Iowa Industrial Commissioner

Decisions

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DECISIONS OF THE IOWA
INDUSTRIAL COMMISIONER
1987

000628

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IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD D. KELLEY, Claimant, vs. ANDERSON-ERICKSON DAIRY, Employer, and EMPLOYERS MUTUAL INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File Nos. 779013 840143 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This decision concerns two arbitration proceedings as identified in the caption, brought by Donald D. Kelley, claimant, against his employer, Anderson-Erickson Dairy, and Employers Mutual Companies, the employer's insurance carrier. Claimant seeks an award of compensation for permanent partial disability as a result of the injuries to his left knee which were sustained on October 27, 1984 and May 6, 1985. The case was heard at Fort Dodge, Iowa on September 8, 1987 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Donald D. Kelley, the claimant, and from Thomas Davidson, the safety and labor relations director for the employer. The record also contains claimant's exhibits one through ten and defendants' exhibit A.

ISSUES

The only issue presented for determination is the extent of claimant's permanent partial disability resulting from the injuries. The defense contended that there was actually only one injury, that being the one of October 27, 1984. Claimant's entitlement to compensation for healing period has been completely paid, as stipulated by the parties, with the healing period having ended on April 6, 1986. Claimant has also been paid 28 weeks of compensation for permanent partial disability as stipulated by the parties. The rate of compensation is stipulated to be $282.65 per week based upon earnings preceeding the October, 1984 injury. The fighting issue is whether some

portion of claimant's current disability related to his left knee is related to a football injury from his teenage years and, resultantly, whether the employer should be relieved from paying some portion of the total currently existing disability affecting claimant's left knee and leg.

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.

Donald D. Kelley is a 37-year-old milk product relief delivery driver who has been employed by Anderson-Erickson Dairy since 1978. In his work he operates three different types of trucks, all of which utilize a manual transmission. He performs both retail and wholesale deliveries. The retail deliveries involve frequent exiting and entering of the delivery truck while carrying relatively small quantities of milk products. Wholesale delivery involves approximately 20 deliveries per day which involve larger quantities of product, but less entering and exiting from the delivery vehicle.

Kelley suffered a football injury affecting his left knee during the 1967 season when he was in high school. In January, 1968, open surgery was performed on the knee which revealed a torn anterior horn of the medial meniscus. At the time of surgery it was indicated that claimant's anterior cruciate ligament was possibly torn, but that it did appear to be stable (claimant's exhibit 1-3). Following that surgery, claimant made an uneventful recovery and was discharged from medical care. His medical records do not show any further knee complaints or problems until the October 27, 1984 injury, consistent with claimant's testimony (claimant's exhibits 1-5, 2-1 through 2-5).

Claimant testified that the first of the two injuries upon which he bases his claims occurred in October, 1984 while he was delivering milk to a fraternity in Ames, Iowa. He testified that while backing out of the truck, pulling milk to the door, he stepped out of the truck onto the rear bumper step of the truck and heard or felt a "pop" in his left leg which was accompanied by the onset of pain. Claimant drove the truck back to the dairy office in Ames and a replacement driver completed the work. Claimant then went to the Trinity Regional Hospital emergency room at Fort Dodge, Iowa, a hospital near his residence at Otho, Iowa, where he was treated conservatively and instructed to take time off work (claimant's exhibit 3). Claimant was referred to T. C. Buchanan, M.D., an orthopaedic surgeon. When claimant's symptoms did not resolve, arthroscopic surgery was performed on December 13, 1984 in which it was found that there was fraying and a flap tear of the retained anterior horn of the

medial meniscus. The anterior cruciate ligament was noted to be absent. The flap tear and fraying of the meniscus was removed (claimant's exhibit 4-8). After recuperating, claimant was fitted with a knee brace to use at work and returned to work, even though he continued to have pain in the knee (claimant's exhibit 4-4).

Claimant testified that, in late April or early May, 1985, while he was reloading the truck at the dairy in Ames, his leg went out on him while he was on some wooden steps at the dairy. He testified that he experienced increased discomfort in his leg and again reported the injury to his employer. Claimant stated that no replacement was available and that he finished the deliveries of the day. On the following day, another person was provided to go along and make the actual deliveries at the locations to which claimant drove the truck. After training the substitute driver for approximately one week, claimant saw the company doctor and was immediately referred to Scott B. Neff, D.O. In September, 1985, Dr Neff performed an upper tibial osteotomy on claimant's left knee. Following recovery from the surgery and an extended period of rehabilitation for the leg, claimant was fitted with a pro-am leg brace which he wears at work, but does not wear when off work. Claimant stated that he has no problem in his nonemployment activities when he is not using the brace. Claimant testified that he still has some pain in the knee occasionally, but that it is not severe. He stated that he is now more cautious of his left leg and tries to do things using the right leg rather than the left. He indicated that he has reduced some of his activities since the 1984 injury.

Thomas Davidson, the Anderson-Erickson safety and labor director, confirmed claimant's testimony of his reporting of the injuries and of claimant continuing to complain of pain in his knee following the first surgery that was performed by Dr. Buchanan. Davidson testified that, since claimant's final return to work, he has been performing the same job, in an excellent manner, without complaints of pain.

When claimant was initially examined by Dr. Neff, Dr. Neff did not have the benefit of the records and reports resulting from claimant's earlier treatment by Dr. Buchanan. It was his impression, however, that claimant had anterior cruciate ligament instability that appeared to be related to old ligament damage related to the football injury (claimant's exhibit 6-1). In the course of treatment, an upper tibial osteotomy was performed on August 27, 1985 (claimant's exhibit 6-6).

In regard to this claim, Dr. Neff stated that it was impossible to tell if claimant slipped and injured the leg at work or if the knee simply gave way due to instability resulting from the football injury. He stated that claimant had a significant

problem related to the football injury, but with which claimant was dealing and functioning normally. He stated that, according to claimant's history, the injury at work worsened the condition of the leg (claimant's exhibit 6-9).

Following the extended recovery and rehabilitation, claimant was fitted with a brace for instability that was due to the lack of claimant's anterior cruciate ligament and claimant found the brace to be beneficial (claimant's exhibits 7 and 8).

Mark B. Kirkland, D.O., indicated that there was no rational way to separate claimant's prior (football) injury from the work injury, but he assumed that the original problem started in 1968 and that when the anterior cruciate ligament is torn, things go from bad to worse (defendants' exhibit A).

APPLICABLE LAW AND ANALYSIS

The only issue to be determined is the extent of permanent partial disability that was proximately caused by claimant's work injuries. In this regard, claimant's symptoms started with the 1984 injury and continued until they were worsened by the 1985 injury. Claimant's testimony regarding both incidents is accepted as being true and correct. Claimant never completely recovered from the 1984 injury and it is found that the 1985 incident was merely an aggravation which, of itself, plays no substantial part in the overall residual permanent disability. All of the permanent disability that has resulted from the work injuries is found to be related to the 1984 incident rather than the 1985 incident. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. Blacksmith v. All American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). "If a workman already has some disability...and his disability is increased by compensable injury, he is entitled to compensation to the extent of the increased disability..." DeShaw v. Energy Manufacturing Company, 192 N.W.2d 777, 780 (Iowa 1971). "Apportionment of disability between a preexisting condition and an injury 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). If no apportionment can be made the defendant is responsible for the entire damage. Becker v. D & E Distributing Co., 247 N.W.2d 727, 731 (Iowa 1976). The plaintiff is not charged with a burden of proof as to the actual apportionment of damages. Any burden of that nature must be assumed by the defendant, since the defendant is the party standing to gain by litigating the apportionment issue. 2 Damages in Tort Actions, § 15.34(1)(a); Wonder Life Company v. Liddy, 207 N.W.2d 27 (Iowa 1973).

Claimant's permanent disability was properly stipulated by

the parties to be a scheduled member disability of the leg compensable under section 85.34(2)(o) of the Code. Thomas W. Bower, L.P.T., and Dr. Neff have jointly rated claimant as having a 28% impairment of the left lower extremity. In making the rating, it appears that they did not attempt to apportion the disability between the work injuries and the prior football injury (claimant's exhibit 8). The evidence in the record does not make any such apportionment and indicates that apportionment would be difficult, if not impossible. The Guides to the Evaluation of Permanent Impairment published by the American Medical Association has been adopted as a guide for determining permanent partial disabilities such as the one now under consideration (section 343-2.4, I.A.C.). The rule permits use of the guide and makes its provisions a prima facia evidence of the degree of disability. It does not, however, prohibit consideration of other methods of assessing permanent partial disability in scheduled members. There was clearly some preexisting permanent partial disability in claimant's left leg. The current issue of the Guides, at page 39, provides for a 10% impairment rating of the leg based upon the simple fact that a meniscectomy has been performed and 10-20% impairment for anterior cruciate ligament loss. A 30% rating would appear warranted at the present time. Since claimant seemed to get along well following recovery from the football injury, and the anterior cruciate ligament was stable, it would appear that a permanent partial disability of approximately 10% of the left leg preexisted the 1984 employment injury.

The rating from Dr. Neff and Mr. Bower in their report (claimant's exhibit 8) clearly shows that claimant was fitted with the brace in order to prevent buckling which resulted from the instability in the left knee caused by the absence of the anterior cruciate ligament. A brace is a type of orthrosis. At page 38 of the Guides, it is provided that a 50% impairment of the lower extremity is appropriate if instability requires the use of an orthrosis. It does not appear that Dr. Neff or Mr. Bower considered that provision from the Guides when making their impairment rating. To the contrary, it appears that their rating was based entirely upon a Cybex evaluation. Claimant uses the brace only for his work, which appears to be rather stressful to his knees. He does not use it for his nonemployment activities and stated that he gets along well without it when he is off work. When the fact that the brace is not used continuously and the rating from Dr. Neff are considered, it is found that claimant's total impairment of his left leg is currently in the range of 30%. When the preexisting 10% impairment is subtracted, it is found that claimant sustained a 20% permanent partial disability of his left leg as a result of the October 27, 1984 injury. This entitles him to receive a total of 44 weeks of compensation for permanent partial disability. After deducting the 28 weeks previously paid, the remaining net balance is 16

weeks.

Defendants filed an Offer to Confess Judgment for the amount of 18%, an amount less than the amount awarded herein. Accordingly, the costs of this action are assessed against defendants in the amount of $65.89.

FINDINGS OF FACT

1. On October 27, 1984, and also during April and May of 1985, Donald D. Kelley was a resident of the state of Iowa employed by Anderson-Erickson Dairy in the state of Iowa.

2. Claimant was injured on both of those dates while performing activities that were a part of his employment.

3. Claimant has been paid all healing period compensation due during his treatment and recovery which ended April 6, 1986.

4. Claimant has also been paid 28 weeks of compensation for permanent partial disability.

5. Donald D. Kelley and Thomas Davidson are both found to be fully credible witnesses.

6. As between the two work injuries, the one of October 27, 1984 is primarily responsible for the permanent disability in claimant's left leg that resulted from either or both of those work injuries.

7. Claimant has a 30% permanent partial impairment of his left leg, of which 10% preexisted October 27, 1984 and is related to a high school football injury.

8. Claimant has a 20% permanent partial disability of his left leg that was proximately caused by his 1984 employment injury.

CONCLUSIONS OF LAW

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

2. Donald D. Kelley sustained injury to his left leg on October 27, 1984 which arose out of and in the course of his employment with Anderson-Erickson Dairy.

3. Donald D. Kelley sustained injury to his left leg in late April or early May, 1985, which arose out of and in the course of his employment with Anderson-Erickson Dairy.

4. The 1985 injury was only an aggravation and is not a proximate cause of permanent disability in the left leg.

5. As between the 1984 and 1985 injuries, all resulting permanent partial disability was proximately caused by the October 27, 1984 injury.

6. Defendants are not responsible for payment of compensation for the 10% permanent partial disability of the left leg which preexisted October 27, 1984 and which was a result of a high school football injury.

7. Defendants are responsible for compensation for a 20% permanent partial disability of claimant's left leg which was proximately caused by the October 27, 1984 employment injury.

8. When an Offer to Confess Judgment has been properly made and the claimant's recovery is less than the offered amount, the costs of the proceeding are to be assessed against the claimant.

9. A preexisting condition, such as some preexisting permanent impairment, is no defense to a claim for healing period or section 85.27 benefits, but it is a proper defense to a claim for permanent partial disability and an employer is not liable to pay compensation for the portion of the permanent partial disability which preexisted the on-the-job injury.

10. Where apportionment between a preexisting disability and an aggravation thereof cannot be made, the defendant is responsible for the entire disability.

11. The burden of proof concerning the basis for apportionment of disability shifts to the defendant once the claimant proves that the current compensable injury was a substantial factor in producing the current level of disability.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant forty-four (44) weeks of compensation for permanent partial disability at the stipulated rate of two hundred eighty-two and 65/100 dollars ($282.65) per week commencing April 7, 1986.

IT IS FURTHER ORDERED that defendants are given credit for the twenty-eight (28) weeks previously paid and are ordered to pay the remaining sixteen (16) weeks in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that the costs of this action are assessed against defendants pursuant to Division of Industrial Services' Rule 343-4.33 in the amount of sixty-five and 89/100

dollars ($65.89).

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 22nd day of September, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KAYLENE R. KIEWIET,

Claimant,

vs.

THE HAIR CLINIC,

Employer,

and

THE TRAVELERS,

Insurance Carrier,
Defendants.

File No. 805022

FILED

NOV 23 1987

IOWA INDUSTRIAL COMMISSIONER

NUNC PRO TUNC ORDER

An arbitration decision was filed herein on November 20, 1987. The following sentence was inadvertently omitted from the order section of that decision: That defendants pay healing period benefits from July 17, 1985 through August 27, 1986 at a rate of $77.46.

O R D E R

IT IS THEREFORE ORDERED that the order section of the arbitration decision filed on November 20, 1987 be amended by the addition of the following language: That defendants pay healing period benefits from July 17, 1985 through August 27, 1986 at a rate of $77.46.

Signed and filed this 23rd day of November, 1987.

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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230-0088
6/85

000637

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KAYLENE R. KIEWIET,

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000638

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KAYLENE R. KIEWIET,

Claimant,

vs.

THE HAIR CLINIC,

Employer,

and

THE TRAVELERS,

Insurance Carrier,
Defendants.

File 805022

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 Kaylene R. Kiewiet, claimant, against The Hair Clinic, employer, and The Travelers Insurance Company, insurance carrier, for benefits as a result of an alleged progressive, cumulative or gradual injury with disability commencing on or about July 17, 1985 or an aggravation of her preexisting back condition on or about that date. A hearing was held in Mason City, Iowa, on April 3, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant, Kathryn Schrot, Sue Kiewiet, Tom Kiewiet, and Ruth Henry; claimant's exhibits 1 through 15, except exhibit 14 which was not offered; and defendants' exhibits A and B. Both parties filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $77.46; that claimant was off work from the date of her alleged injury in July 1985 until August 27, 1986; that permanency benefits, if awarded, commence on August 28, 1986; and that the disputed medical bills are reasonable in amount.

ISSUES

The contested issues are:

1) Whether claimant received a cumulative, progressive or gradual injury that arose out of and in the course of her employment with The Hair Clinic or whether claimant established a material aggravation of her preexisting back condition;

2) Whether there is a causal relationship between claimant's alleged injury and her asserted disability;

3) Nature and extent of disability. In this regard, claimant invokes the odd-lot doctrine;

4) Whether claimant is entitled to medical benefits under Iowa Code section 85.27 and, if so, the extent of those benefits; and

5) The penalty issue under Iowa Code section 86.13 has been bifurcated.

SUMMARY OF THE EVIDENCE

Claimant testified that she was born on October 11, 1950, which makes her 37 years of age. Claimant graduated from high school in 1968. After high school, claimant attended Mankato State University in Mankato, Minnesota. Claimant ultimately attended James College of Hair Styling and graduated from this hair styling school in October 1984. Claimant then recounted her employment history. Claimant mentioned that she worked for a horse publication doing such things as ad work and writing articles. Claimant testified that she was paid a weekly salary while working for this publication and that she put the money back into the publication because she was a co-owner of the publication.

Claimant testified that she started working for The Hair Clinic in Thompson, Iowa, in the fall of 1984 after she completed her training at the hair college. Claimant last worked at The Hair Clinic in July 1985. Claimant started at The Hair Clinic for a weekly wage and then built a clientele and made money through commissions. Claimant liked the work. She did such things as cutting hair, shampooing, and also cleaned the floor and wet towels. Since mid-July 1985, claimant has not worked outside the home.

Claimant testified regarding her back history prior to July 1985. See exhibit 1. Exhibit 1, page 1, discusses an incident in mid-1967. Claimant also talks about a tobogganing incident in which she fractured her tailbone and was in bed for six weeks. Claimant testified that in late 1967 she became symptom free. Claimant then described an incident that occurred on August 22, 1970 when she fell off a horse breaking her right wrist and experiencing other physical problems. Claimant testified that she recovered from this incident and received a doctor's note in December 1970 that stated she had recovered.

Claimant then described an incident in July 1978 in which she tripped over a dog. She stated she was pregnant at the time. In August 1978, she did deliver a baby. Claimant experienced

pain in her right side above her wrist as a result of this incident. Claimant testified that this condition resolved itself.

Claimant testified that from July 1978 through July 1985 she did not have any physical problems and enjoyed her family during this time. She had no back restrictions or problems during this time period from July 1978 through July 1985. She did activities during this time periods such as working on the farm, gardening shoveling snow, and taking care of her children. She also cleaned the house during this time. She went roller skating during this time period and stated "anything we wanted to do we did."

Claimant then described her work at The Hair Clinic. Claimant stated that she stood in one position at The Hair Clinic and her back would start giving her a lot of pain as a result. Claimant stated that she stood over a shampoo bowl which was low and that she would bend over while doing this activity. It would take her five or six minutes to do one shampoo. Claimant first started experiencing pain at The Hair Clinic in her back in about January 1985. In the spring and summer of 1985 she experienced "a lot more pain." Claimant stated her pain was in the low back, left hip and down her left leg. Claimant initially did not complain to her employer but informed her employer of the problem in the spring of 1985. Claimant testified she did not miss any work prior to her separation from The Hair Clinic.

Claimant testified that she had particularly bad back problems when her employer was attending a convention and informed her employer, Ruth Henry, of the incident when she returned from the convention. Claimant saw a chiropractor in Forest City as a result of her back problem. See exhibit 6. Claimant saw the chiropractor from July 10, 1985 through July 24, 1985 but the chiropractor did not help her. Claimant then went to see A. J. Wolbrink, M.D., an orthopedic surgeon.

Claimant testified to what she called a "stairs incident" in 1985. Her left foot went out from under her when she was going down her basement stairs and this caused a little more pain for a short period of time. Claimant had right hip complaints in October 1985. Currently, claimant does not have any right hip complaints.

Claimant testified that Dr. Wolbrink thought exercises would strengthen her back. Claimant did the exercises recommended by Dr. Wolbrink, but her condition has stayed about the same.

Claimant testified of an incident on March 10, 1986 in which she slipped going between two school buses. She stated she slipped on the ice but did not fall down hard. This occurred

because claimant "lost control of her painful left leg." Claimant experienced short periods of pain and then went back to normal.

In August 1986, claimant was given restrictions of no sitting or standing for any length of time. Claimant was also given weight restrictions. Claimant testified that she doesn't feel she can do anything currently. She stated she can cook for short periods of time. She can't roller skate anymore. Claimant lies down most of the time. Claimant needs support when she is in a car and needs to get out of the car to walk. Claimant puts pillows under her knees at night.

Claimant testified that in October 1986 Dr. Wolbrink informed her there was nothing else he could do for her. Claimant has gone to a vocational rehabilitation center in Mason City and seen a vocational rehabilitation counselor. Claimant was not sent to any potential employers by this vocational rehabilitation counselor. Claimant stated that she would like to work. Claimant stated she cannot work because her pain is "just too much."

Claimant testified that she saw John R. Walker, M.D., at her attorney's direction. See exhibit 10. Claimant saw Steven R. Adelman, D.O., at defendants' request. See exhibit 11. Dr. Adelman has concluded that claimant is not able to work. Claimant testified that she has gone to the Mayo Clinic and that they did testing.

Claimant testified that her lower back currently aches on the left side. Claimant stated that she has had the same physical complaints since mid-summer 1985. Claimant has not been able to find employment and stated she has had no help from defendants in this regard. Claimant stated that The Hair Clinic will not take her back. Claimant stated that she cannot do her former job as a hair dresser at this time. She stated that she has some good days and some bad days. Some mornings she is not able to get up at all. She stated that she can walk for a short period of time. Claimant has a corset she wears occasionally. Claimant is not utilizing a TENS unit nor is she currently having physical therapy. Claimant stated she has a hard time concentrating. She stated that she tries to "keep mobile" by walking up to get the mail. She testified that she must rest after any activity. She stated currently she cannot stand for any length of time.

On cross-examintion, claimant testified again that Ruth Henry was at a national convention when claimant had her most serious back problems. Claimant testified that her physical problems worsened when she had to do her own work and Ruth Henry's work while Henry was absent. Claimant acknowledged that she saw the chiropractor on July 10, 1985 prior to the worsening of her back condition. Claimant stated that while working for

The Hair Clinic she carried wet towels weighing twenty pounds that were used for shampooing. She stated that she did move to Buffalo Center at the end of May 1985, but then stated that she did not injure her back while moving. She also stated that she started jogging in 1981 and jogged until the fall of 1983.

Claimant testified that while shampooing at The Hair Clinic, she was "below the normal bending position for her." She testified that her height is five foot nine inches. Claimant was asked whether she had aggravated a congenital defect. See exhibit 9, page 1. Claimant testified that she never talked to Dr. Wolbrink about this. She acknowledged that some of the history set out by Dr. Walker in exhibit 10 is not correct; however, she stated that most of it is correct. Claimant testified that she and Ruth Henry ran the shop and after she left, Ruth Henry was alone in the shop. Claimant stated that prior to her leaving, the work load was increasing at The Hair Clinic. Claimant testified on redirect that all her medical bills and prescription drugs are related to her back condition.

Kathryn Schrot testified that she lives in North Makato, Minnesota, and has a B.A. in psychology. She also has a Masters Degree from The University of Wisconsin at Madison in vocational rehabilitation counseling. Schrot does evaluations of individuals with disabilities. She accesses their transferable skills and develops a goal or a plan for these individuals. She evaluates an individual to determine whether rehabilitaton is a viable option. Her goal is to get people back to work.

Schrot met with claimant and reviewed her medical records. Schrot also listened to claimant's testimony at hearing. Schrot then listed the various factors that she took into account in rendering opinions in this case. Specifically, Schrot mentioned, among other things, the jobs available in the centeral Iowa area, claimant's transferable skills and claimant's medical restrictions. Schrot stated that she does not think claimant is employable. Schrot stated her opinion that claimant is 100 percent vocationally disabled. Schrot stated her opinion that claimant is not able to gain employment in any well-known branch of the labor market. Schrot took Dr. Wolbrink's restrictions into account in making her judgments. Schrot mentioned that claimant's clerical skills are outdated. In any event, Schrot mentioned that with clerical jobs a person cannot sit or stand at will. Schrot did acknowledge that claimant's job search has been limited.

On cross-examinaton, Schrot acknowledged that she was first contacted about claimant's case in January 1987. Schrot first met claimant in March 1987 for a couple of hours.

Sue Kiewiet testified that she is claimant's sister-in-law. Between August 1984 through the summer of 1985, Sue Kiewiet saw

claimant on a weekly basis. Prior to the spring and summer of 1985, claimant was able to walk, dance, bicycle, and roller skate. Prior to the spring and summer of 1985, there was no indication that claimant had back or leg pain. In the spring or summer of 1985, claimant started complaining about leg pain. Claimant's physical problems have become progressively worse. Prior to the spring and summer of 1985, claimant did not complain of back or leg pain.

Tom Kiewiet testified that he is claimant's husband and they were married on August 1, 1984. Claimant did not have any physical restrictions from August 1984 through the spring and summer of 1985. In the spring of 1985, claimant and the witness moved from Thompson to Buffalo Center. Claimant was involved very little in this move. Claimant did not injure her back or legs in this move. During the spring of 1985, claimant complained of back problems and problems with her left leg. Claimant did not complain of right leg problem. Tom Kiewiet testified that since the spring or summer of 1985, claimant's condition has gotten worse. Tom Kiewiet testified that claimant is a "self starter." Claimant walks around during the night because of leg pain.

Ruth Henry testified that she has owned The Hair Clinic since about 1980. Henry testified that she first became aware of claimant's physical problems when she returned from a national convention. Henry stated that claimant's income while working for The Hair Clinic would vary based on the operation's schedule. Henry testified that claimant worked with customers on a daily basis for about four and one-half hours. Henry described claimant's other duties as dusting and carrying towels. Henry testified that claimant could occasionally read magazines and that claimant was given time to rest.

Henry testified that she saw claimant at a Fourth of July celebration on July 4, 1985 and that claimant did not have a back brace on, had her legs crossed, and her elbows were across her knees. Henry also testified that several weeks after this Fourth of July celebration she saw claimant at a fair with her legs crossed. Henry then testified that at a Britt, Iowa meeting, claimant was sitting on one of her legs in a chair. Henry testified that the national convention mentioned above was from about July 15, 1985 through July 24, 1985.

Claimant was recalled and testified that in May 1985 when she was moving she loaded items into boxes but that her husband loaded the family car. Claimant further testified that she unloaded light items but that her sister did the heavy work in this regard. Claimant denied that she was sitting on a leg in Britt, Iowa in Ruth Henry's presence. Claimant denied that she worked four and one-half hours per day with customers and also stated that the "majority of the time I was on my feet for most

1985 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

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).

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.

Finally, the Iowa Court stated in Blacksmith v. All-American,

Inc., 290 N.W.2d 348, 354 (Iowa 1980):

> A cause is proximate if it is a substantial factor in bringing about the result. See Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974). It only needs to be one cause; it does not have to be the only cause. See Langford v. Kellar Excavating & Grading, Inc., 191 N.W.2d at 670.

Traditional material aggravation theory, as set out above, is sufficient to impose liability in this case without exploring the intricacies of McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). In some cases, a material aggravation could occur over a period of time and in this event material aggravation theory would overlap with cumulative injury theory. In this case, claimant materially aggravated a preexisting back condition over a period of time. I am also convinced this process caused some permanent partial impairment to her whole body. Claimant acknowledged in her brief on page 3 that a "specific one-time acute accident" did not occur in this case. The determination of whether claimant sustained a work-related injury in this case is obviously a factual determination; in this regard, claimant was a credible witness at hearing.

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 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).

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 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 not convinced that claimant made a prima facie showing of odd-lot in this case because I am dissatisfied by her work search.

Kathryn Schrot acknowledged in her testimony that claimant made a "limited" work search. I am not convinced from the evidence of record that claimant's physical condition is such that she could not have made more than a "limited" work search. However, there is no question but that claimant has sustained a significant loss of earning capacity. Taking all appropriate factors into account, including her age and physical restrictions, it is determined that her industrial disability is 50 percent.

III. Claimant seeks an award of medical bills and pharmacy bills. The barriers to such an award have been resolved favorably to the claimant in prior divisions of this decision. Therefore, defendants shall pay the contested bills.

FINDINGS OF FACT

1. Claimant was born on October 11, 1950.

2. Claimant is a high school graduate.

3. Claimant started working at The Hair Clinic in Thompson, Iowa in the fall of 1984.

4. Prior to working at The Hair Clinic, claimant had a

preexisting back condition.

5. Claimant materially aggravated her preexisting back condition by engaging in employment activities at The Hair Clinc and this caused some permanent partial impairment to her whole body.

6. Claimant made a limited work search after separating from The Hair Clinic; claimant is not an odd-lot employee.

7. Claimant is currently not working outside her home.

8. Claimant did not injure her back when her family moved from Thompson, Iowa to Buffalo Center, Iowa in the spring of 1985.

9. Claimant was a credible witness at hearing.

10. Claimant's industrial disability is 50 percent.

11. Claimant's stipulated rate of weekly compensation is $77.46.

CONCLUSIONS OF LAW

1. Claimant established by a preponderance of the evidence that she sustained an injury that arose out of and in the course of her employment and that this injury caused some permanent partial impairment to her whole body.

2. Claimant established by a preponderance of the evidence that she sustained an industrial disability of fifty percent (50%) as a result of her work-related injury and resulting whole body permanent partial impairment.

3. Claimant is entitled to payment of the contested medical and pharmacy bills.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay claimant two hundred fifty (250) weeks of permanent partial disability benefits at a weekly rate of seventy-seven and 46/100 dollars ($77.46) with such benefits commencing on August 28, 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 contested medical bills.

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 as requested by the agency.

That this case be returned to docket for resolution of the Iowa Code section 86.13 penalty benefits issue.

Signed and filed this 20th day of November, 1987.

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EARL S. KINKEN, Claimant, vs. OSCAR MAYER FOODS CORP., Employer, Self-Insured, Defendant.	:	File No. 807685 A R B I T R A T I O N D E C I S I O N FILED JUL 20 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Earl S. Kinken, against his self-insured employer, Oscar Mayer Foods Corp., to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained October 19, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner in Davenport, Iowa, on May 20, 1987. A first report of injury was filed October 28, 1985. In the prehearing report, the parties stipulated that all temporary total disability or healing period benefits have been paid and are not at issue. No permanent partial disability benefits have been paid.

The record in this case consists of the testimony of claimant, of G. Brian Paprocki, of Vernon Keller, of Monica Murphy, and of Jeff Rosenow. The record also consists of joint exhibits 1 through 13; of claimant's exhibits 14 through 26; and of defendant's exhibits A through C.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant's rate of weekly compensation is $302.03. They further stipulated that the commencement date for any permanent partial disability due claimant is March 10, 1986, and that claimant has been paid temporary total or healing period benefits as due from October 20, 1985 through March 6, 1986, and for March 18, 1986; that claimant received an injury on the alleged injury date which arose out of and in the course of his employment, and that that injury was causally related to temporary total or healing period disability. The issues remaining for resolution are:

1) Whether a causal relationship exists between claimant's injury and any permanent partial or permanent total disability; and

2) Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement.

REVIEW OF THE EVIDENCE

Claimant is 61 years old and has completed eleventh grade. He gave a work history of a farm laborer, a warehouse worker, truck driver, and siding applicator before beginning work with Oscar Mayer in 1967. Prior to his injury, claimant reported having pushed garbage gondolas holding 1000 to 1500 pounds in the course of his employment. On October 18, 1985, a garbage truck ran into claimant at work. He subsequently spent eight days in the hospital in the intensive care unit and three weeks in the hospital.

Claimant returned to light duty work with Oscar Mayer on March 10, 1986. He now sweeps and supplies locker rooms, chores, that is, scrubs lockers and cleans up the towel house at Oscar Mayer on the night shift. Claimant reported that he continues to have chest and back pain and has a lessening of grip strength although that has not caused problems in his current job. He indicated he hasn't felt up to hunting or fishing since his injury and has been unable to earn time and a half overtime or work six or seven day weeks since his injury. Claimant no longer does house siding after working at Oscar Mayer in order to earn extra income. Claimant agreed that he is a union member guaranteed thirty-six hours of pay per week and forty hours of pay per holiday week. He indicated that his employer and his physicians encouraged his work return although he himself had not wished to return to work. Claimant has no current retirement plans, but stated that whether he would retire would, in part, be a function of whether he would receive sufficient monies from his pension, any workers' compensation recovery, and any recovery on a third party claim against the garbage company. Claimant agreed that F. Dale Wilson, M.D., was an examining and not a treating physician. He agreed that he does part of a recommended exercise program. He has preexisting diabetes.

Robert L. Smith, claimant's neighbor for the past twelve to thirteen years, confirmed that claimant no longer does siding jobs and stated that claimant no longer works on cars or changes oil.

Vernon Keller, safety security manager for Oscar Mayer, reported that he administers the workers' compensation program at the plant and that the employer's policy is to return injured employees to work whenever possible following a work injury. He

reported that there are no present plans to discharge claimant and that the employer will work to provide a job as long as claimant is willing to work. Mr. Keller stated that claimant's job performance is satisfactory and claimant has not indicated he cannot do the job provided. Keller stated that if claimant could not perform his present job, claimant will be medically evaluated to determine if other jobs are available for him. Keller reported that claimant is entitled to all union contract provisions. He agreed that the union contract does not protect an employee against firing, layoffs, or plant buy-out.

Monica Murphy, supervising nurse at Oscar Mayer, reported that she sees claimant daily for heat pack treatments on his right back and chest wall. She stated that claimant does not have difficulty walking, but does have difficulty climbing on the table for treatment with that difficulty such as is characteristic of persons with large abdomens. She indicated claimant had not complained that he was unable to do his assigned job.

Jeff Roscrow, night supervisor at Oscar Mayer, testified that he has been claimant's supervisor for approximately ten months, and that claimant's job had been part of another individual's job before the job was split.

G. Brian Paprocki, a vocational consultant with a masters in science in vocational rehabilitation, saw claimant in a one hour interview on January 29, 1987. He discussed claimant's education, academic abilities, and work background, including his current Oscar Mayer work with claimant. Paprocki opined that claimant's current job duties are not generally characteristic of the job description for janitorial work contained in the Dictionary of Occupational Titles. He opined that claimant would not fair well if he lost his current job because of a fifteen pound lifting limitation, and his lack of arm grip strength, as well as his lack of transferable skills. He agreed that with those limitations, claimant could likely hold positions as a watch guard, as a light laundry, or as a janitorial worker. He reported that those jobs had a pay range from $4.88 to $5.92 per hour. He indicated claimant also could work as a parking lot attendant, a bridge toll taker, a self-service laundry attendant, a gas station attendant, a light packaging worker or a light production worker. Paprocki agreed claimant now has no loss of earning capacity, but for his inability to work overtime. He agreed claimant has no plans to resign and seek other employment. He agreed that not all physicians believe claimant has a loss of grip strength. He reported, however, that he knows of no employer who would allow an individual to take two heat treatments per day.

Claimant was admitted to the hospital on October 19, 1985 and discharged November 5, 1985. The final hospital diagnosis was of a blunt trauma to the chest and abdomen; multiple left

and right rib fracture; right pneumohemothorax; aspiration pneumonia; atrial fibrillation; diabetes mellitus, type II; and persistently elevated liver function tests.

Peter S. Jerome, M.D., treated claimant during his hospitalization at Mercy, and opined on December 30, 1985 that claimant had had a significant chest wall pain secondary to extensive rib fractures which should resolve approximately two months following his discharge. He felt claimant would be likely to return to work by early or mid January 1986. He felt that overall, claimant's prognosis was excellent.

Dennis L. Miller, M.D., examined claimant on February 26, 1986. Claimant then had localized back pain to the midline lumbar area without any well localized tenderness or paravertebral muscle spasm. He had excellent range of forward flexion and could touch his toes with his knees extended. Claimant had good lateral bending both right and left and there was no tenderness over the buttocks and no tenderness over the sciatic notch. Straight leg raising tests were negative to 90 degrees. There was no radiation of pain into his lower extremities and pain was not aggravated by cough or sneeze. Dr. Miller was not clear as to whether claimant had really sustained injury to his back as a result of his work accident or has simply developed weakness in his back as a result of his convalescence, etc. He stated that claimant had certain preexisting degenerative changes in his lumbar spine and a markedly protuberant abdomen placed excessive strain on his back. He noted that claimant tends to stands in hyperextension which excessively strains the facets. Dr. Miller opined that claimant would definitely benefit from weight reduction with a program of exercises to strengthen his back and abdomen; but was unsure that claimant would be terribly co-operative or compliant with an exercise program. He opined that while claimant had certainly sustained a severe injury, he had made a remarkable recovery with little evidence of residual permanent impairment.

Dr. Miller reexamined claimant on April 14, 1987. On May 1, 1987, he opined that claimant did have a loss of external rotation of the left shoulder, but thought this was related to a previous injury. He noted that claimant probably did have some weakness in his upper extremities, but that claimant was physiologically older than his stated age and that he suspected this was a strong factor. He opined there was no objective evidence that the injury of October 20, 1985 caused weakness in the upper extremities. He felt claimant's permanent impairment was largely on range of motion, but that claimant did have some impairment and persistent pain in his chest and probably did have pain with shoulder motion. He felt it was reasonable to assume that that affects heavy lifting, pushing, etc. He felt claimant had some loss of motion in his back, but based on x-ray finding, that loss of motion was present prior to his accident.

He "seriously doubted" that it was related to the accident. He could not confirm loss of motion in the right shoulder and was not convinced that weakness in the two arms was entirely related to the accident. He felt five percent of the whole person for chest pains sounded reasonable; but that claimant's whole person impairment was approximately fifteen percent.

J. H. Sunderbruch, M.D., saw claimant on June 3, 1986. He reported that claimant continued to complain of pain in his chest and, in addition, stated that he had some distress in his right shoulder as well as pain in his left shoulder from his last visit of May 20, 1986. Dr. Sunderbruch stated that the findings noted on May 20, 1986 relative to the left shoulder would indicate limitations of abduction and external rotation - probably due to tendonitis, but not related to the accident. Dr. Sunderbruch stated that claimant stated he had had that ever since the accident, but that that was the first time he complained about it to Dr. Sunderbruch. Dr. Sunderbruch then opined that claimant had made up his mind that he would never get better and though there was no evidence he could not do something heavier, the doctor believed the company was fortunate to be able to have him continue to show up at work and do some type of work.

Dr. Sunderbruch saw claimant on August 12, 1986. He reported that claimant stated he was still having pain in the chest and back, had some difficulty with his left arm as well as his right arm. He stated that claimant continued to say he was just as bad as he always was. He noted that on examination, he found no severe disability, but some limitation of motion in claimant's left shoulder due to crepitation due to old wear and tear of the left acronial clavicular junction, demonstrated in left shoulder x-rays on May 20, 1986. Chest findings demonstrated nothing new. Lungs were negative to auscultation and percussion. He noted that claimant might have some intercostal neuritis because of the old healed fractures, but that his ribs are well healed and there was no reason for claimant to have severe injury or severe pain. He reported that claimant insisted he was not capable of doing more work than he was doing now and further insisted that he did not want to try to do any more though the doctor prevailed upon him that the only way he would improve would be to attempt to do more. The doctor felt that claimant was probably not going to be cooperative with doing anything more than he was doing until he settled in his own mind his relationship with the company because of the previous injury.

Philip A. Habak, M.D., of cardiovascular medicine, P.C., saw claimant on September 30, 1986 and reported that an echocardiogram performed recently was normal. On December 30, 1986, Dr. Habak reported that claimant appeared to be doing quite well; would be maintained on his current regimen of Procan SR 500 mg.; and reevaluated in six months.

F. Dale Wilson, M.D., examined claimant on April 4, 1986. In a report of January 19, 1987, he reported claimant's present symptoms as constant pain in the right front over the fifth and sixth ribs laterally, with some pain in the eleventh and twelfth ribs on the back on the right side and soreness on the left about the level of the elbow. He reported a weight restriction of about ten pounds per doctor's order and a weak left arm. He reported claimant said that, from the injury, he now had weakness and a hard time working with the left wrist. He reported that claimant could not swing his right arm above his shoulder because it aggravated his chest pain and there was limited motion in the right shoulder. He reported that claimant could kneel and squat satisfactorily. Dr. Wilson opined that claimant's injury was the causal factor in respect to the symptoms, pathology and impairment reported. He reported that that applied except that there was a question about the degenerative changes recorded in T11, T12, and L1, as well as sclerosing facets of L5-S1; those where asymptomatic; claimant had some limitation of rotation, but it was difficult to be sure that these degenerative changes came about following his injury. Dr. Wilson's impairment evaluation was as follows:

Impairment evaluation:

			Extremity	Person
1.	Need for medication for pancreas and heart			?
2.	Chest pain, continual			5%
3.	Right shoulder:	Flexion	2%	
		Lateral	2	
		Motion In	1	
		Out	1	
4.	Weakness of two arms		7	
			17%	10
5.	Back rotation			6
				21% Extremity

Fred C. Green, D.O., identified himself as a physician who has been in practice since 1968 and as having been one of claimant's primary physicians for a number of years. He reported that prior to October 19, 1985 claimant's health was stable albeit he was a diabetic who was seen frequently for musculoskeletal complaints. He reported that claimant has had back complaints and some symptomatic dysfunction of the back prior to his injury with the back pain resulting from constant or excessive muscle strain. Dr. Green stated that as of April 8, 1986 claimant's insulin had not changed from 15 NPH. He reported

that post-injury, claimant had constant complaints of chest pain and nonspecific back pain located around the right shoulder blade and the right rib cage. Dr. Green agreed that claimant had had a number of complaints of chest pain prior to the injury, but that these had not been persistent. He opined that claimant's persistent chest wall discomfort was definitely injury related and that that condition would probably continue to cause claimant problems. He reported that claimant's additional weight contributes to his musculoskeletal complaints.

Peter S. Jerome, M.D., identified himself in his deposition as a board certified internist with a subspecialty in pulmonary medicine. He reported that he had taken his pulmonary medicine boards but had not yet received results on those. Dr. Jerome reported that pulmonary function studies of September 26, 1986 revealed that claimant had a moderate[ly] ventilation impairment. He characterized claimant's injury as a minor component in that impairment with his abdominal obesity also being a contributing factor to the impairment. He reported that claimant would not receive significant impairment of ventilatory capacity for doing moderate, vigorous to secondary activities but would have some minor impairment due to residual chest wall pain. Dr. Jerome stated that significant chest wall pain can restrict upper extremity motion, but reported that he did not observe such restrictions in claimant's right shoulder and did not believe claimant had pain significant to disturb his right shoulder range of motion. Dr. Jerome reported that he had observed no weakness in claimant's upper extremities in the course of his care of claimant, and that any such weakness was unlikely related to claimant's injury. Dr. Jerome agreed that trauma can cause changes in insulin requirements, but stated that control of claimant's diabetes was not a major problem at claimant's hospital discharge.

Philip A. Habak, M.D., identified himself in his deposition as board certified in both internal medicine and cardiovascular disease. He reported that claimant gave no medical history of heart disease prior to his injury. He characterized Lanoxin as a cardiac glycosid which slows down the heart and returns its rhythm to normal. Dr. Habak opined that claimant's atrial fibrillation during his hospital stay was injury related, but his atrial flutter of September 30, 1986 was not injury related. He described the fibrillation and the flutter as different types of arrhythmiac conditions. He opined that smoking for forty-four years could affect the condition of the lungs and that nicotine is a cardiac stimulent which could be a predisposing factor [apparently in arrhythmiac conditions]. Dr. Habak reported that he had released claimant for light duty work on October 1, 1986 as a result of his continued chest wall pain in that regular duty work likely exacerbate such pain. He reported that a 15 pounds lifting restriction was related to claimant's chest wall pain.

F. Dale Wilson, M.D., indentified himself as a board certified surgeon who had examined claimant. He reported that claimant self-reported that he had increased his insulin from 15 MPH preinjury regularly to 30 to 100 NPH [at times] following his injury. Dr. Wilson stated that there were no reports that claimant's L5-S1 spondylitis was symptomatic prior to this injury and that changes therein probably were brought about by aggravation "of those changes." He opined that degenerative changes at T11, T12, and L1 and sclerosis of the facets which claimant had likely predated his injury, but stated that degeneration can be particularly stepped up following injuries. Dr. Wilson stated that claimant's weakness in his hands and arms were the most serious defects attributed to his injury in that while claimant had left hand and arm weakness prior to his injury, he had been getting along and had had no right hand or arm weakness preinjury. Dr. Wilson stated that he had no explanation for claimant's hand and arm weakness. He reported that his permanent partial impairment ratings were not based on the AMA Guides but on his personal judgments and experience.

The balance of the evidence was reviewed and considered in the disposition of this matter.

APPLICABLE LAW AND ANALYSIS

We address the causation issue.

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

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).

A cause is proximate if it is a substantial factor in bringing about the result. It need be only one cause of the result; it need not be the only cause. Blacksmith v. All American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

Claimant's physicians generally agree that his persistent chest wall pain is a likely result of his work injury. We agree with that finding.

Dr. Habak reports he has no medical history of claimant having had heart problems prior to his injury; he does not attribute claimant's atrial flutter to his work injury even though he felt claimant's in-hospital atrial fibrillation was work related. Claimant is doing well on anti-arrhymiac heart medication regardless of the cause of his arrhymiac heart conditions. Hence, we do not believe the evidence supports a finding that either his atrial fibrillation or his subsequent atrial flutter has produced permanent partial disability to claimant. Only Dr. Wilson attributes claimant's upper extremity and shoulder complaints to his work incident with Dr. Miller and Dr. Sunderbruch finding no basis for attributing those to the work injury. As both Dr. Miller and Dr. Sunderbruch had greater contact with claimant than did Dr. Wilson, we accept their opinions over that of Dr. Wilson. Dr. Green, one of claimant's long-time treating physicians, stated claimant had had back complaints and symptomatic dysfunction of the back before his work injury resulting from constant to excessive muscle strain. He felt claimant's excessive weight contributed to his musculoskeletal complaints. Dr. Miller was unclear as to whether claimant had injured his back in his work accident or had developed weakness during his convalescence. He further noted that claimant had preexisting degenerative changes in the lumbar spine, a markedly protuberant abdomen which excessively strained his back, and a tendency to stand in hyperextension, thereby, placing excessive strain on the facets. Hence, a number of factors other than the work injury likely significantly contribute to claimant's back problems. It appears likely that claimant's convalescence as well as the injury itself have contributed in part to claimant's back condition. Yet, we do not have evidence sufficient to demonstrate they were a substantial factor in claimant's back complaints. For that reason, we do not find the injury a proximate cause of claimant's current back complaints. Likewise, per Dr. Jerome's testimony,

we find claimant's injury only a minor component and not a substantial factor in claimant's moderate ventilation impairment. The record as a whole does not substantiate claimant's complaint that his injury has aggravated his preexisting diabetes.

We consider the permanent partial disability entitlement question.

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

Claimant is an older worker; his employer has returned him to work which accommodates his various physical conditions. Nothing in the record reflects that the employer will not continue to do so throughout claimant's expected working life. With the exception of Dr. Wilson, who also assessed factors we do not find related to claimant's work injury, claimant's physicians have been reluctant to provide permanent partial impairment ratings. Dr. Miller reported a permanent partial disability of 5 percent for chest pains or 15 percent whole person was appropriate. The whole person impairment apparently also took into account conditions not readily attributable to claimant's work injury. Claimant's work-related impairment appears modest but for his weight restriction. Dr. Sunderbruch has stressed claimant's lack of desire to increase his work tolerance as a factor in claimant's continuing inability to increase his work capacity. Claimant's perception that he is unable to work more than he now is does appear to play a role in his condition given his lack of objective medical findings. That problem cannot properly be attributed to the employer but must be considered a reflection on claimant's own motivations. Dr. Habak did impose a 15 pound lifting restriction on claimant on account of his chest wall pain. That restriction appears claimant's most significant work injury-related restriction. It would hamper him were he to need to seek work with other than his present employer. As noted above, that possibility is remote, however. Furthermore, Mr. Paprocki has identified a number of positions that claimant could fulfill for other employers. We note that while such employers would likely not allow claimant to heat packs per day, those treatments do not appear medically necessary, but rather appear to be provided for claimant's personal comfort. Claimant also is unable to work overtime in his present position. He no longer feels able to work part-time as a house sider. These factors do reflect a loss of earning capacity. We find claimant has sustained an overall industrial loss of 10 percent.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant sustained an injury which arose out of and in the course of his employment on October 19, 1985 when a garbage truck ran into him at work.

Claimant had rib fractures, right pnemohemothorax, aspiration pneumonia and atrial fibrillation while hospitalized on account of the injury.

Claimant had preexisting diabetes mellitus Type II.

Claimant nad preexisting chest wall pain but not persistent.

Claimant has had persistent chest wall pain since his injury.

Claimant had preexisting back pain and musculoskeletal complaints related to his markedly protuberant abdomen, his hyperextended stance, and preexisting degenerative changes in his lumbar spine.

Claimant has had a prescribed dosage of 15 NPH insulin both pre and post injury.

Claimant's injury did not aggravate his diabetes.

Claimant's in-hospital atrial fibrillation related to his injury; his later atrial flutter did not relate to his injury.

Claimant's heart arrhythmiac condition is controlled successfully with medication.

Claimant's work injury was a minor component in his moderate ventilation impairment with his abdominal obesity also being a contributing factor.

Claimant has a 15 pound weight restriction on account of his chest wall pain.

Claimant's upper extremity and shoulder complaints do not relate to his work injury. Left side complaints predated the work injury. Right side complaints were not reported to Dr. Sunderbruch until Spring 1986.

Claimant is an older worker.

Claimant's employer has returned him to work within his restrictions and is likely to retain claimant throughout the remainder of claimant's work life.

Claimant cannot now work overtime and cannot do part-time house siding.

Claimant could perform other more sedentary jobs were he to lose or leave his current position, but could not perform heavy manual labor.

Claimant has a loss of earnings capacity of 10 percent.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that his injury of October 19, 1985 is the cause of the disability on which he bases his claim.

Claimant is entitled to permanent partial disability resulting from his October 19, 1985 injury of ten percent (10%).

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability for fifty (50) weeks at the rate of three hundred two and 03/100 dollars ($302.03) with those payments to commence March 10, 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 20th day of July, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELIZABETH E. KIRKPATRICK,	:	
	:	
Claimant,	:	
	:	FILE NO. 738250
vs.	:	
	:	A R B I T R A T I O N
WESTERN INTERNATIONAL,	:	
	:	D E C I S I O N
Employer,	:	
	:	O N
and	:	
	:	FILED
NATIONAL UNION FIRE INSURANCE CO.,	:	
	:	DEC 08 1987
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Elizabeth E. Kirkpatrick, claimant, against Western International, employer, and National Union Fire Insurance Company, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on March 24, 1983.

On June 25, 1985, the undersigned issued an arbitration decision in this matter which was affirmed with some modification by the industrial commissioner on June 30, 1986. A petition for judicial review was then filed which resulted in an order remanding the case back to this agency for further findings as to the permanency of the condition found work related in the arbitration and appealed decision. According to the remand order of the district court and of the industrial commissioner to this deputy, this deputy is to consider only the evidence presented at the arbitration hearing held on March 14, 1985 and March 18, 1985 and new evidence consisting of five pages of clinical notes dated August 27, 1986 and a two page letter dated September 5, 1986 from Curtis M. Steyers, M.D.

SUMMARY OF EVIDENCE

The following is a summary of 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.

The summary of evidence contained in the arbitration decision of June 21, 1985 as adopted and clarified in the appeal decision of June 30, 1986, is likewise adopted for purposes of this decision as if fully reinnerated herein.

Since the evidentiary hearing in 1985, claimant has been examined on August 27, 1986, by Curtis M. Steyer, M.D., from the Department of Orthopedics at the University of Iowa Hospitals and Clinics in Iowa City, Iowa. From his examination of claimant and review of claimant's past medical records, Dr. Steyers opines that claimant has suffered a seven percent permanent partial impairment to the body as a whole from her left thoracic outlet syndrome (hereinafter referred to as TOS) condition. From a lack of objective evidence, Dr. Steyers could not diagnose the conditions of right TOS or tenosynovitis and carpal tunnel syndrome of the left wrist and no impairment ratings were given for those conditions by Dr. Steyers. Dr. Steyers described the medical reports he reviewed for the purposes of his opinion and all of these records and reports are part of the record in this case except for an evaluation by "Drs. Neff and Bowers." According to Dr. Steyers, these doctors evaluated claimant in January, 1986 and rated her impairment as "zero on both upper extremities." No reports from a Dr. Neff or a Dr. Bowers were a part of the original record of this case.

Dr. Steyers reports that claimant indicated to him that her upper extremity pain is precipitated primarily by pushing and pulling of heavy objects at chest level and any type of activity involving her hands over claimant's head. She complained of pain in the arm and deltoid area as well as intermittent pain in the chest wall. A majority of her pain is in her extremity consisting of pain, numbness and tingling to the left hand. Claimant indicated to him that she is no longer taking anti-inflammatory medications. Claimant states that she is able to tolerate her current job at Western International but fears being put "back onto the line" which would involve overhead activity. Claimant is still working under permanent restrictions imposed by the plant nurse against overhead lifting.

APPLICABLE LAW AND ANALYSIS

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 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).

In the case sub judice, claimant contends that she suffered permanent disability as a result of a work injury herein due to permanent impairment to the body as a whole. The greater weight of evidence establishes that a body as a whole disability did, in fact, occur. Although claimant's primary complaints involved the extremities, the injury involves permanent modification of the body trunk as a result of resection of claimant's rib. It is well settled that it is the anatomical situs of the permanent injury, not the situs of the impairment, disability or pain caused by the injury which determines whether or not to apply the schedules in Iowa Code section 85.34(2)(a-t). Lauhoff Grain Company v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

Claimant's medical condition before the work injuries beginning in 1981 were certainly not excellent given her health history but she had no functional impairments or ascertainable disabilities before the gradual injury date found in the appeal decision in March of 1983. Claimant was able to fully perform physical tasks involving pushing and pulling of heavy objects and overhead reaching and lifting. Claimant has experienced continuous pain in varying degrees since the first onset of her 1981 pain.

Claimant's primary treating physician, Dr. Clemens, has given claimant a significant permanent partial impairment rating to the body as a whole as a result of the left TOS condition. He opines that claimant's impairment is 10 percent although he failed to state whether this rating was to the extremity or to the body as a whole. Dr. Connair rates claimant's impairment as consisting of a 10-15 percent to the body as a whole for the TOS

condition. Dr. Steyers opines that he would rate claimant's impairment as constituting seven percent to the body as a whole. Certainly a finding of a 10 percent permanent partial impairment to the body as a whole as a result of claimant's left TOS condition is appropriate given such medical opinion evidence.

No finding of permanent impairment for right sided TOS or left sided tenosynovitis or carpal tunnel syndrome can be found under the evidence as only Dr. Haines found permanent partial impairment for any of these conditions which is controverted by the other physicians in this case.

More importantly from an industrial disability standpoint, claimant has been restricted as a result of her work injury from performing overhead work and she indicates to Dr. Steyers that she is unable to push or pull heavy objects at chest level. Such restrictions in her physical activities prohibits her from much of the work that she has performed in the past at AMF and at Western International.

On the other hand, claimant has not shown that she has suffered a significant permanent loss in actual earnings as a result of her disability aside from her healing period which has been compensated in the previous arbitration decision. Claimant continues to work at Western International with appropriate acommodations being made for physical limitations. However, a showing that claimant has 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 52 years of age and in the middle of her working career. Her loss of future earnings from employment due to disability is more severe than would be the case for a younger or an older 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).

Although claimant has a high school education and exhibited average intelligence at the hearing, little was shown to indicate claimant's potential for vocational rehabilitation. However, such rehabilitation is not necessary at this time as claimant appears to possess suitable and stable employment at Western International at least at the time of the 1985 hearing.

After examination of all of the factors of industrial disability, it is found as a matter of fact that claimant has suffered a 10 percent loss in her earning capacity from her work injury resulting from left tos condition. Based upon such finding, claimant is entitled as a matter of law to 50 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u)

which is 10 percent of 500 weeks, the maximum allowable for an injury to the body as a whole in that subsection.

As it was found in the appeal decision that the date of injury for permanent partial disability was claimant's first absence from work as a result of the TOS condition, March 24, 1983, defendants are liable to pay these permanent partial disability benefits. These benefits shall be awarded from June 13, 1983, the end of claimant's healing period according to the arbitration and appeal decisions in this case.

It should be noted that it is purely coincidental that the award of permanent partial disability in this case coincides with the finding of permanent partial impairment. This award was arrived at after careful evaluation of all of the industrial disability factors, not just the factor of the extent of permanent partial impairment.

FINDINGS OF FACT

1. The findings of fact as set forth in the arbitration decision as modified by the commissioner in the appeal decision is adopted as fully set out herein.

2. As a result of the work injury of March 24, 1983 consisting of left sided TOS, claimant has suffered a 10 percent permanent partial impairment to the body as a whole and permanent work restrictions against no overhead work with her hands and no pushing or pulling of heavy objects.

3. As a result of the permanent partial impairment and work restrictions caused by the March 24, 1983 work injury, claimant has suffered a 10 percent loss of earning capacity or industrial disability. Claimant is 52 years of age and has a high school education. Claimant's work history consists mostly of working in a manufacturing environment involving extensive use of her hands in overhead work. Claimant's permanent impairment and work restrictions caused by the work injury of March 24, 1983 prohibits claimant from returning to many jobs claimant has held in the past at AMF and at Western International. Claimant's potential for vocational rehabilitation is unknown except that such rehabilitation is not necessary at this time as claimant is currently working at Western International in suitable and stable employment. Claimant, to date, has not suffered a permanent loss of earnings as a result of the work injury.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to permanent partial disability benefits as awarded below:

ORDER

1. Defendants shall pay to claimant fifty (50) weeks of permanent partial disability benefits at the rate of two hundred seventy and 62/100 dollars ($270.62) per week from June 13, 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 additional costs of this action pursuant to Division of Industrial Services Rule 343-4.33 occasioned by these remand proceedings.

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.

6. This matter shall be set back into immediate assignment for prehearing and hearing on the remaining issue involving the extent of additional permanent disability benefits to which claimant may be entitled as a penalty under Iowa Code section 86.13.

Signed and filed this 8th day of December, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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FILED

SEP 22 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS H. KLAREN,	:	
	:	File No. 764821
Claimant,	:	
	:	
vs.	:	A R B I T R A T I O N
	:	
QUAKER OATS COMPANY,	:	
	:	D E C I S I O N
Employer,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Thomas H. Klaren, against his employer, Quaker Oats Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained May 9, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner at Cedar Rapids, Iowa, on June 17, 1987. A first report of injury was filed May 16, 1984. The parties stipulated that claimant has received all temporary total or healing period benefits to which he is entitled and that such benefits are not at issue.

The record in this case consists of testimony of claimant, of Julie Ann Klaren, of James Klima, and of Larry Van Lancher as well as of claimant's exhibits one through four, six and eight and defendant's exhibits A, B and C. Mr. Van Lancher was called as a rebuttal witness.

ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant's rate of weekly compensation is $279.08, that claimant received an injury on May 9, 1984 which arose out of and in the course of his employment, and that the injury was causally related to temporary and permanent disability. The issues remaining for resolution are:

1. The extent of claimant's permanent partial disability entitlement; and,

2. Whether claimant is entitled to payment of mileage expenses enumerated under section 85.27.

The parties indicated that the permanent partial disability entitlement issue may include a sub-issue as to interest due

claimant. The parties also dispute the commencement date for permanent partial disability. Defendant's counsel recommended payment of a charge of $21.96 which is apparently the outstanding section 85.27 issue. The issues presented in claimant's motion in limine appear moot at this time.

REVIEW OF THE EVIDENCE

Claimant was born on September 26, 1956, is married and was graduated from high school in 1974. He began work with Quaker Oats on August 11, 1975 and has worked for the company continuously since then. On May 9, 1984, claimant was loading oats in the LCL dock. He reported that he felt a pain in his back. Claimant subsequently saw the company nurse who referred him to William R. Basler, M.D., the company doctor. Dr. Basler referred claimant to Martin Roach, M.D., an orthopaedic specialist who prescribed physical therapy and referred claimant to Warren N. Verdeck, M.D. Dr. Roach subsequently again prescribed physical therapy and released claimant for work. Claimant reported that he was then referred to James R. LaMorgese, M.D., who ordered a CT scan and myelogram which studies revealed a herniated disc. Claimant underwent a laminectomy at L5-S1 on June 24, 1985, and was off for 13 weeks. On September 23, 1985, he returned to his LCL job with a 40-pound weight restriction.

Claimant continues to hold that job. He described his job as involving loading and unloading case goods, relieving the cereal checker, moving bulkhead doors, changing truck batteries and helping (clean up) dumped loads. He indicated that he also drives a forklift. On cross-examination, claimant agreed that the LCL job primarily involves forklift driving. He had stated that forklift driving is a problem in that it "jolts" his entire body. Claimant agreed that his job is currently easier than it was when he was injured or on his work return. He reported that he has, on occasion, back stiffness and also pain in his right leg.

Claimant agreed that, since his injury, he has received raises as the result of union/management collective bargaining agreements. He has received annual bonuses and anticipates an annual bonus for 1987; he has health and accident insurance. Claimant characterized the LCL job as in the second highest pay bracket within the company. He reported he has not bid on other jobs since the LCL job is "all right" when compared with other jobs. He reported that he intends to stay with Quaker Oats and feels his job is secure. He testified that he has had disciplinary problems with the company in the past, but has none now. He reported that he feels his foreman has unjustifiably expressed dissatisfaction with his work in the past.

Julie Ann Klaren testified that claimant's physical condition bothers him at times, but that, at other times, it does not

bother him. She characterized claimant as a noncomplainer.

James Klima, a co-worker of claimant's who has known claimant for approximately ten years, testified that he is a checker in the shipping department, but previously held an LCL job. He reported that he has observed claimant at work since his work return and that claimant has trouble lifting heavy sacks and is bothered by riding on the forklift. He reported that the forklift is driven on a rough, uneven surface and that holes in the floor are repaired by cutting the holes out and refilling them with cement. He described the checker job as involving taking a product off a roller and loading it in a designated trailer. He reported the bulkhead doors are moved by releasing the door pin and then (apparently sliding) the door to the opposite end (apparently of the trailer). Klima stated that the forklift battery must be changed each day. He agreed that the battery itself was lifted with a hoist, but reported that the battery changer must lean forward approximately two or three feet to remove the seat and the metal platform above the battery. He characterized the plate as extremely heavy. Klima characterized the LCL job as a good job in that an individual just loads a trailer "straight in, straight out" with no left or right maneuvering and with no rollers to which to attend.

Larry Van Lancher is the LCL second shift supervisor and has been claimant's supervisor since November, 1985. He reported that claimant's job as an LCL trucker basically involves forklift truck operation, that is, hauling a load of product to the dock and unloading it onto the truck. He reported that occasionally a load must be hand finished and that hand loading 40-50 pound bags is required for fifteen to twenty minutes once on each shift. He indicated that two people are usually available if 100 pounds need to be handled. He stated that the forklift is operated on a cement floor which is "fairly good" but for a few places where 16-inch steel plates have been placed over cracks. He agreed that the battery of the forklift must be changed each shift, but reported that he has observed claimant doing so with no apparent difficulties. He indicated that claimant has replaced the wrapper roll in the wrapper machine approximately twice in the last 12 months. The plastic wrapper roll weighs about 40 pounds. He testified that he has observed claimant reloading weights of greater than 50 pounds, but that, when he has done so, claimant has always been assisted. Van Lancher agreed that the LCL trucker relieves the checker department and that the trucker must then load and unload product onto the trailer. He indicated that bags of field grain generally weigh approximately 50 pounds; that rice weighs 100 pounds; and, that drums of peanut butter or soybean oil weigh approximately 500 pounds. He reported, however, that incoming ingredients are generally palletized and that they are unloaded with the lifter. He agreed that those which fall off need to be hand reloaded and that one will hand-load to fill out a trailer. Mr. Van Lancher

characterized claimant as a good worker who is able to carry out all assigned job duties.

Dr. LaMorgese has assigned claimant a 10% permanent partial "disability" rating of the body as a whole. In a letter of March 18, 1987 to claimant's counsel, Dr. LaMorgese noted that claimant was released from any lifting restrictions on April 22, 1986. Additionally, he stated the following:

> Usually I instruct patients to restrict their lifting to approximately 70 lbs. after a lumbar laminectomy event with an excellent to good result. I feel that patients after low back surgery from a herniated disk are at increased risk of having a recurrent back injury and that is why I usually have them restrict the amount of weight that they lift. Mr. Klaren indicated to me on April 22, 1986, that if I continued to have a weight restriction on his lifting ability, that he would lose his job. I reluctantly lifted any restriction on his weight in order to try to save him any trouble with his employer. I usually also instruct patients with a low back injury to refrain from doing repeditive [sic] pushing, pulling, or straining and would recommend that they not do this with more than 60 to 70 lbs. of weight also.

Dr. LaMorgese had made the following notes on April 22, 1986:

> April 22, 1986 - patient was late for his appointment this morning because he thought it was 15 minutes later; Dr. had left already. Patient wanted to know if his weight restriction could be lifted and Dr. said to 60 lbs. Patient was concerned his Foreman wouldn't be too pleased but said he rarely needs to lift over 60 lbs. anyway. Dr. said no 100 lb. weights should be lifted yet.
>
> April 22, 1986 - telephone conversation
> I spoke to Mr. Klaren on the phone today. The foreman at Quaker Oats would like to have Mr. Klaren released from all weight lifting restrictions at this point. I am reluctantly doing this so that Mr. Klaren can continue working at Quaker Oats. I feel that in all probability that the patient will do well without a weight restriction. The patient will be seen again in May.

On May 15, 1986, Dr. LaMorgese indicated that claimant appeared to be fully healed and had no neurologic deficits. He reported that claimant had good bilateral ankle reflexes and was

not having significant back problems. He discharged claimant from his care.

The description of an LCL trucker contained in claimant's personnel file is that that individual is responsible for assembly and marking of LCL orders, the correct count of items received in shipments, and the recording of information as to code dates, condition, inspection and identification. The LCL trucker also inspects and loads trailers and performs other duties as assigned or required for effective plant operation.

Computerized job descriptions in records indicate that the LCL trucker would stand approximately 15% of his time and sit approximately 85% of his time with no walking involved. He or she might lift or carry 25 pounds four times per hour, but would not be required to push or pull. The individual would occasionally climb, balance, stoop or crouch. The individual would constantly reach, handle, finger or kick, but would not be required to kneel, crawl, lie down or feel. Strength factors for a cereal checker are essentially identical. A pallet repair and sanitation worker would need to stand approximately 90% of his time and walk approximately 10% of the time with no sitting required. The individual would need to lift or carry approximately 50 pounds approximately 100 times per hour, but would not be required to push or pull. That individual would frequently balance, stoop, kneel and crouch, would occasionally reach, and would constantly handle and finger. That individual would not need to climb, crawl, lie down, feel or pick.

Claimant's exhibit 3 contains the following:

DR. JAMES LAMORGESE

11 @ 6.5 miles per trip = 71.5 miles

1984 - 8-22, 8-30, 9-28, 11-13
1985 - 2-5, 5-7, 7-18, 8-20, 10-22
1986 - 4-22, 5-15

ORTHOPEDIC SURGEONS

4 trips @ 4 miles per trip = 16 miles

1984 -

MERCY HOSPITAL

One trip @ 4 miles = 4 miles

1985 -

TOTAL MILES = 91.5

TOTAL EXPENSE = $21.96

The balance of the evidence was reviewed and considered in the disposition of this matter.

APPLICABLE LAW AND ANALYSIS

Of first concern is the extent of claimant's permanent partial disability entitlement.

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 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 10% permanent partial impairment. He has returned to the job he held at the time of his injury. He himself agreed that the job is now easier than it was either at the time of the injury or at the time of the September, 1985 work return. He can perform that job albeit with some occasional back and leg pain. It appears to be a secure job. Claimant apparently does not intend to seek other employment and has not bid on other jobs within the company as he feels that this job is "all right." Claimant's job is at the second highest wage bracket in the company. He has received increased wages as a result of collective bargaining agreements since his injury. Claimant has, at best, a 70-pound lifting restriction. He himself indicated to his physician that he rarely needs to lift over 60 pounds in his present job. The overall security that claimant has in his present position and his satisfaction with that position indicate that claimant is not likely to be seeking the heavy industrial jobs from which a 70-pound restriction could well preclude him. In any event, should that circumstance

change, claimant's claim would be subject to review-reopening. Additionally, claimant is a younger worker and a high school graduate. His overall demeanor at hearing suggested that he is of at least average intelligence. Consequently, he is in a far better position for retraining for lighter duty, non-industrial employment within any lifting restrictions if he so desired than would be an older worker. Claimant did not testify as to any life activity restrictions outside of his employment. That fact would suggest that claimant's work injury has not been severely disabling. We find that claimant has demonstrated a permanent partial disability of 15%.

At hearing, counsel for claimant indicated that the permanent partial disability question would include a sub-issue as to interest due claimant. No evidence relative to that issue was presented at hearing and that issue was not addressed in briefs submitted by either party. Claimant, of course, is entitled to interest pursuant to section 85.30 on accrued amounts. Likewise, little evidence concerning the commencement date for permanent partial disability benefits was presented. Pursuant to section 85.34(1), those benefits commence upon claimant's work return on September 23, 1985.

Claimant seeks payment of mileage expenses in the amount of $21.96. Section 85.27 permits recovery of mileage expenses related to compensable medical expenses. Defense counsel has recommended payment of such expenses. The expenses are ordered paid.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant was born on September 26, 1956 and was graduated from high school in 1974.

Claimant has worked for Quaker Oats since August 11, 1975 and continues to work for the company.

Claimant sustained an injury which arose out of and in the course of his employment on May 9, 1984 while working in the LCL dock.

Claimant subsequently underwent a laminectomy at L5-S1 on June 24, 1985.

Claimant returned to his LCL job on September 23, 1985 with a 40-pound weight lifting restriction.

On April 22, 1986, Dr. LaMorgese lifted all weight restrictions in order that claimant might continue to work at Quaker Oats.

Dr. LaMorgese generally would prescribe a 70-pound weight

lifting restriction following a laminectomy at L5-S1.

Claimant generally would not lift over 60 pounds in his current position.

Claimant is not having significant difficulty carrying out his LCL job.

Claimant has received several raises since his injury as the result of union-negotiated collective bargaining agreements.

Claimant's LCL job is easier now than it was at the time of his injury or at the time of his work return.

Claimant's LCL job with Quaker Oats is secure and claimant is satisfied with the position.

Claimant is in a better position to seek retraining for a less physically demanding job should he so desire than would be an older worker.

Claimant has had mileage expenses of $21.96 associated with medical treatment related to his compensable injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant is entitled to permanent partial disability of 15% resulting from his May 9, 1984 injury with benefits to commence upon his September 23, 1985 work return.

Claimant is entitled to payment of medical mileage expenses of $21.96.

ORDER

THEREFORE, IT IS ORDERED:

Defendant pay claimant permanent partial disability benefits for seventy-five (75) weeks at the rate of two hundred seventy-nine and 08/100 dollars ($279.08) with those payments to commence on September 23, 1985.

Defendant pay accrued amounts in a lump sum.

Defendant pay claimant mileage expenses as set forth in claimant's exhibit 3 and totalling twenty-one and 96/100 dollars ($21.96).

Defendant pay interest pursuant to section 85.30.

Defendant pay costs pursuant to Division of Industrial Services' Rule 343-4.33.

Defendant file a Final Payment Report when this award is paid.

This case be returned to docket for consideration of the section 86.13 issue.

Signed and filed this 22nd day of September, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED

DEC 21 1987

IOWA INDUSTRIAL COMMISSIONER

OSVALDO CARLOS KOCK, Claimant,	:	File No. 751783
vs.	:	
FORT DODGE COUNTRY CLUB, Employer,	:	A R B I T R A T I O N D E C I S I O N
and	:	
GENERAL CASUALTY INSURANCE, Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Osvaldo Carlos Kock, claimant, against Fort Dodge Country Club, employer, and General Casualty, insurance carrier, defendants for benefits as a result of an injury which occurred December 9, 1983. A hearing was held on February 9, 1987 at Fort Dodge, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Osvaldo Carlos Kock (claimant); claimant's exhibits 1 through 8, 10, 11, 13 and 14; and defendants' exhibits A through L. Both attorneys were ordered to file briefs by May 1, 1987. Defendants' attorney filed an excellent brief on April 29, 1987. Claimant's attorney did not file a brief.

PRELIMINARY MATTERS

Defendants objected to claimant's exhibits 9 and 12 for the reason that (1) they were not served within 60 days of the signing and filing of the hearing assignment order as required by that order and (2) they were not available for him to use in his deposition examination of Thomas Carlstom, M.D., on January 27, 1987. The hearing assignment order required exhibit lists and all medical records to be served within 60 days of the signing and filing of that order. The order was signed and filed on November 12, 1986. Sixty days later would be January 11, 1987. Claimant admitted that these exhibits were not on his exhibit list and they were not served within the 60 day period specified in the hearing assignment order. However, claimant argued that he served them as soon as he received them. One of

the reports had not even been written by January 11, 1987. Therefore, it was not possible for him to serve them since they had not yet been written and he had not yet received them himself. Defendants' motion to exclude claimant's exhibits 9 and 12 is granted because these exhibits were not timely served as required by the hearing assignment order. Defendants' objections to claimant's exhibits 10, 11, 13 and 14; because they are not causally related to the injury and because they are not reasonable and necessary expenses, is overruled and these exhibits are admitted into evidence.

STIPULATIONS

The parties stipulated to the following matters:

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

That claimant sustained an injury on December 9, 1983 which arose out of and in the course of his employment with employer.

That the injury was the cause of some temporary disability.

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 of weekly benefits is $139.08 per week.

That the defendants are entitled to a credit for workers' compensation benefits paid prior to the hearing from December 9, 1983 to October 24, 1984 at the rate of $139.08 per week.

ISSUES

The following issues were submitted by the parties for determination at the time of the hearing.

Whether the injury was the cause of any permanent disability.

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

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

Whether claimant is an odd-lot employee.

Whether claimant is entitled to certain medical benefits.

SUMMARY OF THE EVIDENCE

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

Claimant was age 29 at the time of the injury and age 32 at the time of the hearing. He was born, raised and educated in Santiago, Chile. He completed high school there. After high school he received a mechanical degree in automotive work and machine tools. Past employments in Chile include mechanical work in a garage and tin and copper work in a foundry (Exhibit K, page 20). Claimant also owned and operated his own mechanical garage for a short period of time (Ex. K, pp. 26-30). He came to the United States in 1978 at age 24 to attend Iowa Central Community College in Fort Dodge, Iowa. He graduated and received an Associate of Arts degree (Ex. K, pp. 10 and 11). While attending college, claimant worked picking apples and performed restaurant work. In time, he became a self-taught cook and head chef. Later, he graduated from Northeast Missouri State College in May of 1982 with a Bachelor of Science degree in business. His grade point average was 3.5 (Ex. K, pp. 9 and 10). Claimant could not find a business job immediately so he continued to cook for employer (Ex. K, p. 15). Claimant testified that he could perform the strenuous work of a cook and that he had no back problems prior to this injury (Ex. K, pp. 39-41 and 65). He denied that he suffered any other injuries after this injury (Ex. K, p. 66).

On December 9, 1983, while working for employer claimant slipped on the icy steps while taking a pan of hot grease outside. He bumped his head and shoulder several times on the descending steps but he did prevent getting burned by the grease (Ex. K, p. 49). Claimant related that when he woke up after the fall he was surrounded by people (Ex. K, p. 50). The country club manager took him to Trinity Regional Hospital in Fort Dodge where he was examined, x-rayed, medicated and sent home (Ex. K, pp. 50-53). He was diagnosed as having acute contusions of the right shoulder (Ex. 1, pp 7 and 8). X-rays on the date of injury revealed the following:

> RIGHT SHOULDER AND SCAPULA:
> Two views each of the right shoulder and scapula shows the bony and joint structures to be intact without fracture or dislocation. No soft tissue calcification is present.
>
> IMPRESSION:
> NORMAL RIGHT SHOULDER AND SCAPULA.

(Ex. 1, p. 3)

J. J. Landhuis, M.D., saw claimant on December 12 and 15,

1983 for contusion of the arm, cervical strain and persistant headache (Ex. 1, pp. 1 and 2). Claimant testified that he fainted twice at home and that his friends took him back to the emergency room. A CT scan on December 19, 1983 resulted in a normal head CT scan (Ex. 1, p. 4). Intracranial hemorrhage was ruled out (Ex. 1, p. 6). Dr. Landhuis said on December 19, 1983 that claimant should not work for two weeks (Ex. 1, p. 6). Dr. Landhuis prescribed a cervical collar (Ex. 1, p. 1) for his neck and a sling for his arm (Ex. K, pp. 52 and 55).

Claimant stated that he then went to live with his brother in Colorado on December 20, 1983. At that time claimant was experiencing pain in his back, shoulder and neck, vomiting and had throbbing headaches all of the time (Ex. K, pp. 55 and 56). On December 30, 1983 and January 16, 1984 claimant saw W. D. Burch, M.D., a general practitioner, in Greely, Colorado. Dr. Burch commented that claimant had pain and was out of pain pills. Dr. Burch referred claimant to Earl Hutchins, M.D., a neurologist (Ex. 2, pp. 1 and 2; Ex. K, pp. 56, 57 and 59).

Dr. Hutchins first saw claimant on January 18, 1984. This doctor found claimant's hand discolored, sweaty, puffy and swollen. He noted pain and weakness in claimant's right upper extremity (Ex. I. p. 3). Claimant was admitted to the hospital on January 30, 1984 for x-rays, a CT scan, a bone scan and a cervical myelogram. Claimant was discharged on February 7, 1984 (Ex. G, pp. 1,2 and 3).

The radiologist reported on January 30, 1984 that claimant's spine x-rays disclosed narrowing on the right side at C-6 and the left side at C-7; sclerotic changes at C-6 and C-7 with moderate hypertrophic spurring associated with previous trauma. The changes appeared old with chronicity greater than the two months since the injury on December 9, 1983 (Ex. G, p. 4).

The bone scan revealed increased isotope activity in the lower cervical spine corresponding to the posttraumatic change at C-6 shown on the x-rays (Ex. G, p. 6).

The cervical myelogram also showed C-6, C-7 narrowing of the interspace with hypertrophic lipping. The radiologist gave this result:

> IMPRESSION:
> 1. Extradural defect at C6 C7 on the left and anteriorly at C4 C5 that are most suggestive of bony hypertrophic change rather than any herniated disc disease. There is nothing suggesting herniated disc disease and no intradural abnormalities are identified.

(Ex. G, p. 7)

Dr. Hutchins requested a consultation with Ronald D. Clark, M.D., on January 31, 1984. Dr. Clark reached the following conclusion:

> X-RAY DATA: I have reviewed the x-rays of the cervical spine. There does appear to be significant injury of the cervical spine at the C6, 7 area particularly on the right side. There is osteophyte formation that would make me think this is an older injury than six weeks.
>
> IMPRESSION: 1. I do not find very good evidence of nerve root compromise or irritation in this patient. I feel that most of the evidence points to soft tissue injury in the neck with a low-grade shoulder-hand syndrome on the right side.

(Ex. I, p. 5)

On February 17, 1984 Dr. Hutchins referred claimant to the Mayo Clinic with all of his films, x-rays and reports (Ex. I, pp. 1, 2 and 8).

Claimant was then treated at the Mayo Clinic by John G. Mayne, M.D. Dr. Mayne gave the following information:

> Osvaldo Carlos Kock registered at the Mayo Clinic on February 29, 1984 for a second opinion for neck and right shoulder pain which followed an accident at work on December 9, 1983. It is my feeling and that of my colleague, Dr. Kenneth Johnson of our Orthopedic Surgery Department that his present incapacitating neck and right arm pain follows the significant injury.

(Ex. C)

Claimant was given stellate ganglion blocks and physical therapy to relieve his pain. Dr. Mayne said claimant reported poorly localized pain in the area of the right shoulder and scapula radiating down his arm which caused tingling in his fingers. His physical examination was normal except for pain with abduction and rotation of the right arm at the shoulder. Dr. Mayne examined the x-rays, CT scan, EMG and myelogram done earlier in Fort Dodge and in Colorado. He also ordered an EMG of his own and some x-rays which demonstrated narrowing and degenerative disc disease at C-6 (Ex. C, pp. 1, 2 and 3).

A C-6, C-7 and possibly a C-1 fusion was considered (Ex. C, pp. 1, 3 and 4); however, claimant elected against surgery at least until finishing his Masters degree (Ex. C, p. 5). Claimant was discharged on March 13, 1984 with considerable improvement

in his symptoms. (Ex. C, p. 7)

Dr. Mayne concluded as follows:

> Dr. Johnson noted that Mr. Kock does have significant degenerative changes at the C6-7 level but these degenerative changes were present before his fall on December 9, 1983 since they were evident on the January 30 x-rays just two months after his injury. It may be that he exacerbated a pre-existing condition and that he will be able to return to the activities he could do before the December 1983 fall if given enough time and conservative therapy.

(Ex. C, p. 7).

Claimant then moved to California with his brother (Ex. K, p. 60). He said he registered at the university and hoped to get a Masters degree in business if he could get off the medication which made him drowsy all of the time (Ex. K, pp. 62,63, 66-70). He testified that he continued to receive physical therapy in California in order to avoid surgery (Ex. K, pp. 69 and 70).

In California, claimant contacted James A. Westcott, M.D., on June 7, 1984 for stiffness and pain in his neck and a tingling sensation in both hands. Dr. Westcott continued a heavy regimen of medication, continued physical therapy and referred claimant to Jeffrey M. Lobosky, M.D., on July 24, 1984 for neurosurgical consultation to see if claimant needed an operation to fuse his neck (Ex. 5, pp. 10, 11 and 12; Ex. K, pp. 61 and 62).

At the request of defendants, claimant returned to Iowa and was examined by Thomas A. Carlstrom, M.D., a neurosurgeon, on August 2, 1984. Dr. Carlstrom made this report:

> After examining this patient, I obtained an EMG that same day which was normal, cervical spine x-rays with flexion and extension which showed a significant abnormality between C6 and 7 with interpretation of the abnormality being either congenital or a healed fracture at that level, and no significant abnormalities with flexion or extension. The CT scan showed no abnormalities in either the intraspinal or brachial plexus regions of the cervical thoracic junction.
>
> This patient is suffering from, I believe, myofascial, that is mechanical neck and shoulder and arm pain. I see no evidence for radiculopathy and no evidence for a surigcal [sic] lesion.

(Ex. D, pp. 1 and 2)

Later, Dr. Carlstrom gave a deposition on January 27, 1987. He described claimant's complaints as follows: "At the time I saw him, he was complaining of pain in his arm and shoulder on the right side, and in his neck; numbness and tingling in his hand, and he had had a fairly significant work-up completed by that time." (Ex. L, p. 6)

Dr. Carlstrom declared that the C-6, C-7 abnormality had been present for several years because it appeared the same in his August 1984 x-rays as it appeared in the x-rays in Colorado in February 1984. Dr. Carlstrom stated that the C-6, C-7 problem was either traumatic or congenital. Dr. Carlstrom's expert medical opinion was that claimant suffered a muscular strain of the right shoulder, that is, that he stretched the muscles (Ex. L, pp. 8 and 9). Dr. Carlstrom asserted that the period of recovery should be six to eight months. He stated that claimant had recuperated at the time of his examination on August 2, 1984 (Ex. L, p. 9).

The doctor also stated that maximum medical improvement would have occurred in approximately eight months after the injury (Ex. L, p. 17). On October 16, 1984 Dr. Carlstrom wrote that he did not believe that any additional therapy would be beneficial to claimant and that he would not recommend any future physical therapy (Ex. F).

In his deposition Dr. Carlstrom added that no specific restrictions should be placed on claimant's activity. He stated that claimant did not need any further treatment (Ex. L, pp. 8, 9 and 10). Dr. Carlstrom said he did not examine x-rays from Fort Dodge because they could not be found; however, he did examine the studies done in Colorado and these reports confirm the correctness of his opinions (Ex. C, pp. 10-13).

Dr. Carlstrom said that during the period of time from the date of the injury on December 9, 1983 up until the time of his examination on August 2, 1984 claimant should have avoided lifting with his upper extremities of more than 20 to 35 pounds (Ex. L, pp. 16 and 17). Dr. Carlstrom said that claimant's defects at C-6, C-7 would amount to a three to five percent impairment rating; however, these defects were not caused by the injury of December 9, 1983 (Ex. L, pp. 17-20). The actual dialogue between claimant's counsel and Dr. Carlstrom was as follows:

> Q. Then the final area of questions that I have, Doctor, if the abnormalities that existed in the x-ray did relate to the trauma that we are under litigation for, would they give rise to a permanent partial disability rating?
>
> A. Well, first, they didn't arise. Second, yes, they might.

Q. Okay. And what would your opinion as to the permanent partial disability rating be?

MR. DUCKWORTH: Assuming the defect occurred because of the injury, is that right?

MR. McGREVEY: Uh-huh.

A. Impairment rating might be in the neighborhood of 3 to 5 percent.

Q. I got the impression from your use of the words--I believe it was "significant abnormalities" that it was a more serious condition than what you seemed to be expressing with a 3 to 5 percent disability rating.

A. Well, I did not mention a disability rating. I stated an impairment rating. And, of course, we don't give impairment ratings based upon x-rays. We give impairment ratings based upon physical exam, basically. And his physical examination is not--or was the 2nd of August not particularly remarkable.

Q. During the discussions on that last question, you said it was not caused. Are you of the opinion that you are 100 percent certain that these abnormalities were not caused by the trauma that he says caused these?

A. Within a reasonable degree of medical certainty, yes.

Q. And you base that finding on what?

A. The abnormalities present were old on x-ray in August, were old on x-ray in February, too old to have been caused in December, in February for sure, and probably in August, and they were associated with other abnormalities in the spine consistent with a congenital basis or a previous traumatic basis, including fused ribs and some abnormalities of the upper thoracic spine also.

Q. But if I understand what you are saying right, these preexisting injuries could have been either traumatic or congenital. You don't have an idea which one?

A. I really don't have any idea, no.

Q. All you know is that the trauma didn't come from this particular time?

A. The x-rays do not demonstrate changes that occurred in December 1983.

(Ex. L, pp. 17-20)

All of the medical evidence shows, and claimant verified in his testimony at the hearing on February 9, 1987, that he has taken a great deal of medication since the date of his injury on December 9, 1983. At the hearing he testified that he still has to take pain killers. He testified that he still must use a TENS unit every day as well as perform his home physical therapy.

Notwithstanding Dr. Carlstrom's findings that claimant was recuperated, claimant returned to California and kept his appointment with Dr. Lobosky on August 22, 1984 for surgical evaluation if conservative measures failed (Ex. 5, pp. 5-8). Dr. Lobosky carried out a very extensive examination. The x-ray portion of his report read as follows:

> X-RAYS: Review of the cervical spine films shows some scoliosis to the cervical spine. He also has severe degenerative changes which appear present at the C5-6 and C6-7 levels. There are also minor changes at the C7-T1 levels. There appears to be anterior and posterior osteophytes at C5-6 and especially at C6-7 where the disease process appears to be most marked. This includes disk space narrowing as well as the osteophyte formation. He also has evidence of congenital fusion of the posterior ribs 1, 2 and 3 on the left.

(Ex. 5, pp. 7 and 8)

Dr. Lobosky's assessment was possible cervical radiculopathy. He ordered earlier studies to make a comparison (Ex. 5, p. 8). On October 10, 1984, Dr. Lobosky wanted to start from scratch. He wanted new EMG studies, a cervical CT scan and cervical myelography. If a cervical lesion was identified, then treatment should be rendered (Ex. 5, pp. 4 and 9). On March 25, 1985, Dr. Lobosky reported that claimant's arm pain and tingling had almost completely resolved, but he had significant neck pain. The doctor reported that claimant was now opposed to surgical intervention. Dr. Lobosky agreed because surgery for localized neck pain is not very successful. Dr. Lobosky concluded as follows:

> ASSESSMENT: Stable at this point.
>
> PLAN: It is my opinion that this patient

probably had an underlying cervical spondylosis which was greatly exacerbated by his industrial injury. His disability at this time I think is stable and permanent. It is my opinion that he is disabled to the point that he is only able to work to 50% of his capacity for physical therapy which would require excessive bending, lifting, etc. I have told him that he should be considering other lines of work that are nonstrenuous, and he has assured me that he is completing his Master's Degree in business right now and will be pursuring that in the future. I have renewed his prescription at this time for Dalmane and told him that I would be more than happy to see him back on a prn basis and to contact my office if we can be of further assistance. As long as he continues to improve in terms of his pain syndrome, I have encouraged him to increase his exercise activities and that there would be no reason for me to see him back on a regular basis.

(Ex. 5, p. 1)

At the hearing claimant testified that before this injury he had no limitations. Now he cannot participate in sports, lift, perform the chef job or do any physical work that requires exertion or force. After he graduated with his Master's degree in May of 1985, he began work as a financial analyst in Detroit at $24,000 per year. He did that from June of 1985 until September of 1986. Since November of 1986, claimant has been employed as as an accounting supervisor at $30,000 per year. Claimant testified that he has aspirations of becoming a CPA. His cooking jobs were mainly used to finance his education. These jobs only paid a few thousand dollars per year.

Claimant testified that he was not employed and did not seek any employment from the date of his injury on December 9, 1983 until June of 1985 when he had finished college and his postgraduate work and took the financial analyst job. He stated that he received workers' compensation benefits up until October of 1984. Credit life insurance took care of his car payment. Other than that, claimant testified that he had no other income but lived on his savings.

Claimant requested transportation expenses for his first trip to the Mayo Clinic, second trip to the Mayo Clinic and his trip to see defendants' doctor. He submitted itemized receipts as follows:

First trip to Mayo Clinic	$131.82
Trip to defendants' doctor	
Air fare	125.00

Gas expense	73.65
Second trip to Mayo Clinic	138.07
Total	$468.54

(Ex. 10, pp. 1-6)

Claimant also requested food and meal expenses and attached itemized receipts as follows:

First trip to Mayo Clinic	$153.27
Trip to defendants' doctor	108.42
Second trip to Mayo Clinic	142.27
Total	$403.96

(Ex. 13, pp. 1-9)

Claimant also attached itemized hotel costs as follows:

First trip to Mayo Clinic	$343.70
Trip to defendants' doctor	55.40
Second trip to Mayo Clinic	111.70
Total	$510.80

(Ex. 13, pp. 10-12)

Claimant also submitted itemized miscellaneous expenses of:

Medications	$ 33.88
Parking	3.20
Total	$ 37.08

(Ex. 13, p. 13)

Although defendants objected to these exhibits on the grounds that they were not causally related to the injury and were not reasonable and necessary expenses, nevertheless, defendants did not take specific exception or objection to any of these itemized expenses in particular. Therefore, these expenses appear to be reasonable and are allowed.

After submitting itemized gas tickets for two trips to Mayo Clinic, which have already been allowed, claimant also claimed mileage allowance for these same trips (Ex. 14). Therefore, the mileage allowance claim cannot be allowed because the itemized expenses for these two trips have already been allowed. All that can be allowed as reasonable mileage from claimant's exhibit 14 are the following expenses:

Fort Dodge	Dr. Landhuis	35 miles
Rochester	Mayo Clinic	100 miles
Greely, Colorado	Physical Therapy	400 miles
Rochester	Mayo Clinic	75 miles
Total		610 miles

Therefore, claimant is allowed 610 miles at .24 per mile for a total mileage allowance of $146.40.

All of these allowances come to the grand total of $1,566.78.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 9, 1983 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Claimant did not sustain the burden of proof by a preponderance of the evidence that the injury of December 9, 1983 was the cause of any permanent disability. It is true that claimant has some serious spine and rib problems as was frequently demonstrated on his many x-rays, CT scans and myelograms; however, these reports invariably confirm that these spinal problems and rib problems predate this injury, even though claimant testified that he had no prior problems.

The radiologist in Colorado on January 30, 1984, said that claimant's condition was associated with previous trauma that was greater than the two months that had transpired since this injury had occurred (Ex. G, p. 4). The radiologist who interpreted the myelogram done on February 1, 1984, stated that these were hypertropic changes rather than herniated disc disease. He reported that no intradural abnormalities were identified (Ex. G, p. 7).

Dr. Clark, in Colorado, declared on January 31, 1984 that

the injury of the cervical spine at C-6, C-7 is older than six weeks prior due to the ostophyte formation. Therefore, he confirmed that this condition predated the injury (Ex. I, p. 5).

Dr. Mayne, at the Mayo Clinic, on May 7, 1984 recorded that the significant degenerative changes were present before claimant's fall on December 9, 1983 (Ex. C, p. 7).

Dr. Carlstrom saw claimant on August 2, 1984. He unequivocally stated that claimant's C-6, C-7 problem and other spinal abnormalities, such as scoliosis and fused ribs, all predated this injury of December 9, 1983 (Ex. L, pp. 8, 9, 18 and 19).

Even Dr. Lobosky's report on August 22, 1984 clearly shows that claimant's spinal problems were degenerative and congenital (Ex. 5, pp. 7 and 8). He believed claimant had an underlying spondylosis which was aggravated by the fall of December 9, 1983 (Ex. 5, p. 1). Dr. Lobosky did not attempt to say that the fall caused these various spinal abnormalities that appeared in the various x-rays, CT scans and myelograms.

Dr. Carlstrom, defendants' evaluating physican in this case, gave the most sound and definitive opinion. He spoke with the most clarity and certainty of all the many doctors who examined claimant. Dr. Carlstrom said claimant was suffering from a myofascial strain. Claimant had mechanical neck, shoulder and arm pain (Ex. D, pp. 1 and 2). He declared that claimant had a muscle strain of the right shoulder, that is, claimant stretched his muscles (Ex. L. pp. 8 and 9). He asserted that a reasonable period of recovery would be six to eight months. He declared that claimant had fully recovered at the time of his examination on August 2, 1984 (Ex. L, pp. 9 and 17).

Dr. Landhuis took claimant off work immediately after the injury (Ex. 1, p. 6). Dr. Mayne felt on March 9, 1984 that the injury was still incapacitating (Ex. C, p. 1). Dr. Carlstrom said claimant had reached maximum medical improvement on August 2, 1984 (Ex. L, pp. 9 and 17). Dr. Lobosky found that claimant did not become stable until March 25, 1985; however, this would be an unduly long period of time for a strain or an aggravation of a spondylosis (Ex. 5, p. 1).

Dr. Carlstrom's opinion then, is adopted rather than the view of Dr. Lobosky. Rockwell Graphics Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Therefore, it is determined that claimant is entitled to temporary total disability from December 9, 1983, the date of the injury, to August 2, 1984, the date that Dr. Carlstrom said claimant had recovered and had reached maximum medical improvement.

Claimant did not sustain the burden of proof by a preponderance

of the evidence that the injury of December 9, 1983 caused any permanent disability. Claimant was initially diagnosed as having contusion of the arm, cervical strain and headache by Dr. Landhuis. X-rays of his right shoulder and scapula (Ex. 1, p. 3) and a CT scan of his head (Ex. 1, p. 4) were normal. The only objective medical evidence of physical injury were the abnormalities of claimant's spine and ribs that predated this injury as previously discussed.

Dr. Carlstom said that claimant had an impairment of three to five percent; however, it was not caused by this injury (Ex. L, pp. 17, 18 and 19). He further stated claimant needed no further treatment after August 2, 1984. In addition, there was no need for any specific restrictions on claimant's activities at that time (Ex. L, pp. 8, 9 and 10). Dr. Lobosky indicated that claimant was disabled to the point that he was only able to work up to 50 percent of his capacity for physical therapy which would require bending, lifting, etc. (Ex. 5, p.1). Dr. Lobosky did not assess an impairment rating. Rather he gave his own opinion of the claimant's disability. Again, Dr. Carlstrom's opinion is adopted as the better opinion. It is supported by the most factual data and it is the most informative and reasonable opinion.

Therefore, it is determined that claimant did not sustain the burden of proof by a preponderance of the evidence that the injury of December 9, 1983 was a cause of any permanent impairment or disability. Consequently, claimant is not entitled to any permanent partial disability benefits.

Since claimant is not permanently disabled, the issue of whether claimant is an odd-lot employee is now moot. It might be noted by way of dicta, however, that claimant testified that he never sought any employment of any kind after the date of the injury on December 9, 1983 until after he graduated from postgraduate school with his Master's degree in May of 1985. In order to be entitled to the odd-lot doctrine a claimant normally should demonstrate a bona fide attempt to find employment in the area of residence. Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). Emshoff Petroleum Transportation and Great West Casualty Co., file no. 753723 (Appeal Decision March 31, 1987). Also, it might be added that if claimant was capable of student work, then he was capable of doing a number of other desk jobs, especially with his high intelligence and motivation to achieve and excel.

Claimant has sustained the burden of proof by a preponderance of the evidence that he is entitled to medical benefits under Iowa Code section 85.27 through August 2, 1984 and for his examination by Dr. Carlstrom on that date. Medical expenses after that date are determined to be unreasonable and repetitious for what was initially described by Dr. Landhuis as a contusion

of the arm, cervical strain and persistent headache; and what was eventually diagnosed by Dr. Carlstrom as myofascial or muscle strain. It is more likely that claimant's persistent neck and arm problems are due to his spinal abnormalities that predated this injury. Therefore, all medical expenses after August 2, 1984 are determined to be not caused by the injury of December 9, 1983, which are essentially all the expenses incurred by claimant in California (Ex. 6, 7 and 8). All of claimant's medical expenses prior to that date are reasonable and it is determined that they are to be paid by employer.

No allowance is made for any of the medical expenses in Exhibit 11. Many of these are already paid according to the itemized accounting attached to industrial commissioner form 2a. Others were incurred in California after August 2, 1984. Exhibit 11 p. 15 is a bill from Neuroassociates in Des Moines in the amount of $100.00 dated January 9, 1987, cannot be allowed because there is no indication on the bill what service was performed for these charges. Likewise, Ex. 11, p. 16, a bill from Mercy Hospital Medical Center in Des Moines in the amount of $186.50 dated December 22, 1986 cannot be allowed because, again, on this statement there is no indication what service was rendered for these charges.

Whether defendants authorized certain medical expenses or not is irrelevant and immaterial. Defendants denied liability for an injury up until the time of the hearing. Iowa Code section 85.27 gives defendants the right to choose the care. However, defendants in their answer denied that claimant's injuries arose out of and in the course of employment. The issue of arising out of and in the course of employment was included in the prehearing order as an issue to be tried. It does not seem logical that defendants can deny liability on the one hand and guide the course of treatment on the other. Barnhart v. MAC, Inc., 1 Iowa Industrial Commissioner Report 16, 17 (Appeal Decision 1981). The fact that defendants paid some benefits does not constitute an admission of liability, Iowa Code section 86.13. Nor is failure to file a denial of liability an admission of liability on their part, Iowa Code section 85.26 (2).

FINDINGS OF FACT

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

That claimant fell at work on December 9, 1983 and received a contusion of the arm, cervical strain and persistent headaches.

That claimant already had several spinal problems that predated this injury which Dr. Carlstrom said could have been either traumatic injuries or congenital defects.

That Dr. Carlstrom found that the injury that claimant sustained in the fall on December 9, 1983, was simply myofascial strain or muscle strain.

That claimant did not require any permanent restrictions as a result of this injury.

That claimant attained maximum medical improvement on August 2, 1984 and could work without restrictions on and after that date.

That claimant was able to perform work as a graduate student from September 1984 until his graduation in May of 1985 when he obtained a Master's degree in finance with a 3.5 grade point average.

That after graduation from postgraduate school claimant worked as a financial analyst for $24,000 per year from June of 1985 until September of 1986.

That claimant has been employed as an accounting supervisor since November of 1986 at a salary of $30,000 per year.

That claimant did not seek any employment from the date of the injury on December 9, 1983 until after his graduation in May of 1985.

That claimant incurred reasonably necessary transportation expenses in the amount of $1,566.78.

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 injury was the cause of any permanent disability.

That claimant is not entitled to any additional temporary total disability benefits.

That claimant is not entitled to any permanent partial disability benefits.

That claimant is not permanently disabled.

That claimant did not make a prima facie showing of permanent total disability.

That claimant is entitled to $1,566.78 in transportation

expenses as enumerated above.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant in lump sum one thousand five hundred sixty-six and 78/100 dollars ($1,566.78) in medical expenses for reasonable and necessary transportation and miscellaneous expenses under Iowa Code section 85.27.

That no other amounts are due from defendants to claimant for either temporary or permanent disability benefits.

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

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

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

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBORAH LIGHT, Claimant, vs. ECONOMICS LABORATORY, INC., Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 721376 C O M M U T A T I O N D E C I S I O N FILED DEC 2 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding brought by Deborah Light, claimant, against Economics Laboratory, Inc., employer, and Wausau Insurance Company, insurance carrier, for a full commutation of weekly workers' compensation benefits as a result of the work-related death of her husband, Alan Light, on November 30, 1982. On July 22, 1986, 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. The exhibits received into the evidence at the hearing are listed in the prehearing report.

In the prehearing report, the parties stipulated that the death of Alan Light arose out of and in the course of employment with defendant employer, and that claimant's rate of weekly compensation is $244.45 per week. Defendants admitted in their response to claimant's petition that claimant is entitled to receive widow's benefits for life subject to the provisions of section 85.31 relating to remarriage.

The only issue presented by the parties for determination in this proceeding is whether claimant is entitled to a full commutation of benefits.

SUMMARY OF THE EVIDENCE

The following is a summary of the evidence presented in this case. For 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 is 36 years of age and single. She graduated from high school in 1969. In 1973, she received a B.S. degree from Illinois State University with a major in education of the deaf. Following graduation, she obtained a position teaching deaf persons in 1973 in the public school system for the City of Moline, Illinois. Following the death of her husband in an auto accident in November 1982, claimant earned approximately $19,000-$22,000 annually between 1982 and 1985 in her teaching position. In June 1985, claimant terminated her teaching job and became a full-time managing partner in New Sauk Currency Exchange in the Chicago, Illinois metro area. In February 1985, she along with her father and her brother entered into a partnership which purchased this currency exchange for $229,000.

Claimant and her family are very familiar with the operation of currency exchanges. Claimant's father has been in the business since her childhood and claimant has intermittently worked for her father in this business since she was a child. A currency exchange is a business not familiar to most Iowans. Such an exchange generally is a business establishment which offers services for profit such as cashing for a fee all forms of government issued and personal checks, selling money orders, paying utility bills, license and motor vehicle title work, and acting as distribution agent for the Illinois Department of Public Aid in the distribution of welfare checks and food stamps.

Claimant owns 50 percent of the partnership and is entitled to 50 percent of the profits. Claimant's brother owns 30 percent and her father 20 percent. Claimant contributed $102,000 toward the purchase price, her father $10,000, and her brother $7,000. However, claimant's brother and father are also contributing their past experience and expertise in money exchanges into the partnership. Also, a part of the cash contribution which claimant made in the purchase price of the currency exchange is a loan to the other partners to be repaid by partnership revenues.

The purchase price of New Sauk represented two and one-quarter to two and one-half times the gross income of the currency exchange in the year previous to the purchase. In 1986, the exchange grossed $106,000, up from the previous year, and claimant expects to gross more this year. Last year the partnership's net income was approximately $10,000, of which claimant's share was $5,000. However, claimant's draw from the

partnership last year was approximately $30,000. The difference between the amount of her draw and the partnership's net income represents what the partnership terms as a repayment to a partner. Claimant explained at the hearing that she would prefer that the partnership not have any income for tax purposes. Income should be placed back into the business for growth purposes.

Claimant testified that she desires the commutation because she wishes to manage her own money and needs approximately $40,000 for expansion of her currency exchange business into the south suburbs of the Chicago. She explained that the future of such exchanges lies in the malls and shopping areas of suburbia. She testified that she would place the balance of the commutation proceeds in appropriate mutual funds or other investments.

Claimant states that she has been handling her own monetary affairs since 1973 when she began teaching. She states that she has several financial consultants and accounting firms available to provide her with financial and accounting advice. She states that she is healthy and would have financial security even if the currency exchange business fails in that she could always return to teaching. She indeed plans on returning to teaching should her expansion plans prove successful. Claimant certainly has sufficient other funds available to her in the event of a failure of the currency exchange. She has approximately $102,000 invested in various mutual funds, annuities, money market accounts, IRA's, certificates of deposit and frozen pension fund accounts. She also owns her own home which she estimates has a value of approximately $120,000.

APPLICABLE LAW AND ANALYSIS

Claimant is entitled to a lump sum payment and full commutation of all weekly workers' compensation benefits only after a showing by a preponderance of the evidence that the period during which compensation is payable can be definitely determinable and that the commutation is in the best interest of claimant. Iowa Code section 85.45. When the person seeking a commutation is entitled to benefits for life, the future benefits may be commuted but shall not exceed the number of weeks indicated by probability tables designed by the industrial commissioner for death and remarriage. Iowa Code section 85.45(4). When the commutation is ordered, the industrial commissioner shall fix the lump sum to be paid in an amount which will equal the total sum of the probable future payment capitalized at their present value and upon the basis of interest at the rate provided in Iowa Code section 535.3 for court judgments and decrees. Iowa Code section 85.45. In the case of a full commutation, payment of the lump sum set by the commissioner shall discharge the employer from all further liability on account of the injury or death. Iowa Code section 85.47.

In determining whether the commutation is in the best interest of claimant, this agency cannot act as a conservator or disregard claimant's desires and reasonable plans just because success of the plans is not assured. Diamond v. Parsons Company, 256 Iowa 915, 129 N.W.2d 608 (1964). The Iowa Supreme Court in Dameron v. Neumann Brothers, Inc., 339 N.W.2d 160, 165 (Iowa 1983), has held that this agency should examine the following in determining whether to allow a commutation:

1. The worker's age, education, mental and physical condition, and actual life expectancy (as contrasted with information provided by actuarial tables).

2. The worker's family circumstances, living arrangements, and responsiblities to dependent.

3. The worker's financial condition, including all sources of income, debts and living expenses.

4. The reasonableness of the worker's plan for investing the lump sum proceeds and the worker's ability to manage invested funds or arrange for management by others (for example, by a trustee or conservator).

The Dameron court went on to state that a request for commutation should be approved unless the potential detriments to the worker outweigh the worker's expressed preference and the demonstrated benefits of commutation. Dameron, 339 N.W.2d 165.

In the case sub judice, defendants imply in their cross-examination of claimant that claimant's currency exchange business is not as profitable as some other forms of investment. However, the exchange is a growing business entity and this agency is not about to substitute its judgment over that of a person who has been involved in such exchanges since childhood. Claimant is not a helpless elderly widow. She is a well educated, experienced and appeared to possess considerable business savvy at the hearing. Claimant has clearly shown in this case that the detriments to a full commutation do not outweigh claimant's preferences as to the use of the commutation funds and the potential benefits from a successful move of her exchange business into the shopping center market. Therefore, it will be found that the commutation is in the best interest of claimant and shall be ordered herein.

Claimant's commutation shall be calculated from the date of decision. Heath v. Sidles Distributing Company, III Iowa Industrial Commissioner Reports 127, 129 (Appeal Decision 1983).

Claimant's life expectancy duration and probability of

remarriage after the fifth anniversary computes in the commissioner's tables to 1,374.89 weeks. Division of Industrial Services Rule 343-6.3(3). Given this number of weeks according to the commissioner's commutation table, Division of Industrial Services Rule 343-6.3(2), the commuted value of claimant's entitlement to lifetime widow's benefits according the stipulated rate of compensation is a lump sum amounting to $118,058.33.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. Claimant is 36 years of age, single, and a college graduate with excellent health and no physical or mental impairments.

3. Claimant is in excellent financial condition apart from her workers' compensation beneits, having various investments exceeding $100,000 and a personal residence which she owns outright valued at $120,000.

4. Claimant's plan for investing the lump sum proceeds from commutation into appropriate private investments and expansion of her currency exchange business is reasonable. Claimant is herself an able manager and has taken advice from other able counselors and accountants in the conduct of her business affairs. Claimant's expansion plans of the business appear reasonable despite the element of risk. Claimant's plan to invest the balance of the money into mutual funds or some other sutitable investment appears reasonable.

5. Claimant is very capable of handling her own affairs and fully able to manage the invested funds.

6. Claimant is fully aware that a full commutation terminates her entitlement to further benefits from workers' compensation as a result of her husband's death.

CONCLUSIONS OF LAW

A full commutation is in claimant's best interest and claimant is entitled to a lump sum payment as ordered below.

ORDER

1. Defendants shall pay to claimant the sum of one hundred eighteen thousand fifty-eight and 33/100 dollars ($118,058.33) in full commutation of claimant's workers' compensation benefits as a result of the work injury which resulted in her husband's death on November 30, 1982.

2. Upon payment of the above commuted amount, defendants

shall be discharged from any and all further liability arising under the Iowa Workers' Compensation Law on account of her husband's death on November 30, 1982.

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

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 2nd day of December, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FREDRICK E. LINCK,

Claimant,

vs.

DALE HOWARD,

Employer,
Defendant.

File No. 798207

A R B I T R A T I O N

D E C I S I O N

This is a proceeding in arbitration brought by Fredrick Linck, claimant, against Dale Howard, employer, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury occurring October 27, 1984. This matter was to come on for hearing September 23, 1987, in the Pottawattamie County Courthouse, in Council Bluffs, Iowa, at 10:00 a.m.

Counsel for defendant, Richard Swensen, was present as was the undersigned deputy industrial commissioner. Neither claimant nor his counsel appeared, as counsel called to advise.

Claimant failed to present any evidence in support of the allegations found in his original notice and petition.

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 counsel appeared at the scheduled time and place of hearing.

2. Defendant and the undersigned were present and prepared to proceed to hearing.

3. Claimant failed to present any evidence to support allegations of a compensable work injury.

THEREFORE, 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. Industrial Commissioner Rule 343-4.33.

Signed and filed this 5th day of October, 1987.

Deborah A. Dubik
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROY ALLEN KRAMER, Claimant, vs. JOHN MORRELL & COMPANY, Employer, Self-Insured, Defendant.	:	FILE NOS. 801735 & 801734 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 Roy Allen Kramer, claimant, against John Morrell & Company, self-insured employer and defendant for benefits as a result of an alleged injury due to a fall on April 11, 1985 and for an alleged occupational hearing loss on April 27, 1985. A hearing was held in Storm Lake, Iowa on November 26, 1986 and the case was fully submitted at the close of the hearing. The record consists of the testimony of Roy Allen Kramer (claimant); Charles B. Carnignan, M.D. (claimant's doctor); Ron Hampson (claimant's co-employee); Vickie Henderson (claimant's co-employee); Roger Marquardt (claimant's vocational rehabilitation consultant); and, Dennis L. Howrey (employer's personnel and labor relations manager). There are two sets of exhibits. The exhibits for the fall injury on April 11, 1985 are claimant's exhibits 1 through 12 and defendant's exhibits A, B, and C. The exhibits for the occupational hearing loss are claimant's exhibits A through F and defendant's exhibits 1 and 2. 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 both alleged injuries.

That the type of permanent disability, in the event of a finding of permanent disability, for the alleged fall injury on April 11, 1985, is industrial disability to the body as a whole.

That the disability for the alleged hearing loss is occupational hearing loss as provided in Iowa Code section 85B.

That the rate of weekly compensation in the event of an award is $202.67 per week.

That no credits are claimed and that there are no bifurcated issues.

ISSUES

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

Whether the claimant sustained an injury on April 11, 1985 and an occupational hearing loss on April 27, 1985 which arose out of and in the course of his employment with employer.

Whether the alleged fall injury of April 11, 1985 is the cause of any temporary or permanent disability.

Whether the claimant's employment was the cause of an alleged occupational hearing loss on April 27, 1985.

Whether the claimant is entitled to temporary disability benefits during a period of recovery for the alleged fall injury of April 11, 1985.

Whether claimant is entitled to any permanent disability benefits for either the alleged fall injury of April 11, 1985 or the alleged occupational hearing loss of April 27, 1985.

Whether claimant is an odd-lot employee.

Whether claimant gave notice of both injuries as required by Iowa Code section 85.23 is asserted as an affirmative defense.

Whether claimant commenced this action in a timely manner as required by Iowa Code section 85.26 as to both injuries is also asserted as an affirmative defense.

Whether claimant is entitled to $72 in medical charges of Dr. Carnignan for four office visits at $18 each.

Whether claimant is entitled to a hearing aid as provided by Iowa Code section 85B.12.

SUMMARY OF THE EVIDENCE

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

Claimant is 31 years old, married and has one small child. He is a high school graduate. Prior employments include working as a mechanic in a bowling alley, doing body work for U-Haul and

putting vinyl tops on cars. Claimant began work for employer in February of 1977 (Transcript pages 8-11). Claimant's pre-employment physical examination on February 15, 1987 indicated no back or hearing problems (Exhibit 1). Claimant denied any back or hearing problems prior to his employment for employer (Tr. p. 11). In the course of his employment claimant transported 100 pound dried blood bags, pulled carts, shoveled, stacked boxes, and loaded train cars and semis (Tr. p. 133). Claimant worked in both the beef plant and the pork plant from rendering to the kill floor (Tr. pp. 12-15). During the last year and a half that claimant worked he performed the job of shaving hams. For the four year period prior to that he worked on the kill floor at the head table. Prior to that he worked on the beef kill floor and in rendering (Tr. p. 132).

The noisiest job was working with an air knife at the head table. The second noisiest job was shaving hams by the polisher (Tr. p. 134). Earplugs were made available in 1982 but you had to get time off and go to the nurse in the personnel office in order to get them. About one year before the plant closed on April 27, 1985, earplug dispensers were placed on the wall in the plant. Claimant testified he used the earplugs when they were made available but he did not specify whether he meant in 1982 or in 1984 (Tr. pp. 15 & 16).

Claimant testified that sometime before the plant closed on April 27, 1985, the plant nurse performed a hearing test. She told claimant that he had a great deal of hearing loss and that he should see a specialist. Claimant's family doctor, Dr. Ford (full name unknown), also told him to see a specialist. However, claimant could not afford to see a specialist at that time (Tr. pp. 21-23). Claimant denied any childhood head injuries, listening to rock music or other loud music, family history of hearing problems, hunting, driving tractors or farming (Tr. pp. 36 & 37). Claimant stated that an audiologist told him that his hearing could be helped by a hearing aid (Tr. p. 42).

The back injury under consideration allegedly occurred on April 11, 1985. Claimant fell while descending a ladder near his work station (original notice and petition). However, two other incidents occurred prior to that which are significant in this case. On October 3, 1979, as claimant walked under the rail, a stringer broke, and a hog carcass came off and hit claimant in the back (Defendant's Ex. C, p. 3 and Tr. p. 16). Claimant saw the plant physician, William J. Moreau, D.C., in Estherville. Claimant immediately returned to work and lost no time from work on account of this injury (Def. Ex. C, pp. 3 & 7 and Tr. p. 17). There is no treatment record from Dr. Moreau for this incident.

On August 3, 1981, claimant hurt his back picking up a pail (Def. Ex. C, p. 3 and Tr. p. 18). It should be noted also that

the employee injury record card shows that on February 12, 1981 claimant hurt his back moving boxes and saw Dr. Moreau and that on November 4, 1981, claimant hurt his back pulling a barrel and was seen by Medical Center (Def. Ex. C, p. 3). After the pail injury Dr. Moreau referred claimant to Robert S. Hranic, M.D., in Estherville. On August 4, 1981, Dr. Hranic recorded the following information: "8-4-81 Has back trouble for last 2 yrs. - 2 yrs ago a hog hit him in the back & threw him over table - Has been seeing Dr. Moreau about every other wk. Developed a pain in rt side of back Dr. Moreau unable to help him now." (Claimant's Ex. 3, p. 3).

Dr. Hranic prescribed medication; out-patient physical therapy at Estherville Hospital; had claimant fitted for a back brace; and referred claimant to an orthopedic surgeon by the name of Dr. Giebink (full name unknown) in Sioux Falls, South Dakota (Cl. Ex. 3, p. 2). There is no medical data in evidence from Dr. Giebink himself. Dr. Hranic noted on September 9, 1981, that Dr. Giebink said claimant could work; there was the possibility of a disc in the dorsal spine; but, normally these work out (Cl. Ex. 3, p. 2). Dr. Moreau's notes of October, 1981, also reflect that claimant saw Dr. Giebink in Sioux Falls but claimant did not remember the diagnosis (Cl. Ex. 4, p. 4). Claimant testified that he missed two weeks of work. The employee absence record indicates claimant lost 15 days of work due to injury in early August of 1981 (Def. Ex. C, p. 6).

Claimant testified that after each of these incidents in 1979 and 1981 he returned to full time strenuous work. No permanent impairment rating was given for either injury and he was not paid any workers' compensation benefits for either of these injuries (Tr. pp. 18, 20, 142 & 143).

Employer's injury record card (Def. Ex. C, p. 3) and Dr. Hranic's office notes (Cl. Ex. 3, p. 1) show that again on November 4, 1981, claimant was pulling on a barrel, heard something pop, and it made his lower back sore and tight. The employee's absence record for November of 1981 reflects that claimant lost approximately three days of work due to this low back incident (Def. Ex. C, p. 6).

The Moreau Chiropractic Clinic records show that claimant received a number of treatments for cervical and thoracic pain in 1982, 1984, and 1985 (Cl. Ex. 4, pp. 2-12). The employer's injury record card also shows that claimant reported neck or shoulder problems approximately five times at work in 1982, 1983 and 1984 (Def. Ex. C, p. 3). However, no time was lost from work due to these injuries (Def. Ex. C, pp. 5 & 6).

Claimant received another company physical examination when he returned to work from a shut down on July 13, 1983. He reported no deafness or hearing problems at that time. He did report the back injury at work in 1981 for which he wore a back

brace, but it was okay at the time of the physical examination with no recurrence of the problem (Cl. Ex. 2).

The injury which is the subject of this action occurred on April 11, 1985, just a few days before the plant closed permanently on April 27, 1985. Claimant's job at that time was shaving hams. Claimant descended a ladder from his upper level work station to go on morning break. There was a piece of fat on the first step. Claimant slipped on it, swung around, tried to hold on with one hand, but hit something and lost his grip on the ladder and then he fell to the floor approximately six feet below. When claimant got up Ron Hampson, his co-worker, was there. The foreman sent him to the nurse. She arranged an appointment with Dr. Moreau, but he could not get in until 9:00 p.m. that night. Claimant said his whole spine was very painful. Nevertheless, he continued to work until the plant closed on April 27, 1985 (Tr. p. 128). Claimant did not lose any time from work due to this fall (Tr. pp. 23-27). No absence for this injury is shown on the employee absence record (Def. Ex. C, p. 4).

Defendant points out that Dr. Moreau and other medical reports at the Mayo Clinic verify only that claimant slipped on a ladder but did not confirm that he hit anything or fell to the floor six feet below (Cl. Ex. 4, p. 3). Dr. Moreau recorded that he saw claimant for lumboalgia and cervicalgia on April 11, 1985. Dr. Moreau's records also show that he had seen claimant a number of times in the previous 12 month period for cervical and thoracic pain. The dates of treatment are: March 26, 1984; March 29, 1984; April 26, 1984; April 30, 1984; July 17, 1984; October 3, 1984; December 12, 1984; April 2, 1985; April 4, 1985; and, that claimant cancelled his appointment for April 8, 1985 (Cl. Ex. 4, pp. 3 & 4). Dr. Moreau then saw claimant for this injury of April 11, 1985. After that Dr. Moreau continued to treat claimant on April 13, 1985; April 16, 1985; April 18, 1985; April 20, 1985; April 25, 1985; April 30, 1985; and, May 6, 1985 with a diagnosis of subluxation of the right sacroiliac joint with associated myalgia (Cl. Ex. 4, p. 2).

Dr. Moreau then sent claimant to Dr. Hranic again who looked at the x-rays and sent claimant to Mayo Clinic (Cl. Ex. 5; Tr. p. 27). There is no medical report from Dr. Hranic for this examination in evidence. Claimant was examined by a number of doctors in a number of departments at the Mayo Clinic.

H. K. Ivy, M.D., noted on May 24, 1985, that claimant's problem began when he was hit by the hog carcass six years ago (1979) and that his distress has continued to the present time. Claimant felt that recent vigorous chiropractic manipulations aggravated his discomfort. He described his low back pain as a dull ache. Over the years there has been no tendency for this problem to improve. About a month ago claimant slipped while descending a ladder but caught himself with a sudden jerk which

caused cervical pain. For several years claimant has been aware of a sense of ataxia (lack of muscle coordination) that caused people to comment that he looks drunk when he walks. Dr. Ivy said claimant's lumbar extension was (-2) and his rotation of his neck to the right (-2). Dr. Ivy diagnosed that claimant had (1) chronic lumbar strain, and (2) muscular pain at right cervical area (Cl. Ex. 6, p. 3; Cl. Ex. 9, p. 2).

Claimant was also examined on May 24, 1985 at the Mayo Clinic by S. N. Bell, M.D. Dr. Bell examined claimant and recorded (1) chronic low back pain and, (2) right neck pain. He said he has had the chronic low back pain since the injury six years ago (1979). He said that the neck pain occurred when he slipped from a ladder catching himself with his arms and jolting his neck (Cl. Ex. 6, p. 4). Dr. Bell diagnosed (1) mechanical low back pain and, (2) slowly resolving cervical strain (Cl. Ex. 6, p. 10). He noted (-2) lumbar and (-1) cervical limitation of motion (Cl. Ex. 6, p. 4).

On May 29, 1985, J. D. Bartleson, M.D., in the neurology department, noted that about six and one-half years ago claimant was knocked forward by a hog carcass and developed soreness all over. The pain settled in his low back and he has had fluctuating low back pain ever since. Two months ago he developed neck pain when he fell from a ladder, grabbed with his hands and his head was snapped backward. Chiropractic treatments seemed to make his neck worse (Cl. Ex. 6, p. 14). Dr. Bartleson diagnosed musculoskeletal neck and low back pain. He recommended conservative measures. He suggested that claimant should avoid heavy manual labor and should lose a few pounds (Cl. Ex. 6, p. 17).

Dr. Lowell F. A. Peterson, M.D., supplied medical information by his notes of July 1, 1985 (Cl. Ex. 6, p. 11) and by his deposition on March 17, 1986 (Def. Ex. A). In his medical notes Dr. Peterson stated claimant felt his symptoms all started when he was knocked forward by the hog carcass (Cl. Ex. 6, p. 11). He said there was no evidence of skeletal trauma on the roentgenograms (Cl. Ex. 6, p. 9).

In his deposition, Dr. Peterson testified that he is a board certified orthopedic surgeon who has practiced medicine for 32 years at the Mayo Clinic since October 1, 1954. He also serves as a professor of orthopedic surgery at the Mayo Clinic. He has written approximately 90 articles for publication and medical journals (Def. Ex. A, pp. 1-5). He first saw claimant in July of 1985. He stressed that claimant did not fall off the ladder when he slipped. Also, that when claimant wore his back brace it relieved his back discomfort (Def. Ex. A, pp. 6 & 7). Claimant had no muscle spasm at the time of his examination which is an indication that he was relatively pain free (Def. Ex. A, p. 8). The minor limitations of motion recorded by Dr. Ivy and Dr. Bell on May 24, 1985 were no longer present (Def. Ex. A,

pp. 19 & 20). Dr. Peterson reviewed the roentgenograms and concluded claimant had facet degeneration changes at the lumbosacral joint evidenced by some overriding of the facets and some mild sclerosis. This was relatively early, meaning it was not advanced in its nature. Dr. Peterson testified: "My final conclusion was that the patient had degenerative arthritic changes in the lumbosacral facet joints and that his pain was mechanical on the basis of the facet arthritis." (Def. Ex. A, p. 9).

Dr. Peterson said that mechanical means that it is related to the arthritis rather than nerve root pressure. This is purely a wear and tear phenomenon (Def. Ex. C, pp. 9 & 10).

Dr. Peterson said the problem for which he examined claimant is historically related to claimant's 1979 injury. The 10 percent permanent partial disability rating (Cl. Ex. 6, p. 11) that Dr. Peterson awarded claimant was due to the 1979 incident when the hog fell on him. Dr. Peterson testified that claimant had no impairment from the injury which occurred on April 11, 1985. Dr. Peterson further testified that this injury did not aggravate the claimant's preexisting neck or back problems. The minor limitations of motion noted by Dr. Ivy and Dr. Bell were no longer present (Def. Ex. A, pp. 18-20).

Dr. Peterson said that claimant had reached maximum medical recovery at the time of his examination on July 1, 1985. Dr. Peterson declared that the only complication claimant suffered from the incident that occurred on April 11, 1985 was in regard to his neck, and that basically was a problem that went away or was not a major problem at the time of his examination on July 1, 1985. He did not impose any weight restrictions on claimant (Def. Ex. C, pp. 10 & 11). Claimant had a full range of motion of the lumbar spine and a normal straight leg raising test on both sides (Def. Ex. A, p. 25).

Claimant testified that he retained an attorney to represent him on his back problem and his hearing problem in late 1985 or early 1986. His attorney sent him to see C. B. Carnignan, M.D. He consulted with him about his back and hearing problems. Dr. Carnignan prescribed pain pills for his back pain (Tr. pp. 32 & 33).

Dr. Carnignan examined claimant on October 21, 1985 and made a report on October 26, 1985. Dr. Carnignan reviewed claimant's 1979, 1981 and 1985 back injuries. He also found that the neck injury from the fall on April 11, 1985 did not bother him very much. However, the back continued to cause him pain and caused him to stand or sit in a hunched over position of about five degrees of flexion. The pain was localized over the L-4, L-5 vertebra area. Claimant had a full range of motion in his spine, no radicular pain, and his reflexes, strength, and neurological findings were all within normal limits. Dr. Carnignan said claimant is suffering a 10 percent permanent

whole body impairment due to limited motion and pain from his multiple back injuries during his employment with employer (Cl. Ex. 8).

In his hearing testimony, Dr. Carnignan said that he was a board certified family practitioner in Okoboji, Iowa (Tr. pp. 45 & 46). His history showed that claimant landed on his back when he fell from the ladder on April 11, 1985 (Tr. p. 48). The neck had improved but he was still having trouble with his back. He had trouble standing erect and was most comfortable with about a 20 percent flexion of the back (Tr. p. 49). Dr. Carnignan believed claimant's hearing loss was due to exposure to high noise levels at work. There was nothing else in his history that would cause the hearing loss (Tr. pp. 51, 52 & 101).

Dr. Carnignan raised the impairment rating on claimant's back from 10 percent to 16 percent in his hearing testimony (Tr. p. 54). Dr. Carnignan requested Jim Myerly, M.D., a radiologist, to examine earlier x-rays taken by Dr. Moreau of claimant's neck and back. Dr. Mylerly found no arthritic changes in the cervical area and only minor narrowing at the L-5, S-1 disc space (Tr. pp. 55-59). Dr. Carnignan granted that back problems do not always show up on x-rays (Tr. pp. 86 & 87). Dr. Carnignan formed the opinion that claimant did not have any permanent impairment from the 1979 and 1981 injuries because claimant always returned to heavy labor (Tr. pp. 55-66). Dr. Carnignan felt claimant was just now reaching maximum medical improvement (Tr. pp. 66 & 67). Claimant should avoid heavy lifting and should not lift over 30 to 35 pounds (Tr. p. 68). Dr. Carnignan stated that claimant would require medication for his low back for the rest of his life (Tr. p. 71).

Dr. Carnignan stated that his examination of the claimant in October of 1985 was for the purpose of evaluation. He charged $50 and the claimant paid it himself. Claimant also had four office visits on April 1, 1986; May 5, 1986; October 3, 1986; and, November 7, 1986. Dr. Carnignan charged $18 for each of these office visits for a total amount of $72. Defendant objected to the payment of these medical bills because Dr. Carnignan was not an authorized physician and the purpose of the office visits were for trial preparation (Tr. pp. 71, 72 and 76). Dr. Carnignan acknowledged that he evaluates a number of workers' compensation cases for claimant's counsel in this case and also for other attorneys. He admitted that claimant had not previously been a patient of his prior to that time (Tr. p. 75). Dr. Carnignan granted that the first two office visits in 1986 (April 1, 1986 and May 5, 1986) were for trial preparation. He also admitted that he did in fact raise the impairment rating that he had made earlier in October of 1985 by six percent (Tr. pp. 76-80). Dr. Carnignan also agreed that the 30 to 35 pound weight restriction that he felt appropriate today was no different than Dr. Giebink felt was appropriate back in 1981 (Tr. pp. 80 & 81). Dr. Carnignan

testified that claimant's neck problems were not sufficient to assign an impairment rating (Tr. pp. 88 & 89). The doctor conceded that he did not see the claimant after his 1979 and 1981 injuries. He said that he based his opinion that there was no impairment on the fact that claimant returned to strenuous work after each of these injuries (Tr. pp. 89 & 90). The witness stated that the 10 decibel increase in loss of low tones in the claimant's hearing between his audiogram in October of 1985 and Daniel L. Jorgensen, M.D.,'s audiogram in July, 1986, could be a situation in the eustacion tube, operator error, or a number of other factors (Tr. pp. 92-94). Dr. Carnignan testified that if the fall on April 11 did not cause a new injury, it would certainly have aggravated claimant's preexisting back injuries (Tr. p. 100).

Ron Hampson, a 29 year employee of employer, who now works at the Sioux Falls, South Dakota plant, testified that he worked with claimant on the kill floor shaving hams on April 11, 1985. He testified that claimant left for break just two or three seconds ahead of him. When he got to the end of the platform he saw claimant laying on the floor flat on his back. He went to the plant nurse but returned to his work station and finished the day. Claimant did not miss any work due to this fall (Tr. pp. 108-113). He said the job of shaving hams involved relatively no lifting (Tr. p. 117). However, it was noisy because the polisher, which is a high speed washer, made a high pitched scream (Tr. p. 118).

Vickie Henderson testified that she worked for employer from May 14, 1979 until the plant closed permanently on April 27, 1985. In April of 1985, she worked on the pork kill floor. From her station she could see claimant hanging on the ladder in between the hogs as they went by. His feet were possibly three feet off the ground (Tr. p. 150). He looked like he was having problems. She signaled a co-worker to get help and when she looked back he was laying on the floor (Tr. pp. 145-148). She did not know the length of the ladder but she is five foot six inches tall and she can walk under it (Tr. 147-148). He did not appear to have any back problems before the fall but was having a great deal of problem after the fall (Tr. pp. 148 & 149).

Claimant testified that he has to wear a back brace all of the time now. He ceased to wear it after his 1981 injury. However, he got it out the day after the April 11, 1985 injury on his own initiative and has been wearing it ever since. He testified that he cannot shovel snow. His wife mows the lawn and rakes the yard and does the gardening. He can no longer play volleyball, basketball or baseball. The only thing he does now is a lot of walking and physical therapy exercises. He regularly takes pain pills now prescribed by Dr. Carnignan (Tr. pp. 39-42). Claimant testified that his back has gotten progressively worse since the April 11, 1985 injury (Tr. pp. 134 & 135).

Claimant could not tell if his hearing had changed or not (Tr. pp. 135 & 136).

When the plant closed on April 27, 1985 claimant elected to terminate with employer and take a severance pay rather than transfer to Sioux Falls, South Dakota. He stated he chose to terminate because the doctors at Mayo Clinic told him that he could run into a lot of trouble if he continued to do manual labor in the packing plant (Tr. p. 30). Claimant testified that he tried to join the military service but was rejected because of his back (Tr. p. 139). Since then he has tried to find work with several employers in the community but he has not been successful. When they see the back brace they are not interested. He began wearing the brace of his own volition the day after the April 11, 1985 fall (Tr. pp. 31 & 32). He testified that he drew unemployment compensation as long as he could (Tr. p. 128). Claimant now works five hours a day, four days a week as an assistant teacher with four and five year olds in the head start program. The State of Iowa requires this employment in order for him to draw aid to dependent children benefits and food stamp assistance (Tr. pp. 33 & 34). Claimant tried to return to two former jobs he had done working for farmers during previous plant shut downs of milking cows and working in a hog confinement facility. However, he testified that he was unable to do these jobs (Tr. pp. 37, 38, 44 & 142).

Claimant has no formal training after high school other than a one week mechanic course (Tr. p. 43). Claimant testified that the economic situation in Estherville is sad. There is no employment available there (Tr. p. 128).

Roger F. Marquardt, a vocational rehabilitation specialist, testified he was retained by claimant's counsel to make a vocational capacity evaluation in August of 1986 (Tr. pp. 152-155). He reviewed claimant's medical information and interviewed claimant for about one and one-half hours to two hours (Tr. p. 156). Marquardt believed that claimant had lost approximately 29 percent of his access to jobs because he cannot do heavy work or semi-skilled work in the meat packing industry (Tr. pp. 160 & 161). There are jobs claimant could do in the meat packing industry but he would have to update his skills a little farther in order to engage in other employment (Tr. 169).

Marquardt said claimant was earning $8.25 per hour at the time of the injury and he felt that claimant could now earn $6.50 per hour. Therefore, claimant has encountered a 23 percent loss of earning capacity (Tr. pp. 161 & 162). Also, Marquardt felt that due to his recurring medical problems to his back, Marquardt would advise claimant to seek employment other than in the meat packing industry (Tr. p. 164). The witness thought claimant should try to vocationally rehabilitate himself through sharpening his skills rather than just look for a job (Tr. pp. 167 & 173).

The unemployment rate for Estherville is low, but that might mean that the unemployed people have moved out. Marquardt said it would be very difficult to go out and find a job tomorrow (Tr. p. 171).

Dennis L. Howrey, personnel and public relations manager for employer, testified that from a skill level claimant was an average employee. From his attendance records he was below average because of his repeated absences from work (Tr. pp. 174 & 175). When the plant closed claimant could have transferred to Sioux Falls but chose instead to receive $2,640 in severance pay and $220.03 in vacation pay (Tr. p. 180). He stated that Dr. Moreau, Dr. Hranic and Mayo Clinic were designated as treating physicians in this case (Tr. p. 181). Howrey agreed that on the noise level surveys that the area of the wizard knives at the head table was 95 decibels and that the shaving hams table was 90 decibels. He agreed that claimant worked eight hours a day five or six days a week from 1977 up until the plant closed in 1985 (Tr. p. 186).

R. David Nelson, M.A., an audiologist, tested claimant's hearing on October 24, 1985. His audiometric test results disclosed a mild bilateral sensorineural hearing loss in the low and mid frequency region and severe bilateral sensorineural hearing loss in the high frequencies. This pattern, especially the higher frequencies, is similar to that observed in known noise hearing losses. He said that claimant is a candidate for amplification (Cl. Ex. D, p. 1). Dr. Carnignan interpreted the tests results and wrote that it was equal to a five percent binaural hearing impairment (Cl. Ex. D, p. 2). Binaural hearing aids of the behind the ear type would cost $1,350; binaural in the ear type hearing aids would cost $1,250 (Cl. Ex. F).

Claimant was also tested on September 16, 1986 by Jean Rudkin, M.S., who is an audiologist in the office of Daniel Jorgensen, M.D., an otolaryngologist and head and neck surgeon (Def. Ex. 1, Deposition Ex. 2). Dr. Jorgensen testified by deposition on November 10, 1986 (Def. Ex. 1). He also wrote a letter on November 20, 1986 (Def. Ex. 2). Dr. Jorgensen testified that he examined claimant on September 15, 1986. He found claimant had a mild low frequency sensorineural loss which sloped to a severe high frequency loss. The classic up sign at 8,000 hertz is consistent with a noise induced loss. It was unusal to see the low frequencies below the normal range. That raises the possibility of congenital loss or some other cause for a bilateral hearing loss. With a symmetric problem you have to think of diseases which could cause that. A classic noise induced loss would be normal in the low frequencies but then drop off in the higher frequencies (Def. Ex. 1, pp. 5-9). In order to determine the amount of noise induced loss it would be necessary to see an audiogram performed prior to any noise insult (Def. Ex. 1, pp. 9 & 10). The doctor tried to locate

some earlier audiograms taken when claimant was in school but he was unable to do so (Def. Ex. 1, pp. 14 & 15). Claimant told the doctor that he had no abnormal hearing at the time of the school hearing tests (Def. Ex. 1, p. 10). When claimant's counsel pointed out a variation in the audiogram results between the left ear and the right ear Dr. Jorgensen said that five decibels is certainly within the constraints of test error and depends somewhat on the patients' own responses (Def. Ex. 1, p. 15).

Dr. Jorgensen did not find any family history or hearing problems, no history of head or ear trauma or any preexisting hearing problems (Def. Ex. 1, pp. 17 & 18). He said there was a wide variance in the ability of earplugs to protect the wearer (Def. Ex. 1, p. 18). The witness said that the only way he could find a congenital loss would be to examine a prior hearing test. From the records he had all he could do was suspect that claimant had a congenital component to his hearing loss (Def. Ex. 1, pp. 18 & 19). Dr. Jorgensen felt claimant should have hearing aids. The cost would be less than $1,000 for two aids -- probably between $900 and $1000 (Def. Ex. 1, pp. 23 & 24).

In his letter dated November 20, 1986, Dr. Jorgensen said that he compared the hearing test performed by Mr. Nelson on October 24, 1985 with the one performed in his office on September 15, 1986 and he found a 10 decibel difference in the lower frequencies which claimant sustained during a period of unemployment. He said this raised the possibility of underlying causes for claimant's hearing loss other than noise which predisposed him to a progressive hearing loss at quite an early age. He concluded by saying that noise can be a contributing factor but he did not believe it was the only factor (Def. Ex. 2).

The results of Mr. Nelson's hearing test on October 24, 1985, are as follows:

Left Ear Hearing Level	Frequency in Hertz	Right Ear Hearing Level
30	500	25
25	1000	25
30	2000	25
45	3000	35

(Cl. Ex. D, p. 2)

Applying the formula in Iowa Code section 85B.9 this results in a binaural hearing loss of five percent.

The results of Ms. Rudkins' hearing test dated September 16, 1986, were as follows:

Left Ear Hearing Level	Frequency in Hertz	Right Ear Hearing Level
40	500	30
35	1000	30
40	2000	35
50	3000	50

(Def. Ex. 1, Dep. Ex. 2)

Applying the formula in Iowa Code section 85B.9 this results in a binaural hearing loss of 18.12 percent.

APPLICABLE LAW AND ANALYSIS

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).

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on April 11, 1985 and an occupational hearing loss on April 27, 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 claimant has the burden of proving by a preponderance of the evidence that the injuries of April 11, 1985 and April 27, 1985 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).

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 employee injury record card shows a number of incidents. However, there is no entry for the injury of April 11, 1985 (Def. Ex. C, p. 3). Nevertheless, claimant testified that he slipped on the ladder and fell to the floor that day. Hampson testified he saw claimant laying on the floor. Henderson testified that she saw claimant hanging on the ladder as if he were in trouble, then later saw him laying on the floor. Dr. Moreau's office notes of April 11, 1985 recorded that the patient stepped off a ladder today at work at 10:00 a.m. with resultant inferior lumbalgia and right cervicalgia.

Claimant's lumbar pain was improved on April 15, 1985 but returned again on April 16, 1985 and April 18, 1985 (Cl. Ex. 4, p. 3). Then on April 20, 1985, Dr. Moreau noted that his lumbar spine is better. But then Dr. Moreau mentioned his lumbosacral spine again on April 25, 1985 and stated that it is idiopathic (Cl. Ex. 4, p. 2). On April 30, 1985, Dr. Moreau commented that the intensity of his neck pain is decreased, does not occur in the morning but returns in the afternoon. He also related that the lumbosacral pain persists over the inferior lumbar spine with forward flexion or extension. Significantly, he added the remark that claimant is sunburned after canoeing six hours down the river (Cl. Ex. 4, p. 2). On May 6, 1985, claimant's neck was more improved with even less pain in the afternoon. Dr. Moreau then discontinued his treatment of claimant and referred him to an orthopedist because there was no real improvement in the lumbosacral spine (Cl. Ex. 4, p. 2). Therefore, from Dr. Moreau's records it is concluded that by April 30, 1985, approximately 19 days after the injury, that the neck pain was significantly improved, did not occur in the morning and that its recurrence in the afternoon was diminishing. The lumbosacral pain, which Dr. Moreau characterized as idiopathic, seemed to alternately get better than reoccur. Neither complaint, either the neck or the back, apparently limited claimant's ability to canoe down the river for six hours.

Dr. Moreau referred claimant to Dr. Hranic. Dr. Hranic referred claimant to the Mayo Clinic. There is no report from Dr. Hranic introduced into evidence for this examination. In the Mayo Clinic reports, Dr. Ivy, Dr. Bell, Dr. Bartleson, and Dr. Peterson all clearly state that the history which claimant gave to each of them is that his back pain originated and has been continuous since he was hit by the hog carcass in 1979. None of these doctors reported that claimant associated his back complaints with the fall of April 11, 1985. Claimant did tell the doctors, however, that the neck pain originated with the fall of April 11, 1985 (Cl. Ex. 6, pp. 3, 4, 11, 14 & 18).

Dr. Peterson testified that the injury of April 11, 1985, did not aggravate any preexisting condition in claimant's lumbar

spine (Def. Ex. A, pp. 18 & 19). Dr. Peterson said that when he saw claimant on July 1, 1985, claimant's neck was better and that claimant had no impairment of the cervical area (Def. Ex. A, pp. 18 through 20). From the foregoing evidence it is determined that claimant did slip on the ladder on April 11, 1984 even though the employer did not record an incident on that date. There is a conflict as to whether claimant fell and landed on his back at this time or simply slipped and jerked his neck when he caught himself with his hands. Claimant testified that he hit something and fell to the ground and landed on his back. Hampson and Henderson testified that they saw claimant laying on his back on the floor below the ladder. Yet, the recorded office notes of Dr. Moreau, Dr. Ivy, Dr. Bell, Dr. Bartleson and Dr. Peterson establish only that claimant slipped, caught himself with his hands, and jerked his neck (Cl. Ex. 4, p. 3; Cl. Ex. 6, pp. 3, 4, 11, 14 & 18). Consequently, it is found that claimant did sustain an injury that arose out of and in the course of employment with employer on April 11, 1985 when he slipped on a ladder at work, caught himself with his hands and jerked his neck and that this injury had resolved itself by the time claimant was seen by Dr. Peterson on July 1, 1985. It is further found that any neck problems that arose after that date are probably a continuation of the neck problems that claimant had suffered from prior to this injury and which Dr. Moreau had treated for many years with chiropractic adjustments (Cl. Ex. 4, pp. 6 & 7).

It is further found that claimant did not sustain an injury to his lumbar spine on April 11, 1985. All of the medical reports of all of the doctors, including Dr. Carnignan, traced the origin of claimant's lumbar spine problems back to 1979 and add that these problems have persisted continuously up until the present time (Cl. Ex. 4 & 6). When Dr. Hranic saw claimant in 1981 when he injured his back pulling up a pail, the doctor said that claimant had a back problem for the past two years since the hog hit him in the back in 1979 and that he had been seeing Dr. Moreau about every other week (Cl. Ex. 3, p. 3). Dr. Moreau characterized claimant's back problems as idiopathic (Cl. Ex. 4, p. 2). Dr. Ivy called it chronic lumbar back strain. Dr. Bell called it mechanic low back pain. Dr. Bartleson said it was musculoskeletal low back pain. Dr. Peterson said it was degenerative arthritic changes in the lumbosacral facet joints, that his pain was mechanical on the basis of facet arthritis, and that it was a wear and tear problem. Dr. Peterson, with 32 years of experience as an orthopedic surgeon and professor of orthopedics at the Mayo Clinic declared that claimant's back problem was historically related to his 1979 injury when the hog fell on him. Dr. Peterson said that claimant was 10 percent impaired, but the impairment was due to the 1979 incident. Dr. Peterson flatly stated that the April 11, 1985 incident did not cause any impairment. Claimant had a full range of motion and a normal straight leg raising test. Dr. Peterson did not impose any weight restrictions

or any other restrictions on claimant (Cl. Ex. E; Def. Ex. A).

Even Dr. Carnignan at the time of his first report said that claimant's 10 percent impairment rating was due to claimant's multiple back injuries during his employment (Cl. Ex. 8, p. 3). When Dr. Carnignan testified in person he then said he did not feel claimant had any impairment from the 1979 or 1981 injuries because claimant always returned to strenuous work (Tr. pp. 55-66). First of all, this appears to be an opinion based upon every day logic rather than any scientific or professional medical expertise. Secondly, it is contrary to every day experience. It is not uncommon for injured workers with impairment ratings and who are awarded permanent partial disability benefits to return to their old job or other strenuous work and be able to perform it at the same or even higher level of compensation even though they are impaired in their ability to do so. Claimant has always performed his job, however, Dr. Peterson characterized shaving hams as light work. Howrey testified that claimant was often absent from work. Also claimant's chiropractic record shows that he required many treatments in order to be able to continue to do his job. Claimant's absentee record and his medical record with the chiropractor bear out Dr. Peterson's opinion that claimant's 10 percent impairment occurred in 1979 or at least at a much earlier point in time than April 11, 1985.

Claimant argued that Dr. Ivy's interpretation of the Mayo Clinic's x-rays was different than that of Dr. Peterson's. Claimant also argued that Dr. Moreau's x-rays, as interpreted by Dr. Myerly, did not agree with Dr. Peterson. It is found here that each doctor is entitled to his own interpretation of the x-rays upon which the doctor formed his own individual opinion. The interpretation of x-rays, like beauty, is often in the eye of the beholder. Each doctor is entitled to his own personal individual professional interpretation of what the x-ray he is examining reveals to him in his own professional experience. Dr. Peterson's opinion is not tarnished by what Dr. Ivy saw or said about the x-rays which he examined. Nor is Dr. Peterson's opinion tarnished by what Dr. Myerly saw or said about Dr. Moreau's x-rays. In support of Dr. Peterson, Dr. Myerly did find narrowing at L-4, L-5.

Claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained any temporary or permanent impairment or disability from the injury to his neck which occurred on April 11, 1985. Claimant lost no time from work due to this injury. He worked from the date of the injury until the time the plant closed without any loss of time from this injury or any other reason (Def. Ex. C, p. 4). Claimant further testified that he lost no time from work due to this injury on April 11, 1985. Dr. Moreau, Dr. Hranic, and none of the doctors at the Mayo Clinic ordered claimant not to work. There is no evidence in the record of a release to return to work after a

period of inability to work from any doctor. On the contrary, Dr. Moreau found that it was significant enough to record on April 30, 1985, which is 19 days after the injury, that claimant was able to canoe down the river for six hours (Cl. Ex. 4, p. 2). Consequently, as stated, it is found that claimant did not sustain the burden of proof by a preponderance of the evidence that the fall of April 11, 1985 was the cause of either temporary or permanent impairment or disability and for this reason claimant is not entitled to any temporary or permanent disability benefits for the injury of April 11, 1985.

Claimant did not make out a prima facie case that he is an odd-lot employee. First of all, he was not disabled. Secondly, the evidence indicates that claimant's inability to find work is more due to the economy, claimant's limited skills and his unwillingness to work away from Estherville rather than any impairment or disability that he may suffer from this or any of his prior injuries. Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985).

Defendant did not 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 or to timely bring this action as provided by Iowa Code section 85.26(1). As to notice, claimant reported the fall of April 11, 1985 to the nurse and she sent him to Dr. Moreau that same night. This was not controverted. As to the statute of limitations, the fall occurred on April 11, 1985 and claimant filed this petition on August 11, 1985. Therefore, this action is not untimely but was brought well within the two year period of limitations. Claimant did not contend his disability arose out of his 1979 or 1981 injuries. Claimant at all times asserted that his disability arose out of the April 11, 1985 fall because he always returned to strenuous work after the previous incidents.

Since it has been determined that claimant's neck was essentially well when he saw Dr. Peterson on July 1, 1985, and that any subsequent neck problem was a continuation of the neck problem for which claimant had been treating for many years with Dr. Moreau prior to April 11, 1985, then claimant is not entitled to recover for any medical treatment to his neck by Dr. Carnignan in late 1985 and in early 1986. Dr. Carnignan also found that claimant's neck problems were minor and any impairment was not measurable. Claimant is not entitled to recover for any treatments to his back by Dr. Carnignan because claimant did not prove that his back problems were an injury that arose out of and in the course of his employment on April 11, 1985.

Defendant's argument that claimant is not entitled to recover his medical expenses with Dr. Carnignan because Dr. Carnignan was not an authorized physician is without merit. Defendant has denied liability for an injury and an occupational

hearing loss which arose out of and in the course of claimant's employment. Defendants are not allowed to deny liability on one hand and at the same time control the course of the medical treatment. Barnhart v. MAQ Incorporated, I Iowa Industrial Commissioner Reports 16, 17 (Appeal Decision 1981).

Chapter 85B, Code of Iowa, provides benefits for occupational hearing loss. Section 85B.4 1. defines occupational hearing loss as permanent sensorineural loss of hearing in one or both ears in excess of 25 decibels which arises out of and in the course of employment caused by prolonged exposure to excessive noise levels. Iowa Code section 85B.4 2. states that excessive noise level means sound capable of producing occupational hearing loss. Iowa Code section 85B.5 states that excessive noise level is sound which exceeds the times and intensities published in the table in that section of the Code.

Claimant testified that he had no hearing problems prior to his employment with employer. At his preemployment physical examination on February 15, 1987 and again at the time of his physical examination on July 13, 1983, claimant stated that he had no deafness or ear problems (Cl. Ex. 1 & 2). Claimant may not have been aware of his hearing loss at that time. Claimant's first knowledge of a hearing loss was when the plant nurse tested his hearing sometime before the plant closed and told him to see a specialist because he had a great deal of hearing loss. Claimant testified that he worked the last year and a half shaving hams. For the four years prior to that he worked on the kill floor at the head table using a wizard knife. Therefore, claimant was shaving hams from approximately October of 1984 until April of 1985. He worked on the kill floor at the head table with the wizard knife then from approximately October of 1980 until October of 1984. Claimant testified that the head table was the most noisey job and that shaving hams was the second noisiest job. According to the noise level survey (Cl. Ex. C) the noise level at the head table - wizard knives is 95 decibels. Howrey confirmed this. Much of his employment was before hearing protection was seriously provided to the employees in 1984. Howrey also confirmed that the job of shaving hams was at an area where the noise level was 90 decibels. Howrey agreed that claimant worked in these areas eight hours a day, five or six days a week (Tr. p. 186). It was claimant's testimony that he always wore hearing protection after it was provided by the employer.

R. David Nelson said that claimant's loss in the higher frequencies was similar to that observed in known noise induced hearing losses (Cl. Ex. D, p. 1). Dr. Carnignan's interpretation of Mr. Nelson's test results was that claimant sustained a five percent binaural hearing impairment. Even though some of Dr. Carnignan's intermittent numbers do not appear to be correct, his final determination of a five percent loss is correct (Cl. Ex. D, p. 2).

Dr. Carnignan testified that claimant's loss of hearing was caused by high noise levels at work (Tr. pp. 51 & 52). Mr. Nelson said that claimant was a candidate for amplification (Cl. Ex. D, p. 1). He stated that the cost of binaural hearing aids would be $1,250 to $1,350 (Cl. Ex. F).

Dr. Jorgensen examined the test of Ms. Rudkin and determined that the loss pattern was consistent with noise induced loss. However, claimant's loss in the lower ranges was unusual and suggested some other possible cause for claimant's loss in the low frequencies (Def. Ex. 1, pp. 5-9). Dr. Jorgensen said that he suspected a congenital component in claimant's hearing loss (Def. Ex. 1, p. 19). However, in order to make any kind of a determination as to other causes, it would be necessary to examine prior audiograms, but none could be found. Claimant denied any abnormal hearing as a child or while in school (Def. Ex. 1, p. 10). Claimant also denied head injuries, listening to rock music, family history of hearing loss, hunting, driving a tractor or farming (Tr. pp. 36 & 37; Def. Ex. 1, pp. 16 & 17). Dr. Jorgensen felt that claimant should have hearing aids. He estimated that they would cost between $900 to $1000 (Def. Ex. 1, pp. 23 & 24). Dr. Jorgensen said that he compared Ms. Rudkin's test with Mr. Nelson's test and found a 10 decibel difference in the lower frequencies which apparently occurred during a period of unemployment because Ms. Rudkin's test was taken about a year later. This suggested some other cause for claimant's hearing loss (Def. Ex. 2). However, Dr. Jorgensen also said earlier that a five decibel difference was within normal test error and could be due to the claimant's own responses (Def. Ex. 1, p. 15). Dr. Carnignan said a 10 decibel variation could be an eustacion tube situation, operator error or a number of factors (Tr. pp. 92-94). Claimant can only be reimbursed on the basis of the lowest audiogram (Iowa Code section 85A.9). Defendant did not establish any other cause for claimant's hearing loss. At best, defendant's evidence only raises a suggestion of the possibility of some other cause. The 10 decibel difference does not appear to be great and neither doctor thought that a small decibel difference was significant. The greater weight of the evidence then -- the testimony of both doctors, the noise level surveys, claimant's testimony, Howrey's testimony -- do establish that claimant sustained the burden of proof by a preponderance of the evidence that he did sustain an occupational hearing loss which arose out of and in the course of his employment with employer do to a prolonged exposure to excessive noise levels as specified in Iowa Code section 85B.5.

Iowa Code section 85B.14 provides that the provisions of the workers' compensation law in Chapter 85 also apply to occupational hearing loss insofar as applicable and when not inconsistent with Chapter 85B. Therefore, the notice requirement of Iowa Code section 85.23 applies to occupational hearing losses because Chapter 85B has no specific notice requirement of its

own. Iowa Code section 85.23 generally provides that unless the employer has actual knowledge, the employee must give notice within 90 days of the occurrence of an injury.

The sole purpose of the notice requirement is to give the employer the opportunity to investigate the injury or hearing loss. Robinson v. Department of Transp., 296 N.W.2d 809, 811 (Iowa 1980); Hobbs v. Sioux City, 231 Iowa 860, 862, 2 N.W.2d 275, 276 (1942).

Under the facts of this case it appears that the employer was equally, if not more aware of claimant's work related hearing loss than the employee. The audiogram that was performed by the plant nurse that revealed the hearing loss in this employee was known by the employer before the employer made it known to the employee. Consequently, it is determined that the employer in this case had actual knowledge of the claimant's occupational hearing loss and pursuant to Iowa Code section 85.23, and claimant is relieved of giving notice to employer. This is true even though defendant had actual knowledge of the loss prior to the injury date that is prescribed by statute. Dillinger v. City of Sioux City, 368 N.W.2d 176, 179 (Iowa 1985). Failure to give notice is an affirmative defense. Defendant has not sustained the burden of proof by a preponderance of the evidence that claimant failed to give notice pursuant to Iowa Code section 85.23.

Iowa Code section 85B.8 provides as follows:

> A claim for occupational hearing loss due to excessive noise levels may be filed six months after separation from the employment in which the employee was exposed to excessive noise levels. The date of the injury shall be the date of occurrence of any one of the following events:
>
> 1. Transfer from excessive noise level employment by an employer.
> 2. Retirement.
> 3. Termination of the employer-employee relationship.
>
> The date of injury for a layoff which continues for a period longer than one year shall be six months after the date of the layoff. However, the date of the injury for any loss of hearing incurred prior to January 1, 1981 shall not be earlier than the occurrence of any one of the above events.

In this case the employee-employer relationship terminated on April 27, 1985 when the plant closed. Claimant was not transferred and did not retire. Therefore, the date of injury is April 27, 1985. The hearing loss action was commenced on September 12, 1985. The action then was commenced within two years of the date of the injury. It is also noted that the

action was commenced a few days less than six months after the separation from employment but no harm is perceived to the employer from this slight premature commencement of the action at this point in time.

Claimant did sustain the burden of proof by a preponderance of the evidence that he is entitled to a hearing aid by establishing that he does have a compensable hearing loss. Iowa Code section 85B.12 provides as follows: "...An employer who is liable for occupational hearing loss of an employee is required to provide the employee with a hearing aid unless it will not materially improve the employee's ability to communicate."

Both doctors testified that claimant would benefit from a hearing aid. Therefore, it is determined that claimant is entitled to a binaural hearing aid. The lowest cost estimate was submitted by Dr. Jorgensen. He said the cost would be approximately $900 to $1,000. Claimant than is entitled to a hearing aid in this price range. The employer may, of course, select the source of the aids and the audiologist.

FINDINGS OF FACT

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

That claimant was employed by employer from February 15, 1977 to April 27, 1985.

That claimant slipped on a ladder on April 11, 1985 and caught himself with his hands and jerked his neck.

That as a result of this incident, claimant sustained an injury that arose out of and in the course of his employment.

That this injury had resolved itself by July 1, 1985 when claimant saw Dr. Peterson at the Mayo Clinic.

That any subsequent neck pain after July 1, 1985 was a recurrence of the neck pain for which claimant had been receiving chiropractic treatments for several years prior to this injury.

That claimant did not sustain an injury to his lower spine on April 11, 1985 which arose out of and in the course of his employment with employer.

That claimant told Dr. Hranic, Dr. Ivy, Dr. Bell, Dr. Bartleson, and Dr. Peterson that his lumbar spine problem began in 1979 when he was hit with a hog carcass and that his lumbar spine symptoms have continued since that time.

That Dr. Moreau said that claimant's lumbar spine problems were idiopathic.

That Dr. Peterson's interpretation of the x-rays he examined is no way impugned by Dr. Ivy's interpretation of the same x-rays or Dr. Myerly's interpretation of Dr. Moreau's x-rays.

That Dr. Peterson testified that claimant had degenerative arthritic changes in the lumbosacral facet joints.

That claimant lost no time from work due to the injury to his neck on April 11, 1985.

That no doctor ordered claimant not to work as a result of the injury to his neck on April 11, 1985.

That 19 days after this injury claimant was able to canoe down the river for six hours.

That claimant was exposed to high levels of noise during his eight years of employment with employer from February 15, 1977 to April 27, 1985.

That claimant was exposed to excessive noise levels of 95 decibels when he worked at the head table with a wizard knife for approximately four years and that much of this period of time was before hearing protection was provided.

That Dr. Jorgensen and Dr. Carnignan concurred that claimant's hearing loss was consistent with prolonged exposure to high noise levels.

That defendant had actual knowledge of claimant's hearing loss before defendant notified claimant of it from the audiogram that was taken by the plant nurse.

That claimant terminated his employment on April 27, 1985 when the plant closed.

That claimant has sustained a five percent binaural hearing loss.

That claimant would benefit from a hearing aid.

CONCLUSIONS OF LAW

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

That claimant did sustain the burden of proof by a preponderance of the evidence that he sustained an injury to his neck on April 11, 1985.

That claimant did not prove that his neck injury was the cause of any temporary or permanent disability.

That claimant did not prove any entitlement either temporary or permanent disability benefits for his neck injury.

That claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained an injury to his lumbar spine on April 11, 1985.

That claimant did not make out a prima facie case that he is an odd-lot employee.

That claimant did not prove entitlement to the medical bills for Dr. Carnignan's charges in the amount of $72.

That claimant sustained an occupational hearing loss as defined in Chapter 85B, Code of Iowa, which arose out of and in the course of his employment with the employer (Iowa Code section 85B.4).

That the hearing loss was caused by claimant's employment with the employer.

That the amount of the loss is five percent of a total loss of hearing (Iowa Code section 85B.9).

That claimant is entitled to five percent of 175 weeks of occupational hearing loss compensation (Iowa Code section 85B.6).

That the date of injury is April 27, 1985 when claimant terminated his employment with employer (Iowa Code section 85B.8).

That defendant had actual knowledge of the loss (Iowa Code sections 85B.14 and 85.23).

That claimant's action was timely commenced (Iowa Code sections 85B.8 and 85.26(1)).

That claimant's compensable hearing loss entitles claimant to a hearing aid (Iowa Code section 85B.12).

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant eight point seven-five (8.75) weeks (.05 x 175) of occupational hearing loss compensation at the rate of two hundred two and 67/100 dollars ($202.67) per week in the total amount of one thousand seven hundred seventy-three and 36/100 dollars ($1,773.36) (8.75 x $202.67) commencing on April 27, 1987.

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

That interest will accrue under Iowa Code section 85.30.

That defendant provide claimant with a binaural hearing aid at a cost of between nine hundred dollars ($900) to one thousand dollars ($1,000).

That pursuant to Division of Industrial Services Rule 343-4.33 the costs of both parties for the alleged injury of April 11, 1985 are taxed to claimant.

That the costs of both parties for the occupational hearing loss of April 27, 1985 are taxed to employer.

That the costs of both parties for the attendance of the certified shorthand reporter at the hearing are taxed to employer.

That defendant will remain liable for future medical expenses as a result of the occupational hearing loss.

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

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

Walter R. McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLOTTE KUNCH,	:	
	:	
Claimant,	:	File Nos. 675194
	:	810144
vs.	:	
	:	
GRA-IRON FOUNDRY,	:	
	:	R E V I E W -
Employer,	:	
	:	
and	:	R E O P E N I N G
	:	
PENNSYLVANIA FOUNDRYMEN'S INSURANCE,	:	D E C I S I O N
	:	
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

This decision deals with two files. The first is file number 675194, with an injury date of June 24, 1981, for which a Memorandum of Agreement was filed on August 17, 1981. The employer was self-insured at the time of the 1981 injury and fully admits the compensability of the injury. This decision also concerns file number 810144 which deals with an alleged injury of January 14, 1985. It was stated at hearing that a dispute exists regarding whether or not insurance coverage is available, but that if it is, it is through a subsidiary of Pennsylvania Foundrymen's Insurance.

Claimant seeks compensation for healing period, permanent disability and section 85.27 benefits based upon a condition in her low back for which she underwent surgery in early 1985. She urges that she is permanently and totally disabled under the odd-lot doctrine. The employer admits that claimant was injured in 1981, but states that her claim, other than for section 85.27 benefits, is barred by the provisions of 85.26 of the Code as it relates to the 1981 injury. The employer denies the occurrence of a compensable injury in 1985.

The case was heard at Des Moines, Iowa on February 12, 1987 and was fully submitted upon conclusion of the hearing. The record consists of testimony from Charlotte Kunch and John McLean. The record also contains exhibits 1 through 26.

ISSUES

The issues to be determined are:

1. Whether claimant sustained an injury on January 14, 1985 which arose out of and in the course of employment.

2. Whether either the 1981 injury or the alleged 1985 injury is a proximate cause of temporary or permanent disability.

3. Whether either the 1981 or alleged 1985 injury is a proximate cause of medical expenses.

It was stipulated that the amounts charged for the services rendered were fair and reasonable, that the providers of the services would testify that the treatment was reasonable and necessary to treat the alleged injury and that a causal connection exists between claimant's back condition and the medical expenses for which she seeks payment.

The employer has raised the defense provided by section 85.26 of the Code as it relates to the 1981 injury. The employer also seeks credit for benefits paid directly to claimant by the employer subsequent to January 14, 1985. It was stipulated that, in the event of an award, the rate of compensation is $158.47 per week. Claimant also seeks costs.

STATEMENT OF THE CASE

Charlotte Kunch is a 49-year-old lady who dropped out of school in the seventh grade and subsequently obtained a GED in 1982. In 1983 or 1984 she enrolled in, but failed to complete, a machine trades training course. Kunch has worked as a nurse's aide at the Marshall County Farm, in the laundry for the Ramada Inn Motel, as a shell machine operator at the Dunham-Bush Foundry and also at the Veterans' Home. Kunch lives in Marshalltown, Iowa.

In 1978 Kunch was hired by Gra-Iron Foundry as a light core fitter. Her job involved moving cores from carts onto a line and also working on the cores. She described the cart as six or seven feet high, five feet wide, and with shelves. She stated that the cores were located on racks on the cart and that her job involved moving the cores from the cart. Claimant testified that as many as 300 or 400 small cores would be placed on one cart, but that with the larger cores, there would be only eight or ten on a cart. She stated that the cores vary in weight from as little as two ounces to as much as 100 pounds. Claimant denied having any problems with her back or legs when she commenced employment with Gra-Iron Foundry.

Kunch testified that she started having back trouble in

1981, when she was treated by Edward Stayskal, D.C., and then returned to work on July 22, 1981. There was no change in her work duties and she described her job as the easiest one in the plant. Claimant testified that a while after she returned to work, her legs started to bother her and she went to Axel Lund, M.D., who found nothing wrong and did not take her off work. She then, over the years, saw a series of doctors with complaints primarily involving her right thigh until early 1985 when she was referred to Robert Hayne, M.D., a neurosurgeon in Des Moines, Iowa.

The record does not clearly show whether or not claimant worked up to the time she was admitted to Iowa Methodist Medical Center on January 28, 1985 for the purpose of surgery. It appears that she had continued to work until her hospital admission. Dr. Hayne performed surgery on January 29, 1985 after a myelogram had indicated a protruding intervertebral disc. During the surgery, the protrusion was removed (exhibit 8). Dr. Hayne released the claimant to return to work without restrictions on August 1, 1985 (exhibit 11).

Dr. Hayne felt that claimant's symptoms affecting her low back were the result of a cumulative type of injury which had a causal relationship to her employment (exhibit 12). Dr. Hayne felt that claimant had some degree of protrusion in the disc since her earlier injury in 1981, but that her work aggravated that preexisting condition causing the protrusion to enlarge and the condition to worsen (exhibit 1, pages 11, 17-21 and 26). Dr. Hayne rated her as having a nine percent disability due to surgery and persistent complaints of pain (exhibit 1, pages 8 and 20-22).

Claimant complained of continuing pain in her back which causes her difficulty with activities such as tending garden, mowing the lawn and hanging clothes on the line. She stated that it hurts if she stands or sits too long. She stated that when she returned to work she did her job and did it well while working full 40-hour weeks. She denied complaining when she returned to work, even though she was experiencing pain, because she was afraid her employment would be terminated since she had missed a lot of work due to this injury and other health problems. Shortly after returning to work, approximately September 16, 1985, she was laid off together with some other employees under the plant seniority system.

Claimant has looked for employment at a number of places and has found none. She stated that the job situation in the Marshalltown area is bad.

Claimant testified that, during the first weeks she was off work in early 1985, she was paid workers' compensation directly by the company. She had reported her health problem as being

work-related. The company paid her benefits believed to be equal to what workers' compensation would pay in accordance with the provisions of a collective bargaining agreement (exhibit 26). When the workers' compensation carrier denied the claim, the employer then paid benefits equal to the group nonoccupational disability plan insured by Aetna, even though Aetna denied the nonoccupational claim because it felt that the claimant's condition was work-related. Claimant received checks until August, 1985, when she returned to work.

APPLICABLE LAW AND ANALYSIS

With regard to the June 24, 1981 injury, a Memorandum of Agreement was filed on August 17, 1981. The form filed with the agency shows the last payment of compensation to have been on August 17, 1981. Claimant's petition herein was filed on August 13, 1985, approximately four years later. Claimant, therefore, has the right to section 85.27 benefits which are causally connected to the 1981 injury, but section 85.26 provides a bar to further weekly compensation benefits. Whitmer v. International Paper Company, Folding Carton and Label Division, 314 N.W.2d 411 (Iowa 1982).

With regard to a claimed injury of January 14, 1985, the petition was filed on January 13, 1986, clearly within the two years permitted by section 85.26. Claimant's testimony presented a situation where her symptoms worsened after 1981 while she continued in her employment. She gave a similar history to Dr. Hayne when she initially saw him in January, 1985 (exhibit 8). She gave a similar history of worsening symptoms at McFarland Clinic on January 9, 1984 (exhibit 13, page 1). Claimant also gave a history of worsening to John W. Hughes, M.D., when seen by him in December, 1983 (exhibit 16, page 2). Claimant's testimony of increasing discomfort with the passage of time is accepted as correct. The opinion of Dr. Hayne relating the worsening of her condition to her work is uncontradicted and is accepted as correct. This case is therefore one to which the cumulative trauma rule applies. The date of injury would therefore be January 28, 1985 rather than January 14, 1985. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). Claimant has the burden of proving by a preponderance of the evidence that she sustained an injury which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976). She is found to be a credible witness as it relates to the events leading up to her surgery in 1985 and has carried her burden of proof.

Under section 85.34(1) claimant is entitled to healing period commencing January 28, 1985 and running through July 31, 1985, a span of 26 and 3/7 weeks. The healing period is terminated by her release from Dr. Hayne to return to work and the actual return to work.

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's current unemployment is due to her layoff. There is nothing in the record to indicate that the layoff was a result of anything other than something which would have occurred even if claimant had not been injured. The record indicates that she performed her job adequately during the period of approximately six weeks that she worked following the surgery. In his deposition (exhibit 1, page 13), Dr. Hayne recommended that claimant avoid lifting more than 35-40 pounds and that she also avoid work which required her to bend forward repeatedly. His return to work release did not contain any restrictions (exhibit 11). It is clear that claimant has objective weakness in her back due to the surgery and the condition which necessitated the surgery. It also appears, however, that her lack of employment since the layoff is due more to current economic conditions than it is to the condition of her back. She has, nevertheless, lost access to some jobs such as nurse's aide or a commercial laundry as a result of the restrictions on bending and lifting activities. When all the applicable factors of industrial disability are considered, it is determined that claimant has a 30% permanent partial disability in industrial terms. It is recognized that there is a functional component to her complaints of pain in making this assessment.

Claimant also seeks to recover the following medical expenses:

Robert A. Hayne, M.D.	$1,835.00
Iowa Methodist Medical Ctr.	3,789.50
Pathology Laboratory	91.50
McFarland Clinic, P.C.	44.50
Radiology Professional Corp.	262.70
Associated Anesthesiologists	324.00
Physiatry Associates	158.00
Total	$6,505.20

This case was brought based upon both the 1981 and 1985 injuries. The evidence from Dr. Hayne has been accepted as correct indicating that claimant was injured in 1981 which caused a protruding disk and that, subsequently, through her work activities, she aggravated that condition to the extent that further treatment and surgery became necessary. This case, therefore, presents two injuries which are a substantial factor in bring about the need to obtain medical services which brought about the expenses claimant seeks to recover. A cause is proximate if it is a substantial factor in bringing about the results; it need not be the only cause. Blacksmith v. All American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). The 1981 injury started the process. The cumulative trauma completed the process. Both are substantial factors in bringing about the ultimate need for surgery. The employer's liability for payment of the medical expenses sought by claimant is therefore joint and several with the liability of the employer's workers' compensation insurance carrier on January 28, 1985.

Claimant also seeks to recover mileage for 1,302 miles. A review of the medical records shows the amounts which she seeks to be reasonable. The employer and its insurance carrier are responsible for payment thereof at the rate of $.24 per mile. This computes to $312.48.

Claimant's itemization of costs is proper and claimant is therefore entitled to recover costs in the total amount of $169.75.

The employer seeks credit for the benefits paid to claimant under the collective bargaining agreement, a portion of which appears in the record as exhibit 26 and is identified as "Section E", which reads:

> Section E. In the event Workman's Compensation and/or Weekly Sickness indemnity checks are not received by the Company within fifteen (15) days following the date of the occurreance [sic] of an injury or illness, the Company will issue a check to the affected employee provided he furnish the Company with a doctor's report substantiating such injury or illness. It is understood that the employee will reimburse the Company in such instances when payment is received fraom [sic] the insurance company.

The benefit is one which clearly is paid entirely by the employer. The requirement for reimbursing the employer upon receipt of payment clearly establishes that the benefit is one which is not payable in addition to workers' compensation. The contractual provision is clearly a vehicle which prevents the worker from having no income whatsoever in those cases such as this one where both the workers' compensation carrier and the nonoccupational

disability plan carrier deny liability. The intent of the contractual provision is admirable and should not be violated. The employer is therefore entitled to credit under the provisions of section 85.38(2) for all amounts paid to claimant as either an advance on workers' compensation or an advance of nonoccupational disability income benefits paid in accordance with Article XVII of the controlling collective bargaining agreement as shown in exhibit 26. It was stipulated that the amount of such payments was $4,847.80.

FINDINGS OF FACT

1. Claimant was injured on June 24, 1981 and weekly compensation for that injury was last paid on August 17, 1981.

2. Subsequent to 1981, claimant continued to work performing bending and lifting.

3. The bending and lifting of the employment aggravated a spinal condition which was caused by the 1981 injury.

4. The aggravation of that preexisting condition ultimately led to a period of disability which began on January 28, 1985 when claimant entered Iowa Methodist Medical Center for purposes of surgical excision of a protruding intervertebral disk.

5. Following surgery claimant underwent a period of recuperation which ran continually until claimant was released to return to work and did in fact return to work on August 1, 1985.

6. Approximately six weeks after returning to work, during which time claimant performed adequately without evidence of further injury even though she was experiencing discomfort, she was laid off.

7. Since the layoff, claimant has looked for work, but has been unable to find any.

8. Claimant's back is in a weakened condition from that which existed prior to the injury and she has physical restrictions which have limited her access to portions of the job market in which she had worked prior to the time of the injury in question.

9. The injury of January 28, 1985 was a substantial factor in producing claimant's current industrial disability.

10. Claimant has suffered a 30% loss of earning capacity as a result of the injury of January 28, 1985.

11. There is a functional component to claimant's continued complaints of discomfort.

12. Claimant's injury of January 28, 1985 was produced by cumulative trauma imposed upon a preexisting condition which resulted from the injury of June 24, 1981.

13. Both injuries of 1981 and 1985 were substantial factors in bringing about the need for the surgery and the expenses incurred.

CONCLUSIONS OF LAW

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

2. Claimant sustained injury to her back which arose out of and in the course of her employment through cumulative trauma on January 28, 1985. The injury was an aggravation of a preexisting condition.

3. The injury of January 28, 1985 was a proximate cause of the medical treatment which claimant received resulting in expenses in the amount of $6,505.20. The injury of June 24, 1981 was also a proximate cause of those expenses. Both injuries are likewise a proximate cause of the travel expenses incurred in obtaining medical care in the amount of $312.48 for which the employer is responsible.

4. Claimant's healing period under section 85.34(1), resulting from the injury of January 28, 1985, is 26 and 3/7 weeks.

5. Claimant's disability, related to the injury of January 28, 1985, when evaluated industrially, is a 30% permanent partial disability.

6. The employer is entitled to credit under the provisions of section 85.38(2) of the Code for all payments paid to claimant under Section 3E of Article XVII of the collective bargaining agreement.

7. The liability of the employer and its workers' compensation carrier is joint and several with regard to the section 85.27 benefits.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant twenty-six and three-sevenths (26 3/7) weeks of compensation for healing period at the stipulated rate of one hundred fifty-eight and 47/100 dollars ($158.47) commencing January 28, 1985.

IT IS FURTHER ORDERED that defendants pay claimant one hundred fifty (150) weeks of compensation for permanent partial

disability at the stipulated rate of one hundred fifty-eight and 47/100 dollars ($158.47) per week payable commencing August 1, 1985.

IT IS FURTHER ORDERED that defendants receive credit for amounts paid to claimant under Section 3E of Article XVII of the collective bargaining agreement, in the stipulated amount of $4,847.80. All other accrued amounts which are past due shall be paid to claimant in a lump sum together with interest at the rate of 10% per annum pursuant to section 85.30.

IT IS FURTHER ORDERED that the employer, Gra-Iron Foundry, and its unnamed insurance carrier are, as to claimant, jointly and severally liable for payment of section 85.27 benefits to claimant including $6,505.20 representing the following medical expenses:

Robert A. Hayne, M.D.	$1,835.00
Iowa Methodist Medical Ctr.	3,789.50
Pathology Laboratory	91.50
McFarland Clinic, P.C.	44.50
Radiology Professional Corp.	262.70
Associated Anesthesiologists	324.00
Physiatry Associates	158.00
Total	$6,505.20

IT IS FURTHER ORDERED that defendants pay claimant $312.48 in mileage and transportation expenses.

IT IS FURTHER ORDERED that defendants pay the costs of this action including $169.75 for deposition fees and medical reports under the provisions of Rule 343-4.33.

IT IS FURTHER ORDERED that defendants file Claim Activity Reports as requested by this agency pursuant to Rule 343-3.1.

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

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

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P.O. Box 1200
Waterloo, Iowa 50704

000733

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GREGORY T. LOEPP,	:	
	:	
Claimant,	:	
	:	FILE NO. 786822
vs.	:	
	:	D E C I S I O N
BASCOM INC., d/b/a SIOUX CITY HILTON,	:	
	:	O N
Employer,	:	
	:	A T T O R N E Y
and	:	
	:	F E E S
GENERAL ACCIDENT INSURANCE CO.,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

On May 7, 1987, an order was entered in this matter approving the compromise special case settlement of the parties. The proceeds of the settlement were delivered to the law offices of claimant's attorney and that check was made payable solely to the claimant. Subsequently, a dispute arose between claimant and his attorney as to the amount of attorney fees. Claimant brought the dispute to the attention of the Industrial Commissioner. Pursuant to a telephone conference between the parties and the Division of Industrial Services, confirmed in writing, an agreement was made by the terms of which claimant was to deliver to his attorney a power of attorney authorizing the attorney to endorse and deposit in his trust account the full amount of the settlement proceeds totalling $14,176.69. Claimant's attorney was authorized to pay medical expenses of $196.69 and Gregory Loepp $9,313.00. The remaining balance of $4,667.00 was to be held by claimant's attorney in trust as a lien to secure payment for attorney's fees. An order was entered on May 18, 1987 by Deputy Industrial Commissioner Ort approving the agreement and providing that the matter of attorney fees would come on for hearing as provided by law. On May 28, 1987, claimant's attorney filed an application for approval of fees. An unverified resistance was filed by the claimant on July 6, 1987. Pursuant to the order of the undersigned and notice to the parties, the matter came on for hearing on July 16, 1987. On that date the claimant's attorney, Paul A. Mahr, appeared in person. Claimant did not appear and submitted no evidence.

000734

APPLICABLE LAW AND FACTUAL ANALYSIS

Section 86.39 of the Code of Iowa makes the fees which claimant must pay subject to the approval of this agency. The factors to be considered are the following:

1. The terms of any fee agreement.

2. The time and effort reasonably involved in handling the case.

3. The novelty and difficulty of the questions involved in the case and the skill required to properly perform.

4. The reputation, ability, status and expertise of the attorney.

5. The likelihood that acceptance of employment will preclude the attorney from other employment due to conflicts of interest, unfavorable publicity or antagonism with other clients or other attorneys.

6. The fee customarily charged in the locality for similar services.

7. The amount involved in the controversy, the impact of the result upon the client and the result actually obtained.

8. Time limitations, whether imposed by the client or other circumstances.

9. The nature and length of the professional relationship between the attorney and the client.

Henderson v. Schoon, II Industrial Commissioner Decisions, 363, 364 (1984) citing Disciplinary Rule 2-106(B), Iowa Code of Professional Responsibility for Lawyers.

Mr. Mahr testified that he made an oral agreement with the claimant on his first visit to Mr. Mahr's office on July 11, 1985 by the terms of which Mr. Mahr was to receive one-third of the amount recovered, exclusive of medical expenses. Mr. Mahr testified he had a specific recollection of a contingent fee agreement, but not of all of the details of that agreement. The notes he took at that time were introduced into evidence and they support his contention because they contain the notation "1/3 contingent fee". Although claimant denies in his resistance any conversation in regard to fees at any time until after settlement was agreed to, in his resistance no testimony or other evidence was offered to support his contention. Mr. Mahr testified that he made no running record of his exact time spent on all phases of this matter and in particular the numerous

telephone conferences with claimant's father required after claimant moved to Texas were not recorded. If his attorney's fees had not been based on his normal one-third contingent fee agreement, much more detailed time records would have been maintained. Moreover, because the claimant was financially unable to pay his attorney on an hourly basis for representation from the onset of this litigation, there was no reason to detail every tenth of an hour during the course of these proceedings. His time records submitted in evidence show 35.25 hours spent in correspondence, conferences, research, reviewing records, pleadings, discovery proceedings and negotiations. These records reflect that all discovery had been completed and that this claim was ready for trial before settlement was made.

There was not a great deal of complexity involved in the case so far as an experienced attorney in this field would be concerned. However, the insurance carrier refused to reply to the attorney's requests for settlement prior to the commencement of an arbitration proceeding and failed to make any offer of settlement for more than seven months after the proceeding was commenced. Development of the medical evidence was hindered by claimant's move to Texas and the resulting change of physicians. The rating of his permanent disability was affected by the fact that his training and employment as a draftsman gave him a better income than he had at the time of his injury and by the fact that his shoulder disability does not interfere with that current employment. Under those circumstances a good result was obtained. Mr. Mahr also testified that contingent fees charged in the Woodbury County locality for workers' compensation cases were the same as he charged in this case.

Testimony of Mr. Mahr established that he had been practicing law in Sioux City for 35 years and had handled workers' compensation cases most, if not all, of that time. He therefore clearly has developed expertise in this field of law. The opposing attorney for the employer and insurance carrier was a former deputy industrial commissioner and had written a book and several articles on the subject.

An attorney's time is the only commodity which he can market. The cost of maintaining a law office is substantial and continues regardless of whether fees are earned or not. Where contingent fees are used, it necessarily follows that the attorney will be underpaid in some cases and overpaid in others if the compensation is measured in relation only to the amount of time devoted to the case.

Mr. Mahr testified that he could not recall in his 35 years of practice a client who sometime during the period a case is handled not asking him "What is this going to cost me" or words to that effect. It does not seem plausible that Mr. Loepp would not have asked this question sometime during the 20 months it

took to reach a final settlement. It is more reasonable to believe that the matter was discussed and agreed upon at the first office conference, and therefore was no need to discuss it again until settlement had been effected. It is difficult to assume that anything other than a contingent fee agreement could have been arrived at considering claimant's financial situation when he employed his attorney.

FINDINGS OF FACT

That claimant and his attorney had an oral agreement by the terms of which his attorney was to receive one-third of the amount recovered, exclusive of 85.27 benefits, and that a fee of $4,667.00 pursuant to this agreement is reasonable under all the circumstances set forth above.

CONCLUSIONS OF LAW

Based upon the above findings, attorney Paul Mahr is entitled to an order approving his fee and direct payment thereof.

ORDER

IT IS THEREFORE ORDERED that a contingency fee of one-third (1/3) of claimant's recovery (four thousand six hundred sixty-seven and no/100 dollars ($4,667.00)) be and is hereby allowed.

IT IS FURTHER ORDERED that counsel may retain as his fee in this matter the four thousand six hundred sixty-seven and no/100 dollars ($4,667.00) which has been held in his trust account pending the outcome of this matter.

IT IS FURTHER ORDERED that Attorney Paul Mahr pay the costs of this proceeding.

Signed and filed this 7th day of August, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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CERTIFIED MAIL

Mr. Paul A. Mahr
Attorney at Law
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Sioux City, Iowa 51101

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD LOWE,	:	
	:	File Nos. 673326
Claimant,	:	776977
	:	805718
vs.	:	
	:	
IOWA STATE PENITENTIARY,	:	A R B I T R A T I O N
	:	
Employer,	:	
	:	D E C I S I O N
and,	:	
	:	FILED
STATE OF IOWA,	:	
	:	JUL 8 1987
Insurance Carrier,	:	
Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This case involves three proceedings in arbitration brought by Donald Lowe against Iowa State Penitentiary, his former employer, and the State of Iowa as insurance carrier.

Claimant alleges that he sustained compensable injuries on June 11, 1981, October 3, 1984 and September 26, 1985. He acknowledges receipt of all compensation due for temporary total disability or healing period in relation to the first two injuries. Claimant acknowledges receipt of compensation for temporary total disability or healing period running through December 5, 1985 following the third injury. Claimant seeks additional compensation for healing period and also compensation for permanent disability. Claimant urges that he is permanently and totally disabled. Claimant also seeks to recover $2,919.09 in medical expenses.

The case was heard at Burlington, Iowa on January 8, 1987. The record was reopened to allow entry of a report from a physician whom claimant had failed to disclose in his discovery responses. The record in this proceeding consists of claimant's exhibits 1 through 25 and defendants' exhibits A through F. The record also contains testimony from Donald Lowe, Debra Lowe, Frank Lowe, Betty Lowe and William Haley.

ISSUES

The issues presented for determination are whether any of the three injuries is a proximate cause of any disability which

ow or formerly afflicted Donald Lowe and determination of his ntitlement to compensation for temporary total disability, ealing period and permanent disability. Claimant urges application f the odd-lot doctrine. Claimant also seeks to recover certain edical expenses in the amount of $2,919.09.

SUMMARY OF EVIDENCE

Donald Lowe is a 41-year-old high school graduate who held a number of different jobs between 1963 and 1979 when he commenced employment at the Iowa State Penitentiary. His prior jobs included drill press operator, stock man, oiler on a crane, farm hand, feed salesman, grain buyer, truck driver, street sweeper operator and factory work. Claimant was in the army reserve where he stated that he got paid for just sitting on his butt for 16 hours a weekend and watching other people do their thing.

Claimant began work at the Iowa State Penitentiary at Fort Madison in January, 1979. He worked as an excercise officer escorting inmates between the cellhouse and an excercise area. He stated that the job required that he be on his feet most of the time.

Claimant asserts three incidents of injury to his groin area. The first occurred on June 11, 1981 when he was kicked in the groin by an inmate. He was treated by Vasant F. Pawar, M.D. with rest and medication. He returned to work without restriction in approximately 30 days (claimant's exhibit 23, page 6).

The second incident occurred on October 3, 1984 when claimant slipped on steps on work and strained himself in an attempt to avoid falling. He was again treated by Dr. Pawar with antibiotics, pain medication and rest (claimant's exhibit 23, pages 7 and 8). When claimant's complaints did not resolve, he was first referred to a urologist in Keokuk, Iowa who, in turn, referred him to the University of Iowa Hospitals and Clinics in Iowa City. He was diagnosed as having an infection and was treated with medication and rest. Claimant was apparently not impressed with the physicians at Iowa City who examined him.

When claimant's pain did not resolve an exploratory surgery was performed which resulted in discovery of a bulging weakness in claimant's abdomen which was diagnosed as evidence of a direct inguinal hernia. The weakness was repaired. During the surgery claimant's left testicle was examined and no abnormalities were noted (claimant's exhibit 10). When claimant's complaints did not resolve following recovery from the surgery, a second surgery was performed which resulted in removal of his left testicle. Subsequent examination of the testicle found no abnormalities.

Claimant recovered from the surgery and, on April 22, 1985,

returned to work. At that time he appeared to have relief from his painful symptoms (claimant's exhibit 23, pages 14, 32 and 33). In his testimony, claimant denied experiencing complete relief.

On September 26, 1985 claimant was again kicked in the groin and returned to Dr. Pawar. He was treated by pain medication and rest. When the pain did not resolve, Dr. Pawar referred claimant to a urologist in Springfield who found nothing abnormal and, in turn, referred claimant to a pain clinic. At the pain clinic, a diagnosis of nerve entrapment of the genitofemoral nerve was made, but the results of the nerve blocks used in making the diagnosis were not completely reliable. A second nerve block attempt was recommended which was to be followed by a genitofemoral neurectomy if indicated (claimant's exhibit 23, pages 16-18).

Dr. Pawar was not fully convinced that the neurectomy was indicated and referred claimant to the Mayo Clinic for a further evaluation. The Mayo Clinic diagnosed claimant as having adductor tendonitis and recommended a course of physical therapy (claimant's exhibit 23, pages 19 and 20). While at the Mayo Clinic a Minnesota Multiphasic Personality Inventory was performed which showed claimant to be mildly depressed and pessimistic. It also indicated that his number of physical symptoms and concern about bodily functions was fairly typical for medical patients. Abnormalities were not noted. Claimant did, however, refuse an offer to perform a nerve block in order to seek some relief from his pain (defendants' exhibit A).

The deposition of Dr. Pawar was taken May 28, 1986, approximately one month after claimant had been to the Mayo Clinic. At that time, no benefit had been obtained from the physical therapy which claimant was performing. Claimant testified that, by the time of hearing, there had still been no relief of his pain as a result of the physical therapy.

Claimant testified that he experiences continual severe pain in his left groin. He stated that he does not know of any work that he could perform. He has looked for some work but found none. He stated that his day to day activities include sitting in a recliner for 13 to 17 hours per day. He expressed difficulty getting out of bed, dressing, brushing his teeth, getting up from the toilet or taking a bath. He stated that he had some residual discomfort following the 1981 injury, but that the major change in his condition occurred in September, 1985. Claimant did drive himself to and from the Mayo Clinic and stated that he can mow his lawn. He also performs other activities and chores about his home on occasion.

Claimant testified that he used a large amount of sick leave following his 1984 surgery. He stated that his employment at

the Iowa State Penitentiary has been terminated and that since June of 1986 he has paid all his own medical insurance premiums.

Debra Lowe, claimant's wife during the past seven and one-half years, testified regarding claimant's injuries. She stated that the difference in his physical abilities has existed since 1981. She generally confirmed claimant's testimony regarding his abilities and limitations.

Frank Lowe, claimant's father, testified that claimant currently does not seem able to get around. He felt that he would be unable to drive a tractor. He testified that, prior to claimant's injuries, he had on occasion helped at the family farm, but had not subsequently.

Betty Lowe, claimant's mother, testified that claimant was physically limited, but that he hadn't driven a tractor on the farm since 1978 or 1979 and hadn't helped with chores since he was a child.

William Haley, claimant's father-in-law, testified that claimant currently does little like he used to. He stated that claimant had ceased going fishing, walking, climbing stairs, lifting, moving heavy things or engaging in sports at family gatherings. He stated that claimant appeared to be in great pain last Christmas.

Claimant has been seen by a variety of physicians and subjected to a variety of diagnostic procedures. No concensus has been reached regarding the physiological cause of claimant's complaints. Ian D. Hay, a consultant in endocrinology and internal medicine at the Mayo Clinic, reported a diagnosis of left thigh adductor tendonitis which was expected to improve (defendants' exhibit A). Narayana S. Ambati, M.D., chief of urology at the Veterans Administration Medical Center in Fresno, California, and formerly an associate professor of urology at the University of Iowa, indicated that any disability should be temporary and that recovery should be permanent (defendants' exhibit B). Roger B. Traycoff, M.D., in a report dated January 21, 1986, stated that the results of diagnostic tests were consistent with denervation of either the genitofermoral or ilioinguinal nerves (claimant's exhibit 11).

John P. Allen, in a report of November 11, 1986, found claimant to have subjective complaints of pain with a guarded prognosis for improvement. He found no compelling evidence that claimant was limited and observed claimant to be able to walk in the room, sit down, dress and undress. He felt that claimant was able to be employed, but that such should be a light duty type of employment. Dr. Allen felt that further follow-up treatment to diagnose claimant's condition was warranted (defendant's exhibit F).

Dr. Pawar felt that tendonitis is often a result of injury, that it could result from being kicked and that claimant's current condition is directly related to being kicked on September 26, 1985 (claimant's exhibit 23, pages 24 and 43-58). Dr. Pawar felt that claimant has at least an 80% disability (claimant's exhibit 23, page 23). On another occasion, he indicated that claimant was totally disabled (claimant's exhibit 12).

The Illinois Department of Rehabilitation Services has declined to provide services to claimant as they felt that he did not exhibit any rehabilitation potential (claimant's exhibit 20).

Claimant was evaluated by Marian S. Jacobs, a qualified vocational consultant. Jacobs concluded that Lowe has demonstrated skills that transfer to a variety of jobs classified as light or sedentary work, but that in view of the nature of his pain, there are few, if any, jobs available to him. Jacobs further concluded that Lowe may expect to earn approximately $3.50 per hour in a job if he were successful in obtaining employment (claimant's exhibit 24, pages 7 and 8).

Claimant submitted bills for the following medical services:

Mayo Clinic	$1,938.40	(exhibit 14)
Memorial Hospital	631.65	(exhibit 18)
Memorial Hospital	5.00	(exhibit 19)
Springfield Clinic	30.00	(exhibit 21)
Memorial Medical Center	314.04	(exhibit 22)
Total	$2,919.09	

Claimant also seeks to recover costs including fees from Cheryl Newman Liles, Certified Shorthand Reporter, in the amount of $287.00 for reporting and transcribing the deposition of Dr. Pawar (claimant's exhibit 25).

APPLICABLE LAW AND ANALYSIS

In the prehearing report, the parties stipulated to the occurrence of claimant's 1984 and 1985 injuries. There was no stipulation, however, regarding the occurrence of the 1981 injury. Claimant's testimony in that regard is well corroborated by medical records and is accepted as correct. It is therefore found that claimant did sustain an injury which arose out of and in the course of his employment when he was kicked in the groin by an inmate on or about June 11, 1981.

No claim is made for temporary total disability or healing period with regard to the 1981 and 1984 injuries. When claimant returned to work following the 1981 injury there was no indication that any permanent disability resulted and none appears at this time. The employer's liability for the 1981 injury has been

fully satisfied.

Claimant's period of recuperation following the 1984 injury was somewhat extended. A surgical procedure was performed. Claimant nevertheless returned to work without any apparent permanent restrictions with regard to his physical activities. Dr. Pawar indicated that claimant had complete relief of his pain. There is no satisfactory evidence that any degree of permanent disability resulted from the 1984 injury.

The bulk of claimant's problems seem to have originated at the time of the 1985 injury. Based upon the testimony from Dr. Pawar and the timing and sequence of events it is found that the injury of September 26, 1985 is a proximate cause of the extended healing period and permanent partial disability with which claimant is afflicted.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 26, 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).

Healing period runs until the earlier of a return to work, recuperation to the point that the employee is medically capable of returning to substantially similar employment, or it is medically indicated that significant improvement from the injury is not anticipated [§85.34(1)].

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 medical practitioners have not reached a concensus regarding the nature or source of claimant's physical ailments. Their opinions range from total disability to no disability whatsoever. The diagnoses range from genitofemoral neuropathy to adductor tendonitis. Neither of those two conditions is inherently the type of thing which would necessarily produce total disability. Dr. Traycoff felt that there was a physiological basis for claimant's complaints. The Minnesota Multiphasic Personality Inventory provided no indication of malingering. The existence of claimant's complaints of pain is found to be supported by the objective medical evidence in the record. The severity, however, is not as well established. Claimant has refused offered tests or attempts to relieve his pain. It would normally be expected that a person in severe pain would actively seek relief, particularly through procedures such as nerve blocks which have little chance of producing any further permanent impairment. The drive from southern Iowa to Rochester, Minnesota in one day would be a substantial achievement. Mowing the lawn, while not necessarily particularly strenuous, seems to be a physical activity that is greater than claimant's admitted capabilities. It is certainly understandable that claimant would not want to return to work of the nature he performed at the penitentiary which subjected him to abuse and attacks from inmates. This does not, however, constitute a basis for total disability. Claimant urged application of the odd-lot doctrine. The evidence in the case, however, does not constitute a prima facie showing of total disability. Even if such a showing were made the evidence from Dr. Allen and Marian Jacobs rebuts any claim of total disability under the odd-lot doctrine or otherwise. The evidence from Marian Jacobs and Dr. Allen is relied upon as being the most accurate in the record when determining claimant's industrial disability. When all the factors of disability are considered it is found that claimant has a 40% permanent partial disability when the same is evaluated industrially. It is further found that claimant's entitlement to healing period ended on July 1, 1986, the approximate date at which the therapy recommended by the Mayo Clinic was discontinued and subsequent to which claimant has not entered into any active course of medical treatment. No significant improvement in his condition appears to have occurred or to have been expected subsequent to July 1, 1986.

Defendants seek credit under the plan document for long term disability (defendants' exhibit C). The credit under section 85.38(2) is an affirmative defense which must be raised and proved by the defendant. Such was successfully done in this case. Section 13 of the plan document, which is entitled Scheduled Benefits, contains the following statement:

> MONTHLY INCOME. The monthly income which accrues under this Plan Document for any month, because of a Person's total disability, shall be his

Scheduled Monthly Income Benefit less any payments for that month for which he and any of his dependents are eligible to receive under... Workers' Compensation, any other state sponsored sickness or disability benefit payable, and other group disability benefit for which the Person is or becomes eligible.

Exhibit C clearly shows that the group plan is one which qualifies for credit under the provisions of section 85.38(2) of the code. The plan is provided by the employer without cost to the employees, and official notice is taken of that fact since it is a common benefit provided to all state employees, including the undersigned. The terms of the plan document provide a reduction in the amount paid by the group plan for amounts paid by workers' compensation. That reduction clearly satisfies the second requirement of the statute since it prevents payment of both full workers' compensation and full group benefits. Defendants' assertion that the deputy industrial commissioner who hears the case has no jurisdiction to determine this issue is without merit since jurisdiction is fully provided in Chapter 86 of the code. The employer's argument that a double benefit would result if group benefits were not applied for until after the workers' compensation case was determined is also without merit. Under those circumstances, the appropriate deduction for the amount of the workers' compensation benefit would be made or taken by the group LTD carrier. In some cases, the workers' compensation benefit may completely satisfy the group disability income benefit and the group carrier would not make payment over and above the amount of the workers' compensation. Accordingly, the employer is entitled to full credit for the $9,733.29 of group disability income benefits paid prior to January 4, 1987 and for any paid subsequent thereto. Claimant's medical expenses in the amount of $2,919.09, as shown in exhibits 15, 18, 19, 21 and 22, are all shown to have been related to his complaints resulting from the groin injury and are the responsibility of the employer. It should be noted, however, that the defendant is not entitled to credit for amounts paid by claimant's medical insurance for services provided subsequent to June 1, 1986 when the defendant ceased providing part of the cost of that insurance coverage.

FINDINGS OF FACT

1. Donald Lowe was injured on September 26, 1985 when he was kicked in the groin by an inmate.

2. Following the injury claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of injury until July 1, 1986 when it was medically indicated that further significant improvement from the injury was not anticipated.

3. Claimant has failed to establish his credibility with regard to the severity of his complaints although the existence of complaints has been established.

4. The physiological source of claimant's pain has not been identified, but objective evidence of physiological abnormalities exists.

5. Claimant's medical expenses in the amount of $2,919.09 were incurred for treatment resulting from the injury of September 26, 1985.

6. Claimant has suffered a substantial loss of earning capacity as a result of the injury and is limited to light work.

CONCLUSIONS OF LAW

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

2. The injury claimant sustained on September 26, 1985 is a proximate cause of his inability to return to his employment with the Iowa State Penitentiary, of the medical expenses incurred as a result of the injury and of the permanent partial disability with which he is currently afflicted.

3. When evaluated in industrial terms, claimant has a 40% permanent partial disability.

4. Defendants are entitled to credit for amounts paid under the group long term disability plan.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant an additional twenty-nine and five-sevenths (29 5/7) weeks of compensation for healing period at the stipulated rate of two hundred twenty-two and 64/100 dollars ($222.64) per week commencing December 6, 1985.

IT IS FURTHER ORDERED that defendants pay claimant two hundred (200) weeks of compensation for permanent partial disability at the stipulated rate of two hundred twenty-two and 64/100 dollars ($222.64) per week commencing July 2, 1986.

IT IS FURTHER ORDERED that defendants receive credit for amounts paid under the State of Iowa Long Term Disability Plan in the stipulated amount of nine thousand seven hundred thirty-three and 29/100 dollars ($9,733.29) computed as of January 4, 1987 and credit for all amounts subsequently paid under such plan. The credit is to be applied on a week by week basis to the healing period and permanent partial disability awarded in

this decision.

IT IS FURTHER ORDERED that any amounts remaining past due, after application of the credits provided herein, shall be paid in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants pay the claimant for the following medical expenses:

Mayo Clinic	$1,938.40
Memorial Hospital	631.65
Memorial Hospital	5.00
Springfield Clinic	30.00
Memorial Medical Center	314.04
Total	$2,919.09

IT IS FURTHER ORDERED that costs of this proceeding are assessed against defendants including court reporter fees for Cheryl Newman Liles in the amount of two hundred eighty-seven dollars ($287.00).

Signed and filed this 8th day of July, 1987.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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Des Moines, Iowa 50319

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

IMELDA P. LUNA, f/k/a IMELDA P. SMITH, Claimant, vs. KNOTT PRINTERS, Employer, and CINCINNATI INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 823407 A R B I T R A T I O N D E C I S I O N FILED DEC 15 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Imelda P. Smith, now Luna as a result of her marriage since the commencement of these proceedings (the caption is amended accordingly), claimant, against Knott Printers, employer (hereinafter referred to as Knott), and Cincinnati Insurance Company, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury in January, 1986. On October 8, 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 Albert Church. 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 was employed by Knott at the time of the alleged work injury.

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $131.79 per week.

3. Claimant is only seeking temporary total disability

benefits or healing period benefits from May 16, 1986 through January 4, 1987.

4. All requested medical benefits have been paid by defendants.

In her post-hearing brief, claimant offered new evidence into the record labeled as exhibit A, consisting of correspondence with one of the treating physicians after the hearing. For reasons of due process alone, this should not be allowed. However, a deputy commissioner has no such discretion. Division of Industrial Services Rule 343-4.31 specifically prohibits the taking of evidence after the hearing. Therefore, exhibit A shall not be received into the evidence and was not considered in arriving at this decision.

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 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 began working for Knott in December, 1985. She said that she was hired to work in the bindery but was eventually taught to operate a printing press. The bindery work involved such tasks as cutting paper and operating the folding machine along with other miscellaneous duties. Such work required claimant to occasionally lift boxes of paper. Claimant had been working in print shops in the past. At the time of the alleged work injury, claimant was also working part-time as a cook in a mexican restaurant. This cooking job also required claimant to occasionally lift and use her hands on a repetitive basis.

The facts surrounding the work injury are in dispute. Claimant testified that sometime in January, 1986 (she was unsure of the exact date) while working overtime at Knott on a

Saturday morning during an annual inventory, she stumbled on boxes lying on the floor and struck her right elbow on a folder machine. Claimant said that after the incident her elbow hurt "real bad" and was asked by her supervisor at the time, Dan Curry, if she was "ok." Claimant responded to her supervisor in the affirmative and she continued working despite the persistence of elbow pain. Claimant testified that she reported for work the following Monday and despite the absence of brusing and swelling in her right elbow, the elbow hurt when she tried to use her arm while performing her regular duties.

Claimant did not seek immediate medical treatment. Claimant explained at hearing that she had pain pills which had been prescribed for a gum disease and she used these pills for the pain thinking that the elbow problem would eventually "go away." However, claimant testified that the pain grew worse over time and she began to experience difficulty sleeping at night. Eventually, she talked to her supervisor a few weeks later and to the owner of Knott, Albert Church. Claimant was then sent to the hospital for treatment.

In a note dated February 25, 1986, P. Tranmer, M.D., reports that claimant complained to him that she bumped her arm at Knott and fell "against something about 3 weeks ago" and that "It is not getting any better." Dr. Tranmer's diagnosis was "Contusion, right lateral humeral epicondyle with mild epicondylitis." The doctor prescribed a Velco Tennis Elbow splint and coated aspirin. Claimant testified that she did not return to Dr. Tranmer after that time because she felt that the pain would eventually subside. Claimant said that she eventually ran out of the coated aspirin and her own pain pills and again talked with Church who referred claimant to William Catalona, M.D., an orthopedic surgeon.

In a note dated May 13, 1986, Dr. Catalona reports as follows: "Comes for 2nd opin. cause painful rt. elbow related to inj. when struck elbow hard against machine at work Jan. '86." Dr. Catalona diagnosed acute tennis elbow and advised claimant to change jobs until the pain subsided and to avoid aggravation of the condition. Claimant returned to work but only performed dusting and cleaning work. On Friday, May 16, 1986, claimant testified that she was told by Church that he "would have to let her go" and was told to seek unemployment benefits and that church would not contest such an application. Claimant said that after leaving Knotts she did not seek unemployment compensation benefits as she was not able to work. Claimant testified that she did not work anywhere between May 16, 1986 and January 4, 1987, including her part-time cooking job. In October, 1986, claimant married and moved to Huston, Texas where she now resides. At the time she left Iowa, she was still under the care of Dr. Catalona for her elbow condition. The doctor gave her his records and she then sought treatment from another

orthopedic surgeon in Texas, Ariston P. Awitan, Jr., M.D. In a report dated April 6, 1987, Dr. Awitan states that he likewise diagnosed epicondylitis of the right elbow and treated claimant with anti-inflammatory medication. Dr. Awitan released claimant for regular duty effective January 5, 1987. Claimant testified that she now feels fully able to return to work and has experienced no further difficulties with her right elbow since Dr. Awitan's release to return to work.

Church testified that from his observations of claimant, claimant was able to perform her regular duties at Knott before and after the alleged work injury. He said that he first learned of claimant's fall from his supervisor two weeks after the incident. He said that after the first referral to a doctor, claimant returned to regular work and made no further complaints to him until May, 1986. He said that he talked to Dr. Catalona after the doctor first examined claimant and was told by Dr. Catalona to put her on light duty. However, Church also testified that Dr. Catalona told him that claimant's condition was not related to the fall. Church stated that he laid claimant off on May 16, 1986 not because of her work injury or inability to perform her regular duties, but because of a lack of work and only kept her on staff until she repaid him for a prior loan he had given her before the work injury. Apparently, he was deducting money from claimant's check to repay the loan. Finally, Church testified that claimant was wearing high heels on the day of the alleged injury and that this violated his safety rules. Claimant denied at the hearing that she was wearing high heels as such apparel would not be suitable for inventory work.

Claimant's appearance and demeanor at the hearing indicated that she was testifying in a candid and truthful manner. The same cannot be said of Church's appearance and demeanor.

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.

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, claimant has established by the greater weight of the credible evidence that she suffered a work injury which was a cause of a temporary disability during a period of recovery. Claimant's account of the fall and that the fall precipitated her elbow problems is uncontroverted. The fact that the fall actually occurred is not in serious dispute. There is also little question from the evidence presented that claimant was temporarily disabled as a result of a tennis elbow condition. The fighting issue in this case is the causal connection of the tennis elbow condition to the work injury.

First, the testimony of Church relating to Dr. Catalona's opinion was admissible heresay as this is an administrative hearing. However, the offering of medical expert testimony by way of self-serving heresay by a party is highly unreliable, especially in this case where Church's credibility is suspect. Claimant, on the other hand, credibly testified that she had no prior elbow problems and no other elbow injuries. This testimony is uncontroverted. Furthermore, the tennis elbow condition was first diagnosed by Dr. Tranmer and this diagnosis has remained unchanged by the two subsequent treating orthopedic surgeons. Although no doctor specifically states that the tennis elbow condition was caused by the fall, the only diagnosis of claimant's condition after the fall has been tennis elbow and no other history of injury or elbow complaint has been placed into the record except for the complaints since the alleged work injury.

Although claimant was supposedly laid off for reasons other than her work injury, claimant is still entitled to temporary total disability benefits under Iowa Code section 85.33(1) if she was unable to return to her regular work at the time she was laid off. It is virtually uncontroverted that claimant was not released for full duty until January 5, 1987.

As claimant was returned to full duty without further complaints, claimant is only entitled to temporary total disability benefits under Chapter 85 of the Code. However, an award of permanent partial disability benefits was certainly considered by this deputy commissioner under the holding of Blacksmith v. All-American as the testimony of Church that claimant's temporary disability played no part in the lay off was highly questionable. Permanent disability benefits can be awarded without a showing of permanent partial impairment when it is established that there was a change of employment or jobs to the economic disadvantage of claimant caused by the work injury. On the other hand, claimant failed to show that she was replaced by another healthy person and it could not be found that the firing of claimant was due to the work injury despite Church's lack of credibility.

In the prehearing report defendants raised the defense that claimant should be denied benefits for violation of work rules but cites no authority for such a defense. This deputy is aware, however, that there is some authority in the law of workers' compensation for such an arguement but feels that such a rule is not valid in the State of Iowa. Such a rule is nothing more than a resurrection of the old contributory negeligence/ assumption of the risk defenses outlawed in the early 1900's when chapter 85 was enacted in this state. However, assuming the validity of such a doctrine, defendants would have the burden to establish such a defense. In this case, claimant creditably denied she was wearing high heeled shoes and the defendants failed to carry their burden of proof in this matter.

Claimant sought in this proceeding reimbursement for the expense of purchasing a plane ticket to attend a previously scheduled hearing in this matter which was later continued at the request of defendants. Claimant admitted at the hearing that her attorneys agreed to the continuance. Claimant should have raised the expense issue at the time of the request for the continuance. Such costs are not the type of costs that can now be awarded from this proceeding. See Division of Industrial Services Rule 343-4.33.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. Claimant was in the employ of Knott in January of 1986.

3. Sometime in January, 1986, claimant suffered an injury to the right elbow which arose out of and in the course of her employment with Knott. This injury consisted of a epicondylitis or tennis elbow precipitated by contusion to the arm following a fall at work.

4. The work injury of January, 1986, was a cause of a period of temporary disability from work beginning on May 16, 1986 and ending on January 4, 1987 at which time claimant was medically capable of returning to the same type of work she was performing at the time of the work injury. Although it could not be found that claimant was laid off on May 16, 1986 as a result of the work injury, she was not working between May 16, 1986 and January 4, 1987 and was not physically able to return to the type of work she was performing at the time of the work injury until January 5, 1987.

5. It could not be found that claimant suffered permanent impairment or permanent disability from the work injury.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to temporary total disability benefits as awarded below.

ORDER

1. Defendants shall pay to claimant temporary total disability benefits from May 16, 1986 through January 4, 1987 at the rate of one hundred thirty-one and 79/100 dollars ($131.79) per week.

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

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

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

Signed and filed this 15 day of December, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK LYNCH,	:	
	:	
Claimant,	:	File No. 496574
	:	
vs.	:	D E C I S I O N
	:	
IOWA TURKEY EXPRESS,	:	O N
	:	
Employer,	:	M E D I C A L
	:	
and	:	B E N E F I T S
	:	FILED
AID INSURANCE COMPANY,	:	
	:	JUL 17 1987
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding for medical benefits and for subrogation brought by the claimant, Mark Lynch, against his employer, Iowa Turkey Express, and its insurance carrier, Aid Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained April 30, 1978. This matter was submitted on a stipulated record on April 28, 1987. A first report of injury was filed May 18, 1979.

The record in this matter consists of the stipulation, as well as of claimant's exhibits 1 through 14, and defendants' exhibits 1 through 9, each as identified on the respective exhibit lists submitted.

ISSUES

The issues to be decided are:

1) Whether claimant is entitled to payment of certain medical expenses as causally related to the work injury; as authorized; as fair and reasonable; and as reasonable and necessary medical care; and

2) Whether section 85.22 entitles defendants to credit for $9,000 claimant received from a third party.

REVIEW OF THE EVIDENCE

The parties stipulated that if Horst Blume, M.D., John Dougherty, M.D., and James Walston, M.D., were called to testify on behalf of claimant, those doctors would testify that medical services rendered to claimant were reasonable and necessary and the charges made for such services were fair and reasonable. The parties stipulated that if Alexander Kleider, M.D., a neurosurgeon, and Jim Maroc, M.D., of the Iowa Foundation for Medical Care, testified on behalf of employer and insurance carrier, those physicians would testify that only one neurosurgeon was needed to perform the cervical laminectomies and fusion performed on or about November 30, 1984 and that the services of Doctors Dougherty and Walston were not necessary. Those physicians would further testify that the fair and reasonable charge for performance of such surgery, including followup care is $2,500. The parties also stipulated that a representative of the employer and insurance carrier would testify that claimant did not, prior to incurring medical benefits in question, request that the employer provide medical benefits to the employee and that such medical benefits were not authorized by the employer or insurance carrier.

A newspaper account of the April 30, 1978 injury indicates that a car struck the tractor-trailer claimant was driving. The truck subsequently jackknifed and rolled over at least once. The driver of the car, a Fred Spick, was treated at a hospital and released. Claimant was reported as not injured. On May 23, 1978, J. A. Walston, M.D., reported claimant's objective findings of stiffness and right leg pain and weakness, and diagnosed a bruised leg and cervical myositis. Claimant returned to work on May 15, 1978.

Claimant's answers to the second set of interrogatories indicate that claimant has made a claim against Fred Spick for damages on account of injuries allegedly sustained in the April 30, 1978 accident, and that a settlement with a recovery of $9,000 was reached.

A medical report of Horst C. Blume, M.D., of April 16, 1985 reports that claimant was seen with neck, shoulder, and arm pain on October 20, 1984. On referral from John Dougherty, M.D., a myelogram of the cervical spine evidenced a ruptured disc at C5-6 and C6-7 with cervical surgery on November 30, 1984. An extruded ruptured disc at C5-6 on the right as well as a ruptured disc at C6-7 bilaterally, particularly on the right, was encountered as well as posterior spur formation at the level of C5-6. The ruptured discs were removed, nerve roots decompressed bilaterally, and interbodial fusion was carried out at the C5-6 interspace. Dr. Blume opined that, within a reasonable medical certainty, upon reviewing the history and findings attained, that claimant's injury to the cervical spine and the resulting abnormalities were directly related to the accident in April 1979 [sic].

On October 12, 1984, John J. Dougherty, M.D., reported he had examined claimant on October 9, 1984 regarding his neck and opined that claimant had a degenerated disc and may very well have a cervical disc syndrome.

On September 24, 1979, Dr. Dougherty reported that lateral x-rays of claimant's cervical spine suggested some narrowing at C5/6; AP views of the cervical spine apparently demonstrated narrowing of Luschka's joints at C5/6. The doctor then recommended traction of ten pounds for fifteen to twenty minutes several times a day, and reported that he did not feel a myelogram was necessary. He indicated that while claimant "has a little disc space" he did not feel that claimant needed "an operation." On July 3, 1979, Dr. Dougherty had diagnosed one of claimant's conditions as previous cercival ligamentous and muscular sprain, superimposed on what appears to be an early degenerated disc at C5-6 and questionable slight increased motion at 6/7 with possible discogenic pain.

On March 6, 1985, James H. Walston, M.D., reported that he had examined claimant on September 24, 1984 with pain in the chest, shoulder and back. Claimant was again seen on September 26, 1984 with much worse pain than previously and with pain radiating down the right arm with some numbness and tingling. Dr. Walston opined that claimant suffered a disc lesion which was probably injured originally in the truck accident from five or six years ago and had just become really bad in the last three or four months, requiring surgery that was done.

Medical bills submitted include a bill of Dr. Walston for services from September 24, 1984 through December 20, 1984 in the amount of $1,380. The bill includes a hospital care charge of $130 and a surgical assistant charge of $1,100, as well as charges for six office calls during that period. Also submitted is a Woodbury Anesthesia Group bill for services of November 30, 1984 of $625. A bill of Dr. Horst Blume for services from October 22, 1984 through February 18, 1985 for $3,987 includes charges for a neurological consultation of October 22, 1984 and for an additional history and neurological reexamination/re-evaluation of November 29, 1984; a $3,000 charge for surgery performed November 30, 1984; a $105 charge for three hospital visits from December 1, 1984 through December 3, 1984; as well as additional charges for office visits during that period; and charges for therapy with stereo dynamic interferential currents to the cervical spine bilaterally. Also included are bills from Marian Health Center from October 20, 1984 through October 22, 1984 in the amount of $1,274.50. Claimant was admitted to the Marian Health Center for cervical myelogram by Dr. Dougherty on October 20, 1984. A bill of Marian Health Center from November 29, 1984 through December 3, 1984 totals $3,075. A bill of Dr. Dougherty from October 9, 1984 through October 22, 1984 totals $2,240. A charge on the Dougherty bill for November 30, 1984

indicates arthrodesis/disc, 2 levels $1,500. Also submitted is a March 14, 1985 bill of Marian Health Center indicating OP service for claimant of that date with the service charges totaling $34.25.

A letter from the insurance carrier to claimant's counsel of November 20, 1984 states:

> If Mr. Lynch is having problems related to our injury, Dr. John Dougherty was already authorized. I do not want you to get the impression that we are presently agreeing that any current examinations or treatment is authorized by our office, however, because we certainly have no idea what his work or personal history has been since 1978. Of course, the time has long expired on any weekly benefits.

The balance of the evidence was reviewed in the disposition of this matter.

APPLICABLE LAW AND ANALYSIS

We first address the medical payment question.

. Section 85.27 requires defendants to provide claimant reasonable and necessary medical care for all compensable injuries. Hence, to be entitled to costs of his cervical fusion claimant must establish that his cervical disc herniations were causally related to his original 1978 injury.

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 30, 1978 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

154 N.W.2d 128 (1967).

A 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 a 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).

Agency may disregard uncontroverted medical testimony; it may do so only after stating substantial reasons for not deferring to the evidence, however. Sondag, 220 N.W.2d 903.

An expert's opinion based on an incomplete history is not necessarily binding on the commissioner but must be weighed with other facts and circumstances. Musselman, 261 Iowa 352, 360, 154 N.W.2d 128, 133.

Doctors Blume, Dougherty, and Walston all opine that claimant's ruptured cervical disc relate back to his original April 30, 1978 injury. Each of these physicians was involved in treating claimant for the cervical condition in 1984. None appear to have treated claimant on an ongoing basis from the 1978 injury. Dr. Dougherty diagnosed claimant's conditon in July 1979 as a previous cervical ligamentous and muscular impairment, superimposed on an apparent early degenerated disc at C5-6 and questionable slight increased motion at 6/7 with possible discogenic pain. He did not then feel myeolgraphic studies or surgery were necessary. We have no lay information as to what claimant's activities were from 1978 through 1984. The medical records in evidence do not demonstrate that Doctors Blume, Dougherty, or Walston questioned claimant as to his activities in that period or even considered possible intervening activities in opining that claimant's cervical condition in 1984 related back to his April 1978 injury. Without such, we do not accept their opinions regarding a causal relationship between the April 1978 work injury and claimant's 1984 cervical disc herniations. Hence, claimant has not carried his burden of showing the requisite causal relationship.

We note, however, that even had claimant proved the causation issue, his care after November 20, 1984 was nonauthorized as evidenced in the insurer's letter to his counsel of that date. As care rendered was also of a nonemergency nature, claimant would not be entitled to payment for such care.

As regards the section 85.22 issue, section 85.22 through subsection (1), Code of Iowa 1977, provides:

> When an employee receives an injury or incurs an occupational disease for which compensation is payable under this chapter, chapater 85A, and which injury or occupational disease is caused under circumstances creating a legal liability against some person, other than his employer or any employee of such employer as provided in section 85.20 to pay damages, the employee, or his dependent, or the trustee of such dependent, may take proceedings against his employer for compensation, and the employee or, in case of death, his legal representative may also maintain an action against such third party for damages. When an injured employee or his legal representative brings an action against such third party, a copy of the original notice shall be served upon the employer by the plaintiff, not less than ten days before the trial of the case, but a failure to give such notice shall not prejudice the rights of the employer, and the following rights and duties shall ensue:
>
> 1. If compensation is paid the employee or dependent or the trustee of such dependent under this chapter, the employer by whom the same was paid, or his insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees as may be allowed, by the district court, to the injured employee's or his personal representative's attorney, and shall have a lien on the claim for such recovery and the judgment thereon for the compensation for which he is liable. In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

Defendants would appear to have a lien against claimant's recovery from the third party Spick, provided defendants properly perfected their lien as provided in subsection 1 of section 85.22. No evidence of such perfection through notice to the clerk of

court was provided. Hence, claimant's payment of the recovery amount cannot be ordered. If defendants did perfect their lien, the parties are encouraged to work together to resolve this matter.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant sustained an injury which arose out of and in the course of his employment on April 30, 1978 when the tractor-trailer he was driving was involved in a motor vehicle accident with a car driven by Fred Spick.

Claimant's injuries in that accident were diagnosed as of May 23, 1978 as a bruised leg and cervical myositis.

As of July 3, 1979, Dr. Dougherty diagnosed claimant as having a previous cervical ligamentous and muscle sprain, superimposed on an apparent early degenerated disc at C5-6 and questionable slight increased motion at 6/8 with possible discogenic pain.

As of September 24, 1979, Dr. Dougherty did not believe either myelographic studies or surgery was necessary.

Claimant apparently did not seek further medical care for his cervical condition until Fall 1984.

Claimant's medical histories do not reveal his work or life activities from Septemer 1979 through October 1984.

Other evidence in the record does not reveal claimant's life or work activites from September 1979 through October 1984.

Life or work activities other than claimant's April 1978 motor vehicle accident could have produced claimant's herniated cervical discs.

Claimant received a recovery of $9,000 in a third party action against Fred Spick.

Defendants did not demonstrate they perfected their lien against that recovery as provided in section 85.22(1).

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant is not entitled to payment of medical costs incurred on account of treatment of his cervical disc herniations diagnosed in October 1984.

Defendants have not demonstrated entitlement to a lien against the proceeds in claimant's third party action against Mr. Spick.

ORDER

THEREFORE, IT IS ORDERED:

Claimant taken nothing further from this proceeding.

Claimant pay costs of this proceeding pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 17th day of July, 1987.

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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Sioux City, Iowa 51101

Dr. Wheeler made glancing mention once that claimant occasionally had pain under the left arm when talking about the left shoulder injury (Ex. 6). Otherwise, the medical reports discuss the right shoulder, left shoulder, neck and back. These are parts of the body as a whole (Iowa Code section 85.34(2)(u)) because they are not referred to in the list of scheduled member injuries (Iowa Code section 85.34(2)(a-t)). In his own testimony claimant demonstrated by physical gestures that his pain was over the top of both shoulders, into his neck and into his back primarily. In describing the left shoulder injury he did state that the pain was also in his left arm and hand. Later in his testimony claimant stated that he had pain in both shoulders all of the time for which he took aspirin and uses a TENS unit.

It was mentioned by counsel in argument that an earlier motion for summary judgment made by the Second Injury Fund was denied because even though rotator cuff injuries are considered to be injuries to the body as a whole, it was possible that they could produce loss of use of the arms. This proposition was offered and rejected in a similar rotator cuff injury case in which it was determined that a rotator cuff injury is an injury to the body as a whole. TenEyck v. Farmland Foods, IV Iowa Industrial Commissioner Report 365 (1984). However, it was subsequently held in Alpha L. Fulton v. Jimmy Dean Meat Company, (File No. 755039) Filed July 28, 1986 (Appeal Decision) that it was not necessary for the second injury to be limited to a scheduled member. The Fulton case pointed out that the Mich Coal case did, in fact, involve a body as a whole injury which included the loss of use of a member (Second Injury Fund v. Mich Coal Company, 274 N.W.2d 300 (Iowa 1979).

In this case claimant returned to work after the first or right shoulder injury and he was able to do his job of trimming neck bones with his arms and hands for a period of approximately 10 months until he developed pain in his left shoulder. Claimant testified that he planned to find a job using his arms and hands at waist level and more specifically he planned to go to barber school and become a barber. The written restrictions of the doctors in their medical reports have only limited claimant to no heavy lifting and no working overhead. These restrictions are due to claimant's injury to his shoulders and neck and his degenerative condition and not due to any impairment in his arms themselves. Rotator cuff injuries are generally considered to be body as a whole injuries. Alm v. Morris Barick Cattle Company, 240 Iowa 1174, 38 N.W.2d 161 (1949); TenEyck, IV Iowa Industrial Commissioner Report 365 (1984) affirmed without opinion and therefore without precedential value (388 N.W.2d 664 (Iowa 1986)). Furthermore, it is noted that the agreement for settlement of the first or right shoulder injury was based upon a 10 percent rating of the body as a whole and that the supporting medical report described a rotator cuff injury and converted the right shoulder impairment of 20 percent to 10 percent of the body as a whole.

Consequently, it is found that claimant's right shoulder injury to the rotator cuff is an injury to the body as a whole and also that claimant's injury to the left shoulder to the rotator cuff is also an injury to the body as a whole.

This is a review-reopening decision as to the right shoulder injury which occurred on September 7, 1983 (No. 744384) because this injury was the subject of an agreement for settlement under Iowa Code section 86.13 (Ex. 38). Under Iowa Code section 86.14 the employee must prove a change of physical condition which has resulted in increased incapacity, Wagner v. Otis Radio and Electric Company, 254 Iowa 990, 993-994, 119 N.W.2d 751, 753 (1963); Henderson v. Isles, 250 Iowa 787, 793-794, 96 N.W.2d 321, 324 (1959); Oldham v. Scofield and Welch, 222 Iowa 764, 768, 266 N.W. 480, 482 (1936), or a non-physical change of condition which reduced his earning capacity, Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980). In Blacksmith the employee was transferred to a lower paying job after the injury.

Claimant did not prove a change or worsening of the physical condition of his right shoulder. There was no new medical evidence on the right shoulder. The same evidence that was used to determine the nature and extent of disability for the agreement for settlement was introduced again at the hearing. Claimant did not testify at the hearing as to any worsening or increased physical incapacity in his right shoulder. Claimant testified only that his right shoulder continued to hurt after he returned to work but that he did not reinjure his right shoulder. Claimant did not prove a reduced earnings capacity due to the right shoulder injury. On the contrary, he returned to work and trimmed neck bones for approximately 10 months at substantially the same or similar pay.

The nature and extent of disability as a result of the left shoulder injury is an initial arbitration decision for which the claimant must sustain the burden of proof by a preponderance of the evidence.

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

The opinion of the supreme court in Olson v. Goodyear

Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963) cited with approval a decision of the industrial commissioner for the following proposition:

> Disability * * * as defined by the Compensation Act means industrial disability, although functional disability is an element to be considered . . . In determining industrial disability, consideration may be given to the injured employee's age, education, qualifications, experience and his inability, because of the injury, to engage in employment for which he is fitted. * * * *

In Blacksmith, 290 N.W.2d 348 (Iowa 1980), industrial disability was found to exist where claimant was transferred to a lower paying job after the injury. In McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980), the court indicated that an employer's refusal to give any work to a claimant coupled with claimant's inability to find other suitable work after making a bonafide effort might justify a finding of industrial disability. In this case claimant did not prove a reduction in earning capacity from either his right shoulder or his left shoulder injury under the rationale in either the Blacksmith case or the McSpadden case. In this case claimant has not attempted to do any work within his doctor's recommended restrictions either with his former employer or any other employer since it was determined by Dr. Wheeler that he obtained maximum medical improvement on November 25, 1985 (Ex. 1). Claimant had no satisfactory explanation for why he had not tried to find work with a new employer other than to say he was still employed at his old employer.

As to the old employer claimant never contacted the employer directly to ask for work within his restrictions. Orr testified that claimant had never directly contacted the company himself to ask for work since it was determined that he had obtained maximum medical improvement after the left shoulder injury. Claimant admitted that he never contacted employer directly and ask for work after his second injury. Claimant stated he tried to get work through the union and the union told him the employer had no work for him within his restrictions. Orr testified that he asked the union if claimant wanted to work and the union told him claimant did not want to work for employer. Thus the evidence is in conflict. The burden of proof of reduced earning capacity for the application of the Blacksmith or McSpadden theories is upon the claimant. Claimant has failed to sustain the burden of proof by a preponderance of the evidence. At the same time defendants have asserted that claimant's motivation to go find suitable work within his restrictions may have been reduced because he was receiving $202.67 per week in workers' compensation, $300 per month from one private income disability policy and $200 per month from another income disability policy.

Defendant Second Injury Fund also asserted that claimant perceived that he was more disabled than he could support by medical evidence by his doctors (Ex. 30, p. 1). Employer's office notes show that after claimant had finished treatment with Dr. Wheeler and received a five percent impairment rating from him, that claimant then requested to see Dr. Connolly again who had treated his right shoulder. Dr. Connolly said claimant was not disabled enough to justify a Cybex machine evaluation but he awarded a 10 percent impairment rating for the left shoulder as he had done on the right shoulder. Exhibit 30, page 1 then shows that claimant requested to see still another doctor apparently because he perceived his disability to be greater than that of these two doctors.

Claimant is 38 years old, he has a ninth grade education, a variety of work experiences, but should avoid heavy lifting or overhead work. If he can do barbering, as he plans to do, it would seem that he could perform the waist level machine assisted jobs at employer's ergonomically restructured plant that were described by Orr, or perform a number of other jobs in the general labor market if he choses to work elsewhere. Industrial disability is not necessarily an add-on to functional impairment. It can be equal to, less than or greater than functional impairment. Lawyer and Higgs, Iowa Workers' Compensation -- Law & Practice, section 13-5, page 116.

As to claimant's physical impairment for the left shoulder injury Dr. Wheeler awarded claimant a five percent permanent partial impairment rating of each shoulder (Ex. 1). Employer interpreted this to mean body as a whole in its argument and its brief. Dr. Connolly awarded a "10 percent permanent partial disability [sic]" (Ex. 20). Again, employer has construed this to be a body as a whole rating in its argument and brief. Employer then paid claimant for 37.5 weeks of permanent partial disability based upon a seven and one-half percent impairment of the body as a whole (7.5 x 500 = 37.5 weeks) of the left shoulder.

At the time of the settlement agreement on the right shoulder Dr. Wheeler awarded an impairment rating of eight percent of the upper extremity which converts to five percent of the body as a whole on the AMA Guides (Ex. 21). Dr. Connolly awarded 10 percent of the body as a whole. Therefore, the ratings for both shoulder injuries are the same. Dr. Connolly said that essentially this gentleman had the same problem with his left shoulder that he had with his right shoulder. At the time of the settlement agreement on the right shoulder, both employer and employee thought that a 10 percent permanent partial disability was a fair amount. Therefore, it is determined that claimant is entitled to 10 percent permanent partial disability to the body as a whole as industrial disability for the injury to the left shoulder which occurred on May 13, 1985. When both arms and shoulders are considered he has a 20 percent permanent partial

disability. As a result of this determination, it is further found that claimant is not entitled to any benefits from the Second Injury Fund of Iowa. Both injuries are to the body as a whole and are to be evaluated industrially. When this is done there is nothing left for the Second Injury Fund to pay. Fulton, (No. 755039), Filed July 28, 1986 (Appeal Decision).

FINDINGS OF FACT

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

That claimant sustained an injury to his right shoulder on September 7, 1983 which was diagnosed as a right rotator cuff injury.

That claimant sustained an injury to his left shoulder on May 13, 1985 that was diagnosed as a left rotator cuff injury.

That both rotator cuff injuries are injuries to the body as a whole.

That the claimant entered a settlement agreement for the right shoulder injury of September 7, 1983 for 50 weeks of compensation based upon a 10 percent disability of the body as a whole.

That after the first injury on September 7, 1983, claimant returned to production work and performed this work for 10 months with full use of his right arm without any additional difficulties with that shoulder.

That claimant did not testify or submit any medical evidence of a change or worsening of the physical condition of his right shoulder.

That claimant is now restricted from doing heavy lifting or doing overhead work but can work with his hands and arms at waist level.

That claimant's former employer has a number of jobs that claimant could perform within these restrictions.

That claimant did not prove a non-physical change of condition.

That Dr. Wheeler awarded a five percent impairment rating and that Dr. Connolly awarded a 10 percent impairment rating for both the right shoulder injury of September 7, 1983 and the left shoulder injury of May 13, 1985.

That claimant has sustained an industrial disability of 10 percent of the body as a whole due to the left shoulder injury of May 13, 1985.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHARON K. MANNING, Claimant,	)	File Nos 481989/726458
-vs-	)	
RALSTON PURINA COMPANY, Employer,	)	Decision on Remand
and, LIBERTY MUTUAL INSURANCE CO., and AETNA LIFE AND CASUALTY Ins. Carrier, Defendants.	)	(Case Number 726458 only)

STATEMENT OF THE CASE

On October 15, 1985, the undersigned issued a proposed decision denying additional compensation benefits to claimant in consolidated proceedings for a review reopening from a prior award for an injury on 11/15/77 (file no. 481989) and for arbitration of a claim conerning an injury on 12/10/82 (file no. 726458). Both injuries involved claimant's back.

On January 20, 1987, the industrial commissioner remanded this case back to the undersigned for improperly excluding evidence concerning the reason(s) for claimant's termination from defendant employer, hereinafter referred to as Ralston. Specifically, the commissioner ordered (as amended on 1/18/87) the undersigned to take testimony and make appropriate findings on the causal relationship, if any, between claimant's termination and her injury of 12/10/82 and should such a relationship be found, to determine the extent of permanent disability benefits, to any, to which claimant is entitled.

First, the commissioner was incorrect in that the undersigned had not excluded evidence concerning claimant's termination. In sustaining a hearsay objection, another deputy commissioner issuing an arbitration decision on 5/17/84 had prohibited claimant from testifying about a conversation she had with Ralston management at the time she was informed of her termination. This same testimony was offered and the same objection was made at the hearing in this case but the undersigned felt that such testimony did not constitute hearsay and in any event should not be excluded from the evidence. However, despite the admission of such evidence, claimant's testimony regarding her

When both injuries are considered, claimant's industrial disability is 20 percent.

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 he suffered a change of either physical condition or non-physical condition that would justify an increase in compensation over the agreement for settlement for his right shoulder injury on September 7, 1983 (Iowa Code section 86.14).

That claimant did sustain the burden of proof by a preponderance of the evidence that he is entitled to 50 weeks of permanent partial disability benefits for his second injury to his left shoulder on May 13, 1985 based upon an industrial disability of 10 percent of the body as a whole (Iowa Code section 85.34(2)(u).

That claimant did not sustain the burden of proof by a preponderance of the evidence that he is entitled to any benefits from the Second Injury Fund of Iowa for the reason that he has been fully compensated for the industrial disability from both injuries.

ORDER

THEREFORE, IT IS ORDERED:

That the defendant employer pay to claimant fifty (50) weeks of permanent partial disability benefits for the injury to the left shoulder which occurred on May 13, 1985 (No. 797397) at the rate of two hundred two and 67/100 dollars ($202.67) per week in the total amount of ten thousand one hundred thirty-three and 50/100 dollars ($10,133.50) commencing on December 22, 1985.

That defendant employer is to be allowed a credit for thirty-seven point five (37.5) weeks of permanent partial disability benefits previously paid prior to the hearing at the rate of two hundred two and 67/100 dollars ($202.67) in the total amount of seven thousand six hundred and 13/100 dollars ($7,600.13) leaving a net balance due to claimant in the amount of two thousand five hundred thirty-three and 37/100 dollars ($2,533.37) (10,133.50 - $7,600.13).

That this amount be paid in a lump sum.

[redacted]
001178A

That interest will accrue as provided in Iowa Code section 85.30.

That defendant employer 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 as provided by Division of Industrial Services Rule 343-3.1.

Signed and filed this 18th day of June, 1987.

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SANDRA WHITE, f/k/a SANDRA SLAYMAKER, Claimant, vs. QUAKER OATS, Employer, and IDEAL MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	FILE NOS. 711028 & 735394 A R B I T R A T I O N D E C I S I O N FILED JUN 29 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Sandra White, formerly known as Sandra Slaymaker, claimant, against Quaker Oats Company, employer (hereinafter referred to as Quaker), and Ideal Mutual Insurance Company, insurance carrier, defendants, for benefits as a result of alleged injuries on August 11, 1982 and June 9, 1983. On April 8, 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: Wayne Nelson, William White, Linda Cowles, Kevin Crist and Michael Nichols. 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 11, 1982, claimant received an injury which arose out of and in the course of her employment with Quaker.

2. Claimant seeks temporary total disability or healing period benefits for the time periods from August 12, 1982 through August 29, 1982; September 1, 1982 through September 26,

1982; October 6, 1982 through January 16, 1983; June 10, 1983 through June 20, 1983; and, September 7, 1984. Claimant was off work for these periods of time according to the stipulations of the parties.

3. The August 11, 1982 injury was a cause of temporary disability during a period of recovery.

4. Claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $254.00 regardless of injury date.

5. The medical expenses for which claimant seeks reimbursement in this proceeding are fair and reasonable and causally connected to the back condition upon which she bases her claim herein but that the issue of their causal connection to any 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 on June 9, 1983;

II. Whether there is a causal relationship between any work injury and the claimed temporary and permanent 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 has been employed by Quaker from July, 1979, to the present time in various labor jobs at Quaker's cereal plant in Cedar Rapids, Iowa.

There was little dispute among the parties at the hearing as to the nature of claimant's employment with Quaker. Since her initial hire, claimant has held jobs such as packer, sweeper, helper, capper tender, and rapper tender. Although the job descriptions for these jobs do not show that claimant was required to perform heavy strenuous labor, claimant did testify in a credible manner that she was occasionally required to lift in excess of 25 to 30 pounds. All of the jobs required repetitive

bending, stooping and light lifting along with prolonged standing and walking.

3. On August 11, 1982, and again on June 9, 1983, claimant suffered injuries to her low, mid and upper back which arose out of and in the course of her employment with Quaker.

Claimant testified that on August 11, 1982, while walking on a newly resurfaced floor, she slipped on some cereal product in the Quaker plant and quickly grabbed a railing to prevent herself from falling. In the process, she twisted her back. Claimant saw a chiropractor the next day but after the second day following the incident she could hardly walk. Claimant was then sent to the company doctor, W. R. Basler, M.D. After his examination, Dr. Basler reports that he diagnosed muscle strain and prescribed heat therapy and rest. Claimant remained off work under his direction. After this treatment proved ineffective, claimant was referred to an orthopedic surgeon, James Turner, M.D., for further treatment. Dr. Turner reports that claimant complained of upper back, mid back and upper lower back pain. Dr. Turner's diagnosis was muscle/strain. The existence of this work injury was stipulated by defendants.

Claimant testified that on June 9, 1983, she was lifting barrels and cleaning an area. She claims that she injured herself by "turning wrong or something." She then reported to Dr. Basler who referred her immediately to Warren Verdeck, M.D., an orthopedic surgeon. Dr. Verdeck reports that claimant did not mention any specific incident of injury but complained primarily of low back pain. Dr. Verdeck's diagnosis was chronic low back strain. Although not stipulated, the preponderance of the evidence shows that claimant did in fact suffer a work injury. Regardless of the cause of claimant's susceptibility to injury, the evidence shows at least that there was a temporary aggravation of a preexisting condition. Claimant did in fact suffer continuing pain after performing certain types of work activity.

4. The work injury of August 11, 1982 was a cause of a temporary period of total disability from August 12, 1982 through January 16, 1983 at the specific time within this time period as listed in the prehearing report stipulation and the work injury of June 9, 1983 was a cause of a temporary period of total disability from June 10, 1983 to June 19, 1983.

Following the work injury in August, 1982, Dr. Turner began treatment of claimant in September, 1982, for muscular strain utilizing physical therapy with heat modalities, rest and a conditioning program. After Dr. Turner felt claimant had reached maximum healing, he recommended that claimant return to work in December. However, upon request from claimant, he referred claimant to another orthopedic surgeon, David Naden, M.D.,

and later Dr. Verdeck for a second opinion. These doctors continued claimant on physical therapy and recommended Williams exercises and eventually released claimant for full duty. Claimant returned to work on January 17, 1983.

Following the work injury in June, 1983, Dr. Verdeck treated claimant with rest, medication and continued exercises. Claimant was returned to work by Dr. Verdeck on June 20, 1983. Claimant's symptoms persisted despite her return to work and she returned to Dr. Turner. In order to rule out a possible herniated disc, Dr. Turner ordered a CT scan of claimant's spine which revealed slight bulging of the disc at the L5-S1 level but in the opinion of Dr. Turner, this bulging was insignificant. In August, 1986, Dr. Turner imposed permanent lifting restrictions of 25 pounds which he states was necessary due to claimant's overall small body built rather than any permanent physical defect.

Actually, claimant has suffered a series of aggravation injuries at work beginning with the August 11, 1982 incident. Claimant testified that there was a relative continuous pattern of low back pain since August of 1982. As explained in his deposition testimony, Dr. Turner felt that claimant's continuing problems were a part of a "continuing frame of a given injury" attributable to the work injury in August, 1982. He views the ups and downs of claimant's recovery as a part of the same injury process in which there are temporary aggravations from time to time. The incident in June, 1983, was a part of this process according to Dr. Turner. Dr. Turner stated that the June, 1983, back pain complaint was substantially in or near the same areas injured in August, 1982. Dr. Verdeck, in his deposition testimony, does not provide any opinions which would controvert Dr. Turner's views. Dr. Verdeck's opinions concerning the lack of causal connection of claimant's difficulties to her work only deal with the cause of claimant's continuing difficulties. It seems rather obvious that regardless of the cause of claimant's underlying susceptibility to injury, she in fact was injured repeatedly by certain types of the heavier work activity at Quaker. These injuries certainly caused severe problems for temporary periods of time. The issue of whether claimant suffered permanent damage from these aggravation injuries is dealt with below.

5. Claimant has failed to demonstrate by a preponderance of the evidence that her work injuries found above are a cause of a significant permanent impairment to claimant's body as a whole.

Claimant has had extensive history of low back pain. According to the records of James Stiles, M.D., and Stephen Vanourny, M.D., claimant has had complaints of backaches and low back pain extending back to her childhood in 1973. In 1977, claimant was hospitalized for low back and abdominal pain. An orthopedist at that time felt that the problem may be a disorder

of the lumbrosacral spine and recommended the performance of Williams exercises. However, the diagnosis at that time was that the pain was psychosomatic. Since that time claimant has had a continuous pattern of low back pain and abdominal pain with a repeated diagnosis of vaginitis. In her testimony, claimant states that the 1977 pain was attributable to urinary tract infection. She attributes her back pain in 1978 to pregnancy and could not recall the treatment for low back and thigh pain by her chiropractor, Carl Myrmo, D.C., in 1980. These explanations are insufficient given her medical history.

Claimant suffered a serious car accident in 1976 and Dr. Verdeck states in his reports that claimant complained to him of back problems since that time. In 1984, claimant had an altercation with her ex-husband. However, this incident was not demonstrated to cause claimant significant back problems.

Dr. Turner believes that claimant does not have permanent impairment despite imposing permanent work restrictions. Obviously, he is implying by such an opinion that what permanent problems claimant has are unrelated to her work. He simply believes that claimant is unable due to her body structure to perform heavy work without injury. Dr. Verdeck believes that claimant does have permanent impairment but likewise denies the causal connection of claimant's continuing difficulties to her work. The views of John R. Walker, M.D., who evaluated claimant in 1986 as to causal connection are very unclear. In his report Dr. Walker renders no opinions as to the cause of claimant's low back problems and only states that claimant is "loose jointed." He states in the first part of his report that claimant has no cervical problems, but on the last page states that claimant's neck problems were excerbated by the 1982 work injury. It seems obvious that there is some sort of typographical or drafting error in Dr. Walker's report and consequently the views of Dr. Walker cannot be given much weight.

The surveillance reports and video tapes in evidence were of little value in arriving at this decision. Isolated instances where claimant may not be suffering from acute problems or where she may be able to perform certain types of light recreational activity is of limited value on the issue of whether claimant can perform her work at Quaker which is eight hours per day over a five day work week with occasional overtime.

6. Claimant has incurred reasonable medical expenses for the treatment of her work injury in the amount of $1,715.41 plus medical mileage in the total amount of 1,146.5 miles.

The medical expenses incurred by claimant for work injuries listed above were listed in exhibit H which was not controverted in the record. Given the parties' stipulations as to these expenses, the finding of causal connection of claimant's back

aggravation injuries to her work necessitates a finding of causal connection of the medical opinions incurred to treat these injuries.

The transportation expenses listed in exhibit F were incurred by claimant for necessary treatment of her work injuries as shown by the medical records submitted into the evidence.

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.

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 was only a finding causally connecting the work injury to temporary total disability and not to permanent functional impairment. There was no showing under the theory of Blacksmith or McSpadden as cited above that claimant should be entitled to industrial disability benefits without a showing of permanent impairment.

An injured worker is entitled to temporary total disability benefits under Iowa Code section 85.33(1) from the date of injury until he or she returns to work or until he or she is medically capable of returning to substantially similar work to the work he or she was performing at the time of the injury. Given the findings of fact pertaining to times off work because of the work injuries in this case, claimant is entitled under law to temporary total disability benefits for the times setforth in the order below.

III. Employers are obligated to furnish all reasonable medical expenses for treatment of a work injury under Iowa Code section 85.27. Given the findings as to the total amount of medical expenses incurred, claimant is entitled under law to full reimbursement for such expenses in the amount of $1,715.41.

Using the medical mileage rule, Division of Industrial Services Rule 343-8.1, claimant is entitled as a matter of law to $240.77. In exhibit F claimant had used a milage rate of $.24 per mile, not the current rate of $.21 per mile in calculating the entitlement. One should use $.24 per mile for mileage prior to July 1, 1986 and $.21 per mile for all travel after that time. However, there was insufficient information in this exhibit to make this calculation. Therefore, $.21 per mile was used for the total mileage setforth in the exhibit.

Admittedly, claimant sought care from Dr. Walker without authorization from defendants and defendants normally have the right to choose the medical care under Iowa Code section 85.27. However, in its pleading filed in this case, claimant did not admit to a work injury until the date of the prehearing conference.

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 choose the care. Kindhart v. Fort Des Moines Hotel, (Appeal Decision, March 27, 1985); Barnhart v. MAQ, Inc., I Iowa Industrial Commissioner Reports 16 (Appeal Decision 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 the claimant the right to petition the commissioner to resolve disputes regarding such care. However, this agency does not have the authority to order an employer to furnish any particular care unless the employer's liability for an injury is established. Therefore, the right to control the care must coincide with this agency's jurisdiction over the matter.

Defendants may contend that since the abolishment of the old memorandum of agreement there is no vehicle to admit to a work injury under current law to gain the right to control the medical care. However, under Iowa Code section 86.13, the parties have the tool in the form of a partial settlement to admit to a work injury without prejudicing their rights to challenge causal connection or extent of disability at a later date.

ORDER

1. Defendants shall pay to claimant temporary total disability benefits from August 12, 1982 through August 29, 1982; September 1, 1982 through September 26, 1982; October 6, 1982 through January 16, 1983; and, June 10, 1983 through June 20, 1983.

2. Defendants shall pay to claimant the total sum of one thousand nine hundred fifty-six and 18/100 dollars ($1,956.18) for medical expenses.

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

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

5. Defendants shall pay interest on benefits awarded herein as setforth in Iowa Code section 85.30.

6. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and specifically the sum of one hundred ninety-nine and 45/100 dollars ($199.45) is taxed against the defendants which represent the cost of two (2) eighty-five and no/100 dollars ($85.00) medical reports and

termination was not considered in arriving at the proposed decision of 10/15/85 on grounds of issue preclusion. The deputy commissioner issuing the 5/17/84 decision had made the following finding of fact with reference to the reason(s) for claimant's termination from Ralston:

"Claimant terminated by her employer as a result of excessive absenteeism. A number of her absences result from her work injury. Others resulted from unrelated personal problems of claimant."

It was felt by the undersigned that the issue of claimant's termination had been fully litigated in the prior proceeding from which claimant did not appeal. The commissioner held otherwise and the matter is now again an open question.

After inquiry, both parties declined to offer additional evidence and are submitting the remand issues to the undersigned on the basis of the existing record.

FINDINGS OF FACT

Based upon the evidence presented at the heairng in this case and upon available evidence received at the prior hearing in case number 481989, no finding could be made causally connecting claimant's termination from Ralston and her work injury of 12/10/82.

Claimant testified in this proceeding that she was told by the safety and training manager for Ralston, James Dannels, and a Dennis Bingham at the time of her termination by that she was a good worker and that Ralston was terminating her as a result of her work injury and to protect her from further injury. The only other evidence presented to the undersigned concerning the possible reason(s) for claimant's termination was the testimony of Dannels. Dannels denied being present during any conversation with claimant at the time of her termination. Dannels stated that claimant missed worked 46 days in 1977, 322 days in 1978, 365 days in 1979, 365 days in 1980. 50 days in 1981 and 75 days in 1982. None of the exhibits received in this case or during the hearing of 2/24/84 which resulted in the 5/17/84 decision dealt with the issue of claimant's termination. No transcript of the 2/24/84 hearing was offered as evidence in this case.

First, the commissioner's ruling did not affect the undersigned's finding in the last proposed decision that claimant is not a credible witness. This finding was based upon observations of claimant at the hearing and upon the inconsistencies between her testimony in this proceeding and at the last hearing on the 1977 injury. Therefore, without independent verification, little weight can be given to any of claimant's oral testimony.

the deposition expense of Dr. Verdeck as setforth in claimant's exhibit G. The other costs listed in this exhibit are not taxable under the rule.

7. 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.

This matter shall be set back into immediate assignment for prehearing and hearing on the extent of additional compensation to which claimant may be entitled to under Iowa Code section 86.13.

Signed and filed this 29 day of June, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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001188

FILED

JUN 29 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

OHN WILLARD,	:	
	:	File No. 779876
Claimant,	:	
	:	
s.	:	A R B I T R A T I O N
	:	
OHN DEERE COMPONENT WORKS,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by John Willard, laimant, against John Deere Component Works, a self-insured mployer, for the recovery of benefits as the result of an lleged injury on or about February 6, 1984. This matter was eard before the undersigned at the courthouse in Waterloo, lackhawk County, Iowa on March 11, 1987. It was considered ully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, Teresa J. illard, James R. Taylor, Ron Stuber, Bill Winters, John Michaloff, eorge Ritland and James Zahn; the parties jointly submitted xhibits 1 through 13. All objections to the introduction of xhibits are hereby overruled.

STIPULATIONS AND ISSUES

Pursuant to the pre-hearing report and order approving same, he parties stipulated that there was an employer-employee elationship in existence at the time of the alleged injury. It s disputed as to whether or not the claimant did, in fact, eceive an injury. It is also disputed as to whether or not the njury produced either temporary disability or permanent disability. t is stipulated that, if the claimant did suffer an injury, the efendant is entitled to a credit under section 85.38 which mount will be stipulated to by the parties. It is further tipulated that, in the event an injury is found, it is to a cheduled member to both upper extremities or wrists. It is urther stipulated that if the injury occurred in February, 984, claimant's rate is $279.46. Further, the parties will tipulate as to the appropriate rate depending upon the date of njury which may be established.

The defendant in this case is asserting the affirmative

fense of the expiration of the statute of limitations under
ction 85.26 of the code.

EVIDENCE PRESENTED

Claimant testified he is 45 years old. He began his employment th John Deere in 1966. Claimant testified as to the jobs held defendant's and described in detail the nature of those jobs. aimant's employment history is fully set forth in exhibit 10.

Claimant outlined in detail the nature of the jobs he has ld at John Deere and the type of work he was required to do. is would, at various times, involve operation of pneumatic ippers, grinders and other power tools. According to claimant, ch of these jobs and the operation of the required machinery uld cause considerable vibration of his hands and would also quire twisting and bending of the wrist. When claimant ilized impact wrenches, he said he would have to let the gun hatter" for a period of time to make sure the proper torque vel was reached. When this was done, his hands would vibrate verely.

Claimant stated that in 1981 he went to the medical department John Deere complaining of swelling and numbness in his wrists. was told at that time that he suffered from arthritis. He id he was not told by John Deere that this was a work-related ndition, but he was required to change jobs. Claimant continued suffer difficulty with his wrists, however, and was again vised that he suffered degenerative arthritis. In 1983 or 84, claimant broke his wrist while pheasant hunting.

In July, 1984, due to continued problems with his hands, aimant went to the Mayo Clinic in Rochester, Minnesota in an fort to determine the cause of his problem. Claimant said at after four days of tests, it was determined that he did not ffer arthritis, at which time he inquired as to whether or not s problem could be work-related and was advised to consult his mily doctor. Claimant also went to Iowa City, Iowa to the iversity for examination in June of 1984. While in Iowa City, aimant consulted William Blair, M.D. Dr. Blair diagnosed aimant's condition as carpal tunnel syndrome. Soon thereafter, . Blair performed carpal tunnel surgery on both hands and aimant was off work for six to eight weeks. Claimant then eturned to work as a tractor driver. In July, 1985, claimant derwent a wrist fusion on the right and in October, 1985, he derwent a wrist fusion on the left. Both of these operations re performed by Dr. Blair. Claimant advised that after he scribed to Dr. Blair the nature of his employment and use of rious power tools, the doctor indicated that the cause of his oblem was his employment.

Claimant advised that he returned to work as a computer

erminal operator in April, 1986, which employment he continued
n until a strike occurred at John Deere. The strike concluded
n February, 1987. Claimant says he has no work restrictions
xcept he cannot climb ladders or use vibrating tools. Claimant
aid that he presently has difficulty holding on to things
ecause his wrists are fused at a particular angle.

On cross-examination, there was some indication that,
erhaps as early as 1972, claimant was aware of the possible
elationship between his hand problem and his employment.
laimant also testified on cross-examination as to various home
ctivities which might involve vibration of the wrist such as
utting firewood. Claimant explained that it was his understanding
hat his condition was arthritic and not from an accident or an
mployment cause.

Teresa J. Willard testified that she has been married to the
laimant for 22 years. She said claimant first began to experience
roblems with his hands in the 1970's. The problem, however,
ecame quite severe in the 1980's and got to the point where he
ould receive no relief from the pain. She said that, since his
usions, claimant has had relief from the pain.

Mrs. Willard testified that claimant first began to think
is problem was related to his employment after he went to the
ayo Clinic and was advised that he did not have arthritis. She
said the most definite discussion concerning the work-relatedness
f claimant's condition occurred in January, 1986 in consultation
ith Dr. Blair. She said that when claimant was first off work,
e did go to John Deere and request workers' compensation
enefits, but was not allowed to draw benefits. She said
laimant signed up for the disability plan because they were in
eed of the money.

James R. Taylor testified that he has been employed at John
eere for 23 years. He stated that he has done some of the same
jobs as claimant and confirmed that the job of front end assembly
requires bending and twisting of the wrist in operation of a
neumatic wrench. He said the wrench weighs as much as 20
ounds and causes severe vibration of the wrist when operated.

Ron Stuber testified that he has been an employee of John
Deere for 32 years. He stated that the testimony of claimant
and Mr. Taylor concerning the operation of the pneumatic wrenches
was correct.

Bill Winters testified that he has been employed by the
defendant since 1966. He said he too, at one time, has done the
chipping and grinding job the claimant had done. He stated that
the description given by claimant was correct. According to Mr.
Winters, a person's whole body would vibrate while doing the
chipping and grinding job. He stated that, by the end of the

ay, his hands would be stiff and sore from the constant vibration nvolved.

John Michaloff testified that he is employed by the defendant s a manufacturing supervisor. He stated that he supervised the laimant in the broach department from 1981 to February, 1984. e said he is familiar with that operation and denied that it nvolved flexation of the wrist or vibration. He stated that he as unaware of the reason why claimant was transferred to his epartment. He stated that claimant was transferred out of his epartment due to medical restrictions.

George Ritland testified that he is employed by the defendant as a supervisor. He stated that he supervised the claimant in ebruary, 1984 at which time it was claimant's job to drive around and pick up trash in a small tractor. He said it was not a physically demanding job and stated there was no difference in the claimant's performance of the job either before or after the carpal tunnel surgery.

James Zahn testified that he has worked for the defendant for 20 years and has been a supervisor for the past 13 years. He stated that the job of computer terminal operator did not require twisting and bending of the wrist, although it would occasionally required the use of a hammer. He said that claimant complained about doing this job and that it exceeded his medical restrictions.

William Blair, M.D., testified by way of deposition which was admitted as exhibit 11. Dr. Blair stated that, in March of 1985, in a letter to the John Deere medical department, he indicated that he was uncertain as to whether claimant's condition was related to his employment. The doctor stated that he subsequently obtained a work history from the claimant following which he made the determination that there was a causal relationship between claimant's employment and his problems with his wrists. The doctor stated that claimant had an impairment equal to 32% of the upper extremities. He said that this impairment rating could be separated between the carpal tunnel syndrome and the wrist fusion. He said that 29-30 percent of the impairment would have been related to the fusion and 2-3 percent related to the carpal tunnel. The doctor said that he did not relate the carpal tunnel problem to the claimant's employment.

Dr. Blair stated that the essential problem suffered by claimant was one of arthritis in the wrist joints. He stated that the arthritic condition from which claimant suffered could occur in someone with relatively sedentary employment, but there would be an increased tendency for it to develop in an individual who was involved in activities requiring extension and flexation of the wrist as well as vibration. Dr. Blair indicated that some individuals have a greater propensity toward the development

of arthritis than others. He clearly indicated, however, that the employment activities of the claimant, as described to him by the claimant, would be a significant, contributing factor to the development of the condition for which he treated the claimant. Also included in the exhibit is a February 26, 1986 letter from Dr. Blair to claimant's attorney. Dr. Blair states, in the letter, that given the circumstances of claimant's employment and based upon the description given to him by the claimant, the problems suffered by the claimant were most probably aggravated by his employment.

Exhibit 3 is copies of x-ray reports concerning the claimant.

Exhibit 4 is a copy of a report from Richard B. Tompkins, M.D., of the Department of Internal Medicine, Division of Rheumatology at the Mayo Clinic in Rochester, Minnesota. According to that report, claimant suffered from a mild form of diabetes which could be corrected with diet and an oral agent. It was recommended that claimant have regular follow-ups to check on his diabetes.

Exhibit 5 is an attending physician's report concerning the claimant authored by John Flage, M.D., and dated March 29, 1985. This report indicates that claimant was off work commencing February 18, 1985 for his wrist fusion.

Joint exhibit 6 appears to be the progress notes of Dr. Flage concerning the claimant.

Joint exhibit 7 is a report from a doctor concerning claimant's hearing loss.

Joint exhibit 8 is a May 5, 1986 report from Dr. Flage extablishing work restrictions for claimant.

Joint exhibit 9 is a copy of claimant's earnings from February, 1984 through what would appear to be October, 1983. It is noted, however, that the copy is not clear and cannot be fully understood.

Joint exhibit 10 is a copy of claimant's work history with John Deere.

Joint exhibit 11 has been previously reviewed.

Joint exhibit 12 is a letter from Dr. Flage concerning claimant's work restrictions. This letter is dated July 8, 1986.

Joint exhibit 13 is a letter denying claimant disability benefits.

APPLICABLE LAW AND ANALYSIS

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

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

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

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

It is not necessary for claimant to 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 the time when pain prevents the employee from continuing to work. It 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 claimant's claim under Iowa Code section 85.26 and notice under Iowa Code section 85.23.

The record in this case establishes that the claimant did receive an injury arising out of and in the course of his employment. The reports and deposition testimony of Dr. Blair establish that, at a minimum, claimant suffered a material aggravation of his arthritic condition. The defendant's challenge to Dr. Blair's opinion based upon an inaccurate history related by the claimant is unpersuasive. The record establishes that claimant's testimony concerning the type of work he did is indeed accurate. It is evident that, although Dr. Blair's opinion may have been based upon something less than a complete understanding of claimant's employment activities, it is nevertheless valid and binding.

Although claimant's condition carries a diagnosis of carpal tunnel syndrome and degenerative joint disease, it is evident that both conditions are the result of his employment activities. Claimant has thus proven by a preponderance of the evidence that he is entitled to recovery.

It is not clear from the record the precise date of claimant's injury. Under the McKeever decision the appropriate date of injury is the date upon which claimant was first required to be off work as a result of his condition. It would appear, though

it is not certain, that this first occurred some time in May of 1984. The parties are encouraged to agree upon the date the claimant was first required to leave his employment for treatment and if they cannot do so, to submit evidence upon which an appropriate finding can be made. Claimant is entitled to healing period benefits during the period of time it took him to recover from his carpal tunnel surgery. He is then entitled to payment of permanent partial disability benefits until such time as he was again off work to undergo the wrist fusions. He is entitled to payment of additional healing period benefits during the period of time it took him to recover from the wrist fusions, which would appear to be when he first returned to work. Thereafter permanent partial disability benefits should commence again.

The record establishes the claimant's impairment is to the left upper extremity and is equal to 32% of the extremity. This is a scheduled loss appropriately determined under section 85.34(2)(s). Based upon the combined value charts of the AMA Guide to the Evaluation of Permanent Impairment, claimant's entitlement is equal to 170 weeks.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On or about May, 1984 claimant became disabled as a result of a wrist problem.

2. Claimant's wrist problem was in the nature of carpal tunnel syndrome and degenerative joint disease.

3. Claimant's problems with his wrists developed over a number of years as a result of his employment activities.

4. Claimant was required to be off work for healing purposes following carpal tunnel release surgery and again following wrist fusions.

5. Claimant suffered permanent impairment equal to 32% of both upper extremities as a result of his work injuries.

6. Claimant's rate of compensation is $279.46.

7. Claimant's problems with his wrists developed simultaneously.

8. Claimant filed his claim for benefits in a timely manner.

IT IS THEREFORE CONCLUDED that claimant has proven by a preponderance of the evidence that he received an injury arising out of and in the course of his employment.

IT IS FURTHER CONCLUDED that claimant has proven there is a causal relationship between his injury and the disability to his

upper extremities.

IT IS FURTHER CONCLUDED that the defendant failed to prove by a preponderance of the evidence that claimant's claim is barred by the statute of limitations.

ORDER

IT IS THEREFORE ORDERED that the defendant pay unto claimant healing period benefits commencing with the first day he was off work because of his work injury and continuing until he returned to work following carpal tunnel release surgery.

IT IS FURTHER ORDERED that the defendant shall thereafter commence payment of one hundred seventy (170) weeks of permanent partial disability at the rate of two hundred seventy-nine and 46/100 dollars ($279.46) until such time as claimant was again off work for wrist fusion surgeries at which time healing period benefits shall recommence until he again returned to work. The remaining permanent partial disability entitlement shall then recommence.

IT IS FURTHER ORDERED that the defendant shall be given credit for healing period benefits pursuant to §85.38.

IT IS FURTHER ORDERED that all accrued benefits shall be paid in a lump sum with interest.

IT IS FURTHER ORDERED that costs are taxed to the defendant.

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

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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Second, independent of claimant's testimony, nothing can be concluded from the testimony of Dannels as to the reason(s) for claimant's termination. He only indicated that claimant was absent for a considerable amount of time before leaving the employ of Ralston. He did not testify as to the reasons for any termination by Ralston. Finally, Dannels testified that disciplinary procedures are progressive at Ralston, implying that claimant would have normally received some sort of oral or written warning prior to any involuntary termination.

Given claimant's lack of credibility and the lack of other more reliable evidence concerning the reason(s) for claimant's termination from Ralston, the undersigned cannot make any findings based upon a preponderance of the evidence as to the cause of claimant's termination from Ralston or that the termination was in any way caused by the 12/10/82 work injury.

No further findings need be made under the remand order.

CONCLUSIONS OF LAW

There being no additional findings, the decision of 10/15/85 denying permanent disability benefits remains unchanged.

Signed and filed this 31st day of March, 1987

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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001197

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SUSAN K. WYATT, Claimant, vs. HOLIDAY INNS INC., d/b/a HOLIDAY INN DUBUQUE, Employer, and NORTHWEST NATIONAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 803544 A R B I T R A T I O N D E C I S I O N FILED MAR 19 1987 INDUSTRIAL SERVICES

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Susan K. Wyatt, claimant, against Holiday Inns Inc., employer, hereinafter referred to as Holiday Inn, and Northwest National Insurance Company, insurance carrier, defendants, for benefits as the result of an alleged injury on September 4, 1985. On January 20, 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 shoulder, neck, head, and low back from a fall while working for Holiday Inn. Claimant seeks temporary total disability or healing period benefits during the times she was off work for treatment of these claimed injuries and permanent partial disability benefits for an alleged permanent physical impairment. In addition, claimant is seeking reimbursement for medical expenses for treatment of these injuries. Defendants admit to a fall and to responsibility for an injury and disability to claimant's right arm but deny the causal connection of claimant's other problems to this work injury.

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 Velma Coohey. 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 of facts:

1. On September 4, 1985 claimant received an injury which arose out of and in the course of employment with Holiday Inn. (Paragraph 2 of the prehearing report states otherwise. However, in defendants' description of disputes attached to the prehearing report, defendants admitted to a work-related fall resulting in an injury. Obviously, paragraph 2 is in error. The dispute among the parties is not whether an injury occurred on September 4, 1985 but the causal connection of this injury to claimant's chronic shoulder, neck, head, and low back difficulties beginning in the summer of 1986.);

2. Claimant was off work from July 23, 1986 to September 9, 1986 and she is seeking temporary total disability or healing period benefits for this period of time. Claimant is not seeking temporary total disability or healing period benefits for any times of work prior to July 23, 1986;

3. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $70.83; and,

4. The medical expenses for which claimant seeks reimbursement in this proceeding are fair and reasonable and causally connected to treatment for the medical conditions arising in the summer of 1986, but that there issue of causal connection to any work injury remains and issue to be decided herein.

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 disabilities:

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

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

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 has been employed by Holiday Inn for the last four years.

Claimant initially started as part-time help but since April 1983 she has been a full-time employee of Holiday Inn in Dubuque, Iowa. Before her work injury, claimant was a waitress. Upon her return to work after the work injury, claimant became a hostess and bartender because the waitress work was too heavy for her.

3. On September 4, 1985 claimant suffered an injury which arose out of and in the course of her employment with Holiday Inn.

Claimant's credible testimony established that on September 4, 1985 while she was performing her duties as a waitress, she tripped and fell forward onto the floor. Claimant stated that she immediately felt pain in her elbows and wrists and that her knee was skinned. According to the reports of claimant's primary care physician immediately following this injury, David S. Field, M.D., an orthopedic surgeon, claimant's injuries were described at the time she was admitted to the hospital after the work injury as a fracture dislocation of the right elbow with considerable comminution (broke or separated into pieces) of the right radial head of the right wrist. The elbow dislocation fracture and the right wrist comminution were repaired surgically. The right wrist required the installation of a radial head implant. Claimant also fractured the left radial head but the fracture was treated conservatively. After recovery from the repair surgery, claimant over the next several weeks developed increasing pain and numbness in the median nerve distribution of the right hand. Subsequent to nerve conduction studies in November 1985, claimant was diagnosed as suffering from carpal tunnel syndrome of the right arm and hand. A surgical release of the median nerve entrapment was performed on November 20, 1985. Claimant remained under follow-up care by Dr. Field for her elbow, wrist, and carpal tunnel syndrome problems until May 1986. Claimant was off work for her arm, wrist, and hand difficulties from September 4, 1985 until February 15, 1986.

5. The work injury of September 4, 1985 was a cause of a thirty-nine percent permanent partial impairment to claimant's right upper extremity.

Claimant had no previous medical history of any arm or wrist problems before the work injury in this case. Claimant's past medical records and claimant's credible testimony established that she was in excellent health before the work injury.

Claimant currently has permanent functional impairment to her right upper extremity. The specific finding as to the extent of this impairment is based upon the uncontroverted

opinion of claimant's treating orthopedic surgeon for her elbow and wrist problems, Dr. Smith. According to the prehearing report, claimant has been paid by defendants the sum of $6,920.55 in permanent partial disability benefits for this disability.

6. A finding could not be made causally connecting claimant's chronic shoulder, neck, head, leg, hip, and low back pain to the work injury of September 4, 1985.

Claimant testified that beginning in February or March 1986 she developed pain in her low back, shoulder, neck, and legs along with her arm and hand pain. These pains were unlike other backaches of the past. The medical records submitted indicated that claimant first sought medical treatment for these problems in June 1986 from a board certified neurologist, Patrick R. Sterrett, M.D. Dr. Sterrett treated claimant with medication, bed rest, and physical therapy. Claimant returned a month later with little improvement and Dr. Sterrett prescribed a more comprehensive program of physical therapy, bed rest, and traction. This treatment, likewise, failed to improve claimant's condition and she was then hospitalized by Dr. Sterrett for a few days in August 1986 to rule out spinal disc disease and a possible condition of polymyalgia rheumatica. Tests during the hospital stay which included a myelogram and a CT scan found nothing unusual in claimant's spine.

In attempting to find the cause of claimant's difficulties, Dr. Sterrett consulted with Dr. Field and a rheumatology specialist, Richard Pena, M.D. Upon claimant's release from the hospital, Drs. Field, Sterrett, and Pena agreed to a probable diagnosis of fibrositis and myofascitis although the polymyalgia rheumatica was not totally ruled out. In his deposition, Dr. Sterrett described fibrositis as generalized soft tissue pain and myo-fascitis as inflammation of the muscles and muscle linings. The primary diagnosis was fibrositis.

Claimant's condition improved with the use of Cortisone injections during the hospital stay. It is Dr. Sterrett's clear opinion from the reports submitted into the evidence that the fibrositis and myofascitis was causally related to the September 4, 1985 fall at Holiday Inn. However, the consulting rheumatologist, Dr. Pena, disagrees with Dr. Sterrett and stated in his consultation report during the hospital stay that claimant's condition is "probably not related to the fall in September 1985." Dr. Sterrett in his deposition stated that he felt Dr. Pena's opinions are based upon the lack of evidence in the medical literature to support an opinion that fibrositis is caused by anything specifi-cally. Unfortunately, a deposition or further reports were not sought from Dr. Pena concerning his opinions. The primary reason the undersigned deputy commissioner was not able to find the requisite causal connection in this case is Dr. Sterrett's statement in his deposition that the diagnosis of fibrositis and

myofascitis falls more within Dr. Pena's area of speciality than his own. Given this statement by Dr. Sterrett, the preponderance of the medical opinion evidence does not support claimant's contention in this matter.

In light of the inability to make a causal connection finding favorable to claimant, there is no need to make further findings. Claimant was basing her claim for temporary and permanent disability benefits after July 23, 1986 upon such a causal connection.

CONCLUSIONS OF LAW

In this case there was no controversy raised by the parties concerning the applicable law to be followed in the determination of the issues. 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).

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 has only shown a causal connection between her permanent right upper extremity impairment to the work injury. The extent of such a disability was measured pursuant to 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. 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 that claimant has suffered a thirty-nine percent permanent partial impairment to her arm, claimant is entitled as a matter of law to 97.5 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(m) which is thirty-nine percent of the 250 weeks allowable for an injury to the arm in that subsection. Given claimant's stipulated rate of compensation, this would entitle claimant to a total of $6,905.93 in permanent partial disability benefits. According to another stipulation in the prehearing report, claimant has been paid a total of $6,920.55 in permanent partial disability benefits. Apparently, there has been some sort of lump sum payment as less than 97.5 weeks has elapsed since the time healing period benefits ended in February 1986. At any rate, I must honor the parties' stipulations and claimant is therefore entitled to no further benefits.

Although claimant did not prevail in this proceeding, she

was sincere in her testimony at the hearing and her claim was arguably supported by the medical evidence. Therefore, claimant shall be awarded the costs of this action.

ORDER

IT IS THEREFORE ORDERED AS FOLLOWS:

1. Claimant's petition filed herein is dismissed.

2. 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).

Signed and filed this 19 day of March, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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001204

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEAN YOUNG, Claimant, vs. DAHL'S FOODS, INC., Employer, and MARYLAND CASUALTY INSURANCE COMPANY, Insurance Carrier, Defendants.	FILE NO. 793528 A R B I T R A T I O N D E C I S I O N FILED FEB 27 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Dean Young against Dahl's Foods, Inc., employer, and Maryland Casualty Insurance Company. Claimant alleges that he sustained a compensable injury to his back on March 13, 1985 and seeks benefits based upon that injury.

ISSUES

The only issue presented by the parties at the time of hearing was determination of claimant's entitlement to compensation for permanent disability. It was stipulated that claimant had sustained an injury on March 13, 1985 which arose out of and in the course of his employment with the defendant employer; that the healing period for the injury extended from April 29, 1985 through June 17, 1986; that the correct rate of compensation is $380.14 per week; that 75 2/7 weeks of compensation at the correct rate had been paid prior to hearing; that all requested section 85.27 benefits have been paid by the defendants; except charges for a cane in the amount of $16.64, a back brace in the amount of $84.00 and tennis shoes in the amount of $51.99. It was further stipulated that claimant's disability is causally connected to the injury and that it is a disability to the body as a whole for which the extent of disability should be measured industrially. Claimant also seeks an award of costs.

The case was heard at the commissioner's office in Des Moines, Iowa on October 31, 1986 and was fully submitted upon

e conclusion of the hearing. The record in the proceeding onsists of testimony from Dean Young, Robert Hand, and Margarite ovey. The record also contains joint exhibits 1 through 6 and efendants' exhibits A through D.

SUMMARY OF EVIDENCE

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

Dean Young is a 47 year old married man with three minor hildren. He has a high school diploma. Shortly after Young raduated from high school, he obtained employment as a stockboy t Pigeon's Grocery Store. In August, 1958, he became a meat utter. Claimant left his job with Pigeon's to accept a position ith Dahl's and had been employed as a meat cutter at Dahl's continuously for 17 years prior to the injury. At the time of injury claimant was working as the second man or assistant manager in the meat department. His duties included boning, cutting, sawing, grinding, cleanup and dealing with customers. Young testified that the job required lifting of as much as 100 pounds in the form of pieces of meat or tubs of meat. As second man he filled in and performed the meat department manager's duties whenever the manager was absent.

Young testified that on March 13, 1985, he was preparing for the day's work. In doing so he dumped a bone barrel which he described as three feet high and weighing a couple of hundred pounds into a 55 gallon barrel and hurt himself. He stated that he felt pain in his low back while swinging the barrel up in order to dump it. Young testified that he kept working and tried to work out of the pain but that it would not go away. Young testified that prior to this injury he had some workers' compensation claims for cuts but had never missed any work due to an injury to his back.

Young testified that when he did not recover, he sought care from James L. Blessman, M.D., his personal physician, and was treated with medication and being released from work. He stated that he was eventually allowed to return to work but that the pain did not go away. He was then referred to Robert F. Breedlove, M.D., who arranged to have a CT scan and myelogram performed. Following those procedures, claimant was directed to Thomas A. Carlstrom, M.D., by the Maryland Casualty Company. Young testified that Dr. Carlstrom examined him but did not provide any actual treatment. He stated that all of the treatment that he has received for the injury has been under the direction of Dr. Blessman.

Claimant entered the Mercy Hospital Pain Center in December,

1985. He described the program as hard and tiring but helpful.

Claimant has not undergone surgery and stated that none of the physicians have recommended surgery. He complains of constant lower back pain that runs down his hip and into his leg. He stated that during the hearing the pain ran as far down his leg as his knee and that at times it runs into his foot. He stated that almost everything he does causes pain and that he no longer mows his lawn, changes oil in his car and only gets down on the floor in order to perform his daily back exercises. Claimant stated that activities which increase the discomfort include sitting for more than one-half hour or 45 minutes and standing for extended times. He stated that he is unable to pick up his children and that on one occasion at work he carried a 35 pound box up a flight of stairs and experienced an increase in his discomfort for the remainder of the day. He stated that driving causes problems for him due to the extended sitting and bumps in the roadway.

Claimant testified that he uses a back brace and displayed a corset type of brace. He testified that it was recommended by Dr. Blessman and that he paid for it from his own funds in the amount of $84.00. Claimant testified he has a cane which was also recommended by Dr. Blessman in order to enable him to remain active when he would otherwise be sedentary. He testified that the cane had cost $16.64. Claimant testified that the Pain Center treatment recommended that he enroll in the YMCA. He testified that he did a lot of walking while he was not employed, approximately three miles per day, and displayed a pair of tennis shoes that the insurance carrier paid for when he went into the Pain Center. He testified that the shoes are worn and hurt his feet. He has replaced them with a new pair which cost $55.99. Claimant testified that the insurance company has not paid the cost of the back brace, cane or new tennis shoes.

Young testified that when Dr. Carlstrom released him in approximately October he returned to Dahl's where he spoke to Mark Nissen, the meat manager, Dave Johnson, the grocery manager and Bob Hand, the president of the company. Claimant testified that he was unable to perform all of the activities of a meat cutter due to his physical restrictions but that he was looking for an opportunity to reenter the job market and felt that there were things that he could do for the company and wanted to try them. Claimant stated that Hand's response was negative for so long as claimant's physical restrictions remained in effect but that a job would be available for him as a meat cutter if the restrictions were removed. Claimant stated that no other positions were offered or suggested. He stated that he then began seeking other work.

In response to exhibit B, a letter dated July 16, 1986, claimant again met with Dahl's management including Nissen, Hand

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BEVERLY MARLOWE, Claimant, vs. AMERICAN HONDA MOTOR CO., Employer, and CNA INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 803238 A 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 Beverly Marlowe, claimant, against American Honda Motor Co. (American Honda), employer, and CNA Insurance Companies, insurance carrier, for benefits as a result of an alleged injury on January 3, 1984. A hearing was held in Davenport, Iowa, on March 4, 1987 and the case was submitted on that date. Claimant was allowed to amend paragraph 10 of her petition at time of hearing.

The record consists of the testimony of claimant, Terry Marlowe, and Kathleen L. Negaard; claimant's exhibit 1; and joint exhibits A through K. Neither party filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $254.29; that claimant never returned to work at American Honda after January 3, 1984; that the contested medical bills of $90.00 and $25.00 are reasonable in amount; that claimant's injury arose out of and in the course of her employment with American Honda; and that claimant sustained a whole body injury in the event an award is made in this case.

ISSUES

The contested issues are:

1) Whether there is a causal relationship between claimant's work-related injury of January 3, 1984 and her asserted disability;

and Kenneth Stroud. Claimant testified that they discussed the possibilities of his return to work with the company and that all involved felt that he would not be able to work as a meat cutter and that there was still no job in the company that he was capable of performing. Claimant testified that within the week preceding the hearing he received exhibit C, a letter which makes a conditional offer of jobs with Dahl's. The positions offered included full time utility clerk with a beginning wage of $4.25 per hour and increases up to $5.00 per hour after 18 months and parttime cashier with a beginning wage of $4.25 per hour and increases up to $6.50 per hour after 18 months. The letter further states that if claimant's appearance and performance are satisfactory that he would be considered for a full time cashier position whenever such became vacant and that the potential pay for that position would range up to $8.75 per hour after three years. The letter further states that claimant would receive full fringe benefits if he became employed on a full time basis. Claimant declined the offered positions because he felt that he was unable to perform the physical demands of either position and because there appeared to him to be an excessive number of conditions in the offer. Young testified that he was very disappointed with the company in the sense that none of these positions had been offered or suggested in October of 1985 or the summer of 1986. Claimant was unwilling to jeopardize his current employment with Younkers in order to return to Dahl's where the chance of continued employment appeared small.

Claimant testified that shortly after he initially had discussed returning to work with Dahl's he obtained employment as a parttime security person for Younkers and also as a part-time clerk in the hardware department at the Wards Store at Merle Hay Mall. Claimant stated that the position with Wards was temporary for the Christmas season only and that he terminated the employment in order to enter the Pain Center. He stated that the job paid $3.35 per hour with no fringe benefits. Claimant described the Younkers job as initially involving 18 hours per week working nights at the downtown store but that he moved to the distribution center and became employed on a full time basis April or May, 1986. He earns $4.50 per hour, receives some medical insurance, a discount on purchases and two weeks of vacation as fringe benefits.

Claimant has a wood working hobby and a considerable amount of tools at his home. He testified that he has earned a profit from his wood working in the amount of approximately $150 in the past one to one and one-half years. He stated that he is unable to make a living through wood working but can supplement his income with the hobby.

Claimant testified that he was evaluated at the State Vocational Rehabilitation Facility starting in January, 1986 and

that he has talked with Maggie Covey, a rehabilitation counselor, on several occasions. Claimant acknowledged that Dr. Carlstrom has indicated that he should be able to perform the duties of a grocery store cashier or a utility clerk, the same positions as were offered in exhibit C. He stated that he was unable to perform either of those positions because they require sacking groceries, loading carts and cars, bending and lifting of items such as pet food bags which can weigh as much as 50 pounds. Claimant felt that there was little opportunity to obtain a full time cashier position because Dahl's has hired very few in recent years. He felt that when full time cashiers left the company they were usually replaced by parttime workers. Claimant testified that during the time preceeding the hearing, he had applied for jobs at a number of grocery stores, including a new Dahl's store and was not hired. Claimant denied that the only relief he wanted from Dahl's was for the company to create a new management position for him. Claimant agreed that he would be able to perform many of the functions in the meat department but that he was not capable of performing all meat department activities.

Robert Hand, President of Foods, Inc., stated that when he initially discussed claimant's possible return to work they spoke primarily of the meat department. He stated that claimant later sent in a letter setting out things that he thought he could do for the company and stated that the letter referred to existing positions and also suggested creating new positions. The letter is in evidence as part 3 of exhibit 4. Hand testified that Dahl's has an employee stock option plan but that an employee cannot receive the funds from it so long as the employee is still on the payroll. Hand testified that claimant had not requested the money but that Hand indicated that he could receive it if the employment relationship was terminated. The relationship was terminated and the stock option funds in the amount of approximately $61,000.00 were paid to claimant. He stated that the entire amount came from company contributions to the plan.

Hand testified that his last contact with claimant was in July, 1986 and that it was initiated due to a report from Dr. Carlstrom which indicated that no formal restrictions were necessary. Hand confirmed that after the discussion with other Dahl's managers the claimant informed them that he could not return to full duty in the meat department. Hand stated that within the past couple of weeks immediately prior to hearing the management group decided that claimant could return to work under the conditions expressed in exhibit C.

Hand stated that appearance and grooming were important in dealing with the public and that over the years claimant's had not been as good as that of others in the meat department. He stated that in March, 1985, claimant had some opportunity for

advancement but that it was unlikely to happen in the near future as he had formerly been considered for a meat department manager position but had not been awarded the promotion since it was felt that he did not have the ability to handle people.

Hand testified that there was little turn over in the full time cashier positions but that the position as a full time position was not being eliminated. He testified that in 1982, 1983 and 1984 no new full time cashiers were hired, that one or two were hired in 1985 and that three were hired in 1986 except for the new store that was opened. He testified that formerly 60 percent of the employees in a store were full time and 40 percent were parttime but that now only 40 percent are full time. He stated that cashier's positions were always highly filled with parttime employees. He stated that for claimant to obtain a full time cashier position he would have to compete with other applicants. Hand stated that he was concerned that claimant may have developed a less than favorable attitude toward the company.

Margarite Covey, a vocational rehabilitation counselor, testified that she has been involved in claimant's case with a goal of enabling him to function at his maximum level. She stated that she tried to assist with stress management and also investigated job opportunities. Covey testified that the state vocational rehabilitation process had gone into claimant's wood working skills but that she and claimant agreed that wood working would not provide an adequate income. Covey felt that claimant had demonstrated an interest in agriculture and that she has investigated certain positions. She stated that she found an employment opportunity and that claimant interviewed for a job with the Earl May Company where he exhibited good interviewing skills but was not hired for the $4.00 per hour position. Covey felt that an opportunity for employment existed with the Pioneer Company where claimant could work as a greenhouse technician earning $6.00 to $8.00 per hour. She also felt that there was an opportunity for claimant to work as a lab assistant for the state in the agriculture area where he could earn up to $9.00 per hour.

Joint exhibit 1 contains a collection of medical reports from various practitioners and providers. Claimant commenced his medical care with James L. Blessman, M.D., and when he did not improve was referred to Robert Breedlove, M.D. A myelogram and CT scan were performed with both showing results that were within normal limits. The insurance carrier referred claimant to Thomas A. Carlstrom, M.D. (Ex. 1, pages 11 & 12). Dr. Carlstrom felt that claimant's condition was myofascial rather than neurological. On October 21, 1985, Dr. Carlstrom discharged claimant with a permanent partial impairment rating of six percent of the body as a whole (Ex. 1, pp. 1 & 2). Dr. Carlstrom recommended that claimant needed job rehabilitation to one that required less heavy lifting and imposed an absolute lifting

restriction of 50 pounds and a restriction of 10 to 15 pounds for repetitive lifting.

With Dr. Carlstrom's consent (Ex. 1, p. 3) claimant entered the Mercy Hospital Pain Center and completed the program successfully (Ex. 1, p. 24). Claimant has been evaluated at the Medical Occupational Evaluation Center affiliated with Mercy Hospital Medical Center in January, 1986. It was recommended that claimant pursue aptitude and interest testing through vocational rehabilitation at the Iowa State Vocational Rehabilitation Center.

In February, 1986, claimant entered the Iowa State Vocational Rehabilitation Facility. He was comprehensively tested and evaluated. The final recommendations from the evaluation were that claimant attempt to expand the line of wood working items that he produces and also that he continue with his night watchman job (Ex. 3, p. 1).

In September 1986, claimant was evaluated by Maggie Covey, a certified rehabilitation consultant with Constitution Service Company. The recommendations made at that time were that Covey maintain contact and counsel claimant with regard to job seeking skills and activities in an attempt to move him toward his maximum functional attainment (Ex. 3, p. 14). Covey testified at hearing that she recommended that claimant continue his employment with Younkers but continue exploration of employment possibilities in the agricultural area. She found claimant to be motivated to be gainfully employed (Ex. 6, pp. 9 & 10). Covey agreed that wood working was not a feasible source of full time employment for claimant (Ex. 6, p. 12).

In his deposition taken October 1, 1986, Dr. Carlstrom indicated that when he initially examined claimant he observed a great deal of paravertebral muscle spasm and limited range of motion. Dr. Carlstrom confirmed the lifting restrictions which he had previously imposed but stated that claimant's permanent partial impairment is three or four percent of the body as a whole rather than six percent. Dr. Carlstrom felt that the restrictions were sound from a medical point of view (Ex. 6, pp. 12 & 13). Dr. Carlstrom felt that claimant could not continue to work as a meat cutter but that he could function as a cashier or in a courtesy counter type of position (Ex. 6, pp. 14 & 16).

Mark Nissen, claimant's former supervisor at Dahl's, felt that claimant would not be able to work as a meat cutter at Dahl's and that, to his knowledge, there were no jobs in the grocery business that claimant would be physically capable of performing (Ex. 6, p. 14 & 49).

Kenneth Stroud, supervisor and corporate vice president for Dahl's testified that of the 1,600 employees that Dahl's employs

that there were, to his knowledge, no jobs with Dahl's that claimant would be physically capable of performing (Ex. 6, pp. 32 & 33).

Robert Hand, President of Foods, Inc., and Dahl's, testified by way of deposition that the company has never modified jobs for injured employees (Ex. 6, pp. 66 & 67). He stated that there was no job with Dahl's that claimant was capable of performing in view of his physical restrictions but that possibly a larger grocery warehouse might have some opportunity (Ex. 6, p. 70). He indicated that at the time of injury claimant had been earning $15.10 per hour (Ex. 6, p. 73).

Exhibit 5 shows claimant to have earned approximately $32,000 per year in 1984 and 1983.

APPLICABLE LAW AND ANALYSIS

Through the prehearing report and statements made by counsel at commencement of the hearing the only issues remaining to be determined in the case are the extent of permanent disability; a limited number of medical expenses; and costs of the proceeding. It was stipulated that claimant's condition is compensable under Chapter 85 of the Code.

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. * * * *

The refusal of an employer to reemploy an injured worker is strong evidence of a substantial level of disability. II Larson Workman's Compensation Law, section 57.61.

Claimant is 47 years old and has a high school education. His entire work history has involved work in grocery stores. The primary portion of it has been as a meat cutter. Prior to the injury claimant was earning approximately $32,000 per year at an hourly rate of slightly over $15.00 per hour. He enjoyed an advantageous fringe benefit package. Dr. Carlstrom has suggested that claimant would be capable of working as a cashier or courtesy counter clerk in a grocery store but individuals more familiar with the grocery business, namely Robert Hand,

Kenneth Stroud, Mark Nissen and claimant all agree that if the physical restrictions imposed by Dr. Carlstrom are followed, there is no work that claimant is capable of performing in the Dahl's grocery store business, or in any other grocery store business. The only possible grocery related occupation suggested by any of the people most familiar with the business involved work in a large grocery warehouse or work as a meat inspector or buyer. No evidence whatsoever was introduced which would indicate that any of such positions were currently open or ever would become open to claimant.

Claimant has been throughly evaluated from a vocational rehabilitation standpoint. According to Maggie Covey his best opportunities for employment seem to rest in the agricultural area with either Pioneer or the State of Iowa. According to her, $9.00 per hour would be the maximum earnings that he could achieve in those positions. Many of the jobs in the agricultural field available to claimant appear to pay in the range of $4.00 to $6.00 per hour. Claimant testified that he currently earns $4.50 per hour at the Younkers Warehouse. His current fringe benefit package is minimal. Claimant has obviously sustained a substantial loss of earning capacity.

It would appear that claimant is currently somewhat under-employed. Nevertheless, his current position appears reasonably stable and secure. He has demonstrated his ability to function gainfully in his current position. It would normally be expected that an individual would strive to obtain the employment that was most economically advantageous to him but other factors sometimes come into play. Claimant has a long history of steady gainful employment. Once he became a meat cutter he continued to work as a meat cutter. He changed employers only once during his entire working life. It is understandable that he would not be comfortable in a situation where he had to seek other employment. It is found, however, that the current employment is not truely representative of his actual earning capacity and that for purposes of evaluating his industrial disability and earning capacity a wage range of $6.00 to $8.00 per hour is considered as obtainable if reasonable efforts at obtaining that employment are made. The fact that claimant has no background in agriculture weighs heavily against him should he try to compete for the higher paying jobs in the agricultural area. The record shows complete concensus for the proposition that claimant's wood working activities are not a viable source of full time gainful employment.

One somewhat perplexing part of the case relates to the diagnosed medical condition, the impairment rating and the physical restrictions which have been imposed. The three are not particularly consistent with what is commonly seen in cases of this nature. A truely definitive diagnosis is not found in the record. There is the general diagnosis of a myofascial

deducting the healing period the result is 16 weeks of permanent partial disability to which defendants are entitled to credit.

FINDINGS OF FACT

1. Dean Young is currently afflicted with a three to four percent disability of the body as a whole due to the condition on his back. Medically imposed restrictions on lifting include a 50 pound absolute limit and 15 pound repetitive lifting limit.

2. The cane and back brace which claimant uses were recommended by an authorized treating physician and the cost thereof in the amount of $100.64 is reasonable.

3. The deposition costs in the amount of $241.60 are reasonable.

4. Dean Young is a 47 year old man with a high school education.

5. Young's entire work history has been in the grocery store business with the major part thereof being as a meat cutter.

6. As a meat cutter Young earned in the range of $15.00 per hour.

7. Since the injury claimant's earning capacity has been reduced to the range of $6.00 to $8.00 per hour.

8. As a result of the injury of March 13, 1985, Dean Young has sustained a 45 percent permanent partial disability when the same is evaluated industrially.

CONCLUSIONS OF LAW

1. Claimant is entitled to receive 225 weeks of compensation for permanent partial disability.

2. The employer is responsible under section 85.27 for payment in the amount of $100.64 for the cost of a cane and back brace but is not responsible for the cost of tennis shoes and YMCA membership.

3. Under Rule 343-4.33 the employer is responsible for payment of costs in the amount of $241.60.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant two hundred twenty-five (225) weeks of compensation for permanent partial disability at the rate of three hundred eighty and

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14/100 dollars ($380.14) per week commencing June 18, 1986 less credit for sixteen (16) weeks of benefits previously paid at the time of hearing. Past due amounts are to be paid together with interest pursuant to section 85.30 of the Code.

IT IS FURTHER ORDERED that defendants pay claimant one hundred and 64/100 dollars ($100.64) for the cost of the cane and back brace under section 85.27.

IT IS FURTHER ORDERED that defendants pay claimant the cost of this action in the amount of two hundred forty-one and 60/100 dollars ($241.60).

IT IS FURTHER ORDERED that defendants file claim activity reports as requested by this agency.

Signed and filed this 27th day of February, 1987.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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2) Nature and extent of disability; claimant asserts the odd-lot doctrine; the parties were unable to stipulate to a date when permanent partial disability would commence, if awarded; and

3) Whether defendants owe the three medical bills that have been marked as exhibit 1. Defendants assert a causal connection argument, an authorization argument, and argue that the treatment or care was not necessary.

SUMMARY OF THE EVIDENCE

Claimant testified that prior to working for American Honda she did warehouse work, factory work, worked at a bakery, worked for Oscar Mayer, and worked for Hy-Vee. She started work at American Honda in August 1980 on a full-time basis. Prior to starting at American Honda her health was good and in particular she had no back problems.

Claimant testified that she "went through the tenth grade"; however, she obtained a GED in June 1980.

Claimant testified that prior to January 3, 1984 she had fallen down at home on "Easter of 1983" and went to a chiropractor as a result. She had gone to a chiropractor prior to this Easter incident for headaches and her back. She missed thirty days of work because of this Easter incident and then returned to work at American Honda. She was back to work for four days and was then injured again and missed sixty days as a result. She returned to work in August 1983. She was working as a stacking and material handler at American Honda.

Claimant testified regarding the incident of January 3, 1984 which caused back pain that went into her legs. This incident was "close to the Easter injury" but her pain was on a "different side of her body." The leg sensation or pain was new and a bladder problem was new. The incident of January 3, 1984 involved the lifting of heavy boxes; she did not slip and then fall. She was not able to complete her day on January 3, 1984. She was hospitalized for nine days as a result of the incident of January 3, 1984. She injured her low back on Easter 1983 and injured her back in January 1984 at American Honda. After the January 1984 injury claimant enrolled in a program to improve her lifting ability. Claimant testified that she would now have trouble doing her "old job" at American Honda. She would like to go back to work for American Honda but has been told by them that she "would have to perform work like everybody else."

Claimant obtained a "career assessment/planning inventory" just prior to hearing. See exhibit K. She has not sought employment since January 1984 because she "did not feel she could really do a good day's work with my back."

Claimant testified that standing bothers her legs and her back starts to hurt "real bad." Sitting causes her back to hurt "real bad." She keeps moving to keep pressure off her back. Her back hurts "real bad" by the time the evening comes. Prior to Easter 1983 claimant weighed 150-155 pounds; she now weighs between 180-185 pounds.

Claimant testified that as a result of her injury of January 3, 1984 she has pain in the middle of her back all the time. As a result of the January 3, 1984 injury the pain in her right leg, after too much activity, "feels like it wants to come out the toe." The Easter 1983 incident did not cause this problem.

On cross-examination, claimant acknowledged that prior to coming to work for American Honda her jobs generally lasted less than one year. She worked for American Honda for about three and one-half years. After the Easter 1983 incident claimant went back to work and did the "same job" but was a little slower. After the Easter 1983 incident she worked that week but had some problems. She was then off work from April 11, 1983 through May 23, 1983 because of her Easter 1983 injury. She then returned to work for four days and then missed about three months of work.

Claimant testified that her trouble "really started" in 1983. It was determined that Easter in 1983 was on March 27, 1983, not in April 1983. Claimant was off work at American Honda from May 27, 1983 through August 21, 1983.

Terry Marlowe testified he is claimant's spouse. He stated that in May 1983 his wife received short-term private disability benefits, but not weekly workers' compensation benefits. Claimant also testified that since Easter 1983 she has limited her woodcutting activitiy and such. Prior to Easter 1983 claimant would do what he asked her to do. He also stated that since January 1984 she has "slowed way down." Claimant recovered from the Easter 1983 stairs incident in his opinion; however, it took her longer to recover from the May 1983 incident. In his opinion claimant has not recovered from the January 1984 incident; however, her condition has been stable for about the last year.

Kathleen L. Negaard testified that she is a rehabilitation specialist. She first worked on claimant's file in October 1984 and stayed with the file for about one year. She stopped working with claimant in the fall of 1985. She was put back on the case in January 1987.

Exhibit A, page 3, reads in part:

Although she has had trouble with her upper back in previous years she really has had no problems with her lower back until this summer in about June of 1983. At that time she had an episode of back

pain with radiation of pain down the right leg. At that time she was evaluated by Dr. Kreiter and by a neurologist. She eventually did return to work in August of 1983 and did quite well until this most recent episode. (Emphasis added.)

Exhibit E, page 1 (dated November 8, 1984), is authored by John E. Sinning, Jr., M.D., and reads in part:

I went over the history in some detail, both as reported by Mrs. Marlowe and as recorded in our record. Her problem began in the spring of 1983 when she fell down the stairs at home. Following chiropractic treatment for a time she returned to work, had increasing trouble and then was seen by Dr. John Sunderbruch. Because of increasing pain in the right buttock and leg, she was sent to our office by Dr. Sunderbruch and seen on June 3, 1983 by Dr. Richard Kreiter. X-rays which Mrs. Marlowe brought in were reviewed by Dr. Kreiter with findings of no obvious abnormality. A CT scn [sic] was performed in June 1983 with findings of a probable herniation of the 5th lumbar disc, possibly the 4th disc. (Emphasis added.)

Dr. Sinning stated on page 3 of exhibit E:

It is my conclusion that Mrs. Marlowe has no impairment of function. There are no physical findings to justify her remaining on a "healing status" on workmens [sic] compensation. If she is unable to return to work because of a continued pain problem, then psychiatric evaluation of that pain problem is an essential part of her evaluation.

Exhibit F, page 1 (dated October 31, 1984), is authored by Stephen C. Rasmus, M.D., and reads in part:

She is here because of a back problem that started around Easter in 1983. She fell down stairs while at home. She had back pain afterwards with, as she recalls, some pain into the right leg. She worked at America [sic] Honda and over the course of two weeks the pain got worse. She saw a chiropractor and was off work for about six weeks. She then returned to work. While picking up a head cylinder, she had sudden onset of numbness and paresthesias in both legs. She then saw a number of physicians including Dr. Richard Kreiter and myself when I was working in Clinton. I do not recall my findings then, and I will have to send for my records. Evidently I told her that she had some evidence of

nerve damage. With conservative therapy, she eventually improved to the point that she returned to work in August 1983. In January, 1984, she was holding a box and had sudden sharp pain in her back. She had some urge to go to the bathroom. On the way, some friends noticed the right leg dragging, according to history. She could not get up from the toilet because of pain. She got help and eventually required an ambulance ride to the hospital. She was hospitalized by Dr. Sunderbruch. According to his record then, she had more pain on the left side. She was also seen by Dr. Irey and Dr. Sinning. The left sided pain improved, but the low back pain and intermittent right leg pain has persisted. She was evaluated by Dr. VanGilder in Iowa City. He did not think that surgery was recommended. Dr. Eugene Collins also agreed with that. Currently, her pain is primarily in the middle of the back. She has some discomfort in the right leg down the posterolateral aspect to the toes. That is most noticeable with walking, vacuuming or packing things up. Coughing causes increased back pain. She has some paresthetic feelingsin the right leg that she describes as "bugs crawling." (Emphasis added.)

Exhibit I is the deposition of Dr. Eugene Collins. On page 14 he stated as follows regarding whether the incident of January 3, 1984 aggravated claimant's back situation:

> A. If she had previously injured her back and this was an aggravation of that. It can be temporary, it can be cumulative, more or less. It depends on, if she pulled the muscles and ligaments out, that certainly may have made it a little worse. It may have not. It's -- I can't say one way or the other.

APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the injury of January 3, 1984 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

Claimant filed a petition on October 7, 1985 and stated in paragraph 10 thereof: "Injury is the result of a slip and fall

at place of employment." At hearing, claimant testified that, in fact, she slipped and fell at home and, as a result, an amendment to her petition was sought and granted.

Claimant sustained an injury in March 1983 (Easter 1983), an injury in May 1983, and another injury in January 1984. The May 1983 injury occurred at work as did the January 1984 injury. Claimant did not file a timely arbitration petition seeking workers' compensation benefits because of the May 1983 incident. She did receive private disability monies because of the May 1983 incident, however.

As stated above, claimant has the burden of proof on the issue of causal connection between the stipulated work-related injury of January 3, 1984 and her asserted disability. She must establish the requisite causal connection by a preponderance of the evidence. This, she has failed to do. It is just as likely that her current physical problems are related to the Easter 1983 incident at home and/or May 1983 work incident as it is the stipulated work incident of January 3, 1984. Therefore, she has failed in her burden of proof and as a result takes nothing from this proceeding.

II. It is unnecessary to reach the nature and extent issue in this case given the resolution of the causal connection issue set out in Division I.

III. Claimant also failed to establish by a preponderance of the evidence that the contested medical bills (marked Exhibit 1) are causally related to the incident of January 3, 1984.

FINDINGS OF FACT

1. Claimant injured her back at home on March 27, 1983.

2. Claimant sustained a work-related injury at American Honda and was off work from May 27, 1983 through August 21, 1983 as a result.

3. Claimant sustained a work-related injury on January 3, 1984.

4. Claimant currently suffers from some whole body permanent partial impairment.

CONCLUSIONS OF LAW

Claimant failed to establish by a preponderance of the evidence a causal connection between the work-related incident of January 3, 1984 and her whole body permanent partial impairment.

ORDER

IT IS THEREFORE ORDERED:

That claimant take nothing from this proceeding.

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

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

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

NANCY L. McCONNELL, Claimant, vs. CITY OF CLIVE, Employer, and ARGONAUT INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 773872 A 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 Nancy McConnell against the City of Clive, Iowa, her former employer, and Argonaut Insurance Companies, the employer's insurance carrier. Claimant alleges that she sustained a compensable injury in the nature of a weakening of her immune system which has been manifested by Raynaud's phenomenon, leukoplakia, neurasthenia, dyspnea, chest pain, weakness, and painful limbs. McConnell alleges that her ailments are a result of stress in her employment with the City of Clive which arose from being victimized by sex discrimination and sexual harassment perpetrated by the chief and other members of the Clive, Iowa police department.

The issues presented for determination are whether claimant sustained an injury which arose out of and in the course of her employment; whether the alleged injury is a cause of disability, temporary or permanent; and determination of her entitlement to compensation for temporary or permanent disability. The parties stipulated that in the event of an award, McConnell's rate of compensation is $177.01 per week. The parties further stipulated in the prehearing report that medical expenses in the amount of $12,285.96 have been incurred, and that the providers of the care would testify that the fees charged were reasonable. It was stipulated that in the event of an award defendants are entitled to credit in the amount of $10,536.03 under section 85.38(2) for benefits provided under a nonoccupational group plan.

The case was heard in Des Moines, Iowa, on December 9, 1986 was fully submitted upon conclusion of the hearing. The ɔrd in this proceeding consists of testimony from Nancy ɔnnell, Honorable Allen Donielson, Dennis Diddy, Janice riguez, Janet Hicks, Gary Walker, Jerry Miller, and Gilbert n Dymond. The record also contains joint exhibits 1 through claimant's exhibits 10 and 11, and defendants' exhibits A, B, D, E, and I.

STATEMENT OF THE CASE

The following is only a summary of pertinent evidence essary for deciding the issues in this case. All evidence eived at hearing was considered when making this decision n though it may not be specifically referred to herein.

McConnell claims that her physical ailments developed or e aggravated by stress in her employment. She alleges that stress arose from being victimized by sex discrimination and xual harassment perpetrated by the chief and other members of e Clive, Iowa, Police Department. The events and practices of ich she testified are adequately summarized in claimant's oposed findings of fact filed January 12, 1987. They include e following:

1. In 1977, Claimant Nancy McConnell began working for the Police Department, City of Clive, Iowa, as a nighttime Dispatcher. (Tr. p. 28).

2. At the time of employment by the Clive Police Department (Clive), Ms. McConnell enjoyed good health. (Tr. p. 76).

3. After she began to work for Clive, Ms. McDonnell was subjected to various job related situations which caused her to feel stress.

4. In 1978 Ms. McConnell applied for a patrol person position with Clive, but was forced to withdraw her name from consideration by her Supervisor, Dean Dymond, Clive's Chief of Police. (Tr. pp. 30, 349).

5. Mr. Dymond admitted that he had felt that women should not be police officers, and Ms. McConnell recalled that he had said that women should be at home having babies - "spreading her legs for some nice guy instead of out there working." (Tr. pp. 32-3, 347-8).

6. As a result of the withdrawal of her name from consideration as a patrol person, Ms. McConnell

was promoted to a daytime dispatch position, which included the responsibility of serving as secretary to the Chief of Police. This was the preferred dispatch position. (Tr. pp. 33-4, 368).

7. Thereafter, and up to the date that she became ill on the job, Ms. McConnell was subjected to a variety of crude and sexist jokes and comments by Mr. Dymond and other employees of Clive, inclusive of the following:

a). Mr. Dymond suggested that Ms. McConnell engage in sexual intercourse with him as had his previous secretary, whom he married, by asking Ms. McConnell if she "wouldn't like to have little Dymonds". (Tr. p. 37-8).

b). Mr. Dymond told Ms. McConnell that the way to determine whether a woman is pregnant is to see if her nipples are pink, and asked Ms. McConnell to check her nipples. (Tr. p. 41).

c). On occasion when Ms. McConnell would wear a dress that was not banded at the waist, Mr. Dymond would ask if she was pregnant, and how she had gotten that way.

d). During the years 1981, '82, and '83, Mr. Dymond told Ms. McConnell that he would play with the penis of his young son. (Tr. pp. 40-1, 378-9).

e). Mr. Dymond told Ms. McConnell that when he was intimate with his wife he would pinch her tit and call her a whore. (Tr. p. 49).

f). In 1982, '83, and '84, Mr. Dymond would tell Ms. McConnell about the sex life of his young daughters. (Tr. pp. 52-3, 377).

g). Mr. Dymond would regularly ask Ms. McConnell if she had engaged in sexual intercourse the previous night when she would arrive at work looking tired. (Tr. pp. 39-40, 54, 311, l. 8).

h). When Ms. McConnell's dog became pregnant, Mr. Dymond suggested that her boyfriend had impregnated her dog. (Tr. pp. 54-5, 270, 373).

i). Mr. Dymond would follow Ms. McConnell to the bathroom and talk to her through the door while she used the facility. Ms. McConnell found this to be degrading. (Tr. p. 51).

j). When Ms. McConnell wore a dress that was not banded at the waist, Mr. Dymond asked if she was pregnant. (Tr. pp. 56-7).

k). Mr. Dymond would occasionally suggest that Ms. McConnell was a prostitute by asking her how much money she had made the previous night working the streets. (Tr. p. 200).

8. Ms. McConnell objected to being subjected to these sexist comments and expressed that opposition to Mr. Dymond, but he took no action to correct the situation. In fact, Mr. Dymond encouraged his employees to tell jokes, including racists and sexist jokes. (Tr. pp. 43, 341-4). Mr. Dymond was the highest ranking employee in the department, and Ms. McConnell had no one else to complain to. (Tr. pp. 43, 221).

9. During a performance evaluation in 1982 or '83, Mr. Dymond told Ms. McConnell that she would be a more fun person if she would just participate in the joking like other employees. (Tr. pp. 58-9, 312, 366).

10. Ms. McConnell occasionally told jokes, but objected to jokes and comments that contained sexual content as they made her feel uncomfortable, and found some of them to be plain humiliating and degrading. (Tr. p. 79, l. 15; p. 202).

11. Because of her objection to the sexist treatment that she received, Ms. McConnell was denied a salary increase comparable to other employees of Clive, and was denied the opportunity to participate in training opportunities and the opportunity to represent the police department in collective bargaining activities. (Tr. pp. 59-60, 242, 367-8).

12. Ms. McConnell was subjected to other sexist acts, including physical contact.

13. On one occasion, in 1984, Mr. Dymond hit Ms. McConnell on her buttocks with a ticket book. (Tr. pp. 43, 356).

14. On one occasion, in 1983, Officer Dennis Diddy accosted Ms. McConnell in the hallway near Mr. Dymond's office, tore her clothing and simulated a sex act. (Tr. pp. 46, 218, 230).

15. Ms. McConnell did not consent to these acts, and protested to Mr. Dymond, but he took no corrective action.

16. On June 20, 1984, Ms. McConnell arrived late for work. She was observed by the City Manager, Gary Lago, who reported her tardiness to Mr. Dymond. Mr. Dymond required Ms. McConnell to complete a time slip for this incident. (Tr. pp. 65-6, 323).

17. Ms. McConnell had been both absent and late for work on other occasions, but these were excused absences. (Tr. p. 64).

18. On the same date, Ms. McConnell telephoned the office of the City Manager to inquire about job benefits, and upon learning that the City Manager had taken the afternoon off, jokingly asked his secretary if he had completed a time slip. (Tr. p. 66).

19. Several days later, on June 26, 1986, Mr. Dymond suspended Ms. McConnell for one day for demeaning the City Manager. (Tr. p. 67).

20. A male employee, Gary Walker, had told a crude joke to the City Manager, but he was not suspended for the action. (Tr. pp. 67-8; 266).

21. On one occasion Ms. McConnell advised Mr. Dymond that state investigators had advised her that her name had come up during the investigation of a prostitution ring, but that confidential personnel information was revealed to other employees by Mr. Dymond. It was subsequently established that Ms. McConnell's telephone number had been obtained by accident. (Tr. pp. 198-9).

22. Ms. McConnell felt that she was being discriminated against on the basis of her sex and that she was being sexually harassed, and Ms. McConnell, a [sic] emotionally guarded and defensive individual (Dep. of Dr. Hines, p. 41, l. 16), suffered stress from these acts.

23. "Stress" is caused by the perceptions of an individual that their expectations are being violated - that what they expect to happen in a particular situation, any situation irrespective of content, is not happening and that those expectations are violated with such intensity and such chronicity as to exceed the person's capability of coping with

adapting to that unusual or unexpected set of rcumstances. It's basically a process of a rson's coping skills being overwhelmed. (Dep. of . Hines, p. 45, l. 1; Dep. of Dr. Rooney, pp. 30-1).

25. The sexual harassment and sexual discrimi- tion that Ms. McConnell was subjected to at the ive Police Department violated her expectations d caused her to suffer stress. (Dep. of Dr. Hines, . 45-47; Testimony of Nancy McConnell).

26. Stress may precipitate or exacerbate ıynaud's disease and heart disease, such as olapse Mitral Valve problems. (Dep. of Dr. Hines, 48, l. 8; Dep. of Dr. Rooney, p. 10).

27. During the winter of 1983, Ms. McConnell egan to suffer physical pains, and her hands and eet would turn blue and purple.

28. Ms. McConnell also began to experience ntermittent headaches on a regular basis. (Dep. of r. Ghrist, p. 51, l. 11).

29. Ms. McConnell began to suffer from such ain that she began to see a physician in May or 984, and her illness was diagnosed as Raynaud's isease. (Dep. of Dr. Ghrist, p. 10, l. 7).

30. Raynaud's disease is caused by an over- ctivity of the autonomic, especially the sym- athetic, nervous system. (Dep. of Dr. From, p. 63, . 8; Dep. of Dr. Rooney, p. 17).

31. Raynaud's disease can be induced or ggravated by certain stressful events, either motional or physical (Dep. of Dr. Swieskowski, p. 15, l. 9-19; p. 26, ll. 16-20; pp. 37-38); Dep. of Dr. ooney, p. 10; Deposition of Dr. Ghrist, p. 41; Dep. f Dr. From, p. 64, l. 16; Exhibit 1, p. 126, par. 2).

32. Sexual harassment and sexual discrimination ıre the kinds of stimuli that may cause the autonomic ıervous system to react (Dep. of Dr. From, p. 75, l. ; p. 77, ll. 14-25), and precipitate or exacerbate Raynaud's disease. (Dep. of Dr. Swieskowski, p. 17, l1. 11-21).

33. Ms. McConnell suffered from a severe case of Raynaud's disease. (Dep. of Dr. Swieskowski, p. 9, 11. 9-25).

34. The effects of a severe case of Raynaud's disease is to eliminate the ability of a person to use their hands for practically any purpose. (Dep. of Dr. Swieskowski, p. 10, ll. 5-12). It may also cause constant fatigue, ulceration of the extremities, and a variety of other debilitating conditions. (Dep. of Dr. Swieskowski, p. 15, ll. 3-8; Dep. of Dr. Rooney, pp. 13-4).

35. After receiving the notice of suspension from her job in June of 1984, Ms. McConnell obtained the services of legal counsel and served notice upon the City of Clive that she intended to pursue her legal righs by filing a civil rights complaint. (Tr. pp. 196, 197; 389-90).

36. After serving notice of intent to sue, Ms. McConnell was socially isolated in the workplace, and this caused her stress level to increase. (Tr. pp. 335, 390, 406, 410).

37. Ms. McConnell began to fear and dread going to work and she had nightmares about it. (Tr. p. 406).

38. Ms. McConnell found the work atmosphere to be so strained that she began to suffer from cyanosis, a condition associated with Raynaud's disease where the hands and feet becomes discolored. (Tr. p. 407-8; Dep. of Dr. Rooney, p. 9).

39. On September 3, 1984, Ms. McConnell appeared at work where she experienced a sudden onset of chest pain, vertigo, nausea, and weakness. (Tr. p. 72; Exhibit 1, p. 75).

40. She was taken to a hospital for emergency treatment where she was told by Dr. Ghrist that she had had an anxiety attack, and that she should go home and relax. (Tr. p. 73).

41. On September 4, 1984, Ms. McConnell still felt sick, and she began treatment with Dr. Brian Taylor, who felt that she had Raynaud's disease, and that she was suffering from "severe mental anguish she has been suffering with regard to the present employment situation."

42. Dr. Taylor and his assistant provided Ms. McConnell counseling for a stress problem growing out of her employment situation. (Tr. p. 194; Exhibit 1, pp. 66-7).

43. Dr. Taylor recommended that Ms. McConnell not return to her "aggravting job site" at that time. (Exhibit 1, p. 105).

44. Therafter, Ms. McConnell saw and received treatment from a number of physicians, including her personal physician, Dr. David Swieskowski. (Tr. p. 78-9).

45. Dr. Swieskowski confirmed the Raynaud's disease diagnosis, and found Ms. McConnell to be disabled. He advised her that she shouldn't work at all because of the risk of sudden death associated with cardiac arrythmias. (Dep. of Dr. Swieskowski, p. 33, ll. 10-14).

46. Dr. Swieskowski also found that Ms. McConnell was and continues to be disabled because of fatigue. (Dep. of Dr. Swieskowski, p. 34).

47. Ms. McConnell's illness was the result of her autonomics nervous system's response to job-related stress. (Dep. of Dr. Swieskowski, p. 38, ll. 15-22; Dep. of Dr. Rooney, pp. 21-2, 25-30, 32-34, 68).

48. Ms. McConnell continues to suffer dizziness, light-headedness, exhaustion and fatigue, swollen hands and feet, cramps, headaches, and chest pains. (Tr. p. 81).

49. Ms. McConnell suffers from such exhausting fatigue that she has to have help with her house work. (Tr. p. 82).

50. Ms. McConnell suffers from a severe case of Raynuad's [sic] disease. (Dep. of Dr. Rooney, pp. 10-16; Dep. of Dr. Swieskowski, p. 9, ll. 9-25).

51. Ms. McConnell has not been released to return to work, her prognosis is poor, and she is not likely to get better. (Dep. of Dr. Swieskowski, p. 39, ll. 6-19; Dep. of Dr. Rooney, pp. 70-1).

52. Dr. Swieskowski finds her to be completely disabled and unable to work (Dep. of Dr. Swieskowski, p. 40, ll. 8-24; Tr. p. 83, ll. 22-24), and Dr. Rooney did not find that she was able to return to her present job. (Dep. of Dr. Rooney, pp. 40, 60-1).

53. Ms. McConnell has not worked since September 3, 1984.

The principal condition for which evidence was introduced as an ailment known as Raynaud's phenomenon (also referred to s Raynaud's syndrome or Raynaud's disease). Claimant also omplained of extreme fatigue, headache and various other pains, iscomfort, and general illbeing. The primary emphasis of the edical testimony in the record deals with Raynaud's phenomenon. ittle emphasis is placed upon claimant's other complaints other han noting that she has the complaints.

The consensus from the medical practitioners who have dealt ith claimant is that she is afflicted by Raynaud's phenomenon. he medical treatise, the Merck Manual, 14th Edition, which was dmitted into evidence as deposition exhibit 3 to exhibit 6 escribes the ailment as follows:

RAYNAUD'S PHENOMENON AND DISEASE

Spasm of arterioles, especially in the digits (and occasionally other acral parts such as the nose and tongue), with intermittent pallor or cyanosis of the skin.

Etiology

Raynaud's phenomenon may be idiopathic (Raynaud's disease) or secondary to conditions such as connective tissue disorders (e.g., scleroderma, RA, SLE), neurogenic lesions (including the thoracic outlet syndromes), drug intoxications (ergot and methysergide), dysproteinemias, myxedema, primary pulmonary, hypertension, and trauma. Idiopathic Raynaud's disease is most common in young women.

Pathology and Pathophysiology

Attacks of vasospasm of the digital arteries may last for minutes to hours, but are rarely severe enough to cause gross tissue loss....

Symptoms, Signs, and Diagnosis

Intermittent attacks of blanching or cyanosis of the digits is precipitated by exposure to cold or by emotional upsets. The color changes may be triphasic, pallor, cyanosis, redness (reactive hyperemia); or biphasic: cyanosis, then reactive hyperemia. Normal color and sensation are restored by rewarming the hands. Color changes are not present proximal to the metacarpophalangeal joints and rarely involve the thumb. Pain is uncommon,

but paresthesias consisting of numbness, tingling, or burning are frequent during the attack.

Idiopathic Raunaud's disease is differentiated from secondary Raynaud's phenomenon by bilateral involvement and a history of symptoms for at least 2 yrs with no progression of the symptoms and no evidence of an underlying cause. In idiopathic Raynaud's disease, trophic skin changes and gangrene are either absent or present only in minimal cutaneous areas. The symptoms and signs of the underlying disease usually become manifest within 2 yr, occasionally longer....

Therapy of the secondary forms depends on recognition and treatment of the underlying disturbance. Mild cases of idiopathic Raynaud's disease may be controlled by protecting the body and extremities from cold and by using mild sedatives (e.g., phenobarbital 15 to 30 mg orally t.i.d. or q.i.d.). The patient must stop smoking since nicotine is a vasoconstrictor.

Theodore W. Rooney, D.O., a rheumatologist, a field of icine into which treatment of Raynaud's phenomenon falls, was general agreement with the description contained in the Merck ual and further stated:

Well, Raynaud's Phenomena is the color changes that would occur in fingers or toes characterized by three phases of pallor, cyanosis, and ruber. In order to have a definite Raynaud's phenomena, you need to have two of those three phases.

It's usually precipitated by exposure to cold but may come on spontaneously or may be precipitated by a variety of other factors. It is felt that the color changes seen in the fingers are used to make that diagnosis due to spasm of small little arteries within the digits, fingers, or toes.

Q. Doctor, you have suggested that in terms of causation exposure to cold may be one of the things that cause Raynaud's Phenomena, and then you suggested that a variety of other things might cause it.

What are some of the other things that might cause it?

A. Well, besides cold which is the most common precipitating factor, some people have a stress-

related component whether it be emotional or physical stress that can precipitate their attacks. Some people get attacks without any underlying precipitating factors. Certain medications may precipitate attacks, including beta-blocker used to treat blood pressure or headaches, Ergotamine used to treat migraine headaches so certain medications can actually bring about an attack, and then obviously people that smoke or have anything else that is a stress to blood oxygen or whatever can be another so there is many factors that can potentially bring on episodes of this sort. (Ex. 2, pp. 10-11).

The medical practitioners who have addressed the nature of Raynaud's phenomenon and its causes are in substantial agreement with Dr. Rooney and the Merck Manual. (David E. Swieskowski, M.D., exhibit 3A, pages 20, 21, 43, 44, and 48; Paul From, M.D., exhibit 5, pages 30 through 36, 62 through 64; John H. Ghrist, M.D., exhibit 6, pages 20, 21, 25, 26, 38-48.)

Recognized sources of aggravation of Raynaud's phenomenon known to produce the attacks which characterize it are cold, nicotine, stress, or emotional disturbance and certain medications. Attacks are also known to occur without any identifiable precipitating factor. (Exhibit 2, pages 11, 25, 26, 41, 42, 68; exhibit 3A, pages 15-21; exhibit 3A, pages 15-21, 37, 48; exhibit 6, pages 20, 21, and 26.) Dr. Rooney and Dr. Swieskowski have indicated that stress is an aggravating factor in McConnell's case. (Exhibit 2, pages 34 and 68; exhibit 3A, pages 15-19.) Their opinions are accepted as correct.

As indicated by Dr. From, some medical authorities have suggested that stress may possibly cause the onset of Raynaud's phenomenon, but the existence of any such cause and effect relationship is only a theory and is not generally recognized in the medical community. (Exhibit 5, pages 63-64 and 101.) The greater weight of the evidence is that Raynaud's phenomenon is either etiopathic (no known cause) or is caused by some other underlying disease process. When the condition results from an underlying disease process, it is often progressive. McConnell's condition does not appear to have progressed during the past two years. It is possible that some as yet unidentified underlying disease process exists, but any such disease has not been clearly manifested. (Exhibit 2, pages 25, 42, 49, 67; exhibit 3A, pages 7, 11-13, 24, 31, 32, 43-45, 47 and 52; exhibit 5, page 89.)

Raynaud's phenomenon is manifested by attacks of vasospasm where the skin discolors. The attacks are transient or temporary and in most cases, including the McConnell's, do not result in death or damage to the affected tissues. The evidence has not provided any indication that the source of the attack has any

pearing on the effect or the severity of the attack. (Exhibit 2, pages 44, 51, 71, and 72; exhibit 3A, pages 8, 42, and 49; exhibit 5, pages 81, 82, and 86; exhibit 6, pages 20, 21, 25, 26, and deposition exhibit 3.)

Claimant's testimony relates an ongoing course of working in a setting filled with unwanted and offensive discussions and comments of a sexual nature. She also testified concerning denial of an opportunity to apply for a regular police officer position in 1978, being accosted and subjected to a simulated sex act at the police department in 1983, being hit on the buttocks with a ticket book in 1984, being denied salary increases comparable to that received by other employees, being denied the opportunity to participate in training opportunities, and being denied the opportunity to represent the dispatchers in collective bargaining activities. Claimant fixed the onset of her Raynaud's phenomenon symptoms as occurring in 1983. Her suspension and civil rights complaint were in June 1984. She thereafter apparently continued to work even though she was symptomatic until September 3, 1984 when she had an attack or spell while at work and was taken by ambulance to the hospital. Dr. Ghrist, who treated her for the Raynaud's phenomenon prior to the attack and who also treated her for the attack, opined that the attack was most likely pleuritic chest pain associated with an upper respiratory infection. He recognized the possibility that the attack may have been a stress-induced attack of some type. (Exhibit 6, pages 18, 56, and 57.) No definite diagnosis for the cause or type of the attack has been made by any other medical practitioner. Dr. From acknowledged the possibility that the September 3, 1984 attack could have resulted from something connected with claimant's work as did Dr. Rooney. (Exhibit 2, page 26; exhibit 5, pages 51 and 52.) Dr. Ghrist testified that things that happened in 1984 would neither cause nor exacerbate symptoms of the phenomenon at the present time. (Exhibit 6, pages 20-21.) Dr. From's statements are in substantial agreement with those from Dr. Ghrist. (Exhibit 5, page 52.) Dr. Swieskowski agreed that events from 1984 or earlier would not aggravate claimant's condition at the present time. (Exhibit 3A, page 42.) Dr. Rooney agreed that in claimant's case the exacerbation of claimant's condition due to stress would be transient unless the stimuli continued. (Exhibit 2, pages 51 and 69.)

There is evidence in the record of a mitral valve prolapse, which evidence arises from Stuart Winston, M.D. He indicated that claimant's complaints of chest tightness could possibly be caused by anxiety. (Exhibit 1, page 7.) A further extensive cardiac workup performed under the direction of William S. Wheeler, M.D., a cardiologist, showed no evidence of mitral valve prolapse. (Exhibit 1, page 142.) Dr. Wheeler further indicated that claimant's Raynaud's phenomenon was not related to going to work, and that the supposed cardiac arrests which

Laimant had suffered were not caused by her work. He indicated hat the records from the paramedics did not confirm claimant's tatements regarding cardiac arrest. He felt that claimant's aynaud's phenomenon would not prevent her from working. Exhibit 1, page 142.) Brian T. Taylor, M.D., received a story from claimant which indicated that on two occasions she as pulseless and needed to be resuscitated. (Exhibit 1, page 5.) In September 1984, he indicated that claimant had a hysiologic dysfunction which was apparently related to severe ental anguish resulting from her employment. He indicated that he history involved an attempted rape by claimant's employer hich was aborted by a fellow employee. (Exhibit 1, pages 105 nd 115.) He felt that she was totally disbled. (Exhibit 1, age 104.)

Dr. Rooney felt that claimant was not disabled from per-orming some types of gainful employment but that she should void exposure to cold temperatures. (Exhibit 2, pages 34-36.) . Ghrist felt that claimant was not totally disabled. (Exhibit page 128.) Dr. From found claimant to have no cardiac bnormalities and felt that she was capable of being employed. Exhibit 1, page 36; exhibit 5, pages 48, 51, 52, and 85.) Dr. ieskowski felt that claimant is currently completely disabled ecause she fatigues easily. (Exhibit 3A, page 40.)

APPLICABLE LAW AND ANALYSIS

It is assumed, without deciding, that the events of sexual arassment and sex discrimination of which claimant complained e true. In a workers' compensation case, the burden of proof hat an injury which arose out of and in the course of employ-ent occurred rests upon the claimant. McDowell v. Town of arksville, 241 N.W.2d 904 (Iowa 1976).

The injury must both arise out of and be in the course of he employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 02, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the owa Report. See also Sister Mary Benedict v. St. Mary's Corp., 55 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 49 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the njury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The claimant has the burden of proving by a preponderance of he evidence that the injury of September 3, 1984 is causally elated to the disability on which she now bases her claim. odish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). ndahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A ssibility is insufficient; a probability is necessary. rt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 2 (1955). The question of causal connection is essentially

within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

When an aggravation occurs in the performance of an employer's work and a causal connection is established, claimant may recover to the extent of the impairment. Ziegler, 252 Iowa 613, 620, 106 N.W.2d 591, 595 (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, 253 Iowa 369, 112 N.W.2d 299; 100 C.J.S. Workmen's Compensation §555(17)a.

The pivotal issue in this case is proximate cause. A cause is proximate if it is a substantial factor in bringing about the results; it need not be the only cause. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). Expert testimony that a condition could possibly be related to a claimant's employment, although insufficient alone to support a finding of causal connection, could be coupled with nonexpert testimony to show causation and be sufficient to s sustain an award. Giere v. Base 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).

The Merck Manual indicates that Raynaud's phenomenon may be idiopathic or secondary to some other underlying disease. The

idiopathic form is indicated to be most common in young women. No underlying disease has been identified in claimant. The greater weight of the evidence is that McConnell's affliction with Raynaud's phenomenon is idiopathic. Even if the condition were due to some underlying disease, there is no evidence in the record which shows claimant to have contracted any such disease as a result of her employment. The theory that stress may induce (rather than merely aggravate) the Raynaud's phenomenon is only a theory and, under the current state of the medical knowledge as reflected in the record, does not carry with it the probability (as opposed to mere possibility) necessary to support an award. Injuries arising out of risks or conditions personal to the claimant do not arise out of the employment unless the employment contributes to the risk or aggravates the injury. 1 Larson Workmen's Compensation Law, section 12.00.

The crucial issue in this case is, therefore, what caused Nancy McConnell to be afflicted with Raynaud's phenomenon. That question is unanswerable. The condition is generally considered to be idiopathic and the greater weight of the evidence in this case is consistent with the generally accepted view. As a young woman, claimant is in the group most commonly afflicted by the condition, her history of smoking is a definite known aggravator of the condition. Claimant had stress from many sources. It is not necessary for the employer to prove that the condition is not work related, to the contrary, the burden rests on the claimant to prove that it is probable (more likely than not) that the condition is work related. The evidence in this case fails to establish that it is more likely than not that something in claimant's work at the Clive Police Department was a substantial factor in causing her to become afflicted with Raynaud's phenomenon.

It is important to distinguish between a person being afflicted by Raynaud's phenomenon and the occurrence of the attacks which characterize the phenomenon. The greater weight of the evidence from the physicians in this case is that the attacks are transitory and generally cause no permanent harm to the individual. Factors which produce the onset of the attacks have been medically identified and are generally recognized. Claimant appears to fit the normal recognized pattern in this regard. As a person afflicted with Raynaud's phenomenon, she reacts to stress, cold, and nicotine. She has been away from the employment setting since 1984, but her condition has not shown any substantial change since that time. Claimant has been a relatively heavy smoker throughout most of the time material to this case. That alone could be the most substantial aggravation of her condition. It would explain the lack of apparent improvement since claimant's employment ended. If claimant's complaints of sexual harassment and sex discrimination are true, it is certainly likely that those events, and any other events which emotionally disturbed her, would have also induced attacks. The record fails to include evidence, however, that the onset of

attacks produced disability from performing the normal duties of her employment. The greater weight of the evidence fails to show that she was ever physically unable to perform the duties of her employment due to vasospasm attacks.

Claimant was evaluated by Todd Hines, Ph.D., who found her to have no abnormal psychological condition. (Exhibit 1, pages 22 and 23.)

FINDINGS OF FACT

On September 3, 1984, Nancy McConnell was employed as a secretary and dispatcher for the Clive, Iowa, Police Department.

Nancy McConnell is afflicted with a condition known as Raynaud's phenomenon.

Raynaud's phenomenon is a condition which the greater weight of medical authority characterizes as being either idiopathic, with no definite known cause, or as secondary to some other underlying disease. The idiopathic form is most common in young women. Claimant has not been diagnosed as having any underlying disease which would produce her Raynaud's phenomenon.

The evidence in this case indicates that claimant's Raynaud's phenomenon is idiopathic in nature, and the reason why she is afflicted with the ailment is unknown.

The evidence in this case fails to show that it is more likely than not that anything connected with claimant's employment was a substantial factor in producing the Raynaud's phenomenon with which she is afflicted, or any of her other symptoms, even if it is assumed that her complaints of stress resulting from sexual harassment and sex discrimination are true.

During the time claimant was employed by the Clive, Iowa, Police Department she had attacks of the type which are characteristic of persons with Raynaud's phenomenon. The attacks were precipitated by her use of nicotine, stress and the other factors known to produce the attacks. The evidence fails to show that the attacks which occurred made claimant unable to perform the duties of her employment at any time. The evidence further fails to show that suffering the attacks in any way produced any change, acceleration or lighting up of the Raynaud's phenomenon beyond the time that the attack continued.

The evidence fails to show that it is probable, as opposed to merely possible, that claimant's current physical condition is in any way a result of anything that occurred during her term of employment with the Clive, Iowa, Police Department.

No findings are made with regard to whether or not the

incidents of sexual harassment or sex discrimination of which claimant complains actually occurred.

The evidence fails to show that anything connected with claimant's employment was a substantial factor in producing the attack which claimant sustained while at work on September 3, 1984, or the similar attack which she suffered later during the month of September 1984.

The evidence fails to establish that claimant's employment was a substantial factor in bringing about any cardiac condition with which she is afflicted.

The evidence fails to establish, by a preponderance of the evidence, that claimant is afflicted by a mitral valve prolapse or any other abnormal cardiac condition.

The evidence fails to establish that claimant is afflicted by any abnormal psychological condition or disability.

The evidence fails to establish that anything connected with claimant's employment was a substantial factor in bringing about any psychological condition with which claimant may be afflicted.

CONCLUSIONS OF LAW

Claimant has failed to prove by a preponderance of the evidence that her affliction with Raynaud's phenomenon was proximately caused by sex discrimination, sexual harassment, or any other occurrences connected with her employment with the City of Clive, Iowa.

Claimant has failed to prove by a preponderance of the evidence that the Raynaud's phenomenon with which she is afflicted is the result of an injury which arose out of and in the course of her employment with the Clive, Iowa, Police Department.

Claimant has failed to prove by a preponderance of the evidence that she suffered any disability that was proximately caused in any manner by her employment with the Clive, Iowa, Police Department.

Claimant has failed to establish, by a preponderance of the evidence, that she is entitled to receive any benefits available under chapters 85 or 85A of the Code of Iowa.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding and her petition is dismissed on the merits with prejudice.

IT IS FURTHER ORDERED that costs are assessed against claimant.

Signed and filed this 1st day of June, 1987.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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000791

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TED M. McINTOSH, Claimant, vs. LAUHOFF GRAIN COMPANY, Employer, and AETNA LIFE AND CASUALTY CO., Insurance Carrier, Defendants.	:	FILE NO. 500982 D E C I S I O N O N R E M A N D FILED JUN 17 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

On December 11, 1986 the Iowa Industrial Commissioner remanded the above entitled action to the undersigned. In that order the Industrial Commissioner stated:

> The supreme court remanded the instant case to the industrial commissioner for a determination on the record already made, on the question of impairment of the body as a whole.
>
> THEREFORE, this case is remanded to the original deputy who heard it in compliance with the supreme court ruling.

ISSUE

The only issue presented is whether claimant's injury was limited to the scheduled member or extended to the body as a whole.

FACTS PRESENTED

Dr. Ronald K. Miller, who testified by way of deposition, indicated he is an orthopedic surgeon and first saw claimant on October 17, 1980. Dr. Miller stated: "He suffered a fracture of his hip, which apparently was what they call a subcapital fracture, or a fracture at the base of the head and neck junction." X-rays showed multiple Knowles pins, a flattening of the superior dome of the femoral head and an increase of bone density. Dr. Miller opined that claimant had a partial avascular necrosis

which caused the flattening of the head. Dr. Miller revealed that a total hip replacement was carried out on November 11, 1980.

Dr. Miller stated:

A Okay. Basically, what we're doing is, this is a replica of a bone and what we're doing is, we're making a cut just right down below the round part and we make a cut here (indicating). And then we take this head out. And then we take a prosthetic device with a long stem. We ream out the center of this bone, drop it down in there and then glue it in place, using a special type of bone cement. And then essentially we end up with a device, sitting in here like this (indicating). On the other side of the hip joint, what we do is we have to go in and if there is any cartilage remnants left in there, we have to scrape those out. And then once we get down to bone, we use a little round device like this (indicating) with cutters on it, which looks somewhat like a cabbage grater, and it's put on a piece of power equipment, put into the acetabulum. It rotates at a high rate of speed and just grinds out a perfect half-circle, and depending upon what size cup that you want to use, we can either use a smaller or a larger or we actually have a third size -- there's actually five sizes of these. We can pretty much size them to the patient. Once we have reamed this and prepared it, then we make some large and small holes in here, put some glue in here, put a cup in, hold it and then it is essentially cemented in, in about ten minutes the cement is hardened.

Q What is the composition of the socket?

A It's what they call a high-density polyethylene. It's a very, very durable, very tough material. It is not rigid but if you put these two things together and you push them, you can feel just a little bit of give. Probably not much but it kind of functions a little bit as a spacer and to a very slight degree as a shock absorber.

Q What is the composition of the ball itself?

A The one that we used on him is a chrome, cobalt, molybdenum, manganese, stainless steel alloy on the stem. And most of them, the head is the same composition. On the one that we used on him, we used a ceramic head.

Q Doctor, when was this surgery performed?

A 11-11-80.

APPLICABLE LAW

An injury to a scheduled member may, because of aftereffects, result in permanent impairment of the body as a whole and in turn form the basis for a rating of industrial disability. Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

ANALYSIS

The original injury in this case was a fracture of the femoral neck sustained as the result of a fall on June 21, 1978. As the result of aftereffects claimant required a total hip replacement.

Surgery by itself does not necessarily result in any impairment but some types of surgery are more likely to result in impairment than others.

In the decision of February 11, 1983, the undersigned stated:

> Claimant has met his burden in proving that his injury extends into the body, and he is entitled to have his injury rated industrially. Dr. Miller's testimony, which is uncontroverted, indicates that although claimant's acetabulum was not injured in his accident, in order to repair his injury and make a total hip replacement, the physicians removed a portion of claimant's acetabulum in order to insert an artificial socket. Since the pathology of the resulting surgery went beyond the scheduled member, claimant is entitled to industrial disability.

Dr. Miller's deposition also reveals that the muscles of claimant's buttock were impaired by the surgical procedure.

Clearly, claimant's resultant impairment went beyond his lower extremity. This is also supported by claimant's exhibits 6 and 8 which was submitted by claimant without objection at the January 24, 1983 hearing and defendants' exhibit A which was submitted by defendants at the January 24, 1983 hearing.

The aforementioned evidence by itself is sufficient to show claimant's disability was not limited to claimant's lower extremity. The statements of claimant and claimant's wife at the second evidentiary hearing only reinforced that determination. Claimant's pain was in his hip and back, not in his leg.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, based on the evidence presented and the principles f law previously stated, the following findings of fact and onclusions of law are made:

'INDING 1. On June 21, 1978 claimant had an injury which esulted in the fracture at the base of the head and neck unction of his left femur.

'INDING 2. Claimant's injury resulted in a left hip replacement.

'INDING 3. In replacing the hip, part of the acetabulum was emoved.

'INDING 4. As a result of the surgery the muscles of claimant's uttock were impaired as well as his hip.

'INDING 5. The physicians opined that claimant's impairment was .o the body.

'INDING 6. Claimant's complaints of pain were not to the lower :xtremity but were to the hip and back.

'INDING 7. As a result of his injury, claimant has suffered ermanent impairment which extends into the body.

:ONCLUSION A. Claimant is entitled to have his impairment rated .ndustrially.

ORDER

THEREFORE, the prior decision of the undersigned remains inchanged in its result.

Signed and filed this 17th day of June, 1987.

David E. Linquist

DAVID E. LINQUIST
DEPUTY INDUSTRIAL COMMISSIONER

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000795

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL S. McKEAG, a Minor, by GLORIA J. McKEAG, Guardian/Conservator, Claimant, vs. MAHASKA BOTTLING COMPANY, Employer, and GREAT AMERICAN INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 771096 D E C I S I O N O N D E A T H B E N E F I T S

INTRODUCTION

This is a proceeding for death benefits brought by Michael S. McKeag, a minor, by Gloria J. McKeag, guardian/conservator, against decedent Marlin McKeag's employer, Mahaska Bottling Company, and its insurance carrier, Great American Insurance Companies, to recover benefits under the Iowa Workers' Compensation Act, as a result of an alleged injury and death of August 17, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner at the office of the Division of Industrial Services, in Des Moines, Iowa, on December 15, 1986. But for briefs filed by both parties, the record was considered fully submitted at close of hearing. The division's file reveals that a first report of injury was filed October 22, 1984.

The record in this case consists of the testimony of Gloria McKeag, Michael S. McKeag, Sara McKeag, Gregory McKeag, Steve McKeag, Blane Mayfield, Lowell Weir, Melvin Wineger, Margaret Ann Wineger, Ray S. Wyland, Ronald A. Pettit, Jacob W. Roberts, Steven J. Muhl, and Bradley G. Muhl, as well as of claimant's exhibits 1 through 10 and defendants' exhibit A, C, D, E, F, G, H, I, J, and K. All objections to exhibits are overruled. Claimant's exhibit 1 is the birth certificate of Michael S. McKeag. Claimant's exhibit 2 is a certified copy of the decree of dissolution of marriage of Gloria J. McKeag and Marlin L. McKeag.

Claimant's exhibit 3 is a picture of the Cessna 170B airplane. Joint exhibit 4 is an aircraft hull and liability policy issued by Transport Indemnity Company dated February 29, 1984. Claimant's exhibit 5 is answer to interrogatory number 1 propounded to employer. Claimant's exhibit 6 is an article "Good as New" in the April 1985, Flying magazine, Volume 112, Number 4, page 28. Claimant's exhibit 7 is a job description for director of aviation. Claimant's exhibit 8 is answer to interrogatory number 2 on second set of interrogatories propounded to employer. Claimant's exhibit 9 is answer to interrogatory number 1, third set of interrogatories to employer. Claimant's exhibit 10 is the first report of injury submitted for wage information only. Defendants' exhibit A is a picture of a Cessna 170B airplane. Defendants' exhibit C is Marlin McKeag's spendable earnings records. Defendants' exhibit D is a list of checks written by Marlin McKeag to Pepsi Cola or Mahaska Bottling Company. Defendants' exhibit E is a 1984 aircraft log. Defendants' exhibit F is claimant's answers to request for admissions. Defendants' exhibit G is all interrogatory answers and productions of documents by claimant and employer. Defendants' exhibit H is a Federal Aviation Administration waiver. Defendants' exhibit I is 1980 through 1984 aircraft logs. Defendants' exhibit J is the November 25, 1986 deposition of John Muhl.

ISSUES

The issues to be resolved are:

1) Whether decedent received an injury which arose out of and in the course of his employment;

2) Whether decedent's surviving dependent is entitled to death benefits; and

3) Decedent's rate of weekly compensation.

Defendants assert the defenses of conduct in violation of the employer's rules and rash act.

REVIEW OF THE EVIDENCE

Marlin McKeag had been employed by Mahaska Bottling Company as its corporate pilot with the designated title of Director of Aviation since Spring 1981. A job description, revised as of December 8, 1983, stated the director was to become actively involved in learning and performing all functions of the company, including all departments; was to act as pilot and maintain the company aircraft; and was to train other employees. The job description also stated the position was responsible for communicating with corporate officers for the authorization of nonbusiness use, including nonbusiness passengers, of the aircraft by anyone. As corporate pilot, Marlin McKeag flew

Mahaska Bottling company officials to trips at the company's various holdings throughout the midwest. He also assisted the airplane mechanic on airplane maintenance, did other motor vehicle maintenance for the company, and was involved in quality control with the company.

Mahaska Bottling Company is owned by the Muhl family and manufactures and distributes Pepsi Cola products. Generally, members of the Muhl family are executive officers of the company. Mahaska Bottling Company owned three or four corporate aircraft in 1984, among them, a Cessna 170B, company's oldest and smallest aircraft. The Cessna 170B had been modified with a STOL kit and was used primarily for banner towing, a service Mahaska Bottling Company provided its customers. Banner towing involves flying "low and slow," generally in a populated area, with a banner attached to the plane for advertising or other messages. The Cessna 170B was a fixed gear, taildragger plane. A number of witnesses characterized that type of plane as more difficult to take off and land than tricycle gear planes. The Cessna 170 B had a Pepsi logo on its tailgate. The plane, like other Mahaska Bottling Company corporate aircraft, was housed at the Mahaska Bottling Company hangar at the Oskaloosa Airport. The airport was approximately twelve miles from the city of Oskaloosa itself where the Mahaska Bottling Company plant was located.

On August 17, 1984, at approximately 3:00 or 4:00 p.m., Marlin McKeag agreed to assist Mr. Jim Woodard, an elderly gentleman, who was not a Mahaska Bottling Company employee, locate a model airplane by searching for the model in the Cessna 170B. Mr. Woodard accompanied Mr. McKeag on that flight. The temperature on August 17, 1984 was approximately 95 degrees. There was a strong wind. McKeag was flying the airplane in the vicinity of the Oskaloosa Airport in a "low and slow" flight pattern. The plane crashed and both decedent McKeag and Mr. Woodard were killed. Mahaska Bottling Company officials had not expressly authorized the flight in search of the model airplane and were unaware of that flight until after they were informed of the crash. Neither Mahaska Bottling Company itself, nor any of its corporate members, had any other involvement with model airplanes. The company and its corporate officers had no expressed dealings with Mr. Woodard, but did know of his son, a local florist, from whom the company had on occasion purchased items. Items were also purchased from other florists in the Oskaloosa area.

Disputed evidence centers on whether decedent had expressed or implied permission of Mahaska Bottling Company to fly the Cessna 170B and whether Mahaska Bottling Company derived some benefit from decedent's flying that or other corporate craft for purposes not directly related to transporting Mahaska Bottling Company officials either generally or on August 17, 1984.

Gloria McKeag, decedent's former wife and mother and custodian

of his son, Michael S. McKeag, testified that decedent's duties were at the Mahaska Bottling Company's hangar at the Oskaloosa Airport when decedent was not flying corporate craft. She reported that decedent had flown the Cessna 170B to the Montezuma Airport where he then picked up his son, Michael, on Friday evenings on various occasions in 1981 through 1984. She indicated that decedent and his son then flew back to Montezuma on Sunday afternoons at the completion of the weekend visitation. She stated that decedent was never accompanied by a Mahaska Bottling employee on those flights and was generally alone. Mrs. McKeag testified that Michael had accompanied decedent and members of the Muhl family on a trip to the Bahamas in December 1981 and January 1982. She reported that the Muhl family had permitted Michael to accompany the family to Kansas City for a Michael Jackson concert in July 1984. Decedent had been ill at the time. The flight was on a rented plane with a noncorporate pilot. Mrs. McKeag further testified that decedent had flown family members about the Mahaska Airport in 1982 and that decedent with Michael and Gary McKeag and Sara McKeag had flown a larger Bonanza plane owned by Mahaska Bottling Company for an overnight trip to attend Gary McKeag's son's graduation in Minneapolis in Spring 1983. Mrs. McKeag testified that on August 15, 1984, Marlin McKeag flew the Cessna 170B from the Oskaloosa Airport to the Montezuma Airport where she and Michael McKeag picked up Marlin Mckeag and left to register Michael for junior high school. That flight occurred before 10:00 a.m. The plane was parked in the Montezuma Airport while the registration was taking place.

Michael S. McKeag confirmed his mother's testimony regarding the alleged visitation and other flights. He reported that decedent was usually alone and wearing his blue work uniform containing the Pepsi logo when he arrived at the Montezuma Airport for visitation. He reported that Ray Wyland, the Mahaska Bottling Company airplane mechanic, was once present at the hangar when he and his father returned from Montezuma. Michael McKeag testified that Mahaska Bottling Company executives knew of his visitation flights with his father as Michael had told them of the flights. He reported they raised no objections but did ask him how he liked flying with his father. Michael McKeag testified that in July 1984, he flew with decedent a number of times while staying with decedent. He indicated that one flight was in the Cessna 170 while banner towing was in progress and another flight was in the Bonanza to pick up parts in Des Moines. Michael McKeag testified that Bob Pax, a Mahaska Bottling Company sales manager, picked up the parts from the plane on the latter trip. Michael McKeag stated that decedent had never discussed plane use with him. Michael McKeag reported that decedent was generally at the hangar until 6:00 p.m. every day although he had to check in at the Mahaska Bottling plant each day. He reported that at the hangar, decedent washed and serviced planes, worked on flight books, and built banners. He reported that model airplanes often flew in the vicinity of the

Oskaloosa Airport. Michael McKeag acknowledged that his father had rented an airplane in 1983 to attend decedent's brother's wedding in Virginia.

Sara McKeag, decedent's sister-in-law, who is a photographer and dark room technician, stated that in Spring 1983 decedent at her request flew about a lake in the Cessna 170B to enable her to take aerial photos. She reported that in September 1983 decedent flew her about the Montezuma square in the Cessna 170B to enable her to take aerial photos. She reported that decedent had flown himself and she and Gary McKeag to an evening event in the Mahaska Bottling Company's Bonanza airplane with return and takeoff on the same evening. She reported that she and Gary McKeag had accompanied decedent to Des Moines in a corporate plane to pick up the Steve Muhl family after a Colorado ski trip. Sara McKeag reported that Steve Muhl did not object to her and Gary's presence on the plane. Sara McKeag indicated that decedent had advised her that he had "no problem" in plane use since his employers liked him to keep current. She indicated she was also present for the Minneapolis graduation flight in Spring 1983.

Gary McKeag, Sara's husband and decedent's brother, stated that decedent had open usage of the Cessna 170B although he had to get approval for other planes. He corroborated other testimony regarding various flights and reported that decedent had had to get Mahaska Bottling Company's approval of the Spring 1983 graduation flight and had had to pay for gas used. He testified that at the crash site, John Muhl, president of Mahaska Bottling Company, had stated decedent had no permission to fly the Cessna 170B.

Blane Mayfield, owner of De May Aircraft Adjusting Company for twenty-four years, investigated the August 17, 1984 crash. Mr. Mayfield testified that Jake Roberts, administrative director for Mahaska Bottling Company, told Mayfield that as corporate pilot, decedent could fly the plane almost anytime he wished. Mayfield also stated that airport personnel had said "they" could fly the Cessna 170B whenever they wanted. Mayfield reported he assumed "they" meant Mahaska Bottling Company employees.

Steve McKeag, decedent's brother who is a pilot and a captain in the United States Air Force, testified that he had flown with decedent on three occasions. He reported that in Spring 1982, he and decedent flew to an antique airfield in southern Iowa. No Mahaska Bottling Company officials were then present. He reported that in Spring 1983, decedent took him on a flight about the hangar area after calling Mahaska Bottling Company and "telling them where he was going." Steve McKeag reported that John Muhl then asked Steve McKeag how he had liked flying with decedent. Steve McKeag testified that he had once

also accompanied decedent and Mahaska Bottling Company executives on a business trip to Minneapolis in another corporate plane. Steve McKeag testified that decedent had told him that decedent had greater leeway regarding personal use of the Cessna 170B in that the larger planes cost too much to operate. He testified that decedent had reported he could not log all of his Cessna 170B flying hours without "bumping" aviation pilot specifications or overflying his crew and thereby jeopardizing his pilot's license. Steve McKeag testified that Jake Roberts had told him decedent was allowed to use the Cessna 170B for personal use but that John Muhl had said decedent had no permission to use the Cessna 170B.

Melvin Wineger, the fixed base operator and airport manager at the Oskaloosa Airport, has a home located at the airport. Mr. Wineger testified that he knew of two or three times when decedent had picked up his son for visitation using the Cessna 170B while employed with Mahaska Bottling Company. Wineger testified that decedent paid cash for aviation gas purchased when he used the plane for his personal purposes; decedent otherwise used a Mahaska Bottling Company credit card for gas purchased for other purposes. Aviation gas cost approximately 2.00 per gallon in 1984. Three to five gallons of aviation gas would be used on one-half hour of flight of the Cessna 170B.

Margaret Ann Wineger, Melvin Wineger's wife, reported that he observed the crash on August 17, 1984 from her home and later called John Muhl to inform him of the crash. She stated that John Muhl seemed surprised when told of the crash and reported that decedent had no permission to be flying.

Steven J. Muhl, vice president of operations for Mahaska Bottling Company, reported that per his job description, decedent was to communicate with corporate officers for authorization of nonbusiness use of all planes including having nonbusiness passengers in the aircraft. Steven Muhl stated that decedent was told within six months of decedent's employment that John Muhl had to approve all personal use of aircraft. Steve Muhl indicated that decedent had asked about and been denied personal use of aircraft on several occasions and that decedent subsequently rented planes for personal use. He testified that the decedent's son's accompanying decedent on aircraft had been approved on a number of times but that he was unaware of the visitation trips or of the photography trips and did not recollect other persons being in the plane on other occasions. He reported that had he been aware of the visitation and other trips, decedent would have been reprimanded. Steve Muhl reported that Jake Roberts coordinated all corporate flights and that only approved, nonemployee passengers were allowed. He stated that decedent had had no permission for the final flight or for carrying Mr. Woodard as a passenger and that decedent had no right to either fly the plane or allow a passenger on a flight without corporate approval.

employees.

Ronald A. Pettit, general manager of Mahaska Bottling Company, and a corporate employee for approximately thirty years, stated that he had never discussed personal use of company craft with decedent, but to his knowledge claimant had no personal use rights in company craft. He reported that he understood that Steve, Bradley, or John Muhl or himself could authorize aircraft use. Mr. Pettit stated he had never authorized use of the 170B for goodwill passenger flights or for other nonbusiness purposes. He reported that decedent had never complained to him that the 170B needed greater use for maintenance or that decedent was not able to log all of his flight time.

Jacob William Roberts, administrative director of Mahaska Bottling Company, coordinated use of company planes and flight scheduling. Roberts received aircraft logs kept by decedent. Roberts reported that decedent had never told him he was not keeping track of all time flown because he may have flown too many hours. Roberts reported that the logs did not indicate any personal flights. Roberts characterized personal flights without corporate officers' permission as a violation of company rules. He stated decedent had no independent judgement regarding aircraft use. He reported that decedent would have been severely reprimanded for an initial violation of the personal use rule and terminated for a second violation. Roberts stated that decedent did not complain that he was not flying sufficient hours for personal proficiency or for plane maintenance. Roberts testified that he told Mayfield that decedent needed corporate officers' approval before he could have personal use of the plane. Roberts testified he had a vague recollection of a conversation with Steve McKeag in which he told McKeag it had been determined that decedent was not on Mahaska Bottling Company business at the time of the fatal flight and that, therefore, workers' compensation was not appropriate.

Ray S. Wyland, a certified aircraft mechanic since approximately 1973 and Mahaska Bottling Company's corporate aircraft mechanic in 1984, testified that decedent had never complained that the Cessna 170B was not getting enough use or that he needed greater flying hours in the plane to increase his own proficiency. Wyland testified that neither decedent nor Mahaska Bottling Company officials had indicated that decedent had personal use rights in the 170B and denied that he had ever seen decedent and his son leave the 170B. He reported he had seen Michael McKeag in the hangar area at times and reported that on some Friday nights decedent remained at the hangar after Wyland left at approximately 5:30 or 6:00 p.m. Decedent had a key to the hangar and was authorized to be in the hangar area. Wyland reported that on one occasion he had seen Michael McKeag with his father in a banner towing flight and stated that flights in the airport perimeter were not uncommon. Wyland agreed that

decedent's aircraft logs for 1984 did not record any personal use of the plane. He stated he knew of no plane use not reported to him or logged but that trips which were not reported or reported on authorized trips were possible.

Lowell Weir is an engineer and pilot with Quinn Machine and Foundry. He has piloted planes since 1955 and has been a flight instructor and a fixed base operator. Lowell has had over 1000 hours flight time in taildraggers; he believes they are more difficult to fly than tricycle planes. He reported that a STOL equipped plane is equipped for short takeoff and landings and, therefore, can maintain slower speeds but is harder to take off and needs to be slowed down differently than a non STOL equipped plane. He stated that in banner towing, hooking the banner is difficult and extra power is needed to overcome the power drag. He characterized the banner towing pilot as needing a good feel for the plane at pickup time and as using a low and slow flight pattern which could be quite dangerous for a new or unpracticed pilot. Weir agreed that increased flight time increases the pilot's proficiency in the plane in that the pilot is then more knowledgeable about the idiosyncrasies of the particular plane. He described decedent's flight of August 17, 1984 as a low and slow flight in some respects similar to banner towing flights. Weir agreed, however, that flight within 150 to 200 feet of the ground at a very slow speed is not recommended because one can see better at 300 to 400 feet and also has greater reaction time at that height.

Weir reported that a frequently flown plane requires less frequent oil changes and has less parts corrosion than does a less frequently flown plane. He reported that both the engine and the avionics system will last longer if the plane is flown more frequently and kept in a warm place. He characterized ground running as not as good as flight time because it doesn't assure uniform air flow and cooling throughout the plane. He reported that at least twenty hours of flight time per month is generally recommended and that the Cessna 170B was flown only 7.8 hours in the 30 days immediately prior to August 17, 1984. He opined that the engine and the radio especially could have benefited from decedent's final flight.

Steven McKeag testified that he has a total of 2,200 hours flying time and is familiar with avionics, engine, and air frame maintenance on airplanes. He is on call for air force safety investigations and investigated the August 17, 1984 accident. He admitted, however, that that was his first full accident investigation. He agreed that taildragger and STOL kit flying both required more skill and have a much smaller margin of error than tricycle flying. He opined that the nature of decedent's August 17, 1984 flight would have improved both his banner towing and taildragger flying skills. He opined that 7.6 hours of flight time in thirty days immediately prior to August 17,

1984 was a very low frequency of flight time for a pilot in a demanding aircraft used for banner tows. He opined that decedent's final flight would also have benefited the 170B from a maintenance perspective.

Steven McKeag reported that he had been unable to determine the exact altitude of the August 17, 1984 flight. He reported that from the visual stats available, the altitude was from 150 to 400 feet, however. He opined that the crash occurred because the 170 was being flown at an altitude which did not permit safe recovery of the aircraft. McKeag reported that the flight was always within one-fourth mile of the airport. He reported that the recommended altitude for the Mahaska Airport area was 800 feet, but stated that there was no minimum altitude restriction. McKeag stated that test flying following maintenance of the plane was common and would have occurred within the airport vicinity.

Gary McKeag testified that he has been a licensed pilot since 1970 and generally agreed that increased flight time increases pilot proficiency and that low and slow flying leaves little recourse for altitude changes. He agreed with the above stated testimony regarding maintenance benefits from frequent flights of a plane.

Ray Wyland described the banner towing operation stating that pickup of the banner occurs with the plane's flaps fully retracted and that, therefore, the banner tow pickup differs from ordinary takeoff and landing maneuvers. He reported that he was primarily in charge of maintenance of the Mahaska Bottling Company planes with assistance from decedent. The Cessna 170B had a FFA requirement of 2000 hours of time before overhaul. Wyland reported that at 2000 hours the Cessna's motor was taken apart and inspected with needed parts replaced and that between 2000 hours, the oil was changed and plugs and time mags were cleaned. He agreed generally that increased oil changes are necessary with decreased flight and that disc brake and other parts wear with decreased flight time. An increased flight time increases air movement through the air frame and thereby decreases corrosion in the plane body and moisture in the avionics system. He opined, however, that low, slow flying was not good for the plane because decreased engine cooling is possible in such flight. He further opined that there is no significant difference in maintenance in a plane flown less than 20 hours per month and stated decedent never complained about the 170B's performance or that flight time in the 170B was insufficient for proper air flow through the plane. Wyland stated that aircraft flight logs would reveal the 170B's test flights. No test flight is recorded for August 17, 1984. He stated it was possible that a test flight of less than ten minutes would not be logged. Wyland stated that a plane might be flown after washing but, if so, the flight would be for reasons other than to dry the plane.

Mel Wineger characterized the 170B as in "tip top shape" and as having very high quality maintenance prior to August 17, 1984. He stated decedent had never indicated either decedent or the 170B needed increased flight time for pilot proficiency or plane maintenance. Wineger opined decedent was flying at an altitude of 100 to 200 feet at the time of the fatal crash. He reported that that altitude was not safe in that it was too low and too slow for a hot windy day. He reported that under such conditions, low and slow flight is hard on the aircraft, heats up the plane, and prevents sufficient air flow through the plane. Wineger opined decedent was not increasing his piloting skills on the August 17, 1984 flight and stated there was no evidence decedent was performing either a "touch and go" or "stop and go" takeoff maneuvers on August 17, 1984. Wineger indicated it was not a standard practice to fly an aircraft after washing to dry it. He agreed decedent commonly tested planes following maintenance by flying them about the airport. Wineger characterized the 170B as somewhat distinctive but reported that in a banner tow, it would not be recognized from the air. Margaret Wineger testified that she knew decedent once took the plane up to dry it after washing. Both Bradley and John Muhl testified that one never flies a plane to dry it and that decedent was not authorized to fly the 170B for that purpose.

Jacob Roberts testified that permission was required for test flights in that all maintenance had to be cleared through corporate executives with permission for a test flight implied in permission for performance of the maintenance itself.

Ronald Pettit testified that Mahaska Bottling Company has a $50,000 to $60,000 annual advertising budget and is concerned with finding means to attract more Pepsi consumers.

Steven Muhl opined that generally maintenance and operating expenses for a plane increased with greater flight time. He stated the 170B costs less to operate because it was flown less than other planes. Muhl stated that airplane maintenance schedules are determined by Federal Aviation Association regulations and the aircraft type. He reported that decedent never indicated that the 170B was not flown sufficiently or was deteriorating from lack of use. Muhl agreed that the 170B was somewhat distinctive and identifiable when on the ground. He reported that the Pepsi logo lettering on the plane was only ten to twelve inches high, however. He agreed that planes are not normally flown to dry them after washing. He further agreed that maintenance test flights needed approval in that the maintenance itself would need approval. He agreed that tail dragger and STOL kit equipped planes are harder for most people to take off and land and require different techniques than do tricycle planes.

Gloria McKeag testified that decedent had told her he earned

between $20,000 and $24,000 per year. The first report of injury reflects a gross wage of $490 per week. Jake Roberts identified exhibit C as a recording of decedent's spendable earnings. The exhibit defines spendable earnings as gross pay less federal, state, and payroll taxes. Under the exhibit, decedent's spendable earnings in each biweekly period from August 16, 1984 to May 24, 1984 were $679.36.

Exhibit 7 is decedent's job description as director of aviation. Item 5 of IV, Communications, under the description indicates that the director of aviation will communicate with corporate officers for the authorization of nonbusinss use, including nonbusiness passengers, of the aircraft by anyone. Item 12 of V, Job Description, reports that the director of aviation is responsible for maintaining the necessary travel expense records and for reporting only company business related expenses for reimbursement.

Photos of the 170B in evidence do not indicate that the markings of the plane are so distinctive or that the Pepsi logo is so obvious that persons viewing the plane from the ground at normal flight altitude would recognize it as associated with the products of Mahaska Bottling Company.

Exhibit 6, the article "Good as New," reiterates the propositions regarding the benefits of frequent flights on plane maintenance elicited in testimony.

Exhibit D records checks decedent issued to either Pepsi Cola or Mahaska Bottling Company. Exhibit K reports that no records exist for checks numbers 4150, 3912, and 3911 in the amounts of $257.51, $52.25, and $1,373.99 respectively. The checks there are characterized as reimbursement by Mahaska Bottling Company to decedent, for personal expenses paid while decedent was out of town for extended periods. The interrogatory indicates that while decedent was away from home over the holidays in 1983 and 1984, the company's office staff paid some of his personal expenses to avoid past due situations. It reports decedent repaid those amounts with the above enumerated checks. All other checks which decedent issued the company were for amounts of $100 or less. Check number 4150 is dated February 7, 1984; check number 3912 is dated February 12, 1983; and check number 3911 is dated February 12, 1983.

Exhibit H, a Federal Aviation Administration certificate of waiver or authorization for banner towing indicates, under special provisions for banner towing, that passenger carrying is prohibited except for essential crew members and trainees.

Exhibit 4, an aircraft hull and liability policy issued by the Transport Indemnity Company for the Cessna 170B indicates on page 4, under purposes of use that the aircraft will be used for

"pleasure and business" with the term "pleasure and business" defined as personal and pleasure use and use in direct connection with the insured's business, excluding any operation for which a charge is made. The aircraft is also stated to be used for banner towing.

The balance of the evidence including aircraft flight logs was reviewed and considered in the disposition of this matter.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that decedent received an injury on August 17, 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).

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, 246 Iowa 402, 68 N.W.2d 63.

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure, 188 N.W.2d 283, Musselman, 261 Iowa 352, 154 N.W.2d 128.

Section 85.61(6) provides:

> The words "personal injury arising out of and in the course of the employment", shall include injuries to employees whose services are being performed on, in, or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

Our supreme court has stated:

[a]n injury occurs in the course of the employment when it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of his employer....

The test is whether the act is "in any manner dictated by the course of employment to further the employer's business."....

As a reasonable limitation on the scope of employment-related entertainment, "the authority of the particular employee to undertake entertainment or recreational activities on behalf of his employer must be genuine." 1A A. Larson, Workmen's Compensation § 22.21, at 5-82 (1978). Larson states that the factors relevant to a determination of the existence of such authority include the degreee to which the recipient of the entertainment is in a position to make decisions that benefit the employer, whether authority was actually conferred on the employee to engage in the entertainment, and the extent to which the employer pays for the cost of the entertainment. Id. at 5-82 through 5-83.

Farmers Elevator Company v. Manning, 286 N.W.2d 174, 177 (Iowa 1979). (Citations omitted.) (Emphasis is the court's.)

Recreation or social activities are in the course of employment when the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation or social life. 1A, Larson, Workmen's Compensation § 22.

The Workers' Compensation Act is to be liberally construed in favor of the worker, but under some circumstances the worker

may forfeit his right to benefits by conduct in violation of his employer's instructions. The test is whether the employee was doing what a person so employed may reasonably do within the time of the employment and at a place he may reasonably be during that time. Buehner v. Hauptly, 161 N.W.2d 170, 172 (Iowa 1968).

The employee's negligence, of course, of itself is not sufficient to result in forfeiture of benefits. Our court has held, however, that an employee who takes himself out of the course of his employment by deliberately and unjustifiably going into a place where he knows he is positively and invariably negligent. Enfield v. Certain-Teed Products Company, 211 Iowa 1004, 1015, 233 N.W. 141 (1930). Similarly, our court has held that a carpenter employed in construction of a rain elevator, who was repeatedly instructed not to ride a hoist, and who was killed while using the hoist to descend from the top of the elevator, was at a prohibited place; that is, on the hoist. Hence, his death did not arise out of and in the course of his employment and workers' compensation benefits could not be recovered. Buehner at 173.

In so stating, the court stated:

> Our decisions--as well as those of other jurisdictions--are not completely consistent in dealing with so-called violation of instruction cases. It is sometimes a thin line which divides a finding that the ultimate act itself is prohibited from one that the act was proper and was merely performed contrary to instructions. In the first case compensation is denied; in the second it is paid. We hold a reasonable interpretation of the facts here leads inevitably to the conclusion decedent was at a prohibited place--on the hoist--and was not merely doing a prescribed task--getting to the ground from the platform--in a proscribed manner.
>
> We cannot adopt the argument that once decedent rightfully established himself on the elevator platform any means of descent could be nothing more than negligence in the performance of a service required by, or incidental to, his employment.
>
> When decedent, in direct violation of his employer's orders, left the platform and suspended himself from the hoist 70 feet above the gound [sic], he was indeed at a place where he was expressly prohibited from being and where he could not reasonably be expected to be. The fatal injury resulting therefrom did not arise out of and in the

course of his employment. (Citations omitted.)

Our supreme court expressly overruled the unusual and rash act doctrine in Hawk v. Jim Hawk Chev.-Buick, Inc., 282 N.W.2d 84, 91 (Iowa 1979).

Additionally, we consider 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 memeber 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).

At the onset we do not believe claimant has established that his decedent had private use rights in the Cessna 170B or in other corporate planes. While claimant's witnesses credibly reported, decedent's private use of the 170B and other aircraft that in itself is not sufficient to establish any authorized private use. Even if the testimony of the Muhl family and of other corporate officials is not considered, other, more objective evidence weighs against decedent having authorized private use of the Cessna 170B. Margaret Winegar, a disinterested party, testified John Muhl appeared surprised when she told him by telephone of the crash. He stated decedent had no permission to be flying the Cessna 170B. While Muhl was then not actually observing the crash, this conversation occurred almost immediately after the crash and was Muhl's first knowledge of the crash. Hence, Muhl's assertion that decedent did not have permission to fly bears many of the characteristics of an excited utterance. See Iowa Rule of Evidence 803(2) and comments thereon, Iowa Code Annotated. 1983 Special Pamphlet. We believe that while John Muhl had not witnessed the crash, simply hearing of it in a short telephone conversation with a relative stranger was likely sufficient to produce a condition of excitement such that Muhl's

capacity of reflection was stilled and an utterance free of conscious fabrication was produced. Id. Therefore, we give great weight to Ms. Wineger's testimony that Muhl when informed of the crash stated decedent had no permission to be flying. Likewise, decedent's flight logs do not record any private use of the Cessna 170B. We recognize that Steven McKeag reported decedent told him decedent was unable to record all hours he flew on the Cessna 170B because he would violate FAA regulations were he to do so. We find it unusual that decedent would elect always to not log private use had he actual private use rights, however. That election raises questions as to whether decedent was attempting to conceal information both from the FAA and from his employers. The election to not log private use hours further clouds the issue of decedent's alleged private use rights. Likewise, Mel Wineger testified decedent paid in cash for all aviation gas he purchased for private use of corporate planes. That fact, without more, might simply reflect decedent's preferred payment method. When coupled with decedent's failure to log private use hours, however, it further suggests an attempt to conceal the private use from decedent's employers.

In his brief, claimant argues that decedent could not have flown planes so openly without defendants' consent or at minimum their acquiescense. Claimant's proposition has some merit. On the other hand, decedent's personal flights were relatively infrequent when considered over the course of his entire employment with defendants. Many were relatively brief; many occurred either near the airport environment or at locations removed from Oskaloosa; many took place at night. Most did not involved passengers who would readily have access to decedent's employers or who would readily communicate decedent's activities to his employers. Hence, decedent's private use of corporate planes was not as open and notorious as it may appear at first blush. Indeed, the location of the hangar at the Oskaloosa airport, some twelve miles from the city of Oskaloosa was such that decedent could have flown planes without the permission or knowledge of his employers with relative ease and with only limited chance of discovery. We remain unconvinced that this was not the case. Furthermore, decedent's job description explicitly states decedent was to obtain permission to fly corporate aircraft and to carry nonemployee passengers. The evidence claimant presented was insufficient to show that that explicit instruction had been orally modified even as regards the Cessna 170B. Indeed, the tone of testimony by several defendant witnesses suggested the Cessna 170B enjoyed a special place in John Muhl's affections as the oldest corporate plane and as the first plane John Muhl had purchased. That fact again makes it unlikely that decedent's employers had granted decedent private use rights in the Cessna 170B. Furthermore, the evidence does not show that the costs of operating the Cessna 170B were so minimal as to readily permit decedent private use of the plane. Aviation gas cost $2.00 per gallon in 1984. Three to

five gallons were needed for a one-half hour flight of the Cessna 170B. Full maintenance was required after 2000 flight hours. Oil and other necessary engine fluids would also be used in flight. The evidence does not show claimant always purchased gas before or after private flights or that he in any way reimbursed the company for other flight costs related to personal flights. (Defendants' contention that the three otherwise unaccounted for checks decedent issued defendants related to reimbursement of personal expenses the company paid for decedent while decedent was working away from home over the Christmas holidays is substantiated by the dates on the checks. Each was issued in early February of the year in question.) While decedent's actual salary was modest, it appears unlikely his employer would have given decedent carte blanche oral permission to operate a cost-consuming instrumental at will while expressly forbidding such operation in writing. That such an arrangement would have been unusual is supported by the fact that both Sara McKeag and Steven McKeag questioned decedent as to his alleged private use rights. We note that a number of claimant's witnesses testified that decedent's employers were aware of decedent's private flights and spoke with the witnesses regarding those flights or were present when the witnesses flew on the plane. We do not doubt the credibility of those witnesses. We simply do not have sufficient understanding of the context in which the alleged remarks were made or in which the alleged common flights were made to believe that those happenings are sufficient to override the objective evidence tending to show claimant did not have private use rights in the Cessna 170B. Indeed, preponderance of the evidence means greater weight of evidence; that is the evidence of superior influence or efficacy. Bauer v. Reavell, 219 Iowa 1212, 260 N.W. 39 (1935). Claimant's burden as to proof is not discharged by creating an equipoise. Volk v. International Harvester Co., 252 Iowa 298, 106 N.W.2d 649 (1960). Claimant at best has created an equipoise. Hence, his burden of showing private use rights is not carried.

The evidence does show that decedent in his job description was required to receive express authorization for any flights. In the absence of preponderant evidence showing that his employer either overlooked or orally modified that provision, we are compelled to find that express authorization was required before decedent could use corporate planes. We note that common sense supports that finding in that employers generally do not grant their employees free hand use of expensive company equipment.

Having established that decedent had no private use rights, our in the course of issue is narrowed to the question of whether an employee who is operating an airplane which is owned by his employer and in which the employee has no private use rights can be said to be within the period of his employment at a place where the employee reasonably may be in performing his duties or something incidental thereto while using the plane

without the employer's express authorization to transport a private citizen in order to assist that citizen in searching for a model airplane owned by the citizen and in which the employer has no direct interest.

Claimant argues that decedent was in the course of his employment because either decedent was flying the plane to dry it after washing it or because the employer benefited from decedent's use of the plane in the fatal crash. He first argues that the employer benefited because decedent gained greater proficiency in flying a difficult plane used for a difficult purpose (banner towing) from the final flight. He next argues that the employer received a benefit in that the Cessna 170B's maintenance costs were reduced by frequent flights. He finally argues that the employer received a benefit in that public goodwill was furthered by transport of the private citizen to search for the model airplane.

We first consider the drying off question. The evidence is sufficient to establish that decedent had stated he intended to wash the Cessna 170B on the afternoon of August 17, 1984. There is no evidence other maintenance of the plane was intended or authorized for that afternoon. There is evidence decedent at least on one occasion flew the plane to dry it after washing. There is also evidence establishing that flying a plane to dry it would not be standard or good practice and that decedent was not authorized to fly the plane to dry it. Assuming that decedent did wash the plane and did fly it to dry it, we face the thin line which divides a finding that the ultimate act was prohibited from one that the act was proper and was merely performed contrary to instructions. We believe the act of flying the airplane to dry it was an act itself prohibited. To paraphrase the court in Buehner v. Hauptly, we cannot adopt the argument that once decedent rightfully washed his employer's plane any means of drying the plane could be nothing more than mere negligence in the performance of a service required by, or incidental to his employment. When decedent, in direct violation of his employer's rules regarding plane usage, flew the plane without authorization, he was indeed at a place where he was expressly prohibited from being and where he could not reasonably be expected to be. The fatal injury resulting therefrom could not arise in the course of decedent's employment as a result of flying the plane to dry it.

We consider the first and second employer benefit arguments together. We again find that the evidence is insufficient to clearly show that decedent's piloting proficiency was increased by the fatal flight or that engine maintenance was lessened by the fatal flight. Evidence in the record establishes decedent himself never expressed concerns as to needing increased flight time for his own proficiency or for plane maintenance. Likewise, Mr. Wyland, the corporate airplane mechanic, did not believe

capacity of reflection was stilled and an utterance free of conscious fabrication was produced. Id. Therefore, we give great weight to Ms. Wineger's testimony that Muhl when informed of the crash stated decedent had no permission to be flying. Likewise, decedent's flight logs do not record any private use of the Cessna 170B. We recognize that Steven McKeag reported decedent told him decedent was unable to record all hours he flew on the Cessna 170B because he would violate FAA regulations were he to do so. We find it unusual that decedent would elect always to not log private use had he actual private use rights, however. That election raises questions as to whether decedent was attempting to conceal information both from the FAA and from his employers. The election to not log private use hours further clouds the issue of decedent's alleged private use rights. Likewise, Mel Wineger testified decedent paid in cash for all aviation gas he purchased for private use of corporate planes. That fact, without more, might simply reflect decedent's preferred payment method. When coupled with decedent's failure to log private use hours, however, it further suggests an attempt to conceal the private use from decedent's employers.

In his brief, claimant argues that decedent could not have flown planes so openly without defendants' consent or at minimum their acquiescense. Claimant's proposition has some merit. On the other hand, decedent's personal flights were relatively infrequent when considered over the course of his entire employment with defendants. Many were relatively brief; many occurred either near the airport environment or at locations removed from Oskaloosa; many took place at night. Most did not involved passengers who would readily have access to decedent's employers or who would readily communicate decedent's activities to his employers. Hence, decedent's private use of corporate planes was not as open and notorious as it may appear at first blush. Indeed, the location of the hangar at the Oskaloosa airport, some twelve miles from the city of Oskaloosa was such that decedent could have flown planes without the permission or knowledge of his employers with relative ease and with only limited chance of discovery. We remain unconvinced that this was not the case. Furthermore, decedent's job description explicitly states decedent was to obtain permission to fly corporate aircraft and to carry nonemployee passengers. The evidence claimant presented was insufficient to show that that explicit instruction had been orally modified even as regards the Cessna 170B. Indeed, the tone of testimony by several defendant witnesses suggested the Cessna 170B enjoyed a special place in John Muhl's affections as the oldest corporate plane and as the first plane John Muhl had purchased. That fact again makes it unlikely that decedent's employers had granted decedent private use rights in the Cessna 170B. Furthermore, the evidence does not show that the costs of operating the Cessna 170B were so minimal as to readily permit decedent private use of the plane. Aviation gas cost $2.00 per gallon in 1984. Three to

five gallons were needed for a one-half hour flight of the Cessna 170B. Full maintenance was required after 2000 flight hours. Oil and other necessary engine fluids would also be used in flight. The evidence does not show claimant always purchased gas before or after private flights or that he in any way reimbursed the company for other flight costs related to personal flights. (Defendants' contention that the three otherwise unaccounted for checks decedent issued defendants related to reimbursement of personal expenses the company paid for decedent while decedent was working away from home over the Christmas holidays is substantiated by the dates on the checks. Each was issued in early February of the year in question.) While decedent's actual salary was modest, it appears unlikely his employer would have given decedent carte blanche oral permission to operate a cost-consuming instrumental at will while expressly forbidding such operation in writing. That such an arrangement would have been unusual is supported by the fact that both Sara McKeag and Steven McKeag questioned decedent as to his alleged private use rights. We note that a number of claimant's witnesses testified that decedent's employers were aware of decedent's private flights and spoke with the witnesses regarding those flights or were present when the witnesses flew on the plane. We do not doubt the credibility of those witnesses. We simply do not have sufficient understanding of the context in which the alleged remarks were made or in which the alleged common flights were made to believe that those happenings are sufficient to override the objective evidence tending to show claimant did not have private use rights in the Cessna 170B. Indeed, preponderance of the evidence means greater weight of evidence; that is the evidence of superior influence or efficacy. Bauer v. Reavell, 219 Iowa 1212, 260 N.W. 39 (1935). Claimant's burden as to proof is not discharged by creating an equipoise. Volk v. International Harvester Co., 252 Iowa 298, 106 N.W.2d 649 (1960). Claimant at best has created an equipoise. Hence, his burden of showing private use rights is not carried.

The evidence does show that decedent in his job description was required to receive express authorization for any flights. In the absence of preponderant evidence showing that his employer either overlooked or orally modified that provision, we are compelled to find that express authorization was required before decedent could use corporate planes. We note that common sense supports that finding in that employers generally do not grant their employees free hand use of expensive company equipment.

Having established that decedent had no private use rights, our in the course of issue is narrowed to the question of whether an employee who is operating an airplane which is owned by his employer and in which the employee has no private use rights can be said to be within the period of his employment at a place where the employee reasonably may be in performing his duties or something incidental thereto while using the plane

without the employer's express authorization to transport a private citizen in order to assist that citizen in searching for a model airplane owned by the citizen and in which the employer has no direct interest.

Claimant argues that decedent was in the course of his employment because either decedent was flying the plane to dry it after washing it or because the employer benefited from decedent's use of the plane in the fatal crash. He first argues that the employer benefited because decedent gained greater proficiency in flying a difficult plane used for a difficult purpose (banner towing) from the final flight. He next argues that the employer received a benefit in that the Cessna 170B's maintenance costs were reduced by frequent flights. He finally argues that the employer received a benefit in that public goodwill was furthered by transport of the private citizen to search for the model airplane.

We first consider the drying off question. The evidence is sufficient to establish that decedent had stated he intended to wash the Cessna 170B on the afternoon of August 17, 1984. There is no evidence other maintenance of the plane was intended or authorized for that afternoon. There is evidence decedent at least on one occasion flew the plane to dry it after washing. There is also evidence establishing that flying a plane to dry it would not be standard or good practice and that decedent was not authorized to fly the plane to dry it. Assuming that decedent did wash the plane and did fly it to dry it, we face the thin line which divides a finding that the ultimate act was prohibited from one that the act was proper and was merely performed contrary to instructions. We believe the act of flying the airplane to dry it was an act itself prohibited. To paraphrase the court in Buehner v. Hauptly, we cannot adopt the argument that once decedent rightfully washed his employer's plane any means of drying the plane could be nothing more than mere negligence in the performance of a service required by, or incidental to his employment. When decedent, in direct violation of his employer's rules regarding plane usage, flew the plane without authorization, he was indeed at a place where he was expressly prohibited from being and where he could not reasonably be expected to be. The fatal injury resulting therefrom could not arise in the course of decedent's employment as a result of flying the plane to dry it.

We consider the first and second employer benefit arguments together. We again find that the evidence is insufficient to clearly show that decedent's piloting proficiency was increased by the fatal flight or that engine maintenance was lessened by the fatal flight. Evidence in the record establishes decedent himself never expressed concerns as to needing increased flight time for his own proficiency or for plane maintenance. Likewise, Mr. Wyland, the corporate airplane mechanic, did not believe

frequent flying had any significant impact on plane maintenance. He further testified that decedent's flying pattern of August 17, 1984 was not such as would increase decedent's proficiency as a banner towing pilot. Mel Winegar, the fixed base operator and a disinterested witness, testified decedent was not increasing his piloting skills by maneuvers performed in the fatal flight. He further opined that decedent's August 17, 1984 flight was hard on the aircraft in that it was too low and too slow for sufficient air flow through the plane on a hot windy day. Hence, we do not believe claimant has established decedent's employer received benefits of increased pilot proficiency or decreased plane maintenance costs by the August 17, 1984 flight. Assuming arguendo that those benefits had been established, however, we again are faced with the fact that nonauthorized use of the plane was expressly prohibited. All parties agree decedent's use of August 17, 1984 was not expressly authorized. We find the Buehmer v. Hauptly analysis again fitting. Decisions as to whether the Cessna 170B could or should be flown to increase pilot proficiency or decrease plane maintenance were decisions the employer and not the employee was authorized to make. We do not believe any benefit from increased proficiency or decreased maintenance costs decedent's employers might have received through decedent's nonauthorized August 17, 1984 flight was sufficient to override the fact that flying the plane without authorization was a prohibited act that removed decedent from the course of his employment and from the protection of our Workers' Compensation Act.

We consider claimant's last benefit argument, the public goodwill argument. We note that our court has accepted this argument and the related employer entertainment argument in appropriate cases. See Yates v. Humphrey, 218 Iowa 792, 255 N.W. 639 (1234); Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979), Danico v. Davenport Chamber of Commerce, 232 Iowa 318, N.W.2d 619 (1942). Initially, we note that claimant's case does not fall squarely within the bounds of Yates v. Humphrey. Mr. Woodard was not on the employer's property with the employer's express authorization nor was Woodard performing a service of direct benefit to the employer when decedent assisted him. Hence, we feel claimant's case is more analogous to the employee entertainment cases. We will analyze it in a similar manner. We note the authority of the employee to undertake the activity in his employer's behalf must be genuine. We believe that when the factors relevant to that determination are considered, claimant does not establish that his decedent had such genuine authority. First, we consider the degree to which Woodard as recipient of the model plane search flight was in a position to make decisions benefiting Mahaska Bottling Company. The evidence demonstrates Woodard's ability to make decisions benefiting the employer was limited only to puchasing more soft drinks himself and encouraging his acquaintances to puchase more and also to encouraging his son, the florist, to deal fairly with Mahaska

Bottling Company in the son's business transactions with the company. We believe that any benefit the company received from the August 17, 1984 flight is far offset by the actual cost to the company if it were to allow members of the general public access to its corporate planes. Thus, that factor mitigates against decedent having had genuine authority to undertake the August 17, 1984 flight on his employer's behalf. Likewise, the record shows decedent had no express authority to fly the Cessna 170B on August 17, 1984. Indeed, decedent was prohibited from flying the plane without express authorization and was prohibited from flying noncorporate passengers without express authorization. Hence, no authority was actually conferred on decedent to fly in search of the model plane. We believe decedent's employer would have paid most costs of the flight but for possible aviation gas used. We believe that fact does not act in claimant's favor, however, in that in this case the cost of authorizing the flight must be balanced against the benefit the employer received. As stated, the benefit was too limited to confer genuine authority to fly the plane on decedent. Again, we are faced with the fact that decedent was engaged in a prohibited act when he flew the Cessna 170B on August 17, 1984.

We agree that in exceptional circumstances such as those Professor Larson discusses in section 17:00 et seq. of his treatise cited to above, an employee can exercise independent judgment and violate an employer policy or rule because doing so actually confers greater benefit on the employer. We do not find the facts in this case are so compelling as to result in that finding, however. We believe that decedent in operating his employer's corporate plane without the required express authorization was not within the period of employment at a place where decedent could reasonably be in performing his duties, and while fulfilling those duties as described on his job description. Claimant has not established that decedent's injury occurred in the course of his employment. We note also that the cause or source of decedent's fatal injury was not his job duties but his personal act of assisting Mr. Woodard without his employer's authorization. Hence, decedent's injury also did not arise out of his employment. Claimant has not prevailed in establishing his decedent's injury arose out of and in the course of decedent's employment. Hence, a finding of entitlement to death benefits is not possible. Likewise, we need not decide the rate issue.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Decedent Marlin McKeag was an employee of defendant Mahaska Bottling Company from Spring 1981 until August 17, 1984.

Decedent's designated title with Mahaska Bottling Company was Director of Aviation.

Pursuant to decedent's job description, decedent was responsible for communicating with corporate officers for authorization of nonbusiness use, including nonbusiness passengers, of aircraft by anyone.

Decedent on occasion flew corporate aircraft with nonbusiness passengers for his own purposes.

Decedent did not log any personal flights in his flight logs.

Decedent paid for aviation gas used for personal flights with cash and not with a Mahaska Bottling Company credit card.

All Mahaska Bottling Company aircraft were housed at the Oskaloosa Airport some twelve miles from Oskaloosa.

Mahaska Bottling Company's plant was located in the city of Oskaloosa.

Decedent's private use flights often occurred in the evening when other Mahaska Bottling Company employees were not at the hangar.

Decedent's private use flights often were in the immediate vicinity of the Oskaloosa Airport or were away from the Oskaloosa environs.

Decedent's private use flights were often quite brief.

Decedent's private use flights generally did not involve passengers who would or could readily communicate decedent's use of corporate aircraft to decedent's employers.

Aircraft, including smaller aircraft such as the Cessna 170B, are costly to operate.

The Cessna 170A was Mahaska Bottling Company's oldest corporate plane and had been the first plane which Mahaska Bottling Company President John Muhl had purchased.

John Muhl was surprised on August 17, 1984 when informed of decedent's accident and then stated decedent did not have permission to fly the Cessna 170B.

Decedent had no private use rights in the Cessna 170B or in other corporate aircraft.

Mahaska Bottling Company officials did not authorize decedent to fly the Cessna 170B on the afternoon of August 17, 1984.

Decedent's flight of that afternoon was a prohibited act.

On August 17, 1984, decedent flew the Cessna 170B with a private passenger to search for a model airplane the passenger had lost.

Mahaska Bottling Company had no direct interest in the model airplane.

The passenger was a member of the general public.

The passenger's son was a local florist from whom Mahaska Bottling Company occasionally purchased arrangements.

The passenger and his acquaintances might have been induced to drink Mahaska Bottling Company products through the August 17, 1984 flight.

The passenger's son might have been induced to deal more fairly with Mahaska Bottling Company in his business dealings with the company through the August 17, 1984 flight.

Mahaska Bottling Company had not otherwise permitted use of company planes for the private purposes of the general public.

Any benefit conferred on Mahaska Bottling Company by the August 17, 1984 flight was minimal and not sufficient to override the costs of the flight.

Decedent had no authority to undertake the August 17, 1984 flight on Mahaska Bottling Company's behalf.

The Cessna 170A was a well maintained aircraft.

Decedent's proficiency in flying maneuvers required of him in the Cessna 170A was sufficient and decedent never complained of needing more flight time in order to increase his proficiency.

Decedent's low and slow flight of August 17, 1984 in 95 degree weather in a strong wind potentially neither increased his proficiency or decreased plane maintenance.

Mahaska Bottling Company received no benefit by way of increased pilot proficiency or decreased plane maintenance sufficient to override the fact that the flight was nonauthorized and, therefore, a prohibited act in violation of the employer's expressed rules.

It is not established that decedent washed the plane on August 17, 1984.

Flying a plane to dry it after washing is not standard practice.

Flying the plane to dry it after washing was a prohibited act.

Other plane maintenance was neither scheduled or authorized on August 17, 1984.

December was not within the period of his employment at a place where decedent could reasonably be in performing his duties, and while performing those duties or something incidental to them while flying the Cessna 170B with a nonbusiness passenger on August 17, 1984.

The cause or source of decedent's August 17, 1984 fatal crash was decedent's personal act of assisting a member of the general public without his employer's authorization and in express violation of his employer's rule regarding nonbusiness use of corporate aircraft.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established that claimant's decedent's August 17, 1984 injury arose out of and in the course of decedent's employment.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceeding.

Claimant and defendant pay equally the cost of this proceeding pursuant to Division of Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33.

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

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENT MC PHAIL, Claimant, vs. JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, Employer, Self-Insured, Defendant.	:	File No. 810140 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 Kent McPhail, claimant, against John Deere and Company, hereinafter referred to as John Deere, a self-insured employer, defendant, for benefits as the result of an alleged injury on March 21, 1984. On January 22, 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 he injured his chest and abdominal area from a fall while working for John Deere. He is claiming that as a result of the work injury he is entitled to permanent partial disability benefits for persistent chest and abdominal pain which has not been alleviated by medical treatment.

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: Marvin (Lee) McClenahan, M.D., John Zillig, Gary Geiselbrecht, George Nast, Stacy Murdock, and Jans Smrcina. 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.

Although the prehearing report contains other stipulations, the following stipulations are relevant to this decision:

1. On March 24, 1984 claimant received an injury which arose out of and in the course of employment with John Deere;

2. Claimant is not seeking further temporary total disability or healing period benefits; and,

3. Claimant's entitlement to medical benefits is not in dispute.

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

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

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

FINDINGS OF FACT

1. Claimant was employed by John Deere at the time of the work injury as an industrial truck operator.

Claimant testified that he was operating a forklift truck on the date of the work injury in this case unloading engines from a flatbed truck. Over the last fifteen years claimant has held the following jobs at John Deere: industrial truck operator, gang drill operator, tracer lathe operator, material handler, spray painter, coolant servicer, and working in the casting salvage department. All of claimant's supervisors describe claimant as an excellent, hard working employee.

2. On March 21, 1984 claimant suffered an injury to his legs and abdominal area which arose out of and in the course of his employment with John Deere.

Claimant testified that while attempting to jump from his forklift truck which was sliding off a ramp between the dock and a flatbed truck he was unloading, claimant fell on his stomach area and arm. After reporting to the plant clinic with complaints of pain in the legs and the left lower quadrant of the abdominal area according to clinic records, claimant was sent to the hospital for evaluation of a possible contused kidney by the company physician, Marvin (Lee) McClenahan, M.D. At the hospital, claimant received x-rays of his legs and abdominal areas. These x-rays were negative. No hospital records were submitted but apparently the contused kidney possibility was rejected by the physicians at the hospital as there is no mention of such a condition later in claimant's medical records. Claimant then returned to Dr. McClenahan who prescribed Motrin and ice packs for the injured areas and claimant was then told to take the rest of the day off. The next day Dr. McClenahan's records indicate that claimant was much improved with complaints limited to stiffness and pain in the right thigh and lower leg. A few days later claimant returned to Dr. McClenahan with complaints of soreness in the upper and lower back and both thighs. By

April, claimant missed an appointment with Dr. McClenahan whose records report that claimant indicated to the doctor through his supervisor that he had no problem and was doing fine at that time. Except for the day of the injury and the time expended to receive medical treatment authorized by John Deere, claimant has not lost any time from work as the result of the work injury.

3. A finding could not be made causally connecting claimant's current pain complaints in the abdominal area, an elevated diaphram condition which developed in 1984 with the work injury in this case.

Claimant testified that soon after the injury he was transferred to a foundry area at John Deere where he performed heavy manual labor upon castings. This work he states caused him considerable abdominal pain during lifting, pushing, and swinging "stuff around." The pain, he stated was located in the left front side, below the rib cage. Supervisors testifying at the hearing disagreed with claimant's testimony as to his job assignment in the foundry area because such work would have been in violation of his permanent work restrictions against prolonged standing and walking as a result of an old athletic injury to his knee. Also, his work records do not reflect such a job assignment. According to claimant, this pain persists today whenever he lifts or becomes active. He also experiences pain when he rides in a vehicle which bounces around such as his forklift truck or a large truck. Claimant stated that the pain can last for only a few minutes on occasion or up to a few hours at some times at which time he must stop and rest.

The major problem with claimant's testimony is that his medical records at the plant clinic only relate an abdominal pain complaint at the time of the work injury. During his treatment over the weeks immediately following the injury his complaints reported to Dr. McClenahan involved only his legs and back. According to Dr. McClenahan, the first lower quadrant abdominal pain complaint other than at the time of the injury occurred approximately ten weeks later on July 10, 1984 after an elevated diaphram condition was discovered in an x-ray in June 1984.

When claimant was transferred to a new area in June 1984, Dr. McClenahan sent him to the hospital to receive routine x-rays of his chest, a procedure apparently required by government regulation. According to Dr. McClenahan, claimant had no pain complaints involving his chest or abdomen at that time. These x-rays found an elevated diaphram condition. This elevated diaphram was not found in the x-rays taken of the abdominal area on March 21 following the work injury.

Claimant then began to complain of pain in the left lower quadrant area in July 1984 and Dr. McClenahan referred him to

Michael J. Evans, M.D., for evaluation. After treatment involving an injection of medication into the abdominal area which temporarily relieved the pain, Dr. Evans felt that the cause of the condition was uncertain but probably was "post viral." When the pain persisted into October 1984, claimant was referred by Dr. McClenahan to John R. Pellett, M.D., a professor of surgery at the University of Wisconsin Medical School. After extensive examination by Dr. Pellett and his staff, the cause of the elevated diaphram and claimant's left lower quandrant abdominal pain was not identified and they found nothing except for the persistence of the elevated diaphram condition. Dr. Pellett likewise could not find a connection between the elevated diaphram condition and the pain.

Claimant's pain complaints extended into 1985. In June 1985, claimant was examined by Paulette Lynn, M.D., who felt that the abdominal pain may be musculature and recommended physical therapy. In July 1985, claimant was examined by another physician, Ross A. Madden, M.D. It was the impression of Dr. Madden that some of the chest pain was inflammations of the soft tissue in the rib and chest bone area. He felt that a possible epigastric hernia was unlikely. The doctor also suspected anxiety was playing a roll in claimant's discomfort. He recommended continued therapy with Dr. Lynn. Claimant received physical therapy in August but his pain complaints continued. Claimant hasn't seen a doctor for the last several months. Claimant explained that he no longer seeks medical treatment because the doctors have not been able to help him. In his live testimony at the hearing, Dr. McClenahan states that claimant's pain may be possibly due to a digestive problem, a virus, a cancerous tumor, a contusion from the March 1984 work injury, or an old injury in 1981 in which claimant was kicked by a horse in approximately the same area as claimant's pain complaints. The doctor could not give a definite cause for either of the diaphram problem or claimant's chest and abdominal pain. The elevated diaphram condition ended according to Dr. McClenahan in June 1984.

The above evidence only establishes that claimant's abdominal pain and diaphram difficulties are possibly related to the work injury. Given a prior history of an injury in the same area as the injury of March 1984; the lack of complaints of abdominal pain extending for almost ten weeks after the injury; and, the lack of any definite opinion by a physician supporting claimant's theories in this case, claimant has not established by the greater weight of evidence presented that the work injury was the cause of any of his abdominal or chest problems.

CONCLUSIONS OF LAW

In this case there was no controversy raised by the parties concerning the applicable law to be followed in the determination

of the issues. The foregoings findings of fact were made under the following principles of law:

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 it was found that the claimant's disability was possibly caused by the injury under the medical evidence submitted, claimant could not rely on the Giere case to establish causal connection by lay testimony due to the additional findings concerning a prior injury and the lack of a consistent pattern of pain complaints dating from the injury.

Claimant points out in his brief that Dr. McClenahan on a couple of occasions referred to the condition as workers' compensation related. However, diagnostic treatment following a work injury to determine the cause of claimant's complaints should not bind the employer on the issue of the causal connection of any particular condition to the work injury. Employers should be encouraged to provide such services to claimants when a causal connection is questionable.

Although claimant did not prevail in this proceeding, his claim was at least arguable given the medical evidence. Therefore, claimant shall be awarded costs of this action.

ORDER

Claimant's petition is dismissed. However, defendant shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 (formerly Industrial Commissioner Rule 500-4.33).

Signed and filed this 31ST day of March, 1987.

LARRY P. WALSHIRE
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000826

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICKY L. MERCHANT,

Claimant,

vs. File No. 798237

HART BEVERAGE COMPANY, R E H E A R I N G

Employer, D E C I S I O N

and

ROYAL INSURANCE COMPANY,

Insurance Carrier,
Defendants.

This matter comes on for hearing pursuant to claimant's application for rehearing "to correct obvious error." The "obvious error" in this matter arises as a result of reliance on the stipulation of the parties that claimant had received benefits he had not in fact received.

Based upon additional evidence submitted, i.e., the affidavit of Richard L. Young, it would appear that defendants were given credit for payments made to claimant as a result of a September 1984 injury which they are not entitled to. Defendants are entitled to credit only for payment made as a result of the March 4, 1985 injury.

Finding 2 of the decision filed December 31, 1986 establishes that claimant is entitled to temporary total disability benefits for March 5 and March 6, 1985 and for the period from March 12 to March 21, 1985. This is a period of one and four-sevenths weeks and is supported by claimant's testimony and the report of Allen W. Bronson, D.C. It would appear at this time, however, that claimant was off work for the period from March 5, 1985 to March 21, 1985, which is a period of two weeks and two days. Defendants' letter of January 8, 1987 in any event indicates defendants are willing to stipulate to two weeks and two days and it will be so found.

Claimant's temporary total disability entitlement is for two weeks and two days of benefits under Iowa law. Defendants paid claimant pursuant to Nebraska law the sum of $457.14. This entitles claimant to an additional $130.41. It is noted that had defendants in fact paid two weeks and two days of benefits at a rate of $220.22 then they should have paid $503.42. It is also noted

that the figures arrived at in this rehearing are not the figures arrived at by defendants even though all are presumably operating under the same set of facts. If the solution arrived at here regarding temporary total disability benefits is not satisfactory to the parties, then (1) claimant shall file a clear statement concerning the period of time he was off work in March 1985 including any additional evidence he may have as well as specific reference to the evidence in the record made to date which support his position, and (2) defendants shall do likewise.

In light of the "obvious error" concerning this matter, it would be an abuse of discretion to assess the costs to claimant.

IT IS HEREBY ORDERED that the decision of December 31, 1986 be amended to provide that defendants pay unto claimant one hundred thirty and 41/100 dollars ($130.41) together with interest thereon from March 21, 1985.

IT IS FURTHER ORDERED that costs be taxed to defendants.

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

Steven E. Ort

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CURTIS MERRITT, Claimant, vs. CRO SATELLITE SERVICES, Employer, and CNA INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 806048 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 Curtis Merritt, claimant, against CRO Satellite Services (CRO), employer, and CNA Insurance Company, insurance carrier, for benefits as a result of an alleged injury on July 12, 1984. A hearing was held in Des Moines, Iowa, on February 25, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant and Jack Edward Reynolds; 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 $243.20; that claimant has been off work from July 12, 1984 to date of hearing on February 25, 1987, except that he worked several days during this time period; and that claimant's injury of July 12, 1984 arose out of and in the course of his employment with CRO; and that the section 85.27 issue had been informally resolved.

ISSUES

The contested issues are:

1) Whether there is a causal connection between claimant's injury of July 12, 1984 and his asserted disability; and

2) Nature and extent of disability; claimant has asserted

odd-lot doctrine or is seeking a running award of healing od benefits; defendants assert that claimant is not entitled ermanent total disability benefits and that any permanent ial disability benefits awarded should commence on August 1985.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 30 years old having been born ugust 22, 1956. Claimant completed the tenth grade and then red the Marine Corps in March 1974. He was discharged from Marine Corps in November 1975. In the Marine Corps he was ned to be a truck driver, and he maintained and operated e vehicles. He took a three-month course in the Marine s to learn how to operate these large vehicles that were ly big trucks. Claimant received a GED in the Marine Corps.

Claimant testified that after discharge from the Marine s he started working at a factory in St. Louis, Missouri, ing a forklift and working as a heavy equipment operator for months. This involved some mechanical work and he was paid 50 per hour. He then went into the mobile home remodeling iness as he had prior experience and training in this area. s was basically carpentry work in residential areas and he paid on an hourly basis. He did this work "off and on" for e years which took him up to about 1980. In 1980, he worked the home improvement business. In 1981, he made about ,000 a year doing cable installation and construction as an taller foreman. He climbed telephone poles and such in St. rles, Missouri, and St. Charles County, Missouri. This cable k was new to him and he supervised thirteen people on this . He was paid on a commission basis "based on the amount of k in a day." This job was similar to the job he would imately had with CRO.

Claimant testified that he started working for CRO in ober 1983; he actually worked for a subsidiary of CRO en- led Star Path Enterprises. In October 1983, he was paid 150 and was paid a monthly wage initially with CRO. Exhibit page 3, documents his earnings with CRO. He characterized CRO job as "the best paying job I ever had and it was much e complex than the job I had in 1980 or 1981."

Claimant testified that on July 12, 1984, he was building a ilding that was to contain a "computer satellite system twork" near Creston, Iowa. He was working with one other rson at the time and was "doing the work to put together the ilding." The ladder he was working with slipped and claimant ll from the top of the ladder at about 4:30 p.m. on July 12, 84. It took him fifteen minutes to get off the ground after e fall because of the pain. The fall jarred his body tremen- usly. Prior to his fall, he had no prior low back problems

had experienced cervical problems. Claimant testified that 1973, he broke his neck in an automobile accident and was :ated for this injury until March 1974.

Claimant testified that his "general health" was the "best his life" prior to the fall of July 12, 1984. After the .1, he went to Creston for treatment and it was "almost dnight the night after the accident." The fall caused his ck, neck, and ankles to hurt. The day after the accident aimant went to the Creston Clinic and was given medication. was told of claimant's fall. After claimant's initial eatment in Creston, all medical treatment received by claimant s been in Missouri. On July 17, 1984, claimant saw K. L. rner, M.D. See exhibit 1, page 4. Dr. Turner restricted aimant's activities and told him to get bedrest and do as ttle as possible. Claimant has not had surgery as a result of s injury of July 12, 1984, but has been hospitalized on three casions. The first hospitalization was for approximately ten ys in August 1984 when x-rays were taken and claimant was ven medication. In November 1984, claimant had a myelogram ring a short stay in the hospital and was under the treatment Louis A. Benoist, M.D. The third hospitalization was at a terans Administration Center in August 1986 unrelated to aimant's back. Surgery has been suggested to claimant. laimant is currently on pain medication and has seen a psychi- rist. He first saw a psychiatrist in October 1984. See chibit 1, page 20. From October 26, 1984, he has seen a sychiatrist and does so on a regular basis, which means he sees psychiatrist every three to four weeks. Claimant saw Michael . Taylor, M.D., at the request of Dorothy Kelley, defense ttorney. Claimant has seen T. J. Fitzgerald, Ph.D, on one ccasion as his attorney in St. Louis ("primary attorney") eferred him to Dr. Fitzgerald. Claimant testified that his secondary attorney," Robert Pratt of Des Moines, Iowa, did not efer him to Dr. Fitzgerald.

Claimant testified that he wants "deeply" to go back to ork, but is not physically or emotionally able to do so. He tated that it is physically impossible for him to go back to ork and mentally he cannot cope with repetitious work. He tated that he now has psychiatric problems that he did not have rior to his fall on July 12, 1984. He now seeks isolation and ow limits his activities. Prior to July 12, 1984, claimant considered himself an outgoing person and his activities were extreme." His activities are now "very limited."

Claimant testified that he has received a second GED because he took a test in October 1986 with a satisfactory result. He testified that the military lost records regarding his first GED. Claimant has no other vocational rehabilitation training other than his second GED training. Claimant has applied for social security disability benefits which were denied. His last

workers' compensation weekly benefit check came on or about September 13, 1986. Claimant sees doctors at the Veterans Administration. He testified that doctors have tried different kinds of medication in his case. Claimant is currently on medication for depression and he takes so-called "nerve pills." He also takes sleeping medication. Dr. Fitzgerald tested claimant. See exhibit 1, page 56. Claimant stated his medical restrictions as no lifting, no bending, no twisting about, no running, and no climbing.

Claimant testified that after July 12, 1984, he has not looked for work. However, on February 11, 1985, he tried to return to work and worked an entire day, but was unable to return to work the next day because of physical problems. After this attempt to return to work, he went to a VA hospital in St. Louis, Missouri, and sought pain medication. He does not know when he will be able to return to work.

Claimant testified that he will be starting a course of study in electronics training in Kentucky. He stated this is a "five hour course for two years." He stated that the five hours is composed of four hours of class and one hour of lab time and would enable him to repair computers as a computer technician. The total tuition for this Kentucky course is $7,600 and would require him to move to Kentucky.

Claimant has been married for nine years and has three children. He stated that CRO has not "terminated my employment to my knowledge." However, his last contact with CRO was about four months prior to the hearing of February 25, 1987. There was some discussion that CRO is no longer in existence. Claimant stated he will again see Dr. Turner in the near future. Claimant will see William Cone, M.D., on March 14, 1987 about his psychiatric condition. Dr. Cone attempts to explains claimant's adverse feelings to him. Claimant stated that Dr. Cone's treatment is helping him.

On cross-examination, claimant acknowledged that he has "ability to contract and subcontract." He has also done some of his own contracting and has measured projects and estimated costs. He is not educated to develop blueprints; however, he stated he can do without blueprints. He acknowledged he has general carpentry tools and that he has done remodeling inside and outside. He has helped with the construction of new apartments in the past. While at CRO, he learned about satellite dishes and assisted with the electronic aspects of a cable network. He "picked this up on his own."

On cross-examination, claimant testified that cervical strain was the reason for his early discharge from the Marine Corps and that an automobile accident caused this cervical strain. As a result of this auto accident, he was given a "ten

percent temporary rating." He acknowledged seeing the documents marked exhibit A. Exhibit 1, page 5, documents a 1973 accident that involved a compression fracture to claimant's neck. Exhibit 8, page 5, also makes reference to a November 1974 accident, but claimant at time of hearing didn't recall this incident. He stated the 1973 accident occurred while he was in the home improvement business. Exhibit A, page 5, refers to the injury of November 1974 as a "reinjury." Claimant testified that when he entered the Marine Corps in March 1974, he was "fully recovered." Exhibit A, page 6, also makes reference to a cervical injury in January 1975 while claimant was in the military and claimant, at hearing, testified that this was a "military accident." Claimant acknowledged that after the Marine Corps he "went from job to job." He once again stated that since July 12, 1984, he has not sought employment. He also acknowledged that his alleged injury may have occurred on July 13, 1984.

On cross-examination, claimant acknowledged that in 1976 he injured his low back at home. In August 1984, Dr. Turner admitted claimant to the hospital. Exhibit 1, page 7, contains a history of low back pain at time of admission on August 6, 1984. Exhibit 1, page 7, documents no evidence of disc herniation. Exhibit 1, page 20, discusses claimant's marital problems. Claimant acknowledged that he has stopped conservative treatment. Claimant has been advised to seek vocational rehabilitation or employment that involves a mixture of standing, walking, and sitting.

On cross-examination, claimant testified that in the last four months he found out that CRO Satellite Services "no longer exists."

On recross-examination, claimant acknowledged that there is no evidence of a herniated disc.

Jack Edward Reynolds testified that he is a vocational rehabilitation specialist from Des Moines. He has a Masters Degree in job placement for the severely disabled. He tries to place "displaced workers" by matching their limitations and capacities with various job openings. He looks at both mental and physical limitations. He testified that he is a certified rehabilitation counselor. He does vocational assessment and testing. He states his opinion on the employment capacity of disabled workers. He stated that he has placed a number of clients with limitations similar to those of claimant. He reviews medical and testing records on a regular basis and has reviewed claimant's file including a review of exhibits 1 and A which were received in this case. He has also reviewed claimant's answers to interrogatories and the the entire claims file. He heard all of claimant's testimony on the date of hearing, February 25, 1987. He did not personally interview claimant.

Reynolds stated his opinions and conclusions regarding claimant. Reynolds stated that he has done a "job system review" regarding the areas where claimant could be employed given his limitations. He stated that claimant's cable TV and home remodeling background were taken into account in doing this job system review. He also looked at claimant's "preinjury capacity." Reynolds stated his opinion that claimant is capable of performing "general employment." He stated that it was his understanding that claimant had a medically imposed lifting restriction of "up to fifty pounds" which Reynolds characterized as a medium lifting restriction. Reynolds testified that he was hired by defendants in late January 1987.

Reynolds testified that there are about a dozen jobs available to claimant and characterized these jobs as "light employment." Samples of these jobs are 1) motel-hotel clerk; 2) small parts assembler; 3) gate attendant; 4) security guard; 5) maintenance dispatcher; 6) counter dispatcher; 7) parking lot attendant; 8) car attendant; 9) a service establishment job; 10) a general labor job; 11) denture finisher; 12) electrical parts assembler; and 13) cafe attendant. Reynolds stated his opinion that claimant's training in electronics is feasible for him and that he could enter this field at an entry level at about $20,000 per year. Reynolds has talked with a counselor from Missouri who has administered tests on claimant. Reynolds and this counselor shared information. Reynolds was hired by defendants in this case in order to render an opinion on the employability of claimant. He was employed after the odd-lot doctrine was discussed at prehearing.

Reynolds stated that even without training claimant could be placed in the job market with his medical limitations. Reynolds stated he has had success in a rural setting with similarly situated claimants with similar medical restrictions. He stated that claimant could reenter the job market at the entry level "to much higher." However, he then stated that the best claimant could probably do at this point in time is $3.50 to $5.00 per hour. Reynolds acknowledged that he is not familiar with the labor market where claimant would be seeking employment. However, he restated his opinion that claimant is capable of getting a job at higher than entry level.

On cross-examination, claimant's so-called secondary attorney, Mr. Pratt, had Reynolds look at exhibit 1, page 72, the third full paragraph. Reynolds then discussed claimant's exertional limitations and nonexertional limitations. Claimant's symptoms are set out on exhibit 1, page 71. Claimant has problems concentrating and has a memory problem. Reynolds characterized putting in cable as semi-skilled work. He stated that claimant was doing semiskilled work in July 1984 and based on Dr. Taylor's report (exhibit 1, pages 71-73), claimant could not return to the work he was doing on July 12, 1984. Reynolds also acknowledged

that claimant could only do portions of a home improvement job because of his physical limitations. He also acknowledged that a hotel clerk job would take some concentration. Reynolds then acknowledged that some of the jobs he described on direct examination would be eliminated in his view because of claimant's physical limitations.

Reynolds characterized claimant's positive factors as his work history, GED, contact in the area of his residence, appearance, and the fact that he articulates well. He stated that the negative factors are that he has not worked since 1984, and his unskilled or semiskilled work background.

Reynolds testified that claimant's transferable skills are 1) supervisory ability; 2) ability to learn new jobs easily (he acknowledged that this is probably an aptitude rather than a skill); 3) skills in using his hands and machine tools; 4) skills working with others; and 5) knowledge of electronics. He then stated that the transferable skills could be used in the following industries: 1) construction trade; 2) electronics; 3) telephone and cable installations; and 4) other unrelated industries. He stated that steady attendance would be important in these areas of work. He then restated his opinion that claimant could work on a steady basis. Reynolds then stated again that he talked with claimant's counselor in Missouri about tests that were administered and the conclusion was drawn as a result of these tests that claimant showed promise academically in the field of electronics.

On redirect, Reynolds stated that in his opinion claimant doesn't have a concentration problem. He then stated that claimant's best motivational showing is his interest in returning to school as claimant has not physically looked for employment subsequent to the injury of July 12, 1984. Reynolds stated that claimant believes he can complete his Kentucky schooling.

On recross-examination, Reynolds stated his opinion that claimant is able to look for routine-type employment on his own without vocational assistance.

Exhibit 1, page 7 (dated August 16, 1984), is authored by Kirby Turner, M.D., and reads in part:

HISTORY: This 27 year old white male was admitted with chief complaint of low back pain. On the 7/12/84, while working on construction, fell off a roof and hit in the sitting position. He had a sprained ankle, injury to his back, and was treated with pain pills, rest, and muscle relaxants, but has had no relief of his pain. He finally came in and was admitted to the hospital to try and get

this under control. He had a past history of low back injury before.

Exhibit 1, page 11 (dated August 13, 1984), is authored by Dr. P. Massarat and reads:

CT LUMBAR SPINE: Multiple cuts have been made at the level of L-3, down to L-5 which shows no evidence of herniated disc. The cord appears to be in the midline and epidural fat shows no evidence of displacement. Neuroforamina are patent and lumbar spinal canal believed to be within normal limits. No significant radiographic abnormalities are seen.

Exhibit 1, page 20 (dated October 26, 1984), is authored by William Cone, M.D., a psychiatrist, and reads:

Curtis Merritt was seen for 45 minutes. He is a new patient whose birthdate is 08-22-56. He is a man who was injured on his job as a cable tv installer and he has a bad back and was just released today from Lucy Lee Hospital where apparently they were doing some other tests. He describes marital problems with his wife and difficulties that have to do with uncertainty concerning his future. He is twenty eight years old, his wife has recently had a pregnancy and delivered a child without feet. Both parents were very upset about this. Their relationship has been strained and he doesn't quite know what he needs to do. I prescribed Xanax 0.5 mgss. 1 or 2 qid, #56, refills times 5. I suggested he consider the possibility of counseling for both himself and his wife and scheduled him to see me again for two weeks to evaluate the medication and see what he thinks might be helpful. He is intelligent and articulate. There is a quality about him that makes me wonder whether he wants to solve the problem or whether he wants to have a problem. I will try to clarify that impression after my next contact.

Exhibit 1, page 36 (dated February 22, 1985), is authored by Joseph H. Miller, M.D., and reads in part:

He has had a negative CAT scan. He does have a slight anomaly of the lumbosacral joint but nothing to explain this patient's symptoms. I am afraid I have nothing else to offer him.

He has also had psychological investigation and he said he attempted to go back to work last Fall

[sic] and worked a day and a half but was unable to be persistent with it.

Exhibit 1, pages 46-48 (dated June 27, 1985), is authored by Philip G. George, M.D., and reads in part:

He states that he was released to return to light work in February. He states he was only able to work for a day and a half before he had to take off again and has not been back at work since. He states that his ongoing problems are severe localized pain in the lumbosacral area whenever he tries to bend, twist, lift, push or pull. He states that the pain occasionally radiates into his right leg down to the knee, more or less along the lateral aspect of the thigh. He also notes occasional radiation into the left buttock and hip area. He notes no increased pain at this time with cough or sneeze. Bowel and bladder habits have been unaffected. He states the right ankle seems to just give out on occasion though he is not aware of specific weakness of muscles supporting the ankle or knee on the right. He states the right ankle swells on occasion. He has apparently been tried on numerous medications and presently is taking only Darvocet or Darvon or aspirin when he states he can't stand it any more. He apparently has tried Feldene, Motrin, and Indocin on various occasions without significant relief....

....

....I have advised him to be careful about bending, twisting and lefting [sic] but try to maintain a moderate level of physical activity. Walking, bike riding and swimming are excellent exercises. In my opinion it is not feasible to expect him to return to his former employment climbing light poles and doing heavy construction work. I have scheduled no return appointments. No medication was prescribed.

Exhibit 1, page 50 (dated August 21, 1985), is authored by Louis A. Benoist, M.D., and reads in part:

Basically I think that we have all recommended to him that he obtain a type of employment where he has a mixture of standing, walking and sitting and has restriction on climbing. Actually, I don't suggest that he do any climbing at all and that he not have to do any lifting over 50 lbs.....

....

....I am going to give him a 10% whole body permanent physical impairment loss of physical function based on his continuing low back pain and hip pain and secondary stiffness.

Exhibit 1, page 72 (dated November 12, 1986), is authored by Michael J. Taylor, M.D., and reads in part:

Based upon all the information currently available to me, I can offer the following opinions and recommendations, all within a reasonable degree of medical certainty. It is my opinion that the most appropriate diagnosis for Mr. Merritt's current psychiatric condition is Major Depressive Disorder. It is my opinion that his Depressive illness is directly causally related to the injury of July of 1984, and the physical limitations which have resulted therefrom. Mr. Merritt's Depression is only partially controlled by his present regimen of medication. Psychiatrically, he is probably capable of some type of routine, repetitive, unskilled work, but I do not believe that he is psychiatrically capable of any more complex work than that. The prognosis for Mr. Merritt's psychiatric condition is, however, good. It would be important, in my opinion, for treatment of the Depression to be focused on the target symptoms rather than avoiding weight gain. Mr. Merritt is fully willing to assume responsibility for limiting food intake in spite of appetite stimulation. Asendin has not been demonstrated to be a particularly effective antidepressant. I would urge that more clearly-efficacious antidepressants be tried and that augmentation with Lithium and/or Ritalin be considered.

I view Mr. Merritt to be highly motivated to return to work. I would recommend that he be involved in some type of rehabilitation program to assist him in finding work consistent with his physical limitations. He is not now so impaired by his Depression that he could not benefit from such a rehabilitation program although I do think that the amount of benefit that he received from a vocational rehabilitation program could be even further increased when his Depression is better treated.

Exhibit A, page 5, is a military record dated May 6, 1975 that reads in part:

The past medical history reveals that the patient was involved in two prior automobile accidents. The first one was approximately in late 1973 at which time the patient thinks that he sustained fractures of the cervical spine, but he has very poor recollection of the events. He was evidently admitted to the hospital and treated with traction. The patient cannot remember whether this was as short as five days or as long as six weeks. He then had a reinjury in November of 1974, but this responded to outpatient cervical conservative treatment. However, because of the question of injury to the cervical spine in January of 1975, the patient was referred to the Naval Regional Medical Center, San Diego, California for further diagnostic evaluation and treatment.

Page 6 of exhibit A contains a description of claimant's treatment for the accident of January 1975.

APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the injury of July 12, 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).

Dr. Benoist imposed a 10 percent whole body rating in this case based on "loss of physical function based on his continuing low back pain and hip pain and secondary stiffness." See exhibit 1, page 50. I am convinced that claimant did sustain some permanent partial impairment as a result of his work-related injury of July 12, 1984. However, I am unconvinced that his work-related injury of July 12, 1984 has rendered him imcapable of working even if the task or tasks is repetitious. In other words, if claimant is psychologically incapable of working, the reasons or reasons for this incapacity is or are unrelated to any work incident.

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 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).

It will be found that claimant failed to make the requisite prima facie showing described at page 106 of Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985) becaue his work search after his work-related injury was insufficient. See Emshoff v. Petroleum Transportation Services, (Appeal Decision filed on March 31, 1987) (Claimant must demonstrate a reasonable effort to secure employment in the area of his residence as part of his prima facie showing that he is an odd-lot employee.) In sum, I think claimant is not particularly well motivated to return to work. However, as mentioned by Mr. Reynolds, claimant has shown some motivation to obtain some additional schooling. There clearly is not a "complete lack of motivation" in this case. See Doerfer Div. of CCA v. Nicol, 359 N.W.2d 428, 437 (Iowa 1984). Claimant has sustained some loss of earning capacity because of the injury of July 12, 1984 given the fact that he will have to reenter the labor force at an entry level position. Mr. Reynolds' opinion that claimant can find employment above an entry level position is not believed if in fact that is his opinion. His testimony on the issue of where or how claimant could reenter the labor force was not a model of clarity. Also, I am unwilling to speculate at this point as to whether claimant will successfully complete his schooling in Kentucky.

In a recent appeal decision filed on February 20, 1987 entitled Thomas A. Stewart v. Crouse Cartage Company and Liberty Mutual Insurance Company (No. 738644), the commissioner stated on page 2-3:

> Under current conditions taking into account claimant's age, work experience, education and loss of earning capacity claimant's industrial disability is 50 percent. 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. (Emphasis supplied.)

Taking all appropriate factors into account claimant's industrial disability is determined to be 40 percent. Permanent partial disability benefits commence on August 21, 1985 as he reached maximum healing on that date. See exhibit 1, page 50.

FINDINGS OF FACT

1. Claimant was born on August 22, 1956.

2. Claimant completed the tenth grade.

3. Claimant was in the Marine Corps from March 1974 through November 1975 and drove a truck in the Marine Corps.

4. Claimant obtain a GED in the Marine Corps and subsequently obtained another GED.

5. Claimant worked at a number of manual labor jobs after his discharge from the military.

6. Claimant has worked in the home remodeling business doing such things as residential carpentry work.

7. Claimant started working for CRO in October 1983 and was paid $1,150 per month initially.

8. On July 12, 1984, claimant injured his back, among other things, when he fell while for working for CRO.

9. Claimant's injury of July 12, 1984 caused some permanent partial impairment; his whole body impairment is about 10 percent.

10. Claimant reached maximum healing on August 21, 1985.

11. Claimant is currently psychologically able to work.

12. Claimant will have to reenter the labor force at an entry level position given the amount of time he is off work and his physical problems resulting from his injury of July 12, 1984.

13. Claimant could be better motivated to return to work.

14. Claimant's industrial disability is 40 percent.

15. Claimant's stipulated rate of compensation is $243.20.

CONCLUSIONS OF LAW

1. Claimant established by a preponderance of the evidence that there is a causal connection between his work-related injury of July 12, 1984 and some physical whole body impairment.

2. Claimant established entitlement to healing period benefits from July 12, 1984 through August 20, 1985.

3. Claimant established entitlement to permanent partial disability benefits for two hundred (200) weeks commencing on August 21, 1985.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay the weekly disability benefits described above.

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 to claimant.

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

That defendants shall file claim activitiy reports, pursuant to Industrial Services Rule 343-3.1(2).

Signed and filed this 17th day of April, 1987.

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

000843

DAVID MOORE,	)	
Claimant,	)	File No. 806043
-vs-	)	
	)	
FRENCH & HECHT,	)	ADDENDUM TO
Defendant.	)	ARBITRATION DECISION

FILED
MAY 14 1987
IOWA INDUSTRIAL COMMISSIONER

Subsequent to an inquiry by defendant's counsel, the undersigned on his own motion believes that due to scriveners error and oversight the following should be added to a portion of the decision rendered 5/13/87 to eliminate confusion with reference to the right of defendant to chose the medical care in this case. This addendum does not materially change the decision.

1. The word "denies" contained in the second clause of the first sentence of the second unnumbered paragraph appearing on page 8 of the decision shall be stricken and the following inserted in lieu thereof:

"denied in its answer to claimant's petition filed herein."

2. The following shall be added following the last sentence of the unnumbered paragraph appearing on page 8 of the decision:

"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 choose the care. Kindhart v Fort Des Moines Hotel (Appeal Dec, March 27, 1985). Barnhart v Mag Incorporated, I Ia Ind Commr Rpts 16 (App Dec 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 chose 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 an injury under chapters 85, 85A or 85B has been established. Therefore, the right to control the care must coincide with this agencies jurisdiction over the matter."

The wording contained in the balance of the decision remains unchanged.

Signed and filed this 14 day of May, 1987

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

James Hood, Attorney for Claimant
Larry Shepler, Attorney for Defendant

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID MOORE,

Claimant,

vs.

FRENCH & HECHT,

Employer,
Self-Insured,
Defendant.

FILE NO. 806043

A R B I T R A T I O N

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by David Moore, claimant, against French & Hecht, employer, hereinafter referred to as F & H, a self-insured defendant, for benefits as a result of an alleged injury on either June 9, 1984 or June 29, 1984. On March 10, 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 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 either June 9, 1984 or June 29, 1984, claimant received an injury which arose out of and in the course of his employment with F & H; (2) claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $293.06 per week; and, (3) the medical expenses for which claimant seeks reimbursement in this proceeding are fair and reasonable and causally connected to the shoulder condition upon which claimant is basing his workers' compensation claim in this proceeding. However, that the issue of the causal connection of the medical expenses to any work injury was an issue which remains contested and must be decided in this decision.

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 disability benefits; and,

III. 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 his appearance and demeanor at the hearing, claimant appeared to be testifying in a truthful manner. Also, physician reports submitted into the evidence contain histories of claimed injuries and pain complaints which were consistent with claimant's testimony.

2. Claimant was employed by F & H from 1979 until February 1985 as a general laborer in their wheel fabrication plant.

Claimant testified that his duties consisted of work which required the regular lifting and handling of wheels, manually or mechanically, ranging in weight from 10 to 300 pounds. Claimant stated that he earned approximately $24,000 a year at F & H before he quit in February, 1985, "after a new contract."

3. In June, 1984, claimant suffered injuries to his right shoulder and arm which arose out of and in the course of his employment with F & H.

Claimant testified that he injured his right shoulder when a 50 to 60 pound wheel fell on him in June, 1984. Claimant said that the shoulder swelled but there was no numbness or tingling after this first injury. Claimant did not seek treatment until after a second event in the latter part of June, 1984, following a repetitive lifting of wheels onto a press. In July, 1984, claimant received medical treatment for shoulder pain from a Dr. Koehler (first name unknown) at the East Kimberly Care Center. Dr. Koehler diagnosed acute exacerbation and sprain of the right shoulder. After prescribing moist heat and aspirin, the doctor returned claimant to full duty. Claimant returned to Dr. Koehler approximately once a month over the next three months with persistent shoulder pain complaints. Finally, after heavy lifting on the paint line, his right hand and two fingers and thumb became numb. Claimant then went to the emergency room at Mercy Hospital in Davenport, Iowa. After x-rays and arthrogram revealed no evidence of acromioclavicular (A/C) separation or rotator cuff injury, claimant was released with instructions to return to home and apply ice to his shoulder. At that time claimant was placed on light duty by Dr. Koehler until November, 1984. Claimant then returned to heavy work on the "rim line"

handling again all sizes and weights of wheels. Claimant stated that the continuous numbness ended except for the tips of his fingers. However, the numbness would return after repetitive heavy lifting. Claimant was then laid off and upon returning to work he quit in February, 1985, after a new contract. Claimant did not state precisely why he quit except that he has been a self employed over-the-road truck driver since leaving F & H. After purchasing a truck, claimant began to haul steel on a route from Iowa to the Carolinas.

After November, 1984, claimant did not receive treatment for his shoulder condition again until March 1, 1985, when he consulted without first notifying F & H, his family physician, Samual Williams, D.O. Dr. Williams believed that there was probably a rotator cuff injury or capsular damage but could not be sure without an orthopedic consultation. Dr. Williams then referred claimant to Ralph Congdon, M.D., an orthopedic surgeon. Noting the absence of positive findings on the arthogram, Dr. Congdon treated claimant with physical therapy for a diagnosed condition of "inappropriately rehabilitated muscles." Treatment by Dr. Congdon was approved by F & H and claimant was then sent for physical therapy in May, 1985, but claimant discontinued this therapy after only one session due to his inability to regularly schedule therapy sessions due to his truck driving.

Despite his testimony that he experienced continued problems with shoulder swelling, hand numbness and shoulder pain, especially after heavy lifting, claimant did not seek treatment again until November, 1985. Claimant returned to Dr. Williams who still felt that claimant had a serious shoulder problem. Dr. Williams than referred claimant to a neurologist, Lynn Kramer, M.D. According to her report, Dr. Kramer felt that claimant "certainly may have the thoracic outlet syndrome" but desired a further test called a venous digital angiogram. This test revealed a "mild compression." Dr. Kramer states that she cannot determine from her tests whether the obstruction was 20 percent or greater but that exercises should be considered to see if there can be an improvement. Dr. Kramer also states that this confirms the clinical evaluation. No other reports were submitted from Dr. Kramer. In a letter report to claimant's attorney in December of 1985, Dr. Williams states that after consultation, claimant "definitely has pathology present." Another physician, Robert J. Chesser, M.D., of unknown specialty, indicated in his report of October, 1986, that there had been a definite diagnosis of thoracic outlet syndrome by Dr. Kramer. In the notes of a licensed physical therapist who was providing therapy to claimant pursuant to instructions from Dr. Kramer, the last entry of his notes reads "I am unsure of what is the etiology of this fellow's pain."

Defendant argues in his brief that the above statement by Dr. Kramer, Dr. Williams and Dr. Chesser do not establish by the preponderance of the evidence that claimant suffers from thoracic

outlet syndrome or that any such condition is work related. Defendant points out the lack of any definite causal connection opinion in the record. It is the experience of this agency that thoracic outlet syndrome is an overuse syndrome consisting of compression of the nerves in the thoracic outlet adjacent to the neck caused by inflammation of the soft tissues and ligaments in the outlet. Claimant's pain complaints have been consistent and continues since the date of injury. A finding of a nerve compression in the test performed by Dr. Kramer is consistent with such a condition. The views of Dr. Congdon that claimant's problem is muscular are important but the doctor did not have the benefit of a positive EMG test when he made his diagnosis. Therefore, on the whole record the preponderance of the evidence establishes that claimant suffers from a thoracic outlet condition caused by the injuries in June, 1984.

4. The work injury was a cause of a mild permanent partial impairment to claimant's body as a whole.

Claimant had no previous medical history of any shoulder, neck or arm problems prior to June, 1984, and there is no evidence of any functional impairment prior to the work injury of this case.

Only two physicians have rendered opinions with reference to the extend of claimant's functional impairment from this thoracic outlet syndrome and his right shoulder and arm pain complaints. Dr. Chesser opines that claimant does not have functional impairment under AMA Guidelines. As a result of a loss of pinprick sensation, however, Dr. Chesser felt that claimant warrants at least a one percent impairment. This opinion is confusing because he imposed a significant 50 pound weight restriction with no overhead lifting based upon claimant's history. Dr. Williams opines that claimant has a five percent body as a whole injury from a 20 percent loss of use of his right shoulder. However, Dr. Williams did not fully explain the basis of his opinions. Claimant testified that he is considerably bothered by pain during heavy lifting and prolonged driving of his truck. On the whole record therefore claimant has established that he has at least a mild permanent partial impairment to his body as a whole as a result of his right shoulder condition.

5. The work injuries of June, 1984, is a cause of a ten percent permanent loss of earning capacity.

Claimant has demonstrated that he is physically unable to return to the type of work he was performing at F & H at the time of the work injury due to physician imposed restrictions. Dr. Chesser's physical restrictions are more significant than his impairment ratings. Claimant is not earning as much as he did at F & H, but is employed as an over-the-road trucker by his own choice. The availability of truck driving jobs is certainly

limited by his shoulder complaints. However, claimant's inability to find more profitable trucking jobs appear to be primarily the result of a sluggish economy rather than the work injury.

Claimant is 33 years of age, has a high school education and exhibited average intelligence at the hearing. Due to his age, his loss of earning capacity is not as great as that of an older individual.

Claimant has average potential for successful vocational rehabilitation.

6. Claimant has not been reimbursed for reasonable medical expenses for the treatment of his work injury in the amount of $1,236.60 and for travel to receive medical treatment in the amount of 300 miles.

The above expenses were incurred by claimant for necessary treatment of his injury. They involved the charges setforth in the exhibits for treatment by Dr. Williams, Dr. Kramer and tests, diagnostic imagining and other hospital services ordered by Dr. Williams and Dr. Kramer.

The only mileage not reimbursed was for travel by claimant to receive treatment from Dr. Williams, Dr. Kramer and Dr. Shaffer. Claimant testified that defendant referred him to see Dr. Shaffer.

CONCLUSIONS OF LAW

In this case, there was no controversy raised by the parties concerning the applicable law to be followed in the determination of the issues. The foregoing findings were made by applying 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).

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 mild 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 permanent disability. The extent to which this physical impairment results in disability was examined under the law setforth 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. 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 Co., 373 N.W.2d 101, 105 (Iowa 1985).

Based upon a finding of a ten percent loss of earning capacity or industrial disability as a result of the injury to the body as a whole, claimant is entitled as a matter of law to 50 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is ten percent of the 500 weeks allowable for an injury to the body as a whole in the subsection.

Benefits will be awarded from September 16, 1984, the time of claimant's return from his only lost time from the work injury established in the record.

III. Employer's are obligated to furnish all reasonable medical services for treatment of a work injury under Iowa Code section 85.27.

Defendant claims that treatment by Dr. Williams and Dr. Kramer was not authorized and claimant is not entitled to reimbursement for such expenses under Iowa Code section 85.27 which provides employers with the right to chose the care. However, section 85.27 applies only to injuries compensable under Chapters 85 and 85A of the Code and obligates the employers 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. Mag Incorporated, I Iowa Industrial Commissioner Reports 16 (Appeal Decision 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 the employer the right to chose 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 particular

care unless the employer's liability for an injury under Chapters 85, 85A or 85B has been established. Therefore, the right to control the care must coincide with this agency's jurisdiction over the matter.

Prior to the date of the hearing, defendant in this case denies that claimant suffered any injury which arose out of and in the course of employment. For that reason, defendant did not have the right to chose the medical care for claimant's injuries until the date of the hearing. Therefore, the expenses of the treatment provided by Dr. Williams and Dr. Kramer are reimburseable because such expenses were incurred prior to the date of hearing in this matter.

Given the findings of fact, claimant is entitled as a matter of law to reimbursement in the total sum of $1,208.60. This is the sum of the unreimbursed medical expenses plus $72.00 for medical mileage. The medical mileage expenses are reimburseable at the rate of $.24 per mile pursuant to Division of Industrial Services Rule 343-8.1.

With reference to assessment of costs, claimant seeks reimbursement for the costs of a medical evaluation by Dr. Chesser. This could not be reimburseable under Iowa Code section 85.27 as such services were an evaluation and not treatment under Iowa Code section 85.27. The charged cannot likewise be reimbursed under the Department of Industrial Services Rule 343-4.33 because there is no way one could determine from the evidence submitted as to whether the charge is for the preparation of the report or the time expended in performing the evaluation. The latter cannot be reimbursed under the costs provision. Therefore, the claim for $125 for the evaluation is denied.

ORDER

IT IS THEREFORE ORDERED as follows:

1. Defendant shall pay to claimant fifty (50) weeks of permanent partial disability benefits at the rate of two hundred ninety-three and 06/100 dollars ($293.06) per week from September 16, 1984.

2. Defendant shall pay claimant the total sum of one thousand two hundred eight and 60/100 dollars ($1,208.60) for medical expenses.

3. Defendant shall pay accrued weekly benefits in a lump sum and shall receive a credit against this award for all benefits previously paid and for previous payment of benefits under a non-occupational group insurance plan, if applicable and appropriate under Iowa Code section 85.38(2).

4. Defendant shall pay interest on benefits awarded herein as setforth in Iowa Code section 85.30.

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

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

Signed and filed this 13 day of May, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY MOCK,	:	
	:	File No. 649902
Claimant,	:	
	:	R E V I E W -
RALSTON PURINA COMPANY,	:	
	:	R E O P E N I N G
Employer,	:	
	:	D E C I S I O N
and	:	
	:	
AETNA LIFE & CASUALTY CO.,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

This is a proceeding in review-reopening brought by Mary Mock, claimant, against Ralston Purina Company, employer, and Aetna Life and Casualty Company, insurance company, for the recovery of further benefits as the result of an injury of September 29, 1980. This matter was heard October 21, 1986 at the Bicentennial Building in Davenport, Scott County, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record in this proceeding consists of the testimony of claimant and claimant's exhibits 1 through 28.

STIPULATIONS AND ISSUES

Pursuant to the prehearing report and order approving the same, the parties stipulated as follows:

1. Claimant received an injury arising out of and in the course of her employment on September 29, 1980.

2. Claimant's injury caused temporary total and permanent disability.

3. Claimant's time off work for healing period benefits were for the following periods of time:

September 29, 1980 through October 12, 1980
October 28, 1980 through November 2, 1980
March 2, 1981 through April 26, 1981
July 20, 1982 through August 22, 1982

4. The permanent disability suffered by the claimant was to left leg; however, if it extends to her back, it is to the y as a whole.

5. The commencement date for payment of permanent disability August 23, 1982.

6. Claimant's rate of compensation is $201.38.

7. All medical benefits requested by claimant have been or ll be paid by defendants.

8. Claimant has been previously paid fifteen and five-venths weeks of temporary total disability benefits.

The issues to be resolved in this proceeding are the nature d extent of disability suffered by claimant and whether such sability is causally related to the injury of September 29, 80.

EVIDENCE PRESENTED

Claimant testified she is thirty-nine years old and resides n Leavenworth, Kansas. She is a high school graduate with no urther training.

Claimant advised that she was employed by defendant from eptember 1977 until January 1986 when she was laid off. The efendant is a manufacturer of dog and cat food products. She aid her primary job with defendant was operating a bone marrow tuffing machine. She said this involved watching the machine o make sure there were no spills and keeping the hoppers filled. he job included lifting up to fifty or sixty pounds plus a lot f standing and climbing of steps and ladders.

Claimant said she was injured on September 29, 1980 shortly fter she started her 3:00 to 11:00 p.m. shift. She was moving uckets of material along a catwalk over her machine and fell hrough an open space in it. She said she fell about ten or welve feet straight down landing on her feet and then falling o the floor. Claimant recalled that it felt as though her left leg from her waist down had gone to sleep and she was unable to get up. Claimant said she was taken to the hospital by ambulance and noted swelling in her left leg particularly around the knee. Most of her complaints at that time involved the knee, but claimant later began to experience back pain. She denied prior problems with either of those areas.

Claimant returned to work about two weeks after her accident. She said her knee felt very unstable and she had a pain in her back like a toothache. She received physical therapy on the knee for sometime. Claimant said her leg was treated by a

couple of different doctors and she was admitted to the hospital in March 1981. Claimant had an operation on her knee in July 1982. In June 1983 she attended a back program. She said she was last treated by a doctor in June 1984 when she was released to work with a forty to fifty pound lifting restriction.

Claimant disclosed that in 1977 she received chiropractic treatment for right hip pain and upper back pain which resolved. She added, however, that she still experienced upper back pain with heavy lifting. She was last treated for the upper back problem the early part of 1980.

Following her injury, except for periods of temporary disability, claimant was able to do her regular job. She continued in this position until her January 1986 layoff.

Claimant said she continues to have persistent problems with her left leg. It appears to bend backwards after she stands on it for long periods of time. She now tries to avoid stairs. She said she also has back and hip discomfort which causes her to sit to the right. She treats this with an occasional aspirin and heat. She added that she learned back mechanics at the back school which seemed to help somewhat. Claimant has not received medical treatment for his condition for sometime.

Claimant explained that she had prior work experience with the Hallmark Company where she worked as a quality control supervisor. She also ran a candle making machine for that company. Her only other employment was with the Quad Cities Die Casting Company where she ran a punch press. She acknowledged that her layoff was the result of a plant wide work force reduction. She is presently twentieth from the bottom of the plant seniority list.

Claimant said she has learned to live with her condition though it flares-up on occasion for no apparent reason. The majority of the time she can work an average day without significant back pain. She said that for about three years following her injury she could not do all of the jobs at defendant but can do so now.

On cross-examination claimant again reviewed her employment history. She denied having been told by doctors that one leg is shorter than the other which is the cause of her back and hip pain. She said she has for the most part been able to adjust her life style and activities to minimize her problems with the back and knee.

Claimant's exhibit 1 is a copy of claimant's records from the Moline Chiropractic Center under the care of James R. Vana, D.C. These records show that claimant was first treated by Dr. Vana in early 1977 with a primary complaint of dorsal spine pain

and a secondary complaint of right hip and foot pain. Claimant apparently received about twelve treatments for the problem through September 1977. She next saw claimant in February with complaints she related to her fall at work. Claimant stated her complaints to be low back pain, tilted pelvis, and sciatic nerve damage.

Claimant's exhibit 2 is a copy of a health insurance claim form filed by claimant for her 1977 chiropractic treatment.

Claimant's exhibit 3 is a copy of a September 29, 1980 x-ray report indicating there had been no fracture or dislocation of claimant's left knee. Exhibit 4 is a copy of clinical notes from The Davenport Clinic concerning claimant's treatment there from 1979 through the early part of 1983. Initial treatment at the clinic concerned a cut finger. Treatment for injuries sustained in claimant's fall at work commenced October 1, 1980. Initial notes indicate claimant injured her left leg and back in the fall and contusions in those areas were noted. It appears that claimant's back problems continued or recurred for sometime. It is noted that these clinical notes are exceedingly difficult to read.

Claimant's exhibit 5 is a copy of x-ray reports dated October 1, 1980, October 28, 1980, and February 20, 1981. Impressions of the lumbar spine were spondylolysis of L5 on the left and transitional L5 with partial sacralization of the transverse processes. Exhibit 6 is a copy of a surgeon's report dated October 1, 1980 by P. O. Atienza, M.D. This indicates injuries to claimant's left leg and back with no permanent defect anticipated.

Claimant's exhibit 7 is a copy of the progress notes of Richard L. Kreiter, M.D., concerning claimant for the period from November 12, 1980 to March 30, 1984. Dr. Kreiter's initial diagnosis was resolving injury to left knee with possible anterior cruciate ligament injury and medial collateral strain and resolving low back strain. Claimant was followed intermittently thereafter with occasional flare-ups of both the back and knee problems. In October 1981 the doctor diagnosed a possible medial meniscus tear in the left knee. Her back pain continued intermittently aggravated by mechanical activity. In July 1982 claimant underwent an arthroscopic examination of her knee which included an interarticular shaving. Progress notes through March 1984 continue to show off and on problems with both the knee and the back.

Claimant's exhibit 8 is a copy of the records from her March 1981 hospitalization. Claimant was diagnosed and treated for low back syndrome. Exhibit 9 is attending physician reports for a March 1981 hospitalization. These reports disclose that claimant's work injury was the cause of her low back syndrome.

Exhibit 10 is a June 17, 1981 report from Dr. Kreiter to the safety manager at defendant. At that time the doctor did not expcet claimant's restrictions to be permanent. Exhibit 11 is a letter from J. H. Sunderbruch, M.D., dated June 29, 1981 concurring with Dr. Kreiter's June 17, 1981 assessment of claimant.

Exhibit 12 is a letter dated February 24, 1982 from Dr. Kreiter to the insurance carrier outlining claimant's condition and treatment and suggesting the possibility of an arthroscopic examination. Exhibit 13 is a copy of claimant's hospital records concerning the arthroscopic surgery. The results of this surgery were discussed above. Exhibit 14 is a surgeon's report from Dr. Kreiter relating the need for the knee surgery to the work injury.

Exhibit 15 is a report dated November 2, 1982 from Dr. Kreiter to the insurance carrier advising that the result of the arthroscopic examination disclosed an abnormal lateral meniscus. He states that the condition was probably congenital and not related to claimant's injury. He did not anticipate significant disability.

Exhibit 16 is a letter dated February 7, 1983 to claimant's counsel requesting claimant schedule another appointment with him if she was having additional trouble with her knee. Exhibit 17 is a letter from the doctor to claimant's attorney advising that claimant's injury probably aggravated her preexisting congenital problem. He assigned a five percent impairment to the left lower extremity as a result of the injury. He also discusses her back condition, but no impairment rating is given. Exhibit 18 is additional office notes from Dr. Kreiter. Exhibit 19 is a surgeon's standard report from M. K. Skoglund, M.D., dated July 6, 1983 stating that claimant suffered from chronic lumbosacral strain syndrome.

Claimant's exhibit 20 is a July 28, 1983 physical therapy report indicating claimant did not attend his last three physical therapy sessions. Exhibit 21 is copies of various release to work notes for claimant during her periods of temporary disability.

Exhibit 22 is a copy of the insurance claim filed by Dr. Vana for his 1984 treatment of claimant.

Exhibits 23 is a copy of a June 5, 1984 letter from Dr. Kreiter to defendants commenting upon claimant's limitations which he said would include limited forward flexion, squatting, and lifting more than fifty pounds repeatedly.

Exhibit 24 is an October 14, 1985 medical report from Robert W. Milas, M.D., to the insurance carrier. According to this report, Dr. Milas examined claimant on October 11, 1985. The doctor recites a brief history of claimant's injury and treatment

as well as the nature of his physical examination. Dr. Milas diagnosed spondylolysis involving L5 on the left. He believed that the source of claimant's spondylolysis may have been traumatic in origin, particularly in light of her history of no problems prior to the injury. He recommended no further treatment but did suggest that claimant find employment with limited physical demands. In a subsequent report dated December 10, 1985 (exhibit 25), Dr. Milas assigned a twenty percent permanent impairment rating to claimant's body as a whole.

Exhibit 26 is a medical-occupational evaluation of claimant from Mercy Hospital in Des Moines, Iowa. According to this report, claimant has a five percent impairment to her lower left extremity. The report states that an assessment of the causitive relationship between claimant's spondylolysis and her injury. They stated, however, that if x-rays taken prior to the injury do not reveal a spondylolysis then she had in fact sustained an acute spondylolysis which would accordingly change her prognosis.

Exhibit 27 is a September 26, 1986 report from Dr. Milas. In this report Dr. Milas states that he did review claimant's x-rays taken by Dr. Vana in 1977. Dr. Milas concluded that the 1977 x-rays were quite inadequate to document crispy bony detail. He also reviewed October 28, 1980 x-rays from Davenport Medical Center. He said he was unable to see the spondylolysis on the films, but opined that they may have been taken at a point to early following the injury to see the detail at the fracture site. He also said that the angle at which the x-rays were taken may have concealed the spondylolysis.

Finally, claimant's exhibit 28 is a copy of the AMA Guides to the evaluation of permanent impairment. Those guides disclose that a grade I or II spondylolysis is rated as an impairment equal to twenty percent of the whole man.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 29, 1980 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).

It would appear that claimant's left knee injury did cause permanent disability by aggravating a preexisting congenital defect. The doctor's opinion is, admittedly, somewhat equivocal but on the record as a whole, persuasive on this point.

The more difficult question in this case is the back injury. Dr. Milas is of the opinion that claimant suffered L5 spondylolysis on the left. He opined that the source of claimant's condition was traumatic in origin. Dr. Milas' opinion is subject to question, however, since he concluded that the x-rays taken of claimant's back October 28, 1980 did not show the L5 spondylolysis while the reports issued at the time clearly make reference to this problem. See exhibit 5. The issue is not helped by the report of the doctor at the Mercy Hospital Medical Occupational Evaluation Center in Des Moines, Iowa. In essence, that report merely concludes that claimant's back condition may or may not have been caused by her injury. It is thus apparent that the answer to the question of causation between the injury and claimant's back condition cannot be resolved solely on the basis of the medical opinions.

The controlling factor in this case is the credibility of the claimant. Certainly claimant experienced some right hip pain in early 1977 but she testified that this problem cleared up and she did not have further problems with her back until her injury at work. It does not appear that the problems she experienced in 1977 with her right hip are the same as she experienced after her injury. Even if it is assumed that claimant's 1977 problems were the result of the same back condition as she now has, it is clear that the impairment at that time was temporary in nature and that subseuqnet to her work injury, the impairment is both permanent and disabling. Thus, in either case, a material aggravation of the condition occurred. Nothing else in the record suggests any other cause other than the work injury which brought about her present condition.

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

Although the degree of functional impairment suffered by claimant pursuant to the AMA Guides is significant, it is obvious that claimant has been able to function quite well from an industrial disability perspective. She was returned to and in large part has been able to fulfill the duties of her job. She is presently on layoff status due to noninjury-related factors.

In addition, claimant has demonstrated excellent motivation and has been successful in adapting her life to the limitations from which she suffers. On average, it appears claimant can perform work on a regular eight hour per day basis without significant back pain. She continues, however, to suffer occasional flare-ups of her condition.

It would appear that the injury suffered by claimant does not preclude her from the types of employment she has been able to perform in the past. It does not appear that claimant suffers significant physical restrictions because of her injury. Her primary limitation involves the left knee which gives her difficulty on frequent occasions.

While claimant did have a long period of recuperation, she has reached the point where she could do all of the jobs at defendants that she could have done prior to her injury. It is apparent that claimant suffered considerably in achieving this goal.

Based upon all of the considerations of industrial disability, claimant has shown an industrial loss equal to fifteen percent of the body as a whole.

FINDINGS OF FACT

WHEREFORE, the following facts are found:

1. On September 29, 1980 claimant suffered an injury at work when she fell through a hole in a catwalk at work.

2. As a result of the fall, claimant materially aggravated a preexisting congenital defect in her left knee.

3. As a result of the fall, claimant suffered or materially aggravated a preexisting condition in her back in the form of a L5 spondylolysis on the left causing a twenty percent body as a whole impairment.

4. Claimant underwent a long period of recuperation and was temporarily totally disabled for intermittent periods of time.

5. Claimant has recovered without significant physical limitations although she does suffer significant impairment.

6. Claimant was able to return to work though she is presently on layoff due to economic reasons.

7. Claimant has demonstrated excellent motivation to return to the work force.

8. Claimant is physically and mentally capable of engaging in the type of employment for which she is suited.

9. Claimant's rate of compensation is $201.38

10. The commencement date for payment of permanent partial disability is August 23, 1982.

11. Claimant has suffered a permanent disability for industrial purposes equal to fifteen percent of the body as a whole.

CONCLUSIONS OF LAW

IT IS THEREFORE CONCLUDED:

Claimant has proven by a preponderance of the evidence that there is a causal relationship between her injury and the disability that arises from impairment to her knee and back.

Claimant has proven by a preponderance of the evidence that she has suffered an industrial disability as a result of her injury equal to fifteen (15) percent of the body as a whole.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant seventy-five (75) weeks of compensation for permanent partial disability commencing August 23, 1982 at her rate of two hundred one and 38/100 dollars ($201.38). All accrued payments shall be made in a lump sum together with statutory interest thereon.

Costs of this action are taxed to defendants.

Defendants are to file a claim activity report upon completion of this award.

Signed and filed this 27th day of February, 1987.

Steven E. Ort

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CARROLL MONSEN,

Claimant,

vs.

JOHN MORRELL & COMPANY,

Employer,
Self-Insured,
Defendant.

File No. 815283

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 brought by Carroll Monsen, claimant, against John Morrell & Company (Morrell), a self-insured employer, for benefits under chapter 85B, Code of Iowa. A hearing was held in Storm Lake, Iowa, on February 3, 1987 and the case was submitted on that date.

The record consists of the testimony of Edgar Nitchals, John Whitacre, and Larry Bebo; claimant's exhibits A through H; and Defendant's exhibits 1 and 2. Claimant did not testify in person. Exhibits G and 2 are his deposition testimony. Both parties filed a brief. The exhibit list given to the hearing deputy at hearing reads as follows:

RE: Carroll Monsen vs. John Morrell & Company -
File #815283

Plaintiff's Exhibits:

A. Physical examination given workman for employment with John Morrell & Company - employed 5-20-57.

B. Noise level survey conducted at the John Morrell plant in Estherville by OSHA.

C. Noise level survey conducted at the John Morrell plant in Estherville by John Morrell & Company.

D. Letter from R. David Nelson, M.A., Audiologist of Nelson Hearing Aid Service dated 4-25-86.

E. Letter from C. B. Carignan, M.D. dated January 12, 1987 consisting of 2 pages.

F. Letter from R. David Nelson, M.A., Audiologist stating estimated cost of hearing aid for Claimant dated 1-15-87.

G. Court reported testimony of Carroll Monsen.

H. Photograph of Claimant, Carroll Monsen.

Defendant's Exhibits:

Daniel Jorgensen's hearing loss calculations and audiology report dated 11-11-86. (Deposition Exhibit #1)

1. Deposition of Daniel Jorgensen dated 1-29-87.

2. Deposition of Carroll Monsen, dated October 13, 1986. (Deposition Exhibit #2)

The parties stipulated that claimant's weekly rate of compensation is $241.17 and that any weekly benefits awarded would commence on April 27, 1985.

ISSUES

The contested issues are:

1) Whether this action is barred by Iowa Code section 85.23 because the employer herein was not given notice of, nor did this employer have actual knowledge of, claimant's alleged occupational hearing loss;

2) Whether this action is barred by Iowa Code section 85.26 because it was not timely filed;

3) Whether claimant sustained an occupational hearing loss under chapter 85B, Code of Iowa; that is, whether claimant is entitled to occupational hearing loss benefits under chapter 85B, Code of Iowa;

4) Nature and extent of disability; that is, the number of weeks of permanent partial disability benefits owing; and

5) Whether defendant shall pay the cost of a hearing aid or aids pursuant to Iowa Code section 85B.12.

SUMMARY OF THE EVIDENCE

Claimant testified in exhibit G (taken on February 3, 1987

by telephone) that he is 53 years old and started working for John Morrell in 1957 on the cut floor. He worked on the cut floor and in the boning room for 21 years. His last day of work at Morrell's Estherville plant was on April 27, 1985 when the plant closed. His hearing was good when he started working for John Morrell. He was in the military from 1953-55 and sustained no hearing impairment as a result of his work as a cook or driver. After his discharge, he farmed with his father for a short period of time and then went to work for Morrell. He had a physical examination when he started at Morrell and his hearing was normal at that time. At Morrell, claimant worked on the cut floor at the "head table, break up table." Id. at 6. At the head table the noise level exceeded 90 decibels. He worked full-time at John Morrell. On page 7, he stated: "[M]y hearing started to get bad as the years went on." His ears now ring.

Claimant testified that a company nurse tested his hearing prior to April 27, 1985 and he stated on page 9: "They knew that I had a hearing problem." On page 11, he stated that he knows of no personal basis for a hearing loss, and also stated that the ammonia compressors at Morrell caused the most noise, making it necessary to scream or shout. He has been told that he needs a hearing aid.

On cross-examination, claimant testified on page 14 that he worked around the ammonia compressors at Morrell from 1978 until the plant closed in 1985. These compressors were in the engine room. On page 17, he stated that he has had a hearing problem for the last eight years or so. He does not currently wear a hearing aid. Both of claimant's parents had hearing problems.

Claimant testified in exhibit 2 (taken on October 13, 1986) that he started at Morrell on May 20, 1957. His first job was cleanup, which he did for about one year. He has worked a number of different jobs and was in the boning room running a band saw until 1978. He worked as a boiler operator near or with ammonia compressors. He was in the engine room from 1978 until the plant closed in 1985. On the cut floor, he operated the band saw on the break table. In sum, between 1950-1978 he worked "all different jobs." He worked near the ammonia compressors from 1978 through 1985. He spent four hours or more per day in the ammonia compressor room from 1978 through 1985.

Claimant testified on page 13 that he noticed a hearing problem around 1984 as "it just started coming on gradually." He talked with the plant nurse about his hearing problem. Id. at 14. On page 15, he stated that he does not wear a hearing aid, nor has one been recommended. On page 18, he stated he thinks that noisy machinery caused his hearing loss, but admitted that the ammonia compressor area is not set out in one of the noise level surveys. On page 21, he stated that he learned of his

hearing problem in 1983 when a hearing test was conducted.

Edgar Nitchals testified that he is a former employee of Morrell in Estherville. He started working there in 1952 and has known claimant for thirty years. He stated his opinion that claimant did not have any hearing loss when he started working at Morrell. They worked together in the boiler room and compressor room. The compressors at the pork plant were noisy for the last ten to twelve years. The compressor room was so noisy that it was not possible to talk to coworkers. The room was about sixty feet by eighty feet and was open. Hearing protection was provided in 1983 and hearing tests were conducted by Morrell prior to the plant closure in 1985. A company nurse requested the hearing tests. The foreman was told about the hearing loss situation. Claimant worked in the compressor room. The pork plant was noisier than the beef plant and Nitchals worked in both.

John Whitacre testified that he worked for Morrell in Estherville from January 1957 through April 1985 and that he knows claimant. He stated his opinion that claimant did not have a hearing loss when claimant started at Morrell; they worked together in the boning room and engine room which had "very high noise." The noisiest area was the engine room around the compressors. On occasion, the mufflers were taken off the wizard knives. A notice was posted on a bulletin board to come in for hearing tests. Nitchals had a general discussion with a foreman and plant nurse about occupational hearing loss at Morrell prior to the plant closure in 1985.

Larry Bebo testified that he worked for Morrell from April 1966 through April 1985 and knows claimant as he has worked with him. On the cut floor, the sound level was high and that made it necessary to shout. Bebo met claimant in 1965 and claimant had no hearing loss at that time in Bebo's opinion. In about 1982 or 1983, a plant nurse administered hearing loss tests.

Exhibit E, page 2 (dated January 12, 1987), is authored by C. B. Carignan, Jr., M.D., and reads in part:

A recent audiogram for Mr. Monsen performed by R. David Nelson, a certified audiologist at Spencer, Iowa on April 22, 1986 revealed a pattern of hearing loss typically associated with noise induced hearing loss. This revealed a 145 decibel sum hearing loss of the right ear and a 130 decibel sum hearing loss of the left ear, equivalent to a 12.2% binaural Hearing impairment....

In view of his history and physical examination and the Audiogram which I examined I feel that with reasonable medical certainty, Mr. Monsen's hearing

impairment resulted from his continued exposure to the high noise environment at his workplace at the John Morrell packing plant at Estherville, Iowa.

Exhibit F, page 1, states R. David Nelson's estimate as to the cost of a hearing aid.

Exhibit 1 is the deposition of Daniel Jorgensen, M.D., taken on January 29, 1987. Dr. Jorgenson is an otolaryngologist. He has a soundproof booth and an audiometer. He has a person with a master's degree in audiology do the audiograms. Dr. Jorgensen examined claimant on November 11, 1986 and took a history. Deposition exhibit 1 is an audiogram performed on November 11, 1986.

On page 10, Dr. Jorgensen stated:

Q. And if one has a predisposition towards a hearing loss then that may show up on an audiogram as below the normal hearing levels in the low frequencies, say, frequencies 125 through 750 or 1,000; is that correct?

A. It's possible that these low frequencies or that all of his hearing was below the normal level when he began work at John Morrell. And the noise-induced component is represented by this high frequency loss. It's hard to determine that anything different has occurred without having prior audiograms. People who grew up with their hearing at this level rarely notice any difference. They accommodate quite well and they are comfortable with that. So it's only as he started losing the high frequencies that he may have been aware of a problem.

On page 14, Dr. Jorgensen stated:

Q. And in fact is it fair to say, Doctor, that this exposure at John Morrell & Company is really the major factor in the history and examination as far as demonstrating what caused this man's hearing loss?

A. I think that's fair to say, yes. Can I -- again can I clarify that? I think it's fair to say that that's what contributed to this high frequency loss. When I see the low frequencies outside the normal range I have to think of other causes as well.

On pages 14-15, Dr. Jorgensen stated that claimant has

tinnitus (ringing in the ears) which he characterized as a symptom of hearing loss. He thought that claimant's tinnitus was due to noise. On page 16, he stated that the hearing loss could be a "congenital loss" or a "familial loss."

APPLICABLE LAW AND ANALYSIS

I. Does Iowa Code section 85.23 apply to occupational hearing loss cases? It is concluded that section 85.23 does apply to this class of case as it is not inconsistent with chapter 85B. See Iowa Code section 85B.14. The Iowa Supreme Court stated in Dillinger v. City of Sioux City, 368 N.W.2d 176, 179 (Iowa 1985):

> I. Notice under section 85.23. In pertinent part, section 85.23 requires the employee to give the employer notice within 90 days after the occurrence of the injury "unless the employer or his representative shall have actual knowledge of the occurrence of an injury." Consequently, an employee who fails to give a timely notice may still avoid the sanction of section 85.23 if the employer had "actual knowledge of the occurrence of the injury." The discovery rule delays the commencement of a limitation period, for bringing a cause of action or for giving notice, until the injured person has in fact discovered his injury or by exercise of reasonable diligence should have discovered it. Orr, 298 N.W.2d at 257.

It will be found in this case that the defendant had actual knowledge of claimant's alleged hearing loss prior to the "occurrence of an injury" in this case. The injury did not "occur" in this case until the plant closed on April 27, 1985. Dillinger is authority for the proposition that Iowa Code section 85.23 may be complied with prior to the occurrence of an injury. Id. at 180. Claimant did not realize the compensable nature of his hearing loss until a hearing test was conducted by a company nurse in the early 1980's. This hearing test provided the defendant with actual knowledge of claimant's alleged occupational hearing loss.

II. Is this claim time barred by Iowa Code section 85.26? Section 85B.8 provides in part:

> A claim for occupational hearing loss due to excessive noise levels may be filed six months after separation from the employment in which the employee was exposed to excessive noise levels. The date of the injury shall be the date of occurrence of any one of the following events:

1. Transfer from excessive noise level employment by an employer.

2. Retirement.

3. Termination of the employer-employee relationship. (Emphasis supplied.)

Claimant in this case separated from his Morrell employment on April 27, 1985 and as stated above his cause of action accrued at that time. His petition was filed on May 9, 1986. The Iowa Supreme Court held in Chrisohilles v. Griswold, 260 Iowa 453, 461 150 N.W.2d 94, 100 (1967) that a statute of limitations "cannot commence to run until the cause of action accrues." In this case the cause of action did not accrue until April 27, 1985 when claimant separated from Morrell. Claimant filed his petition within two years of April 27, 1985. This claim is not time barred. In accordance with Iowa Code section 85B.8 claimant waited until six months after his separation from Morrell to file this action.

III. The question of whether claimant sustained an occupational hearing loss, by definition, includes the question of whether a causal relationship exists between claimant's industrial noise exposure and his current hearing loss. Section 85B.4(1) provides:

Occupational hearing loss means a permanent sensorineural loss of hearing in one or both ears in excess of twenty-five decibels if measured from international standards organization or American National standards institute zero reference level, which arises out of and in the course of employment caused by prolonged exposure to excessive noise levels.

In the evaluation of occupational hearing loss, only the hearing levels at the frequencies of five hundred, one thousand, two thousand, and three thousand Hertz shall be considered.

Section 85B.4(1) requires that a claimant's hearing loss both be a permanent sensorineural loss in excess of 25 decibels and that it arise out of and in the course of his employment because of prolonged exposure to excessive noise levels.

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

Section 85B.6 provides maximum compensation of 175 weeks for total occupational hearing loss with partial occupational hearing loss compensation proportionate to total hearing loss.

Claimant has established by the greater weight of the evidence that he sustained hearing loss from his work at Morrell and that all of his hearing loss is attributable to his Morrell employment.

IV. Claimant's binaural hearing loss is 12.2 percent entitling him to 21.35 weeks (12.2 percent of 175 weeks) of permanent partial disability benefits at a rate of $241.17.

V. Claimant has not established entitlement to the cost of a hearing aid.

FINDINGS OF FACT

1. Claimant is 53 years old.

2. Claimant started working for Morrell in Estherville, Iowa in 1957.

3. All of claimant's hearing loss was sustained as a result of his Morrell employment.

4. Claimant did not realize that his hearing loss was work-related until Morrell did a hearing test in the early 1980's; this test provided Morrell with actual knowledge of claimant's alleged occupational hearing loss.

5. Claimant's binaural hearing loss is 12.2 percent.

6. Claimant's stipulated weekly rate of compensation is $241.17.

CONCLUSIONS OF LAW

Claimant has established entitlement to twenty-one point thirty-five (21.35) weeks of permanent partial disability benefits commencing on April 27, 1985 at a rate of two hundred forty-one and 17/100 dollars.

ORDER

IT IS THEREFORE ORDERED:

That defendant pay the benefits described above.

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

That defendant pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33.

That defendant shall file claim activity reports, pursuant to Industrial Services Rule 343-3.1(2), formerly Industrial Commissioner Rule 500-3.1(2), as requested by the agency.

Signed and filed this 17th day of March, 1987.

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES G. NOVAK, Claimant, vs. LUNDBERG SEED FARM, REUBEN LUNDBERG, INC., Employer, and ALLIED MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	FILE NO. 799589 A R B I T R A T I O N D E C I S I O N FILED NOV 17 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding brought by James G. Novak, claimant, against Lundberg Seed Farm, also known as Reuben Lundberg, Inc., employer (hereinafter referred to as Lundberg), and Allied Mutual Insurance Company, insurance carrier, for workers' compensation benefits as the result of an alleged injury on June 20, 1985. On August 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 in this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Clark Borland, Lisa Novak, Rod Rebarcak, D.C., and Roger MarQuardt. 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. With reference to claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding, the parties agree that claimant was married and entitled to two exemptions at the time of the alleged work injury.

2. Claimant is seeking healing period benefits from August 7, 1985 through August 28, 1985; October 20, 1985 through January 5, 1986; and from January 19, 1986 through May 28, 1986

(except for seven days) and defendants agree that except for the period from October 20, 1985 through January 5, 1986, 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. The medical expenses submitted by claimant are causally connected to the back condition upon which the claim herein is based but that the issue of the causal connection of the back condition to any work injury remains an issue to be decided herein.

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;

III. The extent of weekly disability benefits to which claimant is entitled;

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

V. Claimant's rate of weekly compensation.

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 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.

Claimant's wife testified that they both began working for Ruben Lundberg in 1982. Claimant was hired as a farm worker and his wife as a bookkeeper. Claimant received approximately $130 in gross salary plus the free use of a house and free utilities. Claimant also received a periodic bonus at the rate of $.01 per bushel for bagging beans. Claimant's wife received additional compensation for her work. Beginning in 1984, claimant became a "farm manager" with an increase in wages to $167 per week plus a better house along with free utilities including lights and gas. Also, claimant received a periodic bonus of $.05 per bushel for bagging beans. All of the bonuses were paid to previous employees

of Lundberg and the payments were made periodically through the course of a year. Claimant's wife testified that she estimates that from her experience and knowledge of the local house market and cost of utilities, she valued the free utilities as equivalent to $18.46 per week; fee gas at $14.42 per week; and free rent at $46.15 per week. She testified that claimant earned a total of $5,119.25 in bonus money prior to leaving Lundberg's employment.

Following the work injury in this case, claimant was terminated by Lundberg by providing claimant with two weeks notice to vacate the premises. No reason was given in the written notice as to the reason for the termination but claimant and his wife testified that Roger Lundberg, the representative of the owner of the premises, had expressed dissatisfication with claimant's inability to work following the work injury.

The facts surrounding the work injury are not in real dispute. Claimant testified that while lifting a bean bar, a device used to kill volunteer corn plants in a bean field, a lift gave way placing full weight of the bar upon claimant's back. Claimant stated that he fell to his knees and immediately felt low back pain. Claimant did not seek immediate medical treatment and continued working despite the continuation of pain. Claimant's wife explained that both of them were fearful that claimant would lose his job if he did not continue working. However, claimant's wife said that the pain became so severe that they were compelled to seek treatment from a chiropractor. The chiropractor, Rod Rebarcak, D.C., suggested that claimant take a couple of weeks off but claimant continued to work as Roger Lundberg would not allow time off from work. Claimant's pain, however, prevented him from doing much of the work anyway and claimant was eventually terminated by Roger Lundberg on August 7, 1985 in the manner set forth above.

Claimant testified that his low back pain continued after leaving Lundberg's employment. Claimant's wife testified that claimant complained of pain in the lower back with pain shooting down to the knees and ankles and of night pain. Claimant testified that although his back continued to bother him he needed money after losing his job at Lundberg's and looked extensively for replacement employment. Eventually, claimant found employment at Donnellys on August 29, 1985 as a stock handler. Claimant testified that in this job he was required to load 25 pound bags from a pallet onto trucks. Three persons assisted claimant in this loading effort with one person operating a forklift truck. Claimant initially was not assigned to operate the lift truck.

After his treatment of claimant in July, 1985, Rod Rebarcak, D.C., referred claimant to John Grant, M.D., an orthopedic surgeon. Dr. Grant saw claimant on August 22, 1985 shortly before claimant obtained his employment at Donnellys. Following

this exam Dr. Grant states that claimant appeared to him to have an "acute episode of back strain which is now becoming somewhat chronic." Dr. Grant noted in his records that at the time that claimant had low back pain and numbness extending to the knee with difficulty sitting. He prescribed medication along with physical therapy including heat and ultrasound at a local hospital.

From the beginning claimant had difficulty with his work at Donnellys which consisted of repetitive lifting at the same time he was receiving physical therapy for a bad back. Claimant returned to Dr. Grant on September 5 and on September 19. Dr. Grant ordered a CT scan of claimant's back which showed no abnormalities. On September 23, 1985, claimant was advised by Dr. Grant to take time off work at Donnellys but claimant refused for monetary reasons. On October 11, 1985, claimant telephoned Dr. Grant to report that he had hurt his back last night at work. At the direction of Dr. Grant claimant tried bed rest, heat and Motrine medication over the weekend. Dr. Grant saw claimant after the incident on October 21, 1985, noting that claimant reported severe pain "like I had been shot" while lifting a pallet at Donnellys. Dr. Grant's orthopedic impression was that claimant had "acute strain of the lumbar spine which at this point has become somewhat chronic." These are the words Dr. Grant used to describe claimant's condition after his initial examination of claimant in August, 1985.

Claimant testified that he continued to work at Donnellys until October 19, 1985. According to Dr. Grant's records on October 21, 1985, Dr. Grant authorized claimant's absence from work and claimant did not return until Dr. Grant's release for claimant to return to work on January 6, 1986. According to the release slip, claimant was released only to operate a forklift truck and he was directed to avoid repetitive bending and twisting and that he should only occasionally lift up to 15 pounds. Claimant testified that he worked two days and was then laid off. After leaving Donnellys, claimant attempted to find work at various places of employment in the geographical area of his residence but was unsuccessful until May, 1986 when he secured employment as a stable boy. Claimant was working in this job at the time of hearing.

Between January, 1985 and May, 1986, claimant continued to see Dr. Grant who continued to note the persistence of pain and numbness in claimant's low back, legs and night pain except that in November, 1985, claimant's leg pain subsided. Claimant continued with physical therapy and medication during this time. Claimant testified that his pain complaints during this period of time were the same as before. In a report of November 29, 1985, Dr. Grant states as follows: "...Frankly, I think his current continued symptoms are a result of the original injury in June but with almost certainly [sic] aggravation by the incident reported to have occurred on October 10, 1985."

In a report of February 11, 1986, Dr. Grant finally states as follows: "In view of his youth, I suggested that he make a concerted effort to try to obtain work that does not put a premium on a strong back."

Finally, in a report of September 2, 1986, Dr. Grant opined that claimant suffers from a 10 percent body as a whole permanent partial impairment according to the manual for orthopedic surgeons for evaluating permanent partial impairment. Dr. Grant states that he cannot apportion how much this is due to the original injury in June, 1985 and how much is due to the second injury at Donnellys in October of 1985. With reference to his restrictions, Dr. Grant states as follows:

> I feel that he is likely to experience recurring back problems in the future unless he can obtain work that does not require lifting over 15 to 20 pounds and then only on rare occasions perhaps 1 to 2 times per hour at the most. He should avoid jobs requiring repeated bending from the waist or twisting or overhead work that is extensive, and finally he should avoid walking as much as possible on rough, uneven ground or slippery surfaces. Perhaps these restrictions should have been imposed prior to his second injury, but my records do not indicate that I instructed him to that effect. (Emphasis Added).

Dr. Rebarcak testified at hearing that claimant's present difficulties were related to the original June, 1985 injury which predisposed claimant to future reinjury at Donnellys. Dr. Rebarcak testified that he found claimant's symptoms after the Donnellys incident as not as acute as the symptoms he found in June, 1985, after the Lundberg incident. Dr. Rebarcak would add to Dr. Grant's restrictions that claimant not stand over eight hours at one time.

Claimant and his wife testified that claimant continues to experience pain in his back at the present time despite his employment. Claimant's wife said that claimant complains daily of back pain and continues to use a TENS electronic pain device and a back brace most of the day. Claimant stated that he has trouble walking and back pain bothers him most of the day including a burning sensation down to his ankles. Claimant states that he cannot bend, stoop or lift without pain and continues to have difficulty sleeping at night.

Claimant and his wife testified that he works a 48 hour week as a stable hand and sometimes more over a six day period in the care and feeding of horses. Claimant's wage is $4.00 per hour and he grosses approximately $180 per week.

Claimant testified that he is 32 years of age and a high school graduate. Claimant denied any back pain or pain difficulties prior to June, 1985. This testimony is uncontroverted in the record. Claimant's employment prior to Lundberg was unskilled employment in a cap factory and a cattle company. Claimant and his wife testified that claimant has made several unsuccessful attempts to look for more suitable and lucrative employment since leaving Donnellys' employment in January, 1986.

Two vocational rehabilitation consultants have testified concerning claimant's employability. Clark Borland from the Iowa Department of Education holds a master's degree in vocational counseling and has extensive experience of vocational counseling since the early 70's. Borland testified that claimant would not be hired by major industrial employers and claimant is not easily able to enter into the job market without considerable effort. Claimant has an 80 IQ with a 4.7 grade level reading ability and math skills that are rated only at the ninth percentile. Borland expressed surprise that claimant graduated from high school but noted that many small rural schools pass marginal students. He stated that claimant might be able to attend a vocational school but only with extensive tutoring. Claimant would most certainly have difficulty with preemployment physicals. He indicated that claimant's file with the department is still active as claimant has not expressed satisfaction with his current employment.

Roger MarQuardt, another vocational rehabilitation counselor having similar qualifications to those of Borland, testified that his findings as to claimant's capability and skills are similar to those of Borland. However, MarQuardt stated that claimant can be employed in unskilled to semi-skilled work and despite his farm management title at Lundberg, he was manager in name only as he does not have the managerial skills required of most farm managers. MarQuardt notes that claimant is able to function in his stable hand work. In this job claimant can modify work schedules and help is available for those jobs he cannot handle. He notes that claimant was dismissed from a security job after only one week before the stable job because he could not keep adequate records. MarQuardt identified various jobs at the hearing that claimant would be able to perform which could pay from $3.50 per hour up to $10.00 per hour or at wage levels similar to what claimant was earning at Lundberg. He states that generally such jobs are not difficult to find and that claimant was able to find employment on his own. MarQuardt did not testify as to the actual availability of these jobs nor did he perform any survey of available jobs within the geographical area of claimant's residence.

It is a part of the evidence in this case that claimant filed a workers' compensation claim against Donnellys for the October, 1985 incident and this claim was settled under Iowa Code section 85.35 with no admission of liability on the part of Donnellys. The existence of this settlement agreement is irrelevant to any issue in this case although the claimed injury from which it arose and the medical documents attached to the settlement papers were certainly relevant and were considered for purposes of this decision.

Claimant's appearance and demeanor and that of his wife at the hearing indicated that they were 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 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 account of the injury in this case is uncontroverted and supported by the medical evidence.

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).

Claimant's uncontroverted testimony established that he was fired as a result of his inability to work at Lundberg. Claimant was forced to take a job at Donnellys not because he improved physically but because he needed money to support his family. The evidence shows that claimant was receiving physical therapy at the time of his employment at Donnellys and he was in no condition to load trucks. It was certainly not surprising that he suffered additional back pain and back difficulties as a result of his job at Donnellys. Dr. Grant notes that he should have imposed permanent restrictions prior to the second injury. There is little question that Dr. Grant causally connected the chronic problems to a work injury and he so stated on several occasions such a causal connection despite his apparent refusal to apportion his impairment rating. The views of the chiropractor who testified at the hearing substantiated claimant's case even further. Therefore, claimant has established by the greater weight of the evidence a causal connection between the injury of June, 1985, to both temporary and permanent disability.

Defendants argue that the causal connection cannot be found in this case because Dr. Grant did not apportion his impairment rating between the Lundberg and Donnellys injuries. The legal issue is presented as follows:

> After claimant establishes a causal connection between the claimed disability and the work injury, does a claimant also have the burden to establish that there should be no apportionment due to a subsequent injury or does the burden of persuasion shift to defendant to establish the propriety of such an apportionment?

There is no agency precedent as to this precise point of law. Drawing from the general law of torts, this deputy commissioner believes that the correct law is that claimant has no such additional burden after establishing a prima facie case that the disability is causally connected to a work injury. A plaintiff in a personal injury case is not normally charged with a burden as to the actual apportionment of damages. Any burden of that nature must be assumed by the defendant, since the defendant is the party standing to gain by litigating the apportionment issue. 2 Damages in Tort Actions, section 15.34(1)(a); Wonder Life Company v. Liddy, 207 N.W.2d 27 (Iowa 1973). If no apportionment can be made, the defendant is responsible for the entire damage. Becker v. D & E Distributing Company, 247 N.W.2d 727, 731 (Iowa 1976).

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).

It should be noted at the outset that under the theory of law set forth in Blacksmith, et.al., cited above, this deputy commissioner would have awarded some measure of permanent

disability benefits even without a showing of permanent partial impairment for the reason that claimant was terminated from his employment by defendant employer as a result of a work injury and claimant suffered a loss of earning capacity as a result. However, claimant does have permanent impairment and is entitled to additional benefits.

Claimant's medical condition before the work injury was excellent and he had no functional impairments or ascertainable difficulties before the Lundberg injury. Claimant was able to fully perform physical tasks involving heavy lifting; repetitive lifting; bending, twisting and stooping; and, prolonged standing and sitting. As a result of the painful injury in June, 1985, the function of claimant's whole body was effected. Claimant has experienced almost continual pain in varying degrees since the date of injury.

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. These work restrictions are much more important in an industrial disability case than any particular impairment rating.

Claimant's medical condition prevents him from returning to his former work or any other work which requires claimant to violate his work restrictions. Although the diagnosis in this case is only chronic low back pain, the imposition of permanent restrictions as a result of this condition is uncontroverted among the medical experts providing information to this deputy commissioner in this case.

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 is 32 years of age and at the age which should be the most productive of his life. His loss of future earnings from employment due to his disability is more severe than would be the case for a younger or older individual. The vocational experts in this case are not at all encouraging as to claimant's ability to retrain himself outside of a structured employment setting which will be difficult for him to obtain. Claimant's lack of intelligence, along with a lack of reading and math skills, is particularly devastating from an earning capacity standpoint for an individual like claimant who has been physically disqualified from performing heavy work.

On the other hand claimant is not permanently and totally disabled as he appears to have suitable and stable employment at the present time and this is not an appropriate case for application of odd-lot doctrine theory under Guyton v. Irving Jensen Company, 373 N.W.2d 101, 105 (Iowa 1985).

After examination of all of the factors it is found as a matter of fact that claimant has suffered a 60 percent loss of earning capacity from his work injury. Based upon such a finding, claimant is entitled as a matter of law to 300 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 60 percent of the 500 weeks, the maximum allowable for an injury to the body as a whole in that subsection. As it will be found that claimant returned to work or reached maximum healing on January 5, 1986, benefits will be awarded from January 6, 1986.

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 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.

It is found that claimant is entitled to two periods of healing period. First, claimant's termination by Lundberg began an initial period of disability until claimant found employment at Donnellys. Although claimant was looking for work during this period of time, it is apparent from the Donnellys experience that claimant was actually unable to work. A second healing period begins when claimant was off work following the onset of pain at Donnellys in October of 1985. This disability is the result of a susceptibility to reinjury caused by the Lundberg incident. The healing period ends with Dr. Grant's release for employment. As the restrictions imposed at that time ultimately prove to be permanent restrictions and claimant's condition has changed little since the time, this is the most appropriate time to consider claimant as having reached maximum healing.

IV. Claimant is entitled to reimbursement for all medical expenses incurred by him in the treatment of a work injury under Iowa Code section 85.27.

Claimant seeks the expenses listed in the prehearing report.

Defendants claim that such treatment for which claimant seeks reimbursement was not authorized and claimant is not entitled to reimbursement under Iowa Code section 85.27 which provides employers with the right to choose medical care. However, section 85.27 applies only to injuries compensable under Chapters 85 and 85A of the Code and obligates the employers 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 claimant's right

to choose the care. Kindhart v. Fort Des Moines Hotel, (Appeal Decision March 27, 1985); Barnhart v. MAQ Incorporated, I Iowa Industrial Commissioner Report 16 (1981).

Defendants in this case have throughout these proceedings denied that claimant suffered any injury which arose out of and in the course of employment. For that reason and absent a future change in defendants' legal position on the issue of liability, defendants will not have the right to choose the medical care for claimant's injuries until a decision of this agency establishes the compensability of such injury becomes final.

In support of claimant's medical claims, the bills were submitted by appropriate health care providers. According to the prehearing report, there is no dispute as to the causal connection of these bills to claimant's alleged work related back condition. No evidence was offered by defendants to suggest that the bills were not issued in the ordinary course of each health care provider's business. Therefore, it is found that these bills are reasonable and reimburseable.

V. The dispute as to claimant's rate of compensation is with claimant's gross earnings at the time of his work injury. The testimony of claimant's wife who was the bookkeeper at Lundberg concerning the value she placed upon the lodging and utilities furnished by Lundberg appears reasonable and is uncontroverted in the record. The value of employer provided housing is to be included in calculating gross wages. Hoth v. Eilors, I Iowa Industrial Commissioner Report 156, 157 (1980). Also, the evidence indicates that the bonus provided to claimant and his predecessors were regular. Iowa Code section 85.61(12) only excludes "irregular bonuses" from the calculation. The bonus of $5,119.25 will be annualized in the gross wages calculation which add the sum of $98.45 to the figures arrived at by Mrs. Novak in her testimony.

FINDINGS OF FACT

1. Claimant and his wife were credible witnesses.

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

3. On June 20, 1985, claimant suffered an injury to his low back which arose out of and in the course of his employment with Lundberg.

4. The work injury of June 20, 1985 was a cause of a period of disability from all work beginning on August 7, 1985 and ending on August 28, 1985 and a second period of disability beginning on October 20, 1985 and ending on January 5, 1986, at

which time claimant returned to work and reached maximum healing period. Although the second period of disability was in part precipitated by an injury while working for another employer, this second injury was an aggravation of the preexisting injury occurring on June 20, 1985. The original injury of June 20, 1985 remained a substantial causative factor in this second period of disability.

5. The work injury of June 20, 1985 was a substantial cause of a 10 percent permanent partial impairment to the body as a whole. More importantly from an industrial disability standpoint, the June 20, 1985 injury was a substantial cause of permanent restrictions upon claimant's physical activity consisting of no regular lifting over 15 to 20 pounds, no repetitive bending, twisting or overhead work; and, no prolonged walking, sitting, or standing. Claimant had no ascertainable permanent physical impairments or disabilities as a result of a back condition prior to June 20, 1985.

6. The work injury of June 20, 1985 and the resulting permanent partial impairment was a cause of a 60 percent loss of earning capacity. Claimant was terminated by Lundberg solely because of his work injury. Claimant is 32 years of age and can no longer return to the work to which he is best suited given his background and experience. Although claimant is currently employed in suitable work, such work has considerably less earnings. Given claimant's lack of education and intelligence with no transferable skills, the loss of his ability to perform heavy work has a drastic effect upon his earning capacity.

7. The medical expenses listed in the prehearing report for which claimant seeks reimbursement are fair and reasonable and were incurred by claimant for reasonable and necessary treatment of his back condition caused by the work injury of June 20, 1985.

8. At the time of the work injury found herein, claimant's gross weekly earnings consist of the sum of $167 plus $18.46 for furnished lights; $14.42 for furnished gas; $46.15 for furnished house rent and $98.45 for regular bonuses. These figures total a gross weekly earning in the amount of $344.48 per week at the time of the work injury found herein. Given the stipulation of the parties as to marital status and the entitlement to two exemptions, this equates to a rate of $217.11 per week according to the commissioner's rate book for an injury on June 20, 1985.

CONCLUSIONS OF LAW

Claimant has established entitlement to permanent partial disability, healing period and medical benefits as ordered below.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN C. PELZ,	:	File No. 799408
Claimant,	:	
vs.	:	R E V I E W -
WEBSTER CITY CUSTOM MEATS, INC.,	:	R E O P E N I N G
Employer,	:	A N D
and	:	M E D I C A L
FIREMAN'S FUND INSURANCE,	:	B E N E F I T S
Insurance Carrier, Defendants.	:	D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening and pursuant to section 85.27 brought by Steven C. Pelz, claimant, against Webster City Custom Meats, Inc., employer, and Fireman's Fund, insurance carrier, for the recovery of further benefits as a result of an injury claimant received on September 28, 1984. This matter was heard before the undersigned on April 20, 1987 at the courthouse in Fort Dodge, Webster County, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record in this matter consists of the testimony of claimant and Perry Hefty, D.C.; claimant's exhibits 1 through 23; and, defendants' exhibits A, B, C and D. Defendants' objections to claimant's exhibits 21, 22 and 23 are hereby overruled.

STIPULATIONS AND ISSUES

Pursuant to the pre-hearing report and order approving same, submitted by the parties on April 20, 1987, the parties stipulate as to the employer-employee relationship and to the fact that claimant received an injury arising out of and in the course of his employment on September 28, 1984. The parties indicated that the claimant is not making a claim for additional healing period benefits or permanent partial disability benefits. The issues to be determined in this proceeding are whether or not there is a causal relationship between certain medical treatment rendered by Dr. Hefty; whether such treatment was related to the

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ondition from which claimant suffers; and, whether or not such reatment was authorized by the defendants.

EVIDENCE PRESENTED

Perry Hefty, D.C., testified that he is a chiropractor racticing in Webster City, Iowa. Dr. Hefty outlined his ducational training and experience. The doctor stated that he irst saw the claimant on November 12, 1985 at which time he ook a history from the claimant. According to that history, laimant's main concern was soreness in the left shoulder which as affecting his sleep. Claimant reported to the doctor that e had received an injury in October, 1984, when he fell backwards t work and put his hands behind his back to stop his fall.

Dr. Hefty said he conducted an examination of the claimant nd identified a posture problem with the neck to the right. He stated that there was a negative examination for a problem with he bracheal plexus, but that claimant did have a limited range of motion in the arm and weakness in the deltoid muscle. Based pon the examination, the doctor diagnosed a shoulder sprain/strain complex with cervical irritation affecting the shoulder. He stated that he believed it would take an injury such as that described by the claimant to cause the problem from which the claimant suffered.

Dr. Hefty stated that he treated the claimant from January of 1985 through March of 1986 with four or five office visits per month. He said that exhibit 21 is a copy of his bills for the services rendered and stated that they were fair and reasonable as well as reasonably necessary to treat the condition from which claimant suffered. Dr. Hefty said he did not receive notice of nonauthorization of treatment from the employer or the insurance carrier.

On cross-examination, the doctor stated that the claimant referred himself for treatment and was not sent by a referring physician. He stated that all communications between himself and the insurance company were through the claimant's attorney. He also stated that he was aware of the fact that claimant was receiving other treatment.

Claimant testified that he resides in Nevada, Iowa. He stated that he now works for Story Construction in Ames, Iowa. He is age 28.

Claimant testified that he began his employment with the defendant in April, 1984 and worked for them for six or seven months before his injury. Claimant said his injury occurred while he was putting hams on a line, a job he had done since he was hired by the employer, with the exception of one week.

Claimant stated that the injury occurred on September 28, 1984 when he was cleaning up. He said he was pulling on a table and slipped on a piece of meat on the floor and put his hands behind his back to break his fall. He reported that this occurred on a Friday, that the problem got worse over the weekend and that he reported the injury on Monday. Claimant said he was sent to the company doctor who placed a splint on his wrist and placed claimant on light duty. After ten days, the claimant was released to return to work at his regular job which he continued to do until February, 1985 when he returned to the company doctor. He said the doctor treated him with cortisone injections and he saw him four or five times. Claimant stated he did not believe he was getting any better so he consulted Dr. Hefty. Claimant said that his medical doctor recommended physical therapy so he called the hospital to inquire. He reported, however, that at that time he was fed up with medical doctors and decided to seek chiropractic help. The claimant stated he received chiropractic treatments for four or five months and got better. He stated that one of the doctors, referred by the employer, was not paid in full and it was stipulated at the hearing that the insurance company would pay that bill. Claimant said he saw yet another doctor who stated that the chiropractic treatments were probably helping his condition.

Claimant stated that during the time he was seeing the chiropractor he received no notice from the insurer that the treatment was unauthorized. Further, he was not offered alternate care.

On cross-examination, claimant admitted that he did not consult the insurance carrier prior to obtaining the services of Dr. Hefty. Claimant advised that he played softball in the summer of 1985, but that this did not aggravate his shoulder. Claimant said his attorney did notify the defendants in December, 1985 that he was receiving chiropractic care. He denied knowing whether or not his attorney was advised that the insurance company would not pay for the chiropractic treatment. He said he did not receive notice until February, 1986 that the insurance company would not pay the chiropractor's bill.

A review of the claimant's exhibits which were submitted indicates that the medical doctors diagnosed claimant's problem as biceps tendonitis (see exhibit 8). It would appear that the medical doctors do not believe claimant suffered permanent physical impairment (see exhibit 9). These exhibits also indicate that claimant was advised to seek physical therapy.

Exhibit 16 is a letter dated November 11, 1986 from R. R. Reschly, M.D., consisting of two pages. According to Dr. Reschly, he believed that claimant's chiropractic treatments probably did help the patient as much as medical treatment would have done.

Claimant's exhibit 23 outlines the mileage expenses incurred by claimant in order to seek medical treatment. Exhibit 21 is a bill from Dr. Hefty in the amount of $1,706.00.

The defendants' exhibits have been fully reviewed and appear to be primarily duplicates of those exhibits offered by the claimant and need not be set forth in any great detail.

APPLICABLE LAW AND ANALYSIS

Iowa Code section 85.27 states, in part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care. In an emergency, the employee may choose his care at the employer's expense, provided the employer or his agent cannot be reached immediately.

The defendants have previously stipulated that they will pay claimant's medical expenses, with the exception of those incurred for Dr. Hefty's treatment. Defendants accordingly should not only pay for the stipulated treatment expenses, but also for the mileage expenses which claimant incurred in seeking treatment, with the exception of that provided by Dr. Hefty. Claimant sets forth his mileage expenses in claimant's exhibit 23.

It is apparent, in this case, that claimant did not follow proper procedure in seeking treatment from Dr. Hefty. It is equally clear that the chiropractic treatments provided by Dr. Hefty were not authorized by the defendants and that claimant did not take proper steps to advise defendants that he sought treatment from Dr. Hefty or that he had any reason to be dissatisfied with the treatment being offered by the defendants. Claimant contends that he was not offered alternative care, however, this is clearly contrary to the fact that doctors provided by the defendants recommended physical therapy and claimant simply chose to not follow their advice. The troubling aspect of this case is that Dr. Reschly concluded the chiropractic treatments

provided to claimant were beneficial to him and equivalent to that which could have been offered by the medical community. What is absent, however, is whether or not the $1,706.00 incurred by Dr. Hefty would have been the same had physical therapy been undertaken. It is also unclear whether or not the physical therapy would have continued for the period of time that Dr. Hefty continued treatment of the claimant. Another problem which is apparent is that the diagnosis offered by Dr. Hefty is different from the biceps tendonitis diagnosed by the medical providers. Nevertheless, defendants should not be unjustly enriched by the fact that claimant sought chiropractic treatments instead of physical therapy as directed by the doctors. Defendants accordingly will be ordered to pay $500 of Dr. Hefty's bill and to reimburse the claimant for $40 in mileage.

FINDINGS OF FACT

WHEREFORE IT IS FOUND that:

1. On September 28, 1984 claimant suffered an injury arising out of and in the course of his employment.

2. As a result of this injury, it was recommended that claimant obtain physical therapy treatments to relieve the pain suffered as a result of the injury.

3. Claimant sought chiropractic treatment, which was not authorized by the defendants, instead of physical therapy.

4. Defendants have stipulated that they will pay all medical expenses, other than for chiropractic care, incurred by the claimant.

5. The chiropractic treatment provided by Dr. Hefty did improve claimant's condition.

6. The reasonable value of services rendered to claimant by Dr. Hefty in connection with the work-related problem from which he suffered is equivalent to $500.

7. Claimant incurred necessary travel expenses for treatment by Dr. Hefty in the amount of $40.

CONCLUSIONS OF LAW

IT IS THEREFORE CONCLUDED that:

1. Claimant has proven by a preponderance of the evidence that the services rendered by Dr. Hefty were fair reasonable and reasonably necessary for treatment of his condition. Claimant has, however, failed to prove that all of the treatments undertaken by Dr. Hefty were required or that the value of services rendered

by Dr. Hefty were equivalent to that which would have been incurred had he sought physical therapy as required by the defendants' medical providers.

2. Claimant has proven that the value of services rendered by Dr. Hefty was $500.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant five hundred dollars ($500) for services rendered by Dr. Hefty.

IT IS FURTHER ORDERED that defendants pay unto claimant forty dollars ($40) as reimbursement for travel expenses incurred to receive that treatment.

IT IS FURTHER ORDERED that defendants, pursuant to their stipulation, shall pay all other medical expenses, including mileage, which claimant incurred as a result of his condition.

IT IS FURTHER ORDERED that all costs of this action are taxed to the defendants.

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

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL PETERS, Claimant, vs. SWIFT INDEPENDENT PACKING COMPANY, Employer, Self-Insured, Defendant.	:	File No. 697708 A P P E A L D E C I S I O N

FILED

JUL 22 1987

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision denying all compensation because he failed to establish a causal connection between his work injury and the disability on which he bases his claim.

The record on appeal consists of the transcript of the review-reopening hearing and joint exhibits 1 and 2. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

1. Did the issue of causation from the March 11, 1982, injury become moot by the prior 2% permanent disability payment by the Defendants in this Review-Reopening?

2. Is not the principal issue in the Review-Reopening whether the Claimant has sustained as of this time more than the 2% industrial disability earlier paid by Defendant?

3. Alternatively, whether the Claimant met his burden of proof of showing permanent disability arising from the March 11, 1982, accident.

4. Alternatively, whether the Claimant has sustained greater than a 2% industrial disability from the March 11, 1982, accident.

REVIEW OF THE EVIDENCE

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

On March 11, 1982 claimant sustained a work-related injury to his back when a jowl chute fell on his head knocking him to the floor so that his middle back struck a metal stand. Claimant was off work for a period of time before returning to the meat trimming job he was doing before the injury. Claimant states that he bid into a night sanitation job so he could avoid the lifting required in the meat trimming job. Claimant's testimony further indicates that he performed jobs after the work injury which involved long periods of standing, constant repetition, and some lifting (see Tr., pp. 40-46).

Claimant had suffered prior back problems in 1975 and 1980. Claimant was symptomatic from 1980 onward and under the care of John P. McCarthy, D.C. Dr. McCarthy treated claimant after the March 11, 1982 work injury. His diagnoses prior to the work injury and after the work injury are similar. John J. Dougherty, M.D., and R. I. Sprague, D.C., also examined claimant. Dr. Dougherty opines that in view of claimant's continuing back problems it is difficult to tell how much of those problems are the result of claimant's injury or just an aggravation of his preexisting problems. Dr. Sprague assigns a functional impairment rating to claimant's back but does not comment on the cause of claimant's back condition.

Claimant now works as a rod man for a surveying company in Texas since the defendant-employer's plant closing in August 1985. This job requires claimant to walk and bend more than he had anticipated. Claimant describes his back condition as a dull, constant ache in the low back with sharp pain on lifting.

APPLICABLE LAW

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

ANALYSIS

In his brief claimant argues that causal connection was not an issue at the time of hearing. A review of the prehearing order, prehearing report and order approving same, and the trial transcript reveal that both parties understood that whether there was a causal relation between the alleged injury and the disability was in dispute. Claimant, in bringing this action for review-reopening, is seeking additional benefits. It is claimant's burden to show such an entitlement.

Claimant failed to prove that any permanent impairment resulted from the injury on March 11, 1982. The fact that a person has a serious injury does not mean that permanent impairment results. Many serious injuries only result in a temporary condition or a temporary aggravation of a preexisting condition.

The deputy analyzed the medical evidence and came to the conclusion that claimant failed to meet his burden in proving a causal connection between his injury on March 11, 1982 and any further benefits. After review of the record, the undersigned comes to the same conclusion.

Contrary to claimant's assertions, the greater weight of medical evidence would indicate that any permanent problems which claimant may be experiencing preexisted the March 11, 1982 injury. Such a conclusion is supported by the testimony of Dr. McCarthy, whose testimony is given the greatest weight because of the period of time over which he treated claimant. As indicated by the deputy, the diagnosis of claimant's condition in 1980 and 1984 are remarkably similar. Dr. Dougherty's statement regarding claimant's prior problems lends further support to that determination.

Claimant's failure to causally connect his injury with the disability upon which he is basing this claim makes it unnecessary to comment on the question of disability.

FINDINGS OF FACT

1. Claimant received an injury arising out of and in the course of his employment on March 11, 1982 when a chute hit him on the head, knocked him to the floor, and hit him on his back.

2. Claimant had had prior back problems in 1975 and 1980.

3. Claimant had been symptomatic and under Dr. McCarthy's care from 1980 onward.

4. Dr. McCarthy's diagnoses for claimant in 1980 and 1984 were remarkably similar.

5. Claimant's injury of March 11, 1982 resulted in no permanent impairment.

CONCLUSIONS OF LAW

Claimant has failed to established a causal relationship between his March 11, 1982 injury and the disability on which he bases his claim.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing further from this proceeding.

That claimant pay the costs of the review-reopening proceeding along with the costs of the appeal

Signed and filed this 22nd day of July, 1987.

DAVID E. LINQUIST
ACTING INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

IVAN E. PILCHER,

Claimant,

vs.

PENICK & FORD,

Employer,

and

FIREMAN'S FUND INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 618597

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision awarding further healing period benefits, but denying further permanent partial disability benefits. Defendants cross-appeal.

The record on appeal consists of the transcript of the review-reopening hearing and joint exhibits 1 through 22. Briefs have been filed by all parties on appeal.

ISSUES

Claimant states the following issues on appeal:

1. The Claimant is entitled to an additional 110 weeks of permanent partial disability benefits pursuant to Section 85.34(2)(u) because of a psychological condition stemming from his injury on November 25, 1979.

2. The Claimant should not have been taxed with the costs of this action.

Defendants state the following issue on cross-appeal: "Claimant should be barred from any recovery for the reason that healing period terminated on April 29, 1980."

REVIEW OF THE EVIDENCE

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

Claimant sustained a work-related injury to his right eye on November 25, 1979 when a floor drain exploded spraying lime into his eyes. Claimant's left eye recovered completely, however he was left with only shadow vision in his right eye. Subsequently, claimant entered into a settlement agreement pursuant to section 86.13, Iowa Code. This agreement was approved through operation of law since notification of disapproval by this agency was not given within 20 days. See 86.13. Pursuant to the settlement agreement, claimant was paid 140 weeks of permanent partial disability benefits for 100 percent loss of the right eye. The issue of when claimant's healing period ended was specifically left open.

Claimant returned to work following his injury on September 1, 1980. At that time claimant was performing the job he was doing at the time of the injury. Claimant states he later bid into a different job because he didn't want to work with chemicals any longer.

Claimant states that he fears losing his left eye; that he does not like to go out to eat or socialize because people stare at his right eye; and that he no longer actively participates in sports. Claimant believes that it is more difficult to read meters at work since the injury.

Claimant was examined by Thomas Sannito, Ph.D., a clinical psychologist on February 17, 1982. Dr. Sannito states in a letter to claimant's attorney:

> I have reviewed the Ivan Pilcher file and it is my opinion that he is disabled 50%. Losing the visual acuity of his right eye and the disfigurement have affected him psychologically in all phases of his life. He no longer participates in life the way he did before this loss. Whatever work he can do is limited, because the loss of this important sensory organ has severely disrupted his life. He is mentally, emotionally, and psychologically distressed over this result.
>
> Please keep in mind that when a person's mind or mental state is altered, it affects his whole body and day to day functioning.

(Joint Exhibit 3)

Claimant was examined by Vernon P. Varner, M.D., J.D., on March 5, 1985. In his report, Dr. Varner states his impression: "Chronic major depressive disorder with obsessive features with marked increase in low self-esteem, marked social withdrawal, near frank paranoia, although there is no delusional component to it, concerning what everyone is thinking about his eye as he walks by." (Joint Ex. 7)

Claimant was also examined by R. Paul Penningroth, M.D., on November 4, 1985. Dr. Penningroth diagnosed claimant's problems as a "possible adjustment disorder." See Joint Ex. 5.

APPLICABLE LAW

The citations of law in the review-reopening decision are appropriate to the issues and evidence and will only be briefly expanded upon here.

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 additonal award. Stice v. 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 455 (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).

In Gosek v. Garmer and Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968), the court held 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 substantive omission due to mistake, at time of any prior settlement or award."

ANALYSIS

Claimant seeks additional permanent partial disability benefits in this proceeding following his settlement. This agency has consistently held that a settlement approved pursuant to section 86.13 has the same effect as an award of benefits. Claimant must, therefore, establish by a preponderance of the evidence that his condition has changed since the settlement. The evidence presented establishes that claimant's psychological condition has deteriorated since the time of his eye injury but does not disclose whether his condition has changed since the time of the settlement. This does not satisfy claimant's burden.

Furthermore, claimant has presented no evidence or argument that cause for allowance of additional compensation exists on the basis of substantive omission due to mistake. Claimant has made no showing that his psychological condition was unknown to him at the time that he entered into the settlement agreement.

Nor has claimant shown that he could not have discovered through exercise of reasonable diligence that he suffered from traumatic neurosis resulting from his eye injury. Claimant's testimony at the hearing reveals that his fear of losing his good eye and his disinterest in socializing or participation in sports activity began shortly after he returned to work in September 1980 (transcript, pages 23, 35, 44). Claimant's wife testified that she noticed a change in claimant's attitude immediately after the injury. Claimant states that his attorney referred him to Dr. Sannito for examination. Dr. Sannito examined claimant on February 17, 1982--less than four months after claimant's settlement agreement with defendants was approved. Claimant has not seriously pursued treatment of his psychological problems. Some medication was prescribed by Dr. Varner, however, claimant never returned for follow-up evaluation. It is interesting that claimant did not seek psychological evaluation for problems which apparently had existed for at least two years, until four months after settlement with his employer.

To show a change in condition one must show what that condition was at the time of the previous hearing or settlement. The fact that one goes out and obtains evidence that wasn't presented at a prior time does not establish a change of condition. To come up with new evidence may only show a different opinion or shed light on something that should have been presented earlier.

Even if claimant had shown a change of condition, he could not recover benefits for industrial disability since his injury was to a scheduled member and not the the body as a whole. Claimant's psychological problems affect his earning capacity to some extent. However, he has already been compensated for any reduction in his earning capacity through the schedule. The scheduled loss system created by the legislature is presumed to include compensation for reduced capacity to labor and to earn. Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 399 (1942).

Defendants argue that claimant's healing period ended on April 29, 1980. Defendants rest their argument on a report of Jay H. Krachmer, M.D., who examined claimant on April 29, 1980:

> Mr. Pilcher was last seen in the Cornea Clinic on April 29, 1980 at which time his visual acuity in the right eye was not improved and in the left eye his visual acuity remains 20/20. The cornea on the right is completely opacified and vascularized and shows evidence of early lipid degeneration. The visual prognosis of Mr. Pilcher's right eye is extremely poor and it is not likely he will regain useful vision from his right eye. On the other hand we are not at the present time contemplating removing this eye. We are

unable to predict whether this will be necessary in the future. It is reasonable at this point for Mr. Pilcher to return to an active life. It will, however, be necessary for him to wear protective lenses in the interest of his remaining good eye and his working ability will be limited to those tasks which can be performed adequately by a one eyed individual.

(Joint Ex. 13)

The deputy awarded healing period benefits up to September 1, 1980 when claimant returned to work. Section 85.34 (1979) provides:

> 1. Healing period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

Claimant's healing period ended on April 29, 1980. Dr. Krachmer's examination on that date revealed that claimant had substantially recovered and significant further improvement from his injury was not anticipated. The events since April 29, 1980 also show that claimant ceased improvement as indicated by Dr. Krachmer.

Claimant argues that he should not have been taxed with costs of this action. Costs are taxed at the discretion of the deputy. (Division of Industrial Services Rule 343-4.33) Many things may be considered by the deputy. Claimant has not shown an abuse of that discretion.

FINDINGS OF FACT

1. Claimant started work for Penick & Ford on June 21, 1954 and still works for this employer.

2. On November 25, 1979, while working at Penick & Ford, claimant injured both his eyes.

3. Claimant's left eye sustained no permanent partial impairment as a result of the accident of November 25, 1979.

4. Claimant's right eye is 95 percent impaired as a result of the accident on November 25, 1979.

5. On October 29, 1981, the parties filed an "agreement for settlement" which was approved by this agency by operation of law.

6. Claimant did not sustain any permanent disfigurement to his head or face as a result of the accident of November 25, 1979 separate from the appearance of the right eye itself and the area immediately surrounding the right eye.

7. Claimant had a minor surgical procedure performed near his right eye on January 24, 1980.

8. Claimant reached maximum medical recuperation on April 29, 1980.

CONCLUSIONS OF LAW

Claimant's healing period ended on April 29, 1980.

Claimant has not established by a preponderance of the evidence that his condition has changed since the time his settlement, pursuant to section 86.13.

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

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That all costs are taxed to the claimant.

Signed and filed this 21ST day of October, 1987.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOSEPH PINTER, Claimant, vs. FRED CARLSON CO., INC., Employer, and BITUMINOUS CASUALTY, Insurance Carrier, Defendants.	:	FILE NOS. 796964 & 743088 C O N C L U D I N G A R B I T R A T I O N D E C I S I O N FILED JAN 27 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This concludes the interim arbitration decision filed December 11, 1986 wherein the claimant was directed to elect whether or not he would undergo surgery for the hemorrhoid condition with which he is afflicted. Claimant's election to decline the offered surgery was received at this office on January 12, 1987. The only remaining issue to be determined is assessment of claimant's entitlement to compensation for permanent partial disability. Matters stated in the interim decision are considered in this decision even though they are not repeated herein.

ANALYSIS

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 R. 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 method of awarding damages that was approved in Stufflebean v. City of Fort Dodge, 233 Iowa 438, 9 N.W.2d 281 (1943) is appropriate in this case. When considering the award to be made in a case where surgery presents a high probability of a substantial reduction in physical impairment and, correspondingly, of increasing earning capacity, it is appropriate to consider a number of factors that are not normally considered in assessing industrial disability. These include a projection of the degree of disability that would result if the surgery were performed and provided the results that are medically indicated as shown by the record; the degree of disability that currently exists in the absence of surgery and the expense that the employer and insurance carrier would incur if the surgery were to be performed. The expense should include both the direct expenses of treatment and the healing period compensation during the time of recovery from the surgery. The employer should not be held responsible for payment of the uncorrected disability and then subsequently be required to provide surgery. The employer should likewise not profit economically from the employee's decision to decline the offered surgery. The award of disability should therefore be an amount approximately equal to the expense that the employer and insurance carrier would incur if the surgery were performed with results being as anticipated by the medical evidence in the record and the amount of residual disability, if any. In no event should the award exceed the extent of disability that actually exists without submitting to surgery.

Claimant has many demonstrated abilities. He seems to have adapted his employment activities to a form of work for which he is trained and that it is appropriate for his disability. Nevertheless, his earnings have suffered.

If claimant were to have the surgery and the surgery were to be successful, the employer would expend approximately $3,600 in treatment expenses and would also be responsible for paying claimant healing period compensation during the time he was disabled from the surgery. It appears that the healing period would consist of approximately one week in the hospital and approximately four weeks of restriction from lifting or straining (Exhibit 2, page 16). Five weeks of compensation at claimant's rate of $348.61 computes to $1,743.05. When added to the anticipated medical expenses at $3,600 the total is $5,343.05. This is roughly equivalent to 15 weeks of compensation for permanent partial disability which, in turn, is equivalent to a three percent permanent partial disability. The surgery has a high probability of success. If successful, there would be little, if any, permanent impairment. When all the factors of industrial disability are considered, together with claimant's decision to decline surgery and the probable result of such

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urgery if it had been elected, it is found and concluded that laimant is entitled to compensation for five percent permanent artial disability.

The compensation is payable at the end of the first healing eriod, namely September 5, 1983. Teel v. McCord, 394 N.W.2d 05 (Iowa 1986). While it is true that the degree of disability ould not be determined until claimant made his election concerning urgery, it is likewise true that it should have been obvious hat he had some permanent disability as evidenced by the edical restrictions that had been placed upon him. It is likewise true that the employer and insurance carrier have had he benefit of the use of the funds during the time that has ranspired since September 5, 1983. Nothing prevents a defendant rom assessing the degree of permanent partial disability that esults from an injury and voluntarily paying whatever amount ppears reasonable in a timely fashion.

Since claimant has elected to decline surgery and the employer is being ordered to pay compensation under those circumstances, the employee is barred from seeking additional compensation for section 85.27 benefits from the employer and insurance carrier in the event that he should subsequently choose to undergo surgical treatment.

FINDINGS OF FACT

Claimant's disability, when evaluated industrially, is five percent permanent partial disability.

CONCLUSIONS OF LAW

When an injured worker reasonably declines offered surgical treatment, the measure of recovery is an amount that is approximately equal in value to the compensation payable for the anticipated residual disability, if any, plus the direct expenses of the surgery under section 85.27 and additional compensation for healing period connected with the surgery.

Once an injured worker has declined to undergo offered surgery, and the employer has paid compensation for permanent disability based upon the condition being untreated, the employee is thereafter barred from requiring the employer to subsequently pay the cost of the surgery and any healing period resulting from the surgery if it is performed.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant twenty-five (25) weeks of compensation for permanent partial disability at the rate of three hundred forty-eight and 61/100 dollars ($348.61) per week payable commencing September 5, 1983.

IT IS FURTHER ORDERED that defendants receive credit against this award in the amount of seventy and 22/100 dollars ($70.22) and that defendants pay interest on the award pursuant to section 85.30 of the Code.

IT IS FURTHER ORDERED that claimant is barred from hereafter seeking payment from defendants for the cost of hemorrhoid surgery and from any compensation for healing period during any period of recovery resulting from any such surgery.

The costs of this proceeding are assessed against defendants pursuant to Division of Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33.

Defendants are directed to file claim activity reports as requested by this agency.

Signed and filed this 27th day of January, 1987.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARLAND PLIES,

Claimant,

v.

OSCAR MAYER FOODS CORP.,

Employer,
Self-Insured,
Defendant.

File No. 783377

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 Garland Plies, claimant, against Oscar Mayer Foods Corp. (Oscar Mayer), self-insured employer, for benefits as a result of an alleged injury or injuries to his hands and/or arms on or about December 28, 1984. A hearing was held in Davenport, Iowa on March 4, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant, Vernon E. Keller, Monica Murphy, and Peter C. Lau; claimant's exhibits 1 through 6; and defendant's exhibits A through F. Both parties filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $272.83; that only permanent partial disability benefits are at issue in this proceeding; that any permanent partial disability awarded would commence on January 21, 1985; that only scheduled members are allegedly affected (in other words, this is not a whole body case); that the Iowa Code section 86.13 penalty issue was being withdrawn by claimant; that the Iowa Code section 85.38(2) credit issue was being withdrawn by defendant; and that the parties had informally resolved the Iowa Code section 85.27 medical benefits issue.

ISSUES

The contested issues are:

1) Whether claimant sustained an injury or injuries that arose out of and in the course of his employment on or about December 28, 1984;

2) Whether there is a causal relationship between this alleged injury or injuries and claimant's asserted disability; and

3) Nature and extent of disability. Claimant asserts that his disability or impairment affects both of his arms; defendant argues that claimant has no work-related disability, but that in the event disability is found by the agency, it be limited to claimant's hands.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 47 years old and has worked for Oscar Mayer for 22 years in Davenport, Iowa. Prior to December 21, 1984, claimant drove a forklift for Oscar Mayer. On December 21, 1984, claimant started a packing job which entailed unfolding cardboard boxes in rooms where the temperature was 35 to 40 degrees. This new job required repetitive movements of both his arms and he did it all day long on the third shift. Claimant did not experience any problems with his elbows, arms, or shoulders prior to this new job. Swelling started as a result of this new job and was worse the second night of the new job. His hands had to be wrapped.

Claimant testified that on December 28, 1984 the swelling was so bad in both hands and arms that he could not bend his hands and went to a company doctor as a result of this condition. He first saw John J. Bishop, M.D. He ultimately saw Gordon A. Flynn, M.D. Dr. Bishop and Dr. Flynn are associated in some manner. Claimant testified that since December 28, 1984, he has not worked at the packing job and that the new activities he engages in do not require repetitive movement. Claimant testified that his right thumb has a dead sensation and that he has pain in the top of his left hand. Claimant's grip in his right hand has been affected and he has pain "up to the right elbow."

Claimant testified that on several occasions he has seen Raymond W. Dasso, M.D. He has also seen a chiropractor by the name of D. D. Stierwalt.

Claimant testified that after he stopped packing it took several months for his condition to "level off."

On cross-examination, claimant testified regarding the different job functions he has had after he stopped doing the packing job. He stated that after he returned to these light duty jobs his right hand was the worse. He also stated that he has only missed several days of work since his return. His current job involves picking up aluminum pans and putting them into a basket, and that these pans weigh about 15 pounds each. He has been doing this particular job for about two months. Claimant has asked Dr. Flynn to remove his work restrictions because he does not want to be restricted to one particular type of work. Claimant stated that he can do 70 to 75 percent of the jobs at Oscar Mayer with his once imposed medical restrictions. Claimant stated he can do his current assigned work and is not aware of any currently enforced medical restrictions for him. Claimant is not currently taking medication.

On redirect, claimant testified that he could not do the packing job that he started on December 21, 1984.

Vernon E. Keller testified that he is the safety and security manager for Oscar Mayer in Davenport. He administers the company's workers' compensation scheme in Davenport. He testified

:hat he knows of no current medical restrictions that claimant
ıas. He stated that claimant can currently do his job. Keller
:estified that claimant has missed one-half day because of complaints
ıbout his hands.

On cross-examination, Keller testified that both Dr. Bishop
ınd Dr. Flynn are "company doctors." He also acknowledged that
:laimant was paid workers' compensation benefits for the condition
ıt issue here under the assumption that his condition was or is
vork related.

Monica Murphy testified that she is the supervising nurse at
)scar Mayer in Davenport. She helps Mr. Keller administer the
vorkers' compensation scheme to "a minor extent." Ms. Murphy
:estified that she "knows of claimant's job since December 28,
.984." She acknowledged that claimant's wrists and hands had
ıome swelling and that he "came back in the middle of January
.985." She testified that Dr. Flynn has taken off claimant's
ıedically imposed restrictions, and she described claimant's
:urrent work. She further testified that Dr. Flynn has not
:eimposed any medical restrictions. She testified that claimant
:an take meat off a conveyor belt and put it in a box.

Peter L. Lau testified that he is a supervisor at Oscar
ıayer in the "sausage manufacturing" department and has safety
:esponsibilities. He testified that he supervised claimant in
.ate January 1985. He stated that claimant was able to do his
ob and had no complaints about his elbows, hands, or forearms.
.au testified that he last supervised claimant about four weeks
)rior to the hearing of March 4, 1987. Lau testified that claimant
:an do a casing room attendant job and that this job is somewhat
:epetitive. Lau testified that claimant's current job involves
;tainless steel pans, not aluminum pans. He testified that
:laimant currently works with 15,000 to 26,000 pounds per day.

Exhibit 1, page 1 (dated September 25, 1986), is authored by
)r. Dasso and reads in part:

> PHYSICAL EXAMINATION: Physical examination on 9-25-86 reveals a fairly well nourished and well developed, somewhat obese, 46 year old white male, height 5'8", weight 190 pounds who complains of pain in his forearms mainly at this time. He states it is particularly aggravated when he tries to grip things firmly or hold them out in extension away from his body. He states he cannot tolerate that type of work very well or very long. The patient has marked tenderness over the proximal extensor muscles of both forearms and over the medial epicondyle of the left humerus. This is not so bad now, but patient states it is usually quite severe. The patient at this time has normal range of motion of the joints of his thumbs and fingers and of the wrists and elbow joints. He does not have swollen hands now,

but states they were considerably swollen and tender at the time this condition developed when he was doing the ham packing.

Exhibit 1, page 2, reads in part: "PROGNOSIS: Fair. Patient is likely to need some permanent restrictions while at work." Exhibit 1, page 2, also reads in part:

DISABILITY: Patient states he missed about 3 weeks work while under the care of the company doctor about January of 1985. He has been on light work since then. In my opinion, the patient is under permanent restrictions of now being able to return to repetative [sic] use of his hands, wrists, and forearms at any time in the future. In my opinion, the patient has about 10% permanent partial disability of both upper extremities.

Exhibit 3 is authored by Dr. Dasso and reads:

This is a followup report based on the examination of September 25, 1986 on Garland Plies. After seeing the patient again today, 10/9/86, in my opinion, his diagnosis is that of Bilateral Carpal Tunnel Syndrome, and he has a permanent partial disability rating of 5% of both forearms and wrists and hands.

Exhibit 6 (dated August 21, 1985), is authored by John E. Sinning, Jr., M.D., which reads:

It is my pleasure to see Garland Plies today with this perplexing problem of recurrent extensor tenosynovitis involving his wrists. Trying the different anti-inflammatories would seem to be the best bet plus the wrist splinting. The present splint seems perfectly adequate with no indication to try anything more elaborate. I am afraid this will be a trial and error problem that is unlikely to have any rapid solution.

Exhibit C, page 1 (dated November 19, 1986), is authored by Dr. Sinning and reads in part:

I appreciate your asking me to see Garland Plies about his hands and forearm problem. Signs and symptoms in no way suggest a carpal tunnel syndrome. Instead he continues to complain along the same line for which I saw him in August 1985, that is a recurring tenosynovitis of the extensors of both wrists, possibly even a myositis involving the extensors. (Emphasis added.)

Exhibit E is the deposition of Dr. Sinning taken on February 18, 1987. He first saw claimant in August 1985. Dr. Sinning's diagnosis is recurrent extensor tenosynovitis. On page 10, he stated he was unable to determine the cause of this condition. He saw claimant again in November 1986. On page 13, Dr. Sinning stated that on the left side claimant had full motion of his wrist and fingers. He had soreness in both wrists, however. Claimant had no evidence of diagnosable arthritis. He saw claimant again on December 1, 1986 and on that date claimant's

complaints were consistent with an emerging arthritic condition. He stated on page 21 that this "systemic arthritis" was not caused by claimant's Oscar Mayer employment. There is no known cause for this type of arthritic condition according to Dr. Sinning.

On cross-examination, Dr. Sinning stated why he disagreed with Dr. Dasso. Id. at 23. On recross-examination, Dr. Sinning stated that he believed the condition of claimant's arms is unrelated to his Oscar Mayer employment. Dr. Flynn had asked Dr. Sinning to be a consultant in this case. Id. at 45.

Exhibit F is the deposition of Dr. Flynn taken on February 19, 1987. He first saw claimant on December 31, 1984 at which time claimant had "severe swelling of both hands." On page 8, Dr. Flynn stated: "There seemed to be tenderness in the joint itself, and this would suggest more some kind of arthritic problem than it would tendon problem." On page 9, he stated as of June 17, 1985 there was no evidence of bilateral carpal tunnel syndrome. On page 15, he stated that claimant does not "apparently have diagnosable rheumatoid arthritis at this time." On page 16, he stated that claimant's arthritic condition was not caused by his Oscar Mayer employment. On page 22, he stated that claimant's Oscar Mayer employment did not accelerate the disease process.

APPLICABLE LAW AND ANALYSIS

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

The opinions expressed by Dr. Sinning and Dr. Flynn have convinced me that claimant did not sustain any permanent partial impairment to any scheduled member as a result of his Oscar Mayer employment. Dr. Dasso's opinion is not persuasive and I do not find the views of the chiropractor persuasive in this case.

FINDINGS OF FACT

1. Claimant has worked for Oscar Mayer for twenty-two years.

2. Prior to December 21, 1984, claimant did such activities as driving a forklift.

3. On December 21, 1984, claimant started a packing job at Oscar Mayer which required repetitive movements of both his hands and arms.

4. The packing job temporarily aggravated claimant's hands or arms.

5. Claimant's packing job at Oscar Mayer did not cause any permanent partial impairment to any scheduled member or members.

CONCLUSIONS OF LAW

Claimant failed to show the following things by a preponderance of the evidence:

1. That he sustained an injury or injuries that arose out of and in the course of his Oscar Mayer employment that caused any permanent partial impairment or disability.
2. That there is a causal relationship between these alleged injuries and any asserted disability.

ORDER

IT IS THEREFORE ORDERED:

That claimant take nothing from this proceeding.

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

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

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

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

Copies to:

Mr. Peter M. Soble
Attorney at Law
1705 Second Avenue
Rock Island, Illinois 61265

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY LEE PRITCHARD, Claimant, vs. GREAT PLAINS SUPPLY COMPANY, Employer, and ALEXSIS RISK MANAGEMENT SERVICES, INC., Insurance Carrier, Defendants.	:	FILE NO. 774131 A R B I T R A T I O N D E C I S I O N FILED APR 21 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Gary Lee Pritchard, claimant, against Great Plains Supply Company, employer, and Alexsis Risk Management Services, Inc., insurance carrier, defendants, for benefits as a result of an injury that occurred on August 18, 1984. A hearing was held on November 11, 1986 in Dubuque, Iowa and the case was fully submitted at the close of the hearing. The record consists of (1) the testimony of the claimant's witnesses Gary Lee Pritchard (claimant), Rita F. Pritchard (claimant's wife), Richard Corlett, Keith Radloff, Allen Kuehl, Scott R. Henkes, and Bill Roethler; (2) claimant's exhibits 1 through 20 a, b, c, d (with the exception of exhibit 19 which was withdrawn by the claimant); (3) the testimony of the defendants' witnesses Dean Franzen (employer's manager and claimant's supervisor) and Victor Laughlin (private investigator); (4) defendants' exhibits 21 through 30 with numerous subparts.

STIPULATIONS

The parties stipulated to the following matters:

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

That the claimant sustained an injury on August 18, 1984 which arose out of and in the course of his employment with the employer.

That the injury was the cause of some temporary disability ıring a period of recovery and was the cause of some permanent .sability.

That the rate of weekly compensation in the event of an vard is $207.00 per week.

That the fees charged for the medical services or supplies re fair and reasonable.

ISSUES

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

What is the claimant's entitlement to temporary total isability (or healing period) benefits during a period of ecovery?

What is the claimant's entitlement to permanent disability benefits and whether claimant is entitled to scheduled member benefits or to benefits for industrial disability to the body as a whole.

Whether the claimant is entitled to certain medical expenses.

Whether the claimant is an odd-lot employee.

SUMMARY OF THE EVIDENCE

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

Claimant is 38 years old, married and has three children. He completed the eighth grade and quit school in ninth grade because he had trouble learning in school. He has had no other education or training after eighth grade. Past employments include making cheese in a cheese factory; washing cars in an automobile dealership; labor work in the construction industry; and general farming with his parents and also with his wife's parents. Claimant began working for the employer in 1976 and was hired full time in 1977 to erect pole sheds, do remodeling, and put steel in barns. About a year after he started he was made foreman and was a foreman at the time of this injury. This job involved a lot of climbing.

The parties agreed and proceeded on the basis that the injury occurred on August 18, 1984 even though there was some evidence that it may have occurred on August 16, 1984. While putting sheets of steel on a barn roof, a 20 foot sheet of steel came loose from the wire pulling it up to the roof. Claimant was standing about 18 feet up on a ladder preparing to push it

ver the roof. The piece that broke loose fell and knocked laimant backward off of the ladder. Claimant landed on his ack and arms on a concrete curb or an irregular piece of oncrete on the ground below. He was taken to the office of ennis D. Glawe, D.O., in Monona, Iowa for emergency care. Dr. lawe saw claimant approximately 18 times between August 18, 984 and November 26, 1984. Dr. Glawe could not find his ictation for the initial emergency treatment on August 18, 1984 nd therefore this information is not in evidence (Claimant's xhibit 3). The first recorded office visit is on August 20, 984. It shows claimant had a fracture of the left radial head nd muscle spasm in the neck, right arm, left arm and both legs.

On August 21, 22, 23, and 24, claimant was treated for ervical pain with a neck collar, osteopathic manipulation and edications. X-rays did not show any fracture or dislocation in he cervical area. Claimant had cervical tightness, stiffness nd spasm. On August 30, 1984, the notes indicate claimant was reated for swelling of the right wrist and tenderness of the ight elbow. X-rays did not show any fracture or dislocation. A wrist splint was applied and medication prescribed. The adial head cast was removed on September 5, 1984. Slow improvement in tenderness in both wrists was reported on September 12, 1984.

Acute low back pain is first recorded on September 28, 1984 when stepping off a curb by the post office. Claimant was reated with medication and an injection. He received osteopathic manipulation on September 29, 1984, October 6, 1984 and October 12, 1984. Claimant was also receiving physical therapy treatments at the hospital during this period of time.

On October 30, 1984, Dr. Glawe noted that he would allow laimant to return to work light duty for two or three weeks as tolerated beginning with one-half day work on the first ten days. However, claimant testified that he did not return to work until the spring of 1985 (Defendants' Ex. 30, pages 11 & 12). Dean Franzen, employer's manager and claimant's supervisor, testified that claimant did come back to work for six one-half days on November 1, 1984 but that claimant could not do the work and went on workers' compensation. Franzen also said that claimant did return to work on May 16, 1985, but that he was to do ground work and not go up on ladders.

On November 7, 1984, Dr. Glawe referred claimant to an orthopedic surgeon in Dubuque because of his slow progress of recovery. The fracture site healed but claimant did not regain full range of motion (Cl. Ex. 2, letter April 18, 1985). Dr. Glawe last saw claimant on November 26, 1984 (Cl. Ex. 2).

Dr. Glawe testified in his deposition that he was not qualified to make an assessment of disability but that he did feel qualified to testify that claimant did not progress sufficiently

to warrant his return to work from the date of the injury through his last visit on November 26, 1984. However, claimant was concerned about losing his job so Dr. Glawe allowed the qualified light duty release described above on October 30, 1984 (Cl. Ex. 2, p. 10). Dr. Glawe also said that he saw claimant again the following year on July 8, 1985, because claimant had fallen from a ladder approximately six feet and landed on his left forearm. An x-ray showed no fracture or dislocation but there was significant soft tissue swelling. Dr. Glawe expected a slower recovery because this was the same extremity that had been injured previously. Two follow-up visits were planned (Cl. Ex. 2, Deposition Ex. 3).

Claimant was then seen by Scott C. McCuskey, M.D., an orthopedic surgeon in Dubuque, Iowa. Dr. McCuskey saw claimant approximately 17 times between November 16, 1984 and December 17, 1985. He recorded that claimant's initial complaints were pain in both wrists, left elbow, neck and back at the time of the injury (Cl. Ex. 4, p. 6; Cl. Ex. 5, p. 17). He treated claimant for injuries to his neck, back and left elbow. His treatment included two hospitalizations where he manipulated the left elbow under general ansthetic to try to free up adhesions and scar tissue that had formed around the left elbow and were limiting claimant's range of motion in flexion and extension of the left elbow as well as pronation and supination of the left wrist. The surgery improved the range of motion each time but even with follow-up physical therapy it could not be preserved and maintained (Cl. Ex. 4, pp. 6-12; claimant's exhibit 5, p. 1). Claimant had tenderness in his neck but x-rays were normal. He had tenderness in his back and his back motion was limited in lateral bending but again x-rays were normal (Cl. Ex. 5, pp. 17, 18 & 23). Dr. McCuskey treated claimant with medications, a TENS unit and much physical therapy as did Dr. Glawe (Cl. Ex. 5 & 7).

The first time Dr. McCuskey saw claimant on November 16, 1984 he commented that a return to work for this man who does a lot of climbing was guarded. He suggested that vocational rehabilitation was a good idea at that time (Cl. Ex. 5, p. 18). On March 12, 1985, Dr. McCuskey said claimant could not return to the work he was doing on scaffoldings, ladders and roofs and working overhead on ceilings (Cl. Ex. 5, p. 22). Claimant was released to partial work with these restrictions which were permanent, but he was not released to full time work (Cl. Ex. 5, p. 2; Cl. Ex. 4, pp. 16-18). There was no work available for these restrictions but claimant did return to work in May of 1985. He stated that he was able to do the regular work of the employer until July of 1985 when he slipped while descending a ladder on a porch and fell and injured his left wrist. He has not worked since this second injury (Def. Ex. 30, pp. 12-16). Dr. McCuskey testified that he was unable to rate the impairment from the August 18, 1984 injury as he had originally planned to do on August 8, 1985 because of this new injury to the same

extremity (Cl. Ex. 5, p. 24).

Dr. McCuskey then took measurements of the left upper extremity on December 17, 1985 (Cl. Ex. 5, p. 27); gave claimant a nine percent physical impairment rating for the left wrist and a 37 percent physical impairment rating on the left elbow (Cl. Ex. 5, p. 14).

Later on April 10, 1986, Dr. McCuskey took measurements and rated claimant with a five percent impairment of his neck due to a limitation of lateral flexion and rotation. He assigned a six percent physical impairment rating for the claimant's back due to limitations of forward flexion and rotation to the right (Cl. Ex. 4, p. 38; Cl. Ex. 5, p. 16). Dr. McCuskey stated that he used the AMA Guides to determine his ratings (Cl. Ex. 4, pp. 30 & 31).

Dr. McCuskey issued certain permanent restrictions both on December 17, 1985 and again on March 3, 1986.

1. No ladder climbing or pole climbing.
2. Weight lifting as tolerated.
3. Some dexterity limitations of the left non-dominant arm, such as twisting motions.

(Cl. Ex. 5, p. 15; Cl. Ex. 6)

Dr. McCuskey explained a number of times that these restrictions were necessary as a safety factor. Because of the claimant's limited dexterity and weakness in his left elbow there was a great risk of his falling and doing greater harm to himself if he worked in high places or with the arm overhead (Cl. Ex. 5, p. 19 & 22; Def. Ex. 30, pp. 14 & 15). Otherwise, Dr. McCuskey said claimant could do all kinds of things that involve a lot of manual labor (Cl. Ex. 4, p. 33 & 35) or do not involve the lack of dexterity in his non-dominant left upper extremity (Cl. Ex. 4, pp. 33, 35 & 36). Dr. McCuskey said there were many jobs that claimant could do within his restrictions (Cl. Ex. 4, p. 39).

Dr. McCuskey testified that the July of 1985 injury was a separate problem from the August 18, 1984 injury (Cl. Ex. 4, pp. 21 & 22). X-rays of that second separate injury also showed an old dorsal fracture (Cl. Ex. 4, p. 37; Cl. Ex. 5, p. 26).

Claimant was evaluated for the defendants by John Robb, M.D., an orthopedic surgeon with impressive credentials in Cedar Rapids, Iowa, on March 10, 1986. Dr. Robb traced the medical history of the injury of August 18, 1984 and he also described the second injury which occurred in July of 1985. Claimant told Dr. Robb that his right wrist symptoms have largely disappeared, but he complained of pain in his left elbow, neck and back and to some extent in the left wrist (Def. Ex. 29, Dep. Ex. 1).

X-rays of the left wrist did not show any abnormality of the bone or joint and Dr. Robb did not find any impairment or give a rating for the left wrist (Def. Ex. 29, Dep. Ex. 1).

X-rays of the cervical spine did not show any abnormality of the bone or joint and Dr. Robb felt that the symptoms in the neck would ultimately clear and that claimant will not have any impairment of function of the cervical spine (Def. Ex. 29, Dep. Ex. 1).

X-rays of the lumbrosacral spine did not reveal any abnormality of the bone or joint except for some moderate degenerative arthritis of the facets of L5-S1 which he did not attribute to this injury. He stated that most of the symptoms of the dorsal lumbar spine were attributable to muscle strain and will ultimately heal with good function. Nevertheless, he awarded a five percent permanent impairment rating of the body as a whole as a result of the injury to the back (Def. Ex. 29, Dep. Ex. 1).

The x-ray examination of the left elbow showed traumatic arthritis due to injury or old fracture of the radial head. Clinical examination of the left elbow demonstrated physical limitations of extension and flexion, pronation and supination that is equivalent to a 35 percent impairment of function of the left upper extremity (Def. Ex. 29, Dep. Ex. 1).

Claimant testified that in January of 1986 he made a contract to tear down an old building in his hometown of Farmersburg, Iowa for $800 (Cl. Ex. 8); but that after he paid his expenses of $918.48 (Cl. Ex. 9-15), he lost money on the job. The main reason he lost money was that he paid Rick Corlett $500 to do work that claimant was unable to do. Corlett's testimony corroborated the claimant. Corlett testified he did the hard labor. He said claimant used a mall to pound boards off but could not keep up with him. He said claimant complained of his back, seldom used his left arm, sat down often for breaks, and complained of back pain. Keith H. (Joe) Radloff, Mayor of Farmersburg, testified that claimant did no heavy lifting and that Rick did most of the work. Claimant admitted he participated in this work by knocking boards off and by carrying boards.

Defendants' exhibit 21 a through e are five photographs of men working tearing down this old building which were apparently taken by a newspaper, The Clayton County Register, and one or more of these pictures was published in the local newspaper. These photographs show four men dressed in heavy work clothes engaged in tearing down the old building. Franzen identified the claimant as one of the persons in these pictures. In defendants' exhibit 21b Franzen identified the claimant as the man on the left engaged in strenuous work with both arms with a long object on the bed of a truck. In rebuttal claimant denied he was lifting, but countered that he was unhooking a cable for a wench.

Claimant said that he worked for farmers once or twice as a handy man on very brief jobs for just a few dollars or a few bushels of grain.

Claimant also testified that he bought a lime truck in January of 1986 hoping to haul some lime for profit. He said that he had to hire his brother to drive the truck, however, because it hurt his back and arm to drive it over rough ground. He estimated he might have earned $400 in 1986 from the lime truck operation.

Claimant gave a deposition on April 21, 1986 in which he testified that he estimated that he could lift approximately 40 pounds with his right arm and approximately 20 pounds with his left arm and that the maximum he could lift with both arms was between 40 or 50 pounds. Claimant denied that he had done any work or any heavy lifting work for anyone other than the occasional lime truck work since the second injury in July of 1985 (Def. Ex. 30, pp. 17, 18 & 23).

Just a few days before this deposition was taken, more specifically on April 14, 15, 16 & 17, 1985, the defendants hired Victor Laughlin, a private investigator from Waterloo, to perform surveillance on claimant and to observe his activities and to take photographs. Defendants' exhibits 22 through 28 with numerous subparts are a series of 155 photographs of the claimant, his home environment and his activities in building a loading shute for Kuenster Livestock in Farmersburg, Iowa. Laughlin went over each photograph at the hearing and explained what he saw at the time the picture was taken. On April 14, 1986, he went to Farmersburg. He photographed the claimant and verified that he had the right person. On April 15, 1986, he took several pictures of the claimant jogging, then running for about a block. He did not limp or drag his leg at any time while Laughlin was observing him or photographing him.

On April 16, 1986, Laughlin took numerous pictures of the claimant and other men erecting a loading shute with six or eight large timbers approximately 20 feet long which appeared to be either six inches by six inches square or eight inches by eight inches square along with several smaller timbers and planks. Franzen and claimant both testified that the large timbers weigh approximately 12 pounds per foot. Claimant said the long ones were 22 foot long. Laughlin said it appeared the claimant was in charge of the job of building the loading shute and claimant admitted in his testimony that he was in charge of the job. Claimant further testified that he handled the large timbers with the assistance of the other men, but some of the photographs show claimant handling some of the longest timbers without assistance.

The various photographs show claimant loading and unloading large timbers onto a trailer with another person on the other end of the timber. In the same photographs, claimant pushed the large timbers into the trailer unassisted after the end of the timber had been placed on the end of the trailer. In the photographs claimant is shown bending, stooping, squatting, kneeling and working in other bodily positions while engaged in what appears to be rigorous and strenuous bodily activity. Claimant used post hole diggers to remove dirt from the post holes. He elevated the long timbers with both arms over his head to push them into the holes, sometimes with assistance, and other times when he is the only one elevating the timbers. He is shown driving a tractor and carrying a shovel and a long level. He shoveled dirt into the holes and tamped and packed it. He hammered with his right hand. He is shown with a bear hug on the large upright timbers in the holes adjusting their position. These timbers appear to be approximately 20 or 22 feet long. On one occasion, Laughlin testified, that claimant put a bear hug on one of these longer timbers and lifted its entire weight out of the ground to make an adjustment of the timber while it was in the hole.

Claimant testified that he worked on this job for only two or three hours per day and then only on two different days. He dug the holes for the timbers with the tractor and a post hole digger. He conceded that he did use the manual post hole digger to remove dirt from these holes. This operation required pushing down on the handles, pulling the handles apart, and then lifting the dirt out of the ground. He also admitted that he tamped the dirt that was replaced in the holes with a two by four. Claimant admitted that he failed to acknowledge that he did this work in his deposition which was taken only a matter of four or five days later. He acknowledged that he said in the deposition that he could probably only lift 40 or 50 pounds without severe problems. Claimant responded that at the time of the deposition he had forgotten about the loading shute job. He further testified that it was not a job that he did for pay but rather he did it as a favor. Also, he did the job and after it was completed he suffered a great deal of pain from it. He added that Dr. McCuskey's weight lifting restrictions were only to lift what he could tolerate and to find out by experience what he could or could not do.

Scott Henkes testified that he handled most of the poles and that claimant only helped with the larger ones. He said that the claimant has been slower since his injury and favors his left side.

Bill Roethler, age 69, testified that he did more work at the loading shute than the claimant. He also testified that the claimant now carries his left arm and walks with a limp since the injury.

Dr. Robb was shown the pictures on May 13, 1986 of the claimant's activities in constructing the loading shute and also the photographs of the men demolishing the old building. Dr. Robb then gave a deposition on June 24, 1986, in which he said that his earlier evaluations were based on the history which the claimant had given him and the claimant's complaints of pain (Def. Ex. 29, pp. 5 & 10). Dr. Robb said he felt the degree of pain and the limitations of his back were misrepresented by the claimant at the time of the initial examination. Dr. Robb said his rating was based on the fact that claimant was not able to do heavy lifting, but the photographs were not consistent with the rating which he had previously given. After viewing the photographs Dr. Robb did not feel that the claimant had any impairment in his back (Def. Ex. 29, pp. 12-14). Furthermore, Dr. Robb reduced the permanent impairment rating on the left elbow to 15 percent (Def. Ex. 29, p. 14). Dr. Robb said this was because claimant had told him earlier that he had pain on forced flexion and extension of the left arm that was not demonstrated in the pictures (Def. Ex. 29, p. 16). The discomfort which claimant described in the office was not consistent with what he was performing in those pictures (Def. Ex. 29, p. 25).

Dr. Robb further testified that he would not place any permanent restrictions on the claimant at this time in the work place. The claimant could climb ladders and the claimant could perform his old job now. Possibly it was necessary for a couple of years not to climb ladders but he could do it now (Def. Ex. 29, pp. 14-16 & 19-22). Dr. Robb conceded that he could not really tell from the photographs whether claimant was suffering pain while he performed these activities or whether the claimant would be able to do this kind of activity eight hours a day and five days a week. Dr. Robb acknowledged that at the time of his initial examination of the claimant that he thought the claimant was a truthful person and that the claimant was not malingering.

Claimant testified that he is now employed for an implement company as a salesman and has earned only approximately $150 in commissions all year. The salary portion of his income is paid partially by the employer and partially by a state agency. Claimant testified that he is doing this job on a trial basis and he may be laid off at the end of 1986. Business has been bad and the general economy in the entire area has been bad.

Claimant testified that his left arm hurts most of the time, his neck feels heavy, his shoulders hurt and his back aches and hurts. In his deposition claimant said he was not refraining from any kind of physical activities due to pain (Def. Ex. 30, p. 21). Claimant's wife, Rita Pritchard, testified that claimant has pain in his neck, both hips and arm and that she helps him put on his TENS unit every morning.

Allen Kuehl, who works with claimant now at the implement

company, testified that claimant favors his left arm and back but has been able to help Kuehl pick up weights as much as 50 pounds by using his right hand.

Gerald Bennet, a vocational rehabilitation counselor, gave a report that claimant enrolled at the State of Iowa Vocational Rehabilitation Center in Des Moines on October 6, 1986 but that his evaluation was cut short because claimant told him on October 11, 1986 that his employer needed him to return to work on October 20, 1986. The counselor thought that this was inconsistent with claimant's earlier statement when claimant told him the employer was not going to keep him on much longer. He also commented that claimant was bearded and over weight and that this might make him unacceptable to some employers. Also, claimant needed to play down his limitations instead of using them as a crutch (Cl. Ex. 16).

Another counselor, Carroll Regennitter, commented on October 9, 1986 that he thought that the claimant's complaints of pain were inconsistent because he did not report the pain until sometime after the task that caused the pain was completed (Cl. Ex. 16).

Another counselor, Steve Halverson, on October 21, 1986 questioned whether the claimant's slow work pace was due to pain, ability to learn or his cooperation (Cl. Ex. 16).

Dennis Lee Brauer, another vocational rehabilitation counselor for the State of Iowa gave a deposition on May 27, 1986. He defined employability as being able to sustain full time work and felt that the claimant's chances of being employable were slim due to his lack of transferable skills, lack of mathematics and language skills and also his learning disabilities. Linda Sanford, another counselor at Dubuque, Iowa, reported that the claimant's evaluation indicated learning disabilities. His reading and spelling were at the third grade level and his mathematics was at the fifth grade level. She doubted if these scores could be improved (Cl. Ex. 1, Dep. Ex. 2).

Brauer also testified that he did not feel claimant was an odd-lot employee, more specifically that he was incapable of obtaining employment in any well known branch of the labor market. Brauer also testified that the economy in the claimant's area was worse than depressed. It was disastrous (Cl. Ex. 1)!

APPLICABLE LAW AND ANALYSIS

Iowa Code section 85.34(1) provides:

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

employee compensation for a healing period, as provided in section 85.37, beginning on the date of injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Dr. Glawe testified claimant did not progress sufficiently to warrant his return to work from the date of his injury through November 26, 1984 which was the last time he saw claimant for this injury of August 18, 1984 (Cl. Ex. 2, p. 10). The six half days that the claimant worked in November of 1984, based on a partial light duty release by Dr. Glawe, would not constitute a return to work within the statute, only temporary partial disability; since it is not a release to "substantially similar" employment.

Dr. McCuskey said he did not feel claimant was able to return to full time work, but allowed him to return to partial light duty work on March 12, 1985 (Cl. Ex. 5, p. 2; Cl. Ex. 4, pp. 16-18). This release also would not constitute a return to work within the meaning of the statute. However, the claimant did in fact return to regular work on May 16, 1985 and did in fact perform all of the duties of his job including working on ladders until his second injury on July 8, 1985. Claimant's return to regular employment duties including climbing on ladders did constitute a return to work within the meaning of the statute (Def. Ex. 30, pp. 13 & 16). Consequently, claimant is entitled to healing period benefits beginning on the date of the injury, August 18, 1984 to May 16, 1985, the date he actually returned to full time work and did in fact perform all the duties of the job including climbing on ladders (Def. Ex. 30, pp. 12 & 13).

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 18, 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).

The second injury, when the claimant fell off the ladder and sprained his left wrist on July 8, 1985, is a separate and distinct injury from the earlier injury that occurred on August 18, 1984. If this interpretation of the facts in this case needed additional confirmation, then it is supplied by Dr. McCuskey who said that it was a separate problem from the injury of August 18, 1984 (Cl. Ex. 4, pp. 21 & 22). Therefore, the second injury on July 8, 1985 requires its own first report of injury and separate handling by the claimant, employer and insurance carrier. It was not alleged as a part of this action in the petition; it was not designated as a hearing issue in the hearing assignment order; and it was not mentioned as an issue in the prehearing report. Claimant treated it and talked about it as a part of the original injury that occurred on August 18, 1984. However, the defendants assert that it is a separate and distinct injury and should be treated as such. Consequently, no award or determination can be made concerning the July 8, 1985 injury as a part of this decision because it is a separate and distinct injury which requires separate and distinct handling as its own individual claim.

Furthermore, no award can be made relative to the nine percent functional impairment of the left upper extremity due to the left wrist assessed by Dr. McCuskey on December 17, 1985 (Cl. Ex. 5, p. 14) because Dr. McCuskey did not say how much, if any, of this impairment was due to the old dorsal fracture (Cl. Ex. 4, p. 37; Cl. Ex. 5, p. 26); how much, if any, was due to the injury of August 18, 1984; and how much, if any, was due to the injury of July 8, 1985. Furthermore, the other evidence in the case is not sufficient of itself to make a reliable determination on this point.

Dr. McCuskey awarded a five percent impairment of the body as a whole for the injury to the claimant's neck (Cl. Ex. 5, p. 16). Dr. Robb stated that x-rays showed no abnormality of the neck and he felt that the neck symptoms would ultimately clear without any permanent impairment of function (Def. Ex. 29, Dep. Ex. 1). Therefore, claimant's evidence is controverted. In addition, the other evidence in the case fails to prove a permanent impairment even though claimant has suffered a great deal of pain due to the injury in his neck. Therefore, it is found that claimant has failed to sustain the burden of proof by a preponderance of the evidence that he sustained an industrial disability due to the injury to his neck.

Both Dr. McCuskey and Dr. Robb determined claimant sustained a permanent impairment to his back due to the injury of August 18, 1984. Dr. McCuskey assigned a six percent permanent impairment rating (Cl. Ex. 5, p. 16). Dr. Robb assessed a five percent permanent impairment (Def. Ex. 29, Dep. Ex. 1). Dr. Robb then changed his mind after reviewing the surveillance photographs because he felt that the claimant's subjective statements of pain and limitation had been misrepresented and the claimant's actual work activity was inconsistent with the claimant's statements to him (Def. Ex. 29, pp. 12-14). Although Dr. Robb states that his ratings are based on objective measurements, he also takes into consideration subjective factors such as pain (Def. Ex. 29, pp. 8-10). Therefore, if Dr. Robb were to subtract the portion that he allowed for pain, it should still leave the portion he allowed based on objective physical measurements. Consequently, it is determined that claimant has sustained the burden of proof by a preponderance of the evidence that he sustained some impairment to the body as a whole due to the injury to his back as a result of the injury which occurred on August 18, 1984.

Dr. McCuskey found claimant sustained a 37 percent impairment of the left upper extremity due to the elbow (Cl. Ex. 5, p. 14). It is not known whether Dr. McCuskey would have adjusted this rating downward if he had reviewed the surveillance photographs as did Dr. Robb. Dr. Robb adjusted his initial 35 percent impairment of the left upper extremity due to the elbow (Def. Ex. 29, Dep. Ex. 1) down to 15 percent of the left upper extremity after looking at the surveillance photographs (Def. Ex. 29, p. 14).

There is no question that the surveillance photographs are very damaging to the claimant's assertion of severe impairment and severe disability especially when these photographs are coupled with the testimony of Laughlin who took the photographs. The photographs of the claimant in work clothes actively working in the demolition of the old building also did not contribute anything to the assertion of the claimant that he is severely impaired and has suffered a severe disability. Nor did the fact that the claimant did return to his old job and showed that he could perform these duties for two and a half months assist his claim for extensive disability benefits. At the same time claimant has suffered some definite and verifiable impairment based upon the objective orthopedic measurements that demonstrate a loss of extension and flexion in his left elbow, and probably some loss of supination and pronation in his left wrist from the injury of August 18, 1984, even though the latter evidence was not distinctly separated from the injury of July 8, 1985 by Dr. McCuskey.

The same is true of the injury to claimant's back. Removing all of the claimant's subjective complaints of pain and a limp

which was sometimes present to some witnesses and not present at other times to other witnesses, there is some objective evidence of loss of function, even though it is slight. It is entirely possible for claimant to have a small loss of function in his elbow and back and yet on occasion for a short period of time perform strenuous and rigorous work as he has demonstrated in these surveillance photographs. Therefore, it is found that claimant has sustained some industrial disability from the injury of August 18, 1984.

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. * * * *

Claimant is 38 years old and needs to work to support his family. He was steadily employed until the injury. He was employed in the best job that he could find at the time of the hearing.

Although claimant only has an eighth grade education as far as formal education goes, he has nevertheless proven himself to be extremely capable in the construction trade both as a worker and as a foreman and leader of others. He has been resourceful in finding temporary jobs. His greatest industrial disability factor is probably his learning disability problem which might restrict or impair his ability to train for or perform certain kinds of work. Dr. Robb said claimant could go back to his old job as a general construction worker. Dr. McCuskey never denied claimant's ability to do construction or general labor work and even felt it would aid the healing of his arm by increasing the extension and flexion of his left elbow. However, the only work available was on ladders, so Dr. McCuskey felt constrained to

keep him off of ladders as a safety factor, but not due to his inability to do general labor (Cl. Ex. 5, p. 19).

Brauer thought that the claimant's chances for employment were slim, but said there were a number of jobs in the labor market that he could do. Brauer also added that the employment market and the economy in the claimant's area was disastrous! The other three counselors in Des Moines for the State of Iowa seemed to question claimant's sincerity for their program and his subjective complaints of pain.

It is true that the employer did not reemploy the claimant, but it was also established that they did not have any work within Dr. McCuskey's restrictions of not being on ladders or doing overhead work according to Franzen. This was not disputed by claimant. Otherwise, Dr. McCuskey's restrictions are not unduly severe. In effect, claimant could lift whatever claimant determined he could lift and claimant might find some restricted dexterity in his left hand. Claimant demonstrated his weight lifting ability by lifting timbers which possibly weighed as much as 264 pounds in the case of a 22 foot timber which weighs 12 pounds per foot. Likewise, claimant handled a manually operated post hole digger, carried tools, tamped dirt, adjusted timbers, drove a tractor and dug post holes with it. Therefore, based on the foregoing evidence, it is determined that the claimant has sustained a 20 percent industrial disability to the body as a whole.

Claimant's exhibit 17, a bill from Medical Associates (Dr. McCuskey) dated April 10, 1986 for x-rays and a disability examination, cannot be allowed as an Iowa Code section 85.27 medical expense for reasonable medical care because it appears to be a trial preparation expense rather than treatment. Dr. McCuskey gave his impairment evaluation on the neck and back on this same day.

Claimant's exhibit 18, a balance due bill for physical therapy at the Veteran's Hospital at Waukon, Iowa dated October 28, 1986 and claimant's exhibits 20 a, b, c, and d which are prescriptions cannot be allowed. All of these bills are dated in 1986 and it cannot be determined if they are attributable to the injury of August 18, 1984 or the injury of July 8, 1985. Furthermore, for the most part they only give a prescription number and it is not possible to determine if they are associated with either one of these injuries.

Claimant filed a claim for taxation of costs attached to the prehearing report. All of these costs which are lettered (a) through (o) are allowed except letter (e). Letter (e), which is a bill for $420.00 for the preparation of a disability vocational assessment by Dennis L. Brauer, is disallowed because it is a trial preparation expense of the claimant and not a cost of the

proceeding as defined in Division of Industrial Services Rule 343-4.33. The witness fees in items lettered (k) (l) (m) (n) and (o) are calculated at $10.00 per day and this is correct (Iowa Code section 622.69). However, the mileage is calculated at $.24 per mile, but this is not correct. The correct mileage rate on November 11, 1986 was $.21 per mile (Iowa Code section 79.9). Therefore, claimant's total of $1,161.20 must be reduced by $420.00 for the vocational assessment and $18.00 for incorrect computation of mileage leaving a total of $723.20.

FINDINGS OF FACT

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

That claimant was employed by the employer on August 18, 1984.

That on August 18, 1984, claimant sustained an injury to his neck, back, both wrists and left elbow when he was knocked off a ladder and fell several feet to the ground landing on his back and arms.

That Dr. Glawe took claimant off work from the date of the injury through November 26, 1984.

That Dr. McCuskey, his successor, kept the claimant off work until March 12, 1985. That Dr. McCuskey only gave a partial release to work and not a full release to work.

That claimant returned to regular work and performed all of the duties of his old job on May 16, 1985.

That in the accident of August 18, 1984, claimant sustained a permanent impairment to his left elbow and to his back based on the physical measurements of both Dr. McCuskey and Dr. Robb.

That the claimant did not prove by a preponderance of the evidence that he sustained a permanent impairment to his neck.

That the injury of July 8, 1985 is a separate and distinct injury from the injury of August 18, 1984 and therefore this decision applies only to the injury of August 18, 1984.

That claimant did not prove that the medical bills introduced in evidence were reasonable medical care for this injury.

That claimant did not prove that he cannot find any employment in any well known branch of the labor market.

Claimant has sustained a 20 percent loss of earning capacity due to injuries sustained on August 18, 1984.

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 is entitled to 38.714 weeks of healing period benefits from the period beginning on August 18, 1984 to May 16, 1985.

That claimant is entitled to 100 weeks of permanent partial disability benefits based upon a 20 percent industrial disability of the body as a whole.

That claimant is not entitled to payment of the medical bills presented at the hearing.

That the claimant did not establish a prima facia case of permanent total disability under the odd-lot rule.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant thirty-eight point seven-one-four (38.714) weeks of healing period benefits at the rate of two hundred seven and no/100 dollars ($207.00) per week beginning on August 18, 1984 to May 16, 1985 in the total amount of eight thousand thirteen and 80/100 dollars ($8,013.80).

That defendants pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of two hundred seven and no/100 dollars ($207.00) per week in the total amount of twenty thousand seven hundred and no/100 dollars ($20,700.00) commencing on May 16, 1985.

That defendants pay all accrued amounts in a lump sum less credit for amounts previously paid.

That interest will accrue as provided by Iowa Code section 85.30.

That defendants will pay the cost of this action as provided in the Division of Industrial Services Rule 343-4.33.

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

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

Walter R. McManus Jr.
WALTER R. McMANUS JR.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELDON RAY, JR.,

Claimant,

vs.

G.E.T. PLASTICS,

Employer,

and

COMMERCIAL UNION INSURANCE COMPANIES,

Insurance Carrier,
Defendants.

File No. 752493

A P P E A L

D E C I S I O N

STATEMENT OF THE CASE

Claimant appeals from a decision on 86.13 benefits denying all such benefits.

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

ISSUES

Claimant states the following issues on appeal:

I. When does interest start to accrue when liability and permanency are both an issue?

II. Should a penalty be assessed for failure to timely make payment to claimant pursuant to the deputy's decision?

III. Should a penalty be assessed for defendants' failure to make payment to claimant of medical expense as specifically ordered in the deputy's decision?

REVIEW OF THE EVIDENCE

An arbitration decision was filed in this case on April 24, 1985. The following order appears in that decision:

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial benefits for fifty (50) weeks at a rate of two hundred eleven and 15/100 dollars ($211.15).

Defendants pay claimant healing period benefits at a rate of two hundred eleven and 15/100 dollars ($211.15) from the date he was actually off work on account of his injury through June 4, 1984.

Defendants pay accrued amounts in a lump sum.

Defendants pay claimant the following medical expenses:

Neuro-Associates, P.C.	$1,965.00
Gary D. Parson, D.C.	189.00
Medical Center Anesthesiologists, P.C.	350.00
Mercy Hospital Medical Center	5,158.24

Defendants pay claimant mileage expenses for 2,497 miles at a rate of twenty-four cents ($.24) per mile.

Defendants pay interest pursuant to section 85.30.

Defendants pay costs of this proceeding.

Defendants file a final report when this award is paid.

In his professional statement made at the hearing defendants' attorney stated that following expiration of the 20 day period for filing an appeal after the arbitration decision he requested the insurance carrier to issue a check to claimant for permanent partial disability, healing period and mileage as specified in the arbitration decision. He also requested checks be issued directly to the medical care providers listed in the order of the arbitration decision. No where in the arbitration decision does it say that claimant actually paid those medical expenses himself. Defendants' attorney admitted that he neglected to inform the insurance carrier of the amount of interest which was due on the arbitration award.

Defendants' attorney disclosed that the check for the permanent partial disability, healing period and mileage was returned to him uncashed. Defendants' attorney responded by sending a letter to claimant's attorney and re-tendered the original check and offered to have a check in the amount of $1,478.87 issued to claimant to cover the interest awarded in the arbitration decision.

Defendants' attorney then received a letter from claimant's attorney inquiring whether or not the check that was re-tendered would constitute partial payment. Defendants' attorney replied in a letter dated July 5, 1985, which states:

> This check represents the complete amounts due your client under the decision for those items, and does not constitute a partial payment of those specific benefits. Additionally, as set out in my letter to you of June 26, 1985, I have requested Commercial Union to issue a check to your client in the amount of $1,478.87 representing the interest due to the date of the arbitration decision. Likewise, that check will represent full payment of those interest amounts and not a partial payment. Do with these drafts what you will with this knowledge.

(Claimant's Exhibit 4)

Defendants' attorney next heard from claimant's attorney in November of 1985 when claimant's attorney informed him that the re-tendered check had not been cashed and the time for cashing it had expired. Another check was sent which defendants' attorney assumes has been cashed.

Claimant's exhibit 5 is a letter to claimant's attorney from defendants' attorney which states:

> As per your request, I am writing you to verify that the check now in your possession which was originally tendered pursuant to the decision of the Deputy Industrial Commissioner may be cashed and the funds disbursed to your client.
>
> This is done with the understanding that the cashing of the check does not constitute a waiver by either party of any of the remaining claims and that all rights and remedies which either party may have by virtue of the decision or method of payment is reserved to them.

Defendants' exhibit A contains copies of checks issued pursuant to the arbitration decision. Page 1 of exhibit A is a copy of a check issued to claimant and his attorney in the amount of $1,478.87. The issue date is August 7, 1985 and in the box marked "In payment of" the notation "Interest" appears. Page 2 is a copy of a check issued to claimant and his attorney in the amount of $17,310.29. The issue date is June 3, 1985 and the box marked "In payment of" the notation "For PPD, Mileage and Healing period per Award." Pages 3 through 7 are copies of checks issued to medical providers totaling $8,119.50.

Claimant revealed that he received a check following the arbitration decision which was for permanent partial disability and healing period. He indicated he understood that this check was to be full payment after reading the letters marked claimant's exhibits 2 and 4.

APPLICABLE LAW

Iowa Code section 86.13, unnumbered paragraph 4 states:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause or excuse, the industrial commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

In Klein v. Furnas Electric Company, 384 N.W.2d 370, 373 (Iowa 1986), the supreme court stated:

> Our reading of these statutes [86.13 and 85.36] suggests that both of these statutes are applicable by their express terms to weekly compensation payments for industrial disability and do not support the allowance of interest or penalties for late payment of medical expenses allowed under section 85.27. Nor does section 535.2 empower the commissioner to add interest onto the award of medical expenses.

ANALYSIS

The first argument claimant asserts on appeal concerns accrual of interest on late compensation payments. The prehearing report and order approving the same reflects that the only issue for determination is whether a penalty should be assessed pursuant to section 86.13 for late payment. The only other issue which appears in any of the prehearing orders is how the medical expenses were paid. The parties were aware of the issues at the time of the prehearing and should have indicated at that time that interest was an issue. Since it was not discussed at the time of prehearing, it will not be considered here.

The second argument claimant raises is whether a penalty should be assessed for failure to make timely payment of weekly compensation due under the arbitration decision. The deputy found that defendants' actions in tendering payment of weekly benefits were reasonable. The record shows that a check for permanent partial disability, healing period and mileage was issued on June 3, 1985 and that claimant received that check

shortly thereafter.

Claimant cannot, through his own refusal to cash his weekly benefit check, seek penalty benefits for delay in payment of those benefits. The fact that the check defendants tendered did not include medical expenses and interest as ordered by the arbitration decision does not assist claimant's cause. Cashing the check as tendered by defendants would not have prejudiced claimant's entitlement to payment of interest and medical expenses. Further, it is noted that defendants did issued a check for interest due under the arbitration decision and that this check was for a greater amount than claimant's attorney requested in claimant's exhibit 1.

The final argument claimant makes on appeal is whether a penalty should be assessed for failure to make medical expense payments to claimant as ordered. Penalty benefits cannot be awarded for delay in payment of medical expenses. Klein at 373.

The prior order indicated how the medical payments were to be paid. No one appealed that decision. Enforcement of that decision lies with the district court and not this tribunal (see, Iowa Code section 86.42).

FINDINGS OF FACT

1. An arbitration decision was filed April 24, 1985 which ordered payment to claimant of 50 weeks of permanent partial disability, healing period benefits from the date claimant was actually off work through June 4, 1984, mileage, interest and certain medical expense.

2. Defendants tendered payment to claimant of permanent partial disability benefits, healing period benefits and mileage on June 10, 1985.

3. Defendants paid medical expenses directly to the medical providers.

4. Claimant did not cash checks tendered in payment of permanent partial disability and healing period benefits.

5. Defendants did make a good faith attempt to commence payment to claimant.

CONCLUSIONS OF LAW

Claimant has not established that he is entitled to additional benefits under section 86.13, unnumbered paragraph 4.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing as a result of this proceeding.

That claimant pay the costs of this proceeding.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

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1001; 1001.10; 3303.20
FILED: February 5, 1987
STEVEN E. ORT

000921

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD RICKETT,	:	
Claimant,	:	
vs.	:	
HAWKEYE BUILDING SUPPLY CO.,	:	File No. 739306
Employer,	:	D E C I S I O N
and	:	O N
U. S. INSURANCE GROUP,	:	R E H E A R I N G
Insurance Carrier, Defendants.	:	

1001; 1001.10; 3303.20

This was a decision on rehearing to establish that attorney fee that claimant sought to have paid with partial commutation was a reasonable fee.

Attorney fee contract was entered into while claimant was receiving payments under 86.13 but without admission of liability. Attorney fee contract called for claimant to pay one-third of his benefits to claimant and "final disposition."

Held: Attorney fee contract in question held void as a matter of public policy. Such contracts create "differing interests" between attorney and client. Further, such contracts permit counsel to obtain contingent proprietary interest in present property of claimant which rests upon litigation or settlement which may be wholly unnecessary for claimant's benefit and lead to unwarranted litigation.

000922

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ONALD RICKETT,	:	
Claimant,	:	File No. 739306
s.	:	
AWKEYE BUILDING SUPPLY CO.,	:	D E C I S I O N
Employer,	:	O N
nd	:	R E H E A R I N G
. S. INSURANCE GROUP,	:	FILED
Insurance Carrier, Defendants.	:	FEB 5 1987
		INDUSTRIAL SERVICES

INTRODUCTION

On December 10, 1986 rehearing was granted on claimant's pplication for partial commutation which had been granted in art and denied in part by a decision filed November 21, 1986. dditional record has been submitted by the parties as follows:

1. Affidavit of Gary Johansen and attached exhibits A hrough E.

2. Affidavit of Ronald Rickett.

3. Affidavit of Raymond Johansen.

4. Affidavit of Melvin C. Hansen.

5. Affidavit of Norma Buchanan.

All objections to those affidavits are hereby overruled.

ISSUES

1. Is the attorney fee which claimant seeks to pay with his ommuted funds a reasonable fee?

2. Is it in claimant's best interest to pay the attorney's ees by commutation?

EVIDENCE PRESENTED

This summary of the additional evidence reviews only those

facts which are believed to be relevant to the determination made in this decision. All of the material has been reviewed whether specifically set out or not.

Gary L. Johansen states that he is licesend to practice law in the state of Iowa. In November 1983 he was contacted by the claimant concerning the injury of June 7, 1983. Claimant was at that time receiving weekly compensation checks from the defendants. Counsel advised claimant he could not predict the outcome of his case. Claimant and Mr. Johansen entered into a contract for services where claimant would pay unto counsel "one-third of the amount of his recovery of industrial disability." (Affidavit p. 4) The attorney fee contract specifically excluded healing period benefits and the one-third contingent fee "would apply only to the value of the ultimate disposition of his claim, which would not occur until far, far into the future." Claimant was to reimburse counsel for all expenses advanced.

Attorney Johansen states that the fee agreement he entered into with claimant is the usual and customary practice in his office, in Sioux City, Iowa, and in northwest Iowa. He states that this practice has been followed for at least twenty years.

After having arrived at a fee arrangement, Mr. Johansen undertook representation of the claimant. While counsel gathered evidence he attempted to negotiate with defendants. Defendants did not respond to counsel's settlement proposals. On or about February 25, 1985 counsel filed a petition in arbitration with the industrial commissioner "seeking resolution of the duration of healing period and degree of industrial disability sustained by Claimant as a result of his work injury,...." (Affidavit p. 9) Claimant's petition for arbitration was heard on March 4, 1986. One of the issues at hearing was whether claimant received an injury arising out of and in the course of employment. On May 16, 1986 the deputy industrial commissioner filed his decision which found that claimant suffered an injury while in the employ of defendant which caused him to be permanently and totally disabled.

The affidavit of Ronald Rickett discloses the following: He began receiving workers' compensation benefits following his injury in June 1983. Claimant became concerned that his back condition from the injury was not improving. On November 16, 1983 claimant made an appointment to see attorney Johansen at which time he entered into the contingent fee contract with counsel. Claimant understood that he was to pay a fee equal to "one-third of the amount of any recovery they (attorneys) could obtain for me, based upon industrial disability, whether my claim was resolved through a settlement, or by an award entered by the Industrial Commissioner if it actually became necessary to place my claim in litigation...." (Affidavit p. 2) Claimant

ater states that he was advised that "the attorney fee matter ould be resolved only after the value of my claim could be stablished." (Affidavit p. 4)

Raymond Johansen states in his affidavit that it is the sual and customary practice in the Sioux City, Iowa, area for ttorneys to charge a one-third contingent fee in workers' ompensation cases. Mr. Johansen specifies a wide variety of ircumstances which arise in workers' compensation matters.

Melvin C. Hansen states that from the inception of claimant's njury through the date of hearing on March 4, 1986 defendants ad paid claimant weekly benefits and medical expenses related o his injury. Further, that "at no time prior to the hearing n March 4, 1986 had the U. S. Insurance Group opposed or ntended to terminate weekly benefits paid to Mr. Rickett...." Affidavit p. 2)

Norma L. Buchanan states she is the senior claims supervisor or the insurance carrier. She states that the insurance arrier has paid benefits to the claimant commencing July 12, 983 and continuing to the present. She further states that she ad reviewed the insurance carrier's file and that at no time as the insurance carrier considered termination of claimant's enefits.

APPLICABLE LAW AND ANALYSIS

The jurisdiction of the industrial commissioner of the ubject matter and the parties in this case, as it relates to laimant's application for partial commutation, arises by virtue f Iowa Code section 85.45. Iowa Code section 86.39 grants to he industrial commissioner jurisdiction of the subject matter f this rehearing, approval of attorney fees, claims, and liens. pproval of such matters are defined by Industrial Services Rule 43-4.1(9) as a contested case proceeding under section 17A.2(2). s a contested case proceeding the industrial commissioner does ot presently have jurisdiction of the necessary parties to make binding determination of the issue. Since, however, the etermination of the reasonableness of the fee in this case is ecessary to pass on the question of claimant's application for artial commutation, a determination must be made, though rguably not at this time binding.

It is the intent and purpose of Code section 86.39 that laims for attorney fees be made and enforced against injured orkers only under the protection of the workers' compensation ct. Kratz v. Holland Inn, 186 Iowa 963 (1919).

In Workmen's Compensation Law, Rules and Regulations, 1941, l former Industrial Commissioner John T. Clarkson states:

The fair interpretation of this section of the law imposes the duty upon the Commissioner to determine what may be a fair and reasonable charge of an attorney fee for services rendered an injured employee in Workmen's Compensation matters..., which necessarily means the Commissioner's conclusions must be based on the required service and all facts bearing upon what is a fair and reasonable fee.

In this case the record is not sufficient to arrive at a determination of the reasonableness of the fee, consistent with the duty as outlined above. The record is sufficient, however, to determine that claimant's partial commutation to pay attorney fees should not be granted for the reason that the attorney fee contract upon which the fee is based is void as a matter of public policy.

It should be noted at the outset that "the Commissioner should not permit the financial condition of the injured employee to control or materially influence his judgment...." At the same time, however, "the Commissioner must not shut his eyes and regard the case as one prosecuted for the benefit of the attorney...." Id., at 41.

In any action to establish a claim for attorney fees or enforce a lien for an established fee, the burden rests upon the attorney to prove by a preponderance of the evidence that the fee claimed is reasonable. This burden is placed upon the attorney as a result of special standards to which the attorney is subject by the Iowa Code of Professional Responsibility for Lawyers and the ethical canons and disciplinary rules thereunder. See EC (ethical consideration) 2-19 and DR (disciplinary rule) 2-106, ICPRFL.

The essential facts in this case relating to the attorney fee are not in dispute. The claimant hurt his back at work in July 1983. The defendants commenced payment of weekly benefits to the claimant soon thereafter. Claimant briefly returned to work, was unable to work, and payments continued. Claimant also continued to receive medical treatment provided by the defendants. In November 1983 claimant consulted attorney Gary Johansen. At that time claimant was continuing to receive payments. Claimant and his attorney entered into an oral contract which provided that counsel would receive one-third of all compensation paid to claimant after claimant's period of recuperation and upon final disposition of his claim whether such amount was determined by agreement of the parties or upon hearing before the industrial commissioner. Counsel undertook representation of the claimant, collected relevant evidence, and solicited settlement offers from defendants. Defendants did not respond to settlement solicitations but continued payments to claimant. In February 1985 claimant's counsel filed a petition alleging claimant

eceived an injury arising out of and in the course of his mployment and alleging permanent disability as a result thereof. efendants denied claimant's allegations but continued payment f benefits. The matter went to hearing before a deputy commis- ioner on March 4, 1986. On May 15, 1986 the deputy commissioner uled that claimant had been permanently and totally disabled as result of an injury at work. Since the deputy found claimant o have been permanently and totally disabled under section 85.34(3), e did not make a determination of the length of claimant's ealing period under section 85.34(1).

Counsel now seeks to collect under the terms of his fee ontract, twenty-eight percent of claimant's weekly benefits rom the date of the decision by the deputy commissioner.

From the date of claimant's injury to the decision of the eputy commissioner, defendants made payments to the claimant nd provided him medical treatment for his back. They did not, owever, at any time stipulate or concede that claimant suffered n injury arising out of and in the course of his employment. efendants have by affidavit stated that as of the date of the eputy's decision they were continuing payments to claimant and ad no intent at that time of terminating those payments.

Claimant's counsel characterizes the fee agreement between imself and his client as a contingent fee contract. It would t first glance appear to be so. Counsel correctly points out hat courts have long recognized the validity of the contingent ee contract generally. See Wallace v. Chicago, Milwaukee & St. Paul Railway, 112 Iowa 565, 567-68, 84 N.W. 662, 663 (1900). he industrial commissioner also recognizes the validity of the ontingent fee in workers' compensation matters. See Curtis v. ittle Ginny Transportation, file numbers 776283/747223 (December 5, 1986).

The court's power to regulate the reasonableness of the ontingent fee contract arises under its inherent power to egulate the bar. Dunn v. H. K. Porter Co., 602 F.2d 1105, 1109 (3d Cir. 1979). The commissioner's authority arises by virtue f section 86.39. In either case, the principle remains the ame that under such general supervisory powers the court, or in this case the commissioner, may and should scrutinize contingent fee contracts and determine the reasonableness thereof. Rosenthal v. First National Bank, 127 Ill.App.2d 371, 376, 262 N.E.2d 262, 265 (1970).

All of the above principles and citations can be found in Wunschel Law Firm, P.C. v. Clabaugh, 291 N.W.2d 331, 9 A.L.R. 4th 181 (Iowa 1980). In Wunschel the court held that a contingent fee contract for the defense of an unliquidated tort damage claim which is based upon a percentage of the difference between the prayer of the petition and the amount awarded is void. Id.,

it 337. Prior to arriving at this holding, the court undertook in extensive analysis of the factors which must be considered in reviewing a contingent fee contract in relation to matters of public policy. Before such an analysis can begin here, there must be a clear understanding of the subject matter of the fee agreement, i.e., workers' compensation benefits in the State of Iowa.

Prior to July 1, 1982 payment of weekly compensation by an employer to an injured worker constituted an admission of (1) the employer-employee relationship and (2) that the worker had received an injury arising out of and in the course of his or her employment. See section 86.13, Code 1981. In case of questionable liability this tended to work adversely to the worker since the employer tended not to commence payments in order not to waive potential defenses. In 1982 the law was amended to allow employers to commence payments without admitting liability under the act. The 1982 amendments changed the nature of the interest of the worker in compensation benefits. In short, prior to July 1, 1982 the claimant's right to weekly payment was contingent upon the question of liability; subsequent to July 1, 1982 the right to weekly compensation was no longer contingent on the issue of liability. Although employees lost some degree of certainty as to ultimate liability, they gained in the sense that the employer could pay in cases of questionable liability where they otherwise might not. Further, the legislature codified the holding in Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa 1982) which recognized that the receipt of workers' compensation benefits, once commenced, create in the worker a limited property right. As such, the worker is entitled to minimum due process in the form of notice of termination unless he has returned to work.

The property right created by the commencement of compensation payments is a present interest subject to termination on thirty days notice. An analogy could be made to that of a tenant at will. The property interest created is not a contingent interest. The continued receipt of payments is not in such cases determined on liability even though they are subject to termination. The continued receipt of benefits does not become contingent until thirty days after notice of termination. At that time and only until that time does the worker's right to future compensation become contingent on the question of liability. Consequently, a determination of liability while payments are being made does not have the effect of obtaining for the claimant a present property interest; it changes the nature of his present interest from that of a tenant at will to that of a tenant for a term of weeks subject to divestment upon review-reopening or death. A determination of nonliability has the effect of terminating the present property interest. It is with these principles in mind that the attorney fee contract in question here must be reviewed.

The attorney fee contract in this case provided that the laimant would pay one-third of his weekly benefits to his ounsel after his healing period had been completed and a final etermination of his entitlement had been made by agreement or ecision. When a contingent fee contract is ambiguous, it ould be construed in a manner to reflect the intent of the arties and to obtain a reasonable result. Carmichael v. Iowa tate Highway Commission, 219 N.W.2d 658 (Iowa 1974). It would ppear that in this case it was the intent of the parties that o fee be taken on claimant's healing period benefits as defined n section 85.34(1). It is not clear at what point thereafter a ee was to be applied to benefits.

In the Wunschel case at 333 the court, citing Carmichael, ointed out that it is the essential characteristic of a contingent ee contract that the attorney's right to be paid any amount for is services is dependent on the result obtained. In Wunschel he court cited the following disciplinary rules and ethical onsiderations relevant to fee determinations:

DR2-106:

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a resonable fee. Factors to be considered as guides in determining the resonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge or collect a contingent fee for representing a defendant in a criminal case, or either party in any action involving domestic relations.

EC5-7 recognizes circumstances in which a contingent fee is appropriate. It provides:

The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a resonable contingent fee is permissible in civil cases because it may be on the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.

EC2-17 is also relevant. It provides:

The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthmore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively, and to preserve the integrity and independence of the profession.

Finally, EC2-20 deals directly with situations in which a contingent fee contract is or is not proper. It provides:

> Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same consideration as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a res with which to pay the fee. (emphasis added)

The court further cited the following principles of law:

> A contract which contravenes public policy will not be enforced by the courts. See, e.g., Rowen v. Le Mars Mutual Insurance Co., 282 N.W.2d 639, 650 (Iowa 1979); Tschirgi v. Merchants National Bank, 253 Iowa 682, 689-90, 113 N.W.2d 226, 230 (1962). This is a delicate power which "should be exercised only in cases free from doubt." Richmond v. Dubuque & Sioux City Railroad, 26 Iowa 191, 202 (1868). One ground for invalidating a contract on policy grounds is its contravention of "any established interest of society." Liggett v. Shriver, 181 Iowa 260, 265, 164 N.W. 611, 612 (1917). It is not necessary that the contract actually cause the feared evil in a given case; its tendency to have that result in sufficient. Jones v. American Home Finding Association, 191 Iowa 211, 213, 182 N.W. 191, 192 (1921). The principles in our cases are consistent with the standards for determining whether a contract contravenes public policy which are delineated in Restatement (Second) of Contracts §§ 320, 321 (Tent. Draft No. 12, 1977).

The court also cited extensively from the amicus curia brief of the Iowa State Bar Association Committee on Professional Ethics and Conduct and adopted its view of the problems inherent in the type of fee contract under review in that case. While the specific analysis of the problems created by the Wunschel fee contract is not controlling here, application of the general principles obtains the same result.

First, as discussed above, a worker who is receiving payments of workers' compensation benefits has a present property interest, not contingent on liability. Claimant was in this position at the time he entered into the contingent fee contract with his attorney. The contingent fee contract specifies two events which would trigger counsel's entitlement to a fee: (1)recuperation from his disability and (2) a final disposition of his entitlement to benefits. The occurrence of these two events at the same time is unlikely. The first occurrence, if construed to mean the termination of healing period benefits under section 85.35(4)(1), cannot be the basis of a contingent fee contract. It bears no relationship whatsoever to the services of counsel. It is either a factual question of whether the claimant has returned to work or a medical finding as to maximum recovery or ability to return to substantially similar employment. However, if the fee contract is so interpreted and should be given validity, then several important conflicts become immediately apparent.

For one thing, the decision awarding claimant benefits in this case did not establish healing period for claimant. It in fact found that claimant had been totally disabled since his injury. Thus, perhaps counsel is entitled to no fee. More importantly, however, such a contract could allow counsel to recover even if the issue of liability was resolved adversely to his client. It is possible in this case, as well as others like it, that the industrial commissioner could resolve the liability issue adversely to the claimant. In those cases where payments have continued after claimant has reached the statutorily defined healing period but prior to a determination of liability, counsel would be entitled to a percentage fee against those payments even though the result he obtained for his client was the termination of a present property right. In other words, counsel could charge a fee for the amounts received by claimant between the date he achieved maximum medical recovery and the "ultimate disposition of his claim" even when the disposition is adverse to his client, either as a result of a finding of no liability or a determination of an extent of disability less than the defendants had voluntarily paid. This is clearly an absurd result and need not be discussed further at this time since counsel asserts his fee on the basis of payment made after the decision of May 1986.

The attorney fee contract thus under scrutiny here is one where a worker is receiving payments of workers' compensation

benefits under section 86.13 and enters into a contract to pay one-third of his benefits to his attorney on final disposition of his claim by arbitration decision or settlement and his benefits have not been terminated nor has he received notice of termination. There are several matters in such a contract which have a tendency to cause precisely the same problems, if not more, than those which resulted in the voiding of the contract in Wunschel.

One of the most salient facts is directly stated by claimant's counsel in his objections to the affidavits filed by defendants when he states "there are no facts in any of the records now before the commissioner to demonstrate what the Defendants would or would not do in the future as far as continuing to pay weekly workers compensation benefits to claimant and make payment of future medical expenses incurred by the claimant...." Counsel assumes this fact works in his favor on the theory that claimant's future benefits were contingent on adjudication of liability and degree of disability. As stated above, this is not the case and this record merely demonstrates that counsel cannot prove what benefits the claimant has received as a result of his services as opposed to those he received as a result of the defendants voluntary compliance with the provisions of chapter 85. As Wunschel pointed out, a contingent fee contract has two essential elements: (1) the percentage and (2) the amount against which the percentage is taken. The amount against which the fee is taken in this case is not determinable because the duration of voluntary payments made to the claimant is not determinable. It becomes a matter of pure speculation what the claimant would have received absent the services of counsel. That is not to say that the services of counsel may not be of great benefit to a claimant in these circumstances. Indeed, the mere knowledge by defendants that the claimant has consulted and retained counsel may encourage them to continue payments longer than they otherwise would, but it nevertheless remains counsel's obligation and burden to prove that the benefit received or the result obtained was the result of his efforts.

The result obtained in this case did not establish workers' compensation benefits for claimant. It converted claimant's indetermined right to benefits to a determinable one. In short, it merely established a definitive value to his claim. Analysis of the case could conclude here; it should not, however, because the problems raised are not adequately resolved merely on the finding that counsel has failed to meet his bruden. The problem goes much deeper.

"[T]he guiding principle for any fee or an agreement for a fee is that it is, under all of the circumstances known at the time, reasonable. Both parties must have sufficient information upon which to make an informed decision; this includes the client." Wunschel, at 336. The lawyer knows that a claimant

who is receiving compensation payments cannot be terminated without notice or a return to work; the client may not. The lawyer knows the defendants are subject to penalties for unreasonable termination of benefits; the client may not. The lawyer knows that the law defines, in many cases, the extent of the claimant's recovery; the client may not. The lawyer knows that if the issue of liability is lost in litigation, present benefits being received by the claimant will terminate; the client may not. The lawyer knows that the defendants could pay all of the compensation due to claimant voluntarily with no decision or settlement being necessary; the client may not. The lawyer knows that the employer must act in good faith in advising the client as to the character of his payments; the client may not. At the time the claimant in this case entered into the attorney fee contract he had no way of knowing what the contingencies might be as to continued compensation benefits. This is admitted by both claimant and his counsel. It is in fact difficult to imagine how counsel could make an informed decision. It is doubtful at the time the contract was made that even the defendants knew what they would voluntarily pay claimant. They were, however, paying.

As serious as the above problems may be, there is yet another problem with this contract that demands that it and any like it be void as against sound public policy. This contract creates "differing interests" between the lawyer and his client. "'Differing interests' include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client whether it be a conflicting, inconsistent, diverse or other interest." ICPRFL - Definitions. In the instant case the claimant's continued receipt of benefits was not contingent upon a final disposition of his claim either by decision or agreement. Under the contract, his attorney's fee was contingent upon establishing the liability of defendants or negotiating a settlement with them. The longer the claimant continued to receive voluntary payments without a "final disposition" the less he would owe in attorney fees. The sooner there was a "final disposition" the greater would be the fee of his attorney. The attorney, not an independent fact finder controls his fee. Wunschel, at 336. The claimant can receive benefits without taking the risk inherent in litigation; the attorney, however, cannot establish a fee without his client assuming those risks.

The problems for both attorney and client in such an arrangement would appear to be apparent. "It is difficult to believe, upon reflection, that such a fee arrangement in the long run will foster the harmony a lawyer must seek to maintain with his client where fees are concerned." Wunschel, at 336. The client may believe that the lawyer acted out of his own financial interest in proceeding to litigation that, as far as known to him, did nothing but result in a higher fee to his attorney. Workers who might well benefit from legal advice may be reluctant

to do so for fear of losing what they already have to an attorney.

The attorney as well may be inclined to negotiate an early settlement of a case merely to establish a liquidated amount upon which to collect a fee. He may be unwilling to fully disclose to his client the risks and aggravation of the litigation process. Litigation may be commenced which is not necessary further delaying those cases where no payment of compensation has been made or already terminated. The public may perceive the attorney's actions as solely for his financial benefit and cause the workers' compensation system as well as the legal profession to fall into disrepute.

The Wunschel case is a valid starting point for analysis of the public policy considerations of any fee arrangement in a workers' compensation proceeding. It must be remembered, however, that the public policy concerns of the court which arises from its inherent power to regulate the ethical conduct of lawyers is not necessarily the public policy concerns of the industrial commissioner which arise from his statutory duty. To be sure the industrial commissioner is required by statute to be a lawyer and as such shares common interests with that of the legal profession as a whole. However, there must be no mistake that his paramount concern must be administration of the workers' compensation law in such a manner as to insure benefit to the injured employee or his or her dependents. Consequently, it may appear at times that the interests sought to be protected by the court and those of the commissioner are at odds.

For example, one of the distinguishing factors between this case and that which confronted the court in Wunschel is the manner in which jurisdiction of the issue is obtained. The controversy in Wunschel would never have arisen had the client never objected to the fee. He did object and thus the matter came before the court. In this case, however, there is no disharmony between the claimant and his attorney. Claimant, properly so, feels well served by his attorney and has no objection to the fee counsel seeks for his services. One of the policy matters with which the court was concerned in Wunschel is embodied in EC2-23, ICPRFL which requires the lawyer to be zealous in his efforts to avoid controversies with his client over fees. There can be no doubt that counsel in this case has fulfilled this canon. Here, it was the industrial commissioner who placed counsel's fee into issue. It might thus appear that the policy interest of the court in avoiding issues over attorney fees is in conflict with the commissioner's duty to raise the issue in certain cases.

In addition, it cannot go unnoticed that in Wunschel after considerable research, the court was unable to find cases in which similar contingent fee arrangements had been made. This record establishes that it is the usual and customary practice

f lawyers in Sioux City, Iowa, and in the northwest Iowa eographic area to enter into such contracts with injured orkers. Indeed, it is fair to assume that such practices are ommon, usual and customary throughout the state of Iowa. Thus, hile the contingent fee contract in Wunschel was literally one f a kind, it is apparent that this case represents the practices f a large number of lawyers in the state. Prudence, indeed, ill dictate that practices long established should not be hanged for light and transient reasons. Attorneys, however, re no less obliged to conform their practices to accommodate he changing interests of their individual clients and that of ociety as a whole, than are the injured worker, his employer, he insurance carrier, or the industrial commissioner. When hey fail to do so, it is both the right and the duty of the ndustrial commissioner to void that practice in favor of the stablished interest of society as a whole. So that there be no isunderstanding as to the public policy of the industrial ommissioner in regard to attorneys' fees, the following principles elating thereto are stated. It is the policy of the industrial ommissioner:

1. That the workers' compensation law is to be administered nd construed to insure that the injured worker or his or her ependents receive the benefits under the law to which they are ntitled.

2. To encourage voluntary compliance with the provisions of he workers' compensation law.

3. To discourage unwarranted litigation.

4. That injured workers or their dependents should have vailable to them, if desired, their choice of experienced and ompetent counsel to represent their interests.

5. That the logical basis for determination of attorney ees is whether the services rendered were reasonably necessary nd the charges made therefore were fair and reasonable.

6. That fixed fee schedules which may impair the right of ttorneys and clients to negotiate fair and reasonable contracts or fees for services should not be established.

The usual and customary practice of entering into contracts f the nature revealed in this record is in contravention of the bove policies.

Attorney fee questions come before the commissioner in one f four ways. A contested case proceeding filed by the claimant, contested case proceeding filed by his attorney, an application or commutation where one of the purpose of the commutation is o pay fees, or by a contested case proceeding commenced by the

industrial commissioner pursuant to rule 343-4.5. This broad supervisory power arises by virtue of the public interest in insuring that that law is administered for the benefit of the injured worker or his or her dependents. Similar public policy is reflected throughout the workers' compensation act. Agreements between the worker and his employer are not valid without the approval of the industrial commissioner. Section 86.13; section 85.35. An employee cannot waive the amount of compensation payable to him. Section 85.55. Workers' compensation benefits are not subject to attachment, garnishment or execution. Section 627.13. An employee involved in any contested case proceeding may not settle the controversy without the approval of the industrial commissioner. Section 86.27. Finally, all claims for attorney fees are subject to approval by the commissioner and no lien for any such fee is enforceable without his approval of the amount thereof. Section 86.39.

It is understood that the powers of the industrial commis are delicate and require mature deliberation and full consideration of all interests before those powers are exercised in a given case or class of cases. EC7-14 ICPRFL. The commissioner recognizes that there are many circumstances and situations which arise that compel an injured worker to seek legal assistance. The worker should be free in so doing to select the counsel of his choosing and both he and his counsel must be able to contract for legal services without unwarranted interference. If, however, upon proper review of the matter it appears that counsel has overreached, the commissioner should not hesitate to disallow any portion of a fee that is excessive or unreasonable.

One of the further distinctions between this case and Wunschel is that the contract in Wunschel did not involve a present property right of the client. This contract does. It could be argued that the fee contract in this case is not a contingent fee contract at all. For example, the attorney here seeks a percentage of all compensation paid to claimant after the date of the deputy commissioner's decision on May 16, 1986. Assume, arguendo, that also on May 16, 1986 defendants had served upon claimant a thirty day notice of termination of benefits pursuant to section 86.13. Even without the decision on liability, claimant would have received an additional thirty days of compensation pursuant to statute. His receipt of those benefits would not have been as a result of the outcome of the litigation. Yet, under the contract, counsel would still be entitled to his percentage fee. When thus viewed, it becomes apparent that such agreements between counsel and claimant are not contingent fees but rather an acqusition by counsel of a contingent interest in claimant's present and existing property rights. The outcome of the litigation does not create for the client a property interest, that interest was created by statute. The outcome of the litigation merely brings about the condition subsequent upon which counsel's contingent interest in the

client's property right becomes vested. This is clearly contrary to the goal of insuring that injured workers receive the benefits to which they are entitled under the act.

It is also contrary to the goal of discouraging unwarranted litigation. It raises the specter of litigation, not to establish any right for the benefit of the worker, but litigation brought for the purpose of establishing an attorney's fee. It would require in every case prosecuted pursuant to such an agreement a determination of the motives of counsel. It places the commissioner in the wholly untenable position of deciding in each case that it was the worker's interest that was served and not only his attorney's. The widespread practice of utilizing contracts of this nature might compel the industrial commissioner in every case to exercise his discretionary power to commence contested case proceedings as regards to fees to insure that overreaching has not occurred. Not only is such a procedure far beyond the resources of the industrial commissioner's office, but would surely lead to mistrust and suspicion between his office and the bar. Such circumstances would not foster the goal of encouraging voluntary compliance with the workers' compensation law.

It is fully recognized that the private bar is essential to the goal of encouraging voluntary compliance with the law. As already pointed out, the mere knowledge by an employer that a worker is represented by counsel may insure that unreasonable termination of benefits does not occur. See section 86.13. Also, the attorney may be able to insure that the employer acts in good faith and thus alleviate some of the fears and concerns of the worker which may have been present here. See section 85.38(4). Attorneys should be encouraged to undertake representation of injured workers who are receiving payments. The basis of their fee, however, must not be a purported contingent fee, it must be based upon the reasonable necessity of the services undertaken.

Nothing herein should be construed to limit the right of attorneys and their workers' compensation clients from entering into a reasonable contingent fee contract. It must, however, be a truly contingent fee where both the risks and rewards assumed by each party to the contract are the same. Thus, a contingent fee contract entered into prior to the voluntary commencement of payments, where commencement of voluntary payments was the result of the attorney's efforts, or such contracts after termination of voluntary benefits is appropriate. In such cases the true purpose of the contingent fee is fulfilled; it affords to the worker the services of counsel and produces the res out of which the fee can be paid. In cases such as the one here, the res is not or at least cannot be determined to have been the product of counsel's efforts. Further, a worker who is presently receiving compensation payments may be quite capable of paying for the services of counsel whose job is not to create the right to payment, but simply to insure that the employer continues to comply with the act.

Based upon the above and foregoing, it is evidenct that the fee contract which claimant seeks to fulfill by partial commutation is void as a matter of public policy and should not be enforced. Consequently, claimant's application for partial commutation to pay attorney fees is denied.

As in Wunschel, however, counsel's fee contract is not invalid because of illegality of services, but because on policy grounds the manner in which the fee is to be calculated cannot be approved. Counsel did perform valuable services for the claimant for which he is entitled to be compensated. Counsel has every right toseek approval of a reasonable fee on a quantum meruit basis. See Lawrence v. Tschirgi, 244 Iowa at 399-400, 57 N.W.2d at 53.

Signed and filed this 5th day of February, 1987.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRANK E. RIXEN, Claimant, vs. RALSTON PURINA CO., Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	File No. 784536 A R B I T R A T I O N D E C I S I O N FILED FEB 9 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Frank E. Rixen, claimant, against the Ralston Purina Company (Ralston), employer, and the Aetna Casualty and Surety Company, insurance carrier, for benefitsas a result of an alleged injury on July 25, 1984. A hearing was held in Davenport, Iowa, on December 18, 1986 and the case was submitted on that date.

The record consists of the testimony of claimant and James D. Dannels; claimant's exhibits 1 through 7; and defendants' exhibits A through T. Neither party filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $269.08; that permanent partial disability benefits would commence on December 29, 1984, if awarded; and that the contested medical bills are reasonable in amount.

ISSUES

The contested issues are:

1) Whether claimant received an injury that arose out of and in the course of his employment;

2) Whether there is a causal relationship between claimant's alleged injury and his asserted disability;

3) Nature and extent of disability; and

4) Whether claimant is entitled to benefits pursuant to Iowa Code section 85.27 and, if so, the extent of those benefits.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 49 years old and is currently employed by Ralston as a lab monitor. Claimant gathers samples and checks them as a lab monitor. He has worked for Ralston for sixteen years.

Claimant testified that on July 25, 1984, he twisted his right knee while standing at a counter at Ralston. At the time he twisted his right knee, he was turning to throw away samples into a wastebasket. His knee popped at the time of this injury. He told a supervisor about this incident and worked until 8:00 p.m. on the date of injury. Subsequently, a company doctor looked at the knee. Claimant saw J. E. Ives, M.D., about a week later and he treated with Dr. Ives for about a month. Claimant was working during this time period.

In the fall of 1984, claimant sought treatment from Ralph H. Congdon, M.D. He had surgery on November 28, 1984 and returned to work thirty-five days later. Claimant stated that he was unable to recall any restrictions being imposed on him at the time he returned to work. Claimant testified that he had no right knee problem prior to July 1984. However, claimant acknowledged a left knee problem prior to July 1984. In 1978, Richard L. Kreiter, M.D., did surgery on claimant's left knee.

Claimant testified that in 1983 his left knee bothered him and as result he went to Iowa City for treatment. His back was also bothering him at this time. Currently, his right knee has a burning sensation and he "walks with a little bit of a limp yet." Because of his right knee, he cannot squat or bend down. If he tried to squat, "he would fall in a heap."

On cross-examination, claimant testified that he had been a sampler for about a year prior to the incident of July 25, 1984. His ingredient sampling job had been eliminated. On July 25, 1984, claimant was a lab monitor and had the responsibility for gathering samples and checking them.

On cross-examination, claimant acknowledged that in September 1983, he stated to Robert Karr, M.D., that he had dull pain in both knees. See exhibit H, paragraph 2. It was pointed out to claimant that exhibit L documents that claimant had left knee surgery in 1983, rather than 1978.

Claimant testified on cross-examination, that at the time he injured his right knee on July 25, 1984, he was turning to his

left. Claimant stated that his weight was on his right leg. Claimant stated that "his knee gave out and then he lost his balance." He also stated that "his right knee had not been unstable prior to July 25, 1984."

On recross-examination, claimant acknowledged a "1983 tree incident" at his home.

James D. Dannels testified that he is a safety and training person for Ralston and has worked in this capacity for nine years. Mr. Dannels has worked for Ralston for a total of seventeen years. Dannels testified that in 1983 claimant had a right knee problem. Dannels testified on cross-examinaton that in August 1983 claimant was sampling ingredients. At that time, claimant was concerned about standing on cement floors and walking. These activities were part of his job. Dannels contacted Dr. Keister and described claimant's job to the doctor. Dr. Keister said that claimant had weak knees, but he told Dannels claimant could do his job. In 1983, walking and climbing was part of claimant's job. In 1983, Dr. Keister restricted claimant to soft shoes and no prolonged standing. See restrictions contained in claimant's exhibit 1. Dannels testified that these restrictions are still in effect.

Dannels has talked with claimant's wife about claimant's knees. Claimant's wife said to Dannels that "claimant's knees give out." This comment was made prior to July 1984.

Exhibit 2 (dated December 12, 1985) is authored by Dr. Kreiter and reads:

> I am writing in regard to information you requested on Frank Rixen. In review of my old records, I see that on only one occasion did he complain of some discomfort in his right knee. At that time he had been working long hours and had developed an aching along the medial aspects of his knees for which he took 10 to 12 aspirin. I did obtain x-rays of the knees at that time, standing, and his joint compartments were well maintained. As you know he did undergo an arthroscopy of the left knee in 1983 but seemed to function reasonably well in regard to the right knee until his accident or twist in July of 1984. I certainly cannot give any impairment rating to the knee prior to that date since it was functional and really had no impairment on a physical evaluation. He does have permanency now since he had a partial meniscectomy and that would probably give him a 5% permanent disability to the leg because of that surgery.

Exhibit 3 (dated February 15, 1985) is authored by Dr.

Congdon and reads in part:

> I think this patient's type of mechanism of injury best be described as an event that caused the patient to become symptomatic to the point of intolerability in a condition that was previously tolerable. I do believe he tore his meniscus on the 25th of July 1984 but also it was probably not a normal meniscus that finally gave way.

Exhibit H (dated September 6, 1983) is authored by Robert Karr, M.D., and reads in part:

> Frank Rixen was seen in the Rheumatology Clinic on August 31, 1983, with a diagnosis of chronic low back pain, etiology unknown.
>
> This 45 year old male has a several year history of gradual onset of dull, aching pain in both knees, both shoulders and low back. The pain is always exacerbated with activity and relieved with rest.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on July 25, 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).

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 25, 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).

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.

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 following discusson will assume that claimant had trouble with both of his knees prior to July 25, 1984. In resolving this case, I am presented with a fact question that depends in part on the resolution of the question of whether claimant is a credible witness. There will be a finding that claimant is a credible witness.

The evidence in this case, both lay and expert, support a finding that claimant materially aggravated the condition of his right knee at work on July 25, 1984. Prior to July 25, 1984, claimant's right knee may not have been in perfect condition, but he was able to work despite its imperfection. Claimant's testimony that he injured his right knee while twisting on July 25, 1984 is believed. Claimant has carried his burden of proof on the causation issuesin this case.

Claimant is entitled to healing period benefits from July 25, 1984 for the time periods he was off work. He is entitled to eleven weeks of permanent partial disability benefits based on the five percent rating of record. Defendants also owe the contested medical bills as claimant has carried his burden on the causation issues in this case. Any authorization argument fails because defendants did not admit this was a compensable injury, and then assert their statutory right to control the medical care given.

FINDINGS OF FACT

1. On July 25, 1984, claimant was working as a lab monitor for Ralston and in this capacity gathered and tested samples.

2. On July 25, 1984, claimant injured his right knee while standing at a counter at work when turning or twisting to throw samples into a wastebasket.

3. The injury that claimant sustained on July 25, 1984 materially aggravated his right knee condition; his right knee was not in perfect condition prior to July 25, 1984.

4. Claimant's injury of July 25, 1984 resulted in five percent (5%) permanent partial impairment to his right lower

extremity.

5. Claimant is a credible witness.

6. Claimant's stipulated weekly rate of compensation is two hundred sixty-nine and 08/100 dollars ($269.08).

CONCLUSIONS OF LAW

1. Claimant established by a preponderance of the evidence that he materially aggravated his right knee condition on July 25, 1984 while working for Ralston.

2. Claimant established entitlement to weekly benefits and medical bills as a result of his right knee injury.

ORDER

IT IS THEREFORE ORDERED:

That claimant be paid the healing period and permanent partial disability benefits described above with permanent partial disability commencing on December 29, 1984; all weekly benefits shall be paid at a rate of two hundred sixty-nine and 08/100 dollars ($269.08).

That defendants pay the contested medical bills.

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 to claimant.

That defendants pay the costs of this action, pursuant to Division of Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33.

That defendants shall file claim activity reports, pursuant to Division of Industrial Services Rule 343-3.1(2), formerly Industrial Commissioner Rule 500-3.1(2), as requested by the agency.

Signed and filed this 9th day of February, 1987.

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES ROACH, Claimant, vs. HUBINGER COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 500813 R E V I E W - R E O P E N I N G D E C I S I O N FILED MAR 20 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by James Roach, claimant, against Hubinger Company, his employer, and Liberty Mutual Insurance Company, its insurance carrier. Claimant seeks further benefits of additional compensation for permanent partial disability as a result of the injury which occurred on June 15, 1978. Claimant alleges that there has been an unanticipated change in his condition which warrants re-determination of his entitlement to compensation for permanent partial disability. He urges an increase in the amount of permanent partial disability in his leg. He also urges that he has permanent impairment of his back, a condition which was previously thought to be temporary, and that his disability should be evaluated industrially as a disability of the body as a whole rather than as a disability of his left leg. Defendants deny that any change of condition has occurred and further contend that claimant's disability is limited to his left leg. Previous awards in this case have established that claimant did sustain an injury on June 15, 1978 that arose out of and in the course of his employment; that the proper rate of compensation is $180.58 per week; and that previously awarded 44 weeks of compensation for permanent partial disability representing a 20 percent permanent partial disability of the left leg. Healing period and other benefits were also previously awarded. No claim is made for additional healing period or expenses of medical treatment.

The case was heard at Burlington, Iowa on November 5, 1986

and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from James Roach, Joni Roach and Ronald Dean Schreiber. The record also includes exhibit 1 which is the agency file of this proceeding and of which official notice was taken; exhibit 2, which is the deposition of Thomas B. Summers, M.D., taken August 1, 1986; exhibit 2A, office records from Dr. Summers; exhibit 3, the deposition of Larry Bader, D.O., taken March 28, 1986; exhibit 4, the deposition of the claimant taken January 28, 1986; exhibit 5, the transcript of the prior hearing conducted in this case on February 5, 1980; exhibit 6, a report from Edward P. Herrmann, D.O., dated November 14, 1984; and, exhibit 6A, records from Kirksville Osteopathic Hospital.

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. The evidence in the case is relatively uncontroverted on many factors. It appears that the major disputes in the case arise from the conclusions to be reached, rather than a dispute concerning evidentiary facts or occurrences.

James Roach was injured on June 15, 1978 when he fell through a skylight at his place of employment landing on concrete between railroad tracks. The distance of his fall has been alternately described in the record as ranging from 25 feet to 40 feet. Claimant landed on his heel, fell foward to his hands and struck his head on the railroad tracks. An arbitration decision filed June 22, 1979 found that claimant's injury in that incident arose out of and in the course of his employment with the Hubinger Company. The case was heard on Feburary 5, 1980 for the purpose of determining claimant's entitlements and in the decision filed August 15, 1980, claimant was awarded healing period running from the date of injury through August 31, 1979 and 44 weeks of compensation representing 20 percent permanent partial disability of the left leg.

In obtaining treatment for the injury claimant was hospitalized at St. Mary's Hospital in Quincy, Illinois where he was under the care of Frank T. Brenner, M.D. X-rays taken on admission showed a fracture of the posterior superior portion of the left os calcis with marked separation and reduction of the tuber joint angle. X-rays also showed a minor compression fracture of the body of the fifth lumbar vertebra in claimant's lumbosacral spine. On June 22, 1978, the fracture of the left os calcis was treated by open reduction and stablization with two cross screws and a short leg cast was applied. On November 22, 1978, the internal metallic fixation devices were surgically removed. The claimant experienced a gradual recovery and when the case was heard on February 5, 1980, the arbitration decision reflects that claimant complained of pressure and discomfort in the area

of the incision on his left heel and that contact with the left heel caused pain. He wore work boots which had the rear portion of the left boot cut away in order to avoid pressure. Claimant complained of pain in the lumbar and mid-thoracic spine area and of difficulty when lifting, stretching or pulling. He complained of pain when driving a truck but felt capable of driving a car. Claimant complained of tenderness with pressure on his heel, stiffness when he first arose in the mornings and slow healing of any scratch or blister in the heel area and a limp which became more pronounced toward the end of the day. At the time of injury claimant had been employed as a "V" filter operator and spent a majority of his working time watching a series of dials which measure the contents and pressure in tanks. He had not returned to work at the time of the hearing in 1980. Claimant denied the existence of any back, heel or leg problems prior to the fall of June 15, 1978. He attributed all of his physical problems to that fall. The causal connection of the problem in claimant's left leg and the fall of June 15, 1978 was established by Dr. Brenner and is not seriously disputed by any source.

On August 31, 1979, Dr. Brenner examined claimant for purposes of establishing an opinion concerning the extent of claimant's permanent disability. Dr. Brenner found a decreased sensation on claimant's left heel along the line of the surgical incision, atrophy in claimant's left calf and thigh, a 10 degree loss of dorsiflexion, an 18 degree loss of plantar flexion and a 10 degree loss of range of motion of the left forefoot. Dr. Brenner noted thickening of the posterior superior aspect of the os calcis. He rated claimant as having a 20 percent permanent partial physical impairment of the left lower extremity.

Concerning claimant's back, Dr. Brenner noted that claimant voiced complaints that involved the thoracic and lumbar spine and that tended to increase as activity increased. Dr. Brenner noted complaints of tightness and back pain with prolonged sitting and difficulty lifting. His examination found no objective abnormalities other than some diffuse tenderness. He felt that the compression fracture had healed. Dr. Brenner offered no opinion as to any permanent condition affecting claimant's back. The possibility of additional surgery on claimant's heel was acknowledged.

Robert A. Hayne, M.D., examined claimant and found no abnormality in claimant's spine.

Thomas B. Summers, M.D., a board certified neurologist, examined claimant and rated him as having a 25 percent physical impairment of the left leg. Dr. Summers did not disagree with the 20 percent rating made by Dr. Brenner. He was unable to find any objective evidence of permanent impairment elsewhere. Dr. Summers was of the opinion that a condition such as claimant's

would stablize within 15 to 18 months. He conceded, however, that there are some injuries which may not be disclosed by x-rays.

Claimant was examined by Jodie Schlepphorst, D.O. Dr. Schlepphorst voiced the opinion that claimant had suffered permanent injury to the back and rated him as having a 20 percent permanent disability to the body as a whole as a result of the fall from June 1978. Dr. Schlepphorst felt that x-rays taken at his direction showed a narrowing of the disc space between L5 and S1 and also a curvature of the spine which he felt was compatible with increased muscle spasm. It should be noted that Dr. Summers, upon reviewing those same x-ray films, found no abnormalities. None of the other physicians in the case, commented upon any abnormal curvature of claimant's spine or of observing muscle spasms. Dr. Schlepphorst indicated that claimant's back pain was due to an injury to ligaments and soft tissue in his back.

The deputy industrial commissioner who heard the case chose to accept the testimony from Drs. Summers, Haynes and Brenner with regard to the condition of claimant's back. He rejected conflicting evidence from Dr. Schlepphorst. The deputy found claimant's permanent disability to be limited to his left leg and established the degree of disability to be 20 percent in accordance with the rating made by Dr. Brenner.

Subsequent to the 1980 hearing, claimant returned to employment with the Hubinger Company where he obtained the job of "B" evaporator operator, a position which he held for five or six years. He stated that he could do the job without major difficulties. He stated that the job would involve from 12 to 60 trips up and down three flights of stairs each work shift and that at times he would be fatigued halfway through the shift. Claimant stated that the basic part of his job is pushing buttons, activity which he can perform without problems. He stated that he can sit at his job and also does some walking. Claimant feels that his job will end within the next year and expects jobs at the employer's facility to be combined in such a method as to make all job assignments a subject of binding.

Claimant testified that he had been able to perform carpenter work during times when he was not working at the Hubinger Company. He had engaged in driving stock cars subsequent to his fall but ended that activity in 1985 (Ex. 4, pp. 7 & 20).

Claimant testified that he had two surgeries on his left leg in 1981 where a calcium deposit was removed in order to construct a heel. The first surgery was unsuccessful and a second was then performed. Claimant testified that following the surgery his condition improved for about one and one-half years but that the skin did not grow back at a spot on the left side of his

ankle. Claimant complains that fragments of bone now work out of his foot and that a spur has developed in the rear of his foot since the time of the last surgery. Claimant testified that he feels that the foot works less well now than prior to the time of the last surgery. He stated that if he walks on level cement it feels as if the heel is bruised after walking three or four hours. He complained that it stiffens if he mows the yard. Claimant complained that his back bothers when he attempts to perform activities such as working on his car or sitting. He complained of difficulty lifting or when laying on his stomach to sleep at night. He stated that within the last one to one and one-half years a condition has developed where his leg will fall asleep. Claimant is not on medication and has not been since shortly following the 1981 surgeries. His treatment for the foot and leg has been conducted by Dr. Herrmann and no further treatment is currently scheduled. Claimant related that treatment to remove the spur has been recommended but that he is economically unable to take off work to have the surgery performed. Claimant related that he has received care from Dr. Bader at the Osteopathic Hospital in Kirksville, Missouri for his back.

Joni Roach, claimant's spouse, generally confirmed the testimony that claimant related regarding his present problems. She stated that he has difficulty picking up children and needs help when moving furniture or the TV at their home. She feels that his back condition is gradually worsening. Mrs. Roach stated that she performs most of the yard work and shovels the snow at their home. She stated that her marriage to claimant occurred on March 11, 1983 and that she did not know claimant well at the time of the prior hearing. She stated that most of his complaints involve his left leg.

Ronald Dean Schreiber, president and full time business agent of the union at Hubinger, testified that a new contract negotiated in August 1986 does away with light duty jobs. He stated that assignment to the lighter jobs will be subject to normal bidding procedures.

On May 13, 1986, claimant was reevaluated by Dr. Summers. His written report, exhibit 2A, makes the following conclusions:

I do not find any difficulties in the case of Mr. Roach referable to the vertebral column. The most significant findings are those concerning the left lower extremity. In my opinion, there has been some change in the past several years. It may well be that this young man does have a very low grade, chronic, osteomyelitis involving the os calcis of the left foot and from time to time drainage and sequestration do occur. In addition, I suspect that this young man has developed a bone spur

arising from the plantar aspect of the os calcis on the left side.

Not unlikely, this young man will require further surgical treatment in the future.

In his deposition Dr. Summers described a number of differences that had transpired between the time he examined claimant in 1979 and the 1986 examination. He found atrophy of the left leg, enlargement of the left heel, additional operative scars and a pigmented encrusted area at the point where the scars intersected that he felt represented the center of an infection. The doctor also found a bone spur arising from the heel bone, increased impairment of sensation at the outer aspect of the left heel and decreased Achilles tendon reflex. He felt that all of the changes were causally connected to the original injury (Exhibit 2, pages 5-7). Dr. Summers felt that claimant's permanent partial impairment of the leg had increased from 25 percent to 50 percent. He felt that an impairment rating in the range of 35 to 50 percent would not be unreasonable (Ex. 2, pp. 8 & 18). Dr. Summers felt that the bone fragments which were migrating to the surface of the foot and the chronic low grade infection and osteomyelitis were not unusual. He stated that the infection was extremely difficult to treat (Ex. 2, p. 19). Dr. Summers felt that claimant's back complaints were of a soft tissue nature. He attributed them to chronic difficulties involving claimant's leg, foot and the impairment of claimant's ability to walk normally. He expressed the opinion that claimant had a permanent partial impairment of the body as a whole as a result of his spine that was not more than 10 percent of the body as a whole (Ex. 2, pp. 12 & 14). Dr. Summers related that his impairment rating was based solely on claimant's subject complaints and that those complaints were not substantially different in 1986 than they had been in 1979. He confirmed that claimant had not exhibited an abnormal gait at the time of the 1986 examinaton although the deposition of Dr. Summers taken April 1, 1980, at page 12, notes that claimant did exhibit a gait disturbance (Ex. 2, pp. 14 & 15).

Exhibit 3 is the deposition of Dr. Bader taken March 28, 1986. Dr. Bader felt that the fall claimant sustained produced a jamming of joints throughout claimant's body (p. 4). He felt that claimant's problems resulting from the fall were most evident in the mid thoracic spine, cervical occipital region and pelvis (p. 8). He felt that claimant's injury involved soft tissues and ligamentous strain (p. 18). He predicted that claimant will develop arthritic changes in his joints prematurely due to the trauma of the fall (pp. 17-20) Dr. Bader expressed the opinion that claimant had a 10 to 20 percent impairment of the upper body as a result of the fall. He did not follow the AMA Guides in making his determination. He did consider elements such as pain and stress as well as restricted motion and physical

limitations in making his rating (pp. 12-15). Dr. Bader had treated claimant with osteopathic manipulation and felt that it had been beneficial.

APPLICABLE LAW AND ANALYSIS

This is a review-reopening proceeding under section 86.14(2). In a review-reopening proceeding the claimant has the burden of establishing a change of condition that was not anticipated or contemplated at the time of the prior award. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455 (Iowa 1969). The controlling authorities were well summarized in the case Sanford v. Allied Maintenance Corp., IV Iowa Industrial Commissioner Report 297, 298 (1984).

There is evidence in the record that Dr. Brenner expected additional surgery. The record does not, however, indicate that an increase in claimant's disability would result from the surgery. The record particularly does not indicate that it was anticipated that claimant would develop a chronic infection, decreased sensation, further atrophy or exude bone fragments. It is found and concluded that claimant has established a sufficient change of condition to warrant reconsideration of the nature and extent of his permanent disability.

The evidence from Dr. Summers with regard to the condition of claimant's left foot, ankle and leg is accepted as correct. Dr. Summers felt that the disability could fall within a range of 35 to 50 percent of the left lower extremity. His initial rating was 50 percent. That initial rating is perceived by the undersigned to be his best estimate. The doctor's statements regarding a range from 35 to 50 percent is merely his recognition that any scheme or system of providing numerical ratings for physical impairments is an arbitrary process. The 50 percent impairment rating of the left leg from Dr. Summers is the only recent rating of the leg that appears in the record. The record clearly shows that the condition of claimant's foot and leg has worsened since the 1980 hearing was conducted. Accordingly, the rating of 50 percent impairment from Dr. Summers is adopted as correct. The AMA Guides referred to in Rule 343-2.4 is not the exclusive permissible method for determining scheduled membered disabilities. Lauhoff Grain Company v. McIntosh, 395 N.W.2d 834, 839 (Iowa 1986). The problems which claimant has regarding the low grade infection, the lack of healing, the spur formation and the extrusion of bone fragments are all factors which have a significant effect upon claimant's use of his left leg but which would not necessarily be considered under any standardized guide for rating functional impairment.

The problems involving claimant's spine are more elusive. Claimant testified of continuing complaints that have existed since the fall and which did not exist prior to the fall. There is nothing in the record which provides a basis for questioning

claimant's credibility. When deposed in 1980, Dr. Brenner, at page 27, stated:

> A. I think his prognosis -- The back I'm uncertain of. As you brought out, I found nothing objective and yet it's my impression that he is not exaggerating. I think his back complaints are legitimate, and I'm just not smart enough to know what they're about. Probably soft tissue injury, fibrositis, something of that nature; and I wouldn't anticipate that it would get any worse.

When deposed in 1980, Dr. Summers stated, commencing at page 29:

> ...Insofar as his back was concerned he told me that one week before, that was in late October, 1979, he called his doctor because of the pain in the lower back and at that time he had been placed on Norgesic at a dosage of eight tablets a day. That he told me that had not alleviated pain. I guess that was in essence the history regarding the lower back problem.
>
> Q. Doctor, when he was saying these complaints to you, you realized what your X-rays showed and the other tests that you ran showed, do you take the position or the opinion that he was in relating these problems that he said he had, that he was faking them or lying about them?
>
> A. No. I believed him.
>
> Q. So is it possible for him to have the complaints he mentioned, that is the loss of sensation that he mentioned, can those be real and yet your laboratory tests that were performed not show why?
>
> A. That's right. We can't find any explanation for them.

It appears that all of the medical practitioners involved in this case acknowledge that claimant does have back problems. The severity of the trauma which he experienced was certainly sufficient to produce an injury to claimant's spine. Compression fractures in the cervical and lumbar regions have been found on x-rays on one occasion for each but have not been generally recognized in other x-rays of the same parts of claimant's body. The radiographic report found at the first two pages of exhibit 6A concludes that claimant has an essentially normal thoracic spine. As a practical matter, objective evidence of physical impairment or physical abnormality other than in claimant's left leg is absent from the record in this case. The medical practitioners

do not, however, doubt the validity of the complaints that claimant has voiced regarding his spine. Drs. Summers, Bader and Schlepphorst have all assigned a functional impairment rating to claimant's lumbar spine based primarily upon subjective complaints.

The recent case, Lauhoff Grain Company, 395 N.W.2d 834, seems to indicate that there must be actual impairment that extends beyond a scheduled member in order for the disability to be evaluated as disability to the body as a whole. It is consistent with the case Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964). In that case, a fracture of a femur and shortening of the leg occurred. The deputy commissioner awarded benefits based on the assumption that the shortened leg resulted in a tilting of the pelvis and compensatory changes that tilted claimant's spine. Nevertheless, the Supreme Court held that the injury and disability was limited to the scheduled member because there was no medical confirmation of a compensatory change in the spine or tilting of the individual's pelvis. It would be difficult to imagine how a leg that was shortened by approximately two inches could avoid causing an abnormal tilt to the individual's pelvis. The individual had, however, voiced complaints of pain, discomfort and limitation regarding use of his back. On the other hand, precedent includes the case Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (1980) where the court stated: "This is the case of an employee who has no apparent functional impairment...the extent of Blacksmith's industrial disability is an issue of fact for the commissioner to resolve." It is difficult to reconcile why a physical abnormality or functional impairment appears to have been required by the court in Lauhoff and Kellogg but was not required in Blacksmith. Perhaps some enlightenment can be found in Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943) and Alm v. Morris Barrick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In those cases the court seemed to indicate that the situs of the trauma rather than just the situs of the physical impairment, was to be considered. In Dailey at page 764 the court stated:

> Appellants' contention may be best indicated by this quotation from their brief:
>
> "Even though the injury be to a scheduled member we readily concede that if as a result of such injury some other part of the body is affected so as to create a disability separate and distinct from the usual, ordinary and natural results of the injury to the scheduled member, compensation may be awarded in addition to that provided in the schedule. Conversely we contend that even should the situs of the injury be without the schedule, the workman nevertheless is limited by the provisions of the

schedule when the disability and incapacity flowing from the injury are manifested in and confined to the scheduled member." (Italics are ours.)

Support for their argument is found in some of the cases they cite from other jurisdictions, but we find ourselves unable to agree with the doctrine of these decisions. The term "total disability," in the sense of loss of earning power, cannot be said to be "manifested in and confined to" any particular scheduled member. It is an inability of the individual, as such, to earn--not a mere inability of a certain member to function. It may arise solely from some injury to or loss of a scheduled member; or it may result from some injury of wider extent. Cases from other states are of little aid to us here. We are disposed, rather, to rest our decision upon an analysis of the language of our own statutes. Code section 1395 provides:

"For an injury causing permanent total disability, the employer shall pay the weekly compensation during the period of his disability, not, however, beyond four hundred weeks."

This section of the statute sets no limitation which concerns the physical location of the injury causing the disability. The only limitation of that sort is found in cases where "permanent total disability" comes from some injury limited by and included in the schedules contained in Code section 1396. Permanent total disability, as we have said, may be caused by some scheduled injury, even though no other part of the body except the scheduled member be affected. This may happen because of lack of training, age, or other condition peculiar to the individual. Such injury, though causing permanent total disability, is arbitrarily compensable according to the schedule. But where there is injury to some scheduled member, and also to parts of the body not included in the schedule, the resultant "permanent total disability," if established, is compensable under Code section 1395.

This seems a logical interpretation of the statute itself. Appellee fortifies it by reference to Clark v. Clearfield Opera House Co., 275 Pa. 244, 119 A. 136, which seems exactly in point as to the location and extent of the injury involved.

It is our conclusion appellee's injury is not within the schedules of Code section 1396 because

the actual physical injury extended beyond and outside the scheduled area.

In this case the evidence does not show any clear physical abnormality other than in claimant's left leg. The evidence regarding a compression fracture is uncorroborated by any practitioner other than the one that diagnosed each fracture. No physician has imposed lifting restrictions or recommended other limitations upon claimant's activities other than those that necessary follow from the condition of his foot. It is interesting to note that the scope of review in a review-reopening proceeding may be limited to matters related to the change of condition that has occurred. Claimant's own testimony denies any substantial change in the condition of his back. The best evidence to support any alleged change in claimant's back comes from Dr. Summers and the prior decision which gives some indication that Dr. Summers may have initially felt that the back complaints would be temporary but that he now feels they are permanent in nature. It is also interesting to note that if claimant's disability were evaluated industrially, the award would probably be little different from the scheduled member disability award to be made herein due in large part to defendants provision of adequate medical care in a timely fashion and retaining claimant's employment status without loss of actual earnings. What the future holds in this regard, however, is uncertain.

This case is a review-reopening case from a prior agency decision. It was necessary for claimant to show a change of condition in order to obtain an increase from the amount previously awarded to him. Payment of the additional compensation is therefore governed by the case Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). The dates when the compensation came due is not governed by Teel v. McCord, 394 N.W.2d 405 (Iowa 1986) or Dickenson v. John Deere Products Engineering, 395 N.W.2d 644 (Iowa App. 1986), both of which were cases that were review-reopenings from a memorandum of agreement where the issue of the degree of permanent disability had not been previously established. A proceeding for review-reopening from a prior award or settlement is similar to modification of a dissolution of marriage decree in the district court. In both cases an award once made stands valid and unchanged until a subsequent order is entered which modifies it. A modification is therefore effective only from the date of its entry and not retroactively.

FINDINGS OF FACT

James Roach has a 50 percent loss of use of his left leg as a result of injuries sustained in the fall of June 15, 1978.

The evidence does not establish the existence of any physical abnormality or functional physical impairment in any part of claimant's body other than his left leg.

CONCLUSIONS OF LAW

Subjective complaints, in the absence of medically confirmed physical abnormalities or functional impairment which extend beyond the scheduled member, are not sufficient to cause the permanent disability from an injury that is primarily located in a scheduled member to be evaluated industrially rather than functionally.

Claimant's entitlement to compensation for permanent partial disability resulting from the injury of June 15, 1978 is to be evaluated as a 50 percent loss of use of his left leg compensable by 110 weeks of compensation under section 85.34(2)(o) of the Code.

The date for commencment of payment for such additional 66 weeks of compensation is the date of this decision.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant sixty-six (66) weeks compensation at the rate of one hundred eighty and 58/100 dollars ($180.58) per week commencing on the date of this decision.

IT IS FURTHER ORDERED that costs of the proceeding are assessed against defendants.

Defendants are ordered to file claim activity reports as requested by this agency.

Signed and filed this 20th day of March, 1987.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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000958

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT W. ROSE,	:	
	:	
Claimant,	:	
	:	FILE NO. 722500
vs.	:	
	:	A R B I T R A T I O N
PEOPLES NATURAL GAS COMPANY,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Robert W. Rose against Peoples Natural Gas Company, his self-insured employer. The case was heard at Council Bluffs, Iowa on December 16, 1986 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Robert W. Rose; claimant's exhibits 1 through 5; and defendant's exhibits A through E. Exhibit 1 is records from claimant's initial hospitalization on December 24, 1982. Exhibit 2 is a series of reports from Raymond G. Lewis, M.D. Exhibits 3 and 4 are reports from James W. Dinsmore, M.D. Exhibit 5 is a deposition of Dr. Lewis taken July 9, 1986. Defendant's exhibit A is the deposition of Robert H. Westfall, M.D., taken September 4, 1986. Exhibits B and C are additional records from Jennie Edmundson Hospital dealing with the December 24, 1982 admission. Exhibit D is Dr. Westfall's standard surgeon's report. Exhibit E is a drawing made by claimant at hearing which purports to show his position at the time of the explosion from which this claim resulted.

ISSUES

Claimant seeks compensation for permanent partial disability based upon injuries allegedly sustained in an explosion which occurred on December 24, 1982. All other benefits, including section 85.27 benefits and weekly compensation for the time claimant has been off work, have been voluntarily paid by the employer. Claimant's claim for permanent partial disability deals with headaches and complaints of pain in his neck and shoulder region which he attributes to the explosion. The primary issues identified for determination at the time of hearing are whether the current complaints are a result of the explosion and whether such complaints constitute an injury which arose out of and in the course of employment. In the event that compensability for the complaints is found, then the issue

regarding the degree of permanent partial disability is to be decided.

SUMMARY OF EVIDENCE

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

Robert Rose is a 58 year old man who is currently employed as a welder by People's Natural Gas Company. He has been so employed for approximately 20 years. On December 24, 1982, Rose was on call for emergencies which involved responding to suspected gas leaks after normal business hours in the Council Bluffs, Iowa district. Shortly after 4:00 p.m. on that date he was called out to the First Federal Savings and Loan Building located at 32nd and Broadway. While at the scene an explosion occurred which demolished the building and injured both claimant and a co-employee. Claimant testified that he suffered burns on his face and hands, had glass embedded in his legs and face and that he was thrown around by the impact but was not knocked down. Claimant was taken to Jennie Edmundson Hospital in Council Bluffs where his primary treating physician was Robert H. Westfall, M.D. Claimant's lacerations were sutured and burns were treated. He was discharged from the hospital on December 27, 1982 and then returned to work on January 9, 1983.

Claimant testified that he now experiences headaches and pain in his neck. He takes pain medication on a daily basis. Claimant stated that his complaints, including dizziness, are most acute if he works with his hands over his head, works looking up or when he tries to hold his head up while working when laying down. He stated that it causes problems when he tries to weld pipe from a laying position. He testified that the nature of his duties has changed somewhat since the injury but that he still performs the same type of work and is able to perform all of his assigned duties. In recent years the extent of his work as an inspector has increased. Claimant testified that his pay has not decreased and that he is the only welder in the Council Bluffs district. Claimant stated that he has a high school equivalency certificate but has welded since he was 16 years old. He feels that his job is presently secure and he plans to retire when he reaches age 65.

Claimant testified that he had considerable pain in his back and neck at the time he was initially hospitalized and that he reported it to Dr. Westfall. He stated that Dr. Westfall told him that he should hurt all over after what he had been through. Claimant testified that the symptoms continued and that in the spring of 1983 he sought care from Raymond G. Lewis, M.D., his family doctor. After several months of treatment by medication, ultrasound and massage did not seem to help he was referred to

James W. Dinsmore, M.D., an orthopedic surgeon. Dr. Dinsmore prescribed additional medication and cervical traction.

Claimant testified that he was in good health and had not had problems with his neck, back or headaches prior to the explosion. He denied sustaining any subsequent trauma.

Claimant testified that at the time of the explosion he was located between the building and his van. Claimant denied telling the people at the hospital that the van had protected part of his body from the blast but that they seemed to have the idea that it had. Claimant stated that he was heavily clothed at the time and that the clothing protected part of his body.

Defendant's exhibit A is the deposition of Dr. Westfall. Dr. Westfall, a general surgeon, provided claimant's initial medical care following the injury. His treatment of claimant commenced on December 25, 1982 and ended on January 7, 1983 (Ex. A, pp. 4-6). Dr. Westfall observed claimant to have burns and multiple lacerations to his face, forehead, lower extremities and the backs of his hands (Ex. A, pp. 5 & 8). Dr. Westfall felt that the injuries were caused by flying glass and debris from the explosion (Ex. A, pp. 8 & 9). Exhibit B, the admission note from the hospital, indicates that claimant had stated that he was standing opposite his truck with the door open when the explosion occurred and that part of his body was protected by the truck. Dr. Westfall made a similar indication in his deposition (Ex. A, p. 9).

Dr. Westfall testified that claimant made no complaint of pain in his back or neck during the course of treatment and that in his opinion claimant had not sustained any injury to his neck or back and that he expected no permanent disability to result from the injury (Ex. A, pp. 10-13).

Raymond G. Lewis, M.D., a specialist in internal medicine, had seen claimant in December, 1971, for a general physical examination. He felt that claimant had been in good health at that time (Ex. 5, pp. 5 & 6). Dr. Lewis next saw claimant on May 31, 1983, with complaints of severe headaches, stiff neck with discomfort, dizziness when lying down, general stiffness and soreness (Ex. 5, pp. 6, 17 & 18). Dr. Lewis treated claimant with muscle relaxants, anti-inflammatory medication, and ultrasound to his neck (Ex. 5, pp. 8 & 9). When claimant's symptoms were not relieved, Dr. Lewis referred claimant to James W. Dinsmore, M.D., an orthopedic surgeon, for consultation. Dr. Dinsmore treated claimant with additional medication and cervical traction (Ex. 5, pp. 10 & 12).

Dr. Lewis testified that claimant currently complains of problems when working while looking up with his hands overhead. He stated that claimant exhibits a full range of motion of his

neck but with pain when doing so (Ex. 5, p. 13).

Dr. Lewis testified that in his opinion claimant has a 25 percent permanent partial disability of the body as a whole due to the cervical condition and headaches which he experiences (Ex. 5, pp. 14, 30 & 34). He attributes the disability to the explosion and states that it was an injury in the nature of an aggravation of a preexisting condition in claimant's neck (Ex. 5, pp. 16 & 26). Dr. Lewis felt that claimant had been struck by considerable force, as evidenced by the substances that were embedded in his face, head, hands and legs. He felt that such force would be sufficient to aggravate a preexisting neck condition (Ex. 5, pp. 31-33).

James W. Dinsmore, M.D., an orthopedic surgeon, examined claimant on November 29, 1983. He received complaints of pain in claimant's neck, the back of his shoulders, headaches and dizziness when lying down. He found claimant to exhibit a full range of neck motion but with pain on extension. X-rays showed narrowing at the C4-5 level with spurring and degenerative changes. They also showed the C4 vertebrae to be positioned slightly posterior to the C5. Dr. Dinsmore's initial impression was that claimant had a preexisting degenerative spondylitis at the C4-5 level which was aggravated by injury in the nature of an acute sprain of the cervical spine as a result of the injury on December 24, 1982. He initially did not expect claimant's cervical complaints to be a permanent problem but indicated that such a condition can become permanent (Ex. 3).

A subsequent report, exhibit 4, dated April 22, 1986, indicates that Dr. Dinsmore found claimant to have continuing complaints. He stated that claimant has a 10 percent permanent impairment of the cervical spine and that the injury dates back to December 24, 1982.

APPLICABLE LAW AND ANALYSIS

There is no doubt but that claimant was injured on December 24, 1982 in the explosion. The injuries clearly included lacerations and burns. The dispute in this case deals with whether or not the injuries extended into claimant's cervical spine and produced the headaches, dizziness and pain in the neck of which claimant currently complains.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 24, 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 possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially

within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

Expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). 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 evidence in the case presents a factual dispute regarding claimant's position at the time of the explosion. Claimant testified that the explosion produced sufficient impact to demolish and level the building. He stated that he was knocked about but not knocked down by the blast. Whether part of claimant's body was protected by a vehicle or protected by heavy clothing is a major point of contention with defendant urging that the mid-part of his body was protected by a vehicle while claimant denies such occurrence. The physical facts of the matter are that claimant had lacerations on his face, the backs of his hands and foreign fragments embedded at approximately the junction of the mid and distal third of the right leg which appear to have impacted the bone (Ex. 1). It appears that the lacerations existed only above the neck and below the knees. This would be a very unusual pattern for someone who had taken the full force of the impact in a standing position. It would not be impossible, however.

As indicated by Dr. Lewis the neck is a stalk which supports the head. It would seem that the whipping or whiplash effect could have been greater if the head were exposed to the full impact of the blast and the body protected, as could occur if a person were standing behind a vehicle. There would likewise be substantial trauma and impact if the entire body were exposed to the impact of the blast. Generalized pain and discomfort would be expected following exposure to an impact such as the explosion. Where Dr. Westfall treated claimant for a period of approximately two weeks in late 1982 and early 1983, it is questionable regarding whether he would have much independent recollection apart from his records, particularly where claimant did not return to him for further treatment. The records of the initial hospitalization do not report any complaints of pain at any location in claimant's body, even those which were burned or lacerated. The admission note, exhibit B, contains a statement that claimant denied chest or abdominal distress but it makes no mention of complaints of neck pain. The physical examination

contained in exhibit B shows the neck to be supple, that the trachea was in a midline position and that there were no burns. Neither the notes regarding the neck nor extremities, which were obviously injured, contained any indication of whether or not claimant made complaint of pain. It would normally be expected that a person with burns and lacerations would experience pain at the sites of those injuries. It would normally be expected that a person exposed to an impact of an explosion, as was claimant, would experience generalized stiffness and soreness. The records and reports in evidence make no showing of complaints of pain at any location on claimant's body. The fact that they failed to record reports of neck pain is not deemed to be particularly significant with regard to whether or not complaints of neck pain were made. Claimant's testimony regarding experiencing pain in his neck and back ever since the explosion occurred are accepted as correct.

Drs. Lewis and Dismore relate claimant's neck complaints and headaches to the blast. Dr. Westfall does not. The basis for Dr. Westfall's opinion, however, is that claimant, to his recollection, made no complaint of pain in his neck. That rationale is found to be inconsistent with the actual facts of claimant experiencing pain in his neck with an onset at the time of the explosion. For these reasons the testimony and evidence from Drs. Lewis and Dismore is accepted as correct with regard to the explosion being a proximate cause of claimant's current complaints. While it is clear that claimant had a preexisting condition in his neck our Supreme Court has consistently stated that a claimant may recover for a work connected aggravation of a preexisting condition. Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934). See also Auxier v. Woodward State Hosp. Sch., 266 N.W.2d 139 (Iowa 1978); Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960).

A cause is proximate if it is a substantial factor in bringing about the results; it need not be the only cause. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980).

In accordance with the opinion expressed by Dr. Dinsmore, claimant is found to have sprain of the cervical spine which has left him with a 10 percent permanent functional impairment of the cervical spine. The injury is an aggravation of a preexisting condition. Claimant also experiences headaches as indicated by Dr. Lewis.

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, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963).

Drs. Dinsmore and Lewis have provided differing impairment ratings. Dr. Dinsmore has provided a 10 percent rating and Dr. Lewis a 25 percent rating, both of the body as a whole. Dr. Lewis explains the difference as resulting from his decision to include headaches while Dr. Dinsmore's rating appears to be based solely on the condition of claimant's neck.

More important than any functional impairment rating is the fact that claimant has been able to return to his usual employment and has not suffered any loss of earnings as a result of the injuries. He testified that he is able to perform his work, albeit with discomfort. He has not been unable to perform any of his assigned duties. Claimant appears to be appropriately employed in light of his education, experience and physical condition. Claimant's employment appears secure and the evidence provides no reason to expect that he will not be able to fulfill his plan of working until retirement at age 65.

When all the appropriate factors of industrial disability are considered, it is found that claimant's disability, when evaluated industrially, is 10 percent of the body as a whole which entitles him to receive 50 weeks of compensation at the stipulated rate under the provisions of section 85.34(2)(u).

Claimant's healing period under section 85.34(1) was terminated by his return to work on January 9, 1983. At that time he was not symptom free but it appeared that no permanency would result according to the evidence that has been received. It is only when a course of medical treatment failed to relieve all of claimant's symptoms that there became some indication that permanent partial disability would result. In his report of August 20, 1984 (Ex. 3), Dr. Dinsmore indicated that permanency was unlikely. It was not until the report of April 22, 1986 that Dr. Dinsmore assigned a permanent impairment rating (Ex. 4). Exhibit 2, at page 3, a report from Dr. Lewis dated August 3, 1984 indicates that claimant had permanent disability that would be approximately 25 percent. This is the first rating which appears in the record. On May 1, 1984, Dr. Lewis had indicated

that claimant had not yet reached maximum recovery (Ex. 2, p. 2). This is a proceeding in arbitration. It would seem that the rules of Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); and Farmer's Elevator Co. Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979) would be controlling. In this case, however, it was not apparent that any permanent disability would result. This is a substantial difference from the two cases cited. The first medical indication, other than complaints and a continuing course of treatment with Drs. Lewis and Dinsmore, that permanency had resulted is found in the report from Dr. Lewis dated August 3, 1984. Accordingly, payment of claimant's entitlement to compensation for permanent partial disability is determined to run from August 3, 1984, the first day on which it was indicated that permanency would result. The employer will be held responsible for interest from the date that a basis existed to support a claim for some degree of permanent partial disability. That date is August 3, 1984.

FINDINGS OF FACT

1. On December 24, 1982, Robert W. Rose was a resident of the State of Iowa employed by People's Natural Gas Company in Council Bluffs, Iowa.

2. While performing the duties of his employment Rose was injured in an explosion.

3. The injury included a sprain of claimant's cervical spine which has become permanent.

4. Claimant has not experienced actual loss of earnings or income as a result of the injury.

5. Claimant does have some limitations, however, which affect his earning capacity.

6. Claimant has suffered a 10 percent loss of his earning capacity as a result of the injuries suffered in the explosion on December 24, 1982.

CONCLUSIONS OF LAW

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

2. The injury and disability to claimant's cervical spine, his dizziness and headaches are the result of an injury that arose out of and in the course of his employment with People's Natural Gas Company on December 24, 1982.

3. Claimant has sustained a 10 percent permanent partial disability, when evaluated industrially, which entitles him to receive 50 weeks of compensation under the provisions of section 85.34(2)(u).

ORDER

IT IS THEREFORE ORDERED that defendant pay claimant fifty (50) weeks of compensation for permanent partial disability at the stipulated rate of two hundred ninety-seven and 21/100 dollars ($297.21) per week commencing August 3, 1984.

IT IS FURTHER ORDERED that all amounts be paid in a lump sum together with interest at the rate of 10 percent per annum from the date each payment became due as ordered herein.

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

IT IS FURTHER ORDERED that defendant file a claim activity report as requested by the agency pursuant to Division of Industrial Services Rule 343-3.1.

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

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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000967

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD W. ROTHE, Claimant, vs. TRAINING & MANAGEMENT, INC.,/ d/b/a THE DENISON JOB CORPS, Employer, and THE AETNA CASUALTY AND SURETY COMPANY, Insurance Carrier, Defendants.	:	File No. 735112 A R B I T R A T I O N D E C I S I O N FILED MAY 28 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Ronald W. Rothe, against his employer, Training & Management, Inc., d/b/a The Denison Job Corps, employer, and its insurance carrier, The Aetna Casualty and Surety Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained May 25, 1983. This matter came on for hearing before the undersigned deputy industrial commissioner in Sioux City, Iowa, on February 18, 1987. The record was considered fully submitted at close of hearing but for briefs filed by the parties. A first report of injury was filed June 9, 1983. Pursuant to the prehearing report, the parties stipulated that claimant received healing period or temporary total disability benefits from May 26, 1983 through November 4, 1983 with any permanent partial disability due to commence on November 5, 1983.

The record in this proceeding consists of the testimony of claimant, of Patricia Rothe, of James O'Connor, of Patricia Ann Nolan, of Karen Stricklet, of Stephen Sharpsen, Ph.D., and of Nils R. Varney, Ph.D., as well as of exhibits 1 through 37, exhibit 38, exhibits 42 through 44, and exhibits 49 through 55. All objections to exhibits but for those to exhibits 39, 40, 41, and 45 through 48 are overruled. All objections to testimony are overruled.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant received an injury on May 25, 1983 which arose out of and in the course of his employment, and that a causal relationship exists between his claimed disability and that injury. They further stated that claimant's rate of weekly compensation in the event of a permanency award is $132.45. The issues remaining for resolution are:

1) Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement, including the related question of whether claimant is an odd-lot worker under the Guyton doctrine; and

2) Whether claimant is entitled to payment of certain medical costs pursuant to section 85.27.

REVIEW OF THE EVIDENCE

Thirty-five year old claimant, who is a high school graduate, was injured in a motorcycle accident while traveling at a low speed. He landed on his head and was unconscious for over four days. He subsequently responded and was released from the hospital twelve days following his injury. Claimant lives in Denison, Iowa.

Prior to his injury, claimant worked as a service station attendant and mechanic, in candy and insurance sales, as a land surveyor, as a packinghouse worker, and as a counselor at a residential facility, that is, the Denison Job Corp. Claimant characterized that job as a people interaction job where he was on his feet most of the day. Claimant received $4.90 per hour for doing that work. Claimant returned to work with the Denison Job Corp following his work release in November 1983. He worked three and one-half days. Claimant reported that he was expected to do a full day's work while working at the Corp half-days only; he could not handle that; he accepted a job offer at the Denison Movie Center. The movie center at that time was apparently largely a video cassette tape rental store. It has subsequently expanded to include sales of video cassette recorders and televisions. Claimant's wage is $250 per week and he receives a 10 percent commission on profits over costs. His commission amount in 1985 was $4,400, and in 1986 approximately $2,400. Claimant's current responsibilities at the Movie Center are to do bookkeeping, supervise employees, sell VCRs and TVs, rent VCRs and TVs, take inventory, and schedule employees.

Claimant reported a number of impairments including pain on walking on account of a metal support in his right shoe, dizziness, difficulty with word finding, severe loss of his capacity to smell, ringing in his ears, hearing loss, a stiff neck, sleep disturbances with daytime fatigue and night awakening, constant mild to severe headaches for which he must leave work, and

epression. He also testified that Nils Varney, Ph.D, and Marc ines, M.D., has diagnosed a partial complex seizure disorder or which claimant is currently taking medication. Claimant eported that he understood one of the side effects of the edication is high blood pressure and that he consequently takes alium as well. Claimant testified that his wife has noticed nat he is under strain from impending litigation though he imself has been generally unaware of any strain. Claimant escribed himself as a complacent, easygoing person prior to his ıjury. Claimant reported that he is expected to work approximately ifty-five hours per week but had missed part of nineteen days ı January 1987 on account of health problems related to his ıjury. He agreed that time off work included time during which sought medical treatment. In 1985, claimant had been advised seek speech therapy but did not. Claimant opined that he lt he would have had no job had he taken time for speech ierapy as well as time missed from work on account of illness. aimant also did not undergo advised stress therapy.

Claimant opined that the job he now has is the only job in s county which he could perform on a full-time basis. He ined that he could not do packinghouse work or return to his b Corp job as he could not handle working an eight hour day or lking. Claimant testified he has been advised not to drive tor vehicles on account of a probable seizure disorder.

Claimant expressed his belief that Charles Taylon, M.D., his eating physician, was not helping him and that he and his wife d, therefore, sought a referral from Dr. Taylon to Horst ume, M.D. Claimant agreed that he had seen William R. Hamsa, D., on his own as well as apparently Edward Schima, M.D. aimant reported that Robert L. Bendorf, M.D., was a referral rough Robert E. Jonesen, Ph.D. He reported that he had been ferred to Nils Varney, Ph.D., by friends and his counsel.

Patricia Rothe, claimant's wife since 1972, testified that ior to his injury, claimant was a very energetic, hard working rson, who was pleasant, happy, enjoyed time with family and iends, as well as enjoyed working on his car. She reported at following his injuries, claimant has had an air of quiet ger with sporadic eruptions of emotions often coming out on e couple's nine year old daughter. Mrs. Rothe stated that aimant tries very hard to prevent his mood swings and withdraw en he senses a mood eruption is likely so as not to hurt hers. She characterized claimant as withdrawn with friends d as not including himself in conversations at times, but her times as enjoyable. She reported that claimant's social teraction patterns can change in minutes. She has often spent me with claimant at work because claimant initially could not rceive what things needed to be done and later because claimant mply could not handle his work duties.

uch as determining how to dress or what to eat, poor planning
id poor anticipation, experiences of perplexity, the appearance
: a lack of motivation, disorganization, nonspontaneous,
iflexible and rigid behavior patterns, poor judgment, and
:eservation beyond appropriate limits. Also included are
:riods of inappropriate behavior when claimant either tunes out
)cially or uses coarse language or insults or otherwise in-
)propriately speaks to persons, poor impulse control, dis-
.hibited behavior, and self-centeredness, more inconsideration
an would be normal, a childlike dependence, and neglecting to
reinforcing to relatives.

Varney opined that the third diagnosed condition would be
st disabling to claimant because the frontal lobes, particularly
e orbital frontal cortex, are the the organ of rehabilitation
psychotherapy. Varney strongly suspected that claimant's
esent employment was a "fluke" with claimant's risk of unemploy-
nt or underemployment reaching its maximum and staying at that
ximum three to five years after his accident.

Dr. Varney also testified telephonically at hearing as a
buttal witness for claimant. Dr. Varney then stated that a
tient's preinjury behavioral history is indispensable in
eating and diagnosing head injuries and, for that reason, he
d spent more than an hour talking with claimant's wife. He
plained that frontal lobe damage decreases the ability to
ink spontaneously and to make decisions and opined that
aimant's only spontaneous mental activity of note is caused by
s seizure disorder and results in irritability and bizarre
iavior. Varney stated that seizure patients typically get
:se over time if they are untreated in that the cells around
e injured areas become malfunctioning as well. Varney re-
:ted that if the disorder is controlled, part of the decline
the patient over time can be reversed. He opined that Dr.
ies' EEG had confirmed the seizure disorder and reported that
effects of a seizure can last two or three days following
seizure even if the seizure itself occurs in the patient's
:ep. Varney reported that controlling the seizure with
:iconvulsant medication will make claimant more comfortable
will not cure his frontal lobe problem which is disabling in
elf and, hence, control of the seizures cannot make claimant
:etter employee. Varney characterized the diagnosis of
t-concussion syndrome as a too vague and all encompassing
m for a grab bag of symptoms. He agreed that claimant was
ressed and stated that seventy percent of head injury patients
l experience depression within two years of their injury. He
ther stated that depression often accompanies poorly con-
lled seizure disorders. He opined that claimant's depression
ld be treatable only following treatment of his seizure
order. He stated that if the seizures are controlled, the
ression, itself, may resolve or be amendable to treatment
h antidepressant medications. Varney stated that antidepressant

dication would be ineffective if seizures were not controlled d could cause grand mal epilepsy in claimant. He opined that negative EEG or negative MRI did not prove that brain damage d not exist and stated that claimant had eighteen or nineteen twenty-two symptoms of partial complex seizures and that, erefore, behavioral grounds for suspecting that seizures exist re extremely solid. Varney opined as to claimant's extent of sability that if claimant's seizures were controlled, claimant uld be a reasonably content but mentally inert individual. He ined that if the seizures were not controlled, claimant would adually deteriorate and eventually other deficiencies of mory or poor temper control or depression would result in his acement in a psychiatric or neuropsychiatric care facility. :ney opined that in either event claimant was totally disabled.

Dr. Sherretts again testified by way of surrebuttal testimony. reported that there was no reason to assume claimant had a jor seizure disorder in that claimant's sleep disturbance and s use of antidepressant medications could both enhance the ssibility of an abnormal EEG. He further stated that an normal EEG did not necessarily demonstrate seizures in that e absence of a behavioral change in claimant after taking izure medication indicated that if claimant had a seizure sorder it was either not responding to medication or that the normal EEG [did not demonstrate something] contributing to aimant's problem. Sherretts stated that memory gaps and ifusional spells during the day did not demonstrate a seizure sorder. He reported that claimant's loss of of his sense of ell did not necessarily show frontal lobe damage in that loss smell was found in approximately thirty percent of individuals ing even minor head injuries. He reported, however, that the s of smell did indicate the possibility of olfactory nerve age. Sherretts indicated that deterioration in a brain aged individual's condition would not occur unless scar sue was filling in damaged areas. He reported that that dition would show on magnetic scanning; that without scarring ng documented on a magnetic scan it would be ludicrous to sider claimant's condition as deteriorating. Sherretts licated that partial complex seizures are difficult to observe can range from having no notable effect to an individual's ing rage reaction and extreme outbursts in mood and behavior. rretts stated that the latter behaviors are found in individuals h very serious temporal lobe problems where the ability to trol emotion is not present. He reported, however, that the that Dr. Hines performed shows temporal lobe spiking in the ht frontal to more central [region] which would infer temporal peripheral [damage]. Sherretts characterized partial complex zure disorders as one of the more difficult seizure disorders treat in that a variety of factors affect one's seizure eshold. Those factors include fatigue, sleeplessness, ess, medication, diet, and allergies. Sherretts opined the ient must comply with treatment in each area, but if the

patient does so, generally effective seizure control can be achieved. Sherretts disagreed that claimant is totally disabled. He reported that claimant could expect problems with tension and ear ringing, as well as problems with dizziness, headaches, and fatigue. He reported that the fatigue could be expected to improve over time. Sherrets again stated that post-concussion syndrome symptoms are worsened with stress, fatigue, or illness. He reported that claimant could expect his symptoms to improve over the next three to five years if claimant did not consider himself disabled. He expressed once again his understanding that claimant had done a very commendable job at work until recently and stated that if the medical reports were accurate, he would expect that behavior to continue. Sherretts stated that he would be cautious in placing claimant in a position requiring a high degree of sustained vigilance, particularly where the safety of others would be dependent upon claimant. He stated that one must look at claimant's areas of deficit and take those into account in searching for employment for claimant. He opined it would not be a particularly difficult task to find claimant employment taking those into account assuming claimant was sufficiently motivated for employment. Sherretts agreed that an individual with post concussion syndrome symptoms should exercise extra vigilance in driving.

Karen Stricklett testified. Ms. Stricklett hold a Masters Degree in counseling and is a certified rehabilitation counselor as well a certified insurance rehabilitation specialist, who is certified to administer the general aptitude test battery. She is self-employed, but also works with Dr. Sherretts in the Emmanual Hospital Rehabilitaton Unit. Ms. Stricklett reported she has worked with head injured patients and inpatient counseling at the rehabilitaton unit and has had four head injury clients during the past five years whom she followed from hospital release to job placement. She reported that she had reviewed reports concerning claimant supplied her and had asked Dr. Sherretts to review those reports as well. Ms. Stricklett stated that she normally works with rehabilitation clients residing in small towns in Iowa and Nebraska and that she assumed Denison, Iowa was similar to most other small towns in that region. She reported that the jobs she considered for claimant would appear consistent with jobs found in small towns as the jobs were all entry level jobs.

Strickett opined that without retraining claimant could work as a service station attendant, a surveyor's helper, a cashier, a hotel desk clerk, a mail clerk, a messenger, a shipping and receiving or order clerk, or a security guard. She reported that a sales route driver position was considered for claimant before the seizure disorder was diagnosed. Stricklett stated that the jobs outlined, even if sales jobs, were not the type of sales jobs that would involve higher pressured social interaction between the employee and others. Stricklett opined that with

training, claimant could consider a position in drafting as his visual and spatial perceptual skills were excellent; he had done very well on his block design test; and he had a very high performance I.Q. Stricklett stated that drafting would not require a great deal of verbal activity and that an individual would be working regularly with information and things and objects as opposed to people. She also stated that because of claimant's strong mechanical interest, auto mechanics, civil mechanics, or architectural positions, and an automotive parts clerk were positions to be considered. She reported that an electronics position would also utilize claimant's very good mental math skills and his good visual and perceptual skills. Stricklett had considered a precision machine operator for claimant prior to considering the seizure disorder.

Stricklett opined that transportation could be a problem for claimant in getting from his Denison home to jobs in the surrounding environs, but if claimant could not drive, car pooling was a possible option. She agreed that the Christmas season would be hectic for sales clerks and stated that it was uncertain whether claimant should carry a gun if he worked as a security guard considering his seizure disorder. Stricklett agreed that a surveyor has to walk and carry instruments. She reported that while claimant reports he is unstable in his gait and has a medical disability related to his right foot he has no medical restrictions relative to the foot. Stricklett agreed that if claimant had actually missed part of twenty-six work days in January 1985, that work record would seriously handicap his ability to compete in the job market. Stricklett described a self-fulfilling prophecy as a vocational term describing the phenomenon that people will tend to do what they are told they can do. She agreed that Dr. Varney's report came out in July 1986 and expressed her understanding that Dr. Varney had explained his diagnosis to claimant. She also expressed her understanding that claimant's greatest problems had developed in the last five or six months. Stricklett reported that she has worked with two individuals who have grand mal seizures and that both are employable when the condition is controlled with medication. She reported that one is currently employed as a radio electronics worker and the other is attending college to obtain training as an accountant.

As the parties have stipulated that a causal relationship exists between claimant's claimed disability and his injury, medical evidence will be reviewed only insofar as the evidence is relevant to the determination of the nature and extent of claimant's disability.

A St. Joseph Hospital discharge summary of June 8, 1983 of Griffin Evans, M.D., and Charles Taylon, M.D., reports that an emergency CT scan upon claimant's arrival at the hospital revealed a a small epidural hemitoma on the right parietal

region with some surrounding brain edema. A little midline shift was also seen on the CT scan. Follow-up CT scan of the head revealed a slight increase in the epidural hemitoma over the right parietal region with some evidence of mass effect with obliteration of the frontal horn of the right lateral ventrical. Specialists in ENT examined claimant and felt that his seventh nerve palsy was most likely due to a basilar skull fracture with fracture of the petrous bone. A CT scan of the temporal bone revealed fracture to the right temporal bone just anterior to the mastoid. Fluid and hemorrhage was found in the middle ear cavity on the right. There was some suggestion of disruption of the ossicle chain. Dr. Taylon is apparently not board certified. He is associated with the Creighton University School of Medicine, Department of Surgery Division of Neurosurgery, however.

William R. Hamsa, Jr., M.D., initially saw claimant in January 1984 with complaints of a painful metatarsal joint in his right foot. Examination of the foot showed normal motion in the ankle, subtalar and metatarsal joints with definite restricted dorsiflexion and plantar flexion in the metatarsal phalangeal joint of the right great toe with tenderness about the joint. X-rays apparently revealed small amounts of cyst formation on the media side of the metacarpophalangeal head of the first wave with suggestion of some very early osteoarthritic change in the joint surface. Traumatic synovitis or arthritis of the meta-carpophalangeal joint of the right great toe was diagnosed and metatarsal bars for claimant's shoes were recommended. Dr. Hamsa subsequently opined that claimant had traumatic chlondromalacia, and on November 6, 1984 injected steroids into the joint. On November 24, 1984, Dr. Hamsa indicated claimant had excellent relief of pain since the injection, had a fair range of motion, and a little bit of pain on extremes of dorsiflexion or plantar flexion. He did not believe reinjection was indicated. Claimant was to be seen on as-needed basis subsequent to that date.

David H. Chait, M.D., an otolaryngologist, treated claimant for dizziness, balance problems, and hearing loss following his injury. On September 7, 1983, he reported that an ENG demon-strated a right peripheral labyrinthine weakness compatible with previous head injury or resolving phase of post-traumatic labyrinthine hydrops. He further reported that if claimant had a reoccurrence of the symptoms of dizziness, then his diagnosis would be post-traumatic labyrinthine hydrops. On January 23, 1984, Dr. Chait reported that claimant continued to have imbalance problems and that some central nervous system injury accompanied the imbalance which was due to the vestibular injury. Right facial paralysis was improved considerably. Hearing in the right ear was diminished slightly when compared to the left. Claimant was also complaining of nasal obstruction which the doctor felt could be traced to facial nerve injury.

On January 15, 1985, Dr. Chait opined that under the Journal

of American Medical Association Guides for Evaluation of Hearing Handicaps, claimant's right ear handicap was 0 percent; left ear 0 percent; binaural 0 percent with an overall disability rating of 0 percent. Dr. Chait evaluated claimant's dizziness under the American Medical Association Guides to Evaluation of Permanent Impairment and rated claimant as having a number 2 impairment under the audiology standards or a 5 to 10 percent of the whole "man" impairment. He reported that under that impairment rating, the usual activities of daily living can be performed without assistance except activities involving personal and public safety such as operating a motor vehicle or riding a bicycle.

On December 16, 1983, Charles Taylon, M.D., opined that claimant's prognosis was good and stated he did not anticipate permanent neurological disability for claimant. Dr. Taylon then did not recommend further treatment for claimant. A CT scan performed on August 2, 1983 was interpreted as normal. Dr. Taylon again saw claimant on February 5, 1985. Claimant was then complaining of memory problems, both long and short term memory. Claimant complained that he had problems with spelling and word association, stiff neck and continuing fatigue as well as right-sided facial sensitivity. Claimant reported problems with smelling, ringing in the ears, and loss of hearing. He reported his jaw was tight and claimed he always had a headache as well as pain in his right foot on the large toe. Dr. Taylon reported that neurological examination at that time did not reveal abnormalities. A CT scan of February 5, 1985 was normal. An EEG of February 12, 1985 was interpreted as normal. Dr. Taylon then referred claimant to Richard Friedlander, for neuropsychiatric testing. Dr. Taylon again opined that claimant had no objective evidence of disability from a neurosurgical point of view.

Edward M. Schima, M.D., evaluated claimant on April 22, 1986. He had also treated claimant in October 1983 as well and had referred claimant to Richard Friedlander, Ph.D. for psychological evaluation on November 12, 1983. Dr. Schima's report indicates that a repeat CT scan of claimant's head done on November 8, 1983 revealed a post-surgical defect in the right frontal area. Schima reported that patient could walk briskly on a normal basis. An EEG was essentially normal. Schima reported that neurological examination was unremarkable apart from absent detection of camphor bilaterally, flattening of the left nasal labial fold and some difficulty walking on his heels. He stated that claimant seemed to have made a good recovery with a major source of his disability being in the cognitive and behavioral sphere. He reported that in addition to memory and language functional impairment, claimant appeared depressed with that being the most treatable aspect of his condition. The doctor stated: "However, the wife's concern that there has been a change in personality, as well as his performance on psychological testing would raise the question of predominantly

frontal involvement which may sometimes elude detection on standard psychologial testing." Dr. Schima is associated with Omaha Neurological Clinic.

Horst H. Blume, M.D., a board certified neurologist, examined claimant on July 9, 1984. His impression was that claimant had some intermittent occipital myalgia-neuralgia, right more than left. He believed claimant had sustained a cerebral concussion most likely of the areas of left cerebral hemisphere responsible for some of his speech impairment. He felt claimant had intermittent lower cervical nerve root irritation syndrome without motor or sensory deficit.

Charles M. Graz, M.D., assistant professor of the department of psychiatry and behavioral science, Creighton University, evaluated claimant on October 11, 1985. He believed claimant's diagnosis was more towards an organic personality syndrome than an organic affective syndrome. He stated that claimant's features suggested some emotional lability with temper loss and marked apathy and indifference. He noted those are features of an organic personality syndrome. Dr. Graz indicated that while claimant had some depressed features noted, other classical depressive features were not seen. He felt that claimant's depression, that is his apathy, was probably more related to an organic condition than a mood disturbance. He noted that he did not sense the anguish, pain, and suffering that someone in depression experiences in claimant. The doctor opined that if claimant's mental state continued over the next several years it would not change significantly.

Robert E. Joneson, Ph.D., clinical psychologist, adminstered the Luria-Nebraska Neuropsychological Battery; Wechsler Adult Intelligence Scale-revised on claimant as part of a neuropsychological evaluation on October 9, 1985. On the Wechsler claimant obtained a full cale I.Q. score of 116, a performance I.Q. score of 124, and a verbal I.Q. score of 107. The scores indicate claimant is functioning in above-average intelligence range. The doctor opined that in an absolute sense, any deficits claimant has [as a result of his injury], are likely to be extremely minimal and probably do not greatly affect his level of adaptive functioning. Claimant's performance on the Luria-Nebraska test was essentially negative demonstrating that claimant was not experiencing significant neuropsychological deficits. In conclusion, Dr. Joneson noted that following trauma, neuropsychological disabilities which are largely accounted for by certain areas of cerebral activity in time commonly are taken over by new functional systems which develop. Neuropsychological ability then returns to a level very near to premorbid functioning. In a follow-up report of November 7, 1985, Dr. Joneson stated he considered claimant from an emotional standpoint to be quite depressed and as having difficulty functioning. He reported that he had visited with claimant on a

number of occasions prior to administering the test battery and that claimant then had shown significant signs of depression including sleep disturbance, lack of motivation and energy, mood disturbances and irritability.

On July 7, 1986, Ronald L. Bendorf, M.D., a board certified psychiatrist, reported that he had initially evaluated claimant in August 1985 and claimant then had a mild organic brain syndrome secondary to cerebral trauma and reactive depression. Claimant was treated with antidepressant medication and supportive therapy through June 16, 1986. Dr. Bendorf's impression as of July 7, 1986 was that claimant continued to manifest some mild to moderate depressive symptomatology of a reactive nature associated with his injuries. The doctor reported there was a very strong likelihood that some of the depression would persist and become a more chronic dysthylic disorder. The doctor reported that magnetic imaging of claimant's brain on April 30, 1986 was interpreted as within normal limits and failed to show any abnormal imaging of the intercranial contents. He anticipated claimant would improve somewhat once the "stress of his suit" had been resolved, but felt a chronic depressive element existed which would not likely resolve. Dr. Bendorf reported it was difficult to say how much disability claimant's chronic depression would cause, but that he felt it would be a contributing factor to his overall incapacity.

D. M. Lambert, M.D., a psychiatric consultant, evaluated claimant on or about April 10, 1985. He opined that claimant did not display symptoms of clinical depression but that tests administered indicated a long-term psychological adaptive mechanism rather than a depressive illness.

Claimant was evaluated at the Psychological Services Center of the University of South Dakota on September 28, 1984. In a report of Patricia White, M.A., clinical psychology trainee, claimant was advised that the findings from the neuropsychological test suggested no major brain dysfunction or impairment.

Nancy Appletoft, M.A., speech language pathologist, evaluated claimant on September 18, 1984. She believed following assessment that claimant was functioning on the purposeful and appropriate level of the Rancho Los Amigos Scale of Cognitive Functioning. Language characteristics were minimal auditory receptive and auditory memory deficit, minimal reading deficit, mild word finding problem, minimal writing deficit, and mild arithmetic deficit. Claimant had no observable difficulties in orientation, fund of general information, problem solving, reasoning or organizational skills.

Richard Friedlander, Ph.D., clinical psychologist, evaluated claimant on November 12, 1983. Assessment procedures were the Wechsler Adult Intelligence Scale-Revised, wide range achieve-

ment test, spelling section, partial Luria-Nebraska Psychological Battery For Memory Scale, receptive speech scale and a psychological interview. Intellectual assessment on the Wechsler indicated a current full-scale I.Q. of 113, approximately the 80th percentile level of claimant's age group. A verbal I.Q. of 100, 50th percentile level; and a performance I.Q. of 130, the 98th percentile level. Dr. Friedlander noted that claimant experienced cognitive fatigue as well as physical fatigue after a fairly brief period of concerted effort. He appeared to have experienced a decline in his spelling ability, scoring at the 8.7 grade level on a standard spelling achievement test. Claimant's strengths were highly developed visual analysis and integrated skills as well as a keen ability to size up social situations.

Dr. Varney reported that as of the examination on July 21, 1986, claimant performed at the bright normal level on the Wechsler verbal scales with a verbal I.Q. of 117, 87th percentile, and in a very superior level on the Wechsler performance scale with a performance I.Q. of 136, 99th percentile. Verbal and nonverbal short-term memory were also far above average. Recent memory and temporal orientation were intact. Word finding was relatively weak while reading and spelling were far above average. Instructural praxis and spatial orientation were intact.

Marc E. Hines, M.D., a board certified neurologist, reported that a 24 hour ambulatory EEG performed on September 4, 1986 showed frontal-central focal episodes, very proximal and very focal in character; approximately 18 episodes during sleep and lasting up to twelve to fifteen seconds with focal short and slow episodes with disruption of background rhythm activity. Occasional bursts of focal spike was seen in the same area. The doctor's impression was that the EEG was diagnostic of focal epileptiform abnormality in the right frontal-central area.

On July 11, 1984, defendants' counsel advised claimant's counsel that Aetna and Denison Job Corp did not authorize medical treatment of claimant by Dr. Horst Blume, Dr. Anderson, or Dr. Myer. On July 30, 1984, P. L. Myer, D.O., advised that he had referred claimant to a Dr. Don Anderson, of Denison, on September 12, 1984 for injuries and problems resulting from his May 25, 1983 injury. On August 3, 1984, D. D. Anderson, D.C., advised Jim Spitsen, Commercial Insurance Division, that he had referred claimant for neurological evaluation to Dr. Blume. On March 12, 1985, Dr. Taylon advised that he had referred claimant to a Dr. Robert Soll, in Denison, and to Dr. Blume. He also indicated he was referring claimant to the Denison Health Center for evaluation.

The balance of the evidence was reviewed and considered in the disposition of this matter.

APPLICABLE LAW AND ANALYSIS

Our first issue is nominally whether claimant is entitled to benefits and the nature and extent of his benefit entitlement. While the parties have stipulated claimant's work injury and his disability are causally related, they have left the issue of the exact nature of claimant's disabling condition undecided. We believe that question must be examined using a causal relationship analysis:

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 25, 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).

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).

A doctor's expertise and board certification also may accord his testimony greater weight. See Reiland v. Palco, Inc., 32 Biennial Report of the Industrial Commissioner 56 (Rev. Dec. 1975); Dickey v. ITT Continental Baking Co., 34 Biennial Report of the Industrial Commissioner 89 (Rev. Dec. 1979).

Permanent means for an indefinite and undeterminable period. Wallace v. Brotherhood of Locomotive Firemen & Eng'rs, 230 Iowa 1127, 1130, 300 N.W. 322, 324 (1941), citing Gardner v. New England Mut. Life Ins. Co., 218 Iowa 1094, 1104, 254 N.W. 287, 292 (1934).

Claimant has a documented and little disputed problem with his right foot for which he wears a metatarsal bar in his shoe. The condition does not result in obvious impairment. Claimant has no medically imposed restrictions on account of it. Hence, we do not believe that it produces significant disability to claimant. Claimant claims dizziness, balance and hearing loss problems. Dr. Chait described claimant's right ear hearing as diminished slightly when compared to the left on January 23, 1984. By January 15, 1985, however, Dr. Chait opined that claimant had a zero percent overall hearing handicap. For that reason, we believe that whatever claimant's own perception of his hearing capabilities, the objective evidence does not support a finding that claimant has a significant hearing handicap on account of his work injury. Dr. Chait did opine that claimant has a class 2 or 5 to 10 percent body as a whole impairment on account of his dizziness and reported that under that standard the usual activities of daily living can be performed without assistance but for activities involving personal or public safety such as operating a motor vehicle or riding a bicycle. We find the doctor's opinion substantiates claimant's claim that his dizziness continues to create problems for him.

Claimant's other alleged problems relate to his emotional and cognitive functioning. The fighting issues between the parties relate to the nature of and degree of difficulites claimant's alleged deficits in these areas of functioning cause him. At the onset we are disappointed that neither party offered the testimony of claimant's treating neurologist or his treating psychiatrist. The insights of the treating physician because of that physician's ongoing relationship with the claimant are of significant value in assessing problems such as claimant alleges. Dr. Taylon's report alone is not of significant assistance, however. We do not know that as of December 16, 1983, Taylon believed claimant's prognosis was good; as of February 12, 1985--some fourteen months later--he felt claimant had no permanent neurological impairment. He interpreted CT scans of August 2, 1983 and February 5, 1985 and an EEG of February 12, 1985 as normal. Hence, claimant's treating physician did not believe claimant had significant neurological damage.

Dr. Taylon's reports in evidence to not reflect that he was ever concerned that claimant might have orbital central cortex or frontal lobe damage or partial complex seizures. We find that disturbing given the doctor's long-term relationship with claimant. Taylon, while associated with the Creighton University Medical School Division of Neurosurgery, is not a board certified neurosurgeon, however. Horst Blume, a board certified neurologist who examined claimant only on July 7, 1984, felt claimant had a likely cerebral concussion of areas of left cerebral hemisphere responsible for some speech impairment. He did not report findings of other significant neurological impairment. Dr. Schima, who is associated with the Omaha Neurological Clinic, but whose letterhead does not identify him as board certified in neurology, examined claimant on April 22, 1986. He found claimant's neurological exam unremarkable but for three items including absence of camphor detection bilaterally. He felt claimant had made a good recovery but for disabilities remaining in the cognitive and behavioral spheres. He stated a question of predominantly frontal involvement which could elude detection on standard psychological testing remained given claimant's wife's concern with claimant's personality changes and claimant's performance on psychological testing. Despite Dr. Schima's lack of board certification, we give great weight to his opinion as he appears to have thoroughly and objectively examined and evaluated claimant. His opinion supports Dr. Varney's contention that claimant had damage to the orbital central cortex. Claimant's wife's and his employer's testimony are also consistent with Dr. Varney's testimony as regards claimant's primary disability. Claimant apparently now has many symptoms of orbital central cortex damage which were not present prior to his injury. His wife testified to these at hearing and apparently report them to both Dr. Schima and Dr. Varney. Ms. Nolan's testimony as to claimant's preinjury moods and behavior is not sufficient to override claimant's wife's testimony regarding claimant's personality changes given that Mrs. Rothe also reported such changes to Dr. Schima. We, therefore, reject Dr. Sherretts' diagnostic opinion that claimant's primary difficulty is a post-concussion syndrome. We note that acceptance of Dr. Varney's opinion in this matter does not mean we accept his opinion wholehandedly. Both Dr. Varney and Dr. Sherretts at times appeared more concerned with promoting the position espoused by the party for whom they were called as a witness than with objectively assisting us in reaching the truth in this matter. For that reason, we have sought more diligently than we might otherwise have had need for more objective evidence supporting their conclusions before adopting any conclusions of either of these two clinical neuro-psychologists.

We next address the question of whether claimant has partial complex seizures. Dr. Varney so opines stating claimant has 18 to 22 symptoms of such seizures. Dr. Sherretts disagrees stating that hard signs for neurological damage are largely

absent on CT scans and that the EEG's are inconsistent for seizures. He later stated, however, that where partial complex seizures are present with temporal lobe problems extreme rage reactions and extreme [changes] in mood and behavior are likely to occur. Dr. Sherretts agreed that the 24 hour ambulatory EEG which Dr. Hines, a board certified neurologist, performed on September 4, 1986 may more readily show seizures if present. The EEG was interpreted as showing focal epileptiform abnormality in the right frontal-central area. Claimant's wife, a credible witness who appeared genuinely concerned with the wellbeing of her family and not merely with the outcome of this claim, testified as to claimant's spontaneous outbursts in their home and against their nine year old daughter. She also testified claimant is more of a person now than he was prior to going on seizure control medication. Claimant's employer testified to inappropriate incidents at work. Mr. O'Connor also appeared a sincere, truthful individual who would not have manufactured incidents or impressions simply to promote claimant's claim. We find the combination of the above supports a finding that a high probability exists that claimant has partial complex seizures which will likely significantly diminish his wellbeing if not controlled.

Various practitioners have opined that claimant suffers from either a reactive or an organic depression. Others have stated that an organic personality syndrome or long-term psychological adoptive mechanism accounts for his clinical symptomatology. Claimant's psychological symptomatology has not responded to treatment with either antidepressant medication or with supportive therapy from Dr. Bendorf. Dr. Bendorf opined a very strong likelihood existed that the depression would persist and become a more chronic dysthylic disorder. Dr. Sherretts and Dr. Varney both opined depression is an extremely common reaction to head injury. Claimant's psychological problems at least in part have an organic basis related to his injury and are likely to be a longstanding handicap to him.

Having assessed the nature of claimant's functional disabilities, we reach the question of the nature and extent of his benefit entitlement. Initially, we do not believe claimant has made a prima facie showing he is an odd-lot employee.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot 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.

The burden of persuasion on the issue of industrial disability

always remains with the worker. However, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of fact finds the worker does fall in the odd-lot category, the worker is entitled to a finding of total disability. Id. Even under the odd-lot doctrine, the trier of fact is free to determine the weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong to compel a finding of total disability as a matter of law. Id. In Guyton, the court also stated the following regarding determination of a worker's industrial loss.

> The question is more than the one posed by the commissioner concerning what the evidence shows Guyton "can or cannot do." 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 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?) Id.

Claimant remains at work despite his difficulties and even if he were to no longer hold his present employment, he has not shown he has sought work and been unable to find any on account of his injury. See Emshoff v. Petroleum Transportation Services and Great West Casualty, file number 753723, Appeal Decision filed March 31, 1987.

We do not accept Dr. Varney's worse case scenario as the only outcome available to claimant. It is not wholly consistent with our past experience with brain damaged claimants. See section 17A.14.5. Furthermore, disability must be judged on claimant's present circumstances. Dr. Varney asks us to project into the future. That we may not and will not do. Should claimant's circumstances change significantly, review-reopening of his claim is available. Similarly, Dr. Varney's opinion that claimant is 100 percent disabled appears to include more than a functional rating of claimant; it appears to reflect Dr. Varney's belief that claimant, at best, can be made comfortable but is otherwise mentally inert. Likewise, claimant has not shown he is otherwise totally disabled at this time.

> For workmen's (sic) compensation purposes total disability does not mean a state of absolute

helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his [sic] mentality and attainments could do. Franzen v. Blakley, 155 Neb. 621, 51 N.W.3d 833 (1952). Total and permanent disability contemplates the inability of the workman (sic) to perform any work for which he (sic) has the experience or capacity to perform. Shaw v. Gooch Feed Mill Corp., 210 Neb. 17, 312 N.W.2d 682 (1981).

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

Karen Stricklett, a certified rehabilitation counselor, testified to a number of positions she believes claimant could hold. While Ms. Stricklett had not expressly evaluated the Denison, Iowa job market, we do not believe that job market could differ so significantly from the job market in other small towns in Iowa and Nebraska with which Ms. Stricklett is familiar as to seriously discredit her conclusions. Likewise, we agree that claimant because of either his dizziness or his likely partial complex seizures would have difficulty driving. We do not find that precludes him from all employment in the Denison environs, however. Entry level positions such as Ms. Stricklett outlined might well be available to claimant in Denison itself. We do not believe claimant's foot injury precludes his walking modest distances to employment. Likewise, claimant has not shown carpooling to jobs in the surrounding area is not a possibility for him. His handicaps prevent his driving, but not his riding in a car.

Claimant, nevertheless, has significant disabilities for a younger worker. He has a 5 to 10 percent body as a whole impairment on account of is dizziness/balance problems as well as impairment from the organic and psychological problems outline above. While we reject Dr. Varney's 100 percent disability rating, claimant has significant symptoms and suffers significant handicaps on account of his diagnosed organic and depressive difficulties. These already have a serious impact on his ability to enter into life activities and maintain employment. They may well decrease his ability to remain employed in the future. Indeed, claimant and his wife both appear highly motivated to develop and maintain claimant's optimum employment potential whatever that may be. Claimant appears to have had a supportive and tolerant employer. The evidence suggests this is not a situation which will be maintained indefinitely in the future, however. Claimant is a bright individual who has consistently performed very well on intelligence testing. His cognitive deficits include his word finding difficulties and his difficulty with simple decision making as demonstrated on the Tinkertoy test. He may, therefore, require greater direction or overt instruction, either orally or verbally, than would an individual without brain damage. We do not believe that necessarily

precludes his performing the jobs Ms. Stricklett believed were now available to him; nor do we believe those handicaps preclude claimant from attempting retraining for positions Ms. Stricklett believed claimant might be able to perform with retraining. We note defendants have not attempted any form of head injury rehabilitation with claimant. They did return him to work, however, and cannot fairly be burdened with the fact that claimant chose to end that employment and seek other work. Claimant's earnings now apparently exceed his earnings when injured. Having considered all factors, we believe claimant has sustained a loss of earning capacity of 65 percent.

Claimant seeks payment of medical costs under section 85.27. We note at the onset that our analysis of this issue is made more difficult by the fact that little evidence relating to claimant's alleged medical costs is available to us. Exhibit 46, claimant's handwritten compilation of alleged medical and medical mileage costs, was not timely served and, therefore, was inadmissible. Additionally, little other evidence as regards medical care or as regards costs of medical services was placed in the record. The section requires the employer to provide reasonable and necessary medical care; it allows the employer to select the care provider; and provides claimant with a method by which claimant may petition for alternate care. Claimant may seek other care of his own accord in an emergency, however.

Claimant testified his treating physician, Dr. Taylon, referred him to Horst Blume, M.D. Dr. Taylon concurs and also apparently referred claimant to a Dr. Robert Soll and to the Denison Health Center. Dr. Taylon was claimant's authorized treating physician. Claimant's referral by a treating physician to another care provider is generally considered authorized care unless the employer/insurer otherwise advises claimant. Hence, claimant is entitled to payment of costs incurred with Dr. Soll and the Denison Health Center. Claimant is also entitled to payment of any costs incurred with Dr. Blume until defendants advised claimant's counsel on July 11, 1984 that medical treatment with Dr. Blume was not authorized. No evidence exists that care of Dr. Myer or Anderson was ever authorized. Payment of costs for their care is disallowed unless the doctors are associated with the Denison Health Clinic in which case care to July 11, 1984 is compensable. Payment of costs for their care is disallowed. Likewise, claimant testified he saw Dr. Hamsa, Dr. Schima, and Dr. Varney on his own. While claimant may have benefited from their care, we find no evidence claimant attempted to communicate his need or desire to seek that care to defendants. Defendants, therefore, were not able to either permit such care or attempt to work with claimant to determine other appropriate care. Defendants, therefore, are not liable for costs of care those individuals provided. We are unable to determine whether Dr. Joneson could appropriately refer claimant to Dr. Bendorf. Therefore, any costs outstanding with Dr. Bendorf are also

disallowed.

FINDINGS OF FACT

Claimant sustained an injury which arose out of and in the course of his employment on May 25, 1983 when injured in a motorcycle accident while traveling at a low speed.

Claimant landed on his head; claimant was unconscious for four days following his injury but was discharged from the hospital on the twelfth day following his injury.

Claimant had injury-related slightly diminished hearing in his right ear when compared to his left, but has no binaural hearing handicap.

Claimant has injury-related problems with balance and dizziness which result in a 5 to 10 percent body as a whole permanent partial impairment and which would interfere in activities of daily living related to personal or public safety such as riding a bicycle or driving a car, but which do not otherwise require that claimant have assistance in performing the normal activities of daily living.

Claimant has inappropriate, spontaneous episodes of rage at home and at work.

Claimant has minimal word finding deficit as well as other minimal cognitive difficulties.

Claimant has superior intellectual ability as evidenced on general post-injury intelligence tests.

Claimant has almost daily headaches.

Claimant has numerous symptoms often associated with damage to the orbital central cortex which symptoms were not present prior to claimant's injury.

Dr. Schima's objective observations and opinions support Dr. Varney's opinion that claimant has damage to the orbital central cortex.

Dr. Hines' EEG demonstrates focal epileptiform abnormality in the right frontal central area.

Claimant's rage reactions are consistent with partial complex seizures where temporal lobe problems exist.

Claimant likely has partial complex seizures.

A partial complex seizure disorder would also prevent claimant from driving a motor vehicle.

Claimant has psychological difficulties related to his injury resulting in a depressed and apathic affect as well as emotional lability and temper loss which difficulties have not responded to treatment with antidepressant drugs and supportive therapy.

Claimant's psychological difficulties are likely in part organic and permanent.

Claimant is 31 and a high school graduate.

Claimant is now employed but may be let go from his present job.

Claimant has interests and skills and intellectual capacities which would permit retraining for other occupations.

Claimant has interests and skills and intellectual capacities which would permit him to now engage in entry level employment beyond his present job.

Claimant's earnings now exceed his earnings when injured.

Claimant returned to his Denison Job Corp job and voluntarily left that job for his present job.

Claimant and his spouse are highly motivated for claimant to remain employed.

Claimant has not sought other work in Denison or its environs.

Claimant has not demonstrated that difficulties he may face as regards transportation to work are unreasonable.

Claimant's functional impairment on account of his brain injury, probable partial complex, seizure disorder, and psychological difficulties is severe, but does not result in total disablement.

Claimant has a loss of earning capacity of 65 percent.

Dr. Taylon referred claimant to Dr. Blume, Dr. Soll and the Denison Health Center.

On July 11, 1984, defendants advised claimant through his counsel that care from Dr. Blume, Dr. Myer, and Dr. Anderson was not authorized.

Care from Dr. Hasma, Dr. Schima, and Dr. Varney was not authorized and was not sought in an emergency.

Whether Dr. Bensdorf's care was appropriately authorized is

not determinable.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant is entitled to permanent partial disability from his May 25, 1983 injury of sixty-five percent (65%).

Claimant is entitled to payment of medical costs with Dr. Blume through July 11, 1984 and to payment of medical costs with Dr. Soll and the Denison Health Clinic including care provided by Dr. Myer and Dr. Anderson to July 11, 1984.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disbility for three hundred twenty-five (325) weeks at the rate of one hundred thirty-two and 45/100 dollars ($132.45).

Defendants pay claimant costs of medical care with Dr. Blume through July 11, 1984 and costs of medical care with Dr. Soll and with the Denison Health Clinic including any care with the clinic that Dr. Myer and Dr. Andrson provided to July 11, 1984.

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 28th day of May, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS RUNGE,

Claimant,

vs.

FRENCH & HECHT,

Employer,
Self-Insured,
Defendant.

FILE NO. 771016

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 Dennis Runge, claimant, against French & Hecht, employer and self-insured defendant for benefits as the result of an injury which occurred on May 29, 1984. A hearing was held on October 17, 1986 in Davenport, Iowa and the case was fully submitted at the close of the hearing. The record consists of joint exhibits 1 through 23; defendant's exhibit A; the testimony of Dennis Runge (claimant), Bob Wayt, II (a co-employee), Gary Schlieper (a co-employee), and Monica Walters (industrial nurse).

STIPULATIONS

The parties stipulated to the following matters in the prehearing report:

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

That the claimant sustained an injury on May 29, 1984 which arose out of and in the course of employment with the employer.

That in the event of an award of temporary disability the time off work for which the claimant seeks disability benefits is from June 1, 1984 to July 9, 1984.

That in the event of an award of permanent disability the commencement date for benefits is July 9, 1984.

That the rate of compensation in the event of an award is $260.83 per week.

That the employer is making no claim for credit for benefits paid prior to the hearing.

That the employer is making no claim for credit for sick pay or medical benefits paid under an employee non-occupational group plan, except that it is stipulated that if it is later determined that any of the medical bills in claimant's exhibits 1 through 22 have been paid by the group medical plan already, then the employer will not be required to pay them again.

ISSUES

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

Whether the claimant is entitled to payment of certain medical expenses.

Whether the injury of May 29, 1984 was the cause of any temporary or permanent disability.

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

Whether the claimant is entitled to any compensation for benefits during the period from May 30, 1984 to July 9, 1984 because a claimant allegedly refused suitable work consistent with his disability offered by the employer.

Paragraph 12 of the prehearing report specifies that there is an issue about whether the claimant should be suspended from benefits because of his alleged refusal to submit to a medical examination pursuant to the revisions of Iowa Code section 85.39. However, this issue is not specified on the hearing assignment order and therefore, this issue cannot be determined by this decision. Furthermore, defendant did not mention this issue in its opening statement, closing statement or post-hearing brief. In addition, insufficient evidence was presented at the hearing in order to make a determination if this were a viable issue.

PREHEARING MATTERS

At the request of defense counsel all witnesses except claimant and Monica Walters, industrial nurse, were sequestered.

The claimant's original notice and petition, which was filed pro se, alleged a claim for benefits against the Second Injury Fund of Iowa in paragraph 19. The claimant dismissed this portion of his claim at the time of hearing and in addition it was not specified in the hearing assignment order.

SUMMARY OF THE EVIDENCE

All of the evidence presented at the hearing was examined

and considered in the decision in this case, however, only the most pertinent evidence will be mentioned in this written decision.

Claimant, age 32, began working for employer in 1979 and performed several labor and heavy labor types of jobs (Exhibit 9, page 4). Even though claimant previously lost a part of his right thumb in a bandsaw in 1973, bruised his right shoulder in a car accident in 1981 (Ex. 15), and was hit in the right knuckle and arm when he was beaten up with a baseball bat in 1981 (Ex. 11 & 18), claimant testified that nevertheless he could perform his job and regularly lifted rims and other items weighing from 40 pounds to 200 pounds at work. Bob Wayt and Gary Schlieper, co-employees, testified that claimant was very strong and regularly lifted items weighing up to 200 pounds and even heavier without difficulty prior to the instant injury. They further testified that this lifting required flexable movements of his wrists and arms. Claimant testified that none of these prior incidents bothered him at the time of the instant injury and that they had left him with no disability to perform his job at French & Hecht. Claimant's testimony was corroborated by the testimony of Wayt and Schlieper.

On May 29, 1984 at approximately 5:00 p.m., some rims got jammed under a conveyor belt. Claimant stepped out on a ledge to unjam the rims. He caught his foot on a bolt and fell to the floor. In this fall his right arm grazed an iron skid and he landed on his right fingers, wrist and hand. The fall abrased his right forearm and hyperflexed his right wrist. Claimant was taken to the East Kimberly Urgent Care Center. The nurse recorded pain in his right wrist and hand. Dr. O'Connor (full name unknown) reported that claimant's sensation was intact but claimant could not extend his fingers or wrists, but they could be extended on stimulation. An x-ray was taken, a futuro wrist splint was applied, medicine prescribed, and claimant was returned to work to do one handed work with his left hand. Dr. O'Connor diagnosed right wrist tenosynovitis and a strain (Ex. 1).

Claimant did not return to work on May 30, 1984 or May 31, 1984. On June 1, 1984, he telephoned and asked Monica Walters, plant nurse, for permission to see his own doctor. Walters testified that she declined to give him permission. Furthermore, she cautioned him that if he did see his own doctor it was at his own expense. In addition, she made it clear that if he needed medical attention he could go back to the Urgent Care or to contact Dr. Beckman (full name unknown) at his office. This was his employer's choice of physician. Walters' testimony is supported by her recorded notes (Ex. A).

Claimant saw John Skehan, his own personal physician, on June 1, 1984 (Ex. 2). Dr. Skehan referred the claimant to John A. Baker, M.D., an orthopedic surgeon, who also saw him on June

1, 1984 (Ex. 3). Dr. Baker found claimant could not extend his right fingers or wrist. The doctor took x-rays, applied a volar wrist splint, and diagnosed right radial nerve palsy. Dr. Baker took claimant off work as of June 1, 1984 and released him to return to work on light duty with no lifting with the right arm effective July 9, 1984 (Ex. 3, p. 5). Walters testified that she explained to claimant that the company refused to accept Dr. Baker's release from work because he was not the company's authorized doctor and also because they had documentation from their own doctor that the claimant could work except that he could not use his right hand. Walters testified that the company offered claimant full time work within these limitations but the claimant declined it.

Dr. Baker treated claimant from June 1, 1984 to January 30, 1985. In June of 1984, he ordered an EMG and physical therapy. Claimant maintained he could not extend his fingers and wrist, but this was inconsistent with Dr. Baker's other medical findings and Dr. Baker suspected a strong functional overlay (Ex. 3, pp. 1-4). Dr. Baker reported on April 8, 1985 that he had trouble assessing the claimant's disability because the claimant's symptoms seemed to be way above and beyond his objective findings. Furthermore, because of inconsistent results in the Cybex test, Dr. Baker declined to give a percentage rating. However, he said he doubted if there was any significant disability. Nevertheless, he did not want to evaluate the true loss unequivocally without a repeat Cybex examination (Ex. 3, p. 7). A repeat Cybex examination was never performed.

The EMG/NCV tests for Dr. Baker were taken at the Franciscan Medical Center on June 26, 1984. Robert J. Chesser, M.D., reported evidence of some denervation in the radial nerve distribution, however, with good symmetrical nerve conduction studies and the good progress patient had demonstrated to date he expected a good prognosis (Ex. 5). However, a later EMG/NCV test performed for the employer's doctor, Dr. Kreiter (full name unknown), by Daniel J. Johnson, M.D., much later on April 24, 1985, did indicate some impairment of the right radial nerve in the following respect:

> EMG of the right arm is normal.
> NCV's of both radial nerves indicates a slowing of motor conduction of the right radial nerve with normal distal sensory latency.
>
> This is suggestive of an injury to the posterior interossius branch of the right radial nerve in the forearm.
> (Ex. 6)

Walters testified that she called the claimant on June 2, 1984 to come into work as it was indicated that he could do so

by Dr. O'Connor at Urgent Care. She said that claimant could work in the store room, file and sort for her, or do customer service work. She said claimant sounded confused on the telephone. His speech was slurred. He had no interest in one handed work and he thought he would take some vacation time (Ex. A). At the hearing she described other one handed work which the claimant could do as driving the sweeper, filing, record keeping and janitor work.

On June 11, 1984, claimant called Walters. She told him again that Dr. Baker's treatment was unauthorized and that Dr. Baker's release from work was not being acknowledged. She told him to go back to Urgent Care and Dr. Beckman at his office. Claimant did return to Urgent Care on June 13, 1984. He was seen by Dr. Koehler (full name unknown) who also said he could return to work with no use of the right hand or wrist. Dr. Koehler also referred claimant to Dr. Kreiter, who was an orthopedic surgeon and set up an appointment for July 6, 1984. Claimant refused to sign the work status determination of Dr. Koehler (Ex. 1, pp. 5-7). Walters testified it was reported to her that claimant became disorderly at Urgent Care on June 13, 1984 and this is also recorded in her notes (Ex. A).

Dr. Kreiter saw claimant on July 6, 1984 for an evaluation before returning to work because claimant was taking a considerable amount of medication, more specifically Tylenol 3 and Darvocet at the same time. Dr. Kreiter reported claimant had a cloudy sensorium possibly from the medication. He found some weakness of dorsiflexion and some radial numbness. Dr. Kreiter decreased claimant's analgesics and put him on anti-inflammatory medications and stated that he could return to work on July 9, 1984. Claimant returned to work on July 9, 1984 and did, in fact, perform one handed work for Walters at that time. Dr. Kreiter saw claimant again on September 14, 1984. At that time he thought claimant was under the influence of either medication or alcohol. He said claimant had a good range of motion for his right shoulder, elbow and digits. His reflexes were intact and his strength was improved. However, claimant still had some decreased sensation on the dorsum of the right hand. His radial nerve was otherwise functioning. Dr. Kreiter felt like his examination was inadequate because claimant was tremulous and uncooperative (Ex. 7).

Claimant was examined for the employer by Bruce L. Sprague, M.D., on April 16, 1985. Dr. Sprague commented that claimant appeared to have been drinking and his sensorium was not very clear. The results of his examination based on several clinical tests was essentially normal, except claimant resisted active dorsiflexion of the right wrist, but he still had full passive dorsiflexion. Dr. Sprague noted that Dr. Baker's EMG showed some denervation of the extensor muscles of the right forearm. On May 6, 1985, Dr. Sprague noted that Dr. Kreiter's EMG report

showed decreased conductivity and changes in the extensor digiti communis muscle of the right forearm condusive with a post-interosseous nerve syndrome. Dr. Sprague ended this report as follows:

> Because of the patient's attitude, one is reluctant to operate on him because the complications from this type of surgery can be significant, and the eventual improvement may be minimal. Therefore, I feel it would be most efficacious to give him an impairment rating of 10% of the upper extremity due to weakness of the extensor commmunis [sic] muscle, as well as the indius proprius instead of trying to undertake the surgical correction.
> (Ex. 8).

Claimant was seen for the last time by Dr. Sprague on January 20, 1986 for continued right wrist pain. Basically, there was no change from the claimant's previous condition. However, Dr. Sprague did comment in this report that the claimant had denied any previous injuries other than the one at work (Ex. 8).

Much of the claimant's past medical history was introduced into evidence. It demonstrated a number of accidents and illnesses for which the claimant's personal physician had ordered prescription drugs (Ex. 10-18).

Claimant presented unpaid medical bills as follows: (Ex. 19 through 22)

Dr. John Skehan	$ 26.00
Dr. John A. Baker	276.00
Rock Valley Physical Therapy	158.00
Franciscan Medical Center	190.00
Total	$650.00

Walters testified that claimant could have and would have been given the same treatment by the employer's doctors that he received from Dr. Baker if claimant would have gone back to Urgent Care and given them a chance. She also testified that the employer's doctors had been to the plant and that they knew the plant. Also the company doctors knew it was the employer's policy to return injured workers to work in some capacity as soon as possible and that the employer's doctors agreed with this policy and tried to implement it. She further testified that Dr. Baker had not been to the plant and was not familar with the employer's policy.

Claimant testified that his current condition is that he suffers weakness in his fingers, hand and wrist on the right hand and that he cannot dorsiflex his right wrist.

APPLICABLE LAW AND ANALYSIS

Iowa Code section 85.27 provides that the employer shall furnish reasonable medical care, but also provides that the employer has the right to chose the care. The employer did provide emergency care at the time of the injury. Walters testified that additional care could have been and would have been provided if claimant would have returned to Urgent Care or Dr. Beckman as she directed him to do. Claimant did not return to Urgent Care or Dr. Beckman. Instead claimant chose to see his own personal physician for reasons of his choosing. Walters informed claimant that if he chose his own care the payment for it would be his own expense. Claimant did talk to his union representative and they verified that the employer could chose the care. Claimant testified his own physician was closer to him and more convenient and that he was not happy with the treatment he received at Urgent Care. Walters testified that claimant wanted to go to his own doctors so he could get stronger pain pills. In any event, claimant chose to see his own physicians knowing full well that the employer had the right to chose the care and that if he chose the care he would be expected to pay for them himself. The union representative told claimant that the non-occupational group medical plan would pay for some of his bills and it is possible that the claimant may have relied on this information to some extent. Nevertheless, it is determined here that claimant's medical expenses in the amount of $650 as shown in exhibits 19 through 22 are not authorized medical expenses and the employer is not responsible for their payment.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 29, 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).

Claimant has not sustained the burden of proof by a preponderance of the evidence that he is entitled to temporary disability benefits for his time off work from June 1, 1984 to July 9, 1984. On the two occasions that claimant saw the employer's doctor, May 29, 1984 and June 13, 1984, it was determined that claimant could be returned to work to do one handed work with his left hand. Although his right wrist was splinted and his right arm was abrased, the rest of his body was fully functional. Walters enumerated a number of jobs which the claimant could perform with one hand. When claimant returned to work on July 9, 1984, he did in fact perform some of these very same jobs because he was still restricted by Dr. Baker to light duty and to avoid use of the right hand. It was not shown that Dr. Baker knew one handed work and light duty work was available to the claimant from the start back on June 1, 1984. Therefore, claimant has failed to prove by a preponderance of the evidence that he was unable to work during the period from June 1, 1984 to July 9, 1984.

In addition, Iowa Code section 85.33(3) provides as follows:

> If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employee refuses to accept the suitable work the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

Again Walters enumerated several light duty jobs claimant could possibly do one handed and testified that he did in fact do some of these very same jobs when he returned to work on July 9, 1984 with the same restrictions from Dr. Baker that had been imposed earlier by Dr. O'Connor and Dr. Koehler.

Claimant also admitted he did these jobs but under the mistaken belief that he did them May 30, 1984, May 31, 1984 and June 1, 1984. It is determined that the claimant was mistaken in his testimony because the employer's attendance records (Ex. 9, p. 5) show that claimant was absent from work from May 29, 1984 through July 7, 1984. Walters further testified that she knew he was absent from work also on these dates. Claimant conceded in his testimony that he suffered from memory problems especially regarding dates and sequence of events. Walters' notes show that she called claimant to come to work on June 2, 1984 but that he had no interest in one handed work and thought he would take a vacation day that day and maybe a few after that (Ex. A). Therefore, it is found that claimant is not entitled to temporary disability benefits because claimant refused suitable work (Iowa Code section 85.33(3)).

The injury was the cause of some permanent disability and claimant is entitled to some permanent partial disability benefits. It is true claimant had prior injuries to his right arm. However, claimant testified that his partially severed right thumb did not effect his strength in the rest of his right upper extremity. This appears to be true because claimant, Wayt and Schlieper all testified as to the claimant's ability to regularly lift extremely heavy weights every day at work.

As to the right shoulder injury in 1981 from the automobile accident the x-rays were negative and the claimant's diagnoses was strain only. No residuals from this automobile accident were indicated (Ex. 11).

As to the incident when claimant was beat up with a baseball bat in June of 1981 there appears to be a right knuckle injury as the claimant admitted (Ex. 11, p. 2). A careful search of the University of Iowa records for this injury and his treatment show that claimant was hit in the right hand and he received a contusion of the right middle MCP joint (Ex. 18, p. 18). Claimant testified that his right wrist and arm were casted to immobilize the knuckle. The right knuckle was noted to be swollen but the x-ray of it was normal (Ex. 18, p. 22). Claimant was discharged from the orthopedic department without additional follow-up (Ex. 18, p. 23). A careful search of all the records in exhibit 18 do not reveal any serious injury or disability to the right arm or knuckle.

Claimant failed to disclose these prior injuries to Dr. Sprague prior to his evaluation. It is not known and cannot be determined how much, if any, Dr. Sprague would have discounted his 10 percent permanent impairment assessment for the prior injuries. No evidence suggests that any prior permanency existed. The prior injuries do not appear to have affected the nerves of the arm as were affected by this injury. There is sufficient evidence of permanent impairment for this injury for the following reasons. First, claimant testified that his prior injuries had no residual effects and the medical records do not show any either. Secondly, claimant, Wayt and Schlieper all testified that claimant did regularly lift items weighing up to 200 pounds and sometimes even greater than that without difficulty. These jobs involved flexibility of his arms and wrists. Thirdly, Dr. Baker's EMG/NCV performed by Dr. Chesser showed evidence of denervation in the radial nerve distribution of the right arm (Ex. 5, p. 3). Fourth, Dr. Kreiter's EMG/NCV performed by Dr. Johnson showed slowing of the motor conduction of the right radial nerve suggestive of an injury to the posterior interosseseous branch of the radial nerve (Ex. 6). Fifth, Dr. Sprague also noted the results of these two EMG/NCV tests and stated they go along with the patient's history and would account for his

symptomology (Ex. 8, p. 2). Sixth, claimant testified his current complaints are weakness in his fingers and inability to dorsiflex the right wrist. Urgent Care, Dr. Baker, Dr. Kreiter, and Dr. Sprague all made note of these very same symptoms all the way through the claimant's treatment from beginning to end. Seventh, claimant demonstrated his hand and fingers at the hearing illustrating how much he could and could not flex and extend the fingers and wrist on his right arm. Therefore, applying agency expertise to the foregoing information it is determined that the claimant has sustained a 10 percent permanent impairment of the right arm. (Iowa Administrative Procedure Act, section 17A.14(5)).

FINDINGS OF FACT

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

That the medical expenses that the claimant incurred as shown in exhibits 19 through 22 were not authorized by the employer, but on the contrary were incurred by the claimant as his own choice of care knowing that they would not be covered under the workers' compensation law.

That claimant refused to work during the period June 1, 1984 through July 9, 1984 even though the employer made it clear that special light duty one handed work was available and that Dr. Baker's release was not recognized as excusing the claimant from work.

That claimant did not return to work and attempt to do the one handed light duty work that was offered.

That claimant sustained a 10 percent permanent impairment of the right arm based upon the factors discussed above.

CONCLUSIONS OF LAW

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

That claimant is not entitled to payment of the medical expenses which he is claiming under Iowa Code section 85.27.

That claimant is not entitled to temporary disability benefits for the period June 1, 1984 to July 9, 1984 under Iowa Code section 85.23 or Iowa Code section 85.34.

That claimant is entitled to 25 weeks of permanent partial disability for a 10 percent permanent impairment of the right arm.

ORDER

WHEREFORE, IT IS ORDERED:

That defendant pay to claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of two hundred sixty and 83/100 dollars ($260.83) per week in the total amount of six thousand five hundred twenty and 75/100 dollars ($6,520.75) commencing on May 30, 1984.

That the defendant pay these accrued benefits in a lump sum.

That interest shall accrue as provided by Iowa Code section 85.30.

That defendant will pay the cost of this action as provided by Division of Industrial Services Rule 343-4.33, formerly Iowa Industrial Commissioner Rule 500-4.33.

That defendant file claim activity reports as requested by this agency as provided by Division of Industrial Services Rule 343-3.1, formerly Iowa Industrial Commissioner Rule 500-3.1.

Signed and filed this 31 day of March, 1987.

Walter R. McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARLENE SCARLETT, Claimant, vs. FIRESTONE TIRE & RUBBER CO., Employer, and CIGNA INSURANCE COMPANIES, Insurance Carrier, Defendants.	FILE NO. 760079 A R B I T R A T I O N D E C I S I O N FILED JUN 9 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Marlene Scarlett, claimant, against Firestone Tire & Rubber Company, employer (hereinafter referred to as Firestone) and CIGNA Insurance Companies, insurance carrier, defendants, for benefits as a result of an alleged injury on March 19, 1984. On March 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. All testimony was received during the hearing from claimant and the following witnesses: Chuck Scarlett, Naomi Petrie, Judy Steenhoek, and Mike Polovick. 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 March 19, 1984, claimant received an injury which arose out of and in the course of employment with Firestone.

2. Claimant is entitled to healing period benefits for the period from March 19, 1984 to May 28, 1985 and the work injury is a cause of permanent disability.

3. The commencement date for permanent partial disability

its shall be May 29, 1985.

4. Claimant's rate of compensation in the event of an award of eekly benefits from this proceeding shall be $345.10 per wee.

5. All requested medical benefits have been or will be paid by efendants.

6. Claimant has been paid 87 weeks of compensation at the rat of $345.10 per week prior to the hearing.

The only issue submitted in the prehearing report for determination in this decision is the extent of claimant's entitlement to weekly benefits for permanent disability.

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 her physicians during treatment and evaluation of her injuries. Physicians in this case expressed their belief that claimant's physical complaints are real. Claimant's physicians and a rehabilitation specialist, Judy Steenhoek who monitored and coordinated claimant's treatment for Firestone's insurance carrier, all indicated that claimant was highly motivated to follow physicians' instructions and to return to normal work life. Consequently, claimant was found to be credible.

2. Claimant was employed by Firestone from 1978 until her work injury in March, 1984.

There was little dispute among the parties as to the nature of claimant's employment at Firestone. Claimant testified that her jobs at Firestone primarily involved tire building but she also held positions as a ultility worker and janitor. All of claimant's positions at Firestone involved working around moving machinery, overhead reaching, lifting in excess of 25 pounds and repetitive pushing and pulling. Claimant was earning $13.50 per hour as a tire builder at the time of the work injury.

Claimant has not worked for Firestone since the work injuries herein but this is primarily due to her layoff. After her release from work, she received a layoff notice as a result of a general plant wide reduction in force. Claimant has since chosen to take severance pay and separate her relationship with Firestone relinquishing her right to recall from layoff. Claimant stated that one of the reasons for the decision to take the severance pay and not wait for a recall from Firestone is

Firestone's unstable future and past history of layoffs.

3. On March 19, 1984, claimant suffered multiple injuries which arose out of and in the course of her employment with Firestone.

Claimant testified at the time she suffered her injuries she was using a tire building machine. Somehow she was pulled into the machine and she lost consciousness for a few minutes. Claimant is unable to remember the events immediately before and after the incident. According to the medical records of treating physicians, claimant was immediately taken to the hospital with mutiple facial fractures, a ruptured eardrum, two skull fractures, a fractured right ankle and multiple bruises and contusions over the body. A few days later claimant underwent surgical procedures to repair the facial and ankle fractures and to suture the collateral ligament of the right ankle. Claimant was discharged from the hospital on March 30, 1984.

Claimant was treated by Robert G. Smits, an otolaryngologist, for facial injuries and her ear condition. Since he first saw claimant, claimant complained of dizziness which Dr. Smits attributes to a traumatic injury of the inner ear and the events of March 19, 1984. Dr. Smits has a special interest in balance problems due to inner ear disease. According to Dr. Smits, claimant temporary loses her ability to maintain her position after assuming certain positions for a few minutes at a time. This condition is described by Dr. Smits as mild so long as she does not place herself in a dangerous situation when she experiences these dizziness episodes. Claimant also suffered a mild hearing loss in the speech range. Claimant's facial injuries healed satisfactory. Claimant reached maximum healing from the head and facial injuries in March, 1985.

Claimant's right ankle problems were treated by William Boulden, M.D, an orthopedic surgeon. Dr. Boulden surgically repaired the fracture and ligament damage while claimant was in the hospital. Repair of the fracture involved the insertion of a plate and screws which was later removed. Dr. Boulden recommended ankle rehabilitation exercises and referred claimant to Thomas Bower, LPT, for physical therapy.

Claimant developed right shoulder difficulties and she was initially treated by Dr. Boulden. However, after conservative therapy failed to alleviate the persistent pain, claimant was referred to Scott Neff, D.O., an orthopedic surgeon, who has an apparent specialty in shoulder injuries according to Dr. Boulden. Dr. Neff ultimately surgically repaired an "impingement syndrome" in December, 1984.

Claimant also was treated for neck and right elbow pain following the injury by Robert A. Hayne, M.D., a neurosurgeon.

After x-rays of a cervical spine, Dr. Hayne opined that her pain might be due to spondylosis. Aside from restricting her activity during a period of recovery, Dr. Hayne did not actively treat these complaints and claimant improved with the passage of time. Dr. Hayne released claimant for work with restrictions in October, 1984.

Finally, claimant was treated for post-traumatic stress reaction associated with her work injuries of March 19, 1984 by Todd Hines, Ph.D., a clinical psychologist. Claimant testified that she experiences nightmares of being caught and smothered and experiences anxiety or panic after these nightmares. After three sessions with Dr. Hines, claimant improved and the nightmares have become less frequent. Dr. Hines' active treatment ended in 1984.

Claimant reached maximum healing from all of her injuries in June of 1985 and she was released to work at that time. However, due to her seniority she was unable to return to work due to a major plant layoff. Mike Polovick, the labor relations manager at Firestone, testified that regardless of her injuries, claimant would not be working today at Firestone due to her low senority and the lack of available work at Firestone.

4. The work injury of March 19, 1984 was a cause of significant permanent partial impairment to claimant's body as a whole.

Claimant's medical records indicate that she had significant problems with bilateral carpal tunnel syndrome especially on the right in March, 1980, which required a release surgery in April, 1980, by Douglas Reagan, M.D. No doctor opines that she suffered permanent impairment from this condition but claimant experienced significant problems continuously until her layoff from Firestone in the latter part of 1980. Claimant worked only a few months in 1981 and was again laid off until December, 1983. Claimant then only worked a few months before her March, 1984 injuries. However, despite this limited work activity since 1980, there is no record of right wrist complaints after 1980 in the physician and company records contained in the record.

Claimant's medical records also reveal that she experienced pain in the left shoulder, neck and left arm in early 1980. However, treatment of these conditions was conservative. This past history of neck complaints prohibits a finding that claimant's neck problems after the March, 1984 injuries were work related. Dr. Haynes only opines that the condition may be caused by spondylosis.

Claimant testified that since the Firestone injuries she has experienced recurrent severe and/or as she describes "sickening" headaches which immobilizes her for as much as three or four hours at a time. These headaches have become less frequent

since the injury but claimant states that they still occur three or four times a month. Claimant had no such headaches before her injuries in March, 1984. Claimant's physicians have not opined as to the permanency of these headaches but they persist after almost three years since the work injuries.

Claimant testified that like her headaches, claimant's nightmares have subsided but persist on occasion. She had no such nightmares before March, 1984. However, Dr. Hines opines that claimant did not suffer any permanent psychological damage from the March, 1984 injuries.

Claimant stated that she suffers hearing loss which she notices only when other noise is present such as a radio or people talking in a room. Dr. Smits opines that claimant has suffered a mild permanent hearing loss from inner ear damage. This loss is 25 decibels in the speech range.

Claimant continues to have dizzy spells which cause her to fall down on occasion. Claimant's friend, Naomi Petrie, observed claimant losing her balance on two occasions since the injury. Claimant did not have balance problems before March, 1984. Dr. Smits considers the condition as mild but imposed permanent work restrictions against working around moving or dangerous machinery.

Claimant testified that she continues to have lingering pain in her right shoulder after heavy activity. Dr. Neff and a therapist, Bower, opined that claimant only has a one percent permanent partial impairment to the upper extremity due to her shoulder condition. However, Dr. Neff has imposed permanent work restrictions prohibiting lifting in excess of 25 pounds; work above shoulder height; and, repetitive pushing and pulling.

Claimant further testified that she continues to have stiffness and aching in her left ankle after prolonged standing. Dr. Boulden and the therapist, Bower, opines that claimant suffered a nine percent permanent partial impairment to the lower extremity from the March, 1984 injury.

The above permanent, physical and mental problems persist today despite a determined effort on the part of claimant to achieve rehabilitation. This determination is verified by her physicians and the rehabilitation specialist, Steenhoek, who monitored claimant's medical treatment.

5. The work injuries of March 19, 1984, are a cause of a 25 percent permanent loss of earning capacity.

Although claimant's impairment ratings are low and most physicians describe her permanent impairments as mild, the permanent work restrictions imposed by claimant's physicians are significant from an industrial disability standpoint. Claimant

can no longer perform the type of work she was performing at the time of the March, 1984 injuries and most other heavy factory labor work. Claimant also was earning a substantial wage in the excess of $13.00 per hour at the time of the work injury. Consequently, her loss of earnings as a result of the work injuries are quite severe. However, claimant chose to take severance pay and terminate her relationship with Firestone due to a realistic view of her bleak future at Firestone regardless of her disability. It is also well known that the availability of manufacturing work at the wages claimant earned at the time of the work injuries is on the decline in this state and elsewhere.

Furthermore, claimant's employment prior to Firestone primarily consists of clerical and typing work since 1962. Claimant admits that such work is still available to her and that she could earn somewhere in the neighborhood of $10,000 to $11,000 per year from such employment.

Claimant is 42 years of age, has a high school education and exhibited average intelligence at the hearing. Claimant has average potential for successful vocational rehabilitation. Claimant has chosen to be self-employed as a horse breeder and trainer, a business in which her and her husband have been involved in over the last several years. She now has a fine facility in which to perform this work activity. However, claimant's riding of horses is not favored by Dr. Smits due to claimant's balance problems but he does allow such activity if claimant is careful. Claimant testified that she earns approximately $5,000 a year in such activity. Claimant also has leather work talents which can be used for making leather articles or repairing horse tack. This activity, however, has not yielded any significant income. According to Steenhoek, such a leather work skill is marketable in the local ecomony but she was not very clear as to the potential earnings from such activity. Claimant only earns a little over $2,000 a year from her leather work and teaching of leather work classes.

Claimant is middle age and should be in the most productive years of her life. Her loss of earning capacity due to disability is much more severe than would be the case for a younger or older individual.

Finally, claimant's physical problems before March, 1984 with her right carpal tunnel syndrome and neck pain were significant but she lost little, if any, work as a result of these problems. Consequently, these conditions had not developed to a point where they affected her earning capacity prior to the work injuries herein.

CONCLUSIONS OF LAW

The foregoing findings of fact were made under the following

principles of law:

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

Although a finding was made causally connecting the work injuries to significant functional impairment to her 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 setforth 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 R. 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 physical condition and the work injuries was made in this case because such an apportionment is proper only when there was some ascertainable disability which existed independently before the injuries occurred. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). In this case, there was no independent ascertainable disability before March, 1984.

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 or utilized by claimant without prior notice to defendants at the prehearing conference.

Defendants argued in this case that claimant had not established a body as a whole disability. This was clearly not the case. The permanent work restrictions were based primarily upon claimant's balance problems due to inner ear disease and her shoulder difficulties. Both of these physical conditions are clear body as a whole injuries. It is well established in Iowa that a shoulder injury is an injury to the body as a whole and not to a scheduled member injury simply because the function of the shoulder joint impacts on a scheduled member. 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 (Appl. Dec. 1982); Godwin v. Hicklin G.M. Power, II Iowa Industrial Commissioner Reports 170 (Appl. Decn. 1981). Furthermore, claimant has suffered multiple permanent impairments. Three or more scheduled member injuries in the same incident constitute a body as a whole injury because Iowa Code section 85.34(u) is a catchall provision to include all disabilities not previously described in the subsection. No other subsection deals with more than two scheduled member injuries in the same incident. Schlottman v. Sharpe Bros. Contracting Co., (Review-reopening decision filed January 4, 1980).

Based upon a finding of a 25 percent loss of earning capacity as a result of the 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. The parties stipulated that claimant received 87 weeks of compensation before the hearing and that claimant was entitled to healing period benefits in the amount of 57 6/7 weeks. Therefore, claimant was paid 29 1/7 weeks of permanent partial disability. Consequently, claimant is entitled to an additional 95 6/7 weeks of weekly compensation for permanent partial disability.

ORDER

1. Defendants shall pay to claimant an additional ninety-five and six-sevenths (95 6/7) weeks of permanent partial disability benefits at the rate of three hundred forty-five and 10/100 dollars ($345.10) per week from twenty-nine and one-seventh (29 1/7) weeks after the stipulated beginning of permanent partial disability benefits, May 29, 1985.

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

3. Defendants shall pay interest on benefits awarded herein as setforth 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 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 9th day of June, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUSSELL LEE SCHOONOVER,	:	
	:	
Claimant,	:	File No. 814532
	:	
vs.	:	
	:	A R B I T R A T I O N
PROGRESSIVE TRANSPORTATION CORP.,	:	D E C I S I O N
	:	
Employers, Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Russell Lee Schoonover against his employer, Progressive Transportation Corp., to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained September 10, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner in Burlington, Iowa, on March 18, 1987. No first report of injury has been filed. The record was considered fully submitted at close of hearing.

The record in this proceeding consists of the testimony of claimant and of Susan Weber, as well as of joint exhibits 1 through 8. Joint exhibit 1 is a statement of Macomb Clinic, Ltd., in the amount of $40. Joint exhibit 2 is a medical report identified as of the clinic relative to claimant. Joint exhibit 3 is radiology report of Lyle E. Adams, M.D., of February 12, 1986. Joint exhibit 4 is a McHugh Drug Store statement for Soma and McPomen in the amount of $35.60. Joint exhibit 5 is a McDonough District Hospital statement for lumbar spine x-rays in the amount of $83. Joint exhibit 6 is the deposition of Donald Dexter, M.D., taken July 31, 1986. Joint exhibit 7 is a statement for the deposition of Dr. Dexter in the amount of $61.20. Joint exhibit 8 is a statement for sheriff fees in the amount of $33.20.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant received an injury on September 10, 1985 which arose out of and in the course of his employment. They stipulated that an employer-employee relationship exists between claimant and the named defendant. They stipulated that claimant has been off work since his injury date to December 7, 1986 and that the commencement date for any permanent partial disability benefits

d claimant would be December 7, 1986. They further stipulated
at claimant received $3,270 in gross earnings in the thirteen
eks immediately preceding his injury and that claimant is
itled to five exemptions. The issues remaining to be decided
e:

1) Claimant's rate of weekly compensation in the event of
award;

2) Whether a causal relationship exists between claimant's
jury and his claimed disability;

3) Whether claimant is entitled to benefits and the nature
d extent of any benefit entitlement, including the related
uestion of whether claimant is an odd-lot worker under the
ayton doctrine; and

4) Whether claimant's claim fails for failure to give
otice as provided in section 85.23.

REVIEW OF THE EVIDENCE

Claimant testified that he was driving for Progressive
ransportation under a trip lease with Prairie Transport on
eptember 10, 1985, hauling 555 pound barrels of corn syrup for
he Hubinger Company. He reported that in Greenville, South
arolina, he opened the back of the tractor-trailer and two
arrels fell out. He testified that the first barrel pushed him
ver backwards, but the second did not hit him. Claimant
ndicated that another individual unloaded the remaining barrels.
Claimant then proceeded to North Carolina where he spent the
night in his sleeper. Claimant testified he had a hard time
getting out of the sleeper the following morning and that he
then called Progressive and talked to Junior, the dispatcher.
Claimant testified that he told Junior what had happened and
that his back was hurting and then signed off the lease.
Claimant continued trucking for a time following the September
incident. He took another trip lease with Progressive to
Arkansas and reported that he there unloaded sacks of starch.
Claimant agreed that that caused him back problems, but stated
he did not call Progressive concerning them.

Claimant initially saw Donald Dexter, M.D., of the Macomb
Clinic, Ltd., on February 11, 1986. Claimant was off work at
that time and continues to be off work at the present. Claimant
testified that his condition is stable and will not improve
unless he has surgery which he cannot presently afford.

Claimant is 43 years old and completed tenth grade; he was a
C and D student. Claimant attended diesel repair school and at
one time owned a diesel and auto repair shop. Claimant has also
run heavy equipment, worked in construction, and farmed. He has

trucked for approximately twenty years. Claimant testified that he now has a 45 pound lifting restriction and has difficulty bending. He reported that he could not do diesel work as that requires heavy lifting and that he could not handle the juggling involved in riding tractor-trailers, farm tractors, or heavy equipment. He indicated he could not do the bending required in construction work. Claimant testified he had had no physical limitations before his injury. He reported that he cannot cut wood or rake his yard. Claimant agreed that he had tried to dig post holes following his injury, but reported that he had only completed three and then "his boy finished up." Claimant denied that he had farmed in 1984.

Susan Webster reported that she owns Progressive Transportation with her husband. Ms. Webster indicated that her office files do not reflect a reported injury and stated she had no idea claimant had had an injury until his petition was served on February 19, 1986. She reported that she never received a call regarding an injury and that she was sure that someone would have told her of an injury. She testified she saw claimant when he took the Arkansas load for Progressive and was then unaware anything was wrong. She agreed that both she and Junior act as dispatchers.

Ms. Webster stated that claimant's alleged injury was the only time that problems had developed with Hubinger's syrup barrels. Hubinger apparently loads the barrels. She testified that the barrels are generally stacked three feet from the back door of the trailer. Ms. Webster testified that Hubinger would charge Progressive Transportation for any destroyed barrels. She recalled signing the bill of lading for the corn syrup trip claimant drove and indicated that the bill reported damage to a barrel but did not report a destroyed barrel. She stated that she was "positive" that Hubinger had made no claim for the value of the syrup and the barrel.

Dr. Dexter's notes for February 11, 1986 indicate that claimant reports a back injury in September 1984 when a barrel full of corn syrup rolled out of the truck and hit his hands. It states claimant tried to hold the barrel but then let it fall, but wasn't knocked over. He states, "strained it." Claimant reported pain radiating down both posterior thighs to the knees, especially on standing and bending. The note states "Unable to work since injury - hasn't notified company..." At hearing, claimant could not recall telling his physician this but stated he had notified the company of his injury even though he had not notified them he was off work. Claimant's gait was guarded; he had back pain on toe walking as well as on heel walking. Flexion was 30 to 40 degrees. Leg length appeared equal. Straight leg raising was positive apparently bilaterally at 60 to 70 degrees. The impression was of chronic lumbar sacral strain. Soma and Meclomen as well as heat were prescribed.

Lyle E. Adams, M.D., interpreted lumbar spine x-rays of February 12, 1986 as showing that the last lumbar disc space was quite narrow and had some reactive body change due to longstanding abnormal weight bearing likely related to a degenerated disc. The disc space above was very slightly narrowed as well, but there were no other areas of abnormality and no evidence of fracture.

In his deposition, Dr. Dexter agreed with the radiological interpretation that claimant had a longstanding degenerative condition in his back. He opined that on the basis of the history claimant had given the doctor, claimant's injury certainly could have aggravated the preexisting degenerative condition. He further opined that claimant has a five to ten percent permanent partial "disability" as a result of his injury. Dr. Dexter is a board certified general surgeon.

The balance of the evidence was reviewed and considered in the disposition of this matter.

APPLICABLE LAW AND ANALYSIS

Our first concern is whether claimant failed to give notice as required under section 85.23.

Defendants have raised the issue of lack of notice of the work injury within 90 days from the date of the occurrence of the injury under section 85.23. Lack of such notice is an affirmative defense. DeLong v. Iowa State Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940). In Reddick v. Grand Union Tea Co., 230 Iowa 108, 295 N.W. 800 (1941) the Iowa Supreme Court has ruled that once claimant sustains the burden of showing that an injury arose out of and in the course of employment, claimant prevails unless defendant can prove by a preponderance of the evidence an affirmative defense. 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. Dept. of Transportation, 296 N.W.2d 809, 811 (Iowa 1980). The time period for notice of claim does not begin to run until claimant, as a reasonable person should recognize the nature, seriousness and probable compensable character of his injury or disease. Reasonableness is judged on the basis of claimant's own intelligence and education. Id.

Claimant testified he called Junior, who with Mrs. Webster, was a company dispatcher, the morning following his work incident and told him what had happened and that his back was hurting. Defendant did not cross-examine claimant as to the exact content of his conversation with Junior. Furthermore, Junior was not called to testify regarding that conversation. We find this

surprising as notice to Junior of a work incident would certainly constitute notice to Progressive. The company dispatcher would be the individual with whom claimant would communicate while on the road. The obligation to pass information received regarding a work injury on to management would rest with Junior and not claimant. Hence, even though Mrs. Webster testified she had no knowledge of claimant's injury, defendant has not proved it lacked actual knowledge of claimant's work incident since claimant's testimony that he notified Junior is credible and accepted. Dr. Dexter's report of claimant's initial medical visit substantially reports the accident as claimant described. It also states "claimant hasn't notified company." While claimant could not recall this conversation, he did state he had not notified the company he was off work on account of his injury yet reiterated that he had notified it of the incident, itself. If claimant had been a full-time Progressive employee one would, of course, expect that he had notified the employer he was off work. As claimant worked for Progressive only intermittently, and apparently was able to continue working for Progressive and other trucking firms for a time after his injury, it is not inconsistent that claimant would not have notified Progressive immediately when he was compelled to leave work on account of the injury. Dr. Dexter's report then is not seriously detrimental to claimant's overall credible testimony that he actually reported his work incident to Junior. Likewise, we attach little significance to the fact that the bill of lading characterized the barrel as damaged rather than destroyed. The mention of the barrel, of itself, substantiates that some incident occurred on the Hubinger trip. Defendants have failed to prove lack of notice of claimant's injury.

We reach the causation question.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 10, 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. Perris 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).

Claimant waited approximately five months following his injury before he visited Dr. Dexter. The history claimant gave the doctor was generally consistent with that given at hearing, however. No evidence of other accidents or work incidents was presented. Dr. Dexter opined that claimant's September 1984 injury "certainly could have" aggravated claimant's preexisting longstanding degenerative back changes. That opinion is not couched in absolute probabilities. Claimant has worked without apparent difficulties and had carried on various life activities until his injury, however. He testified he is unable to drive over the road now and that he can neither cut wood or rake his yard. These activity limitations, with Dr. Dexter's uncontroverted opinion testimony, are sufficient to establish that claimant's current disability is related to the injury on which he bases his claim.

We reach the benefit entitlement question.

Initially, claimant has not made a prima facie showing he is an odd-lot worker.

In Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985), the Iowa court formally adopted the "odd-lot 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.

The burden of persuasion on the issue of industrial disability always remains with the worker. However, when a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence of suitable employment shifts to the employer. If the employer fails to produce such evidence and the trier of fact finds the worker does fall

in the odd-lot category, the worker is entitled to a finding of total disability. Id. Even under the odd-lot doctrine, the trier of fact is free to determine weight and credibility of evidence in determining whether the worker's burden of persuasion has been carried, and only in an exceptional case would evidence be sufficiently strong to compel a finding of total disability as a matter of law. Id. In Guyton, the court also stated the following regarding determination of a worker's industrial loss.

> The question is more than the one posed by the commissioner concerning what the evidence shows Guyton "can or cannot do." 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 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?) Id.

Claimant testified he could not now drive a truck or engage in any of his other various past jobs. He testified he has a 45 pound lifting restriction and is limited in bending. Claimant's testimony as to jobs he cannot do is not shored up with expert vocational testimony; neither are his self expressed physical restrictions supported by medical reports in the record. Claimant's unsubstantiated testimony as regards these matters is given less weight than it would receive were it supported by appropriate expert opinion. Furthermore, the record does show claimant has skills in diesel and auto repair, farming, heavy equipment and construction work. Each of these past work experiences likely involve skills which claimant could use in vocations involving lifting of less than 45 pounds and limited bending. Likewise, the record is devoid of evidence that claimant has actually sought work. His physical impairment of five to ten percent is not so great as to preclude his seeking and attempting some kind of employment. His failure to do so is further evidence that no prima facie case that claimant is an odd-lot worker is made.

We consider the industrial disability question.

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).

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).

Many of the factors relating to industrial disablity were analyzed as regards the odd-lot issue. Additionally, claimant is 43 years old and has completed tenth grade. He was a low average student. His self-described limitations do not preclude most moderately strenuous employment. He has practical work experience and formal training which likely could be used in employments within his physical capacities. He has not sought work either with his former employer or otherwise. While claimant believes back surgery is necessary, the record does not show his treating physician recommends surgery. Claimant's permanent partial impairment is modest. All factors suggest a loss of earning capacity of 20 percent.

Claimant apparently seeks healing period benefits to which he is entitled under section 85.34(1). Claimant has not returned to work. The parties stipulated claimant was off work from his injury date to December 7, 1986 with permanent partial disability benefits to commence as of that date. Healing period benefits will run from claimant's injury date to December 7, 1986 for those days on which claimant was actually not working on account of his injury.

The rate issue remains. Claimant received $3,270 in gross earnings in the thirteen weeks immediately preceding his injury and is entitled to five exemptions. No evidence was presented suggesting claimant's rate should be decided other than under section 85.36(6). Claimant's rate then is found to be $171.70.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant injured his back on September 10, 1985 when barrels rolled from the back of the trailer truck he was lease driving for defendant employer.

Claimant called the company dispatcher the following morning and told him of the incident and that claimant's back was hurting.

Claimant continued to work for a time after his injury.

Claimant eventually was unable to work but did not renotify the company.

Claimant first saw Dr. Dexter on February 11, 1986.

Claimant has longstanding degenerative changes in his back.

Claimant worked as a trucker and engaged in various life activities prior to his injury but has been unable to work as a trucker or engage in those activities following his injury.

Claimant's injury aggravated claimant's degenerative back condition.

Claimant is 43 years old and has completed tenth grade.

Claimant was a low average student.

Claimant has training as diesel mechanic and once operated a diesel and auto mechanic shop.

Claimant has farmed, trucked, worked construction, and operated heavy equipment.

Claimant has self-described limitations on bending and lifting more than 45 pounds.

Claimant has knowledge and skills which would transfer to work within those restrictions.

Claimant has not sought work since his injury.

Claimant has a modest permanent partial impairment of the body as a whole.

Claimant reached maximum medical healing on December 6, 1986.

Claimant earned $3,270 in the thirteen weeks immediately preceding his injury and was entitled to five exemptions.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Defendant has not established that claimant failed to give notice of his injury as required under section 85.23.

Claimant has established that his September 10, 1985 injury is causally related to the disability on which he bases his claim.

Claimant has not established he is an odd-lot worker.

Claimant is entitled to permanent partial disability resulting from his September 10, 1985 injury of twenty percent

(20%) with those benefits to commence December 7, 1986.

Claimant is entitled to healing period benefits from September 10, 1985 to December 7, 1986 for those days he was actually off work on account of his injury.

Claimant's rate of weekly compensation is one hundred seventy-one and 70/100 dollars ($171.70).

ORDER

THEREFORE, IT IS ORDERED:

Defendant pay claimant permanent partial disability benefits for one hundred (100) weeks at the rate of one hundred seventy-one and 70/100 dollars ($171.70) with those benefits to commence December 7, 1986.

Defendand pay claimant healing period benefits from his injury date to December 7, 1986 for those days he was actually off work on account of his injury.

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30

Defendants pay costs pursuant to Industrial Services Division Rule 343-4.33.

Defendants file claim activity reports as required by the agency.

Signed and filed this 7th day of April, 1987.

HELEN JEAN WALLESER
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ARLENE M. SCHUBERT,

Claimant,

vs.

BURLINGTON PEPSI-COLA CO.,

Employer,

and

CIGNA INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 785314

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 Arlene M. Schubert against Burlington Pepsi-Cola Company, her former employer, and Cigna Companies, its insurance carrier. Claimant seeks benefits as a result of injuries sustained in an accident that occurred on December 17, 1984, when a fork lift ran over her left foot.

The case was heard at Burlington, Iowa, on January 7, 1987, and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Arlene M. Schubert, Peggy Lewis, Suzanne Adams, Connie May and Roy Nelson. The record also contains claimant's exhibits 1 through 19 and defendants exhibits 1, 2, 4, 5 and 6. Subsequent to the hearing, claimant sought to introduce exhibit 20, an electromyography report dated December 24, 1986. Defendants objected. Admission of the proposed exhibit would violate Rule 343-4.31 and the provisions of the hearing assignment order. The objection is sustained.

ISSUES

The parties stipulated that claimant sustained an injury on December 17, 1984 which arose out of and in the course of her employment with regard to injury to her left foot, but an issue exists regarding whether the injury is limited to the left foot. Claimant contends that it extends into her back and leg. The parties stipulated that the injury is a cause of disability during a period of recovery for the left foot, but claimant contends the injury extends beyond the foot to the left leg and

ber back. The parties stipulated that claimant's entitlement to healing period ran from December 17, 1984 to October 29, 1985. They further stipulated that claimant worked commencing on October 29, 1985 through November 26, 1985 and again on December 11, 12 and 13, 1985. Claimant also seeks healing period compensation for all other times subsequent to October 29, 1985. The parties stipulated that claimant's rate of compensation is $172.06 per week. In accordance with the hearing assignment order, the issue regarding the nature and extent of claimant's permanent disability has been severed and is not to be decided in this decision, but is reserved for a subsequent determination.

Claimant also seeks payment of medical benefits under Iowa Code section 85.27 in the total amount of $2,767.23 which defendants contend were unauthorized. It was stipulated that the provider of the services would testify that the fees were reasonable and that the expenses were incurred for reasonable and necessary medical treatment. Defendants also urged that the injury is not a proximate cause of the expenses which claimant seeks to recover. The parties stipulated that defendants have paid claimant 43 weeks of healing period compensation.

The parties stipulated that treatment provided by Richard Neiman, M.D., had been authorized.

STATEMENT OF THE CASE

All the evidence received at the hearing was considered when deciding this case even though it may not be specifically referred to in this decision.

Arlene M. Schubert is a 59-year-old lady who has been employed by the Burlington Pepsi-Cola Company, and its predecessor, since 1962. Schubert testified that on December 17, 1984, a fork lift ran over her left foot, causing her to fall to the ground and injure her left elbow, left knee and left hip. She testified that she had a large bruise on her left hip and scrapes on her left elbow and knee. Claimant was taken by ambulance to the emergency room at Burlington Medical Center where she was treated by Duane Nelson, M.D. X-rays disclosed multiple fractures in her left foot for which she was treated with a cast and then sent home. Schubert testified that, while at the emergency room, she told the persons treating her that she had pain in her leg, elbow and groin, and that they treated the elbow but did nothing about her groin or hip. Schubert testified that when she returned home, while undressing, she and her daughter observed a large lump on her hip that was discolored and that they returned to the emergency room where Dr. Ridgley diagnosed the mark as a blood clot. Schubert testified that when she was subsequently seen by Dr. Nelson, she complained of pain in her leg, hip, and back and that, at times, he had her stoop over. She stated that, at times, Dr. Nelson treated her

back and sent her to physical therapy for her foot and back. In May, she was treated with a CT scan and steroid injection which she felt had not helped. Schubert testified that, in October, Dr. Nelson advised her that he had done as much as he could, released her to return to work, and informed her that she could go to her family doctor. She testified that, by that time, her foot was no longer painful and seemed to be healed, but that she did have pain in her back, leg and hip which was worsening. Claimant testified that she then went to her family physician, Harry N. McMurray, M.D., who in turn referred her to Richard F. Neiman, M.D. Schubert stated she is currently under care by Dr. Neiman.

Claimant testified that, when she returned to work, she was given a job punching holes in plastic two-liter bottles, sorting and placing them into a case. She felt that she did the job adequately and was happy to be back to work, but that her employment was involuntarily terminated.

Schubert testified that, prior to the injury of December 17, 1984, she had not suffered any substantial injuries to her back or left leg and that her back and legs had not made her unable to perform the duties of her employment. Defendants' Exhibit 6, a copy of claimant's personnel file, shows her to have injuries in the nature of a strained back on January 23, 1978, and April 19, 1973 as the only recorded injuries to her back. The personnel file shows no prior injuries to her left leg. Claimant testified that she was not restricted with regard to her leg or back prior to the accident of December 17, 1984. She denied sustaining any other injury to her back since December 17, 1984. Claimant acknowledged one subsequent occasion, when she fell and injured her foot for which it was again placed in a cast. She stated that she recovered from that incident and that her back returned to the same condition as it was before she stumbled. Claimant testified that her back and hip are worse now than they were at the time she returned to work in October, 1985.

Schubert testified that, under the direction of Dr. Neiman, she received tests and treatment at Mercy Hospital in Iowa City, and was referred to Dr. Dykstra at Steindler Clinic who also examined her and ordered steriod treatments. Schubert testified that she takes pain pills which she acquires at the Apothecary and that the pills were prescribed by her doctors for the pain in her back and leg.

Claimant testified that she had nothing wrong with her when she went to work on the morning of December 17, 1984.

Peggy Lewis and Suzanne Adams testified that they are friends of the claimant and have known her for several years. Both testified that, prior to Schubert's December 17, 1984 injury, she was very active and exhibited no apparent restrictions in her back or legs and gave no indication of being in pain.

Both also testified that since the injury, Schubert has exhibited restricted physical activity, that it appears to be hard for her to bend, and that she moves in a slower manner. Both testified that there are times when she appears to be in pain.

Connie May, claimant's daughter, visited claimant at the emergency room on December 17, 1984, observed the discoloration and lump on claimant's left hip, and took her back to the emergency room. May cared for claimant for at least six weeks and testified that claimant made complaints of pain in her foot and hip during that period of time.

May testified that she observed nothing wrong with claimant's back, left hip or leg prior to December, 1984 and stated that she knew of no prior injuries to claimant's back, hip or leg. She stated that claimant had previously exhibited no restriction of motion and was very active. She stated that, since the injury of December, 1984, claimant is unable to bend, kneel or squat as before and, in general, moves like an old person. May testified that claimant's condition is worsening with the passage of time. Connie May testified that Dr. Nelson, an orthopaedic specialist, has now moved away from the Burlington, Iowa area.

APPLICABLE LAW AND ANALYSIS

The primary issue in this case concerns whether or not the fork lift accident of December 17, 1984, is a proximate cause of injury to claimant's back or left hip and leg, rather than being limited to her left foot.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 17, 1984 is causally related to the disability on which claimant now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

A cause is proximate if it is a substantial factor in bringing about the result, it need not be the only cause. Blacksmith v. All American Inc., 290 N.W.2d 348, 354 (1980 Iowa).

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).

Joint Exhibit 1 is the deposition of Richard F. Neiman, M.D., taken November 6, 1986. Dr. Neiman is a qualified neurologist. As a result of the various diagnostic tests which have been performed, Dr. Neiman has diagnosed claimant as having severe spinal stenosis at the L4-5 level with an anteriorly bulging disc. (Defendants' Exhibit 5; report dated May 22, 1986) Dr. Neiman notes that claimant had extensive osteoarthritis in her back which probably predated the accident but was aggravated by the accident. (Defendants' Exhibit 5; report dated April 14, 1986) (Joint Exhibit 1, pages 10-12) Dr. Neiman indicated that a multitude of activities could aggravate a preexisting condition such as the one claimant had prior to her fall. (Joint Exhibit 1, page 15) He stated, however:

> We see in many individuals who have asymptomatic degenerative changes in the back with foraminal stenosis, a relatively minor injury, like a fall, coming down can give -- make a very symptomatic condition, so I'd have to say even though you see a pre-existing condition, I felt the accident was the responsible cause. (Joint Exhibit 1, page 17)

Dr. Neiman opined that there was a direct causal connection between claimant's spinal condition and the injury of December 17, 1984. (Joint Exhibit 1, pages 20, 21, 24, 25) Dr. Neiman explained his disagreement with the opinion of Dr. Nelson, who felt that there was no relationship between the trauma of December 17, 1984 and claimant's current back condition. He stated:

> Well, certainly we have a condition of trauma to the buttocks. She obviously fell and hit the buttocks. That's well confirmed on the emergency room note. It describes a 5 by 8 centimeter

hematoma over the left thigh. She obviously fell and struck it. She had pain referable in the lower back since the time of the injury. Dr. McMurray felt that she had definite symptoms at least in his notes going through this. I felt her history was certainly consistent with that of an injury to the lower back being caused by the fall itself. I thought there was just no question about it at all. (Joint Exhibit 1, page 24)

H.N. McMurray, M.D., claimant's long-time family physician, in a report dated January 14, 1986, stated that his records going back to 1971 showed no prior problems relating to claimant having low back pain or left sciatic involvement. He also indicated that he had treated claimant for a possible thrombophlebitis connected with the hematoma on her hip in early 1985. Dr. McMurray indicated in the report that when he examined claimant again on November 8, 1985, she exhibited some sciatic symptoms on the left side. After testing and treatment for the problem, Dr. McMurray recommended that claimant see a neurologist. In the next to last paragraph of the report, Dr. McMurray stated, "It was my impression at that time that the current problem involved was that of traumatic origin, and she should continue under the care of the original physician....She was referred back to Dr. Nelson."

Duane K. Nelson, M.D., was claimant's treating physician. In a report dated December 20, 1985, he stated:

> I think that Mrs. Schubert's low back pain and sciatic pain are from degenerative disease in her back. I do not find evidence of a traumatic injury. The temporal relationship between injury and complaints is such that I cannot attribute her symptoms to the injury in December of 1984. Most cases of low back pain and sciatica are from degenerative changes although in our society a relationship to an injury or work condition is often sought to explain the discomfort.

In a report dated December 4, 1985, Dr. Nelson stated:

> The recovery was delayed by the development of low back and sciatic like pain. I cannot attribute these symptoms to her initial injury and [in] my opinion they are an unrelated problem.

Earlier indication in Dr. Nelson's notes seems somewhat inconsistent with the December reports. A note dated February 22, 1985 shows that he performed a straight leg raise test and also tested for knee jerks and ankle jerks, tests commonly performed on individuals with complaints of low back pain or

evidence of nerve impingement. A note of May 1, 1985 shows that those tests have again been performed. In a note of July 29, 1985, Dr. Nelson states:

> I think most of her left lower extremity symptoms may be due to radicular symptoms and an L5 distribution.... Her lower extremity pains have been present ever since her fall and I'm sure are due to her injury. We do know that she did have a contusion over the lateral aspect of her hip and its [sic] very likely that she began to experience the low grade radicular symptoms at that time.

In a report of October 10, 1985, Dr. Nelson states, "She has a sciatica which may or may not be related to her initial injury." He then went on to provide a disability rating and released her to return to work with restrictions.

Claimant obviously had a preexisting degenerative condition in her spine, but it appears that the condition was asymptomatic. She fell and then became symptomatic evidencing particular symptoms. A review of Dr. Nelson's notes and claimant's own testimony indicates that her back complaints have continued to progressively worsen since the fall and even since her brief return to work in October, 1985. It is normally expected that, following trauma, some recovery from the injuries will occur.

Individuals with preexisting degenerative changes in their spine are highly subject to injuries which aggravate that preexisting condition. Degenerative conditions generally worsen over a period of time without any intervening trauma. In cases such as this, it is difficult to differentiate the extent to which the current condition is a result of work-related trauma and the extent to which it is the normal progression of the degenerative condition. That question is not, however, currently before the undersigned for determination. It is found that the fall of December 17, 1984 is a substantial factor in bringing about complaints regarding claimant's low back and left leg and the injury of December 17, 1984 is found to have extended into claimant's back and left leg by aggravating a preexisting degenerative condition in her spine.

Claimant seeks a running award of healing period. The healing period provided by section 85.34(1) ends when it is medically indicated that significant improvement from the injury is not anticipated, when the employee returns to work or when the employee becomes medically capable of returning to employment substantially similar to that in which the employee was engaged at the time of injury. In this case, claimant's return to work was not a return to substantially similar employment. Claimant's return was to light duty, part-time work. It is determined that her healing period should be terminated at the point it was

medically indicated that significant improvement from the injury was not anticipated. Dr. Nelson indicated that such had occurred in his office note of October 10, 1985. A release to return to work and an impairment rating are also sometimes used as guidelines for determining the end of healing period. Thomas v. William Knutson & Son, Inc., 394 N.W.2d 124, 126 (Iowa App. 1984); Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). Dr. Neiman has provided treatment to claimant, but the treatment does not appear to have produced any significant improvement in claimant's condition. Without surgery, it is not expected that her condition will change significantly. It is therefore concluded that the healing period has ended and that it ended October 29, 1985 as stipulated by the parties and as supported by Dr. Nelson. A period of disability, such as one resulting from surgery, may support an entitlement to further healing period in the future, but such issue is not presently under determination. It would be very unusual for the period of recovery resulting from an injury of the type claimant suffered to extend over a period of years.

Roy Nelson testified that Dr. Nelson was the only physician that had been authorized to treat claimant. Apparently, the employer had not specifically authorized a replacement after Dr. Nelson left the Burlington area. Counsel stipulated that Dr. Neiman had been authorized to treat claimant. In a note maintained by Dr. Nelson dated February 18, 1985, he indicates that claimant was referred to Dr. McMurray for the possible blood clot and lump in her leg. Defendants contend that claimant's medical expenses were unauthorized as they relate to the five items for which claimant seeks recovery. Since defendants have denied liability for claimant's back condition, they are not entitled to select the care which claimant will receive for that condition. Barnhart v. MAQ, Inc., I Iowa Industrial Commissioner Report, 16 (Appeal Decision 1981). A referral by an authorized physician authorizes treatment by the physician to whom the referral is made. Limoges v. Meier Auto Salvage, I Iowa Industrial Commissioner Report, 207 (1981). The charges from Mercy Hospital (exhibit 17) were incurred under the direction of Dr. Neiman and are clearly the responsibility of the employer or of defendants. The referral to Dr. Dykstra at the Steindler Clinic was also made by Dr. Neiman and is likewise clearly the responsibility of defendants (exhibit 18).

It is difficult to rule upon the medical expense charges from Apothecary 24, from Dr. McMurray and from the Burlington Medical Center without making some finding with regard to whether or not the aggravation of claimant's preexisting degenerative spinal condition created any permanency. The issue which was bifurcated was determination of the extent of permanent disability and the issue of whether or not some degree of permanency existed is not necessarily prohibited from being addressed in this decision. Consistent with the opinion expressed by Dr. Neiman

5. Defendants are responsible for payment of claimant's medical expenses under the provision of section 85.27 in the amount of $2,767.23.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant forty five and one-seventh (45 1/7) weeks of healing period at the rate of one hundred seventy-two and 06/100 dollars ($172.06) per week commencing December 17, 1984. Defendants shall receive credit for all amounts previously paid in accordance with the stipulation of the parties.

IT IS FURTHER ORDERED that defendants pay claimant two thousand seven hundred sixty-seven and 23/100 dollars ($2,767.23) under the provisions of section 85.27 for the following medical expenses:

Apothecary 24	$1,795.23
Harry N. McMurray, M.D.	99.00
Mercy Hospital	316.00
Steindler Clinic	110.00
Burlington Medical Center	447.00

Defendants are entitled to credit for the amounts previously paid to Apothecary 24.

The costs of this proceeding are assessed against defendants.

Signed and filed this 9th day of June, 1987.

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRANK E. RIXEN, Claimant, vs. RALSTON PURINA CO., Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	File No. 784536 A R B I T R A T I O N D E C I S I O N FILED FEB 9 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Frank E. Rixen, claimant, against the Ralston Purina Company (Ralston), employer, and the Aetna Casualty and Surety Company, insurance carrier, for benefitsas a result of an alleged injury on July 25, 1984. A hearing was held in Davenport, Iowa, on December 18, 1986 and the case was submitted on that date.

The record consists of the testimony of claimant and James D. Dannels; claimant's exhibits 1 through 7; and defendants' exhibits A through T. Neither party filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $269.08; that permanent partial disability benefits would commence on December 29, 1984, if awarded; and that the contested medical bills are reasonable in amount.

ISSUES

The contested issues are:

1) Whether claimant received an injury that arose out of and in the course of his employment;

2) Whether there is a causal relationship between claimant's alleged injury and his asserted disability;

3) Nature and extent of disability; and

4) Whether claimant is entitled to benefits pursuant to Iowa Code section 85.27 and, if so, the extent of those benefits.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 49 years old and is currently employed by Ralston as a lab monitor. Claimant gathers samples and checks them as a lab monitor. He has worked for Ralston for sixteen years.

Claimant testified that on July 25, 1984, he twisted his right knee while standing at a counter at Ralston. At the time he twisted his right knee, he was turning to throw away samples into a wastebasket. His knee popped at the time of this injury. He told a supervisor about this incident and worked until 8:00 p.m. on the date of injury. Subsequently, a company doctor looked at the knee. Claimant saw J. E. Ives, M.D., about a week later and he treated with Dr. Ives for about a month. Claimant was working during this time period.

In the fall of 1984, claimant sought treatment from Ralph H. Congdon, M.D. He had surgery on November 28, 1984 and returned to work thirty-five days later. Claimant stated that he was unable to recall any restrictions being imposed on him at the time he returned to work. Claimant testified that he had no right knee problem prior to July 1984. However, claimant acknowledged a left knee problem prior to July 1984. In 1978, Richard L. Kreiter, M.D., did surgery on claimant's left knee.

Claimant testified that in 1983 his left knee bothered him and as result he went to Iowa City for treatment. His back was also bothering him at this time. Currently, his right knee has a burning sensation and he "walks with a little bit of a limp yet." Because of his right knee, he cannot squat or bend down. If he tried to squat, "he would fall in a heap."

On cross-examination, claimant testified that he had been a sampler for about a year prior to the incident of July 25, 1984. His ingredient sampling job had been eliminated. On July 25, 1984, claimant was a lab monitor and had the responsibility for gathering samples and checking them.

On cross-examination, claimant acknowledged that in September 1983, he stated to Robert Karr, M.D., that he had dull pain in both knees. See exhibit H, paragraph 2. It was pointed out to claimant that exhibit L documents that claimant had left knee surgery in 1983, rather than 1978.

Claimant testified on cross-examination, that at the time he injured his right knee on July 25, 1984, he was turning to his

left. Claimant stated that his weight was on his right leg. Claimant stated that "his knee gave out and then he lost his balance." He also stated that "his right knee had not been unstable prior to July 25, 1984."

On recross-examination, claimant acknowledged a "1983 tree incident" at his home.

James D. Dannels testified that he is a safety and training person for Ralston and has worked in this capacity for nine years. Mr. Dannels has worked for Ralston for a total of seventeen years. Dannels testified that in 1983 claimant had a right knee problem. Dannels testified on cross-examinaton that in August 1983 claimant was sampling ingredients. At that time, claimant was concerned about standing on cement floors and walking. These activities were part of his job. Dannels contacted Dr. Keister and described claimant's job to the doctor. Dr. Keister said that claimant had weak knees, but he told Dannels claimant could do his job. In 1983, walking and climbing was part of claimant's job. In 1983, Dr. Keister restricted claimant to soft shoes and no prolonged standing. See restrictions contained in claimant's exhibit 1. Dannels testified that these restrictions are still in effect.

Dannels has talked with claimant's wife about claimant's knees. Claimant's wife said to Dannels that "claimant's knees give out." This comment was made prior to July 1984.

Exhibit 2 (dated December 12, 1985) is authored by Dr. Kreiter and reads:

> I am writing in regard to information you requested on Frank Rixen. In review of my old records, I see that on only one occasion did he complain of some discomfort in his right knee. At that time he had been working long hours and had developed an aching along the medial aspects of his knees for which he took 10 to 12 aspirin. I did obtain x-rays of the knees at that time, standing, and his joint compartments were well maintained. As you know he did undergo an arthroscopy of the left knee in 1983 but seemed to function reasonably well in regard to the right knee until his accident or twist in July of 1984. I certainly cannot give any impairment rating to the knee prior to that date since it was functional and really had no impairment on a physical evaluation. He does have permanency now since he had a partial meniscectomy and that would probably give him a 5% permanent disability to the leg because of that surgery.

Exhibit 3 (dated February 15, 1985) is authored by Dr.

Congdon and reads in part:

> I think this patient's type of mechanism of injury best be described as an event that caused the patient to become symptomatic to the point of intolerability in a condition that was previously tolerable. I do believe he tore his meniscus on the 25th of July 1984 but also it was probably not a normal meniscus that finally gave way.

Exhibit H (dated September 6, 1983) is authored by Robert Karr, M.D., and reads in part:

> Frank Rixen was seen in the Rheumatology Clinic on August 31, 1983, with a diagnosis of chronic low back pain, etiology unknown.
>
> This 45 year old male has a several year history of gradual onset of dull, aching pain in both knees, both shoulders and low back. The pain is always exacerbated with activity and relieved with rest.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on July 25, 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).

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 25, 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).

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.

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 following discusson will assume that claimant had trouble with both of his knees prior to July 25, 1984. In resolving this case, I am presented with a fact question that depends in part on the resolution of the question of whether claimant is a credible witness. There will be a finding that claimant is a credible witness.

The evidence in this case, both lay and expert, support a finding that claimant materially aggravated the condition of his right knee at work on July 25, 1984. Prior to July 25, 1984, claimant's right knee may not have been in perfect condition, but he was able to work despite its imperfection. Claimant's testimony that he injured his right knee while twisting on July 25, 1984 is believed. Claimant has carried his burden of proof on the causation issuesin this case.

Claimant is entitled to healing period benefits from July 25, 1984 for the time periods he was off work. He is entitled to eleven weeks of permanent partial disability benefits based on the five percent rating of record. Defendants also owe the contested medical bills as claimant has carried his burden on the causation issues in this case. Any authorization argument fails because defendants did not admit this was a compensable injury, and then assert their statutory right to control the medical care given.

FINDINGS OF FACT

1. On July 25, 1984, claimant was working as a lab monitor for Ralston and in this capacity gathered and tested samples.

2. On July 25, 1984, claimant injured his right knee while standing at a counter at work when turning or twisting to throw samples into a wastebasket.

3. The injury that claimant sustained on July 25, 1984 materially aggravated his right knee condition; his right knee was not in perfect condition prior to July 25, 1984.

4. Claimant's injury of July 25, 1984 resulted in five percent (5%) permanent partial impairment to his right lower

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DELBERT F. SEIBERT, SR.,	:	
Claimant,	:	
vs.	:	FILE NOS. 790700 & 790701
JOHN MORRELL & COMPANY,	:	A R B I T R A T I O N
Employer, Self-Insured, Defendant.	:	D E C I S I O N

INTRODUCTION

This is a proceeding in arbitration brought by Delbert F. Seibert, Sr., claimant against John Morrell & Company, employer and self-insured defendant, for benefits as a result of an injury (heart attack) that occurred on August 15, 1983 and another injury (heart attack) that occurred on June 6, 1984. A hearing was held on November 24, 1986 at Storm Lake, Iowa and the case was fully submitted at the close of the hearing. The record consists of joint exhibits A through F, the testimony of Delbert F. Seibert, Sr., (claimant) and Dennis Howrey (personnel and labor relations manager). Excellent briefs were submitted by each attorney.

DATE OF INJURY CLARIFICATION

The first report of injury and the petition give a date of the second injury (heart attack) as June 2, 1984. The prehearing report uses the date of June 8, 1984. However, claimant testified that his second heart attack occurred on June 6, 1984 (Exhibit F, page 18) and the hospital admission date is shown as June 6, 1984 (Ex. A, Deposition Ex. A). Therefore, the date of June 6, 1984 will be used as the second injury (heart attack) date in this decision.

STIPULATIONS

The parties stipulated to the following matters:

That an employer/employee relationship existed between the claimant and the employer at the time of both of the alleged injuries.

That there was no dispute to be resolved about the claimant's entitlement to temporary disability benefits as a result of the

first injury which occurred on August 15, 1983, if the injury is found to be compensable.

That the time off work for which the claimant seeks temporary disability benefits as a result of the second alleged injury which occurred on June 6, 1984 is from June 6, 1984 to September 27, 1984 in the event of an award.

That in the event of an award of permanent partial disability, the disability is industrial disability and the commencement date of benefits is September 27, 1984.

That the weekly rate of compensation in the event of an award is $209.44 per week.

That the claimant's entitlement to medical benefits is no longer in dispute.

That there is no claim for credits nor any bifurcated proceedings.

ISSUES

The parties submitted the following issues for determination at the time of the hearing:

Whether the claimant sustained an injury on August 15, 1983 and another injury on June 6, 1984 arising out of and in the course of his employment with the employer.

Whether either injury was the cause of either temporary or permanent disability.

Whether the claimant is entitled to temporary disability benefits as a result of the injury on June 6, 1984.

Whether the claimant is entitled to permanent disability benefits as a result of either injury to include whether the claimant is an odd-lot employee or otherwise entitled to permanent total disability.

SUMMARY OF THE EVIDENCE

Claimant was born on July 15, 1928 at Moulton, Iowa near Ottumwa. He was 58 years old at the time of the hearing and 55 years old at the time of both of his heart attacks, one of which occurred on August 15, 1983 and the other one on June 6, 1984. Claimant graduated from high school in 1948 at the age of 20 because he had difficulty as a student. He started to work for the employer after high school on November 2, 1948. He passed a preemployment physical examination. He continued to work for the employer for approximately 36 years until his second heart

attack on June 6, 1984 and his voluntary retirement in November of 1984. He did spend two years in the military service in 1950 and 1952 for the Korean conflict at which time he served as a maintenance man in the field artillery in the Army in Japan. Claimant worked at the Ottumwa plant for 25 years until it closed in 1973. Then he transferred to the Estherville plant. Most of his career he worked on the hog kill floor snatching guts (removing viscera), dropping bung guts (a related job), cutting spermatic cords or as a utility man performing any job that might be designated as a relief man.

The claimant's testimony as related in this summary of the evidence is a combination of what claimant testified to in his deposition (Ex. F) and what he testified to at the time of the hearing.

The Estherville plant shut down generally from June of 1982 until August of 1983, a period of approximately 14 months. When the plant opened claimant went back to dropping bung guts. This job amounts to cutting out the anus of a hog with a butcher knife and pushing the bung and bung guts through the hip bones which have already been fractured so that the bung and bung guts can be removed with the other intestinal viscera by other employees. Claimant testified it did not require a lot of physical exertion but it was fast (Ex. F, p. 7). Claimant testified that he did not want to go back to bung guts and he told them he did not think he could do it (Ex. F, p. 7). He was soft physically from being off work during the shut down (Ex. F, p. 9). In addition, the employer planned to speed up the chain faster than he had ever worked before (Ex. F, p. 8). Moreover, previously two men had dropped bung guts and now he would be the only man on this job. Furthermore, he was upset because the employer reduced his wages from approximately $11.00 per hour when the plant closed to approximately $8.00 per hour when the plant reopened. This amounted to approximately a 25 percent cut in wages. He testified that he did the job because he had to earn a living. He also conceded that he chose this job; he bid on it and got it because he needed money after being out of work for over a year. However, he was not able to keep up. It was necessary to shut down the line on account of him several times. The foreman told him that if he could not do the job that they would find someone else who could and get rid of him. He felt depressed, disturbed and did not know what he would do if he got fired.

Then at approximately 9:00 a.m. on August 15, 1983, two and one-half days after the plant had reopened, claimant could not keep up. The line shut down. Roger Hewitt, his foreman, yelled at him. Thirty minutes later he had his first heart attack. His shoulder ached, he had chest pain and he got dizzy (hearing testimony). He got weak in the knees, short of breath, and had chest pain (Ex. F, p. 10). The plant nurse took his blood

pressure and pulse and sent him to the hospital for about three weeks (Ex. F, p. 11). He did not return to work until January 3, 1984 (Ex. F, p. 12). At that time he was released to do light work which consisted mainly of maintenance jobs (Ex. F, p. 13).

In May of 1984, a foreman came to the maintenance shop and told claimant that he was needed back on the production line on the kill floor cutting out spermatic cords. In his deposition claimant said this foreman was Roger Hewitt. In his hearing testimony he said this foreman was Bob Reed.

Barrows are castrated male hogs. Cutting out spermatic cords consists of cutting out the scar tissue, a little red cord and a bladder at the end of it with a knife on each side of the barrow. Claimant characterized this as a very difficult job because he had to work with his hands above his head all of the time with no chance to rest them at his side (Ex. F, p. 17). Claimant testified that Donald Wolters, M.D., his physician, had advised him not to work with his hands over his head. However, claimant testified that when he started on this job he thought he could do it. However, after he started it he found out that he could not keep up. He consulted Dr. Wolters who recommended that claimant go back to light duty again. However, his foreman, Roger Hewitt, told claimant that there was not anything else he could do so he did not know what to tell claimant (Ex. F, p. 17).

When too many barrows came down the line without gilts in between, claimant could not keep up and it was necessary to stop the line. Then one of the foremen -- either Bob Reed, Orville Molan or Roger Hewitt -- would chew him out. They took turns. They indicated that if he could not do the job they would find someone else who could. Claimant received the impression he would be fired (Ex. F, pp. 18 & 19). Claimant admitted, however, that he did not know of any employee who was ever fired because they could not do a certain job.

Then approximately two weeks after he went back to the line cutting spermatic cords at approximately 9:00 a.m. on June 6, 1984 Bob Reed yelled at him for stopping the line. About 15 minutes later claimant had his second heart attack. He felt pain in his shoulder and chest and became short of breath. The nurse told him he was having a heart attack and sent him back to the hospital for several days (Ex. F, pp. 19 & 20). Claimant testified at the hearing that he has not worked since that day. However, he was released for light duty again and he asked Dennis Howrey if he could return to work, but was told that the employer had no light duty jobs for him. In his deposition claimant testified that he was never released to go back to work (Ex. F., p. 21). Claimant testified that he took voluntary retirement because he could not get light duty at the employer's and he needed money.

Claimant testified that he had no prior heart problems before these two heart attacks. He quit smoking after the first heart attack. He currently has pain if he climbs stairs or walks too fast, does anything that takes any strain, lifting or heavy work (Ex. F, p. 22). He does not mow the yard, rake the yard, shovel snow or carry heavy groceries. He carried his wife's suitcases up three steps, blacked out and fell back down the steps. He has not sought any employment since his last heart attack (Ex. F, p. 23). He has no plans or intention of seeking other employment (Ex. F, p. 24). He has not investigated any vocational rehabilitation programs. Social security did not recommend vocational rehabilitation due to his age.

Claimant testified that he has had diabetes for approximately 20 years since he was 35 years old for which he takes insulin (Ex. F, p. 22). He has what is known as brittle diabetes which is a more severe and difficult to control form of diabetes. Claimant stated that he had two brothers die from heart attacks prematurely. His mother and father died of heart attacks but not until their old age in their 70's. His father also had diabetes (Ex. F, pp. 26 & 27).

Claimant testified he moved back to the Ottumwa area in April of 1986. He now receives a pension of $476.77 a month from John Morrell & Company and a disability pension from Social Security in the amount of $717.00 for a total retirement income of $1,193.77. It was demonstrated that claimant was receiving more income now than when he was working earning wages. Moreover, social security disability also entitles the claimant to Medicare coverage. Claimant testified that he is out of condition. His current activities are limited to short walks, watching television and fishing for channel cat. He said that he was enjoying retirement and that he fishes every day in the summer. Claimant agreed that if he took a full-time job that he would lose his social security benefits. Nevertheless, he testified that he would go back to work if he were able to do so.

Dean Hanson, chief union steward and 30 year Morrell employee, corroborated claimant's testimony on several points. He testified that when the plant reopened in August of 1983, the employees suffered a wage cut of approximately 25 percent. Many workers were eliminated and the remaining employees were required to do more work. The speed of the chain was increased. The employees had agreed to lower wages but not the increase in work. The employees were bitter and upset. The increase in work doubled their madness and reprisal against the company (Ex. D, pp. 5-9).

After the first heart attack the company wanted the claimant to work on the line because he was the only qualified person; whereas claimant and the union wanted claimant to have a rehabilitation job. Both Hanson and the divisional steward, Irwin Booth, tried to get claimant off the line but the foreman would not bring him

off. Hanson and other union representatives were involved a number of times because claimant could not keep up; the chain was stopped; and the foreman were yelling at claimant to do the job or they would find someone else (Ex. D, pp. 12-14 and 24 & 25). Hanson personally heard Roger Hewitt holler at claimant to hurry up (Ex. D, p. 27). Hanson was personally called to claimant's station about four times in the two week period before the second heart attack (Ex. D, p. 29). The spermatic cord job was not one that claimant had bid on. He was there because the company forced him there (Ex. D, p. 30).

Dennis Howrey, personnel and labor relations manager for the employer, testified that claimant bid on and therefore chose the job of dropping bungs prior to his first heart attack. The chain speed on the dropping bungs job was 650 per hour when the plant closed in 1982. Due to an industrial engineering study it was scheduled to increase to 780 per hour after the plant reopened in August of 1984. But it was to be increased over a period of time because there were many new and inexperienced people on the line when the plant reopened. Howrey testified that on the day that the claimant had his second heart attack that the chain speed was set for 475 to 500 hogs per hour. However, Howrey estimated that the actual chain speed was probably 350 to 375 hogs per hour due to many stoppages of the line. Howrey testified that in his opinion the speed of the chain was slower on that day then it was when the plant closed. The spermatic cord job was not considered strenuous, but rather was in the nature of light duty or restricted duty for a person who might have a hand laceration. He knew of no one who was ever fired because he could not do a job. If claimant applied for a job today, at age 51 with two heart attacks, Howrey would look at other applicants first. It is an employer's market. There are many candidates to chose from.

Donald Wolters, M.D., testified that he is a physician in family practice in Esterville, Iowa. He treated claimant for his first heart attack on August 15, 1983 and his second heart attack on June 6, 1984. He had not treated claimant for heart problems prior to this time. His medical diagnoses was myocardial infarction each time substantiated by an electrocardiogram and elevated enzymes. After the second episode Dr. Wolters advised claimant not to go back to the kind of work he was previously doing because he had two episodes of myocardial infarction while he was working there (Ex. A, p. 8). Dr. Wolters stated that stress, both physical and emotional, was an aggravating factor to the first myocardial infarction (Ex. A, p. 9). He stated that claimant's job situation and attendant stress probably aggravated his second myocardial infarction (Ex. A, p. 9). In answer to a lengthy hypothetical question Dr. Wolters indicated that claimant's job circumstances were both a possible and probable cause or aggravation of claimant's second myocardial infarction (Ex. A, p. 9-12).

Dr. Wolters said that the first myocardial infarction damaged the heart muscle. This was evidenced by the electrocardiogram and the abnormal amount of enzymes in the bloodstream. This would reduce the ability of the heart to function under periods of stress and strain after the first heart attack (Ex. A, pp. 17 & 18). Claimant is unable to return to his previous job as a probable result of the aggravation of his heart condition by the physical and emotional stress involved by his job at Morrell's (Ex. A, p. 28). Claimant's heart condition is permanent. Dr. Wolters did not feel that claimant could return to his former job on the production line with the employer (Ex. A, pp. 12 & 13).

Dr. Wolters granted that claimant had been an insulin diabetic for approximately 25 years and that diabetics tend to develope cardiovascular disease at a greater rate than persons who are not diabetics (Ex. A, pp. 14 & 15). He stated that claimant has ischemic heart disease. There is an insufficient amount of blood profusing the heart because of the diminished caliber of his coronary arteries (Ex. A, pp. 15 & 16). There was also evidence that claimant smoked a pack of cigarettes a day for approximately 39 years from age 16 to age 55. Dr. Wolters referred claimant to Robert J. Blommer, M.D., who is an internal medicine specialist in Ottumwa, Iowa. Dr. Blommer noted that claimant also had a history of alcohol excess (Ex. A, Dep. Ex. 1). However, claimant denied it in his testimony and there was no evidence of it in any other medical records.

Dr. Wolters said that even though claimant's heart attacks were not severe, nevertheless, the fact claimant has more discomfort with less exertion is due to the heart attacks because he did not think that claimant's diabetic condition had changed all that much (Ex. A, pp. 18 & 19). He said that claimant had a more severe form of diabetes known as brittle diabetes in which his blood sugar level fluctuates rapidly, uncontrollably and unpredictably. This increased the claimant's predisposition for myocardial infarction (Ex. A, pp. 20 & 21).

Although claimant could not go back to the same kind of work on the production line, Dr. Wolters did feel that claimant was not totally disabled. He should avoid work meeting quotas or certain demands because claimant was a very hard worker. The plant nurse was concerned about allowing him to go back to work because claimant did not know when to quit (Ex. A, p. 22). Dr. Wolters said claimant could work at a gas station, work as a night watchman or sort nuts and bolts. He could drive a tractor and do field work but could not throw bales, do heavy lifting or stand mental stress or strain. He could work as a clerk in a store (Ex. A, p. 23). He believed claimant could have returned to some kind of light duty work within three to four months after the onset of his second heart attack generally and more specifically on September 27, 1984 (Ex. A, p. 27).

Dr. Wolters said he agreed with two statements from the book entitled the Heart written by Jay Willis Hurst, copyright 1986. Those two quotes are as follows:

Quote. "A single, isolated, identified physical or emotional stress in individuals rendered susceptible to harm therefrom by reason of preexistent heart disease, whether or not previously known or symptomatic, if of sufficient intensity and duration, is capable of eliciting adverse cardiac responses which, in turn, can trigger or hasten certain cardiac lesions and dysfunctions such as an acute attack of angina pectoris or an acute myocardial infarction, a cardiac dysrhythmia (including sudden death therefrom), and a bout of acute congestive heart failure." Close quote.
(Ex. B, p. 4)

Quote. "The shorter the time interval between the exposure of an individual to a potentially noxious stimulus and the appearance of clinical or pathologic evidence of new heart disease or dysfunction, the more likely there is a causal relationship between the two. Conversely, the farther apart in time, the less likely is a cause and effect relation." Close quote.
(Ex. B, p. 5)

Dr. Wolters did not assess an impairment rating (Ex. A & B). Dr. Blommer made no comment on causal connection, impairment nor did he give an impairment rating (Ex. A, Dep. Ex. 1).

Claimant was examined at the Mercy Occupational Evaluation Center (MOEC) at Des Moines on November 26, 1985 by Dr. Paul From, M.D., and Robert W. Jones and G. Patrick Weigel, vocational rehabilitation personnel. They submitted a report and evaluation dated December 3, 1985 (Ex. E, Dep. Ex. 1). Dr. From also testified by deposition that he is an internal medicine doctor who works a lot with heart problems. He is the founder and director of the MOEC (Ex. E, pp. 4 & 5). He found that claimant had a number of significant health problems: (1) diabetes mellitus; (2) arteriosclerotic coronary artery disease; (3) possible anginal syndrome; (4) cataract in the right eye; (5) arteriosclerosis obliterans of the lower extremities; (6) chronic bronchitis from previous tobacco abuse; (7) seborrheic; (8) complications of diabetes with microaneurysms, retinopathy, and peripheral neuropathy; (9) benign prostatic hyperplasia; (10) past history of bicipital tendonitis; and (11) status post appendectomy, hemorrhoidectomy, fracture of the left clavical and fracture of the ribs (Ex. E, pp. 19 & 20). A number of these diseases are risk factors and create a predeposition for a heart attack: (1) family history of heart disease and diabetes;

(2) longstanding diabetes mellitus; (3) vascular problems in the lower extremities, eyes and heart; (4) wide spread arteriosclerotic disease; and, (5) tobacco abuse that accellerated coronary artery disease (Ex. E, pp. 22 & 23 and 33-36).

Dr. From said it would be impossible for him to say whether dropping bung guts or cutting spermatic cords caused claimant's myocardial infarctions. It is possible. It did occur at work. Packinghouses subject workers to physical and psychological stress. He stated that he agrees with the American Heart Association that myocardial infarctions are usually multifactorial. Myocardial infarctions usually occur when they are going to occur anyway. Most of them occur while at rest. He concluded by saying, "I think that I would say that since it did occur there, it is possible it was related and that I could not say more than that" (Ex. E, pp. 24-26).

Dr. From conceded that he was not aware of the precise physical stresses or any of the emotional stresses on claimant at the time of his heart attacks (Ex. E, pp. 36-43). However, he still maintained the cause was multifactorial. Dr. From said that claimant's heart disease was caused by diabetes, aging, background genetics, and arteriosclerosis. But it was possible that his work at Morrell's aggravated his coronary diseases to infarction. The fact he had two heart attacks at work would make it even more possible but he could not bring himself to say that the job caused the infarctions. He would not, however, dispute Dr. Wolters' opinion that it was probable (Ex. E, pp. 43-45).

Based on his own tests, Dr. From stated that the permanent functional impairment would not be in the sedentary range. Rather claimant had the ability to do work like painting, masonary, paper hanging and light carpentry work. In the recreational activity area claimant could walk three and one-half miles per hour, bicycle, play table tennis, fox trot, play single badminton, play double tennis, rake leaves, hoe in a garden and perform many calisthenics. Dr. From said that claimant has some impairment, but some of it may be due to deconditioning and psychological factors (Ex. E, pp. 26 & 27). All of claimant's impairment may not be due to his heart. Claimant has no heart failure, no anginal syndrome, no significant arrhythmia, he takes only a mild heart pill and he could meet the stress on Dr. From's stress test. So he was not completely disabled. His other health problems may be a part of his total disability. He can work at a sedentary to moderate activity level and, therefore, he is not completely impaired or totally disabled. Based on AMA Guidelines, claimant's degree of physical impairment would be less than 20 percent of the whole man (Ex. E, pp. 27-30 and p. 53).

When Dr. From refers to the whole man he means his impairment due to this heart, blood vessels, nerves, years of tobacco abuse

and diabetes all at once (Ex. E, p. 58).

Later in his testimony Dr. From said that claimant had an impairment of about one-fourth to one-fifth of a man and the whole man impairment is the result of all of these problems (Ex. E, p. 59).

Dr. From said that claimant could perform light to medium work and lift and carry 25 pounds. However, claimant should avoid moving machinery and electrical hazards. Claimant could do stockroom clerking, mailroom clerking, mechanical repair work done at a bench, security guard and light custodial work (Ex. E, pp. 31 & 32 and Dep. Ex. 1, p. II-3).

Dr. From stated that claimant's biggest problem is the ongoing process of artery disease that both predated and post-dated these two heart attacks. He believed that since claimant is a diabetic without good control that he will suffer another infarction before too many months or years go by. Coronary artery disease has no known cure but possibly things could be done to help bide him over some more time (Ex. E, pp. 30 & 31).

Stanley W. Thorpe testified by deposition that he is a vocational rehabilitation specialist who saw and evaluated claimant in December of 1985. He took a family history, a work history and administered several tests (Ex. C, pp. 1-15). All of his scores were low, typical of a person with no career choices or dreams, which may have been indicative of his age, physical condition and health. It was indicative of a person thinking of retirement (Ex. C, p. 16). His intelligence would not qualify him for an entry level job (Ex. C, pp. 18 & 19). Claimant had third and fourth grade reading abilities (Ex. C, p. 20). Thorpe testified that given claimant's age, education, job experience, health and vocational abilities, the services that claimant is capable of performing are so limited in quality, quantity, dependability, or availability that they do not exist in a reasonably stable competitive job market (Ex. C, pp. 26 & 27). The jobs Dr. From suggested are not available on a regular and continuous basis and if they were claimant could not do them (Ex. C, p. 27). If they were available and claimant could do them they would pay the minimum wage of approximately $3.50 per hour. Claimant was earning approximately $8.25 per hour when he suffered his second myocardial infarction (Ex. C, p. 27 & 28). Thorpe said that 95 percent of his placements are in Des Moines or Minneapolis. He places about 40 percent of the people he trains. Possibly due to retirement claimant was not motivated to achieve. Claimant did not ask Thorpe to find him a job. He evaluated him only. Thorpe acknowledged that claimant was receiving approximately $1200 per month and that if he went back to work he would lose his social security disability retirement benefit and also Medicare coverage (Ex. C, pp. 29-37). He thought, however, that claimant's lack of motivation might stem

from his physical disabilities and his heart attacks (Cl. Ex. C, pp. 37 & 38). The witness granted that his testimony was inconsistent with a number of things that Dr. From listed that the claimant was able to do and that it was also inconsistent that the claimant did not do anything at the present time (Ex. C, p. 39). It was Thorpe's final conclusion that claimant was fully disabled (Ex. C, Dep. Ex. 1). Thorpe read the MOEC evaluation and disagreed with several particulars in it. Thorpe still felt that the claimant was fully disabled (Ex. C, Dep. Ex. 1).

APPLICABLE LAW AND ANALYSIS

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).

Claimant has the burden of proving by a preponderance of the evidence that he received injuries on August 15, 1983 and June 6, 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).

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

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63 (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, 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, 188 N.W.2d 283 (Iowa 1971), Musselman, 261 Iowa 352, 154 N.W.2d 128 (1967).

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation

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

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

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

An employer takes an employee subject to any active or

dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler, 252 Iowa 613, 620, 106 N.W.2d 591 (1960), and cases cited.

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

The question is whether the diseased condition was the cause or whether the employment was a proximate contributing cause Musselman, 154 N.W.2d 128, 132 (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 348, 354 (Iowa 1980). In addition, it has been stated by Larson:

> If there is some personal cause or 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 non-employment life. The comparison is not with the employee's usual exertion in his employment but with exertions of normal non-employment life of this or any other person. 1B Larson §38.83,p.7-237

The Iowa Supreme Court has adopted the Larson test Briarcliff College v. Campolo, 360 N.W.2d 91, 94, 95 (Iowa 1984).

The claimant has the burden of proving by a preponderance of the evidence that the injuries of August 15, 1983 and June 6, 1984 are causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

The opinion of the supreme court in Olson, 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. * * * *

Claimant has sustained the burden of proof by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with the employer at the time of his first myocardial infarction on August 15, 1983 and at the time of the second myocardial infarction on June 6, 1984. Claimant and Dr. Wolters (his family doctor and treating physician) both testified that claimant had no heart problems prior to his first myocardial infarction. Dr. Wolters, Dr. From and other physicians all found that claimant did have severe and longstanding diabetes mellitus, ischemic heart disease, arteriosclerotic coronary artery disease, family history of heart disease and was a cigarette smoker for approximately 40 years before his first heart attack. Claimant also had a number of other health problems. There was general agreement that most of these conditions were all risk factors and predisposed a heart attack at some time. Moreover, claimant's form of brittle diabetes which was unpredictable and uncontrollable increased his predeposition for a myocardial infarction. Dr. Wolters testified that both physical and emotional stress at work were aggravating factors to both the first and second myocardial infarctions. He indicated that the job circumstances were both a possible and probable cause or aggravation. Dr. Wolters agreed with the quote from the book entitled Heart to the effect that physical and emotional stress can cause an infarction in people with a preexisting condition and that the shorter the interval between the stress and the infarction the more likely there was a causal relationship. In this case, both the claimant's infarctions

incurred shortly after he was hollered at. Also, he had been placed under the stress of the line stoppages and his perceived threat of losing his job of 35 years.

Dr. From preferred to believe that heart attacks are multifactorial and occur when they are going to occur anyway as the result of the underlying conditions that predispose them. He thought that it was impossible to say what specifically caused claimant's heart attack. However, he conceded that it was possible that claimant's work of dropping bung guts and cutting out spermatic cords under the circumstances of this case either caused or aggravated the infarction. Dr. From freely acknowledged that both infarctions did occur while at work. He stated that this increased the possibility. Dr. From said that he did not dispute the opinions of Dr. Wolters that it was probable. Dr. From's testimony does not controvert, contradict or refute Dr. Wolters' testimony. If anything, it supports Dr. Wolters' testimony by saying that it was possible that the work caused or aggravated the infarctions.

It is true that claimant had natural changes occurring in his body. However, the myocardial infarctions under the facts of this case are an extraneous factor that are the result of exertion and stresses greater than those normally found in non-employment life.

The res gestae of the first infarction support Dr. Wolters' opinion. Claimant had been off work for 14 months. He was soft and deconditioned. He had only been back to work for two and one-half days. He was now working alone dropping bung guts rather than working with another man. The speed of the chain was in the process of being increased. Claimant could not keep up. The chain was shut down several times. When this occurred the foreman chewed him out and claimant was told to either do the job or they would find somebody else who could. Claimant perceived that his only method of livelihood of the past 35 years was in immediate jeopardy. The foreman yelled at him. Thirty minutes later claimant had his first myocardial infarction on August 15, 1983. The fact that claimant had incurred a 25 percent wage cut when the plant reopened may also have been a factor.

At the time of the second myocardial infarction claimant had been returned to the line cutting spermatic cords after six months of light duty. He had to work with his hands and arms raised at all times which was contrary to Dr. Wolters' recommendations. He consulted Dr. Wolters and Dr. Wolters told him to go back to light duty. However, the foreman said he did not have any light duty for him. Claimant tried to do the job but he could not. He caused several line stoppages. The foreman chewed him out. Too many barrows came along in one group and the line stopped. The foreman yelled at him. Fifteen minutes later he had the

second myocardial infarction on June 6, 1984.

Hansen, the chief union steward, corroborated claimant's testimony on the stressful conditions in general. In particular, he testified that he and others tried on several occasions to get claimant removed from the stressful circumstances. However, the foreman refused saying claimant was the only qualified person to do the job. Hansen testified that he personally witnessed the line stoppages and the claimant being yelled at.

Howrey testified that the speed of the line on the day of the first myocardial infarction was less than when the plant closed. However, this was an estimate. He did not testify from plant records. He may or may not have been correct. It was established that the line was in the process of being speeded up. That was established. Claimant could not keep up and was getting pressure from the foreman. That was established. Defendants did not introduce any evidence to contradict or rebut the fact that the claimant was under pressure from the foreman and was being yelled at. Claimant was an extremely conscientious worker according to the nurse. She was concerned because he did not know when to quit. Claimant perceived that the only employment he had known since high school and that his only source of income for the last 35 years was in serious jeopardy at the time of the second heart attack.

Therefore, claimant has proven that both the physical and psychological stress of his job aggravated his very serious and multiple predepositions to myocardial infarction at the time of both heart attacks. Claimant has demonstrated that both the physical and psychological stress was greater than non-employment life. There is no serious evidence to the contrary. Claimant has proven both myocardial infarctions are injuries arising out of and in the course of his employment with the employer.

The parties have stipulated that there is no dispute concerning claimant's entitlement to temporary disability benefits as a result of the first myocardial infarction. Accordingly, no determination is made on this point at this time.

The parties have stipulated that the claimant's time off work for temporary disability benefits for the second myocardial infarctions should be from June 6, 1984 to September 27, 1984. Dr. Wolters testified that even though claimant could not return to his old job, he could have returned to light duty work on September 27, 1984. This is evidence that indicates the claimant obtained maximum medical improvement on September 27, 1984. Therefore, it is found that claimant is entitled to healing period benefits from June 6, 1984, the date of the second infarction, to September 27, 1984, the date that it became medically indicated that significant improvement from the injury was no longer anticipated (Iowa Code section 85.34(1)).

Claimant is not permanently and totally disabled. Both Dr. Wolters and Dr. From said that claimant could not return to his old job on the production line. However, both doctors specified a number of jobs that the claimant could do. Dr. Wolters said he could work at a gas station, work as a night watchman or sort nuts and bolts. He could drive a tractor and do field work but should avoid heavy bales and stress and strain. He could work as a clerk in a store or other light duty work. Dr. From said claimant could do more than sedentary things. He could do such tasks as painting, masonary, paper hanging and light carpentry work. Dr. From enumerated a number of energetic recreational activities claimant could perform. Some of claimant's disability is due to deconditioning and psychological factors. Claimant can do light to medium work. Claimant could do stockroom clerking, mailroom clerking, mechanical repair work at a bench, security guard and light custodial work. Dr. From said that claimant's biggest problem is the ongoing process of artery disease that both predated and post-dated his heart attacks. He believed that claimant would suffer another myocardial infarction before too many years or months due to the claimant's poorly controlled diabetes.

Claimant is not an odd-lot employee. Professor Larson's statement of the general rule indicates that in order to make a prima facie case, claimant must demonstrate an effort to secure employment in his area of residence. Guyton v. Irving Jensen Company, 373 N.W.2d 101, 105 (Iowa 1985). Claimant testified in his deposition and at the hearing that he had not sought any employment and he had no intention to do so.

Thorpe's opinion that claimant is fully disabled must be discounted because it conflicts with the opinion of the two medical doctors in this case. Also, Thorpe found that the claimant had no motivation to work. Thorpe's tests indicated that claimant was retired and indeed he was by virtue of his own testimony at the hearing. This was probably a wise choice on the part of claimant. He was suffering from a number of very serious physical illnesses at the time of both heart attacks. Moreover, claimant was receiving more money in disability income than he was receiving when he was earning wages. In assessing the amount of disability, consideration must be given to the employee's plans for retirement. Curtis v. Swift Independent Packing, IV Iowa Industrial Commissioner Report 88 (1984) and claimant's retirement benefits. Swan v. Industrial Engineering Equipment Co., IV Iowa Industrial Commissioner Report 353 (1984).

Dr. Wolters did not designate a permanent impairment rating. Dr. From assessed 20 percent of the body as a whole due to all of the claimant's poor health conditions of heart, blood vessels, nerves, tobacco abuse and diabetes.

Claimant was age 55 at the time of the heart attacks. He

has the benefit of a high school education, but he did have difficulty as a student. All of claimant's scores on Thorpe's tests are low. This appears to be both due to a lack of ability and lack of incentive. Claimant cannot go back to production work or any work with stress and strain. According to Dr. From claimant's disability is mostly due to his many severe underlying health conditions rather than his myocardial infarctions. There is a scar on claimant's heart muscle, but both of the infarctions are over. They are done. However, his underlying diseases continue. Both Dr. Wolters and Dr. From thought that there were a number of jobs that claimant could do if he chose to work. Based on the foregoing considerations it is determined that claimant has sustained an industrial disability of 25 percent of the body as a whole.

FINDINGS OF FACT

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

That claimant was employed by the employer on August 15, 1983 and June 6, 1984 and that he suffered a myocardial infarction on each of these dates while at work.

That prior to each of these heart attacks, claimant was under inordinate physical and psychological stress at work and due to work.

That prior to both heart attacks claimant suffered from multiple and severe underlying health problems of severe and poorly controlled diabetes mellitus, ischemic heart disease, arteriosclerotic coronary artery disease, had a family history of heart disease, and smoked cigarettes approximately 40 years prior to his first heart attack and had a number of other health problems.

That Dr. Wolters testified that it was both possible and probable that the claimant's work aggravated his myocardial infarctions.

That Dr. From testified that it was impossible to say what specifically caused the myocardial infarctions but that it was possible that the claimant's work aggravated his preexisting coronary disease to bring about the infarctions.

The claimant was temporary disabled from June 6, 1984 to September 27, 1984 as a result of the second heart attack.

That claimant cannot return to production work but both Dr. Wolters and Dr. From mentioned a number of jobs the claimant could do.

That claimant's worst disability is due to his underlying diseases.

That claimant is entitled to a 25 percent industrial disability to the body as a whole.

That claimant did not prove that he was an odd-lot employee because he never sought any work of any kind. He testified that he had not sought work and that he had no intention of looking for work. Claimant stated that he was retired.

CONCLUSIONS OF LAW

Based upon the evidence presented and the principles of law previously stated, the following conclusions of law are made:

That claimant did sustain an injury on August 15, 1983 and June 6, 1984 at the time of the first and second myocardial infarctions both of which arose out of and in the course of his employment with the employer.

That each of these myocardial infarctions were the cause of temporary and permanent disability as an aggravation of a preexisting underlying condition of diabetes and heart disease.

That claimant is entitled to healing period benefits from June 6, 1984 to September 27, 1984.

That claimant is entitled to permanent partial disability benefits of 125 weeks commencing on September 27, 1984 for a 25 percent industrial disability of the body as a whole.

That claimant did not sustain the burden of proof by a preponderance of the evidence that he is permanently and totally disabled either as an odd-lot employee or otherwise.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant sixteen point one-four-three (16.143) weeks of healing period benefits from June 6, 1984 to September 27, 1984 at the rate of two hundred nine and 44/100 dollars ($209.44) per week in the total amount of three thousand three hundred eighty and 99/100 dollars ($3,380.99).

That defendant pay to claimant one hundred twenty-five (125) weeks of permanent partial disability as industrial disability at the rate of two hundred nine and 44/100 dollars ($209.44) commencing on September 27, 1984 in the total amount of twenty-six thousand one hundred eighty and no/100 dollars ($26,180.00).

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

That interest will accrue under Iowa Code section 85.30.

That defendant is to pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 including the claimant's itemized costs as shown in paragraph D of the prehearing report.

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

Signed and filed this 17th day of June, 1987.

Walter R. McManus, Jr.
WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SUZANNE D. SEYMOUR, Claimant, vs. UNITED PARCEL SERVICE, Employer, and LIBERTY MUTUAL INSURANCE, Insurance Carrier, Defendants.	FILE NO. 727538 A R B I T R A T I O N D E C I S I O N FILED APR 6 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Suzanne D. Seymour, claimant, against United Parcel Service, employer, and Liberty Mutual Insurance Company, insurance carrier, defendants for benefits as a result of an injury which occurred on February 15, 1983. A hearing was held on November 11, 1986 at Dubuque, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Suzanne D. Seymour (claimant); claimant's exhibits A through Z (with the exception of exhibit K) and AA, BB and CC; and defendants' exhibits 1 through 42.

STIPULATIONS

The parties stipulated to the following matters:

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

That the claimant sustained an injury on February 15, 1983 which arose out of and in the course of her employment with the employer.

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

That the rate of compensation in the event of an award is $127.56 per week.

That the provider of medical services would testify that the fees were reasonable and that the defendants are not offering contrary evidence.

ISSUES

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

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

Whether the claimant is entitled to any temporary or permanent disability benefits.

Whether the claimant is entitled to certain medical benefits.

SUMMARY OF THE EVIDENCE

All of the evidence was examined and considered and the following is a brief summary of the most pertinent evidence.

Claimant is age 35, divorced, has no dependants, is unemployed and lives with a friend. She is a high school graduate and studied pottery in summer school for two years at Luther College in Decorah, Iowa where she presently resides. Past employments include factory worker, keypunch operator, file clerk, teletype operator, art model, arts instructor, library aid, outreach worker for legal services, babysitting and mowing lawns. She started to work for United Parcel Service on January 27, 1981. She worked from midnight to 3:30 a.m. loading and unloading cars and trucks on the dock and driving them up to and away from the dock. She worked typically 15 hours per week and earned $11.87 per hour. Prior to her employment with the employer she was in good health, very physical and only weighed 135 pounds. Prior to this injury she had twisted her back at work in November of 1982. At that time she felt a twinge, reported it to the employer, and saw D. W. Wright, M.D. She was treated and fully recovered and was having no further problems at the time of this injury.

The various medical reports describe various ways in which this injury occurred. However, since it has been stipulated that the claimant received an injury which arose out of and in the course of her employment with the employer it will suffice to give the claimant's version in her testimony at the hearing. She testified that on February 15, 1983 she was lowering an eight foot by four foot platform which had been stored upright. One end of the platform was frozen to the floor so it fell in a twisted manner. She caught it with both hands as it dropped and felt a cross ways slam in her left hip and back. It felt like she was hit by lightening and she had a white out sensation.

She could not get out of bed the next morning. She reported the injury to the employer and went to see David R. Bakken, M.D., on February 16, 1983 who hospitalized her from February 17, 1983 until February 25, 1983.

Dr. Bakken found tenderness with spasm in the lumbar spine, more on the left than on the right and diagnosed low back syndrome (Defendants' Exhibit 1). He treated her several times from February 16, 1983 through Novemer 18, 1983 with physical therapy, medication, bedrest and a TENS unit. He found a trigger point to the left of L5, Sl (Def. Ex. 3), but no radiculopathy (Def. Ex. 6). He did not describe a traumatic onset but did state that her low back pain was related to her lifting activities at United Parcel Service (Def. Ex. 6). He also mentioned that she engaged in certain self treatments by raising herself on her hands while sitting, hanging from doorways, and by obtaining osteopathic manipulation five times prior to one of her visits (Def. Ex. 8). She also attempted inverted lumbar traction with a device called a back swing (Def. Ex. 9). She also walked with a walker to decompress her lumbar spine (Claimant's Ex. BB, page 10).

Dr. Bakken sent her to the Gunderson Clinic (an orthopedic clinic) in LaCrosse, Wisconsin where she was seen four times by Steven Hauge, M.D., in March and April of 1983. He diagnosed a back strain. A CT scan was suggestive of a disc problem at L5, Sl, but claimant declined to take a myelogram. He recommended that she return to work on April 25, 1983. (Def. Ex. 4)

In May of 1983, claimant did return to work for nine days. After work on May 16, 1983, she noted pain in her back and could not get out of bed the following morning.

Claimant also decided on her own to go to the Apple Valley Medical Clinic in July of 1983 where she was seen by Donald B. Miller, M.D., (Def. Ex. 14).

Eventually, Dr. Bakken recommended a time table for claimant to return to work on November 30, 1983. Dr. Bakken thought that claimant had a back strain (Cl. Ex. BB, p. 13) aggravated by stress from marital problems (Cl. Ex. BB, p. 14). He felt that her problem was work related even though she did not describe a traumatic onset of her back pain to him (Cl. Ex. BB, pp. 16 & 17).

Dr. Bakken also recorded that claimant had cardiac dysrythmia probably secondary to caffeine ingestion, hirsutism with irregular menses, mild chronic situational depression, capsulitis of the thumb at the PIP joint and a possible mitrol valve prolapse (Def. Ex. 1, Cl. Ex. BB). Further evidence revealed a past medical history of tonsellectomy, apendectomy, ovary surgery and a miscarriage.

Claimant testified that she asked to see a chiropractor but the insurance carrier denied this request. She consulted with Richard Roby, D.O., an osteopath, but he needed repeated treatments and she wanted immediate relief and therefore discontinued treatment with him.

Claimant testified that she decided on her own to go and see Dr. Miller at the Apple Valley Medical Clinic (an orthopedic clinic) but that the insurance carrier accepted this as authorized treatment. Dr. Miller saw claimant on April 22, 1983, diagnosed mechanical low back syndrome--subacute, and recommended that she see the Institute for Low Back Pain in Minneapolis, Minnesota (Def. Ex. 5 & 11). Dr. Miller reported on August 31, 1983 that claimant did see Charles Burton, M.D., at the Institute for Low Back Care at the Abbott Northwestern Hospital and a CT scan showed no evidence of a prolapsed disc or stenosis and a myelogram was also normal (Def. Ex. 13). On September 20, 1983, Dr. Miller said claimant still had discomfort but there was nothing further that he could do from an orthopedic point of view (Def. Ex. 15).

Dr. Burton saw claimant on August 10, 1983, for low back pain, aching with sharp stabbing sensation in the buttocks more on the left than on the right, with pain into the leg. Claimant reported that she used aspirin, beer and rum for pain relief. It was also revealed that she suffered currently from an endocrine dysfunction from the use of birth control pills in 1978 that now causes irregular menses, facial hair growth, and lactation (Def. Ex. 12). Dr. Burton recommended a percutaneous radio frequency facet nerve block with epidural steroid administration for her mechanical low back syndrome on October 12, 1983 (Def. Ex. 16). This was carried out on November 7, 1983 (Def. Ex. 17). Claimant was also instructed in a stringent weight reduction program with the admonition that if it was not followed the likelihood of returning pain was quite high (Def. Ex. 18).

The facet nerve block did relieve her pain and pursuant to Dr. Bakken's plan she returned to work on November 30, 1983 and worked until Deember 26, 1983 when, due to a shortage of help at work, claimant over worked and could not get out of bed on the following morning of December 27, 1983. Dr. Burton then referred claimant to Matthew Monsein, M.D., of the Chronic Pain Rehabilitation Program of the Sister Kenny Institute at the Abbott Northwestern Hospital in Minneapolis (Def. Ex. 21). Dr. Monsein completed an extensive history and physical examination and reached the following conclusion:

IMPRESSION:
1. Mechanical back syndrome.
2. Status post facet block.
3. Chronic pain syndrome.
4. Depression.
5. Marked family dysfunction.
6. Employee anger syndrome.

7. Anxiety, situational.
8. Possible alcohol abuse.
9. Chronic pain patient.

(Def. Ex. 21)

All prior x-rays, CT scans and myelograms did not reveal any lateral stenosis or nerve root impingement. It was his impression that the degree of pain and incapacity was in excess of his physical findings. He did demonstrate some physical findings consistent with mechanical back syndrome and a paralumbar spasm on the left side while standing, triggering point tenderness at the L5, S1 area, and a positive forward stretch test on the left (Def. Ex. 21).

Claimant was admitted to the pain program on January 22, 1984 and discharged on February 15, 1984 but continued to complain of pain in the low back area which Dr. Monsein felt was due to psychological factors. Claimant had been victimized as a child and subjected to psychological and physical abuse in her family and she sees her present life as a continuation of this victimization. In addition, she suffered from galactorrhea and urinary stress incontinence which they treated at that time (Def. Ex. 22 & 23). Dr. Monsein thought that if she followed a 50 pound weight restriction for 90 days she could then work again without any restriction (Def. Ex. 23 & 24). He did not feel that she had a permanent disability (Def. Ex. 25). After her discharge from the Pain Rehabilitation Center Dr. Monsein wrote to the claimant that she had a myofascial syndrome where she had experienced a muscle strain or sprain (Def. Ex. 26). On April 3, 1984, Dr. Monsein estimated that the maximum medical improvement would occur on June 1, 1984 when claimant finished her clinic follow-up weight reduction course. He recommended against returning to United Parcel Service for fear that she would physically reinjure her back and also because employer mistrust might produce adverse psychological reactions (Def. Ex. 28). On May 31, 1984, Dr. Monsein stated claimant had reached a point of maximal medical improvement and assessed a five percent permanent impairment rating (Def. Ex. 33). Dr. Monsein reported on December 3, 1984 that claimant had taken a job at the airport, worked 12 days and strained herself again lifting weights up to 70 or 80 pounds. Dr. Monsein than reduced her weight restriction to 10 or 15 pounds and raised her impairment rating to 12.5 percent and recommended retraining her for lighter work (Def. Ex. 36). Dr. Monsein did testify that these changes of a lowered weight restriction and a higher impairment rating were related to her subsequent job at the airport and not her work for the United Parcel Service (Def. Ex. 40,p. 25).

In his deposition Dr. Monsein defined mechanical low back syndrome as follows:

A. A mechanical back syndrome is defined as a

condition where there is some element of pathology in the structures of the low back, such as -- how can I put it -- so that there is some mechanical disfunction of the back, that there is some weakness in the ligaments or the structures supporting the lumbar vertebrae, but there is no frank evidence of a herniated disk.
(Def. Ex. 40, p. 10).

When claimant completed the pain clinical treatment the defendants ceased to pay for additional medical treatment, but claimant nevertheless continued to seek and obtain additional medical care. Among other things she saw Ralph Knudson, M.D., of Decorah from January 23, 1985 to July 16, 1985 (Cl. Ex. J). He hospitalized her from February 13, 1985 to March 4, 1985 (Cl. Ex. O). Dr. Knudson also prescribed physical therapy from James Hughes, LPT, from March 1, 1985 to September 23, 1986 and she received regular physical therapy treatments from him (Cl. Ex. G, H, R, S, U, V, W, and X). Dr. Knudson diagnosed diffuse tenderness in her back in the left side (Def. Ex. CC, p. 6). He hospitalized her because she had suicidal feelings (Def. Ex. CC, p. 7). He found a lot of depression due to feelings of worthlessness and low self esteem because she could not work and marital problems (Def. Ex. CC, pp. 10 & 11). He did not have a definitive opinion on whether her condition was permanent or not and he was not able to assign any permanent impairment rating (Def. Ex. CC, pp. 13 & 14). He thought a five pound weight restriction would be appropriate (Def. Ex. CC, pp. 15 & 20). He was not directly asked and did not give a professional medical opinion on whether the injury of February 15, 1983 caused the problem for which he treated her or caused her current condition (Def. Ex. CC).

Claimant was seen and evaluated on October 17, 1984 for the defendants by Richard F. Neiman, M.D., in Iowa City. He appeared to conclude that claimant did have a mechanical low back syndrome for which nothing more could be done. He assessed a permanent impairment rating in the range of 10 to 12 percent (Def. Ex. 37). Dr. Neiman ordered a myelogram and a CT scan and the claimant was hospitalized at Mercy Hospital in Iowa City for these procedures from March 11, 1986 to March 13, 1986. The myelogram and CT scan demonstrated no abnormality on either test. Dr. Neiman saw nothing to suggest a surgical remedial lesion. He suggested that claimant be rated and to get her into some useful type of occupation (Def. Ex. 42).

A psychiatric evaluation on March 22, 1986 concluded dysthymia disorder but that claimant was showing improvement from the level of depression she had three years ago (Def. Ex. 38).

Claimant also consulted the Minnesota Headache Institute on April 2, 1986 on her own. No real conclusion was reached by this group (Def. Ex. 39 and Cl. Ex. L).

At the hearing claimant testified that her back is not much better now than it was at the time of her injury on February 15, 1983. It was best after she left the pain clinic and prior to when she reinjured it working at the airport.

Claimant testified that she applied for a job at Living History Farms but did not want to relocate to Des Moines. She was not able to endure the standing and lifting in the airport job. She worked a short time at the Luther College Food Service as a dishwasher for three hours a day but that hurt her back after six days and she could not handle the standing and lifting. She worked for a veterinarian for a short period of time but was not able to do that either. She has applied for social security disability but was denied benefits.

Claimant began a vocational evaluation and career planning program in Des Moines on September 2, 1986 but she terminated the program after nine days. Richard L. Rattray, counselor, reported on September 26, 1986 as follows:

> Bunny elected to terminate the evaluation at the end of the 9th day. The constant pain, low self-confidence, and the possiblity [sic] of hooking up with an acquaintance in Waterloo at a food convention are some of the reasons she elected to terminate at this time.
> (Cl. Ex. Z).

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 15, 1983 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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 has sustained the burden of proof by a preponderance of the evidence that her injury of February 15, 1983 was the cause of both temporary and permanent disability. Dr. Bakken said that the injury was the cause of her disability. The other doctors proceeded on this same basis but did not directly give a professional medical opinion on causation. There was no evidence that the injury of February 15, 1983 was not the cause of some temporary and permanent disability even though claimant did have other problems.

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

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber, Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler, 252 Iowa 613, 106 N.W.2d 591 (1960). See also Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934).

Most of the practitioners of the healing arts also testified that psychological problems combined with what normally would be a simple back strain to prolong and increase the amount of temporary and permanent disability. The employer takes the employee as is, and therefore, takes her subject to any active or dormant health impairments. Lawyer & Higgs, Iowa Workers' Compensation -- Law and Practice, section 42. As it happened claimant had severe psychological problems stemming from childhood and a stressful marital problem was existant at the time of this injury. The injury was in February of 1983 and she separated from her husband in March of 1983 and was later divorced sometime in 1984. Claimant did see a counselor for this situation. Claimant had numerous endocrine and female problems which influenced her during this period of time as well as a personal problem with alcohol abuse.

The evidence shows that the defendants did pay for treatment for both physical and psychological problems of the claimant as required by statute up to the point of maximum medical improvement. Iowa Code section 85.34(1) provides for healing period benefits. Since the claimant did not return to work and cannot return to her old job, then healing period benefits begin on the date of the injury and continue until it is medically indicated that significant improvement from the injury is not anticipated.

The physical injury in this case was basically a back strain or what has been defined as an aggravation of a mechanical low back syndrome. Usually a back strain condition will be worse at first and then will gradually heal over a period of time with or without medical treatment. In this case claimant was treated by a local physician, Dr. Bakken, who was quite considerate and sympathic to her problems; the Gunderson Orthopedic Clinic at LaCrosse, Wisconsin; the Apple Valley Orthopedic Clinic; the Institute for Low Back Care at Minneapolis, Minnesota; and the Pain Rehabilitation Center at the Sister Kenny Institute in Minneapolis, Minnesota. In the process she received treatment for psychological problems, family problems, endocrine problems, female problems and urinary problems. Yet, at the hearing she testified that her back was not much better now than it was when she was first injured on February 15, 1983. Claimant has described enormous subjective pain and incapacity which Dr. Monsein testified exceeded his physical, objective, professional, medical findings. Dr. Monsein determined that maximum medical improvement occurred on May 31, 1984. This is the only opinion by any professional person on this point. Therefore, it is determined that claimant is entitled to healing period benefits for the period from the day after the injury February 16, 1983 through May 31, 1984.

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, 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. * * * *

Dr. Monsein, who was the claimant's treating physician and probably the doctor who gave her the most individual attention, gave the claimant a functional impairment rating of five percent. The increased rating of 12 1/2 percent after the subsequent injury at the airport cannot be considered because Dr. Monsein

indicated that this increase in rating was due to the later injury. However, defendants' evaluating physician, Dr. Neiman, gave claimant a 10 to 12 percent functional impairment rating. Claimant is 35 years old, single and has no dependants. She has average to above average intelligence according to the evidence. She is young enough to be trained or retrained in a number of occupations. The variety of her past employments show that she has potential in a wide variety of employment opportunities. She has the advantage of a high school education and training in pottery and other crafts. The biggest detriment is that she cannot return to physical manual labor which she enjoyed a great deal coupled with the fact that she does not like sterotyped female types of jobs. There was no evidence that the claimant has made any serious attempts to obtain full time employment in a job within her physical restrictions. It also appears that she has not made a serious attempt at retraining. She came to Des Moines for a lengthy course of rehabilitation training sponsored by the State of Iowa and quit after nine days in order to go to a food convention in Waterloo with friends. According to her testimony she still suffers pain and Dr. Monsein corroborated that she does have a chronic pain syndrome. This of course will be a source of disability until it either goes away or she gives it up. At the same time pain that is not substantiated by clinical findings is not a substitute for impairment. Waller v. Chamberlain Mfg., 2 Iowa Industrial Commissioner Reports 419, 425 (1981). Based on the foregoing information it is found that claimant has sustained a 35 percent industrial disability to the body as a whole from the injury of February 15, 1983.

Iowa Code section 85.27 provides that the employer shall provide reasonable medical care for an injured worker but that the employer also has the right to chose the care. It is determined in this case that the employer did provide reasonable care to the claimant. It could possibly be stated that in some instances it was more than reasonable care under the circumstances. Some of the care that the employer paid for did not appear to be directly related to the work injury. Much of the same testing and evaluation was done more than once in order to determine if there was something more than back strain or mechanically low back syndrome involved.

Claimant's exhibit B, the exercise bicycle in the amount of $251.15, is allowed because it was prescribed by David Jones, M.D., a psysiologist at the Kenny Institute (Def. Ex. 23, p. 3). Claimant also testified that Dr. Bakken prescribed it and this testimony was not controverted. Also claimant's exhibit M, the medical bill for Dr. Bakken in the amount of $29.00 is allowed because he was an authorized physician and there was no evidence that the authority to see him was revoked.

All of the other bills contained in claimant's exhibits A through O cannot be allowed because (1) there is no evidence

that they were authorized by the defendants; (2) it was not proven that they were caused by the injury of February 15, 1983; (3) it was not proven that they were reasonable medical expenses. Some of the treatment appears to be for non-work related health conditions. Much of it is repeated treatment in therapy which have all ready been done in the past and according to the claimant did not improve her condition better than it was back on February 15, 1983.

FINDINGS OF FACT

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

That claimant was employed by the employer and sustained an injury on February 15, 1983 while at work on that date.

That the claimant attained maximum medical improvement according to Dr. Monsein on May 31, 1984.

That Dr. Monsein rated claimant's permanent functional impairment at five percent of the body as a whole and Dr. Neiman rated her permanent functional impairment at 10 to 12 percent of the body as whole.

That claimant is age 35, single and has no dependants. She has average or better than average intelligence, a variety of previous work experiences and an infinite potential for retraining in jobs which do not involve lifting more than five to 15 pounds.

That claimant incurred $280.15 in allowable medical expenses for an exercise bicycle in the amount of $251.15 and treatment with Dr. Bakken in the amount of $29.00.

CONCLUSIONS OF LAW

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

That the injury of February 15, 1983 was the cause of temporary and permanent disability.

That the claimant is entitled to healing period benefits from February 16, 1983 through May 31, 1984.

That claimant is entitld to 175 weeks of permanent partial disability benefits for a 35 percent industrial disability to the body as a whole beginning on June 1, 1984.

That claimant is entitled to the payment of $251.15 for an exercise bicycle and $29.00 for the treatment of Dr. Bakken in

the total amount of $280.15 in allowable medical expenses.

ORDER

THEREFORE, IT IS ORDERED:

That the defendants pay to claimant sixty-seven point two-eight-six (67.286) weeks of healing period benefits for the period from February 16, 1983 through May 31, 1984 at the rate of one hundred twenty-seven and 56/100 dollars ($127.56) per week in the total amount of eight thousand five hundred eighty-three and no/100 dollars ($8,583.00).

That defendants pay to claimant one hundred seventy-five (175) weeks of permanent partial disability benefits at the rate of one hundred twenty-seven and 56/100 ($127.56) per week in the total amount of twenty-two thousand three hundred and twenty-three and no/100 dollars ($22,323.00).

That the defendants pay accrued benefits in a lump sum.

That interest will accrue under Iowa Code section 85.30.

That the defendants pay to claimant two hundred eighty and 15/100 dollars ($280.15) in allowable medical expenses for an exercise bicycle and for Dr. Bakken's bill.

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

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

Signed and filed this 6th day of April, 1987.

Walter R. McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VELMA SPURRIER,	:	
Claimant,	:	FILE NO. 798220
vs.	:	A R B I T R A T I O N
EAGLE SIGNAL,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Velma Spurrier, claimant, against Eagle Signal, employer and self-insured defendant for benefits as a result of an alleged injury which occurred on August 27, 1984. A hearing was held on October 16, 1986 in Davenport, Iowa and the case was fully submitted at the close of the hearing. The record consists of claimant's exhibits 1 through 28; defendant's exhibits 1, 2, 3, 4, 5, 6, 8, 12, 14, 15 & 16; the testimony of claimant's witnesses, Velma Spurrier (claimant), Shirley Klein (co-employee and group leader), Blanche Wacker (co-employee, foreman and supervisor), Patrick Doherty (a rehabilitation counselor) and the testimony of the defendant's witnesses, Patricia West (employment supervisor), James Neifing (manager of personnel and industrial relations), Phillip Peterson (supervisor), Gentiel (John) M. DeGryse (plant manager). Claimant's exhibit 25, which is two electronic solid state boards, is being stored by claimant's attorney, but photographs of these two boards have been substituted in place of the actual boards. Defendant's exhibit 16, which is a video tape of the final assembly operation, is being stored by defendant's counsel.

STIPULATIONS

The parties stipulated to the following matters:

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

That the rate of compensation in the event of an award is $210.01 per week.

That all requested medical benefits have been paid.

That the defendant has paid the claimant disability income from an employee non-occupational accident and sickness plan at the rate of $120 per month from September 4, 1984 to May 6, 1985 in the total amount of $3,119.99 and that the defendant is entitled to a credit for this amount in the event of an award.

That the defendant has paid the claimant disability retirement payments at the rate of $390 per month since April 1, 1985 in the total amount of $7,410.00 is stipulated. However, the defendant's entitlement to a credit under Iowa Code section 85.38(2) for these payments is disputed.

ISSUES

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

Whether the claimant sustained an injury on August 27, 1984 which arose out of and in the course of her employment with the employer.

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

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

Whether the claimant is an odd-lot employee.

Whether the claimant satisfied the notice requirement of Iowa Code section 85.23 has been asserted as an affirmative defense by the defendant.

Whether the defendant is entitled to a credit under Iowa Code section 85.38(2) for the retirement disability benefits at the rate of $390 per month since April 1, 1985 in the total amount of $7,410.00 at the time of the hearing.

SUMMARY OF THE EVIDENCE

Claimant was born January 17, 1928. She was 56 years old at the time of the injury and 58 years old at the time of the hearing. She is married and has two adult children. She completed the seventh grade and has not received any additional schooling since then. She did take a soldering course and was awarded a certificate while working for Eagle Signal. She declined to attempt to obtain a G.E.D. certificate as a part of vocational rehabilitation. Her prior employments include two production work type of jobs for two other employers. She started to work for Eagle Signal about June 28, 1951 and has worked there continuously for 33 years until her injury on

August 27, 1984. She took disability retirement from this employment on March 6, 1985. She has applied for social security disability retirement but was denied.

All of her jobs with Eagle Signal involved the use of her hands. Earlier jobs included working on the teletype line, working on the relay line, and line tester. In the mid 1970's she began stuffing boards in solid state. This job entailed sitting and placing a number of small parts onto different size boards eight hours a day except for 20 minutes for break and 30 minutes for lunch. These small parts were in a lazy susan in front of her or beside her. She also found it necessary to work with her head cocked to the right. This was a group incentive or group piece work job so you had to keep up or the other employees would be unhappy with you. Her last job with the company was called final assembly of timers. Various witnesses said that it was similar to stuffing boards in solid state, but that stuffing boards was much more difficult. A video was shown at the hearing of a lady performing the final assembly of timers job.

Claimant's exhibit 27 is a detailed description compiled by the claimant of the movements of the right arm in various jobs with the employer. The claimant assembled relays for the first 20 years of her employment with the employer and this job involved the use of the right arm 18,240 times in an eight hour day. The next four years as a line tester also required extensive use of the right arm but the number of movements was not calculated. Then claimant's remaining nine years with the employer of stuffing boards in solid state required 25,600 right arm movements per day. Two solid state boards were shown at the hearing and were marked claimant's exhibit 25. However, claimant stated that these were not the same boards that she stuffed at Eagle Signal. Rather, these two boards which were shown at the hearing were some telephone equipment boards which she had located simply to make an illustration of what a solid state board looked like and she demonstrated the work that she did with a board of this type.

Claimant was rear ended in an automobile accident on December 13, 1967 (Claimant's Exhibit 11, page 1). As a result of that accident there was disc protrusion at C5-6 on the right (Cl. Ex. 11, p. 2). Byron W. Rovine, M.D., a neurologist, performed an anterior cervical interbody decompression and fusion at C5-6 on February 13, 1969 (Cl. Ex. 11, p. 3). Claimant testified that she totally recovered from the surgery. She could do her job at work, cut the grass at home and go bowling. She had no residual pain. She stated that she had a full range of motion except that she could only put her chin half way down to her chest. She had no pain when she started the job in solid state. Sometime after she started in solid state while stuffing boards her neck began to hurt. It affected the right side of her face

and neck. Her right eye watered. As time went by it became gradually worse. In June of 1984 her shoulder began to hurt. She first noticed it when she was picking up parts under her bench at the end of the day and got a twinge in her right shoulder. On another occasion she reached behind to get a unit and the pain in her right shoulder caused her to grab it with her left hand. The shoulder got worse as time went by and claimant went to see her family physician, John F. Collins, M.D., a general practitioner in Davenport in June of 1984.

Shirley Klein, claimant's group leader on final assembly, and Blanche Wacker, claimant's group leader, foreman and supervisor in solid state, both testified that they observed and heard the claimant complain of pain in her neck and right shoulder aggravated by her work, but claimant continued to do her job and was able to maintain the pace. Neither of these two witnesses reported their knowledge to the personnel department or to their supervisor.

The office notes of Dr. Collins show that he saw claimant on June 13, 1984. She complained of numbness in her hands and arms and discomfort in her neck. It was worse on the right. He prescribed medication and told her to wear the cervical collar which she had at home. She began using this collar after the automobile accident and continued to use it after that for neck comfort. X-rays were taken. Dr. Collins suspected cervical problems at C6-7. He referred claimant to Dr. Rovine again on August 17, 1984 (Cl. Ex. 9).

Dr. Rovine saw claimant on or about August 27, 1984. Claimant described pain in her right interscapular area, right shoulder, and upper arm as well as diffuse numbness in the right upper extremity. X-rays revealed some degenerative arthritic findings principally at C6-7. Dr. Rovine concluded:

> I believe Mrs. Spurrier has symptoms for two reasons. First of all, I believe she has some degenerative disc disease at the C6-7 level which is causing her interscapular pain. However, the major problem seems to be in the right shoulder. She may have some bursitis and probably also some rotator cuff symptomatology as well. There is nothing to suggest a recurrent disc extrusion. (Cl. Ex. 4)

Dr. Rovine ordered two weeks of rest and medication but claimant did not show significant improvement. On September 10, 1984, Dr. Rovine again ruled out disc symptoms and referred claimant back to Dr. Collins for treatment of bursitis and rotator cuff syndrome and authorized two more weeks away from work. Although Dr. Rovine described her job in some detail, he did not specifically relate the complaints to her employment in either of his two reports (Cl. Ex. 3 & 4).

Claimant testified that after she saw Dr. Rovine on August 27, 1984, she and her husband had a meeting with Pat West, employment supervisor and James Neifing, personnel manager on that same day. She gave them the letter from Dr. Rovine dated August 27, 1984 which read as follows:

8-27-84

Velma Spurrier is in my care for pain in her right shoulder and arm due to arthritis in her neck & shoulder.

She has been instructed to rest at home, and is not to work until further notice. She will be seen for followup in two weeks.

Byron W. Rovine, M.D.

(Cl. Ex. 7)

At the meeting claimant said she told them her job was causing her problems. She told them that her shoulder hurt and that she could no longer reach for anything anymore. Her husband also told them that Dr. Rovine had said it was related to the work she was doing.

West testified that when claimant's husband called to arrange a meeting he indicated that it was about a work related claim. West further testified that claimant stated at the meeting that reaching at work caused her pain and that she needed two weeks off work in the form of a leave of absence. She also verified that claimant's husband said at the meeting that Dr. Rovine said the work that claimant was doing caused the flare-up. West made a summary of what transpired at the meeting dated August 27, 1984 at 2:50 p.m. This summary records that claimant's husband did say that the doctor indicated that the flare-up was due to the work which claimant was doing (Cl. Ex. 17).

Neifing testified claimant's husband did, in fact, state that the flare-up of arthritis claimant was having was caused by her work and that is why he had a meeting.

Phillip Peterson, who was the claimant's supervisor in solid state, along with West and Neifing, all three testified that claimant never made a formal report of injury to them. Furthermore, they had no knowledge or reason to believe that she was having any difficulty of any kind.

Claimant's exhibit 23 is a handwritten note dated June 21, 1984, 3:30 p.m. written by someone with the initials K D M. DeGryse identified K D M as Karl Madsen of the personnel department. Madsen states in the note that he observed claimant wearing a neck collar brace; that she said she did it at work about two years ago; but he found no record of it.

Claimant, West and Neifing, all three agreed that claimant was given the choice of filing a workers' compensation claim or proceeding under the company group non-occupational health plan. When it was explained to claimant that she could receive the leave of absence that she was requesting and receive immediate benefits under the non-occupational plan, and that a workers' compensation claim might involve controversy and delays, claimant opted not to file a workers' compensation claim, but instead elected to proceed under the non-occupational group health plan (Cl. Ex. 17).

Claimant took a leave of absence for a month beginning August 27, 1984 to September 24, 1984. She worked a full day on September 25, 1984 and worked until noon on September 26, 1984 at which time she left the job and never returned. She testified that she hurt so bad on the right side of her head, neck and arm that she could not work. Claimant said she has arthritis now and that she will have it for the rest of her life. Surgery would not correct it. Dr. Collins told her that as long as she kept working it would only get worse. Dr. Collins then referred claimant to Richard R. Ripperger, M.D., an orthopedic surgeon in Davenport, for treatment of her right shoulder. Dr. Ripperger first saw claimant on November 15, 1984. He performed an arthrogram on December 4, 1984 and diagnosed a rotator cuff tear. He performed surgery on her right shoulder on December 18, 1984 (Cl. Ex. 6).

Claimant testified that she was paid non-occupational income disability benefits for approximately six months up until March of 1985. Then on March 6, 1985, she was paid disability retirement benefits and she is still receiving them. The prehearing report indicates that the income disability payments were $120 per month and that the disability retirement benefits are $390 per month.

Defendant's exhibit 6 is a copy of a portion of the retirement plan. DeGryse testified that disability retirement benefits and workers' compensation benefits were mutually exclusive. However, defendant's exhibit 6 makes no mention of the effect of workers' compensation payments on the disability retirement plan benefits. Cecilia Blaskovich, a vocational rehabilitation specialist reports that the claimant told her on August 5, 1986 that claimant would receive $390 per month of long term disability for the remainder of her life regardless of any other benefits that she receives.

Claimant testified that she would like to work but cannot because she has so much pain in her right neck and shoulder. She applied at Job Service but they are waiting for her doctor reports before contacting her. She received several job possibilities from Blaskovich and looked into some of them but for some reason each one she looked into had some reason she could not do it.

Claimant stated that she wore her neck collar to most of the interviews. Claimant conceded that the onset of her symptoms in June of 1984 coincided with her husband's retirement in the same month and year. Claimant testified that she and her husband were campers and that they went camping during the one month leave of absence in August and September of 1984. Claimant also confirmed that she took a trip to Arizona in December of 1985 with her husband in their motor home to visit relatives.

Defendant's exhibit 4 is a typed, unsigned anonymous letter from an unknown writer which was received at Eagle Signal on January 13, 1986. The writer suggests and alleges primarily by insinuation and innuendo that claimant is attempting to defraud the employer and insurance carrier by making a false claim that her work caused her arthritis. This letter prompted defendant to place claimant under survellience in Arizona on February 4, 1986, February 5, 1986 and March 1, 1986. However, the investigation revealed nothing more than claimant could freely open and close the car door with her right hand.

Patrick D. Doherty, a rehabilitation counselor, testified at the hearing and submitted a written report which is marked claimant's exhibit 10. He saw claimant on two occasions. He stated that claimant suffers from arthritis particularly localized in her right shoulder and spine. His test placed her in the average intelligence range, which is good for a person with a seventh grade education. He took into consideration the work restrictions mentioned by Dr. Collins and Dr. Ripperger and concluded as follows:

> In reviewing the labor market access for Mrs. Spurrier, I feel she is unemployable. I believe she is not able to find suitable employment based on her age, (57) education, (7th. grade) work experience, (factory work) and physical restrictions (2 pounds or 15 pounds depending on Dr.). (Cl. Ex. 10)

To that conclusion he added this: "I feel if Mrs. Spurrier could obtain employment it would be so limited in quality or quantity that it would preclude steady employment. Without steady employment Mrs. Spurrier has no material earning capacity" (Cl. Ex. 10).

The witness conceded that he never actually tried to find a job for claimant or to place her in any type of employment. He granted that the area economy was not good and that several capable people cannot find employment. Doherty was asked if the fact that claimant and her husband are both currently receiving pensions; that they can spend the winter where it is warm; that her husband is already retired; that they are free to travel together and have the means to do it would affect her motivation.

Doherty responded that he did not address the claimant's motivation to work in his evaluation.

Ceclia Blaskovich, a rehabilitation specialist, and president and founder of Medisult, testified by deposition (Defendant's Ex. 14) and submitted written material (Def. Ex. 8). She interviewed claimant and her husband (Def. Ex. 8, pp. 7 & 8); Dr. Ripperger (Def. Ex. 8, pp. 9 & 10); John DeGryse and visited Eagle Signal plant in Davenport (Def. Ex. 8, p. 10). She examined other medical and hosiptal records and the report of Dr. Doherty (Def. Ex. 14, Deposition Ex. 2). Blaskovich reported that she identified and presented 32 potential jobs to claimant (Def. Ex. 8, pp. 12-20). Claimant presented herself at several of the potential jobs wearing a neckcollar/brace. Some the jobs were not within her limitations. However, some of the jobs were within her physical ability yet an application was not completed (Def. Ex. 8, p. 10). Blaskovich showed Dr. Ripperger job descriptions for management/ trainee, desk clerk, receptionist, telephone sales, telemarketer and general merchandise salesperson. Dr. Ripperger personally approved all of these job classifications with his initials on August 6, 1986 with authorization to return to work on August 6, 1986 (Def. Ex. 8, pp. 21 through 26).

Blaskovich prepared a job description for claimant's former job of assembler-traffic control at Eagle Signal along with Richard Erickson, an industrial engineer. Dr. Ripperger by his signature approved this job as suitable for the claimant on September 12, 1986 with an authorization to return to work on September 12, 1986 (Def. Ex. 8, p. 4). John DeGryse testified that this job was now recently opened again and he would be willing to consider hiring the claimant for it if her weight restriction is 15 pounds as defined by Dr. Ripperger rather than 2 pounds as defined by Dr. Collins. Dr. Ripperger indicated on the Medisult Physician Consult Form that claimant obtained maximum healing in December of 1985 and that she could perform the job described by Blaskovich within her physical restrictions of no repetitive lifting or overhead work and no lifting over 15 pounds (Def. Ex. 8, p. 27).

Dr. Collins found that claimant's job at Eagle Signal aggravated the arthritic condition of her neck and right shoulder. He stated that she sustained a 10 percent permanent impairment of the shoulder and a five percent permanent impairment of the neck for a total over all impairment of 15 percent of the body as a whole due to the June of 1984 injury (Cl. Ex. 1; Cl. Ex. 14, pp. 19-24 & p. 45). He said that she should not do overhead work or lift more than two pounds due to the shoulder. She should do no bending or stooping and lift no more than five pounds due to the neck (Cl. Ex. 1). As to causal connection he felt that the arthritis in the neck was aggravated by the wear and tear aspect of the use of the arm, doing the same thing over and over again (Cl. Ex. 14, p. 11). Dr. Collins also formed the

opinion that claimant's job aggravated the arthritis in her right shoulder (Cl. Ex. 14, pp. 14 & 15). Dr. Collins said in his opinion that the continual use aggravated the arthritis in both her shoulder and her neck (Cl. Ex. 14, pp. 16-18).

Dr. Collins also related that claimant did continue to have pain in her neck following the 1969 cervical decompression and fusion. He is the one who prescribed a neck collar for her to wear at that time and instructed her to continue to wear it at her discretion. This is not uncommon for people who have had neck injuries. It helps cut down the pain and discomfort that they have (Cl. Ex. 14, pp. 29 & 30). Dr. Collins believed that the arthritis in her neck developed shortly after the 1969 cervical fusion and on account of it (Cl. Ex. 14, p. 34). When he last saw claimant on September 18, 1985, she complained also of arthritic pain in both hands and knees (Cl. Ex. 14, pp. 46 & 47). The video was set up for Dr. Collins to view but defendant's counsel chose not to show it to Dr. Collins (Cl. Ex. 14, p. 42).

Dr. Ripperger briefly summarized his findings in a letter dated September 9, 1985 (Cl. Ex. 5). As to causal connection he said that he did not know if her job accelerated her arthritic condition in her neck and right shoulder, however, according to the history claimant gave him the job aggravated her symptoms. Restrictions would have to be determined on a trial and error basis. A reasonable starting point would be no repetitious lifting, no overhead work, and no lifting over 15 pounds. He stated that he did not advise her to quit her job. He declined to give a rating until after one year from the surgery (Cl. Ex. 5). Then on November 13, 1985, Dr. Ripperger gave a 40 percent permanent impairment rating secondary to the neck and shoulder condition (Cl. Ex. 12). In his depositions he said he was unable to say how much, if any, of her impairment was due to the aggravation of her arthritis due to her job, the preexisting arthritis condition, and the earlier fusion in 1969 (Cl. Ex. 13, pp. 10-12).

Dr. Ripperger gave more detailed information in his deposition (Cl. Ex. 13). His final diagnosis on her neck was degenerative arthritis of her cervical spine and a fusion at C5-C6. His final diagnosis on her right shoulder was (1) degenerative arthritis; (2) degenerative cuff disease; (3) status post rotator cuff repair; and (4) status post excision of distal clavical (Cl. Ex. 13, p. 5). Dr. Ripperger stated that he did not know if her job accelerated any arthritic changes but he believed it aggravated the shoulder and neck condition due to the repetitive use of her right upper extremity and also from working with her head tilted to one side for eight hours a day (Cl. Ex. 13, pp. 6 & 7). But then on cross-examination Dr. Ripperger did say it not only increased her symptomatic condition, but in addition with regard to the neck and the cuff disease probably speeded up, accelerated or worsened structural damage

as well (Cl. Ex. 13, p. 27). But then again he later testified on redirect examination that he did not know if there was a permanent aggravation of her symptoms or structural damage because he did not see her before November of 1984. However, he did concede that there was an increase in her symptoms which has persisted that is definitely associated with her work temporarily at least. However, establishing a true cause and effect relationship is hard to do and actually almost impossible to do irrespective of what information he might have (Cl. Ex. 13, pp. 34-36). Dr. Ripperger testified that he did not know if motion in itself would cause increased wear and tear on the joints but it can aggravate the underlying arthritic condition in terms of pain (Cl. Ex. 13, pp. 7-10).

In his deposition Dr. Ripperger rated the claimant with a 25 percent permanent impairment of the neck, but he could not break down how much was due to the earlier fusion, the earlier degenerative arthritic condition and the aggravation of the arthritis due to the injury. He did not know if any of it could be attributable to the aggravation caused by her job (Cl. Ex. 13, pp. 11 & 12). Later, in a letter to Blaskovich, he said the 1969 decompression and fusion could be rated at a 15 percent impairment in his opinion (Cl. Ex. 15).

Dr. Ripperger did not know if the job aggravated the degenerative arthritis in her shoulder, but stated that it could have caused an aggravation as to pain (Cl. Ex. 13, p. 17). He did not know if her job aggravated the degenerative cuff disease but said that it "could aggravate the underlining cuff disease" (Cl. Ex. 13, p. 14). Then later in his testimony he responded to questions indicating that yes her work did aggravate the degenerative arthritis in her shoulder and her degenerative cuff disease (Cl. Ex. 13, p. 20). He had no opinion on whether the job caused the cuff repair or not (Cl. Ex. 13, pp. 18 & 20) or the excision of the distal clavical (Cl. Ex. 13, pp. 20 & 21).

Dr. Ripperger rated the right shoulder at 20 percent of the body as a whole (Cl. Ex. 13, p. 22). Again he could not factor out how much, if any, of this impairment was due to the aggravation of the underlining condition because he had not seen claimant before November of 1984.

Dr. Ripperger testified that a healing plateau after a rotator cuff repair would be 9 to 15 months after surgery and the surgery was performed on December 18, 1984 (Cl. Ex. 13, p. 24). Dr. Ripperger reviewed the video of the final assembly of timers and concluded that the work depicted on the video would symptomatically irritate or aggravate either the neck or right shoulder condition of the claimant (Cl. Ex. 13, pp. 33 & 34).

Peter D. Wirtz, M.D., a board certified orthopedic surgeon, examined and evaluated claimant for the defendant. He submitted

a written report on July 17, 1986 (Def. Ex. 12) and testified by deposition on October 10, 1986 (Def. Ex. 15). He examined claimant on July 17, 1985 and reviewed the video at the time of the deposition on October 10, 1986. His examination, however, was limited to the right shoulder and x-rays of the right shoulder and it did not include her neck (Cl. Ex. 15, pp. 6 & 7). Dr. Wirtz determined that claimant had an impairment of five percent of the body as a whole due to the shoulder. He allowed one percent for ten degrees loss of forward flexion in the right shoulder and four percent for weakness (Def. Ex. 12; Cl. Ex. 15, pp. 8 & 9). He did not see the need for any restrictions (Cl. Ex. 15, p. 9). Dr. Wirtz believed that the claimant could perform the jobs which Dr. Ripperger had approved at the request of Blaskovich of assembler-traffic control, store salesperson, management trainee, receptionist, telephone sales and telemarketing (Cl. Ex. 15, pp. 10-12). The doctor testified that the claimant's work would not cause degenerative cuff disease or a rotator cuff tear nor would it aggravate her cervical disc condition (Cl. Ex. 15, pp. 13 & 14). He found no arthritis in her shoulder (Cl. Ex. 15, p. 21). He did not use the orthopedic guide which Dr. Ripperger used, but instead Dr. Wirtz followed the AMA Guide for his ratings (Cl. Ex. 15, pp. 20 & 21).

APPLICABLE LAW AND ANALYSIS

Iowa Code section 85.23 provides as follows:

> Unless the employer or his representative shall have actual knowledge of the occurrence of an injury received within ninety days from the date of the occurrence of the injury, or unless the employee or someone on his behalf or a dependent or someone on his behalf shall give notice thereof to the employer within ninety days from the date of the occurrence of the injury, no compensation shall be allowed.

Lack of notice or failure to give notice is an affirmative defense. Delong v. Iowa State Highway Commission, 299 Iowa 700, 295 N.W. 91 (1940); Reddick v. Grand Union Tea Company, 230 Iowa 108, 295 N.W. 800 (1941); Mefferd v. Ed Miller & Sons, Inc., Thirty-third Bienniel Report of Industrial Commissioner 191 (1977). Supervisory persons are considered to be representatives of the employer. Actual knowledge of the employer or his representatives does away with the necessity of notice. Hobbs v. Sioux City, 231 Iowa 860, 2 N.W.2d 275 (1942); Frank v. Carpenter, 192 Iowa 1398, 86 N.W. 647 (1922). Klein and Wacker were friends and co-employees of the claimant but they both testified they were also supervisors. Klein was a group leader in final assembly of timers. Wacker was a group leader, foreman and supervisor while stuffing boards in solid state. They testified that they observed and heard the claimant complain on a number

of occasions that her job aggravated the pain in her neck and right shoulder. Even though they failed to report these incidents to personnel or higher authorities, nevertheless, they were representatives of the company and had actual knowledge of the claimant's injuries or aggravations of injury at the time that they occurred. Therefore, claimant was not required to give formal written notice.

Furthermore, in Jacques v. Farmer's Lumber & Supply Co., 242 Iowa 548, 47 N.W.2d 236 (1951) it was determined that the 90 day period does not begin to run until the employee finds out about or discovers the injury. Substantially, the same rule in somewhat more detail appears in Volume III, Larson, section 78.40, paragraph 15-155: The time period for notice or claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of his injury or disease. The rule in Jacques and the rule in Larson quoted above were adopted and further clarified in Robinson v. Department of Transportation, 296 N.W.2d 809, 812 (Iowa 1980). There the court said the reasonableness of the claimant's conduct is judged in the light of his or her own education and intelligence. Claimant must know enough about the injury to realize it is both serious and work connected.

In this case claimant testified (and she is believed) that her first knowledge that workers' compensation was involved was at the time of the meeting on August 27, 1984 with Neifing and West. She and her husband wanted the meeting to obtain a leave of absence as recommended by Dr. Rovine and to gain the benefits of the non-occupational group plan. Her first thought or knowledge of workers' compensation was at that meeting when Neifing and West mentioned it. Therefore, claimant reported the injury at the time she first learned that it might be compensable under the workers' compensation law. Therefore, the claimant did give timely notice as required by Iowa Code section 85.23.

In addition, McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 374 (Iowa 1985) not only judicially adopted the cumulative injury rule but held that the date of occurrence of injury is when the employee is no longer able to work due to the injury. Claimant clearly appears to have a cumulative injury from repetitive use of her right arm in numerous reaching movements with her neck tilted to the right. This history is mentioned by all of the doctors. The date of injury then is August 27, 1984 which is the first day claimant was no longer able to work due to the injury. Claimant reported the injury to the employer as work related on this very date. Therefore, claimant did give notice within 90 days of the occurrence of the injury.

Defendant has not sustained the burden of proof that claimant failed to give proper notice as required by Iowa Code section 85.23. On the contrary, claimant has proven that the notice requirement

was satisfied in three different ways as setforth above. Consequently, it is found that the employer had actual notice and also the claimant did give proper notice within 90 days as required by Iowa Code section 85.23.

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).

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on August 27, 1984 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63 (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, 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, 188 N.W.2d 283 (Iowa 1971), Musselman, 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.

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.

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).

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

When an aggravation occurs in the performance of an employer's work and a causal connection is established, claimant may recover to the extent of the impairment. Ziegler, 252 Iowa 613,

620, 106 N.W.2d 591, 595 (1960).

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager, 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler, 252 Iowa 613, 106 N.W.2d 591 (1960). See also Barz, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist, 218 Iowa 724, 254 N.W. 35 (1934).

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 27, 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, 261 Iowa 352, 154 N.W.2d 128 (1967).

Dr. Collins, the general practitioner who has been the claimant's personal physician for approximately 20 years, was quite clear, definitive and unequivocal. He found that the claimant's repetitive work caused an aggravation of the preexisting arthritic condition in her neck and right shoulder. He also found the injury was the cause of a five percent permanent impairment in the neck and a 10 percent permanent impairment in the right shoulder. He imposed a five pound weight restriction due to the neck and a two pound weight restriction due to the right shoulder.

Dr. Rovine found that claimant had arthritis in her neck and right shoulder. He did not say it was caused by or aggravated by work. Therefore, it could be said that his evidence is neutral on whether the work caused an injury and whether the injury caused the disability because he was silent on these points in his reports. He did not establish causation, but at the same time he did not deny causation. If anything other than

neutral his evidence implies that there was a causal connection that the work at least aggravated the prior arthritic condition because his history contained quite a bit of detail on the movements the claimant made at work and he did in fact order her to cease working. If the job was not aggravating her preexisting arthritic condition, then why was it necessary to take her off work? Furthermore, claimant and her husband asserted to Neifing and West that Dr. Rovine told them that her complaints were caused by work. Neifing and West accepted this statement and offered her the choice of a workers' compensation claim or benefits under the non-occupational group health plan. Thus the implications that flow from Dr. Rovine's treatment are that the claimant's work did at least aggravate the preexisting arthritis condition, based upon (1) Dr. Rovine's note (Cl. Ex. 7) taking her off work; (2) claimant and employer's response to the note by calling a meeting because of an alleged work related injury; and (3) the notes that West and Neifing put in the personnel file at that time identifing this as a work related injury (Cl. Ex. 17).

Dr. Ripperger, a board certified orthopedic surgeon, said that he did not know if claimant's job accelerated any arthritis changes, but he believed that it aggravated these symptoms of pain in both the right shoulder and neck due to the repetitive use of her right arm and from working with her head tilted to the right (Cl. Ex. 5; Cl. Ex. 13, pp. 6 & 7). Then later in his testimony he also stated that her work not only aggravated the symptoms but also speeded up, accelerated or worsened actual structural damage as well as in her neck and shoulder (Cl. Ex. 13, p. 27) which symptoms still persisted at the time of the deposition (Cl. Ex. 13, p. 35). Therefore, Dr. Ripperger did find in effect that the work caused an aggravation injury to her neck and right shoulder.

Dr. Ripperger could not be pinned down on whether the work injury caused or did not cause a permanent impairment either by his deposition testimony (Cl. Ex. 13) or by his written report to claimant's attorney (Cl. Ex. 5 & 12) or his report to Blaskovich (Def.Ex. 8, p. 27). He did assign an impairment rating for the neck and shoulder of 40 percent one year after the surgery by a written report on November 13, 1985 (Cl. Ex. 12). In his deposition he rated the neck at 25 percent (Cl. Ex. 13, p. 12) and the right shoulder at 20 percent (Cl. Ex. 13, pp. 22 & 23) but he refused to break down or factor out the current aggravation injury from the preexisting condition on either the neck (Cl. Ex. 13, pp. 11 & 12) or with respect to the right shoulder (Cl. Ex. 13, p. 23). Later he told Blaskovich that the 1967 decompression and fusion would be rated at 15 percent (Cl. Ex. 15). Dr. Ripperger could not allocate because he did not examine or know claimant before November of 1984. Even if he did it would be difficult to establish a cause and effect relationship (Cl. Ex. 13, pp. 34-36). Therefore, Dr. Ripperger neither confirmed or

denied that the claimant's aggravation injury to her neck and right shoulder were the cause of any permanent impairment. He did concede however that the symptoms still persisted up to the time of his testimony (Cl. Ex. 13, p. 35) which implies some possible impairment and disability.

Dr. Wirtz reviewed the video and determined that the final assembly of timers job would not cause either the right shoulder problem or the neck problem. He found no arthritis in her shoulder. He gave a permanent impairment rating of five percent of the right shoulder. He did not examine her neck or give a rating for the neck. He did not state whether she had arthritis in her neck or not.

Based on the foregoing evidence, it is found that claimant did sustain the burden of proof by a preponderance of the evidence that she did suffer an aggravation injury to the arthritic condition in her neck and right shoulder due to the repetitive nature of her work for the employer. Dr. Collins' testimony is clear, definitive and unequvocal. The results of Dr. Rovine's examination and the actions taken by the claimant and the company are clearly indications of a work related injury. Dr. Ripperger's testimony established that the claimant suffered an aggravation of her arthritis in her neck and shoulder due to her employment. The testimony of Dr. Wirtz must be discounted. Not only is he a forensic evaluating doctor who only saw the claimant once, but he did not examine her neck, and the video he saw was only the final assembly job and not the solid state job. How much he knew about the movements in the solid state job was not established. His examination and comments appear to be cursory.

Claimant has suffered temporary disability and is entitled to temporary disability benefits. The healing period in this case began on the date of the injury August 27, 1984 and continued to December 1, 1985, the date which Dr. Ripperger told Blaskovich that it was medically indicated that significant improvement from the injury was no longer anticipated (Def. Ex. 8, p. 27) Iowa Code section 85.34(1).

It is also found that the claimant's work injury did cause some permanent impairment. Dr. Collins rates the neck at five percent and the right shoulder at ten percent for a total of 15 percent of the body as a whole. Dr. Ripperger has assigned an impairment rating of 25 percent for the neck and a 20 percent for the right shoulder but cannot say how much, if any, is attributable to the instant injury. He declined to find any permanent impairment due to the aggravation injury, but did state that her symptoms have persisted. Therefore, his ratings are of little value, but do indicate considerable impairment for some reason. Dr. Wirtz did not rate the neck but assigned a five percent permanent impairment rating for the shoulder. The

uncontradicted testimony of Dr. Collins, the statement of Dr. Ripperger that the claimant's symptoms have persisted, the foregoing ratings of all of the doctors, coupled with the claimant's testimony and the testimony of the other witnesses in this case (especially Klein and Wacker), do establish that the work injury was the cause of some permanent impairment and disability.

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, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963).

The functional impairment ratings of Dr. Collins and Dr. Wirtz are not large. Dr. Ripperger's impairment ratings cannot be used because he could not say how much, if any, was due to this injury. Dr. Rovine did not rate the claimant.

Claimant's age of 57 makes it more difficult to find work. It also brings her closer to retirement age, and from the evidence presented, it appears as if she may have already retired. Consideration must be given to the employee's plans for retirement, Swan v. Industrial Engineering Equipment Co., IV Iowa Industrial Commissioner Reports 353 (1984) as well as retirement benefits being received. McDonough v. Dubuque Packing Co., Volume I, I Industrial Commissioner Decisions 152 (1984).

Her seventh grade education reduces her employability but still she has a good intelligence inspite of the lack of a twelfth grade formal education. However, she told both Doherty and Blaskovich that she was not interested in studying for or completing the requirements for her GED. She is a well dressed person, makes a good appearance and is personable.

Her prior life long factory work reduces her transferable skills, but Blaskovich identified 32 jobs that she thought the claimant could perform. Dr. Ripperger approved the job descriptions and reported that claimant could perform her old job as an assembler and also several other areas of work as well. DeGryse

said it is possible she could be employed by Eagle as an assembler if she chose to follow Dr. Ripperger's 15 pound weight restriction rather than Dr. Collins' two pound weight restriction.

Doherty said claimant was unemployable, but he admitted that he did not address her motivation. Claimant would have to give up a $390 per month pension if she returned to work. She and her husband are both receiving pensions at this time. They have a motor home and camper. They like to travel and do travel. Claimant has constant pain from arthritis which apparently now also effects her hands and knees. Although claimant appeared at some of the prospective employers wearing her neck brace Blaskovich said she made no applications for the jobs that she could do. Employers are responsible for a reduction in earning capacity caused by a work injury but they are not responsible for a reduction in actual earnings because the employee resists returning to work. Williams v. Firestone Tire and Rubber Co., III Iowa Industrial Commissioner Report 279 (1982).

Claimant did not make out a prima facia case that there are no jobs available to her in any well known branch of the labor market. Guyton v. Irving Jensen Construction Co., 373 N.W.2d 101 (Iowa 1985). On the contrary, Blaskovich has proven that there are a number of jobs that the claimant could do within her qualifications and restrictions. Nevertheless, claimant's earning capacity has been reduced. She frequently earned $10.00 per hour. The jobs now available range from minimum wage to $4.00 or $5.00 per hour.

Based on the foregoing factors it is determined that claimant has sustained a 25 percent industrial disability to the body as a whole.

Iowa Code section 85.38(2) provides as follows:

> Credit for benefits paid under group plans. In the event the disabled employee shall receive any benefits, including medical, surgical or hospital benefits, under any group plan covering nonoccupational disabilities contributed to wholly or partially by the employer, which benefits should not have been paid or payable if any rights of recovery existed under this chpater, chapter 85A or chapter 85B, then such amounts so paid to said employee from any such group plan shall be credited to or agaist any compensation payments, including medical, surgical or hospital, made or to be made under this chapter, chapter 85A or chapter 85B. Such amounts so credited shall be deducted from the payments made under these chapters. Any nonoccupational plan shall be reimbursed in the amount so deducted. This section shall not apply to payments made under

any group plan which would have been payable even though there was an injury under this chapter or an occupational disease under chapter 85A or an occupational hearing loss under chapter 85B. Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that may be made against them by reason of having received such payments only to the extent of such credit.

There are clearly three conditions which must be met before credit may be allowed: (1) benefits received under a group plan; (2) contributions to that plan made by the employer; and (3) the benefits should not have been paid if workers' compensation was received. Hebensperger v. Motorola Communications and Electronics, Inc., II Iowa Industrial Commissioner Report 187, 189 (1981). Roma L. Dyvad v. Southfield Care Center & St. Paul Fire & Marine Ins. Co., File 736345, Appeal Decision filed August 19, 1986.

Claimant received benefits under a group plan. All contributions to the plan were made by the employer according to the testimony of DeGryse. He further testified that this plan and workers' compensation are mutually exclusive. He stated that you cannot receive benefits under both plans. This was contradicted by what the claimant told Blaskovich. Blaskovich reported that claimant told her that she would receive the $390 of disability retirement income for the remainder of her life regardless of any other benefits she received (Def. Ex. 8, p. 8). Examination of the plan documents submitted by defendants is silent as to whether the employee can or cannot receive disability income and workers' compensation benefits at the same time (Def. Ex. 6). The plan documents are the best evidence of what the plan provides. Iowa Code section 85.38(2) speaks to benefits which should not have been paid or payable if rights of recovery existed under the workers' compensation act. This section expressly states that does not apply to payments which would have been payable even though a compensable injury occurred. McDonough v. Dubuque Packing Co., Volume I, I Industrial Commissioner Decisions, page 152 (Filed September 2, 1984). The defendant, who is the proponent of entitlement to a credit, has failed to sustain the burden of proof that they are entitled to the credit. The testimony of DeGryse is contradicted by the statement of the claimant to Blaskovich. The plan documents, which are the best evidence, contain no written provisions supporting the claim for the credit. Therefore, it is found that defendants are not entitled to a credit for the disability retirement benefits made to the claimant.

FINDINGS OF FACT

WHEREFORE, based upon the evidence presented the following

findings of fact are made:

That claimant began work for the employer on or about June 28, 1951 and retired on disability on March 6, 1985 after approximately 33 years of active employment for the employer.

That all of the claimant's jobs with the employer, especially stuffing boards in solid state and her last job of final assembly of timers required repetitive use of the right arm and shoulder. Furthermore, stuffing boards required working with their head and neck tilted to the right.

Claimant developed arthritis in her neck following a cervical decompression and fusion in 1969 due to an automobile accident not related to her employment.

That subsequently claimant developed arthritis also in her right shoulder.

That claimant has also now developed arthritis in her hands and knees.

That the claimant's work of stuffing boards in solid state and the final assembly of timers materially aggravated the preexisting arthritis in her neck and right shoulder.

That the claimant was no longer able to work on August 27, 1984.

That surgery was performed on her right shoulder on December 18, 1984 and that she reached maximum medical improvement after the surgery on December 1, 1985.

That Dr. Collins, a general practitioner and her personal physician, determined that claimant suffered a five percent permanent impairment of her neck and a 10 percent permanent impairment of her right shoulder due to an aggravation of the arthritis in the neck and right shoulder.

That several possible job opportunities were available but claimant did not seriously try to become employed.

That claimant and her husband are both retired and drawing pensions, own a motor home and camping equipment and do travel and camp.

That arthritis has been diagnosed in claimant's neck, right shoulder, knees and hands and that she suffers with arthritis pain particularly in her neck and right shoulder regularly.

That claimant's motivation to seriously seek employment is very questionable under the circumstances.

That claimant failed to demonstrate that she could not find employment in any well known branch of the labor market.

That claimant suffered an industrial disability of 25 percent of the body as a whole as a result of the August 27, 1984 injury.

That claimant's supervisors, Klein and Wacker, had knowledge of the aggravation injury to the claimant's neck and right shoulder.

That claimant reported the injury to the employer on the same date that she learned it might be work related which was on August 27, 1984.

That the disability income plan documents introduced into evidence do not show that the claimant is not entitled to benefits if she has a compensable injury under the workers' compensation law.

CONCLUSIONS OF LAW

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

The defendants failed to prove by a preponderance of the evidence that the claimant failed to give notice as required by Iowa Code section 85.23. On the contrary, claimant established that: (1) defendants had actual knowledge of the injury; and (2) that claimant gave notice both as required by the discovery rule and as required by the cumulative injury rule.

That claimant sustained the burden of proof by a preponderance of the evidence that she suffered an aggravation of the arthritis in her neck and right shoulder which arose out of and in the course of her employment of stuffing boards in solid state and in final assembly of timers.

That the aggravation of the arthritis in her right shoulder was the cause of temporary disability from the date of the injury on August 27, 1984 to the point when Dr. Ripperger determined she had attained maximum medical improvement on December 1, 1985.

That the aggravation injury to the neck and to the right shoulder was the cause of permanent impairment and that the claimant is entitled to permanent partial disability benefits for 25 percent industrial disability to the body as a whole.

That the defendants did not sustain the burden of proof that they are entitled to a credit under Iowa Code section 85.38(2)

in the amount of $7,410.00 for disability retirement benefits paid to the claimant.

ORDER

WHEREFORE, IT IS ORDERED:

That the defendants pay to claimant sixty-six (66) weeks of healing period benefits for the period of August 27, 1984, the date of the injury, to December 1, 1985, the date of so called maximum medical improvement at the rate of two hundred ten and 01/100 dollars ($210.01) per week in the total amount of thirteen thousand eight hundred sixty and 66/100 dollars ($13,860.66).

That the defendants paid to claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of two hundred ten and 01/100 dollars ($210.01) per week in the total amount of twenty-six thousand two hundred fifty-one and 25/100 dollars ($26,251.25) commencing on December 2, 1985.

That defendants are entitled to a credit in the amount of three thousand one hundred nineteen and 99/100 dollars ($3,119.99) for payments made under the non-occupational accident and sickness plan as stipulated.

That the defendants pay accrued benefits in a lump sum.

That interest will accrue under Iowa Code section 85.30.

That defendants will pay the costs of this action pursuant to Division of Industrial Services Rule 500-4.33, formerly Iowa Industrial Commissioner Rule 500-4.33.

That defendants file claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1, formerly Iowa Industrial Commissioner Rule 500-3.1.

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

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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001096

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD M. STABENOW, Claimant,	:	File No. 814599
vs.	:	
McDONALD'S RESTAURANT, Employer,	:	A R B I T R A T I O N D E C I S I O N
and	:	
KEMPER INSURANCE, Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Donald Stabenow, claimant, against McDonald's Restaurant, employer, and the Kemper Insurance Group, insurance carrier, for the recovery of benefits as the result of an alleged injury on January 3, 1986. This matter was heard before the undersigned on March 13, 1987 at the courthouse in Waterloo, Blackhawk County, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of the claimant, Angela Stabenow, and Jack Stabenow; and, joint exhibits 1 through 5.

STIPULATIONS & ISSUES

Pursuant to the prehearing report and order approving the same, the parties stipulated as follows:

1. At the time of the alleged injury there was an employer/employee relationship between the claimant and the employer.

2. If claimant suffered an injury arising out of and in the course of employment, it was to the lower right extremity and caused permanent partial impairment equal to 5 percent and entitling him to 11 weeks of permanent partial disability benefits.

3. If claimant suffered an injury arising out of and in the course of employment then he is entitled to healing period benefits from January 7, 1986 through January 27, 1986.

4. At the time of the alleged injury claimant was married and entitled to two exemptions; his gross weekly earnings from McDonald's was $211.14 and he was earning $38.00 per week from the United States Army Reserve.

5. The medical expenses incurred by claimant for treatment of the alleged injury were reasonably necessary and the charges, therefore, were fair and reasonable.

The issues to be resolved in this proceeding are:

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

2. Whether the alleged injury is or was the cause of the disability upon which this claim is based.

3. Whether there is a causal relationship between the alleged injury and the medical expenses incurred by claimant.

4. Claimant's rate of compensation.

EVIDENCE PRESENTED

Claimant testified he is 25 years old, married and has no children. He is presently employed by Birchwood Specialty and has been so for eight months. Claimant said he was previously employed by McDonald's where he worked from February 1981 until June or July 1986.

Claimant's job at McDonald's was that of a janitor. His duties included washing windows, unloading trucks, cleaning grills and mopping floors. The hours of claimant's employment varied slightly from 10:00 or 11:00 p.m. until 8:00 or 9:00 a.m.

Claimant recalled that January 3, 1986 was a Friday. He had started work at about 10:00 or 11:00 p.m. on Thursday. At about 3:30 or 4:00 a.m. he was mopping the floors in the restaurant. As he was swinging the mop under one of the booths he made a twisting motion to get the mop under it. At the same time he heard a loud pop from his right knee. He said this pop was louder than anything which could be considered normal. He added, however, that he did not experience pain and did not have any immediate problems with his leg. Because he did not feel any pain he finished his shift and did not report the incident to his employer. He said, however, that he did mention it to his wife when he called her at 4:30 a.m. that morning.

Claimant said that after he got home he went to sleep and did not engage in other physical activities. He went to work Friday night, but again did not report the incident. On Saturday morning after claimant got off work he went home and began

moving furniture out of his house to relocate to an apartment he had rented. His brother was helping him with the move.

Claimant stated that they had the truck he had rented about half loaded when he and his brother were loading a coffee table weighing about 45 pounds onto it. As claimant went to move to the side his knee locked on him. He said he sat down for about half an hour to let the pain subside. A friend of his and his brother finished loading the truck while claimant rested the knee.

Claimant went to work that night at about 12:00 a.m. Sunday. He did, however, have problems and limped around at work. At about 6:00 a.m. he felt pain in his knee while looking at an orange juice machine. He asked the manager to get him help unloading a truck that had come in.

After work claimant helped his brother unload the rest of his belongings from the truck. He was scheduled to work Sunday night but called to work to report he would not be able to come in and work. He said he did not tell the manager about the popping incident with his knee that had occurred Friday morning. On Monday, claimant sat around the house and that evening decided he should go to the emergency room at the hospital.

Claimant's wife took him to the hospital. When he checked into the hospital he gave a nurse a history of having the knee lock up while moving furniture into the truck. He said the first time he thought of the relationship between the popping sound at work and his knee problem arose after talking to the emergency room doctor who told him there would be a loud pop when cartilage breaks. Claimant was referred to John R. Walker, M.D., who he saw on January 8, 1986.

After returning home from Dr. Walker's office, claimant called the manager at McDonald's and told him he would not be in to work, inquired about a meeting he was supposed to attend, and advised him of the incident that had occurred at work on Friday morning. Claimant said he was familiar with the procedure for filing for workers' compensation because of a prior experience. After reporting the incident, he completed the appropriate claim forms and was later contacted at home by the insurance carrier.

Dr. Walker referred claimant to his partner, James E. Crouse, M.D., who performed arthroscopic surgery on claimant's knee. Claimant was off work until January 28, 1986. He was able to return to work and do his duties. He quit in June and July to take the job where he is presently employed. Claimant said that exhibit 5 contains the itemizations of the medical expenses he incurred for treatment of his knee injury.

On cross-examination, claimant reconfirmed that there were

no witnesses to the incident that occurred at work early Friday morning. Also, that he did not report the incident to his employer until Monday or Tuesday morning. Claimant did not deny telling the emergency room nurse that he had hurt himself loading a truck on Saturday morning, but did deny saying anything about ice being a factor in the injury. Claimant also denied any previous problems with his knee.

On redirect examination, claimant explained that he gave the emergency room nurse a history before he spoke to the doctor. He said he was not aware of the connection between the popping in his knee on Friday and subsequent problems with his knee until he had talked with the doctor.

Claimant said that at the time of his injury he was receiving $165 per month from the U.S. Army Reserve.

Angela Stakenow testified that she is the wife of claimant. She said she first became aware of a possible problem with claimant's knee when he spoke to her on Friday morning. She said she did not consider it significant at the time because claimant only mentioned a loud popping sound.

Mrs. Stakenow next became aware that claimant was having a problem with his knee on the following Saturday morning. Because of claimant's continued problems, Mrs. Stakenow took claimant to the hospital about 7:00 p.m. on the following Monday. Mrs. Stakenow said she was present when claimant gave the history of the injury to the emergency room nurse and said that claimant denied having slipped on ice. She said that the claim was initially made on her employer's group insurance policy, but that there was no coverage. Mrs. Stakenow said she was also present when the claimant discussed the popping sound in his knee with the emergency room doctor.

Jack Stakenow testified that he is claimant's brother. He said he was helping claimant move on the Saturday morning when his knee locked up. he said he and claimant were carrying a coffee table at the time. He said claimant had just stepped into the truck when claimant grabbed the knee. Claimant then sat down and Jack finished loading the truck.

Joint exhibit 1 is a statement of claimant's earnings from his job at defendant's for the 14 week period prior to his injury.

Joint exhibit 2 is a compilation of medical records concerning claimant from a Raymond W. Carson, M.D., which covers a period of time from 1978 through mid 1985. These records contain no information concerning claimant's knee.

Joint exhibit 3 contains a medical report from James E.

Crouse, M.D., dated February 28, 1986. According to Dr. Crouse's report, claimant "was working at McDonald's on La Porte Road mopping when he twisted his knee and felt a pop in his knee with severe pain in the inside aspect of his knee." Dr. Crouse goes on to explain that claimant was diagnosed as having a bucket handle medical meniscus tear of the right knee. The torn cartilage was excised by arthroscopic surgery on February 10, 1986. Dr. Crouse states that the meniscus tear occurred on February 3, 1986. He stated that claimant would have a permanent impairment of 5 percent of the lower right extremity as a result of the injury.

Joint exhibit 5 is copies of claimant's medical records from Schoitz Medical Center in Waterloo, Iowa. According to those records, claimant was first seen at the medical center on January 6, 1986 at about 10:20 p.m. The nurse's description of claimant's problem states that two days earlier claimant had slipped on ice and twisted his knee while loading a truck. The next note from the medical center appears to be January 8, 1986 which reflects that claimant was working at McDonald's when he heard a popping sound in his knee and felt immediate pain. Also contained in the exhibit is a clinical history and physical examination report dictated by John R. Walker, M.D., on January 9, 1986. This report indicates that claimant heard the pop in his knee at McDonald's but did not feel immediate pain. There is an operative report authored by Dr. Crouse included as well as nurse's notes and progress notes included in the exhibit.

Joint exhibit 5 contains itemized statements from various medical providers. In light of the stipulation of the parties as to the fairness and reasonableness of these changes, they will not be set out in detail.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on January 3, 1986 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 3, 1986 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

As a general rule, inconsistent or inaccurate medical histories can be extremely damaging to a claimant's credibility. There is, of course, a glaring inconsistency in this case. The emergency room nurse was told claimant injured himself while loading a truck full of furniture at home, yet he bases his claim on an incident occurring several hours earlier at work. It is also noted that Dr. Crouse's report says claimant felt immediate pain following the popping sound while both claimant and Dr. Walker's January 9, 1986 report state he felt no immediate pain. Notwithstanding these inconsistencies, however, claimant is believable, his explanation of the inconsistencies is reasonable and more facts are consistent with his claim for recovery than are not.

First, claimant did mention the popping sound to his wife the mornning it happened. Second, he was not physically active follwing the injury until he began moving his furniture. Third, the medical experts support the causal relationship and claimant's contention that he did not feel immediate pain. Fourth, claimant did report the incident as soon as it became clear as to the significance of the occurrence. Also, he made this contention prior to becoming aware that he was not covered for medical insurance by his wife's policy.

It is in any case difficult to fully articulate the reasons why one person's explanation is accepted and another's is not. Amoung the factors which contribute to this claimant's credibility were his appearance and demeanor on the witness stand. He was clear and direct in his answers and at no time appeared to be evasive. Also, with the exception of the initial history given to the emergency room nurse, claimant has been entirely consistent

in his version of the events and circumstances surrounding his injury. In summary, claimant prevails because he is believed.

Claimant having prevailed on the issue of an injury arising out of and in the course of employment, he also prevails on the issue of the causal relationship between that injury and his disability as well as the medical expenses incurred. Close examination of all the medical opinions shows that those opinions are in, in fact, based upon full disclosure of the facts and, thus, the premises upon which they are based are sound.

The final issue for determination is the rate of compensation for which claimant is to be paid. It is stipulated that claimant's gross weekly earnings from defendants was $211.14; and, that he earned $38.00 per week from the army reserve. The applicable provision, relating to claimant's rate of compensation, is section 85.36(6) which states that claimant's rate "shall be computed by dividing by thirteen the earnings...of said employee earned in the employ of the employer....." (Emphasis added.) Claimant contends that his weekly earnings from the army reserve should be included in calculating his rate. These earnings, however, were not earned in the employ of McDonald's and are, thus, excluded from calculation of the rate under the applicable subsection. Claimant's rate is based then upon gross weekly earnings of $211, married, with two exemptions, which equals $140.67.

FINDINGS OF FACT

WHEREFORE, the following facts are found:

1. On January 3, 1986 claimant injured his right knee while mopping floors at defendant's.

2. The knee injury suffered by claimant was a bucket handle medial meniscus tear.

3. As a result of the injury, claimant incurred the following medical expenses.

a.	Schoitz Medical Center	$ 824.65
b.	Orthopedic Specialists	1,332.00
c.	Consolidated Regional Labs	16.50
d.	Clinical Radiologists, P.C.	15.90
e.	Waterloo Anesthesia Group, P.C.	240.00

4. As a result of his injury, claimant was temporarily totally disabled from January 7, 1986 to January 28, 1986.

5. As a result of his injury, claimant suffered permanent partial impairment equal to five (5) percent of the lower right extremity.

6. At the time of his injury, claimant's gross weekly earnings from defendant was $211.14; he was married and entitled to two exemptions.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has proven by a preponderance of the evidence that on January 3, 1986 he suffered an injury arising out of and in the course of his employment.

Claimant has proven by a preponderance of the evidence that there is a causal relationship between the injury he suffered on January 3, 1986 and the disability and medical expenses upon which this claim is based.

Claimant has proven by a preponderance of the evidence that his rate of compensation is one hundred forty and 67/100 dollars ($140.67).

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant three (3) weeks of healing period benefits commencing January 7, 1986 and eleven (11) weeks of permanent partial disability benefits commencing at the conclusion thereof all at the rate of one hundred forty and 67/100 dollars ($140.67). All accrued benefits shall be paid in a lump sum together with statutory interest thereon.

IT IS FURTHER ORDERED that defendants pay the medical expenses incurred by claimant as a result of this injury which are set forth in finding of fact number 3 thereof.

IT IS FURTHER ORDERED that defendants pay the costs of this action.

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

Steven E. Ort

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES STILLINGS, Claimant, vs. PAYNE & KELLER, Employer, and AETNA CASUALTY & SURETY CO., Insurance Carrier, Defendants.	FILE NO. 755731 A R B I T R A T I O N D E C I S I O N FILED MAY 21 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Charles W. Stillings, claimant, against Payne & Keller, employer, hereinafter referred to as P & K, and Aetna Casualty & Surety Company, insurance carrier, defendants, for benefits as a result of an alleged injury on January 16, 1984. On March 11, 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 as a result of a work injury to his low back, claimant has suffered severe permanent industrial disability. Defendants dispute the severity of this disability.

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 Kenneth Perron. 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 January 16, 1984, claimant received an injury which arose out of and in the course of his employment with P & K; (2) claimant does not seek additional temporary total disability or healing period benefits in this proceeding; (3) the commencement date for permanent partial disability benefits, if awarded

herein, shall be January 24, 1985; (4) claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $206.42; (5) all requested medical benefits have been or will be paid by defendants; and, (6) defendants have voluntarily paid 25 weeks of permanent partial disability benefits to claimant prior to the hearing.

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 disability benefits.

FINDINGS OF FACT

1. Claimant was employed as an iron worker helper by P & K from November, 1982 to January, 1984 except for a six month period of layoff between December, 1982 and May, 1983.

Claimant was a non-union iron worker for P & K Construction Company. Claimant's wages were $8.00 per hour for a 40 hour work week. P & K has a long term "evergreen" contract with ADM Company who has a plant in the Clinton, Iowa area. According to Kenneth Perron, superintendant of P & K at the ADM plant in Clinton, this contract provides for a flat charge per hour for construction and maintenance work at the ADM plant but does not guarantee that such work will be available.

After the work injury in January, 1984, claimant never returned to P & K and was terminated for "medical reasons" according to company records. According to claimant's superior, claimant's job performance was only fair despite a better than average attitude. Consequently, given the heavy competition for jobs in the Clinton area, claimant probably would not be rehired regardless of his physical condition.

2. On January 16, 1984, claimant suffered an injury to his lower back consisting of a herniated disc at the L5-S1 level of the spine, which arose out of and in the course of his employment with P & K.

From his demeanor at the hearing, claimant appeared to be testifying for the most part truthfully although some inconsistencies between his testimony at hearing and in this deposition, pointed out by defense counsel in cross-examination, revealed that he has a tendency to exaggerate the effects of his disability and downplay his current physical abilities. Claimant testified that at the time of the injury he was assisting in handling conveyor shells, or large tubes, with a boom truck. One of the

shells slipped and claimant pulled his back in an attempt to hold onto the shell. Claimant felt severe pain and numbness in the low back after a few minutes extending into his neck. These symptoms did not subside and claimant sought treatment from D. G. Wulf, M.D., two days later. Upon a diagnosis of acute back strain, Dr. Wulf prescribed medication and mild physical therapy. Claimant's condition deteriorated over the next few days and pain extended into his legs. Claimant was then referred by Dr. Wulf to a board certified neurosurgeon, Eugene Herzberger, M.D. According to Dr. Herzberger's records and deposition testimony, claimant complained of severe low back and leg pain and was immediately hospitalized for approximately six days for diagnostic testing and intensive physical therapy. A CT scan at the hospital revealed that claimant had suffered a herniated disc at the L5-S1 level of the spine. Despite the diagnosis, Dr. Herzberger's treatment remained conservative with medication and physical therapy for approximately one month. Claimant's condition did not improve over this period of time and claimant was again hospitalized in early March, 1984, by Dr. Herzberger who performed at that time a chemonucleolysis procedure in the area of the herniated disc. This procedure consisted of injecting chemopapain into the area of the disc to dissolve or reduce the size of the herniated disc thereby relieving pressure on the ajoining nerves. Claimant's leg pain was significantly reduced by this procedure but claimant's low back pain persisted to a limited degree at the present time.

3. The work injury of January 16, 1984, is a cause of a mild permanent partial impairment to claimant's body as a whole.

Claimant had no previous medical history of any back problems and no prior functional impairment or disability due to a back problem before the work injury in this case. Claimant's past medical records and credible testimony established that he was in excellent health before the work injury.

Claimant currently has permanent functional impairment to his body as a whole. Claimant's primary treating physician, Dr. Herzberger, has opined that claimant has suffered from a five percent permanent partial impairment to the body as a whole as a result of a weaken back caused by the January 16 work injury. However, Dr. Herzberger has not imposed any restrictions on claimant's work activities. In his deposition testimony, Dr. Herzberger stated that claimant is able to perform any type of physical work but agreed with claimant's counsel and another neurosurgeon, Byron Rovine, M.D., that claimant should avoid over strenuous activity of the lower back and use common sense.

Claimant stated that the back pain persists at the present time but admits that since the injury claimant has been involved in extensive physical activity both at work and at home. Claimant is in excellent physical condition and works out

regularly with weights in excess of 50 pounds. Since reaching maximum healing from the injury in July, 1985, claimant had numerous full and part-time jobs requiring repetitive and heavy lifting in a woodworking shop, a cereal plant, and an assembly plant and a metal fabricating company as a welder. Claimant also performs a limited amount of auto maintenance, carpentry, cement contracting, welding and electrical wiring on a self-employment basis. All such work at times requires heavy and repetitive lifting.

Claimant did reinjure his back after the work injury on July 25, 1984, after lifting a 50 to 60 pound keg of beer. However, after examination and another CT scan, Dr. Herzberger opines that claimant suffered only muscle ligament strain and did not suffer any permanent damage from this incident. This opinion is uncontroverted in the record.

6. The work injury of January 16, 1984, was a cause of a 15 percent permanent loss of earning capacity.

Due to only a mild physical impairment caused by the injury, claimant is physically able to return to the work he was performing at the time of the work injury and most other jobs claimant has held in the past such as construction work and auto and truck repair.

However, the work injury is a significant cause of claimant's current reduced earnings from employment. Claimant's employment has been spurious and low paying since the injury. Claimant only earned a little over $2,000 in 1986 and must rely on a few odd jobs for his income due to heavy unemployment in the Clinton, Iowa area. Admittedly, claimant's loss of income is largely due to the poor state of the Iowa economy, but the fact remains that claimant was placed into this situation because he was terminated by P & K as a result of his inability to return to work following the work injury. Defendants have made no effort to return claimant to his job despite the availability of work at P & K.

Claimant is 23 years of age. Due to his youthful age, claimant's disability is not as severe as would be the case for an older person. Despite the fact that claimant has only a tenth grade education, claimant exhibited above average intelligence at the hearing. Claimant is very versatile and his knowledge of auto mechanics and electricity was gained by reading books. Claimant is currently attending college. Consequently, claimant has high potential for successful vocational rehabilitation.

A Richard McCluhan, apparently a vocational rehabilitation consultant (his qualifications were not submitted into the evidence) performed a "VERTEK" evaluation of claimant's vocational opportunities. This evaluation is simply a computer read out of jobs in the dictionary of occupational titles which match

claimant's work history, education, physical abilities and transferrable skills. The read out identified a very large number of jobs, in excess of 100. However, the read out has only limited value in the assessment of claimant's disability because it does not provide information as to the availability of those jobs in the geographical area of claimant's residence or even in this state or surrounding states. On the other hand, the large number of jobs identified was further evidence of claimant's versatility.

CONCLUSIONS OF LAW

In this case, there was no controversy raised by the parties concerning the applicable law to be followed in the determination of the issues. The foregoing findings of fact were made on 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).

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 claimant's permanent functional impairment to his 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 setforth 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. 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).

Based upon a finding of a 15 percent loss of earning capacity or industrial disability as a result of the injury to the body as a whole, claimant is entitled as a matter of law to 75 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 15 percent of the 500 weeks allowable for

an injury to the body as a whole in that subsection. Claimant has already been paid 25 weeks according to the parties' prehearing report. Therefore, claimant shall be awarded an additional 50 weeks.

ORDER

IT IS THEREFORE ORDERED as follows:

1. Defendants shall pay to claimant an additional fifty (50) weeks of permanent partial disability benefits at the rate of two hundred six and 42/100 dollars ($206.42) per week from seven (7) days after defendants' last voluntary payment of permanent partial disability benefits.

2. Defendants shall pay interest on benefits awarded herein as setforth in Iowa Code section 85.30 and cases interpreting in that code section.

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

4. 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 21 day of May, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM E. SWANSON, SR.,	:	
Claimant,	:	
	:	FILE NO. 783926
vs.	:	
	:	ARBITRATION
OSCAR MAYER FOODS CORPORATION,	:	FILED
	:	DECISION
Employer,	:	
Self-Insured,	:	MAY 13 1987
Defendant.	:	
		IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by William E. Swanson, Sr., claimant, against Oscar Mayer Food Corporation, employer, hereinafter referred to as Oscar Mayer, a self-insured defendant, for benefits as a result of an alleged injury on January 8, 1985. On March 12, 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 he injured his right thigh, left thigh, right foot and toes, right hand, left hand and low back from a chemical burn at work. Claimant seeks permanent partial disability benefits for alleged permanent functional impairment. Defendant denies that the chemical burn caused any of claimant's permanent physical problems.

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 the hearing. Oral testimony was received during the hearing from claimant on the following witnesses: Annetta Swanson and Vernon Keller. 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 January 8, 1985, claimant received an injury which arose out of and in the course of his employment with Oscar Mayer; (2) claimant has been paid temporary total disability benefits and does not seek additional temporary total disability or healing period benefits for the work injury; and, (3) all requested medical benefits have been or will be paid by defendant.

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

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

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

FINDINGS OF FACT

1. On January 8, 1985, claimant suffered a severe chemical burn to his right thigh which arose out of and in the course of his employment with Oscar Mayer.

On the day of the work injury, claimant was cleaning equipment with a device called a "saniseptor." This device applies a soap-like substance on the surface of machines which must then be rinsed off. The soap-like substance is caustic and consequently, claimant was compelled to wear protective rubber clothing and boots as well as a shield over his face when he operated this device. The injury occurred when a hole developed in the right leg of the protective garment worn by claimant and the skin on the right thigh became exposed to the caustic soap. Within minutes claimant felt his right leg become warm and after investigating he observed an eight inch by five inch "black ball" hanging on his leg. Claimant then contacted his foreman and asked to take a shower. After the shower the black ball appeared "like a scab and was bleeding." After reporting to the plant first aid department, claimant was taken to the hospital and received medication called "Silverdean." The next day claimant was sent to Ahmad Chamany, M.D., (specialty unknown). Dr. Chamany then diagnosed a chemical burn and removed the burned area on claimant's skin. After a period of healing, claimant underwent two skin graft procedures to cover the burned area with skin taken from his right leg. Claimant was then released to return to full duty on April 9, 1985 by Dr. Chamany.

Observations by the undersigned of the injured area at the hearing revealed a well healed but rather unsightly scar approximately 10 or 11 centimeters in diameter on claimant's front thigh. No noticeable scar was seen on claimant's left leg in the area of the skin graft.

2. A finding could not be made that the chemical burn of January 8, 1985 was a cause of permanent functional impairment.

Claimant and his mother testified at the hearing that prior to the chemical burn, he had no numbness or tingling in his legs, hip, back, hands or feet and since that time he has had those complaints. Claimant and his mother testified that prior to January 8, 1985 claimant had no low back pain, left leg limp or right toe or foot drag but has experienced these symptoms since the injury.

Two medical opinions have been offered into the evidence. Defendant relies on the views of the treating physician, Ahmad Chamany, M.D. Dr. Chamany states that the chemical burn did not extend into the muscle or lower tissues of the right thigh and that the burn did not cause any significant functional problem or any work limitation. In June, 1986, claimant was examined by F. Dale Wilson, M.D., (specialty unknown). His examination described all of the physical problems described above by claimant and his mother. Dr. Wilson initially states in his report that the work injury of January 8, 1985 was a causative factor in these symptoms which the doctor believes are permanent. However, aside from loss of sensation in the area of the right thigh skin graft, Dr. Wilson states that he has no explanation as to why these complaints exist. He apparently bases his causal connection opinions only on the fact that claimant had no such complaints before. During the hearing claimant was asked why he did not complain to Dr. Chamany about these various problems. Claimant responded that they did not become noticeable until four to five months after the injury.

First, claimant has not established by a preponderance of the evidence that his pain and loss of sensation complaints other than in the right thigh is causally connected to the chemical burn. Considerable weight must be given to the treating physician who indicates that the burn did not extend beyond the surface skin. Also, claimant's various complaints occurred several weeks after the incident. Furthermore, the only doctor to state that claimant does have impairment caused by the work injury cannot explain how a skin burn can cause low back pain, foot drop and limp and loss of sensation in the hands.

Finally, although causation of the loss of skin sensation in the right leg is rather obvious, Dr. Chamany apparently did not believe this to be significant enough to cause functional loss of the use of the leg. Dr. Wilson gives a one percent impairment rating for such a loss of sensation but, likewise, cannot explain how such a loss of sensation can result in a functional loss of use. Claimant himself at the hearing was unable to explain or describe any functional loss of use of the leg caused by the numbness in the right leg.

Admittedly, claimant suffered a very painful and unsightly burn and probably does have the various troublesome and painful physical problems in his hands, hip, back and legs which were discussed during the hearing but his claim that these problems were caused by the chemical burn has simply not been established by the greater weight of the medical opinions offered into the evidence. We have two well qualified doctors in this case who disagree and the testimony of claimant and his mother alone simply was not enough to tilt the scale in favor of claimant.

CONCLUSIONS OF LAW

In this case there was no controversy raised by the parties concerning the applicable law to be followed in the determination of the issues. 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).

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 sub judice, no finding was made causally connecting the work injury to permanent functional impairment to a body member. Therefore, claimant is not entitled to permanent disability benefits.

Although claimant did not prevail in this proceeding, he

appeared sincere in his testimony presented at the hearing and his claim is supported by at least one physician. Therefore, the claimant shall be awarded the costs of this action.

ORDER

IT IS THEREFORE ORDERED as follows:

1. That claimant's petition is dismissed.

2. Defendant shall pay the costs of this action pursuant to Division of Industrial Services Rules 343-4.33.

Signed and filed this 13 day of May, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL L. THOMAS, Claimant, vs. STANLEY JONES MECHANICAL CONTRACTORS, INC., Employer, and USF&G, Insurance Carrier, Defendants.	:	File No. 738508 A R B I T R A T I O N D E C I S I O N FILED JAN 5 - 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Michael L. Thomas, claimant, against Stanley Jones Mechanical Contractors, Inc., employer, and USF&G, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained June 21, 1983 stipulated as arising out of and in the course of employment. This matter came on for hearing before the undersigned deputy industrial commissioner September 29, 1987. The record was considered fully submitted at the close of hearing. The record in this case consists of the testimony of claimant and Peggy McKinney, and joint exhibits 1 through 11, inclusive.

ISSUES

Pursuant to the prehearing report and order approved September 29, 1987, the issues presented for resolution are:

1) Whether claimant's injury is causally connected to the disability on which he now bases his claim;

2) Whether claimant is entitled to temporary total disability/healing period benefits for the period from February 6, 1985 through September 9, 1985, inclusive, as a result of wrist surgery;

3) The nature and extent of any permanent partial disability benefits which may be awarded;

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4) The appropriateness and authorization of certain medical expenses; and

5) Whether claimant is entitled to Iowa Code section 86.13 penalty benefits.

FACTS PRESENTED

Twenty-four year old claimant testified he graduated from high school, studied carpentry one year at an area vocational school, and denied any further formal education or training. Claimant testified to work experience as a farm hand and in maintenance before securing work with defendant employer, first as a plumber's helper earning $5.00 per hour and last as a laborer earning $6.00 per hour. Claimant began the labor position in May 1983 explaining he assisted the semi-skilled and skilled workers at the Monsanto plant in Muscatine, Iowa. Claimant worked approximately one month before he was injured on June 21, 1983.

Claimant recalled little about his accident. He explained only that he fell at work and awoke in the hospital. Medical records revealed that after emergency care at Muscatine General Hospital, claimant was transferred to the University of Iowa Hospitals where he remained until discharged on July 3, 1983. His accident was described in the medical records as a fall off of a scaffold approximately thirty feet to the ground striking the back of his head. X-rays revealed a lateral temporal skull fracture, subdural or epidural hematoma and right front horn compression. Claimant was found to have a laceration at the anterior portion of the tympanic membrane. Claimant was closely observed and described as intermittently somnolent and agitated. Hand and chest restraints were used. At the time of discharge, claimant was described as alert and oriented but exhibiting short term memory deficits. He was advised to contact a local otolaryngologist for followup audiograms to rule out significant conduction defect. (Joint Exhibit 2)

Claimant returned to Kentucky and recalled he came under the care of Carey W. Campbell, M.D., whom he described as treating him for his head, and "back, some" and who referred him to William J. Stodghill, M.D., for problems with his left wrist in August 1983. Claimant explained Dr. Stodghill put his left wrist in a short arm cast and that he was released to return to work November 15, 1983. Claimant testified he first noticed a problem with his wrist when he came to his "senses" in the hospital when he saw an egg-shaped knot the size of a dime or a quarter and could feel ridges in his wrist. He recalled he mentioned his wrist was bothering him to the University of Iowa personnel. Claimant explained he later came under the care of David S. St. Clair, M.D., who, on February 7, 1985, performed a bone grafting on the wrist. Claimant was released to return to

work September 9, 1985 with a lifting restriction of 50 pounds. Claimant testified he is still under that lifting restriction.

Since his injury, claimant described working as a hand laster on a production line making new shoes, a cook, a van driver, general laborer, farm laborer and truck driver at rates of pay varying from $3.35 to $4.50 per hour. Claimant testified he is currently employed as an activities assistant working with mentally challenged individuals at a rate of pay of $3.50 per hour. Claimant testified that his health before the accident was excellent but that he is now unable to taste or smell, that he has hearing loss in his right ear, his back bothers him and that he has little mobility in his wrist. Claimant testified to an inability to sit or stand for extended periods of time without having his back "knot up." He explained he feels a tightness in his wrist which increases with use, a loss of grip in that wrist and finally that he cannot push down with the wrist without causing pain.

Claimant has sought to return to work with defendant employer but no work has been available to him.

Peggy McKinney testified that she is the director of administrative services for defendant employer and as such administers both the insurance program and employee benefit program. She described defendant employer as a general contractor specializing in heating and plumbing, air conditioning and resource recovery. She explained that because of the various locations in which the employer works, it is the employer's policy to use local labor whose wages are based on the locale where work is available. She explained that claimant was not returned to work at the Monsanto plant in Muscatine because the job began winding down in mid-October and was finished by mid-December 1983; that the claimant was the only nonlocal laborer hired for that job; and that he was hired only in consideration of his uncle who was a long time employee of the company. She indicated that although claimant had advised her of problems with his back and his hearing, claimant never complained about any problems with his wrist.

Claimant's medical records from the University of Iowa show that on discharge from the hospital, a motor examination revealed claimant to be able to move all extremities equally and purposely without evidence of a wrist fracture. Dr. Campbell first makes note of claimant's wrist problem August 18, 1983, stating claimant is "still complaining" of tenderness of the left wrist. Dr. Campbell indicates that he recommended to the claimant to proceed with an orthopedic consulation for followup evaluation of the wrist. With regard to claimant's complaints of back pain, claimant submitted to lumbar spine x-rays July 15, 1983, which, according to Dr. Campbell's office notes of July 28, 1983, showed questionable compression fracture at L1-L2. Dr.

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Campbell writes "This appears to be an old and possibly a developmental finding." On December 29, 1986, Dr. Campbell expresses the opinions that the claimant's wrist injury occurred at the time of his fall on or about June 21, 1983 and further, with regard to complaints of back pain, the complaints did not occur until weeks after his injury and were not reported on initial consultation when claimant was alert and cooperative. Dr. Campbell opines "It is therefore my opinion that the conditions I detected in his back are of a degenerative nature, that the symptoms were aroused during the course of his sedentary activity, while recovering from his injury, and further that the symptoms had resolved at the time of my last encounter on 11 August 83." (Jt. Ex. 3f)

William J. Stodghill, M.D., orthopedic surgeon, treated claimant regularly from August 23, 1983, on referral from Dr. Campbell for left arm pain until November 15, 1983, when claimant was released to return to work. Claimant was diagnosed as having a fracture of the left carponavicular and treated with a short arm cast. At that time, Dr. Stodghill opined that the fracture of the navicular was directly related to the June 21, 1983 accident. On December 21, 1983, Dr. Stodghill writes "the fracture of the navicular has healed uneventfully...." (Jt. Ex. 7c) Claimant later returned to Dr. Stodghill for further followup on October 2, 1984, complaining of continuing problems with pain and a limitation of motion in his wrist. Surgery was discussed with and rejected by claimant. In December 1986, Dr. Stodghill wrote "I feel that this fracture of the navicular and avascular necrosis represents 15% impairment of the extremity or 9% of the whole man, this is in accordance with the AMA Guidlines [sic] for Permanent Impairment. It is my opinion that the fracture of the navicular and the subsequent avascular necrosis is a direct result of his accident of June of 1983." (Jt. Ex. 7e)

David S. St. Clair, M.D., performed a Russe bone grafting of the left navicular and carpal tunnel release February 7, 1985, after x-ray showed a nonunion of the left carpal navicular. On August 9, 1985, Dr. St. Clair reported "I would estimate his permanent physical impairment to be 25% of the upper extremity because of the likelihood of developing arthritic changes in the future." (Jt. Ex. 11f) In December 1986, Dr. St. Clair opined "We estimate this impairment at about 30 % now. According to AMA guidelines we can rate his limited motion at 11%; however, his non-union doesn't have any specific recommendations for that, so I estimated his total impairment related to the upper extremity at the present time to be 30%." (Jt. Ex. 11k)

In April 1984, claimant consulted Harold T. McIver, M.D., complaining of diminished hearing on the right and roaring in his head. Dr. McIver determined claimant had a 30 percent loss of hearing but he could not determine how much of that hearing loss was due to the accident. On November 19, 1985, Dr. McIver

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writes "He complains, this time, of complete loss of smell since his accident. There has been no regain of his smell and we must assume that it is due to the skull fracture suffered at the time of the accident" and on December 30, 1986, he opines "It is my opinion that to a reasonable degree of medical probability that the extent and causation of the loss of smell, taste and hearing was due to the accident that the patient was involved in." (Jr. Ex. 8f, 8g)

Claimant was also seen by James O. Shaw, M.D., F.A.C.S., for evaluation of his hearing impairment, who advised that he could not give any opinion as to whether or not the claimant sustained high frequency hearing loss as a result of his fall because he had had no opportunity to examine claimant or test his hearing prior to the fall. Dr. Shaw calculated a mild monaural hearing impairment of 3.8 percent in only the left ear and further advised that calculations for a bilateral hearing impairment yields a value of 0.6 percent. Notwithstanding the lack of opportunity to previously test claimant's hearing, Dr. Shaw opined that the sensorineural hearing loss may have been present prior to his accident. (Jt. Ex. 4c)

Claimant was evaluated by Robert J. Barnett, M.D., A.A.O.S., April 20, 1984 who concluded "Patient has arthritic changes from his fractured wrist and estimate he has a ten percent permanent disability to the left arm." Dr. Barnett also indicated that claimant has an injury to his back, should not do any heavy lifting and estimated claimant has a 5 percent permanent disability to the body as a whole.

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 21, 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). The expert

opinion may be accepted or rejected, in whole or in part, by the trier of fact. Id. at 907. Further, the weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. See also Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

When 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).

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(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.

Iowa Code section 85.27 states, in part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.

Iowa Code section 86.13 states, in part:

> If a delay in commencement or termination of benefits occurs without reasonable or prabable cause or excuse, the industrial commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

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ANALYSIS

Of first concern is whether or not the disability on which claimant now bases his claim is causally connected to his injury of June 21, 1983. Claimant seeks an award of benefits based on hearing loss, an injury to his back and wrist.

With regards to claimant's hearing loss, both Dr. McIver and Dr. Shaw attest to a loss of hearing. Dr. Shaw could not state a definite cause for the sensorineural loss but acknowledges claimant did sustain a severe intracranial injury and he did not totally dismiss a causal connection between the two. Dr. McIver finds a hearing loss, first cannot determine how much of the loss is due to the accident and then determines the extent and causation of the loss of smell, loss of taste and loss of hearing were due to the accident. Medical records from the University of Iowa show claimant incurred a laceration of the anterior portion of the tympanic membrane. Claimant was specifically advised to contact an otolaryngologist for followup audiograms to rule out significant conduction defect. Obviously, there was immediate concern claimant would incur hearing loss. Claimant's hearing has been impaired by his own opinion and the opinions of two medical experts. It is concluded claimant's hearing loss is causally connected to his injury of June 21, 1983.

Claimant's wrist injury presents a somewhat more complicated set of facts. Claimant fell June 21, 1983 and was hospitalized immediately thereafter. The nurse's notes from the University of Iowa show claimant was closely observed. The notes reveal claimant was in leather and posey restraints for a good part of the time he was at the hospital. The only notation with regard to pain was made June 29: "complains of hands hurting." There are no complaints of pain in the wrist found. J. Godersky, M.D., Associate Professor of Neurosurgery at the University of Iowa, wrote on July 5, 1983, that on discharge from the hospital, motor examination revealed 5+ strength in all motor groups of the upper and lower extremities and later specifically states there was no evidence of a wrist fracture. When claimant came under the care of Dr. Campbell July 8, 1983, Dr. Campbell noted that motor, sensory and deep tendon reflex examinations throughout the upper and lower extremities were normal except for a depressed right ankle jerk. It is accepted the first medical notation of claimant's wrist pain is found in Dr. Campbell's office notes of August 18, 1983, almost two months post-accident. Yet, Dr. Campbell referred to claimant still complaining of tenderness in the left wrist. This must lead to the conclusion that even though it had not been documented before, claimant had complained previously about such pain. All the medical experts who treated claimant's left wrist problem concurred it was probably caused by claimant's fall on June 21, 1983. There is no evidence in the record which might establish or even suggest any intervening occurrence that might have caused it. Claimant's skull fracture was a life

threatening injury and close attention was paid to his failure to recover quickly from it. It is determined claimant's wrist injury is causally connected to his accident of June 21, 1983. Claimant is therefore entitled to temporary total disability/ healing period benefits for the period from February 6, 1985 through and including September 9, 1985, pursuant to Iowa Code section 85.34(1) and defendants are liable for the medical expenses arising therefrom pursuant to Iowa Code section 85.27.

From the medical records in evidence, it appears Dr. Campbell was the only physician who regularly treated claimant for any back problems. Dr. Campbell determined the injury brought on a degenerative condition in the back which resolved itself by August 11, 1983. Dr. Nelson, on July 15, 1983, determined claimant's pain was the result of a congenital condition and expresses no opinion on causation with respect to claimant's accident or impairment. He advises only that a small depression fracture of the third lumbar vertebra is present. Dr. Barnett concludes claimant has a 5 percent permanent partial disability to the body as a whole but expresses no opinion as to causation nor to impairment. Dr. Stodghill, although an orthopedic surgeon, makes no note of any complaint of back pain or injury. Dr. Campbell's position is therefore accepted. It is concluded the injury aggravated a preexisting condition. However, it is also noted that the aggravation was only temporary.

What remains to be decided then is claimant's entitlement to permanent partial disability benefits. Although a hearing loss or wrist injury, standing alone, would be a scheduled injury compensable under Iowa Code sections 85.34(2)(l) or (r), the combination of injuries claimant, if proven, brings this case within section 85.34(2)(u) such that compensation is payable based upon disability to the body as a whole.

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

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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 currently 24 years old with a high school education and one year vocational training in carpentry. Claimant cannot be considered to have any substantive specialized training, but appears to be of average intellectual ability. A review of his employment history shows he has principally earned his way as a manual laborer. He is now engaged in an occupation which pays less than the wage he earned as a laborer. Because of medical restrictions, claimant has limited ability to lift. Therefore, a significant portion of the labor market is currently closed to him. It was in this part of the market claimant was best able to maintain employment. However, claimant is a young man who appears to possess the capability to retrain himself for work outside of the type he previously performed. Outside of having a kidney removed when he was eight years old, childhood bronchitis and a pulled muscle, claimant had an unremarkable medical history before his accident. It is now accepted that claimant has suffered a permanent impairment to his wrist thus affecting his dominant hand. While claimant asserts a loss of grip, there is neither medical nor demonstrative evidence in the

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file to support this assertion. It is accepted that claimant has suffered a permanent impairment of his hearing. Claimant also suffers from a loss of taste and smell. Considering then all the elements of industrial disability, it is found claimant has sustained a 15 percent disability for industrial purposes as a result of his injury of June 21, 1983.

Iowa Code section 85.34(2) provides that compensation for permanent partial disability shall begin at the termination of the healing period.

It is determined claimant's healing period encompasses the period from June 21, 1983 through and including November 15, 1983, when claimant was released by Dr. Stodghill. Claimant was temporarily totally disabled for the period from February 6, 1985 through and included September 9, 1985, when claimant was released to return to work by Dr. St. Clair after wrist surgery. Therefore, permanent partial disability benefits shall commence effective November 15, 1983.

The final issue for determination then is whether or not claimant is entitled to additional benefits pursuant to Iowa Code section 86.13. In January 1987, claimant amended his original notice and petition to include a penalty claim. Claimant asserted that there had been a termination of permanent partial disability benefits, based on a 25 percent impairment rating by Dr. David St. Clair, without reasonable or probable cause or excuse. Defendants disagree, citing disputes as to the compensability of the injuries alleged and as to the nature and extent of disability.

Generally speaking, penalties are not imposed where there are legitimate disputes over causation or extent of impairment. See, for example, Just v. Hygrade Food Products Corp. and National Union Fire Insurance Company, File No. 656372, Appeal Decision filed January 31, 1984, Vol. IV, Iowa Industrial Commissioner Reports at 190. A review of the evidence establishes a bona fide dispute existed as to the benefits owed to the claimant, particularly with regard to the issues of causation and extent of impairment. Therefore, no penalty will be imposed.

Finally, defendants ask that any award in this proceeding contain appropriate directions as to the identity of the payees on checks issued, if any further beneftis are awarded. Since the issue of attorney fees was not raised at the time of the prehearing nor is it a part of the hearing assignment order, it is not so addressed in this decision.

FINDINGS OF FACT

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

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1. Claimant sustained an injury which arose out of and in the course of his employment of June 21, 1983, when he fell 30 feet from a scaffold.

2. Claimant was hospitalized and x-rays revealed a lateral temporal skull fracture, hematoma and right front horn compression with a laceration of the anterior portion of the tympanic membrane.

3. As a result of the fall, claimant incurred a left wrist injury that was not immediately identified and treated.

4. Claimant underwent a Russe bone grafting of left navicular and carpal tunnel release for treatment of navicular nonunion.

5. Claimant was unable to work as a result of the surgery from February 6, 1985 through and including September 9, 1985.

6. Claimant has suffered a permanent partial impairment to his left wrist.

7. As a result of the fall, claimant has suffered a permanent partial impairment of his hearing.

8. Since his injury, claimant has lost his senses of smell and taste.

9. Claimant temporarily aggravated a preexisting condition in his back.

10. Claimant is 24 years old, a high school graduate, with one year of vocational training in carpentry.

11. Prior to his accident, claimant had an unremarkable medical history.

12. Claimant is currently under medical restrictions which limit his ability to lift and perform the manual labor he had previously been able to perform and from which he had made his living.

13. Claimant is currently engaged in an occupation which pays a lower wage than that which he was able to earn as a laborer.

14. Claimant has limited mobility in his wrist, perceives a tightness in his wrist that increases with its use and further perceives a loss of grip in his left hand.

15. Claimant is left hand dominant.

16. Claimant has a permanent partial disability to the body

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as a whole.

17. Claimant has a 15 percent industrial disability as a result of his injury.

CONCLUSIONS OF LAW

Wherefore, based on the principles of laws previously stated, the following conclusions of law are made.

1. Claimant has established the disability to his wrist, hearing, taste and smell are causally connected to his injury of June 21, 1983.

2. Claimant has not established any permanent disability to his back as a result of his fall.

3. Claimant has established he is entitled to additional temporary total disability benefits for the period from February 6, 1985 through and including September 9, 1985.

4. Claimant has established a 15 percent disability for industrial purposes as a result of his injury of June 21, 1983.

5. Claimant has established defendants' liability for medical expenses for treatment of the wrist injury.

6. Claimant is not entitled to penalty benefits under Iowa Code secton 86.13.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay unto claimant thirty point eight fifty-seven 30.857 weeks of temporary total disability benefits for the period from February 6, 1985 through and including September 9, 1985 at the stipulated rate of one hundred forty-eight and 18/100 dollars ($148.18) per week.

Defendants shall pay unto claimant seventy-five (75) weeks of permanent partial disability benefits at a rate of one hundred forty-eight and 18/100 dollars ($148.18) per week commencing November 15, 1983.

Defendants shall pay all disputed medical expenses.

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

Defendants shall receive full credit for all permanent

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partial disability benefits previously paid.

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

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

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

Deborah A. Dubik

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DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM LLOYD TUTTLE, Claimant, vs. STANNARDS, INC., Employer, and FARMERS INSURANCE GROUP, Insurance Carrier, Defendants	:	File No. 780967 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 the claimant, William Lloyd Tuttle, against his employer, Stannards, Inc., and its insurance carrier, Farmers Insurance Group, to recover benefits under the Iowa Workers' Compensation Act, as a result of an injury sustained June 12, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner in Burlington, Iowa, on March 17, 1987. The record was considered fully submitted at close of hearing but for briefs. A first report of injury was filed November 19, 1984.

The record in this proceeding consists of the testimony of claimant, and of David B. Dutman, as well as of joint exhibit 1 and claimant's exhibits 2 through 6. Joint exhibit 1 is medical records and reports relating to claimant's injury of June 12, 1984. Claimant's exhibit 2 is income tax returns of claimant. Claimant's exhibit 3 is receipts for over-the-road expenses. Claimant's exhibit 4 is claimant's transcript of grades received at Kirkwood Community College. Claimant's exhibit 5 is the deposition of David Booth taken February 25, 1987. Claimant's exhibit 6 is the deposition of William R. Pontarelli, M.D., taken February 25, 1987.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant received an injury which arose out of and in the course of his employment on June 12, 1984, and that that injury

was causally related to claimant's claimed disability. They further stipulated that claimant's healing period benefit entitlement terminated August 16, 1985. The parties indicated that the issues remaining are whether claimant is entitled to permanent partial disability benefits, the extent of any such entitlement, and claimant's rate of weekly compensation in the event of an award.

REVIEW OF THE EVIDENCE

Claimant testified that his is unmarried but has a child, born October 1, 1984, for whom he must make child support payments. Claimant graduated from high school in 1972 and gave a work history as a fishing guide, a restaurant cook, a factory worker, and a free standing fireplace builder prior to beginning work with Stannards in August 1979. Claimant's factory work largely involved shipping and palletizing, but some quality control. In building free standing fireplaces, claimant worked at cutting metal, grinding, welding, and painting, as well as shipping the product. At Stannards, claimant initially worked as a laborer helping another trucker, but subsequently drove his own van, moving household furniture throughout the United States. This involved loading the furniture on the van, driving the van to the destination and unloading there. Claimant was on the road approximately twenty-five days each month. He hired other persons to help him and paid them from his gross receipts. He reported that he was not required to stay in motels, but preferred to do so. Claimant ate meals while on the road. He was not reimbursed for either his motel costs or his meal costs. Claimant's 1984 1099-MISC with Stannards, Inc., reflects non-employee compensation of $35,565.60. Claimant's 1984 income tax return Schedule C, Profit or [Loss] From Business or Profession, reflects total business deductions of $15,743 with a net profit of $19,823. Deductions were as follows: bank service charges $189; utilities and telephone, $1,272; wages, $7,823; food and motels, etc., $4,613; claims, $1,356; postage, $2; and packaging material, $488.

David E. Booth, Jr., testified that he is the accountant for Stannards, Inc. He identified Booth deposition exhibit 1 as showing claimant's accrual and cash amounts in the thirteen weeks prior to September 5, 1984. The deposition actually records accrual and cash amounts from June 14, 1984 through September 12, 1984. Total accrual during that period equalled $15,279.63. Cash amounts were $15,885.61. Booth identified Booth exhibit 2 as claimant's accrual and cash amounts in the thirteen weeks prior to June 12, 1986. The exhibit actually reflects accruals and cash from March 14, 1984 through June 12, 1984. Accrual amounts were $9,863.15. Cash outlays were $10,915.25. Accrual amounts represent the actual income claimant earned during a week. Accrual amounts are not paid during the week earned, but are paid after Stannards receives the accrued

commission amounts from Bekin Van Lines. Cash amounts represent monies advanced claimant to permit him to operate his truck. Claimant's accrual amount represents 36 percent of the net line haul on any run made. Claimant apparently was also paid for an item called accessorial services. Apparently, both types of payments are reflected in the accrual amounts. Mr. Booth testified that claimant's workers' compensation taxable wage was calculated by multiplying the gross amount claimant received, apparently the accrual amount, by 33 percent. Hence, the gross earnings were considered to be 33 percent of the accrual amount. Claimant identified exhibit 3 as his expenses in the thirteen weeks immediately prior to his injury. The exhibit indicates labor amount of $2,565.00; food amounts of $785.49; and motel expenses of $187.31, for a total of $3,537.80.

Claimant testified that he was in above average physical condition prior to June 12, 1984 and had had no other back injuries. He admitted he had injured his knee in a motorcycle accident in Fall 1979. Claimant reported his work injury occurred as he was loading a car for shipment from California to Oregon. He stated that as he was putting up a walk board, he leaned over and had a catch in his back. He subsequently saw a Dr. Miller, a general practitioner, who referred him to Webster B. Gelman, M.D. Dr. Gelman performed a laminotomy with removal of a central herniated disc, L4-5, on the left on December 14, 1984. Claimant subsequently saw William R. Pontarelli, M.D., for followup care. Dr. Pontarelli released claimant to return to work in August 1985, but advised him not to return to furniture loading or long distance driving and to limit his lifting to 20 pounds. The employer has not offered claimant work.

Claimant is currently enrolled in a food service management program at Kirkwood Community College. Claimant reported that he started college in Fall 1985 in a premedical program, but switched to the food service management program after he had difficulties with the medical program. Claimant's grades and classes completed reflect approximately a 3.5 grade point average on a base of 4:00. Claimant's food service managment program is a two year course. Following completion of the course, claimant will either be able to work as a food service manager, that is, a restaurant operator, or as a chef. Claimant opined that a restaurant manager would earn from $9,000 to $15,000 per year whereas a chef could earn anything from minimum wage to $15,000 per year.

Claimant testified he has considerable back pain which physically limits what he can do. Claimant reported taking 1600 mg. of Motrin most days, and stated that he cannot snow or water ski or back pack or do Twaekuondo. He reported he can only play one or two games of pool per day and cannot ride his motorcycle as he used to. Claimant reported that a job as a chef could involve heavy lifting and might involve standing for long

periods of time. He says he does not know if he could do this. He opined he could handle the job of restaurant manager, however. Claimant has gained forty pounds since his injury date. Claimant stated that Dr. Pontarelli did not believe this was a significant factor in claimant's back pain, however. Claimant has been diagnosed as manic-depressive. Claimant stated medication controls his condition and that his manic-depression neither affects his work nor his school. At times, he gets nervous, however.

Claimant testified that since his injury he has applied for work as a restaurant cook, but did not receive that job. He also applied for work as a "job coach" at Goodwill Industries. There, he was one of forty applicants and was told he did not have enough experience working with the handicapped. The company offering the cooking job went bankrupt within a week of his application.

David B. Dutman, testified that he is a food service instructor at Kirkwood Community College and also owns a restaurant. He characterized claimant as a highly motivated student who has missed several days. Mr. Dutman reported that claimant had indicated he missed time either because of his back or because his medications were bothering him. On cross-examination, Mr. Dutman reported that he was not aware that claimant was taking medications for manic-depression and stated he was unable to tell whether claimant could not attend because of medications for his back or because of medications for that condition.

Dutman testified that claimant has stated he cannot lift over forty pounds and gets assistance with lifting large items.

Dutman reported that an average student graduating from the Kirkwood course would initially receive wages of from $9,000 to $15,000 per year while an above average student would start generally at approximately $13,000 per year. He characterized claimant as an above average to excellent student. Dutman reported the part-time chef in his own restaurant who has completed the Kirkwood course earns $4.50 per hour or about $9,000 per year. The manager, also a Kirkwood graduate, has had three years additional training at the Hyde Park Culinary Institute and has worked at Stouffers Restaurant. He earns $20,000 per year.

Dr. Pontarelli, a board certified orthopedic surgeon, has opined claimant has a 20 percent body as a whole permanent partial impairment under the American Academy of Orthopedic Surgeons standards. In his deposition, Dr. Pontarelli reported that he last saw claimant in Feburary 1987 and that claimant should not perform any frequent, that is, no more than once an hour, lifting of more than twenty pounds and is to change positions as often as necessary to relieve pain in his back.

injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden, 288 N.W.2d 181.

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. Id.

Claimant has a moderately severe functional impairment as well as a medically imposed 20 pound lifting restriction and a need to change positions frequently. He cannot return to his former position as an over-the-road trucker. The employer has apparently made no effort to rehire claimant in other less demanding work. Claimant's own efforts at immediate reemployment appears minimal and do not reflect a serious desire for gainful work at this time. Claimant has enrolled in college courses. While his initial premedical program might have been overly ambitious, his current food services program appears ideally suited to his pretrucking employment experience. He is doing very well in his courses and is characterized as an above average to exceptional student. He may have difficulties performing some of a chef's duties, but does not expect difficulties working as a restaurant manager. Beginning and long-term wages are also greater for a restaurant manager than for a chef. (See Dutman testimony.) Claimant is a young worker. He is bright and appears flexible. His noninjury related maniac-depression appears well controlled. Claimant testified it has interfered with his life functioning.

His career change should prove a much easier adjustment for him than a like change would be for an older worker. While his initial earnings likely will be considerably less than he would have earned as a trucker, his overall earnings should stabilize modestly below the net profit reported on his 1984 income tax return. Net profit rather than gross intake is the appropriate measure of claimant's lost earning capacity as net profit in claimant's case best reflects his actual livelihood. We are also mindful that claimant's 1984 income tax return reflects net profit over approximately an eight month and not a twelve month period, however. Weighing all the above factors, claimant is found to have a reduction of earning capacity of 25 percent.

We consider the rate issue.

Section 85.36, unnumbered paragraph 1, provides:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar.

Claimant was paid by his output. Therefore, section 85.36(6) applies. Section 85.36(6) provides:

> In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including overtime or premium pay, of sale employee earned in the employ of the employer in the last completed period of thirteen consecutive calender weeks immediately preceding the injury.

Claimant's injury occurred June 12, 1984. Therefore, Booth deposition exhibit 2 is applicable. Accrued amounts represent amounts claimant earned in the employ of the employer during that period. Accrual amounts were $9,863.15. Claimant had a total of $3,537.80 in expenses for labor, food and motels in that period. When that figure is deducted from the total accruals, the resulting sum, $6,325.35, is considerably more than the one-third amount, $3,254.84, on which defendants have calculated claimant's compensation rate. Hence, defendants' compensation rate has no ready correlation to claimant's actual spendable earnings. The question remains, however, whether claimant's expense amounts must be excluded from gross earnings in calculating his rate. Section 85.61(12) states that reimbursement of expenses and expense allowances are excluded from gross wages.

Claimant never received an expense reimbursement; therefore, the question, in part, is whether any of claimant's total accrual amounts should be considered an expense allowance under section 85.61(12). Claimant received 36 percent of the gross from each load hauled. He was required to pay all his own expenses from that amount. Claimant testified he was free to decide which expenses he incurred on each load and that he could have worked without hiring labor or staying in motels. Presumably,

he also had control over the quanity and quality of the food which he purchased and consumed. Defendants did not expressly deliniate any portion of claimant's earnings as an expense allowance but for providing that only one-third of the gross accruals would be used to calculate claimant's rate. As noted, that figure has little bearing to claimant's actual expenses. Defendants have not provided other evidence suggesting how it relates to control over the type and quantity of employee expenses. Claimant's level of control over his own income appears to have been so great that no amount of that income may be considered as expense allowance. We find that claimant had made a prima facie showing that his rate should be calculated on the total accrued amounts. Defendants have not shown evidence as to why rate calculations on that total is inappropriate; nor have they provided evidence of a more appropriate rate calculation figure. Claimant's rate, therefore, is calculated on the total accrual amount. See McCarty v. Freymiller Trucking, Inc., file numbers 729340, 729341, Appeal Decisions filed February 25, 1986.

Claimant is not married, but is required to support his dependent child. The child was conceived but not born on claimant's injury date. Afterborn children are entitled to benefits following a death arising out of and in the course of the employment. Computation of rate under section 85.36 is based on the maximum number of exemptions for actual dependency, to which the employee was entitled on the date on which the employee was injured, however. Section 85.61(10). Claimant could not have taken an exemptions for his then unborn child on his injury date. Therefore, his rate is that of a single person entitled to one exemption. Claimant's rate is $390.40.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant has a moderately severe functional impairment.

Claimant has a 20 pound lifting restriction.

Claimant is a younger worker and a high school graduate.

Claimant cannot return to truck driving and the employer has not offered him other work.

Claimant has made only minimal efforts to seek other employment at this time.

Claimant is enrolled in a community college food service course which is well suited to his past work experience as a restauant chef.

Claimant is doing well in his food service course.

Claimant could perform the duties of a restaurant manager but might have some difficulty with lifting required of a chef.

Claimant is an above-average to exceptional student.

An above-average student can expect a starting salary of approximately $13,000 as a restaurant manager.

Claimant's net profit for the approximately eight month period he worked in 1984 was $19,823.

Over time, claimant's income in food service work should stabilize modestly before that amount.

Claimant's dependent child was conceived but not born on claimant's injury date.

Claimant would not have been entitled to an exemption for the child on his injury date.

Claimant's rate is computed for a single person with one exemption.

No part of claimant's gross compensation from the employer was designated expense allowance.

Claimant chooses the type and amount of costs he would incur in driving for the employer.

Claimant's rate of weekly compensation is computed on the gross compensation he received.

Claimant was paid on the basis of his output.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant is entitled to permanent partial disability resulting from his June 12, 1984 injury of twenty five percent (25%).

Claimant's rate of weekly compensation if three hundred ninety and 40/100 dollars ($390.40).

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for one hundred twenty-five (125) weeks at the rate of three hundred ninety and 40/100 dollars ($390.40) with those payments to commence August 16, 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 7th day of April, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLARENCE UKASICK, Claimant, vs. JOHN MORRELL & COMPANY, Employer, Self-Insured, Defendant.	:	File No. 815284 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 brought by Clarence Ukasick, claimant, against John Morrell & Company (Morrell), a self-insured employer, for benefits under chapter 85B, Code of Iowa. A hearing was held in Storm Lake, Iowa, on February 3, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant, Shirley Ukasick, John Mollenhour, and John L. Hauschen; claimant's exhibits A through F; and defendant's exhibit 1. Both parties filed a brief. The exhibit list given to the hearing deputy at time of hearing reads as follows:

RE: Clarence Ukasick vs. John Morrell & Company - File #815284

Plaintiff's Exhibits:

A. Physical exam given workman for employment with John Morrell & Company - employed 4-13-58.

B. Noise level survey conducted at the John Morrell plant in Estherville by OSHA.

C. Noise level survey conducted at the John Morrell plant in Estherville by John Morrell & Company.

D. Letter from R. David Nelson, M.A., Audiologist of Nelson Hearing Aid Service with attached hearing report dated 4-25-86.

E. Report from C. B. Carignan, M.D. consisting of

two pages dated 11-28-86.

F. Estimate of cost of hearing aid for Claimant from R. David Nelson, Audiologist dated July 1, 1986.

Defendant's Exhibits:

Report of Daniel L. Jorgensen dated 10-22-86. (Deposition Exhibits included in Exhibit 1.)

1. Deposition of Daniel L. Jorgensen dated 1-29-87.

The parties stipulated that claimant's weekly rate of compensation is $200.14 and that any weekly benefits awarded would commence on April 27, 1985.

ISSUES

The contested issues are:

1) Whether this action is barred by Iowa Code section 85.23 because the employer herein was not given notice of, nor did this employer have actual knowledge of, claimant's alleged occupational hearing loss;

2) Whether this action is barred by Iowa Code section 85.26 because it was not timely filed;

3) Whether claimant sustained an occupational hearing loss under chapter 85B, Code of Iowa; that is, whether claimant is entitled to occupational hearing loss benefits under chapter 85B, Code of Iowa;

4) Nature and extent of disability; that is, the number of weeks of permanent partial disability benefits owing; and

5) Whether defendant shall pay the cost of a hearing aid or aids pursuant to Iowa Code section 85B.12.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 55 years old and completed the eighth grade. He helped his father farm for twenty-one years. He then was in the U.S. Army from 1953-55. He was given a physical examination when he entered the military and had no hearing problem at that time. He was a mail clerk in the army and had no hearing problem when he was discharged.

Claimant started working for Morrell on April 13, 1959. Prior to starting work for Morrell, claimant had worked as a "highway road builder" in Iowa and had also worked in Colorado.

He was given a physical examination when he started at Morrell and had normal hearing at that time. See Exhibit A. When claimant started at Morrell, he worked in the beef plant where he worked for eight months. He then transferred to the pork cut where he worked until the plant closed on April 27, 1985. While working for Morrell, claimant was given a hearing exam (prior to April 27, 1985) and was told by a company employee that he had sustained occupational hearing loss; he discussed this hearing loss with his foreman.

Claimant testified that he worked near the break table in the pork cut area at some point. He was shown exhibit B and testified to the decibal level at various stations in the pork cut area. He also testified that prior to 1982 he did not wear earplugs while working at Morrell. After 1982, he wore earplugs if they were available.

Claimant testified that when he worked near a fat grinder at Morrell it was "impossible" to have a conversation. He also stated that he sustained no high school injuries nor has he had any head injuries. He stated that his brothers have no problems with their hearing, but that his parents had hearing problems when they got older.

Claimant worked for twenty-six years for Morrell on a full-time basis. The cut floor was always noisy and he had to shout to communicate with his coworkers. He does not now have ringing in his ears.

On cross-examination, claimant testified that he first noticed hearing loss in the late 1970's or early 1980's. His wife commented about his hearing. He first had his hearing checked in the 1980's.

Claimant is currently receiving a retirement pension from Morrell in the amount of $508 per month and currently runs a W. C. Frank restaurant. Claimant's last job at Morrell was working on a box machine on the cut floor. He never worked on the kill floor. Claimant once again described the noise level near the fat grinder.

On cross-examination, claimant stated he could not remember when he discussed his occupational hearing loss with his foreman.

On redirect, claimant testified that the cut floor was an open room with a number of work stations and that the same was true of the basement. He stated that his farming activities were not noisy as he milked cows and such, and his brother did the field work. Claimant was 21 when he entered the military.

On redirect, claimant testified that from 1985 to present his hearing remained about the same or perhaps became a little

bit worse. When claimant started work for Morrell, his hearing was not tested with an audiogram.

Shirley Ukasick testified that she married claimant in 1958 and at that time his hearing was normal, and that the physical examination given when claimant started at Morrell established that claimant had normal hearing. She also testified that claimant developed a hearing problem seven to eight years prior to the final plant closing in 1985.

John Mollenhour testified that he started work for Morrell in Estherville in March 1959 and worked there until the plant closed in 1985. He worked with claimant on the cut floor, and they also worked in the basement near the fat grinder which caused a "real loud noise." The basement was an open room as were all other rooms in the packing plant. The ceilings and floor were made of cement.

On cross-examination, Mollenhour was told by claimant three or four months ago that claimant's hearing was "probably getting worse."

John L. Hauschen testified that he worked at the Morrell Estherville plant from 1963-85, and worked in the basement section of the cut floor. The basement area is about thirty feet by forty-five feet with the "main noise" coming from the fat grinder. He commented that the noise was "one big combination of everything." He also mentioned the noise generated by wizard knives.

Exhibit E, page 1 (dated November 28, 1986), is authored by C. B. Carignan, Jr., M.D., and reads in part:

> Mr. Ukasick told me that he began noticing a problem with his hearing about 7 or 8 years ago when he began having difficulty understanding conversation in areas with background noise, he noticed that he would often have to ask people to repeat what they had said or to talk louder in order for him to understand them. His wife found this to be annoying, as well as the fact that he seemed to play the radio or tv much too loudly for her tastes.
>
> Mr. Ukasick has resided at Estherville Iowa for 27 years. He worked at the Morrell packing plant for 26 years except for 1 1/2 years when they were shut down. He worked in a very high noise environment on the cutting floor with power saws and fat grinders and during the last 2 years of his employment as a box strapper in this same high noise area.

Exhibit E, page 2, describes a binaural hearing impairment of 12.2 percent.

Exhibit F, page 1, states R. David Nelson's estimate as to the cost of a hearing aid.

Exhibit 1 is the deposition of Daniel Jorgensen, M.D., taken on January 29, 1987. Dr. Jorgensen is an otolaryngologist. He has a soundproof booth and an audiometer. He has a person with a master's degree in audiology do the audiograms. Dr. Jorgensen examined claimant on October 22, 1986 and took a history. Deposition exhibit 1 describes an audiogram performed on October 22, 1986.

On page 11, Dr. Jorgensen stated that claimant's John Morrell work is "a large contributor of his loss." On page 12, he stated that claimant has sustained a 6.8 percent binaural hearing loss. On page 13, he discussed the use of his sound-proof booth and discussed the cost of a hearing aid.

APPLICABLE LAW AND ANALYSIS

I. Does Iowa Code section 85.23 apply to occupational hearing loss cases? It is concluded that section 85.23 does apply to this class of case as it is not inconsistent with chapter 85B. See Iowa Code section 85B.14. The Iowa Supreme Court stated in Dillinger v. City of Sioux City, 368 N.W.2d 176, 179 (Iowa 1985):

> I. Notice under section 85.23. In pertinent part, section 85.23 requires the employee to give the employer notice within 90 days after the occurrence of the injury "unless the employer or his representative shall have actual knowledge of the occurrence of an injury." Consequently, an employee who fails to give a timely notice may still avoid the sanction of section 85.23 if the employer had "actual knowledge of the occurrence of the injury." The discovery rule delays the commencement of a limitation period, for bringing a cause of action or for giving notice, until the injured person has in fact discovered his injury or by exercise of reasonable diligence should have discovered it. Orr, 298 N.W.2d at 257.

It will be found in this case that the defendant had actual knowledge of claimant's alleged hearing loss prior to the "occurrence of an injury" in this case. The injury did not "occur" in this case until the plant closed on April 27, 1985. Dillinger is authority for the proposition that Iowa Code section 85.23 may be complied with prior to the occurrence of an injury. Id. at 180. Claimant did not realize the compensable

nature of his hearing loss until a hearing test was conducted by a company nurse in the early 1980's. This hearing test provided the defendant with actual knowledge of claimant's alleged occupational hearing loss. Also, claimant did not have to comply with section 85.23 until chapter 85B became effective on January 1, 1981.

II. Is this claim time barred by Iowa Code section 85.26? Section 85B.8 provides in part:

> A claim for occupational hearing loss due to excessive noise levels may be filed six months after separation from the employment in which the employee was exposed to excessive noise levels. The date of the injury shall be the date of occurrence of any one of the following events:
>
> 1. Transfer from excessive noise level employment by an employer.
>
> 2. Retirement.
>
> 3. Termination of the employer-employee relationship. (Emphasis supplied.)

Claimant in this case separated from his Morrell employment on April 27, 1985 and as stated above his cause of action accrued at that time. His petition was filed on May 9, 1986. The Iowa Supreme Court held in Chrisohilles v. Griswold, 260 Iowa 453, 461 150 N.W.2d 94, 100 (1967) that a statute of limitations "cannot commence to run until the cause of action accrues." In this case the cause of action did not accrue until April 27, 1985 when claimant separated from Morrell. Claimant filed his petition within two years of April 27, 1985. This claim is not time barred. In accordance with Iowa Code section 85B.8 claimant waited until six months after his separation from Morrell to file this action. In any event, claimant was not required to file this action until after chapter 85B became effective in 1981.

III. The question of whether claimant sustained an occupational hearing loss, by definition, includes the question of whether a causal relationship exists between claimant's industrial noise exposure and his current hearing loss. Section 85B.4(1) provides:

> Occupational hearing loss means a permanent sensorineural loss of hearing in one or both ears in excess of twenty-five decibels if measured from international standards organization or American National standards institute zero reference level, which arises out of and in the course of employment caused by prolonged exposure to excessive noise levels.
>
> In the evaluation of occupational hearing loss, only the hearing levels at the frequencies of five hundred, one thousand, two thousand, and three thousand Hertz shall be considered.

Section 85B.4(1) requires that a claimant's hearing loss both be a permanent sensorineural loss in excess of 25 decibels and that it arise out of and in the course of his employment because of prolonged exposure to excessive noise levels.

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

Section 85B.6 provides maximum compensation of 175 weeks for total occupational hearing loss with partial occupational hearing loss compensation proportionate to total hearing loss.

Claimant has established by the greater weight of the evidence that he sustained hearing loss from his work at Morrell. It is also determined that all his hearing loss is attributable to his Morrell employment.

IV. 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 Prince holding provides some guidance in this case.

As a factual matter it is concluded that the audiogram conducted at Dr. Jorgensen's office is more accurate than the test conducted by Mr. Nelson because Dr. Jorgensen has a soundproof booth. It is, therefore, unnecessary to construe Iowa Code section 85B.9 as urged by the parties. Defendant argued that the lower of the two tests must be accepted as a matter of law.

Claimant is entitled to 11.9 (6.8% of 175 weeks) weeks of permanent partial disability benefits commencing on April 27, 1985 at a rate of $200.14.

V. Claimant is entitled to the least expensive hearing aid provided by Dr. Jorgensen, Mr. Nelson, or another provider, at the cost of the defendant.

FINDINGS OF FACT

1. Claimant is 55 years old.

2. Claimant started working for Morrell in Esterville, Iowa, on April 13, 1959.

3. Claimant has sustained some hearing loss and all of his hearing loss was sustained as a result of his Morrell employment.

4. Claimant did not realize that his hearing loss was work-related until Morrell did a hearing test in the early 1980's; this hearing test provided Morrell with actual knowledge of claimant's alleged hearing loss.

5. The Morrell plant in Estherville, Iowa closed on April 27, 1985.

6. Claimant's binaural hearing loss is 6.8 percent.

7. Claimant's stipulated weekly rate of compensation is $200.14.

CONCLUSIONS OF LAW

1. Claimant has established entitlement to eleven point nine (11.9) weeks of permanent partial disability benefits commencing on April 27, 1985 at a rate of two hundred and 14/100 dollars ($200.14); this case is not barred by either Iowa Code section 85.23 or Iowa Code section 85.26.

2. Claimant has established entitlement to the cost of the least expensive hearing aid or aids.

ORDER

IT IS THEREFORE ORDERED:

That defendant pay the benefits described above.

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

That defendant pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33.

That defendant shall file claim activity reports, pursuant

to Industrial Services Rule 343-3.1(2), formerly Industrial Commissioner Rule 500-3.1(2), as requested by the agency.

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

T. J. McSweeney
T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LORI VEACH, Claimant, vs. INTERNATIONAL PIZZA, Employer, and NATIONAL UNION FIRE INS. CO., Insurance Carrier, Defendants.	FILE NO. 796675 A R B I T R A T I O N D E C I S I O N FILED APR 27 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Lori A. Veach against International Pizza, her former employer, and National Union Fire Insurance Company, insurance carrier. Claimant alleges that she sustained a compensable injury to her left knee and back on May 12, 1985 and seeks compensation for healing period, permanent partial disability and section 85.27 benefits. The rate of compensation is also in issue.

The case was heard at Council Bluffs, Iowa on December 16, 1986 and was fully submitted upon conclusion of the hearing. The record in this proceeding consists of testimony from Lori A. Veach, John Veach and Cindy Hargin. The record also includes claimant's exhibits 1 through 20A and defendants' exhibits 21 through 34. Exhibit 1 is a deposition of O. Max Jardon, M.D., taken October 6, 1986. Exhibit 17 is the deposition of Ronald K. Miller, M.D., taken October 8, 1986. Exhibit 21 is claimant's deposition taken June 11, 1986. Exhibit 29 contains the medical expenses which claimant seeks to recover. Exhibit 34 is the employer's statement of claimant's earnings.

ISSUES

The issues identified by the parties for determination are whether claimant sustained an injury on May 12, 1985 that arose out of and in the course of her employment; whether a causal connection exists between the alleged injury and any disability which she has experienced; determination of the nature and extent of disability, if any, related to the alleged injury and

he amount of claimant's entitlement with regard thereto; etermination of claimant's entitlement to section 85.27 benefits; nd establishment of the correct rate of compensation. It was tipulated that 72 weeks of compensation have been paid at the ate of $74.67 per week.

SUMMARY OF THE EVIDENCE

Lori A. Veach is a 32 year old married lady with a nine year ld daughter. Lori holds an associate degree in law enforcement nd has completed approximately three-fourths of the requirements oward a degree in sociology through Northwest Missouri State ollege. She is a high school graduate and stated that while in igh school she received above average grades.

Following high school Lori made a brief attempt at training o become a licensed practical nurse and worked approximately ne year as a nurse's aid at the Clarinda Municipal Hospital. he then spent a considerable amount of time traveling throughout he United States. While doing so she performed work as a aitress, cook and switchboard operator. On return from her ravels she obtained employment at the Clarinda Mental Health nstitute as a food service worker where she worked from approximately 977 through 1982 (excluding periods of absence). She has orked as a cook at a truckstop. She obtained her job with nternational Pizza, also known as Pizza Hut, in February, 1985, here she worked until May 12, 1985 when she fell and injured er left knee. Claimant has not returned to substantial continuous ainful employment since May of 1985.

Claimant has a rather extensive medical history. It is dequately summarized in exhibit 18. Some of the more significant vents include the following:

2-29-78 Auto accident, reported that both knees struck the dashboard, made complaints of pain in her neck and arms. (Ex. 27-I, p. 1)

7-22-79 Slipped on jello at work and twisted knee. Minimal swelling observed. (Ex. 27-I, p. 51)

8-07-79 Lateral and medial meniscectomies performed on claimant's left knee. (Ex. 26-C, p. 12)

8-31-79 In response to continued complaints of severe pain in the knee an additional surgery was performed to investigate a suspected infection. (Ex. 26-C, pp. 23 & 27)

0-03-79 Manipulation of the left knee performed under general anesthetic in response to the knee becoming stiffened in a flexed position. (Ex. 26-C, p. 30)

0-22-79 An exploratory laparotomy and appendectomy were performed due to claimant's continued complaints and a diagnosis of possible appendicitis. (Ex. 26-C, pp. 40 & 41)

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01-8-80 Claimant complained of reinjuring left knee by slipping in water. (Ex. 27-I, p. 52)

01-27-80 Auto accident, complaints of pain in neck, left shoulder and elbow. (Ex. 27-I, p. 16)

04-24-81 Complained of falling six days earlier injuring left knee. Treated with a long leg cast for one week. (Ex. 27-K, p. 6)

08-31-81 Hughston surgical repair of patellar misalignment performed by Ronald K. Miller, M.D. (Ex. 27-B, p. 4)

10-16-81 Claimant hospitalized for complaints of backache, tingling and paralysis in left leg and left foot drop. The attending physician was Maurice P. Margules, M.D., a psychiatrist evaluated claimant and diagnosed a conversion hysteria reaction manifested by paralysis. (Ex. 27-E, p. 1)

12-09-81 Auto accident with complaints of chest and elbow pain. (Ex. 26-B, p. 1)

02-02-82 Seen by Dr. Miller with complaint of continuing pain and four episodes of the knee giving out. (Ex. 27-B, p. 10)

03-02-82 Fitted with Palumbo knee brace. (Ex. 27-B, p. 10)

04-26-82 Dr. Miller rates 15 percent impairment of left leg. (Ex. 27-B, p. 11)

06-11-82 Dr. Miller recommends that claimant change occupations to work in a seated position. (Ex. 27-B, p. 11)

01-03-83 Admitted to Clarinda Municipal Hospital with complaints of severe low back pain radiating into right leg. Mild improvement with therapy but discharged with continuing complaints. (Ex. 27-I, pp. 46 & 47)

06-22-83 Hysterectomy performed to relieve reproductive system problems and also to relieve back pain. (Ex. 26-A, p. 10)

10-05-84 Last in a series of emergency room visits for headache and abdominal pain spanning nearly one year. (Ex. 26-A, pp. 25-78)

11-20-84 Seen by Dr. Miller with an infectious erruption on the incision of the left knee. (Ex. 27-B, p. 12)

05-12-85 The alleged fall at Pizza Hut which is the basis for this proceeding.

05-20-85 Claimant referred to O. Max Jardon, M.D., for evaluation. (Ex. 27-B, p. 13)

06-26-85 Elmslie-Trillot patellar tendon relignment performed by O. Max Jardon, M.D., after conservative treatment and a cast had not been successful at resolving claimant's complaints (Ex. 27-A, p. 3)

11-04-85 L5-S1 diskectomy performed by Dr. Jardon for bulging L5-S1 disc. (Ex. 27-A, pp. 11-14)

07-01-86 Dr. Jardon rates claimant as having a 10 percent disability of the body as a whole due to the disc and 14 percent of the body as a whole due to the knee. (Ex. 27-A, p. 18) The impairment of the leg was rated at 35 percent. (Ex. 27-A, p. 18)

Since the last surgery she briefly held a job as a cashier

for three weeks earning $3.35 per hour. She stated that she was unable to tolerate the work.

Claimant currently complains of continuing pain, discomfort and limitation regarding her back and left leg. She states that the knee continues to swell with excessive use.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on May 12, 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).

Claimant testified to an incident of falling. The incident was apparently witnessed by co-employees. No evidence was introduced to dispute claimant's testimony of falling. Her testimony is therefore accepted as correct. It is found that Lori A. Veach did fall from shelves at the Pizza Hut where she was employed on May 12, 1985.

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

In view of the preexisting weakness in claimant's knee it would not be unexpected for her to have injured the knee by either twisting it or in some other fashion in such a fall. Her testimony with regard to experiencing immediate pain and complaints upon falling is also accepted as correct. Claimant's testimony to the effect that she experienced discomfort in her back immediately after falling is also accepted as correct. It is found that the degree of discomfort to claimant's back immediately following the fall was relatively minor. It is therefore found and concluded that claimant did sustain injury in a fall that occurred on May 12, 1985 which arose out of and in the course of her employment with International Pizza.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 12, 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

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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 contentions of the parties are such that the extent of injury to the knee is one of the disputes. Defendants contend that the injury to the knee on May 12, 1985 created only temporary disability with no additional permanency. Claimant seeks healing period and permanent partial disability compensation for the knee. The record contains little in the way of direct expert medical opinion concerning causation for the treatment performed on claimant's knee, but what does appear seems consistent with an injury having occurred on May 12, 1985. When questioned Dr. Jardon rated claimant's left leg as having a 35 percent impairment. He declined, however, to express an opinion regarding how much of that permanent disability preexisted the current injury. Dr. Miller indicated that on April 26, 1982 he rated claimant as having a 15 percent permanent partial impairment of the leg (Ex. 17, p. 14) but that he currently rates her as having a 34 percent permanent partial impairment of the leg (Ex. 17, p. 8). Dr. Miller went on to explain that the difference in his ratings is due to a change in rating methods between the first and second editions of the AMA Guides and that the impairment following the injury of May, 1985 would have been approximately the same as had existed previously in 1981 (Ex. 17, pp. 28-30).

Claimant went about her business between 1982 and May of 1985 without receiving a substantial amount of medical care for the knee. During recent times she has again gone for substantial periods without seeking a great deal of care for the knee. Exhibit 20, the surveillance video tape, showed claimant to ambulate reasonably well with the knee, albeit with a noticeable change in her gait. The video tape confirmed claimant's testimony that she is unable to squat and must bend from the waist when she attempts to reach the ground. When all of the evidence in the record is considered, it is found that claimant has failed to prove by a preponderance of the evidence that there has been any substantial change in the degree of permanent partial disability in her left leg as a result of the May 12, 1985 injury.

Claimant seeks to recover permanent partial disability as a result of an injury to her back. The issue of the employer's liability for the condition of claimant's back is seriously disputed by the employer. Claimant's hospitalizations in 1981 and 1983 for back complaints provide ample evidence of preexisting difficulties. Dr. Miller did not dispute the existance of a causal connection between the need for surgery (and resulting disability) in claimant's back and the May 12, 1985 fall but he did indicate that it was a subject of good faith dispute (Ex. 30). In his report dated January 8, 1986, Michael T. O'Neil, M.D.,

states: "According to Mrs. Veach's history, the back injury is related to the May 12, 1985, accident at the Pizza Hut." He seems to make no argument with that statement (Ex. 4). Dr. Jardon does feel that a causal connection exists between the fall of May 12, 1985, claimant's herniated disc, the laminectomy and resulting disability. He makes the causal connection primarily upon the change in claimant's gait due to the cast and the knee surgery rather than the impact of falling (Ex. 1, pp. 23-33, 42-44 & 51).

An injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles claimant to industrial disability. 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).

An injury is the producing cause; the disability, however, is the result, and it is the result which is compensated. Barton, 253 Iowa 285, 110 N.W.2d 660 (1961); Dailey, 233 Iowa 758, 10 N.W.2d 569 (1943).

For an injury resulting from trauma to a scheduled member to be compensated industrially the claimant must prove that physical injury, derangement, change or impairment exists within the body at a place other than the scheduled member and that the condition that extends beyond the scheduled member was caused by the injury to the scheduled member. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964). There is no expert medical testimony in the record which conflicts with or disputes the opinions expressed by Dr. Jardon. Accordingly, Dr. Jardon's opinions are accepted as correct. It is therefore found that the change in claimant's gait resulting from the treatment performed upon her knee, in particular the wearing of a cast for extended periods and use of crutches, was a substantial factor in producing a herniated lumbar disc. It is concluded that the herniated lumbar disc, and resulting disability, was proximately caused by the injury of May 12, 1985. In making the finding of a causal connection it is recognized that Dr. Jardon had initially indicated that the back condition was not related to the fall of May 12, 1985 but his more recent expression, as summarized in exhibit 5, is believed to be a more accurate indication of Dr. Jardon's actual opinion since it is consistent with the opinions expressed in the depositions taken October 6, 1986.

Claimant's entitlement to compensation for healing period is in dispute. At the present time claimant remains under medical care, albeit minimal, under the direction of Dr. Jardon. The purpose of the continuing care is to strengthen claimant's left leg through physical therapy. Dr. Jardon has indicated that some improvement in claimant's left leg may still be forthcoming (Ex. 1, pp. 6-8), that six to nine months is a normal amount of

time for maximum medical improvement to occur but that claimant's has been slower than normal (Ex. 1, pp. 20 & 21) but that if the knee does improve with further therapy the disability will probably stay about the same (Ex. 1, p. 19). Dr. Jardon felt that the healing period had not ended on November 18, 1985 (Ex. 6 and Ex. 27-A-16). On January 8, 1986, Dr. O'Neil indicated that claimant was still recovering from back surgery and would require extensive rehabilitation (Ex. 4). On March 17, 1986, Dr. Jardon indicated that claimant still had a good deal to gain through physical therapy but that she was not cooperating (Ex. 27-A, p. 17A). Claimant had not been released from his care and he indicated that if she refused to attend the pain clinic and do physical therapy, it would be counter productive to her gaining maximal improvement (Ex. 3). The other physicians have given no indication of when the healing period ended. The record reflects that claimant's current problem is a lack of strength in her quadriceps. The same condition was noted on several occasions prior to the 1985 injury. The statements from Dr. Jardon seem to indicate that while further improvement in the knee is possible the amount of change expected will probably not be great. It appears that the amount of change will be dependant upon claimant's own motivation. Where no improvement is anticipated, no healing period benefits are payable. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). It has been held that it is at the point at which disability can be determined that the disability award can be made and that until such time healing period benefits are indicated. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124 (Iowa App. 1984). Dr. Jardon rated claimant's disability on July 1, 1986 (Ex. 2 & 27-A-18). There is no indication in the record that claimant has made any change in the extent of the disability of her left leg since July, 1986 and Dr. Jardon does not expect it to be reduced. It is therefore found that claimant's recovery reached the point that it was medically indicated that further significant improvement from the injury was not anticipated on July 1, 1986. Claimant's entitlement to compensation for healing period under the provisions of section 85.34(1) commences May 12, 1985 and runs through July 1, 1986.

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, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963).

Dr. Jardon rated claimant as having a 10 percent permanent impairment of her body as a whole due to the laminectomy and a 24 percent impairment of the body as a whole when considering both the back and leg (Ex. 2, Ex. 27-A-18, Ex. 1, p. 33). Dr. Miller agreed with the 24 percent body as a whole rating (Ex. 30). Dr. O'Neil gave no impairment ratings. He did state, however, that claimant would not be capable of work which required any significant amount of standing, stooping, lifting, bending or stair climbing (Ex. 4). With regard to physical restrictions, Dr. Jardon indicated that claimant should avoid climbing stairs, kneeling, crouching and similar activities. He stated that ideally she should have a job which would permit her to sit for a period of time but that would also permit standing and walking for short periods. He indicated that she could perform light work that was semi-sendentary in nature. He indicated that the limitations were essentially the same as what claimant should have practiced prior to May 12, 1985 but that adherence to the limitations was even more critical now (Ex. 1, pp. 35-37). In 1982, Dr. Miller had indicated that claimant should be retrained to perform sitting-type work where walking on her feet would be kept to a minimum. He recommended against carrying heavy objects (Ex. 17, pp. 13 & 14). He indicated that he would make the same recommendations currently (Ex. 17, p. 42). The recommendations from the three physicians are not inconsistent and are accepted as correct. The 24 percent physical impairment rating of the body as a whole indicated by Drs. Jardon and Miller is accepted as correct. Of that rating, however, only the 10 percent attributable to the back injury is found to have been proximately caused by the May 12, 1985 injury.

The video tape, exhibit 20, seems to indicate that the claimant's knee represents the greater portion of her physical impairment. The video tape shows her performing activities of bending at the waist to the ground and lifting objects from the ground with her legs in a straight position. This is not inconsistent with claimant's testimony as she did indicate the ability to perform such activities. She also indicated, however, that a day when she performs such activities was usually followed by one or more days of extreme discomfort and lack of activity. The surveillance reported in the video tape and exhibit 20A indicates that the bending and lifting activities were performed on July 1, 1986. The next day surveillance was performed appears to have been July 14, 1986.

Claimant is a high school graduate and has completed approximately three years of college level education. Her return to gainful employment will most likely need to be in a job that is primarily sitting and requires little in the way of stair

climbing, lifting, carrying or physical agility. From her testimony it appears that she can be a good student when she so desires. It is found that she does have the ability to perform adequately in obtaining further education. Claimant's entire work history, however, except for the switchboard operator job, appears to have involved a great deal of standing or walking. She has lost the ability to perform that type of work but, for all practical matters, she had lost that ability prior to May 12, 1985. The Pizza Hut job was clearly contrary to her abilities and an injury of the type which occurred on May 12, 1985 was likely if she engaged in the type of work she performed at Pizza Hut. The limitations regarding claimant's back have arisen since May 12, 1985 but they are not substantially different from the limitations that are applicable to her knee and preexisted May 12, 1985. Claimant's wage and earnings history has been in jobs that paid at or only slightly above the minimum wage level. Claimant appears to have the ability to enter the secretarial field which should provide her employment at an earning level not substantially different from that she has previously experienced. If she should choose to complete her college education she can probably expect an earning level well above what she has previously experienced. Claimant has, nevertheless, lost access to a number of positions in the job market. When all applicable factors are considered, it is found that she has sustained a 20 percent loss of earning capacity as a result of the injury of May 12, 1985. It is concluded that claimant's disability that resulted from the May 12, 1985 injury, when evaluated industrially, is a 20 percent permanent partial disability under the provisions of section 85.34(2)(u).

Claimant's rate of compensation is in issue. The statement, exhibit 34, submitted by the employer shows her to have earned $1,237.63 during the weeks ending February 27, 1985 through May 22, 1985. Reference to a calendar shows the pay periods to have ended on Wednesdays. Since claimant was paid by the hour her compensation rate should be based on section 85.36(6) or (7) or (10). Since the workers' compensation act is to be interpreted liberally to the benefit of the employee, the method which provides the highest rate of compensation should be utilized. Under section 85.36(6), the 13 weeks used to determine the rate are the "13 consecutive calendar weeks" immediate proceeding the injury. This would exclude from use the weeks ending May 15 and May 22, 1985. The record is unclear with regard to the time when claimant actually commenced employment. The record shows it to have been in February but no specific date is given. The pay in the amount of $20.50 for the two weeks ending May 27, 1985 is not consistent with the two week earnings for the other completed pay periods. It indicates that claimant was not employed and working during the full two weeks. It indicates that she was probably not employed and working during even one full week of those two weeks. It is found that the earnings of $20.50 indicate that claimant had just started and had not worked a

full week prior to February 27, 1985. Accordingly, those weeks are excluded from determining her rate of compensation. Claimant's rate should be computed under section 85.36(7). There is no record of what other employees earned. The only reasonable assumption is to assume that claimant's earnings during the 10 full weeks that she was employed, when averaged, will provide an indication of the amount she would have earned had she been so employed by the employer for the full 13 weeks immediately proceeding the injury and had worked when work was available. The gross earnings during the 10 week period are $1,131.45 for an average of $113.14. At the stipulated status of married with three exemptions the rate of compensation is therefore $82.37 per week. Claimant testified that she received tips that were not reported to the employer and that were not reported for purposes of income taxes. There is no concise evidence in the record of what those tips might have been. Accordingly, the nature of the tips is too speculative to be used as a basis for determining the rate of compensation. The employer's statement regarding claimant's earnings is consistent with the W-2 Form shown in exhibit 33, claimant's 1985 income tax return. The tax return shows no income from tips other than reported on the W-2 Form. Claimant's tax return was prepared and presumably signed by her under penalty of perjury, the same as applies to her testimony at hearing. Income tax returns carry a further potential penalty for tax fraud if the person fails to report income. These additional factors make it inappropriate to use any alleged tip income in determining the rate of compensation.

Claimant seeks benefits under section 85.27. In the prehearing report she listed eight expenses which she was seeking to recover. In the deposition of Dr. Jardon additional expenses for his fees in the amount of $2,504.00 appear to be unpaid.

Prior findings in this decision have found both the knee and and back conditions to have been injuries which were proximately caused by the fall of May 12, 1985. Accordingly, all the treatment for claimant's knee and back that has been accomplished is found to have been proximately caused by the injury. The treatment that has been employed was provided by an orthopedic specialist and the fact that it was performed is an indication that the specialist felt that the treatment was reasonable and necessary. Dr. Jardon opined that his own fees in the amount of $2,504.00 for the knee and laminectomy were fair and reasonable (Ex. 1, p. 53). Dr. Jardon had recommended that claimant obtain the use of a TENS unit (Ex. 1, p. 25). He recommended that she have assistance for her housework commencing on May 30, 1985 (Ex. 9).

The bill from Dr. Jardon in the amount of $2,504.00 is found to be an expense of treatment that was reasonable, necessary and proximately caused by the injury of May 12, 1985. The amount of the bill is found to be fair and reasonable. Since claimant did not list it as one of the itemized expenses for which she is

seeking payment, it is assumed that the bill has previously been paid by the employer. It is, under the terms of this ruling, the responsibility of the employer.

With regard to all the claimed medical expenses it was stipulated that the record should reflect that the provider of the services would testify that the fees charged were reasonable and that the services provided were reasonable and necessary treatment of the alleged work injury and that defendants would not be offering any evidence to the contrary.

Exhibit 29(A) is a bill from Jennie Edmundson Hospital incurred September 2, 1986 in the total amount of $43.00. It appears to have been incurred for a Cybex evaluation and physical therapy. Dr. Miller directed claimant to Jennie Edmundson Hospital on that occasion (Ex. 30). Accordingly, recovery is granted.

Exhibit 29(B) is charges from Surgical Suppliers of Omaha, Inc., in the amount of $652.33. Exhibits, and all sub-exhibits, show the charges to have been incurred for rental of a TENS unit and adhesive patches. Such was recommended by Dr. Jardon in exhibit 1 at page 25 and is the responsibility of the employer.

Exhibit 29(C) is charges from the University of Nebraska Hospital in the amount of $6,846.36. From the bill it appears that Blue Cross/ Blue Shield paid $6,349.06, that a discount in the amount of $60.50 was allowed to Blue Cross, and that the remaining balance of $436.80 was due from claimant. It is not explained why claimant seeks to recover only $436.80 as set forth in the prehearing report rather than the entire amount of the bill. Such is preceived to be a mathematical error. After allowing the Blue Cross discount the total is $6,785.86. The record shows that claimant received authorized treatment at the University Hospital under the direction of Dr. Jardon. Accordingly, defendants are responsible for payment of the entire amount of the bill in the amount of $6,785.86.

Exhibit 29(D) is a statement from Dr. Jardon through Associated Orthopedic Surgeons, P.C., in the amount of $3,800.00. The itemization shows the services to be those which were performed in treatment of the knee and back injuries. Based upon the previous findings and stipulations, defendants are responsible for payment.

Exhibit 29(E) is a statement from Clarinda Municipal Hospital in the amount of $112.00. The record shows that claimant was undergoing physical therapy at the hospital as recommended by Dr. Jardon with the apparent knowledge of defendants as shown in exhibit 24. Defendants are therefore responsible for payment.

Dr. Jardon recommended household assistance for claimant

effective commencing May 30, 1985. Exhibits 29(f) and (g) appear as the cost of that assistance. In view of the stipulations made regarding reasonableness of charges, defendants are found responsible for payment of $2,713.50 for the services of Cindy Hargin-Fahey and $558.00 for the services of Richard Linfor. The record does not disclose when Dr. Jardon recommended termination of the household assistance.

In exhibit 27-H claimant seeks mileage for 1,985 at $.24 per mile. The dates and distances shown appear reasonable and consistent with the medical records. Defendants are therefore found responsible for payment.

FINDINGS OF FACT

1. On May 12, 1985, Lori A. Veach was a resident of the State of Iowa, employed by International Pizza at the Pizza Hut in Clarinda as a waitress.

2. Claimant was injured on May 12, 1985 when she fell from shelves while attempting to obtain materials with which to perform her work at the Pizza Hut.

3. Following the injury claimant was medically incapable of performing work in employment substantially similar to that she performed at the time of injury from May 12, 1985 until July 1, 1986 when it was medically indicated that further significant improvement from the injury was not anticipated.

4. The injury directly affected claimant's left knee and affected her back somewhat due to the impact of the fall but more significantly due to the use of a cast and crutches associated with treatment for the injury to the knee.

5. Claimant's testimony is generally accepted as reasonably credible but it is somewhat impaired by her denial of receiving any treatment for her back or back problems subsequent to 1981 when the record showed hospitalization for the same in January, 1983. It is also somewhat impaired by the irreconcilible inconsistency between her testimony of receiving tips and the lack of reporting any income from tips on her income tax return.

6. Claimant is a 32 year old married lady with one dependant child who resides in Clarinda, Iowa with her husband.

7. Claimant is a high school graduate and has completed approximately three years of college work.

8. Claimant's work experience is primarily in the area of waitress and food service work. She has little in the way of clerical skills or skills which currently qualify her for most semi-sedentary or light occupations.

9. In the 10 weeks preceding the week in which she was injured claimant earned $1,131.45, with an average weekly earning of $113.14, an amount found to be fairly representative of what she would have earned during each of the 13 calendar weeks preceding the week of the injury if she had worked whenever work was available.

10. Claimant is of at least average intelligence, emotionally stable and reasonably motivated to be gainfully employed.

11. Claimant did not return to work with Pizza Hut as it was not medically indicated that she do so. She attempted work in a clerical position which was found to involve an excessive amount of standing.

12. Claimant currently has a functional impairment of approximately 24 percent of the body as a whole of which 10 percent is attributable to the condition of her back and 14 percent attributable to the condition of her left leg. The impairment of the back is a result of the current injury but the impairment of the leg preexisted the current injury. She has a 20 percent loss of earning capacity due to the 1985 injury.

13. The injury which claimant sustained to both her back and leg were in the nature of an aggravation of a preexisting condition.

14. In obtaining treatment for the injuries claimant incurred expenses which were authorized by the employer or an authorized physician in the total amount of $15,132.84, including mileage in the amount of $468.00 based upon 1,985 miles at the rate of $.24 per mile.

CONCLUSIONS OF LAW

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

2. Claimant sustained injury to her left knee and back on May 12, 1985 which injury arose out of and in the course of her employment with International Pizza doing business as Pizza Hut.

3. Claimant is entitled to recover healing period in accordance with section 85.34(1) in the amount of 59 3/7 weeks running from May 12, 1985 through July 1, 1986.

4. When evaluated industrially claimant's disability is 20 percent permanent partial disability which provides an entitlement under section 85.34(2)(u) of 100 weeks of compensation for permanent partial disability payable commencing July 2, 1986.

5. Claimant's rate of compensation, computed under section

85.36(7) is $82.37 per week.

6. The fall that claimant experienced on May 12, 1985 is a proximate cause of injury to her left knee and to her spine and is a proximate cause of temporary total disability only with regard to the knee but of permanent disability with regard to the spine.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant fifty-nine and three-sevenths (59 3/7) weeks of compensation for healing period at the rate of eighty-two and 37/100 dollars ($82.37) per week commencing May 12, 1985.

IT IS FURTHER ORDERED that defendants pay claimant one hundred (100) weeks of compensation for permanent partial disability at the rate of eighty-two and 37/100 dollars ($82.37) per week commencing July 2, 1986.

IT IS FURTHER ORDERED that defendants pay all past due amounts in a lump sum together with interest pursuant to section 85.30 at the rate of ten percent (10%) per annum.

IT IS FURTHER ORDERED that defendants receive credit against the award for prior payments made in the stipulated amount of seventy-two (72) weeks of benefits being paid at the rate of seventy-four and 67/100 dollars ($74.67) for a total of five thousand three hundred seventy-six and 24/100 dollars ($5,376.24).

IT IS FURTHER ORDERED that defendants pay claimant section 85.27 benefits in the total amount of fifteen thousand one hundred thirty-two and 84/100 dollars ($15,132.84).

IT IS FURTHER ORDERED that defendants file claim activity reports as requested by this agency pursuant to Division of Industrial Commissioner Rule 343-3.1.

Signed and filed this 27th day of April, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD E. WAGNER, Claimant, vs. GROWMART, INC., Employer, and AMERICAN MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILED MAR 26 1987 IOWA INDUSTRIAL COMMISSIONER File No. 714982 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 Ronald E. Wagner against Growmart, Inc., his former employer, and American Mutual Insurance Company, its insurance carrier. The case was heard in Des Moines, Iowa on November 14, 1986 and was fully submitted on conclusion of the hearing. The record in the proceeding consists of testimony from Ronald Wagner, Viola Wagner, G. Brian Paprocki, and Margaret Cecilia Blaskovich. The record also contains claimant's exhibits A through F and defendants' exhibits 1, 2, 3 and 4. Defendants' delay in serving the witness and exhibit lists as required by the prehearing order is found to have not been prejudicial to claimant. The belated compliance is excuseable under the circumstances that exist in this case. The attorney that formerly handled this file left the defending law firm at approximately the time the exchange of witness and exhibit lists was required to be accomplished.

ISSUES

The only issues for determination deal with permanent disability. Claimant seeks an award of permanent total disability. He urges that his disability extends beyond any scheduled member and into the body as a whole. He relies upon the odd-lot doctrine. Defendants assert that claimant's disability is an 88 percent permanent partial disability of the right arm. Defendants further contend that a sural nerve transfer surgery which was performed was not reasonable and necessary medical treatment for the injury. This carries with it the implication that defendants

should not be responsible for any disability which resulted from that surgical procedure. Defendants contend that claimant has no permanent disability in his right leg or at any part of the body other than the right arm. It was stipulated that claimant sustained an injury on September 29, 1982 which arose out of and in the course of his employment with Growmart, Inc. It was stipulated that his entitlement to compensation for healing period runs from September 29, 1982 and through August 2, 1985. It was stipulated that the correct rate of compensation is $137.34 per week and that 67 weeks of compensation at the correct rate had been paid prior to the hearing. Claimant also seeks to recover costs in the nature of an expert witness fee for G. Brian Paprocki in the amount of $150 plus mileage.

SUMMARY OF EVIDENCE

Ronald Wagner is a 49 year old married man with four children, only one of which is 18 years of age or younger. Claimant is a 1955 high school graduate who was an average student but performed well in athletics.

Claimant has a diverse work background. His work history includes the following: farm work, aviation photography in the navy, railroad section gang removing ties and rails, packing and shipping overhead door parts, machinist at John Deere in Waterloo, cutting meat in a meat market, highway maintenance for the state of Iowa, light bulb sales, institutional supply sales, management of a gas station-convenience store, plant manager for a Pronto Pizza plant. Claimant was not financially successful at all of the business endeavors in which he has engaged.

Claimant commenced employment with Growmart at some point after September 1, 1982. He was hired to run a uniharvester corn picker picking seed corn. He was paid $4 per hour and worked as much as 80 or 90 hours per week.

On September 29, 1982 claimant's right hand was caught in the husking rollers of the corn picker. The injuries were severe. The injury involved cuts and lacerations and burns which actually extended into the bone of claimant's forearm. (Exhibit E, page 6) The trauma and initial injury did not appear to extend beyond claimant's right arm. (Ex. E, pp. 7 - 8)

Claimant received his medical care for the injury from Douglas S. Reagan, M.D., an orthopedic surgeon who specializes in surgery in the hand and arm. Dr. Reagan testified that 14 surgeries were performed on claimant's hand and arm through the course of treatment. The first surgery cleaned the wound and repaired the ulnar artery in order to restore a blood supply to the hand. The second through sixth surgeries were dressing changes and debridement of dead and injured tissue. The seventh surgery, performed on October 26, 1982, attached a flap of skin

and other tissue to claimant's arm with the arm being affixed to claimant's right leg. On November 30, 1982 the flap was detached from the leg and placed on the arm in order to attain skin coverage for the open and burned areas of claimant's hand. In February and March of 1983 an additional flap was placed on the top of claimant's hand from his lower thoracic area. In October 1983 the radius of claimant's right arm fractured due to having been burned. Further surgery was required to repair that fracture. The surgery resulted in fusion of claimant's right wrist.

The original injury had destroyed all the tendons in claimant's hand except for one flexor tendon to the wrist and one to the little finger. The remaining range of motion of the fingers was limited and entirely passive. The initial injury had severed claimant's median nerve and on April 17, 1984 part of the sural nerve from claimant's right lower leg was removed and grafted to claimant's hand in order to restore sensation. At that same time devices known as "Hunter rods" were placed in claimant's hand in order to prepare for subsequent tendon grafts. The sural nerve graft was reasonably successful but the Hunter rods became infected and were removed. Further efforts to restore function to claimant's right arm have not been attempted. (Ex. E, pp. 9-17)

Dr. Reagan indicated that the surgical attempts to restore function to claimant's right hand and arm were not the only course of medical treatment that could have been employed. He stated that other available courses would have included amputation or simply, covering the exposed portions of the hand and arm with skin. Dr. Reagan testified that Mr. Wagner was allowed to choose the nature of treatment. Dr. Reagan stated that his goal was to restore some function to the hand. He felt that he had been successful, to some degree, in restoring protective sensation but that he had not been able to restore motor function to the fingers. Dr. Reagan stated that it would be difficult to determine whether claimant would currently be better off if the hand had been amputated initially. (Ex. E, pp. 24-26, 51-53) Dr. Reagan stated: "So I guess I would say that looking back, we can say maybe that's what we should have done; but looking ahead from where we were, I don't know that we would have done anything different." (Ex. E, p. 53)

Dr. Reagan evaluated claimant's permanent partial impairment as 58 percent of the body as a whole. (Ex. E, p. 37) Of that rating, Dr. Reagan attributed the major part to the right upper extremity which he felt had been impaired to the extent of 90 percent. (Ex. E, pp. 40-41) He stated, however, that 90 percent of the upper extremity did not directly equate to 58 percent of the whole person and that other things, including numbness in claimant's foot were also involved. (Ex. E, pp. 37-39) In giving the reason for translating claimant's disability

into the body as a whole, Dr. Reagan stated: "It was my understanding,...that apparently the Industrial Commissioner feels that the shoulder joint is part of the body rather than part of the upper extremity. Before that time we always rated shoulder situations as part of the upper extremity, and it was kind of some information that we'd learned that apparently the Industrial Commissioner had somehow decided that the shoulder was part of the body rather than part of the upper extremity." Dr. Reagan had conducted an evaluation of the range of motion of claimant's right arm and shoulder and found the shoulder to be significantly restricted. (Ex. E, pp. 29-30) He attributed the shoulder involvement to the surgery where flaps were placed on claimant's injured hand and arm. (Ex. E, pp. 31, 38) Dr. Reagan contributed the numbness in claimant's foot to the surgery involving grafting of the sural nerve. (Ex. E, pp. 38, 50) Dr. Reagan performed his evaluation of claimant's permanent partial impairment on August 5, 1985. He felt that it was surprising but not impossible if claimant's range of shoulder and arm motion had increased significantly subsequent to the time when he performed his evaluation. (Ex. E, pp. 30-33)

Dr. Reagan did not impose any particular restrictions on claimant's activities. He stated:

> Our feeling was that he could do anything essentially, that we were not going to put a limitation on what he could do. We wanted him to be as active as possible, to use his arm as much as possible and to let his limitations speak for themselves.
>
> What we were saying is that there was nothing that he couldn't do if he wanted to do it or felt that he could do it. We didn't want to limit him at a particular occupation or a particular weight limit or to any particular area that he could work in.

(Ex. E, p. 43)

Exhibit 1 is the deposition of Scott B. Neff, D.O., taken July 23, 1986. Dr. Neff, a board certified orthopedic surgeon, examined claimant on April 21, 1986. Dr. Neff rated claimant as having an 88 percent permanent partial impairment of the right upper extremity. (Deposition Ex. 2) In making this rating Dr. Neff found that claimant had a complete loss of use of his right hand and wrist. He found no impairment, whatsoever, in claimant's right shoulder. He felt that claimant's injury had not affected the shoulder. (Ex. 1, pp. 9, 30-33)

Dr. Neff described the sural nerve transfer as an elective procedure designed to reproduce sensation. He stated that if

someone develops protective sensation and is able to distinguish between heat and cold the transfer is considered successful. He stated that the sural nerve is a sensory nerve that supplies senation to the skin and is found on the outside of the lower leg but, it provides no motor function. (Ex. 1, pp. 18-22) Dr. Neff indicated that the sural nerve graft would produce numbness in the Achilles' tendon area of claimant's leg. (Ex. 1, p. 29) Dr. Neff stated that the skin numbness over the calf is not rateable because it does not subject the body to any increased risk or loss of function as would numbness in the hand or numbness in the bottom of the foot. (Ex. 1, p. 32) Dr. Neff stated that skin grafts do not affect permanent function of an extremity and that while they affect appearance they are not rateable from a permanent impairment rating standpoint. (Ex. 1, pp. 27-28) Dr. Neff stated that his impairment rating was an objective rating using the AMA Guidelines and guidelines published by the American Academy of Orthopedic Surgeons. (Ex. 1, p. 15)

In the deposition Dr. Neff discussed various options that had existed for treating claimant's injury. He stated that Dr. Reagan's first goal would have been to try to prevent a life threatening infection and the second goal would have been to try to save as much function of the upper extremity as possible. Dr. Neff declined to state whether or not the claimant would be better off today if an amputation had initially been performed and that there is currently no medical need for an amputation. (Ex. 1, pp. 23-24) Dr. Neff acknowledged that claimant's care had been rendered by an expert in the field. (Ex. 1, p. 35)

APPLICABLE LAW AND ANALYSIS

The primary issue in this case is determination of the nature and extent of claimant's permanent disability. Claimant urges that his disability extends into the body as a whole so that it should be evaluated and compensated industrially. Defendants urge that claimant's disability is limited to his right arm and that it should be compensated under section 85.34(2)(m).

The medical authorities, namely Drs. Reagan and Neff, agree that claimant has suffered nearly total loss of use of his right arm. Dr. Reagan finds a 90 percent loss while Dr. Neff finds an 88 percent loss. It is at this point, however, that their assessments of the case diverge. Dr. Reagan found claimant to have impairment in his shoulder while Dr. Neff felt that claimant's shoulder was not impaired whatsoever. Dr. Reagan based his conclusions regarding the shoulder upon claimant's range of motion with the shoulder. He did not identify any particular abnormality in claimant's shoulder. He did not make a definitive diagnosis of anything being anatomically deranged in claimant's shoulder. He simply found a restricted range of motion which he related to the skin flap transfer treatment that had been

employed. Both physicians agreed that the initial trauma of the injury had not affected the shoulder.

An injury to a scheduled member may, because of after effects (or compensatory change), result in permanent impairment of the body as a whole. Such impairment may in turn form the basis for a rating of industrial disability. Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943); Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

The most recent pronouncement from the Iowa Supreme Court in this area is the case Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986). The case Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949) has often been relied upon as authority for the proposition that an injury to the shoulder constitutes an injury to the body as a whole rather than a scheduled member injury to the arm. In Alm the injury was to the claimant's collar bone, not the shoulder joint. Dailey dealt with an injury to the hip socket and was found to constitute an injury to the body as a whole. Lauhoff also dealt with an injury to the upper femur in which the treatment rendered led to a total hip replacement involving both the ball and socket of the hip. In Lauhoff the court declared that even though a total hip replacement had occurred, it was necessary for the commissioner to make a finding of fact regarding whether or not the disability extended beyond a scheduled member and into the body as a whole. The court was unwilling to rule that a total hip replacement is an injury that extends into the body as a whole as a matter of law. It should be noted that Lauhoff deals with circumstances wherein an injury to the femur, part of a scheduled member, resulted in surgery that was performed on parts of the body other than the scheduled member.

It has long been established that whenever the treatment employed for an injury aggravates or increases the disability initially caused by the injury, the employer and its insurance carrier remain responsible for all of the resulting disability. Injury resulting from treatment is considered as having been proximately caused by the original injury. Heumphreus v. State, 334 N.W.2d 757 (Iowa 1983); Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960); and Cross v. Hermanson Bros., 235 Iowa 739, 16 N.W.2d 616 (1944). The majority rule is that an employer's duty and obligation to provide reasonable medical care includes restorative and reconstructive care in order to preserve or return as much function as may possibly be accomplished. Injuries which result from restorative medical treatment are considered to have been proximately caused by the original trauma and are the responsiblity of the employer and insurance carrier. 2 Larson Workmen's Compensation Law, §61.13(e) and §61.14. Dr. Reagan testified that he considered the original injury to be the cause of the restricted shoulder motion which he observed. The law, however, seems to require some objective

evidence of injury other than that located in the scheduled member if the disability is to be compensated industrially. It is actually motion of the arm that is measured when shoulder motion is evaluated. Cases such as Lauhoff and Kellogg v. Schute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964), seem to require that, as well as causation, there be physical injury, derangement or change that is found at some point other than the scheduled member in order to have the disability be compensated industrially as a disability to the body as a whole. From the evidence introduced in this case it appears as if the evaluation of the range of motion of claimant's shoulder that was conducted under the direction of Dr. Neff was more thorough and objective and also more recent than the evaluation performed under the direction of Dr. Reagan. Further, Dr. Reagan indicated that it was possible for the claimant's shoulder motion to have improved. The evaluation of claimant's shoulder that was performed under the direction of Dr. Neff is accepted as more accurate than the evaluation performed by Dr. Reagan regarding the shoulder. Further, there is no objective evidence of any physical injury, derangement or anatomical change in or about claimant's shoulder joint. Without such his injury cannot be characterized as one to the body as a whole on the basis of the shoulder.

Claimant also complains of numbness involving the calf and Achilles' tendon region of his right leg. The record reflects that this is obviously due to the removal of the sural nerve in claimant's right leg as was performed in order to restore sensation to claimant's right hand. The removal of that nerve was clearly performed as part of the treatment for the injury to claimant's right arm. As such the initial trauma is a proximate cause of whatever disability resulted from removal of the nerve from the leg. Additionally, the removal of the nerve from the leg constitutes a physical injury, derangement and anatomical change to the right leg. Restoration of protective sensation to an injured member is certainly within the realm of reasonable medical care, even though the decision regarding whether or not to perform such a procedure may be elective.

In fact, all the attempts made by Dr. Reagan to restore function, as nearly as possible, to claimant's right hand and arm constitute reasonable medical care and were the obligation of the employer. The simple fact that the procedures were ultimately not as successful as had been originally hoped does not mean that they were not reasonable or necessary. The decision regarding whether or not treatment is reasonable or necessary is to be made at the time the treatment is being employed, not through hind sight. The fact that other, less expensive methods of treatment existed which would have produced substantially similar results to those that were actually obtained is of little significance when considering the reasonableness and necessity of the procedures that were in fact employed. As indicated by Dr. Neff in exhibit 1 at page 23, the upper

extremity does not lend itself well to a prosthetic fitting. If the infectious process had not prevented the tendon grafts which Dr. Reagan intended, it is quite possible that claimant would now have some use of his right hand. Even though the best anticipated result would likely have been far from normal, it would most likely have been far superior to any commonly available prosthetic device. Restoration of sensation was an important part of the effort to restore function to claimant's right hand. The graft of the sural nerve from claimant's leg was a necessary step in that effort. It is clear that whatever disability exists in claimant's right leg is a result of the sural nerve grafting and any such disability was proximately caused by the original injury.

Dr. Reagan indicated that some disability existed in claimant's right leg is a result of the sural nerve transfer. (Ex. 1, p. 38) He did not, however, offer an impairment rating. Dr. Neff acknowledged that there had been a loss of sensation in claimant's right calf and Achilles' tendon area but stated that such was not a rateable impairment. He stated that he was relying on the AMA Guides in making his evaluation. The AMA Guides, more properly referred to the The Guides to the Evaluation of Permanent Impairment published by the American Medical Association have been adopted by the industrial commissioner as a guide for determining permanent partial disabilities of scheduled members. (Rule 343-2.4) Chapter 2 of the second edition (current) of such reference deals with the nervous system. Table 14, found at page 82, indicates that the sural nerve can be responsible for as much as a five percent impairment of the lower extremity. Since the sural nerve provides sensation, and does not affect motor functions, table 4 at page 73 should be used in evaluating the disability in claimant's right leg. It would appear that claimant's disability would fall within the second class that being decreased sensation with or without pain, which is forgotten during activity. The grading is 5 to 25 percent. In view of the fact that the nerve has been totally removed, and is not merely impaired to some degree, the grading should be in the upper portion of that range. For purposes of illustration, a 20 percent grading of a five percent impairment of the lower extremity would make the loss of claimant's sural nerve equal to a one percent impairment of the lower extremity. Dr. Neff's statement that the loss of the sural nerve is not a rateable disability is rejected since it is contrary to what is indicated in the reference which he espoused to rely upon in making his impairment ratings.

The case therefore presents itself as one which involves impairment of two scheduled members, namely, the right arm and the right leg. The disability should be evaluated and compensated under the provisions of section 85.34(2)(s). In order to perform such an evaluation, it is necessary to convert both scheduled member disabilities into their respective disabilities

of the body as a whole and combine them using the appropriate tables. Simbro v. Delong's Sportswear, 332 N.W.2d 886 (Iowa 1983). The 88 percent impairment of claimant's right upper extremity or arm as determined by Dr. Neff is accepted as correct. Under table 20 found at page 23 of the AMA Guides this is equivalent to 53 percent impairment of the whole person. Table 15 found at page 82 of the Guides equates a one percent impairment of the lower extremity or leg to a zero percent impairment of the whole person. Examination of table 15 shows the whole person impairment to be 40 percent of the lower extremity impairment. The fact that the conversion under the table provides a zero impairment of the whole person does not refute the fact that some permanent impairment in the leg does exist. Even though it is not necessary to use the combined values chart to arrive at the impairment rating of the body as a whole appropriate for these scheduled member disabilities the entitlement to compensation should, nevertheless, be determined under section 85.34(2)(s) rather than 85.34(2)(m). Fifty-three percent of 500 weeks is 265 weeks. Claimant's entitlement to compensation for permanent partial disability is therefore determined to be 265 weeks representing a 53 percent permanent partial disability under the provisions of section 85.34(2)(s).

In making this determination claimant's claim for permanent total disability benefits was evaluated and considered. If he were found to be totally disabled, he would be entitled to compensation for total disability under section 85.34(2)(s). Claimant has a diverse employment background. He has experience in many areas. Neither Paprocki nor Blaskovich, the rehabilitation specialists who testified at the hearing, expressed an opinion that claimant was economically unemployable, or unable to be gainfully employed. It is recognized that the loss of an arm may, under some circumstances, render a person totally disabled from an industrial standpoint. Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983); Barton v. Nevada Poultry Co., 253 Iowa 285, 292, 110 N.W.2d 660, 663 (1961). The disability in claimant's leg has no appreciable effect upon his employability. There are many individuals who are gainfully employed even though they have lost the use of one arm. Such an injury does not constitute total disability as a matter of law. The legislature obviously did not intend for such an injury to constitute total disability as a matter of law. Claimant urges that the odd-lot doctrine from Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985) provides a rule that the burden of proof of employability shifts from the claimant to the defendants once a prima facie showing of total disability has been made. For purposes of analysis of this case, and without ultimately deciding, it is assumed that the odd-lot doctrine can be applied to cases where the disability falls under section 85.34(2)(s). Those who are permanently and totally disabled are those who are unable to earn a living for themself. Guyton, 373 N.W.2d 101; McSpadden v. Big Ben Coal Co., 282 N.W.2d 181, 192 (Iowa 1980); Diederich

v. Tri-City Railway Co., 219 Iowa 587, 594, 258 N.W. 89, 902 (1935). There are few individuals who have no earning capacity whatsoever. The true test, however, of total disability is the ability to be self-supporting. Among the group of those who are considered totally disabled, the odd-lot employee has a relatively lower degree of disability then some of the others. In Guyton, it was indicated that it is often necessary for a worker to show, through a bona fide effort to obtain employment, that no jobs exist, consistent with his abilities. Such a search is generally considered to be one of the requirements for showing a prima facie case although it is not the exclusive method of showing a prima facie case of total disability. In the case now under consideration it is found that the claimant has failed to make a prima facie showing of permanent total disability under the odd-lot doctrine or otherwise. It is further found, however, even if such a showing had been made, the evidence from Blaskovich and other evidence in the case refutes claimant's claim of total disability. If claimant's disability were evaluated industrially under all the appropriate factors namely age, education, qualifications, experience and inability to engage in employment for which he is fitted, it is clear that claimant has a substantial disability but something less than total disability. In spite of the severe injury, Ronald Wagner is found to have the capacity of being a gainfully employed productive member of society. It is found that he is capable of being self-supporting.

Claimant seeks to recover costs in the amount of $150 as expert witness fees for the testimony of G. Brian Paprocki. The request is proper under Division of Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33, and the controlling statutes. Costs will be assessed accordingly in favor of claimant.

FINDINGS OF FACT

1. As a proximate result of the injury of September 29, 1982 Ronald E. Wagner has an 88 percent permanent partial impairment of his right arm and a one percent impairment of his right leg.

2. The impairments resulting from the injury are equivalent to a 53 percent functional impairment of the body as a whole.

3. Claimant has not introduced evidence sufficient to establish that his injuries resulting from the accident of September 29, 1982 have produced permanent impairment that is located in a part of his body other than his right arm and right leg. He has failed to establish that the permanent impairment affects his body as a whole rather than the two scheduled members.

4. Claimant failed to make a prima facie showing that he is

permanently and totally disabled. To the contrary, it appears that he has the ability to be gainfully employed and self-supporting.

5. All the treatment provided under the direction of Dr. Reagan was reasonable and necessary.

CONCLUSIONS OF LAW

Claimant's disability in this case is to be compensated under the provisions of section 85.34(2)(s). When so evaluated he is entitled to receive 53 percent of 500 weeks or 265 weeks of compensation for permanent partial disability compensation payable commencing August 3, 1985.

Pursuant to the stipulation made by the parties, claimant is entitled to receive 148 3/7 weeks of compensation for healing period at the stipulated rate of $137.34 per week.

Pursuant to the stipulation made by the parties defendants are entitled to credit for 67 weeks of compensation that has been previously paid.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant one hundred forty-eight and three-sevenths (148 3/7) weeks of compensation for healing period at the rate of one hundred thirty-seven and 34/100 dollars ($137.34) per week commencing September 29, 1982.

IT IS FURTHER ORDERED that defendants pay claimant two hundred sixty-five (265) weeks of compensation for permanent partial disability at the stipulated rate of one hundred thirty-seven and 34/100 dollars ($137.34) per week commencing August 3, 1985.

IT IS FURTHER ORDERED that defendants receive credit for the sixty-seven (67) weeks of compensation which the stipulation shows to have been previously been paid and to 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, formerly Industrial Commissioner Rule 500-4.33, including an expert witness fee in the amount of one hundred fifty dollars ($150) and statutory mileage for the testimony of G. Brian Paprocki.

IT IS FURTHER ORDERED that defendants file claim activity reports as requested by this agency.

001162

Signed and filed this 26th day of March, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILBERT E. WARD,	:	
	:	
Claimant,	:	File No. 774247
	:	
vs.	:	
	:	A R B I T R A T I O N
AMERICAN FREIGHT SYSTEM, INC.,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Wilbert E. Ward, against his self-insured employer, American Freight System, Inc., to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained August 22, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner in Cedar Rapids, Iowa, on February 4, 1987. The record was considered fully submitted at close of hearing. A first report of injury was filed September 10, 1984. Pursuant to the the prehearing report filed by the parties, claimant was paid healing period benefits from August 24, 1984 through October 4, 1985. Claimant has also been paid permanent partial disability benefits for fifty weeks with a commencement date of October 4, 1985.

The record in this proceeding consists of the testimony of claimant, of Patricia Ward, of Bill Lyman, of Judith L. Spilde, of John R. Kessenich, and of Owen Julius, as well as of claimant's exhibits 1 through 10, 12 and 13, and defendant's exhibits A through L. Claimant's exhibit 1 is office records of James W. Turner, M.D. Claimant's exhibit 2 is office records of John R. Walker, M.D. Claimant's exhibit 3 is a September 6, 1985 report of Thomas Lehmann, M.D. Claimant's exhibit 4 is a September 7, 1985 report of B. J. Stitzel, D.O. Claimant's exhibit 5 is a July 16, 1985 report of a Dr. Winthrop S. Risk. Claimant's exhibit 6 is a disability determination unit social security file for 1985. Claimant's exhibit 7 is the curriculum vitae of Owen Julius. Claimant's exhibit 8 is physical examination reports of October 9, 1982 and September 24, 1982. Claimant's exhibit 9 is claimant's application for employment of May 22, 1961. Claimant's exhibit 10 is copies of temporary total disability checks dated September 6, 1984, November 16, 1984, December 19, 1984, and January 4, 1985. Claimant's exhibit 12

materials relating to claimant's application for an independent dical examination. Claimant's exhibit 13 is two photographs a Housler. Defendant's exhibit A is a series of medical ports relative to claimant's treatment under Dr. Turner's rection. Defendant's exhibit B is medical reports relative to eatment by Wilford S. Risk, M.D. Defendant's exhibit C is inical notes of Dr. Lehmann and Dr. Collalto. Defendant's hibit D is a September 5, 1985 report of B.J. Stitzel, D.C. fendant's exhibit E is a psychiatric consultation of Juan S. Lopez, D. Defendant's exhibit F is an October 27, 1986 report of ntague S. Lawrence, M.D. Defendant's exhibit G is a December , 1986 report of B. O. Osmundson, M.D. Defendant's exhibit H medical notes of W. N. Verdeck, Defendant's exhibit I is a port of W. B. Cutliff, M.D. Defendant's exhibit J is Professional habilitation Management records concerning claimant. M.D. fendant's exhibit K is a number of items of correspondence tween representatives of the parties. Defendant's exhibit L an explanation sheet regarding pension benefits.

ISSUES

Pursuant to the prehearing report, the parties stipulated at claimant's medical costs are fair and reasonable; that aimant received an injury on August 22, 1984 which arose out and in the course of his employment; that a causal relation- ip exists between that injury and claimant's back condition; , that claimant's rate of weekly compensation is $343.62. ther stipulations as to healing period benefits paid and manent partial disability benefits were as recorded above. endant waived the asserted defenses of lack of notice and ling of claim outside the period provided in the appropriate itute of limitations. The issues remaining for resolution are:

1) Whether claimant is entitled to benefits and the nature l extent of any benefit entitlement;

2) Whether claimant is entitled to payment of certain lical costs pursuant to section 85.27; and

3) Whether claimant is entitled to payment of costs of an ependent medical examination pursuant to section 85.39.

REVIEW OF THE EVIDENCE

Claimant is 62 years old and has completed tenth grade. He prior work experience as a service station owner, a mechanic, over-the-road and in-town delivery trucker. He began work a trucker with the predecessor of American Freight in 1955 worked for the predecessors until his August 22, 1984 injury. imant was injured on that date while attempting to hook up ble bottom trailers. He pulled on a "housler" (phonetic) and ded to complete the hookup procedure. His back snapped and

he felt a sharp pain. Claimant initally saw B. J. Stitzel, D.C., and then C. H. Stark, M.D., the company doctor. Dr. Stark referred claimant to J. W. Turner, M.D., an orthopedist. Dr. Turner treated claimant conservatively and prescribed physical therapy. Claimant had subsequent medical referrals and examinations by J. R. Walker, M.D., an orthopedic surgeon, with Doctors Lehmann and Collata at the University of Iowa Hospitals and Clinics, with Mayo Clinic physicians, and with Winthrop B. Risk, M.D., a neurologist, and Juan F. Lopez, M.D., a psychiatrist.

Claimant's job required him to load and unload trucks as well as sort freight and deliver freight. Claimant testified that his work required bending, stooping, and walking, as well as carrying and lifting weights ranging from five to five hundred pounds often awkwardly packaged. Defendant contends its employees are not required to lift over seventy-five pounds without assistance either from a second employee or from a two-wheel dolly. Claimant agreed that a two-wheeler was carried on deliveries but contended that items had to be manually lifted from the truck. Claimant's only current work release permits lifting to fifty pounds. Claimant is currently receiving a Teamster Union retirement pension and some form of social security benefits.

Claimant testified that he had earned approximately $35,000 in 1983. His salary was $13.06 per hour for in-town delivery jobs and $.303 per mile for on-the-road trucking. Claimant testified that he had intended to work as long as he could and denied having told his employer's representatives that he wanted to retire. Claimant understood that had he been able to work for American Freight for thirty years, he would have received a monthly pension of $1,000 and not $775. He had 27 1/2 years seniority at his retirment.

Claimant denied that he had had serious back pain prior to his August 22, 1984 injury. He agreed that he had seen Dr. Stitzel prior to the injury for neck and low back pain, but stated he had been able to work every day even with such pain. He reported that he now has constant pain in the back and with radiation into both his left and right lower extremities. Claimant reported numbness in his left and right toes as well as difficulty in sleeping, standing, sitting, and walking. He reported that he can lift no more than five pounds and cannot bend, stoop, crawl, or climb. He reported that he can drive but cannot hunt, fish, ride a motorcycle or do yard maintenance or animal husbandry about his acreage. Claimant testified that Dr. Turner's reference to an aggravation of his back condition in Fall 1984 was a reference to increased pain resulting from physical therapy in Fall 1984 which therapy was prescribed on account of the August 1984 injury. Claimant agreed that he had irritated his back in Fall 1984 while off work when he attempted to fix a home dryer drum barrel. Claimant refused employer-provided treatment at

the Kansas City Work Evaluation Center. He reported he would have preferred a less distant University of Iowa program which Dr. Turner had suggested. Claimant agreed that he told the employer provided vocational counselor that he wanted a union job in trucking. He agreed that he did not inquire to the union as to whether jobs were available or otherwise seek union help with obtaining jobs.

Patricia Ward corroborated her husband's testimony regarding changes in the couple's lifestyle following his injury.

Judith L. Spilde, administrator of American Freight's workers' compensation claims, stated that the company hired Professional Rehabilitation Management, Inc., to work with claimant through October 1985. Ms. Spilde reported that claimant called her following involvement of vocational rehabilitation personnel. She stated that claimant was very upset and adamant that he was not interested in vocational rehabilitation as he intended to retire. Records from Professional Rehabilitation Management demonstrate that claimant ahd his spouse had minimal desire for vocational rehabilitation as claimant wanted to return to either his prior job or another union job only or to retire without attempting retraining.

Ms. Spilde agreed that American Freight refused to provide a section 85.39 examination of claimant by Dr. Walker and agreed that claimant had already received a permanent partial impairment rating when that examination was requested.

John R. Kessenich, terminal manager for American Freight's Cedar Rapids facility, testified that at coffee claimant had said he would retire. Mr. Kessenich identified defendant's exhibit L as a document prepared by the Temsters Union pension bureau explaining pre and post April 1, 1985 pension benefits. He stated that the right hand column represented undeducted accrued benefits after twenty years of service. Kessenich reported that the new pension amounts would have been effective prior to claimant's retirement and that under those amounts, claimant at age 60 should be receiving $900 per month in pension benefits and not $775 as he would have received under the old plan. Kessenich agreed he had no personal knowledge of the Teamsters benefit plan. The undersign's review of exhibit L supports Mr. Kessench's conclusions, however.

Bill Lyman, business agent for Teamsters Local 238, stated that the Teamsters' master freight agreement had no mandatory retirement age. He indicated that one local member had retired last year at approximately age 75 or 76. He reported that that instance was unusual, however. Lyman testified that claimant contacted him following his injury regarding other jobs. He told claimant claimant would not likely be hired given his condition. Lyman denied that the Teamsters Union contract had a

fifty pound lifting restriction, but said that the contract could prevent accommodation of injured workers because of its seniority provisions. Lyman stated that claimant's seniority date with American Freight would either be 1960 or 1961 and reported that he thought he told claimant of the increase in pension amount following April 1, 1985. He reported that an individual with thirty years seniority would receive $1000 per month [apparently at age 60] and that if that individual could continue his employment, increases would continue with age until a maximum of $1500 per month pension was possible at age 65.

Owen Julius, a vocational rehabilitation counselor, met with claimant on February 18, 1986 and January 27, 1987 for a total of two to three hours. Mr. Julius has testified before this agency on other occasions and his qualifications are well known to the undersigned as well as set forth in claimant's exhibit 7. Mr. Julius reported that he understood claimant's physical restrictions to be as outlined in Dr. Walker's reports. He opined that claimant could not return to his previous employment and had limited transferrable skills as claimant is not a high school graduate. Julius opined that claimant could not peform jobs such as car cleanup or service station attendant because such jobs would require walking, standing, bending, and twisting. Julius agreed that the Iowa economy is quite poor and that even persons with skills have difficulty finding employment. He also opined that age discrimination would be a factor if claimant were to seek employment.

A work analysis prepared by Professional Rehabilitation Management, Inc., reports that no light duty work is available at the Cedar Rapids terminal as the union will not allow any type of substitution of workers. It reports claimant's job involves standing, walking, and sitting a maximum of fifty percent of the time; lifting and carrying to 500 pounds with help seventy-five percent of the time; pushing and pulling without cart twenty-five percent of the time; turning motions left and right approximately fifty percent of the time; climbing into a trailer twenty-five percent of the time; bending twenty-five percent of the time; twisting twenty-five percent of the time; stooping and reaching, both above and below the waist, twenty-five percent of the time; and handling/coordination one hundred percent of the time.

On January 25, 1985, Dr. Turner suggested that the ideal way of further reconditioning claimant would be to return him to work on a graduated basis with both limited hours and restrictions on bending and lifting. Dr. Turner released claimant for work on May 29, [1985] with no lifting or carrying of over fifty pounds and no full bending. On May 3, 1985, J. L. Spilde indicated that American Freight had received a work release from the doctor dated April 10, 1985. She reported that the company was bound by the Teamsters contract and could not allow a work

return with a fifty pound lifting restriction. She indicated that a release permitting lifting to seventy-five pounds is considered a full release. By way of responding to a June 26, 1985 report of Jan Bickley, of Professional Rehabilitation Management, Dr. Turner felt claimant could return to work if he followed through with a good program on teaching of lifting and work habits, but had never stated that claimant would have no restrictions. He reported that claimant's job description involved many heavy liftings and that claimant should be restricted to moderate amounts of weights lifted as well as in positions in which he were to lift such weight or objects.

On May 6, 1985, Dr. Turner opined that claimant had a twenty percent permanent impairment of the whole person as a result of the chronic pain and limitations in the back. He opined that ten percent of that permanent impairment was due to "any recent aggravation." He reported that, if possible, claimant should continue actively working, but stated he felt it would not be feasible under the lifting guidelines presented in claimant's job description. Dr. Turner's initial impressions of claimant on September 19, 1984 was of sprain and strain symptoms superimposed on degenerative changes in the back. On examination at that time, claimant had significant limitation of forward flexion lacking 20 inches of touching his toes. Claimant could stand on tip toes and could stand on heels. Straight leg raising was limited to 80 degrees bilaterally by hamstring tightness. Leg lengths were equal. Patellar reflexes were both 1+ as were ankle reflexes. Dorsiplantarflexion of feet was strong. Hip flexors, abductors, adductors, quadriceps and hamstrings were all of equal strength. Claimant had diffuse low back tenderness, but no specific sciatic notch tenderness. Lumbar spine x-rays showed disc spaces to be fairly well maintained but with moderate anterior spurring and probably more pronounced lateral spurring at the disc levels. Claimant did not appear to have appreciable foraminal encroachment. CT scan revealed mild bulging at L2, 3, L3-4, and L4-5. L5-S1 showed minimal bulging. Claimant had slight L2, 3 spinal stenosis. Dr. Turner noted that claimant was obese and reported that that condition did not help the stress on his back. Dr. Turner treated claimant conservatively and prescribed physical therapy. On October 3, 1984, Dr. Turner noted that claimant had pain and aching all over the legs and that claimant's therapy apparently "was aggravating."

On June 26, 1985, Dr. Turner again opined that claimant had a 20 percent permanent impairment with 10 percent attributed to the "aggravation occurring in the fall of 1984."

Claimant was examined at University of Iowa Hospitals on September 6, 1985 by a Dr. Lehmann and a Dr. Collalto. Dr. Lehmann suggested a myelogram which claimant refused. A rehabilitation program was suggested. It was noted that if

claimant did not enter that rehabilitation program, his healing period was nearing an end.

On September 7, 1985, B. J. Stitzel, D.C., reported that he had treated claimant for some time primarily for a lower back problem which affected the pelvis and radiated into the right leg causing a sciatic neuralgia.

Winthrop B. Risk, M.D., a neurologist, examined claimant in December 1985. In a July 16, 1985 report, he indicated that claimant's primary diagnosis was lumbosacral strain with bilateral radiculopathy, right greater than left, with an additional diagnosis of right-sided hemisensory impairment with right upper limb weakness, etiology undetermined but possible previous CVA. Risk noted that claimant reported sharp, shooting pains in the mid-lumbar region which radiated into the right leg initially to the knee and subsequently to the calf. He reported that claimant reported pain shooting into the left gluteal region and stated claimant described his pain as constant, dull, aching pain with exacerbation of shooting pains frequently, especially with movement such as bending, turning, twisting, or stooping. Straight leg raising was positive at 90 degrees on the right due to severe pain. Claimant also had diffused sensory impairment over the right face, arm, and leg. Dr. Risk opined that claimant was then totally impaired for any type of full-time employment until his underlying problem was more fully diagnosed and further efforts had been completed as regards treatment. Dr. Risk noted that lumbosacral spine films from July 5, 1985 revealed arthritic sprain of the lumbar vertebra. The lower lumbar facets had preserved disc spaces and good alignment. He reported that such films indicated mild to moderate degenerative arthritis.

Claimant was examined by various doctors at the Mayo Clinic. On December 30, 1986, B. J. Osmundson, M.D., reported that a Dr. D. W. Kimmel, of the Department of Neurology, had examined claimant and concurred with the diagnosis of mechanical back pain with radiculopathy in the right lower extremity. Additionally, Dr. Kimmel noted sensory loss on the right side of the body and thought this was most likely due to the old left frontal trauma. The Mayo physicians also noted claimant's diabetes.

Montague S. Lawrence, M.D., a thoracic and cardiovascular surgeon, examined claimant on October 27, 1986. The doctor noted that claimant had a strong history of deep venous obstruction involving his right lower extremity with mild edema of the leg. He reported he saw claimant to consider his circulation to his legs, but that claimant's arterial circulation in the right foot was good with femoral pulses present bilaterally and no bruits over his femoral arteries.

W. N. Verdeck, M.D., examined claimant on October 23, 1986. He noted that claimant was able to reach over to about six inches

from the floor with lateral flexion to about 15 degrees. Straight leg raising was negative and reflexes at the knee and ankle were 2+ and symmetrical. Plantar responses were down. Claimant had altered sensation over the entire right lower extremity. The doctor noted that his symptoms were suggestive of radiculopathy, but that other than the altered sensation nothing on exam suggested such. A CT scan was ordered. On November 6, 1986, Dr. Verdeck interpreted the CT scan as showing very minimal degenerative changes at the L4-5 level facets. He noted that some impingement by bony spurs on the right foramin at L4, 5 was also possible. There was no definite evidence of disc herniation.

John R. Walker, M.D., an orthopedic specialist, examined claimant initially on or about July 24, 1985. His examination findings were consistent with those of other physicians. Dr. Walker did note, however, that claimant reported that his right side and leg were swollen so badly following his injury the swelling split his pants. The right side on examination measured three-eighths of an inch greater than the left even though claimant favored his right side. The right calf measured three-fourths of an inch greater than the left calf. Dr. Walker opined that claimant had had an apparent vascular problem at the time of his injury and advised further medical examination regarding that problem. He opined that claimant had some "disc genetic disease," probably a ruptured lumbar disc, not well localized. He also opined that claimant had preexisting degenerative osteoarthritic change in the lumbar spine upon which had been superimposed multiple sprains in the lower back region, along with sciatica of the right lower extremity. He also opined that claimant had suffered a sprain of the cervical spine superimposed on spondylolsis of C5, C6. Dr. Walker opined that claimant's permanent partial impairment at that time was 38 to 40 percent of the body as a whole.

Dr. Walker again saw claimant on April 30, 1986. Claimant then complained that he had aching in his cervical spine and that his neck would pop and crack when he turned his head. He also complained that his right upper extremity including all fingers would go asleep and that his right shoulder was painful. Claimant complained that he had pain in the low back region particularly in the right buttock region which radiated down the medial and lateral aspect of the right leg to the foot and toes. He complained that approximately four months earlier he had began to have left buttock pain with radiation of pain down both medially and laterally into both the medial and lateral aspect of the left lower extremity. Claimant reported that sitting for long periods increased his right lower extremity and leg pain and also his back pain. Claimant felt that he dragged both legs when walking, but that the right leg was worse. Dr. Walker reported that on physical examination at that time, straight leg raising tests were markedly positive with a Lasegue sign markedly

positive on the right side. He reported that claimant seemed to have lost sensation particularly in the right upper and right lower extremities to gross sensory testing. The doctor opined that claimant seemed worse than when last examined. He opined claimant had 10 percent body as a whole permanent partial impairment in the cervical spine; 35 percent body as a whole permanent partial impairment in the lumbar spine; and four percent body as a whole and 15 percent right lower extremity permanent partial impairment of the right lower extremity related to some type of vascular injury. Dr. Walker then opined that the permanent partial impairment of the body as a whole was 49 percent and that such impairment was in addition to any previous problem claimant had from wear and tear arthritic changes. In a report of August 5, 1986, Dr. Walker characterized his initial 38 to 40 percent permanent partial impairment as a "temporary partial impairment" and reported that all of that amount was definitely due to claimant's August 22, 1984 injury.

Juan F. Lopez, M.D., performed a psychiatric consultation with claimant on September 26, 1985. Dr. Lopez diagnosed claimant's condition as an adjustment disorder with depressed mood with additional Axis III diagnosis of back injury, borderline diabetes, and possible CVA. He opined that claimant's depressed mood seemed to be secondary to his physical problems and his inability to move about and work. He reported that claimant's symptoms were not of sufficient severity or length to meet the criteria for a major depressive disorder and that claimant's pemorbid function spoke against a possible psychiatric illness.

A balance of $401 remains outstanding for Dr. Walker's services.

The balance of the evidence was reviewed and considered in the disposition of this matter.

APPLICABLE LAW AND ANALYSIS

Our concern is the nature and extent of claimant's benefit entitlement, if any.

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

Also to be considered is the following decision of this agency:

Although the Iowa Supreme Court has indicated that age is a factor to be considered in determining industrial disability, it does not indicate what the effect of young age, middle age or older age is supposed to be. Obviously, it is a factor that cannot be considered separately but must be considered in conjunction with the other factors. For example, the effects of a minor back injury upon a young person with extensive formal education would

limit the scope of his potential employment-less than that of a middle-aged person with no formal education.

How to apply age as a factor when a person is nearing the end of his normal working life is a dilemma. When considering the age factor, it is apparent that the scope of employment for which claimant is fitted is narrowed simply because of the reluctance of employers to initially employ persons of advanced years. Therefore, the advanced age alone without the combination of an injury is limiting. Lack of education or at least a showing of diminished educability is in and of itself also a limiting factor for entry into many fields of employment....

The Michigan Supreme Court has stated regarding retirement:

> Compensation benefits are geared to weekly wage loss. It is consistent with the concept of tying weekly compensation benefits to weekly wage loss to factor into the benefit program the statistically established generalization that workers, even if not disabled, retire between 60 and 75 and no longer earn weekly wages. There is no discrimination against disabled workers over 65 in taking into account the wage loss they would "presumptively" suffer due to normal retirement. Cruz v. Chevrolet Grey Iron Div. of Gen. Motors, 247 N.W.2d 764, 775 (Mich. 1976).

Initially, we note that the parties have stipulated claimant's back problem is causally related to his work injury. They have not stipulated that claimant's other problems including his generalized loss of sensation on the right side, his vascular problems, his cervical problems, and his sexual difficulties relate to his injury. Claimant has diabetes; he had a serious head injury at age four; he may have had a cardiovascular accident; he has degenerative arthritis. These conditions appear to be more probable causes of the above recited problems than claimant's work injury. Dr. Walker's opinion connecting these problems to claimant's injury is rejected as greater weight is given to the opinions of claimant's treating physician, Dr. Turner. Dr. Turner does not connect the described conditions to claimant's back injury.

As we have rejected Dr. Walker's causal relationship testimony, we need consider his opinion as to partial impairment only as the opinion relates to claimant's back condition. Dr. Walker

related that claimant had a 35 percent body as a whole permanent partial impairment of the lumbar spine all of which was in addition to any previous back problems related to wear and tear arthritis. Dr. Turner opines claimant has a 20 percent body as a whole permanent partial impairment on account of his back and recites that ten percent is related to claimant's Fall 1984 aggravation. Dr. Turner's diagnosis of claimant's condition was a sprain or strain superimposed on degenerative back changes. Claimant has attempted to show that by "Fall 1984 aggravation" Dr. Turner meant aggravation of claimant's condition by physical therapy prescribed to treat claimant's August 1984 injury. We do not adopt claimant's position. We believe Dr. Turner's opinion is better read in the context of his diagnosis which speaks of [existing] degenerative changes in claimant's back. Where so read "Fall 1984 aggravation" must be interpreted to mean August 1984 injury. Hence, Dr. Turner relates one-half of claimant's total permanent partial impairment on account of his back problem to claimant's August 1984 injury. Dr. Turner was claimant's treating physician and saw claimant more frequently and in a more sustained basis than did Dr. Walker. For that reason, we give greater weight to Dr. Turner's opinion as to claimant's functional impairment on account of claimant's injury.

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

It appears claimant was able to continue working even with his degenerative back condition until his August 1984 injury. Therefore, we do not find that the preexisting condition produced an ascertainable portion of claimant's ultimate industrial disability and apportionment is not appropriate in this case.

In considering claimant's industrial disability, we find claimant to be an older worker with a moderately severe functional impairment to his back. His education ended after the tenth grade and his job skills are limited. Claimant has medical restrictions on extended standing, sitting, bending, stooping and lifting of more than 50 pounds. Claimant testified he intended to work for an extended period had he not been injured. Other evidence suggests claimant was already contemplating retirement when injured at age 60. Further, claimant has not been highly motivated to seek other work or to seek vocational rehabilitation. Claimant has many health problems unrelated to his work injury which likely affect his ability to perform and enjoy his work. Claimant may well have considered retirement a viable life option in the time surrounding his work injury. Claimant testified that his retirement pension was lessened on account of his earlier retirement following his work injury.

Under the new pension formula, claimant might have received $1500 per month had he worked to age 65. He now should be receiving $900 per month. That fact must be weighed against the fact that claimant's actual work life was nearing an end when he was injured; the fact that claimant lacked motivation to accept or seek other work; and the fact that defendant had little willingness to accommodate claimant following his injury. Indeed, we find it somewhat incredulous that defendant could not in any matter return claimant to work with a fifty pound rather than a seventy-five pound lifting restriction. It's failure to do so is a factor having substantial bearing on the question of claimant's industrial disability. After assessing all factors, we find claimant's earning capacity was reduced by 25 percent following his August 22, 1984 injury.

Claimant apparently seeks healing period benefits for times during his healing period in which claimant's employer paid claimant full holiday pay. We must determine this issue without the benefit of knowing the provisions of claimant's work contract regarding holiday pay. We assume that holiday pay involves pay for time off work on account of a scheduled holiday. We believe that under that reasoning, claimant is not entitled to healing period benefits during those times he received holiday pay. Arguably, claimant was then not off work on account of his injury but off work on account of the scheduled holiday. Furthermore, granting claimant healing period benefits for those days would provide claimant with a windfall at defendant's expense. We do not believe that result was intended under our Workers' Compensation Act.

In their prehearing report, the parties stipulated the section 85.27 and 85.39 issues had been resolved but for those relating to Dr. Walker's care for claimant. We do not find claimant entitled to payment of care Dr. Walker provided under section 85.27. Any care Dr. Walker provided claimant was not authorized and was not provided in an emergency situation or petitioning the agency for alternative care after claimant communicated dissatisfaction with care provided by his authorized physician to defendant. Neither did care by Dr. Walker substantially benefit claimant or potentially reduce claimant's ultimate impairment. Hence, payment for any of Dr. Walker's services under section 85.27 would be inappropriate.

Section 85.39 permits claimant one independent medical examination under appropriate circumstances. Ms. Spilde agreed defendant did not provide claimant an examination with Dr. Walker where that request was made following receipt of a permanent partial disability rating. Claimant, therefore, is entitled to payment for one examination by Dr. Walker, that is, the costs of claimant's initial July 24, 1985 visit with Dr. Walker.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant injured his back on August 22, 1984 while working for defendant.

Claimant's injury consisted of a sprain or strain of the low back superimposed on degenerative changes.

Claimant is 62 years old.

Claimant has completed tenth grade.

Claimant has numerous medical problems not related to his work injury. Claimant's back condition relates to his work injury.

Claimant has limited job skills.

Claimant has worked primarily at manual labor jobs involving heavy lifting as well as bending, stooping, standing, and sitting.

Claimant cannot now perform the above physical maneuvers on a sustained basis.

Claimant's employer was unwilling to accommodate claimant's work release with a fifty pound lifting restriction.

Claimant was reluctant to seek vocational rehabilitation as claimant wanted to either work at his prior job or retire.

Claimant has not returned to work.

Claimant has retired.

Claimant has a moderately severe functional impairment.

Claimant's loss of earnings capacity is 25 percent.

Claimant received full holiday pay on those days on which he did not receive healing period benefits.

Dr. Walker's care of claimant was unauthorized, was not provided in an emergency, and did not benefit claimant significantly or reduce claimant's ultimate disability.

Claimant requested an independent medical examination with Dr. Walker after claimant had already received a permanent partial impairment rating.

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CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant is entitled to permanent partial disability resulting from his August 22, 1984 injury of twenty-five percent (25%).

Defendant receive credit for permanent partial disability benefits already paid claimant representing ten percent (10%) permanent partial disability.

Claimant is not entitled to healing period benefits for those dates on which claimant received full holiday pay.

Claimant is not entitled to payment of any costs incurred with Dr. Walker under section 85.27.

Claimant is entitled to payment of costs of his July 24, 1985 evaluation with Dr. Walker under section 85.39.

ORDER

THEREFORE, IT IS ORDERED:

Defendant pay claimant permanent partial disability benefits an additional seventy-five (75) weeks at the rate of three hundred forty-three and 62/100 dollars ($343.62).

Defendant pay costs of claimant's July 24, 1983 examination with Dr. Walker.

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, formerly Industrial Commissioner Rule 500-4.33.

Defendants file claim activity reports as required by the agency.

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

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ORDELL C. WEILAND, Claimant, vs. WILSON FOODS, Employer, Self-Insured, and SECOND INJURY FUND OF IOWA, Defendants.	FILE NO. 744384 R E V I E W - R E O P E N I N G A N D FILE NO. 797397 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 review-reopening and arbitration brought by Ordell C. Weiland, claimant, against Wilson Foods, employer and self-insured defendant, and Second Injury Fund of Iowa, defendant, for benefits as a result of two injuries one of which occurred on September 7, 1983 (File No. 744384) and the other one which occurred on May 13, 1985 (File No. 797397). This hearing is a review-reopening as to the injury which occurred on September 7, 1983 (File No. 744384) because there was an agreement for settlement of that case dated August 29, 1984 and approved September 4, 1984 for 50 weeks of permanent partial disability benefits based upon a 10 percent impairment rating of a body as a whole in the total amount of $10,247.50. A hearing was held on November 25, 1986 at Storm Lake, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Ordell Weiland (claimant); Mary Weiland (claimant's wife); William Orr (employer personnel and labor relations manager); joint exhibits 1 through 38; and, Second Injury Fund exhibit A. All three 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 both injuries.

That claimant sustained injuries on September 7, 1983 and on

May 13, 1985 which arose out of and in the course of employment with the employer.

That the injuries were the cause of both temporary and permanent disability.

That there is no dispute as to the claimant's entitlement to temporary disability benefits and that claimant has been paid benefits from September 10, 1983 to August 20, 1984 for the first injury and from June 14, 1985 to December 22, 1985 for the second injury.

That the commencement date for permanent partial disability benefits from the first injury is August 20, 1984 and for the second injury, December 22, 1985.

That the rate of weekly compensation for the first injury is $204.95 per week and $202.67 per week for the second injury in the event of an additional award.

That all requested medical benefits have been or will be paid by the defendant employer.

That defendant employer is entitled to a credit for 50 weeks of permanent partial disability benefits paid on account of the first injury dated September 7, 1983 and 37.5 weeks of permanent partial disability benefits paid on account of the second injury dated May 13, 1985.

ISSUES

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

Whether claimant is entitled to benefits for scheduled member injuries or whether claimant is entitled to benefits for injuries to the body as a whole as industrial disability as to each of the alleged injuries.

Whether claimant is entitled to any additional permanent partial disability benefits.

Whether the Second Injury Fund is liable for any disability benefits.

SUMMARY OF THE EVIDENCE

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

Claimant is age 38, married, and has three dependant children. He attended Alta high school until the ninth grade at which time

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he got behind and quit. Past employments include wrapping butter in a creamery, driving a forklift in a grease gun factory, cutting hair as a barber in the Navy, testing cylinders in a hydraulic cylinder plant, and working as a carpenter. Claimant started to work for employer in 1970 and passed a preemployment physical examination at that time. He has not had any health problems in the past prior to these injuries except for a kidney stone two years ago. He performed several jobs for employer such as boning hams, hooking sides, trimming butts, skinning hams, skinning butts and shoulders, and grading loins. All of these jobs required repetitious use of the hands and arms and shoulders. Sometimes claimant handled 3,000 to 4,000 items of product per day. In addition, the speed of the line was increased over the years.

At the time of the first injury on September 7, 1983, claimant was trimming butts when he developed pain in his right shoulder (Exhibit 33). Claimant testified that his right shoulder actually hurt for about one month prior to that date and he kept getting behind. Claimant demonstrated by gestures at the hearing that the top of his right shoulder and the back of his right shoulder hurt until he could not lift this shoulder at all. He told his foreman who reported it to the nurse. The nurse sent him to Keith O. Garner, M.D., in Cherokee. Dr. Garner put claimant in the hospital for a week. The admission summary sheet of the Sioux Valley Memorial Hospital at Cherokee shows calcific tendonitis of the right shoulder and subdeltoid bursitis of the right shoulder (Ex. 31). All of Dr. Garner's treatment was for the right shoulder (Ex. 13, 14, 15 & 16). Dr. Garner referred claimant to John F. Connolly, M.D., an orthopedic surgeon, at the University of Nebraska Medical Center in Omaha. Claimant testified that he was off work for almost a year on account of his right shoulder injury.

Dr. Connolly first saw claimant on October 17, 1983 (Ex. 25). He noted that claimant had been previously treated for right rotator cuff tendonitis. Dr. Connolly suspected a partial degenerative tear of the right rotator cuff that did not mandate surgical repair. Dr. Connolly continued to see claimant on November 14, 1983, November 23, 1983, March 5, 1984, and May 14, 1984 for his right shoulder rotator cuff injury (Ex. 21, 22, 23, 24, and 25). On May 14, 1984, Dr. Connolly found that claimant had a full range of motion and some moderate weakness. He gave claimant a 10 percent overall functional impairment of the body as a whole (Ex. 21). Dr. Connolly recommended in a letter to Dr. Garner on May 14, 1984, that claimant return to work with employer with the following restrictions:

> ...I think it is time that he get back to work activity as much as possible, within the limits of his functional impairment. I asked him to get back in touch with his employer and with you, and try to

arrange for his return to work. I think he should do work that does not require overhead lifting but can do work with his arm by his side or he can lift objects that do not require throwing or pushing upward over his head.
(Ex. 21).

Claimant then saw Mark Wheeler, M.D., an orthopedic surgeon in Sioux City for his right shoulder on July 9, 1984. Dr. Wheeler diagnosed rotator cuff impingement syndrome (Ex. 11 & 12). An arthrogram on July 25, 1984 ruled out a suspected rotator cuff tear (Ex. 11, 12, 13 & 14). On August 15, 1984, Dr. Wheeler released claimant to return to work with these restrictions:

> Ordell Weiland may return to work as of Monday, August 20, 1984 and should do no working with right arm above shoulder- 15 lb. weight limit - should return to work on a graduated hourly schedule.
> (Ex. 10)

Dr. Wheeler stated that claimant had a permanent partial physical impairment rating of eight percent of the upper extremity for the right shoulder (Ex. 8). (Using the AMA Guides, 8 percent of the upper extremity converts to 5 percent of the whole body).

Claimant and employer entered into an agreement for settlement on August 29, 1984 which was approved on September 4, 1984, for a 10 percent impairment of the body as a whole which translated to 50 weeks of compensation at the rate of $204.95 per week in the total amount of $10,247.50 (Ex. 38).

Claimant did not testify nor did he introduce any medical evidence that his right shoulder injury had changed or become worse. Claimant testified only that his right shoulder continued to hurt after he returned to work but that he did not reinjure it.

Claimant testified that when he returned to work from the right shoulder injury he began trimming neck bones. This job is constant pushing and pulling. You reach up and grab a 10 pound or 15 pound piece of the animal, hold it with the left hand, and cut it with a wizard knife with the right hand, then push it down the line to three other employees. The sows are the biggest and they are the hardest.

Claimant did this job for approximately 10 months after he returned to work until May 13, 1983 when he began to get the same kind of pains in the left shoulder. He said they actually began about 30 days before that date. He saw the nurse who sent him to Dr. Garner again. Claimant demonstrated by gestures at the hearing that the pain was in the top of his left shoulder, up into his neck, down into his back, and down into his hand and arm.

Dr. Wheeler saw claimant again on July 31, 1985 for left shoulder pain radiating into the back. His examination revealed a rotator cuff syndrome, left shoulder (Ex. 5). On August 12, 1985, Dr. Wheeler noted that Dr. Garner's x-rays showed no abnormalities (Ex. 6). On August 26, 1985, Dr. Wheeler described claimant's symptoms as shoulder difficulty with pain radiating across both shoulders from his neck, occasionally under the left arm. He recorded that claimant had neck pain of uncertain etiology complicated by his shoulder symptoms (Ex. 6). On October 21, 1985, claimant still had bilateral shoulder pain. On November 25, 1985, Dr. Wheeler said claimant continued to have pain in his shoulder, but his neck and back were slightly less stiff. He said claimant reached maximum medical healing. He estimated claimant had five percent permanent partial impairment rating of each upper extremity (Ex. 2). Dr. Wheeler's final comments were contained in a letter to Dr. Garner dated November 26, 1985:

> I have evaluated Ordell Weiland today, November 25, 1985. I feel he has reached maximum medical improvement. Would give him a five percent permanent partial impairment rating of each shoulder. I have advised him that he will have permanent difficulty in doing work calling for heavy lifting or working above shoulder level.
> (Ex. 1)

At claimant's request (Ex. 30, p. 1) claimant saw Dr. Connolly one time on December 24, 1985 as an independent medical examination to evaluate claimant's left shoulder injury. Dr. Connolly stated that the pain was located in the rotator cuff region and made the following concluding comments:

> ...Essentially, the gentleman has the same problem in the left shoulder that he had several years ago on the right side, namely rotator cuff tendinitis with degeneration. I do think that he has about the same amount of functional impairment as a result of the shoulder problem. This should amount to 10% permanent partial disability as a result of impaired strength and range of motion.
>
> I think his present regimen is satisfactory, and that he should continue with an exercise program and use the TENS as needed. He also needs to think about changing his job, since apparently he is not able to manage in the position he has at Wilson's.
> (Ex. 20)

Claimant testified that both Dr. Wheeler and Dr. Connolly

told him "to get out of the packinghouse" or he would wear out and someone would have to feed him by the time he was middle age. Claimant also testified that the doctors told him not to perform repetitive work. Claimant said that the union steward tried to get light work for him but the company would not give him an answer. Claimant testified that the employer did not contact him. Claimant did not testify that he personally contacted the employer to return to work. Claimant testified that he knew the plant had been restructured, all of his old jobs had been eliminated, and that the plant was now essentially a processing plant and that many of the former employees had been rehired and had returned to work at these new jobs.

Claimant testified that he decided to take the advice of the doctors and get out of the packinghouse. He stated that vocational rehabilitation recommended that he obtain his GED. He is working on his GED at this time. He needs the GED to enter a 21 month course of barber school. Claimant thought he could be a barber if he got a special chair so that he could work at waist level while cutting hair. Furthermore, if it hurt he could quit for awhile because he would be his own boss. Claimant estimated that he could charge $3 or $4 per hair cut. He estimated that he could then earn $10, $15 or $20 per day.

Claimant said that his current situation is that he has pain in both shoulders all of the time. He takes aspirin for it and has been using a TENS unit. He has trouble sleeping because if he rolls onto either shoulder it feels like knife stabs. He can no longer throw a ball with his son; cannot bale hay in the small pasture; cannot milk cows or do chores. He goes to school one day a week. He tries to show some calves or pigs at fairs and shows. For income he charges a fee to purchase livestock for friends at the sale barn. Claimant said that he also had two income disability insurance policies in addition to workers' compensation. One of these policies paid him $300 per month for about one year and four months. The other one paid him $200 per month and it is near the end of his payments.

Claimant admitted that he applied for unemployment compensation but that his claim was dismissed and that he did not receive any unemployment compensation. He also conceded that he told job service in a written stipulation of facts that due to restructuring of Wilson's operations, work compatible with the limitations placed on him by the doctor was now available (Ex. 37). He thought however that this was actually done by his attorney to preserve his wage credits. He said that he followed his attorney's advice in filing this stipulation.

Counsel for the Second Injury Fund and the employer elicited from the claimant on cross-examination that the doctor reports did not say that he was to get out of the packinghouse, but rather the medical reports stated that he should change the type

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of work he was doing for the employer. Claimant also granted that none of the doctors' restrictions in the medical reports mention that claimant was to avoid repetitive work. Claimant countered that the doctors orally advised him not to do packing-house work.

Claimant said that he was looking for work with his hands at waist level which was not fast and did not require lifting above his waist or shoulder. Claimant admitted that he had not sought any employment of this kind and had not been turned down for any employment of this kind. Claimant had no explanation for why he had not looked for work that he could do either at Wilson's or elsewhere other than to state that he thought he was still employed at Wilson.

Mary Weiland, wife of claimant, testified that claimant no longer eats with his right hand but now eats with his left hand. He cannot reach up and grab dishes in the cupboard. He cannot play ball with his children. They cannot go to dances because it hurts his arms. He has pain in both arms. It is painful emotionally for her when she has to get up first and leave the house and go to work.

William Orr testified that he is the personnel and labor relations manager for employer at Cherokee. He said that the plant was converted from a packing plant to a processing plant in the spring of 1986, more specifically May 19, 1986. The plant was gutted except for the outer walls and was completely redesigned ergonomically. The cut and kill floor where claimant previously worked have been eliminated. Most of the jobs are now automated or machine assisted. They now have 425 employees and will have 700 employees soon. He said that claimant could do 90 percent to 95 percent of the jobs within the restrictions imposed by Dr. Wheeler and Dr. Connolly. He described seven jobs in some detail of a packaging, machine assisted or processing nature that claimant could do. He testified that claimant had 16 years of seniority and that would qualify claimant for approximately 20 to 25 of these 400 jobs now at the plant at a wage of $8.50 per hour. Claimant was earning $8.00 per hour when he left. These jobs do involve repetitive use of the hands but they are not high speed jobs. Employees are not working faster because there is no incentive bonuses. The witness granted that claimant did not receive a release, as such, from the doctor to return to work after the second injury to the left shoulder. However, the doctor's letter that claimant had obtained maximum medical improvement along with the specified restrictions of the doctor's were treated the same as a release. Orr said that there are jobs that claimant could do for the same or more income within the doctor's restrictons. Less than five percent of the jobs require lifting and many of the jobs are at waist level.

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When the plant reopened all employees were encouraged to come back. All employees on the seniority list were contacted directly by employer. Claimant was not contacted directly because he was not on the seniority list. He had been removed from the list because the union representative, John Kitterson, told employer that claimant did not want to come back and work for employer. Thus, claimant's name was taken off the list so it would not be necessary to contact him each time if he did not want to work for employer. Claimant did not contact employer and ask for a job. Orr testified that if claimant would have come in he would have had a job for him. He also stated that if claimant would apply now they would have a job for him. Orr said claimant is still considered to be an employee but he is not on the seniority list because he understood that claimant did not want to work for employer.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injuries of September 7, 1983 and May 13, 1985 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 v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

All of the medical reports summarized above demonstrate that Dr. Garner, Dr. Wheeler and Dr. Connolly all treated an injury to claimant's right shoulder, left shoulder, neck and back, more specifically, claimant was diagnosed as having a rotator cuff injury of the right shoulder and a rotator cuff injury of the left shoulder. Dr. Garner briefly mentioned the humerous, elbow and wrist once when he was discussing the right shoulder injury but that he believed these were only referred pains (Ex. 16).