condition.

10. The medical report of Dr. Naden was not served prior to the prehearing conference.

11. The problems which led to the cancellation of Dr. Coates' deposition on March 16, 1985 were the result of actions in not allowing a free flow of information.

CONCLUSIONS OF LAW

Claimant has not established by a preponderance of the evidence her condition has changed since September 2, 1980 and that this change of condition is proximately caused by her industrial injury. Therefore, claimant is not entitled to an award of further benefits for file no. 618141.

Claimant has not established that the medical expenses in exhibit 1 or the transportation expenses listed in exhibit 2 are

000060

0006274

causally related to any work injury.

WHEREFORE, the decision of the deputy as to file no. 618141 is reversed.

Claimant has not established a compensable work injury of October 28, 1980.

The information sought by claimant's attempt to depose defendants Century Engineering/Wausau's attorney, John Bickel is privileged by the work product rule set out in Hickman, 329 U.S. 495.

WHEREFORE, the ruling of February 25, 1985 is affirmed.

The medical report of Dr. Naden was not served prior to the prehearing conference as required by Division of Industrial Services Rule 343-4.17, formerly Industrial Commissioner Rule 500-4.17. No demonstration of emergency justifying a continuance was made.

WHEREFORE, the ruling of July 17, 1985 is affirmed.

The problems which led to the cancellation were a result of claimant's actions in not allowing a free flow of medical information as required by section 85.27, The Code.

WHEREFORE, the ruling of February 11, 1986 is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants Century Engineering/Wausau pay unto claimant two hundred sixteen dollars ($216.00) for mileage incurred in the 85.39 examination (exhibit 2) (141 miles at $.24/mile)

That defendants Century Engineering/Wausau pay unto claimant two hundred forty-three dollars ($243.00) for costs in file numbers 618141 and 662314 as set out in exhibit 4; item 4 is reduced to one hundred fifty (150) in accordance with Iowa Code section 622.72.

Signed and filed this 4 day of February, 1987.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

000061
0006274

Copies To:

Mr. Robert R. Rush
Attorney at Law
526 Second Avenue, S.E.
P.O. Box 2457
Cedar Rapids, Iowa 52406

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

Mr. Steven Udelhofen
Attorney at Law
1000 Des Moines Bldg.
Des Moines, Iowa 50309