Iowa Industrial Commissioner

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DECISIONS OF THE IOWA
INDUSTRIAL COMMISIONER
1987

001215

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY ACKERMAN, Claimant, vs. WEISS CONSTRUCTION CO., Employer, and FIREMAN'S FUND INSURANCE CO., Insurance Carrier, Defendants.	:	File Nos. 806005 806006 A R B I T R A T I O N D E C I S I O N FILED FEB 23 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

These are proceedings in arbitration brought by Larry Ackerman, claimant, against Weiss Construcion Co. (Weiss), employer, and Fireman's Fund Insurance Co., insurance carrier, for benefits as a result of alleged injuries on October 17, 1985 (No. 806005) and on October 22, 1985 (No. 806006). A hearing was held in Davenport, Iowa, on Decemer 17, 1986 and the case was submitted on that date.

The record consists of the testimony of claimant; claimant's exhibits 1 through 10; and defendants' exhibits A and B. The court reporter at hearing was not certified in Iowa; however, she was allowed to stay in the hearing room. The parties stipulated as follows at time of hearing:

The parties stipulate, pursuant to section 17A.10(2) of the Code of Iowa, that they waive the requirements for recording oral proceedings and maintaining the record of oral proceedings contained within section 17A.12(7) of the code.

It is further stipulated that no official verbatim record of the oral proceeding will be made or maintained and that for purposes of review on appeal the only official record of the oral proceeding will be the exhibits received into evidence and the written decision of the deputy industrial commissioner.

The parties stipulated that claimant's weekly rate is $331.19; and that the medical bills at issue are reasonable in amount. Defendants waived their Iowa Code section 85.23 defense at time of hearing. The rate issue was informally resolved at time of hearing.

The contested issues are:

1) Whether claimant received an injury which arose out of and in the course of his employment with Weiss;

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

3) Nature and extent of disability; claimant argues that any permanency benefits which may be awarded commence on April 6, 1986; defendants argue that any permanency benefits which may be awarded commence on January 8, 1986; and

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

SUMMARY OF THE EVIDENCE

Claimant testified that he is 36 years old and was employed by Weiss in October 1985 as a heavy construction worker. He has a twelfth grade education. He received an honorable discharge after four years in the U.S. Navy. He obtained jet engine mechanic experience in the navy. He sustained no injuries prior to October 1985 and characterized his health as excellent prior to October 1985.

Claimant testified that on October 17, 1985 (a Thursday) he stepped in some mud while lifting a bag of cement that weighed about 100 pounds and injured his low back when he twisted with the bag in hand. The next day he went to a chiropractor. On October 22, 1985, claimant was shoveling sand at a construction site and experienced low back pain as a result. Claimant testified that he was told by Weiss that he could go to the doctor of his choice for treatment of his back problem. On October 24, 1985, claimant saw Steven L. Funk, D.O.; he was treated by Dr. Funk from October 24, 1985 through January 6, 1986 and received weekly workers' compensation benefits during this time period. On January 6, 1986, claimant tried to go back to work and told Weiss about his restrictions on that date. Weiss informed claimant that they could not take him back given his medical or physical restrictions.

Claimant testified that on January 6, 1986, he saw Raymond W. Dasso, M.D., and was ultimately evaluated by Barry Lake Fischer, M.D. On April 6, 1986, claimant felt he could go back to work and did so doing "light cleanup" for $230 per week. His medical

restrictions "limited the amount of work" he could do. In January 1986, claimant had a 25 pound weight restriction with no repetitive lifting or squatting. Claimant was paid $550 per week prior to October 17, 1985. Claimant currently has severe pain in his lower back. After October 17, 1985, claimant no longer hunted, fished, or "roughhoused" with his children.

On cross-examination, claimant acknowledged that he selected Dr. Funk. Dr. Funk ultimately told claimant to go back to work and to "lift to tolerance." Claimant thought that perhaps Dr. Dasso imposed the 25 pound weight restriction.

On cross-examination, claimant acknowledged that he "returned" to work for a construction company other than Weiss; this company called claimant. Claimant testified that he went to see Dr. Dasso; D. D. Stierwalt, D.C.; Thomas A. Brozovich, D.C.; and Irwin T. Barnett, M.D., for evaluations rather than treatment or therapy. Claimant testified as to the amount of his earnings in 1981 through 1985.

Exhibit 1 (dated January 8, 1986) is authored by Dr. Funk and reads in part:

> [Claimant] slipped in the mud and fell into a hole and immediately had sharp pain in the low back radiating to both legs and severe leg weakness....He had severely torn ligaments in the upper lumbar spine and tight restriction of the sacroiliac and fifth lumbar joints. The nerve signs which were originally present are gone at this point and the fifth lumbar and sacrum symptoms are completely gone, but the injury at the second and third lumbar segments persists. Larry definitely has weakening of the ligamentous and muscular structures in this area, which is probably permanent.

Exhibit 2, page 3 (dated April 22, 1986), is authored by Dr. Funk and contains a 30 percent whole body rating. Dr. Funk also commented on page 3: "I feel that Larry will never improve to the point that he can do heavy labor without severe back pain... and certainly [I] would not certify him able to return to his original work."

Exhibit 3, page 3 (dated May 20, 1986), is authored by Dr. Fischer and contains a 30 percent whole body rating.

Exhibit 5, page 3 (dated February 28, 1986), is authored by Dr. Dasso and reads in part:

> DISABILITY: The patient has totally been disabled from the date of the injury until the present time. In my opinion he has permanent partial disbility

with no restrictions of no lifting over 25 pounds and no excessive bending, stooping or twisting; however, he will probably have an additional six months or so of total disability before recovering to the degree that he can do light work.

APPLICABLE LAW AND ANALYSIS

I. 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).

Claimant's testimony that he injured his low back at work on October 17, 1985 is believed. Claimant's testimony that he aggravated his low back injury at work on October 22, 1985 is also believed. Claimant established by a preponderance of the evidence that he sustained an injury which arose out of and in the course of his employment.

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

A 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).

Dr. Funk's causal connection opinion is found to be persuasive

as is his 30 percent whole body rating. Dr. Funk started treating claimant shortly after the incidents in October 1985. See exhibit 1, page 1.

III. 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).

Claimant is 36 years of age and is not well educated. He has a work history of manual labor jobs and was able to perform these jobs prior to October 1985 as his health was good. His testimony that he sustained no injuries prior to October 1985 is believed. Dr. Funk stated that claimant cannot return to "heavy labor without severe back pain." See exhibit 2, page 3. This evidence is also believed. It would appear from the evidence of record that claimant is not a particularly good candidate for vocational rehabilitation.

Taking all appropriate factors into account, it is concluded that claimant is entitled to 200 weeks of permanent partial disability benefits based on an industrial disability of 40 percent. Permanency benefits commence on April 6, 1986 as claimant returned to work on that date. I am not convinced that claimant had reached maximum healing on January 8, 1986. Claimant is, therefore, entitled to healing period benefits from October 17, 1985 through April 5, 1986.

IV. Defendants' authorization arguments are rejected. A finding of fact will be made that the employer told claimant that he could select his treating physician. He did so. Any causal connection arguments are also rejected for the reasons stated above. In sum, all contested medical bills are to be paid by defendants. Also, defendants' authorization arguments fail because they did not admit that claimant has a compensable injury, and therefore cannot control the course of medical treatment.

FINDINGS OF FACT

1. Claimant is thirty-six (36) years old.

2. Claimant sustained no physical injuries of any consequence prior to October 17, 1985.

3. On October 17, 1985, while working for Weiss, claimant injured his low back when he picked up a bag of cement that weighed about 100 pounds; he slipped into a mud hole with his right foot and fell on his left side with a resulting low back injury.

4. On October 22, 1985, claimant materially aggravated the October 17, 1985 low back injury while working for Weiss; he was shoveling sand on October 22, 1985 at the time of his aggravation.

5. As a result of the work incidents of October 17, 1985 and October 22, 1985, claimant sustained whole body impairment in the range of thirty percent (30%).

6. Claimant has a work history of heavy manual labor jobs.

7. Claimant is not currently able to do heavy labor because of medically imposed restrictions; these restrictions were imposed because of the work-related injuries sustained in October 1985.

8. Claimant will not be able to do heavy labor in the future because his physical impairment relating to his low back is permanent.

9. Claimant is a poor candidate for vocational rehabilitation.

10. Claimant is well motivated to work and to improve his physical condition.

11. Weiss informed claimant that he could choose his own treating physician and he did so.

12. Claimant had not yet reached maximum healing on January 8, 1986.

13. Claimant's industrial disability is forty percent (40%).

14. Claimant's stipulated weekly rate of compensation is three hundred thirty-one and 19/100 dollars ($331.19).

CONCLUSIONS OF LAW

1. Claimant established by a preponderance of the evidence that he sustained injuries that arose out of and in the course of his employment.

2. Claimant established by a preponderance of the evidence that there is a causal connection between his work-related injuries and his asserted disability.

3. Claimant established entitlement to healing period benefits and permanent partial disability with permenant partial disability benefits commencing on April 6, 1986.

4. Defendants' authorization and causal connection arguments regarding the contested medical bills are without merit and, therefore, defendants shall pay these bills.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay healing period benefits from October 17, 1985 through April 5, 1986, and then pay two hundred (200) weeks of permanent partial disability benefits commencing on April 6, 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 to claimant.

That defendants pay the contested medical bills.

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

That defendants shall file claimant activitiy 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 23rd day of February, 1987.

T. J. McSWEENEY
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001223

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DARLENE ALBERTSON (BYRNES), Claimant, vs. DONALDSON, INC., Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	No. 729018 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 Darlene Albertson (Byrnes), claimant, against Donaldson, Inc., employer and Travelers Insurance Company, insurance carrier, for the recovery of benefits as the result of an alleged injury on March 17, 1983. This matter was heard on March 10, 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, John Byrnes, Mary Pospichal and Vincent J. Gehling and joint exhibits one through thirteen. The defendants' objection to exhibit three is sustained.

STIPULATIONS AND ISSUES

Pursuant to the pre-hearing report and order approving the same, the parties stipulated as follows:

1. On March 17, 1983 there existed an employer-employee relationship between the claimant and Donaldson, Inc.

2. On March 17, 1983 the claimant suffered an injury arising out of and in the course of her employment.

3. The injury suffered by claimant caused temporary disability from March 17, 1983 to January 19, 1984.

4. If claimant suffered permanent disability as a result of

her injury, then such disability arises from facial disfigurement.

5. The commencement date for permanent disability, if any, is January 19, 1984.

6. The claimant's rate of compensation is $231.25, she is married and entitled to two exemptions.

The issues presented by the parties for determination in this proceeding are:

1. Whether the claimant suffered permanent disability as a result of her injury, and if so, the extent of disability suffered.

2. Whether the claimant is entitled to reimbursement for certain travel expenses under code section 85.27.

EVIDENCE PRESENTED

Claimant testified that she is and has been employed by defendant for 14 years. She had previously worked as an office manager for a livestock yard which was a position she held for 18 years.

Claimant said that at the time of her injury she was operating a hot melt machine. She said this was a machine which heated wax to 400 degrees in a vat for application to an air filter manufacturing process. One of her duties was to make sure the vat was always 1/2 to 3/4 full. In order to maintain that level of wax she was required to put sheets of wax into the vat. On the afternoon of March 17, 1983, she was putting some sheets of wax into the vat when it bubbled over splashing hot wax on her hand and face. Claimant said she screamed and two co-employees came to her aid and placed ice on the burns. She was then taken to Cresco Mercy Hospital.

Claimant was treated at the hospital by Thomas L. Duncan, M.D. After the doctor administered some shots and applied bandages, claimant was sent home. Claimant then came under the care and treatment of doctors at the Cresco Medical Center. Claimant said she received extensive and painful treatment of the burns because of an infection that developed. After the infection cleared, claimant underwent treatment at the Mayo Clinic in Rochester, Minnesota consisting of steroid injections, skin grafts and debridement.

Claimant explained that her present problems from the injury include difficulty breathing through her left nostril, an obvious bright red scar on her lip where the skin graft was performed, a twitching nerve in her lip which gives her the appearance of a sneer, hypersensitivity to heat and cold and a

chronic mild infection of the graft area. She also explained that she is embarrassed by her scar and is reluctant to be seen in public. Claimant said that she cannot cover the scar with makeup because of the propensity for infection to develop as a result. She added that fumes or dust in the work place also aggravate the infection.

Claimant further testified that she believed she would have difficulty finding employment if she lost her current job. She attributed the concern to the fact that she now feels very uncomfortable meeting new people in most social settings, unless she is with people she knows. Claimant clearly became distressed and emotionally upset at the hearing while testifying as to these matters.

On cross-examination claimant explained in detail the wage structure and fringe benefits she has at defendants. She also said that after some initial psychological counseling concerning her injury, she agreed that further counseling would not be necessary in learning to cope with her disfigurement.

Claimant said that she has not had continuing medical problems from her injury except that an infection develops every two or three weeks. Although she has not missed a lot of work, she has been told by her doctor to stay out of the plant when infection develops.

John Byrnes testified that he has been married to the claimant for 11 years. He said that prior to her injury, claimant was a very socially active person involved in many activities including motorcycle riding and square dancing. Since the injury, claimant has curtailed many of these activities. He said claimant must now be careful to protect her face from cold and heat, particularly sunlight. Mr. Byrnes said claimant now has difficulty meeting people because of the obvious scarring and the twitching and contracting of her upper lip. He said he had noticed people staring at the claimant's scar.

On cross-examination, Mr. Byrnes said that he believed he had been and is supportive of claimant and offers her encouragement. He said he thought claimant could obtain work, though not necessarily the kind she would like. He said claimant enjoys working.

Mary Lou Pospichal testified that she works at defendant's and has done so for 14 years. She said she has known the claimant for the entire time she has worked there. Ms. Pospichal said that there has been a considerable change in claimant's attitude and behavior since the injury. She said claimant is very self-conscious about her injury and now avoids meeting new people. She added that claimant is now reluctant even to go to the lunch room to eat with other employees. She said claimant

appears to be "on edge" all the time since the injury. She said she believed claimant was a very good worker for defendants.

Vincent J. Gehling testified that he is the production control manager at defendant's. He said he is not the claimant's immediate supervisor. He said that claimant is in the upper 28% of 191 employees on the seniority list at the plant. He said that he sees the claimant on a daily basis and that her immediate supervisor speaks highly of her as an employee. He stated that he was unaware of any plant closing or layoffs in the immediate future.

Exhibit 1 is an 8 x 10 color photograph of claimant. In her testimony claimant said this picture was taken prior to repair of a protruding tooth. Exhibit 2 is a series of six photographs showing claimant's injury in various stages of healing.

The defendant's objection to exhibit 3 was sustained and it will not be reviewed.

Exhibit 4 is a letter report from Ian T. Jackson, M.D., a plastic surgeon, dated August 27, 1986. Dr. Jackson reports he saw the claimant on August 15, 1986 at which time the skin graft was soft and flat, which was satisfactory. He noted, however, that it was unfortunately red in color and obvious. He also noted that she had developed a pulling up of the nasolobial area giving the appearance of a twitch and she had complaints of nasal blockage and infection on the alar rim from time to time. The doctor characterized the claimant as having "redness of the lip and over the grafted area and twitching" which were "definitely very obvious, and would be noticed by the general public..." The doctor said he was not certain as to the cause of the nasal blockage.

Exhibit 5 is a note of May 30, 1986 from S. G. Kepros, D.D.S., in which the doctor states he had recontoured and crowned the left lateral incisor of the claimant which had protruded abnormally since the March, 1983 injury.

Exhibit 6 is a letter dated December 23, 1985 from Donald E. Dowe, M.S.W. concerning claimant's therapy at the Northeast Iowa Mental Health Center in Decorah. According to that letter, claimant was seen on several occasions from December, 1983 through February, 1984 in an effort to help her deal with significant stress arising from her efforts to adjust to the disfigurement of her face. She was last seen in February, 1984 at which time she reported she felt much improved.

Exhibits 7, 8, and 10 are all brief reports from Dr. Jackson. All of these reports predate Dr. Jackson's report of August, 27, 1986 (exhibit 4). These reports have been reviewed but need not be set forth herein.

Exhibit 9 is a report dated August 28, 1985 from Peter F. Kepros, M.D. Dr. Kepros outlines the history of claimant's treatment at the Cresco Medical Center. The doctor refers in the letter to the emergency room records at the Howard County Hospital and the office records of the Cresco clinic. Those records were admitted as exhibit 12. A review of that exhibit discloses the extensive course of treatment claimant underwent in connection with her burns.

Exhibit 11 is a two-page report dated April 18, 1983 from Dino S. Andriani, M.D. of the Cresco Medical Center. This report contains a detailed history of the claimant's treatment immediately following the injury as well as a full description of those injuries.

Finally, exhibit 13 is an itemized statement of mileage traveled by claimant to secure medical treatment. Total miles traveled were 2,042.

APPLICABLE LAW AND ANALYSIS

Iowa Code section 85.34(2)(t) provides that:

> ...For all cases of permanent partial disability compensation shall be paid as follows:...For permanent disfigurement of the face or head which shall impair future usefulness and earnings of the employee in his occupation at the time of receiving the injury, weekly compensation, for such period as may be determined by the industrial commissioner according to the severity of the disfigurement, but not to exceed one hundred fifty weeks.

Both parties, through counsel, have submitted well-researched and well-reasoned briefs on the meaning of this statute and its application to the facts in this case. The Iowa Industrial Commissioner cases cited by defendants are less on point than argued. In this case there can be no dispute that claimant suffers from an obvious, permanent and unsightly scar on her upper lip.

It must be noted, however, that claimant not only suffers from an unsightly appearance, but continues to experience chronic infection and apparent nerve involvement in the upper lip. In addition, the scar is supersensitive to heat, sunlight and cold thus requiring special precautions by claimant. Clearly these are impairments that will and do affect claimant's employability and thus earning capacity as a factory production worker. Not only is her physical appearance distracting, but it also involves limitations on the type of work she could do.

It is the duty of the industrial commissioner to award benefits for disfigurement that impairs usefulness and earnings. It is his further duty to assess compensation based upon severity of this disfigurement. In the instant case claimant has shown considerable severity and should be compensated accordingly. She will be awarded 75% impairment of the face totalling 112 1/2 weeks.

Claimant is also entitled to reimbursement for mileage traveled for medical treatment which totals 2,042 miles. The applicable mileage rate is $.24 per mile.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, the following facts are found:

1. On March 17, 1983 claimant received an injury to her face when 400-degree hot wax splashed on her at work.

2. Claimant underwent an extensive and painful healing period.

3. As a result of claimant's injury, she suffered permanent disfigurement to her face.

4. The permanent disfigurement suffered by claimant is in the form of an obvious bright red scar on her lip which is hypersensative to heat and cold; subject to chronic infection; causes a sneering look because of nerve twitching; and causes claimant embarrassment and humiliation in public.

5. The disfigurement suffered by claimant impairs the usefulness and future earnings of the claimant in her occupation as a factory production worker.

6. The severity of claimant's disfigurement is equal to 75% of the face or head.

7. Claimant's rate of compensation is $231.25.

8. Claimant returned to work January 18, 1984.

9. Claimant incurred mileage expenses for medical treatment in the amount of $490.08.

IT IS THEREFORE CONCLUDED that claimant has proven by a preponderence of the evidence that she suffered permanent disfigurement to her face of a severe nature entitling her to an amount equal to 75% thereof.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant one hundred twelve and one-half (112 1/2) weeks of permanent partial disability at her rate of two hundred thirty-one and 25/100 dollars ($231.25) commencing January 19, 1984. All accrued benefits shall be paid in a lump sum together with statutory interest thereon.

IT IS FURTHER ORDERED that defendants are to pay unto claimant four hundred ninety and 08/100 dollars ($490.08) for mileage reimbursement.

Costs are taxed to defendants.

Signed and filed this 26th day of June, 1987.

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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001230

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY ALBERTSON, Claimant, vs. I-29 COUNTRY DIESEL, Employer, and GREAT WEST CASUALTY, Insurance Carrier, Defendants.	:	FILE NO. 745347 A R B I T R A T I O N D E C I S I O N FILED JAN 30 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Terry Albertson, claimant, against I-29 Country Diesel, employer, and Great West Casualty Company, insurance carrier, for benefits as the result of an alleged injury on May 12, 1983. A hearing was held at Council Bluffs, Iowa on May 27, 1986 and the case was fully submitted at the close of the hearing. The record consists of claimant's exhibits 1 through 12; defendants' exhibits A through H; the testimony of Terry Albertson (claimant), Bill Hill, Chuck Johnson and Juanita Grindle for the claimant; and the testimony of Gene White, Ron Brierly and Dick Horst for the defendants.

STIPULATIONS

The parties stipulated to the following matters:

That the existence of an employer/employee relationship between the claimant and the employer at the time of the alleged injury was established by an interim order.

That the alleged injury was the cause of both temporary disability during a period of recovery and the cause of permanent disability.

That the extent of the claimant's entitlement to weekly compensation for temporary total disability or healing period disability, if the defendants are liable for the injury, is from May 12, 1983, the date of the injury, to the present time as a running award.

That the weekly rate of compensation in the event of an award is $179.00 per week.

That the parties will agree on the payment of medical expenses if the injury is found to be compensable.

That no credits are claimed for payments under an employee non-occupational group plan or for workers' compensation benefits previously paid.

That there are no bifurcated issues.

ISSUES

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

Whether the claimant sustained an injury on May 12, 1983 which arose out of and in the course of his employment with the employer.

Whether the intoxication of the employee was the proximate cause of the injury.

Whether the claimant is entitled to any temporary or permanent disability benefits.

PRELIMINARY MATTERS

Claimant objected to certain medical records of a hospital and a laboratory (Defendants' Exhibit A & Claimant's Exhibit 12); the deposition testimony of Carlos Carrion, M.D., (Def. Ex. E); the deposition testimony of Peter J. Stephens, M.D., (Def. Ex. F); and the Federal Motor Carrier Safety Regulations Pocketbook (Def. Ex. G). The claimant's objection is overruled and these exhibits are admitted into evidence as evidence normally within the purview of Iowa Administrative Procedure Act, section 17A.14 and Division of Industrial Services Rules 343-4.17 and 343-4.18, formerly Iowa Industrial Commissioner Rules 500-4.17 and 500-4.18.

SUMMARY OF THE EVIDENCE

The claimant is 35 years old, single (divorced) and has no children. He graduated from high school where he took general courses and automobile mechanics. He has no additional formal education in the way of trade school or college. Past employments include construction work, factory work, packinghouse work and logging. He was also in the Army for about one and one-half years where he served as a truck driver and a cook. Claimant has known Gene White, the owner and operator of I-29 Country Diesel for many years. When White drove for Schroeder Feeds and

claimant was 15 years old, claimant worked with White and rode with him to the Blackhills. White introduced claimant to truck driving at that time. White later hired claimant as an over-the-road driver for Werner Enterprises in April of 1983. I-29 Country Diesel hires drivers and leases drivers and tractors to Werner. Werner issued the claimant a driver's certification and medical examiner's certificate on April 12, 1983 (Cl. Ex. 3) and claimant began to work at that time. Claimant denied that he was given (1) any written course of instruction or a written test; (2) a driver's manual (Cl. Ex. 4); or (3) a Federal Motor Carrier Safety Regulation Pocketbook (Def. Ex. G). Claimant did agree that he did sign a letter of abandonment on April 12, 1983 that acknowledges that he is responsible for the return of the tractor and trailer under dispatch to Werner Enterprises in Omaha, Nebraska if he should terminate his employment with them (Cl. Ex. 5).

Claimant had no real prior over-the-road driving experience. He was apprenticed to Ron Brierly, an experienced driver, to learn to drive, to learn to keep the log book, to learn how to handle shipping documents, to learn when and where to eat and get fuel and other techniques of the trade. Claimant had made approximately four trips with Brierly before his injury on May 12, 1983. Brierly taught him what to do and how to do it. Claimant said that Brierly had driven for several years; that Brierly was the lead man; that Brierly handled the papers (Cl. Ex. 6); and that Brierly made the decisions. Claimant testified that he was learning the business from Brierly.

Claimant testified that he knew that it was against the rules to drink in the cab of the truck. However, he did not know of any rule that you could not drink during a layover. He denied that Gene White or anyone told him you could not drink while you were under dispatch. There were a number of times he and Brierly could not load or unload and they would layover at a truck stop and do some drinking. In fact, they did it almost every time unless there was no bar where they were at.

Brierly said that he knew drinking was discouraged but that he drank once in a while and that he drank with the claimant. Brierly testified that he has been driving for five years and that he has been drinking alcoholic beverages during that period of time during breaks and layovers. Drinking is customary among drivers. He has even drunk alcohol with White on a couple of occasions.

White testified that his policy is that drivers are not to drink on the road until the destination is reached and the load is unloaded. Claimant was not supposed to be drinking because he was under dispatch. White testified that he specifically talked to claimant about drinking when he was hired. Furthermore, White has a huge sign in I-29 Country Diesel that says if a

driver has alcoholic beverages in the vehicle or if a driver is reported drinking on the road he will be terminated. He further testified that he elaborated on this with claimant. He told claimant that if his truck was parked in front of a tavern he would be terminated on the spot. White stated that while he knew some would drink anyway, he hoped that none of the drivers would drink. Even though this injury involved a considerable amount of drinking, White had no explanation for why Brierly did not get fired as a result of it.

Dick Horst, safety director for Werner, testified that claimant should have been given a test on the DOT rules about drinking. He also should have been given a copy of the Federal Motor Carrier Safety Regulations Pocketbook and also the Werner Enterprises Driving Manual which contain rules on drinking. However, Horst could not verify that this was actually done in the claimant's case. Claimant denied that he was given any written test of any kind and he denied that he was given any books or booklets of any kind when he was given his license by Horst.

The Werner Enterprises Driver's Manual (Cl. Ex. 4) prohibits alcohol consumption anytime you are in charge of a loaded trailer anywhere and while a driver is laid over. The manual says that a violation will result in dismissal. Horst also testified that the verbal order of Werner's is that there is to be no alcohol in or near or around the vehicles -- not one drop. Horst interpreted the Werner rule as strickly no drinking while under dispatch but had no explanation for why Brierly was not fired as a result of this incident. Horst acknowledged that Werner employed about 435 drivers in 1983.

Defendants called attention to section 392.5 Intoxicating Beverage of the Federal Motor Carrier Safety Regulations Pocketbook which prohibits a person from using an alcoholic beverage within four hours before operating or having control of a motor vehicle generally (Def. Ex. G).

One of the issues in this case is whether the passenger door of the cab was defective; the nature of the defect; and whether it contributed to the claimant's injury. Bill Hill, a former truck driver, and a friend of the claimant who is related to the claimant through marriage, testified that he talked to claimant before he left on this trip. Hill stated that this Kenworth, Unit #388, had a defective door. You had to slam it hard in order to close it and if you gave it a hard bump the door would open.

Chuck Johnson, an owner-operator of his own truck and a friend of the claimant, looked at the passenger door of this unit at the request of claimant before he left on this trip. Johnson found that the door had a gap at the top. The door was

sprung and was not sealing properly. This Kenworth model of tractor has had a lot of trouble with their doors. They require a lot of adjusting. Johnson said that slamming it hard will close it. He just looked at the door and did not try to fix it. The particular defect caused by these doors is an air leak, a wind noise that bugs you. Johnson agreed that this door has two latches. If the door comes off the first latch, then the second latch is supposed to hold the door closed. Johnson verified that the custom and practice in the trucking industry is that the driver is responsible during layovers and at all times for the equipment until the truck is brought back home again. Johnson further confirmed that alcohol and beer are customary at truck stops and that it is a common practice for truckers to drink while on the road during layovers and breaks.

Rodney B. Blackburn testified by deposition that he formerly worked at the I-29 Country Diesel Truckstop as a mechanic for Gene White in 1980 and 1981. Unit #388, a Kenworth tractor, was purchased from Werner's after it had been previously wrecked. Blackburn testified that he installed a complete right side in the cab in order to repair it. After it was fixed he took it on a couple of trips and it worked fine. He did not know anything about the condition of the cab at the time of the injury because he was not working at I-29 Country Diesel then and he had not talked to White, Brierly or claimant about this incident. Johnson testified that this model Kenworth was made too light and the doors regularly need to be adjusted once or twice a year. Otherwise they get wind leaks at the top. Also, you have to slam the Kenworth door hard at all times to get it to close. Once it is closed tightly it stays closed and does not pop open. He knows of no situation where the door would come open once it is closed completely. The chronic problem is that these doors leak air at the top and also that they will not close without slamming them very hard. The door does have a double lock. If it does not go all the way closed, the first lock will hold it closed. He testified that he never worked on this truck again due to a door problem after the initial replacement of the right side of the cab. (Cl. Ex. 10)

Stephen L. White testified by deposition that he is the brother of Gene White and a former employee of I-29 Country Diesel as a general mechanic. White stated that he worked on engines, diesels and also performed body work. He currently owns and operates his own automobile repair shop in Tabor, Iowa. He knew of Unit #388, that it was once wrecked when owned by Werner's, and that it had a complete right side installed in it several years ago. He worked on this door on this unit for wind leaks. Wind leaks are customary for the Kenworth cab. The hinge is made of mild steel. It gets deformed or bent from the constant jarring from rough roads which causes a gap at the top of the door and allows wind to leak into the cab. He clarified that he was not aware of the Kenworth door ever failing to close.

White said that he cannot recall for sure, but the claimant may have complained about a wind leak, but he did not say that he had to slam the door in order to shut it. He testified that neither Brierly nor claimant complained about the door not shutting properly. Yes, he has heard other people say that the Kenworth door did not shut properly, but he thought that they meant that this was because there was an air leak after it was shut. Stephen White also pointed out that this door hinged at the front edge. Therefore, it opened at the back edge of the door (Cl. Ex. 2).

Claimant testified that the passenger door on Unit #388 did not work properly. It did not latch real tight. When closed, there was a gap in the top corner near the windshield. It had been fixed before this trip when he was injured, but it had come loose again as they drove along the road. You had to slam it a lot to get it to shut. He had complained about it and it was fixed about a week before his last trip by Stephen White and another mechanic. However, it had worked loose and would not shut properly again.

Claimant testified that he and Brierly left Omaha on May 9, 1983 and went to Crete, Nebraska to get a load of Alpo dog food to take to Phoenix, Arizona. He said that at Crete he had to slam the door hard or it would pop open. He would test it with his shoulder until he got it to stick. He said Brierly would test it with his shoulder too. Claimant testified that Brierly said that they could not stop and get it fixed because it was hard to get little things fixed and it seemed like a minor problem at the time.

Juanita Grindle testified that she was the mother of claimant. At a New Year Eve's party she heard Brierly admit that the door on this truck was "messed up" and that it did not close properly. Brierly denied that he said that the door did not work properly at the New Year Eve's party.

Brierly further testified that the door worked good after it was fixed just prior to the trip to Crete. He also denied that the door gave them any problem between Crete, Nebraska and Phoenix, Arizona. He denied that it would not shut properly and that you had to bump it with your shoulder to see if it would open. He denied that it made a wind noise on this trip. Brierly did testify that before it was fixed a week before this trip, it had to be slammed hard in order for it to latch.

Gene White said that the only complaint about the passenger door was wind noise. He personally knows that it was fixed and the door was adjusted one trip before the trip to Phoenix. The truck needed no passenger door repairs after Ron Brierly returned it from Phoenix after the claimant was injured. This unit should not need another door adjustment within three to four

weeks. At 500,000 miles this unit was not an old truck.

Claimant testified that this truck had a sleeper and you were supposed to use it. He was told you were supposed to sleep in the truck and that motel bills were not authorized. When on the road he and Brierly always slept in the truck. Both White and Brierly told him that he was responsible for both the truck and the load. He signed a letter of abandonment when he was employed that said you cannot run off and leave the equipment. He was told that he was responsible for the equipment until he got it back home again.

Gene White testified that drivers are responsible for the tractor and trailer when out on the road. He stated the employer will pay for a motel on some occasions, typically the second night of a layover. Otherwise, he expects the drivers to sleep in the truck because he does not want the truck unattended.

Horst testified that the drivers are responsible for the care and control of the trucks whether they are loaded or unloaded. The company policy is not to pay for a motel bill unless the truck is broken down over 24 hours. Otherwise, if a driver takes a motel he is supposed to pay the motel bill himself. Horst acknowledged that the truck is the driver's home on the road and also his place of employment. Horst further testified that the employee is under the control of the employer except for 60 minutes in which to eat in a 10 hour period; and even during the 60 minutes the driver is responsible for the care and control of the equipment.

Claimant and Brierly arrived in Phoenix, Arizona at approximately 4:00 p.m. or 5:00 p.m. on May 11, 1983. Claimant was the driver on the last leg of the trip. The dispatcher at the destination said that they could not unload until the following morning. Claimant testified Ron knows the road and selected that they layover at a truckstop on the interstate which was adjacent to the Roadrunner Restaurant and another building which housed the Bean Pot Bar. Claimant testified that he cleaned up, ate and went to the Bean Pot Bar and began drinking beer and shooting pool. Ron came in a short time later around 7:00 p.m. and also began drinking beer. This had been their customary practice on other trips unless there was no bar at that location. Claimant said that they drank and talked to people for about two or three hours. He admitted to buying some hashish in the bar, but he denied smoking it. He did admit to taking caffeine pills while driving sometimes in order to stay awake. He denied drinking any kind of alcohol other than beer on this night. Claimant said he did not know how many beers he or Brierly drank. Claimant testified that Ron left to go to sleep in the cab. Claimant stayed and continued to drink and talk to people in the bar. Claimant estimated that he left the bar at approximately 11:30 p.m. to 12:00 midnight, but he did not look at a clock in

order to determine the time. Claimant said that he proceeded to the Roadrunner Restaurant to get something to eat.

At the Roadrunner Restaurant the claimant encountered Gladys Deffenbaugh; however, at the hearing, he testified that he does not remember her or having any dealings with her. Deffenbaugh testified by deposition that she was the cashier at the restaurant. Claimant came in, and entered into a dining area that was closed. When she went in to get him he was standing there, weaving and staring at an empty booth. When he came into the main cafe he began talking to customers who, for the most part, ignored him. Then he got in a passageway through the counter that the waitress uses and rocked back unsteadily on his heels. Then he poked a lady customer to get her attention and she told him, "I'll flatten you!" The witness had asked claimant to sit down or leave the restaurant several times. He never did sit down, but eventually left sometime between 11:00 to 12:30 p.m. as best she could recall. Sometime later a customer came in and told her that the guy who was in here fell out of his truck and broke his back (Def. Ex. B, p. 16). At another point in her testimony she said that she was told that the claimant was trying to get in his truck and fell out and broke his back (Def. Ex. B., p. 30). Deffenbaugh did not go to the scene of the accident.

Charles J. Gregory, a policeman for 12 years, testified by deposition that as he patroled the restaurant area around midnight a waitress came out and waived him down. She said a subject was inside trying to stir up fights and requested assistance. He found claimant to be unsteady on his feet, smelled of alcohol, his eyes were bloodshot and watery. He was kind of feisty and had a cocky attitude. Gregory testified that the claimant was intoxicated. When Gregory asked claimant if he had ever been arrested before the claimant replied, "Yeah, yeah for beating up cops." Gregory stated that he got the claimant's name and ran a warrant check which came out negative. Gregory believed claimant was too intoxicated to drive a vehicle and gave him a chance of going to his truck or motel or going to jail. Claimant elected to go to his truck. Later that morning Gregory had heard that claimant had fallen from a truck and had hit his head against another truck (Def. Ex. C, p. 11). Gregory was at the scene and saw claimant laying on the ground.

Albert T. Sindel, a policeman for 11 years, responded to a call to assist Officer Gregory. Sindel stood with the claimant while Gregory ran a warrant check. Sindel believed that the claimant was intoxicated because of his facial features, blurry eyes, and loud, boisterous and antagonistic manner. Sindel stated that the claimant was not sober enough to drive a motor vehicle. Sindel felt that claimant was intoxicated enough to be arrested under the Arizona disorderly conduct statute which includes public intoxication, but since claimant could move under his own power they gave him a chance to go to bed. When

Officer Gregory gave the claimant the option to go to bed or go to jail, Sindel last saw the claimant walking off toward his truck, but did not see him get in it. (Def. Ex. D)

Claimant testified that he had no recollection of talking to Deffenbaugh, Gregory or Sindel. He testified that he did recall getting into the truck but he did not know what time it was then. Brierly was sleeping in the cab on the driver's side with his head against the driver's door and his feet over the doghouse. He said they were getting on each other's nerves when they arrived in Phoenix so claimant tried to be quiet in getting into the truck and only gave the door one slam. He thought about testing it with his shoulder, but he decided not to do so. Claimant testified that he took off his boots and socks and put them on the floor of the cab. He took off his outer shirt and put it across the back of the seat. He put his knees up on the dash and went to sleep. The next thing he knew he woke up on the ground laying on his back with his feet toward the front of the truck and he wondered what had happened. When he tried to get up the pain was so bad that he blacked out. He could not turn his head. He could only move his eyes. Eventually he heard noises; people tried to move him; he felt a board sliding under him. He next recalls being in the hospital but does not know much about the first week there. From Phoenix he was transferred to Schoitz Hospital in Waterloo, Iowa and eventually to the VA Hospital in Milwaukee, Wisconsin where he still goes for periodic maintainence treatment. Claimant said that he did not know how he ended up on the ground. He said that he was only speculating when in his deposition he stated that the door popped open and that he fell out. Claimant conceded that it is possible that he got up to go to the bathroom, but he does not think so because he did not put his boots on. His best recollection is that he left the bar, went to the cafe, ate, went to the truck and went to sleep. He definitely remembers getting into the truck; he does not know what happened after he went to sleep.

Brierly said that he did not know how many beers he drank. It might have been eight, nine or 10 like he said in his deposition, or it might be 10 or 12, he just did not know. He testified that he was intoxicated and that the claimant was intoxicated too. Claimant could walk but could not drive or ride a bicycle. Brierly stated he went back to the truck around 10:00 p.m. or 10:30 p.m. and went to sleep in the cab with his head against the driver's door and his feet up on the doghouse. He does not remember claimant returning to the truck. The next thing he recalls is that someone was up on the passenger seat tapping him on the foot and woke him up and told him claimant was on the ground. Brierly said he found claimant conscious, there was no blood on the ground, and claimant did not say what had happened. He found claimant's boots and socks and outer shirt on the passenger's side of the cab. Otherwise, his recollection was

that claimant was fully clothed with T-shirt and pants. As far as he knows, no one saw claimant fall and claimant did not say how he fell. Claimant did say that he could not feel his legs. When Brierly talked to him on the ground claimant mumbled and said his legs would not move. Brierly said he may have told the police that claimant fell 10 feet out of the truck and that he was intoxicated but not overly so. Brierly stated that he saw the claimant in the bar about 10:30 p.m. and that claimant was intoxicated but not overly done. The next time he saw claimant he was on the ground beside the truck. Brierly was not too clear, but thought that the claimant may have consumed a white powder substance or smoked a marijuana cigarette. Claimant denied that he did either one of these things.

Brierly said that when he reported the accident to Gene White the following morning White thought that claimant had fallen out of the truck.

Claimant's exhibit 8, a Nebraska first report of injury, which was prepared on May 12, 1983, contains three pertinent entries. Item 24 says, "Sitting in tractor." Item 25 says, "Employee fell out of tractor (investigation indicates that employee had been drinking)." Item 29 states, "broken neck, paralyzed from neck down."

The City of Phoenix Fire Department Emergency Report indicates that claimant fell out of a semi-truck either hitting his back on the ground or another truck. It states that the fall was not witnessed. The patient could not move his legs. Patient is ETOH and has consumed unknown amounts of alcohol and possibly amphetamines. Patient gives inconsistent answers. This report is dated May 12, 1983 at 0324 hours (Cl. Ex. 11, Deposition Ex. B).

Joseph M. Suarez, M.D., an intake doctor at St. Joseph's Hospital and Medical Center made a report marked 0423 hours on May 12, 1983. He speculated that claimant had fallen from the cab of the truck that he was found laying beside. He also concluded that claimant was intoxicated because he smelled strongly of alcohol; his blood alcohol was 177; and he could not recall the events of the evening before. He assessed a C6-7 fracture-dislocation with quadriplegia. Dr. Suarez states that Stephen Bloomfield, M.D., was called and attended to the patient (Def. Ex. A, p. 31).

Dr. Bloomfield also speculated that claimant fell 10 feet from the cab of his truck and was found by a passerby lying on the ground by his truck. Strangely the only visible physical sign of trauma was a minor abrasion to the left knee. Dr. Bloomfield said claimant had ETOH on his breath and he believed that he may well have been inebriated. Claimant had total paralysis of his arms and legs. Tongs were placed in claimant's head for traction for a closed reduction of the C-6, C-7 dis-

location fracture in the neck (Def. Ex. A, pp. 1-3).

A blood alcohol test at St. Joseph's Hospital on May 12, 1983 at 0440 hours showed an alcohol reading of 177 MG/DL. It also stated a drug screen was sent to Smith-Klein Laboratory (Def. A., p. 8). The Smith-Klein report showed a reading of 18GM/DL for ethinol. No other drugs were detected in the sample (Def. Ex. A, p. 9).

On May 13, 1983, Russell Chick, M.D., a consulting doctor, speculated that claimant had tripped and fell from the cab of his truck landing on his head and neck on a loading dock (Def. Ex. A, p. 12).

Carlos Carrion, M.D., appears to be the physician in charge of the patient at all times on the hospital records. Dr. Carrion and Dr. Chick installed a number three halo on May 17, 1983 with four skull pins tightened to six pounds of torque on an alternating basis (Def. Ex. A, p. 14).

Dr. Bloomfield discharged the claimant to an extended care facility in Iowa on June 7, 1983. He commented that claimant did well physically but he anticipated other problems because claimant did not accept the fact that his chances of walking again were almost nil (Def. Ex. A, pp. 4-7).

Dr. Carrion also testified by deposition on May 16, 1985 (Def. Ex. E). He testified that he is a board certified neurosurgeon who has practiced in the Phoenix area for approximately 15 years. He treated claimant at St. Joseph's Hospital for a broken neck, more specifically a fracture dislocation of the cervical spine of C-6 on C-7. A blood alcohol test was made on claimant because every patient admitted through the trauma service has a number of tests performed and one of these tests is a blood alcohol and drug test. Dr. Carrion testified that this has been the hospital procedure for approximately five years. This is important to a neurosurgeon in order to determine whether a neurological deficit is due to alcohol and drugs alone or whether it is in combination with an injury. Dr. Carrion finds the results of these tests provided by the lab as dependable. He examined the claimant's blood alcohol results taken at 4:40 a.m. on May 12, 1983 and stated that they became a part of the claimant's hospital records. The St. Joseph's tests recorded a blood alcohol of 177 and the Smith-Klein test showed 18 grams per liter. He stated that these two readings were comparable. He has not seen claimant since he was discharged on June 7, 1983.

Dr. Carrion said that the history of a fall fit the claimant's injury. In layman's language claimant's spinal cord got pinched or squeezed by the bones in his neck and ceased to work. It need not be severed into two pieces. A solid squeeze is sufficient to produce permanent damage to the fibers in the spinal cord

from the brain that control the body. The spinal cord will not regenerate itself. Dr. Carrion testified that this is permanent damage; it will not get better; but it may get worse for a number of reasons. Claimant was totally paralyzed basically from the shoulder level down. He can move the right hand well, but cannot move the left hand. He had some motion in the upper left extremity, but none below that, nothing, and he is never going to have anything.

Dr. Carrion projected the claimant's future in the following dialogue with counsel:

A. You want me to project what he's going to need?

Q. Yeah.

A. The patient right now have [sic] a significant neurological deficit. Providing he had the right attitude and providing he gets enough schooling, he may be able to care for himself and, indeed, find employment. Although he is rather limited. He can only use one hand, out of his entire body probably. So the--the avenues for employment are extremely limited. But medically, he will need a physician to follow him at least three or four times a year, for life. He will have recurring urinary infections, which will shorten his life. He will have several number of sores, regardless of how well he take [sic] care of himself. And so this also will require, from time to time, a visit to the doctor and treatment for the same. He'll--and I'm sure in the past, when he was in Waterloo, Iowa, he received some psychiatric help; and he will require more. My short contact with the patient led me to the impression that he didn't accept the injury. And if, in fact, that he will not accept the injury, and will make a hell of his life.

Q. By that, that's the statement in here that he said that--you're not telling me--I will walk and I will be able to walk. It's just a matter of time. That kind of a macho attitude. This is not going to get me. I'm going to walk. But that's unrealistic.

A. Unrealistic is a very common problem. But, as a rule, there is some degree of acceptance and some plans--realistic plans for the future. I'm afraid this man will not make plans for the future that are in any way realistic.

Q. Without some psychiatric intervention or change of attitude?

A. To help him; to live with whatever he gets.

Q. What do we find happens to people who are immobile like him with the extremities of the legs, as far as do they atrophy or--

A. They get atrophy. And what is more important than that--atrophy is just for the looks. He's not using them anyhow. But he is going to have phlebitis, which could be dangerous to his life.

Q. Circulatory problems--

A. Yeah.

Q. Urinary--is that because he's immobile?

A. No. It's because the normal pathway of the urine have been bypassed. He's not voiding like a normal human being would.

Q. I see. Because those muscles are not receiving signals from the brain?

A. Yeah. The blood--it just lay there. And it always will have some amount of urine in the blood, which will be a source of infection.

(Def. Ex. E, pp. 24, 25 & 26)

Peter J. Stephens, M.D., of Davenport, Iowa, testified that he is a board certified anatomic clinical and forensic pathologist who specializes in human consumption of alcohol and testifies frequently in civil and criminal cases. He found the St. Joseph's blood alcohol report of 177 miligrams per deciliter in close concordance with the Smith-Klein laboratory report of 180 miligrams per deciliter. The tests done by different laboratories yielded virtually the same result (Def. Ex. F, p. 34). These readings might produce different effects in different individuals depending upon several varibles, but you can say that persons with these readings would certainly be under the influence of alcohol at that level. It would be harder to see in the dark; climbing would be more difficult due to loss of coordination; and a person would not be able to drive safely (Def. Ex. F, pp. 38-43). A significant amount of alcohol had been recently ingested (Def. Ex. F, p. 80). Dr. Stephens stated that the nature of the injury implies a fall from a height, and he speculated that claimant fell off the runs or from the cab itself (Def. Ex. F, p. 54).

Dr. Stephens gave the following opinion as to the cause of the fall:

> Q. Now, doctor, do you have an opinion as to why he fell from that ladder or from the deck of the truck?
>
> THE WITNESS: It is my opinion that the fall in somebody who was presumably familiar with climbing into that cab and in the absence of any mechanical defect in the vehicle -- it's my opinion that the fall was due to incoordination on the basis of an elevated blood-alcohol level.
>
> (Def. Ex. F, pp. 54 & 55)

Dr. Stephens admitted that he did not know several foundation elements of the claimant's blood alcohol tests but the information he examined is the kind of information upon which he usually relies. He did confirm that no other drugs were found in the claimant. Dr. Stephens agreed that he could equally conclude that claimant could have fallen from inside the truck. He also gave the following testimony:

> A. If his boots are inside the truck, it implies that he was either in the truck cab or for some reason best known to himself he took his boots off. In regards to whether or not the door was defective or not defective, I have no way to express any kind of opinion on that. Even if the door were not defective, it's quite possible that he may have climbed in the cab, I suppose, and partially closed it or leaned against the handle. I don't know the configuration of that cab. Anything is possible. If the cab door was defective, I suppose it's possible that he popped out and he fell out of it, sure.
>
> (Def. Ex. F, pp. 106 & 107)

Dr. Stephen speculated that claimant may have fallen getting in the truck but that it was equally possible that he fell out of the cab (Def. Ex. F, pp. 104-108).

Richard E. Jensen, Ph.D., an analytical chemist who specializes in alcohol and drugs, testified by deposition for the claimant. He stated that he is the director of Forensic Toxicology at the Metropolitan Medical Center in Minneapolis, Minnesota and that he also has formed his own company entitled Forensic Associates, Inc. His curriculum vitae contains numerous highly respectable

credentials (Cl. Ex. 11, Dep. Ex. A). Jensen examined the medical records and the testimony of Dr. Carrion and Dr. Stephens and other witnesses in this case and concluded that several deficiencies in the evidence make it impossible to form a reliable opinion on whether the claimant was intoxicated or not (Cl. Ex. 11). The most that Jensen could establish was that some alcohol had been consummed (Cl. Ex. 11, p. 36). In response to whether or not the consumption of alcohol under the facts of this case was the probable cause of the claimant's fall Jensen testified as follows:

> Now, based upon those salient facts that I have just asked you to assume, and based upon a reasonable degree of scientific certainty, do you have an opinion as to whether or not the consumption of alcohol by Terry Albertsen had anything to do with or was the probable cause of his fall? And you may answer yes or no to that. Do you have an opinion?
>
> A. Yes, I have an opinion.
>
> Q. What is your opinion?
>
> A. My opinion is that I don't feel it has any effect at all on the fall, as you described the circumstances of your hypothetical.
>
> Q. Have you found any connection anywhere between any consumption of alcohol, regardless of the degree, and the fall?
>
> A. No, I have not.
>
> Q. And do you then have any opinion as to whether or not there is sufficient probative or competent evidence in any of the records that we have today presented to you, heretofore or today, as to whether or not we could come to any conclusions with regard to Terry Albertsen's alcohol content at the time of his fall?
>
> A. There is nothing that will provide us with that information. We can come to no conclusion about that.
>
> (Cl. Ex. 11, pp. 74 & 75)

After lengthy examination and cross-examination Jensen confirmed that in his opinion none of the alcohol tests in this case have any probative value and that there has been no showing that alcohol had any effect on whether or not the claimant fell from the truck (Cl. Ex. 11, p. 138).

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 May 12, 1983 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 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 test of whether an injury arose out of employment is whether there is a causal connection between conditions under which the work was performed and the resulting injury, i.e., whether the injury followed as a natural incident of the work. The employment must be a proximate contributing cause. Musselman, 261 Iowa 352, 355, 360, 154 N.W.2d 128, 130, 132 (1967).

A cause is proximate if it is a substantial factor in bringing about the 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 (1980).

This may be best illustrated by the language used in Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 700, 701, 73 N.W.2d 732, 737 (1955) when the court cited from a Massachusetts case as follows:

> The court said in In re McNicol, 215 Mass. 497, 499, 102 N.E. 697, L. R. A. 1916A 306: "It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of

> the exposure occasioned by the nature of the employment, then it arises 'out of' the employment." (Emphasis supplied.)

The Burt court then gave an illustration of these principles by citing an Iowa case that has some similarities to the instant case in these words:

> Also see Reddick v. Grand Union Tea Co., 230 Iowa 108, 116, 296 N.W. 800, 804, where we said: "We think the record also presents sufficient evidence that the injury arose out of the employment; that is, a causal connection fairly appears between the conditions under which the work was performed and the resulting injury-the injury followed as a natural incident of the work."
>
> In that case claimant recovered as a result of the death of the employee by carbon monoxide poisoning from a car exhaust in the place where he was required to work.

The Iowa Supreme Court has recognized a concept of "continuous employment" for traveling employees when the employer furnishes lodging and other expenses and has found that a traveling employee out of town crossing a street to get a meal on a Sunday evening did receive an injury both arising out of and in the course of employment. Walker v. Speeder Mach. Corp., 213 Iowa 1134, 1146, 1149, 240 N.W. 725 (1932).

Although not specifically relied upon in this decision, it is appropriate to point out that some commentators have questioned whether Iowa may or may not have adopted the positional risk doctrine in Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979) where the court found that where one employee assaulted and killed another employee at work under an insane delusion, it was an injury that arose out of and in the course of employment. Lawyer & Higgs, Iowa Workers' Compensation -- Law & Practice, section 5-1, pages 32 & 33. All of these cases bear out that the workers' compensation law is for the benefit of the working person and should be liberally construed to that end. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124 (Iowa 1984).

The courts are practically unanimous in holding that the term "injury arising out of and in the course of employment" should be given a broad liberal interpretation. Pohler v. T. W. Snow Constr. Co., 239 Iowa 1018, 1019, 33 N.W.2d 416 (1948).

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., 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).

Iowa Code 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. (Emphasis added.)

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 12, 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, 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).

Actual work activity at the time of the injury is unnecessary. Bushing v. Iowa R. & L. Co., 208 Iowa 1010, 1019, 226 N.W. 719, 723 (1929).

Emphasis is placed upon whether the employee is furthering the employer's business, Linderman v. Cownie Furs, 234 Iowa 708, 710, 13 N.W.2d 677, 679 (1944), Sister Mary Benedict, 255 Iowa 847, 124 N.W.2d 548 (1963); whether or not the task is common to the job, Bushing, 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929); or outside of the usual employment duties, Petersen v. Corno Mills Co., 216 Iowa 894, 899, 249 N.W. 408, 410 (1933).

Traveling employees are within the scope of their employment while they pursue many of the activities of daily living while on the road. Walker, 213 Iowa 1134, 240 N.W. 725 (1932). They are in the course of their employment from the time they leave home until the time they return home. Heissler v. Strange Bros. Hide Co., 212 Iowa 848, 237 N.W. 343 (1931). This is true irrespective of whether the employer or the employee is paying the employee's expenses. Being on the road in pursuit of the employer's business is enough to satisfy the in-the-course-of

employment requirement. Madison v. Kapperman, Thirty-third Biennial Report, Iowa Industrial Commissioner 155 (1977).

Claimant has proven by a preponderance of the evidence that the injury arose out of and in the course of his employment with the employer. Claimant testified that he understood that he was responsible for the tractor and trailer and the load at all times when he was on the road. This is corroborated by the testimony of White, Horst and Brierly and other witnesses as well as the letter of abandonment signed by the claimant (Cl. Ex. 4). Claimant understood it was his duty to sleep in the truck. He and Brierly always slept in the truck. Motels were only authorized in exceptional circumstances according to White and Horst. There is no question about the fact that claimant was a traveling employee. Horst testified that truckers are under the control of the employer the entire time that they are out on the road and that they are responsible for the equipment and the load at all times.

Claimant testified that he returned to the truck around midnight, got inside, put his boots and socks on the floor, and his outer shirt over the seat, put his knees up on the dash and went to sleep. The next thing he knew he was lying on the ground and could not get up and could not move his legs. There is nothing in the evidence to contradict his testimony. On the contrary, Brierly said that after the injury occurred he found the claimant's articles of clothing in the truck as the claimant had testified. At 3:24 a.m., claimant was found laying beside the truck with a broken neck by an unknown passerby. There are no witnesses to how the claimant was injured or how the accident occurred. Claimant does not recall how he was injured. Dr. Stephens believed that he must have fallen from a height and granted that he could have fallen from the truck or fallen while trying to get into it. Although no one knows how or why the claimant fell, all the persons who advanced a theory do speculate that he must have fallen from a height. The fact of a broken neck seems to bear out this assumption and this was also Dr. Carrion's opinion that a fall was consistent with the claimant's injury.

The cab of the truck is several feet off of the ground. Some reports place it as high as 10 feet off the ground. If an employee is required to sleep several feet above the ground level in a truck, then it can be said that falling from a height and becoming injured is a natural incident, a proximate cause, one cause and a substantial factor in consideration of all the circumstances by a person familiar with the whole situation. As a traveling employee under the total control of the employer, the claimant was engaged in continuous employment. His work placed him in a position where such an injury could occur. But for his employment he would not have been at that time and in that place and in that situation that resulted in his injury.

Thus, it is found that the injury did arise out of his employment and that his employment was the cause or source of the injury.

The employee was at the place he was supposed to be, a place where his employer's business required his presence and subjected him to a danger incident to the business. Actual work activity is not necessary. Claimant was carrying out his instructions by his presence at the truck. His presence at the truck furthered his employer's interest and was common to the job of most truckers in the trucking industry and in particular this claimant's job with this employer. As a traveling employee, especially one that is under the constant control of his employer according to Horst, it is difficult to say claimant was not in continuous employment. Thus, it is found that the injury occurred in the course of his employment.

It is not necessary to find whether the claimant deviated from his employment or not by drinking at the Bean Pot Bar, because at the time of the injury the claimant was at the truck where he was supposed to be. Dorman v. Carroll County, Iowa App. 316 N.W.2d 423 (1981); Pohler, 239 Iowa 1018, 33 N.W.2d 416 (1948).

It is not necessary to determine whether claimant was in violation of Rule 392.5, Intoxicating Beverages of the Motor Carrier Safety Regulation Pocketbook because there was no evidence that either the claimant or Brierly or anyone intended to operate the truck or to do anything other than to sleep in it until the following morning which would be well over four hours after consuming any alcohol beverages. Furthermore, Horst could only testify that the claimant should have been given a copy of the pocketbook. He could not testify that the claimant was given a copy of the pocketbook. The claimant denied that he was given the pocketbook or the driver's manual at the time he received his license.

Claimant was intoxicated in some degree. Even Dr. Jensen said claimant had consumed some alcohol. The lay witnesses--Deffenbaugh, Gregory and Sindel--thought claimant was intoxicated. The doctors who treated the claimant at the hospital--Suarez, Bloomfield and Carrion--seemed to think that claimant was intoxicated. Dr. Stephens, the pathologist, thought claimant was intoxicated. Brierly, his companion, thought claimant was intoxicated, but not overly so. The claimant's intoxication, however, whatever the degree, did not prevent claimant from performing his duty at the time of the injury which was to get into the truck and go to sleep somewhere around midnight. The claimant was at the time and place where he was supposed to be and performing the duty that he was supposed to perform at that time. Therefore, his violation of the company rule against drinking while under dispatch, even if he was aware of such a rule, did not remove him from the course of his employment in

this situation. Furthermore, it was not established that the claimant was informed that he could not drink in the evening during a layover. On the contrary, claimant's experience was that his trainer, Brierly, drank with him on practically all these occasions unless there was no bar in the vicinity. Horst could not say that the claimant was given a copy of the company rules or not. Claimant denied that he received a copy of the operator's manual. Brierly testified that it was common to drink during layovers and that it was commonly done and that he himself did it. Gene White said that he explained to the claimant that he was not to drink under dispatch. However, the claimant denied this and testified that no one instructed him that you could not drink on layover. Therefore, it has not been established by the evidence that the claimant did violate a company rule that had been clearly communicated to him. On the contrary the practice the claimant experienced with Brierly, his trainer, was that you could drink on layovers.

Consequently, claimant has proven by a preponderance of the evidence that he did sustain an injury which arose out of and in the course of his employment.

The defendants have asserted the claimant's intoxication as an affirmative defense. At the time this injury occurred Iowa Code section 85.16(2) (1981) was worded as follows: "No compensation under this chapter shall be allowed for an injury caused: ... 2. When intoxication of the employee was the proximate cause of the injury." The case of Reddick, 230 Iowa 108, 117, 296 N.W. 800, 804 (1941) held, "...Intoxication, in order to be a defense, must have been the proximate cause of the injury." This was generally interpreted to mean that the intoxication had to be the sole proximate cause of the injury rather than a proximate cause of the injury. Lawyer & Higgs, Iowa Workers' Compensation -- Law and Practice, section 7-4, page 63. Applying this rule to the instant case it is not possible to find that the intoxication was the sole proximate cause of the injury. Nor is it possible to find that intoxication was a proximate cause of the injury or even a substantial factor in bringing about the injury because there is absolutely no evidence, only speculation, as to how or why the claimant fell and broke his neck. How the injury occurred is unknown. There is no direct evidence. There are no eye witnesses. The circumstantial evidence provides very little illumination. The claimant does not know why or how he fell. Claimant did not know how or why he fell at the time of the accident and he did not know how or why he fell at the time of the hearing. In order to find that intoxication was the sole proximate cause of the injury, it is necessary to know how the injury occurred and that is not known from the evidence in this case.

There are a number of cases that have dealt with workers' compensation and accidents where consumption of alcoholic

beverages was involved. The case of Lamb v. Standard Oil Co., 250 Iowa 911, 96 N.W.2d 730 (1959), involved a person who was involved in a fatal accident after drinking at the Top Hat in Fort Dodge, Iowa. The case involved a blood alcohol level of .196 and medical expert testimony that Lamb was intoxicated at the time of the accident. Lamb's car crashed into a tree after going out of control on an icy road. Other cases include Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174 (Iowa 1979) and Hawk v. Jim Hawk Chevrolet-Buick, Inc., 282 N.W.2d 84 (Iowa 1979). The common thread that runs through all of the cases where benefits were awarded is that some cause other than intoxication existed and could have been the sole proximate cause of the accident.

Where an accident is one which could occur in the absence of intoxication, the defendants fail to meet their burden of proof of the affirmative defense by evidence which shows a mere possibility or equipoise. Volk v. International Harvester Co., 252 Iowa 298, 106 N.W.2d 649 (1960).

Several persons have speculated on how the injury occurred. Dr. Stephens and Dr. Carrion indicate that claimant fell from a height. The fact that his shirt, boots and socks were in the truck cab indicate that claimant was in the cab when he took them off. A C6-7 fracture is more common when a person lands on their head than on their feet. It would be necessary to get the body inverted from a standing, upright position into one where the head were lower than the rest of the body. If claimant were seated, the door opened and he fell, it is likely that he would fall head first since his buttocks would remain on the truck seat until the falling upper body pulled him off the seat. If one were not already in the cab, it would be somewhat more difficult to fall in such a manner as to land on one's head.

The most common and logical theory seems to be that the claimant fell from the truck and broke his neck. The possibility that the passenger door was defective and popped open has not been rebutted. There is substantial evidence that the door on this model truck has to be slammed hard and sometimes several times in order to shut completely and securely. Claimant testified that he only slammed it once so that he would not disturb Brierly. Thus, the passenger door may not have closed tightly when claimant entered the truck. It is certainly possible that some third party may have opened the door and allowed claimant to fall. If any person had done so it would be unlikely that they would step foreward and subject themself to liability for the accident. A truck which appeared unoccupied to a person standing on the ground would be a likely target for a thief. Some other driver could have simply opened the door of the wrong truck.

Numerous other possibilities could be conjectured. This

case, like the Reddick case at page 117, cannot make a finding that the injury was caused by intoxication when such a decision would have to be based "largely on speculation, conjecture and mere surmise." If it is not known how the injury occurred, then how can it be said that intoxication caused it? Consequently, defendants have failed to prove by a preponderance of the evidence that the intoxication of the claimant was a proximate cause of the injury.

The parties stipulated that the injury was the cause of both temporary and permanent disability. Therefore, the only remaining issue is to determine the nature and extent of 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."

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. * * * *

Based upon the medical testimony, and particularly the testimony of Dr. Carrion, the inescapable decision must be that claimant is and has been permanently and totally disabled since the date of the injury. Dr. Carrion testified that the claimant is totally paralyzed from the shoulder level down. It is permanent. It will never be any better. It will probably get worse. Claimant can move his right hand and there was a little motion in his upper left extremity. Otherwise, below that there is nothing and there never is going to be anything. Claimant will need continued medical care for the rest of his life. Dr. Carrion predicted severe emotional problems unless the claimant received psychiatric care and becomes more realistic about his physical condition.

Claimant is a high school graduate without any advanced

training. His past employments were all manual labor type of employments. The only bright spot in his recovery to date is that he has been able to drive a van with special controls. Otherwise he remains a wheelchair quadriplegic. Therefore, it is found that the claimant is and has been permanently and totally disabled since the date of the injury.

FINDINGS OF FACT

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

That claimant was employed by the defendant on or about April 12, 1983 as an apprentice over-the-road truck driver.

That the claimant was injured on May 12, 1983 by falling from a height which resulted in a broken neck. Claimant was found lying beside his truck at 3:24 a.m. unable to move his extremities.

That claimant was intoxicated at the time of the injury.

That the injury caused the claimant to be paralyzed from the shoulders down and that he is a wheelchair quadriplegic at the present time.

That there are no witnesses to the accident and the claimant is unable to recollect how or why he fell. How or why he fell is unknown and cannot be determined from the evidence.

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 claimant did prove by a preponderance of the evidence that he sustained an injury that arose out of and in the course of his employment with the employer as an over-the-road apprentice truck driver (Iowa Code section 85.3(1) (1981)).

That the injury caused the claimant to be permanently and totally disabled from the date of the injury (Iowa Code section 85.34(3) (1981)).

That the defendants failed to prove by a preponderance of the evidence that the claimant's intoxication was the proximate cause of the injury (Iowa Code section 85.16(2) (1981)).

ORDER

THEREFORE, IT IS ORDERED:

That the defendants pay permanent total disability benefits to the claimant commencing on May 12, 1983 at the rate of one hundred seventy-nine and no/100 dollars ($179.00) per week.

That the defendants pay accrued benefits in a lump sum.

That interest will accrue under Iowa Code section 85.30.

That the defendants pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33, formerly Iowa Industrial Commissioner Rule 500-4.33.

That the defendants file claim activity reports as required 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 30th day of January, 1987.

Walter R. McManus Jr.

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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001255

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JEFFREY L. ANDERSON, Claimant, vs. ROBERT M. JENSEN, Employer, and BITUMINOUS CASUALTY COMPANIES, Insurance Carrier, Defendants.	:	File No. 737537 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 Jeffrey L. Anderson, claimant, against Robert M. Jensen (Jensen), employer, and Bituminous Casualty Companies, insurance carrier, for benefits as a result of an alleged injury on May 20, 1983. A hearing was held in Des Moines, Iowa on March 25, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant and Blaine Boken; and joint exhibits 1 through 4. Neither party filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $87.96; that claimant has been paid 18 4/7 weeks of healing period benefits; that any permanency benefits awarded would commence on November 4, 1983; that claimant has been paid 75 weeks of permanent partial disability benefits; that claimant's injury of May 20, 1983 arose out of and in the course of his Jensen employment; and that claimant is not currently entitled to permanent total disability benefits (he did not assert the odd-lot doctrine).

ISSUES

The contested issues are:

1) Whether there is a causal relationship between claimant's

work-related injury of May 20, 1983 and his asserted disability; and

2) Nature and extent of disability; specifically, whether claimant is entitled to more than 75 weeks of permanent partial disability benefits.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 22 years old, having been born September 10, 1964. He quit school in the tenth grade, but has obtained a GED. In 1983 or 1984, he attended Iowa Western Community College in Council Bluffs, Iowa, to become a parts specialist. This involved classroom instruction and he worked "inside like a parts store." He didn't complete this course of study.

Claimant testified that he sustained an injury on May 20, 1983 and sought chiropractic care in Audubon, Iowa as a result. Ultimately, he saw Maurice P. Margules, M.D., in Council Bluffs and had back surgery in July 1983. Shortly after his back injury of May 20, 1983, claimant stopped working for Jensen as he "did not work more than a month after the injury." Claimant informed Jensen of his back injury and was told by Jensen that he would have to do all his assigned tasks by himself.

Claimant testified that prior to his injury of May 20, 1983, he worked solely at manual labor jobs such as construction work. He testified that he had no back problems prior to May 20, 1983.

Claimant testified that his first job after the May 20, 1983 injury was with Atlantic Steel Erectors of Atlantic, Iowa, where he worked from June 1985 through August 1, 1985. He attempted to get jobs prior to the Atlantic Steel Erectors job, but was unsuccessful in doing so because he told about his physical problems on his job applications. At Atlantic Steel Erectors, claimant was required to lift items off the ground that weighed 100 to 150 pounds. As best claimant can recall, Dr. Margules imposed a weight restriction of 60 to 80 pounds; the Atlantic Steel Erectors job required heavier weights "pretty frequently." Claimant testified that he always has pain in his lower back due to the injury of May 20, 1983. When he rides in a car this sets off his back pain. Claimant's main problem area is where his back surgery was performed. Sometimes he could not sleep at night because of the pain caused by the Steel Erectors job.

Claimant testified that he quit the Atlantic Steel Erectors job on August 1, 1985 because no light duty positions at a lesser rate of pay were available with this employer. Claimant simply could not handle going to work every day and sustaining the resulting pain. He was unable to concentrate and was unable to keep up with his work.

Claimant testified that he worked from August 1985 through September 1985 in the state of Georgia hanging drywall and pouring concrete. Putting materials on the ceiling is what "got to me." He did not tell his Georgia employer about his back problems. He mixed cement for this employer. The job also required a lot of carrying. Stooping also caused problems on this job. He was required to climb stairs carrying 60 pound bags of cement. Shoveling also caused him to have back problems on this job. He quit this job because of his back problems. Standing on a hard surface and holding materials over his head caused him to have problems on this job. The site of his back surgery was the "problem area." Claimant was able to do his Georgia job for one or two hours before he got to hurting "real bad."

Claimant testified that his next job was a landscaping job in Phoenix, Arizona mowing lawns at apartment buildings and at big estates. He would push lawnmowers around in order to do this job. He worked in this position for two or three months. His left leg became numb and tingled because of this job. This job required him to lift bags of grass and to lift lawnmowers in and out of trucks. No nonlifting activities were available with this Arizona employer.

Claimant's current employment is in Des Moines doing general construction. His employer does remodeling and home construction, and he has had this job for almost a year. Claimant was paid $4.00 initially for this construction job and is currently paid $5.00 per hour. He does a lot of cleanup on his current job and finishes concrete. He stated he is not particularly good at finishing concrete. At his current job other workers have to help him with lifting. He currently exceeds, on occasion, Dr. Margules' weight restriction. His current employer allows him to sit down when he needs to.

Claimant saw Dr. Margules in November 1986 or December 1986. He saw Dr. Margules as the result of twisting his back while working in South Dakota. He said that his back hurt worse for three days because of the South Dakota incident and characterized the problem as a temporary one. He stated that after three or four days his back was back to the way it was after his back surgery; he stated that this is the way his back would normally feel.

Claimant testified that on October 14, 1984 he was involved in a fight in Audubon, Iowa, and went to Chiropractor Barnes as a result. He sustained several broken ribs as a result of the fight. His back bothered him the night of the fight and the next day, but then his back went back to the way it was before the fight according to claimant.

Claimant testified that he was involved in an automobile

accident in Council Bluffs on October 5, 1985. He went to Dr. Margules to get checked out after he was involved in this accident. He saw Chiropractor Barnes before he saw Dr. Margules. Claimant testified that he did not injure his back where it had previously been injured on May 20, 1983.

Claimant testified as to his confinement at Eldora Training School and to being in various jails after his Eldora Confinement. Claimant testified that he has trouble getting along with people, but that he has two or three close friends. Claimant testified that he does not like working inside. He stated regarding inside work that "I'm against it and I don't like it." Claimant testified that he doesn't handle pressure well "as I like things to go easy." He also testified that he "gets totally nervous when he is around people all day."

Claimant testified that his father drives a truck. He has ridden with his father, but it caused a problem with his back because of the bouncing around. He testified that riding in a truck causes more problems for him than riding in a car.

On cross-examination, claimant described his wages at Jensen and also described his work duties. He stated that his work injury on May 20, 1983 occurred when he was lifting an intake manifold off a truck engine. He stated that he was unemployed for two years between his Jensen employment and Atlantic Steel Erectors employment. He applied at a number of places during this two-year period. He stated that he had pain in his back all the time even after his back surgery. He stated that his back always bothers him since the surgery. Claimant testified that he was told by Dr. Margules in late 1983 at the time of his release that he would have pain for the rest of his life.

Claimant testified that he started the Georgia job two weeks after separating from the Atlantic Erectors job. Claimant stated that working with sheet rock and bags of cement at the Georgia job temporarily worsened his condition, but he did not seek medical attention as a result. Claimant testified that the Georgia and Arizona jobs required him to lift weights in excess of the limitation posed by Dr. Margules. He stated that he went directly from the Phoenix job to his current Des Moines job. He stated that he generally works forty hours per week at his current job, but that there are slow periods. His current job requires bending and stooping. He works with a wheelbarrow and this requires twisting which causes his back symptoms to increase.

Claimant testified that he was cutting some wood in South Dakota and that the incident in South Dakota was a "significant aggravation of his problem." He saw Dr. Margules as a result of this South Dakota incident. He did not seek medical attention in either Georgia or Arizona. Claimant does not recall telling Dr. Margules about the South Dakota incident.

On cross-examination, claimant testified that the fight of August 14, 1984 affected his lumbar spine as he was thrown against a rail. As best claimant can recall, he did not tell Dr. Margules about this fight. On cross-examination, claimant testified that he did not mention the car accident of October 14, 1984 to Dr. Margules. On cross-examination, claimant stated that he generally works 34 or 40 hours per week. He earns about $150 per week.

On redirect examination, claimant testified that the fight and the automobile accident increased his back symptoms temporarily, but did not cause him any permanent problems.

Blaine Boken testified that he worked with claimant in Georgia and currently works with claimant in Des Moines. Boken and claimant did the same job in Georgia, and Boken testified that claimant tried to do his work in Georgia, but had a lot of trouble doing so. Claimant complained every day about his physical condition while working in Georgia. Boken is claimant's current supervisor or foreman on his job in Des Moines. Boken has worked for his employer for about two years and characterized claimant as a willing worker. Boken also testified that claimant has a good attitude about his work, but that he has a lot of pain. Claimant has a lot of trouble doing drywalling currently. Boken and claimant have an arrangement whereby Boken helps claimant do his job. Claimant has problems with heavy work, but always tries.

Boken testified regarding the South Dakota incident. Claimant was putting in some duct work and twisted his back with a resulting pop; this was at the same area as the original injury of May 20, 1983. Boken testified that he currently observes claimant in pain every day.

On cross-examination, Boken testified that in Georgia claimant and himself were paid $8.00 per hour. Boken testified that he hired claimant for his current job. Boken testified that he did not witness the South Dakota incident. However, claimant came off the ladder and said to Boken that he "had really hurt his back."

On redirect, Boken testified that claimant recovered from the South Dakota incident and was able to return to his "previous condition."

Exhibit 1, page 24 (interrogatory 23), reads:

> INTERROGATORY NO. 23. Have you been a party to any conversation or do you have any information whatsoever indicating that your employment with Robert M. Jensen would be terminated or in any way jeopardized or affected at any time by this injury

stated that claimant's complaints are consistent with the history given by claimant. On page 11, he stated that claimant's surgery of July 23, 1983 was made necessary by the injury of May 20, 1983. On page 13, he stated that claimant's condition will not be getting any better. Claimant's medical restrictions are set out on page 14.

On cross-examination, Dr. Margules stated that claimant had a reasonably good result from his surgery. On page 19, claimant's medical restrictions are explained further. On page 23, Dr. Margules stated that the auto accident and/or fight could have worsened claimant's preexisting condition.

Exhibit 4 included claimant's 1985 tax returns documenting his meager earnings that year.

APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the injury of May 20, 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 number of fact issues face the agency at this juncture. Did the fight of August 14, 1984 cause any permanent partial impairment by causing claimant to sustain a new injury or problem? Did this fight materially aggravate claimant's injury of May 20, 1983? Did claimant's auto accident of October 15, 1984 cause a new injury or materially aggravate claimant's stipulated injury of May 20, 1983? Did the South Dakota incident cause a new injury or materially aggravate claimant's stipulated injury of May 20, 1983? Despite the fact that claimant gave Dr. Margules an incomplete history, I am convinced from the expert and nonexpert evidence of record that the fight of August 14, 1984, the auto accident of October 15, 1984, and the South Dakota incident only temporarily aggravated claimant's condition which was caused by the injury of May 20, 1983. I am also convinced that claimant's injury of May 20, 1983 caused some permanent partial impairment in the range of 10 to 15 percent.

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).

Claimant conceded on the record that he is not currently entitled to permanent total disability benefits. However, claimant has clearly sustained some loss of earning capacity as a result of the whole body impairment caused by the work-related injury of May 20, 1983. Claimant is poorly educated and has a history of manual labor jobs. Between his separation from Jensen and the Atlantic Steel Erectors job he applied for employment at a number of places; however, his physical condition set out on his job applications was a substantial factor in the resulting fruitless job search. The record documents that claimant is well motivated to find a job and keep it. He tried to do the Atlantic Steel Erectors job but was unable to do so because of the physical problems caused by the injury of May 20, 1983.

It is also noteworthy in this case that Jensen made absolutely

no effort whatsoever to keep claimant employed after his work-related injury of May 20, 1983. A defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). Similarly, 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. Id.

Taking all appropriate factors into account, it is concluded that claimant is entitled to 250 weeks of permanent partial disability benefits commencing on November 4, 1983 at a rate of $87.96 based on an industrial disability of 50 percent. Defendants are, of course, entitled to a credit for benefits already paid.

FINDINGS OF FACT

1. Claimant was born on September 10, 1964.

2. Claimant quit school during the tenth grade; claimant has a GED.

3. Claimant has had only manual labor jobs during his work life.

4. Claimant sustained a whole body injury on May 20, 1983 while working for Jensen.

5. Claimant's injury of May 20, 1983 caused whole body impairment in the range of 10 to 15 percent.

6. Claimant was unable to continue doing his regular or usual Jensen employment tasks because of the physical problems caused by his work-related injury of May 20, 1983.

7. Jensen made no effort whatsoever to keep claimant employed after his work-related injury of May 20, 1983.

8. A fight in August 1984 in which claimant participated did not cause any permanent whole body impairment.

9. An auto accident in October 1984 in which claimant was involved did not cause any permanent whole body impairment.

10. An incident in South Dakota while claimant was doing some construction-type work did not cause any permanent whole body impairment.

11. After claimant separated from Jensen, he applied for employment at a number of places; he failed in part to secure employment with these employers because of the physical problems

caused by his work-related injury of May 20, 1983; he disclosed these physical problems on job applications.

12. Claimant secured employment with Atlantic Steel Erectors, but was unable to do this job because of the physical problems caused by his work-related injury of May 20, 1983.

13. Claimant is currently employed on a full-time basis.

14. Claimant is well motivated to remain employed even though he has some physical problems doing his current job.

15. Claimant's current industrial disability is fifty percent (50%).

16. Claimant's stipulated weekly rate of compensation is eighty-seven and 96/100 dollars ($87.96).

CONCLUSIONS OF LAW

1. Claimant established by a preponderance of the evidence that there is a causal connection between his stipulated work-related injury of May 20, 1983 and some whole body impairment in the range of ten to fifteen percent (10-15%).

2. Claimant established by a preponderance of the evidence that his current industrial disability is fifty percent (50%) entitling him to two hundred fifty (250) weeks of permanent partial disability benefits commencing on November 4, 1983 at a rate of eighty-seven and 96/100 dollars ($87.96).

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay the weekly 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 Industrial Services Rule 343-4.33.

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

Signed and filed this 15th day of May, 1987.

T. J. McSweeney

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEO ANDERSON,	:	
	:	
Claimant,	:	File No. 818237
	:	
vs.	:	
	:	A R B I T R A T I O N
JOHN MORRELL & COMPANY,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

This is a proceeding brought by Leo Anderson, 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 4, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant, Sharon Ruth Anderson, Warren Evans, and Harold Selberg; claimant's exhibits A through G; and defendant's exhibits 1 through 3. Both parties filed a brief. The exhibit list given to the hearing deputy at time of hearing reads as follows:

RE: Leo Anderson vs. John Morrell & Company - File #818237

Plaintiff's Exhibits:

A. Physical exam given workman for employment with John Morrell & Company - employed 4-29-63.

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.

E. Report from C. B. Carignan, M.D. dated 12-15-86.

F. Nelson Hearing Aid Service estimate of hearing aid cost dated 1-15-87.

G. Photograph of claimant.

Defendant's Exhibits:

Audiology report and hearing loss calculations of Daniel Jorgensen, M.D. dated 1-7-86. (Deposition exhibits included in defendant's Exhibit 1.)

1. Deposition of Daniel L. Jorgensen dated 1-29-87.

2. Dr. Hranac - office notes.

The parties stipulated that claimant's weekly rate of compensation is $224.08 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 46 years of age and was raised on a farm. He was drafted into the U.S. Army and had a physical examination when he entered which established that his hearing was normal. He drove a truck in the army and his hearing was normal in 1962 when he was discharged.

Claimant started working for Morrell in April 1963 and had a physical examination when he started that established he had

normal hearing. See exhibit A. Claimant then described the jobs he had while working for Morrell. At some point at Morrell, he worked around a dehairer which generated a "terrific noise level." He worked at both the beef plant and the pork plant. Prior to 1982, he did not wear hearing protection. In 1982 and 1983, OSHA did noise level tests at the Morrell facility. Claimant separated from Morrell in April 1985 and prior to leaving Morrell claimant talked with a plant nurse about his hearing loss after a test was done and talked to a foreman about his hearing loss.

Claimant was shown exhibit B and then testified that near the dehairer in the pork plant the decibel level was 98 to 99. In the early 1970's, he noticed he had a hearing problem.

Dr. Jorgensen has told him he needs a hearing aid.

On cross-examination, claimant acknowledged that in July 1985 he had drainage problems with his ears. He saw his personal physician on two occasions as a result. See exhibit 2.

Claimant testified that in July 1983, a physical examination was performed and no hearing problem was noted. In August 1983, claimant was transferred to the pork plant to drive hogs up to the kill floor and the dehairer "was right above." He had a hearing test in 1983 or 1984 and then started to wear hearing protection devices. See exhibit 3 documenting a test on March 1, 1984. He stated that his hearing has not changed since he left the plant. He has the wax cleaned from his ears periodically. He characterized the noise levels in the pork plant and beef plant as about the same. He also stated that the first notice of his hearing loss claim was when he filed his petition on May 9, 1986.

On redirect, claimant testified that the wax in his ears caused a drainage problem. On recross-examination, claimant stated that Mr. Nelson has not told him that he needs a hearing aid.

Sharon Ruth Anderson testified that when claimant started working for Morrell in 1963 his hearing was normal. In 1985, she noticed that the TV and radio were too loud when claimant was using them. She stated her opinion that claimant's hearing loss was not caused by anything other than Morrell.

Warren Evans testified that he worked for Morrell from 1964 to 1985 and that he met claimant in 1964 at which time claimant did not have a hearing problem. They worked in the same area at Morrell and Evans described the noise at those places.

Harold Selberg testified that he worked with claimant at Morrell in Estherville. He stated that the noise level was

about the same in both plants and that the work stations were "open" allowing the noise to "go throughout the room."

Exhibit E, pages 1-2 (dated December 15, 1986), is authored by C.B. Carignan, Jr., M.D., and reads in part:

> Mr. Anderson worked at the John Morrell packing plant for 1 day less than 22 year altogether. During the last 9 years of his employemnt [sic] there he worked in an area of very high noise levels on the kill floor near loud power saws, compressors, etcetera. He wore ear plugs provided by his employer during the last year he worked at the plant which were provided by his employer in an attempt to protect the worker's hearing.
>
> ....
>
> An audiogram performed for Mr. Anderson by R. David Nelson, a certified audiologist from Spencer, Iowa on 5-5-86 shows a 1.9% monaural hearing impairment of the right ear and 11.2% nomaural hearing impairment of the left ear, equivalent to a 3.4% Binaural hearing impairment which is equivalent to a 1% functional impairment of the whole person.
>
> In view of his history and physical findings and the Audiogram I eamined [sic] I feel that with reasonable medical certainty Mr. Anderson's hearing impairment was caused by and occurred as a result of exposure to high noise levels at his work place at the Morrell packing plant in Estherville, Iowa during his long employment there.

Exhibit F, page 1, states R. David Nelson's estimate of 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 January 7, 1987 and took a history. Deposition exhibit 1 is an audiogram performed on January 7, 1987.

On page 7, Dr. Jorgensen stated that claimant noticed a hearing problem in the last seven or eight years. On page 8, Dr. Jorgensen stated:

> He stated he worked for John Morrell for 22 years and for six to eight of those years he stated he worked in an area where the decibel level was

greater than 90 decibels. He wore ear protection only for the last two and a half to three years that he worked at the plant.

On page 9, Dr. Jorgensen stated that claimant's binaural hearing loss is 13.2 percent. On page 15, he stated: "I think it's safe to say that he's got a hearing loss due to a noise exposure at the plant." On pages 16-17, he stated his opinion that claimant's hearing loss is not due exclusively to plant noise, but that it was a "large contributor." On page 21, he stated that a hearing aid would help claimant.

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.

The defendant in this case had actual knowledge of claimant's alleged hearing loss prior to the plant closure in April 1985. This claim is not barred by Iowa Code section 85.23. Claimant was not required to satisfy section 85.23 prior to the occurrence of an injury on April 27, 1985, but it was permissible for him to satisfy section 85.23 prior to the occurrence of an injury. Dillinger, at 180. Also, claimant did not have to satisfy section 85.23 until his cause of action accrued on either April 27, 1985 or six months thereafter. See section 85B.8. The occurrence of the injury date and the date when this cause of action accrued may be the same in this case with that date being April 27, 1985.

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 or six months thereafter. 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." 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 his hearing loss is attributable to his Morrell employment.

IV. The 13.2 percent binaural hearing loss figure obtained from Dr. Jorgensen's office will be utilized in this case. I am convinced that Mr. Nelson's test result is inaccurate.

Claimant is entitled to 23.1 weeks (13.2% of 175 weeks) of permanent partial disability benefits commencing on April 27, 1985 at a rate of $224.08.

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 46 years old.

2. Claimant started working for Morrell in Estherville, Iowa in April 1963.

3. Claimant has sustained hearing loss and all of his hearing loss was sustained as a result of his Morrell employment.

4. Morrell had actual knowledge of claimant's occupational hearing loss prior to April 27, 1985.

5. Claimant's binaural hearing loss is 13.2%.

7. Claimant's stipulated weekly rate of compensation is $224.08.

CONCLUSIONS OF LAW

1. Claimant has established entitlement to twenty-three point one (23.1) weeks of permanent partial disability benefits commencing on April 27, 1985 at a rate of two hundred twenty-four and 08/100 dollars ($224.08).

2. Claimant is entitled 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 18th day of March, 1987.

T. J. McSweeney
T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHEL ANDERSON, Claimant, vs. RUSSELL SMART ORCHARD, SMALL'S FRUIT FARM, Employer, and EMPLOYERS MUTUAL COMPANIES, Insurance Carrier, Defendants.	:	File No. 779596 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

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Michel Anderson, claimant, against Russell Smart Orchard/Small's Fruit Farm, employer, and Employers Mutual Companies, insurance carrier, for benefits as a result of an alleged injury on September 19, 1984 (claimant's petition alleges an injury date of April 25, 1986; an amendment to petition was allowed at time of hearing). A hearing was held in Council Bluffs, Iowa on December 12, 1986 and the case was submitted on that date.

The record consists of the testimony of claimant, Roberta Anderson, and Thomas Lucas; defendants' exhibit A (during the course of the hearing some of defendants' exhibits were remarked; defendants' exhibits B through E were remarked as joint exhibits); and joint exhibits 1 through 24.

The parties stipulated that claimant's weekly rate of compensation is $105.49 and defendants waived their argument that some medical care was unauthorized (they made this concession after it was pointed out to them that they had denied the compensability of the claim).

ISSUES

The contested issues are:

1) Whether claimant received an injury on September 19,

34 while working at Small's Fruit Farm (claimant alleges an injury to his back and to his right knee on that date);

2) Whether there is a causal relationship between the leged injury of September 19, 1984 and the asserted impairment claimant's back and/or right knee and the alleged resulting sability;

3) Nature and extent of disability; claimant is asserting ne odd-lot doctrine in this case; and

4) Whether claimant is entitled to benefits pursuant to owa Code section 85.27 and, if so, the extent of those benefits; efendants urge a causal connection argument in this regard.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 22 years of age having been born on May 6, 1964. He is currently married but was not married on September 19, 1984. He graduated from high school and characterized himself as an "average student." Claimant testified that he had no back or right knee problems prior to September 19, 1984. After graduating from high school in 1983, claimant worked for Small Fruit Farm doing such activities as driving a truck and general farm labor. He then testified that he worked at Small's for two autumns and indicated that one of these autumns was after high school.

Claimant testified that on September 19, 1984, he was carrying an irrigation pump in the back of a flat bed truck. A portion of the back of this truck broke and claimant's leg went through the broken board. This occurred at approximately 2:30 p.m. He had pain in his right knee and this knee started swelling "instantly." Shortly thereafter pain started in his back and he characterized this pain as sharp through the hip. Claimant was initially treated by J. W. Barnes, M.D., of Missouri Valley, Iowa, and Dr. Barnes administered ultrasound to claimant's neck and back. Dr. Barnes' treatment lasted about two weeks.

Claimant was paid workers' compensation benefits while he was off work and, as he recalled, he was paid benefits for about one and one-half months. When claimant attempted to return to Small's Fruit Farm for one day he was informed that "he could not be used."

Claimant testified that he started working for International Nutrition on November 16, 1984 stacking feed bags on pallets. The bags weighed between 50 and 100 pounds. On December 4, 1984, while working for International Nutrition, claimant injured his right knee but did not receive workers' compensation because he did not file a claim. His attendance at International Nutrition was very poor. He worked a total of six to seven

months at International Nutrition.

Claimant testified that in April 1985, he went to an emergency room in Omaha because of a back problem. He stated that his back "had never gotten any better." He then testified as to the doctors or chiropractors that treated him for his back problem. He testified that his medical bills have not been paid and that he has not had surgery to date.

Claimant testified that after separating from International Nutrition he worked at several lumber yards but quit after missing too many days. Claimant started a packing plant job for Iowa Beef Processors in May 1986 doing such things as breaking necks. He ultimately quit this job. He testified that currently lifting is out of the question, and that bending, walking, and getting out of a low place is a problem for him. While working at the packing plant, claimant had pain in his lower back into his right leg down to about his knee. Claimant did not file a claim against the packing plant, however. He separated from this employer on or about August 20, 1986 and was paid $5 per hour by Iowa Beef Processors. He worked there forty to sixty hours a week and acknowledged that he could work as a neck breaker. Claimant is currently going to school at Universal Technical Institute getting training in air conditioning and heating. He is financing this venture with a student loan.

Claimant testified that there was a fight at International Nutrition on or about April 14, 1985 and that his younger brother was involved in this fight.

Claimant testified that his back has not improved since September 19, 1984 and that he currently has pain in his right leg.

On cross-examination, claimant stated that he started the technical training about three weeks prior to hearing. Claimant did not have a job between the time he quit Iowa Beef and the time he started school. Claimant testified that he is approximately six foot seven and weighs 235 pounds. Claimant once again denied that he was involved in a fight in April 1985.

Roberta Anderson testified that she is claimant's spouse and that she married claimant on November 16, 1984. She testified that claimant's health problems started after he began work at Small's Fruit Farm. She testified that claimant had pain when he started working for International Nutrition and that he frequently missed work there because of back pain. She recalled no injuries that claimant sustained at International Nutrition. She also started working for Iowa Beef Processors in May 1986. She acknowledged that claimant was able to do the neck job there. She stated, however, that the hog shackling job that claimant did at Iowa Beef Processors hurt his back. In sum, she stated

. she knew of no other injury other than the injury sustained
:laimant at Small's Fruit Farm.

On cross-examination, Roberta Anderson acknowledged that she
ted to a claims adjustor by the name of Thomas (Tom) Lucas.
was then questioned about her deposition testimony and
:ifically her testimony regarding fights in which claimant
egedly engaged. On redirect, she testified that claimant
quently complained about his back prior to April 1985.

Thomas Lucas testified that he "came on this claim" in
ember 1985. On January 7, 1986, he had a conversation with
erta Anderson. Ms. Anderson told him that claimant was doing
ay" until he engaged in two fights. One of these fights
with an individual by the name of Stu. The other fight was
International Nutrition with "a number of men."

Defendants' exhibit A is a statement taken from claimant by
mas Lucas on January 17, 1986. This report reads in part on
es 13-14:

Q. Okay, now let's go back to Tribulato, that and your attorney record here, review this and then want to kind of cover this fairly straight. I saw Michel on April 15th of '85. Now that would have been, you were at St. Joseph Hospital the 12th, April 15th would have been a Monday. "At that time the patient said he was working Friday of the week before and he was lifting a box and he hurt his back." Now this is a little more specific about what happened the Friday before. Now does that ring any bells for you?

A. Uh might have been, it's possible because some of the mixes we run are in bags, that's water soluble and then packed in boxes.

Q. Okay do you recall that incident at all?

A. No. I just recall not being able to get back up.

Q. Okay "he was lifting a box and hurt his back. He was referred here by Dr. Wilson".

A. Yea there you go, Wilson.

Q. Okay. "Then Friday before he saw me he got in a scuffle at work and he hurt his back again". Tell me a little bit about that.

A. I was in the scuffle. I was in it due to the

fact that everybody around me was in it, I wasn't fighting, the box room is kind of a topped off little bitty room.

Q. Do you know who started the fight?

A. Oh, if I can remember his name, Russell, I can't remember his last name, works at International Nutrition.

Q. Who did he start the fight with?

A. Uh my little brother.

Q. Is that Shadd again?

A. Yea and then it just kind of bubbled into one of them bar room type of deals.

Q. What was the fight over, what was it about?

A. I don't know for sure to tell you the truth.

Q. Who all was there besides yourself and you say a bar room brawl, who else was there?

A. The bosses and everybody.

Q. Bosses being?

A. Steve Finner and all the rest the working crew.

Q. Do you recall the names of other working crew?

A. Uh Tracy Bunge, B U N G E, uh the Russell, Shadd, me, uh let's see, there's been some there since that have quit, uh Steve Finner was there, everybody that worked there was there.

Q. Mr. Silver there at all?

A. No.

Okay.

A. I don't believe so.

Q. Okay Sue Crist, was she there or any of the gals up front?

A. They weren't in the back, no, they were at work, but they weren't in the back.

Q. Okay so in this scuffle what exactly happened, what caused this onset?

A. Just them two fighting, everybody ended up getting into it.

Q. What specifically happened to your back and how did that happen at that time?

A. I got knocked, I got pushed into the, into the scaffolding where the bags was on the lower one, the lowest one that they had and that's what that was and then when Steve and everybody got it broke up, why everybody managed to pile off.

Q. Were you piled upon you mean?

A. Yea.

Q. Okay, were you able to get up from that pile then?

A. Yea.

Q. Did you require assistance out to your car at that time or someone's car to go to St. Joe?

A. Yea.

Q. How much assistance?

A. Quite a bit, I kind of hobbled, I did a little but not a lot. It hurt to walk.

Q. Now from the description here it sounds like it was considerable particularly with your admission to St. Joe Hospital, was it very noticeable, did you feel anything happen at that time when that occurred?

A. No because what happened to me didn't occur til after that was done and over with and everybody got back to work.

Q. What do you mean now?

A. Well see after the scuffle was all done and over, everybody, after it all got settled out everybody went back to work.

Q. Including yourself?

A. Uhhuh.

Q. Okay, did you have another fight out in the parking lot somewhere?

A. No, I didn't.

Q. Did you have a fight with somebody by the name of Stu?

A. No.

Q. No?

A. No, I never got into a fight with anybody.

Q. Okay.

A. Stu Chase is another one that was working there too.

Q. Okay, "he went to emergency room at St. Joe's and went to a chiropractor and had some treatments. Still persisted having low back pain. He could just barely hobble around, was having considerable pain in his back, back was going down his right leg and he could hardly use his right leg at all. Has been down pretty much of the time until I saw him. He said it still hurts. It hurts considerably in the mid low back and down the right leg mostly in the knee. Said it hurt to blow his nose and it hurts in the back. At times it feels like his right leg is going to sleep". Does that all sound pretty accurate?

A. Uhhuh.

Q. "He said he had no trouble with his back prior to this injury except last fall. He hurt his back and it took about 2 months to clear up but it did clear up completely." Does that sound accurate to you then?

A. Uhhuh.

Q. Okay, all of these other incidents along the line, are you saying that that which happened at Small's Fruit Farm is the current cause or is something else that occurred along the way such as the fight perhaps the real problem here?

A. No, what happened at Small's Fruit Farm I

believe is, I would, what I meant by cleared up completely is the pain would go away but there would be days that it would hurt, you know, it would be sore but it never did hurt like it did at that moment you know and that's what I tried to impress upon my lawyer is that you know I'm trying to be honest.

Exhibit 1 is claimant's deposition. On pages 18-19, he denied engaging in fights at International Nutrition. On page 30, claimant stated that he had surgery on his right knee with cartilage taken out. Dr. Tribulato performed this surgery. On page 35, he stated that his back doesn't hurt every day now. He worked for Small's for about a week after the injury of September 1984. He saw Dr. Margules for his back in December 1985.

Exhibit 2 is the deposition of Roberta Anderson. She stated in part on pages 7 and 8:

Q. And your husband was involved in fights at work, wasn't he?

A. Well, I don't know if he was involved with them, but I just knew there were fights down there.

Q. Didn't you tell Tom Lucas that he'd hurt his back from some of those fights?

A. I told him that he hurt his back down at work, but I don't know if it was due to the fights. I knew that the fight happened that day, and he come home saying his back hurt.

Q. And was this the fight with Chad, or was this the other fight?

A. With Chad.

Q. There was more than one fight at work, wasn't there?

A. I think so.

Q. And did he come home complaining about his back hurting after the other fight?

A. Yeah.

Q. Do you recall talking to a Tom Lucas about your husband's condition?

A. Yeah.

Q. And if Mr. Lucas recalls what you claim that the injury to his back was the result of another fight at work initially involving his brother, would you agree with that?

A. Agree to what?

Q. That your husband was injured as a result of a fight at work, that he injured his back?

A. I didn't say that his -- he hurt his back during the fight.

Q. What did you say?

A. Well, I said his -- when he come home, his back hurt from it. I didn't say that the fight caused it.

Q. But, he did come home complaining that his back hurt after that -- on that same day that his brother was in a fight?

A. Yeah.

Q. Did your husband have to be taken to the hospital that day, or on any other occasion when there was a fight at work?

A. Yeah.

Q. What hospital did he go to?

A. Saint Joe's.

Q. And what was -- what kind of treatment did he receive?

A. They just gave him a shot for pain, as I remember.

Q. Were you with him?

A. Yeah.

Q. Where was his pain?

A. In his back.

Exhibit 3 is the deposition of Steven Finnern taken on October 8, 1986. He testified that he is the plant manager at International Nutrition. On page 9, he stated that claimant did

not fail to show up for work because of a back problem or knee problem.

Exhibit 4 is the deposition of Steven J. Silver taken on September 15, 1986. He testified that he owns International Nutrition. On page 6, he testified that claimant's job application was dated October 30, 1984 and that no physical problems were listed thereon. This application was marked as deposition exhibit 1. On page 13, Silver testified that claimant made a claim for benefits because of a knee injury but that he received no benefits. On page 14, Silver testified that claimant did not complain of back problems and that he was able to do his job. On page 18, claimant's knee injury at International Nutrition was discussed further; he returned to work the day following the injury.

Exhibit 5 (dated August 15, 1986) is authored by Louis F. Tribulato, M.D., and reads in part:

> I saw Michael [sic] August 5, 1986. At that time he said he had injured his knee in September in 1984 and had been having trouble ever since then. It swelled up and then it got better. Ever since then it has swelled off and on. He has a clicking at times and at times it pops. The pain has persisted. The last flare-up was about three weeks ago. He just squatted down and then when he got up he couldn't straighten his knee. It has been bothering him ever since.
>
> Examination showed a probable torn medial meniscus of the right knee. At that time I suggested an arthrscopy [sic] and probably removal of the medial meniscus.
>
> As you know I have seen Mr. Anderson since April 1985, for an injury to his back which he sustained in early April 1985. I have reviewed my chart and I see he had pain from the back down to the leg, mostly the knee, but I don't see anything specifically referring to the knee pathology at that time....
>
> From the history I would judge that the knee problem is a result of the injury of September 1984. (Emphasis added.)

Exhibit 7 (dated March 6, 1986) is authored by Maurice P. Margules, M.D., and reads in part:

> It is our [sic] opinion, as the result of the injury sustained on September 20, 1984, the patient has a herniated lumbar disc at the L5-S1 interspace

on the Right.

Exhibit 9 (dated February 24, 1986) is authored by J. W. Barnes, M.D., and reads:

> Michael [sic] Anderson was first seen by me September 27, 1984, with acute L.S. strain. He was seen again April 11, 1985, with back pain radiating down the leg, which he states occured [sic] while on the job. Orthopedic consult was recommended.
>
> I cannot ascertain whether this resulted from the original injury.

Exhibit 11 (dated January 15, 1986) is authored by Dr. Tribulato and reads in part:

> I saw Michael [sic] on April 15, 1985, and at that time, the patient said he was working Friday of the week before and he was lifting a box and hurt his back. He was referred here by Dr. Wilson. Then, the Friday before he saw me, he got in a shuffle at work and hurt his back again. He went to the emergency room at St. Joe's and he went to a chiropractor and had some treatments. He still persisted having low back pain. He could just very [sic] hobble around and was having considerable pain in his back. The pain was going down his right leg and he could hardly use his right leg at all. He says he has been down pretty much of the time until I saw him. He said it still hurts and hurts considerably in the mid low back and down the right leg, mostly to the knee. He said it hurts to blow his nose and hurts in the back. At times, it feels like his right leg is going to sleep. He said he had no trouble with his back prior to this injury except last fall, he hurt his back and it took about two months to clear up but it did clear up completely.
>
> ....
>
> Diagnosis was right low lumbar disc. (Emphasis added.)

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on September 19, 1984 which arose out of and in the course of 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 September 19, 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).

At hearing, claimant's counsel commented that this case presents an issue of fact. I agree. The credibility of the claimant and his wife are, of course, at issue in resolving this factual dispute. It is clear to me that neither claimant nor his wife were credible witnesses. In short, I think that the claimant injured his back in a fight. He may have injured his back while working for Small's Fruit Farm, but the degree of impairment or disability from this incident cannot be determined from the record made in this case. It is claimant's burden to show a causal link between his work injury and his asserted disability. Claimant herein has failed to do that. However, it will also be concluded that he did not even establish that he sustained a back injury that arose out of and in the course of his employment with Small's.

Claimant has shown that he sustained a right knee injury that arose out of and in the course of his employment with Small's. He has also established by a preponderance of the evidence that there is a causal connection between this knee injury and temporary impairment to this member. See exhibit 5. However, there is insufficient evidence of record to determine the extent of the impairment to claimant's right knee. It is noted that he also injured his right knee while working at International Nutrition. Also, it is not sufficiently established of record that the impairment to claimant's right knee is permanent. The Iowa Industrial Commissioner has outlined the circumstances under which agency expertise is properly invoked to assist a claimant in carrying his or her burden of proof. See Franklin v. Hazel L. Veldhuizen, decided on November 13, 1985 and Lundy v. Radio Shack Corp., decided August 30, 1985. This case is not an appropriate one for use of agency expertise to aid the claimant. Exhibits such as exhibit 19 are not a sufficient basis for awarding weekly benefits (permanency or temporary total disability) to claimant because of the right knee work incident of September 19, 1984. However, medical benefits are awarded for claimant's right knee injury. At hearing, the parties stated on the record that they could ascertain what bills relate solely to claimant's right knee injury.

FINDINGS OF FACT

1. Claimant was working for Small's Fruit Farm on September 19, 1984 and on that date injured his right knee when he fell through a hole in the back of a flatbed truck.

2. After claimant separated from Small's, he started work in November 1984 at International Nutrition; he separated from International Nutrition in June 1985.

3. While working for International Nutrition claimant injured his back while engaged in a fight.

4. Claimant also injured his back at International Nutrition when he lifted a box.

5. Claimant did not sustain any permanent impairment to his back as a result of his employment at Small's Fruit Farm.

6. Claimant did not sustain any permanent partial impairment to his right knee as a result of his employment at Small's Fruit Farm.

7. Claimant's stipulated rate of compensation is $105.49.

CONCLUSIONS OF LAW

1. Claimant failed to establish by a preponderance of the evidence that he sustained a back injury that arose out of and in the course of his employment with Small's.

2. Claimant failed to establish causal connection between his alleged back injury and his asserted impairment or disability.

3. Claimant established by a preponderance of the evidence that he sustained a right knee injury that arose out of and in the course of his employment with Small's.

4. Claimant established a causal connection between his work-related right knee injury and some temporary impairment to this member, but failed to establish any permanent impairment attributable to his work-related right knee injury at Small's Fruit Farm.

5. This record does not provide a basis for the use of agency expertise.

6. Claimant established that he is entitled to some medical benefits because of his right knee injury; no medical benefits are owing because of claimant's back problems.

ORDER

IT IS THEREFORE ORDERED:

That claimant take nothing from these proceedings except the medical benefits described above.

That claimant 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 27th day of January, 1987.

T. J. McSweeney

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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001288

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEORGE ARMSTRONG,

Claimant,

vs.

DEPARTMENT OF BUILDINGS & GROUNDS,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

File No. 515778

R E V I E W -

R E O P E N I N G

D E C I S I O N

FILED

MAY 26 1987

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by the claimant, George Armstrong, against his employer, Department of Buildings and Grounds, and its insurance carrier, State of Iowa, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained July 26, 1978. This matter came on for hearing before the undersigned deputy industrial commissioner in Des Moines, Iowa, on March 6, 1987. The record was considered fully submitted at close of hearing but for briefs filed by both parties.

The record in this proceeding consists of the testimony of claimant and of Roger F. Marquardt, as well as claimant's exhibits 1 through 4 and defendants' exhibits 1 through 8. Claimant's exhibit 1 is mileage expenses itemization; claimant's exhibit 2 is a December 11, 1986 report of Dr. From; claimant's exhibit 3 is a March 28, 1986 Veterans Administration operative report; and claimant's exhibit 4 is a curriculum vitae of Roger Marquardt. Defendants' exhibit 1 is a progress note of Doctors Hamra and Cadoret of May 1, 1980; defendants' exhibits 2, 3, 4, and 5 are reports and progress notes of Doctors Brooks and Cadoret from January 13, 1982 through February 16, 1982; defendants' exhibits 6 and 7 are progress notes of Doctors DeHamer, Hamra and and Cadoret of March 29, 1982 and May 11, 1982; defendants' exhibit 8 is a May 11, 1982 report of Dr. From.

ISSUES

The issues for resolution are:

1) Whether a causal relationship exists between claimant's injury and his claimed disability;

2) Whether claimant has sustained a change of condition since the last hearing in this matter;

3) Whether claimant is entitled to benefits and the nature and extent of any such benefit entitlement, including the related question of whether claimant is an odd-lot employee; and

4) Whether claimant is entitled to reimbursement of mileage expenses under section 85.27.

Claimant's rate of compensation is $99.04.

REVIEW OF THE EVIDENCE

Claimant testified that he was born July 8, 1917 and has completed the eleventh grade. He gave a work history primarily involving physical labor including local route truck driving, painting, roofing, plastering, and custodial work. Claimant testified that all jobs held required lifting of greater than twenty-five pounds. Claimant's last job was as a custodian in the Iowa House of Representatives. He reported that he injured himself on July 28, 1978 while attempting to squeeze a mop bucket. Claimant subsequently had double hernia repair surgery. Claimant had additional hernia surgery on March 16, 1986.

Claimant testified that he has had physical problems since the last hearing and that activities worsen the pain he feels with his hernia. He reported that bending over binds the hernia as does getting out of bed a certain way. Claimant reported that at times his symptoms worsen and that his March 1983 surgery helped a little but that he probably still has problems with his hernia.

Claimant subsequently agreed that he had testified in the September 1980 hearing that he felt he could not lift and that he could not carry a light sack of groceries. He agreed he testified that he could not paint and that driving his pickup truck was painful as well as vacuuming, walking, bowling, and playing football and softball. Claimant agreed he had testified that he then had weakness in his legs, and trouble getting dressed as well as back pain. He agreed he had testified that he had cut back on social gatherings after the injury and lost approximately 90 percent of his enjoyment of sexual activity on account of the injury. He agreed he had then told Dr. Hines that he had sleeping problems and was unable to work as a result of those problems. Claimant agreed that he had had stress and pain since his hernia surgery and that he hadn't felt good since

1978. Claimant has had prostrate surgery as well as the hernia surgery. He has also had bladder tumors, leg circulation surgery, and bypass surgery. Claimant had a severe heart attack in 1982. As a result, he has had to be much more careful and cannot get excited as he suffers if he makes a strenuous effort.

Roger Franklin Marquardt testified that he is a vocational rehabilitation specialist who examined claimant for one hour on February 17, 1987 and then took a vocational and educational history. Mr. Marquardt has testified before this agency on numerous occasions. His qualifications are well known to the undersigned as well as set forth in exhibit 4. They will not be delineated herein. Mr. Marquardt testified that claimant's relevant employment history involved semi-skilled to unskilled heavy to light/medium work. He testified that he had based his physical restrictions for claimant on Dr. From's December 11, 1986 report in which the doctor stated that claimant should not be lifting in excess of twenty-five pounds. Marquardt, therefore, had looked for light work for claimant. Marquardt opined that claimant had no transferable skills and that no full-time competitive employment was available to claimant when claimant's education, age, past skills, motivation, and functional capacity were considered. He reported that under the Iowa Job Service wage survey for Polk County, the median wage for janitorial work was now $5.20 per hour; that for general construction, which claimant has also performed, $9.50 per hour, and that for light trucking driving $7.32 per hour. Marquardt stated that all required repetitive or occasional lifting of twenty-five pounds or more. Marquardt indicated that claimant had had a stable work history when younger and that part-time employment might be available for him, however. He reported that claimant could work as a hotel desk clerk or could work on occasion delivering cars or picking up cars. Such positions would pay no more than minimum wage. Marquardt stated claimant had been willing to work at such positions provided his social security income was not jeopardized. He characterized claimant as fairly active and reported that claimant now does some chauffering for friends from which he derives a feeling of self-worth.

Marquardt stated that he was aware of claimant's history of alcohol abuse, but reported that the alcoholism was not noted to be a problem for claimant as far as his ability to find employment. He agreed he was unaware that claimant had served a fifty day jail term for alcohol-related reasons. Marquardt further agreed that he was not aware that claimant had not been able to lift more than twenty-five to thirty pounds in 1978 even though he was aware of claimant's back problems, his leg weakness, and his circulatory problems. He reported that he was aware that claimant had heart problems, but was unaware of his severe 1982 heart attack and subsequent bypass surgery. He reported that the heart condition and surgery would affect claimant's employability. Marquardt stated it would be exceptional for an

employer to take a chance on a 70 year old worker. He further stated that claimant was disabled from full-time competitive employment on account of his various health problems.

Claimant traveled to the University of Iowa Hospitals and Clinics for examination on February 15, 1982, March 29, 1982, and May 11, 1982. He reported total mileage of 672 miles. Medical records from the University of Iowa Hospitals and Clincs in evidence indicate that claimant has diagnoses of alcohol abuse by history, as well as mixed personality disorder with antisocial traits as well as some histrionic and passive aggressive traits.

A May 11, 1982 report of Paul From, M.D., states that he saw claimant in his office on May 5, 1982. Claimant was then complaining of a pressure sensation in the lower abdomen, occasional dysuria, inability to eructate or flatulate at night, legs giving away easily, early morning awakening, and the sensation that he was becoming older and feebler. He noted that on bending claimant's equilibrium was disturbed. On walking, claimant's legs were giving way and there was some parasthesia with questionable cramping. Claimant stated he was generally slowing down and was quite depressed and experiencing family tragedies, loss of his fiance, death of a brother, and other problems. Dr. From opined that claimant then was still basically suffering from a psychological problem and that his numerous complaints had no medical basis. He reported that claimant remained disabled with the disability basically that from a psychological standpoint, but remaining extemely real to claimant.

An operative report of Barry Miller, M.D., of March 28, 1986, states that claimant has a recurrent right, direct inguinal hernia and that Bassini repair of the right inguinal hernia was undertaken. Dr. Miller reported that the recurrent hernia was obvious with a ballooning effect of the fascia of the floor of the canal with very tough fibrous and scarred tissue.

On December 11, 1986, Dr. From opined that claimant's recurrent hernia was related to claimant's original hernia in July 1978. He reported that ignoring claimant's other problems and concentrating only upon the hernia, he would anticipate a six to eight week total disability from the hernia repair with four to six weeks of partial disability or approximately ten to fourteen weeks or three months for healing. Dr. From indicated that he would restrict claimant to not lifting more than twenty-five pounds several times per day on account of his injury only and not on account of his other problems. He opined that claimant's weak tissues indicated by the ballooning effect of claimant's scarred and fibrous tissue and claimant's need for a second inguinal hernia repair, would make recurrence of the hernia more likely. He reported that because of the restrictions, the poor tissues, and the possibility of a recurrence of the hernia,

claimant had sustained a five percent impairment of the whole man [sic].

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

APPLICABLE LAW AND ANALYSIS

In the prior decision in this matter on appeal to the supreme court claimant was awarded 10 percent permanent partial disability resulting from his injury for psychological disability. We must examine claimant's condition at the time of hearing resulting in that award and his condition at present to determine whether reopening of claimant's claim is justified under section 86.14(2).

In a review-reopening proceeding in which the claimant is seeking additional compensation after a previous award of disability, he mut show a change of condition since the previous award which would entitle him to an additional award. Stice v. Consolidated Ind. Coal Co., 228 Iowa 1031, 291 N.W. 452 (1940). Claimant has the burden of showing by a preponderance of the evidence that increased incapacity which entitles him to additional compensation is a proximate result of the original injury. Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 457 (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). Controlling authorities as to factors bearing on whether a change of condition has occurred are well summarized in Sanford v. Allied Maintenance Corp., IV Iowa Industrial Comm'r Report 297, 198 (1984).

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

Claimant asserts a change of condition on account of his 1986 recurrent right, direct inguinal hernia and repair of March 28, 1986. Dr. Miller, Claimant's treating physician, originally characterized the hernia as recurrent. Dr. From opined the recurrent hernia related to claimant's original July 1978 hernia. The evidence substantiates that claimant's recurrent hernia was a proximate result of his original injury. Claimant, therefore, suffered at least a temporary change of condition and is, at minimum, entitled to weekly compensation during his recovery from his recurrent hernia repair under either section 85.33(1) or section 85.34(1).

The only evidence as to the period of temporary total or healing period entitlement is Dr. From's opinion that he would anticipate a six to eight week total disability from the hernia repair with four to six weeks of partial disability or approximately ten to fourteen weeks for healing. While we find this opinion confusing at best, defendants have offered no contrary evidence as to reasonable length of recovery. In the absence of such, we will not speculate as to the appropriateness of the recovery time Dr. From suggests. We find claimant entitled to fourteen weeks of healing period or temporary total disability benefits on account of his recurrent hernia repair.

We reach the question of whether claimant has sustained a permanent change of condition entitling him to permanent partial disability benefits, including the question of whether claimant has shown he is now an odd-lot worker. 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).

In the initial decision, claimant was found to have a low level anxiety which in relation to his age, education and experience, did not produce permanent partial disability beyond 10 percent. In 1982, Dr. From still opined claimant basically suffered from a psychological problem and that his numerous complaints had no medical basis. In December 1986, following claimant's 1986 surgery, Dr. From opined claimant had a five percent permanent partial impairment to the body as a whole. He restricted claimant to 25 pound lifting and stated recurrences of claimant's hernia were likely. At hearing, however, claimant agreed that his actual activity restrictions have remained substantially similar since his original hernia injury in July 1978. Hence, the functional impairment appears no more restricting to claimant than was his earlier described psychological impairment. Mr. Marquardt opined that under Dr. From's December 1986 restrictions, claimant had no transferable skills and no full-time competitive employment was available to claimant when claimant's education, age, past skills, motivation, and functional

capacity were considered, Marquardt was apparently testifying as to claimant's employability only as it relates to hernia and subsequent surgeries. Marquardt later agreed claimant was disabled from full-time competitive employment on account of his various health problems, however. Those problems include past bladder tumors, prostrate surgery, leg circulation surgery, and bypass surgery. Claimant testified that he had a severe heart attack in 1982 and as a result must be much more careful and cannot get excited as he suffers if he makes a strenuous effort. Claimant's own testimony suggests that even if an actual medical basis for claimant's complaints has now been discovered and even if a permanent partial impairment rating can now be assigned for those complaints, claimant's overall earnings situation has changed little as it relates to his 1978 injury. Further, claimant's numerous other problems could well be producing any change in claimant's earning capacity actually present. A proximate cause need only be a substantial factor and not the only cause of a result. Blacksmith v. All American, Inc., 290 N.W.2d 348, 354 (Iowa 1980). Nevertheless, claimant has not established that his 1986 recurrent hernia repair was a proximate cause of any permanent change in his earning capacity following the initial hearing and subsequent decision in this matter. Claimant is not entitled to further permanent partial disability benefits on account of his July 1978 injury.

As claimant has not shown a permanent change in his condition, we need not reach the question of whether claimant is an odd-lot worker. For reasons discussed above, claimant has not made a prima facie showing his inability to find employment results from his injury and subsequent injury-related change of condition and not from extemporaneous factors. See Beemblossom v. Tindal Farm Supply Co. and Allied Insurance, a/k/a Aid Insurance, file No. 727594, Arb. dec., filed January 29, 1987.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant sustained an injury July 26, 1978 which arose out of and in the course of his employment and for which claimant underwent hernia repair surgery.

In the decision following the initial hearing in this matter, claimant was found to have a low level anxiety for which he was awarded 10 percent permanent partial disability.

Claimant underwent recurrent hernia repair surgery on or about March 28, 1986 which surgery related to his original 1978 injury.

Dr. From assigned claimant a permanent partial impairment to the body as a whole following such surgery and imposed a 25

pound lifting restriction on claimant.

Claimant's recovery period following the repair surgery lasted fourteen weeks.

Claimant's actual activity restrictions have remained substantially similar since his July 1978 injury.

Claimant suffers from numerous medical conditions other than his work-related recurrent hernia including past bladder tumors, leg circulation surgery, prostrate surgery, and bypass surgery.

Claimant had a severe heart attack in 1982. As a result, he must be much more careful and cannot get excited as he suffers if he makes a strenuous effort.

Claimant is seventy (70) years old.

Any change in claimant's permanent earning capacity since the initial hearing in this matter is not proximately caused by his 1978 injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established a temporary change in his condition since the initial hearing in this matter which change is a proximate result of the original injury.

Claimant is entitled to fourteen (14) weeks of temporary total disability benefits with those benefits to commence on March 28, 1986.

Claimant has not established a permanent change in his condition since the original hearing in this matter which change is a proximate result of the original injury.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant fourteen (14) weeks of temporary total disability at the rate of ninety-nine and 04/100 dollars ($99.04) with those benefits to commence March 28, 1986.

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30.

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

Defendants file claim activity reports as required by the agency.

Signed and filed this 26th day of May, 1987.

Helen Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT AUGUSTIN, Claimant, GEO. A. HORMEL & COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 764369 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 Robert Augustin, claimant, against George A. Hormel & Company (Hormel), employer, and Liberty Mutual Insurance Company, insurance carrier, for benefits as a result of an injury on March 15, 1984. A hearing was held in Des Moines Iowa on February 27, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant; claimant's exhibit A; and defendants' exhibits 1 and 2. Neither party filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $348.62; that claimant was off work from May 10, 1984 through July 22, 1984; that neither temprary total disability benefits or healing period benefits are at issue in this proceeding; that any permanent partial disability benefits awarded would commence on July 23, 1984; that claimant sustained an injury on March 15, 1984 that arose out of and in the course of his Hormel employment; that claimant's injury is scheduled; that there is a causal relationship between the injury of March 15, 1984 and claimant's asserted disability; that the parties informally resolved the medical benefits (section 85.27) issue; and that the parties informally resolved the credit (section 85.38(2)) issue.

ISSUE

The contested issue is the nature and extent of disability;

claimant asserts that his disability impairs both of his arms; defendants assert that claimant's disability or impairment affects only his hands or, alternatively, that he has no work-related disability or impairment. In sum, defendants argue that claimant should take nothing from these proceedings; however, if there is an award it should only be because of impairment to claimant's hands.

SUMMARY OF THE EVIDENCE

Claimant testified that he is thirty years of age and is currently employed. He then testified as to the jobs he has held through the years. For instance, he worked making pizza for one month and had no physical problems doing this job. After the pizza job, he worked at a gas station in Minnesota while he was still in high school. He was physicaly able to handle this job. His next job was at a Piggly-Wiggly Store in Austin, Minnesota and he was physically able to do this job. His next job was as a produce clerk at another supermarket while he was still in high school. He worked at this job on a part-time basis for three years. After high school, he worked at this grocery store for four years on a full-time basis. He separated from this grocery store job in late 1981.

Claimant testified he started working for Hormel in Knoxville, Iowa on September 14, 1981 and had a physical examination at the time he was hired. Claimant then described the physical problems he developed while working for Hormel. Claimant had surgery on his right hand on May 10, 1984. He had surgery on his left hand on June 7, 1984. Subsequent to these surgeries he went back to work but experienced numbness in both hands and arms. Claimant testified regarding the various jobs or functions he has performed while working for Hormel.

Claimant testified as to the identity of the various doctors he has seen because of his work-related injuries. He saw a licensed physical therapist in July 1985. Claimant testified regarding his present physical condition and stated that his arms and hands lack strength. He also testified that the grip in his hands has been affected. He has numbness in both his hands and arms after working. He feels better over the weekend. He has some problems when he drives. He has aching in his hands when he gardens. He does exercising on his own to help remedy his physical problems.

Claimant testified on cross-examination that his deposition testimony marked as defendants' exhibit 1 is true and correct in all respects.

Exhibit 1 is the deposition of claimant taken on July 18, 1986. On page 11, claimant stated that his first job with Hormel was hanging sausages. He did this job until January 1986

and then worked as a Multivac boxer and operator. He now works on a Cryovac machine. On page 14, he stated that he returned to work in July 1984 and worked continuously up to the time of his deposition in July 1986. On page 18, claimant testified, "well, I believe it was in March [1984] when I really noticed the pain I was having in my hands and the numbness at night with my--whole arms and up through my shoulders (indicating)." On page 18, he stated that his physical problems at Hormel are not caused by any specific incident. He then admitted that he arbitrarily picked March 15, 1984 as the injury date. On page 20, he stated that his physical problems do not stop at his wrists and that they extend throught both his arms and shoulders. On page 22, he stated that he has carpal tunnel syndrome in both hands, but that the left hand is worse according to Dr. Chuck Vander Linden.

On page 25 of his deposition, claimant testified that he worked in the manufacturing department until January 1986. He experienced pain from gripping at work. On page 27, he stated he has numbness in both hands, but that his whole arm goes numb as well. On page 32, claimant stated he has problems with his elbows.

On cross-examinaton, claimant testified that the elbow problem lessened after he changed jobs in January 1986. On page 37, he stated he has problems from his wrist up to his shoulders.

Exhibit 2 is the deposition of Scott B. Neff, D.O., taken on January 6, 1987. Dr. Neff is a board certified orthopedic surgeon. Dr. Neff examined claimant on October 27, 1986, but conducted no tests at that time. Deposition exhibit 1 is Dr. Neff's report. On pages 9 and 10, Dr. Neff stated, "surgery was completely successful in eliminating the pressure on the nerve which was part of the syndrome and caused the initial abnormality of the EMG study." On Page 11, Dr. Neff defined what he thinks the term "impairment" means. On page 12, he stated his opinion that claimant has no impairment because he has normal nerve function. On page 12, Dr. Neff stated that claimant had an excellent result from his surgeries. On page 13, Dr. Neff stated his disagreement with Dr. Bashara about how this case should be handled. On page 13, Dr. Neff also stated that he could see no evidence of restriciton of motion. On page 15, Dr. Neff stated that if there is a loss of motion that an impairment rating would be appropriate.

Exhibit A, section 1, page 7 (dated April 16, 1985), is authored by Jerome Bashara, M.D., and reads in part: "I would give this patient a 5% permanent partial physical impairment of each upper extremity related to his operated carpal tunnel syndrome, work related."

Exhibit A, section 2, page 3 (dated April 16, 1985), is authored by Dr. Bashara and reads in part: "He continues to

have some difficulties with mild restriction of motion of both of his wrists, intermittent numbness and tingling of his fingers and some mild weakness in his grip."

APPLICABLE LAW AND ANALYSIS

I am convinced that claimant sustained some permanent partial impairment as a result of his stipulated work-related injuries; however, I am not convinced that this disability or impairment extends beyond his hands. A wrist is generally treated as part of the hand under established agency precedent. See Elam v. Midland Mfg., 2 Iowa Indus. Comm'r Rep. 141 (Appeal Decision 1981). Also, Dr. Bashara's comments of record are too vague to establish by a preponderance of the evidence that claimant's disability or impairment extends beyond his hands. Dr. Bashara gives claimant a five percent impairment rating for each "upper extremity." However, he seems to be relying on loss of motion in claimant's hands to justify his ratings.

A finding of fact will be made that the injuries to claimant's hands occurred simultaneously and, therefore, this case is governed by Iowa Code section 85.34(2)(s) as construed in Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983). Using the impairment tables of the AMA Guides to the Evaluation of Permanent Impairment the two five percent hand impairment ratings are converted into whole body ratings and then the combined value chart is utilized. The result is a six percent whole body rating. Six percent of 500 weeks is 30 weeks at a rate of $348.62.

FINDINGS OF FACT

1. Claimant started working for Hormel on September 14, 1981.

2. While working for Hormel claimant sustained injuries simultaneously to both hands only; the impairment to each hand is five percent.

3. Claimant's resulting whole body impairment is six percent.

4. Claimant's stipulated rate is $348.62.

CONCLUSIONS OF LAW

1. Claimant has established entitlement to thirty (30) weeks of permanent partial disability benefits commencing on July 23, 1984 at a rate of three hundred forty-eight and 62/100 dollars ($348.62).

ORDER

IT IS THEREFORE ORDERED:

That defendants pay the weekly benefits described above.

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

That each party shall bear his or its own costs of this action.

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 15th day of April, 1987.

T. J. McSWEENEY
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BONNIE M. BAKALAR, Claimant, vs. WOODWARD STATE HOSPITAL-SCHOOL, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	FILE NO. 756871 A R B I T R A T I O N D E C I S I O N FILED MAY 2? 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Bonnie M. Bakalar, claimant, against Woodward State Hospital-School, her employer, and the State of Iowa as insurance carrier. The case was heard, evidence closed and considered fully submitted on December 22, 1986. The record in this proceeding consists of testimony from Bonnie M. Bakalar, Roger Marquart and Pam Carroll. The evidence also includes claimant's exhibits 1 through 11, 13 and defendants' exhibits 1 through 20. Claimant's exhibit 1, the deposition of Thomas B. Summers, M.D., specifically includes deposition exhibits 1, 2 and 3. The exhibits offered by defendants generally duplicate the exhibits offered by claimant except as to the number assigned to the exhibit.

ISSUES

Claimant alleges that she slipped on ice in the course of her employment at the Woodward State Hospital-School on January 23, 1984 and as a result thereof injured her lower back and her left leg. She seeks compensation for healing period through July 17, 1984 and an award for permanent partial disability. It was stipulated that in the event of such an award the commencement date for payment of permanent partial disability compensation is July 17, 1984. It was stipulated that claimant's rate of compensation in the event of an award is $161.09 per week. Defendants seek credit under section 85.38(2) for benefits paid to claimant under a non-occupational group plan. Claimant also requested that the issue of credit entitlement be determined. At hearing the undersigned had indicated to the parties that he

would consider that issue but on reconsideration the undersigned declines to do so in accordance with paragraph three of the hearing assignment order, the general agency policy of enforcing paragraph three of the hearing assignment order and specific directives to the staff to not decide the issue even if requested by both parties.

SUMMARY OF EVIDENCE

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

Bonnie M. Bakalar is a 51 year old woman who resides in Woodward, Iowa. She graduated from high school near the top of her class. Shortly thereafter she commenced training to become a registered nurse but dropped out in order to get married. She has practiced as a licensed practical nurse since 1960 intermittently. She has also worked as a bookkeeper at a feed and grain elevator and as a high school study hall supervisor.

Claimant's medical history includes evidence of an on-the-job injury that occurred in approximately July of 1970 (Defendants' Exhibit 1, page 3). In connection therewith she was examined by Thomas B. Summers, M.D., on June 14, 1971. According to Dr. Summers she reported that she had injured herself on June 8, 1970 while lifting a patient at the Park View Manor Nursing Home where she was employed. Her complaints involved primarily her right hip at the time she was seen by Dr. Summers but she reported having back complaints which had resolved (Def. Ex. 20, pp. 7-9). Dr. Summers was unable to find any evidence of serious injury or residuals of injury. He felt that the findings were normal and that her complaints were out of porportion to the findings (Def. Ex. 20, p. 19). Defendants' exhibit 10 shows the diagnosis for that injury to have been a musculo-fascial sprain of the right iliac crest. Page 2 of exhibit 10 indicates that claimant had pain in the abductor area when the staight leg raising test was performed. Claimant complained of sensory changes in the right knee. She exhibited reduced knee and ankle reflexes (Ex. 10, p. 2).

Defendants' exhibits 3 and 4 are office records from claimant's family physician, J. I. Royer, D.O.

On defendants' exhibit 4, at an entry dated July 10, 1978, there appears to be a notation which reads, "varicose veins left leg and knee" and the words "advised suphose."

An entry dated January 25, 1982 in defendants' exhibit 3 reports, "fell on icy sidewalk @ WSHS (presumably Woodard State Hospital-School) yesterday 1-24-82, 11:55." The following notation also appears, "L sacro-iliac area & iliac crest." The

entry of January 28, 1982 states, "feels like needles." The following entry dated February 4, 1982, where legible, appears to state, "can't lie down...no comfortable position...no change bowel or bladder."

An entry dated April 26, 1982 indicates that claimant reported being kicked by a resident and injurying her neck and cervical area (Def. Ex. 3).

An entry in defendants' exhibit 3 dated January 24, 1984 appears to read, "slipped on ice @ WSHS (presumeably Woodard State Hospital-School) yesterday, tried to catch herself & twisted back, c/o pain R. hip & back, L. leg...Norgesic Forte #20..." This entry seems to indicate that claimant reported slipping on ice at Woodard State Hospital-School, that she had tried to catch herself and twisted her back. It also seems to indicate that she made complaint of pain in her right hip and back and in her left leg. An entry of February 3, 1984 seems to indicate that claimant's upper back seemed better but that her lower back was worse.

In early February, 1984, claimant's treatment was transferred at the request of the employer to Scott B. Neff, D.O. A CT scan of her back was performed on February 29, 1984 which was interpreted as showing a small herniated L5-S1 disc with the herniation being on the right side (Def. Ex. 19). On March 5, 1984, Dr. Neff recommended that claimant obtain a lumbrosacral corset (Def. Ex. 15, p. 3). By March 26, 1984, claimant was making complaint to Dr. Neff that the brace made her left leg swell and feel worse. She complained of pain in the left leg. On April 16, 1984, Dr. Neff confirms the existence of swelling in the left knee and calf (Def. Ex. 14).

Dr. Neff initially was of the opinion that the defect in claimant's spine as shown by the CT scan and the problem in her left knee arose from the same injury (Ex. 14). He went on to relate, however, that he believed that she had a large venous varicosity or popliteal vessel abnormality which was not related to the injury (Def. Ex. 14 dated May 9, 1984). By May 24, 1984, Dr. Neff again indicated that the deep venous thrombosis was not related to her injury at work and that she was off work due to the thrombosis but that the problem in her spine and left leg, which he felt resulted from the injury, were diminished (Def. Ex. 14).

Claimant was referred to Bradley T. DeWall, M.D., for treatment of the venous thrombosis. Dr. DeWall felt that the thrombosis was secondary to an injury to her leg. By August 28, 1984, he felt that claimant's thrombosis had improved but that she continued to have difficulty with her leg. He felt that she would continue to have restrictions with regard to lifting and similar activities due to her back and her knee and that she

needed to be able to change positions frequently due to the venous problem but that it should not cause her difficulty with ambulation. He went on to state that claimant would have some disability due to her lower back and leg but that she was not totally disabled from performing licensed practical nurse work but would be disabled from working at Woodward. He felt that she had a good prognosis for returning to work (Def. Ex. 18).

On June 4, 1984, Dr. Neff modified his early opinions regarding relationship between the thrombosis and the original injury in January. He stated that:

> She did indeed have pain in her knee, and that is why she underwent diagnostic arthroscopy. Following arthroscopy, a dressing was placed on her leg, and she apparently had swelling which, she feels, brought on the phlebitis in her calf. I certainly cannot argue with the fact that any kind of immobilization either cast or brace or dressing can cause deep venous return to be slowed, and can exacerbate or cause thrombophlebitis.
>
> Her leg was swollen before the arthroscopy, but she did not have the severe calf pain.
>
> I am in somewhat of a dilemma as to how best to deal with this. She says that her leg was fine until she fell, and I have told her that she has had vericose veins for sometime, in my opinion.
>
> I guess the best way to resolve this is to have me state that I feel that the brace on her leg, did worsen the possibility or potential for thrombophlebitis, and could certainly have contributed to it's development and degree. If you will review the copies of office records, she did have swelling in her leg and swelling behind the back of her knee, before undergoing the arthroscopic examination.

He felt that she was not yet ready to return to work due to the phlebitis. On June 27, 1984, he authorized claimant to return to light or relatively sedentary work. He clarified the release on July 9, 1984 by indicating that she should avoid squatting and handling patients. On June 17, 1984, he issued specific work restrictions (Def. Ex. 14).

On July 19, 1984, Dr. Royer indicated to the Bankers Life Company that claimant's thrombosis would require a year leave of absence from work but that she could possibly do clerical work. He attached a sheet showing very substantial activity restrictions (Def. Ex. 8).

On November 26, 1984, a myelogram was performed which was interpreted as showing no abnormalities (Def. Ex. 13, p. 6).

On February 14, 1985, Martin S. Rosenfeld, D.O., advised the Bankers Life Insurance Company that his diagnosis of claimant was sciatica without disc rupture. He felt that her prognosis was guarded. He indicated that her functional limitations were to be determined by what she could tolerate and that she should avoid repetitive motions such as bending, squatting, reaching, stretching, prolonged sitting and/or standing (Def. Ex. 13, p. 1).

Claimant was examined by John A. Grant, M.D. The history he received indicated that she firmly denied any previous back or knee problems of any consequence but acknowledged occasional back distress of short duration from pulled muscles. His assessment of claimant's case stated:

> As is so often the case with this type of back problem, we are dealing with a patient who has been out of work for 15 months because of a back injury. With each passing month, the chance of her returning to active employment at her former job or at any job decreases significantly. Her examination in my office revealed obesity plus limited back motion and limited straight leg raising, plus the effects of what I feel is probably chondromalacia of the patella but, other than this, there are no striking objective abnormalities. In answer to your accompanying questions, I have the following comments. I feel this lady has sustained a strain of the lumbosacral spine which has become chronic with associated muscular low back pain and that most likely she has some chondromalacia of the left knee with early degenerative change and, finally, that she is a status post phlebitis of the left leg with the appearance that this is now under good control. I do not find any objective abnormalities to suggest a ruptured intervertebral disk.
>
> In terms of treatment, I think it would be advisable for this lady to lose weight, but I anticipate that this is unlikely to happen. It might be of some value to try a transcutaneous nerve stimulator and certainly she should be on an exercise program of Williams and Mackenzie exercises as well as encourage her to be up and ambulating. I would strongly discourage any operative approach. It might be of some value for her to attend a back school or pain clinic in an attempt to learn to "live around her symptoms". As far as I can determine, her signs and symptoms are consistent with the objective findings.

If this lady is to return to work she should avoid a job that requires her to stand or walk other than on an occasional basis and hopefully she would be allowed to sit frequently but also be allowed to change positions in terms of sitting, standing, and walking on a rather irregular optional basis. I think she should avoid lifting anything over 20 pounds, but I see no reason she could not lift an occasional object up to 20 pounds. She should avoid any bending from the waist but could probably tolerate occasional kneeling or squatting. It would be very advisable that she not be required to climb or reach overhead on other than a rare basis. I think she could use her hands and arms on a repetitive basis fairly frequently provided this does not aggravate the back situation. Motor vehicle operation for short distances would probably be acceptable.

It is my feeling that this lady is probably totally disabled from engaging in the work she was previously doing. I think it is going to be virtually impossible for her to ever return to a job that requires lifting or repeated bending or prolonged periods on her feet. She does give information suggesting that she has done bookkeeping work, and I would think this is something she could do if she can get to the point of sitting for reasonable periods of time.

The final question seems to be somewhat repetitious of the others, but I think this lady could return to a job that does not require repeated bending, twisting or turning, that allows sitting, standing and walking on a nonregimented basis, that avoids any lifting of any consequence other than occasional objects up to 20 pounds, and that does not require repeated bending. Whether such work is available, of course, is something I cannot answer.
(Def. Ex. 12)

He subsequently further specified her restrictions to include a job that permitted random sitting, standing and walking and that would avoid lifting that was no more than 25 to 35 pounds and only on an occasional or intermittent basis. He felt that she should avoid jobs that require twisting of the trunk or repeated flexion or overhead work. He recommended that she avoid slippery uneven surfaces or climbing ladders or scaffolding (Def. Ex. 12, p. 7).

Thomas B. Summers, M.D., testified by way of deposition (Claimant's Ex. 1). He rated claimant as having an 18 percent

impairment of the body as a whole as a result of claimant's injuries that occurred on January 23, 1984 (pp. 13 & 14). He felt that the thrombosis was a complication of that injury (p. 15). He explained his opinion regarding the relationship of thrombosis to the January, 1984, injury by stating that accidental injury can cause contusion of soft tissues and interfere with normal circulation which can cause blood clots to form. He stated that the occurrence is very common among individuals following surgery, following he felt that the time sequence of events established the causal relationship between the thrombosis and the January injury (pp. 44-46).

Claimant testified at approximately 2:30 p.m., on January 23, 1984, she had used her car in connection with her employment and in walking from the car toward the office she slipped on ice, twisted her body and felt pain in her right lower back and left leg. She denied actually falling. She testified that she immediately notified her supervisor and that an instant report was prepared. The report makes no mention of injury to the left leg (Def. Ex. 6).

Claimant testified that she sought treatment from Drs. Royer, Neff, McClain and Rosenberg. She stated that for a time she wore a TENS unit. She testified that she was sent to Iowa Orthotics for a brace which she wore for a month or six weeks but while wearing the brace her left leg started swelling noticeably. She stated that Dr. Neff then had her take the brace off. Claimant reported having arthroscopic surgery to her knee in May, 1984, but stated that it did not help.

Claimant testified that she liked her job and wanted to return to work. She stated that she talked with her immediate supervisor who suggested a light duty return to work if a medical release could be obtained. Claimant testified that she obtained a light duty release from Dr. Neff, but was then told by her supervisors that there was no work available for her within the restrictions that Dr. Neff had imposed. Claimant has not returned to work subsequently at any location.

Claimant testified that she feels unable to do the work at Woodard State Hospital-School due to her physical limitations. Claimant stated that she does not know of any job at Woodard State Hospital-School that she could perform. She stated that the state has not offered any other jobs to her. She stated that when released by Dr. Neff in July, 1984, she still had pain in her back and leg and that the leg would give out at times. She stated that there has been no change in her condition in the last year or so. She complained of noticeable pain at all times in her back. She stated that it varies to the extent that on good days she can walk about one and one-half blocks but that on bad days, of which she has one or two per week, she requires pain medication every four hours. She complained that her leg

will give out on occasion and stated that she fell while walking to the building for the hearing in this case and exhibited torn clothing. She stated that the left leg continues to become swollen.

Claimant testified that her health was good prior to the January, 1984, injury although she had trouble with her right leg and mid and upper back in the past. She stated that the prior instance had completely resolved without any residual difficulties.

Claimant testified that she could possibly work as a school supervisor if she were able to avoid climbing stairs but that the work paid much less than what she earned at Woodard. Claimant felt that her skills were obsolete in the bookkeeping field and that she would be unable to perform some of the functions that she had previously performed at the grain elevator. Claimant testified that she feels that she is unable to do any work and that the total disability payments of $677.04 per month that she receives from the Bankers Life Company would terminate if she obtains gainful employment.

Claimant testified that since the injury she has ceased performing much of the work around her home, all of which she had previously done herself, and now hires help for the lawn and has help from family members for some of her heavier housework. She stated that she has tried to rake and ride a riding lawnmower but that it caused her too much pain. She said that she had assistance in starting the mower.

Pam Carroll, claimant's niece, confirmed claimant's testimony regarding claimant's limitations in caring for her home. She stated that claimant displays a great deal of difficulty getting in or out of a car, walking distances and that even getting up and down is a problem. She observed claimant fall while coming to the hearing. Carroll testified that she has performed painting, lawn mowing and shoveling of snow for claimant since the injury but had not done so previously. She stated that she sees claimant almost daily. Carroll testified that her children sometimes play at claimant's house and that claimant supervises them.

APPLICABLE LAW AND ANALYSIS

It was stipulated that claimant received an injury on January 24, 1984 that arose out of and in the course of her employment at the Woodard State Hospital-School. Her testimony regarding that incident of slipping on ice is accepted as correct. The result of that injury is the primary issue in this case.

The claimant has the burden of proving by a preponderance of

the evidence that the injury of January 24, 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).

Following the injury claimant made immediate complaint of pain in her back and there appears no evidence in the record to indicate that her back was not injured to some degree in that incident. It does appear in Dr. Royer's notes that she also made complaint regarding her left leg. This would seem to provide some indication that there was injury of some sort to the leg. The real problem in claimant's leg seems to be related to the thrombosis, rather than to direct injury from falling. There is evidence in the record from 1978 to indicate that claimant had preexisting varicose veins.

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.

There is no indication in the record that varicose veins were in any manner disabling prior to January 23, 1984. It appears that Drs. DeWall, Neff and Summers related the deep pain thrombosis to the injury of January 23, 1984, either directly, or as a result of treatment. Claimant's burden of proof is establishing probability. When all material factors are considered, it is found more likely than not that the injury of January 23, 1984, either directly or as a result of treatment, was a proximate cause of the thrombosis which developed. 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 (Iowa 1980). Injury resulting from medical treatment is considered as being proximate to the original injury. Cross v. Hermanson Bros., 235 Iowa 739, 741, 16 N.W.2d 616, 617 (1944); Heumphreus v. State, 334 N.W.2d 757 (Iowa 1983); and Bradshaw, 251 Iowa 375, 101 N.W.2d 167 (1960). It is therefore found that the injury of January 23, 1984 was a proximate cause of injury to claimant's low back and to her left leg, particularly the region of the knee. It is specifically found to be a proximate cause of the thrombosis which developed in claimant's left leg.

Claimant's medical history shows that the thrombosis was most likely an aggravation of a preexisting condition of varicose veins. The records also show prior back problems with claimant

and the injury to her spine is likewise determined to be an aggravation of a preexisting condition.

When an aggravation occurs in the performance of an employee'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 CT scan performed early in claimant's treatment showed disc herniation but a later myelogram failed to produce similar results. The difference could be due to some resolution of the herniation or merely differences in the accuracy of the diagnostic procedures. Dr. Neff's reports show that claimant had indicated to him that her back condition was resolving and that her complaints regarding her back had diminished. Nevertheless, Dr. Neff has placed substantial activity restrictions on claimant. Similar restrictions have been recommended by Drs. Summers, Rosenfeld and Grant. Claimant has continuing complaints regarding her back and left leg. She has complaints regarding her right hip but such do not appear to be significantly disabling.

The employer determined that it had no work that was within claimant's physical restrictions as imposed by Dr. Neff. This is an indication that she has sustained a substantial degree of disability. II Larson Workman's Compensation, section 57.61, pages 10-164.90 through 10-164.95. An employer's refusal to give any sort of work to an injured claimant may justify an award of disability. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980). Claimant's motivation certainly seems suspect and her complaints seem to be somewhat exaggerated in regards to the findings of the medical practitioners. She will lose her disability pension if she returns to gainful employment. It is found that her current status of unemployment is not an accurate indication of her actual earning capacity. She does, nevertheless, have some permanent disability, as diagnosed by Dr. Summers.

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).

When all the appropriate factors of industrial disability are considered, it is found that claimant has sustained a 25 percent loss of earning capacity resulting from the injury of January 24, 1983 and that her disability, when evaluated industrially under section 85.34(2)(u), is a 25 percent permanent partial disability which entitles her to receive 125 weeks of compensation at the stipulated rate payable commencing July 17, 1984 as stipulated by the parties.

As represented by the parties claimant has been paid healing period through June 30, 1984. The effective date of Dr. Neff's release was July 17, 1984. There is evidence which could support a longer healing period, however, since the parties stipulated that compensation for permanent partial disability commenced on June 17, 1984, claimant's healing period entitlement is hereby established as running from January 23, 1984 through July 16, 1984 with defendants having entitlement to credit for the amounts previously paid through June 30, 1984. The difference is two and two-sevenths weeks payable commencing July 1, 1984.

Even though the issue of credit entitlement will not be ruled upon in this decision, some analysis of the precedents would seem to be in order since the issue is one which both parties want decided. Section 85.38(2) has not been addressed by the Iowa Supreme Court in the workers' compensation field but similar issues exist and are well settled in the civil litigation field. Work place injury litigation was originally conducted in the courts. In moving to an administrative process many similarities continued to exist both in matters of procedure and in elements of recovery. Division of Industrial Services Rule 343-4.35 adopts the Iowa Rules of Civil Procedure except where a conflicting agency rule exists. The administrative process and the courts both allow recovery of expenses of treatment, lost income during a period of recuperation and compensation for permanent disability or loss of earning capacity. The collateral source rule from civil practice has been statutorily confirmed in the workers' compensation field by Code sections 85.3(1) and 85.38(1). It is generally applied to workers' compensation cases in most jurisdictions as found in IV Larson Workman's Compensation, section 97.51 et. seq. Upon reviewing the controlling precedents it would appear that the status quo or normal rule is that there is no offset or credit and that the allowance of a credit is the exception. If no credit is applied, the worker receives both the group benefit of payment and the workers' compensation benefit. Simply stated, if the record is silent on the issue of credit, the claimant receives both.

The proposition that the burden of proving an entitlement to anything rests on the proponent is so well settled that Rule 14(f)(5) of the Rules of Appellant Procedure provides that the

citation of authority for that proposition is not necessary. The same rule regarding burden of proof applies in administrative proceedings. Wonder Life Company v. Liddy, 207 N.W.2d 27 (Iowa 1973). The credit provided by section 85.38(2) is similar to the defenses of "payment" or "accord and satisfaction" both of which are affirmative defenses where the burden of pleading and proof is placed on the defendant. Electra Ad Sign v. Cedar Rapids Truck Center, 316 N.W.2d 876 (Iowa 1982); Glenn v. Keedy, 248 Iowa 216, 80 N.W.2d 509 (1957). The agency has formerly recognized and applied the normal rules which place the burden of showing an entitlement to a credit on the employer. Argo v. Van Hulzen Oil Company, IV Iowa Industrial Commissioner Report, 15 (1984); McCrady v. Iowa Beef Processors, Inc., IV Iowa Industrial Commissioner Report, 239 (1984); and Hebensperger v. Motorola Communications and Electronics, Inc., II Iowa Industrial Commissioner Report, 187 (1981).

The normal rules of res judicata and issue preclusion apply in administrative proceedings. Bd. of Sup'rs, Carroll Cty. v. Chi. & N.W. Trans. Co., 260 N.W.2d 813 (Iowa 1977). Iowa Rule of Civil Procedure 72 provides that an answer must state any additional facts deemed to show a defense. Iowa Rule of Civil Procedure 101 requires that any defense which "...alleges any matter in justification, excuse, release or discharge...must be specifically pleaded." Payment, accord and satisfaction and the section 85.38(2) credit are defenses of the type affected by I.R.C.P. 101. It has long been the law of this state that such defenses are barred if not raised and litigated at the time of trial. Lynch v. Lynch, 250 Iowa 407, 94 N.W.2d 105, (1959); Dewey v. Peck, 33 Iowa 242 (1872). The general rule in civil litigation is that with regard to any occurrence or accident, all claims, theories of recovery and defenses must be raised and tried at the trial or they are thereafter barred. The doctrines of res judicata and issue preclusion exist because (1) parties should not be harassed by multiple litigations of the same case; (2) rights of litigants should be established and not changed; (3) efficient use of tribunals precludes retrial of the same case; and, (4) prestige of the tribunal is lost if its decisions are easily changed. The general trend is to expand the theories of res judicata or preclusion rather than to limit them. A. Vestil, Res Judicata/Preclusion,, Chapters 4 & 5 (1969).

Under I.R.C.P. 219 a judgment is defined as "every final adjudication of any of the rights of the parties in an action...." When tried to the court, the court issues written findings of fact, separately stated conclusions of law and directs an appropriate judgment. The only time when an existing issue in a case is not determined by the judgment is if it has been bifurcated by a previously entered order in accordance with I.R.C.P. 105 or 176. Agency issues are bifurcated by Rule 343-4.2. Orders which bifurcate issues are typically made both in the courts and before the agency when the prehearing conference is conducted.

In both forums issues that are not raised at the prehearing conference, regardless of pleading technicalities, are not permitted to be raised at the hearing or trial. In agency practice the failure to raise an issue constitutes a waiver of that issue. It has been applied to prevent the defenses in the nature of notice under section 85.23, limitations of action under section 85.26 and lack of employer-employee status. There is no generally recognized precedent which permits defenses or issues to survive if they are not timely raised.

The recent case of Olson v. Department of Transportation, File No. 738244 (1986) is somewhat inconsistent with the other precedents both within the agency and in general civil litigation.

Olson, contrary to the generally recognized practices, allows the unraised 85.38(2) defense to survive the hearing and places the burden of raising the issue and proving the lack of the employer's entitlement to the credit on the claimant. The Olson decision specifically allowed the employer to take a credit, even though facts showing entitlement to a credit had not been established. It is a precedent wherein the agency condones non-payment of its awards due to collateral source payments even though the facts which might warrant application of the credit have not been established.

The only reason Olson gives for its result is to avoid a windfall to the claimant. Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982). The Olson case seems to treat group benefit payments as the legal equivalent of payments made under Chapter 85. Some distinctions do exist. Group benefit payments are not required to be reported to the agency under Code section 86.13. Group benefit payments have not been construed to conclusively establish notice of injury under section 85.23. They have not been held to constitute payment of compensation for purposes of the statute of limitation under section 85.26. The group benefit payments are paid in satisfaction of a separate contractural obligation and are not identified as being made in satisfaction of workers' compensation liability. This is a situation that differs substantially from that which exists when crediting overpaid healing period benefits to a permanent disability award. Windfalls are not an uncommon occurrence in any type of litigation. They most frequently arise as a result of actions taken or omitted by the attorneys representing the parties. If the failure to raise what would have been a valid defense results in an award to the claimant, claimant has received a windfall recovery. The defense under section 85.38(2) is no different from the others in that regard. The credit is mandatory, rather than discretionary, when the facts supporting its application exist. Windfalls arise only when defense council fails to either obtain a stipulation from the claimant's counsel that the credit is due or, identify the issue at the prehearing conference. Since the employer, rather than the claimant, makes the actual

payment to purchase the group coverage, selects the provider of the group coverage and deals directly with the policy instruments, it would seem that the employer would be in the better position to have access to the terms and conditions of the policy under which the group benefit is provided.

Parties resort to litigation, before this agency and in the courts, in order to obtain a final determination of their relative rights and responsibilities. When the agency makes a final decision, the same may be enforced by having it entered as a judgment in the District Court under section 86.42. It can be urged that under Olson the agency decision is not final because the issue of credit remains in dispute and undecided. The alternate course of conduct is for the claimant to have judgment entered on the award in the District Court without any credit being allowed as was done in the case Krohn v. Iowa School for the Deaf, Misc. No. 57-49, Pottawattamie County District Court, which is now on appeal to the Supreme Court. Krohn involved agency file numbers 670278 and 683281. The decision of the District Court in Krohn, which held that the defendant had lost the right to seek the section 85.38(2) credit by failing to raise it as an issue at the prehearing conference is consistent with generally recognized principles of procedure. The court stated, in part:

> This court finds that the Pre-Hearing Report serves a salutory purpose of refining the issues for trial and both parties, when entering into the Pre-Hearing Report, should be bound thereby.
>
> Accordingly the state cannot be heard to say after all issues are tried and they have agreed that they do not want credits to in effect thereafter say that they then want a credit against any judgment that results. To allow such would be to allow the deputy commissioner to litigate all the known issues as agreed by the parties and if the state loses let them make an end run around the deputy's ruling and thereafter claim a credit. Under those circumstances they couldn't lose, and the Pre-Hearing Report is meaningless.

In declining to rule upon the credit issue since it was not raised at the prehearing conference, even though a ruling was requested by both parties, it is recognized that it has been held to be an abuse of discretion for a court to deny an amendment to pleadings to conform to proof where the parties voluntarily tried the issue. Mooney v. Nagel, 251 Iowa 1052, 103 N.W.2d 76 (1960). The practice of declining to permit an amendment to conform to the proof of an issue voluntarily tried seems little different from declining to rule upon an issue which was not raised at the prehearing conference but which the parties agree

and request to have decided. Since the issue of credit under 85.38(2) is not to be determined no ruling is made herein regarding the burden of raising the issue, the burden of proof of the issue, whether the failure of either party to raise the issue prevents it from being raised in the future, whether it is necessary for the claimant to again petition the agency in order to avoid having the credit be applied to her award (rightfully or wrongfully) or whether the claimant may enforce her award through section 85.42 of the Code without further litigation in the agency on the issue of the credit.

FINDINGS OF FACT

1. On January 23, 1984, Bonnie M. Bakalar was a resident of the State of Iowa, employed by the Woodard State Hospital-School in the State of Iowa.

2. On January 23, 1984, Bonnie M. Bakalar injured her back and her left leg when she slipped on ice on the employer's premises while she was performing her duties as a licensed practical nurse.

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 January 23, 1984 until July 16, 1984 when it became medically indicated that futher significant improvement from the injury was not anticipated.

4. The injury sustained by claimant consisted of initially a wrenching, twisting or strain of her spine and also of her left knee. Those initial injuries and treatment of those injuries was a substantial factor in aggravating a preexisting varicose vein condition in claimant's left leg which resulted in the development of a deep vein thrombosis in claimant's left leg.

5. Claimant is a 51 year old divorced lady who is a high school graduate.

6. Claimant is a licensed practical nurse and has experience in clerical work.

7. The injury to claimant's spine was an aggravation of preexisting conditions in her spine.

8. Prior to the injury claimant was capable of working as a LPN but the medical restrictions which have been placed upon her render her unable to perform the duties of an LPN at the Woodard State Hospital-School.

9. Claimant is limited in her ability to bend, squat, lift, carry, climb or in general perform rapid or strenuous movements.

10. Claimant's knowledge and training as a LPN and her experience in clerical work, together with her residual physical capabilities demonstrate that she has residual earning capacity.

11. When all the material factors of industrial disability are considered, it is found that claimant has sustained a 25 percent loss of earning capacity as a result of the injuries she sustained on January 23, 1984.

12. Claimant is not motivated to return to gainful employment in view of the loss of permanent disability benefits that would result if she were to do so.

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 and left leg on January 23, 1984 which arose out of and in the course of her employment with the Woodard State Hospital-School.

3. The trauma sustained on January 23, 1984 and the treatment applied are a proximate cause of the deep vein thrombosis which developed in claimant's left leg.

4. Claimant is entitled to compensation for healing period under section 85.34(1) commencing on January 23, 1984 and running through July 16, 1984. After allowing credit for amounts previously paid as stipulated by the parties, a balance of two and two-seventhes weeks of compensation for healing period remains due.

5. When all the applicable factors of industrial disability are considered, it is found that claimant has sustained a 25 percent permanent partial disability, in industrial terms, which entitles her to receive 125 weeks of compensation under section 85.34(2)(u) at the stipulated rate payable commencing July 17, 1984 as stipulated by the parties.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant two and two-seventhes (2 2/7) weeks of compensation for healing period at the rate of one hundred sixty-one and 09/100 dollars ($161.09) commencing July 1, 1984.

IT IS FURTHER ORDERED that defendants pay claimant one hundred twenty-five (125) weeks of compensation for permanent partial disability at the rate of one hundred sixty-one and 09/100 dollars ($161.09) commencing July 17, 1984.

IT IS FURTHER ORDERED that defendants pay all past due accrued 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 pay the costs of this action pursuant to Division of Industrial Commissioner Rule 343-4.33 including the following:

Dr. Summers' report	$150.00
Dr. Summers' deposition testimony	150.00
Johnson, Huney & Vaugh reporters' fees	187.56
Total	$487.56

IT IS FURTHER ORDERED that defendants file claim activity reports as requested by the agency pursuant to Division of Industrial Commissioner Rule 343-3.1.

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

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN H. BALDUS,	:	
Claimant,	:	File No. 695505
vs.	:	
GEORGE A. HORMEL & CO.,	:	R E V I E W -
Employer,	:	R E O P E N I N G
and	:	D E C I S I O N
LIBERTY MUTUAL INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Steven H. Baldus, claimant, against George A. Hormel & Co. (Hormel), employer, and Liberty Mutual Insurance Co., insurance carrier, for benefits as a result of an injury on February 17, 1982 (a memorandum of agreement was filed herein on April 22, 1982). A hearing was held in Fort Dodge, Iowa, on December 2, 1986 and the case was submitted on that date.

The record consists of the testimony of claimant and Kay Baldus; claimant's exhibits 1 and 2; and defendants' exhibits A through Y. At the hearing held on December 2, 1986, defendants objected to a portion of exhibit 1 (deposition of June Hageness taken October 16, 1986 that was designated as item 7 of the exhibit) and exhibit 2. These objections are now overruled. In defendants' post trial brief, they cite the agency to Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893 (Iowa 1980); however, the quoted portion of this decision relates to the exclusion of portions of a deposition, not an entire deposition. Defendants' argument that the entire Hageness deposition should be excluded because it is a "discovery deposition" is without merit. Claimant also filed a brief in this case.

The parties stipulated that claimant's weekly rate of compensation is $322.15; and that claimant never returned to work after his work-related injury of February 17, 1982.

ISSUES

The contested issues are:

1) Whether there is a causal relationship between claimant's injury of February 17, 1982 and his asserted disability; and

2) Nature and extent of disability; specifically, claimant argues that his injury is a whole body injury while defendants argue that claimant's disability is limited to his right upper extremity.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 43 years old. Claimant also testified that he graduated from high school in 1961, and has had eleven months of training in hairdressing but did not complete this training. He has no other technical training or formal education. He farmed at some point and has worked at a gas station. Claimant started working for Hormel in August 1971 as a laborer; he worked at Hormel until February 17, 1982. He was "officially terminated" by Hormel "52 weeks later."

Claimant testified that on February 17, 1982, he was working in the cafeteria at Hormel and was required to move tables and take the wax off the floor. On February 16, 1982, claimant and a foreman talked about a "potential [health] problem" because of claimant's job. Claimant testified that he injured his right arm on the job when he was stripping and mopping the floor. Prior to February 17, 1982, claimant did not have any restrictions due to problems with his right arm and/or right shoulder. Claimant sought medical attention because of his injury. Currently, he only goes to a doctor "if the pain gets bad." At some point, he was given a shot of cortisone in his right forearm.

Claimant testified that after February 17, 1982, he has sold cowboy boots and travels around the country in order to do so (he has had this job for about two and one-half years). The cowboy boot job has "no set method of compensation." He earned about $5,500 the first year selling boots and about $9,000 the second year. He was earning $560 per week gross at the time of his injury at Hormel. The cowboy boot job does not have any physical requirements. He has no fringe benefits and no social security taxes are withheld. He cannot afford financially to keep this job. He recently drove a grain truck and this caused "lots of problems with the right arm."

Claimant testified that he currently does not use his right arm at all unless he has to because "the minute I use it, it hurts." On February 17, 1982, claimant was training and breeding horses, but cannot now physically do these things.

Claimant testified that he was treated for arthritis in his

neck, knees, and hands in the early 1970's. He also acknowledged that he has a drinking problem and goes to AA meetings as a result. He has gone to the Mercy Pain Clinic in Des Moines. He currently is not on medication.

Claimant testified that "the pain is all one from the top of his shoulder to the forearm; it feels like one unit." His right elbow and right shoulder started hurting together. He "can't use his right shoulder at all." In January 1986, a lump (calcium deposit) started on his right shoulder. His right elbow has not improved since February 17, 1982 and is "still painful." His right forearm swells once in awhile but not his right elbow. The pain in his right shoulder is like the pain in his neck as it feels like one unit. He acknowledged that he has had pain in his neck for years.

Claimant testified that he has never been released by Dr. Birkett to return to work so he did not complete a Job Service application to help him find work. He last saw Dr. Birkett about four months prior to hearing.

Claimant acknowledged on cross-examination that Dr. Blessman of the Mercy Pain Clinic is of the opinion that claimant can work. He also stated that the Fort Dodge Hormel plant closed in June 1982 and claimant had an opportunity to transfer to the Beloit, Wisconsin Hormel plant at that time; however, he "went on disability with Hormel" instead. He was not physically able to start work at Beloit. His job at Fort Dodge had been a "handicap job" (he was on this particular handicap job for about three months prior to February 17, 1982) and Hormel did not have such a job for claimant at Beloit. For eight years prior to February 17, 1982, claimant had been on a "handicap job" of some sort.

Claimant testified that between 1983-86, he made "no placement contacts." He did not look into any educational opportunities during that period. He was last in contact with Job Service in 1983. Between January 1986 and May 1986, claimant was in Arizona selling boots. Between 1973-81, he went to Iowa City because of his neck problems and because of a problem with one of his knees. He "could not remember" whether he had problems with his right shoulder in the 1970's. Prior to February 17, 1982, claimant did not have pain to the extent he could not use his right shoulder.

On redirect, claimant testified that he did not miss any work during the twelve months prior to February 17, 1982 because of his right shoulder or right elbow.

Kay Baldus testified that she is claimant's spouse. Prior to February 17, 1982, claimant was able to do his job at Hormel and work with horses. He "did not exhibit any real problems

with his right arm" prior to February 17, 1982. After February 17, 1982, claimant was in a lot of pain. After February 17, 1982, he was "hurting" and he "couldn't move his arm when he came home." She has to turn claimant over in bed. Prior to February 17, 1982, claimant missed work because of his neck problems. For the last two years, she has not observed any improvement in claimant's physical condition; he cannot use his hands and arms a lot.

Exhibit E, page 1, dated February 22, 1974, is authored by Robert L. Rodnitzky, M.D., and reads in part:

> Your patient Steven Baldus was seen in the Neurology Out-Patient Department on February 19, 1974. This 30 year old, right handed, meat cutter suddenly became aware of neck stiffness one year ago. He stated that while at work he suddenly became unable to turn in either direction. Within three months this improved considerably. In December, 1973, his neck once again became stiff and there was difficulty in turning his head to the left and extension. Direct pain has now come to radiate somewhat into the left shoulder and the lateral aspect of the left arm. The arm pain is intermittent in nature. Additionally in December he noted the onset of a steady aching mid-lumbar pain located just to the left of the midline. The pain radiates into the left lateral thigh. There is no cough or sneeze pain. He finds that sleeping on his abdomen or his back results in worsening of the back pain. He can sleep on his side without difficulty. He denies weakness of the extremities and there has been no bowel or bladder dysfunction.
>
> The past medical history is significant in that the patient was involved in an auto accident in 1965 during which he states he hurt both arms so severely that he had to keep them motionless for one week. Family history and review of systems was not contributory to the current problem with the exception of complaint of frequent swelling of the hands and feet in the past several weeks.

Exhibit K, dated August 5, 1974, is authored by Dr. Rodnitzky, and reads in part:

> Your patient, Steven Baldus, was seen in the Neurology Out-Patient Department on August 2, 1974. Since Mr. Baldus' last visit he attempted to return to work but was unable to continue because of nausea and generally not feeling well. In regard to his cervical problem, he continues to note

mid-cervical pain radiating into the right posterior shoulder. There are no sensory symptoms and the arms are strong. He denies any dysfunction in the lower extremities with the exception of a "catch" in his right knee when initially standing.

Exhibit N (dated October 15, 1975) is authored by Dr. Rodnitzky and reads in part: "[H]e has noted some shoulder pain on the left.... It was my feeling that Mr. Baldus's [sic] shoulder pain was referred for the most part from his neck."

Exhibit T (dated February 26, 1982) is authored by Mark Fortson, M.D., and reads in part: "We feel that Mr. Baldus' right shoulder pain most likely represents right shoulder tendinitis."

Exhibit W, page 2 (dated September 27, 1982), contains Dr. Blessman's opinion that claimant can return to work. Exhibit X, page 2, contains a 19 percent impairment rating for claimant's right arm given by Thomas W. Bower, L.P.T.

Dr. Birkett's deposition taken on June 12, 1985 contains testimony on page 18 that supports claimant's material aggravation theory. Thomas Bower's deposition taken on February 11, 1986 contains testimony on page 9 that provides the basis for his 19 percent impairment rating.

Dr. Blessman's deposition contains the following opinion at page 22 thereof:

> I think it was my opinion, at least, that the reason for his failure to respond was that he had the problem of alcoholism that was aggravating any long term or chronic pain problem that may have been there.
>
> Q. Okay. Upon discharge then, did you obtain a final diagnosis at that time?
>
> A. Yes.
>
> Q. What was that diagnosis?
>
> A. His final diagnosis would have been tendonitis of the elbow and alcoholism.
>
> Q. All right. There are references in this letter, and this will be put into evidence, anyway, but to attempts to refer him to various groups for assistance in dealing with his alcohol addiction. Do you know or have any information as to whether any follow-up was made by Mr. Baldus subsequent to

his discharge from the Pain Center?

A. Up until the time of discharge, he was into a lot of denial that he needed comprehensive treatment for his alcoholism and did not follow through with recommendations.

Exhibit 1 contains a letter dated July 16, 1982, which is authored by W. Leimbach, M.D., that reads in part: "We feel that Mr. Baldus has a lateral epicondylitis as a cause of his right elbow pain."

APPLICABLE LAW AND ANALYSIS

The claimant in this case bears the burden of showing that "there resulted an ailment extending beyond the scheduled loss...." Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 1262, 130 N.W.2d 667, 669 (1964). This is a question of fact determined from the record. Id. at 1257, 130 N.W.2d at 669. The Iowa Supreme Court held that such a showing had been made in Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). There the court stated that:

> [W]hile the trauma, the injury, was limited to the right foot, the Commissioner found claimant, as a result thereof, was affected with an ailment that extended beyond the scheduled loss of a foot, or the use thereof. The schedule is not applicable.

Id. at 292, 110 N.W.2d at 664.

The Iowa court reached a similar conclusion in Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). In Dailey, the claimant sustained an injury to his right femur. This injury caused a shortening of the leg, which in turn resulted in a tilting of the pelvis and curvature of the spine, Id. at 763, 10 N.W.2d at 571. On the basis of this evidence, the court held that claimant's initial scheduled injury resulted in a nonscheduled permanent ailment, and that he was entitled to nonscheduled permanent disability benefits. Id. at 765, 10 N.W.2d at 573-74.

The Iowa Court of Appeals stated in Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890, 893 (Iowa App. 1983):

> The statute which confers the right to collect disability compensation can also limit the amount of compensation payable for specifically enumerated disabilities. Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W.2d 660, 662 (1961). Thus, Iowa Code § 85.34(1) provides a statutory compensation schedule for the loss of specifically

enumerated members. "The very purpose of the schedule is to make certain the amount of compensation in the case of specific injuries and to avoid controversies." Dailey v. Pooley Lumber Co., 233 Iowa 758, 760, 10 N.W.2d 569, 571 (1943).

If a claimant's impairment is limited to a scheduled member "we are not concerned with the question of the extent of disability. The compensation in that event is definitely fixed according to the loss of use of the particular member." Dailey, 10 N.W.2d at 571. See also Graves v. Eagle Iron Works, 331 N.W.2d 116, 118-119 (Iowa 1983). "[W]here the result of an injury causes the loss of a foot, or eye, etc., such loss, together with its ensuing natural results upon the body, is declared to be a permanent partial disability and entitled only to the prescribed compensation." Barton, 253 Iowa at 290, 110 N.W.2d at 663. (Emphasis added.)

In the instant case, claimant's impairment that resulted from his injury of February 17, 1982 is clearly limited to the right upper extremity. Claimant has therefore failed to establish by a preponderance of the evidence that his injury is an "unscheduled" injury. See Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834, 835 (Iowa 1986). Claimant's neck and shoulder problems were present prior to February 17, 1982; that is, claimant's injury of February 17, 1982 did not cause his neck and shoulder problems nor does the evidence of record support the conclusion that this injury materially aggravated claimant's preexisting neck or shoulder problems.

Claimant is entitled to 47.5 weeks of permanent partial disability benefits commencing on October 20, 1982 based on the 19 percent impairment rating of record. See Iowa Code section 85.34(2)(m) (this subsection determines the amount of compensation to be paid because of an injury to a claimant's right upper extremity).

FINDINGS OF FACT

1. On February 17, 1982, claimant injured his right upper extremity while working for Hormel stripping wax from floors and mopping floors.

2. The physical impairment from claimant's injury of February 17, 1982 did not extend beyond his right arm.

3. Claimant had neck and shoulder problems prior to his February 17, 1982 injury and this injury did not cause claimant to have neck or shoulder problems nor did it materially aggravate his preexisting neck or shoulder problems.

4. Claimant reached maximum healing on October 19, 1982.

5. Claimant's stipulated weekly rate of compensation is three hundred twenty-two and 15/100 dollars ($322.15).

CONCLUSIONS OF LAW

1. Claimant established by a preponderance of the evidence that his injury of February 17, 1982 caused some physical impairment.

2. Claimant failed to establish by a preponderance of the evidence that he sustained a whole body injury.

3. Claimant established entitlement to healing period benefits from February 17, 1982 through October 19, 1982 and then forty-seven point five (47.5) weeks of permanent partial disability benefits commencing on October 20, 1982 at a rate of three hundred twenty-two and 15/100 dollars ($322.15).

ORDER

That defendants pay the weekly benefits described above at a rate of three hundred twenty-two and 15/100 dollars ($322.15).

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 7th day of January, 1987.

T. J. McSWEENEY
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KARL BARKDOLL,

Claimant,

vs.

AMERICAN FREIGHT SYSTEM, INC.,

Employer,
Self-Insured,
Defendant.

FILE NOS. 816913 & 778471

A R B I T R A T I O N

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Karl Barkdoll, claimant, against American Freight System, Inc., a self-insured employer, hereinafter referred to as American Freight, defendant, for workers' compensation benefits as a result of alleged injuries on April 11, 1984 and August 30, 1984. On February 25, 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 two separate events, he injured his head, upper back, right shoulder, right arm and hand from a fall while working for American Freight. Claimant seeks temporary total disability or healing period benefits during his recovery from the claimed injuries and permanent partial disability benefits arising from alleged permanent physical impairment. In addition, claimant is seeking reimbursement for certain medical expenses. Defendant denies that the injury resulted in temporary or permanent disability and contests the appropriateness of certain medical expenses incurred by claimant.

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 John Kesenich. 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 April 11, 1984 and on August 30, 1984, claimant received injuries which arose out of and in the course of his employment with American Freight; (2) claimant seeks temporary total

disability or healing period benefits from March 20, 1985 through April 30, 1985 and claimant was off work for that period of time; (3) claimant's rate of weekly compensation in the event of an award of benefits from this proceeding shall be $275.37; and, (4) the physicians who provided medical services to claimant for which defendant refuses to pay would testify that their charges for such services are fair and reasonable and defendant is not offering contrary evidence.

The prehearing reports submit 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 and 85.39.

FINDINGS OF FACT

1. Claimant was a credible witness.

Claimant's appearance and demeanor at the hearing indicated that he was testifying in a candid and truthful manner.

2. Claimant was employed by Amercian Freight from July, 1970 until October, 1985.

There was no dispute that claimant's duties at American Freight involved freight handling and truck driving. The truck driving was limited to occasional local freight delivery. Freight handling was claimant's primary job. The weight of the freight that was handled by claimant ranged from only a few pounds to over 1,000 pounds. Claimant used lift trucks and other devices to handle the heavier freight. The freight also came in different sizes and shapes such as barrels, pipes, rolls of carpet and large pieces of equipment. When claimant delivered freight, he would use a large straight truck or a tractor-trailer semi with a short trailer. Aside from repetitive bending and lifting, claimant testified that this job also required balancing, kneeling and crawling to properly handle the freight. Claimant was customarily paid $13.21 per hour over a 40 hour week.

3. On April 11, 1984 and on August 30, 1984, claimant suffered an injury to his head, right shoulder, upper back and right arm which arose out of and in the course of his employment with American Freight.

Claimant's credible testimony and the consistent histories

he provided to his physicians in this case established that he injured his head, right shoulder, upper back, right arm and right hand on two occasions while working as a freight handler for American Freight. Claimant testified that in April, 1984, while attempting to unhook a trailer from a truck-tractor, a step on the tractor broke and he fell two feet to the ground on his right side. The pain in the right shoulder and arm persisted after this incident and he saw a Michael Stark, D.O., the company doctor. After x-rays, Dr. Stark told claimant to simply go home and take it easy for a while. Claimant continued working but continued to experience some pain and missed a few days of work over the next couple of months. On August 30, 1984, claimant was unloading a trailer and a 30 pound box fell on his right shoulder and arm. Claimant testified that he again felt severe pain in his right shoulder and arm. He then attempted to return to Dr. Stark but became angry about having to wait more than an hour for the appointment and went to his own family doctor, Yang Ahn, M.D., Dr. Stark's associate at MediCenter West in Cedar Rapids, Iowa. Dr. Ahn told claimant to take a week off from work and return to his office. After this week of rest, claimant's condition remained unchanged and Dr. Ahn referred claimant to an orthopedic surgeon, W. J. Robb, M.D.

4. The work injury of August 30, 1984 was a cause of a temporary period of total disability while claimant was recovering from the injury from October 8, 1984 through April 18, 1985.

Claimant was first seen by Dr. Robb on October 9, 1984 with complaints of neck and right shoulder pain radiating into his right arm and numbness and tingling in his right fifth ring finger. Upon a diagnoses of a sprain to the cervical spine and probable protruded disc at the C-6 level, Dr. Robb treated claimant with a cervical collar, intermittent traction, physical therapy, ultrasound therapy and medication over the next several months. Although claimant's condition improved to a limited degree, Dr. Robb concluded on April 18, 1985, that claimant would not be able to return to his job at American Freight and gave claimant a permanent impairment rating to his right upper extremity. Another physician, Richard Neiman, M.D., who specializes in neurology, reported that he examined claimant in May, 1984, and likewise felt that claimant's condition was permanent at that time. Therefore, maximum healing from the work injury occurred at the time claimant's condition was first considered permanent by his treating physician, Dr. Robb, on April 18, 1985.

Defendant appears to contend that claimant had returned to work at some point in time earlier than May, 1985. Claimant owns and operates a caterpillar and a backhoe used in earth moving projects. Claimant testified that he has owned this equipment for some time and has not used this equipment extensively in recent years. Claimant testified that he only earned a few hundred dollars a year in this endeavor. The evidence does not

indicate that claimant was performing any of this work before April 18, 1985.

Dr. Neiman suggested that claimant receive a myelogram and surgery if necessary to correct a probable herniated cervical disc. Claimant refused this treatment and desires rather to live with the pain. The physicians in this case feel that claimant has made a reasonable decision in this regard given the risk of such tests and surgery.

5. The work injury of August 30, 1984 was a cause of significant permanent partial impairment to claimant's body as a whole.

Claimant established by his testimony and the lack of contrary medical evidence that he had no neck, back, shoulder or arm difficulties or functional impairment before April, 1984. Dr. Robb does not give a specific opinion concerning the causal connection of claimant's permanent impairment to the work injuries but his reports describe a constant pattern of treatment stemming from the last incident on August, 1984. Dr. Neiman states that according to the history he took from claimant, the permanent impairment was caused by the August, 1984, injury as the earlier injury in April appeared minor. A third opinion was obtained from John Walker, M.D., an orthopedic surgeon from Waterloo, Iowa. Dr. Walker connects both work injuries to permanent impairment, however, the greater weight of the evidence presented demonstrates that only the later injury in August of 1984 was a cause of claimant's permanent functional impairment.

Dr. Robb rates claimant as suffering from a 10 to 15 percent permanent partial impairment to the right arm due to secondary radiculitis and involvement of the nerves of the right shoulder and arm. Dr. Neiman rates claimant under orthopedic guidelines as suffering from a 15 percent permanent partial impairment of the body as a whole as the result of a probable disc problem. Dr. Neiman restricts claimant's work activity to light duty with lifting under 20 pounds. However, occasional lifting in the 20 to 50 pound range would not be a problem for claimant. According to Dr. Neiman claimant should avoid repetitive bending, stooping or lifting. Dr. Walker concurs with Dr. Neiman's permanent partial impairment rating to the body as a whole but believes that only seven percent of this rating is attributable to the two work injuries. Claimant's credible testimony established that prolonged sitting is likewise intolerable to him due to shoulder pain and his headaches. Dr. Robb causally relates these headaches to the cervical back problem.

The extent of claimant's functional impairment is tempered to some degree but his demonstrated ability to operate heavy earth moving equipment such as his caterpillar and backhoe. This type of equipment requires the extensive use of this hands and arms, prolonged sitting and bouncing. However, claimant's

credible testimony also established that he performs such activity only in a very limited manner.

6. The work injury of August 30, 1984 was the cause of a 40 percent permanent loss of earning capacity or industrial disability.

As a result of his functional impairment and physician imposed restrictions, claimant is unable to return to the work he was performing at the time of the work injury. Claimant's employment before working for American Freight primarily consisted of over-the-road trucking. It is the experience of this agency that such work many times involves the responsibility to load and unload cargo. However, it is also the experience of this agency that there are trucking jobs which do not require unloading and that persons are many times available at delivery points to load or unload cargo for drivers. Also, claimant is able to use his hands and arms and sit for long periods of time in the operation of his caterpillar and backhoe. However, trucking requires prolonged sitting and the use of hands and arms constantly, hour after hour, week after week, year after year which claimant cannot do. Therefore, claimant has demonstrated an inability to return to over-the-road trucking. Claimant's only work experience involves manual labor and trucking, the work he can no longer perform.

Claimant has suffered a significant loss in actual earnings from employment due to his work injury. His only earnings at the present time involve a few part-time jobs operating his caterpillar and backhoe. This type of work has only yielded a few hundred dollars of earnings each year primarily because his disability prevents him from becoming more involved in such activity.

Claimant is 59 years of age, and has only a sixth grade education. As claimant is close to normal retirement age, his loss of earning capacity as a result of his disability is not as great as that of a younger person.

Claimant has demonstrated above average intelligence at the hearing and a willingness to try a new endeavor such as computer work. However, it is quite unusual for a person to spend hundreds of dollars on computer equipment and nothing on the training that will be necessary to properly operate and secure employment in the area of computers. Apparently, computers are more of a hobbie than a real attempt at vocational rehabilitation.

Claimant has limited potential for successful vocational rehabilitation due to his lack of formal education and a manual labor background.

8. Treatment of the work injury by claimant's family physician, Dr. Ahn, in October, 1984, was not authorized by defendant.

Although treatment from Dr. Ahn was necessary and reasonable treatment, it was not authorized by defendant. Defendant had admitted to a work injury before this time. Claimant's impatience with Dr. Stark after the second injury was not reasonable.

9. Claimant traveled 160 miles in an attempt to obtain treatment from Dr. Stark, an employer authorized physician, in October of 1984.

In support of his medical mileage request, claimant testified that he traveled to Dr. Stark's office twice and incurred an auto expense of 460 miles. Any treatment by Dr. Stark was authorized by defendant at the time.

10. The fee charged by Dr. Walker for an independent disability evaluation in August, 1985, in the amount of $631 is fair and reasonable.

Dr. Robb as the employer retained physician first evaluated claimant's disability in April, 1985. Another employer retained physician, Dr. Neiman, rated claimant's disability in May, 1985. Claimant was dissatisfied and sought the opinion of Dr. Walker as to the extent of his disability. This independent evaluation was approved by order of this agency in July, 1986. Defendant stipulated that Dr. Walker would testify that his fee was reasonable and that they are not offering any contrary evidence. Consequently, the fee is found to be reasonable.

CONCLUSIONS OF LAW

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

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be awarded without a showing of a causal connection to a physical change of condition. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

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

In this case, claimant argued that the work injury compelled claimant to retire early and that his pension would have been much higher had he been able to retire at the normal retirement age. Claimant contends that this fact should be taken into consideration in any award of industrial disability benefits. Defendant argues that the existence of a pension or the lack thereof is irrelevant to the concept of industrial disability in this state and that if anything the trend in other states is either legislatively or by judicial decision is to lower disability benefits to prevent multiple receipt of benefits under various federal and state benefit programs. The contentions of defendant are much more convincing. The allowant of a pension is not one of the factors of industrial disability delineated by the courts of this state and the industrial commissioner. Also, if there are compelling reasons for some sort of offsetting to occur to prevent multiple receipt of disability benefits, this should be done by the state legislature or the courts, certainly not by an administrative agency without statutory authority to do so.

Based upon the finding of a 40 percent loss of earning capacity or industrial disability as a result of an injury to the body as a whole, claimant is entitled as a matter of law to 200 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 40 percent of the 500 weeks allowable for an injury to the body as a whole in that subsection.

III. Employers are obligated to furnish all reasonable medical services for treatment of a work injury under Iowa Code section 85.27 and only reasonable fees are to be reimbursed for such services and for any independent disability evaluation under Iowa Code section 85.39.

First, defendant admitted to a work injury in this case and consequently had the right to choose the medical care under Iowa Code section 85.27. Kindhart v. Fort Des Moines Hotel, Appeal Decision, Filed March 27, 1985. As the services of Dr. Ahn were not authorized and it was found that claimant's impatiences with Dr. Stark was unreasonable, claimant is not entitled under law to reimbursement for the $40 expense he incurred with Dr. Ahn

despite the fact that such services were probably reasonable.

Second, claimant's travel to and from Dr. Stark's office in October, 1984, totalling 160 miles is a valid medical expense and he should receive mileage reimbursement pursuant to Division of Industrial Services Rule 343-8.1 at the rate of $.24 per mile or a total of $38.40.

Third, the only issue that remains to be decided after an order from this agency approving an independent examiner under Iowa Code section 85.39 is the reasonableness of the fee charged. The finding that such a fee is reasonable under the party's stipulation in the prehearing report entitles claimant to full reimbursement of the fee charged in the amount of $631.00.

Claimant seeks taxation of costs in this proceeding pursuant to Division of Industrial Services Rule 343-4.33 and the parties stipulated that claimant was paid the amounts listed in the attachment to the prehearing report. Therefore, claimant is entitled to taxation of all amounts listed in the total amount of $95.50.

ORDER

IT IS THEREFORE ORDERED as follows:

1. Defendant shall pay to claimant two hundred (200) weeks of permanent partial disability benefits at the rate of two hundred seventy-five and 37/100 dollars ($275.37) per week from April 19, 1985.

2. Defendant shall pay to claimant healing period benefits from August 30, 1984 through April 18, 1985 at the rate of two hundred seventy-five and 37/100 dollars ($275.37) per week.

3. Defendant shall pay to claimant the following medical expenses: medical mileage, thirty-eight and 40/100 dollars ($38.40); and the fee for Dr. Walker's exam, six hundred seventy-one and no/100 dollars ($671.00).

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

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

6. Defendant shall pay the cost of this action pursuant to Division of Industrial Services Rule 343-4.33 and specifically the sum of ninety-five and 50/100 dollars ($95.50) is taxed against the defendant for costs setforth in the attachment to the prehearing report filed in this proceeding.

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

Signed and filed this 13 day of May, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CRAIG S. BARKER, Claimant, vs. DWAIN JOHNSON TRUCKING, Employer, and CIGNA, Insurance Carrier, Defendants.	FILE NO. 742287 A R B I T R A T I O N D E C I S I O N FILED FEB 18 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Craig S. Barker, claimant, against Dwain Johnson Trucking, employer, and CIGNA, insurance carrier, for benefits as a result of an alleged injury on August 14, 1983. A hearing was held on October 14, 1986 at Davenport, Iowa and the case was fully submitted at the close of the hearing. The record consists of joint exhibits A through M, claimant's exhibits 1 and 2, and defendants' exhibit N; the testimony of Craig S. Barker (claimant); Mary Ann Buck (vocational rehabilitation counselor) and Marla Torgerson (senior rehabilitation specialist).

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 injury.

That the claimant sustained an injury to his left leg on August 14, 1983 which arose out of and in the course of his employment with the employer.

That the left leg injury was the cause of some temporary disability.

That the claimant is married and entitled to four exemptions.

That all requested medical benefits have been or will be

aid by the defendants.

That the defendants have paid the claimant 167 1/7 weeks of compensation at the rate of $246.79 per week prior to the hearing commencing on August 15, 1983 and continuing through September 29, 1986.

That the claimant is entitled to the costs in the amount of $206.60 for reports from Jane Lamb Health Center in the amount of $40.00 and a transcript from Reporting Services in the amount of $166.60 in the event of an award. This written stipulation is included as part of the record.

ISSUES

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

Whether the claimant received an injury to his back on August 14, 1986 which arose out of and in the course of his employment with the employer.

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

Whether the injury to the left leg was the cause of any permanent disability.

Whether the claimant is entitled to either temporary or permanent disability benefits for either the injury to the left leg or the alleged injury to the back and, if so, the nature and extent of benefits.

Whether the claimant is an odd-lot employee.

What is the proper rate of weekly compensation.

SUMMARY OF THE EVIDENCE

Claimant is 32 years old and married but a dissolution is pending. He has two dependant children, one from the current marriage and one from another marriage. Claimant finished seventh grade but obtained his GED two weeks prior to the hearing. Past employments include dispatcher for his father's taxi business; scale operator and barge loader; grain truck driver; over-the-road truck driver hauling beer, meat, produce, gasoline and liquid fertilizer; and also pipe fitter for a short period of time. Claimant's non-employment talents also include auto body repair, diesel maintenance and engine mechanics. He has not attended any trade schools. He has been steadily employed since he was 16 years of age up until the time of this injury.

Claimant began working for defendant on or about June 2, 1983 as an over-the-road truck driver. The typical run was from Chicago to California and back to Chicago. Claimant was injured in a motor vehicle accident with a pickup truck which was pulling a boat and trailer about three miles west of Cheyenne, Wyoming on August 14, 1983 while returning from California. Claimant testified that he was driving east on Interstate 80 in the right hand lane. A second vehicle was also proceeding east in the left hand lane. A third vehicle, a pickup truck, pulled out onto the highway from the right shoulder. Claimant had no place to go. The front of the claimant's vehicle hit the rear of the pickup. The impact caused the bumper of his truck to press against the wheel which locked the steering. As a result his truck rolled over a number of times and came to rest upside down.

Claimant testified that after the accident he was hurt all over. When he first tried to stand up he fell down again. More specifically, he received a cut and bruise on his throat, his back hurt, his left leg was injured, his right hand was swollen, and he received an eight inch gash on his left shoulder. He was taken by ambulance to a hospital in Cheyenne, Wyoming where he received emergency treatment. They put a splint on his leg and released him. Claimant declined to see an orthopedic surgeon in Cheyenne but opted instead to fly back home to Clinton, Iowa. The ambulance record and the record of the emergency treatment at Cheyenne were not introduced into evidence by either party.

Back in Clinton claimant went to see his own personal physician, Frank B. Rogers, M.D. Claimant saw Dr. Rogers on August 17, 1983, August 22, 1983 and August 29, 1983. Dr. Rogers aspirated a red, but clear liquid from claimant's left knee and referred him to Jay P. Ginther, M.D., a board certified orthopedic surgeon since 1979. Claimant further testified that he saw Dr. Rogers one more time later for his back on April 25, 1984 because Dr. Ginther would not look at his back. Dr. Rogers indicated that claimant's injuries were to his right hand, left knee, left jaw, and right side of the neck. The back is not mentioned. An x-ray of the left knee showed no fracture (Joint Exhibit D).

Claimant testified that he told Dr. Ginther about all of these injuries, but Dr. Ginther said the leg had to be fixed first. Claimant stated that Dr. Ginther performed surgery on his left knee at Jane Lamb Hospital in Clinton, Iowa and that Dr. Ginther was his main treating physician in 1983, 1984, 1985 and 1986.

Dr. Ginther's notes indicate that he first saw claimant on August 31, 1983. He performed an arthroscopy on the left knee on September 6, 1983. Dr. Ginther said that this surgical procedure revealed, (1) a bucket handle tear of the medial

meniscus, which was repaired; (2) a partial tear of the anterior cruciate ligament which did not lend itself to repair; and (3) a finding of some scar tissue (fibrotic material) on the medial shelf which was also repaired. While under anesthesia the joint was stressed and the only ligament damage that was documented at that time was anterior cruciate ligament tear (Jt. Ex. B, page 13; Jt. Ex. I, pages 4-6).

Near Christmas in 1983, claimant's car got stuck in the snow and he jogged on his knee due to the 80 degree below zero windchill factor. There was also evidence that he attempted to push a stalled vehicle. However, Dr. Ginther said that these events may have caused a setback, but they did not significantly effect the claimant's knee condition or change the ultimate outcome (Jt. Ex. B, p. 1; Jt. Ex. I, p. 8).

Dr. Ginther reported on April 11, 1984, that claimant's condition was unchanged. He stated that claimant was not making progress and it may be time to give him a rating (Jt. Ex. B, p. 11). This office visit on April 11, 1984 is also the first time that Dr. Ginther's notes revealed any evidence of back symptoms. The note says that claimant mentioned pain down his right leg starting in the low back. Dr. Ginther said he would start some lumbar conditioning exercises for that (Jt. Ex. B, p. 11). Claimant had seen Dr. Ginther approximately 17 times over a seven month period before the first back complaint was mentioned on April 11, 1984. Claimant also received physical therapy treatments approximately 14 times beginning on October 20, 1983 (Jt. Ex. E, p. 49) before he first mentioned back pain in these notes on April 10, 1984 (Jt. Ex. E, p. 55).

Dr. Ginther's office notes show that the back was not mentioned again until four office visits and four months later on August 13, 1984. At that time claimant reported radiation down both legs. The note says that claimant indicated he was having some problem with his back from the time of the injury, but that it was a relatively minor thing until just recently. Claimant requested Dr. Ginther to have him evaluated by another physician (Jt. Ex. B, p. 10). Dr. Ginther then sent claimant to Lynn D. Kramer, M.D., a neurologist at Dubuque. Dr. Ginther had no recollection of treating the claimant's back prior to that time (Jt. Ex. I, pp. 8 & 9).

In a letter to the insurance company dated October 5, 1984, Dr. Ginther stated: "He reported to me on 13 August that the back had bothered him from the very beginning, although he had not made a point of it in the previous year, and that now it was becoming the major factor." (Jt. Ex. B, p. 2)

Dr. Kramer saw claimant on August 23, 1984. X-rays and EMG studies disclosed a normal lumbar spine and gave no evidence of a herniated nucleous pulposis or herniated disc. Dr. Kramer's

only objective physical finding was a reduced ankle jerk bilaterally, more so on the left than on the right, that might be suggestive of central herniation at L5-S1. Dr. Ginther ordered a CT scan to rule this out. The CT scan read normal also. Then an enhanced CT scan and a myelogram were ordered and they read as normal also (Jt. Ex. B, p. 10; Jt. Ex. C; Jt. Ex. I, pp. 9 & 10; Jt. Ex. E, p. 59; and Jt. Ex. E, pp. 26-28 & pp. 35 & 36). Dr. Ginther agreed that the only objective finding for the claimant's back pain was absent left ankle reflex (Jt. Ex. I, pp. 22 & 26).

Dr. Ginther than speculated and worked under a presumptive diagnoses that the back and down the leg symptoms might be coming from scarring in the epidural space (Jt. Ex. I, p. 23). Claimant was administered some epidural steriod injections by Hong Choi, M.D., (Jt. Ex. E, pp. 6-11 & 15-18). These injections provided only minimal improvement and were discontinued (Jt. Ex. I, pp. 10 & 11). A TENS unit was tried and did provide significant improvement (Jt. Ex. B, p. 8; Jt. Ex. I, p. 11).

Dr. Ginther's office notes reflect some improvement on March 7, 1985, March 20, 1985 and April 22, 1985 (Jt. Ex. B, p. 8; Jt. Ex. I, pp. 12 & 13). On May 22, 1985, Dr. Ginther said claimant had some persistent spasm in his back, but no other demonstrable finding other than absent ankle jerk. At that time he assessed an impairment rating of five percent of the body as a whole on the claimant's back (Jt. Ex. B, p. 6; Jt. Ex. I, p. 13). On May 31, 1985, Dr. Ginther rated the left knee at 17 percent of the left lower extremity. He also recommended that claimant be retrained for an occupation that did not require as much physical activity as truck driving (Jt. Ex. B, p. 6; Jt. Ex. I, pp. 13 & 14). Dr. Ginther did not think claimant could do the job of an over-the-road trucker anymore (Jt. Ex. I, p. 17).

Claimant saw Dr. Ginther two more times after that. On September 3, 1985, Dr. Ginther saw him for a three month checkup. No improvement was reported. On March 7, 1986, Dr. Ginther indicated there was very little progress and little hope of progress (Jt. Ex. B, p. 3).

Dr. Ginther did refer claimant to the University of Iowa Hospitals and Clinics for an evaluation by Dr. Albright (full name unknown) of his left knee problems because the claimant's knee continued to buckle causing the claimant to fall. The knee also continued to be very painful. In the latter part of 1985, the claimant fell and fractured his right ankle and was treated by Charleton H. Barnes, M.D., an associate of Dr. Ginther (Jt. Ex. B, p. 5). Dr. Albright saw the claimant on February 3, 1986. He could not determine the etiology of the left knee pain. He did feel that the anterolateral rotatory instability could possibly be improved by some physical therapy exercises (Jt. Ex. A). However, Dr. Ginther did not think that Dr. Albright's regimen of physical training exercises was likely to change things much (Jt. Ex. I, p. 16).

At his deposition Dr. Ginther was asked about the probable cause of the claimant's knee and back problems and replied as follows:

> A. The knee very clearly would be related to the accident in August of '83. And based upon the patient's statement that the back condition started at that time, the back would also be related. (Jt. Ex. I, p. 18)

Defendants had claimant examined by John E. Sinning, Jr., M.D., an orthopedic surgeon on August 28, 1986 and by Dr. Sinning's associate, Charles T. Cassel, M.D., who is also an orthopedic surgeon who specializes in knee ligaments (Jt. Ex. K). Dr. Sinning made the following statement at the end of his examination as to the back and the left knee:

> IMPRESSIONS: No impairment of function of the back. No physical impairment, no consistent pattern of pain suggesting impairment and no x-ray evidence of abnormalities.
>
> Regarding the left knee, strong suggestion of posterior cruciate injury with posterior and posterolateral rotary instability. (Jt. Ex. K, p. 3)

Dr. Cassel examined for the knee only on October 6, 1986 and gave the following diagnosis:

> DIAGNOSIS: Left chronic posterior cruciate ligament tear with secondary laxity of the posterior lateral corner. 2) Patella femoral chondrosis, bilaterally, left greater than right, left side is secondary to the chronic posterior cruciate ligament laxity and the posterior sag of the tibia on the femur. (Jt. Ex. K, p. 5)

Dr. Cassel recommended surgery for the posterior ligament tear provided claimant makes the necessary physical buildup recommended prior to surgery and provided that surgery is still indicated after a bone scan and a presurgical arthroscopy (Jt. Ex. K, p. 5).

Claimant had not decided whether or not to elect to have the additional surgery at the time of the hearing. Claimant testified and Dr. Ginther's notes indicate that claimant is suspicious of surgery and generally opposed to it. Dr. Sinning testified claimant was suspicious of surgery because at the University of Iowa they discussed surgery but they would not give him any

guarantee of success (Jt. Ex. M, pp. 29, 34 & 35). However, claimant had taken the bone scan test prior to the hearing and was planning on taking the physical therapy exercises to build up his quadriceps.

Dr. Sinning testified by deposition on October 9, 1986 (Jt. Ex. M). He stated that he has been a board certified orthopedic surgeon for over 20 years since 1965. He examined and evaluated claimant on August 28, 1986 as well as all or most of the available medical data at that time. Dr. Sinning pointed out that there was nothing in Dr. Rogers' notes (Jt. Ex. D) that indicated that the claimant had any back pain (Jt. Ex. M, p. 6). There is nothing in Dr. Ginther's notes from his initial visit on August 31, 1983 that comment at all about the back (Jt. Ex. M, pp. 6 & 7). Dr. Sinning testified that claimant told him that Dr. Ginther told claimant to first worry about his leg and then take care of his back (Jt. Ex. K, p. 1; Jt. Ex. M, p. 8). Dr. Sinning related that he found significant discrepancies in claimant's history and medical records that he examined in that claimant did not complain about his back until April of 1984 (Jt. Ex. M, p. 10). The doctor examined his back somewhat extensively including an x-ray of his back and found that his back was normal (Jt. Ex. K, p. 3; Jt. Ex. M, pp. 11-13). Dr. Sinning's opinion on causal connection and impairment with respect to the claimant's back is expressed in the following dialogue:

Q. Okay. Now, doctor, based on the same information, do you believe -- do you have an opinion within a reasonable degree of medical certainty as to whether or not Mr. Barker sustained an injury to his back on August 14, 1983, as a result of the vehicular accident that was described to you?

A. Yes.

Q. And what's that, sir?

A. It's my opinion that the record does not support any thought that he injured his back in that accident.

Q. And, doctor, could you give us your rationale for that position?

A. We have the record of two doctors, both of whom described Mr. Barker's complaints in detail. Neither of those doctors mention any complaint about the back. The first record that we have about any back complaint is in April, 1984, so many months after the accident that it's too far away to consider that the accident had any affect on his back.

Q. Doctor, regardless of cause, does Mr. Barker have any impairment to his back?

A. No.

(Jt. Ex. M, pp. 13 & 14)

Dr. Sinning would not place any physical restrictions on claimant due to his back complaints (Jt. Ex. M, p. 26). Dr. Sinning did not find an absent ankle reflex as reported by Dr. Kramer (Jt. Ex. M, p. 29).

Dr. Sinning speculated that since claimant had treated with Dr. Rogers for complaints of back pain, hip pain and pain down the right leg on October 11, 1982 which was prior to the motor vehicle accident, than it was just a matter of time until he had a recurrence of this back pain. With an absolute lack of physical findings, no consistent pattern of pain that suggests impairment, no x-ray evidence of abnormalities and the failure of the problem to respond to any of the treatment for it, makes if difficult to support the thought that his back was injured in the accident (Jt. Ex. M, p. 15). Furthermore, claimant was unable to relate his back complaints with any particular events or activities including the buckling of the knee (Cl. Ex. M, p. 40). Dr. Sinning felt that his back had simply become the focal point for the stress and misery he has suffered because of the knee injury and his long and difficult recovery from the knee injury (Jt. Ex. M, p. 15).

As for the left knee, Dr. Sinning observed that the tibia was posterior to its normal position in relation to the knee and the femur in what he described as a sag position. Dr. Sinning could pull it forward to normal position, but it would slide back when he would release it. This is a characteristic finding for an injury to the posterior cruciate ligament. X-rays confirmed the relative posterior displacement of the tibia in relation to the femur. Dr. Sinning's formal diagnoses was posterior cruciate ligament injury of the left knee with secondary laxity of the posterior lateral corner. This injury is consistent with the accident of August 14, 1983 and Dr. Sinning believed there was a cause and effect relationship (Jt. Ex. M, pp. 16-19). He felt that the motor vehicle accident has to be considered the most likely cause (Jt. Ex. M, p. 45).

Dr. Sinning testified that Dr. Cassel agreed but prior to any surgical reconstruction there were three requirements; (1) claimant would have to build up his quadriceps; (2) a diagnostic arthroscopy would be necessary to determine the condition of the surfaces within the knee; and (3) a bone scan was required to determined the extent of early arthritis in the knees. Dr. Cassel

would be the knee surgeon. There is about a 70 percent success rate in restoring stability to the knee (Jt. Ex. M, pp. 22-25). Dr. Sinning testified that the claimant's current left knee impairment rating based on the AMA Guides to the Evaluation of Permanent Impairment is 25 percent of the left lower extremity because of the instability due to a posterior cruciate loss. If the knee is surgically repaired the impairment might be a little less, because he would expect a stable knee but he would also sacrifice some range of motion. He estimated that a 20 to 25 percent permanent impairment rating would be a reasonable range after the surgery (Jt. Ex. M, pp. 25 & 26).

On the issue of maximum medical improvement, Dr. Sinning testified as follows:

> Q. Doctor, again you've reviewed the records concerning Mr. Barker's past medical care and treatment and, of course, have visited with him and conducted an examination. Do you have an opinion within a reasonable degree of medical certainty as to when Mr. Barker may have reached his maximum recuperation from the injuries suffered August 14, 1983?
>
> A. Yes, I do.
>
> Q. And what's that, sir?
>
> A. I think he reached his maximum recovery in the late winter or early spring of 1984.
>
> Q. And, doctor, what's your rationale for that position?
>
> A. It was during that time that his knee seemed to have reached its maximum recovery in terms of his ability to handle weights. He suffered a temporary setback when his car was stuck Christmas Eve 1983 and he had to push the car out of a snowdrift; but he seemed to have -- he got over that setback. He was doing well on his weight lifting and from that point on the knee never really changed.
>
> Q. Now, doctor, would you at that time have recommended that Mr. Barker return to driving truck?
>
> A. Yes.
>
> Q. And would there have been some restrictions, though, however?

A. Yes.

Q. And what would those have been, sir?

A. The restrictions would have been that he could have been, but that he would not have been able to handle loading and unloading beyond light weight over level surfaces.
(Jt. Ex. M, pp. 27-29)

Dr. Sinning could not explain why Dr. Ginther, Dr. Kramer and Dr. Albright failed to diagnose posterior cruciate ligament injury unless it may not have been as fully apparent earlier in his treatment (Jt. Ex. M, pp. 35 & 36). Dr. Sinning felt that the term epidural scarring was used here because Dr. Ginther could not identify anything else. Dr. Sinning found no evidence of epidural scarring (Jt. Ex. M, p. 44). He believed the steroid injections of cortisone were used as a treatment for low back pain in which no real cause can be found but disc degeneration or herniated disc was suspected (Jt. Ex. M, p. 38). He said the knee did not cause a back injury but might cause some temporary soreness (Jt. Ex. M, p. 40).

The restrictions placed on claimant due to his left knee are: (1) that he can stand or work but during an eight hour day he needs to sit down or not walk periodically; (2) he can lift or carry up to 30 or 35 pounds frequently and 50 pounds occasionally; and (3) he should not squat at all (Jt. Ex. J, p. 4).

Marla Torgerson, senior rehabilitation specialist, ran a computerized analysis that identified 70 job titles that claimant could do within his restrictions but she did not know what was available in the Clinton area (Defendants' Ex. N). She said claimant did well on the General Aptitude Battery Test (GABT) that he took for them.

Mary Ann Buck, a rehabilitation specialist, interviewed claimant and took a history. She evaluated the GABT test and told him to get his GED which he did do. She discussed options for future employment. He expressed an interest in dispatching, broadcasting and announcing, being an automobile damage estimator, or being an insurance property inspector. The next step was to look at specific jobs. Her written report is joint exhibit J, pages 5 through 8.

Claimant testified that he took a job as a bartender for approximately six months starting around Thanksgiving day in 1985. He worked eight hours a day and three days a week. He quit this job because of knee problems. Otherwise he has had no post-accident employment.

Claimant testified that his back hurts all of the time and sends pain down his legs. Sometimes he cannot stand up or bend. He can only work in the garden for about two hours at a time. He could not drive a truck because he could not stand the bouncing. He could not load or unload a truck. He has tried to get another tavern job and his name is in at Job Service but he has not yet been called.

Claimant testified that his agreement on compensation with the employer was that he was to receive $800 for a trip from Chicago to California and back to Chicago. Typically he received $300 for the trip out, $300 for the trip back and an additional $200. He submitted a list of itemized expenses and all of his expenses were reimbursed except meals and clothing. The extra $200 was marked RD EXP. It was usually broken down to $100 for the trip out to California and $100 for the return trip to Chicago. The $300 for the trip out and the $300 for the trip back was typically marked wages. Claimant testified that he did not know what RD EXP meant other than it had something to do with taxes. Both counsel and claimant referred to RD EXP as road expense. On the claimant's last trip when the accident occurred the wages amount was relabled "rent" and there were no entries in the RD EXP columns. Defendants did not introduce any evidence to explain these entries. Exhibit H, the accounting sheets, show that claimant was paid a total of $3,685.39 marked either as wages or as rent and a total of $1,225.00 marked as RD EXP. These two figures added together total $4,910.39. The exhibit also shows that claimant worked from June 2, 1983 to August 14, 1983, a total of 10 weeks and four days or 10.571 weeks.

Claimant stated he was not reimbursed for his mileage expense from Clinton, Iowa to the University of Iowa which was 95 miles round trip to see Dr. Kramer on February 3, 1986.

APPLICABLE LAW AND ANAYLSIS

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 August 14, 1983 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 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).

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 14, 1983 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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).

Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

If a claimant contends he has industrial disability he has the burden of proving his injury results in an ailment extending

beyond the scheduled loss. Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964).

Claimant did not prove by a preponderance of the evidence that he sustained an injury to his back which arose out of and in the course of his employment due to the accident which occurred on August 14, 1983. The emergency treatment report from Cheyenne was not admitted into evidence. Therefore, it cannot be used to support the claimant's contention. Claimant averred that he complained of his back to both Dr. Rogers and Dr. Ginther. Although both doctors made detailed notes, no back injury from the accident is reported by either doctor in close proximity to the date of the accident. It is possible that claimant reported a back injury and that these two doctors both neglected to report it. However, it is not very probable or likely that either doctor would fail to record such pertinent and significant information following a severe motor vehicle accident. This was Dr. Sinning's opinion also.

Dr. Ginther said in a letter to the insurance company that claimant reported to him on August 13, 1984 (one year later) that his back bothered him from the very beginning, but claimant had not made a point of it in the previous year (Jt. Ex. B, p. 2).

Dr. Ginther testified in his deposition that he had no recollection of treating the back prior to that time on August 13, 1984 (Jt. Ex. I, pp. 8 & 9). However, Dr. Ginther did record in his office notes on April 11, 1984, that the claimant complained of back pain (Jt. Ex. B, p. 11).

X-rays, a CT scan, an enhanced CT scan, and a myelogram all demonstrated a normal back to Dr. Ginther and Dr. Kramer. The only organic, physical, medical, objective finding for claimant's back complaint was reduced ankle reflex bilaterally and more so on the left by Dr. Kramer. Neither Dr. Ginther or Dr. Kramer made a definite diagnoses. Both doctors proceeded on a presumptive diagnoses of epidural scarring, rather as a possibility, than as a probability.

Dr. Ginther could say that the knee injury was very clearly caused by the accident in August of 1983; but he could not do so with respect to the back. Rather than give his own personal, professional, medical and orthopedic opinion, he said that based on the patient's statements that the back condition started at that time, and implied that based on claimant's statements the back would also be related (Jt. Ex. I, p. 18). This is far short of saying with a reasonable degree of medical certainty that he could testify that the accident either caused or probably caused the back injury.

By contrast Dr. Sinning did state that it was his opinion within a reasonable degree of medical certainty that his examination,

x-rays and the medical records do not support any thought "that he injured his back in that accident." Dr. Sinning contradicts Dr. Kramer and said he found no absent ankle reflexes and that characterizing the claimant's condition as epidural scarring and giving steroid shots was an acknowledgment that Dr. Ginther and Dr. Kramer did not know what it was for sure. Dr. Sinning very definitively found absolutely no impairment in the back. He also gives several medical reasons for his conclusions which all appear to be very sound (Jt. Ex. M, pp. 15 & 40).

The bulk of the evidence, the preponderance of the evidence, the greater weight of the evidence establishes that the claimant did not injure his back at the time of the incident on August 14, 1983. Consequently, based upon the evidence in the record it must be found that claimant did not sustain the burden of proof by a preponderance of the evidence that he received an injury to his back arising out of and in the course of his employment with the employer from the accident that occurred on August 14, 1983.

The parties stipulated that the left knee injury arose out of and in the course of employment with the employer. Both Dr. Ginther and Dr. Sinning found that the accident of August 14, 1983 was the cause of the left knee injury. There is no dispute about causal connection of the left knee injury.

Iowa Code section 85.34(1), Healing Period, provides for the payment of compensation as follows:

> [B]eginning on the date of injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Claimant did not return to his former employment. Although Dr. Sinning said that he could return to his former employment with the restriction of not loading or unloading beyond light weights on level surfaces, the healing period in this case will be determined based upon when it was medically indicated that significant improvement from the injury was not anticipated.

Dr. Sinning said that occurred in the late winter or early spring of 1984 (Jt. Ex. M, pp. 27-29). Dr. Sinning's opinion tends to be reinforced by Dr. Ginther's office note dated April 11, 1984 at which time Dr. Ginther said that claimant's condition was unchanged, he was not making any progress, and it may be time to give him a rating (Jt. Ex. B, p. 11). However, a number of Dr. Ginther's subsequent office notes -- more specifically

March 7, 1985, March 2, 1985 and April 22, 1985 -- reflect some degree of improvement even though it was characterized as "slow." On May 31, 1985, Dr. Ginther rated the left knee at 17 percent impairment of the left lower extremity. A year earlier the Cybex machine readings would have yielded an impairment rating between 20 and 25 percent. Thus, the knee had significantly improved over this period of time (Jt. Ex. B, p. 6).

"It is only at the point at which a disability can be determined that the disability award can be made. Until such time, healing benefits are awarded to the worker." Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (1984). In Thomas the court said that healing period benefits continue until the disability can be determined. Thomas at 126. Therefore, it is determined here that claimant's healing period ended when Dr. Ginther gave claimant a permanent partial disability rating on May 31, 1985.

Consequently, it is determined that claimant is entitled to healing period benefits for the left knee injury beginning on the date of the injury, August 14, 1983 through May 31, 1985, when the disability rating was made.

Claimant has argued that he is entitled to have his healing period benefits continued because Dr. Sinning has uncovered the need for additional surgery. Also he argues that it would be inappropriate to award permanent partial disability benefits at this time until the outcome of the surgery is known. However, this decision will determine the rights and liability of the parties at the time of the hearing based on the evidence presented at the hearing on the issues defined in the hearing assignment order. If either party can generate evidence that warrants an end to, diminishment of or increase of compensation subsequent to this award which cannot be resolved by the parties themselves, then a review-reopening proceeding is available under Iowa Code section 86.14(2).

Dr. Ginther rated the left knee injury at 17 percent of the left lower extremity using the AMA Guides (Jt. Ex. B, p. 6). Dr. Sinning, using the AMA Guides, assessed a 25 percent impairment of the left lower extremity based on instability due to posterior cruciate loss (Jt. Ex. M, pp. 25 & 26). It is determined now that claimant does currently have a 25 percent permanent functional impairment of the left lower extremity and is entitled to 55 weeks (.25 x 220) of permanent partial disability (Iowa Code section 85.34(2), paragraph O).

It is not necessary to determine whether the claimant is an odd-lot employee because he has not proven that he is entitled to industrial disability.

The final matter to be decided is the proper rate of compensation.

Iowa Code section 85.61, paragraph 12 provides:

Gross earnings means recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Claimant has proven by his testimony and joint exhibit H that he received recurring payments from the employer for employment before any authorized or lawfully required deduction or withholding of funds by the employer in the amount of $3,685.39 marked either as wages or as rent and also $1,225.00 of compensation identified only as RD EXP. Added together his total recurring payments amount to $4,910.39. Defendants contend that the $1,225.00 of RD EXP constitutes reimbursement of expenses or an expense allowance. However, defendants introduce no evidence in support of this contention. Defendant could have quite effectively cleared this matter up by testimony, a deposition, or even an affidavit by a company representative who knows exactly what RD EXP means. However, defendants chose to leave it a mystery and rely upon the arguments of counsel, but the arguments of counsel cannot be construed as evidence.

Furthermore, the argument of counsel that these amounts are about $25 per day is not borne out by the evidence in exhibit H. Secondly, the argument of counsel that there was no withholding is not persuasive either. On the contrary, if the employer called these amounts RD EXP to avoid withholding social security tax and having to match it, as well as to avoid unemployment compensation taxes and workers' compensation premium, then this latter argument would be specious. Therefore, it is found that claimant has proven that he has received gross earnings of the entire amount and the defendants have failed to prove any portion of it was a reimbursement for expenses or an expense allowance.

Since the employee did not work for the employer for the full 13 weeks, the gross earnings of $4,910.39 should be divided by 10.571, the actual number of weeks which the claimant did in fact work (Iowa Code section 85.36, paragraph 6 & 7). This computation yields a gross weekly earnings rate of $465.00. The workers' compensation benefit schedule for July 1, 1983 provides a weekly compensation rate of $290.46 per week for a married employee with four exemptions. Consequently, the proper rate of weekly compensation is determined to be $290.46 per week as asserted by the claimant in this case.

FINDINGS OF FACT

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

That claimant was employed by the employer at the time of the motor vehicle accident on August 14, 1983.

That as a result of the accident the claimant seriously injured his left knee.

That the claimant did not prove by a preponderance of the evidence that he injured his back in this accident.

That the employee was off work from the date of the accident until he began working as a bartender around Thanksgiving in 1985.

That Dr. Ginther ceased to note improvement of the knee and gave the claimant an impairment rating on May 31, 1985.

That Dr. Ginther assessed a 17 percent permanent impairment rating on the left knee and Dr. Sinning assessed a 25 percent permanent impairment rating on the left knee.

That the amount marked RD EXP is part of the claimant's gross earnings and that the proper rate of compensation is $290.46 as previously calculated.

That the claim of the claimant for 95 miles of round trip mileage from Clinton, Iowa to the University of Iowa and return to see Dr. Albright on February 3, 1986 was not disputed.

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 did not sustain the burden of proof by a preponderance of the evidence that he sustained an injury to his back as a result of the accident on August 14, 1983.

That the left knee injury is the cause of both temporary and permanent disability.

That claimant is entitled to healing period benefits from the date of the injury, August 14, 1983 through May 31, 1985 at which time it was medically determined that significant improvement for the injury was not anticipated and his treating physician assessed an impairment rating.

That claimant is entitled to permanent partial disability benefits for 55 weeks based on a 25 percent permanent impairment

of the left lower extremity commencing on June 1, 1985.

That the claimant's gross earnings of $4,910.39 should be divided by the 10.571 weeks that he worked to arrive at a gross weekly wage of $465.00 which in turn gives claimant a weekly workers' compensation rate of $290.46 as a married person with four exemptions.

That claimant is entitled to medical mileage in the amount of $22.80 for the 95 miles of round trip expense from Clinton, Iowa to Iowa City and back to Clinton, Iowa to see Dr. Kramer on February 3, 1986 at the rate of $.24 per mile.

That the odd-lot doctrine has no application to scheduled member injuries and therefore no application to the instant case.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant ninety-three point seven-one-four (93.714) weeks of healing period benefits at the rate of two hundred ninety and 46/100 dollars ($290.46) per week commencing on August 14, 1983 through May 31, 1985 in the total amount of twenty-seven thousand two hundred twenty and 17/100 dollars ($27,220.17).

That defendants pay to claimant fifty-five (55) weeks of permanent partial disability benefits at the rate of two hundred ninety and 46/100 dollars ($290.46) per week commencing on June 1, 1985 in the total amount of fifteen thousand nine hundred seventy-five and 30/100 dollars ($15,975.30).

That the defendants pay the accrued benefits in a lump sum.

That interest will accrue under Iowa Code section 85.30.

That the defendants are entitled to credit for benefits previously paid as stipulated in the prehearing report.

That the defendants pay to claimant twenty-two and 80/100 dollars ($22.80) for medical mileage as previously explained.

That each party pay their own costs of this proceeding except that the defendants are to pay claimant for the cost of exhibit L, Jane Lamb Health Center records in the amount of forty and no/100 dollars ($40.00) and exhibit M, Reporting Services in the amount of one hundred sixty-six and 60/100 dollars ($166.60) which amounts total two hundred six and 60/100 dollars ($206.60) as stipulated to at the hearing. Defendants are also to pay the cost of reporting the hearing.

Defendants are to 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 18th day of February, 1987.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DALE BARKER,

Claimant,

vs.

IOWA STATE PENITENTIARY,

Employer,

and

STATE OF IOWA,

Insurance Carrier,
Defendants.

FILE NO. 637946

R E V I E W -

R E O P E N I N G

D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by Dale Barker against Iowa State Penitentiary and the State of Iowa as employer and insurance carrier. Claimant seeks further benefits for permanent disability as a result of the injury which occurred on June 4, 1980. The case was heard at Burlington, Iowa on November 5, 1986 and was fully submitted upon conclusion of the hearing. The record in this proceeding consists of testimony from Dale Barker, Wayne Gerdes and Patricia Marshall. The record also contains claimant's exhibits 1 through 17 and defendants' exhibits A through I. Official notice was taken of the agency file including in particular the review-reopening decision filed January 16, 1984 following a hearing which was conducted on April 22, 1983. Also considered were the transcript and exhibits which were part of the record made at that hearing.

The issues presented by the parties for determination are whether or not there has been a change in claimant's earning capacity or physical condition subsequent to the previous hearing which was proximately caused by the injury of June 4, 1980 and which would warrant a review of claimant's entitlement to compensation for permanent disability benefits.

The prior decision established the compensability of claimant's injury and an entitlement to 45 percent permanent partial disability of the body as a whole when evaluated industrially. It further fixed the rate of compensation at $141.10 per week. At the time of the prior decision claimant was employed as a correctional officer at the Iowa State Penitentiary but appeared

to have a relatively high rate of absenteeism due to sick leave or the effects of the June 4, 1980 injury. It was noted in the prior decision that if claimant's rate of absenteeism continued the employer would consider him to be "economically unemployable."

SUMMARY OF EVIDENCE

Dale Barker testified that following the injury of June 4, 1980, he missed a large amount of time from work due to headaches and other problems that arose from the June 4, 1980 injury. He also had a service connected disability in his knee and a bout with the flu which had caused absences. The injury occurred when claimant was beat by a number of inmates with clubs resulting in severe injuries to his head, neck and back. On or about November 21, 1983, claimant resigned from his employment at the Iowa State Penitentiary pursuant to a settlement agreement which provided that he would be able to recover unemployment benefits (Defendants' Exhibits F & G). The settlement agreement further provided that "...Dale Barker's employment record will be changed to a resignation and will be purged of all documents relating to the discharge and resulting grievance..." The record does not contain any written evidence of the incident or events which prompted the action to terminate claimant's employment.

Claimant's testimony was that the termination referred to conduct unbecoming an officer and excessive use of sick leave. He stated that those two grounds were provided to the United States Post Office when he attempted to obtain employment there. Claimant felt that the information given to the Post Office by the Penitentiary prevented him from being hired. Defendants' exhibit I is the response to the Post Office that was made by Patricia Marshall on behalf of the Penitentiary. It indicates that claimant was terminated for failure to follow institutional rules and conduct unbecoming a state employee but was later allowed to resign following a grievance. The report contains an additional statement that claimant had a lot of problems with absenteeism but had been injured on the job.

Since resigning from the Penitentiary claimant has had little success in obtaining comparable employment. He worked for several months as a maintenance person at a McDonald's Restaurant operated by Wayne Gerdes. While there he developed problems with his knee. Gerdes testified that claimant did not miss more than one or two days of work due to sickness except for the extended absence that arose with the knee problem. He stated that claimant did not make complaint of headaches while employed. Claimant had testified that he did experience headaches while employed by Gerdes.

Claimant testified that he has applied for several other positions, including a number with the State of Illinois, but

has been unable to become employed. He attributes this to physical disabilities resulting from the June 4, 1980 injury. He particularly complains of a lack of physical agility that renders him unable to pass physical fitness tests. Claimant also contends that the Penitentiary has released unfavorable employment information to prospective employers in violation of the agreement made in settling the grievance regarding the termination of his employment.

Patricia Marshall testified that she has responded fully to congressional inquiries regarding claimant's employment history as shown in exhibits 5 and 8. Marshall denied conveying derogatory information to any prospective employers who had made inquiries. Marshall felt that records of the employer dealing with sick leave were not related to the termination and were therefore not to be purged under the settlement agreement.

At hearing claimant testified that his medical condition was unchanged from the time of the hearing conducted in 1983. He indicated that improper disclosure of information by the Penitentiary was the basis for this review-reopening proceeding.

APPLICABLE LAW AND ANALYSIS

Since this is a proceeding in review-reopening from a prior award the compensability of the injury, the rate of compensation and the nature and extent of the injury have previously been determined. The doctrine of res judicata applies to administrative proceedings and issues once litigated may not be relitigated upon the mere request of a party. The administrative system does provide, however, for reopening where circumstances have changed to the extent that the original award is no longer appropriate. In a review-reopening proceeding the claimant has the burden of establishing that he suffered an impairment or lessening of his earning capacity as a proximate result of his original injury, subsequent to the date of the prior award, which therefore entitles him to additional compensation. An increase in disability may occur without a change in physical condition. A change in economic conditions may be sufficient. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 350 (Iowa 1980). Deaver v. Armstrong Rubber Co., 170 N.W.2d 455, 457 (Iowa 1969). Stice v. Consolidated Ind. Coal Co., 228 Iowa 1031, 1035, 291 N.W. 452 (1940). The change of condition necessary to warrant review-reopening must be something which was not anticipated to occur at the time of the prior proceeding. Meyers v. Holiday Inn of Cedar Falls, Iowa, Iowa App. 272 N.W.2d 24, 25 (1978). The ground may be a circumstance that existed but was unknown and could not have been discovered through the exercise of reasonable diligence. Gosek v. Garmer and Stiles Co., 158 N.W.2d 731, 735 (Iowa 1968). It must be more than a difference of opinion of experts. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957).

Claimant has testified that there has been no change in his physical condition since the prior hearing and there is no evidence in the record to indicate that there has been any change, causally related to the injury, that has occurred since the prior hearing. The thing that has changed is that claimant is no longer employed at the Penitentiary. Claimant urges that his absences from work due to headaches was one of the factors which led to his resignation in lieu of termination. Marshall does not feel that the resignation in lieu of termination was related to use of sick leave or absences resulting from the 1980 injury. The record does not contain any of the notices, decisions or other documents which show the basis for the action to terminate claimant's employment. It therefore cannot be found that the injury of June 4, 1980, or anything connected with it, played any part in bringing about the termination of claimant's employment. As previously stated, for a change to be a basis for a review-reopening there must be a causal connection between the change and the injury. The injury must, in fact, be a proximate cause of the change. The common rule of proximate cause applies, namely, a cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. Blacksmith, 290 N.W.2d 348, 354 (Iowa 1980). Claimant has failed to prove by a preponderance of the evidence that the resignation from employment in lieu of termination was caused by the injury of June 4, 1980.

Claimant seeks relief on the basis that he has been unable to obtain other employment. He testified concerning an inability to pass fitness tests but the evidence fails to show that such is something that could not have been discovered through the exercise of reasonable diligence at the time of the prior hearing. Claimant urges that he reapplied for the same job that he held at the Penitentiary in March or April of 1984 and was interviewed but was not hired. He stated that he was told he was not qualified for the position.

Claimant urges that the release of information that is unfavorable to him has prevented him from obtaining employment. The settlement of the grievance as shown in exhibit F does not specify what, if any, of claimant's sick leave history was to be purged. Since it cannot be determined whether or not use of sick leave was one of the grounds for the action to terminate claimant, it cannot be determined whether or not the sick leave records were intended by the parties to be part of what it was to be purged. If a violation of that agreement did, in fact, occur a remedy for that breach does not exist within the workers' compensation statutes.

FINDINGS OF FACT

1. Claimant has failed to demonstrate a change in his physical condition that has occurred subsequent to the prior

hearing held in this case on April 22, 1983.

2. Claimant has failed to establish that injury of June 4, 1980 was a substantial factor in bringing about any of the changes in his economic circumstances that have occurred subsequent to April 22, 1983.

CONCLUSIONS OF LAW

1. Claimant has failed to show a substantial change of condition or a substantial change in circumstances that was not within the anticipation or contemplation of the deputy commissioner at the time of the hearing on April 22, 1983 for which the injury of June 4, 1980 was a proximate cause.

2. Claimant has failed to make the requisite showing in order to reopen this case under the provisions of section 86.14(2).

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding and that the claim for review-reopening of the prior award be and is hereby dismissed on the merits with prejudice.

Costs of this proceeding are assessed against defendants pursuant to Rule 343-4.33.

Signed and filed this 27th day of February, 1987.

MICHAEL G. TRIER
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN D. BAWEK, Claimant, vs. JENS OLESEN & SONS CONSTRUCTION CO., Employer, and IOWA CONTRACTORS WORKERS' COMPENSATION GROUP, Insurance Carrier, Defendants.	File No. 776636 A R B I T R A T I O N D E C I S I O N FILED JAN 21 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Steven D. Bawek, against his employer, Jens Olesen & Sons Construction Co., and its insurance carrier, Iowa Contractors Workers' Compensation Group, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained October 5, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner in Waterloo, Iowa, on December 30, 1986. The record was considered fully submitted at close of hearing. Pursuant to the prehearing stipulation of the parties and a form 2A filed May 5, 1986, claimant has received sixty weeks of benefits from October 6, 1984 through November 27, 1985.

The record in this case consists of joint exhibits 1 through 10 as well as of claimant's and Kathleen Bawek's testimony. Joint exhibit 1 is Dr. Cameron's medical reports from October 5, 1984 through July 24, 1985. Joint exhibit 2 is St. Francis Hospital records from October 5, 1985 through November 26, 1984. Joint exhibit 3 is Dr. Delbridge's medical reports from November 16, 1984 through January 22, 1986. Joint exhibit 4 is Dr. Delbridge's office notes with x-ray reports attached from November 16, 1984 through January 22, 1986. Joint exhibit 5 is Dr. Worrell's medical records from June 12, 1985 through October 25, 1985. Joint exhibit 6 is Dr. Worrell's medical notes from June 11, 1985 through July 25, 1985 with a report of July 11,

35. Joint exhibit 7 is the deposition of Dr. Delbridge taken
/ 20, 1986. Joint exhibit 8 is Dr. Worrell's medical report
July 7, 1986. Joint exhibit 9 is claimant's deposition taken
/ 20, 1986. Joint exhibit 10 is Dr. Worrell's deposition
ken December 29, 1986.

ISSUES

The issues for resolution are:

1) Whether a causal relationship exists between claimant's injury and his asserted disability; and

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

Per the prehearing report, the parties stipulated that aimant received an injury which arose out of and in the course his employment, and that claimant's rate of weekly benefits $232.52. Per the attachment to the prehearing report and eement of counsel at time of hearing, the parties agreed that aimant received an injury to his left wrist and that if aimant's injury is to that scheduled member only, his permanent tial disability entitlement is that impairment rating which . Delbridge assigned. Claimant contends, however, that he ceived a head injury causally related to his work injury which ad injury extends his disability into the body as a whole and titles him to industrial disability benefits.

REVIEW OF THE EVIDENCE

Thirty-two year old claimant testified that he was injured October 5, 1984 when he fell from the top rung of an eight ot stepladder onto a concrete floor hitting his head and left ist on the floor. Claimant sustained a two inch laceration ove the left eyebrow and minor abrasions to the middle forehead d a commuted Colle's fracture of the articular surface of the dius and ulnar styloid tip of the left wrist.

Alan B. Cameron, M.D., initially treated claimant at St. Francis spital emergency room on his injury date with sutures for the cial laceration. Claimant's wrist was cast. After the cast s removed claimant was referred to physical therapy for wrist habilitation. On February 7, 1985, Dr. Cameron opined that aimant had nonunion of the distal ulnar fracture and evidence osteoporosis with disuse. He then recommended claimant seek cational rehabilitation to a less physical occupation and ined claimant would likely not be able to return to construction ck. On May 14, 1985, Dr. Cameron opined that claimant was rmanently disabled from work with heavy vibration to his left ist or heavy jarring to the left wrist such as sledgehammer or r hammer work and that he should avoid lifting greater than

wenty pounds in the left wrist. On July 24, 1985, Dr. Cameron tated that claimant had a restriction of supination with eight ercent disability, restriction of pronation with eight percent isability, restriction of radial deviation with two percent isability, and restriction of ulnar deviation with two percent isability resulting in a thirteen percent "disability" under he AMA Guides combined values. Dr. Cameron is a family practitioner.

Arnold E. Delbridge, M.D., a board certified orthopedic and and surgeon, initially saw claimant on November 16, 1984. He hen noted that claimant had a slight dorsal tilt of the distal adius with evidence of a compression fracture extending into he joint. The doctor noted that claimant had some limitation f motion of his neck but no upper extremity numbness and had eadaches which the doctor believed very likely were due to the low on the head and to his neck injury. AP, lateral, obliques nd odontoid views of his cervical spine showed no definite ractures of his neck though claimant continued to have neck ain. The doctor initiated physical therapy for the neck onsisting of traction, heat, and massage through January 29, 985. On May 10, 1985, Dr. Delbridge noted that claimant was ecovering nicely except that he continued to have headaches and ausea albeit a CT scan of his head was negative. Dr. Delbridge uggested neurological consultation and on May 31, 1985 referred laimant to James P. Worrell, M.D., a board certified neurologist.

After initially examining claimant, Dr. Worrell noted on une 12, 1985 that claimant reported that since his injury he ersisted in having headaches and nausea and just did not feel ell. The headache was reported as involving both sides of the ead and temples and the back of the head as well and as of arying severity although present most of the time. Claimant as reported as "aggravated" by sunlight, exertion, heat, and training, and as having headache with nausea and light headed-ess. Claimant was irritable and short tempered since the njury and not as sharp as prior to the injury. Claimant's wife ad noted a personality change in that the couple fought more. laimant's sex drive was down; he had no energy; and was more orgetful. Claimant's sense of smell was reported as possibly omewhat reduced. Claimant had had no seizures. Coordination esting was quite normal with good associated movements noted. r. Worrell stated that claimant's symptoms of irritability, ersonality change, lack of concentration and drive could be onstrued as suggesting some type of frontal head injury with a artial frontal brain syndrome. Dr. Worrell prescribed Imipramine. he doctor suggested that an EEG and psychometric evaluation be onsidered. Claimant was again seen on July 15, 1985 with like ymptoms. His EEG was normal. Dr. Worrell recommended an xercise program to try to stimulate his endogenous endorphins.

Claimant testified that he had personality changes following is injury and that he was impatient with his family, lost his

temper easily, and had a decrease in energy level and could not concentrate. He reported that he continues to have frequent back and neck stiffness following work and that he has headaches and nausea albeit these are not as frequent as early on after his injury. Claimant testified that he had thought that the Imipramine that Dr. Worrell prescribed had made his lack of energy and drive worse and that he had feared the medication could be addicting. He indicated that he called Dr. Worrell on the phone and discussed the matter with him angerily and subsequently neither continued the medication nor continued treatment with Dr. Worrell. The advised psychometric testing was never undertaken. Claimant stated that such bouts of anger were not characteristic of his preinjury behavior.

On October 25, 1985, Dr. Worrell reported that he had last seen claimant in July [1985]. Claimant subsequently telephoned the doctor because claimant was upset with his evaluation and the Imipramine prescribed. The doctor opined that this was a part of claimant's problem in that his personality had changed and he had difficulty getting along with people. He opined that claimant would be able to return to some type of supervised functional employment. He noted that claimant had no focal or neurological deficit involving the motor system, but deficits mainly in his ability to cooperate and deal with people and a lack of energy and enthusiasm. On July 7, 1986, Dr. Worrell opined claimant had permanent impairment of ten to fifteen percent of the body as a whole considering his mental deficits.

In his deposition, Dr. Worrell described the frontal lobe of the brain as controlling personality and behavior, interest and drive (in life and jobs) ability to concentrate and attitude toward and ability go get along with people and [sic] the person's environment. He characterized frontal lobe syndrome as a personality disorder brought on by organic changes in frontal lobe. The doctor opined that in July 1985 claimant could work under modest supervision where someone monitored his activities explaining that persons with frontal lobe syndrome have a decreased ability to concentrate and very often cannot make the connection from a completed task to the next task without direction. The doctor opined that chronic headaches over an extended time are common after head injuries and that claimant's headaches and nausea are part of a post injury problem not specifically related to the frontal lobe. The doctor opined that after reviewing selected portions of claimant's deposition, he felt claimant's frontal brain syndrome had improved significantly such that claimant now had no impairment on his ability to earn a living. The doctor stated he based that opinion on claimant's stated ability to find and work at a job which he seemed to enjoy.

On January 22, 1986, Dr. Delbridge stated that claimant had good flexion, good dorsiflexion of the left wrist but limitation

of supination by fifteen degrees, a two percent impairment of the upper extremity; pronation of thirty degrees, a loss of fifty degrees, an eight percent impairment of the upper extremity, and that as a result his overall impairment of his left upper extremity was ten percent. He opined that other than claimant's headaches, occasional feeling of nausea, and some aching in his neck, claimant did not have appreciable permanency with regards his neck and head injuries. In his deposition, Dr. Delbridge indicated that as a result of Dr. Worrell's consultation and his own observations, he suggested claimant not climb ladders as he might fall given his dizziness, headaches, and his nausea symptoms. He further opined that he believed that claimant's head problems were also a result of his work injury. The doctor agreed, however, that he has not specifically asked claimant whether claimant has had headaches before the injury. Dr. Delbridge agreed that claimant's left wrist was his nondominant side, but stated that because at times the dominance of one hand is not complete, he did not reduce the impairment rating for nondominance even though the AMA Guides do so.

Claimant is a high school graduate who spent three years in the navy where he received eight weeks of training as a machinist mate. Subsequent to to his military discharge, he worked as a laborer, a truck driver, and a route salesperson before becoming a construction union member. He earned between $5.50 and $6.00 per hour generally in his nonconstruction jobs and earned between $8.60 and $10.25 per hour in his construction jobs. Claimant had been working for Jens Olesen & Sons Construction approximately two years when injured and was then earning $9.00 per hour. He was the low boy operator but also filled in where needed on general laboring and concrete work. Claimant characterized himself as in excellent physical condition prior to his injury and having no wrist, neck or back problems. He indicated that he did not return to construction work because he could not use air tools, could not lift as much, could not put as much weight on his wrist, and was sore on side to side motion. Claimant moved his family to Arizona in December 1985. He reported that prior to doing so, he had talked to persons about the possibility of finding other work in Iowa and believed there were no opportunities here. He testified that he had a "motivation problem" when he initially arrived in Arizona and that he attempted to start looking for work but was unable to "get going" until he finally did so at his wife's insistance. Claimant reported that he had no difficulties with motivation prior to his injury. He reported that he had difficulty finding a job within his limited training. In March 1986, claimant began work preparing road sealer machines for painting at which he earned $5.25 per hour. Claimant reported that he could handle the minimal physical demands of this position but for his headaches which at times were brought on by the heat, overexertion, and bending forward required on the job.

Claimant left that position to become a salesperson in the buildings materials department of a building supply store. Claimant remains working there. His salary has increased from $6.50 per hour when he began work in Summer 1986 to $7.15 per hour at time of hearing. Claimant anticipated an increase to $7.50 per hour following his review. Claimant reported that the job holds a possibility of advancing to department manager and then store assistant manager with subsequent increases in hourly wage. He eventually would need to increase his hours to more than the forty hours he is currently working per week. He is uncertain he could handle those hours. Claimant characterized himself as not unhappy with his job but simply wishing he could do better. He reported he had applied for other sales jobs in like fields. Claimant holds an Arizona class 4 chauffers license and had applied for jobs as a forklift operator and other sales work which he stated would pay between $11.00 and $12.00 per hour, but had not been hired.

Claimant expressed his belief that because of his good background in all fields of construction but for his injury, he would eventually have become a foreman or supervisor receiving pay of approximately $12 to $15 per hour.

Claimant reported that he continues to have a problem with becoming angry and has "blown up" at work approximately a half a dozen times such that his supervisors have had to talk to him about the problem. He reported that he continues to have headaches but that he generally is able to leave the floor and go to the break room when these become severe.

Claimant reported that he no longer has the energy or stamina to play softball, basketball, football or bicycle as he had prior to his injury. He reported that Dr. Delbridge advised him not to play sports involving his left wrist.

Kathleen Bawek, claimant's wife of five years, substantiated claimant's testimony regarding changes in his personality and physical condition following his work injury. She indicated that claimant has headaches more frequently after a busy stressful workday. Mrs. Bawek works as a grocery cashier approximately fifteen to twenty-three hours per week. Claimant cares for the couple's children, ages four and eight, when his work schedule is such that he is off work while his wife is working.

Claimant's appearance throughout hearing was very flat; his voice was a monotone; and he generally appeared to lack enthusiasm and energy.

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

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 5, 1984 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Agency may disregard unconroverted medical testimony; it may do so only after stating substantial reasons for not deferring to the evidence, however. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974).

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

Permanent means for an indefinite and undeterminable period. Wallace v. Brotherhood of Locomotive Firemen and Enginemen, 230 Iowa 1127, 1130, 300 N.W. 322, 324 (1941), citing Garen v. New England Mutual Life Insurance Company, 218 Iowa 1094, 1104, 254 N.W. 287, 292 (1934).

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

Our initial concern is whether a causal connection exists between claimant's injury and his asserted disability. The parties stipulate claimant has a [causally related] left wrist injury. They dispute whether claimant has a head injury causally related to his work injury. The asserted head problem consists of chronic headache and nausea and partial frontal brain syndrome. Both Dr. Delbridge and Dr. Worrell believe the headache and

nausea are post injury sequalae not uncommon following head trauma. That characterization is accepted and provides the necessary expert opinion establishing causal relationship as regards those problems. Dr. Worrell, after examining claimant, initially felt claimant's personality changes and related symptoms following his injury were suggestive of partial frontal lobe syndrome. In July 1986, he opined claimant's mental deficits produced a permanent partial impairment of ten percent of the body as a whole. Those remarks of the doctor when coupled with his examination notes and claimant and his wife's testimony at hearing are sufficient to establish that claimant's work injury produced at least a temporary partial frontal brain syndrome. Dr. Worrell testified in his deposition, however, that after reading portions of claimant's deposition, but not actually reexamining claimant, he believed claimant's syndrome had improved significantly and that claimant now has no impairment of his ability to handle employment on account of that syndrome. We reject the doctor's latter opinion, however. The doctor did not personally reexamine claimant. Claimant's effect, vocal tone, and the substance of his testimony at hearing were consistent with continuing behaviorial difficulties such as the doctor earlier had associated with frontal brain syndrome. Furthermore, the doctor's December 1986 opinion merely stated that claimant was no longer impaired as to his ability to earn a living. While we do not reach the issue of whether the doctor's opinion invades the province of the commissioner by improperly assessing industrial disability and not functional impairment, we believe the doctor's opinion is based on an inaccurate medical history and fails for that reason. Claimant testified at hearing that he continues to have problems with anger and that he has lost his temper a number of times at work such that his supervisors have spoken to him concerning the problem. That fact was not elicited in claimant's deposition testimony which Dr. Worrell reviewed. Sudden bouts of temper sufficient to raise concern among an employee's supervisors may well represent a serious impairment of an employee's ability to earn a living. Claimant is found to have continuing partial frontal brain syndrome symptoms sufficient to impair his ability to earn a living. While perhaps decreasing in severity, these have continued since his injury and the period at which they will terminate is indeterminable. Claimant's partial frontal brain syndrome is found to be a permanent condition, which like his headaches and nausea, is causally related to his work injury and extends his injury to the body as a whole. Dr. Worrell opined claimant's frontal brain syndrome had improved significantly. Claimant was able to motivate himself at his wife's behest to seek and obtain employment. Claimant's job requires him to interact with individuals and to do some inventory and other mathematical calculations. He has been able to secure a wage increase since beginning this employment. These facts suggest claimant's syndrome symptoms have improved although still existing. For those reasons, we believe claimant's

permanent partial impairment from the syndrome more nearly approximates the lower range Dr. Worrell suggested in July 1985. Claimant is found to have a ten percent permanent partial impairment of the body as a whole related to his partial frontal brain syndrome. Dr. Delbridge's opinion of ten percent permanent partial impairment of the upper extremity on account of claimant's wrist injury is accepted per the parties' stipulation and as better supported by the evidence overall than is Dr. Cameron's opinion regarding the wrist permanency. A ten percent impairment of the upper extremity equals six percent permanent partial impairment of the body as a whole under the AMA Guides. A six percent body as a whole impairment and a ten percent body as a whole impairment equal a 15 percent body as a whole impairment under th AMA Guides combined values chart. Additionally, claimant has impairment not previously assessed on account of his injury related chronic headaches and nausea. These, with his numerically assessed permanencies, are such that claimant's overall permanent partial impairment can be characterized as moderate to mildly severe.

Having already considered the extent of claimant's permanent partial impairment we now reach the question of the nature and extent of his disability.

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).

In Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980),

stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden, 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 is a younger worker and a high school graduate. His experience is primarily as a heavy laborer and equipment operator in the construction industry. Claimant's wrist condition and, to a lesser extent, his chronic headache and nausea preclude his returning to those fields. Claimant has transferable skills in that he has been able to use his knowledge of building materials to obtain his current position as a building materials salesperson. At time of hearing, claimant appears to be having some success at that position and had obtained a raise. His current salary, even if he were to receive the further raise he anticipated at hearing, still lags behind his salary when injured, however. Further, claimant's testimony indicated that his partial frontal brain syndrome is causing him difficulties with the interpersonal relations required in his sales position. Those difficulties, were they to continue, could seriously jeopardize claimant's ability to earn a livelihood. They could well prevent him from advancing further with his present company; they could even result in his dismissal by his present employer. (The latter possibly is more remote given claimant's past favorable employment reviews. Unfortunately, we are not aware of whether reviews occurred before or after claimant's episodes of anger at work.) Claimant's motivation to work is good given the effects of his partial frontal brain syndrome. He has accepted his situation and appears genuinely interested in mastering the new skills required in his current position. If his brain syndrome difficulties do not create greater problems for him, we anticipate he will at least be able to handle his current employment. We find the possibility that he will

advance to supervisory roles overall too speculative to consider but note that claimant will generally be competing for managerial positions with individuals not having partial frontal brain syndrome. We find that claimant has sustained a 25 percent loss of earning capacity based on his present circumstances. Should claimant's job situation change or should his partial brain syndrome change this finding, of course, would be ripe for review-reopening.

Defendants contend claimant is entitled to healing period benefits only through November 27, 1985; claimant until his work return in March 1986. Little evidence actually supporting either position was presented at hearing. Healing period ends upon a return to work, as return to substantially similar work or at the point of maximum medical recovery. Claimant has not returned to work or returned to substantially similar work. It is difficult to assess medical recovery from claimant's partial brain syndrome. We believe that the ability to acquire and sustain employment beyond the supervised employment Dr. Worrell advised in July 1985 is evidence of a return to more normal functioning despite that condition's continuing existence. We adopt claimant's position as to termination of claimant's healing period.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant sustained an injury which arose out of and in the course of his employment on October 5, 1984 when he fell from the top rung of an eight foot stepladder onto a concrete floor hitting his head and wrist on the floor.

Claimant sustained a two inch laceration above the left eyebrow and minor abrasions to the middle forehead.

Claimant sustained a commuted Colle's fracture of the articular surface of the radius and ulnar stylois tip of the left wrist.

Claimant experienced stiffness and loss of motion in the neck as well as headache and nausea.

Claimant's wrist was cast.

Claimant underwent physical therapy for his wrist and neck.

Claimant continues to have weakness and lost range of motion in his wrist. Claimant has intermittent neck stiffness and chronic headache and nausea.

Claimant experienced symptoms of irritability, personality

change, lack of concentration, forgetfulness, and loss of energy and drive following his injury.

Claimant has a moderate to mildly severe permanent partial impairment from his wrist condition and his headache and nausea, and from a partial frontal brain syndrome as a result of his injury.

Claimant is 32 years old and a high school graduate.

Claimant's prior work experience is largely in the construction trades.

Claimant cannot return to construction work on account of his work injury. At his wife's insistenace, claimant was able to seek and find employment in March 1986.

Claimant has transferable skills which he applies in his present position as a building supplies salesperson.

Claimant has bouts of anger as a result of his partial frontal brain syndrome and has received a number of reprimands from work supervisors after these have occurred at work.

Claimant's partial brain syndrome could affect his continued ability to function in his current employment.

Claimant is well motivated to work given the effects of his partial frontal brain syndrome.

Claimant has a 25 percent loss of earning capacity.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that his October 5, 1984 injury is the cause of the disability on which he now bases his claim.

Claimant is entitled to permanent partial disability resulting from his October 5, 1984 injury of twenty-five percent (25%).

Claimant is entitled to further healing period benefits from November 28, 1985 to the date he actually returned to work in March 1986.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for one hundred twenty-five (125) weeks at the rate of two

hundred thirty-two and 52/100 dollars ($232.52) with those payments to commence on the date he actually returned to work in March 1986.

Defendants pay claimant additional healing period benefits at the rate of two hundred thirty-two and 52/100 dollars ($232.52) from November 28, 1985 to the date he actually returned to work in March 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, formerly Industrial Commissioner Rule 500-4.33.

Defendants file claim activity reports as required by the agency.

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

Helen Jean Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS BEAU,	:	
Claimant,	:	
vs.	:	FILE NO. 765725
JOHN DEERE DUBUQUE WORKS OF DEERE & 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 Thomas Beau, claimant, against John Deere Dubuque Works of Deere & Company, employer and self-insured defendant for benefits as a result of an injury which occurred on September 16, 1983. A hearing was held on November 14, 1986 at Dubuque, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Mervin Leon McClenahan, M.D. (employer's medical director), Ann A. Beau (claimant's wife), Thomas Beau (claimant), Russell Spensley (supervisor), and joint 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 September 16, 1983 which arose out of and in the course of his employment with the employer.

That the injury was the cause of temporary disability during a period of recovery.

That the claimant was entitled to and did receive temporary disability benefits on various dates during his period of recovery.

That defendant has paid claimant "7.7 weeks (38 1/2 days [sic])" of temporary disability at the rate of $304.21 per week.

That the injury was the cause of some permanent disability.

That the commencement date for permanent partial disability benefits is stipulated to be May 30, 1984 in the event of an award.

That the weekly rate of compensation is $304.21 per week in the event of an award.

That all requested medical benefits have been or will be paid.

ISSUES

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

What is the extent of claimant's entitlement to permanent partial disability benefits?

Whether the claimant is entitled to scheduled member disability benefits or whether the claimant is entitled to benefits for industrial disability to the body as a whole.

SUMMARY OF THE EVIDENCE

Claimant was 37 years old at the time of the injury and 40 years old at the time of the hearing. He is a high school graduate. His grades were C's and D's in school. He considered himself an average student. He did not go to college or community college and he did not believe he was college material. He has received no special education or training since high school and was not in the military service. Past employments include operating a machine and driving a truck at a quarry, driving as a chauffeur, and working in a feed store.

Claimant started to work for the employer on April 17, 1972. He has worked there ever since for approximately 15 years. All of his jobs for the employer prior to this injury were incentive pay types of jobs.

Claimant was injured on September 16, 1983 while operating a punch press machine that is 15 or 20 feet high and weighs thousands of pounds. The day before the injury claimant saw the machine wobble. He reported this to his supervisor who got an electrician who put a lockout on the machine. Claimant put a sign on the machine which said "Do Not Operate." The following day when he returned to work he found the lockout was off of the machine and the sign was gone. When he operated the machine a shield came off and a 1,200 pound bull gear inside the machine came off and fell toward him. He backed away from it as it fell toward him and he tried to push it away from himself. As he did

so he heard a "pop" sound in his right shoulder. His body was thrown against a hopper at which time he injured his lower back. In the fall he landed on his knees. At first he was dazed and did not feel anything. On his way to the dispensary he noticed he could not move his right arm. At the hospital his back began to bother him. He had never had any back trouble prior to that time. Claimant was seen at Mercy Hospital emergency room, x-rayed and returned to work (Exhibit 38, page 2).

Claimant was then seen by Anthony J. Piasecki, M.D., an orthopedic surgeon, at Medical Associates on September 22, 1983 and again on October 12, 1983. X-rays of the right shoulder were negative for any acute injury. X-rays of his back showed degenerative changes with lipping, narrowing of the disc spaces and a sacralized last segement in the lumbar spine. Dr. Piasecki diagnosed (1) back strain, (2) contusion or strain of the right shoulder, and (3) tendinitis of the left knee. Dr. Piasecki treated claimant with medications and physical therapy (Ex. 38, pp. 2 & 7).

The employer then asked for a second opinion from Scott C. McCuskey, M.D., another orthopedic surgeon at Medical Associates, who saw claimant on October 31, 1983, December 2, 1983, December 13, 1983, December 16, 1983, January 12, 1984, January 31, 1984 and February 25, 1984 (Ex. 38, pp. 3-11). Dr. McCuskey diagnosed (1) bursitis of the sub deltoid region of the right shoulder and (2) mild strain of the back (Ex. 38, p. 12). Dr. McCuskey treated claimant with physical therapy, medications, and trigger point injections.

Claimant complained of testicle, genital, prostate and urinary problems which he claimed he did not have before the accident. He was examined by George K. Kraemer, M.D., a urologist at Medical Associates (Ex. 38, pp. 4 & 34) and Robert A. Pfaff, M.D. (Ex. 38, pp. 25, 27 & 30). Several tests were done and claimant was seen a number of times but no conclusive diagnosis was ever reached and nothing was suggested by any of the doctors that any of the symptoms were related to the accident of September 16, 1983 (Ex. 8).

When claimant began to manifest sleeplessness and a grudge against the safety crew at the employer, Dr. McCuskey commented that this point of contention may be playing a role in his ability to recover on a subconscious level (Ex. 38, p. 9). Also the physical therapist found claimant's symptomology difficult to understand (Ex. 38, p. 10). Due to the migrating, wandering nature of his symptoms; conflict with the safety crew; and stress from work; it was arranged for claimant to see Patrick R. Sterrett, M.D., a neurologist and Jerome F. Beckman, Ph.D, who works with biofeedback. These doctors are both at Medical Associates Clinic also (Ex. 38, p. 13).

Dr. Sterrett examined claimant extensively for right shoulder, low back and right knee pain on March 2, 1984. Dr. Sterrett's examination was essentially negative except for chronic right shoulder pain that is fleeting in terms of position. He did order an EMG and nerve conduction study of the right shoulder (Ex. 38, pp. 14-18). The EMG/NCV tests showed no denervation. Dr. Sterrett concurred with the treatment program of Dr. McCuskey and Dr. Piasecki and had nothing further to recommend (Ex. 38, pp. 21 & 22).

Dr. Beckman reported that claimant continued to be angry with John Deere because he had warned them to fix his machine before the injury. Dr. Beckman recommended exercises and that claimant unload his grudges because they can interfer with healing and increase pain (Ex. 38, p. 15).

Claimant was next seen by David S. Field, M.D., the third member of the orthopedic staff at Medical Associates on April 17, 1984. Dr. Field found no evidence of disc disease that needed any further evaluation of the back. He felt claimant had a ligamentous strain secondary to the injury (Ex. 38, pp. 19 & 21; Ex. 4). An arthrogram of the right shoulder on May 2, 1984 showed (1) no rotator cuff tear, but (2) did show adhesive capsilitis of the right shoulder (Ex. 38, p. 24; Ex. 5).

Claimant was also seen by Dr. Schultz (full name unknown) at Medical Associates who also appears to be an orthopedic doctor on July 3, 1984 and August 3, 1984 (Ex. 38, pp. 29-31). Dr. Field continued to see claimant several times in late 1984 and early 1985 (Ex. 38, pp. 31-33; Ex. 6, 7, 8, 9 & 10). Claimant was then seen and treated by Paulette Lynn, M.D., a physiatrist at Medical Associates. She saw claimant from March 20, 1985 to July 3, 1986 approximately 18 times (Ex. 11 through 24 generally).

Claimant was also examined by William G. Clancy, M.D., of the Sports Medicine Clinic at the University of Wisconsin on July 1, 1986. He found claimant had reduced range of motion of his right shoulder and slightly decreased muscle strength compared to his left shoulder. Dr. Clancy clinically suspected a partial rotator cuff tear and recommended a repeat arthrogram (Ex. 33). There was no evidence that this was ever done.

On October 9, 1985, Dr. Field reviewed that claimant has had difficulties with his right shoulder since the injury on September 16, 1983 and that he had performed a shoulder manipulation and injection on May 18, 1984. Dr. Field gave range of motion measurements of the right shoulder and found that claimant had a 15 percent impairment of the right upper extremity which equates to nine percent of the whole body (Ex. 23). Later, on September 6, 1986, Dr. Field added a five percent permanent impairment for claimant's back condition (Ex. 35). The combined value of nine percent and five percent in the AMA Guides is 14 percent of the body as a whole.

Dr. McClenahan, the employer's medical director, took measurements and gave claimant a 22 percent permanent impairment rating of the right upper extremity for the shoulder injury of September 16, 1983 (Ex. 1, p. 22; Ex. 25). Dr. McClenahan did not give a written rating for the claimant's back condition. However, at the hearing he testified that he agreed with the five percent body as a whole rating for the back. He testified that his 22 percent right upper extremity rating converts to 13 percent impairment of the body as a whole. Then combining 13 percent impairment for the right shoulder and five percent for the back resulted in an overall combined impairment rating of 17 percent of the body as a whole.

Claimant was evaluated for impairment by Arnold E. Delbridge, M.D., on May 21, 1986 at Waterloo, Iowa (Ex. 32). Dr. Delbridge noted there was no atrophy of the shoulder and claimant's EMG report was negative. However, the right shoulder was slightly weaker than the left shoulder. Claimant's range of motion measurements were calculated and resulted in an 18 percent impairment of his right shoulder which converted to a whole man impairment rating of 11 percent. Dr. Delbridge commented that claimant's preexisting spondylolysis and spondylolythesis was aggravated causing persistent stiffness, soreness and pain in his back as a result of his injury. Dr. Delbridge agreed that the impairment rating of five percent awarded by Dr. Field would be reasonable. Using the Guides to Evaluation of Permanent Impairment, Second Edition, Dr. Delbridge correctly combined the 11 percent impairment of the shoulder and the five percent impairment of the back and gave claimant a 15 percent overall impairment rating of the whole man. Dr. Delbridge gives further insight into the impairment by his concluding paragraph:

> This man will be compromised as a result of his injury in terms of what he is able to do. The changes that have occurred in his work are that he cannot do piece work anymore. Apparently he was doing piece work prior to his accident. Now according to him he can't keep up. He will definitely have trouble with his limited shoulder motion doing any work above chest level indefinitely. Considering his back situation, heavy lifting is not advised. His lifting limit should be in the range of forty pounds and he should avoid markedly excessive stooping and bending and especially lifting from floor level and twisting.
> (Ex. 32)

Dr. McClenahan testified that claimant received possibly 300 or more physical therapy treatments, numerous trigger joint injections, a TENS unit and many medications. He said that the

spondylolysis and spondylolythesis were congenital but claimant had not complained of any back problems prior to this injury. He said claimant should not do work above shoulder height with his right arm. However, he could lift any amount of weight up to shoulder height. Dr. McClenahan said the claimant should have no restrictions due to his back in his opinion.

Ann Beau, claimant's wife, testified that claimant has back pain and right shoulder pain and that it is difficult for him to sleep. Previously he played basketball, baseball and volleyball but cannot lift his hand over this head now.

Claimant testified he has back pain if he stands or sits too long. He did not have any back problems before the accident. His right shoulder is not painful, but he cannot lift his arm over his head or behind his back. His right arm is his dominant arm. If he holds it up it tires quickly. If he tries to write a two page letter it makes his arm sore and gives him pain. Previously, he could curl weights up to 60 or 70 pounds but now he can only curl 20 or 30 pounds.

Claimant testified that he has tried to do a number of jobs for the employer since the injury. He tried forklift, spot welder, straight presses, plane cutter, paint line and external lathe but he was unable to do these jobs. He now performs a janitor's job on the second shift removing old wax from the floor and then waxing the floor with new wax. In this job he operates a buffer, a wet vacuum and mops. He also stacks chairs. This is the first job that he really can handle. Russell Spensley, his supervisor, testified that claimant performed this job well without difficulty and that he is a good employee. Claimant testified that the janitor's job pays $12.00 per hour which is approximately $3.00 less per hour then he was making previously when he had the opportunity to work incentive pay jobs. There may be some incentive pay jobs at the employer's which he could handle but he does not have the senority to get them. Dr. McClenahan testified that claimant has the best job that he could do now with his seniority.

APPLICABLE LAW AND ANALYSIS

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

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

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

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's shoulder injury was an injury to the body as a whole. There was no evidence that it was limited to the arm alone (Iowa Code section 85.34(2)(m)). Dr. Delbridge clearly stated that this man had a rotator cuff injury and that rotator cuff injuries are considered by the industrial people as body of

the whole injuries. Therefore, he converted his right upper extremity to a body as a whole rating. Claimant's back injury is unquestionably an injury to the body as a whole.

Claimant's worse impairment is that he cannot lift his right arm above his right shoulder or head. The body as a whole impairment ratings of three very competent physicians are quite close. Dr. Field awarded 14 percent. Dr. Delbridge assessed 15 percent. Dr. McClenahan determined 17 percent. The two orthopedic surgeons, Dr. Field and Dr. Delbridge, are extremely close at 14 percent and 15 percent respectively. Since they are orthopedic surgeons, then their ratings would have to be given the greatest weight. As far as impairment ratings go there is a common misconception that industrial disability is greater than functional impairment and that it is an add on --- something to be examined on top of functional impairment. However, such is not the case. Industrial disability can be the same as, less than or greater than functional impairment. Lawyer & Higgs, Iowa Workers' Compensation -- Law & Practice, section 13-5, page 116.

Claimant is 40 years old, has the benefit of a high school education, and has average or better intelligence. It is possible for him to learn new skills within his limitations if necessary or if he chooses to do so. His employer has provided him with extensive and prolonged medical care. The employer has provided several jobs for claimant until claimant found one which he could do without difficulty and still earn a good income. However, his compensation has been reduced and he has lost the opportunity to earn incentive pay at the present time. There may be some remote possibility of incentive pay in the distant future if his seniority is sufficient for one of these jobs.

Claimant testified that he is now earning $12.00 per hour and this is $3.00 per hour less than he was previously earning with incentive pay. Apparently then he was earning approximately $15.00 per hour and has suffered a $3.00 per hour loss of income.

The fact that the claimant had prior congenital back anomalies is of no consequence because he was having no back problems prior to the injury of September 16, 1983.

Based on the foregoing considerations, it is determined that claimant has sustained an industrial disability of 20 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 injured on September 16, 1983 when a 1200

pound gear came off of his machine, hit him in the right shoulder and forced his back against a hopper.

That the injury aggravated a preexisting congenital spondylolysis and spondylolythesis condition in his back.

That the injury damaged his right shoulder and rotator cuff.

That three physicians rated the claimant's impairment at 14 percent, 15 percent and 17 percent of the body as a whole for both the right shoulder injury and the back injury.

That claimant's worst impairment is his ability to raise his right arm above his shoulder or head.

Claimant is age 40, has a high school education, average or better intelligence, and is currently working for the same employer for $12.00 per hour.

That claimant previously earned approximately $15.00 per hour doing incentive pay jobs which results in an approximate $3.00 per hour loss of income.

That claimant is currently unable to perform incentive pay jobs and the possibility of obtaining an incentive pay job is not imminent.

That claimant sustained a 20 percent industrial disability to the body as a whole.

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 has sustained industrial disability to the body as a whole for the injury to his right shoulder and the injury to his back caused by the accident of September 16, 1983.

That claimant is entitled to 20 percent permanent partial disability to the body as a whole as industrial disability.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant one hundred (100) weeks of permanent partial disability benefits at the rate of three hundred four and 21/100 dollars ($304.21) per week in the total amount of thirty thousand four hundred twenty-one and 10/100 dollars ($30,421.10) commencing on May 30, 1984.

That the defendant pay the accrued benefits in a lump sum.

That interest will accrue under Iowa Code section 85.30.

That defendant will pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33. However, all of the costs attached to the prehearing report are not allowed. The medical report from Medical Associates of January 5, 1985 in the amount of fifteen and no/100 dollars ($15.00) and another medical report from Medical Associates dated March 22, 1985 in the amount of fifteen and no/100 dollars ($15.00) are both allowed. The item to Westfall Reporting for deposition on January 22, 1986 in the amount of eighty-two and no/100 dollars ($82.00) is allowed. These costs total one hundred twelve and no/100 dollars ($112.00). The other items for copies, postage, longdistance telephone tolls and zerox expense are denied.

The 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 27th day of May, 1987.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN BEEMBLOSSOM, Claimant, vs. TINDAL FARM SUPPLY CO., Employer, and ALLIED INSURANCE, a/k/a AID INSURANCE, Insurance Carrier, Defendants.	:	File No. 727594 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, John Beemblossom, against his employer, Tindal Farm Supply Co., and its insurance carrier, Allied Insurance f/k/a Aid Insurance Co., to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained February 21, 1983. This matter came on for hearing before the undersigned deputy industrial commissioner at the Divison of Industrial Services office in Des Moines, Iowa, on December 11, 1986. But for briefs subsequently filed and considered, the record was considered fully submitted at close of hearing.

The record in this case consists of the testimony of claimant, of Janet Craven, of Donna Daniel, of Jill Boileau, and of Kathleen Benson-Larson, as well as of joint exhibits 1 through 41. Joint exhibit 1 is a radiological consultation report of May 24, 1983. Joint exhibit 2 is records of reports of John C. VanGilder, M.D. Joint exhibit 3 is records and reports of David Naden, M.D. Joint exhibit 4 is physical therapy records prepared by Pam Hazel. Joint exhibit 5 is records of Muscatine General Hospital for an admission of claimant of June 25, 1984. Joint exhibit 6 is records of E. A. Dykstra, M.D. Joint exhibit 7 is further physical therpay department notes prepared by Pam Hazell. Joint exhibit 8 is records of David M. Paul, M.D. Joint exhibit 9 is a consultation report of July 5, 1983 from University of Iowa Hospitals. Joint exhibit 10 is a report of Walter L. Gerber, M.D. Joint exhibit 11 is interrogatories submitted to Kathleen Benson.

, 1983. Joint exhibit 34 is a radiology
, 1977. Joint exhibit 35 is a duplicate of
int exhibit 36 is a neurology report from
a Hospitals of November 14, 1979. Joint
ngton County Developmental Center report to
1986. Joint exhibit 38 is the resume of
n. Joint exhibit 39 is the deposition of
ibit 40 is interrogatories answered by
t exhibit 41 is a letter from defense
counsel Mullins.

ISSUES

solution are:

oloyer-employee relationship exists between
ged employer;

ant received an injury which arose out of
his employment;

al relationship exists between the alleged
disability;

nt is entitled to benefits and the nature
efit entitlement, including the question

paid a percentage on the number of loads hauled and on the number of bushel hauled. Individuals and corporations contracting with The Farm Supply for hauling paid The Farm Supply which then paid the trucker.

Claimant's daily work hours apparently varied with the job he was performing. Mr. Tindal either directly or through his secretary instructed claimant as to his duties on each day. Mr. Tindal testified that when The Farm Supply sends a trucker out with a Farm Supply truck, either The Farm Supply directs the trucker as to the particular trip or the person contracting for hauling from The Farm Supply directs the trucker as to the particulars of the hauling Job. On February 21, 1983, Rath Packing Company apparently called Leonard Tindal and sought hauling of livestock from its Columbus Junction plant to its Waterloo plant. Tindal then contacted claimant who appeared at Tindal Farm Supply to undertake the haul. Mr. Tindal testified that when claimant got to the Columbus Junction Rath Packing plant, Tindal expected claimant to go wherever Rath Packing told him to but that claimant had the ability to say yes or no. Claimant testified that when he arrived at Tindal Farm Supply on February 21, 1983, he discovered the truck had a blown air bag which could cause difficulties with braking. Claimant stated that he had not wanted to take the truck for that reason, but was told to take the truck and proceed to Rath. Tindal testified that he expected claimant to go directly from Columbus Junction to Waterloo with a load of hogs he was hauling but for stops for dinner or other necessities, but that claimant, as a trucker, was expected to know the appropriate route to take to Waterloo and was not specifically directed as to which route to travel. Tindal testified that it was never discussed whether claimant had the ability to hire other individuals to assist claimant in either loading or unloading or transporting livestock, but that Tindal himself would have assumed no financial obligation for anyone else. A friend of claimant's was traveling with claimant on the injury date without The Farm Supply's express permission.

Tindal testified that as of February 21, 1983, The Farm Supply had no long range plans as to how much they "were going to use John" and that he was not sure that that was discussed with claimant before he left.

The three tier tractor-trailer rig which claimant was driving on February 21, 1983 overturned enroute to the Waterloo Rath Packing plant as claimant attempted to maneuver a sharp corner. The truck and trailer tipped on the right side onto the road shoulder and claimant was thrown in and out of his seat a few times and was straddled on the gearshift. Claimant was transported by ambulance to the St. Luke's Hospital emergency room where he was treated and released after approximately three hours. Claimant reported that immediately following the injury, he had a bruise on his thigh but no other abrasions, that his

left leg was numb, and that his neck bothered him.

Claimant saw D. C. Shimp, D.O., at the Washington Clinic the following morning. Dr. Shimp apparently examined claimant, ordered x-rays, and prescribed physical therapy consisting of whirlpool, hot packs, and heat. On May 3, 1983, Dr. Shimp indicated that claimant continued to make slow progress with medication and physical therapy, but that he had no other suggestions for therapy. His diagnosis of that date was of myofascitis of the entire spine.

An x-ray report of J. Gardner, M.D., of February 24, 1983, reports that on a coned down view of L2, there is a very slight irregularity in the anterior border of the L2 vertebral body which the doctor believes to be a developmental variation rather than a compaction fracture. The doctor opined that he did not expect this defect to be the cause of claimant's rather severe progressive neurological findings. Dr. Gardner interpreted cervical and lumbar spine views of that date overall as showing normal lordotic curvature of the cervical region and the lumbar region with vertebral body heights maintained. He noted a narrowing of of the C5-6 and the C6-7 disc spaces accompanied by osteophyte lipping. In the lumbar region, the disc spaces were normal with vertebral body heights measuring unchanged from 1977. An earlier x-ray report of a Dr. Fedge of February 10, 1977 was reported as essentially negative with vertebral body heights maintained at all levels and no definite loss of disc space, no significant congenital variations, and no misalignment. Dr. Fedge subsequently interpreted lumbar sacral spine x-rays of February 14, 1984 as showing some accentuation of the normal lumbar lordosis and a modest scoliosis. Moderate degenerative change was noted but no evidence of significant congenital variation or recent or previous trauma. He interpreted x-rays of May 21, 1984 as showing a slight narrowing of the 4-5 and 5-1 disc interspaces, but no appreciable misalignment and no definite spondylolysis. Degenerative changes in the posterior articular facets were noted.

Dr. Shimp subsequently referred claimant to John C. Van Gilder, M.D., a professor and chair of the division of neurosurgery at the University of Iowa Hospitals and Clinics. Dr. VanGilder initially saw claimant on March 3, 1983 with chief complaints of paraspinal pain in the lower thoracic and lumbar area, left hip pain, and left leg pain. On examination, claimant was moderately tender in the lower parathoracic and lumbar area bilaterally with scoliosis of the lumbar spine, convexity to the right, secondary to muscle spasm. Claimant had moderate tenderness in the left inguinal anterior thigh area and in the left hip. Knee reflexes were +1; ankle reflexes were trace on the left, +1 on the right; both toes were downgoing to plantar stimulation. There was questionable weakness of dorsiflexion of the left foot. Flexion of the back and the lumbar spine was

limited to 40 degrees with exacerbation of his scoliosis with stretching of the low back muscles. Straight leg raising was positive at 60 degrees on the left and 70 degrees on the right. No "clear cut" muscle atrophy was present. Claimant had mild paracervical tenderness of his cervical spine with good strength in the upper extremities and reflexes +1 and symmetrical. The doctor then believed that claimant's condition represented a contusion on a muscular basis; that claimant had given a clear history of improvement both in the painful [sic] syndrome and weakness in the left foot and felt that claimant should continue with conservative management.

Dr. VanGilder again saw claimant on April 5, 1983. Low back examination revealed a normal lordotic curve. Low back flexion remained at approximately 40 degrees with lateral bending of 30 degrees to the right and 35 degrees the to the left. There was no evidence of focal weakness of the lower extremities and sensory examination to vibration and position and pinprick was normal with no evidence of neurological deficit. VanGilder suggested claimant continue with conservative management consisting of physical therapy, analgesics, and antispasmodic medication. VanGilder prescribed Elavil, 50 mg. hour of sleep as well. On examination on May 25, 1983, claimant could flex the low back approximately 70 degrees with lateral bending of 35 degrees right and left. Again, claimant had no evidence of focal weakness of the lower extremities and sensory examination remained normal. Reexamination July 5, 1983 was essentially the same, but for straight leg raising positive at 75 degreess left and 80 right in the supine position. When seen on September 1, 1983, claimant had a normal lordotic curve and could flex his low back to 80 degrees with lateral bending of 35 degrees left to right. Straight leg raising was 90 degrees bilaterally with a mild loss of normal lordotic curve of the lumbar spine. Sensory examination was normal. Dr. VanGilder opined that claimant was gradually demonstrating improvement, quite marked since July and indicated that claimant could return to work in approximately two months. In a handwritten note of September 7, 193, Dr. VanGilder opined again that claimant could return to work as a truck driver on or about November 1983 and that he doubted that any permanent disability would result. He also noted that he could find no evidence of malingering in claimant.

Claimant was again seen on November 8, 1983. Claimant then reported that he continued to have low back pain which radiated into the left buttock but not down the leg. Parathesis was still present in the left foot but was improved since September. Physical examination was essentially similar other than sensory examination demonstrated spotty hypalgesia over the dorsum of the left foot as well as mesial aspect of the left leg. Increased exercise, particularly hip strengthing exercises, were prescribed. On reexamination on June 14, 1985, claimant's physical condition was essentially unchanged with straight leg

raising at 80 degrees bilaterally and no evidence of hypalgesia on sensory examination of the lower extremities. Dr. VanGilder opined that claimant remains with intractable pain somewhat helped with Elavil. He opined that claimant continued to be disabled and would be unable to return to truck driving. VanGilder agreed claimant had approximately 20 percent "medical disability." He doubted claimant's condition would significantly change in the future given his prolonged consistent symptomatology. On August 26, 1985, Dr. VanGilder opined that claimant would be limited to no climbing, no lifting greater than 20 pounds, no prolonged standing greater than one hour, and no prolonged sitting asociated with jostling, as would be associated with driving a truck, and that claimant is employable only in sedentary work. In his deposition, Dr. VanGilder opined that claimant had reached maximum medical healing as of his June 13, 1985 examination. The doctor further opined that claimant's 20 percent functional impairment and his limitations resulted from the February 1983 injury.

Claimant was subsequently examined by David C. Naden, M.D., a board certified orthopedic surgeon. Dr. Naden initially evaluated claimant on December 8, 1983. Examination findings were not significantly different from those of Dr. VanGilder other than that Dr. Naden found lateral bending only to be about 10 to 15 degrees each way with muscle spasm and guarding, and rotation of 5 to 15 degrees each way and maybe 5 to 10 degrees of hyperextension. All motion of the back was found to produce muscle spasm, pain and tightness. Dr. Naden noted that in the prone position claimant had evidence of instability of his spine from L5-S1 to the lower dorsal spine. Dr. Naden opined that claimant's prognosis was guarded and felt that claimant would probably not be able to return to work in his then present condition. Claimant was admitted to the Muscatine General Hospital on January 25, 1984 for myelogram and CT scan. The CT scan revealed mild anterior spur formation of the lumbar spine with slight narrowing of the L5-S1 disc space. No evidence of a herniated disc was seen. The myelogram was interpreted as revealing bulging discs at the L4-5 and the L5-S1 levels. The nerve roots were not cut off or compromised, however. In a February 28, 1984 report, however, Dr. Naden indicated that the AP films of the myelogram did not show really good evidence of a nerve root cutoff at either of the levels, but that he thought that claimant had as bulging disc midline at the two levels which was probably intermittently causing symptomatology down into his lower left extremity. He characterized claimant as having had a preexisting condition that was aggravated by his truck accident and which has caused an intermittent bulging disc in the lower spine. The doctor opined that claimant had a physical impairment of around 17.5 to 20 percent which the doctor would attribute approximately 50 percent to his preexisting conditions and approximately 50 percent to his [February 1983] accident. The doctor then felt that the prognosis was not

excellent but that while it may be difficult for claimant to get back to driving, he would probably improve with time and eventually be employable and function in a "halfway decent fashion."

Dr. Naden reexamined claimant on January 29, 1985. His physical examination was essentially as presented previously. The doctor's ultimate diagnosis was of degenerative disc disease with some evidence of nerve root encroachment on the left, probably involving both the L-5 and S-1 nerve roots. The doctor opined that surgery would not really profit claimant and that he was getting along adequately albeit not driving a semi. In his deposition, Dr. Naden opined that claimant could lift or carry from 10 to 12 pounds on a repetitive basis, that claimant could do intermittent sweeping, that claimant could either sit or stand approximately 40 to 50 percent of the time during an eight hour work day. Dr. Naden noted that claimant has a mild limp which is probably secondary to his condition and habit. The doctor agreed that he had seen no significant change in claimant's condition during the approximate year between his last two examinations and that as of his last examination no significant medical improvement was likely. The doctor further opined that while 50 percent of claimant's condition could be attributed to degenerative changes, it was the February 1983 incident which caused these preexisting changes to become symptomatic. Dr. Naden further stated that claimant could not bend, stoop, or twist. He subsequently stated that because of the intermittent nature of claimant's symptoms, claimant would need employment which would accommodate those times in which he was having more difficulty and [was unable to perform within the limitations outlined]. Dr. Naden opined that claimant's activities as a laborer and trucker at Tindal Farm were such that could logically lead to degeneration of the spine.

Claimant was examined and treated by E. A. Dykstra, M.D., an orthopedic surgeon, initially on September 21, 1984 per referral of Dr. Shimp. Initial physical examination was consistent with those outlined above. EMG's were nondiagnostic. Further physical therapy and epidural steroid injections were prescribed. Claimant reported benefits from both regimes but continued to have symptoms with very minimal change in his condition as of February 18, 1985. Dr. Dykstra then opined that claimant would be unable to return to truck driving and that there would be no long term changes in the original "disability" of 15 to 20 percent, 10 of which was related to the present episode. Claimant testified that the insurer subsequently refused to continue authorization for physical therapy.

David M. Paul, M.D., examined claimant on February 14, 1984 and November 13, 1984, both pursuant to a disability determination for the Social Security Administration. Following the February examination, Dr. Paul stated that claimant did not appear to require professional care nor significant amounts of pain-

relieving medication as he could walk a mile and was fully independent in all areas of daily living but for a problem of pain. He stated that claimant may have "a mechanical backache" or a "chronic pain syndrome," but that there was much in the history and examination findings to suggest symptomatic or conversion overlay. He noted that there appeared to be no examination findings which could confirm significant musculoskeletal system functional limitations. The November examination and report was consistent. In both reports, Dr. Paul commented on claimant's performance on testing. Noting that "according to a Burns' bench study," Burns' bench patients who show inability to perform or who refuse to even try the bench test also show a significant correlation with conversion personality features as defined on MMPI testing.

Claimant was seen for evaluation of epididymitis and prostatitis following his February 1983 accident. The conditions were treated and resolved successfully.

Claimant testified that he initially had a TENS unit prescribed following his injury; subsequently a back brace which he continues to wear was prescribed. Claimant testified that during the period when he lived by himself following his injury his son mowed lawn and shoveled snow while his daughters did laundry and grocery shopped. He admitted that he occasionally washed dishes himself. Claimant now lives with his children's mother in a one story house which has three front steps and two back steps as well as a garage. Claimant admitted that he moved furniture when the couple moved into their current home following his February 1983 accident.

Claimant reported that he has constant low back pain which goes into his left leg with leg numbness at times. Claimant localized his pain as in the left center of the back and approximately three inches above the beltline and radiating into the left buttock and hip through the mid thigh. He reported that at times the leg is completely numb to the mid thigh and that he then uses a walker. Claimant expressed his belief that when he favors his left leg, the right leg "flares up." Claimant reported that he walks approximately a mile every day but must stop after about two blocks and rest. He indicated that if he sits from one-half to three-quarters of an hour, he is awfully stiff and that he therefore tries to get up every fifteen minutes. Claimant stated that he can drive an automoatic car but has not tried to drive a stick shift car as he is unable to push the clutch down in his son's stick shift truck. Claimant tesitifed that prior to his injury he handled ninety to one hundred pound seed corn bags but now he does not even attempt to pick up five pounds of potatoes. He reported that he gives himself rest periods during the day when at home or he simply lies down or sits. Claimant testified that he depends on his Elavil to sleeps through the night and that following his injury

he began to sleep on a heated waterbed. Claimant river or creek fishes on occasion and hunted mushrooms four times last spring. Claimant has no medical appointments currently scheduled and sees Dr. Shimp only for renewal of his Elavil prescription. He occasionally takes Tylenol during the day.

Claimant could not recall having complaints of pain and numbness in both legs in February 1977, but stated he went to a chiropractor at that time and came out of it just like that. A note of Dr. Shimp on February 9, 1977 reflects complaints of pain and numbness in both legs.

Claimant reported that he was offered a job last year but was unable to accept it on account of his injury. He reported that he has applied for other jobs through his counsel. Claimant indicated that he talked to Erv Lewis of State Vocational Rehabilitation at the Washington County Development Center and that Mr. Lewis referred him for vocational rehabilitation inhouse evaluation in Des Moines. Claimant subsequently underwent inhouse evaluation in Des Moines and also on the job evaluation at the Washington County Development Center.

Claimant testified that he met on two occasions with Jan Craven, a vocational rehabilitation coordinator with Professional Rehabilitation Management. He agreed that she had told him he could call her at any time and that he had not done so. He refused to indicate that those calls could be made collect. Claimant testified that he attempted a work hardening program involving further physical therapy as well as exercise through the YMCA, but that he was unable to do so as he developed poison ivy over an extended portion of his body. He stated that the poison ivy cleared up after a month but, by then the YMCA program was not available. Claimant testified he followed up on any employment references which Ms. Craven gave him. He stated he has lived in Washington, Iowa throughout his life and his family resides there. He indicated that he relies on his family to fulfill his physical needs. He testified he has difficulties with driving substantial distances.

Jan Craven testified that she has a masters degree in special education; behavioral disorders, educationally and mentally handicapped and behavior disordered, as well as a masters degree in vocational counseling. Craven met with claimant for initial assessment on October 3, 1985. Following the initial job readiness assessment, claimant's case was put on hold until January 21, 1986 pending completion of the State Vocational Rehabilitation evaluation. Ms. Craven testified that upon reinstitution of services, a work hardening program consisting of physical therapy at the Washington Community Hospital and exercise at the Washington YMCA was instituted to prepare claimant for functioning throughout an eight hour work day. She reported that the YMCA was contacted on January 29, 1986. A

letter regarding the program sent to claimant and his counsel on February 4, 1986. Craven testified that claimant never entered into the work hardening program but that she had been informed that claimant's brother had heart surgery and that may have been a reason why claimant did not attend classes. She subsequently testified that she did have some indication concerning the poison ivy episode. She noted that the work hardening program was available to claimant from January through May 1986 even though he never participated. In her deposition, Pam Hazell, licensed physical therapist, stated she advised Ms. Craven that Ms. Hazell would initiate a program with claimant at the YMCA. Hazell testified claimant once attempted contact with her as to a time for them to work together, but that for whatever reason contact was not made between her and claimant. Ms. Craven testified that she authorized a labor market survey which identified positions in both the Iowa City and Muscatine area which claimant could possibly fill. These included small engine repair, rod and lure tying, gun repair, and small parts assembly. She agreed that some of the positions offered on-the-job training but noted that many were small family-operated firms. She stated that an August 1, 1986, approximately thirty-two openings in small assembly and repair and mechanics in the Iowa City to Muscatine area were identified, but stated only one or two were actually accepting applications for employment and that she had identified only one possible job opening. Craven agreed that her August 6, 1986 report states there does not appear to be an abundance of jobs within claimant's capacities within claimant's geographic area and that she had been unable to find a single employer who had a job within claimant's restrictions. She opined, however, that claimant's employability was a function of his locale and if claimant lived near or was mobile to Iowa City, claimant was employable. She opined that claimant had expressed an interest in employment in Iowa City or Muscatine, or otherwise within thirty minutes of his home if he were able to travel to those locales.

Ms. Craven testified that she had advised claimant to contact and speak with the job training partnership act coordinator in the Washington area and that claimant had met with that individual on one occasion. Ms. Craven indicated that claimant did not wish to relocate and characterized the Washington, Iowa economic picture as very poor at the time of the labor market survey. She characterized this as a "very significant factor" in job availability. Ms. Craven's written reports concerning her involvement in claimant's case are consistent with her oral testimony.

Donna Daniel testified that she is a vocational rehabilitation counselor with the State Vocational Rehabilitation Program and has been such since 1976. Ms. Daniel has a masters degree in vocational rehabilitation counseling. She has been assigned to the state's evaluation facility in Des Moines since 1984 and was

claimant's rehabilitation counselor during his stay at the evaluation facility in November and December 1985. She reported that while claimant's stay at the evaluation facility was interrupted on account of the Thanksgiving holiday and also on account of a personal tragedy in claimant's life, claimant completed his assigned evaluation program and was ultimately discharged on December 17, 1985. Ms. Daniel indicated that claimant was willing to cooperate in the evaluation program and desired to do his best in all that he was assigned to, but that while claimant had some skills, the most significant concern was whether claimant could physically tolerate performing any skills on a full-time competitive level. Ms. Daniel characterized claimant as best at hands on activities in the industrial skills area, particularly small parts assembly, electronics portion of such tasks. She reported that on-the-job evaluation was recommended in order to observe whether claimant could handle such work physically. She agreed that actual work hardening was not a specific recommendation at the facility. Records concerning claimant's stay and performance at the evaluation center were consistent with Ms. Daniel's oral testimony.

Ms. Daniel's January 3, 1986 report noted that vocationally, claimant received selective recommendations to pursue employment as a production assembler, small parts assembler, and related assembly portions of an electronics worker job. She noted that his hands on performance met expectations for those positions but his physical tolerance for full-time employment and activities that might be related and necessary to these positions is questionable. Ms. Daniel characterized claimant as a very cooperative, mature, and motivated individual. A building maintenance final report of Dorothy Tarr indicated that no vocational recommendations were made in that area since in the reporter's opinion, work requiring comparable physical movements--walking, bending, twisting, pushing, pulling, etc., would be contraindicated. It was suggested that possibly inspection-type tasks or dispatcher work could be considered and this would not be so physically demanding and would provide claimant an opportunity to alternate his physical position between sitting, standing, and walking. In a work awareness final report, claimant was noted to be better able to follow verbal with demonstrated instructions than he was able to follow written or verbal [instructions] only. Academic-related tests were very difficult for claimant and he needed much encouragement and support to carry them out. The psychological evaluation report indicated that the WAIS-R was administered claimant and the results suggested intellectual functioning within the average range with claimant's nonverbal skills surpassing his verbal skills [WAIS verbal IQ 89, performance IQ 98, full scale IQ 92]. Claimant's performance on reading tests was at the 5.8 grade equivalent; math test placed at the seventh grade [23rd percentile]. The reporter stated that performances at those levels were not supportive of further academic training. Performances on the

DAT mechanical reasoning and space relation tests were both in the inferior range, and did not reflect claimant's prior experience in mechanical work.

Jill Boileau, director of client services at the Washington County Developmental Center, testified that the center is a sheltered work activity center and work adjustment center that serves vocationally, physically, mentally and emotionally handicapped individuals. She reported that claimant attended the center through the work adjustment program upon referral of his regional vocational rehabilitation counselor. Ms. Boileau indicated that claimant was in the development center program for ten working days and that following that time it was concluded that claimant was not ready for competitive employment and that although motivated, it was doubtful that claimant could competitively be employed. Ms. Boileau indicated that Dr. Shimp reported at her request that claimant could do hand sorting; hand pickups, which would involve lifting bags and placing items into a truck; read envelopes, which would involve sitting for long periods; fiber rolls, which would involve sitting for long periods; janitorial, which would involve some lifting; tempo paper folding, which would involve sitting for long periods; and bending; running the drill press; table saw; band saws; and participating in activities. Dr. Shimp indicated that claimant could not do tempo delivery which involves walking for long periods. The witness indicated that claimant's program at the center was based on Dr. Shimp's checkoff report as well as on the limitations Dr. VanGilder had suggested.

Kathleen Benson-Larson, director of the Iowa Methodist Medical Center Low Back Institute, and formerly a vocational consultant and branch manager at Crawford Health and Rehabilitation Services, testified. Ms. Benson-Larson has testified before the agency on other occasions and her qualifications are well known to the undersigned as well as outlined in exhibit 38. They will not be further set forth here. Ms. Benson-Larson indicated that she first became acquainted with claimant when, in her capacity as a certified social security vocational expert, she was asked to review claimant's file concerning his application for social security disability benefits and answer interrogatories prepounded. She reviewed all matters in that file as of December 1985 and was present for all testimony on the day of this hearing. Ms. Benson-Larson opined that claimant could not function physically in competitive sustained employment. She indicated that claimant could function only in casual or intermittent employment or in selective placement. Benson-Larson opined that claimant is not capable of dependably and continually selling his services in the competitive labor market. She further opined that the work hardening program which Ms. Craven had attempted for claimant was an appropriate approach in that the physical tolerance problem was the most significant hurdle to claimant's employability in that he has innate abil-

ities and interests, as well as skills which could be utilized to return him to the job market if his physical abilities would so permit. Ms. Benson-Larson's answers to interrogatories propounded in the social security administration hearing as well as the ultimate decision in that hearing were reviewed and considered in the disposition of this matter.

Evidence concerning claimant's earnings with the employer was reviewed and considered.

APPLICABLE LAW AND ANALYSIS

We first consider the employer-employee relationship question.

Iowa Code sections 85.61(1) provides in part:

2. "Worker" or "employee" means a person who has entered into employment of, or works under contract of service, express or implied, or apprenticeship, for an employer....

The Iowa Supreme Court stated in Nelson v. Cities Service Oil Co., 259 Iowa 1209, 1213, 146 N.W.2d 261 (1967):

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

Given the above, the court set forth its latest standard for determining an employer-employee relationship in Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981). The court stated in part:

> I. The employer-employee relationship. As defined in section 85.61(2), The Code, an "employee" is a "person who has entered into the employment of, or works under contract of service...for an employer." Factors to be considered in determining whether this relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or

for whose benefit it is performed. The overriding issue is the intention of the parties. McClure v. Union, et al., Counties, 188 N.W.2d 285 (Iowa 1971). (Emphasis added).

Workers' compensation law is for the benefit of workers and should be liberally construed. Irish v. McCreary Saw Mill, 175 N.W.2d 364 (Iowa 1970).

Workers' Compensation Act is remedial in nature and should be given a liberal construction to accomplish the purpose intended. Snook v. Herrmann, 161 N.W.2d 185 (Iowa 1968).

In cases of doubt as to workers' compensation cases, the court must construe statutes liberally with view to extending aid to every employee who can fairly be brought within them. Usgaard v. Silver Crest Gay Club, 127 N.W.2d 636 (Iowa 1964).

When the above factors are applied to claimant's case, it is evident claimant was an employee of Tindal Farm Supply when injured. The Farm Supply had the right of selection and employed claimant at will. Likewise, The Farm Supply had the right to discharge claimant. Indeed, The Farm Supply had discharged claimant in November 1982 and voluntarily called him back on his injury date. The Farm Supply was responsible for payment of wages to claimant. The parties considered those payments made as wages and not as payment for services an independent contractor rendered. Tindal Farm Supply withheld state, federal and FICA taxes. Tindal Farm Supply paid claimant vacation pay and any other benefits its full-time employees were entitled to all times during which claimant was employed. Tindal Farm Supply had the right to control the work. Leonard Tindal, directly or indirectly, assigned claimant his daily work duties. While Tindal testified claimant could say "yes" or "no," claimant's testimony as regards driving the tractor-trailer rig with its blown air bag demonstrates that claimant believed he would jeopardize his job were he to refuse to perform directed duties. Claimant did have some control over how he performed his work in that he could determine the routes he followed while driving and apparently was not prohibited from permitting nonemployees to ride in the rig with him. Claimant had no actual control over the nature of his assigned work, however; that rested with The Farm Supply. Whatever control claimant exercised was that which with one would expect a skilled employee to be trusted; namely, that related to carrying out his assigned duties with minimal direction or instruction. Similarly, Tindal Farm Supply was identified as the authority in charge of the work. Rath Packing contacted The Farm Supply and not claimant for trucking services. Nothing in this record suggests Rath or any other entity or individual believed claimant had actual authority over the work performed or that claimant performed his services for other than The Farm Supply's benefit. That the immediate benefit may have

been to Rath is not relevant. Rath contracted with The Farm Supply for hauling services and paid The Farm Supply for those services. Clearly, the ultimate benefactor from claimant's labor was The Farm Supply.

The parties stipulated as to the arising out of and in the course of issue provided the employer-employee relationship was established. We need not, therefore, discuss that issue. We consider whether claimant has established a causal relationship between his work injury and his claimed disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 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). 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).

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.

Dr. VanGilder opined claimant's current low back and lower

extremity difficulties resulted from his February 1, 1983 work accident. Dr. Naden believes that claimant's condition results from the work accident and from degenerative changes in claimant's spine. Dr. Naden believes both that claimant's prior activities for The Farm Supply were of a type which could "logically lead" to degenerative spinal changes and that claimant's work incident caused those preexisting changes to become symptomatic. Claimant's only known prior incident of low back and leg problems occurred in 1977. That difficulty, whatever its nature, apparently resolved and claimant had been able to work as a trucker and farm laborer until his work injury. Only then did his condition become so manifest that he has been unable to work or live as he had prior to that incident. Claimant's 1983 work injury materially aggravated any prior degenerative changes such that the requisite causal relationship between the work injury and the disability is found.

We now reach the fighting issues, namely, the nature and extent of claimant's benefit entitlement and whether claimant is an odd-lot worker under the Guyton holding.

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).

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 has not made a prima facie showing that he is an odd-lot worker. Under the odd-lot doctrine, the injury must be the factor which makes the worker incapable of obtaining employment in any well known branch of the labor market. In claimant's case, we cannot ascertain whether claimant's current nonemployabiility arises from his injury as such or from claimant's nonparticipation in a work hardening program. All vocational experts agreed that claimant's primary problem is his physical condition and lack of physical tolerance. Both Ms. Craven and Ms. Benson-Larson testified that work hardening was the appropriate and necessary approach to rehabilitate claimant for productive employment. Defendants, through Ms. Craven's efforts, attempted to establish a work hardening program for claimant. At least portions of that program were available to claimant from February through early Summer 1986. Claimant who by that time certainly had some understanding that physical conditioning was essential to his vocational wellbeing never participated in the program. He did not even visit the YMCA and use his employer-provided membership. While claimant asserts and we would like to believe that claimant's nonparticipation resulted from a series of unfortunate mishaps in claimant's life, we conclude the record does not support that conclusion. Claimant made little effort to communicate to either defendants or his own counsel that he was unavailable for the program. Claimant did not inform his own counsel of his alleged problems with participation until June 10, 1986. While claimant did not have a telephone during part of the time in question, Mr. Mullins, his co-counsel, has his office in the same small community in which claimant resides. One suspects that if claimant had considered preservation of and participation in the work hardening program a priority, either he personally or one of the family members on whom he relies for assistance would have contacted Mr. Mullins in April or May 1986. Mr. Mullins or his co-counsel then could have immediately contacted defendants and, thereby, demonstrated that claimant had a good faith desire to participare in the work hardening efforts. Likewise, neither claimant nor any family member on his behalf directly attempted to call Ms. Craven collect or communicate to defendants by letter that claimant then could not participate in the work hardening efforts. While we agree claimant has academic limitations, he was able to function with enough common sense and social appropriateness in his adult life to remain employed until his injury. Hence, we do not feel that his intellectual abilities and level of social sophistication precluded his realizing the importance of communicating his inability to participate in the work hardening program in a

timely fashion. Further, claimant's, at best, languid approach to the work hardening efforts offered him raises serious questions as to his motivation. As the Guyton court pointed out, the question of the extent to which the injury reduced the claimant's earning capacity requires consideration of all factors that bear an actual employability. Motivation is such a factor. We agree that claimant participated in the state vocational rehabilitation program and the opportunity center program. Both of those programs assessed claimant's ability to perform employment tasks in his current physical state. Neither was designed to assist claimant in achieving a higher level of physical functioning. Only the work hardening program was designed to achieve that. Work hardening was essential to claimant's employability in that claimant had transferable skills. We also agreed that claimant at one time contacted Pam Hazell regarding initiating work hardening and that Ms. Hazell was uncertain why further contact did not occur. We believe, however, that claimant had a responsibility to make further efforts at contact with Ms. Hazell on his own behalf. His failure to do so or to offer a credible reason why he did not do so over an extended period also raises serious questions as to his motivation. Claimant's failure to seriously attempt to either participate in or preserve the possibility of participating in such a program counterbalances any finding of motivation to work through his participation in less essential vocational efforts. Claimant has not shown that his failure to find any employment in a well-known branch of the labor market results from his injury and not from his own lack of motivation. Claimant is not an odd-lot worker.

Other evidence does show that claimant has sustained a substantial loss of earning capacity, however. Claimant is an older worker. He lives in a smaller, economically depressed, community where employment opportunities are limited. His desire not to relocate is reasonable and cannot be used as a negative factor in assessing his current industrial disability. He is a high school graduate but is academically limited and apparently lacks the abstract thinking skills required for more sophisticated academic retraining. His prior experience is largely as a truck driver and manual labor. His residual physical problems from his injury are likely such that he could not return to like jobs even were he to complete the work hardening offered. On the other hand, he has transferable skills identified through state vocational rehabilitation and with work hardening might be able to find employment within his permanent limitations. As discussed above, claimant's motivation to work is, at best, marginal. All factors support an overall loss of earning capacity of 75 percent. A significant change in any of the factors bearing an employability would, of course, make this award ripe for review-reopening.

We reject both claimant's and defendants' position as to the running of healing period benefits. Evaluation and care by Dr. Naden

initially was intended to discover whether claimant's condition could be improved with further treatment. Hence, the initial examination time could not constitute the end of the healing period. Reexamination on January 29, 1985 demonstrated claimant's condition had not changed significantly in the subsequent year and raised a fair assumption that significant further improvement could not reasonably be anticipated. That assumption was supported by Dr. Dykstra's February 18, 1985 conclusion that claimant had very minimal changes in his condition even with physical therapy and steroid injections and Dr. VanGilder's June 14, 1985 opinion that claimant's condition would not change significantly in the future. Claimant's healing period is found to run through January 29, 1985.

Claimant seeks vocational rehabilitation benefits. The reason he seeks them is unclear from the record. Section 85.70 entitles claimant to such benefits during that time in which he was actively participating in a vocational rehabilitation program recognized by the state board for vocational education. If either the Washington City Opportunity Center Program or the State Vocational Rehabilitation on site evaluation program qualifies under the section, claimant is entitled to vocational rehabilitation benefits for times in which he was in attendance and defendants are advised to pay claimant any such entitlement.

The rate issue remains. In his brief, claimant states:

> Since John had not returned to work for the full thirteen-week period of time before his injury, it would appear that Iowa Code Section 85.36 (7) is applicable and as Defendants earlier admitted, the gross weekly wage for purposes of determining John's rate of compensation is $263.00. The appropriate rate is, therefore, no less than $164.44 per week.

Claimant appears to be waiving all other rate issues raised but for that of claimant's entitlement to an exemption for his son. Claimant's son was 18 at the time of the injury. Claimant's son apparently was still attending high school, however, and claimant apparently still was required to and was paying child support for him. We conclude the claimant could properly have claimed his son as an exemption. Therefore, the appropriate rate is $164.44.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Tindal Farm Supply, d/b/a B & T Farm Supply, originally hired claimant in January 1980 and laid him off in November 1982.

Tindal Farm Supply called claimant back to work on February 21, 1983.

Tindal Farm Supply had the right of employee selection, employed claimant at will and had exercised the right to discharge claimant.

Tindal Farm Supply was responsible for paying claimant wages and withheld federal and state income taxes, FICA taxes, and child support from claimant's wages.

Tindal Farm Supply paid claimant vacation pay and any other benefits to which its full-time employees were then entitled.

Tindal Farm Supply's chief executive officer assigned claimant his daily work activities and claimant's discretion was largely limited to determining how to reasonably perform the job assigned.

Tindal Farm Supply had the right to control the work performed.

Rath Packing Company contacted Tindal Farm Supply for trucking services.

Tindal Farm Supply either directly purchased fuel and other supplies for the tractor-trailer or reimbursed claimant for purchase of those items.

Any repairs on the tractor-trailer were made on Tindal Farm Supply property with Farm Supply tools and supplies.

Tindal Farm Supply was identified as the authority in charge of the work and for whose benefit the work was performed.

Claimant was an employee of Tindal Farm Supply on February 21, 1983.

Claimant sustained an injury which arose out of and in the course of his employment on February 21, 1983 when the tractor-trailer he was driving overturned. Claimant was thrown about in the truck cabin.

Claimant initially was treated for a bruise on his thigh, left leg "numbness" and neck pains.

Claimant has no evidence of neurologic deficit but has continuing leg "numbness," low back pain radiating into his left buttock, and weakness and fatigue.

Claimant did not generally have similar complaints or limitations prior to his injury.

Claimant is limited from lifting greater than 20 pounds, from climbing, prolonged standing, and from prolonged sitting.

Claimant's limitations and complaints result from his work injury.

Claimant injured his testicle in his work accident. That injury has since resolved.

Significant improvement in claimant's condition could not reasonably be anticipated after January 29, 1985.

Claimant is 55 years old; a high school graduate and has limited academic ability.

Claimant's work experience is primarily as a manual laborer and truck driver. Claimant cannot return to either occupation.

Claimant has transferable skills which might result in gainful employment but claimant's present physical condition prevents his attempting employment utilizing those skills.

Work hardening is advisable for claimant.

Defendants attempted a work hardening program for claimant. Claimant was not well motivated to either participate in or preserve the right to participate in that program.

Claimant has not made prima facie showing that his inability to obtain employment in any well-known branch of the labor market results from his work injury and not from his own lack of motivation.

Claimant is not an odd-lot worker.

Claimant's local labor market is limited and economically depressed.

Claimant has a reasonable desire to remain near his family and not relocate.

Claimant has a moderately severe functional impairment.

Claimant has sustained a loss of earning capacity of 75 percent.

Claimant had been in the employ of the employer for less than thirteen calendar weeks immediately preceding the injury.

Claimant's gross weekly wage for rate commutation purposes is $263.00, the wage amount paid a similar Tindal Farm Supply employee.

Claimant's son was over 18 but still attending high school on the injury date.

Claimant still was obligated to support his son and was paying child support for the son on claimant's injury date.

Claimant was entitled to claim his son as a federal income tax exemption on claimant's injury date.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that claimant was an employee of the employer, Tindal Farm Supply, on February 21, 1983.

Claimant has established his February 21, 1983 injury arose out of and in the course of his employment.

Claimant has established that his February 21, 1983 injury is the cause of the disability on which he now bases his claim.

Claimant is entitled to healing period benefits from his injury date through January 29, 1985. Defendants are entitled to credit for benefits previously paid.

Claimant is entitled to permanent partial disability benefits resulting from his February 21, 1983 injury of seventy-five percent (75%).

Claimant's rate of weekly compensation is one hundred sixty-four and 44/100 dollars ($164.44).

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for three hundred seventy-five (375) weeks at a rate of one hundred sixty-four and 44/100 dollars ($164.44) with those payments to commence on January 30, 1985.

Defendants pay claimant healing period benefits from his injury date through January 29, 1985 at a rate of one hundred sixt-four and 44/100 dollars ($164.44). Defendants receive credit for benefits previously paid.

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 27th day of January, 1987.

Helen Jean Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAURETTA BELLER,	:	
	:	
Claimant,	:	
	:	File No. 799401
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,	:	MAY 27 1987
	:	
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Lauretta Beller, against her employer, Iowa State Penitentiary, and its insurance carrier, State of Iowa, to recover benefits under the Iowa Workers' Compensation Act, as a result of an injury allegedly sustained January 10, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner in Burlington, Iowa, on March 17, 1987. A first report of injury was filed April 12, 1985. The record was considered fully submitted at close of hearing.

The record in this case consists of the testimony of claimant, of George Beller, of Kimberly Carroll, of Laurie Carroll, of Rebecca D. Gary nee Hilary, and of Mary Lou Cooper, as well as of joint exhibits 1 through 17. Joint exhibit 1 is medical records of William Whitley, D.D. Joint exhibit 2 is a disability report of Marian S. Jacobs. Joint exhibit 3 is the deposition of Dr. Whitley. Joint exhibit 4 is the court reporter fee regarding said deposition. Joint exhibit 5 is the deposition of G. Patrick Weigel. Joint exhibit 6 is a statement of court costs. Joint exhibit 7 is income tax returns. Joint exhibit 8 is medical records of Keith W. Riggins, M.D. Joint exhibit 9 is the court reporter fee for the deposition of Dr. Riggins. Joint exhibit 10 is the deposition of Dr. Riggins. Joint exhibit 11 is the fee of Dr. Riggins for said deposition. Joint exhibit 12 is a March 9, 1987 report of Dr. Riggins. Joint exhibit 13 was identified as a March 4, 1987 report of Dr. Riggins, but is apparently a December 23, 1986 report of the doctor. Joint

exhibit 14 is the Department of Corrections accident report. Joint exhibit 15 is a November 24, 1986 report of Sinesio Misol, M.D. Joint exhibit 16 is a March 4, 1987 letter of JoAnn E. Wilbur. Joint exhibit 17 is Blue Cross/Blue Shield documents regarding claimant.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant's rate of weekly compensation is $215.23; that claimant remains off work; and that claimant's medical costs are fair and reasonable. The issues remaining to be decided are:

1. Whether claimant received an injury which arose out of and in the course of her employment;

2. Whether a causal relationship exists between claimant's injury and her claimed disability;

3. Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement;

4. Whether defendants are entitled to a credit under section 85.38(2) for benefits paid claimant; and

5. Whether claimant is entitled to payment of certain medical costs as medically necessary and causally related to her injury.

As regards the issue of claimant's entitlement to healing period or temporary total disability, claimant contends that she remains off work and is still entitled to a running award of healing period benefits. Defendants contend that per exhibit 15, the report of Dr. Misol, claimant's healing period ended four to six weeks after January 10, 1985.

REVIEW OF THE EVIDENCE

Claimant is 39 years old and a high school graduate. She was a licensed cosmotologist in Kentucky, but not in Iowa, and has not done cosmotology work since 1978. She has done some assembly line factory work, but has worked primarily as a correctional officer at prison facilities. She most recently worked as a correctional officer at Iowa State Penitentiary and testified that she was injured there on January 10, 1985 when she saw fell on the ice "really hard and fast." Claimant stated that she tried to brace her fall with her hands, but fell on her tailbone. She apparently continued on to a lower prison gate following that incident, but did report an injury to her wrist to her supervisors. An accident report detailing a wrist injury, but not injury to the rest of claimant's body was completed.

Claimant initially saw William H. Whitley, D.O., for her vrist condition and treated with him for the wrist condition rom January 10, 1985 through early February 1985. Whitley pparently prescribed pain medication for the wrist. Claimant ontinued working. Claimant did not see Dr. Whitley or anyone lse for medical care from February 1985 until May 13, 1985 when he returned to Dr. Whitley for treatment of her "back."

On that date, claimant told Dr. Whitley that last winter she ad slipped at the prison and fell and since then intermittently, he had had low back pain, that during the last two or three eeks had localized and gotten worse. Dr. Whitley's examination f claimant on May 13, 1985 revealed tenderness on pressure with he coccyx bones and tenderness in the iliosacral and low lumbar pine areas. Impression was of a probable acute coccyxitis. He rescribed Naprosyn, Aristocort, and "shot" and a donut for laimant to sit on at work. On May 21, 1985, Dr. Whitley nterpreted x-rays as confirming that the coccyx nest was pushed nteriorly and slightly to the right. Donald H. Rice, M.D., had eported on the same date that that finding might be a congenital ariation or might be an old healed fracture through the sacrococcygeal yndermosis. Claimant apparently traveled to Kentucky by car in une 1985. This apparently caused acute flareup of her coccyxitis. laimant apparently stopped working on July 5, 1985.

Claimant returned to work on a four hour per day basis on ctober 3, 1986 inventorying furniture at the penitentiary. his involved lifting and bending furniture in order to get nventory numbers. She indicated that she could not handle the ork physically and, therefore, left on December 17, 1986. aimant saw Keith W. Riggins, M.D., on that date. Dr. Riggins a board certified orthopedic surgeon. Claimant complained of w back pain which radiated to the right leg. Examination of ie lumbar spine demonstrated range of motion to be full and mplete with no vertebral spasm present. Deep tendon reflexes re 2+ and symmetrical and no motor sensory deficits were noted. raight leg raising caused low back discomfort, but without diation. X-rays demonstrated minimal degenerative spur rmation at the L3-4 level, and computerized axial tomography the spine demonstrated circumferential type bulging at the -4 level without localized herniation. On December 23, 1986, . Riggins characterized claimant's condition as intervertebral sc disease and reported tht she had specific functional mitations on bending, lifting and sitting for long periods, as ll as on strenuous pushing, pulling or lifting with the upper tremities. Dr. Riggins opined that claimant would not be able return to the full duties of a correctional officer, but ssibly could return to some segment of those duties which ecluded her being involved in altercations or performing nding or lifting activities. On March 9, 1987, Dr. Riggins ined that although claimant's intervertebral disc disease was t directly caused by her injury at work, the condition was

the legs and lower back. (Dep. p. 18, ll. 19-25; p. 19, ll. 1-5.)

He later stated that ligaments, once damaged, do not repair themselves but are either surgically repaired or remained damaged. He characterized as "very remote" the possibility of repairing the ligaments and cartilages surgically given the proximity to the sacral plexus and the possibility of damaging nerves in the area. The doctor later stated that claimant would be helped if while working in a sitting position she got every half hour for ten minutes or five minutes every fifteen minutes to avoid problems with pain. He characterized as speculation, however, the statement that if claimant could spend twenty minutes out of every hour on her feet, she could avoid the pain and function within the 95 to 98 percent range for her body as a whole. The doctor stated that when the coccyx bones were knocked out of alignment it would hurt and there would be discomfort but not necessarily bruising or discoloration. He also stated the following:

Q. Would it have been less pain when she fell than when you saw her in May or more painful?

A. It's hard to say. I would think it probably would have been more painful for a more prolonged period and it would probably hurt all the time rather than just sitting. (Dep., p. 31, ll 17-22.)

The doctor stated that he saw claimant on February 7, 1985 with complaints of left arm and shoulder aching and with a ganglion cyst on the arm, but that claimant did not complain of pelvic problem nor of any injury to her right wrist. Claimant testified that her back pain following her injury was a dull pain.

Claimant was examined by Sinesio Misol, M.D., a board certified orthopedic surgeon, on June 6, 1986. In the course of his examination, Dr. Misol reviewed Dr. Whitley's notes. The doctor reported that claimant had forward flexion of the spine to 90 degrees or normal with extension to 35 degrees. Bending to the right, 15 degrees, to the left, 10 degrees. Rotation to the right 20 degrees, to the left 20 degrees. Straight leg raising was negative. Claimant had no atrophy of the legs, and was able to walk on her heels and toes, and had normal knee and ankle reflex. Dr. Misol interpreted a scan performed on October 2, 1985 as essentially within normal limits except for a bifid coccyx with some anterior angulation of that portion of the coccyx. He did not know whether this was congenital or traumatic. He reported the bone scan was negative; he believed the coccyx had not been fractured. His impression was post contussion, coccyx with some residual discomfort. He opined that there was no permanent partial impairment and that the only thing keeping

claimant from maximum recuperation was loss of muscle strength in the abdomen and approximately thirty pound weight gain. He recommended that claimant undergo an abdominal paraspinal muscle exercise program of isokenetio [sic] and isometric exercises. On November 24, 1986, Dr. Misol opined that claimant's concussion of the coccyx of January 10, 1985 would probably account for a four to six week healing time.

A report of Dr. Whitley of June 17, 1985 states that x-rays taken in May 1985 have findings of an apparent fractured-dislocation of the coccyx with the largest proximal segment on the left side of the sacrum. Three smaller coccygeal segments are in articulation with the right side of the sacrum. The doctor states that by the history related this is most likely post traumatic, but that he cannot 100 percent rule out a bifid coccyx on a congenital basis.

On cross-examination, claimant reported that she had told her husband that the Iowa State Penitentiary accident report was incorrect in that the report did not state that she had fallen on her tailbone, but that she otherwise did not tell anyone at the state penitentiary that the report form was incorrect.

Claimant reported that Mary Lou Cooper, of the Iowa State Penitentiary, told her that if she would drop her lawsuit the penitentiary would pay claimant's medical bills and benefits. Claimant agreed that following May 1985, Blue Cross/Blue Shield paid her medical costs. She did not recall telling Dr. Whitley on August 12, 1985 that the claim was not work related and that, therefore, Blue Cross/Blue Shield should be paying it. Dr. Whitley's note of August 12, 1985 states the folowing:

> We are presently preparing the records for transfer to Mr. Hoffman for a workmens compensation. There seems to be some question, apparently they contacted Blue Cross, and Blue Cross said that they would go ahead and pay the medical records, but not to mention workmens compensation on the claim. I find that difficult to do inasmuchas [sic] that would be essentially untrue on our part. When we fill out the form it does ask if there is other insurance involved, so I am really not sure how to approach this insurance thing on her. I am certainly not going to lie to Blue Cross, thats up to them, if they wish to thats their business, but from the standpoint of our office we are not going to fabricate any information on a claim to Blue Cross.

Claimant also denied that she had had pain in her back before January 10, 1985 and stated she had had three successful full-term pregnancies without particular discomfort in her back.

Claimant reported that she has made no efforts with vocational retraining, that she had a very limited field for retraining, and had not looked into retraining because she had hoped to return to work at the prison. Claimant reported that her long-term disability benefits were being held as of March 4, 1987 during a period of reevaluation.

Claimant's daughter, Kimberly Carroll, age 17, testified that she lives with her mother and remembers that her mother talked about both her wrist and her tailbone discomfort on the night of the injury. She reported that since the injury, claimant cannot lift laundry, unload the dishwasher, cannot rake the lawn, cannot grocery shop, cannot drive in a car for too long, and cannot sit or stand for very long. She indicated that claimant continues to use her donut and that claimant has difficulty sitting on bleachers for school activities. Laurie D. Carroll substantiated her sister's testimony regarding her mother's restrictions. George Beller, claimant's husband since September 1979, substantiated his stepchildern's testimony as regards claimant's life activity restrictions. He indicated that he has been a lieutenent at the Iowa State Penitentiary since 1980 and opined that claimant's job as a correctional officer requires manhandling and pad search of men larger than claimant. He stated that less than ten percent of correctional officers are female. Claimant is 5' 5" tall and weighs 160 pounds. Mr. Beller reported that on January 10, 1985, claimant stated that she had fallen on her buttocks and that she hurt all over.

Rebecca D. Gray nee Hillary, R.N., testified that she is a nurse with the Health Care Unit at the Iowa State Penitentiary. She reported that state penitentiary personnel report to the health care unit for work injury stabilization. She reported that medical personnel complete an accident report that records whatever the employee told the personnel concerning the injury. The employee reviews the report and signs it. On occasion, an employee will add other information following the review. The witness identified joint exhibit 17 as the accident report she had completed following claimant's injury in January 1985. She reported that what was written on the report is exactly what claimant told her and that the report was filled out as claimant was describing the injury. The report reflects that claimant did not say she had hurt her back or had any complaints of back pain. Page 1 of exhibit 14 states: "Pd. state was walking down hill on west end slipped in snow--fell backwards and caught self with hands when fell down--c/0's of dull ache in st. wrist. No other c/0's of injury." Page 2 of exhibit 14 states: "Has full R.O.M. in Rt wrist - No edema, discoloration or lac in wrist. C/o's of dull ache. Pulse good gd in wrist. (nonintelligible) gd. Reports no further injury." Claimant signed page 1 of the report.

Mary Lee Cooper stated that she has been a purchasing assistant at Iowa State Penitentiary and was handling workers' compensation claims for the penitentiary on January 10, 1985. Ms. Cooper stated that the employee contacts her when an injury occurs and completes a report of that injury. The employee is instructed to describe all circumstances of the injury and all body parts affected. Ms. Cooper could not recall claimant stating that she had back pain on January 10, 1985. Towards the end of May 1985, claimant did call her and state that claimant was experiencing pain in her tailbone. She then told claimant to see a doctor and that if the complaint was related to the January injury, a medical report would be needed to that effect. Ms. Cooper denied having ever talked to Blue Cross/Blue Shield, or that she had told claimant that if she dropped the workers' compensation claim the state would pick up the Blue Cross/Blue Shield. The witness did agree that she had talked to a Dick Andrews who had told her that if claimant stopped her claim, the state would go ahead and pay her bills.

Marian S. Jacobs, a vocational consultant, evaluated claimant in late 1985 and prepared the report dated April 28, 1986. In the report, Ms. Jacobs indicated that Dr. Whitley had, as of January 1986 restricted claimant to one hour of standing, fifteen to thirty minutes of sitting, ten pounds lifting, thirty to forty-five minutes walking on grass and thirty minutes walking on concrete, but had not restricted claimant's bending and stooping. Jacobs interviewed claimant in her home on November 26, 1985. Claimant then was under Dr. Kantamneni's care for treatment of nervousness and depression and was taking antidepressants. Extended periods of sitting, standing, walking, or heavy lifting were described as aggravating claimant's tailbone and low back pain. Claimant's nonwork-related abilities included furniture refinishing, basic typing, and basic book-keeping. Claimant reported doing housework at her own pace. Claimant demonstrated excellent communication skills during the interview and subsequent phone conferences with Ms. Jacobs. Ms. Jacobs administered the general aptitude test battery to claimant and reported that claimant's GATB test scores indicated claimant could be expected to perform satisfactory in a number of jobs classified as light or sedentary with sitting/standing/walking flexibility. The job incuded security guard (with periodic walking through clock rounds), cashier (in a work setting that permits sitting and standing during the work day), file clerk, mail clerk (in a work setting with no lifting requirements over ten pounds), and salesperson. Jobs outlined pay between $3.50 and $6.00 per hour, the median range being approximately $4.00 to $4.50 per hour. Jacobs opined that claimant also could transfer her skills to the following specific jobs in work settings allowing the necessary sitting/standing/standing flexibility with lifting up to ten pounds; that is, cosmotologist, telephone solicitor, and night clerk. She opined that claimant could earn approximately $10,000 per year working as a cosmotologist

and approximately $3.35 per hour as either a solicitor or clerk. Jacobs opined that claimant was precluded from a move to an Iowa Merit Commission clerical position within the penitentiary because of Dr. Whitley's stringent limitations on her lifting, standing and sitting activities. Jacobs reported that claimant earned $652 biweekly or $8.15 per hour assuming a forty hour work week in July 1985, her last regular pay period. She indicated that claimant could expect to earn from $3.35 to $6.00 per hour in a specialized work setting suitable to her physical limitations post injury. Jacobs reported that claimant's past work experience as a production machinist, production assembler, production inspector, cosmotologist, telephone operator, and correctional officer involved extensive sitting or standing throughout the work day, and that, therefore, claimant was precluded from work in those areas unless the work duties were adapted to meet her physical needs. Jacobs reported that claimant had not utilized Job Service or Iowa State Vocational Rehabilitation Services because of her continuing treatment for depression and pain. Jacobs opined that claimant had marketable skills that were transferable to a limited number of job categories and work settings and that, therefore, her employment options are significantly curtailed by her injury. She opined that claimant is thirty percent vocationally disabled.

G. Patrick Weigel evaluated claimant at the Mercy Occupational Evaluation Center on June 6, 1986. Mr. Weigel is manager of the Mercy Occupational Evaluation Center and holds a Masters Degree in rehabilitation counseling. Weigel testified that during her evaluation, claimant was asked to perform two VALPAR work samples involving sitting. He indicated that claimant had done quite well on the samples even though they included sitting in total of approximately two hours and fifteen minutes. Weigel subsequently agreed that claimant had stood for a modest portion of the one of the samples, however. Weigel opined that if claimant were working as a cosmotologist in her own shop, her income level would be quite similar to her income while employed as a prison guard. He was unaware whether claimant qualified to work as a cosmotologist in Iowa. Weigel opined that claimant was motivated and was optimistic about her work with the State of Iowa and hoped to return to that work as soon as she was able. He opined that from the impressions and observations of the evaluation center, claimant would make a good employee. He opined that claimant should be able to find and keep competitive, gainful employment. On cross-examination, Weigel agreed that claimant had sat well back in the chair and utilized the back of the chair for support and did use her donut while performing the evaluation. He reported, however, that claimant did not verbalize any pain or discomfort or sitting problems while being evaluated. His impression was that claimant was taking medication for pain while being evaluated. Weigel subsequently noted that low back pain is generally a term to describe pain around the beltline, a little bit below, and above the tailbone. Weigel deposition

exhibit 1 is the Center's report on claimant's evaluation. Under conclusions and recommendations, it is stated that nothing found in the vocational portion of claimant's evaluation would preclude claimant's returning to her previous employment. It was hoped that she would complete the exercise program Dr. Misol recommended and then would be physically able to return to her previous employment.

Claimant's W-2 wage and tax statement for 1985 indicates that she earned $14,057.04. Claimant's earnings in 1984 apparently as reported on the deductions for married couple when both work on her income tax return was $16,820.48. Earnings in 1983 were $16,274.60. Earnings in 1982 were $15,717.38. Earnings in 1981 were $15,970.93. Joint exhibit 17 lists amounts Blue Cross/Blue Shield has paid for "back pain" for claimant. Joint exhibit 16 indicates that claimant's long-term disability benefits under state coverage have continued without interruption from November 9, 1985 to March 4, 1987. The total amount paid on the disability claim as of March 4, 1987 was $11,926.42.

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 received an injury which arose out of and in the course of her employment.

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on January 10, 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 injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe, 246 Iowa 402, 68 N.W.2d 63.

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d

298 (Iowa 1979), McClure, 188 N.W.2d 283, Musselman, 261 Iowa 352, 154 N.W.2d 128.

Neither party apparently disputes that claimant injured her wrist in a work incident on January 10, 1985. The fighting issues are whether claimant's alleged coccyx injury and her alleged intervertebral degenerative disc condition are injuries which arose out of and in the course of that work incident. At the onset we note that claimant did not visit a doctor for her coccyx condition until May 13, 1985. Neither did she report injury to other than her wrist in reports she either completed or reviewed upon completion for her employer at the time of her January 10, 1985 injury. Neither do medical notes indicate claimant complained of low back or tailbone pain to Dr. Whitley when she saw him for treatment of her wrist in January and February 1985. Claimant continued to work through July 5, 1985. Her medical history to Dr. Whitley in May 1985 describes the January 10, 1985 work incident as the event in which claimant's pain originated. Claimant's husband and children testified that claimant had complaints of other than wrist pain from her injury date onward. Claimant did call her employer's representative in May 1985 and report she had back complaints which she believed arose from her injury. Sufficient credible evidence exists to establish that the physical results of claimant's January 10, 1985 work incident extended beyond her wrist. Whether claimant's coccyx condition and her intervertebral degenerative disc disease are disabilities relating to the January 10, 1985 injury remains to be decided.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 10, 1985 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756, 760-761 (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).

X-rays show that claimant's coccyx nest is pushed anteriorly and slightly to the right. Both Dr. Rice and Dr. Misol believe that finding might be congenital or could represent an old healed fracture. Dr. Whitley has opined that from claimant's history, the condition is most likely traumatic although he cannot rule out the possibility the condition is congenital.

Claimant reported she carried three pregnancies to term without significant difficulties with "back." Claimant's spouse and children testified as to the difficulties with pain and with prolonged sitting claimant has had-since January 10, 1985. Claimant continues to use a donut for sitting. No one suggests that device is not necessary for her wellbeing. Claimant did not need that item prior to her work injury. We find sufficient credible evidence exists to establish a causal relationship between claimant's work injury and disability related to her coccyxitis.

We consider the question of whether claimant's degenerative disc disease relates to her work injury. On Dr. Riggins has diagnosed, treated and evaluated claimant's disc condition. He has rendered varying opinions as regards whether claimant's work injury contributed to the disc condition. He opined in his deposition both that it was possible, but he had no way of knowing whether claimant's "bulging" was consistent with a fall such as that of January 10, 1985 and that he could not medically establish that claimant's injury had aggravated her preexisting degenerative process. Riggins later opined that claimant's intervertebral disc disease was not directly caused by but aggravated by her injury. Claimant has gained thirty pounds since her injury. She has largely been inactive. Dr. Riggins did not see claimant until December 17, 1986. While Dr. Whitley stated that claimant had tenderness on pressure with the coccyx bones and tenderness in the iliosacral and low lumbar spine areas on May 13, 1985, other medical evidence suggesting claimant had a disc problem as a result of her January 10, 1985 injury is virtually absent. Dr. Misol found limited evidence of a back condition when he examined claimant in June 1986. He did not relate that to her injury. The almost two year period between claimant's injury and Dr. Riggins' diagnosis, Dr. Riggins' inconsistent opinions and the absence of objective evidence demonstrating claimant had significant low back complaints from

her injury onward raise serious questions as to whether claimant's claimed disc condition relates to her injury. Claimant has not shown the requisite causal connection.

We consider the question of claimant's benefit entitlement. As claimant has not shown her intervertebral disc disease relates to her work injury, we consider this question only as it relates to her coccyx problem and her wrist injury. We consider the healing period question. Claimant contends she is still entitled to a running award of healing period benefits. Defendants contend any healing period entitlement ended four to six weeks after her injury per Dr. Misol's November 24, 1986 report. Dr. Whitley opined that surgical repair of claimant's damaged ligaments is not possible given their proximity to the sacral plexus. He reported that ligaments, once damaged, do not repair themselves without surgery. He also stated that "maybe eventually there would be healing occur..." The tenor of the doctor's remarks suggests that claimant's coccyx condition is not likely to change significantly in the foreseeable future and has not changed significantly from her injury onward.

An appeal decision by this agency held:

> That a person continues to receive medical care does not indicate that the healing period continues. Medical treatment which is maintenance in nature often continues beyond that point when maximum medical recuperation has been accomplished. Medical treatment that anticipates improvement does not necessarily extend healing period particularly when the treatment does not in fact improve the condition.

Derochie v. City of Sioux City, II Iowa Industrial Commissioners Report 112, 114 (1982).

Healing period as used in section 85.34(1) may be characterized as that period during which a reasonable expectation of improvement of disabling condition exists. Healing period ends when maximum medical improvement is reached. When claimant's condition will not improve from the start but will be aggravated by further physical exertion, claimant is not entitled to healing period benefits as no further improvement of claimant's condition is anticipated. Armstrong Tire & Rubber v. Kubli, 312 N.W.2d 60, 65 (Iowa App. 1981).

Permanent means for an indefinite and undeterminable period. Wallace v. Brotherhood of Locomotive Firemen and Enginemen, 230 Iowa 1127, 1130, 300 N.W. 322, 324 (1941), citing Garen v. New England Mutual Life Insurance Company, 218 Iowa 1094, 1104, 254 N.W. 287, 292 (1934).

We find that claimant's condition as it exists is a permanent condition which has not changed appreciably since at least May 13, 1985. Any significant healing occurred within the time frame Dr. Misol set forth. Claimant remained at work during that time. Hence, claimant is not entitled to a healing period award. Any permanency award runs from July 5, 1985 when claimant left work on account of her coccyx condition.

We reach the permanent partial disability entitlement 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).

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

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."

In Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden, 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. McSpadden v. Big Ben Coal Co., supra.

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).

Claimant is 39 years old and a high school graduate. She has post-work experience as a cosmotologist, a factory worker, and a correctional officer. She appears to have been well placed vocationally as a correctional officer and motivated to return to that work. Claimant did not successfully return to work at the state penitentiary when Dr. Whitley released her for work in October 1986. Unfortunately, it is difficult to ascertain whether claimant left that work on account of her work-related coccyx condition or on account of her degenerative disc disease. Claimant testified that she could not handle the lifting and bending involved in inventorying furniture. Dr. Whitley had restricted claimant's lifting on account of her coccyx condition but not her bending. Dr. Riggins has restricted both claimant's bending and lifting on account of her degenerative disc disease; hence, it appears the latter condition likely played a greater role in claimant's inability to continue her employment on her October 1986 work return. Likewise, claimant testified her employer refused her employment as a correctional officer in March 1987 as she could not return under Dr. Riggins' restrictions. Those restrictions relate to claimant's nonwork-related degenerative disc disease. Therefore, claimant has also not shown that her employer refused her employment on account of her work-related disability.

While claimant appeared motivated to return to her prior work, she has not sought other training. Claimant is aware of a limited number of correctional officer positions with the employer which she could fulfill within both her work-related coccyx restrictions and her nonwork-related disc restrictions. Claimant is also aware that under the labor management agreement between her employer and its employee, it is not possible for senior employees to be bumped from those positions in favor of physically restricted employees. Hence, claimant's insistance that the employer provide her such positions is unrealistic and does not provide sufficient justification for claimant's absolute failure to seek other employment or consider retraining. Dr.

Whitley opined claimant's coccyx condition precludes her from employment involving sitting. Claimant performed satisfactorily on VALPAR samples involving extensive sitting even though she used her donut, a modified sitting technique, and some standing to do so. That finding suggests that claimant is not so limited vocationally because of her coccyx condition as Ms. Jacobs opined and claimant believes. Claimant's functional impairment on account of her coccyx condition is quite small. An impairment was not assigned for the nonwork-related disc condition. Restrictions for that condition are far more stringent than those for the work-related coccyx condition. Under Varied Industries v. Sumner, industrial disability relating to that condition as surmised from the restrictions is apportioned out and not considered in assessing claimant's work injury-related loss of earning capacity. Claimant was bright and wellspoken. Her past work history as a cosmotologist, her past hobby of furniture fefinishing as well as her dress, general appearance and demeanor at hearing suggested claimant is a creative person with artistic talents. One suspects she would do well if she returns to a field, such as her prior work as a cosmotologist, where she could utilize these talents on a routine basis. Mr. Weigel has opined that if claimant were appropriately licensed she could earn earnings as a cosmotoligist near her earnings as a correctional officer. Claimant's VALPAR testing performance suggests she could work at a number of positions with some reasonable accommodation to her sitting, standing and walking restrictions. Claimant is still a relatively young worker. She is at an age where many women are only beginning financially remunerative careers after having spent extensive years working as homemakers. Claimant appears to have derived satisfaction from working. It would be a great loss to claimant personally were she to permit her work-related coccyx difficulties or her disc condition to unnecessarily preclude her from a personally and economically productive life. When all factors are considered, claimant is found to have a 25 percent loss of earning capacity.

The parties list a section 85.27 issue. Only joint exhibit 10 contains evidence regarding outstanding medical costs. Claimant, of course, is entitled to payment of any reasonable and necessary medical expenses for treatment of her work-related coccyx condition. She is not entitled to payment of costs related to treatment of her degenerative disc disease Dr. Whitley's treatment related to the coccyx condition. Claimant is entitled to payment of her actual costs for treatment. We cannot ascertain to which condition the Ft. Madison Hospital costs after May 21, 1985 related or to which condition the "99999" relates or to which condition claimant's treatment with Dr. Rice after October 2, 1985 relates. Claimant, therefore, is not entitled to payment of her costs for those treatments.

Defendants seek a credit under section 85.38(2) for both

long-term disability and health insurance benefits paid claimant. The section provides:

> 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 chapter, chapter 85A or chapter 85B, then such amounts so paid to said employee from any such group plan shall be credited to or against 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.

As regards the long-term disability benefit, no evidence was submitted indicating that claimant would not receive the benefit were she entitled to workers' compensation recovery or as to whether the long-term disability plan was contributed to wholly or partially by the employer. Defendants, of course, would be entitled to a credit if benefits would not have been paid had claimant been entitled to workers' compensation benefits to the extent of defendants' proportionate contributions to the plan, if any. The parties are encouraged to work together to resolve this issue without further agency intervention.

As regards health insurance payment, the evidence demonstrates those benefits would not have been paid had claimant received an injury which arose out of and in the course of her employment. The evidence does not demonstrate that the health care plan was contributed to wholly or partially by the employer. Defendants, of course, would be entitled to a credit to the extent of defendants' proportionate contributions to the plan, if any. The parties are encouraged to work together to resolve this issue without further agency intervention.

FINDINGS OF FACT

THEREFORE, IT IS FOUND:

Claimant fell on ice at work at the Iowa State Penitentary on January 10, 1985.

She braced her fall with her wrist but fell into a seated position.

Claimant visited the penitentiary infirmary on her injury date and reported wrist complaints, but not complaints as to the rest of her body.

Claimant completed an accident report for her employer on January 10, 1985 and reported a wrist injury, but no injury to the rest of her body.

Claimant visited Dr. Whitley for treatment of her wrist injury from January 10, 1985 through early February 1985, but did not report or receive treatment for other than upper extremity complaints.

Claimant continued to work following her injury.

Claimant saw Dr. Whitley on May 13, 1985 and complained of low back pain intermittently since her January 10, 1985 injury which during the last two or three weeks had localized and gotten worse.

Claimant had acute coccyxitis.

Claimant had carried three pregnancies to term without significant "back" difficulty prior to her injury.

Claimant had worked full time and engaged in numerous physically demanding household activities prior to her injury.

Claimant had difficulty with those activities since her injury.

Claimant's coccyx condition is related to her work injury and is not a congenital condition.

Claimant has gained thirty pounds since her injury.

Claimant left work July 5, 1985 for reasons related to her coccyx condition.

Claimant returned to work on October 3, 1986 and left work again in December 1985 because she believed she could not handle the lifting and bending involved.

Claimant saw Dr. Riggins December 17, 1986.

Dr. Riggins diagnosed a degenerative disc condition.

Dr. Misol examined claimant on June 6, 1986 and found only minimal signs of degenerative disc problems.

Claimant's degenerative disc disease is not a condition resulting from her injury.

Claimant's coccyx condition cannot be surgically treated as it involves ligament and tissue damage near the sacral plexus.

Ligament damage does not heal unless surgically repaired.

Claimant's coccyx condition remains substantially as it was on May 13, 1985.

Claimant is 39 years old.

Claimant is a high school graduate.

Claimant has prior work experience as a correctional officer, a factory worker, and a cosmotologist.

Claimant is licensed as a cosmotologist in Kentucky, but not in Iowa.

Claimant was motivated to return to work as a correctional officer, but not to seek other employment or retraining.

Claimant's employer's labor management agreement precludes bumping senior employees from positions in order to get the position for a physically handicapped employee.

Claimant has restrictions on sitting, standing, walking, and lifting related to her coccyx condition.

Claimant has more stringent physical restrictions related to her nonwork-related back conditions.

Claimant's inability to return to work in March 1987 related to the back conditions and to Dr. Riggins' restrictions for that condition.

Claimant has a minimal functional impairment.

Claimant is creative and artistic.

Claimant performed satisfactorily on VALPAR samples involving extensive sitting.

Claimant could perform work with appropriate accommodations of her coccyx condition.

Claimant has a loss of earning capacity of 25 percent.

Claimant received long-term disability benefits following her injury.

Claimant received Blue Cross/Blue Shield health care benefits for medical care following her injury. Claimant would not have received such benefits if care had been provided for an injury which arose out of and in the course of her employment.

It is not determinable whether claimant's employer contributed wholly or partially to either the long-term disability or the Blue Cross/Blue Shield benefit plan.

Dr. Whitley provided claimant medical care related to her coccyx condition.

Dr. Rice provided claimant care related to her coccyx condition on or before October 2, 1985.

Fort Madison Hospital costs on or before May 21, 1985 related to claimant's coccyx condition.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established an injury on January 10, 1985 which arose out of and in the course of her employment.

Claimant has established a causal relationship between the January 10, 1985 injury and her wrist and coccyx condition, but not between the injury and her degenerative disc disease.

Claimant is entitled to permanent partial disability resulting from her injury of January 10, 1985 of 25 percent (25%).

Claimant is entitled to payment of her actual costs for medical care with Dr. Whitley and with Dr. Rice on or before October 2, 1985 and with the Fort Madison Hospital on or before May 21, 1985.

Defendants have not established an entitlement to a credit under section 85.38(2) under this record. The parties are encouraged to resolve the section 85.38(2) issue without further intervention of the agency.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits

for one hundred twenty-five (125) weeks at a rate of two hundred fifteen and 23/100 dollars ($215.23) with those benefits to commence on July 5, 1985.

Defendants pay claimant's actual medical costs as outlined in the above conclusions of law.

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 27th day of May, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS J. BLACKFORD,	:	
	:	
Claimant,	:	File Nos. 744940
	:	747501
vs.	:	
	:	R E V I E W -
SWIFT INDEPENDENT PACKING COMPANY, a/k/a SWIFT FRESH MEATS COMPANY,	:	R E O P E N I N G
	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

INTRODUCTION

These are proceedings styled in review-reopening brought by the claimant, Dennis J. Blackford, against his self-insured employer, Swift Independent Packing Company, a/k/a Swift Fresh Meats Company, to recover benefits under the Iowa Workers' Compensation Act as a result of injuries sustained April 8, 1983 and August 9, 1983. These matters came on for hearing before the undersigned deputy industrial commissioner at the Division of Industrial Services Office in Des Moines, Iowa, on November 6, 1986. The record was considered fully submitted at close of hearing.

The record in these proceedings consist of claimant's exhibits 41 through 70 as well as of claimant's exhibits 1, 3, 41, 26, 27, and 28, in the prior proceedings in these matters held on July 31, 1984 as well as of defendant's exhibit C and of claimant's and Harry Lake's testimony. Pursuant to the requests of the parties, official notice is taken of the contents of the file and of prior proposed arbitration and appeal decisions of December 27, 1984 and November 20, 1985, respectively. Claimant's exhibit 41 is an August 22, 1986 deposition of John L. Walker, M. D. Claimant's exhibits 42 through 45 are reports of Dr. Walker of June 1, 1984, February 12, 1986, March 19, 1986, and November 3, 1986, respectively. Claimant's exhibit 46 is a waiver of physical defect executed between claimant and the Marshalltown Times Republican. Claimant's exhibits 47 through 51 are claimant's W2 statements for the years 1979 through 1983 with Swift. Claimant's exhibits 52 and 53 are claimant's forms 1099R for the year 1983 with Swift. Claimant's exhibits 54 through 57 are claimant's W2 statements for the Times Republican and Marshalltown Newspapers for the years 1983 through 1985. Claimant's exhibit

58 is claimant's W2 statement for the year 1985 with Pioneer. Claimant's exhibit 59 is a copy of claimant's last prehearing pay stub. Claimant's exhibit 60 is a copy of the Iowa Newspaper Association Group Health Plan. Claimant's exhibit 61 is the October 30, 1986 deposition of Bary Carl. Claimant's exhibit 62 is claimant's employee service record. Claimant's exhibit 63 is a blank application for employment with Swift Independent Packing Company employment application. Claimant's exhibit 64 is a blank health inventory to be filed with said employment application. Claimant's exhibit 65 is a Marshalltown addendum to Swift Independent Packing Company application. Claimant's exhibit 66 is a record of work, earnings and tax. Claimant's exhibit 67 is Swift Independent Packing Company comprehensive medical plan for nonsalaried employees. Claimant's exhibit 68 is a Swift Independent Packing Company pension plan for non-salaried employees. Claimant's exhibit 69 is a Swift group insurance plan. Claimant's exhibit 70 is Swift savings plan. Prior hearing exhibits 41, 26, 27, 28, 3, and 1 were identified in the prior hearing decisions. Defendant's exhibit C is a compilation consisting of various medical records concerning claimant as identified on the exhibit, as well as copies of the depositions of Peter Wirtz, M.D., taken July 27, 1984, Lloyd James Thurston, D.O., taken July 24, 1984, and Carl O. Lester, M. D., taken July 17, 1984, as well as a copy of the transcript of the July 31, 1984 hearing in these matters. Also included is claimant's original employment application with Swift. All objections to exhibits are overruled.

ISSUES

Pursuant to the prehearing report filed and approved prior to these proceedings and pursuant to the appeal decision filed November 20, 1984, the sole issue remaining is whether claimant is entitled to permanent partial disability on account of the August 9, 1983 injury.

We note that an expressed conclusion of law in both the original proposed decision and the appeal decision in the earlier proceedings was that claimant was not entitled to temporary total, healing period, permanent partial or permanent total benefits on account of the April 8, 1983 injury. Claimant's stipulated rate is $234.23.

REVIEW OF THE EVIDENCE

Considerable evidence was presented not relevant to the issue before us. This review of the evidence will be confined to the evidence relevant to the issue of permanent partial benefit entitlement as a result of August 9, 1983 injury. All evidence relevant to that issue was reviewed and considered in the disposition of these matters even if such evidence is not expressly set forth in the following review of the evidence.

Claimant testified that he graduated from high school in 1973. He subsequently worked as a laborer at Coca Cola and at Royce Litho and Printing for approximately two and one-half years. At Coca Cola, claimant also worked as a minor mechanic changing machine parts. Each job entailed lifting from 40 to 80 pounds. Claimant subsequently took a one year printing trades course after which he became employed as the Marshalltown Times Republican as an apprentice pressman. As a pressman, claimant made press plates and changed press plates for different size papers. He reported that the only physical labor involved was changing and putting the roll shaft on the press. He characterized the roll shaft as being about four foot long and two inches in diameter and weighing from 40 to 50 pounds. The press plates weigh more than one pound; ink buckets weigh approximately 35 pounds.

Claimant continued at the Times Republican for three years before beginning work at Swift Independent Packing on November 3, 1979. Claimant remained at Swift until November 17, 1983. The base rate when claimant started was apparently $7.27 per hour. Workers apparently began at a wage below the base rate and reached base rate in approximately six months. Once the base rate pay is reached, jobs are classified by bracket and the worker receives $.05 per hour more than the base per each bracket of classification. Workers receive overtime pay at time and one-half the regular rate for all hours over eight per day and for all hours over forty per week. Claimant reported that he initially worked trucking fat on the cut floor and that this was a zero bracket job at which he worked 48 to 50 hours per week and pushed from 2 to 400 pounds. Claimant subsequently worked pulling chittlings. Claimant stated he was not then qualified for brackets but worked 45 to 50 hours per week and lifted approximately eight pounds. Claimant later returned to the chittling job and received two brackets. Claimant also worked as a night checker. He testified that he worked 50 to 55 hours per week and that the job was an eleven bracket job on which he earned $11.55 per hour. Claimant was subsequently bumped off the night checker job but reported that approximately twice a month he was called to work that job and then received the eleven bracket pay. Claimant apparently sustained a carpal tunnel injury while doing the chittling job and transferred to a night janitor job. He characterized that job as a zero bracket job at which he earned $8.05 per hour and worked 42 to 44 hours per week. Claimant reported that the job required him to scoop and shovel up to twenty pounds of meat. Claimant subsequently worked at the night janitor job at Swift. That is also a zero bracket job at which claimant earned $8.35 per hour while purportedly working 45 to 50 hours per week.

Bary Carl, personnel manager for Swift Independent Packing, testified that it would be unusual for any production worker to average more than 44 to 45 work hours per week, but agreed that

the night checkers would likely work approximately four hours overtime on Fridays. He reported that the janitorial jobs were generally straight eight hour per day jobs.

Cost of living adjustments were made to Swift Independent employees every six months to October 1982. Employees were guaranteed a 36 hour work week and received paid vacation after one year. Claimant testified that employees received two weeks of paid vacation after one year. Mr. Carl indicated that one and two year employees received one week of paid vacation only with three year to twenty year employees receiving two weeks of paid vacation. Swift employees also received eight paid holidays per year. Swift also provided its employees with a group health and accident insurance plan, a payroll savings plan, and a $10,000 death benefit policy as well as a pension and disability program. Eligible employees, of which claimant was one, could also participate in a group retirement program which would be effective after thirty years of employment. Claimant reported that under the savings plan, Swift made a maximum contribution of $3.00 per check into the savings plan program which the employee could then match. Claimant reported that he generally participated at the maximum amount in that plan. He reported that after 1982, employees were required to pay $2.30 per week for the pension and disability plan. Mr. Carl reported that Swift employees now contribute $3.00 per pay period for individual health and accident insurance with the company.

Claimant testified that he resigned from Swift following his injury because the work aggravated his back condition. He opined he also could not do other jobs he had held at Swift without aggravating his back condition. Claimant testified that he had worked on the loading dock as a shipping clerk for over a year before being bumped and was unaware of any employer dissatisfaction with his work. Eleven brackets is the highest job classification at Swift for nonmaintenance and nonskilled workers. Claimant was a member of a union while at Swift.

Claimant returned to work as a pressman at the Times Republican in November 1983 and continues to work there. Prior to beginning that employment, he signed a waiver of physical defect concerning his carpal tunnel problem and his back injury. Claimant reported that his wages have increased from $7.05 when he began employment on November 20, 1983 to $7.63 per hour at time of hearing. Claimant was expecting his annual review on November 22, 1983 and anticipated a $.30 per hour raise following such review. Claimant reported that the Times is a nonunion shop and that he generally has received no overtime. Claimant reported that the Times has a 60-40 employer-employee contribution medical benefits program under which he is required to pay $24.74 every two weeks for health insurance. Claimant receives two weeks paid vacation and five paid holidays per year. Claimant is not yet eligible to receive disability insurance or participate in the company

retirement plan. Each of those programs require ten years of employment before an employee is eligible to participate. The retirement plan is effective after 35 years of service when an employee reaches age 65. On cross-examination, claimant agreed that retirement plan vesting period with his present employer is the same as that with Swift. Claimant agreed that only Dr. Walker has recommended surgery for his back and stated that claimant prefers postponing surgery.

Claimant reported that he restricts his personal activities because of fear that he will reinjure himself. He stated that he does not lift, jog, play football or baseball. On cross-examination, claimant agreed that he has never jogged. Claimant reported that he has low back pain which progresses into his right leg on a daily basis and that he is now having left leg pain. He reported having trouble mowing his lawn, riding in a car, sitting, and sleeping. Claimant reported that he continues to golf and golfed in early Summer 1986 approximately four or five times per week using a pull cart. Claimant signed up for and apparently participated in a beer drinkathon golf tournament in the Summer 1986. Claimant fishes and has a boat in Missouri. He described his boat as a 15 foot John motorboat with an electric trowler motor and boat trailer. Claimant launches the boat from the trailer. Claimant described his fishing tackle box as weighing from five to ten pounds and as being one foot long by eight inches by six inches. Claimant's wife works nights and claimant reported that he cares for his two children, ages eight and nine, when he is not attending evening classes.

Since September 1986, claimant has been enrolled at Marshalltown Community College taking courses in Introduction to Business and Accounting I. He expressed his belief that he needs to get out of manual labor and stated he would like to use that schooling to either advance in his present position or with another company. Claimant has not sought either formal vocational counseling or vocational rehabilitation. Claimant agreed that he has not had to actively search for a new job since leaving Swift.

Harry Lake testified that he is 69 years old and before his January 12, 1984 retirement had worked sixteen years and five months as a job service manpower specialist in the Marshalltown area. Mr. Lake indicated that he was familiar with the Marshalltown job market at the time of his retirement and that he has attempted to stay abreast with that market since his retirement. Lake responded that that low back problems and related restrictions such as those outlined in claimant's exhibits 41 through 45 would affect the employability of a person otherwise having claimant's characteristics and residing in the Marshalltown area in a negative sense in that employers generally do not hire persons with low back injuries. Lake agreed that if claimant had received a 4.00 GBA in his printing courses and a 3.50 GBA

in high school, those facts would suggest that, with training, additional jobs would open for claimant. Lake reported that employers generally make a genuine attempt to accommodate handicap workers, but when employment applicants are plentiful they take only the best; whereas when employment applicants are few, employers will select employees with physical defects provided they can continue to protect their own interests.

Mr. Carl testified that the Swift health questionnaire which potential employees are required to complete with their job applications does contain considerable questions concerning prior workers' compensation claims and prior back problems. Carl testified that Swift would not necessarily exclude an individual with prior back problems from employment, but stated that for, primarily humanitarian reasons, such individuals would not be considered for positions which they could not physically handle or where they might experience an aggravation of their condition or further injury.

Claimant's wages, tips, and other compensation in his last full year at Swift, that is 1982, were $32,701.01. Claimant's wages, tips, and other compensation with his current employer in 1985 were $15,257.03. As of October 23, 1986, claimant had earned $13,473.72 with his current employers in 1986.

In his deposition, Dr. Wirtz indicated that strenuous activity will irritate claimant's back condition temporarily and that he will have intermittent low back pain and some leg radiation with activities that are strenuous. In an October 31, 1983 report, Dr. Wirtz indicated that strenuous activities would include lifting, repeated lifting of objects, as well as prolonged carrying of heavy objects. He reported that ackward positions of the back would tend to likewise give claimant low back complaints. In an October 13, 1983 report, Dr. Wirtz characterized claimant's problem as degenerative disc disease which would be symptomatic with heavy labor activities and would produce future injuries with such activities.

Per the prior decision in this matter, claimant's medical condition is characterized as as protrusion at L4, 5 centrally and at L5, S1 centrally and on the left side.

John R. Walker, M.D., an orthopedic specialist, reexamined claimant and reported thereon on February 12, 1986. The doctor characterized as a rather marked change that the fifth lumbar disc was practically collapsed down to zero height, although some disc was left anteriorally and in the mid portion of the disc as seen in lateral x-rays. Dr. Walker stated that claimant did have some permanent problem with a somewhat narrower fifth lumbar disc prior to his injury and that that could be set at six percent [permanent partial impairment] of the body as a whole. Dr. Walker subsequently indicated that claimant had a

twelve percent [permanent partial impairment] of the body as a whole as a result of his work injury giving him a total eighteen percent permanent partial "disability." On November 3, 1986, Dr. Walker opined that claimant should particularly avoid the following activities:

> 1.) He should avoid all shoveling, pitching hay, shoveling sand, shoveling dirt or spading and/or shoveling meat.
>
> 2.) The patient should not repeatedly bend down and pick up objects from the floor and repeatedly lift them from the floor to a table height. If he does, he must squat down. He should not pick up ten to fifteen pounds at a time and certainly not repetitively.
>
> 3.) Any lifting should be accompanied by a squat position rather than a bending of the lumbo-dorsal spine.
>
> 4.) As far as carrying is concerned, probably he could carry as much as 35 to 40 lbs. from table height to another distance of say 5 to 10 feet but this should not be done repeatedly.
>
> 5.) The patient should avoid riding lawnmowers, tractors or vehicles which give a lot of spring and bounce.

APPLICBLE LAW AND ANALYSIS

Our sole concern is claimant's entitlement to permanent partial disability benefits on account of his August 9, 1983 injury.

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).

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).

Claimant is a younger worker whose present and past educational records suggest considerable intellectual ability. Apparently, only Dr. Walker has assigned claimant an impairment rating, that being 18 percent of the body as a whole, 12 percent of which the doctor attributes to claimant's work injury. Claimant's preexisting lumbar disc narrowing to which the remaining six percent is attributed did not appear to be producing any industrial disability prior to claimant's work injury. Claimant to that point had satisfactorily performed his job at Swift without problems related to a back condition. Hence, any industrial disability

ultimately found cannot be apportioned between claimant's work injury and the preexisting condition. Both Dr. Walker and Dr. Wirtz generally have restricted claimant from physical maneuvers of lifting, bending, carrying over 35 to 45 pounds and other strenuous activities associated with heavy manual labor. Claimant voluntarily left his job at Swift following his injury. He testified he did so because he could no longer carry on his job duties without aggravating his back condition. The fact that claimant's income dropped by at least 50 percent in the year following his job change gives additional credibility to claimant's testimony in that regard. Claimant fortunately has training, skills and work experience in other than heavy manual labor and was able to utilize these to return to a position as a pressman with his previous employer. Claimant's job with that employer appears secure and claimant's salary is increasing consistently with his longevity with the employer. In several years, it may nearly equal the wage level he could have received had he remained with Swift. Claimant's need to sign a waiver of physical defect regarding his back condition with his prior employer upon his rehire after leaving Swift is reflective of difficulties Mr. Lake testified claimant might well encounter in the open labor market were he to need to compete for work positions with other workers of like experience and skills but lacking a back injury, however. One suspects claimant's prior work record with his present employer was of assistance in his securing that position despite his back injury. One also suspects that had that previous work history been lacking, claimant's present employer would have been less likely to have hired him even with a waiver of physical defect. On his job transfer, claimant lost benefits he received as a Swift employee. His current benefit package is not significantly less than that received at Swift, however. Claimant's testimony concerning the amount of overtime he generally earned at Swift is discrepant with Mr. Carl's testimony on that subject. We are not convinced claimant's accounting of earned overtime is necessarily more correct. Hence, we do not believe lost overtime hours is a significant factor in assessing claimant's loss of earning capacity. Likewise, claimant's current nonunion status is not a condition which can be said to result from his work injury and, therefore, is not a factor in assessing lost earning capacity. Claimant testified to restrictions on his nonwork life activities. We believe that testimony was exaggerated in claimant's favor in that claimant later acknowledged that he has never jogged and in that claimant continues to be able to golf, launch and operate his motorboat and care for his children, both of whom are at an age where a fair level of physical prowess would generally be required of their caretaker. As noted by Drs. Wirtz and Walker, claimant does have some real physical limitations on his activities on account of his back condition, however. He is motivated to continue work and to train himself for less physically demanding work. Given his younger age, his intellectual capacities, and his personal ambition, he is likely to be successful in those

Claimant is continuing his education in the hopes of obtaining training necessary for nonphysically demanding work.

Claimant has a moderate permanent physical impairment related to his August 9, 1983 work injury.

Claimant has a loss of earning capacity of 20 percent.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant is entitled to permanent partial disability resulting from his August 9, 1983 injury of twenty percent (20%).

ORDER

THEREFORE, IT IS ORDERED:

Defendant pay claimant permanent partial disability benefits for one hundred (100) weeks at the rate of two hundred thirty-four and 23/100 dollars ($234.23).

Defendant pay accrued amounts in a lump sum.

Defendant pay interest pursuant to section 85.30.

Defendant pay costs pursuant to Division of Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33.

Defendant file claim activity reports as required by the agency.

Signed and filed this 12th day of January, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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001444

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PEGGY L. BETTS, Claimant, vs. ALEXANDER MANUFACTURING COMPANY, Employer, and KEMPER GROUP, Insurance Carrier, Defendants.	:	File No. 804631 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 Peggy L. Betts, claimant, against Alexander Manufacturing Company, employer, and Kemper Group, insurance carrier, for the recovery of benefits as a result of an alleged injury on September 16, 1985.

The record consists of the testimony of claimant, Larry Fuller, and Georia Franks; claimant's exhibits 1 through 24; and defendants' exhibits A through E. The record was considered fully submitted at the conclusion of the hearing. On December 4, 1986, however, the parties jointly submitted an additional exhibit in the form of a disability report by R. L. Emerson, M.D. That report is accepted into the record and is hereby designated claimant's exhibit 25.

STIPULATIONS AND ISSUES

Pursuant to the prehearing report and order approving the same, the parties stipulated to the following:

1. At the time of the alleged injury there was in existence an employer-employee relationship between claimant and the employer.

2. Claimant sustained an injury arising out of and in the course of her employment on September 16, 1985.

3. As a result of the injury, claimant was temporarily totally disabled.

4. If claimant suffered permanent disability, then such disability is to the body as a whole.

5. If claimant is entitled to permanent disability benefits, the commencement date thereof is February 17, 1986.

6. Claimant is single and entitled to one exemption.

7. All medical expenses requested by claimant have been or will be paid by defendants, however, claimant's application for an independent medical examination remains to be determined.

8. Defendants have previously paid claimant for the period from September 16, 1985 through February 16, 1986 (except for three weeks) at a rate of $125.79.

9. Each party has actually paid any expenses which they now to seek have taxed as cost.

EVIDENCE PRESENTED

Claimant testified she is forty-three years old, has two adult children, and resides in Swaledale, Iowa. Claimant completed the eighth grade. She has no further specialized training or education.

Claimant advised that prior to 1972 she worked as a home-maker. Since 1972 and prior to her injury claimant has worked as a full-time employee. She described most of her jobs as heavy to medium heavy labor. Her work experience includes work as an assembler, punch press operator, packager, school cafeteria worker, and bookkeeper and sales work. Claimant's bookkeeping and sales work covered a five year period from 1976 to 1981 while she and her husband operated a rental business.

Claimant recalled that she began working for defendants in 1982 or 1983 packaging batteries for radio and medical equipment. She next was assigned to solder and package batteries and then to the "sonic welder." The sonic welding required claimant to put the batteries on flats and then stack them on a pallet. Claimant said that lifting the flats was the most difficult aspect of her job. She also said the job required a lot of twisting and bending.

Claimant indicated that she first began to experience low back pain in June 1983. She said she did not recall any problems prior to that time. She experienced a problem again in August 1983 which developed at home while canning. She went to the hospital to see a doctor concerning this problem, then was

instructed to remain at bedrest for about seven days. Claimant returned to work in September 1983. She indicated that she recovered from this problem and continued working, without difficulty until September 1985.

On September 16, 1985 claimant was working on the sonic welder when she noticed that her back was beginning to hurt. She did not report this to her supervisor because she thought the pain would go away. When she went home she had planned to go to bed but received a call to go to the hospital with her mother. When claimant returned to work the next day she reported her back pain to her foreman. Shortly thereafter, claimant was taken to see the company doctor. Claimant said she could not recall any specific incident which brought about her back pain.

Claimant said the pain she experienced in September 1985 was not the same as she had suffered earlier because she had pain radiating down her left leg and part of the way down her right leg.

The company doctor, Samuel R. Hunt, M.D., placed claimant in the hospital. While in the hospital she was seen by another doctor as well. Claimant advised that after she was released from the hospital she returned to work on October 1, 1985. She was not, however, able to do the work a full day. Because of continued problems she was referred to Timothy C. Mead, M.D. She was shortly thereafter referred to Paul H. Gislason, M.D., who again hospitalized her and treated her with steroid injections. Claimant reported that Dr. Gislason's treatment program improved her condition somewhat. Dr. Gislason had hospitalized claimant in December 1985. After claimant's release from the hospital claimant sought to have her care and treatment moved from Dr. Gislason who is in Mankato, Minnesota, to Mason City. Claimant explained that because of the condition of her automobile she had difficulty getting to Mankato to see Dr. Gislason. After she missed a January 7, 1986 appointment with Dr. Gislason because her car would not start she said the insurance carrier suspended her compensation payments. The industrial commissioner ordered the insurance carrier to provide claimant with alternative medical care closer to her home by a decision filed June 3, 1986.

Claimant advised that Dr. Gislason released her to return to work on February 17, 1986. She did return to her packaging job at that time. She was unaware of any restrictions imposed upon her and asked her supervisor if there were any restrictions. The supervisor told her she did not know. Claimant added, however, that she was given lighter work to do upon her return which continued until she left work in May 1986. Claimant testified that she seemed to get along okay on her job with light duty work.

Claimant recalled that in May she was called into the office

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Claimant recalled that in May she was called into the office

and asked about statements by coworkers that she had intentionally hurt her back. Claimant denied this. Claimant said that some of her coworkers made light of her back condition. On May 30, 1986 claimant quit her job stating as a reason that she was going to start her own business. She contended at hearing, however, that this was neither the sole nor primary reason for quitting. Claimant said her main reasons for leaving was a feeling that she was being put down because of her back injury. She also said that working was causing her continuous pain.

Claimant did, in fact, start her own business in June 1986. She described in detail the nature of this business which was making figurines, plaques, and other similar items. She said she was able to get Wal-Mart to market the items. Claimant stated that she hired an individual to help her in this business as well as received the assistance of her friend, Larry Fuller. Claimant said she used her savings funds to start this business.

Claimant reported that the business was successful at first, but by the first of August she had to cease doing business. She stated that she had problems because her accounts were in different states and the physical stress of traveling from one place to another increased her back pain. She said she was unable to keep the business going due to money shortages.

Claimant disclosed that in June 1986 she was involved in an auto accident with a deer while returning from Wisconsin. She said she sought medical attention for pain in her chest where she struck a steering wheel. She also experienced low back pain later on. Claimant stated that the auto accident aggravated her back pain for a while but it subsided within a few days. She said she believed she was in the same condition after the accident as she was before it.

Claimant said she continues to see Dr. Emerson, who had placed her in the hospital a third time where she received physical therapy, bedrest and medication. She has not had surgery on her back. She said Dr. Emerson had released her for part-time work and she is presently waiting for restrictions to be established. Claimant has also been examined by John Walker, M.D.

Claimant indicated that she has looked for employment in several different places and is willing to undergo vocational rehabilitation.

Claimant stated that at the time of her injury her wages were $4.93 per hour for what was a standard forty hour work week. She explained that her itemization of travel expenses included meals and added that Dr. Walker is still unpaid.

Claimant reported that since her injury she has been restricted

somewhat in that she no longer sweeps floors, makes beds, goes bowling, and has been instructed to limit twisting and bending. She said there are a lot of general household chores she can no longer do. She stated that she was uncertain whether she could continue in factory work and was uncertain whether she could do the job she was doing at the time of her injury. Claimant reported that she has not been paid workers' compensation since she returned to work on February 17, 1986.

On cross-examination, claimant was questioned concerning her job applications and prior work history. She was also extensively examined concerning her prior health history and revealed several injuries she had suffered in the past. Claimant revealed that she had on occasion been treated for arthritic problems.

Claimant was questioned concerning the extent of and nature of the examination conducted by Dr. Walker. She indicated that perhaps her back condition was worse at the time she saw Dr. Walker because of the long drive to his office.

Claimant stated that when she returned to work on February 17, 1986 she continued to do sonic welding but was not required to do any lifting. She said at the time she quit defendants she was not required to do any lifting.

On redirect examination, claimant denied that any of her prior accidents had caused back problems.

Larry Fuller testified that he started living with claimant in December 1984. He said that at that time there was no indication that claimant suffered any back problems and he was not aware of the problems which had occurred in 1983. Mr. Fuller said he became aware of claimant's injury of September 16, 1985 after she came home from work and said she had hurt her back at work. He said he has continued to live with claimant since and on some days claimant does not have pain but on other days she appears to move around cautiously. He said he does not believe claimant tells him when her back is bothering her. Mr. Fuller reported that claimant had no limit on her lifting prior to the injury, but now her lifting ability is somewhat limited.

Mr. Fuller advised that it was his observation that sitting seems to bother claimant if she has to do so for long. He reported that he was involved in the figurine business with claimant and attributed the failure of that business to lack of capital. He reported that neither he nor claimant had any expectation of receiving operating capital in the near future.

On cross-examination, Mr. Fuller testified that they had purchased a bus for $100 so claimant could lie down in the back while they were traveling to distant places in connection with their business. He also described the severe mechanical problems

with claimant's automobile.

Georgia Franks testified that she has been employed by defendants since 1970. She said she had held positions as production worker, personnel manager, production manager, general manager, and is now the plant manager. She said defendants now employ 185 people. She reported that she was not claimant's immediate supervisor at the time of the injury.

Ms. Franks testified that claimant began employment with defendants on February 14, 1983. She reported that claimant did well at the job for which she was initially employed. Overall, she described claimant as a very good worker and said she always did her job very well. She stated, however, that claimant was "a complainer" about a number of physical complaints prior to September 1985. She said she first became aware of the injury of September 16, 1985 on the following day. Ms. Franks stated that claimant returned to work briefly on October 1, 1985 and then was off work again.

She said claimant did return to work on February 17, 1986 and was instructed not to lift any flats at that time. The only lifting required of claimant was about a ten ounce battery. She said claimant stayed at that job for two weeks. She said claimant was then switched to soldering because they thought claimant might like that position better. She said claimant did not make complaints of back problems after February 17, 1986.

Ms. Franks testified that claimant worked until May 30, 1986 when she quit. She reported that claimant came into the office and gave two weeks notice that she was leaving. She said they did not go into details at that time about her reasons for leaving. Claimant later came in and said that she wanted to leave earlier because her business was going so well she needed to be there to operate the business. Ms. Franks said claimant gave no indication she was quitting because of her back condition.

Ms. Franks testified that she observed claimant from her return to work in February 1986 until the time she quit on May 30, 1986. She reported that she saw no indication that claimant was suffering from back pain. Ms. Franks testified that based on her observations of claimant, claimant would be able to do a variety of different jobs at defendants. On cross-examination, Ms. Franks testified that claimant's gross weekly wage was $197.20. She stated that prior to claimant's returning to work they had a verbal release from the doctor that claimant could return. She said that when claimant returned in February 1986 there was no written release, but there was a verbal release and a lifting limit of twenty pounds. Ms. Franks testified, however, that they did not want claimant to lift anything. She stated that the defendants could accept claimant with one hour sitting

restrictions, no lifting, bending or twisting. She reported that defendants have several sedentary type jobs. She said defendants would consider rehiring claimant depending upon her medical restrictions and the qualifications of other applicants. She denied that defendants were angered at claimant because of the workers' compensation proceeding. On rebuttal, claimant testified that she did have complaints of pain between February 1986 and May 30, 1986. She said she did report these problems with other employees. She said she did not report them to Ms. Franks because she was told not to be complaining about her back. She admitted, however, that she did leave her employment early after telling Ms. Franks that her business was going well.

Georgia Franks retook the stand and denied that she had told claimant not to complain about her back.

Claimant's exhibit 1 is a copy of the progress notes from Park Clinic in Mason City, Iowa, concerning claimant. A review of these notes indicate that in June 1983 claimant was suffering from a low back ache. There is some notation that claimant suffered arthritis and cramping in her hips and knees. A September 6, 1983 progress note indicates that claimant was again suffering low back pain for which she was placed on Motrin and Valium. Apparently, the pain improved and claimant was released to return to work. Further review of the reports indicate that claimant did suffer various ailments through 1983 and portions of 1984 primarily dealing with her blood sugar levels and upper respiratory problems. There is no indicated of back pain reappearing until the note of October 7, 1985. The diagnosis given at that time indicates probable L5 radiculopathy.

Claimant's exhibit 2 is a medical record from St. Joseph Mercy Hospital dated August 30, 1983. According to that report, claimant reported with low lumbar back discomfort radiating down the left buttock. There is no indicated of any specific injury. There is some indication that the pain extended into the left leg. The diagnosis at that time was low back strain.

Claimant's exhibit 3 is progress notes from the North Iowa Medical Center dated September 29, 1984. This report concerns claimant's complaint of chest pain.

Claimant's exhibit 4 is Dr. Hunt's progress notes from September 17, 1985 through October 2, 1985. These reports indicate that claimant was suffering from lower back discomfort with pain down her left leg to her heel. It also indicates some right thigh discomfort. It further indicates that there was no specific incident of injury. Diagnosis on September 17 was acute back injury with left leg weakness. Claimant was to see Dr. Fisher. Dr. Hunt's diagnosis was acute back strain with left sciatica. Dr. Hunt notes that while claimant was admitted to the hospital a lumbosacral spine x-ray series revealed

degenerative disc disease at L4-L5 and L5-S1 with moderate scoliosis. Included in the exhibit is a release to return to work for claimant dated September 19, 1985 indicating that she could return on September 23 with a fifteen pound lifting limit.

Claimant's exhibit 5 is records from St. Joseph Mercy Hospital concerning claimant's admission there from September 17, 1985 through September 19, 1985. The history reflected in these reports is consistent with that which has been previously disclosed. The admitting diagnosis was acute back strain with left leg weakness, expect ruptured or bulging disc L5-S1. Discharge diagnosis was acute back strain with possible L5 nerve root entrapment. Claimant was given several instructions upon discharge.

Claimant's exhibit 6 contains some return to work slips indicating that claimant would return to work certain restrictions in 1985. It also includes a physician's report by T. C. Mead, M.D., dated October 6, 1985. According to that report, claimant suffered a herniated disc at L4-L5 which was related solely to her injury. Dr. Mead's progress notes are also attached which cover the period from October 14, 1985 to December 16, 1985. A review of these notes indicate that claimant continued to suffer rather severe pain over that entire period of time. Claimant's exhibit 7 is an October 29, 1985 letter from Dr. Mead to the insurance carrier. According to that letter, Dr. Mead felt that conservative therapy would be successful in treating claimant.

Claimant's exhibit 8 is a letter dated December 13, 1985 from Dr. Gislason and attached radiographic reports. Dr. Gislason indicates that claimant did have positive right leg raising, but felt that conservative treatment would be successful. He also recommended steroidal injections to get her started on a physical therapy program. Dr. Gislason indicated that it was his impression that claimant did have some sciatica probably secondary to a good strain of her low back. Claimant's exhibit 9 also contains a letter from Dr. Gislason dated December 24, 1985 with an attached discharge summary. His diagnosis was degenerative disc disease L4-L5. Claimant apparently had negative straight leg raising at the time of her discharge. Claimant's exhibit 10 is a letter dated January 28, 1986 from an associate of Dr. Gislason, Elmer W. Lippmann, Jr., M.D., to the insurance carrier. Dr. Lippmann reported claimant had a full range of motion and that his neurological examination was within normal limits. Claimant's exhibit 11 is a letter dated February 11, 1986 from Dr. Gislason to the insurance carrier. According to that letter, Dr. Gislason had last seen claimant on December 14. He indicated that claimant continued to suffer many complaints. There were some positive findings, however, the doctor indicated that he believed claimant could return to work on Monday, February 17, 1986. He said that her work schedule should be

tempered so she can handle it on an increasing basis. Attached to claimant's exhibit 11 is an April 18, 1986 report from Dr. Gislason to the insurance carrier which reports the results of his examination on April 15, 1986. Dr. Gislason indicated that degenerative disc disease does not result from a single isolated incident, however, stated that her disability did commence on September 16, 1985, and that it was the result of her injury. Dr. Gislason assessed a ten percent permanent partial disability to the claimant as a result of her back condition.

Claimant's exhbiit 12 is a copy of a report dated June 23, 1986 which concerns claimant's automobile accident with the deer. This reports that claimant did have muscle spasms in the upper and lower back. X-ray examinations, however, indicated that there was no significant change from her prior examination.

Claimant's exhibit 13 is a letter dated July 10, 1986 from T. C. Mead, M.D., to the insurance carrier. This letter very briefly reviews Dr. Mead's treatment of the claimant. Dr. Mead indicates that although claimant did have some preexisting degenerative disc disease, it was his opinion that the symptoms were initiated as a result of her employment at the defendants. Claimant's exhibit 14 is a letter dated July 15, 1986 from Dr. Gislason discussing whether or not the September 16, 1985 injury materially aggravated the underlying disc disease suffered by claimant. It also includes an August 26, 1986 letter from Dr. Gislason. Read together, these indicate that it is Dr. Gislason's opinion that while the injury did not cause the degenerative disc problem, it did aggravate it. He said that if a division of percentage is necessary he would estimate 75 percent of the disability due to the industrial accident with 25 percent being the result of the preexisting condition.

Claimant's exhibit 15 is a detailed report from John R. Walker, M.D., dated July 18, 1985. Dr. Walker's findings are set forth in considerable detail. He concludes that claimant did have a preexisting problem. At the same time, however, he points out that claimant did not have symptoms of her preexisting condition prior to the work injury for which he concludes that the cause of her problem was the work-related injury. Dr. Walker assessed claimant's total permanent disability at 20 percent of the body as a whole and indicated that 10 percent was the result of a preexisting condition and 10 percent was added because of her work-related injury. He recommended that claimant not return to heavy work. Claimant's exhibit 16 is reports from Dr. Emerson dated August 14, 1986. There is a detailed review of claimant's history and a finding that claimant has low back and bilateral leg symptoms perhaps secondary to protruded intervertebral disc at L4-5. Dr. Emerson estimated claimant's permanent partial impairment to be 10 percent of the body as a whole.

Claimant's exhibit 17 is medical records from St. Joseph

Mercy Hospital concerning her admission on August 29, 1986. Her attending physician was R. McCoy, M.D. There is again a considerable history set forth. Dr. McCoy indicates that claimant has a very difficult problem to resolve. He indicated that he was not able to find evidence of neurological deficit or evidence of definite nerve root irritation. The final diagnosis was severe low back pain with bilateral sciatica, right greater than left. The report also contains a psychological evaluation of the claimant. The principal discharge diagnosis from Mercy Hospital was low back pain probably secondary to a herniated L4-5 disc. Claimant's exhibit 18 is a letter dated September 26, 1986 from Raymond L. Emerson, M.D., in which Dr. Emerson indicates that the motor vehicle accident on June 23, 1986 was not a contributing problem to claimant's present disability, and further indicated that he believed claimant suffered a 10 percent body as a whole injury as a result of her work-related incident. Claimant's exhibit 19 is a list of unpaid medical bills incurred by claimant. These will be set forth in the findings of fact. Claimant's exhibit 20 is a record of claimant's mileage expenses. Claimant's exhibit 21 is a copy of claimant's weekly earnings from May 20, 1985 through September 15, 1985. Attached thereto is a copy of claimant's wage statement. Claimant's exhibit 22 is a bill from Dr. Walker in the amount of $306. Claimant's exhibit 23 is a bill for $20 for a medical report. Claimant's exhibit 24 is a copy of an attending physician's statement by Dr. Emerson to the defendants. Claimant's exhibit 25 is a copy of a physical activity assessment of claimant by Dr. Emerson.

Defendants' exhibit A contains copies of the return to work slips which have been previously discussed in claimant's exhibits. Defendants' exhibit B is a copy of a voluntary termination by claimant dated May 29, 1986 which indicates that claimant's sole and exclusive reason for leaving is that she had her own business to run on a full-time basis. Defendants' exhibit C is a computer printout of medical treatment received by claimant on December 10, 1985 at St. Joseph Hospital. Defendants' exhibit D is a copy of claimant's attendance record. Defendants' exhibit E is a copy of a towing charge dated January 7, 1986 to claimant for trying to start a Ford Escort.

APPLICABLE LAW AND ANALYSIS

The first matter for determination is whether claimant suffered permanent partial disability and, if so, whether it was causally related to her work injury. Numerous medical reports in the record including reports from Doctors Emerson, Walker, and Gislason indicate that claimant does indeed suffer from permanent partial disability.

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

Not only do the medical reports indicate that claimant suffers permanent disbility, there seems to be little debate among the medical experts that claimant suffered a preexisting condition. At the same time, however, those experts clearly indicate that claimant's condition was materially aggravated at work due to the fact that she did not have prior disability in her low back. The records do reflect that claimant suffered a problem in 1983, however, it is clear that this was a temporary aggravation and that claimant did not suffer continuing a long-term disability as a result. Accordingly, the record herein establishes that there is a causal relationship between the injury suffered by claimant on September 16, 1985 and her subsequent disability. It should be noted that not only do the doctors agree as to the causal relationship, there appears to be very little disagreement among the doctors as to the extent of the permanent functional impairment suffered by claimant. Dr. Gislason assigned an impairment rating of 10 percent although he later said thst probably 25 percent of that rating is attributable to the preexisting condition. This would mean then that Dr. Gislason has assigned claimant a 7 1/2 percnt permanent partial impairment

as a result of the injury. Likewise, Dr. Walker assesses a 20 percent body as a whole impairment, but reduces this impairment rating by 10 percent as a result of preexisting conditions. Dr. Emerson does not engage in dividing up the disability between preexisting problems and subsequent problems but did assign an impairment rating of 10 percent of the body as a whole. The record, thus, establishes rather convincingly that claimant suffers a 10 percent body as a whole impairment as a result of the work-related 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).

This is not a case where the defendants refuse to return the employee to work. Defendants did return claimant to work and did make every effort to accommodate her physical limitations. It is clear that it was claimant's decision to leave her employment to engage in her business enterprise. Certainly, the work injury was a factor in this consideration since claimant as a self-employed would have greater control over her activities. Defendants, however, cannot be considered under such circumstances to have refused claimant employment, nor is the record sufficient to make a finding that claimant could not physically return to her previous employment. It is clear on this record that the defendants did have jobs available to claimant that she could do within her restrictions and were willing to make those jobs available to her.

There are, however, other factors which indicate that claimant has suffered industrial disability. She has a limited educational background and her prior work experience is in physical menial labor. It is noted, however, that claimant is not inexperienced in the operation of her own business and did so for five years with her husband. The type of injury suffered by claimant is the type most disabling to an individual who has her type of prior work experience. Claimant was impressive as to her desire to return to work and become gainfully employed. She would appear to be intellectually, emotionally, and physically capable of some types of employment. She has not established that she is an odd-lot employee in that the only type of work available to her is of such limited quantity and quality as to render her permanently and totally disabled. Based upon all of the factors of industrial disability, claimant has established a permanent partial disability for industrial purposes equal to 35 percent of the body as a whole.

Since this is an injury producing permanent disability, defendants are obligated to pay claimant healing period benefits as defined in section 85.34(1). The record discloses that claimant was off work from September 17, 1985 to February 17, 1986. She did, however, return to work briefly on October 1, 1985 and defendants are not required to pay compensation for that day. Claimant contends that she is entitled to additional healing period commencing July 1, 1986 and continuing to the present. She has not established that she is so entitled. She has not established whether her lack of ability to work from

September or from July 1, 1986 to the present was a result of her condition or the result of the failure of her business enterprise. In any event, claimant has submitted at least three different medical reports that indicate she did achieve maximum medical recovery prior to the present time. The records indicate that claimant did achieve maximum medical recovery on April 18, 1986 which was subsequent to her return to work. Claimant should, however, be permitted to recover temporary total disability benefits for the period from August 29, 1986 to and including September 4, 1986 for the period in which she was admitted to St. Joseph Mercy Hospital. Thus, the record establishes that claimant is entitled to healing period benefits for the period from September 17, 1985 to October 1, 1985, and from October 2, 1985 to February 16, 1986. Permanent partial disability benefits shall commence as of February 17, 1986 and continue to August 29, 1986. Additional healing period or temporary total disability payments should commence August 29, 1986 and continue to September 5, 1986 at which time permanent partial disability payments shall recommence.

Claimant has established that she is entitled to reimbursement for the examination by Dr. Walker under provisions of section 85.39 in the amount of $306. Pursuant to claimant's exhibit 19, defendants are directed to pay the following medical expenses:

North Iowa Medical Center	$ 87.00
Radiologists of Mason City	21.00
Surgical Associates, P.C.	243.00
Mercy Hospital	2,088.72
Reimburse claimant for prescriptions costs	14.49

Claimant also requests reimbursement for 328 miles travel to secure medical treatment and payment should accordingly be ordered. Claimant should be reimbursed at the rate of $.24 per mile.

Claimant also seeks an adjustment in her rate of compensation. The basis of this adjustment is claimant's desire to exclude certain incomplete work weeks which were included in the calculation of her rate. Claimant's request is consistent with prior holdings of the agency which have interpreted section 85.36 to require a determination of weekly earnings based on full or completed weeks. See Lewis v. Alfs Manufacturing Co., I Industrial Commissioner Report 206, Appeal Decision 1980, and Schotanus v. Command Hydraulics, Inc., I Industrial Commissioner Report 294 (1981). Accordingly, claimant's rate of compensation is adjusted to $133.77.

FINDINGS OF FACT

WHEREFORE, the following facts are found:

1. On September 16, 1985 claimant suffered an injury to her low back while at work.

2. As a result of the low back injury, claimant was off work from September 17, 1985 through September 30, 1985 and from October 2, 1985 through February 16, 1986.

3. As a result of her injury, claimant suffered permanent disability.

4. Claimant's low back injury resulted in a protruded intervertebral disc at L4-L5.

5. Claimant's injury produced impairment to the body as a whole equal to 10 percent.

6. Claimant has an eighth grade education and work experience primarily limited to manual labor.

7. Defendants returned claimant to work following his injury.

8. Claimant quit her employment voluntarily in May 1986 for a variety of reasons.

9. Claimant is capable of doing light duty work.

10. Claimant has incurred the following medical expenses for which she is entitled to reimbursement:

a.	Mileage	$78.72
b.	Prescriptions	14.99

11. Claimant is entitled to reimbursement for an independent medical examination pursuant to section 86.39 in the amount of $306.00.

12. Claimant has incurred the following medical expenses which remain unpaid:

a.	North Iowa Medical Center	$ 87.00
b.	Radiologists of Mason City	21.00
c.	Surgical Associates, P.C.	243.00
d.	Mercy Hospital	2,088.72

13. Defendants have previously paid claimant weekly compensation for the period from September 16, 1985 through February 16, 1986, except for three weeks.

14. Claimant was temporarily totally disabled from August 29, 1986 through September 4, 1986.

15. Claimant's industrial disability resulting from the

work injury is 35 percent of the body as a whole.

16. Claimant's average weekly wage at the time of her injury was $211.47 and she was single with one exemption.

CONCLUSIONS OF LAW

IT IS THEREFORE CONCLUDED:

Claimant has proven by a preponderance of the evidence that she received an injury arising out of and in the course of her employment on September 16, 1985.

Claimant has proven by a preponderance of the evidence that there is a causal relationship between her injury and the disability and medical expenses upon which this claim is based.

Claimant has proven by a preponderance of the evidence that she suffered permanent partial disability as a result of her injury equal to thirty-five percent (35%) of the body as a whole.

Claimant has proven by a prepondeance of the evidence that she is entitled to reimbursement for an independent medical examination.

Claimant has proven by a preponderance of the evidence that her rate of compensation is one hundred thirty-three and 77/100 dollars ($133.77).

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant healing period benefits from September 17, 1985 through September 30, 1985 and from October 2, 1985 through February 16, 1986 for a total of twenty-one and five-sevenths (21 5/7) weeks; permanent partial disability benefits from February 17, 1986 through August 28, 1986 and from September 5, 1986 and continuing until a total of one hundred seventy-five (175) weeks shall have been paid; and temporary total disability benefits from August 29, 1986 through September 4, 1986 for a total of one (1) week. All weekly compensation shall be paid at the rate of one hundred thirty-three and 77/100 dollars ($133.77). All accrued payments shall be paid in a lump sum together with statutory interest thereon.

IT IS FURTHER ORDERED that defendants be given credit for eighteen and five-sevenths (18 5/7) weeks of compensation previously paid at the rate of one hundred twenty-five and 79/100 dollars ($125.79).

IT IS FURTHER ORDERED that defendants pay unto claimant for reimbursement of expenses the following:

a.	Dr. Walker	$ 306.00
b.	Prescriptions	14.49
c.	Mileage	78.72

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

a.	North Iowa Medical Center	$ 87.00
b.	Radiologists of Mason City	21.00
c.	Surgical Associates, P.C.	243.00
d.	Mercy Hospital	2,088.72

All accrued payments shall be made in a lump sum with interest.

The costs of this action are taxed to the defendants.

Defendants are to file an activity report upon completion of this award.

Signed and filed this 9th day of April, 1987.

Steven E. Ort
STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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FILED

FEB 29 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PEGGY L. BETTS, Claimant, vs. ALEXANDER MANUFACTURING COMPANY, Employer, and KEMPER GROUP, Insurance Carrier, Defendants.	:	File No. 804631 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This is a continuation of the arbitration case commenced by Peggy L. Betts against Alexander Manufacturing Company and the Kemper Insurance Group based upon her injury that occurred on September 16, 1985. Other issues in this proceeding have previously been heard and decisions have been entered. Claimant has previously been awarded compensation for healing period and thirty-five percent (35%) permanent partial disability.

ISSUES

The only issue to be determined by this decision is whether or not the penalty for unreasonable delay or denial of compensation as provided by the fourth unnumbered paragraph of Iowa Code section 86.13 should be assessed. The record in the proceeding consists of testimony from claimant and from Darrall Leighton. The record also includes the prior arbitration decisions entered in the case and all the exhibits which were received into evidence at the prior hearings.

SUMMARY OF EVIDENCE

The following is a summary of evidence presented in this case. Only the evidence most pertinent to this decision is discussed, but all of the evidence received at the hearing was considered in arriving at this decision. Conclusions about what the evidence offered may show are inevitable with any summarization. The conclusions in the following summary should be considered to

be preliminary findings of fact.

The primary facts as found and determined in the prior decisions are considered to be controlling for purposes of the issue now being considered.

Claimant injured her back in an injury which arose out of and in the course of her employment on September 16, 1985. She was off work following that incident, except for one day when she unsuccessfully attempted to return to work, until February 17, 1986. On May 30, 1986, she resigned and started her own business.

Georgia Franks, a supervisor for the employer, indicated that claimant returned to work with a verbal 20-pound lifting limit from her doctor and also with other restrictions. Franks indicated that claimant was not allowed to perform lifting while she was working subsequent to the injury.

Claimant was paid weekly compensation voluntarily by the defendants during the healing period, except for three weeks following a date when she missed a doctor's appointment.

On April 8, 1987, the other issues in the case, except for the claim for section 86.13 benefits now under consideration, were determined. Claimant was awarded healing period compensation and compensation for permanent partial disability, which was determined to be a 35% industrial disability. In pertinent part, commencing at page 11 of the decision, the gist and rationale of that ruling is stated as follows:

> Not only do the medical reports indicate that claimant suffers permanent disability, there seems to be little debate among the medical experts that claimant suffered a preexisting condition. At the same time, however, those experts clearly indicate that claimant's condition was materially aggravated at work due to the fact that she did not have prior disability in her low back. ... Accordingly, the record herein establishes that there is a causal relationship between the injury suffered by claimant on September 16, 1985 and her subsequent disability. It should be noted that not only do the doctors agree as to the causal relationship, there appears to be very little disagreement among the doctors as to the extent of the permanent functional impairment suffered by claimant. Dr. Gilason assigned an impairment rating of 10 percent although he later said thst [sic] probably 25 percent of that rating is attributable to the preexisting condition. This would mean then that Dr. Gislason has assigned claimant a 7 1/2 percnt [sic] permanent partial

impairment as a result of the injury. Likewise, Dr. Walker assesses a 20 percent body as a whole impairment, but reduces this impairment rating by 10 percent as a result of preexisting conditions. Dr. Emerson does not engage in dividing up the disability between preexisting problems and subsequent problems but did assign an impairment rating of 10 percent of the body as a whole. The record, thus, establishes rather convincingly that claimant suffers a 10 percent body as a whole impairment as a result of the work-related condition.

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). 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 [sic] 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.

...

Since this is an injury producing permanent disability, defendants are obligated to pay claimant healing period benefits as defined in section 85.34(1). ... Claimant should, however, be permitted to recover temporary total disability benefits for the period from August 29, 1986 to and including September 4, 1986 for the period in which she was admitted to St. Joseph Mercy Hospital. ...

The rate of compensation was also adjusted.

As indicated in the first arbitration decision filed June 3, 1985, claimant missed a medical appointment with Dr. Gislason. She attributed it to automobile trouble. A great deal of

evidence was introduced concerning whether or not she had been able to get the vehicle started on that day, which the record shows to have been January 6, 1986.

Darrall Leighton, the claims representative with Kemper Insurance Group, was primarily responsible for this claim and testified that, to his knowledge, there was no medical report from any physician which affirmatively indicated that claimant had not sustained any permanent disability as a result of the injury. Leighton also testified that the January 6, 1986 medical appointment was a regularly scheduled appointment for purposes of treatment and that it was not an appointment that was scheduled for purposes of an independent medical examination.

Leighton testified that, when claimant was hospitalized from August 29, through September 4, 1986, he was concerned that the hospitalization may not have been causally connected to her employment injury. Claimant's exhibit 17, the hospital records from that hospital admission, contain numerous references to claimant's employment injury and make no suggestion of any other reason for the period of hospitalization.

APPLICABLE LAW AND ANALYSIS

The penalty which can be assessed under the fourth unnumbered paragraph of section 86.13 requires that a delay in commencement of benefits without reasonable or probable cause or excuse must have occurred. The Iowa Supreme Court has not yet ruled upon how that standard is to be determined, but the Wisconsin Court of Appeals has addressed the issue in the case Kimberly-Clark Corporation v. Labor and Industry Review Commission, 405 N.W.2d 684 (Wisconsin 1987). The Wisconsin statute authorizes a penalty to be assessed for failure to pay compensation when the claim is not "fairly debatable." The Wisconsin Court had permitted an employee to maintain a tort action for bad faith denial of compensation benefits. Coleman v. American Universal Insurance Co., 273 N.W.2d 220 (Wisconsin 1979). The Iowa Supreme Court has declined to recognize such a tort, but indicated that, in those states which recognize such a cause of action, it is necessary for the insured to show: (1) the absence of a reasonable basis for denying benefits provided by the policy, and (2) the insurer's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. Pirkl v. Northwest Mutual Insurance Association, 348 N.W.2d 633 (Iowa 1988); Higgins v. Blue Cross, 319 N.W.2d 232 (Iowa 1984).

The Wisconsin Court, in a case dealing with bad faith on the part of an insurer, stated that there must be some reasonable basis, whether it concerns a question of fact or a question of law, which would lead a reasonable insurer to conclude that it need not make payment on the claim. Anderson v. Continental Insurance Company, 271 N.W.2d 368 (Wisconsin 1978). The Wisconsin

Court ruled that the lack of a reasonable basis to deny a claim may be inferred from the insurer's or employer's conduct where there is a reckless disregard of a lack of a reasonable basis for denial or a reckless indifference to the facts or to proof submitted by the insured. The criteria established by the Wisconsin Court seems well reasoned and is adopted as the standard to be used when considering claims for additional compensation under the fourth unnumbered paragraph of Iowa Code section 86.13.

This case presents three instances where the additional compensation is sought, namely, the three weeks when benefits were suspended following the time claimant missed the January 6, 1986 medical appointment, the four days of benefits when claimant was hospitalized commencing August 29, 1986 and for the failure to pay any compensation for permanent partial disability prior to the hearing wherein it was awarded.

The only statutory basis for suspending compensation for failure to keep a medical appointment is found in Code section 85.39. Section 85.39 deals only with independent medical examinations. It does not deal with medical appointments which are for the purpose of regular recurring treatment. From the record in this case, it is clear that the January 6, 1986 appointment which claimant missed and which therefore triggered the unilaterally imposed suspension of benefits was not an appointment of the type referred to in section 85.39. There is no law which requires an injured worker to accept treatment from an authorized physician. The worker is always free to seek treatment at his or her own expense from the physician of his or her choice. The remedy for failing to treat with the authorized physician is that the employer is absolved from paying the cost of medical treatment. Failing to attend appointments, for the purpose of treatment, with the authorized treating physician is not a basis under section 85.39 for denial or suspension of weekly compensation benefits. The suspension that was imposed is therefore found to have been imposed unreasonably and without probable cause or excuse. The claimant is entitled to a penalty of 50% of the amounts which were not paid in a timely fashion.

The next period to be addressed is the period of four days when claimant was hospitalized, commencing August 29, 1986. The passage of time that had occurred and claimant's automobile accident are determined to be sufficient to render liability for that period of hospitalization fairly debatable. This is so held even though exhibit 17, the medical records from that period of hospitalization, do not make reference to any incident of injury or other source of the problems which led to the hospitalization, other than the employment injury. Darrall Leighton's testimony regarding questions concerning the automobile accident as indicated in exhibit 18 was a factor. Leighton also indicated that he was under the assumption that there was no

problem with claimant and her new business, but that when the hospital report indicated claimant was unable to do her new work, he suspected that something had happened in that new work which was responsible for the hospitalization. It is not unreasonable for an insurer to require independent corroboration of a claim before making payment based solely on the claimant's allegations, regardless of whether they are made directly or indirectly through medical personnel. It is found that the failure to pay compensation for the four-day period of hospitalization commencing August 29, 1986 was not unreasonable. No additional compensation will be awarded for that period.

The degree of industrial disability is often difficult to determine. Leighton testified that he knew of no medical reports saying that claimant had not sustained any permanent impairment and that all the orthopaedic surgeons provided a permanent impairment rating when requested. Leighton testified that claimant had made improvement whenever she was under treatment and that it was expected she would be able to return to work. The record shows that claimant did, in fact, return to work. Her return to work was not without restrictions, however, and she did not return to employment which was substantially similar to that in which she was engaged at the time of injury. From the record made, it appears that she did not ever regain her full physical capabilities that she had prior to the injury while still employed by the employer or thereafter. The fact that claimant left the employment shortly after she returned to work does, however, present a problem since claimant was not readily observable by defendants. It nevertheless appeared that claimant did have some long-standing restrictions.

The employer does have the statutory duty under section 85.27 to provide reasonable care and the right to communicate directly with the physicians. The employer also has the duty to pay compensation according to the statutes. Refraining from making inquiry on the subject of permanent impairment is not reasonable when there are indications that permanency exists. The physicians were not asked about permanent disability and, when asked, they uniformly indicated that a degree of permanent impairment had resulted from the injury. The combination of continuing physical restriction and functional impairment rating, for a worker whose work is primarily in the nature of manual labor, is sufficient to apprise any reasonable person that some degree of permanent industrial disability has occurred.

Claimant was awarded 35% permanent partial disability, but additional compensation is warranted only to the extent that the failure to pay was unreasonable. In this case, it was readily apparent that claimant had sustained an industrial disability of not less than 7 1/2 percent. This entitles claimant to additional benefits based upon 37.5 weeks.

When added together, claimant is entitled to additional compensation for 40.5 weeks.

The employer's original computation of the rate of compensation was not unreasonable and it is that rate which should be used when determining the penalty, even though it was erroneous. The rate which had been paid was $125.79 per week. Fifty percent thereof is $62.89 per week.

The statute does not indicate when additional compensation becomes due and payable. It is determined that it should run from the date of the decision which awards it. Any other treatment would result in a complex formula with pyramiding of interest and penalties which the legislature has not directed. Kline v. Furnas Electric Co., 384 N.W.2d 370 (Iowa 1986).

FINDINGS OF FACT

1. Claimant's appointment with Dr. Gislason that had been scheduled for January 6, 1986 was an appointment made for purposes of treatment under section 85.27 of The Code and was not an appointment for an examination under section 85.39 of The Code.

2. The suspension of benefits for three weeks following when claimant missed that January 6, 1986 appointment constitutes an unreasonable termination of benefits that was made without probable cause or excuse.

3. When asked, all of the physicians who had treated or examined claimant indicated that she had sustained permanent impairment as a result of the injury.

4. When claimant returned to work at the end of her healing period, she returned at a level of restricted activity and never resumed the same level of activity or the same actual job that she had prior to the time of her injury.

5. It was readily apparent that claimant had at least a 7.5 percent permanent partial disability, when the same was evaluated industrially, as a result of her compensable injury of September 16, 1985.

6. The fact that claimant had a substantial degree of permanent partial disability was readily apparent at a date no later than December 4, 1986, the date by which all medical evaluations had been received by the parties and submitted to this agency.

7. The failure to pay compensation for at least a 7.5 percent permanent partial disability was unreasonable and the 37.5 weeks of compensation which the impairment rating provides were unreasonably denied without probable cause or excuse.

8. A penalty of 50% is appropriate.

9. Defendants' original computation of the rate of compensation, although incorrect, was not unreasonable.

CONCLUSIONS OF LAW

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

2. Defendants are responsible for payment of 40.5 weeks of additional compensation for the unreasonable termination and denial of compensation.

3. Where an erroneous, but reasonable, computation of a lower rate of compensation has been made, the additional benefits awarded should be based upon that rate of compensation.

4. The amount of additional compensation to be awarded should be 50% of the amount that was unreasonably unpaid.

5. Additional compensation awarded as a penalty pursuant to the fourth unnumbered paragraph of Code section 86.13 becomes payable on the date of the decision which awards it and there is no liability for payment of interest prior to the date of the award.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant forty point five (40.5) weeks of additional compensation under the provisions of the fourth unnumbered paragraph of section 86.13 of The Code of Iowa at the rate of sixty-two and 89/100 dollars ($62.89) per week payable in a lump sum on the date of this decision.

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against defendants pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 27th day of February, 1988.

MICHAEL G. TRIER
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GENE BELVEL,

Claimant,

vs.

FRENCH & HECHT,

Employer,
Self-Insured,
Defendant.

File Nos. 675717
825131

R E V I E W -
R E O P E N I N G
A N D
A R B I T R A T I O N
D E C I S I O N

INTRODUCTION

This is a consolidated proceeding filed by Gene Belvel, claimant, against French & Hecht, a self-insured employer, for the recovery of further benefits as a result of an injury occurring April 20, 1981, and for benefits as a result of an alleged injury of a continuing nature which became disabling in January 1985. This matter was heard before the undersigned at the Bicentennial Building in Davenport, Iowa, on December 23, 1986. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of Gene Belvel, and claimant's exhibits 1 through 18.

STIPULATIONS AND ISSUES

Pursuant to the prehearing report and order approving the same, the parties stipulated that there was an employer-employee relationship between the claimant and the defendant at the time of the alleged injuries. It was stipulated that claimant received an injury arising out of and in the course of his employment on April 20, 1981. It was stipulated that the injury of April 20, 1981 resulted in temporary disability for the period from May 28, 1981 to July 9, 1981, and again from March 11, 1982 to April 4, 1982. It was stipulated that claimant's rate of compensation for an injury of 1981 is $255.83, and that if an injury is found in 1985 the rate of compensation is $267.78. It was stipulated that there is no dispute regarding medical benefits or defendant's entitlement to credit under section 85.38(2). It was stipulated that claimant received 9 4/7 weeks of healing period benefits.

The issues to be resolved at this proceeding are whether

claimant received an injury arising out of and in the course of his employment in 1985, whether the injury of April 20, 1981 or the alleged injury of 1985 was the cause of any permanent disability.

EVIDENCE PRESENTED

Claimant testified he began working for the defendant in 1971. He said he ceased his employment there in February 1985 and presently works as a bridge tender at the Rock Island Arsenal.

Claimant advised that he suffered no problems with his hands until 1981 when his job at defendant changed from that of a janitor to putting rims on combine wheels. Claimant said the rims weighed between 80 and 100 pounds and he had to use his hands to turn them. After several months on this job he began to experience numbness in his hands. He said he also began to lose strength in his hands and they would be swollen and painful at night. As a result of this condition, claimant consulted the company doctor.

Claimant said the company doctor operated on his wrist for carpal tunnel syndrome at Mercy Hospital in Davenport. He said this operation improved his condition quite a bit but he continued to experience numbness with increased activities. Claimant returned to work as a janitor and pallet repairman. Claimant said his hands continued to feel weak and he felt numbness in his fingers. Claimant advised he was able to do his job until December 1984 when because of a work force reduction, he was returned to the rim line.

Claimant said that after December 1984 he worked mostly on line two which ran rims of 45 to 65 pounds. He said he would pick up and carry rims most of the day. After working on this job for a period of time, claimant again began to experience problems with his hands and the pain returned at night. He said he reported this problem to the company nurse who refused to send him to the doctor. Claimant said that upon her refusal, he went on his own to the doctor. Subsequently, the doctor placed him on a 15 pound weight lifting restriction. This was apparently in 1985. He said that although he was placed on the light duty rim line, the foreman put him back on the same job where he was required to lift in excess of 15 pounds. Claimant consulted the union representative concerning this matter. He said that his hands continued to grow worse with more swelling and pain and he experienced a loss of range of motion in his wrists as well as weakness in the hands and increased numbness. Claimant reported that at approximately the same time there was an additional plant reduction in the work force and that he quit working because his pay was reduced to $6.00 per hour, and the employer would not respect the limitations imposed upon him as a result

of his wrist condition.

After leaving the employment with defendant claimant worked as a carpenter where his hands continued to cause him trouble. He was then unemployed for a period of about eight months. He said he presently works as a bridge tender at the Rock Island Arsenal which does require him to do some heavy lifting. He said he continues to experience numbness in his hands and that his right hand has gotten worse over the past two weeks. Claimant demonstrated the limited motion in his right hand. He also indicated that his left hand was deteriorating.

Claimant said that one of his physicians advised him that cigarettes may be a cause of his problem and he has accordingly reduced his cigarette habit. He reported, however, that he continues to suffer from the condition and has noted no improvement.

On cross-examination, claimant said that he worked about two months between the time the problem first arose and his carpal tunnel surgery. He said after the 1981 surgeries, he had pretty good grip strength. Claimant reported that the problems which arose in 1985 took some time to develop. Claimant reported that after he quit work in February 1985, there was some improvement in his condition.

Claimant advised that his wife is employed by one of the physicians who had assigned an impairment rating to him.

Claimant reported that on occasion his hands appeared discolored, particularly when it gets cold. Claimant reported that his hands were in pretty good condition until about two or three weeks prior to the hearing when he was required to do heavy work with his job at the arsenal.

Claimant's exhibit 1 is copies of medical records concerning claimant from East Kimberly Urgent Care Center. According to those records, claimant presented on January 15, 1985 with complaints that his hands would go numb and ache. According to the January 15 records, claimant suffered from possible recurrent carpal tunnel syndrome. Claimant was released to return to limited duty work with a 15 pound lifting restriction. Nerve conduction studies were scheduled to take place at Mercy Hospital. The results of those studies are included in the exhibit which indicate that claimant had carpal tunnel syndrome, but as compared to the May 1981 examination there had been a mild to moderate improvement on the right and the left was essentially unchanged. This report by Stephen C. Rasmus, M.D., also indicates that there was a mild slowing of the right ulnar nerve conduction at the wrist, indicating possible compression at Guyon's canal. A January 18, 1985 work status form indicates that claimant's 15 pound lifting restriction was to continue. Also included in the

exhibit is a January 29, 1985 report from Dennis Miller, M.D. Dr. Miller reviewed claimant's history including the prior problems with claimant's hands. He notes that the electrodiagnostic tests done on January 17, 1985 do not indicate a worsening of claimant's condition from his 1981 status. The doctor clearly recommends a change in claimant's work activities and indicates that with a change of activity, he would not anticipate permanent impairment. Claimant's exhibit 2 is a letter from John F. Collins, M.D., to claimant's attorney suggesting that Dr. Paul Beckman, who treated claimant in 1981, would be the appropriate person to obtain a permanent impairment rating. Included with the exhibit is a January 11, 1985 office note from Dr. Collins indicating that he believed claimant's heavy lifting at work was a cause of the exacerbation of his symptoms. Claimant's exhibit 3 is a duplication of the report from Dr. Miller which was discussed as part of claimant's exhibit 1.

Claimant's exhibit 4 is a letter from Paul H. Beckman, M.D., to claimant's attorney dated September 20, 1985. According to that letter, Dr. Beckman believed, based upon claimant's description of his job duties, that the job could certainly aggravate if not cause a recurrence of carpal tunnel syndrome.

Claimant's exhibit 5 is a letter from John F. Collins, M.D., to claimant's attorney indicating that claimant had a 30 percent impairment of the upper extremity on the right and 25 percent on the left as a result of his carpal tunnel problem which equated to a 34 percent body as a whole impairment. Claimant's exhibit 6 is copies of Mercy Hospital records from 1981 indicating that claimant at that time suffered from bilateral carpal tunnel syndrome for which he was surgically treated on May 28, 1981. That particular surgery was to release the carpal tunnel on both the left and right wrists. Claimant's exhibit 7 is a certificate to return to work executed by Dr. Beckman on July 2, 1981 indicating that he could return to work on July 6, 1981. Claimant's exhibit 8 is a physician's report to defendant by Dr. Beckman following the 1981 surgery indicating that claimant's employment was the cause of the condition. Claimant's exhibit 9 is additional copies of releases to return to work. Claimant's exhibit 10 is a copy of a physician's report dated August 9, 1982 which indicates claimant suffered a strain of the left forearm and imposing a 10 pound lifting limit for ten days. Claimant's exhibit 11 is a copy of a return to work slip concerning the same event. Claimant's exhibit 12 is a release from work for the period from March 11, 1982 to April 5, 1982 executed by Dr. Beckman. Claimant's exhibit 13 is a surgeon's report from a doctor whose name is not disclosed on the report concerning myositis of the right shoulder in November 1981. Claimant's exhibit 14 is the return to work slips executed by Dr. Beckman in connection with that problem. Exhibit 15 is a note and accompanying work slips from Dr. Beckman indicating claimant was to be off work for two weeks as a result of numbness in his

right hand for the period from July 8 and 9, 1981. Claimant's exhibit 16 is a release from work concerning claimant dated January 11, 1985 indicating that he could not return to work because of pain in his hands. Claimant's exhibit 17 is a note from Dr. Collins indicating that claimant should avoid lifting anything over 15 to 20 pounds as a result of an aggravation of his previous condition. This note is dated January 11, 1985.

Claimant's exhibit 18 is a letter dated October 23, 1986 from Dennis L. Miller, M.D., to the defendant concerning claimant's carpal tunnel condition. Dr. Miller indicates that he saw claimant on January 29, 1985 concerning claimant's complaints. The doctor notes that the January 1985 electrodiagnostic tests did not disclose a worsening of claimant's condition. The doctor explains in detail his examination of claimant and concludes that at the most claimant suffers a five percent impairment of the right and left extremities based on the degree of sensory loss he had at the time of that examination. The doctor notes that he reviewed the evaluation of Dr. Collins dated February 6, 1986 in which Dr. Collins assigned a 34 percent whole body impairment to claimant as a result of his carpal tunnel condition. According to Dr. Miller, Dr. Collins' assessment of claimant's impairment is totally inappropriate and do not reflect at all the findings in this case. The doctor also suggested that a possible cause of the numbness and tingling in claimant's wrists might be related to his heavy smoking.

APPLICABLE LAW AND ANALYSIS

Claimant alleges disability arising from one or both injuries. In file number 675717 (injury date August 20, 1981) it is his burden to prove by a preponderance of the evidence that the disability upon which he bases this claim is causally related to that injury. Bodish v. Fischer v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). This question 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 must meet the same burden concerning his alleged injury of January 1985. In addition, however, claimant has the

burden of proving by a preponderance of the evidence that he received an injury on April 20, 1981 which arose out of and in the course of employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman, 261 Iowa 352, 154 N.W.2d 128.

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.

Both the injury of April 1981 and alleged injury of January 1985 fall within the concept of cumulative trauma as discussed in McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (1985). McKeever determined that liability attaches in a cumulative injury case when because of pain or "physical inability" the employee is no longer able to continue working.

As applied to the facts of this case, it is clear that claimant has in fact suffered two injuries. The first in 1981 arising from repeated trauma while working on the rim line. The

second was a recurrence of the same condition which arose in 1985, again following work on the rim line. Claimant apparently had minimal problems between 1981 and 1985 when he worked as a janitor, although he was not for any extended period totally without symptoms.

There seems little doubt among the experts that claimant's employment was a substantial cause of his condition, though there is a suggestion that heavy smoking may have been a contributing factor.

There is considerable disagreement between the experts, particularly Doctors Collins and Miller, as the extent, if any, of permanent impairment suffered by claimant. Dr. Collins asserts claimant suffers a 34 percent body as a whole impairment based on the combined values of a 30 percent right and 25 percent left upper extremity impairments. Dr. Miller, however, suggests claimant may have no impairment if he changed his activities and would, at the most, have a 5 percent impairment of each extremity. Based upon the experts' reports, together with claimant's testimony as to his present problems, it must be concluded that claimant does suffer permanent impairment to the upper extremities.

The source of claimant's permanent impairment seems clearly to be his 1981 injury. Although a reaggravation occurred in 1985, all diagnostic tests actually showed claimant's condition improved on the right and grew no worse on the left. In addition, claimant did not suffer lost time from his 1985 injury. Claimant did cease his employment in 1985, but his reasons for doing so appear to have been motivated in large part by a reduction in his wages. No doubt his carpal tunnel problem was a factor in this decision, but it has not been shown to what degree and there is no medical basis to conclude he could not work, even though he was under limitations. Thus, although defendant is liable for medical treatment necessitated by the 1985 recurrence of carpal tunnel syndrome, claimant has not shown an entitlement to weekly compensation.

The extent of claimant's permanent impairment will be determined on the basis of the October 23, 1986 report of Dr. Miller. Neither Dr. Miller nor Dr. Collins were claimant's treating physician for the 1981 injury; both have been involved in claimant's treatment for the 1985 injury. Dr. Miller's report is adopted, however, because of his greater expertise as an orthopedic surgeon and because his opinion is supported by objective findings and detailed analyses. Thus, his opinion that claimant has a 5 percent impairment of each upper extremity is controlling. Since this is a bilateral carpal tunnel syndrome diagnosis, section 85.34(2)(s) is the controlling section for assessment of permanent disability. Lynch v. Armstrong Rubber Co., No. 718211 (Appeal Decision, March 1987.) The combined value

chart of the AMA Guides assigns a 6 percent body as a whole impairment.

Code section 85.34(2) is controlling as to the commencement date for payment of permanent disability which, in this case, establishes the date of July 10, 1981. McKeever is controlling as to the rate of compensation which is found to be $255.83.

There was some indication of a possible statute of limitations defense, however, the same was not affirmatively pled and not designated as an issue at the prehearing conference or by the prehearing report.

FINDINGS OF FACT

WHEREFORE, the following facts are found:

1. On April 20, 1981, claimant suffered an injury arising out of and in the course of his employment.

2. The nature of claimant's injury was bilateral carpal tunnel syndrome.

3. Claimant was off work from May 28, 1981 through July 9, 1981.

4. Claimant returned to work on July 10, 1981.

5. Claimant's rate of compensation is $255.83.

6. Claimant was off work in March and April 1982 for an unrelated condition.

7. Claimant suffered permanent impairment as a result of his April 1981 injury equal to 5 percent of each upper extremity.

8. Claimant suffered a recurrence of his carpal tunnel syndrome in January 1985.

9. As a result of the recurrence, claimant incurred medical expenses but lost no time from work nor permanent disability.

10. Claimant has been paid all healing period benefits to which he is entitled.

CONCLUSIONS OF LAW

IT IS THEREFORE CONCLUDED:

Claimant has proven by a preponderance of the evidence that there is a causal relationship between his injury of April 1981 and the disability upon which this claim is based.

Claimant has proven by a preponderance of the evidence that in January 1985 he suffered an injury arising out of and in the course of his employment.

Claimant has failed to prove by a preponderance of the evidence that he suffered disability as a result of his January 1985 injury.

Claimant has proven by a preponderance of the evidence that as a result of his injury of April 1981, he suffered permanent partial disability pursuant to section 85.34(2)(s) equal to six percent (6%) of the body as a whole.

ORDER

IT IS THEREFOR ORDERED in file number 675717 that defendant pay unto claimant Thirty (30) weeks of permanent partial disability commencing July 10, 1981 at the stipulated rate of two hundred fifty-five and 83/100 dollars ($255.83). All accrued benefits shall be paid in a lump sum together with interest.

IT IS FURTHER ORDERED in file number 825131 that claimant take nothing from these proceedings.

Costs are taxed to defendant.

Defendant shall file a claim activity report in thirty (30) days.

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

Steven E. Ort

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRENT E. BOELMAN, Claimant, vs. IOWA MOLD TOOLING, INC., Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 794825 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 Brent E. Boelman, claimant, against Iowa Mold Tooling, Inc., employer, and Travelers Insurance Company, insurance carrier, for benefits as a result of an alleged injury on January 9, 1985. A hearing was held at Mason City, Iowa on September 4, 1986 and the case was fully submitted at the close of the hearing. The record consists of the testimony of Brent E. Boelman (claimant); Annette Boelman (claimant's wife); and Dave C. Quinn (night supervisor); claimant's exhibits 1 through 19; and defendants' exhibits A and B.

STIPULATIONS

At the time of the hearing 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 weekly rate of compensation in the event of an award is $177.00 per week.

That in the event of an award the defendants are entitled to credits under Iowa Code section 85.38(2) for $1,040.00 of disability income and $674.88 of medical benefits previously paid under employee non-occupational group health plans.

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 or about January 9, 1985 which arose out of and in the course of his employment with his 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 as a result of the alleged injury.

Whether the claimant is entitled to medical benefits for the alleged injury under Iowa Code section 85.27.

The issue of whether the claimant is entitled to any penalty benefits under Iowa Code section 86.13 has been bifurcated.

SUMMARY OF THE EVIDENCE

Claimant is 28 years old, married and has two dependent children. He moved to Iowa from Missouri in 1979. He graduated from high school in 1976 and has taken some vocational rehabilitation classes in the evening since his injury. Past employments include several jobs as a farm laborer, production work at Winnebago Industries, general labor work at a Missouri co-op and five and one-half years of experience cutting, bending and forming steel in what is called shear and brake work for Kiefer Built Homes of Kanawha. Claimant started to work for the employer on August 9, 1984 operating shears, brakes and punch presses at approximately $7.00 per hour. Claimant described this work as medium heavy work. He generally lifted from 10 pounds to 50 pounds several times a day. Two men would handle 100 pounds.

Claimant's regular physician from 1979 to 1985 was W. W. Weisbrod, D.C., a chiropractor, at Belmond, Iowa. Dr. Weisbrod's testimony and his office notes show that he treated the claimant for numerous ailments including cervical, thoracic and lumbar back pain over these years. Claimant lost no time from work and was not hospitalized for any of these back complaints. Claimant testified that he had eight or nine adjustments for his low back over the period from 1979 to January 1985. His last adjustment for low back pain prior to January, 1985, was on October 5, 1983. Claimant testified that prior to 1985 he did not have any radicular pain into his buttocks or legs. Dr. Weisbrod's testimony corroborated claimant's testimony on these points.

In the fall of 1984, claimant began doing heavier work on larger pieces of steel for the employer. In January of 1985, he began to encounter periodic backaches with pain that radiated

down into his legs. He went to see Dr. Weisbrod twice for these complaints in January of 1985. Dr. Weisbrod's notes (Claimant's Exhibit 1) and Dr. Weisbrod's deposition testimony (Defendants' Ex. B, pages 23 & 24) confirmed that he treated the claimant for low back pain on January 11, 1985 and again on January 19, 1985. Neither the notes of Dr. Weisbrod nor his testimony relate the pain to any specific event or to anything which took place at work. In fact on January 19, 1985, claimant said he noticed the pain last night in bed (Cl. Ex. 1, Def. Ex. B, p. 24). This is the last time that he saw Dr. Weisbrod. Dr. Weisbrod testified that in January of 1985, the claimant did not describe any particular incident or event that caused his back to hurt (Def. Ex. B, p. 24). Dr. Weisbrod stated that claimant never did mention radicular pain to him (Def. Ex. B, p. 47). Dr. Weisbrod made no determination of permanent impairment (Def. Ex. B, pp. 49 & 55).

Claimant next went to see Michael J. Whitters, D.O., in Clarion on January 23, 1985 with pain in his low lumbar area and radiation down both legs. Dr. Whitters saw claimant only once; he suspected a bulging lumbar vertebra; ordered a CT scan; and referred claimant to Robert E. McCoy, M.D., an orthopedic surgeon in Mason City. Dr. Whitters told claimant's counsel that claimant was doing a lot of heavy lifting at work and obviously aggravated a low back problem (Cl. Ex. 2). Claimant testified that Dr. Whitters took him off work on January 23, 1985 until further notice. Dr. Whitters' office note on January 28, 1985 states that claimant is to "stay off work." Dr. Whitters made no determination as to whether the claimant was permanently impaired or not (Cl. Ex. 2 & 3).

Claimant testified he told his supervisor, Dave Quinn, that Dr. Whitters wanted a CT scan and that Quinn told him to see the company doctor, Lyle R. Fuller, M.D., in Garner. Dr. Fuller states he saw claimant on January 24, 1985. Dr. Fuller adds that claimant denied any previous back problems at the time of his preemployment physical examination in August of 1984 and that claimant failed to report any new back problem to the employer in January of 1985. Therefore, Dr. Fuller did not evaluate his back problem (Cl. Ex. 4).

The CT scan ordered by Dr. Whitters was taken on January 25, 1985 at St. Joseph's Mercy Hospital in Mason City. It ruled out a herniated disc and revealed some congenital problems in the claimant's back.

Impression:
1) Bilateral spondylolysis defects at the L 5 level with grade I anterolisthesis of L 5 relative to S 1.
2) Mild changes of congenital central stenosis at the L 3 and L 4 vertebral levels.
3) No herniated nucleus pulposus.

(Cl. Ex. 6)

Claimant first saw Dr. McCoy on February 12, 1985. Dr. McCoy reviewed claimant's history of low back pain for several years and described the heavy nature of his work. He commented that claimant had been off work since January 22, 1985. Dr. McCoy's clinical tests in his office were essentially negative but x-rays showed a mild bilateral spondylolisthesis at L-5, S-1 with a mild forward slip. There was no evidence of a herniated intervertebral disc. Dr. McCoy commented that claimant was five foot eleven inches tall and weighed 266 pounds. He recommended that claimant get his weight down to 200 pounds, do partial sit-ups, and walk one mile five times a day. While walking, claimant fell on the ice, which caused additional pain in his low back and legs. Dr. McCoy returned claimant to work on April 22, 1985 with a 20 pound weight restriction, but the employer did not have any work to meet that weight restriction (Cl. Ex. 5 & 7). Dr. McCoy again returned claimant to work on May 28, 1985 with a 30 pound weight restriction, but again employer did not have work within the restriction. Dr. McCoy commented on February 18, 1985, that he doubted that claimant would be able to continue his present heavy job for the rest of his life without anticipating further significant difficulty (Cl. Ex. 8). On August 27, 1985, Dr. McCoy discharged claimant, still with a 30 pound weight restriction, and summarized his situation as follows:

> Mr. Boelman has spondylolisthesis for which he went to a chiropractor once or twice a month somewhat irregularly prior to his exacerbation of his problem from his work activities. I would estimate his Permanent Partial Impairment of Function from his work exposure at 10% of the whole man. I think he may be dismissed from my care. I would be glad to see him again on a prn basis.
> (Cl. Ex. 5)

The best overview of Dr. McCoy's visualization of claimant's situation, including causal connection, may be contained in his letter dated May 29, 1985:

> As you are aware, I first saw Brent Boelman on 2/12/85. At that time he had been off work since the 22nd of January and said that about 6 weeks prior to his office visit with me, which would be about the first of the year, he began having pain in his low back radiating down both legs which was further aggravated over the next couple of weeks by driving a forklift.
>
> Mr. Boelman is very heavy and has spondylolisthesis of L5-S1 with a mild forward slip on L5-S1. This

is the underlying situation on which his work activities where [sic] superimposed. I believe that the work activities did precipitate the discomfort that he describes in his low back, however, I think there was an underlying predisposition in the status of his low back that caused him to be susceptible to heavy lifting. I think it is advisable for him not to return to the same type of heavy lifting in the future. It is my understanding that he has been in contact with more than one vocational rehabilitation agency and is anxious to proceed with retraining for some sort of light work if indeed he is not able to find light work with his present employer of [sic] some other employer. (Cl. Ex. 8)

Dr. McCoy commented one more time on October 28, 1985 by saying: "Mr. Boelman has a chronic problem which was aggravated at work and is made more troublesome by his extreme overweight situation." (Cl. Ex. 10).

Claimant saw John R. Walker, M.D., of Waterloo on January 27, 1986. Dr. Walker gave this opinion:

OPINION: This man has had a pre-existing [sic] problem consisting of a spondylysis [sic] of the L-5 vertebral body, namely the pars interarticularis areas. This, of course is a congenital anomaly and it should be noted that he was having some small amount of difficulty prior to his repeated injuries at the Iowa Mold & Tool Company. To this, he has certainly added a superimposed sprain of the lumbosacral joint, superimposed on the spondylolisthesis and secondly of course he has developed some sciatic pain, possibly due to disc disruption at L-5.

In-as-much as this man has really not had traction and the usual therapy and perhaps a back exercise program, I believe that he should be subjected to this. I would put him in the hospital for two weeks of intensive care and therapy. I certainly do not for a minute disagree with his plan to be evaluated for vocational rehabilitation. Probably in the sense of the word this man is never going to be able to return to heavy work. I believe that he had a 10% partial impairment prior to his injuries at Iowa Mold and I believe that to this he has added another 10% permanent, partial impairment. (Cl. Ex. 12)

Claimant testified that he drew unemployment compensation

from May 8, 1985 to February 27, 1986, except when he worked for a farmer for about six weeks in October, November and December of 1985, at which time he earned $1,723.51 (Cl. Ex. 17 & 18). He worked for the same farmer again in 1986 off and on preparing the fields and hauling grain and has earned approximately $1,500.00 in 1986. Claimant testified that he has been able to perform all of the farm labor required of him, but he has only violated his 30 pound weight restriction on one occasion when he slid some bags of grain across the floor.

Claimant testified that he took approximately two or three weeks of vocational rehabilitation training under the Job Training Partnership Act. They taught him how to look and act in order to get a job. They suggested college but claimant did not feel financially or academically equipped for it. Claimant stated he received very poor grades in high school. Furthermore, this program does not pay any money while you attend college.

Claimant said that he currently suffers with aching lower back pain that goes down both legs, mostly on the left, to the knees and sometimes to his toe on the left. Since January, 1985, the difference in his condition is that he has continuous aching in his back and the pain goes down both legs.

Claimant conceded that he did not reveal his prior back problems at the time of his preemployment physical examination with Dr. Fuller because he did not think these back problems were serious. He also admitted that his January, 1985, problem was not the result of a specific incident or event. He states he did not report it to the employer until January 23, 1985.

Dave Quinn, night supervisor, testified claimant called in on January 23, 1985 and said he would be missing work due to back problems. Quinn asked if it were work related. Quinn testified that claimant told him that it was not work related; rather it was from a childhood injury. Quinn said that he reminded the claimant that if it was work related, then claimant would have to see the company doctor, Dr. Fuller, in Garner. Quinn testified that claimant showed no physical signs of injury that he could detect at work and that the claimant made no complaints of injury at work. If claimant was sick or injured, Quinn said he is the person that claimant was supposed to notify.

Claimant denied that he told Dr. McCoy that he was virtually symptom free just before he fell on the ice by walking on or about February 17, 1985. Claimant admitted that he had not had any treatment for his back for over a year since he saw Dr. McCoy last in August of 1985 and he testified that he has not seen a doctor for his back since he saw Dr. Walker in January of 1986.

Claimant's exhibit 19 is an application for employee group

disability benefits signed by claimant on February 9, 1985. Question 10 asks whether the patient's ailment is due to illness or injury arising out of and in the course of his employment. There is no entry in either the yes or no blank spaces. Defendants' exhibit A is the same form signed by the claimant on February 12, 1985. On this exhibit question 10 has an x behind the no answer. Claimant testified that someone else must have put the x in the no answer. He does not remember doing it and he does not remember signing the form on two different occasions.

Claimant's wife Annette testified even though claimant had a stiff neck and a sore back before January of 1985, he did not have any leg pains and he did not miss any work on account of them. In January of 1985, he began to complain of the weight when he would carry their child and he said his lower back was stiff from working. She noticed that he was slow in getting up from sitting and that he walked very carefully. Since January of 1985, he has avoided carrying their child and carrying groceries and other lifting obligations. She mows the yard and does the gardening.

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 January 9, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The 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.

Although many injuries have a traumatic onset, no accident is required. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1116, 125 N.W.2d 251, 254 (1963).

Nor does there have to be a special incident or usual occurrence. Ford v. Goode, 240 Iowa 1219, 1222, 38 N.W.2d 158, 159 (1949). A personal injury may develop gradually over an extended period of time. Black v. Creston Auto Co., 225 Iowa 671, 281 N.W. 189 (1938); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

An employer is liable for all consequences which naturally

and proximately flow from an injury. Oldham v. Scofield & Welch, 222 Iowa 764, 767, 768, 266 N.W. 480, 482, 269 N.W. 925 (1936). This applies to the situation where treatment aggravates or increases disability and the worker is not negligent in selecting the person who administers the treatment. Lindeken v. Lowden, 229 Iowa 645, 295 N.W. 112 (1940).

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 9, 1985 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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).

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 v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

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

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 did establish by a preponderance of the evidence that he sustained an injury that arose out of and in the course of his employment with his employer. It is true that the claimant has had a preexisting back condition since at least 1977. He received periodic chiropractic adjustments since 1979 for low back pain from Dr. Weisbrod through October 5, 1983. It was determined by the CT scan, that Dr. Whitters ordered, that claimant did not have a herniated intervertebral disc, but rather suffered from a congenital bilateral spondylolisthesis at L-5, S-1. Superimposed on this congenital condition is a man who is five foot eleven inches tall and weighs as much as 272 pounds in some reports, which is approximately 100 pounds more than he should weigh for his height. Also, he failed to tell Dr. Fuller at the time of his preemployment physical examination that he had suffered from previous back problems. Also, when he

reported his back pain to Quinn on January 23, 1985, there was a conflict between Quinn's testimony and the claimant's testimony as to whether the pain was related to his job or something that he had since childhood, like a congenital spondylolisthesis at L-5, S-1. It would appear that the employer may have been led to believe that this was not work related due to the claimant's statements made at the time of the preemployment physical examination and the claimant's statements to Quinn that his back pain was not work related and, therefore, the employer did not try to control the medical services. Rather, Dr. Fuller told claimant to go ahead and see his family physician. It is also true that there is no specific accident, incident or event that occurred when claimant began to have trouble. It is also true that after treatment began claimant fell on the ice while walking on or about February 17, 1985 and reinjured his healing back. However, he was walking or supposed to be walking one mile five times a day pursuant to Dr. McCoy's orders. Also, it is true claimant did not report the injury until January 23, 1985 which was after he had seen Dr. Weisbrod for pains twice on January 11, 1985 and January 19, 1985 and Dr. Whitters once on January 23, 1985. Also, it is noted that the employee only worked for this employer for approximately six months from the time he started to work until he had problems.

Nevertheless, two orthopedic surgeons have reviewed basically this same information and have asserted that the claimant did sustain a work related injury through aggravation of his congenital spondylolisthesis which "is made more troublesome by his extreme overweight condition." It would appear from the evidence that even though the claimant was aware of the fact that he had suffered minor back complaints in the past for which he had taken chiropractic treatments, he did not consider these earlier episodes to be serious in nature. It was not until he had pain down his legs and Dr. Whitters suspected a herniated disc and told him it was related to heavy lifting at work on January 23, 1985, that claimant was first aware of the fact that his back pain was work related. Claimant reported his back pain to Quinn on that same day, January 23, 1985. Quinn told him to see Dr. Fuller if it was work related and claimant did go and see Dr. Fuller on January 24, 1985.

Even though claimant is obviously aware of his weight, there is no evidence that claimant knew that he had a congenital spondylolisthesis at L-5, S-1 until after the CT scan on January 25, 1985. It has been a principle of workers' compensation law for a long time that an injury does not require an accident or specific occurrence or event. Furthermore, the doctrine of cumulative injury has been confirmed by the Supreme Court of Iowa in the McKeever case cited above. If claimant fell while walking and suffered a set back on his healing, it would be considered sequelae of the same injury in that he was walking pursuant to Dr. McCoy's orders. There is no medical opinion by

any opposing medical examiner or evaluator to refute, rebut, controvert or contradict the opinions of Dr. McCoy and Dr. Walker to the effect that the claimant suffered a work related aggravation of a preexisting condition. Consequently, claimant has proven by a preponderance of the evidence that he did sustain an injury on January 9, 1985 which arose out of and in the course of his employment with the employer.

Claimant testified that Dr. Whitters told him on January 23, 1985 not to work until further notice. Dr. Whitters' office note on January 28, 1985 reflects, "stay off work" (Cl. Ex. 2). Claimant never returned to work and was never found medically capable of returning to the same or substantially similar employment. Dr. McCoy discharged claimant and gave him a permanent impairment rating on August 27, 1985 (Cl. Ex. 5, p. 4). If Dr. McCoy discharged claimant on August 27, 1985, that certainly strongly implies that claimant had reached the point in Dr. McCoy's eyes that it was medically indicated that significant improvement from the injury was no longer anticipated. Iowa Code section 85.34(1). Also, the point at which disability can be determined by the assessment of an impairment rating has been determined as a point at which healing period can be ended. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124 (Iowa App. 1984). The fact that claimant fell and reinjured his back can be considered sequelae of the original injury. In addition, it seems to be immaterial because when Dr. McCoy tried to return claimant to work with a 20 pound weight restriction in April of 1985, and again with a 30 pound weight restriction in May of 1985, the employer did not have any work for him within these restrictions (Cl. Ex. 5). Thus, even if he had not fallen it appears that he would not have been able to return to work on account of the weight restrictions which appear to be due to his overall condition rather than the fall on February 17, 1985. The receipt of unemployment compensation benefits will not preclude an award of healing period benefits when hindsight makes it clear that the employee was not able to return to his old job due to the weight restrictions. Schotanus v. Command Hydraulics, Inc., I Industrial Commissioner Report 294 (1981). Consequently, it is determined that claimant's injury caused him to be temporarily disabled for a period of healing from January 23, 1985 to August 27, 1985 and that he is entitled to healing period benefits for this period of time.

Both Dr. McCoy and Dr. Walker assessed that claimant had sustained a 10 percent impairment of function of the body as a whole due to the work related aggravation of his preexisting bilateral spondylolisthesis. Dr. Walker also said that claimant had a 10 percent partial impairment prior to this injury due to the preexisting condition.

Claimant is 28 years old and is young enough to be trained in a number of other job opportunities. He has the advantage of

a high school education. His past experience is somewhat limited to general labor work and the farm work in particular seems to be limited to irregular periodic employment. The 30 pound weight restriction is still in effect. Claimant testified that he felt that he could safely lift 40 pounds in his own personal opinion. Nevertheless, claimant is limited because of the injury to engage in the work for which he is best suited, i.e. manual labor and medium heavy labor work. This back injury, plus his continued extreme overweight condition, and the 30 pound weight restriction will definitely restrict claimant's ability to locate employment in a market where employers have the ability to pick only the cream of the crop. However, claimant has been able to perform as a general farm laborer both in the fall of 1985 and again in the spring and summer of 1986. Based on the foregoing factors, claimant is determined to have sustained a 25 percent industrial disability to the body as a whole.

Whether the employer and insurance carrier failed to control the medical services due to being misled as to whether there was or was not a work related injury is not entirely clear from the evidence presented. They could have been misled or they may have not been misled. In either event, Dr. McCoy's treatment seems to be more than reasonable and conservative when compared with the numerous procedures that Dr. Walker states were possible and that he is still willing to do, including multiple surgeries (Cl. Ex. 12).

It is questionable whether Dr. Walker's examination on January 27, 1986 was necessary medical treatment after claimant's own chosen physician had discharged him on August 27, 1985. However, since Iowa Code section 85.27 provides for reasonable medical services, rather than reasonable and necessary medical services, and since the claimant still had some rather serious subjective complaints of (1) throbbing pain in the low back; (2) bilateral leg pains into the toe; (3) bending pain; and (4) that he could not sleep on his stomach, a consulting opinion five months later can be justified. Consequently, the following medical expenses are allowed under Iowa Code section 85.27.

Radiologists of Mason City	1-25-85	$ 159.00
	2-26-85	21.00
Surgical Associates	2-12-85	35.00
	2-26-85	22.00
	3-15-85	22.00
	4-05-85	17.00
	4-19-85	22.00
	5-24-85	22.00
St. Joseph's Mercy Hospital	1-25-85	439.00
Bloemke Pharmacy	2-13-85	4.85
	3-15-85	11.75

	4-03-85	11.75
John R. Walker, M.D.	1-27-86	241.00
North Iowa Medical Center	2-26-85	71.00
Michael L. Whitters, D.O.	1-23-85	17.00
TOTAL		$1,116.35

Claimant's list of mileage expenses for 540 miles is not controverted by defendants and appears to be correct for the most part. The only discrepancy is a trip to Dr. McCoy on April 16, 1985. Dr. McCoy's office notes do not record a trip or visit to him on that date. Therefore, from the total of 540 miles shown on claimant's exhibit 16, 35 miles have been deducted and the claimant is allowed the remaining 505 miles at the rate of $.24 per mile for a total allowance of $121.20 as reasonable necessary mileage expense. In addition, claimant is allowed costs of $85.00 for a report from Dr. Walker and $25.00 for the cost of the medical report from Dr. McCoy (Cl. Ex. 14). Division of Industrial Services Rule 343-4.33(6), formerly Iowa Industrial Commissioner Rule 500-4.33(6).

FINDINGS OF FACT

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

That claimant was employed by defendant employer from August 9, 1984 to January 23, 1985.

That claimant began doing heavier work in the fall of 1984 handling 10 pounds to 50 pounds of sheet metal several times a day.

That in January of 1985, claimant suffered pain in his low back and saw his family physician on January 11, 1985 and again on January 19, 1985. Then on January 23, 1985, claimant saw Dr. Whitters for his low back complaints but added that the pain ran down his legs.

That Dr. Whitters took the claimant off work on January 23, 1985, for a work aggravated injury caused by heavy lifting at work.

That a CT scan ordered by Dr. Whitters taken on January 25, 1985, showed no herniated intervertebral disc as Dr. Whitters suspected, but did reveal congenital central stenosis and congenital bilateral spondylolisthesis.

That claimant was referred to and did see Dr. McCoy, an orthopedic surgeon, on February 12, 1985 and was treated by him until August 27, 1985 at which time claimant was discharged as having attained maximum medical improvement.

That claimant continued to have generally the same low back pains and pain down the leg complaints after August 27, 1985 and saw Dr. Walker on January 17, 1986.

That Dr. Whitters, Dr. McCoy and Dr. Walker all found that claimant's condition was aggravated by heavy lifting at work. That Dr. McCoy and Dr. Walker assessed a 10 percent functional impairment rating for the aggravation of the claimant's congenital spondylolisthesis.

That claimant encountered medical expenses as enumerated above in the total amount of $1,116.35 and mileage expenses as set out above in the amount of $121.20.

That claimant incurred costs of $85.00 for a medical report from Dr. Walker and $25.00 for a medical report from Dr. McCoy.

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 sustained an injury on or about January 9, 1985 which arose out of and in the course of his employment with the employer.

That the injury was the cause of both temporary disability and permanent disability.

That the claimant is entitled to healing period benefits from January 23, 1985 to August 27, 1985.

That claimant is entitled to permanent partial disability benefits of 25 percent of the body as a whole as industrial disability commencing on August 28, 1985.

That claimant is entitled to recover medical expenses in the amount of $1,116.35 as enumerated above.

That the defendants are entitled to a credit of $674.88 for medical expenses that they have already paid under the employee non-occupational group health plan as stipulated in the prehearing order.

That claimant is entitled to medical mileage expenses in the amount of $121.20 as enumerated above.

That the claimant is entitled to costs in the amount of $85.00 for a medical report from Dr. Walker and $25.00 for a medical report from Dr. McCoy.

That defendants are entitled to a credit in the amount of $1,040.00 for disability income already paid to the claimant under an employee non-occupational health plan as stipulated in the prehearing report.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to the claimant thirty-one point zero (31.0) weeks of healing period benefits from January 23, 1985 to August 27, 1985 at the rate of one hundred seventy-seven and no/100 dollars ($177.00) per week in the total amount of five thousand four hundred eighty-seven and no/100 dollars ($5,487.00).

That defendants are entitled to a credit in the amount of one thousand forty and no/100 dollars ($1,040.00) for income disability payments previously made as stipulated.

That defendants pay to claimant one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on August 28, 1985 for a twenty-five percent (25%) industrial disability of the body as a whole at the rate of one hundred seventy-seven and no/100 dollars ($177.00) per week in the total amount of twenty-two thousand one hundred twenty-five and no/100 dollars ($22,125.00).

That defendants pay the accrued amounts in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That the defendants pay to claimant or the provider of services the medical expenses enumerated above in the total amount of one thousand one hundred sixteen and 35/100 dollars ($1,116.35) less the credit of six hundred seventy-four and 88/100 dollars ($674.88) as stipulated in the prehearing report.

That the defendants pay to claimant one hundred twenty-one and 20/100 dollars ($121.20) in medical mileage expenses as set out above.

That the defendants pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33, formerly Iowa Industrial Commissioner Rule 500-4.33 and that these costs include the medical report of Dr. Walker in the amount of eighty-five and no/100 dollars ($85.00) and the medical report of Dr. McCoy in the amount of twenty-five and no/100 dollars ($25.00).

That the defendants file claim activity reports as required by Division of Industrial Services Rule 343-3.1, formerly Iowa Industrial Commissioner Rule 500-3.1.

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

Walter R. McManus Jr.

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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001497

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUSSELL W. BOWERS,	:	
	:	
Claimant,	:	
	:	
vs.	:	
	:	FILE NO. 766837
LEHIGH PORTLAND CEMENT CO.,	:	
	:	A R B I T R A T I O N
Employer,	:	
	:	D E C I S I O N
and	:	
	:	
TRAVELERS INSURANCE COMPANY,	:	
	:	
Insurance Carrier, Defendants.	:	

FILED
JAN 29 1987
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Russell W. Bowers, claimant, against Lehigh Portland Cement Company, employer, and Travelers Insurance Company, insurance carrier, for benefits as a result of an injury which occurred on June 9, 1984. A hearing was held at Mason City, Iowa on September 5, 1986 and the case was fully submitted at the close of the hearing. The record consists of the testimony of Russell W. Bowers (claimant), Cindy Baker (a person who lives with claimant), and Lou Fasing (supervisor of safety and training); claimant's exhibits 1 through 23; and defendants' exhibits A through E.

STIPULATIONS

At the time of the hearing the parties stipulated to the following matters:

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

That the claimant sustained an injury on June 9, 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.

That the type of permanent disability, if the injury is found to be a cause of permanent disability, is scheduled member disability to the lower left extremity.

That the commencement date for permanent partial disability, in the event such benefits are awarded, is April 15, 1985.

That the rate of compensation in the event of an award is $269.93.

That all authorized medical benefits have been or will be paid under Iowa Code section 85.27.

That the defendants are entitled to credit for 35 weeks of temporary total disability already paid at the rate of $269.93 per week and temporary partial disability in the amount of $535.24 for the period from January 8, 1985 to January 29, 1985.

ISSUES

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

Whether the injury was the cause of additional temporary disability for which the claimant has not been paid.

Whether the injury was the cause of any permanent partial disability.

Whether the claimant is entitled to additional temporary disability benefits.

Whether the claimant is entitled to permanent partial disability benefits.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 37 years old, divorced, and has lived with Cindy Baker since before this injury. He has two children. He completed high school and two years of college at North Iowa Area Community College. He qualified for the Associate of Arts Degree but did not pay the fee for a certificate and therefore never received it. Before he went to college he worked for his father for five years as an apprentice electrician after high school.

Claimant began working for the employer on March 4, 1976 and has performed various different jobs for them such as yard laborer, shift laborer, miller helper and burner helper. On June 9, 1984, he was injured while trying to unblock the fourth stage of the preheat tower. He opened the "suicide doors" and was poking air rods up in there to free the fourth stage when hot dust hit the floor and flowed like water over the floor. It went over his boot through the stitching and severely burned his left foot. His foot was placed in a five gallon pail of water and he was taken to Mercy Hospital at Mason City for emergency

care where he was treated by A. G. Chanco, M.D., who was on call. Dr. Chanco cleaned, dressed and wrapped the wound. After that claimant was treated by Philip R. Caropreso, M.D., a general surgeon, who treated claimant for deep second and third degree burns of the dorsum of the left foot. According to his office notes, he saw claimant 11 different times from June 11, 1984 through September 6, 1984 (Claimant's Exhibit 1). As early as July 19, 1984, the initial skin healing had occurred, but claimant began to have trouble with ulcerations due to wearing work boots according to Dr. Caropreso.

7/19/84 PC
Burns have epithelized in the dorsum of the left foot. However, in attempting to wear his boots, which is necessary before he returns to work, the patient ulcerated and blistered the burned areas. Advised to continue to wear the cast boot for the next two weeks. Do not attempt to wear boots any more. Return to see me August 7, 1984.
(Cl. Ex. 1, page 5)

On August 7, 1984, claimant continued to have trouble.

8/7/84 PC
The patient's burn wound in the left foot is ulcerated again in its lateral aspect. The patient states that he tried wearing sandals without any socks and the rubbing of the sandals caused the breakdown of the skin. I advised him to go back to the cast shoe. Put nothing over this area that will rub against it. See me again in one week.
(Cl. Ex. 1, p. 5)

Claimant continued to complain of ulcerations and that the wound opened up and Dr. Caropreso then referred claimant to C. Joseph Plank, M.D., a dermatologist. Dr. Plank saw claimant nine times from July 12, 1984 to January 21, 1985 (Cl. Ex. 2). Dr. Plank verified that claimant did demonstrate eczema, raw skin, small ulcers, persistent superficial erosions, irritation, erythema and some bleeding in the burn wound area. The wound area is very sensitive to anything which touches it. Claimant expressed "tremulous" concern about losing his job because he could not wear boots (Cl. Ex. 2, pp. 2 & 3). Dr. Plank recommended and claimant did try working on light duty wearing tennis shoes. On January 10, 1985 and again on January 21, 1985, Dr. Plank said that he had no explanation for the erosions and no treatment for them that worked. He referred claimant to Mayo Clinic and expressed the desire that claimant not return to his office again (Cl. Ex. 2, pp. 4 & 5; Cl. Ex. 5). The following comments fairly summarize Dr. Plank's final position:

Because of the continued complaints of extreme

discomfort and inability to wear any kind of shoes, even though he continued to use the Duoderm gauze pads under the sock and shoe, the patient was told that he would have to be evaluated elsewhere as my expertise had been exhausted. In essence, the skin appeared essentially normal for having sustained a burn. The continued opening and eroding of the skin was unexplainable based upon my medical background and knowledge. To be unable to tolerate even a soft shoe and standing during work is not understandable.
(Cl. Ex. 9)

Dr. Plank did not make a finding of any permanent impairment and accordingly, he did not give a permanent impairment rating. Dr. Plank did comment that a photograph had been taken, but no photograph was introduced into evidence at the hearing.

Claimant was also treated by Jon R. Yankey, M.D., and David A. Ruen, M.D., two family practice physicians, on approximately 22 occasions from November 30, 1984 through February 25, 1985 at the request of the employer (Cl. Ex. 3). Dr. Yankey found several small scattered superficial erosions and surrounding erythema over the lateral dorsum of the left foot; a violaceous discolored area laterally; and the area was objectively sensitive to light touch. Like Dr. Plank, he could not medically explain the worsening of the left foot. He and Dr. Plank concurred with the Mayo Clinic recommendation of continued conservative care of the wound with ointments, creams and duoderm dressings. Claimant expressed opposition to returning to work on January 9, 1985 to do light filing in tennis shoes, but on January 18, 1985 he said the job was not causing him any problem, but the wound was bleeding which was verified by Dr. Yankey. Mr. Lou Fasing, safety training supervisor, was present with the claimant and Dr. Yankey at this examination. It was agreed claimant would continue with conservative medical care and continue to do his light filing job at the plant. Dr. Ruen and Dr. Plank reached the same conclusion on January 25, 1985, that claimant should continue with his light duty work (Cl. Ex. 3, p. 3). On February 4, 1985, Dr. Ruen found claimant's healing slightly better and said that he could work on the following day, February 5, 1985. While under the care of Dr. Yankey and Dr. Ruen from November 30, 1984 to February 25, 1985, claimant continued to have recurrent ulcers or erosions (Cl. Ex. 3).

Dr. Yankey referred claimant to Sigfrid A. Muller, M.D., of the Dermatology Department of the Mayo Clinic by a letter on November 30, 1984 for evaluation and recommendations concerning further care of claimant's left foot. He also requested Dr. Muller's opinion on whether claimant was able to return to work on light duty wearing a soft shoe such as a tennis shoe or jogging shoe and not be required to do any heavy lifting or

straining (Cl. Ex. 6).

Dr. Muller saw claimant on December 5, 1984. His examination revealed an area approximately 4 cm. x 4 1/2 cm. of erythema and scarring with small areas of superficial erosions with considerable tenderness. K. A. Johnson, M.D., of the Mayo Clinic Department of Orthopedics felt the skin was unstable and that claimant might need some sort of composit replacement of the involved deeply scarred skin. Jack Fisher, M.D., of the Mayo Clinic Plastic Surgery Department recommended continued conservative management and then a recheck of the wound on January 4, 1985 to see if the scar continues to be sensitive and easily ulcerated (Cl. Ex. 7).

On January 7, 1985, Dr. Muller wrote that reexamination of the claimant showed considerable healing and less erythema, but that a few erosions remained. The area was very painful. Dr. Fisher, the plastic surgeon, thought the conservative approach was still appropriate; but found it difficult to explain the origin of the pain since there was no crushing injury. If the scar should continue to break down, then incision and grafting might be necessary. Dr. Muller felt that claimant could return to work on a job that did not require much heavy lifting or walking. Dr. Muller took photographs of the lesion of the foot but they were not admitted into evidence (Cl. Ex. 8).

Claimant returned to work at light duty filing and lifting one pound and two pound files occasionally and sitting and cross-referencing written materials wearing a soft shoe on approximately January 7, 1985. Dr. Plank and Dr. Yankey agreed on January 11, 1985, that the duties were not causing or worsening the claimant's foot condition (Cl. Ex. 10).

Apparently, claimant did not work for some reason from approximately January 29, 1985 to February 4, 1985. On February 4, 1985, Dr. Ruen stated that claimant could return to work. Also on February 5, 1985, Dr. Ruen issued a note that said claimant may carry up to 20 to 25 pounds without restrictions and that he may walk 30 to 50 feet every 30 to 45 minutes (Cl. Ex. 12).

Dr. Muller reported that he saw claimant on February 20, 1985 at which time claimant had a 3 x 2 cm. ulceration on the dorsum of the left foot with severe pain at the site. Claimant said he felt working (walking and filing only) worsened his condition. Claimant was then referred to G. B. Irons, M.D., of the Mayo Clinic Plastic and Reconstructive Surgery Department. Dr. Irons very succinctly describes the chronology of events after that in a letter dated April 19, 1985 as follows:

> I saw Mr. Bowers first on February 20, 1985 for evaluation of an old burn on the lateral dorsum of

his left foot. The burn had occurred seven months previously but had healed down to a quarter sized superficial defect. I recommended conservative care and saw him back on March 6th at which time it was healing but very slowly and I felt that a skin graft would speed things up considerably and this was done as an outpatient under local anesthesia on that date. He was seen back on March 12, 1985 and again on April 3rd at which time he was noted to have a good take of the skin graft and was healing nicely. He was then referred back to his local physician and I have not seen him since that time, but Doctor Ruen called me on April 8th to discuss Mr. Bowers' returning to work. I told Doctor Ruen that I saw no contraindication to him returning to work, but I would leave that final judgment up to him.
(Cl. Ex. 13)

After claimant's skin graft on March 6, 1985, Dr. Ruen released claimant to return to work with no restrictions on April 12, 1985 (Cl. Ex. 12).

Dr. Muller describes the events that occurred to the claimant after the skin graft in a letter dated July 2, 1986, which he drafted after he saw the claimant for the last time on June 17, 1986.

I saw again Mr. Russell W. Bowers of Mason City, on June 17, 1986. He had not been seen by us since a year ago last April, at which time he had been dismissed after a skin graft to the burn site on the dorsum of the left foot. The area healed satisfactorily with a 100% take of the skin graft. He subsequently returned to work in the "yard gang" where he ran small equipment, wearing a steel-toed boot, for about three weeks and then he was laid off until approximately October, 1985, when he worked again in a similar situation for approximately four weeks before being laid off again. He began jogging in mid-April or so and noted increased tenderness and some drainage at the former burn site on the dorsum of the left foot and when he was recalled to work in mid-May, 1986, he could only work for three days because of increased pain and soreness at the skin graft site on the dorsum of the left foot. He was under the care of Doctor Caropreso since that time and has been using telfa daily and staying off his foot as much as possible.
(Cl. Ex. 19)

Dr. Muller's examination on June 17, 1986, found a well

healed scar that was freely moveable 2 x 3 cm. in size on the mid-dorsum of the left foot and within the scar he had three small areas of approximately 6 to 8 mm. of superficial erosion. There was no sign of infection. The lesions were healing satisfactorily and the doctor anticipated they would heal completely in one or two more weeks. Dr. Muller said that he saw no reason why claimant could not return to work. Dr. Muller made no finding of permanent impairment and likewise made no permanent impairment rating (Cl. Ex. 19).

In his final report dated November 15, 1985, Dr. Ruen stated that after the skin graft in March of 1985, claimant was returned to full activity without restrictions on April 12, 1985. The skin graft site has taken extremely well. Claimant has occasional itching and swelling for which he applies lotions and foam pads. The graft is approximately 2 cm. x 3 cm. and is hyperpigmented and thinner than the skin on the rest of his foot. He concludes as follows:

> On his multiple examinations over the course of the last several months, I have not noticed any breakdown in the skin, however, he describes some hypersensitivity to this area with exam. His range of motion and strength in his foot is entirely within normal limits. I believe that his prognosis is excellent. I do not feel that there is any functional permanent impairment in his foot.
> (Cl. Ex. 16)

Dr. Ruen likewise did not assess a permanent impairment rating.

Also on November 14, 1985, Dr. Caropreso examined the claimant and reported a faint burn wound along the lateral dorsal aspect of the left foot about 2 cm. x 3 cm. with a hyperpigmented skin graft in the proximal portion of the wound. The skin is dry, but supple. There are no masses, no motion dysfunction and no loss of range of motion. There is tenderness to light touch in the area of the skin graft. He states there has been no breakdown of the skin on the dorsum of his foot since the skin graft healed.

Dr. Caropreso concludes as follows:

> Mr. Bowers seems to be disabled from his burn wound injury. With the exception of some hyperpigmentation, dry skin, and tenderness, no other evidence can substantiate the extent of his difficulties. Nevertheless, it would not be uncommon for skin grafted areas and healed burn wounds to be temperature sensitive and/or pressure sensitive for the remainder of a person's life. No definite functional disability can be made at this time until at least one year

has passed from the time of his skin grafting. I plan to follow Mr. Bowers up to evaluate the effect of my treatment.
(Cl. Ex. 15)

On May 6, 1986, Dr. Caropreso reported that the cream which he had prescribed six months ago had failed to help claimant's condition and that his medical treatment had not helped the claimant's complaints. Only additional surgery can be recommended. Claimant was discharged unless he elects to pursue additional surgery such as a thicker graft, a pedicle flap, or some form of microvascular surgery where thicker tissue is grafted to the area (Cl. Ex. 17).

The parties stipulated that claimant was off work from June 10, 1984, until January 6, 1985, which is the day after the injury to the day Dr. Muller, Dr. Yankey, Dr. Plank, Fasing and claimant agreed that he should try to work on light duty. These dates are confirmed by Dr. Ruen (Cl. Ex. 16). During that period benefits were suspended for 13 days from November 16, 1984 to November 29, 1984 because claimant failed to go see Dr. Yankey as he was directed to do by the employer (Iowa Code section 85.39). Fasing testified that claimant called him on the telephone on November 14, 1984 to inquire about getting his workers' compensation check. Fasing said he told claimant it would be coming with the letter that said that claimant was to go see Dr. Yankey at 3:45 p.m. on November 16, 1984. Defendants' exhibit D is a copy of that letter dated November 14, 1984. It has a handwritten notation by Fasing at the bottom of the letter that indicates that he told the claimant at 1:30 p.m. that day that this letter was going out that night and that Fasing had notified the claimant of what was on the letter. The letter states it is in regard to a possible return to work. Fasing also noted at the bottom of the letter that claimant was not too happy about it. At the hearing Fasing testified that claimant called Dr. Yankey a baby doctor. Fasing said that when he found out claimant did not keep the appointment he was instructed by his superior to suspend the claimant's benefits. A new appointment was made for November 30, 1984, which claimant did keep. The letter of suspension of benefits is defendants' exhibit B.

Claimant testified that Fasing told him about the appointment but did not tell him the time and date of the appointment. Claimant further testified that he did not receive the letter until November 17, 1985, the day after the appointment date. Claimant further stated that the rural road that he lived on was out and that may have delayed delivery of the letter.

The letter itself does not indicate that it was sent by certified mail return receipt requested as the other defendants' exhibits, but it may have been sent that way because Fasing testified that he did not have the return receipt with him at

the hearing. Fasing also testified that he did not have the cancelled workers' compensation check so that it could be seen what day it was cashed.

The parties stipulated that claimant was off work again from January 29, 1985 to April 14, 1985. These dates are confirmed by Dr. Ruen (Cl. Ex. 16). It is not immediately clear from the evidence why claimant did not work from January 29, 1985 to February 5, 1985. Benefits were suspended again for 13 days from February 5, 1985 to February 19, 1985. This was during the period of light duty when claimant wore light shoes and was supposed to cross-reference engineering materials in Fasing's office. Fasing stated that claimant would cross-reference materials for 30 to 45 minutes with his foot elevated and then claimant, at his own discretion, would walk approximately 52 feet three or four times a day to file them. By contrast, claimant stated that he was required to file books and to be on his feet all day in violation of Dr. Ruen's instructions of keeping his foot elevated 30 to 45 minutes out of every hour (Cl. Ex. 12, p. 1). Fasing said he called Dr. Ruen and described the work and gave claimant the opportunity to hear the conversation by holding the phone away from his ear. Claimant on the other hand denied that Fasing had called Dr. Ruen in his presence. Dr. Ruen's office notes on February 5, 1985, do not record a call from Fasing, however, at the same time they do not record the restriction slip that Dr. Ruen gave to claimant on the same date (Cl. Ex. 12, p. 1). Defendants' exhibit C is a letter of suspension of workers' compensation benefits for refusal to work under Iowa Code section 85.33. Claimant's exhibit 22 is a letter of disciplinary layoff effective February 5, 1985 until February 19, 1985 for failure to follow instructions and insubordination and refusing to work at the direction of Fasing in the engineering department.

The parties' stipulated the claimant was off work from May 19, 1986 to August 7, 1986. Claimant testified that he returned to work full time as a burn tender on May 12, 1986. He worked three days but it caused erosions on his foot. He went to see Dr. Caropreso and Dr. Caropreso took him off work. Dr. Caropreso was his own choice of physicians. Claimant did not ask or tell the employer that he was going to see Dr. Caropreso. There was no evidence that Dr. Caropreso notified the employer or insurance carrier that he saw the claimant on that date.

Claimant testified that he was never told that Dr. Caropreso was no longer an authorized physician by the employer. Claimant denied he paid Dr. Caropreso and Fasing denied that the employer or carrier had paid Dr. Caropreso. There was evidence that Dr. Caropreso had treated claimant for sore throat and other matters in the past (Cl. Ex. 1). Fasing testified that during this period of time Dr. Muller was the only authorized physician. Dr. Muller said he could go back to work after he examined claimant

on June 17, 1986 (Cl. Ex. 19), but claimant did not do so. Fasing said he did not inform claimant of Dr. Muller's letter, but claimant's attorney received this report on July 24, 1986 according to the date stamp on the exhibit. Also, it was brought out that in the interrogatories claimant's attorney acknowledged that the authorized physician was Dr. Muller at this time. Claimant testified he did not get a return to work slip from Dr. Muller and the company did not tell him he was released to come back to work. Claimant testified that he did not get a copy of Dr. Muller's letter and that he did not know he was supposed to return to work after seeing Dr. Muller.

The office notes of Dr. Caropreso for May 19, 1986 verified that claimant returned to work on May 12, 1986, May 13, 1986 and May 14, 1986. He had to wear steel toed boots which he had not worn for a year. He climbed stairs and worked in increased temperatures, and this caused his foot to cramp. Claimant said his foot became stiff and he could barely walk on it. Dr. Caropreso states that Mr. Bowers further stated, "I don't care if I ever go back there." His examination found erythema probably secondary to bandage usage and a 1 cm. superficial abrasion through the skin graft in its central portion. There was no other sign of injury or infection. Because of the ulceration he recommended that claimant stay off work and come back and see him in eight days (Cl. Ex. 18, p. 1).

Claimant's exhibit 22 is a short note from Dr. Caropreso that he saw claimant on the following dates in 1986 -- May 6, 1986, May 19, 1986, May 27, 1986, June 5, 1986, July 1, 1986, July 7, 1986, July 22, 1986 and August 7, 1986. Dr. Caropreso's next office note is for the date August 7, 1986 at which time he says he has nothing to offer the claimant medically, he will recommend customed fitted shoes, and that claimant should return to work (Cl. Ex. 22). There are no office notes or medical reports for five of the office visits -- May 27, 1986, June 5, 1986, July 1, 1986, July 7, 1986 and July 22, 1986.

Claimant testified that he still has difficulties with his left foot. He stated that he has episodic, periodic open ulcerations, swelling, numbness and soreness and he feels they will always be there. There is a discolored area on his left foot measuring approximately two inches by four inches. The area of the ulceration is approximately 1 1/2 inches x 2 inches. The pain is constant. The skin is thin and dry. The skin cracks and breaks down easily. It feels like dead skin. The scar area is very thin skin. Weather changes effect it. Heat burns this area like a burn. Swelling may last from one day to one week. If he walks long distances his foot gets sore. Climbing ladders as a burner helper or an electrician causes it to swell. Climbing stairs pulls the skin apart and causes it to bleed. He cannot ski because he cannot wear boots. Jogging causes his foot to swell, crack and break open. The burn area

itches all of the time and he puts hand lotion on it every day. Numbness comes and goes. Many of these complaints are the same complaints that the claimant described to the doctors during the course of his treatment.

Cindy Baker testified that she has lived with claimant since before the injury on June 9, 1984. He had no problem with his left foot prior to the injury. She said he had constant pain, itching and throbbing in his skin graft area. He cannot walk long distances. He does have periodic erosions, ulcerations and excoriations. He has tried to get well and has done nothing contrary to that objective. She has observed that his skin continually cracks, breaks open and bleeds. The burn area is a different color and texture. It is dry, tender, sensitive and cracks open if it is bumped. He cannot stand sunlight or heat on the area. He has to keep it covered up most of the time. He carries lotion and uses it all of the time. He has done everything he knows how to do and it still does not heal.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 9, 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 claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from June 9, 1984, the day of the injury, until January 6, 1985 which is the day Dr. Muller, Dr. Yankey and Dr. Plank agreed that he should try to return to work on light duty. Dr. Ruen also confirmed these same approximate dates (Cl. Ex. 12) and the parties stipulated claimant was off work for this period of time.

An issue exists as to whether the claimant is entitled to benefits from November 16, 1984 to November 29, 1984 for 13 days for refusing or failing to keep an appointment with Dr. Yankey.

Iowa Code section 85.39 states that the employee shall submit to examinations requested by the employer without cost to the employee. It further provides: "...The refusal of the employee to submit to the examination shall suspend the employee's right to any compensation for the period of the refusal. Compensation shall not be payable for the period of suspension."

Fasing said he mailed the notice and it should have been received prior to the appointment. Claimant testified that he received the letter the day after the appointment. Fasing testified that he informed claimant of the time and date of the appointment verbally on the telephone on November 14, 1985. Claimant denied that Fasing told him the time and date of the appointment on the telephone. This letter is not marked certified mail return receipt requested as the other letters in the defendants' exhibits, but Fasing testified that he did not have the return receipt with him at the hearing. Neither did he have the cancelled check for the workers' compensation payment to show what date it was cashed. This problem of whether the claimant was notified could have been avoided by Fasing had he sent the letter certified mail return receipt requested in a timely matter. All of the other letters in the defendants' exhibits were sent in this manner. Therefore, it is determined that claimant should not be denied benefits from November 16, 1984 to November 29, 1984 because it was not established by the proponent of the suspension that the claimant had actual notice of the time and date of the appointment. Fasing's testimony was controverted by the claimant's testimony. Consequently, claimant is entitled to temporary total disability benefits from June 10, 1984 to January 6, 1985.

The evidence is not sufficient to determine the claimant's entitlement to temporary partial disability benefits but the parties did not indicate that that was an issue to be determined by this decision.

The next issue to be decided is whether the injury was the cause of additional temporary disability and whether the claimant is entitled to temporary total disability benefits for the period from January 29, 1985 to April 14, 1985. The parties stipulated the claimant was off work for that period of time. Dr. Ruen agreed to the same approximate dates (Cl. Ex. 16). The evidence is not sufficient to make a determination for the time between January 29, 1985 and February 5, 1985. It is not clear why claimant did not work during this period of time, but on February 5, 1985 a dispute arose between Fasing and claimant as to whether cross-referencing and filing the engineering booklets violated the restrictions imposed by Dr. Ruen. Fasing testified

that claimant could sit and cross-reference for 30 to 45 minutes and then get up and file the one pound materials only three or four times a day. Claimant on the contrary testified and generally alleged that the filing entailed several trips and violated the weight restrictions. Fasing said he called Dr. Ruen and described the work and Dr. Ruen approved it. He gave the claimant the opportunity to hear the telephone conversation. Claimant on the other hand denied that Fasing called Dr. Ruen in his presence.

On February 4, 1985, Dr. Ruen said claimant could go back to work on February 5, 1985 (Cl. Ex. 3, p. 4). Dr. Ruen's notes do not record a telephone call from Fasing on February 5, 1985; however, neither do they record the restriction slip given to the claimant also on February 5, 1985 (Cl. Ex. 12, p. 1).

On February 6, 1985, Dr. Ruen checked the foot and stated that it is slightly improved and the best that he has seen this injury to be. This statement disproves the claimant's contention that cross-referencing and filing had worsened the condition of his foot (Cl. Ex. 3, p. 4). The February 6, 1985 note also records that claimant was having trouble at work regarding his restrictions and had been suspended (Cl. Ex. 3, p. 4). The notes do not record that this restriction had been violated or in what manner the restrictions had been violated. Claimant could have resolved this issue by asking Dr. Ruen's intervention on his behalf if, in fact, the restrictions were violated but instead claimant choose to refuse to work at the special task that had been provided for him. Considerable effort was expended by the combined efforts of Dr. Muller, Dr. Yankey, Dr. Plank, Fasing and claimant to get the claimant back to work on a light duty basis. There is no reason to believe that Dr. Ruen would not have intervened in claimant's behalf if Dr. Ruen's restrictions had been violated.

Iowa Code section 85.33(3) provides:

> 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.

The claimant has the burden of proof that he is entitled to benefits for this period of time. The employer has proven that employment was available which claimant could do through special arrangements. Claimant failed to prove by a preponderance of

the evidence that he could not do this work. Consequently, claimant is not entitled to temporary disability benefits from January 29, 1985 through March 5, 1985.

Claimant has proven he is entitled to temporary total disability benefits from March 6, 1985 to April 12, 1985 which is from the date of his skin graft at Mayo Clinic (Cl. Ex. 13) to the date Dr. Ruen released claimant to go back to work (Cl. Ex. 12, p. 2).

The next issue is whether claimant is entitled to temporary total disability benefits from May 19, 1986 to August 7, 1986 or beyond while special shoes were ordered. Claimant returned to his old job on May 12, 1986 and worked three days. On May 19, 1986, claimant saw Dr. Caropreso because the steel toed boots caused his foot to cramp. Dr. Caropreso recommended that he not work and report back in eight days. Dr. Caropreso was claimant's choice of physician. Claimant did not ask the employer or tell the employer he was going to see Dr. Caropreso. There was no evidence Dr. Caropreso reported to the employer that claimant had seen him or that claimant was taken off work. Claimant's attorney acknowledged in the interrogatories that Dr. Muller was the authorized physician at this time. There is no indication that Dr. Caropreso was an authorized physician at this time. Claimant testified that he had seen Dr. Caropreso earlier and no one ever told him he was no longer an authorized physician. However, claimant had not been treated for over a year and a-half by Dr. Caropreso for this injury. Notice to counsel constitutes notice to the client. If counsel knew that Dr. Caropreso was no longer authorized, any failure to communicate that information to claimant is to be held against claimant, not the employer. Claimant, not the employer, selected claimant's counsel.

Furthermore, claimant was told to come back in eight days. Claimant did go back and did see Dr. Caropreso five times on May 27, 1986, June 5, 1986, July 1, 1986, July 7, 1986 and July 22, 1986, but there are no office notes or reports for these visits introduced into evidence to determine whether visits were for this injury or some other condition? Did Dr. Caropreso release the claimant to return to work eight days later on May 27, 1986 or on one of these subsequent visits? The injury claimant reported to Dr. Caropreso on May 19, 1986 was only a 1 cm. superficial abrasion in the skin graft and erythema from bandage application. It does not seem like this would cause claimant to be off work for another four months until August 7, 1986.

Moreover, Dr. Muller said claimant was able to work on June 17, 1986 (Cl. Ex. 19). This report was received by his attorney on July 24, 1986. Claimant said Dr. Muller's letter and statement that he was able to work was never communicated to him. This is possible, but not probable. Claimant had the duty to find out

what his work status was after seeing Dr. Muller if he intended to establish that he was temporary totally disabled at that time. For the foregoing reasons it is found that the claimant has not proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 19, 1986 to August 7, 1986 or thereafter while special boots were possibly to be ordered for him by Dr. Caropreso.

Claimant contends that he is entitled to permanent partial disability benefits even though none of the doctors who treated him found any permanent impairment or assessed a permanent impairment rating. Claimant cites Conyers v. Ling-Casler Joint Venture, Volume 2, State of Iowa Industrial Commissioner Decisions 309 (1984) appeal decision in which it was stated:

> ...The absence of a functional impairment rating does not preclude an award. The Iowa Administrative Procedure Act, chapter 17A of the Iowa Code, and more specifically section 17A.14(5) recognizes utilization of "[t]he agency's experience, technical competence and specialized knowledge" to evaluate evidence.
>
> It should be noted that this authority is not generally used as a substitute for available medical evidence. This authority is only used rarely as an exception to the general rule of relying on medical expertise to establish impairment and the degree of impairment.

In this case Dr. Plank, a dermatologist, commented that claimant's subjective complaints exceeded his objective medical findings (Cl. Ex. 9). He treated claimant at least nine times over a six month period and observed the wound several times but made no finding of permanent impairment and did not give an impairment rating.

Dr. Yankey and Dr. Ruen treated claimant approximately 22 times for a three month period and saw the wound many times. Neither doctor found any permanent impairment or gave an impairment rating. On the contrary, Dr. Ruen said there was no functional impairment (Cl. Ex. 16).

Dr. Irons, a plastic surgeon at the Mayo Clinic, found the skin graft had a good take and he returned claimant to normal work duties. He made no finding of permanent impairment and gave no impairment rating.

Dr. Muller, a dermatologist at the Mayo Clinic, saw the claimant approximately five times. On June 17, 1986, he saw no reason why claimant could not return to work. He made no finding of permanent impairment and gave no impairment rating.

Dr. Caropreso saw claimant about 11 times in 1984 and approximately eight times in 1986. He saw the wound many times. He even stated claimant "seems to be disabled from his burn wound injury" but failed to use this opportunity to make his own personal finding of permanent impairment or give a permanent impairment rating on November 14, 1985. Dr. Caropreso saw the claimant approximately eight times in 1986, which were all more than one year after the skin graft, and Dr. Caropreso did not make a finding of permanent impairment or make an assessment of a permanent impairment rating.

If five competent doctors, most of whom are specialists, viewed this wound injury on numerous occasions over a two year period and did not find any permanent impairment or give an impairment rating, it seems presumptuous for the hearing deputy to endeavor to make a finding of permanent impairment and arrive at an appropriate permanent impairment rating.

Dr. Plank took at least one photograph of the injury and Dr. Muller took more than one photograph of the injury but no photographs were introduced into evidence by either party.

In Arce v. Sandra Pollock d/b/a Electric Doughnut, Volumne IV, Iowa Industrial Commissioner Report 14 (Review-Reopening 1983) the hearing deputy did have the opportunity and advantage of viewing the wound. In this case, for reasons of their own choosing, the wound was not displayed at the hearing.

If five competent doctors who viewed the wound on myriad occasions cannot find permanent impairment and assess a rating, it does not seem appropriate for the hearing deputy who never saw the wound and never saw even a photograph of the wound to attempt to find permanent impairment or to conjecture what an appropriate rating should be.

This is not to say that the claimant has not suffered because there is physical evidence that his skin does encounter small ulcerations in the wound area which have caused him a great deal of difficulty. The problem is that several medical experts did not believe it prevented him from working or that it caused him to be permanently impaired. For this reason it must be concluded from the evidence presented at the hearing that the claimant has not proven by a preponderance of the evidence that he sustained a permanent partial disability.

FINDINGS OF FACT

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

That the claimant was employed by the employer at the time he sustained a severe burn injury to the lateral aspect of the

from March 6, 1985 to April 12, 1985 and that the claimant is entitled to temporary total disability benefits for those periods of time.

That the injury of June 9, 1984 was not the cause of any permanent partial disability.

That the claimant is not entitled to medical mileage for his trips to see Dr. Caropreso in 1986 but he is entitled to medical mileage for his trip to the Mayo Clinic and return on July 2, 1986.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant thirty point seven-one-four (30.714) weeks of temporary total disability benefits for the period June 10, 1984 to January 6, 1985 and five point two-eight-six (5.286) weeks of temporary total disability benefits for the period March 6, 1985 to April 12, 1985, a total of thirty-six point zero-zero-zero (36.000) weeks of temporary total disability benefits at the rate of two hundred sixty-nine and 93/100 dollars ($269.93) per week in the total amount of nine thousand seven hundred seventeen and 48/100 dollars ($9,717.48).

That the defendants pay these benefits in a lump sum less credit for benefits previously paid.

That interest will accrue under Iowa Code section 85.30.

That defendants pay the claimant thirty-nine and 90/100 dollars ($39.90) for one hundred ninety (190) miles round trip mileage to the Mayo Clinic on July 2, 1986.

That each party pay their own costs of preparing the case for hearing, except defendants are to pay claimant thirty and no/100 dollars ($30.00) for the cost of a report from Dr. Irons and thirty and no/100 dollars ($30.00) for the cost of a report from Dr. Muller (Cl. Ex. 20) and defendants are to pay for the cost of the shorthand reporter at the hearing.

That the defendants file 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 29th day of January, 1987.

Walter R McManus Jr

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARRY BRANT, JR., Claimant, vs. IOWA POWER AND LIGHT COMPANY, Employer, Self-Insured, Defendant.	:	FILE NO. 492024 R E V I E W - R E O P E N I N G

INTRODUCTION

This is a proceeding in review-reopening brought by Harry Brant, Jr., against Iowa Power and Light Company, his self-insured employer. Claimant seeks further benefits based upon the injury that occurred on December 15, 1976. Compensability of the injury was established by the memorandum of agreement filed March 17, 1978.

It was stipulated that claimant has been paid all healing period to which he is entitled and that he has been paid 87 1/2 weeks of permanent partial disability at the correct rate of $160.00 per week. The primary issues in the case deal with claimant's entitlement to compensation for permanent partial disability and whether that compensation should be determined as a scheduled member disability to the arm or as an industrial disability to the body as a whole.

The case was heard at Council Bluffs, Iowa on December 15, 1986 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Harry Brant, Jr., Mary Nelson, Rodney Radford, and Randy Williams. The evidence includes joint exhibits 1 through 10.

SUMMARY OF EVIDENCE

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

Harry Brant, Jr., is a 52 year old married high school graduate who resides at Glenwood, Iowa. The greater part of his working life has been spent in the employment of Iowa Power and Light Company where he has been employed almost continuously

since 1953. The only employment interruptions shown in the record were two years of military service in 1954 through 1956, one year when Brant worked for Coors Brewery in Denver, Colorado in 1962, and a three month strike in 1964. He has worked as a laborer, ground man, truck driver, lineman, working line crew foreman and has been an electric serviceman since October 10, 1985 (Exhibit 6).

Brant's injury of December 15, 1976 occurred when a truck, in which he was riding with two co-employees, overturned. Claimant testified that he could not move his right arm following the accident. The initial examination concluded that the shoulder had been bruised. After a period of therapy claimant returned to work but later was hospitalized due to internal bleeding. Ronald K. Miller, M.D., became involved in claimant's case at that time to treat his shoulder complaints. Dr. Miller found claimant to have evidence of a mild chronic rotator cuff impingement and suspected that he had sustained a partial rotator cuff tear (Ex. 4, page 1). After a period of approximately one year of conservative treatment consisting primarily of therapy and exercises, Dr. Miller concluded that claimant had a rotator cuff tear and assigned a physical impairment rating of 35 percent of the arm. He indicated that claimant would have problems with prolonged heavy overhead lifting, weakness and catching in the shoulder and inability to fully and forcefully abduct, elevate and externally rotate his arm (Ex. 4, p. 4).

At the time of the accident Brant was employed working as a lineman out of the Logan, Iowa facility but the majority of his work had been in Council Bluffs, Iowa. After the hospitalization in early 1977 he returned to work as a lineman. He described the duties of a lineman as setting poles and running wire. He stated that the work involves shoveling a lot of dirt, hanging transformers and in general doing everything necessary to provide power to a house or building. Brant stated that a line crew normally involves three persons, a truck driver, a lineman and a working line crew foreman. In August of 1978, claimant was made a working line crew foreman.

Brant testified that he had worked in Glenwood until the time he was transferred to Council Bluffs in 1967. He stated that he preferred to work in Glenwood but that the first opportunity to transfer back to Glenwood occurred in 1981. In making the transfer he gave up the line crew foreman job in Council Bluffs to work as a lineman at Glenwood. He stated that while the foreman and lineman actually do much the same work, the work in Glenwood was easier because the wires and cables used in Glenwood were smaller than those used in the metropolitan area of Council Bluffs. Due to an early retirement offering made by the company in 1985, a serviceman position became open and claimant bid into the job because he considered it to be easier and lighter work than that of a lineman. Claimant testified that as a serviceman

he receives the same rate of pay, $15.31 per hour, that he would earn as a lineman, and that occasionally he fills in as a lineman when the regular person is absent. Brant stated that when he transferred from the foreman job in Council Bluffs to the lineman job in Glenwood he sustained a reduction in pay in tne amount of $320 per month but that he also reduced his commuting expenses.

Claimant continued to work until eventually seeking further medical care in 1982. During the intervening time he described a number of incidents where the shoulder caused problems. He sustained two other injuries which were apparently of minimal severity since they did not result in any lost time from work (Ex. 8 & 9). Claimant testified that he learned to perform many activities with his left hand rather than the right, which had been his dominant hand. He stated that on several occasions he had considered surgery but was reluctant to have it. Brant denied having any problems with his right shoulder prior to the December 15, 1976 accident and he denied any further substantial trauma to the arm or shoulder subsequent thereto. The problems which Brant described as occurring between 1976 and 1982 seem consistent with the problems that Dr. Miller had anticipated in his report of March 10, 1978 (Ex. 4, p. 4).

Brant testified that he experienced severe pain while throwing a rope underhanded in 1982 and that he subsequently returned to see Dr. Miller. On October 29, 1982, Dr. Miller performed surgery in the nature of an arthrotomy of the right shoulder with resection of the anterior distal clavicle, acromionectomy and biceps tenodesis. The rotator cuff, however, was found to be intact (Ex. 4, pp. 7 & 8). After a period of recuperation Brant returned to employment as a lineman.

Brant testified that prior to the 1982 surgery he experienced constant pain in his shoulder and frequently used Ben-Gay, muscle relaxers or heat. On occasion he had Cortisone shots. He also experienced weakness in the shoulder. Brant stated that the surgery improved his shoulder, that the constant pain is now gone and that he has recovered approximately 75 percent of his strength in the arm and shoulder. He complained of stiffness in cold, wet weather and some restriction in his range of motion. He stated that he occasionally experiences a sharp pain if he performs certain movements and that the shoulder bothers if he does a lot of shoveling. He stated that he currently does little overhead work and that his job as a serviceman requires less strength than that required of a lineman.

Brant testified that he enjoys his present job and expects to continue in it until he retires. He indicated that he expects to retire at age 62 or possibly sooner. He feels that his job is secure. He stated that when others retired through the early retirement program he had his choice of jobs including

foreman and he felt that he could have done any of the jobs available.

Dr. Miller's deposition is part of the record as exhibit 2. At page 11, Dr. Miller expressed the opinion that the 1976 truck accident was a very substantial factor in claimant's shoulder complaints which ultimately necessitated the surgery that was performed in 1982. Dr. Miller went on to relate that claimant's problem is mainly an upper extremity problem (p. 27) but that it does effect the shoulder (pp. 40 & 41). He rated claimant's functional impairment as 30 to 35 percent of the upper extremity (p. 42) which he felt was equivalent to a 15 to 20 percent impairment of the body as a whole (p. 49).

Mary Nelson, the manager of Compensation Services for Iowa Power and Light and former administrator of labor relations and benefits, testified that the difference in pay between a foreman and a lineman is $1.82 per hour or $312 per month.

Rodney Radford, claimant's former foreman, testified that he has known Brant for approximately 30 years. He stated that claimant was always able to do his work and that he felt claimant was capable of working as a foreman, lineman, or serviceman. Radford confirmed that a serviceman's work is lighter in nature than lineman's work. He confirmed that prior to the time of surgery Brant had complained regarding his shoulder. Radford further testified that Brant would have approximately broken even economically when he transfered from the Council Bluffs foreman position to the Glenwood lineman position due to a reduction in commuting expenses.

Randy Williams, the supervisor of the Iowa Power and Light Glenwood Service Center, testified that he has known claimant since 1963. He related that there had been no openings in the Glenwood facility until 1981 and that claimant had told him that working out of the Glenwood facility provided less commuting expense and the opportunity for more overtime work. Williams confirmed that more overtime was available at Glenwood than at Council Bluffs. Williams also confirmed that in 1985 claimant had his choice of the line foreman or serviceman position and selected the serviceman position. Williams related that claimant had indicated to him that he did not want the responsibility of being foreman and also liked the independence of working alone as a serviceman. Williams confirmed that the serviceman job is easier physically than the lineman position but that claimant has filled in as line crew foreman on occasion since 1985.

APPLICABLE LAW AND ANALYSIS

The first issue to deal with is whether claimant's disability is to be evaluated industrially or as a scheduled member disability.

Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983).

The governing authorities are Lauhoff Grain Company v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Kellogg v. Shute & Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964); Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); and Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). These cases demonstrate that for an injury to extend into the body as a whole it is necessary that there be some objectively determinable physical impairment and disability that exists other than in a scheduled member. In this case the claimant's disabilities are manifested in his ability to use his arm. The actual functional disability, however, does not lie within the arm other than for that which results from the biceps tenodesis in which the attachment of the biceps muscle was relocated. All of the remaining surgical procedures dealt with parts of claimant's shoulder other than the arm itself. Most of the problems with the range of motion of claimant's arm result from the injury that exists within the shoulder rather than that which exists in the arm. It is therefore found and concluded that claimant's disability is a disability to the body as a whole which is to be evaluated industrially under the provisions of section 85.34(2)(u) rather than as the scheduled member of an arm which would be compensable under section 85.34(2)(m).

A considerable amount of time elapsed between the 1976 accident and the 1982 surgery. There is, however, no evidence of substantial intervening trauma. Dr. Miller expressed his professional opinion that a causal connection existed between the 1976 accident and the surgical procedure. 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). It is therefore found and concluded that the December 15, 1976 truck accident is a proximate cause of the surgery performed in 1982 and the disability which claimant now experiences in his right shoulder.

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).

Dr. Miller had rated claimant's functional impairment at 35 percent of the arm in 1978. After the surgery he again rated the functional impairment and placed it at the same figure of 35 percent of the upper extremity. Surgery did not increase claimant's impairment. From his own testimony it appears that it improved his condition and, if anything, reduced the extent of his functional impairment. This is certainly what one would expect to result from the performance of a successful surgical procedure.

Harry Brant, Jr., has not suffered any actual loss of earnings directly due to his injury. The only reduction of earnings that he has experienced arose from his decision to transfer from Council Bluffs back to Glenwood which is the place at which he resides. From an economic standpoint the reduction of commuting expenses and the opportunity for additional overtime appears to have been a factor that Brant considered when deciding to transfer. An additional factor is also the fact that the work at Glenwood was lighter than the work in the Council Bluffs area. Four years later, in 1985, Brant bid into the serviceman position which he currently holds. This again was without any loss of income from the lineman position. Brant could have become the line crew foreman had he desired. Brant agreed that he would be capable of performing the work of the line crew foreman at the Glenwood plant but he choose to work as the serviceman. The evidence in this case has failed to show that Harry Brant, Jr., has suffered any loss of actual earnings or opportunity for advancement due to the injury. It does not appear that it was necessary for the employer to make accomodations or to modify his job in order to permit him to continue in his employment. There appears from the record no reason to believe that his job is in any manner insecure. From all indications it appears that claimant is appropriately employed in a position which he is able to perform when the factors of his age, education, qualifications, experience and physical impairment is considered. He has, nevertheless, suffered an impairment of his ability to compete for employment and to engage in certain types of employment. It has not been necessary, however, for him to actually compete for jobs or seek other employment as a result of the injury. When all the appropriate factors of industrial disability are considered, it is found and concluded that claimant's disability is a 15 percent permanent partial disability. This entitles him to receive 75 weeks of compensation for permanent partial disability. The 87 1/2 weeks previously paid is in excess of

the amount of this award and no additional amounts are owing to claimant from the employer.

FINDINGS OF FACT

1. Harry Brant, Jr., was a resident of the State of Iowa employed by Iowa Power and Light Company within the State of Iowa on December 15, 1976.

2. Harry Brant, Jr., injured his right shoulder on December 15, 1976 when the truck in which he was riding overturned.

3. At the time of the injury Brant was employed as a lineman working for Iowa Power and Light Company.

4. Harry Brant, Jr., is 52 years of age, married and a high school graduate.

5. Claimant has been employed during nearly all of his working life by Iowa Power and Light Company.

6. Ever since the injury claimant has continued to be employed by Iowa Power and Light Company without any actual loss of earnings or opportunity for career advancement due to the injury.

7. Claimant's transfer from a foreman position in Council Bluffs to a lineman position in Glenwood was induced in part by claimant's desire to reduce the amount of time and expense involved in commuting to and from work, in part, by greater opportunity for overtime work at Glenwood and, in part, due to the lighter nature of the work at Glenwood.

8. In transfering from a foreman position in Council Bluffs to a lineman position in Glenwood, claimant sustained a loss of earnings in the amount of $1.82 per hour but the loss in gross earnings was offset to some degree by reduced commuting expenses and increased opportunities for overtime work.

9. Claimant has a 35 percent permanent functional impairment of his right upper extremity, an amount of impairment that is equal to that which initially resulted from the 1976 injury.

10. A 35 percent functional impairment of the arm is roughly equivalent to a 15 to 20 percent impairment of the body as a whole.

11. Claimant's actual functional impairment and physical disability is not limited to his arm but extends into the shoulder and into the body as a whole.

12. Claimant is presently employed by Iowa Power and Light

Company in a position that is appropriate to his abilities and limitations and he appears secure in that employment.

13. When all applicable factors are considered, claimant has a 15 percent loss of earning capacity.

CONCLUSIONS OF LAW

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

2. The injury of December 15, 1976 is a proximate cause of the disability which Harry Brant, Jr., now experiences in his right shoulder.

3. The disability is a 15 percent permanent partial disability of the body as a whole when the same is evaluated industrially which entitles claimant to receive 75 weeks of compensation at the stipulated rate of $160.00 per week under the provisions of section 85.34(2)(u) of the Code.

4. Claimant's entitlement has been overpaid due to the 87 1/2 weeks of compensation previously paid by the employer but the workers' compensation law makes no provision for requiring repayment of benefits which have been overpaid.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding as his entire entitlement has been previously paid by the employer.

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

IT IS FURTHER ORDERED that defendants file a final report as requested by the agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 9th day of April, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA A. BRIDGES, Claimant, vs. UNITED PARCEL SERVICE, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File No. 781971 A R B I T R A T I O N D E C I S I O N F I L E D APR 8 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Patricia A. Bridges, claimant, against United Parcel Service (UPS), employer, and Liberty Mutual Insurance Company, insurance carrier, for benefits as a result of an alleged injury on May 15, 1984. A hearing was held in Des Moines, Iowa, on March 11, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant, Darrel Bridges, Barbara Smith, and Nita Bradley; claimant's exhibits 1 through 4; and defendants' exhibits A through D. Neither party filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $99.26 and that the statute of limitations issue was being withdrawn by defendants.

ISSUES

The contested issues are:

1) Whether claimant gave proper notice to defendants, or defendants had actual knowledge of claimant's alleged injury, as required by Iowa Code section 85.23;

2) Whether claimant received an injury which arose out of and in the course of her employment with UPS;

3) Whether there is a causal relationship between the alleged injury of May 15, 1984 and claimant's asserted disability; and

4) Nature and extent of disability; the parties were unable to stipulate as to when permanency benefits would commence if awarded.

SUMMARY OF THE EVIDENCE

Claimant testified that she finished high school in 1968 and then started work. Part of her employment history is set out in exhibit A, page 4 (interrogatory No. 6). At hearing, claimant testified regarding how long she worked for these various employers and her rate of pay. She also outlined her duties with the various employers she worked for after graduating from high school. Claimant has taken a night course in bookkeeping.

Claimant testified that she worked as the "main secretary/ receptionist" for Teleconnect in Cedar Rapids, Iowa, from July 1982 through February 1983. She was paid $5.00 initially by Teleconnect. Claimant attended the American Institute of Business in Des Moines from March 1983 through May 1984 taking court reporter classes. She did not complete this curriculum. Claimant started working on a part-time basis for UPS on April 23, 1984 and worked about 15 to 20 hours per week. Her job at UPS was loading boxes off a conveyor belt into a truck.

Claimant testified that she had some back problems prior to May 15, 1984. Specifically, claimant had "an incident" at Teleconnect in the fall of 1982. At the time of this incident, claimant was putting postage on mail and bent over to get an envelope and then experienced pain in her back. She received medical attention as a result of this incident, but took no time off work other than the time required to visit doctors on two occasions. Exhibit 1, pages 1 and 2, document that claimant saw a chiropractor in Altoona, Iowa, in April of 1984 and that she told this chiropractor she had back problems because of the Teleconnect incident; specifically, claimant related to this chiropractor that she had pain in her legs and back. Claimant identified this chiropractor as Donald MacKenzie and that she found his name in the Yellow Pages. Claimant stated that on April 23, 1984, she had a problem with her lower back and a problem "down both legs." Her legs bothered her the most but she also had back problems. She stated that activity would make her problems worse. At this point, the pain was below the beltline. Claimant testified that she also went to this chriro-practor after an incident at UPS on May 15, 1984.

Claimant testified that her job at UPS required her to take boxes off the conveyor belt and mark them and then put them in a trailer (truck) for shipment. Claimant testified that incorrect

zip codes would result in her being required to lift items. Claimant testified that her UPS job required lifting, loading, and climbing. Claimant was required to lift doors on the trailers she was loading and also to shut these doors. She characterized the doors on these trailers as "huge."

Claimant testified that at the end of her work shift on May 15, 1984, she had to close the door on a semitrailer. Her usual procedure was to pull the door with her arm and then close it completely with her foot. On May 15, 1984, she said the latch was different than usual. Claimant was using her right foot and her right foot "went between the truck and the dock and she fell on her tailbone." Severe pain resulted. However, claimant finished locking the door and then completed her day of work. She characterized the pain from this incident as "more severe than before." The pain experienced by claimant prior to May 15, 1984 was in her lower back. Claimant went home on May 15, 1984 at about 4:00 p.m., and when she got home she told her husband about the incident at work that day. Claimant testified that on May 16, 1984, she told Barb Smith, her immediate supervisor, about the incident at work. Barb Smith told claimant to take it easy when claimant told her about the incident of May 15, 1984. She also sought chiropractic treatment on May 16, 1984 and characterized this as "normal manipulation." Claimant's duties were "the same" on May 16, 1984, however. Claimant worked for UPS on a part-time basis until the end of May 1984. On May 28, 1984, claimant started work for the U.S. District Court as a deputy clerk setting up new files. Claimant is currently working as a deputy clerk for the U.S. District Court and is paid about $17,000 per year as a full-time employee. Initially, claimant was paid $5.00 per hour as an employee of the U.S. District Court which was $3.00 less than she was paid at UPS.

Claimant testified that she saw William Boulden, M.D., on August 30, 1984. See exhibit 1, page 7. In August 1984, Dr. Boulden performed a CT scan. On September 6, 1984, Dr. Boulden did a further examination and claimant was informed that she has a herniated disc. Claimant was told about the option of surgery and was given the pros and cons of this option. One and one-half years after September 6, 1984, claimant returned to Dr. Boulden and informed him that she did not want back surgery. Claimant has also been evaluated by Dr. Marvin Dubanksy. See exhibit 1, page 10. Dr. Dubansky is opposed to back surgery. Claimant also has seen Thomas A. Carlstrom, M.D., and he is opposed to surgery also. See exhibit 1, page 12.

The discussion with Barbara Smith on May 16, 1984 lasted about two to three minutes and it was the first thing that claimant did when she came to work on May 16, 1984.

On cross-examination, claimant acknowledged that she told chiropractor MacKenzie on April 23, 1984 that she had pain in

her left leg and back. See exhibit 1, page 1. He also acknowledged that she told chiropractor MacKenzie that her back problems were present for eleven to twelve years prior to April 23, 1984. See exhibit 1, page 2. Claimant testified that she is not sure whether she told Dr. Carlstrom that she was having back problems for eleven or twelve years prior to seeing him.

Claimant testified that she saw a Dr. Huey in Cedar Rapids as a result of the incident at Teleconnect in the fall of 1982.

Claimant testified that her alleged work-related injury of May 15, 1984 is described on page 7 of exhibit A (interrogatory 12) that reads: "While closing overhead trailer door, my foot slipped off the ladder and I fell--landing on my tailbone. The latch on this particular door was different than the ones I had worked with before." Claimant testified that at the time of the May 15, 1984 incident she was working part time at UPS and was a full-time student at AIB. Claimant acknowledged that she did not ask UPS or Liberty Mutual to provide medical care as a result of her alleged injury of May 15, 1984. She testified that she saw Dr. Carlstrom in about October 1986. Dr. Carlstrom's letter, marked as exhibit 1, page 12, is dated January 19, 1987. Claimant's medical bills as a result of the May 15, 1984 incident were turned into her husband's carrier and claimant testified that she did not ask UPS or Liberty Mutual at any point to pay any of her medical bills that related to the incident of May 15, 1984. Claimant testified that the "employee accident report" marked as exhibit C was filled out at the top by her and that her signature appears at the bottom. However, the writing in the middle was by someone other than herself (it is clear from examination of the exhibit as to the different styles of handwriting set out on the exhibit).

On redirect, claimant testified that the Sue Brown described in exhibit 1, pages 8 and 9, was a claims adjustor for Iowa National Mutual Insurance Company. Claimant talked with Ms. Brown because claimant sought workers' compensation benefits from Iowa National Mutual Insurance Company as a result of the incident at Teleconnect. Claimant testified that she received no weekly benefits as a result of the Teleconnect incident.

Barbara Smith testified that she is employed as a part-time supervisor by UPS. In May 1984, claimant was a new employee and worked as a loader on a part-time basis generally three or four hours per day. Ms. Smith testified that on May 16, 1984 she did not have a conversation with claimant about a work-related injury on May 15, 1984. On May 15, 1984, Ms. Smith evaluated claimant's work for UPS. Ms. Smith testified that she recalled no conversations at any point in time with claimant regarding an alleged work-related injury at UPS. Ms. Smith testified that she learned of the alleged work-related injury of May 15, 1984 about one year prior to the March 11, 1987 hearing. Ms. Smith

initially testified that claimant worked the evening of May 15, 1984; however, she later acknowledged in her testimony that she may have made a mistake about the time claimant worked on May 15, 1984. The evaluation that Smith did of claimant lasted "at the most" ten minutes and it was right before claimant left work on May 15, 1984.

Nita Bradley testified that she is an office supervisor in the personnel department at UPS. She testified that claimant was hired as a part-time employee with her hours set from 11:00 a.m. to 3:00 p.m. At the time of hiring, claimant was informed of UPS' policy that work-related injuries were to be reported to a worker's immediate supervisor so that an accident report could be completed. Bradley testified that Barbara Smith would have been the correct person for claimant to report to in the event of a work-related injury, and that such a reporting by claimant to Smith would have been in accordance with UPS policy. Bradley did the exit interview when claimant separated from UPS. See exhibit D.

Jill Leonard completed the first report of injury and at the time she worked as a safety clerk in the safety department. See exhibit 4.

Bradley testified that claimant never reported her alleged work-related injury of May 15, 1984 to UPS. Bradley testified that instructions on reporting injuries are given verbally at a worker's original orientation. Barbara Smith would have given claimant these instructions. Barbara Smith was under an obligation to report work-related injuries in May 1984, but did not do so regarding an alleged injury on May 15, 1984 regarding claimant. On-the-job injuries are referred to a company doctor. Claimant's exit interview was conducted by telephone on May 29, 1984. At the time of the exit interview, claimant did not mention any work-related injury. On cross-examination, Bradley testified that UPS prefers that an injured employee complete an injury report himself or herself. This report would be completed at the personnel department of UPS.

Darrel Bridges gave rebuttal testimony. He testified that he is claimant's spouse and had a conversation with her on May 15, 1984 about a work-related injury at UPS on that date. At supper on May 15, 1984, claimant was having physical problems and claimant's spouse asked her if she reported the injury to UPS. She stated that she had not reported the injury and he instructed her to report it on May 16 1984. On the evening of May 16, 1984, he asked claimant whether she had reported the injury to UPS and she stated she had.

Dr. Boulden stated on page 7 of exhibit 1:

8-30-84: Pat Bridges is a 33 year old female who

has developed low back pain starting in April of 1984. She has been treated by a chiropractor and that has not relieved her symptoms and the last two months she has not had any real relief. Therefore, I have been asked to see the patient.

....

Impression: Probable herniated disc L5-S1.

Exhibit 1, page 9 (dated November 5, 1984), is authored by Dr. Boulden and reads in part:

It is my feeling that while she was working at UPS, that her symptoms became worse to the point where she was found to have a ruptured disc.

Therefore, I feel they would be the people who would be responsible for her problem, and therefore, this ties in with my letter of October 15, 1986 concerning the same matter.

Exhibit 1, page 10 (dated July 11, 1986), is authored by Dr. Marvin Dubansky and reads in part:

CHIEF COMPLAINT: Painful back, pain going down both legs, mostly front, some in the back, sometimes goes down to the calf. This started when she bent over to pick up an envelope on the floor while at work at Teleconnect in the Fall of 1982.

She then fell in 1984 at UPS and landed on her tailbone and this bothers her a little bit at this time. She went to a chiropractor and eventually saw Dr. Boulden and a CAT scan was done in August 1984 at Lutheran Hospital. She was told that she had a ruptured disc and should have surgery of one disc and possibly another. She decided not to have surgery and had no other particular treatment except for the chiropractor.

Exhibit 1, page 12 (dated January 19, 1987), is authored by Dr. Thomas Carlstrom and reads in part:

According to the history the patient gave me, her current symptoms should be considered related to the slipping injury in May of 1984.

I assume that she has reached maximum benefit of healing at the present time, and probably has been

at that level for sometime. According to the AMA guidelines, she would rate about a 1% impairment.

I don't think surgery is recommended. I do note that she has a very msall [sic] herniated disc seen on the CT scan. My best guess is that a surgical procedure would not leave her feeling any better than she is right now, and that is what I base the above recommendations upon.

Exhibit A, page 8 (interrogatory 15) reads:

15. Give the names of each and every person known to the Claimant to have been present at the events of May 15, 1984, or who had personal knowledge of the same.

ANSWER:

Barb Schmidt [sic] - foreman - reported incident to her the day after when I reported to work.

Told my husband of incident when I got home that afternoon.

Went to see chiropractor (Dr. D. MacKenzie) day after incident.

Exhibit A, page 21 (interrogatory 21) reads:

21. State when and to whom of the Employer's personnel the Claimant reported her alleged injuries and whether such report was oral or written; if oral what was the substance of such report?

ANSWER:

Barb Schmit [sic] - foreman - reported incident to her upon arriving to work the day after the fall. She told me to just take it easy. As far as I know nothing was written up at the time.

Exhibit B is the deposition of claimant taken on June 19, 1986. On page 10, she described the Teleconnect incident. On pages 14-15, she described the UPS incident of May 15, 1984. On page 16, claimant stated once again that she reported the incident of May 15, 1984 to Barbara Smith on May 16, 1984, when she reported to work at about 11:30 a.m. On page 17, she stated that she does not recall Barbara Smith writing up an accident report. On page 18, she described her back problems caused by the Teleconnect incident. On page 25, claimant stated that the

necessary to allege the injury was work-connected when giving notice. It logically follows that the actual knowledge alternative is not satisfied unless the employer has information putting him on notice that the injury may be work-related.

In the instant case, claimant testified under oath that she informed Barbara Smith of May 16, 1984 at about 11:30 a.m. about her alleged work-related injury of May 15, 1984. I believe claimant's testimony in this regard; specifically, I believe that claimant had a conversation with Barb Smith on May 16, 1984 about her alleged injury and that Ms. Smith was informed that the alleged injury occurred at work. Ms. Bradley testified that Ms. Smith was the proper supervisory person for claimant to report to in the event of a work-related injury. Ms. Smith's testimony at hearing that she did not have a conversation with claimant in May 1984 about an incident on May 15, 1984 is not believed because she obviously demonstrated a faulty memory by her performance at the hearing held on March 11, 1987.

It is of no consequence in this particular case who has the burden of proof on the section 85.23 issue because claimant's testimony, on the fact issue of whether she told her UPS supervisor about the incident of May 15, 1984, is believed by this hearing deputy. In other words, if it is assumed for purposes of discussion that a claimant has the burden of persuasion to establish compliance with section 85.23, claimant in this case would still prevail on the section 85.23 issue.

II. Claimant has the burden of proving by a preponderance of the evidence that she received an injury on May 15, 1984 which arose out of and in the course of 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 established by a preponderance of the evidence that she sustained a work-related injury on May 15, 1984 while working for UPS.

III. The claimant has the burden of proving by a preponderance of the evidence that the injury of March 15, 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).

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).

Dr. Boulden's opinion on this causal connection issue is persuasive. Claimant, therefore, carried her burden of proof on this fighting issue. Claimant sustained some permanent partial impairment as a result of her work-related injury of May 15, 1984. I am convinced that claimant sustained a new injury or materially aggravated a preexisting condition.

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

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

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

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

IV. 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).

Claimant is entitled to some permanency benefits in this case and, therefore, the date when the benefits commence must be determined. Some evidence of record on this issue is Dr. Carlstrom's opinion found at page 12 of exhibit 1. However, the evidence of record does not provide much basis for resolution of this issue. Based on the information set out on page 7 of exhibit 1, it is concluded that claimant had reached maximum healing on August 30, 1984 and, therefore, permanency benefits commence on August 31, 1984.

Claimant's current employment as a deputy clerk is a consideration in assessing her industrial disability; her current employment lessens her industrial disability and defendants' resulting liability. However, I am convinced that claimant has sustained some loss of earning capacity as a result of her work-related injury of May 15, 1984 and resulting permanent partial impairment. A showing that a claimant has not sustained any loss, or a small loss, of actual earnings does not preclude a finding of industrial disability. See Michael v. Harrison County, 34 Biennial Reports, Iowa Indus. Comm'r 218, 220 (Appeal Decision 1979) and the cases discussed therein. Taking all appropriate factors into account, it is concluded that claimant is entitled to 25 weeks of permanent partial disability benefits based on an industrial disability of five percent.

FINDINGS OF FACT

1. Claimant was born on October 18, 1950.

2. Claimant graduated from high school in 1968.

3. After graduating from high school claimant worked at a number of clerical jobs.

4. Claimant worked for Teleconnect in Cedar Rapids, Iowa from July 1982 through February 1983 as a secretary/receptionist and injured her back while employed by Teleconnect.

5. Claimant started working for UPS in April 1984 and voluntarily quit her employment with UPS in May 1984.

6. On May 15, 1984, claimant sustained a new injury to her back or materially aggravated her preexisting back condition.

7. On May 16, 1986, claimant informed her immediate supervisor, Barbara Smith, about her work-related injury of May 15, 1984 and told Ms. Smith that this injury was sustained on the job.

9. Claimant reached maximum healing on August 30, 1984.

10. Claimant is currently working as a deputy clerk for the U.S. District Court and is paid about $17,000 per year.

11. Claimant's industrial disability is five percent (5%).

12. Claimant's stipulated rate is ninety-nine and 26/100 dollars ($99.26).

CONCLUSIONS OF LAW

1. This action is not barred by Iowa Code section 85.23.

2. Claimant sustained a work-related injury at UPS on May 15, 1984.

3. There is a causal connection between the work-related injury of May 15, 1984 and some permanent partial impairment.

4. Claimant is not entitled to any healing period benefits because after her separation from UPS she started work for the U.S. District Court; her permanency benefits commence on August 31, 1984 if it is necessary to determeine when she reached maximum healing. An argument could be made that permanency benefits should commence on May 15, 1984 because claimant is not entitled to any healing period benefits. It is unnecessary to resolve this issue as claimant is only entitled to twenty-five (25) weeks of permanency benefits.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay claimant twenty-five (25) weeks of permanent partial disability benefits at a rate of ninety-nine and 26/100 dollars ($99.26).

That defendants pay accured benefits in a lump sum and pay interest purusant 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 Industrial Services Rule 343-4.33

That defendants shall file claim activity reports, pursuant

to Industrial Services Rule 343-3.1(2), as requested by the agency.

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

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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001538

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES BROWN, Claimant, vs. DES MOINES ASPHALT & PAVING COMPANY, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Defendants.	File No. 688217 R E V I E W - R E O P E N I N G D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by James Brown, claimant, against Des Moines Asphalt and Paving Company, employer, and United States Fidelity and Guaranty Company, insurance carrier, for the recovery of further benefits as the result of an injury he received arising out of and in the course of his employment on September 9, 1981. This case was heard October 7, 1986 at the office of the Division of Industrial Services in Des Moines, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, Merlin F. Hopper, Frank Moyer and Larry S. Brown; claimant's exhibits 1 through 9; and, defendants' exhibits 1 through 3.

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 his employment on September 9, 1981;

2. Claimant's injury caused temporary total or healing period disability and ten percent permanent partial disability to the right upper extremity; and,

3. Claimant's rate of compensation is $264.30.

The issues to be determined in this proceeding are:

1. Whether claimant is entitled to healing period benefits for the period from May 11, 1982 to September 6, 1983; and,

2. Whether claimant is entitled to healing period benefits from March 15, 1985 to December 16, 1985.

EVIDENCE PRESENTED

Claimant testified that he was a truck driver for defendant. He explained in detail his job duties and the use of his right arm to perform them. Claimant advised that defendant's business was that of an asphalt paver and seasonal in nature. He said he injured his right arm in September 1981 about three-fourths of the way through the season.

Claimant first sought treatment for his injury from his family physician but later came under the care of Martin S. Rosenfeld, D.O. Dr. Rosenfeld apparently treated claimant conservatively. He last saw Dr. Rosenfeld on May 10, 1985. Claimant said he returned to work in the spring of 1985 but contended he could not handle the job. He said he then moved to Cedar Falls, Iowa.

In November 1982 claimant consulted James E. Crouse, M.D. Dr. Crouse suggested the possibility of surgery to excise claimant's right distal clavicle. Surgery was peformed in October 1983. Claimant said he had a second surgery in December 1984. For a period of time in July 1984 claimant worked for Weaver Construction Co. Claimant said he was released for light duty work following his December 1984 surgery on March 15, 1985. Claimant said he sought work from defendant but was not hired back. He said other efforts to find light work were unsuccessful. Claimant contended he had a setback in his recovering from the second surgery in April 1985 while lifting weights.

On cross-examination claimant admitted he had been represented in this matter since May 1982. He denied making representations he could work between May 1982 and September 1983. He admitted he did not seek medical treatment from May until November 1982. Claimant stated he went to defendant following his light duty release in March 1985 but did not tell them he was available for light duty work.

Claimant stated he worked for Weaver Construction Company in July 1983 or 1984. Claimant said he received a full release to return to work on December 16, 1985.

Merlin F. Hopper testified that he is the vice president in

charge of sales for defendant. He said his duties also include overseeing employees and some work with workers' compensation claims. He said he has followed claimant's injury since September 1981.

Mr. Hopper advised that claimant returned to work in May 1982 for a short period of time. He said he did not know why claimant left his employment with defendant and has had no contact with him until April 1986. He said that the defendant received no notice that claimant could return to light duty work in March 1985. He said defendant would have had light duty work available for claimant within the light duty restrictions.

He said that claimant came looking for a truck driving job in April 1986. No such jobs were available at the time, but Mr. Hopper checked on claimant's driving record nonetheless. The driving record is in evidence as defendants' exhibit 3. On cross-examination Mr. Hopper stated that claimant would not have been hired due to his driving record.

Frank Moyer testified that he is employed by defendant as a purchasing agent, truck foreman, and shop foreman. He said claimant returned to work following his injury in May 1982. In July 1982 claimant called in to work reporting he would be absent due to appointments with lawyers. Claimant did not report to work thereafter. Mr. Moyer stated that after claimant returned to work he reported soreness in his shoulder but did not request special consideration.

Larry S. Brown testified that he is a claims adjuster for the insurance carrier. He stated that he took over management of claimant's file from another employee. He said he had reviewed the file and found no reference to a request for additional benefits for the period from May 1982 to September 1983. He contended that normal office procedure would have been to note in the file any such inquiries. Mr. Brown advised that the file reflected that in July 1983 there was a conversation with claimant's attorney about continued problems with claimant's shoulder.

Claimant's exhibit 1 is the deposition testimony of James E. Crouse, M.D., given September 30, 1986. Dr. Crouse advised that he is an orthopedic surgeon practicing in Waterloo, Iowa. The doctor reported that his first contact with claimant was November 18, 1982 at which time he took a history from and examined claimant. Based upon that history and examination Dr. Crouse diagnosed claimant's condition as a sprain of the acromioclavicular joint with disruption of the cartilage in the joint and cystic changes in the joint. He causally related claimant's condition to his injury of September 1981. Dr. Crouse believed it would be necessary to excise this distal portion of claimant's clavicle to relieve the shoulder problem.

Dr. Crouse said he next saw claimant on September 8, 1983. The purpose of this visit was further consideration of shoulder surgery which was performed October 24, 1983. Dr. Crouse stated that based upon claimant's statement that he could not work and job description, it was his opinion that claimant could not do many of his job activities between November 1982 and October 1983.

Dr. Crouse went on to testify about his follow-up care of claimant through the fall of 1983 and spring and summer of 1984. He said that on March 22, 1984 claimant was doing quite well although he would have a lot of soreness in his shoulder with lifting activity. When claimant was seen on June 26, 1984, Dr. Crouse diagnosed chronic impingement of the subacromial space which he related to the injury of September 1981. Dr. Crouse advised that claimant was not released to return to work at that time. The same problem was noted August 27, 1984 at which time a second surgery was planned. Claimant was not released to return to work. The second surgery was to be for acromioplasty and exploration of the rotator cuff.

Claimant's second surgery was performed December 3, 1984. No rotator cuff tear was found. A portion of the acromion was excised along with the bursa and a tight ligament was released. The doctor indicated these procedures were necessary to treat persistent bursitis and tendonitis. Dr. Crouse followed claimant through the winter of 1985. Claimant was released to return to light duty work on March 14, 1985. Dr. Crouse next saw claimant December 16, 1985, April 25, 1985, and then again in August and October. The doctor advised that when he saw claimant on December 16, 1985 he had achieved maximum medical recovery.

Claimant's exhibits 2 and 3 are medical reports and office notes from Dr. Crouse. The substance of these reports and notes has been adequately reviewed through the doctor's testimony and need not be set forth again. It is interesting to note, however, that in the doctor's letter of November 18, 1982 to claimant's counsel, Dr. Crouse estimated claimant would need two or three months post surgery rehabilitation before returning to work.

Claimant's exhibits 4 and 5 are copies of reports from Martin S. Rosenfeld dated February 18, 1982 and May 20, 1982 respectively. In his first letter Dr. Rosenfeld reviews the history of claimant's injury and his findings on physical examination. Dr. Rosenfeld diagnosed a traumatic blow to the femoral branch of the brachial plexus with resolving neuritic pain. In his letter of May 20, 1982 the doctor noted that claimant had residual right shoulder and right acromioclavicular pain. He assigned a permanent impairment of ten percent of the right upper extremity.

Claimant's exhibit 6 is a copy of the transcript of hearing

on December 9, 1982 in the Iowa Department of Job Service hearing number 83R-VI-2180-OT. This is reviewed in conjunction with defendants' exhibit 2 which is a copy of a claims deputy's decision in the same file dated September 23, 1982. These documents disclose that the Department of Job Service found that claimant voluntarily quit his employment with defendant on July 9, 1982 without explanation. In that proceeding claimant admitted he returned to work for defendant in May 1982. He also admitted that he did not advise defendant as to his reason for leaving work. He admitted that he did not seek medical treatment prior to leaving his employment or thereafter until November 1982. Claimant also stated at the hearing that during the pendency of his claim for benefits he continued to seek employment which apparently included truck driving jobs.

Claimant's exhibits 7 and 8 are his answers and clarifications thereof to defendants' interrogatories. These answers provide little additional information. It is noted that claimant's answers filed August 1, 1984 do not disclose his July 1984 employment with Weaver Construction Co. See interrogatory 10 and 20. This employment was disclosed in his answers filed September 10, 1986. The answers to interrogatories also include a January 7, 1985 report from Dr. Crouse.

Claimant's exhibit 9 is a copy of claimant's deposition testimony given September 20, 1984. Claimant explains in considerable detail the circumstances of his injury. He also outlines his course of treatment to date. Claimant states he was employed by Weaver Construction Co. in July 1983. Claimant testified that he did tell defendant he was having problems with his shoulder after his return in May 1982 and that he returned to Dr. Rosenfeld. Claimant indicated that when he left Des Moines in 1982 he moved to Iowa Falls and lived with a girlfriend.

Defendants' exhibit 1 is a copy of a summary of compensation payments made to claimant. Defendants' exhibit 3 is a copy of claimant's driving record. This record shows eleven traffic convictions including OMVUI from July 28, 1978 to January 31, 1986. Two license revocations for alcohol related problems, an April 23, 1985 accident, and a December 23, 1985 license suspension.

APPLICABLE LAW AND ANALYSIS

Analysis of this case must begin with what appears to be some degree of inconsistency in both claimant's version of the facts and his theories of recovery. First, claimant argues that he is entitled to healing period benefits commencing May 11, 1982 and continuing to September 6, 1983. He contends that none of the requirements of section 85.34(1) were met during this period of time. He argues this position notwithstanding his August 6, 1982 application to the industrial commissioner for a partial commutation of benefits in which he and his counsel

represented that the period of his disability had been definitely determined as of that date. See section 85.45(1) and R.C.P. 80(a). Claimant's present testimony is that in August 1982 his condition was so disabling he could not work at all. He further argues that he did not return to work in May 1982, thus terminating healing period benefits. The record, however, contains ample evidence including claimant's sworn testimony at a job service hearing and sworn answers to interrogatories that he returned to work for defendant in May 1982 and continued in their employ until July 1982.

Claimant stated in his deposition that after he returned to work in May 1982 he developed shoulder pain and consulted Dr. Rosenfeld. At this hearing and at the job service hearing claimant said he did not return to Dr. Rosenfeld after May 10, 1982. Claimant has contended throughout his sworn testimony that he quit work at defendant in July 1982 because of severe shoulder and arm pain. He admitted at his job service hearing, however, that he did not inform the defendant that this was the reason for his leaving. His deposition reveals that he left Des Moines to move in with a girlfriend in Iowa Falls. In addition, even though claimant contends he had to quit work because of continuing shoulder pain, he did not request or seek additional medical treatment until November 1982. Claimant conceded he had the benefit of legal counsel throughout this period.

In addition, claimant was apparently employed by Weaver Construction Co. in either July 1983 or 1984. His job was to push asphalt with a lute and lasted from four to six weeks. Claimant's deposition testimony suggests he had this job in July 1983. His testimony at this hearing and answers to interrogatories indicate July 1984. Since claimant's hearing testimony relates this to a period when he was under the care of Dr. Crouse, it would seem July 1984 is the more likely date for that employment. Thus, claimant was gainfully employed at the very time he had Dr. Crouse convinced that he was so disabled he could not work. There is not a single reference to this employment in any of Dr. Crouse's notes nor in his deposition testimony. It would further appear that claimant did not bother to notify defendants of this employment. Even claimant's August 7, 1984 answers to interrogatories fail to disclose employment he had had less than two weeks earlier. This employment was not disclosed until September 1986.

In addition to his nondisclosure of employment, claimant's driving record discloses he was involved in an auto accident on April 23, 1985. The record does not reveal the nature or circumstances of this accident. There is no reference to this accident in Dr. Crouse's office notes. There is no reference in claimant's answers to interrogatories. It is noted, however, that it was two days later, April 25, 1985, that claimant reported to Dr. Crouse a "bit of a setback" in his recovery.

The setback was attributed to lifting weights.

Claimant denied at hearing that he made any representations to anyone that he was capable of employment between the period of May 11, 1982 and September 6, 1983. It was during this period that claimant was seeking unemployment compensation benefits. See section 96.4(3). It is also noted that claimant did not seek medical treatment from Dr. Crouse until after he had been denied unemployment benefits from job service on the basis of a voluntary separation of his employment from defendant.

These inconsistencies, omissions, and lack of candor on behalf of claimant render exceedingly suspect any medical opinion based upon claimant's history or complaints of pain. It is the claimant's burden to prove by a preponderance of the evidence that the injury of September 9, 1981 is the cause of the disability upon which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The issue of such a relationship is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

The opinions of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). An opinion of an expert based upon an incomplete history is not binding upon the commissioner, but must be weighed together with the other disclosed facts and circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Burt, 247 Iowa 691, 73 N.W.2d 732. In regard to medical testimony, the commissioner is required to state the reasons on which testimony is accepted or rejected. Sondag, 220 N.W.2d 903.

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

Claimant's argument that none of the prerequisites of section 85.34(1) had been met on May 11, 1982 is rejected. Even if Dr. Rosenfeld's impairment rating did not accurately reflect the date claimant achieved maximum medical recovery, claimant did in fact return to work. The exact date of claimant's return

was not disclosed at hearing. In the absence of evidence to the contrary, however, May 11, 1982 is adopted. This was the date claimant represented to the industrial commissioner in order to obtain his August 6, 1982 partial commutation. It is thus clear that the termination of claimant's healing period benefits on May 10, 1982 was proper on the basis of two of the three requirements of the statute; he had achieved maximum recovery and he had returned to work. The only question is whether he was entitled to have those benefits reinstated at a later date.

Claimant contends that he quit his employment on July 9, 1982 because of pain and discomfort from his injury. He has not been persuasive on this point. He did not request that defendant accommodate his difficulties; he did not request or seek additional medical treatment; and, he did not even tell defendant that he was leaving because he could not do the work. It was not until November 1982 that claimant sought additional advice on his condition. Further, claimant's deposition suggests personal motives for wanting to move from Des Moines to Iowa Falls.

Claimant has also failed to establish that healing period benefits should be reinstated in November 1982 when he first visited Dr. Crouse. Claimant did not pursue any treatment with Dr. Crouse until September 1983. Also, his permanent impairment did not improve. In fact, his permanent impairment of ten percent of the extremity has not changed since May 10, 1982. Claimant cannot extend his temporary disability merely by failing to follow medical advice. The only date which would reasonably support a recommencement of temporary total or healing period benefits is September 8, 1983 when he returned to Dr. Crouse for actual treatment of his condition.

The next question is when, or if, claimant's temporary disability terminated following the September 8, 1983 recommencement date. Again, it would appear section 85.34(1) is controlling. The record shows that claimant returned to work in July 1984 for Weaver Construction Co. This employment lasted four to six weeks. Absent any clarity as to dates, it will be found that claimant returned to work on July 1, 1984 and quit on or about August 4, 1984. On June 26, 1984 Dr. Crouse noted that claimant had improved but still had weakness and restricted motion. Claimant was advised to continue a rehabilitation program. He was not released to return to work. By August 27, 1984 claimant's condition had deteriorated to the point where a second surgery was necessary.

Dr. Crouse causally relates claimant's need for the second surgery to the original injury of September 1981. It is clear, however, that Dr. Crouse's opinion was based upon an incomplete history and inaccurate information provided him by claimant. There is no indication that Dr. Crouse knew claimant had returned to work in the construction industry in July 1984 contrary to

his recommendation for a conservative therapy treatment program. It is not possible to determine on this record whether the persistent bursitis and tendonitis which necessitated the surgery would have been present had claimant followed the doctor's advice. Thus, Dr. Crouse's opinion as to causation between the original injury and claimant's second surgery must be disreguarded. It is equally possible that claimant's second surgery was necessitated by his failure to follow the advice of his treating physician. The ultimate objective of the workers' compensation law is to return the injured employee to work. The accomplishment of this goal requires the cooperation of all parties and an employer should not be penalized for an employee's unreasonable refusal to accept medical treatment. Johnson v. Tri-City Fabricating & Welding Company, Thirty-Third Biennial Report of the Industrial Commissioner 179 (1977).

Based upon the above and foregoing, claimant has failed to establish that he is entitled to additional healing period benefits for the period from May 11, 1982 to September 6, 1983. Claimant has further failed to prove that there is a causal relationship between his injury and the disability he suffered from March 15, 1985 to December 16, 1985.

To the extent that the defendants may have overpaid claimant, they are entitled to credit against any future benefits to which the claimant may be entitled. The industrial commissioner is without authority to order claimant to reimburse defendants for any overpayment.

FINDINGS OF FACT

WHEREFORE, the following facts are found:

1. On September 9, 1981 claimant received an injury to his right arm.

2. As a result of the injury claimant was off work from September 9, 1981 to May 11, 1982.

3. Claimant returned to work for defendants on May 11, 1982 and voluntarily quit on July 9, 1982.

4. Claimant quit working for defendants on July 9, 1982 for personal or unknown reasons.

5. On August 6, 1982 claimant obtained a partial commutation of benefits at which time he represented to the industrial commissioner that his healing period terminated May 10, 1982.

6. As a result of his injury claimant suffered a permanent partial impairment of his right upper extremity equal to ten percent.

7. Between May 10, 1982 and November 18, 1982 claimant did not seek medical treatment or consultation.

8. Claimant consulted a physician on November 18, 1982.

9. Between July 9, 1982 and September 6, 1983 claimant was capable of engaging in employment substantially similar to that in which he was engaged at the time of his injury.

10. On September 6, 1983 claimant sought additional medical treatment which resulted in surgery to resect the distal clavicle of his right shoulder.

11. As a result of his surgery, claimant was temporarily totally disabled from September 6, 1983 to July 1, 1984.

12. On July 1, 1984 claimant returned to work for Weaver Construction Company.

13. Claimant has been less than candid.

14. Claimant returned to work on July 1, 1984 without a release from his doctor.

15. Claimant failed to disclose to his doctor that he returned to work on July 1, 1984.

16. In December 1984 claimant underwent surgery for chronic tendonitis and bursitis of the right shoulder.

17. The opinion of Dr. Crouse that claimant's second surgery was the result of his injury of September 9, 1981 is not reliable because of claimant's failure to provide Dr. Crouse with a complete and accurate history of his activities prior thereto.

18. Claimant has been paid all permanent partial disability benefits to which he is entitled.

19. Claimant has been paid the following temporary total and/or healing period benefits:

September 10, 1981 to May 10, 1982
August 7, 1983 to May 10, 1984
September 26, 1984 to May 23, 1986

CONCLUSIONS OF LAW

IT IS THEREFORE CONCLUDED that claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from September 6, 1983 to July 1, 1984.

IT IS FURTHER CONCLUDED that defendants are entitled to credit against any additional or future benefits due claimant in an amount equal to the excess benefits they have paid to claimant.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from these proceedings.

All costs are taxed to claimant.

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

Steven E. Ort
STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEL P. BUCKLES,

Claimant,

vs.

J. I. CASE COMPANY,

Employer,
Self-Insured,
Defendant.

File No. 768671

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 Del P. Buckles, claimant, against J. I. Case, self-insured employer, for benefits as a result of an alleged injury on June 19, 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; claimant's exhibits 1 through 3; defendant's exhibit A through Z and AA. At hearing, defendant was allowed an opportunity to introduce additional materials into the record of this case. Neither the agency or claimant have received these materials and, therefore, they are not received or considered. Defendant stated in its letter brief that it was unable to locate the materials it had sought to introduce into evidence. Claimant also filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $370.86; that claimant's injury arose out of and in the course of his employment with J. I. Case; that healing period benefits are not at issue; that permanent partial disability benefits commence on June 11, 1985, if awarded; that claimant has been paid medical benefits and 101 weeks of disability benefits; and that claimant is entitled to vocational rehabilitation benefits pursuant to Iowa Code section 85.70.

ISSUES

The contested issues are:

1) Whether there is a causal relationship between claimant's injury of June 19, 1984 and his asserted disability; and

2) Nature and extent of disability.

SUMMARY OF THE EVIDENCE

Claimant testified that he was 33 years of age at time of hearing having been born on December 31, 1952. He started working for J. I. Case on September 11, 1972. Prior to starting work for J. I. Case, claimant worked at a gas station and for Fuller Brush. Claimant graduated from high school in 1971 and attended the University of Iowa for one year. He is currently working on an "associate degree" in computer-aided design or manufacturing. He started this program in the fall of 1985. Initially, he received rehabilitation benefits through the state of Iowa to pursue this associate degree. This is an 82 hour program (six semesters) and he needs to complete 22 more hours. He will probably graduate in the fall of 1987.

Claimant testified that he worked in a warehouse at J. I. Case for his first two years of his employment. From 1974-1984, he was a welder at J. I. Case and his only injury during this period (other than the back injury at issue here) was a left knee injury. Claimant described a motorcycle accident in which he injured his neck. He also stated that he injured an arm in a ladder incident and this ladder incident did not result in any back injury (claimant worked the day after the incident).

On June 19, 1984, claimant injured his back and reported this injury to a nurse. He initially was off work for a week as a result of this back injury. Claimant had surgery in early 1985, as he recalls, and stated that it was an L5-S1 disc laminectomy. Claimant testified that in June 1985, he was advised he could return to work with a 30-40 pound weight restriction with no repetitive lifting or stooping. But see exhibit Z (twenty-five pound weight restriction imposed by Dr. Milas); Dr. Chesser may have imposed the 30-40 pound restriction. The doctor who performed claimant's surgery (R. W. Milas, M.D.; see exhibit E) advised him to seek retraining. Claimant testified that he has friends [who have] "less seniority [than he would have if he was still at J. I. Case who] are welders at J. I. Case." Claimant currently has problems with pain and does not shovel the walk anymore.

On cross-examination, claimant stated that his motorcycle accident occurred in 1972 or 1974. This accident resulted in a strain to the neck and a mild concussion and he missed six months of work as a result of his injuries. Claimant could not recall when the "ladder incident" occurred. In January 1978, claimant injured a knee and was off work from January 1978 through November 1980 as a result. In April 1978, he fell on some stairs and was knocked unconscious, but no injuries resulted. Claimant described his current schooling as "working with computers and entering drawings into computers." He has interviewed with Square D, but was not hired because he does not graduate until the fall of 1987, if then.

page 31 with Mr. Shepler asking the question:

> Q. I take it even for a surgeon like Dr. Milas, but especially for yourself with the records you have available to you, it is pretty difficult to say whether Mr. Buckles might have had some degenerative conditions in his back that pre-existed his herniated disc?
>
> A. Correct.

On page 32, Dr. Chesser imposed a 13 percent whole body rating and on page 33 stated a 30-40 pound weight restriction. On page 35, he stated that claimant got a "decent surgical result." on page 45, he stated in response to a question by Mr. Liebbe:

> Q. If I understand you correctly, you are saying that the injury he reported was the cause of that central herniation?
>
> A. Yes.

On page 53, Dr. Chesser responded to a question posed by Mr. Shepler:

> Q. Ordinarily if he had had the type of herniation surgically addressed by Dr. Milas right after the June 1984 accident, you would normally expect some compromise of that S-1 nerve root either right after the accident or certainly by the time you saw him in December 1984, wouldn't you?
>
> A. I would.

APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the injury of June 19, 1984 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

A 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).

I am convinced by Dr. Chesser's testimony that the work-related injury of June 19, 1984 caused claimant's herniated disc with the resulting surgery. The fact that the herniation did not occur shortly after the incident in June 1984 is not sufficient, given all the evidence of record, to persuade me that there is no causal connection between claimant's work-related injury and the disc herniation he ultimately experienced. Also, I am not convinced that claimant had low back problems that predated June 1984 that caused the impairment he now suffers; that is, I am persuaded that he recovered from the injuries he sustained prior to June 1984 and that, in any event, most of those injuries or problems affected areas other than claimant's back.

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).

Claimant is now 34 years of age and his ability to do manual labor is now questionable. Dr. Chesser testified that he "felt [claimant] could not return to heavy construction work" and this testimony is believed. Claimant, however, is obviously well motivated to obtain an education that will enable him to overcome his physical limitations. It would appear that he will reenter the labor force in the fall of 1987 after he completes his training at Black Hawk College. It is probable that he will reenter the labor force this fall, not merely possible, and this circumstance is of greater consequence in assessing his industrial disability as compared to a circumstance in which a worker's chance of gaining employment is remote or unlikely. In sum, the probability that claimant will reenter the labor force in the fall reduces his industrial disability.

Taking all appropriate factors into account, it is concluded that claimant is entitled to 175 weeks of permanent partial disability benefits based on an industrial disability of 35 percent. Defendant has paid 101 weeks of disability benefits and defendant is entitled to credit toward the healing period or permanency benefits owed to claimant.

FINDINGS OF FACT

1. Claimant is thirty-four (34) years old.

2. Claimant is a high school graduate with one year of college.

3. Claimant started working for J. I. Case on September 11, 1972; prior to starting work for J. I. Case performed manual labor jobs.

4. On June 19, 1984, claimant injured his back while working for J. I. Case; he was a welder on that date.

5. In 1985, claimant had an L5-S1 disc laminectomy performed by R W. Milas, M.D.

6. Claimant has sustained permanent partial impairment as a result of his back injury of June 19, 1984 and the back surgery performed by Dr. Milas.

7. Claimant's permanent partial impairment prevents him from performing heavy labor now and in the future.

8. Claimant is currently pursuing a two year associate degree from Black Hawk College in the field of computer-assisted design and will probably graduate in the fall of 1987.

9. Claimant will probably reenter the labor force in the fall of 1987 as he is a well-motivated student and is well motivated to return to work.

10. Claimant's industrial disability is thirty-five percent (35%).

11. Claimant's stipulated rate of weekly compensation is three hundred seventy and 86/100 dollars ($370.86).

CONCLUSIONS OF LAW

1. Claimant established by a preponderance of the evidence that there is a causal connection between his work-related injury of June 19, 1984 and the impairment of his back.

2. Claimant established entitlement to one hundred seventy-

five (175) weeks of permanent partial disability benefits commencing on June 11, 1985.

ORDER

IT IS THEREFORE ORDERED:

That defendent pay one hundred seventy-five (175) weeks of permanent partial disability benefits commencing on June 11, 1985 at a rate of three hundred seventy and 86/100 dollars ($370.86).

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

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

That defendant pay the costs of this action pursuant to 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 25th day of February, 1987.

T. J. McSweeney

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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001557

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOYCE BURKHEAD,	:	
	:	File No. 728496
Claimant,	:	
	:	A R B I T R A T I O N
vs.	:	
DR. KEN HENRICHSEN d/b/a WINTERSET VETERINARY CLINIC,	:	D E C I S I O N
Employer,	:	
and	:	
UNITED FIRE & CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Joyce Burkhead, claimant, against Dr. Ken Henrichsen d/b/a Winterset Veterinary Clinic, employer, hereinafter referred to as the Vet Clinic, and United Fire and Casualty Company, insurance carrier, defendants, for benefits as the result of an alleged occupational disease or injury on or about March 15, 1983. On November 19, 1986 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 suffered a toxic exposure to certain chemicals while working for the Vet Clinic. She is also claiming that as a result of an occupational disease or, in the alternative, a work injury, she underwent extensive medical treatment and is no longer able to return to work for the Vet Clinic. Claimant seeks healing period benefits during her recovery from the chemical exposure and permanent partial disability benefits for an alleged permanent physical impairment caused by the occupational injury or disease. In addition, claimant is seeking reimbursement for medical expenses.

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: Bill Burkhead and Penny Chrysler. The exhibits receieved 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. Claimant received an injury which arose out of and in the course of employment with the Vet Clinic on March 15, 1983, but whether there was a continuous or prolonged exposure over the period of employment with the Vet Clinic was a matter in dispute to be resolved by this decision;

2. The time off work for which claimant is now seeking either temporary total disability or healing period benefits is from September 1, 1983 to June 1, 1984;

3. The type of permanent disability if the injury or occupational disease is found to be a cause of permanent disability is an industrial disability to the body as a whole;

4. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $132.82 per week; and,

5. The fees charged for medical services for which claimant seeks reimbursement in this proceeding are fair and reasonable and causally connected to the treatment of the condition upon which claimant is basing her claims in this proceeding but that the reasonableness and necessity of the treatments and their causal connection to any work injury was an issue to be decided in this decision.

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

I. Claimant received an injury or occupational disease arising out of and in the course of her employment;

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

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

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

FINDINGS OF FACT

1. Claimant was a credible witness.

Claimant's appearance and demeanor at the hearing indicated that she was testifying in a candid and truthful manner.

2. Claimant was employed by the Vet Clinic from September 1981 to April 1983 as a receptionist/secretary and as mixer and dispenser of feed additives.

Claimant's testimony established that as a mixer and dispenser of feed additives, she was was regularly required by the Vet Clinic to mix both liquid and dry chemicals. The liquid chemicals were stored and mixed in a small supply room in the Vet Clinic but the dry chemicals were stored and mixed in an attached garage area. The dry chemicals were contained in bags ranging from ten to fifty pounds and were not covered. The dry chemicals at first were mixed together in a thirty gallon garbage can. The chemicals were removed from their storage bags using a coffee can. The chemicals were then poured into a paper bag for weighing and subsequently dumped into the garbage can. The garbage canwas then rolled around to mix the ingredients together. Claimant established that there was a considerable amount of chemical dust in the air most of the time within the garage area as a result of this process. This chemical dust collected on shelves and on all items stored in the area. There was no ventilation system within the garage area at the time claimant worked there. The clinic's feed additive business then increased and the mixing had to be accomplished with an open cement mixer. This automated mixing process increased the amount of chemical dust in the air of the garage.

At first, claimant was not furnished protective equipment but was later given gloves and masks. This protection, however, was ineffective according to the testimony of claimant and fellow employee, Penny Chrysler. Claimant and Chrysler established that claimant was regularly exposed to chemical dust by physical contact with the dust on claimant's hands, face, eyes, nose, mouth, hair, and by breathing the dust internally. Claimant testified and defendants admit that the chemical dust to which claimant was regularly exposed contained the chemicals known as copper sulfate, arsenilic acid, and F.O.A. 290.

3. On April 23, 1983 claimant suffered disablement as the result of an occupational disease which arose out of and in the course of her employment with the Vet Clinic.

On April 24, 1983 claimant permanently discontinued working at the Vet Clinic pursuant to instructions from her physicians as the result of a severe allergy or hypersensitivity to the chemicals of copper sulfate, arsenilic acid, and F.O.A. 290 which was acquired as a result of her repeated exposures to those chemicals while performing her job at the Vet Clinic over approximately two years. The level of exposure to copper sulfate, arsenilic acid, and F.O.A. 290 at the Vet Clinic was far greater than in everyday life or in other occupations. These findings are based upon the preponderance of the medical opinion evidence presented in this case and the credible history of the disease process described by claimant, her husband, and two physicians involved in this case.

Prior to 1980, claimant had allergies and frequent colds but the symptoms were not serious and she never lost work as a result of these symptoms. In 1980 while working for another veterinary, claimant had an allergic reaction to Glytassin and Oxytetracycline powder (an antibiotic) consisting of a rash on her face but no watering of the eyes. Upon a diagnosis of contact dermatitis by Robert T. Schulze, M.D., a dermatologist, claimant symptoms cleared after treatment which included injections of steroid medications. Claimant was, however, told to avoid these substances in the future which she did and she experienced no future allergic reactions until her employment at the Vet Clinic.

Three or four months after beginning her employment with the Vet Clinic in September 1981, claimant began to notice persistent post nasal drainage and nasal congestion. These symptoms along with headache and watering eyes were worse during times of the feed additive mixing. In January 1983, claimant broke out with a rash on her face with edema of the eyelids. She was then seen by a physician's assistant who treated her with a steroid injection. The symptoms decreased for a few days but then reoccurred and she returned to Dr. Schulze. Upon another diagnosis of contact dermatitis, Dr. Schulze gave claimant an injection of steroids and prescribed eyedrops and skin oitments. A week later claimant was referred by the Vet Clinic to another dermatologist, Roger I. Ceilley, M.D. One month later, Dr. Ceilley performed patch testing on claimant using some of the compounds she was working with at the Vet Clinic. From this testing, Dr. Ceilley found that claimant was highly sensitive to four chemicals; namely, copper sulfate, arsenilic acid, F.O.A. 290, and quaternium-15. The worse skin reaction was to copper sulfate.

Between January and March 1983 claimant noticed that when she started her job at the Vet Clinic in the morning her eyes would begin to water and she would develop nasal congestion, post nasal drainage, and headaches. These symptoms improved or disappeared when she was at home. By March 1983, claimant also noticed an abnormal amount of fatigue.

On March 15, 1983 claimant was attempting to avoid duties as a feed additive mixer but at the insistence of a customer, she mixed a bag of feed additive when other employees at the clinic were not available. She did not immediately experience a reaction, but later that evening her eyes began to water and swell. By the next morning her eyes were almost swollen shut. After returning to work, she was referred by the Vet Clinic back to Dr. Ceilley. Upon complaints of muscle aches, feeling tired and nauseous, and a general feeling of ill health, Dr. Ceilley believed that claimant was suffering from a reaction to the feed additives which he termed as "serum sickness" and admitted claimant to the hospital. After steroid medication treatment

and other tests which excluded other causes of claimant's illness, claimant was released after two days upon a final diagnosis that all of the symptoms were attributable to a hypersensitive reaction to the chemicals at the Vet Clinic.

After her return to work a week later when the symptoms subsided, claimant began to develop headaches, watering eyes, and nasal congestion after only a few days. She then was referred by Dr. Ceilley to an allergist, John A. Caffrey, M.D., for immunotherapy. Dr. Caffrey instructed claimant to stay away from the Vet Clinic and claimant left her employment at the clinic on April 24, 1983. In May 1983, claimant complained to Dr. Caffrey of eye difficulties, severe diarrhea, head congestion, dizziness, severe headaches, and muscle cramps. After further patch testing which revealed allergic reactions to many items including cats and tobacco (claimant is a smoker), Dr. Caffrey diagnosed that claimant was suffering from perennial allergic rhinitis and conjunctivitis as a result of an occupational exposure to chemicals at the veterinary clinic. Dr. Caffrey attributes all of claimant's symptoms including diarrhea to the copper sulfate exposure. This diagnosis was made inspite of the views of Thomas B. Summers, M.D., a neurlogist who stated to Dr. Caffrey that claimant was experiencing a psychophysiologic reaction and suspected claimant was suffering from depression.

Dr. Caffrey's immunotherapy ended after a few months because it appeared to the doctor that the treatment was not beneficial to claimant's condition. Claimant has not returned to the Vet Clinic but continues to experience chronic nasal and sinus infections causing continuous nasal congestion and nasal drainage along with a general feeling of fatigue and ill health, headaches, nausea, diarrhea, and muscle cramping. Claimant's condition is currently being monitored and occasionally treated as needed by a clinical toxicologist, Mark T. Thoman, M.D.

All of the treating physicians rendering opinions in this case attribute claimant's chronic nasal congestion and drainage problems, general fatigue, digestive tract problems, and muscle cramping to claimant's hypersensitivity reaction to the chemicals copper sulfate, arsenilic acid, and F.O.A. 290 following her exposure to these chemicals at the Vet Clinic. These causal connection opinions are shared by the toxicologist, Dr. Thoman, whose qualifications are impressive. The causal connection of the chronic nasal infection and drainage problems to the chemical exposure at the Vet Clinic was expressed by a specialist in pulmonary medicine, Steven Zorn, M.D., after his examination of claimant on June 1, 1984. The opinions of Dr. Zorn are not shared by an audolaryngologist retained by defendants, Robert Updegraff, M.D., who attributes much of claimant's problems to general allergies from various substances such as tobacco and to an abnormality called a nasal septum deflection. This deflection was never detected by any other physician in this case despite

the frequent x-rays of claimant's nasal and sinus cavities over the last five years. Therefore, the preponderance of the medical opinion evidence supports claimant's contention that her chronic nasal infection problems and other chronic symptoms of ill health are attributable to chemical poisoning at the Vet Clinic and to her hypersensitivity reaction to those chemicals at work which developed over a period of two years prior to March 1983. As explained by Dr. Thoman, the real culpert was the fact that claimant was compelled to inhale the dust into her sinus passages and lungs. Had the exposure been limited to physical contact to the exterior skin, claimant's reaction would not have been so severe.

4. The occupational disease was a cause of a period of total disability while claimant was recovering from symptoms of the disease extending from March 16, 1983 until April 24, 1984, except for a few days she worked immediately prior to her permanently leaving the Vet Clinic in April 1983 and for the period of time she worked, from May 1983 until September 1983, in another job.

The Vet Clinic owner provided claimant with another job in one of his other business ventures, Tempe Manufacturing, after she left the clinic. The job lasted from May 1983 until September 1983 at which time claimant was laid off because the business venture was not financially successful. On April 24, 1984 claimant reached maximum healing from her occupational disease. The maximum healing date was arrived at from the deposition of the toxicologist, Dr. Thoman, who stated that maximum healing in cases such as claimant's occurs after a year following the last serious exposure. Defendants point out that in the deposition of Dr. Ceilley claimant's symptoms had cleared when he referred claimant to Dr. Caffrey in April 1983. However, Dr. Caffrey explained that claimant was still under heavy doses of steroid drugs at the time in order to control the allergic reactions. There being no other clear opinion as to the time of maximum healing, the views of Dr. Thoman were accepted. Claimant's testimony established that she did not work from the time she was laid off from Tempe Manufacturing until the date of her maximum healing. Claimant did not begin her current job as a waitress until June 1984.

5. The occupational disease which led to disablement on April 24, 1983 is a cause of significant permanent partial impairment to claimant's body as a whole.

Claimant certainly had a medical history of allergic reactions before she worked for the Vet Clinic, but she nad little or no permanent functional impairment as a result of these problems before her exposure to the chemicals at the Vet Clinic. All of the treating physicians rendering opinions as to the causal connection of claimant's difficulties to the chemical exposure

at the Vet Clinic state that claimant suffers from some degree of permanent impairment as a result of this exposure. The permanency opinions are based upon a continuation of claimant's symptoms at the present time despite the lack of any current exposure to the chemicals. Dr. Zorn attributed much of her problems to chronic sinus infection evidenced by yellowish nasal drainage, headaches, and a cobblestone pattern of the posterior pharynx. This opinion is not shared by Dr. Updegraff, but Dr. Zorn's opinions are given the greater weight. Dr. Zorn's written report is much more thorough as to claimant's history and some of the x-ray and clinical findings of Dr. Updegraff are wholly inconsistent with the findings of claimant's treating physician since 1983. All of claimant's treating physicians who believe that claimant suffers permanent chronic infections from the occupational disease defer to Dr. Thoman's expertise as to the extent of claimant's physical impairment.

Based upon his review of the history and his examination of claimant, Dr. Thoman concluded in October 1986 that claimant suffers from a twenty-five to thirty percent permanent partial impairment to the body as a whole as a result of her chemical exposure at the Vet Clinic. This is much higher than an earlier rating he made in 1985. Dr. Thoman explained that claimant was much worse after his second examination in 1986. Generally, the permanent impairment involves not only chronic infections but general fatigue, digestive tract problems, chronic eye problems, and muscle cramps. Dr. Thoman also explains that claimant now has to be much more careful about exposure to all metals and to other substances she had been allergic to in the past. The doctor states that claimant has become hypersensitive or much more sensitive than before 1981 to those materials as a result of her expsosure at the Vet Clinic and she must, therefore, restrict her everyday life activities and the type of physical work she can perform accordingly. Even in her current job as a waitress, according to Dr. Thoman she will experience difficulty with handling certain types of foods and chemicals present in a restaurant setting.

6. The occupational disease of claimant caused by her work at the Vet clinic is a cause of a forty-five percent permanent loss of earning capacity or industrial disability.

As a result of her functional impairment and physician imposed physical restrictions, claimant is unable to return to the work she was performing at the Vet Clinic. Whether or not claimant had some sort of functional impairment from her various allergies before her employment at the Vet Clinic is not important as there is no evidence of any loss of earning capacity before 1983.

Claimant's past employment primarily consists of work as a waitress, secretary/receptionist, and as a veterinary clinic

worker. Despite reasonable efforts to find suitable replacement employment, claimant has not located such employment. Although she is working as a waitress, claimant was credible when she explained that this job was obtained only because of her friendship with the owners. Dr. Thoman has demonstrated that claimant would have difficulty in working in manufacturing jobs and other areas where exposure to metals and certain foods would occur on a regular basis. However, claimant has not demonstrated, prima facie, that secretary/receptionist jobs generally are not available to her because of her disability.

Claimant has suffered a significant loss of actual earnings from employment due to her occupational disease. Claimant's credible testimony establishes that she would be making at the present time approximately $8.00 per hour if she were to have continued at the Vet Clinic. She currently earns only minimum wage or $3.35 per hour as a waitress.

Claimant is forty-six years of age and does not have a high school education. Claimant has shown low potential for successful vocational rehabilitation. However, claimant has not shown that the services she can perform as a secretary/receptionist in a relatively clean environment are so limited in quality, quantity, and dependability that a reasonably stable market for them does not exist within the geographical area of her residence.

7. Claimant has incurred reasonable medical expenses for treatment of her occupational disease in the amount of $9,400.33. Exhibit 5, which is uncontroverted, establishes that claimant has incurred a total of $7,920.49 in expenses for hospital and doctor care since 1983. In addition, claimant has submitted a listing attached to the prehearing report demonstrating additional expenses for medical mileage in the amount of $1,479.84. Claimant has demonstrated from the medical evidence presented that the treatment was reasonable for the occupational disease and that all of the treatment was causally connected to this occupational disease.

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 of fact were made under the following principles of law:

I. and II. Claimant alleges to have an occupational disease under chapter 85A of the Iowa Code and is claiming in the alternative a work injury under chapter 85. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury or occupational disease which arose out of and in the course of her employment. The words "out of" refer to the cause or source of the injury or disease. The

words "in the course of" refer to the time and place and circumstances of the injury or disease. See generally Cedar Rapids Community School District v. Cady, 278 W.2d 298 (Iowa 1979); Crowe v. DeSoto Consolidated School District, 246 Iowa 402 68 N.W.2d 63 (1955).

Iowa Workers' Compensation law distinguishes worker injuries from occupational diseases. Iowa Code section 85A.8 states as follows:

> Occupational diseases shall be only those diseases which arise out of and in the course of the employee's employment. Such diseases shall have a direct causal connection with the employment and must have followed as a natural incident thereto from injurious exposure occasioned by the nature of the employment. Such disease must be incidental to the character of the business, occupation or process in which the employee was employed and not independent of the employment. Such disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have resulted from that source as an incident and rational consequence. A disease which follows from a hazard to which an employee has or would have been equally exposed outside of said occupation is not compensable as an occupational disease.

In further explanation in the distinction between the work injuries and occupational diseases the Iowa Supreme Court in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) at page 190 states as follows:

> [T]o prove causation of an occupational disease, the claimant need only meet the two basic requirements imposed by the statutory definition of occupational disease, given in section 85A.8. First, the disease must be causally related to the exposure to harmful conditions of the field of employment....Secondly, those harmful conditions must be more prevalent in the employment concern than in everyday life or in other occupations.

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

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 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).

No apportionment or loss of earning capacity between claimant's preexisting allergy conditions and the occupational disease was made in the finding of fact because such an apportionment is proper only when there was some ascertainable disability which existed independently before the occupational disease occurred. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). In this case, it was found that no such loss of earning capacity existed before 1983.

Based upon a finding of a forty-five percent loss of earning capacity or industrial disability as a result of a disability to the body as a whole, claimant is entitled as a matter of law to 225 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 45 percent of the 500 weeks allowable for an injury to the body as a whole in that subsection.

As claimant has established entitlement to permanent partial disability, claimant may be entitled to weekly benefits for healing period under Iowa Code section 85.34(1) from the date of disablement until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work she was performing at the time of the injury or disease; or, until it is indicated that significant improvement for the injury is not anticipated, whichever occurs first. Given the findings pertaining to times off work because of the work injury and the time she reached maximum healing, claimant is entitled under law to healing period benefits from September 1, 1983 through April 24, 1984 or a total of thirty-three and six-sevenths weeks. In the prehearing report claimant was not seeking healing period benefits prior to September 1, 1983.

IV. Employers are obligated to furnish all reasonable medical services for treatment of a work injury under Iowa Code section 85.27. As a result of the findings concerning medical expenses, defendants are obligated to pay under the law the amounts so found causally related to the occupational disease. Also there is evidence that the defendants' group carrier has paid most of these expenses. However, a credit entitlement issue under Iowa Code section 85.38(2) was not an issue identified as contested at time of the prehearing conference in this case and it was not identified as a hearing issue in the assignment order. Therefore, such an issue cannot be dealt with in this decision except for a general statement that credit should be given if defendants are entitled to such a credit.

ORDER

IT IS THEREFORE ORDERED as follows:

1. Defendants shall pay to claimant two hundred twenty-five (225) weeks of permanent partial disability benefits at a rate of one hundred thirty-two and 82/100 dollars ($132.82) per week from April 25, 1984.

2. Defendants shall pay claimant healing period benefits from September 1, 1983 through April 24, 1984 at the rate of one hundred thirty-two and 82/100 dollars ($132.82) per week.

3. Defendants shall pay claimant the sum of nine thousand four hundred and 33/100 dollars ($9,400.33) as reimbursement for medical expenses listed in exhibit 5 found in the attachment to the prehearing report filed in this matter.

4. Defendants shall pay accrued weekly benefits at a lump sum and shall receive credit against this award for all weekly benefits previously paid.

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

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

7. 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).

8. Defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Service Rule 343-3.1 (formerly Industrial Commissioner Rule 500-3.1).

Signed and filed this 26th day of February, 1987.

Larry P Walsh.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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001570

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DANIEL J. CAMPBELL,	:	
Claimant,	:	
vs.	:	FILE NO. 804104
UMTHUN TRUCKING CO.,	:	
Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
INTERCONTINENTAL INSURANCE, MGRS.,	:	FILED
Insurance Carrier, Defendants.	:	JAN 16 1987
	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Daniel J. Campbell against Umthun Trucking Company, his former employer, and Intercontinental Insurance Managers. The case was heard at Burlington, Iowa on November 3, 1986 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Daniel J. Campbell and Kenneth A. Scott. The record also includes exhibits 1 & 2, 4 through 25, and 29 & 30. Claimant's objection to exhibit 3 is sustained. The offense of fraudulent practice in the third degree is an aggravated misdemeanor under Code section 714.11, not a felony. In view of the nature of the proceeding the matters obtained in exhibit 3 are likewise not shown to be relevent as character evidence.

ISSUES

Claimant seeks benefits as the result of an alleged injury of August 8, 1985. The case carries a full slate of issues including whether or not claimant received an injury which arose out of and in the course of employment; whether a causal relationship exists between the alleged injury and any disability; determination of entitlements to compensation for temporary total disability or healing period; and determination of liability for section 85.27 benefits. Defendants urge that claimant made a false representation on his application for employment which relieves the employer from liability. The employer's position is supported by an excellent brief filed by defense counsel.

SUMMARY OF EVIDENCE

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

Daniel J. Campbell is a 43 year old married truck driver. Campbell testified that on a date of which he was uncertain, while at a town in Missouri of which he was uncertain, he fell from his truck when an "O" ring broke while he was tightening a tarp. Campbell stated that he fell against the tractor and then to the ground. He stated that it happened so fast that he could not be certain of how he actually fell. He testified that he was taken by a colored man to a clinic where an examination found nothing abnormal but he was provided with a sling. Campbell stated that he experienced and made complaints of stiffness and numbness in his right arm.

Campbell testified that he notified the employer of the incident and then drove the truck home where he entered into a course of medical care administered by a number of employer authorized physicians including Donald MacKenzie, M.D., Jerry M. Jochims, M.D., Koert Smith, M.D., G. W. Howe, M.D., and James V. Worrell, M.D.

Claimant testified that the care has not relieved his complaints and that he continues to experience headaches and numbness in his arm. Drs. Howe, Smith, MacKenzie and Worrell have diagnosed claimant as having herniated cervical discs at the C5-6 and C6-7 levels (Exhibits 18 & 24, Exhibit 25, page 6 and Exhibit 30, pages 17 & 18).

At one point in time Dr. Jochims declined to provide further care to claimant because he perceived claimant to be misrepresenting things to him. In exhibit 9, a report from Dr. Jochims dated January 7, 1985, he indicates that he had treated claimant for an alleged work injury with J. I. Case Company in 1977 and was later called as an expert witness in the case. When claimant saw Dr. Jochims for the currently litigated injury he denied ever having seen Dr. Jochims previously and further denied ever having been employed by J. I. Case (Ex. 9).

Drs. MacKenzie, Howe and Worrell are all of the opinion that claimant's condition is such that surgery is indicated (Ex. 23, 24 & 25, p. 7). Dr. Worrell felt that there was a causal connection between the condition he found in claimant's cervical spine and the alleged injury of August 8, 1985, but he was unaware that claimant had seen Dr. MacKenzie for neck pain in 1984 (Ex. 25, pp. 8-10). Dr. Worrell felt that the spurring that he observed in diagnostic tests concerning claimant's cervical spine had existed prior to August 8, 1985, but that the cause of disc herniation could be anything (Ex. 25, p. 6). Dr.

MacKenzie felt that the spurring and degeneration observed in claimant's cervical spine was a progressive condition that had occurred subsequent to a traumatic injury and that would have occurred at least nine to 12 months before November 7, 1985. X-rays from January, 1985, did not show spurring (Ex. 30, pp. 24-26). Dr. MacKenzie stated that the accident of August, 1985, may have excerbated and accelerated the need for surgery but that he was certain that by the time the August, 1985, alleged injury occurred that disc degeneration was well underway (Ex. 30, p. 28).

When claimant applied for employment with Umthun Trucking Company, he made several misrepresentations of fact on his employment application. He denied ever having been injured on the job yet his testimony has revealed at least three claims for workers' compensation benefits, some of which resulted in payments to him. He also denied ever receiving workers' compensation on the application form. Claimant misrepresented his prior employment history by indicating approximately 10 years of continuous employment with Earl Lumsden Trucking, a business which he admitted had never existed. At hearing claimant admitted that he had been employed by several employers. On the application claimant indicated that he had received his last physical examination by a Dr. Seitz on May 16, 1984, when in fact he had been examined by Dr. MacKenzie on January 29, 1985, only two days prior to the date he filled out the application. Exhibit 7 shows claimant to have made complaints on January 29, 1985, which are similar to those he urges arose from the alleged injury of August, 1985. When claimant took his preemployment physical for Umthun he failed to disclose the previous problems he had been having with his back and neck. Claimant's misrepresentations made to Dr. Jochims have already been referred to.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on August 8, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Claimant's petition sets forth an alleged injury date of July 8, 1985. The first report of injury on file indicates an injury date of August 8, 1985. There is reference in the record in the first report of injury and in some medical reports that indicates that claimant was seen and x-rayed at a clinic in Murphy, Missouri. No records, however, from that institution are in evidence. The condition of which claimant complains is one which is not obvious from simple observation. Whether the alleged incident on which he bases his claim occurred on August 8 or July 8, 1985 is not of particular importance when the evidence from the medical practitioners indicates that the cervical spine spurring was a condition which would have preexisted

either date. Exhibit 6 clearly shows that claimant complained of an injury arising from falling off a truck on November 28, 1984 and then made complaints of pain involving his neck and numbness in his right hand on January 29, 1985 (Ex. 7). From the objective evidence in the record, it would appear that the condition of claimant's cervical spine is as likely related to the November, 1984, incident as to any alleged incident from July or August of 1985.

It is only by claimant's subjective complaints that a determination can be made regarding the source or sources of the problem in his cervical spine. Claimant appeared at hearing where his appearance and demeanor were observed. The record is replete with instances of where he has made misrepresentations in order to get whatever it may have been that he wanted. At hearing he stated that his memory is unreliable. It is found that claimant has failed to establish his credibility as a witness. Accordingly, his testimony cannot be relied upon. The complaints of which Campbell testified at hearing are not greatly different from those which appear in the progress notes of Dr. MacKenzie for January 29, 1985 found in exhibit 7. Claimant has been employed as a truck driver subsequent to July and August of 1985 and the fact that he was employed with Umthun for approximately five months is not a particularly persuasive indication that his condition has in any way worsened beyond the normal progressive nature of the degenerative condition as indicated by Dr. MacKenzie. The alleged injury of July or August, 1985, appears quite similar to the injury alleged to have occurred in November, 1984, as both appear to deal with falling from a truck. The alleged injury was unwitnessed and is not corroborated by any evidence confirming that claimant fell from the truck. When all of the evidence as a whole is considered and given the weight which it deserves, it is found that claimant has failed to prove by a preponderance of the evidence that he fell from a truck in July or August of 1985. He has failed to prove by a preponderance of the evidence that he sustained an injury that arose out of and in the course of his employment in July or August of 1985. He has failed to prove that the complaints which he voiced at hearing and for which he has received medical treatment are related in any way to any injury that occurred while he was employed by Umthun Trucking Company.

The fact that the employer and its insurance carrier have paid benefits to claimant does not constitute an admission of liability. Code sections 85.26 and 86.13.

FINDINGS OF FACT

1. Daniel J. Campbell is a resident of the State of Iowa who was employed by Umthun Trucking Company as a truck driver from February, 1985 through August, 1985.

2. Daniel J. Campbell misrepresented facts dealing with his medical history and employment history when he applied for employment with Umthun Trucking Company. He misrepresented material facts concerning his medical history when seen by Dr. Harding for his preemployment physical and when seen by Dr. Jochims for purposes of treatment for the alleged injury upon which this claim is based.

3. Claimant is not a credible witness and his testimony cannot be relied upon.

4. Daniel J. Campbell has failed to prove that he sustained any injury by falling off a truck in July or August of 1985 while he was employed by Umthun Trucking Company.

CONCLUSIONS OF LAW

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

2. Claimant has failed to prove by a preponderance of the evidence that he sustained an injury which arose out of and in the course of his employment with Umthun Trucking Company.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding. The costs of this proceeding are assessed to the parties with each responsible for payment of the cost incurred.

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

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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001575

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA A. CARTER,	:	
	:	
Claimant,	:	
	:	FILE NO. 753620
vs.	:	
	:	A R B I T R A T I O N
OSCAR MAYER FOODS CORPORATION,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

FILED

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IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding brought by Patricia A. Carter, claimant, against Oscar Mayer Foods Corporation, employer and self-insured defendant, for benefits as a result of an alleged injury of a cumulative nature, which manifested itself about November 1, 1983 according to the petition. A hearing was held at Davenport, Iowa on October 14, 1986 and the case was fully submitted at the close of the hearing. The record consists of joint exhibits 1 through 14; defendant's exhibits 15 and 16; and the testimony of Patricia A. Carter (claimant), Vernon Keller (safety/security manager) and Monica Murphy (supervising nurse).

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 times off work for which the employee seeks temporary disability benefits are: November 14, 1983 to April 15, 1984; April 30, 1984 to July 17, 1984; July 19, 1984 to July 29, 1984; and November 17, 1984 to November 18, 1984.

That the rate of compensation in the event of an award is $249.05.

That the medical benefits are not in dispute.

That the defendant is entitled to a section 85.38(2) credit for previous payments under non-occupational group plans in the amount of $6,807.86 for income disability and $4,863.27 for medical expenses.

ISSUES

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

Whether claimant sustained an injury of a cumulative nature that manifested itself about November 1, 1986 which arose out of and in the course of employment with the employer.

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

Whether the claimant is entitled to temporary or permanent disability benefits.

Whether the employer had actual knowledge of the injury or the employee gave notice of the injury within 90 days as required by Iowa Code section 85.23.

SUMMARY OF THE EVIDENCE

Claimant is approximately 43 years old, separated and has one dependent son age 11. She has worked as a "stacker" in the "slice pack" (sliced meat) department for approximately 17 years. In March of 1979, while working in another department temporarily, she was involved in a work related accident that resulted in the amputation of all of the middle finger on her left hand and approximately one-half of the index finger on the left hand. She was paid workers' compensation benefits and both parties agreed that the former injury has no connection with the current action. Claimant's job as a stacker requires repetitive use of both hands on a production line in the plant in approximately 45 degree temperatures seven hours a day and five days a week. A two foot wide plastic belt delivers sliced meat to her in one pound stacks. The stacks are approximately four or five inches high and the meat is cold. She wears gloves provided by the employer but her hands still get cold. Her job is to pick up a stack of sliced meat with her right hand and grasp it securely with that hand. Then with both hands she straightens up the stack and passes it to her left hand which places the stack in a plastic bubble, while her right hand reaches for the next stack of sliced meat. Both hands are constantly in motion.

Claimant testified that she first started having difficulties in about 1981 to the best of her recollection. She experienced pain in the crease in the palms of her hands, her wrists and up into her arms. There was numbness and tingling in her thumb and forefinger. She reported this to First Aid and went there a number of times. She told them "my hands hurt." She testified that "I had no idea what it was." As a consequence she did not report it as a work related injury because she did not know what it was. At First Aid the nurse would wrap her hands and send her back to work.

She first saw her family physician, Duane Manlove, D.O., for the condition on November 10, 1983. He diagnosed carpal tunnel syndrome of the right wrist and took her off work on November 14, 1983. On November 18, 1983, he referred her to Richard T. Beaty, D.O., an orthopedic surgeon (Joint Exhibits 1 & 3).

Dr. Beaty saw claimant on November 22, 1983 and he also diagnosed right carpal tunnel syndrome (Jt. Ex. 5) and later also diagnosed left carpal tunnel syndrome (Jt. Ex. 7). He performed a right carpal tunnel release and median nerve neurolysis as an outpatient on December 1, 1983 (Jt. Ex. 4) and left carpal tunnel release and median nerve neurolysis on January 18, 1984 (Jt. Ex. 6).

Claimant testified that Dr. Manlove told her this could happen from the type of work that she did. However, she did not ask him and he did not say what caused her condition.

Claimant testified that she did not ask Dr. Beaty if it was work related and he did not offer her an opinion on whether it was work related or not.

Claimant testified that she first reported this condition to the employer about the end of November, 1983, when she learned that she had to have surgery. She reported the injury in order to obtain medical and income disability benefits. Defendant's exhibit 15 is a claim statement completed by the claimant on December 30, 1983 signed by the claimant which indicates the disability was not caused by work and that no claim has been or will be filed with a workers' compensation carrier by placing an x in the no box in answer to these questions.

Apparently claimant never did tell the employer or any of its representatives that she had a work related injury until she filed her petition. The petition was signed by her attorney on January 9, 1984. According to the proof of service it was mailed to the employer on January 16, 1984.

Monica Murphy, head nurse, filed a first report of injury on January 20, 1984 which states that she first learned of this injury on January 18, 1984. Murphy also testified at the hearing that her first knowledge of a work related injury was when the petition was received. Murphy granted that claimant had complained of sore wrists and hands at work and that she had wrapped her hands to give them support, like in extra muscle, but the claimant never stated that it was job related. Murphy did not know claimant had been treated by Dr. Manlove or Dr. Beaty. Murphy conceded that the symptoms of carpal tunnel are numbness and tingling in the fingers and waking up at night. She did not know if claimant complained of numbness or tingling

or not. If claimant would have said this was a work related injury they have their own doctors other than Dr. Manlove and Dr. Beaty to treat the claimant. A company doctor is not required for non-work related injuries. Murphy testified that the company has had at least eight cases of carpal tunnel syndrome and possibly more.

Vernon Keller, safety and security manager for the employer, testified that the company has had eight cases of carpal tunnel in the last five years. He also stated that all carpal tunnel is not caused by work. When an employee reports an injury or distress to First Aid it does not necessarily mean it is work related. It may well have been something that occurred at home. He received the claimant's accident and illness reports from Dr. Manlove (Jt. Ex. 1) and Dr. Beaty (Jt. Ex. 5) and the statement of claim (Def. Ex. 15), but none of these reports indicated a work related injury. Claimant did not seek the help of the employer for carpal tunnel syndrome, but rather pursued it on her own through her attorney. Keller stated his first knowledge of a claim for a work related injury was when he received the original notice and petition.

Claimant testified that she received payment of all of her medical bills and also income disability payments through the employer non-occupational group health plan and not through workers' compensation payments.

Claimant testified that she is now back to work and she is doing the same job at the same pay. Both hands ache most of the time and pain goes up into her wrists, the left more than the right. She thinks her motion is the same as before but her hands fatigue and get tired easier. She does not get paid by the piece. She still goes to First Aid to get her hands wrapped. She is not seeing a doctor now.

Dr. Beaty, the treating physician, stated generally that the etiology of carpal tunnel syndrome is not clear. Repetitive trauma is considered to be one cause, however, the vast majority of cases are idiopathic. The type of work claimant did could be a cause of carpal tunnel syndrome. Dr. Beaty made the following specific determination with respect to the claimant's carpal tunnel syndromes:

My position in this case is basically this: that Mrs. Carter is working in a job activity which would involve a repetitive trauma to the palms of the hand. This either caused or aggravated carpal tunnel syndromes necessitating the surgery which she has subsequently undergone.
(Jt. Ex. 9)

Dr. Beaty did not indicate whether claimant suffered any

permanent impairment or not and he did not give a permanent impairment rating.

Claimant was examined by William F. Blair, M.D., of the Division of Hand Surgery of the University of Iowa Hospitals and Clinics, Department of Orthopaedic Surgery on September 18, 1984. He made the following report on September 28, 1984:

> Mrs. Carter described to us ten years of employment on the production line at Oscar Mayer prior to the development of her symptoms which were consistent with carpal tunnel syndrome. The job of packing meat which she explained to us appeared to require repetitive flexion and extension activities of the wrist, while grasping packages. Although we would consider this to be a "idiopathic" type of carpal tunnel syndrome, the prolonged and repetitive nature of her job was a possible contributing factor. It is possible that the activities of the job either caused the syndrome or aggrevated [sic] to some degree a syndrome that would have developed anyway.
>
> Mrs. Carter has recovered nicely from her surgical procedures. I would ascribe no impairment to either of her hands as a result of her syndrome or surgeries.
> (Jt. Ex. 14)

The defendants have pointed out that several of the insurance forms completed by Dr. Manlove, Dr. Beaty and the claimant either indicate that the carpal tunnel syndromes are not work related or they do not answer this question. This is true and will be addressed in the discussion that follows.

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 she received an injury on November 1, 1983 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa,

249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "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).

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).

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 1, 1983 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Iowa Code section 85.23 provides:

> 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.

In Jacques v. Farmers Lbr. & Sup. 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 Transp., 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.

McKeever Custom Cabinets v. Smith, 379 N.W.2d 368, 374 (Iowa 1985) not only judically 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 has sustained the burden of proof by a preponderance of the evidence that she sustained an injury on or about November 1, 1983 which arose out of and in the course of her employment with the employer.

Her treating physician, Dr. Beaty, unequivocally stated that claimant's job involved repetitive trauma to the palms of her hands which either caused or aggravated the carpal tunnel syndromes necessitating surgery (Jt. Ex. 9). This evidence is not refuted, rebuted, controverted or contradicted by any other evidence.

Dr. Blair stated that although he considered her carpal tunnel syndrome to be "idiopathic"; nevertheless, the possible repetitive nature of her job was a possible contributing factor.

Idiopathic is interpreted to mean of unknown origin, but peculiar to the individual for purposes of this decision. Dr. Blair stated it is possible that the activities of her job either caused or aggravated her condition that would have developed anyway. Therefore, Dr. Blair does not dispute Dr. Beaty's opinion, but rather says that it is possible that he is correct.

The employment need only be a proximate contributing cause. Musselman, 261 Iowa 352, 360, 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). It is difficult to say that the same hand motions that are made by an employee seven hours a day, five days a week for 17 years are not a substantial factor under the facts of this case.

Dr. Manlove did not give a definite opinion on causation by way of a dictated report or a deposition. Claimant testified that Dr. Manlove told her that her work could have caused her carpal tunnel. However, he did not clarify in his opinion to her personally whether it did, or whether it did not, cause it. He did not volunteer an opinion and she did not ask for one. Therefore, what Dr. Manlove told the claimant does not definitely support causation nor does it definitely negate causation. If it is anything other than neutral, it tends to support causation rather than negate it for the reason that he took the risk to tell her that her work could be a possible cause of her injury. In any event, it does not controvert Dr. Beaty, the treating surgeon, who plainly stated that her job either caused it or aggravated it.

In the illness and disability accident report signed by Dr. Manlove on November 18, 1983, he did not check either the yes or no block to the question of whether this was or was not an occupational injury (Jt. Ex. 1). On the group health claim form signed by Dr. Manlove on November 27, 1983, there is an x marked in the no block to the question of whether this condition is due to an injury arising out of employment (Jt. Ex. 3). These are both routine insurance forms. It is noted that the signature of Dr. Manlove on each of these two forms is totally different, which raises the inference that either one, or possibly both of the signatures, do not belong to Dr. Manlove, but rather might be the signature of one or more clerical assistants in his office (Jt. Ex. 1 & 3). Therefore, little or no weight can be given to the probative value of either one of these forms on the issue of causation.

Dr. Beaty's combined bill and medical report for November 22, 1983, (claimant's first visit) says bilateral carpal tunnel but did not check either the yes or no block behind the words work related (Jt. Ex. 2). The combined bill and report for the

right carpal tunnel surgery on December 1, 1983, put an x in the no block behind the words work related (Jt. Ex. 4). The combined bill and report for the left carpal tunnel surgery on January 18, 1983, also put an x in the no block behind the words work related (Jt. Ex. 6). None of these three forms is signed by Dr. Beaty or anyone else. The preparer of these forms is unknown. Therefore, these forms have little or no probative value.

An illness and accident disability report dated December 21, 1983, for the right carpal tunnel syndrome (Jt. Ex. 5) and another one dated January 31, 1984, for left carpal tunnel syndrome (Jt. Ex. 7) both have an x in the no block after the words occupational injury. Both of these forms bear Dr. Beaty's signature, but the signature on each form is so perfectly identical in every detail that it has to be a rubber stamp signature. This raises the inference that both of these reports were prepared by a clerical assistant rather than by Dr. Beaty himself. Therefore, they must be given very little or no weight on the issue of causation.

When Dr. Beaty did express his own personal, professional medical opinion by dictating a letter which specifically addressed the subject of causation he clearly stated that the claimant's job either caused or aggravated the carpal tunnel syndromes that resulted in her surgeries (Jt. Ex. 9).

Two more insurance forms which show by an x in the no block behind the words occupational injury which are dated after Dr. Beaty's dictated letter are also most likely done by clerical assistants rather than the doctor who signed these forms (Jt. Ex. 11 & 12). Therefore, they bear little or no weight on the issue of causation.

Consequently, it is found that claimant did sustain the burden of proof by a preponderance of the evidence that she did sustain an injury on or about November 1, 1983, which arose out of and in the course of her employment with the employer as a stacker in the slice pack department; that this injury is the cause of temporary total disability on the dates stipulated by the parties in the prehearing report; and that claimant is entitled to temporary total disability benefits for these dates.

Claimant introduced no medical evidence to prove the injury was the cause of permanent disability. Dr. Beaty was silent on this matter. He never mentioned it (Jr. Ex. 9). Dr. Blair definitely states that he would ascribe "no impairment to either of her hands as a result of her syndrome and surgeries" (Jt. Ex. 14). Consequently, the claimant has not sustained the burden of proof by a preponderance of the evidence that she has suffered any permanent disability or that she is entitled to any permanent disability benefits.

Defendants did not sustain the burden of proof by a preponderance of the evidence that the claimant failed to give notice as required by Iowa Code section 85.23. Even though claimant had pain in her palms, wrists and arms from 1981 to 1983, she testified that she did not know what it was. She had them wrapped at First Aid a number of times. Apparently, the medically trained people at First Aid did not know what it was either, or if they did know, they chose not to tell her.

All of the critical dates occurred within a 90 day period.

The petition alleges an approximate injury date of November 1, 1983. Claimant saw Dr. Manlove on November 10, 1983. Dr. Manlove told her that she had carpal tunnel and that it could have been caused by work and sent her to Dr. Beaty. Dr. Beaty saw claimant for the first time on November 22, 1983, and performed outpatient surgery on December 1, 1983 and again on January 18, 1984. The original notice and petition was signed January 9, 1984, served January 16, 1984 and the first report of injury was filed January 20, 1984.

The best evidence of when claimant knew the nature of her injury was when she saw Dr. Manlove and Dr. Beaty in November of 1983 and they told her that she had carpal tunnel syndrome. The best evidence of when she knew it was serious was after she saw Dr. Beaty and he told her that she needed surgery which resulted in her reporting the condition to the employer in order to obtain medical and income disability benefits. The best, and indeed the only, evidence of when claimant considered the injury was work related and compensable was when she served the original notice and petition on the defendant on January 16, 1984. All of these events occurred within a period of less then 90 days.

In McKeever, 379 N.W.2d 368, 374 (Iowa 1985) the court not only upheld the commissioner's adoption of the cumulative injury rule, which applies to the facts in this case, but also found that the injury occurs when the injury prevents the employee from continuing to work. In this case the injury occurred when claimant ceased to work at Dr. Manlove's direction on November 14, 1983. Notice of injury was given to the defendants when the original notice and petition was served on January 16, 1984, approximately two months later. Consequently, claimant did give notice by filing her petition within 90 days of when she discovered the nature, seriousness and compensable nature of her injury and also within 90 days of the occurrence of the injury itself.

FINDINGS OF FACT

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

That claimant was employed by the employer on the date of

the injury as a stacker in the slice pack department.

That the job of a stacker requires constant repetitive motions with both hands everday seven hours a day, five days a week in a cold temperature environment of approximately 45 degrees.

That the claimant has performed the same hand motions repetitively for approximately 17 years.

That Dr. Beaty, the treating physician and surgeon, found that claimant's job either caused or aggravated her bilateral carpal tunnel syndromes which required the surgeries on December 1, 1983 and January 18, 1984.

That Dr. Blair, an evaluating physician, granted that claimant's employment could have caused her bilateral carpal tunnel condition.

That claimant has proven by a preponderance of the evidence that her bilateral carpal tunnel condition was caused by her employment.

That the parties stipulated that the claimant was off work for this injury for the periods of time stipulated to in the prehearing report.

That no medical evidence was presented that indicated that the claimant was permanently impaired.

That Dr. Blair stated that the claimant was not permanently impaired.

That the injury occurred on November 14, 1983 when claimant was forced to leave work and that she gave notice of the injury by serving her petition on January 16, 1984.

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 sustained an injury on November 14, 1983 which arose out of and in the course of her employment with the employer.

That the injury was the cause of temporary disability on the dates stipulated to in the prehearing report.

That the injury was not the cause of any permanent disability.

That the claimant is entitled to temporary total disability benefits for the dates stipulated to in the prehearing report.

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

That claimant gave notice within 90 days of the occurrence of the injury and also within 90 days of when she discovered the nature, seriousness and compensable character of the injury.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant thirty-four point eight-five-seven (34.857) weeks of temporary total disability for the dates stipulated to at the rate of two hundred forty-nine and 05/100 dollars ($249.05) per week in the total amount of eight thousand six hundred eighty-one and 14/100 dollars ($8,681.14), less credit under Iowa Code section 85.38 as stipulated in the prehearing report in the amount of six thousand eight hundred seven and 86/100 dollars ($6,807.86).

That the defendant pay the accrued benefits in a lump sum.

That interest will accrue under Iowa Code section 85.30.

That defendant will pay the cost of this action in accordance with 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 pursuant to Division of Industrial Services Rule 343-3.1, formerly Iowa Industrial Commissioner Rule 500-3.1.

Signed and filed this 9th day of February, 1987.

Walter R. McManus Jr.
WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ARNOLD LEE CERETTI,	:	
	:	File Nos. 729818
Claimant,	:	760405
	:	
vs.	:	A R B I T R A T I O N
	:	
DEPARTMENT OF TRANSPORTATION,	:	A N D
	:	
Employer,	:	R E V I E W -
and	:	
	:	R E O P E N I N G
	:	
STATE OF IOWA,	:	D E C I S I O N
	:	FILED
Insurance Carrier,	:	
Defendants.	:	JUN 22 1987

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

These are proceedings in arbitration and review-reopening brought by the claimant, Arnold Lee Ceretti, against his employer, the Iowa Department of Transportation, and its insurance carrier, the State of Iowa, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained on January 20, 1983 with an aggravation on March 2, 1983. This matter came on for hearing before the undersigned deputy industrial commissioner in Des Moines, Iowa, on April 17, 1987. A first report of injury was filed April 4, 1983. The record was considered fully submitted at close of hearing but for briefs. The record consists of the testimony of claimant, of John S. Martin, Jr., and of Charles R. Pickett, as well as joint exhibits 1 through 22 as identified on the joint exhibit list submitted by the parties at time of hearing.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant's rate of weekly compensation is $155.77; that claimant received an injury arising out of and in the course of his employment on January 20, 1983 with material aggravation of that injury occurring on March 2, 1983; that the injury and the material aggravation are causally related to a temporary total disability to claimant; and that the commencement date for additional permanent partial disability benefits owed claimant would be March 19, 1984. Defendants have already paid claimant fifty weeks of permanent partial disability based on a finding

of ten percent permanent partial impairment. The issues remaining to be heard are:

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

2) The extent of any additional permanent partial disability benefits entitlement to claimant.

REVIEW OF THE EVIDENCE

Twenty-six year old claimant testified that when injured on January 20, 1983, he had been employed as a department of transportation Equipment Operator I for three years. An Equipment Operator I is a nonskilled laborer who does general road maintenance consisting of snow removal, highway patching, and highway sign changing among other duties. On January 20, 1983 claimant slipped and fell while moving chloride bags. He stated that he was off three weeks and returned prior to March 2, 1983. On March 2, 1983, claimant was jackhammering and experienced severe back pain with leg tingling. Claimant treated with D. R. Toriello, D.O., following both the January and March incidents. Dr. Toriello referred him to J. D. Bell, D.O., a board certified orthopedic surgeon, who with Dr. Toriello admitted claimant to Des Moines General Hospital on April 10, 1983. Myelographic studies revealed a large disc rupture at L5 central. A microdiskectomy was performed April 13, 1983.

Claimant testified that Dr. Bell released him for work six months after surgery. Claimant stated he attempted a work return with the department of transportation and expressed his belief that he could have been an aggrate inspector, an individual who takes and tests samples of road patching. Claimant was unaware of openings for that position at the time of his work release, however. Claimant testified that he applied for a number of jobs following his injury and told his potential employers of his previous back condition. He reported that he had taken twenty Iowa State Merit examinations, but received rather low test scores and that his high school grades ranged from C's through F's. Claimant did graduate with his regular high school classs, however. Claimant testified that he was earning $6.47 per hour when injured. He reported that before his hiring as an Equipment Operator I, other preinjury jobs had paid approximately $5.00 per hour. Approximately nineteen months following his injury, claimant was hired by Crescent Chevrolet as an auto detailer. An auto detailer washes cars and prepares them for customer delivery. Claimant received $4.50 per hour in that position and stayed with the company eight months. He then took his existing job with General Fire and Safety. At General Fire, claimant inspects and installs fire and safety equipment. He initially earned $4.50 per hour as

well as a sales commission on equipment sold, which commission generally ran from $10 to $15 per month. Claimant is now earning $8.00 per hour with General Fire and Safety. He receives a number of fringe benefits including 50 percent major medical health insurance coverage. Claimant testified that the health insurance had a $500 deductible, but did not indicate whether this related to the major medical coverage or to other health insurance coverage. Claimant testified that at General Fire, he is not a union member and is an employee at will. He expressed concern stating that he was the longest hired employee in Des Moines and had himself replaced a terminated employee who was receiving a higher wage. Claimant has no retirement benefits at General Fire and Safety. Claimant stated that he can perform his duties at General Fire and Safety, but uses his upper body to lift. He reported that his employer provides him with a helper, something that it does not generally do for other employees. Claimant stated that he has difficulty driving long distances, and if his job requires him to travel thirty to forty miles he sits on a pillow or coat while traveling. He reported he must sleep on a firm mattress and can no longer do auto servicing or body work or assist at carpentry. He stated that he has difficulty fishing and hunting and cannot jackhammer or shovel.

John S. Martin, Jr., claimant's brother-in-law, testified that he has known claimant for approximately four years but only following his injury. He reported that he sees claimant approximately once a week and has noticed that claimant has difficulty sitting and must twist about to become comfortable. He reported that claimant cannot ski, or ride in a speedboat or pick up his three year old niece. Martin testified that he hired claimant to paint his house approximately two years ago and claimant could only work a couple of hours per day because of back pain. He reported that claimant did not paint the house overhang.

Charles R. Picket, a department of transportation Maintenance Supervisor III for the past eight years, testified that he was claimant's supervisor. Mr. Picket reported that claimant began work on May 18, 1981 earning $5.23 per hour and that claimant was earning $6.35 per hour when he last worked with the department of transportation. Picket testified that an Equipment Operator I now earns $8.14 per hour and receives the usual state employee fringe benefits including paid vacation, accumulating sick leave, a $10,000 life insurance policy, hospital insurance, dental insurance, and Iowa Public Employees Retirement System benefits. Picket explained that advancement to Equipment Operator II is not automatic, but at the current time is based on education and experience. He stated that claimant could have remained an Equipment Operator I for ten to fifteen years, and that the physical demands of an Equipment Operator II and III are about the same as those for an Equipment Operator I. He

stated that supervisor positions are not as physically demanding as equipment operator positions. Mr. Picket began work with the department of transportation twenty-two years ago and advanced to his current positon from an original positon as an Equipment Operator I equivalent.

On July 12, 1983, Dr. Bell opined that claimant had responded well to his lumbar laminectomy and had a ten percent permanent partial "disability." On a medical report of August 24, 1983, the doctor stated that on physical examination on August 23, 1983, claimant had good range of motion without significant pain but with some low back stiffness. On December 5, 1983, Dr. Bell opined that claimant was not capable of heavy manual labor, but could sit comfortably for extended periods, but should not stoop or lift excessively or repetitively. On December 22, 1983, the doctor stated claimant should not lift greater than twenty-five pounds and could not stoop, bend or twist. In his deposition, the doctor stated that excessive sitting is not recommended following back surgery and reported that claimant's lifting of twenty-five pounds should not be done more than ten times per day.

The following exchange took place in Dr. Bell's deposition of June 24, 1986:

Q. Okay. Now Mr. Ceretti, as I understand it, on -- in his petition for the workmen's compensation, maintained that he was injured on January 20th, 1983 in which he fell off a mound at work and on March 2nd, 1983 he re-aggravated that condition using a jackhammer at work.

Was that part of the medical history that you have?

A. The medical history that we had gotten was associated with opening some type of trailer door while he was at work. Falling off of the dirt mound was part of my memory as far as recollection goes. It is not part of the record.

Q. Okay. Is that the type of activity that is consistent with being causally connected to the kind of injury that he had?

A. That is correct.

Q. Okay. And is the injury -- the situation that the medical circumstances that he had -- namely a ruptured disk in this case -- Was that something that was congenital and born with? Or was that something that was associated with trauma?

A. We're talking about the ruptured disk?

Q. Yeah.

A. The ruptured disk is something that a person has and develops due to trauma. Not something that they're born with.

Q. Okay. And do you have an opinion within a reasonable degree of medical certainty that -- that the impairment and injury that he has is causally connected then consistent with the medical history that was given to you?

A. Yes, it is consistent with the medical history.

(Bell dep., p. 13, l. 25; p. 14, ll 1-25; p. 15, ll 1-7.)

Joel Boyd, D.O., examined claimant on February 27, 1985. Claimant's deep tendon reflexes were +2/4, extensor hallus longus strength was equal bilaterally; claimant had no sensory loss to pinprick or light touch. Claimant continued to complain of occasional back spasm. Flexoril was prescribed. Dr. Boyd's impression was that claimant was stable post lumbar laminectomy.

Marian S. Jacobs, a vocational consultant, interviewed claimant, reviewed the restrictions imposed by Dr. Bell and reviewed state vocational rehabilitation assessments of claimant and produced a disability report. Ms. Jacobs stated that claimant had excellent communication skills and that state vocational rehabilitation records indicated that claimant's math skills were at the 7.6 grade level, that his reading skills were at the 9.8 grade level, and were adequate for vocational training, that claimant had good tool knowledge, good manual and finger dexterity, excellent eye and hand coordination, accurate sorting and discrimination skills, good verbal abilities, good basic mechanical and woodworking skills, the ability to assemble and disassemble an air compressor and a washing machine transmission, and unsatisfactory electronic boards comprehension. Ms. Jacobs reported that all of claimant's previous jobs but for short order cook, gas and oil service attendant, and salesperson, were jobs requiring medium to heavy work and lifting of 50 to 100 pounds. She reported that the delineated jobs were light jobs and generally paid from $4.00 to $5.03 per hour. She stated that, additionally, claimant could work as a paper products inspector generally expecting to earn $6.31 per hour. Ms. Jacobs opined that a worker without disability is generally hired over a qualified but disabled worker. She stated that claimant has an additional loss in fringe benefits and advancement opportunities if he is unable to find work within the public sector or with a union employer. She reported that claimant has no supervisory skills and that his low math skills preclude employ-

ment as either a billing clerk or payroll clerk, paying $6.36 per hour and $7.51 per hour, respectively. Ms. Jacobs stated that, when injured, claimant was earning $5.88 per hour with fringe benefits equaling an additional 26 percent or $1.53 per hour. She stated that if claimant continued to be employed as an Equipment Operator I he would be earning $6.26 per hour with additional fringe benefits of 26 percent or $1.63 per hour. She reported that claimant's current earnings is $8.00 per hour with approximately $10 to $15 per month commissioner. She opined that if claimant left the job for any reason, work within his physical limitations and within Dr. Bell's recommendations would generally pay from $4.00 to $6.31 per hour. Ms. Jacobs opined that claimant had a variety of specific, marketable skills, however, those being vehicle and equipment operation, maintenance, repair, service, inspection, and installation, cooking, and sales. She stated that he had progressed from an unskilled to a semiskilled worker. She stated the following regarding claimant's ability to engage in employment:

> Mr. Ceretti is working in a job, utilizing his installation, maintenance and repair skills. However, if this employment is exertionally inappropriate, given his physical limitations and the nature of his disability, then, in my opinion, Mr. Ceretti faces a reduction in job options and earning capacity. (Emphasis in the original.)

Ms. Jacobs' report was dated January 14, 1987.

State Vocational Rehabilitation staffing reports of May 2, 1984 characterized claimant as extremely highly motivated to obtain employment. Other vocational rehabilitation reports state that claimant did not appear to have a great deal of difficulty with his back and did not express a great deal of discomfort in the evaluation area. Claimant was reported as showing a two grade level improvement in his math skills in only five periods in the academic preparation area. The reporter stated that that performance showed a great deal of promise that claimant could improve his math skills. It was hoped that claimant would continue to upgrade those skills through adult education. On February 29, 1984, claimant self-reported to the vocational rehabilitation evaluator that he is able to lift 50 to 75 pounds, but not repetitiously; that he could be on his feet and could sit for two to three hours before he experienced pain. Various notes in the vocational rehabilitation reports speak of disruptions in the evaluation process variously attributed to job search, merit testing, and back pain.

One hundred seventy-one dollars in medical costs with Dr. Bell are submitted. These consist of office examinations of February 14, 1984, March 6, 1984, March 12, 1984, and March 26, 1984. A March 6, 1984 record notes as an explanation of activity "INJ

Tendon _____ trigger." The charge and debit for that service is $49.00. Medical costs with East Des Moines Clinic with which Dr. Toriello is associated with consist of costs of $68.00. Dr. Toriello's impression is as status post lumbar laminectomy.

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

APPLICABLE LAW AND ANALYSIS

Our initial issue is whether a causal relationship exists betweem claimant's injury and material aggravation and any permanent partial disability.

The claimant has the burden of proving by a preponderance of the evidence that the injuries of January 20, 1983 and March 2, 1983 are causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Dr. Bell has stated that claimant has a ten percent permanent partial "disability" following his lumbar laminectomy. In his deposition, the doctor stated the history claimant gave was consistent with disc herniation such as claimant suffered. The history of the initial event that Dr. Bell relayed was at variance with that claimant gave at hearing; the history of the material aggravation was consistent with that which claimant gave. Dr. Bell acknowledged the history he recited was from memory and not part of the medical record. Both the history claimant recited of the initial injury and the history of the material aggravation both Dr. Bell and claimant recited are consistent with the progress of claimant's symptomatology to his ultimate surgery and its sequala including the functional impairment and restrictions Dr. Bell placed on claimant. The

requisite causal connection is found.

We reach the question of whether claimant is entitled to permanent partial disability benefits beyond the ten percent permanent partial disability benefits defendants have already paid.

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).

In Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

For example, a defendant employer's refusal to give any sort

of work to a claimant after he suffers his affliction may justify an award of disability. McSpadden, 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 is 26 years old. As such, he is a young worker with more vocational flexibility than an older worker would have. He is a high school graduate who apparently did poorly in school. His math skills improvement at state vocational rehabilitation would suggest his non-noteworthy high school grades related to immaturity and not to actual intellectual incapacity, however. Hence, that lackluster performance cannot be said to preclude claimant's entering and obtaining vocational retraining should he so desire. Indeed, Ms. Jacobs notes claimant has advanced from an unskilled to a semiskilled worker. Claimant currently works installing fire safety equipment; has done so for several years, and is able to perform his duties satisfactory albeit with some modification and some assistance from a helper his employer provides him. Claimant had a good response to his laminectomy and has a ten percent permanent partial "disability" rating from Dr. Bell. Dr. Bell has restricted claimant to 25 pounds lifting no more than ten times per day and advised against stooping, bending or twisting. He stated claimant can sit comfortably for extended periods but also stated excessive sitting is generally not recommended following back surgery. Claimant reported considerably less restrictions to his vocational evaluator on February 29, 1984. Claimant then stated he could lift 50 to 75 pounds nonrepetitiously and could sit and be on his feet for two or three hours before he experienced pain. Claimant is highly motivated to remain employed and continue job advancement. He was able to remain in his previous job and his employer apparently attempted no accommodation of his injury and did not assist him in obtaining other employment. Claimant's present salary is greater than his salary when injured and near what he would now be earning had he remained with the injury employer. Claimant did lose a number of fringe benefits, however. His back injury likely limits his access to unskilled and semiskilled jobs with larger employers who are more likely to provide like protections for their employees. Claimant expressed concern for his job security with his present employer. His successful advancement on that job and his employer's willingness to accommodate him by providing him with a helper suggests he is a respected and valued employee whose fears for his job safety are ill-founded. Nevertheless, we do believe claimant's injury has impaired his ability to compete in the job market such that he has less flexibility in job choices and less options should his present employment end. Claimant has sustained an overall loss of earnings of 15 percent. Defendants are given credit for 10 percent permanent partial disability already paid.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant injured himself January 20, 1983 when he slipped and fell while moving chloride bags in the course of his employment as a department of transportation Equipment Operator I.

Claimant materially aggravated his injury March 2, 1983 while jackhammering in the course of his employment.

Claimant underwent a microdiskectomy/lumbar laminectomy at L5 central April 13, 1983.

Claimant could not return to the heavy manual work required of an Equipment Operator I and was off work nineteen months before finding other employment.

Defendant employer did not accommodate claimant or attempt to find him other employment.

Claimant subsequently found his present job where he performs semiskilled labor.

Claimant now earns only slightly less than what he would now be earning as an Equipment Operator I but lost a number of fringe benefits.

Claimant has less job security in his present job but his job appears stable; claimant's present employer accommodates claimant's physical needs by providing claimant an assistant.

Claimant is medically advised against bending, stooping, and twisting.

Claimant is medically restricted to lifting 25 pounds no more than ten times per day, but self-reported he could lift 50 to 75 pounds nonrepetitively.

Claimant is medically advised against prolonged sitting on account of his back surgery, but self-reported being able to sit and stand two to three hours before experiencing pain.

Claimant is well motivated to work.

Claimant is 26 years old and a high school graduate.

Claimant improved two grade levels in math in only five sessions in state vocational rehabilitation academic training.

Claimant had lackluster high school grades which likely did not relate to a lack of intellectual ability.

Claimant could seek and complete vocational training should he desire.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established a causal relationship between his January 20, 1983 injury and his March 2, 1983 material aggravation and the disability on which he now bases his claim.

Claimant is entitled to permanent partial disability resulting from his injury of January 20, 1983 and his material aggravation of March 2, 1983 of 15 percent. Defendants are entitled to a credit for 10 percent permanent partial disability benefits previously paid.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability for an additional twenty-five (25) weeks at the rate of one hundred fifty-five and 77/100 dollars ($155.77) with those benefits to commence March 19, 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 22nd day of June, 1987.

Helen J Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BARBARA CLESTER, Claimant, vs. LOUIS RICH/OSCAR MAYER, Employer, and UNDERWRITERS ADJUSTING COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 789213 A R B I T R A T I O N D E C I S I O N FILED MAR 5 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Barbara Clester, claimant, against Louis Rich/Oscar Mayer, employer, and Underwriters Adjusting Company, insurance carrier, for benefits as a result of an injury which occurred on January 18, 1982. A hearing was held on October 15, 1986, at Davenport, Iowa and the case was fully submitted at the close of the hearing. The record consists of joint exhibits 1 through 7 with various subparts; defendants' exhibit A; and the testimony of Barbara Clester (claimant), Linda Riley (supervisor of safety and security) and Alvero Rocha (supervisor of the deboning line).

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 January 18, 1982, which arose out of and in the course of her employment.

That the injury was the cause of some temporary disability.

That the claimant's entitlement to weekly compensation for temporary disability benefits is from February 8, 1982 to February 16, 1982 and May 27, 1982 to June 21, 1982 and benefits for these periods have already been paid.

That the commencement date for permanent partial disability in the event of an award is June 22, 1982.

That the rate of weekly compensation in the event of an award is $155.16.

That defendants are entitled to a credit for benefits paid for 4.714 weeks of compensation at the rate of $155.16 per week for temporary disability benefits paid to the claimant prior to the hearing in the event of an award.

That the employer tendered a check in the amount of $465.48 to the claimant for permanent partial disability on January 25, 1985 and that in the event of an award no interest will be due on $465.48 after January 25, 1985.

ISSUES

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

Whether the injury of January 18, 1982, is the cause of any permanent disability.

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

Whether the claimant is entitled to certain medical expenses to see doctors who are not authorized by the employer was an issue shown on the prehearing report. However, in his closing arguments the claimant's attorney withdrew the claim for payment of doctor bills for doctors that the claimant saw without authorization of the employer.

Whether the claimant is entitled to certain medical mileage expenses.

Whether the defendants have proven the affirmative defense that the claim was not timely filed as required by Iowa Code section 85.26.

SUMMARY OF THE EVIDENCE

Claimant is 38 years old. She began working for the employer on or about June 1, 1981 and is still currently employed there. Prior to her employment with this employer she had no problems or any medical treatment on account of her fingers, hands or wrists. Initially claimant worked dejointing, that is separating the drums from the thigh of a turkey leg. She held the turkey with her left hand and operated a knife with the right hand. This dejointing could usually be done in one motion, but sometimes required two motions. Sometimes the knife would hit the bone

jarring her hands. She testified that she dejointed 42 pieces per minute. She worked 60 minutes each hour. She had a 15 minute break in the morning; a 30 minute break for lunch; and a 15 minute break in the afternoon. Sometimes she worked 10 or 12 hours per day.

In about November of 1981, claimant began having trouble with her hands. Her right ring finger and left long finger would shut and she would have to pry them open. She noticed a knot on each hand just below the right ring finger and the left long finger. When this locking occurred at work she reported it to the foreman who sent her to the nurse. The nurse indicated that she might need surgery and sent her to see Steve Palmer, M.D., in West Liberty. He examined her on January 18, 1982, and described her condition as "trigger fingers." Dr. Palmer referred claimant to Bruce L. Sprague, M.D., in Iowa City (Jt. Ex. 5). Dr. Sprague is an orthopedic surgeon who specializes in surgery of the hand and upper extremity. An extremely impressive curriculum vitae for Dr. Sprague appears as joint exhibit 3A.

Dr. Sprague examined claimant on January 25, 1982 and found there was a nodule within the flexor tendon sheath of both the right ring finger and the left long finger. He stated she had bilateral stenosing synovitis of the right ring finger and the left long finger (Jt. Ex. 3B). A surgical release was performed on each of these fingers at Mercy Hospital in Iowa City on February 4, 1982 (Jt. Ex. 3A through 3C). At the follow-up examination on February 15, 1982, Dr. Sprague found claimant had a full range of motion of the fingers at the MP, PIP and DIP joints except for about 10 degrees flexion contracture at the left long finger PIP joint. He returned claimant to work without restrictions except that she was not to go back to using a knife (Jt. Ex. 3C).

Claimant testified that after her surgery the left long finger would lock shut in a partial flexed position and she would have to put hot water on it and force it to open it in the morning. She returned to Dr. Sprague on May 14, 1982. He reported that her right hand was doing well, but the DIP joint on her left long finger would pop on full extension. He then detected a nodule within the profundus tendon catching as it goes through the sublimis commiture which had not been recognized before (Jt. Ex. 3D). Dr. Sprague performed a second surgery on May 27, 1982, on the left long finger for this nodule in the profundus tendon. His goal was to explore this area and try to decrease the size of the nodule to prevent the triggering (Jt. Ex. 1D through 1F & Jt. Ex. 3D).

After the surgery in June and July of 1982, claimant continued to have problems with the left long finger. It lacked 10 degrees full extension at the DIP joint, snapped or popped at the PIP joint, and there was some catching of the profundus

tendon as it comes through the sublimis commiture (Jt. Ex. 3E through 3G). Although these reports refer to the right ring finger, it is believed that this is a clerical error because the claimant's problem at this point in time according to her testimony and all the other evidence was with her left long finger. On July 12, 1982, Dr. Sprague added that claimant did have some scarring and some mild contracture of the palmar fascia, but she did have a full range of motion of the MP, PIP and DIP joints of the left long finger (Jt. Ex. 3H). Claimant returned with the same general symptoms on November 12, 1982, but Dr. Sprague commented that she was able to do her job. He did not feel that anything further could be done and recommended that she continue with her job (Jt. Ex. 3I).

Claimant testified that when Dr. Sprague told her that she would continue to have catching in her left long finger she was not satisfied and went to see William Catalona, M.D., an orthopedic surgeon in Muscatine as a phyisican of her own choice to get a consulting opinion. She testified that Dr. Catalona said that it could not be surgically repaired.

Dr. Catalona reports that he examined claimant on June 6, 1983. She complained of triggering and persistent painful snapping and catching of her left long finger. He obtained Dr. Sprague's operating notes after her visit but commented that claimant did not return for further discussion of her problem. Dr. Catalona's diagnosis was crepitus and persistent painful snapping of the finger secondary to tendonitis. He concluded he could not make a definite prognosis or comment on any neurosis, functional overlay or other problems. He felt that if she continued using her hands in repetitive work she would continue to have problems. He opposed repeated surgery if the first time around did not relieve the symptoms. He noted a transverse incisional scar of the distal palmar crease and PIP joint but did not indicate that there was anything unusal about these scars (Jt. Ex. 2A and 2B). He did not find any impairment and did not give any impairment rating.

Claimant testified that she also saw William F. Blair, M.D., of the University of Iowa Hospitals and Clinics as a physician of her own choice for a consulting opinion. She stated that he could only recommend pain pills and muscle relaxers. Dr. Blair's office notes for May 8, 1984, show that claimant saw him for her left long finger. His examination indicated that she had a full range of motion of all of the joints of the hand except the left long finger MP joint lacked 10 degrees of full maximum hyperextension. He also found a palpable cord running along the peritendon fascia at the level of the transverse palmar flexion crease and a palpable nodule in the area of the right ring finger. He said the claimant identified the nodule and cord as being painful. The concluding impression was that claimant had a slight excess scar as a result of her triggering release and some stiffening

relating to it. He felt it might be very, very early Dupuytren's phenomenon, but she had no family history for it and denied excessive ethanol intake. He did not feel any surgical options would be beneficial for her (Jt. Ex. 1G & 1H). Dr. Blair did not mention an impairment or give an impairment rating.

Claimant testified she also saw Gerald W. Howe, M.D., an orthopedic surgeon in Iowa City as a physician of her own choice. Dr. Howe's report is dated October 1, 1984. He declared that this lady has an early Dupuytren contracture and probably some scarring involving the digital nerves. He thought this could be improved by surgery to remove the fiborous band and the scarring. He said he felt this was undoubtedly a workers' compensation injury and should be considered a compensable injury (Jt. Ex. 4). He did not make a finding of any impairment or assess an impairment rating.

Claimant returned to see Dr. Sprague on December 5, 1984 for irritation of the flexor tendon of the left long finger and some aching pain in the palm of her hand which awakens her at night and is relieved by rubbing and massaging. He noticed that she did have some scarring of the palmar pontarosis at the area of the previous incision and a nodule within the flexor tendon sheath which was slightly tender to palpation. Dr. Sprague felt that she had recurrent tenosynovitis of the left long finger and he did not feel she had Dupuytren's disease. He said she had full extension and full flexion of the left long finger. He repeated that there is some mild catching of the nodule in the flexor tendon sheath as she flexes and extends her finger. He related she was able to work by not actively using this finger. He recommended against further surgery because there is a very good possibility that she will continue to have problems with scarring and catching. He felt she would always have some limitation because of her reaction to the A 1 pulley of the flexor mechanism of the left long finger (Jt. Ex. 3J). On January 4, 1985, Dr. Sprague assessed a permanent partial impairment rating of 10 percent of the left long finger (Jt. Ex. 3K).

Claimant testified she was examined by F. Dale Wilson, M.D., for an evaluation but that he did not treat her. Dr. Wilson reported that he examined claimant on August 12, 1985 and his report is dated August 20, 1985. A curriculum vitae for Dr. Wilson was not admitted into evidence. Dr. Wilson carefully traces the history of the claimant's symptoms and medical treatment. His examination of the left hand disclosed the following:

Concerning the left hand: There is a scar in the palm 1.2 cm. transversly at the distal palmer crease. There is a contracted fascia from this scar extending approximately 4 1/2 cm. long and very tender, pressure on this produces the pain that she is aware of; this is the source of her

misery. There is a diagonal scar which is 2 cm. long across the volar surface of the proximal phalanx of the 3rd finger. Deep beneath this scar, which is soft, freely moveable, when the finger is moved passively, non tender a grain of wheat size nodule, it does not bind up.
(Jt. Ex. 6, page 3)

Dr. Wilson's detailed testing revealed some loss of motion at the PIP joint and some lack of grip strength in the left hand. As a separate attachment to his report, but bearing the same date, is the following impairment rating:

Impariment [sic] evaluation:

I.	Right Hand	0	
II.	Left Hand		
	A. Motion loss 3rd finger 16 %	3 %	Hand
	B. Pain	3	
	C. Weakness of the hand	5	
	D. Nerves	0	
	E. Impairment due to deformity which is a scar (Dupuytren contracture)	10	
		21 %	of the hand

(Jt. Ex. 6, p. 5)

At Dr. Sprague's final examination of the claimant on January 6, 1986, Dr. Sprague rather succinctly summarizes her stituation as follows:

The patient returns to the office today stating that her symptoms involving her left long finger are approximately the same as they were on December 5, 1984, when I saw her last. She still has some cramping of the long finger at night, which awakes her, and in the morning she states that her finger is flexed at the PIP joint of 90 degrees, and she has difficulty opening the long finger. She has to put it in hot water and gradually stretch it out. She denies any decreased sensation.

On examination today, she still has some scarring in the palm and some catching of a nodule in the long finger distal palm. She does not have any

locking per se this afternoon. She has normal sensibility involving the entire left hand.

She has full flexion at the MP, PIP, and DIP joints. She lacks 10 degrees of full extension at the MP joint but has full extension at the PIP joint and DIP joint. I feel that she still is entitled to a 10% impairment of the left long finger due to her lack of extension and the catching in the palm. I do not feel that she has any Dupuytren's disease involved here. This is residual scarring of the palmar fascia due to the surgery, as well as her stenosing tenosynovitis.
(Jt. Ex. 3L)

Claimant testified that she went to Shay Chiropractic Clinic in Muscatine a number of times by her own choice and they performed acupuncture. She said it did help if you continue to go twice a week for treatments.

Claimant testified that the condition of her right hand at the time of hearing was that she still wakes up at night and the whole hand is numb. When she drives the car the steering wheel of the car hurts the surgical scar on the palm of her hand. As to her left hand when she wakes up in the morning her left long finger is flexed about one-half. It feels tight and throbs. She has to soak it in hot water for about 15 to 20 minutes to loosen it up. She tries to pry it loose and presses it against the steering wheel of the car on the way to work to try to get it to open. There is a pulling sensation in her left palm. In her present job at work she does not use the left long finger at all. If she did, it would not open the following day due to swelling and pain. She only uses the thumb and forefinger of her left hand to do her present job. She thinks her left long finger is getting worse as time goes by.

The injury has imposed a number of limitations on her. She cannot bathe or change diapers on her grandchild. She cannot use vibrating tools to do yard work at home. Her hands are sensitive to cold and cold makes her palms throb. She cannot play sports, open aspirin bottles, and she cannot peel an orange. She drops things, her hands cramp and she has difficulty lifting four or five pounds. She did concede that in her present job she routinely lifts 10 pound bags and 20 pound boxes at work regularly. She took a typing course. The right hand typed fine but the left long finger could not type the letters c, d and e.

She conceded that Dr. Catalona, Dr. Blair, Dr. Howe and Dr. Shay were her own choice of doctors. The employer had only authorized Dr. Palmer and Dr. Sprague. Her attorney chose Dr. Wilson.

Claimant testified that she made eight trips to Iowa City from home to see Dr. Sprague, a distance of 80 miles round trip. Therefore, she is claiming a medical mileage expense for 640 miles for these trips.

Riley testified that she is the plant supervisor of safety and security and this includes first aid. Since the surgery claimant had some complaints of sore hands and was given aspirin or Advil. Others also have had sore hands because of the repetitive use of their hands. The witness testified that she observed the claimant at work and the claimant does well, in fact above average, at a job that requires high speed use of both hands. Riley testified that claimant routinely packs 10 pound bags and places them into 20 pound boxes and lifts these weights without any problem. Her only medical restrictions are that she is not to use straight knives or wizard knives. Riley has never noticed the claimant's left long finger in the contracted position at work.

Rocha testified that he is the supervisor of the deboning line and that he is the claimant's supervisor. In fact, he hired claimant. Her only restrictions are no straight knives and no wizard knives. She has been able to perform all of her production line jobs since her surgeries and she has not made any complaints to him or the nurse that she cannot do her job. If there was something wrong, he would know it. He can see no obvious problems. She does a good job; she does an efficient job; she learns fast. On a scale of one to ten he would rate her at eight.

APPLICABLE LAW AND ANALYSIS

The defendants have asserted that claimant failed to timely file this action as required by Iowa Code section 85.26. However, no evidence was presented at the hearing and no mention of this issue was made in the opening statement, closing argument or in the post-trial brief of the defendants. The industrial commissioner's file shows that the defendants have never filed a first report of injury. Also defendants have not filed a memorandum of agreement as required by Iowa Code section 86.13 or a notice of voluntary payments as required by Iowa Code section 86.20 under the Iowa Workers' Compensation Law of 1980 which was in effect at the time of the injury. Therefore, pursuant to these sections of the code in effect at that time the statute of limitations has never begun to run. Consequently, defendants have failed to prove by a preponderance of the evidence that the action was not timely filed as required by Iowa Code section 85.26.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 18, 1982 is causally related to the disability on which she now bases her claim.

Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Claimant has sustained the burden of proof by a preponderance of the evidence that the injury is the cause of permanent disability and that she is entitled to permanent disability benefits. The employer actually does not dispute that the injury was the cause of permanent disability. In fact, defendants tendered a check to the claimant for three weeks of permanent partial disability based upon a 10 percent impairment of the left long finger in the amount of $465.48 which the claimant declined to accept. The disputed issue in this case is whether the permanent disability is to the left long finger as determined by Dr. Sprague or to the entire left hand as proposed by Dr. Wilson or to both hands as suggested by claimant's counsel.

As set forth above the burden of proof is on the claimant; a possibility is insufficient; a probability is necessary. The question of causal connection is essentially within the domain of the expert. Dr. Sprague was the treating physician during the entire course of treatment from January 25, 1982 through January 6, 1986. He performed two surgeries and saw the claimant on several other occasions. He is the doctor responsible for the success or failure of her medical treatment. He is a specialist in hand surgery and the upper extremity. His credentials as an orthopedic surgeon and hand surgeon are outstanding. No current curriculum vitae was submitted for Dr. Wilson. He too may be outstanding, but all that can be determined from the evidence in the record is that he is a general surgeon in Davenport, Iowa. Also, Dr. Wilson only saw the claimant one time, after all of the other treatment was completed, and his examination was for the expressed purpose of making an evaluation and giving a rating at the request of claimant's counsel. The reports of Dr. Catalona and Dr. Blair all begin by stating that

the claimant sought consultation about her left long finger. Dr. Catalona observed the scar but made no comments about it. Dr. Blair described it as mild excessive scarring in the palm of the left hand. Dr. Sprague mentions the scar in a number of his reports. Nevertheless, Dr. Sprague did not find any impairment in the hand itself. Dr. Sprague mentions the hand in rating the finger. Therefore, he did not overlook the problem in the hand. Consequently, it must be concluded that Dr. Sprague felt that the scarring was not a cause of impairment to the hand itself.

Although Dr. Catalona, Dr. Blair and Dr. Howe may not have examined the claimant for the express purpose of determining whether she had an impairment or not or giving a rating for an impairment, it does not go unnoticed that none of these doctors asserted or suggested an impairment to either the hand or the finger. This does not mean that the claimant did not have an impairment, but it does mean that three doctors that could have helped her sustain the burden of proof of an impairment of any kind did not do so. Dr. Sprague seems to be the best evidence of impairment in this case. In adopting the opinion of Dr. Sprague over Dr. Wilson the principles mentioned in Rockwell Graphic System, Inc. v. Prince, 366 N.W.2d 187 (Iowa 1985) were taken into consideration.

Claimant described various indications of weakness in her left hand. She cannot bathe or change her grandchild, open aspirin bottles, peel an orange, she drops things, and she can only lift about four or five pounds. However, she did not clarify if these inabilities were due to her left long finger or her left hand. Reviewing her testimony her major complaint was about her left long finger. Rocha and Riley testified she was an above average worker, very fast with her hands in production line work, she made no complaints and showed no signs of not being able to do the job for three years following her surgeries. They testified that she routinely lifted 10 pound bags and 20 pound boxes. Therefore, the testimony of the claimant about weakness, if it was intended to apply to her hand, is quite strenuously contradicted by the defendants.

Therefore, based on the foregoing discussion, it is determined that the claimant has failed to sustain the burden of proof by a preponderance of the evidence, the greater weight of the evidence, that she has sustained a permanent impairment in her left hand or in her right hand. She has established scarring, it has been mentioned that it is mild excessive scarring in the left hand, that it is sensitive to cold, that she wakes at night with numbness sometimes in the right hand, and she testified that it hurts the right hand scar if she touches it against the steering wheel of her car. However, the claimant has not proven by a preponderance of the medical evidence or other evidence that her complaints amount to any significant impairment of her left or right hand. On the contrary, Rocha and Riley testified that she

does high speed production work without any impairment or complaint.

Claimant has proven by a preponderance of the evidence that she sustained a ten percent impairment to the left long finger (Jt. Ex. 3K & 3L). Accordingly, she is entitled to 3.0 weeks (10% x 30 weeks) of permanent partial disability to the second finger (Iowa Code section 85.34(2)(c). Claimant has established that she is entitled to 640 miles of medical mileage to see Dr. Sprague at the rate of $.24 per mile in the total amount of $153.60. Her testimony was not controverted on this point. No claim was made for the trips to Iowa City for surgery on two different occasions.

Claimant withdrew her claim for payment of the bills of Dr. Catalona, Dr. Blair, Dr. Howe and Dr. Shay. Therefore, these medical bills are no longer an issue in the case. The drug bill from Wester Drug in the amount of $37.36 prescribed by Dr. Miquery was in no way related to this injury by testimony of the claimant or otherwise. Therefore, it cannot be allowed (Jt. Ex. 7E).

FINDINGS OF FACT

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

That the claimant was employed by the employer on January 18, 1982 when bilateral stenosing tenosynovitis along with nodules in the flexor tendon sheath developed in the right ring finger and her left long finger due to the repetitive nature of her work using her hands and fingers dejointing turkey legs for the employer.

That the claimant sustained the burden of proof by a preponderance of the evidence that she has sustained a 10 percent permanent impairment of her left long finger.

That the claimant has not sustained the burden of proof by preponderance of the evidence that she sustained an impairment to either of her hands.

That the claimant has proven that she made eight trips to see Dr. Sprague at 80 miles round trip totaling 640 miles.

That the defendants produced no evidence on the issue of the claimant's failure to file this action in a timely manner.

CONCLUSION OF LAW

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

That the injury was the cause of permanent partial disability.

That the claimant is entitled to 3.0 weeks of permanent partial disability of the left long finger (10% x 30 weeks).

That the claimant is not entitled to any permanent partial disability to either the left hand or right hand.

That the claimant is entitled to $153.60 in medical mileage as calculated above.

That the defendants did not prove by a preponderance of the evidence that the claimant failed to bring this action in a timely manner as required by Iowa Code section 85.26.

ORDER

THEREFORE, IT IS ORDERED:

That the defendants pay to claimant three point zero (3.0) weeks of permanent partial disability benefits at the rate of one hundred fifty-five and 16/100 dollars ($155.16) per week in the total amount of four hundred sixty-five and 48/100 dollars ($465.48) commencing on June 22, 1982.

That the defendants pay the accrued benefits in a lump sum.

That interest will accrue under Iowa Code section 85.30; however, interest will not accrue after January 25, 1985, the date on which claimant declined to accept defendants' check in the amount of four hundred sixty-five and 48/100 dollars ($465.48).

That the defendants pay to claimant one hundred fifty-three and 60/100 dollars ($153.60) for medical mileage.

That each party pay their own costs of this action except that the defendants are to pay the cost of providing the court reporter at the hearing pursuant to Division of Industrial Services Rule 343-4.33, formerly Iowa Industrial Commissioner Rule 500-4.33.

That the defendants are to 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 5th day of March, 1987.

Walter R. McManus Jr.

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CARL W. CLIFTON, Claimant, vs. PROCESS PIPING COMPANY, Employer, and AETNA CASUALTY & SURETY, Insurance Carrier, Defendants.	FILE NO. 663073 R E V I E W - R E O P E N I N G D E C I S I O N

INTRODUCTION

This is a review-reopening proceeding from a memorandum of agreement filed March 13, 1981 dealing with an injury of February 18, 1981. Claimant, Carl W. Clifton, seeks further benefits in the nature of payment of disputed medical expenses; additional compensation for temporary total disability or healing period; and compensation for permanent disability. The case was heard at Burlington, Iowa on November 4, 1986 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Carl W. Clifton (claimant) and Pauline Clifton (claimant's wife). The record also contains claimant's exhibits 1 through 8 and 12 through 22. Defendants' exhibits A and B were received into evidence. Claimant's exhibits 9, 10 and 11 and defendants' exhibit C were offered but were not received into evidence and remain with the file as an offer of proof only.

Consistent with the memorandum of agreement having been filed, the parties stipulated in the prehearing report that an employer/employee relationship existed between claimant and Process Piping Company on February 18, 1981 and that Clifton sustained an injury on that date which arose out of and in the course of his employment. The parties stipulated that in the event of an award claimant's weekly rate of compensation is $318.09. It was further stipulated that with regard to the medical expenses for which claimant seeks payment, the fees charged for the services that were rendered were reasonable and that the providers of the services would testify that the services were reasonable and necessary treatment for the alleged work injury. The parties stipulated that two weeks of weekly compensation has been paid.

The issues to be determined are claimant's entitlement to compensation for temporary total disability or healing period; claimant's entitlement to compensation for permanent partial disability; and claimant's entitlement to recover costs of medical treatment under section 85.27 of the Code. Defendants urged that the expenses incurred by claimant were unauthorized. A primary issue in the case is whether or not the problems for which claimant seeks compensation have a causal connection with the injury that occurred on February 18, 1981.

SUMMARY OF EVIDENCE

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

Carl W. Clifton is a 64 year old married man who commenced his apprenticeship as a pipe fitter and plumber in 1950 and became a journeyman in 1955. He testified that he has worked in the trade continually since that time. Prior to the time he entered his trade he had served 10 years in the army where he attained the rank of staff sergeant and worked primarily in the field of telephone and telegraph communications and cable splicing. His education is limited to the sixth grade.

Claimant characterized the term "plumbing" as dealing with residential work involving light pipes and fittings. He characterized "pipe fitting" as industrial work involving heavy pipe that carries steam, hydraulics or other fluids. Clifton stated that the work varies between light and heavy depending upon the weight of the pipe that is involved and the amount of pulling, straining and crawling about that is required on the particular job. He feels that a considerable amount of use of his back and physical strength is part of his trade. Clifton testified that due to the pain he presently experiences in his back he is unable to pull, lift, strain, use wrenches, work with his hands over his head, crawl on floors, climb stairs or ladders, walk on inclines or even place himself into position to work under a typical residential kitchen sink. He feels that he is completely unable to work in his trade.

Clifton testified that on February 18, 1981, he was working as a pipe fitter at the Arco Chemical Plant in Fort Madison, Iowa running two-inch diameter threaded galvanized pipe. At one point in the day claimant was standing on a sawhorse using two wrenches to turn an elbow to the appropriate angle where it would align with the next piece of pipe to be installed. Clifton testified that the elbow had already been tightened in a pipe vise and was quite tight. He testified that he was in a position where he was reaching out and pulling on both wrenches

at the same time. He stated that he pulled as hard as he could, felt pain in his right side and groin and fell to the floor. Claimant testified that the pain subsided somewhat after he had rested for 10 or 15 minutes. He stated that the incident occurred near the end of the day and was not reported immediately. He stated that while riding home after work his back was sore.

While eating supper that evening claimant found himself unable to swallow and felt a sensation that he described as like a knot in his esophagus. He stated that the sensation went away but that when he tried to eat again it recurred. Clifton testified that he walked into his front room and fell to his knees. He feared that he was having a heart attack. He was taken to the St. Mary Hospital Emergency Room in Quincy, Illinois. The emergency room records show that claimant complained of the onset of pain in his right lower quadrant during the afternoon which had let up by suppertime when he experienced pain in the epigastric area. He related a history of a hiatal hernia. He voiced no complaints regarding his back and the notes of the physical examination report no tenderness of the spine was observed (Claimant's Exhibit 21).

Claimant testified that on the following day he sought care from Frank T. Brenner, M.D., and was treated with Tylenol 3 and advised to rest in bed for two weeks. Claimant stated that his back and right hip were bothering him. He stated that Dr. Brenner recommended an additional two weeks when the condition did not improve. Exhibit 21, a report from Dr. Brenner dated February 24, 1981, indicates that claimant complained of pain in the right side and that the doctor diagnosed the condition as a muscle stain of the right low quadrant. The report is dated February 24, 1981 and indicates that the date of first treatment was February 23, 1981 (Cl. Ex. 20 & 21).

Dr. Brenner retired and claimant was referred to Bruce W. Johnson, M.D. Dr. Johnson saw claimant on June 16, 1981 were claimant voiced complaints of pulled muscles in his abdomen and back. Dr. Johnson interpreted an x-ray report taken at that time as showing arthritis and spondylosis. Dr. Johnson explained to claimant that spondylosis is often a congenital condition which the doctor felt was probably aggravated by claimant's work. The doctor recommended physical therapy (Cl. Ex. 17 & 19). Claimant testified that he chose to go to an osteopathic physician, Charles M. Eaton, D.O., upon the recommendation of his son rather than to enter into the physical therapy recommended by Dr. Johnson. He testified that he was having continual pain in his lower back and right side which he described as a burning sensation in the lower groin. He stated that he was unable to work at that time and had not been released to return to work by any physician.

In a report dated June 30, 1981, Dr. Eaton indicated that

claimant exhibited severe muscle spasm in his entire right side and that his right sacroiliac had slipped forward. He felt there was a definite connection between the injury of February 18, 1981 and his findings. Dr. Eaton stated that he had been treating claimant with osteopathic manipulation and had observed some improvement (Cl. Ex. 18). In a report dated April 27, 1982, Dr. Eaton diagnosed claimant's condition as torn ligaments and muscles. He stated that when he first treated claimant the symptoms included sciatic neuritis as well as muscle spasm and low back pain. The report indicates that claimant returned to light work on July 27, 1981 and had been able to perform light work but that any heavy work precipitated immediate pain and muscle spasm in the right low back area. Dr. Eaton indicated that the prognosis for a return to normal work could not be determined at that time (Cl. Ex. 16).

Claimant testified that the treatment he received from Dr. Eaton gave him some relief but that the pain in his back returned. He stated that Dr. Eaton released him to return to light duty work on July 3, 1981. Claimant testified that he had been paid only two weeks of workers' compensation and that it then stopped.

Claimant stated that he had no direct contact with Aetna Insurance Company as he had an attorney in June, 1981. Claimant testified that the insurance carrier had not directed him to obtain his treatment from any particular doctor and that he had not requested that the insurance carrier send him to a physician for any of his complaints.

Claimant did return to work with William Gould, a Quincy, Illinois plumbing contractor. He obtained the job through the union hall. Claimant stated that it was a small job and that he was assigned to help weld pipe and install air lines. He testified that he was unable to perform full duty but that the other workers knew of his condition and helped him. When the job ended claimant was laid off and then obtained another job through the union hall. He described it as one which involved working with copper and plastic but that he was again unable to do a full load of work and that the other workers made accommodations for him. He obtained a third job with State Mechanical Contractors and then resummed work for Gould where he remained employed through the end of 1981. Claimant testified that in all of these jobs he was unable to carry a full load of the work and was never able to resume the type of work he had performed prior to February 18, 1981.

Claimant stated that on December 29, 1981 he hurt himself while working at Gould. He described the injury as one which injured his shoulder but did not involve his back. He stated that he received at least three weeks of workers' compensation checks and a disability settlement in the amount of $6,682.37 from Gould's insurance carrier. He stated that he received

treatment for that injury from Kent W. Barber, M.D. Claimant testified that he has not worked since the day of that injury, namely December 29, 1981. He stated that he has also not looked for work since December 29, 1981. Claimant felt that he had recovered completely from the shoulder injury.

Claimant was referred to Jerry L. Jochims, M.D., for an examination. Claimant stated that Dr. Jochims took no x-rays but discovered a hernia and recommended surgery. Claimant denied that anything had happened after February 18, 1981 to cause the hernia or to injure his back. Dr. Jochims felt that claimant's symptoms were related to the right inguinal hernia which he found and recommended surgical treatment (Defendants' Ex. A). Dr. Jochims was also of the opinion that the hernia was directly related to the incident of February 18, 1981 (Def. Ex. A, Cl. Ex. 15). Dr. Jochims concluded that there was nothing wrong with claimant's back although he was aware that x-rays previously taken had showed spondylosis. Dr. Jochims offered to arrange surgical care for the hernia (Def. Ex. A). The date of the examination was September 7, 1982.

Claimant testified that he had no insurance and waited until October, 1983 to have the hernia repaired when the Illinois Public Aid Department agreed to fund it. The surgery was performed by David B. Drennan, M.D. Claimant testified that the surgery cleared up the pain he had experienced in his groin and that he recuperated for two weeks after the surgery and was then released. In claimant's exhibit 14, Dr. Drennan indicated that claimant underwent hernia repair surgery on October 28, 1983, that he should avoid lifting for eight weeks following the surgery, and that there should be no permanent disability.

Claimant related that he received some care from James A. Shaw, D.C., Quincy, Illinois, for which he incurred expenses in the amount of $1,202.00 for which he has not been repaid. He stated that the adjustments helped at the time but that the pain came back and that at times the treatments seemed to make his pain worse.

Claimant testified that he is unable to do activities around their home or generally engage in activities that he performed prior to February 18, 1981. He related that in early May of 1986, he attempted to assist in using a sledge hammer to break concrete in his yard and experienced a severe exacerbation of his back pain. He described the pain as similar to what he felt on February 18, 1981. Claimant stated that he sought medical care under the direction of Robert J. Tiffin, M.D., and was treated with medication but did not improve. He stated that he was eventually hospitalized. Claimant related that his condition had been fairly stable and that when he went to the emergency room he told the attending physician that he had been doing reasonably well up to that time.

Claimant testified that in 1978 he received workers' compensation for an incident where he stepped off a truck and injured his leg and ankle. He stated that the incident had not injured his back or groin and that when he recovered he was able to work in his trade. Claimant recalled an incident in 1971 or 1972 when he experienced back pain after moving bathtubs and sought medical treatment. He stated that the condition cleared up in a few days. Claimant testified that he had never experienced pain or discomfort of the degree that he experienced on February 18, 1981 and that all of his prior injuries had been relatively minor and had not kept him off work for more than three or four days. Claimant testified that he still has pain in his back that extends below the beltline and down his right leg. He stated that it has not changed a bit since 1981. Claimant related that he took early social security retirement at age 62. He stated that he had given up trying to work in 1982.

Claimant disagreed with exhibit 21 where it indicated that he was first seen on February 23 and returned to work on March 2, 1981. He felt that Dr. Brenner's own illness, retirement and death had caused confusion to appear in the records.

Pauline Clifton, claimant's spouse, was present in the hearing room while claimant testified and generally she agreed with his testimony. She testified that prior to February 18, 1981, claimant had been in good health, expressed no complaints of back or groin problems and worked whenever work within his trade was available.

Mrs. Clifton testified that claimant is no longer able to dance, bowl, perform repair work around their home, drive for more than approximately 30 minutes, or sit for extended periods of time. She stated that during a normal day he spends a great deal of time laying down.

Mrs. Clifton stated that when claimant worked during late 1981, he was very tired in the evenings and often would go directly to bed without eating.

Mrs. Clifton stated that claimant had recovered fully from the December, 1981 shoulder injury at some point in time in early 1982, approximately two or three months after the injury occurred.

Defendants' exhibit B is a collection of records and reports dealing with the back problems claimant encountered in early 1986.

When Dr. Tiffin first began his involvement with claimant he felt that x-rays taken on May 16, 1986, were interpreted as showing an old compression deformity of the third lumbar vertebra with a five millimeter osteophyte that was encroaching on the

spinal canal. A CT scan confirmed the existence of the osteophyte but found no disc herniation (Ex. B, page 7). In exhibit B at page 2, Dr. Tiffin discusses claimant's problem. He suggests that either the osteophyte was not present on February 18, 1981, and that it is the result of a reactive arthritis type of process resulting from that injury or, the other possibility is that the osteophyte was already present in 1981 as a result of prior arthritic changes and that the injury that occurred was similar to the one that occurred in May, 1986. He was unable to state which scenario was the more likely. None of the other x-rays referred to in the record note a compression fracture or an osteophyte.

Claimant seeks payment of the following medical expenses:

Department of Public Aid, State of Illinois	$1,671.35
James A. Shaw, D.C.	1,202.00
The Brown Drug Company	53.70
Earel & Buss Drugs	17.74
Riley's Drug Store	10.85
Charles M. Eaton, D.O.	390.00
Bruce W. Johnson, M.D.	14.00
St. Mary Hospital	138.60
TOTAL	$3,498.24

APPLICABLE LAW AND ANALYSIS

The memorandum of agreement filed in this case conclusively establishes that an employer/employee relationship existed and that the claimant did sustain an injury which arose out of and in the course of his employment. Trenhaile v. Quaker Oats Co., 228 Iowa 711, 292 N.W. 799 (1940). It does not, however, establish the nature or extent of disability. Freeman v. Luppes Transport Company, Inc., 227 N.W.2d 143 (Iowa 1975). It is not necessary to show a change of condition in order to review the adequacy of the payments made under the memorandum of agreement. Majorado v. Catepillar Tractor Co., 1-1 State of Iowa-Industrial Commissioner Decision 168 (1984). The only occurrence of injury asserted by claimant is the injury he sustained while attempting to align pipe. There is no evidence in the record of claimant sustaining any other injury on February 18, 1981. When claimant was seen at the emergency room on February 18, 1981, the history includes report of pain in the right lower quadrant and the physical examination indicates what is reported as slight epigastric tenderness in the abdomen. Dr. Brenner diagnosed claimant's condition as a muscle strain in the right low quadrant. The report indicated that when it was made, February 24, 1981, the doctor expected that claimant would be able to resume work on March 2, 1981. Claimant did not return to work. Exhibit 20, which bears the date of March 2, 1981, leaves blank the space following questions 7, 8, 9 and 10 which deal with the time when the claimant would be able to return to work. At question 13

the form indicates that claimant was improving slowly. The form shows that claimant had an office visit on March 3, 1981. It is therefore clear that Dr. Brenner's initial expectation of a return to work on March 2, 1981 was incorrect and had been changed. Weekly compensation therefore extends beyond March 2, 1981. The next evidence in the record from a medical practitioner comes from Bruce W. Johnson, M.D., in his report of June 19, 1981 (Ex. 19). Claimant indicated that he had been under conservative treatment following the time when Dr. Brenner took him off work. Dr. Brenner's records that are in evidence give no indication of what type of treatment was utilized during the three months following March 2, 1981. There is likewise no concrete medical evidence which conflicts with claimant's description of his treatment. Dr. Johnson found claimant to exhibit tenderness in the right lower quadrant that extended into his lower back. He felt that claimant had arthritis and spondylosis which had been aggravated by claimant's work and were responsible for claimant's pain. Dr. Eaton examined claimant in June, 1981, and observed muscle spasm. He felt that there was a definite connection between the injury of February 18, 1981 and the condition for which he treated claimant (Ex. 18). Although there appear to be no records in evidence which show the precise date that any physician released claimant to return to work, he did make an actual return to work on July 27, 1981. Accordingly, claimant's first healing period ended on July 26, 1981.

Claimant worked until the last part of December, 1981, when he injured his shoulder. Claimant apparently did little in the way of seeking medical care until he was examined by Jerry L. Jochims, M.D., on September 7, 1982. Dr. Jochims, an orthopedic surgeon, felt that claimant's symptoms were related to a hernia and not to anything that was wrong in claimant's back. Dr. Jochims felt that the hernia was causally related to the accident of February 18, 1981. He suggested that claimant seek surgical treatment and if there was any problem in obtaining treatment, that claimant seek assistance from him. Claimant went approximately a year thereafter before he arranged treatment for the hernia through the Illinois Department of Public Aid and David B. Drennan, M.D. Claimant never requested assistance from Dr. Jochims. The surgery was performed October 28, 1983 and, according to claimant's testimony and indications from Dr. Drennan (Ex. 14), there is little, if any, permanent disability resulting from the hernia. The report indicates that claimant was restricted from lifting for eight weeks following the surgery which was performed on October 28, 1983. Additional healing period which runs from October 28, 1983 through December 22, 1983 is allowed.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 18, 1981 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).

Claimant's description of his injury involved a complaint of pain in the right lower quadrant of his body. Dr. Brenner diagnosed an injury of the right lower quadrant. Dr. Johnson observed tenderness in the right lower quadrant. Dr. Jochims diagnosed the hernia and felt that it was related to the accident that claimant had described (Ex. 15). An activity of the type which claimant described as producing the injury is certainly the type of straining which could be expected to produce a hernia. In view of the prompt, continuing complaints, early medical diagnoses (albeit incorrect), the diagnosis and opinion regarding proximate cause from Dr. Jochims, the surgical treatment which apparently confirmed the hernia diagnosis and repaired the defect, and claimant's testimony that the surgery resolved that portion of his complaints all fit together to establish that claimant did suffer the hernia on February 18, 1981 in the accident which he described.

After the hernia was repaired, claimant was seen on one occasion by Kent W. Barber, M.D. Dr. Barber interpreted x-rays taken November 7, 1983, as showing borderline narrowing of the L-4 interspace with minimal chronic degenerative arthrosis and equivocal narrowing of the L4, L5 interspace (Ex. 13). Dr. Barber stated that claimant obviously did have some sensory loss of his right sciatic nerve which presumable followed either the back injury in 1972 or the one which had occurred two years earlier (Ex. 12). There is nothing in the record to indicate that claimant had sought any medical care after he saw Dr. Barber until early 1986 when he suffered an excerbation while attempting to break concrete with a sledge hammer. He apparently had been getting along reasonably well up until that incident (Ex. B). Radiographic studies have shown the existence of an old compression deformity in the third lumbar vertebra with an osteophyte that encroachs on the spinal canal but they do not show any disc herniation. Dr. Tiffin was unable to state whether the osteophyte, which appears to be the source of claimant's sciatic nerve problem, was in existence on February 18, 1981. He apparently feels that the osteophyte was either a reactive arthritis type of process that resulted from the 1981 injury or, on the other hand, the osteophyte was possibly in existence previously and that the injury of February 18, 1981 produced nerve impingement and pain with loss of function. He suggests that radiologic exams be reviewed in order to determine the previous presence or absence of the osteophyte (Ex. B, p. 2). No such comparison or review appears to have been accomplished. Nothing in the record refers to a compression fracture or osteophyte prior to the 1986 radiographic studies.

The injury producing activity which claimant described consisted primarily of pulling with one arm while pushing with the other. That type of activity would not normally be expected to produce a disc injury in the lower back and the diagnostic studies which have been performed indicate that there is no disc injury in claimant's lower spine. The nerve root impingement in this case appears to result from an osteophyte. In June, 1981, Dr. Johnson found claimant to be affected by arthritis and spondylosis. Stedman's Medical Dictionary, 24th Edition, defines spondylosis as vertebral ankylosis. It also states that the term is often applied nonspecifically to any lesion of the spine of a degenerative nature. The same reference defines ankylosis as stiffening or fixation of a joint as a result of a disease process, with fibrous or bony union across the joint. Dr. Johnson characterized spondylosis as a congenital condition which means that it preexisted February 18, 1981. Radiographic studies were conducted under the direction of Dr. Barber in 1983. Up to this point in time there was no reference to the existence of an osteophyte although degeneration in claimant's lower lumbar spine was noted. The conditions noted by Dr. Barber and Dr. Johnson are not dissimilar even though the descriptive words employed by each of them are not identical. It was not until the 1986 incident that the osteophyte and compression fracture were identified.

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).

It is found that claimant had an ongoing degenerative process in his spine that was aggravated in the injury that occurred on February 18, 1981. Claimant did, however, return to work, albeit with complaints of discomfort, and he continued to work until a subsequent injury struck him. Claimant has failed to prove that the injury of February 18, 1981 produced any permanent disability or any permanent change in the course of the preexisting degenerative condition in his spine.

It is therefore found and concluded that the injury claimant sustained on February 18, 1981 was a hernia and a temporary aggravation of a preexisting degenerative condition in his spine. The combination of those two conditions resulting from the injury entitles claimant to temporary total disability compensation from February 19, 1981 through July 26, 1981, a span of 22 4/7

weeks. It is found that claimant made no further significant improvement, and that none was medically indicated, subsequent to July 26, 1981, until he entered the hospital for surgery on October 28, 1983. Claimant is entitled to additional temporary total disability running from October 28, 1983 through December 22, 1983 due to the correction of the hernia, a span of eight weeks.

Claimant is entitled to recover the expenses of care for both conditions up to July 26, 1981 and for the hernia subsequent thereto. He is not entitled to recover expenses of care for his back condition that were incurred subsequent to 1981. The employer is responsible for payment of claimant's expenses at St. Mary Hospital incurred on February 18, 1981 and June 16, 1981. Conducting reasonable diagnostic tests is part of providing reasonable medical care, even though the tests may ultimately show the complaints to not be related to the work injury. Pote v. Mickow Corp., 694639 (Review-Reopening Decn. June 17, 1986). The same reasoning makes the employer responsible for claimant's expenses with Bruce W. Johnson, M.D. and Charles M. Eaton, D.O. Dr. Eaton's charges continue on through December 18, 1981. It was not unreasonable for claimant to continue seeing Dr. Eaton following his return to work since he was still having complaints. Claimant is not responsible for the medical practitioners' failure to promptly diagnose the hernia condition. Exhibit 5 is for a prescription for an expectorant for a cough. Such is not shown to have any bearing to claimant's industrial injury. The bills from The Brown Drug Company, Earel & Buss Drugs and the other charge from Riley's are unable to be connected to the industrial injury. Of the charges shown on exhibit 1, the charges to Blessing Hospital for October 27 and 31, 1983 are found to be related to the hernia and are therefore the responsibility of the defendants. The charges from Dr. Drennan are likewise found to be related to the hernia and the responsibility of the defendants. The payments made to Dr. Barber have not been shown to be related to the industrial injury and are therefore not the responsibility of the employer.

In summary, defendants are responsible for payment of the following expenses:

Blessing Hospital	$1,346.35
David B. Drennan, M.D.	258.00
Charles M. Eaton, D.O.	390.00
Bruce W. Johnson, M.D.	14.00
St. Mary Hospital	138.60
Total	$2,146.95

FINDINGS OF FACT

1. Carl W. Clifton sustained a hernia on February 18, 1981 when he strained while attempting to align pipe. The hernia

condition was not promptly diagnosed. In that same incident he also aggravated a preexisting degenerative condition in his spine.

2. Following the injury claimant was unable to engage in employment substantially similar to that he had engaged in at the time of injury from February 19, 1981 until July 27, 1981 when he returned to work.

3. Claimant suffered another injury with a different employer in late December, 1981, and has not thereafter returned to gainful employment.

4. The surgical treatment of the hernia left no permanent physical impairment or permanent disability.

5. The aggravation of claimant's preexisting degenerative spinal condition, that occurred on February 18, 1981, had no further effect upon claimant following the end of December, 1981. The problems which claimant continues to have with his spine have not been shown to be related to the February 18, 1981 injury. To the contrary, it appears most likely that they are a part of the ongoing degenerative process which preexisted February 18, 1981.

6. The medical expenses claimant incurred at Blessing Hospital, with Dr. Drennan, Dr. Eaton, Dr. Johnson and St. Mary Hospital were all fair and reasonable charges rendered for services that were provided to claimant as reasonable and necessary treatment for the injuries he sustained on February 18, 1981.

7. The employer did not designate a treating physician.

8. The assessment made by Dr. Jochims, an orthopedic surgeon, is adopted over conflicting opinions regarding claimant's back.

CONCLUSIONS OF LAW

Claimant is entitled to receive compensation for temporary total disability commencing February 19, 1981 and running through July 26, 1981 and also commencing October 28, 1983 and running through December 22, 1983.

Claimant failed to show that he suffered any permanent physical impairment or permanent impairment of his earning capacity as a result of the injuries sustained on February 18, 1981.

The injury of February 18, 1981 was a proximate cause of a hernia and a temporary aggravation of a preexisting degenerative

condition in claimant's spine.

Claimant is not entitled to receive any compensation for permanent disability based upon the injury sustained on February 18, 1981.

Where the employer fails to designate or select an authorized physician, it cannot later complain that the care selected by the employee was unauthorized. Claimant is entitled to recover $2,146.95 in section 85.27 benefits.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant thirty and four-sevenths (30 4/7) weeks of compensation for temporary total disability at the rate of three hundred eighteen and 09/100 dollars ($318.09) per week with twenty-two and four-sevenths (22 4/7) weeks thereof payable commencing February 19, 1981 and with eight (8) weeks thereof payable commencing October 28, 1983.

IT IS FURTHER ORDERED that defendants shall receive credit for the two (2) weeks previously paid. All past due amounts are to be paid to claimant in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants pay claimant two thousand one hundred forty-six and 95/100 dollars ($2,146.95) under section 85.27 of the Code.

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against defendants.

IT IS FURTHER ORDERED that defendants shall file claim activity reports as requested by this agency.

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

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RODNEY COKER,	:	
	:	File No. 745328
Claimant,	:	
	:	A R B I T R A T I O N
vs.	:	
	:	D E C I S I O N
OSCAR MAYER & COMPANY,	:	
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Rodney Coker, claimant, against Oscar Mayer Foods Corporation, a self-insured employer, for the recovery of benefits as the result of an alleged injury occurring on or about November 6, 1981. This matter was heard before the undersigned on October 20, 1986 at the Bicentennial Building in Davenport, Scott County, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, Monica Murphy, Eileen Coker, and Vernon Keller; joint exhibits 1 through 12; and, defendant's exhibit A.

STIPULATIONS AND ISSUES

Pursuant to the prehearing report and order approving the same, the parties stipulated at the time of hearing to the following:

1. There is an employer/employee relationship between the claimant and the employer at the time of the injury.

2. Claimant sustained an injury arising out of and in the course of his employment on November 6, 1981.

3. Claimant was off work following his injury for the period from May 24, 1982 through July 2, 1982, from July 8, 1982 through July 23, 1982, from July 11, 1983 through July 15, 1983, and from December 1, 1983 to the present.

4. That the injury sustained by claimant was an injury to the body as a whole.

5. That claimant's rate of compensation in the event of an award is $245.82.

6. That if the medical provider were called to testify, he would testify that the fees charged in connection with his services were fair and reasonable, further that such fees and expenses were reasonably necessary to treat the claimant's condition.

7. That defendant is entitled to a credit pursuant to section 85.38(2) in the event of an award for disability or sick pay income to the claimant in the total amount of $9,459.58.

The issues to be determined in this proceeding are whether there is a causal relationship between the injury suffered by claimant and the disability upon which this claim is based; the extent and nature of such disability should a causal relationship be established; and, whether or not there is a causal relationship between the medical expenses incurred by the claimant and the injury.

EVIDENCE PRESENTED

Claimant testified he is fifty years old. He said he left high school in 1953 when he was a sophmore and later obtained a GED. Claimant had no prior work experience before entering the United States Marines in which he served from February 3, 1954 through February 4, 1957. He stated that his primary job in the marines was the operation of a motor transport vehicle. Upon discharge from the marines claimant went to work for Service Rubber Company where he served in the capacity of a serviceman and machine operator. He held this job for three years before going to work for a year and a half as an insurance salesman. Claimant said he spent the next one and a half to one and three-fourths years working in the general maintenance division of the Illinois Department of Transportation where he mowed grass and plowed snow on Illinois roadways. He then worked briefly for a company as an oiler of automatic cutters before working for Eagle Signal Company for a three month period as an automatic lathe operator. Claimant began his employment with defendant in June of 1968.

Claimant's primary employment with defendant was in the ham boning department where his duty was to cut the ham off of the ham bones. He had held that job for approximately thirteen years. Claimant was in this position at the time of his injury on November 6, 1981.

Claimant explained that part of his job is to figure inventory tickets at the end of the day. He said that on the 6th of November 1981 he was doing this job while sitting at a desk chair in one of the offices. He said he stretched back in the chair and fell over backwards striking his neck and shoulders

against the wall. He said he was helped up from the chair at which time he was experiencing pain in his head, neck, and shoulders. Claimant said he reported the accident to the company nurse on that day and told her what had happen and how he felt. He left work that day at his regularly scheduled time and went to a tavern to cash his check. Claimant said he began to feel dizzy and then went home to lay down for the evening.

Claimant said that he first went to see the company doctor concerning this matter on November 23, 1981. Between the 23rd of November and his injury he had not received medical treatment and had continued to work although he felt pain in his left arm and dizziness. Claimant explained that John J. Bishop, M.D., examined him and sent him to Mercy Hospital for further tests. He said he next saw his family physician concerning the matter who then referred him to a doctor in Moline. In June 1982 claimant underwent a fusion of the cervical vertebrae of the fifth and sixth levels. He stated he was off work for a week prior to the surgery commencing May 24, 1982 until he returned on July 8, 1982.

Claimant reported that he had been treated for a prior problem concerning his left arm. This he described as a thoracic outlet syndrome which was surgically treated by removal of the first rib in his left side. This occurred in November of 1979 or 1980. Claimant reported that the problems with his left arm cleared up and he did not have any neck problems as a result of this incident. Claimant reported that he was able to recover full strength in his left arm and shoulder prior to the incident which occurred at work in November 1981.

Claimant advised that after his return to work in July of 1982 he continued to suffer problems with his arm, shoulder, and neck. He also continued under the care of his doctor and was released from work for about a two week period before returning. Claimant continued to work while under the care of his family physician until July of 1983. Up until that time claimant was able to continue to perform his regular job. In July 1983 claimant was again off work for a period of time. He did, however, return and continued working until December 1, 1983. At that time the pain was sufficiently severe that claimant could not continue working and he has not yet returned to work.

Claimant stated that since being off work he had been examined at the Mayo Clinic in Rochester, Minnesota, and attended a pain clinic in Iowa City, Iowa. He has been treated with various modalities including steroidal injections, the use of a TENS unit, and biofeedback training. Despite these continued treatments, claimant stated that he continues to suffer weakness in the grip of his left hand. He said he also experiences numbness in his forefinger on his left hand and the thumb. He reported having difficulty handling tools and writing with a pen.

Claimant reported experiencing muscle atrophy in his left arm due to his inability to use it properly. Claimant again contended, however, that he did not have problems with his left arm from November 1980 to November of 1981.

Claimant also reported that he had restrictions on the movement of his neck and that its limited to about forty-five degrees. He said he often hears a popping sound in his neck and that there are restrictions on the flexion and extension of the neck. Claimant reports pain between the shoulder blades and that he has a pulling sensation in his neck which gets worse with activity. He stated that he had none of these problems prior to November 1981. Claimant advised that he continues to take medication in the form of aspirin or tylenol II. He reports that overuse of his left arm results in muscle spasms in the left shoulder. He advised that he has eliminated a number of his recreational activities because of these continuing problems. Claimant felt that his condition had grown worse since he quit his employment in December of 1983.

On cross examination claimant was questioned about prior complaints of neck pain. Claimant stated that he could not recall any of the specific incidents referred to. Claimant stated that he recovered from his thoracic outlet syndrome in September of 1980 and did not experience problems from that time on. Claimant agreed, however, that medical records of the defendant would be more accurate on this point than his memory. Claimant revealed that he did not miss work from November 23, 1981 to May 1982. He stated he could not recall if or how many times he complained to the company nurse concerning neck pain between those periods of time. Claimant said that after November 1981 he did request light duty work from the defendant which was provided to him. Claimant stated on cross-examination that he was examined by F. Dale Wilson, M.D., but that Dr. Wilson did not provide him with any medical treatment.

Eileen Coker testified that she had been married to the claimant for eighteen years. She stated that she was married to the claimant at the time of an earlier accident in 1969 in which he injured his neck but stated he had made a full recovery from that incident. She too stated that she could not specifically recall subsequent incidents of neck pain or injury.

Mrs. Coker stated that claimant's initial complaints following his thoracic outlet syndrome surgery were resolved. She stated that claimant was able to resume his normal routine around the house and activities including hunting, fishing, golf, and baseball. She stated that he had resumed full activity by the summer of 1981. Mrs. Coker stated that claimant came home in November 1981 not feeling well and laid around the house that whole weekend. She said between November 6 and May 1982 claimant continued to work but gradually decreased his activities. She

reported that he had neck surgery in June 1982 but that his activity level did not resume to normal. She advised that claimant continues to use medication, a soft neck collar, a TENS unit, and other methods to relieve pain. She said he has been involved in a group pain therapy session since March 1986. She reported that claimant has not looked for work in the past several years.

On cross-examination Mrs. Coker stated that following the November 23, 1981 visit with the doctor claimant did not see another physician until May 1982.

Monica Murphy testified that she is the supervising company nurse for defendant. She has been with defendant for a total of eight years and has served in the capacity of supervising nurse for five years. She stated her job duties include treating injuries and monitoring workers' compensation and sick leave claims. She stated that she knew the claimant and had reviewed his records. Ms. Murphy advised that she was aware of claimant's injury the following morning.

Ms. Murphy testified that prior to November 6, 1981 claimant had a number of absences from work for left shoulder and neck pain. She reported that the medical records disclose that claimant suffered a back injury while hunting in October 1969 and was off work for a short period of time following that incident. She said the records reflected that claimant went home on March 27, 1975 complaining of left side and rib problems. Also, the records showed that on February 7, 1977 claimant fell at home and strained muscles in his neck and back. Claimant was apparently off work for three days in April 1977 due to neck and arm problems. He also reported neck problems in February 1979. She said the medical records reflected that he had had thoracic outlet surgery on February 12, 1980.

Ms. Murphy stated that she worked the same shift as claimant and would have been on the job between November 1981 and May 1982. She reported that claimant made no complaints of neck or arm pain during that period of time. She stated that at the time of claimant's injury in November 1981 he was on work restrictions not to exceed forty hours per week and a thirty pound lifting limit. She reported that in May 1981 claimant's left arm turned back and blue with no apparent injury. She advised that claimant's complete medical records were contained in defendant's exhibit A.

Vernon Keller testified that he is the safety and security manager for defendant and has served in that capacity for ten years. His duties include administration of workers' compensation benefits. He stated that since December 1, 1983 claimant has not returned to the defendant to request light duty work. He stated that light duty work is available and that some jobs

require lifting only eight to sixteen ounces with little or no bending. He said these jobs can be done while sitting or standing. He stated that the claimant qualifies for these jobs based upon his seniority. He added that claimant would have been qualified for light duty work as of December 1, 1983. He stated that claimant remains an employee of defendant but is presently on extended leave without benefits.

Joint exhibit 1A is the deposition testimony of John L. Hill, M.D., taken May 18, 1984. Dr. Hill testified that he is engaged in the practice of medicine in the state of Illinois and licensed there. His specializes in cardiovascular and thoracic surgery. He stated that his first occasion to treat the claimant was in November 1979 which was in connection with a thoracic outlet syndrome problem. He said he also saw the claimant in 1982 following the injury in November 1981. This first visit occurred in April at which time claimant was complaining of left forearm pain, loss of motion, and continuing aching. The doctor stated that he had no record from that visit that claimant had fallen at work and injured himself. He said he examined the claimant again in July 1982 at which time claimant indicated he had fallen off a chair the day before. He conducted an examination at that time and found nothing of significance. Dr. Hill testified that he had nothing in his records indicating that claimant had fallen at work in November 1981. He did concede that the incident had been mentioned in other medical records. Dr. Hill was of the opinion that claimant could no longer continue to do the type of work he was doing prior to the problems with his cervical disc.

Dr. Hill stated that he did not believe that the thoracic outlet syndrome problem that claimant had was related to the cervical disc problem. Dr. Hill noted that claimant had been examined at the Mayo Clinic at which time the etiology of his continued pain could not be determined. Dr. Hill did not express an opinion as to the cause of claimant's cervical disc problem.

Joint exhibit 1B is the deposition testimony of Rodney Coker. The deposition has been reviewed and it is noted that there are no significant variances between claimant's testimony and his deposition and that at the hearing in this matter.

Joint exhibit 2, a through w, are clinical notes and hospital records concerning claimant's treatment at Franciscan Rehabilitation Center, Illini Hospital, Mayo Clinic, Mercy Hospital, Moline Public Hospital, and University of Iowa Hospitals and Clinics. X-ray reports taken at Illini Hospital on April 28, 1982 disclose that at that time claimant suffered from minimal degenerative arthritic changes of the cervical spine with a slightly narrowed C5-C6 intervertebral disc space. Posterolateral spurs were also noted bilaterally at C5-C6. Moline Public Hospital records show

that in late May 1982 claimant was examined by myelogram which resulted in a diagnosis of 6th cervical nerve root radiculopathy secondary to a herniated disc and/or cervical spondylolysis. Claimant's admitting history which was taken by Stanton L. Goldstein, M.D., indicates that claimant's problem first arose following a fall in a chair at work on December 18, 1981.

Claimant was readmitted to the Moline Public Hospital in June 1982 for surgical treatment of the C5-C6 problem. The specific procedure undertaken was an anterior cervical interbody fusion at C5-C6. Remaining hospital records detail claimant's continued difficulty with pain following this procedure. An April 1984 evaluation of claimant at the Mayo Clinic failed to reveal a specific neurological cause from claimant's continued pain. Records are also included from the Pain Clinic at the University of Iowa. A letter dated May 14, 1985 from Viney Kumar, M.D., to claimant's attorney states that the Pain Clinic does not make statements as to causation.

One of the most detailed statements as to the cause of claimant's cervical problem is from John J. Bishop, M.D., in his letters of February 11, 1985 and September 22, 1986. (Exhibit 3) Dr. Bishop sets forth an extensive review of claimant's health history. He notes that as early as January 1980 claimant was experiencing pain in his left arm and shoulder. An orthopedic surgeon examined claimant January 28, 1980 and concluded that claimant suffered from thoracic outlet syndrome or possibly cervical radiculitis secondary to osteoarthritis. Treatment at that time centered on the thoracic outlet syndrome.

Dr. Bishop states that it was his definite belief that claimant's cervical problem started prior to January 1980. Further, that possibly the thoracic outlet syndrome was not the cause of claimant's problems at that time but rather cervical radiculopathy. The doctor also felt that it was significant that claimant went from November 1981 to May 1982 without medical treatment, a period of about six months. Dr. Bishop concluded that it was unlikely that claimant's symptoms and disability were related to the fall which occurred at work.

Exhibit 10 is an evaluation of claimant conducted by Dr. Wilson on July 17, 1984. Dr. Wilson concludes that the fall in November 1981 was the causative factor in claimant's disability. He bases this opinion upon a finding that the thoracic outlet syndrome surgery resolved all of claimant's problems. It is not clear what records the doctor may have reviewed, if any, concerning claimant's problems the time of that surgery.

There are numerous insurance claim forms in the medical records. Some of these forms state claimant's condition was the result of a work injury, others indicate it was not.

A review of defendant's exhibit A discloses complaints by claimant of neck and arm pain, or lack thereof, consistent with the testimony of Monica Murphy.

APPLICABLE LAW AND ANALYSIS

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 6, 1981 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).

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

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

Other than various insurance claim forms filed by various doctors, some of which state claimant's injury was from work and others that state otherwise, there are but two expert opinions concerning causation in this record. Dr. Wilson causally relates the claimant's disability to the injury and Dr. Bishop does not. Of the two opinions, Dr. Bishop's must be adopted.

First, Dr. Bishop was a treating physician of the claimant and clearly dealt with the causation question in greater detail. The concerns or factors outlined by Dr. Bishop to support his opinion appear well founded. These include the fact that claimant had similar, if not identical complaints before the fall in November 1981 as he did after. Also, claimant was able to work for about six months following the incident with few, if any complaints. Claimant concedes that the medical records of defendant are more reliable than his memory. The diagnosis of claimant's condition is one suggestive of a long term degenerative process and not one of traumatic origin. At most, the fall against the wall merely slightly aggravated a preexisting condition.

Dr. Wilson's opinion appears to be little more than a conclusion without substantive foundation. Claimant cannot be said to have met his burden of proof on this record.

FINDINGS OF FACT

WHEREFORE, the following facts are found:

1. On November 6, 1981 claimant injured his neck at work.

2. The injury at work may have slightly aggravated a preexisting osteoarthritic condition.

3. Claimant's subsequent disability and medical expenses were not caused by the injury of November 6, 1981.

CONCLUSION OF LAW

IT IS THEREFORE CONCLUDED that claimant has failed to prove by a preponderance of the evidence that there is a causal relationship between his injury and the disability upon which this claim is based.

ORDER

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

IT IS FURTHER ORDERED that each party shall pay the costs they have incurred in this proceeding. Defendant shall pay the cost for the attendance of the court reporter.

Signed and filed this 27th day of February, 1987.

STEVEN E. ORT
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001635

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY KAY WILLITS COLLINS Claimant, vs. FRIENDSHIP VILLAGE, INC., d/b/a FRIENDSHIP VILLAGE RETIREMENT CENTER, Employer, and GREAT AMERICAN INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 679258 R E V I E W - R E O P E N I N G D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by the claimant, Mary Kay Willits Collins, against her employer, Friendship Village, Inc., d/b/a Friendship Village Retirement Center, and its insurance carrier, Great American Insurance Companies, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained August 13, 1981. This matter came on for hearing before the undersigned deputy industrial commissioner in Waterloo, Iowa, on December 29, 1986. The record was considered fully submitted at close of hearing.

The record in this case consists of the testimony of claimant, of Orlo K. Collins, of Florence Hare, of Thomas Magner, and of Judy Steinhook, as well as of joint exhibits 1 through 30. Exhibits 1 and 2 are medical reports of M. A. Afridi, M.D., of May 17, 1983 and February 14, 1984, respectively. Exhibits 3 through 6 are medical reports of James E. Crouse, M.D., of August 23, 1982, February 25, 1983, April 29, 1983, and September 12, 1983, respectively. Exhibits 7 through 11 are office records of Dr. Crouse. Exhibit 12 is the deposition of Dr. Crouse taken November 6, 1986. Exhibits 13 through 16 are medical illustrations as originally introduced and elaborated upon by Dr. Crouse in his deposition. Exhibits 18 through 20 are reports and notes of Dr. Crouse as originally introduced in the Crouse deposition. Exhibit 21 is a report and accompanying office

notes of R. R. Roth, M.D., of February 14, 1983. Exhibit 22 is Dr. Roth's progress report from August 17, 1981 through October 28, 1982. Exhibit 23 is Schoitz Hospital records from August 31, 1981 to September 16, 1981. Exhibit 24 is Schoitz Hospital records from November 24, 1981 to December 8, 1981. Exhibit 25 is Schoitz Hospital records of October 19, 1982 to October 29, 1982. Exhibit 26 is Schoitz Hospital records from March 8, 1983 to March 20, 1983. Exhibit 27 is the curriculum vitae of Thomas W. Magner. Exhibit 28 is a report of Mr. Magner of August 2, 1985. Exhibits 29 and 30 are reports of Judy Steenhoek of December 23, 1986 and November 14, 1984, respectively. All evidentiary objections are overruled.

ISSUES

Pursuant to the prehearing report and the uncontested modification of same, the parties stipulated that claimant's work injury is the cause of temporary disability and that claimant is entitled to temporary total or healing period benefits from August 14, 1981 to April 20, 1983 with permanent partial disability benefits to commence on that date. They further stipulated that claimant's rate of weekly compensation is $93.82. Issues remaining to be resolved are:

1) Whether a causal relationship exists between claimant's injury and her claimed permanent disability;

2) Whether claimant is entitled to permanent partial or permanent total disability benefits; and

3) Whether claimant is an odd-lot worker under the Guyton doctrine.

REVIEW OF THE EVIDENCE

Claimant, who was born on February 1, 1948, injured herself while working in the infirmary at the Friendship Village Retirement Center. She attempted to prevent a confused patient from falling from her bed and subsequently fell to the floor hitting her buttocks and back. Claimant's injury occurred on August 13, 1981, a Thursday evening. She experienced immediate low back pain but worked throughout her shift. Claimant was off the following three days, but on her work return was examined by Carol Walters, R.N., night supervisor who subsequently referred her to R. R. Roth, M.D. Roth initially prescribed Motrin and treated claimant with physical therapy. Claimant continued to experience low back pain with radiation into her left leg. On physical examination on August 24, 1981, claimant's straight leg raising was positive at 60 degrees on the left, DTR's were normal and Patrick's sign was negative.

On August 28, 1981, Dr. Roth referred claimant to James

Crouse, M.D., a board certified orthopedic surgeon. Claimant was admitted to Schoitz Memorial Hospital on August 31, 1981. A lumbar pantopaque myelogram of September 8, 1981 showed a disc protrusion at L5 on the left. An L5 disc excision was carried out on September 11, 1981. Dr. Crouse reported that postoperatively, claimant initially did very well with no leg pain. On October 27, 1981, claimant was complaining of recurrent pain in her back and into the left leg. Following an initial attempt at conservative treatment, claimant was readmitted to Schoitz Hospital on November 25, 1981. A CT scan of November 25, 1981 suggested a protruded disc at L5 in the midline and somewhat to the left. On December 1, 1981, claimant had reexploration of the L5 disc, a laminectomy at L5-S1 including complete curettage and rongeuring of the L5 disc space. Dr. Crouse reported that claimant improved following that surgery and released her to return to work on February 8, 1982. Claimant testified that she attempted to return to work on that date as a nurse's aide at Friendship Village with restrictions, but that after two and one-half hours of work, she could not handle the lifting and bending required. She indicated that her supervisor then instructed her to leave work. Claimant stated that her back improved with bedrest and that after examination by Dr. Crouse, she was released to return to work on April 8, 1982 for half days working as a ward clerk. In that position, claimant filed medications, kept and filed patient records, and answered the telephone. Claimant testified that she worked two or three days, but developed low back problems on bending, leg problems while walking, and headaches. She reported that her supervisor advised her to leave and that Dr. Crouse then advised her that she could not work. Claimant testified that Crouse has not since released her for either job.

Claimant's low back and left buttock pain persisted and worsened through Spring and Summer 1982. Her straight leg raising test remained positive. On August 26, 1982, Dr. Crouse opined that she probably had formed adhesions subsequent to her two surgeries. Dr. Crouse readmitted claimant to Schoitz Hospital and on October 20, 1982 performed a decompression of L4, L5 on the left with bilateral, lateral fusion at L3 through the sacrum. Claimant testified that she initially improved following that surgery, but subsequently had a return of low back and left leg pain. A back brace and corset were prescribed. Claimant was continued on Parafon Forte for muscle spasm and pain. TENS unit treatment was initiated.

In Spring 1983, claimant was referred to M.A. Afridi, M.D., for psychiatric evaluation. Claimant was noted subjectively as feeling anxious and depressed as a result of pain. Her condition was diagnosed as a depressive reaction, anxious personality, and back pain. Dr. Afridi primarily treated claimant for her back pain and saw her on six occasions for acupuncture related to that pain. The doctor prescribed Elavil 50 mg. at bedtime as well.

In a report of February 25, 1983, Dr. Crouse indicated that claimant's increasing left leg pain after initially having good relief following her last surgery could be attributed to post-operative scarring. He reported that no further surgical treatment was indicated and opined that she was quite likely to continue to have left leg symptoms as well as intermittent low back symptoms. He estimated that her permanent impairment would be approximately 25 percent of the body as a whole under the Manual for Orthopedic Surgeons. On April 29, 1983, Dr. Crouse opined that claimant had been totally disabled from working since August 1981 and reported she did not believe she was able to return to work as a nurse's aide or any job requiring repetitive lifting, bending, and stooping. He then reported that under the Manual for Orthopedic Surgeons, a patient with surgical excision of a disc with a fusion with lifting activities modified and some persistent pain and stiffness would have an estimated permanent partial impairment of 20 percent of the body as a whole. In his deposition, Dr. Crouse characterized that as a misstatement on his part of the manual and again opined that claimant's actual permanent partial impairment should be 25 percent of the body as a whole.

Claimant was admitted to Schoitz Medical Center on March 8, 1983 and subsequently underwent an exploratory laparotomy with lysis of adhesions, small bowel enteroenterostomy, and bilateral oophorectomy with removal of large right ovarian cyst with a discharge on March 20, 1983. She saw Dr. Crouse on April 7, 1983 with back discomfort and some left leg pain. He noted her recent surgery and stated that prior to that surgery her back had been reasonably comfortable. Dr. Crouse opined in his deposition, however, that bowel surgery wouldn't have injured claimant's back but for weakening the abdominal muscles and, thereby, aggravating back symptoms in a patient already having them or creating increased aching simply from altered activities and accompanying bedrest.

Dr. Crouse apparently saw claimant in November 1984 for further evaluation regarding her permanent partial impairment and then did not see her until August 27, 1986 when she was reevaluated because of reported increased discomfort in her back and through her left leg. The doctor then stated that claimant had been getting along reasonably well and was able to do light housework until two weeks prior to her examination. He indicated that her back and leg pain persisted from the August 13, 1981 injury but that he expected claimant's exacerbation of back discomfort to resolve and leave her with the same degree of permanent impairment previously estimated.

In his deposition, Dr. Crouse indicated that claimant's history of initial improvement and then worsening of her condition was consistent with adhesions as a complication of a back injury. Dr. Crouse opined that claimant could occasionally lift

from 10 to 20 pounds and could frequently lift very light weights. He opined she could not do prolonged sitting, but could sit six hours total daily with a break after a couple of hours. He reported that she could stand ten to fifteen minutes at a time up to a couple of hours during the day. He characterized bending and stooping activities as quite limited and reported that she should not be climbing. He indicated claimant was able to drive but would need occasional breaks from the sitting involved. He reported claimant had no permanent restrictions concerning reading, but should change positions and move about occasionally while doing so to avoid prolonged sitting. Dr. Crouse opined that claimant's restrictions would prevent her from working as a nurse's aide, as a ward clerk in an unrestricted capacity, as a waitress, and as a cashier in an unrestricted capacity. The doctor opined, however, that a number of sedentary activities claimant could perform on a full-time basis were within the restrictions outlined by him.

Claimant testified that she continues to have back and leg pain and muscle spasms and that her condition is aggravated by cold, damp weather. She has difficulty sleeping. Her left leg gives out although she has not fallen. She reported she takes from eight to nine nonprescription pain pills per day. Claimant does housekeeping at home, working intermittently at sweeping, vacuuming, cooking, cleaning; she occasionally does family laundry. She does not carry groceries. Claimant testified that she told Dr. Crouse that she had back pain and headaches after she had read for too long and that he then told her not to sit and read for too long a time. Claimant reported that she can drive her husband's gearshift, four-wheel drive truck for at least fifteen to twenty miles without problems. She denied that the vehicle was hard to drive stating occasionaly she could move her feet about.

Claimant reported that her daughter and the daughter's seventeen month old child live with claimant and her husband. Claimant stated that the daughter does housekeeping for claimant and that claimant "takes care of" the baby only if her husband or claimant's sister is there. Claimant opined that she could not babysit for income because of the constant activity and lifting involved. She denied having ever told Judy Steenhoek that she enjoyed being home watching the child. Claimant opined she could not work as a housekeeper because of the reaching and lifting involved; that she could not work as an usher because of standing and walking involved or as a ticket taker because of standing and sitting involved. Claimant reported that she can ride in a car for approximately an hour and then must walk around. She stated she has difficulty climbing stairs and must do so slowly and carefully and while using a handrail. Claimant indicated that she no longer bowls and dances both of which she had done prior to the injury.

Claimant testified that she completed ninth grade and as of December 19, 1986 had enrolled in a program towards obtaining her GED. She reported that she wanted her GED in order to enhance her employability, but agreed that she had not taken steps to obtain it until Judy Steenhoek suggested she do so. Claimant obtained a nurse's aide certificate in 1979 after completing a three month course. She had been employed as a nurse's aide at various nursing homes prior to her employment at Friendship Village. Claimant has also worked as a homemaker, as a clearing house coupon counter, as a waitress, and as a barmaid. As a coupon counter, claimant sat counting boxes of coupons. She reported that she would count a box and then get up and get the next box. A break was available every two hours. As a nurse's aide, claimant was involved in general patient care including bathing, showering, walking patients, applying heat treatments, and lifting patients with the assistance of another person.

Claimant reported that she does not routinely read the newspaper want ads in that she does not believe doing so will benefit her. She reported that she had not looked for work because she was familiar with the Waterloo economy and felt that with three back surgeries she would not be hired there. Claimant stated that she had visited the area office of State Vocational Rehabilitation but that when she did so, she was told that she was at the wrong place that vocational rehabilitation only helped people with "handicaps." She indicated she was not told what programs were available for someone with difficulties such as hers. Claimant indicated that she had called Karen Johns of Job Service regarding the Job Service work search program, but that Ms. Johns had not returned her call. Claimant indicated that she had not called Ms. Johns again in that she was occupied with a family member's death. Claimant further explained that her understanding was that Steenhoek was to help her obtain her GED and then to help her seek employment, not that Steenhoek was to initially help her seek employment. Claimant agreed that she has not considered work with the Home Shopper Network or telephone sales work. Claimant agreed that she had never formulated plans to determine what employment she could handle but stated she would be willing to seek retraining. She subsequently agreed that she had not looked into such retraining, however.

Orlo K. Collins, claimant's husband, testified that he has known claimant whom he married on April 3, 1982 since February 1981. He substantiated claimant's testimony regarding her condition. Mr. Collins testified that he has discouraged claimant from returning to work because he did not feel she should work given her condition.

Florence Hare testified that she has known claimant since March 1981 and has observed her activities since the injury. She also substantiated claimant's testimony regarding claimant's

condition.

Thomas W. Magner, who is employed full time as a vocational rehabilitation counselor with the state of Iowa, and who also does private vocational consulting, testified that claimant's counsel retained him to assess claimant's employability. Mr. Magner is a certified rehabilitation counselor and holds a Master of Science Degree in rehabilitaton counseling. He has been employed in rehabilitation work since 1973. Magner saw claimant initially on July 30, 1985 and then on October 9, 1986 and once spoke with her by telephone. Magner reported that he took a work history for claimant, examined her educational background and reviewed the medical information from Dr. Crouse including her impairment rating and his restrictions on claimant's activities as well as Crouse's deposition. Magner indicated that he reviewed the Dictionary of Occupational Titles anad the Iowa State Occupational Coordinating Handbook as well as considered the local job market. He opined that claimant is motivated to work and is quite frustrated at her inability to work. He opined that claimant could not do nurse's aide work, ward clerking, babysitting, telephone answering, housecleaning, or telemarketing. He stated that most sedentary jobs require sitting and that with restrictions against prolonged standing and sitting, claimant could not handle such jobs. Magner agreed there was no indication that claimant had sought other employment or training and stated that while generally getting a GED results in better preparation for employment than a ninth grade education only, he did not believe a GED would make claimant employable given that claimant's pain limits what she can actually do. Magner agreed that if sedentary work in stable jobs were available, and if claimant could perform such work, claimant could work in recognizable fields in the Waterloo area. Magner agreed that he had not assisted claimant in learning how to look for work or how to interview for jobs nor had he arranged interviews with claimant, nor did he recommend claimant seek vocational rehabilitation in July 1985, nor did he mention that Job Service was available to assist claimant.

Judy Steenhoek indicated that she has a Masters Degree in job placement and job development and has worked as a rehabilitation specialist with Intracorp for approximately five years. Ms. Steenhoek indicated that Great American Insurance Company initially asked her in Fall 1984 to evaluate and make recommendations as to claimant's employability. Rehabilitation work with claimant was reinitiated in November 7, 1986. Ms. Steenhoek then saw claimant on that date and on December 10, 1986 and December 22, 1986 as well. Ms. Steenhoek took an employment history and reviewed her medical records and restrictions. In December 1986, Ms. Steenhoek gave claimant information about how to begin work on her GED. Ms. Steenhoek also directed claimant to a job search assistance class with Job Service. Ms. Steenhoek only could meet with claimant when a person from claimant's

counsel's office was present. Ms. Steenhoek opined that this did not help her develop a relationship with claimant.

Ms. Steenhoek opined that generally the longer an individual is off work the more difficult it will then be to return to work. She stated that obtaining a GED will positively affect employ-ability and that work on the GED was a form of gainful activity and, therefore, was a justifiable job placement effort. Ms. Steenhoek opined that there were jobs within the Waterloo labor market which claimant could perform. She reported that she had contacted employers in telemarketing, home shopping, and at Casey's Store, but had not advised those propspective employers as to claimant's permanent partial impairment rating or her restrictions. Ms. Steenhoek opined that claimant could do sales work, clerking, cashiering, telemarketing, light weight fast food delivery, order clerking, motel desk clerk, ticket sales, and receptionist work as well as bartending in very specific settings. Ms. Steenhoek characterized telemarketing as a growing, more reputable field in which individuals can sit or stand. She reported that a telemarketing personnel worker informed her on-site telemarketing work paying $150 to $200 per week for a thirty hour week was available in Waterloo. Ms. Steenhoek agreed she had not considered whether light weight delivery work would involve stair climbing. Ms. Steenhoek indicated that her wage survey had revealed that jobs within claimant's capacities would pay from $3.35 per hour to $8.00 per hour. The greater number of positions surveyed had salary ranges from $3.35 to $4.25 per hour. Claimant was earning $4.25 per hour when injured. Ms. Steinhoek testified that she is aware that employers are hesitant to hire persons with back problems because they fear further workers' compensation claims. She reported that she knew of no job where claimant would be able to lie down or bathe if needed for her pain.

Ms. Steenhoek characterized motivation as a most important factor in finding employment. She reported that claimant had not been highly motivated to seek employment from her injury date to her medical release, but that she had seen a slight improvement in claimant's motivation since she began working with her in November 1983.

The reports of Mr. Magner and Ms. Steenhoek were consistent with their testimony at hearing.

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

APPLICABLE LAW AND ANALYSIS

Our initial concern is with the causal connection issue.

The claimant has the burden of proving by a preponderance of

the evidence that the injury of August 13, 1981 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).

Subsequent to her work-related fall, claimant underwent three back surgeries. Generally after her surgeries, claimant's condition improved initially and then again deteriorated. Claimant continues with back and leg pain. Dr. Crouse opined that claimant's course is typical of that found in persons who develop adhesions following back surgery and that her back and leg pain persisted from her August 13, 1981 injury. Claimant has established the requisite causal connection between her claimed disability and her injury. Defendants raise the issue that claimant's condition somehow results from her abdominal surgery. The evidence including Dr. Crouse's express testimony does not support that, however.

Our next concern is the nature and extent of claimant's benefit entitlement and the related question of whether claimant is an odd-lot worker.

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."

In Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

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.

Proof that a defendant failed to retain claimant in its employ in any capacity after the work injury is one of the factors which determines whether the claimant made a prima facie case showing he is an odd-lot employee, although such proof is not necessarily conclusive. Chrysler Corp. v. Duff, 314 A.2d 915 (Delaware). See also 2A Larson, The Law of Workmen's Compensation, section 57.61 at 10-164.90.

Age is a relevant factor in determining industrial disability. However, a distinction must be drawn between a case where, for instance, persons age 45 to 50 are displaced from the only line of work for which they are trained or educationally qualified, and the case where the vast majority of claimant's earning years are passed. In the former case (of course dependent upon various factors) the injured worker's earning capacity has seriously been reduced due to age. He or she has been injured not at a time when they are younger and more easily retrainable, nor at an advanced working age when working earning capacity will be curtailed by the fact that a person will soon retire and that their earning capacity will not be based upon their work but upon their age, retirement schemes, etc. These people have been injured at the prime of their earning years, where they have many working years ahead of them-where their earning capacity is based upon their ability to work--to be employed. Industrial disability is based upon lack of earning capacity due to a compensable injury that has diminished the injured worker's ability to maintain the earning capacity he enjoyed prior to his injury. Haney v. Protein Blenders, Inc. and TransAmerican Insurance Services, (Appeal Decision October 18, 1985).

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 ex-

perience or capacity to perform. Shaw v. Gooch Feed Mill Corp., 210 Neb. 17, 312 N.W.2d 682 (1981).

Claimant has made a prima facie showing that she is an odd-lot worker. Claimant has restrictions on bending, lifting, sitting, standing, stooping and climbing. She continues to have significant back and leg discomfort which is not likely to diminish in the future. The discomfort and limitations in themselves would limit what claimant "can or cannot do," but alone would hardly be sufficient for a prima facie showing that claimant is incapable of obtaining employment in any well known branch of the labor market. Additionally, claimant is only thirty-eight years old. She appears to be a reasonably intelligent lady who was well motivated to work throughout her preinjury lifetime. Claimant's formal education is minimal, however. She has only completed ninth grade and a three month nurse's aide training course. Given those education limitations, her preinjury history of consistent work at lackluster jobs is remarkable. The greater weight of the evidence shows claimant cannot return to such employment, however. Both Dr. Crouse and Mr. Magner have opined claimant cannot do a whole series of manual jobs including nurse's aide, ward clerking, cashiering, waitressing, babysitting, receptionist and telephone answering, housecleaning and telemarketing. Defendants' vocational expert, Ms. Steenhoek, has opined that claimant could do sales work, clerking, cashiering, telemarketing, light weight, fast food delivery, order clerking, motel desk clerking, ticket sales, receptionist work and bartending in very specific settings. Ms. Steenhoek's opinions are rejected as contrary to the medical opinion of Dr. Crouse and because Ms. Steenhoek appears to not have considered all physical maneuvers required of claimant in each of the positions recommended. Further, she did not inform potential employers of claimant's restrictions. Hence, her testimony does not establish that claimant would actually be offered positions given claimant's restrictions. Ms. Steenhoek did not consider the climbing likely required in fast food delivery nor apparently the prolonged sitting and standing required in clerking, sales, and bartending. (Arguably, claimant might be able to do coupon counting under conditions like those under which she did that work in the past. We do not believe the evidence establishes that such work is so readily available in the general economy as to carry defendants' burden of showing suitable employment exists for claimant, however.)

Defendants argue claimant's failure to look for work and her failure to work on her GED show a lack of motivation on her part. In a more general case, we might well agree with defendants. Claimant testified, however, that she did not seek work because given her three back surgeries she felt she would not find work in the depressed Waterloo economy. Claimant's perception of her situation was in keeping with her education and life and work experience. If jobs were actually available for claimant in the Waterloo economy, defendants were in far better position than

claimant to ascertain that and direct claimant as to how to go about obtaining those positions. We do not believe that claimant should be penalized because they did not choose to actively involve themselves in claimant's rehabilitation until mere weeks before the hearing in this matter. Likewise, claimant left school almost twenty years ago, and but for her nurse's aide course, has not returned. Some insecurity about returning to school is understandable in a person with that educational history. Both defendants' and claimant's legal representative and claimant's vocational expert were in a position to encourage claimant to begin work on her GED and direct her as to how to do so. We find the fact that none took that very reasonable action until just days prior to hearing far from commendable. We do not believe that failure should be charged against claimant, however. Further, we are not convinced that claimant's obtaining her GED would appreciably enhance her employability given her significant physical problems and limitations. We note that claimant did begin work on the GED within days of Ms. Steenhoek's active involvement with her case. That fact speaks well of claimant's actual motivation. We encourage claimant to continue her educational efforts as doing so is likely to enhance her own self esteem and life satisfaction. Defendants have not produced evidence of suitable employment for claimant nor shown that claimant's failure to find work results from something other than her injury when all factors bearing on her actual employ-ability are considered. Claimant is a permanently totally disabled worker.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant, a nurse's aide, was injured on August 13, 1981 when she fell to the floor hitting her buttocks and back while attempting to prevent a confused patient from falling from her bed.

Claimant had an L5 disc protrusion on the left. Dr. Crouse performed an L5 disc excision on September 11, 1981.

Claimant initially did well but developed recurrent left leg pain.

Dr. Crouse re-explored the L5 disc and performed a laminectomy at L5-S1 on December 1, 1981.

Claimant attempted to return to work as a nurse's aide on February 8, 1982 but could only work two and one-half hours.

Claimant attempted to work four hours per day as a ward clerk in April 1982, but was unable to continue after two or three days.

Claimant has not otherwise been released to work.

Claimant's low back and leg pain returned.

On October 20, 1982, Dr. Crouse performed a decompression of L4, L5 on the left with bilateral, lateral fusion at L3 through the sacrum.

Claimant improved initially but had a subsequent return of low back and left leg pain.

Claimant has developed adhesions as a complication of her back surgeries.

Claimant will continue to have left leg and intermittent low back symptoms.

Claimant can frequently lift very light weights; can occasionally lift from ten to twenty pounds; cannot bend, stoop, climb, twist; and cannot sit or stand for prolonged periods.

Claimant has received only minimal vocational rehabilitative assistance.

Claimant's work experience is primarily as a nurse's aide; she has also done coupon counting, waitressing, bartending and like manual labor.

Claimant cannot return to those employments or other manual labor requiring physical maneuvers from which she is restricted.

Claimant has not actively sought work, but her perception that no work would be available to her was reasonable given her back surgeries, her minimal work skills, and the depressed local economy.

Claimant is 38 years old and has completed ninth grade.

Claimant enrolled in a GED program after being encouraged and assisted in doing so.

Claimant's motivation to work is reasonable given her physical condition, her current work skills, and her education level.

Claimant is incapable of obtaining employment in any well known branch of the labor market as a result of her work injury and not as a result of factors attributable to her but not otherwise bearing on her actual employability.

Claimant is an odd-lot worker.

Defendants have not shown suitable employment exists for claimant.

CONCLUSIONS OF LAW

THEREFORE, IT IS FOUND:

Claimant has established that her August 13, 1981 injury is the cause of the disability on which she bases her claim.

Claimant is entitled to permanent total disability benefits resulting from her injury from her injury date and through the period of her disability.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent total disability benefits at the rate of ninety-three and 82/100 dollars ($93.82) during the period of her disability.

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 29th day of January, 1987.

Helen Jean Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY KAY WILLITS COLLINS Claimant, vs. FRIENDSHIP VILLAGE, INC., d/b/a FRIENDSHIP VILLAGE RETIREMENT CENTER, Employer, and GREAT AMERICAN INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 679258 R E V I E W - R E O P E N I N G D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by the claimant, Mary Kay Willits Collins, against her employer, Friendship Village, Inc., d/b/a Friendship Village Retirement Center, and its insurance carrier, Great American Insurance Companies, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained August 13, 1981. This matter came on for hearing before the undersigned deputy industrial commissioner in Waterloo, Iowa, on December 29, 1986. The record was considered fully submitted at close of hearing.

The record in this case consists of the testimony of claimant, of Orlo K. Collins, of Florence Hare, of Thomas Magner, and of Judy Steinhook, as well as of joint exhibits 1 through 30. Exhibits 1 and 2 are medical reports of M. A. Afridi, M.D., of May 17, 1983 and February 14, 1984, respectively. Exhibits 3 through 6 are medical reports of James E. Crouse, M.D., of August 23, 1982, February 25, 1983, April 29, 1983, and September 12, 1983, respectively. Exhibits 7 through 11 are office records of Dr. Crouse. Exhibit 12 is the deposition of Dr. Crouse taken November 6, 1986. Exhibits 13 through 16 are medical illustrations as originally introduced and elaborated upon by Dr. Crouse in his deposition. Exhibits 18 through 20 are reports and notes of Dr. Crouse as originally introduced in the Crouse deposition. Exhibit 21 is a report and accompanying office

notes of R. R. Roth, M.D., of February 14, 1983. Exhibit 22 is Dr. Roth's progress report from August 17, 1981 through October 28, 1982. Exhibit 23 is Schoitz Hospital records from August 31, 1981 to September 16, 1981. Exhibit 24 is Schoitz Hospital records from November 24, 1981 to December 8, 1981. Exhibit 25 is Schoitz Hospital records of October 19, 1982 to October 29, 1982. Exhibit 26 is Schoitz Hospital records from March 8, 1983 to March 20, 1983. Exhibit 27 is the curriculum vitae of Thomas W. Magner. Exhibit 28 is a report of Mr. Magner of August 2, 1985. Exhibits 29 and 30 are reports of Judy Steenhoek of December 23, 1986 and November 14, 1984, respectively. All evidentiary objections are overruled.

ISSUES

Pursuant to the prehearing report and the uncontested modification of same, the parties stipulated that claimant's work injury is the cause of temporary disability and that claimant is entitled to temporary total or healing period benefits from August 14, 1981 to April 20, 1983 with permanent partial disability benefits to commence on that date. They further stipulated that claimant's rate of weekly compensation is $93.82. Issues remaining to be resolved are:

1) Whether a causal relationship exists between claimant's injury and her claimed permanent disability;

2) Whether claimant is entitled to permanent partial or permanent total disability benefits; and

3) Whether claimant is an odd-lot worker under the Guyton doctrine.

REVIEW OF THE EVIDENCE

Claimant, who was born on February 1, 1948, injured herself while working in the infirmary at the Friendship Village Retirement Center. She attempted to prevent a confused patient from falling from her bed and subsequently fell to the floor hitting her buttocks and back. Claimant's injury occurred on August 13, 1981, a Thursday evening. She experienced immediate low back pain but worked throughout her shift. Claimant was off the following three days, but on her work return was examined by Carol Walters, R.N., night supervisor who subsequently referred her to R. R. Roth, M.D. Roth initially prescribed Motrin and treated claimant with physical therapy. Claimant continued to experience low back pain with radiation into her left leg. On physical examination on August 24, 1981, claimant's straight leg raising was positive at 60 degrees on the left, DTR's were normal and Patrick's sign was negative.

On August 28, 1981, Dr. Roth referred claimant to James

Crouse, M.D., a board certified orthopedic surgeon. Claimant was admitted to Schoitz Memorial Hospital on August 31, 1981. A lumbar pantopaque myelogram of September 8, 1981 showed a disc protrusion at L5 on the left. An L5 disc excision was carried out on September 11, 1981. Dr. Crouse reported that postoperatively, claimant initially did very well with no leg pain. On October 27, 1981, claimant was complaining of recurrent pain in her back and into the left leg. Following an initial attempt at conservative treatment, claimant was readmitted to Schoitz Hospital on November 25, 1981. A CT scan of November 25, 1981 suggested a protruded disc at L5 in the midline and somewhat to the left. On December 1, 1981, claimant had reexploration of the L5 disc, a laminectomy at L5-S1 including complete curettage and rongeuring of the L5 disc space. Dr. Crouse reported that claimant improved following that surgery and released her to return to work on February 8, 1982. Claimant testified that she attempted to return to work on that date as a nurse's aide at Friendship Village with restrictions, but that after two and one-half hours of work, she could not handle the lifting and bending required. She indicated that her supervisor then instructed her to leave work. Claimant stated that her back improved with bedrest and that after examination by Dr. Crouse, she was released to return to work on April 8, 1982 for half days working as a ward clerk. In that position, claimant filed medications, kept and filed patient records, and answered the telephone. Claimant testified that she worked two or three days, but developed low back problems on bending, leg problems while walking, and headaches. She reported that her supervisor advised her to leave and that Dr. Crouse then advised her that she could not work. Claimant testified that Crouse has not since released her for either job.

Claimant's low back and left buttock pain persisted and worsened through Spring and Summer 1982. Her straight leg raising test remained positive. On August 26, 1982, Dr. Crouse opined that she probably had formed adhesions subsequent to her two surgeries. Dr. Crouse readmitted claimant to Schoitz Hospital and on October 20, 1982 performed a decompression of L4, L5 on the left with bilateral, lateral fusion at L3 through the sacrum. Claimant testified that she initially improved following that surgery, but subsequently had a return of low back and left leg pain. A back brace and corset were prescribed. Claimant was continued on Parafon Forte for muscle spasm and pain. TENS unit treatment was initiated.

In Spring 1983, claimant was referred to M.A. Afridi, M.D., for psychiatric evaluation. Claimant was noted subjectively as feeling anxious and depressed as a result of pain. Her condition was diagnosed as a depressive reaction, anxious personality, and back pain. Dr. Afridi primarily treated claimant for her back pain and saw her on six occasions for acupuncture related to that pain. The doctor prescribed Elavil 50 mg. at bedtime as well.

In a report of February 25, 1983, Dr. Crouse indicated that claimant's increasing left leg pain after initially having good relief following her last surgery could be attributed to post-operative scarring. He reported that no further surgical treatment was indicated and opined that she was quite likely to continue to have left leg symptoms as well as intermittent low back symptoms. He estimated that her permanent impairment would be approximately 25 percent of the body as a whole under the Manual for Orthopedic Surgeons. On April 29, 1983, Dr. Crouse opined that claimant had been totally disabled from working since August 1981 and reported she did not believe she was able to return to work as a nurse's aide or any job requiring repetitive lifting, bending, and stooping. He then reported that under the Manual for Orthopedic Surgeons, a patient with surgical excision of a disc with a fusion with lifting activities modified and some persistent pain and stiffness would have an estimated permanent partial impairment of 20 percent of the body as a whole. In his deposition, Dr. Crouse characterized that as a misstatement on his part of the manual and again opined that claimant's actual permanent partial impairment should be 25 percent of the body as a whole.

Claimant was admitted to Schoitz Medical Center on March 8, 1983 and subsequently underwent an exploratory laparotomy with lysis of adhesions, small bowel enteroenterostomy, and bilateral oophorectomy with removal of large right ovarian cyst with a discharge on March 20, 1983. She saw Dr. Crouse on April 7, 1983 with back discomfort and some left leg pain. He noted her recent surgery and stated that prior to that surgery her back had been reasonably comfortable. Dr. Crouse opined in his deposition, however, that bowel surgery wouldn't have injured claimant's back but for weakening the abdominal muscles and, thereby, aggravating back symptoms in a patient already having them or creating increased aching simply from altered activities and accompanying bedrest.

Dr. Crouse apparently saw claimant in November 1984 for further evaluation regarding her permanent partial impairment and then did not see her until August 27, 1986 when she was reevaluated because of reported increased discomfort in her back and through her left leg. The doctor then stated that claimant had been getting along reasonably well and was able to do light housework until two weeks prior to her examination. He indicated that her back and leg pain persisted from the August 13, 1981 injury but that he expected claimant's exacerbation of back discomfort to resolve and leave her with the same degree of permanent impairment previously estimated.

In his deposition, Dr. Crouse indicated that claimant's history of initial improvement and then worsening of her condition was consistent with adhesions as a complication of a back injury. Dr. Crouse opined that claimant could occasionally lift

from 10 to 20 pounds and could frequently lift very light weights. He opined she could not do prolonged sitting, but could sit six hours total daily with a break after a couple of hours. He reported that she could stand ten to fifteen minutes at a time up to a couple of hours during the day. He characterized bending and stooping activities as quite limited and reported that she should not be climbing. He indicated claimant was able to drive but would need occasional breaks from the sitting involved. He reported claimant had no permanent restrictions concerning reading, but should change positions and move about occasionally while doing so to avoid prolonged sitting. Dr. Crouse opined that claimant's restrictions would prevent her from working as a nurse's aide, as a ward clerk in an unrestricted capacity, as a waitress, and as a cashier in an unrestricted capacity. The doctor opined, however, that a number of sedentary activities claimant could perform on a full-time basis were within the restrictions outlined by him.

Claimant testified that she continues to have back and leg pain and muscle spasms and that her condition is aggravated by cold, damp weather. She has difficulty sleeping. Her left leg gives out although she has not fallen. She reported she takes from eight to nine nonprescription pain pills per day. Claimant does housekeeping at home, working intermittently at sweeping, vacuuming, cooking, cleaning; she occasionally does family laundry. She does not carry groceries. Claimant testified that she told Dr. Crouse that she had back pain and headaches after she had read for too long and that he then told her not to sit and read for too long a time. Claimant reported that she can drive her husband's gearshift, four-wheel drive truck for at least fifteen to twenty miles without problems. She denied that the vehicle was hard to drive stating occasionaly she could move her feet about.

Claimant reported that her daughter and the daughter's seventeen month old child live with claimant and her husband. Claimant stated that the daughter does housekeeping for claimant and that claimant "takes care of" the baby only if her husband or claimant's sister is there. Claimant opined that she could not babysit for income because of the constant activity and lifting involved. She denied having ever told Judy Steenhoek that she enjoyed being home watching the child. Claimant opined she could not work as a housekeeper because of the reaching and lifting involved; that she could not work as an usher because of standing and walking involved or as a ticket taker because of standing and sitting involved. Claimant reported that she can ride in a car for approximately an hour and then must walk around. She stated she has difficulty climbing stairs and must do so slowly and carefully and while using a handrail. Claimant indicated that she no longer bowls and dances both of which she had done prior to the injury.

Claimant testified that she completed ninth grade and as of December 19, 1986 had enrolled in a program towards obtaining her GED. She reported that she wanted her GED in order to enhance her employability, but agreed that she had not taken steps to obtain it until Judy Steenhoek suggested she do so. Claimant obtained a nurse's aide certificate in 1979 after completing a three month course. She had been employed as a nurse's aide at various nursing homes prior to her employment at Friendship Village. Claimant has also worked as a homemaker, as a clearing house coupon counter, as a waitress, and as a barmaid. As a coupon counter, claimant sat counting boxes of coupons. She reported that she would count a box and then get up and get the next box. A break was available every two hours. As a nurse's aide, claimant was involved in general patient care including bathing, showering, walking patients, applying heat treatments, and lifting patients with the assistance of another person.

Claimant reported that she does not routinely read the newspaper want ads in that she does not believe doing so will benefit her. She reported that she had not looked for work because she was familiar with the Waterloo economy and felt that with three back surgeries she would not be hired there. Claimant stated that she had visited the area office of State Vocational Rehabilitation but that when she did so, she was told that she was at the wrong place that vocational rehabilitation only helped people with "handicaps." She indicated she was not told what programs were available for someone with difficulties such as hers. Claimant indicated that she had called Karen Johns of Job Service regarding the Job Service work search program, but that Ms. Johns had not returned her call. Claimant indicated that she had not called Ms. Johns again in that she was occupied with a family member's death. Claimant further explained that her understanding was that Steenhoek was to help her obtain her GED and then to help her seek employment, not that Steenhoek was to initially help her seek employment. Claimant agreed that she has not considered work with the Home Shopper Network or telephone sales work. Claimant agreed that she had never formulated plans to determine what employment she could handle but stated she would be willing to seek retraining. She subsequently agreed that she had not looked into such retraining, however.

Orlo K. Collins, claimant's husband, testified that he has known claimant whom he married on April 3, 1982 since February 1981. He substantiated claimant's testimony regarding her condition. Mr. Collins testified that he has discouraged claimant from returning to work because he did not feel she should work given her condition.

Florence Hare testified that she has known claimant since March 1981 and has observed her activities since the injury. She also substantiated claimant's testimony regarding claimant's

condition.

Thomas W. Magner, who is employed full time as a vocational rehabilitation counselor with the state of Iowa, and who also does private vocational consulting, testified that claimant's counsel retained him to assess claimant's employability. Mr. Magner is a certified rehabilitation counselor and holds a Master of Science Degree in rehabilitaton counseling. He has been employed in rehabilitation work since 1973. Magner saw claimant initially on July 30, 1985 and then on October 9, 1986 and once spoke with her by telephone. Magner reported that he took a work history for claimant, examined her educational background and reviewed the medical information from Dr. Crouse including her impairment rating and his restrictions on claimant's activities as well as Crouse's deposition. Magner indicated that he reviewed the Dictionary of Occupational Titles anad the Iowa State Occupational Coordinating Handbook as well as considered the local job market. He opined that claimant is motivated to work and is quite frustrated at her inability to work. He opined that claimant could not do nurse's aide work, ward clerking, babysitting, telephone answering, housecleaning, or telemarketing. He stated that most sedentary jobs require sitting and that with restrictions against prolonged standing and sitting, claimant could not handle such jobs. Magner agreed there was no indication that claimant had sought other employment or training and stated that while generally getting a GED results in better preparation for employment than a ninth grade education only, he did not believe a GED would make claimant employable given that claimant's pain limits what she can actually do. Magner agreed that if sedentary work in stable jobs were available, and if claimant could perform such work, claimant could work in recognizable fields in the Waterloo area. Magner agreed that he had not assisted claimant in learning how to look for work or how to interview for jobs nor had he arranged interviews with claimant, nor did he recommend claimant seek vocational rehabilitation in July 1985, nor did he mention that Job Service was available to assist claimant.

Judy Steenhoek indicated that she has a Masters Degree in job placement and job development and has worked as a rehabilitation specialist with Intracorp for approximately five years. Ms. Steenhoek indicated that Great American Insurance Company initially asked her in Fall 1984 to evaluate and make recommendations as to claimant's employability. Rehabilitation work with claimant was reinitiated in November 7, 1986. Ms. Steenhoek then saw claimant on that date and on December 10, 1986 and December 22, 1986 as well. Ms. Steenhoek took an employment history and reviewed her medical records and restrictions. In December 1986, Ms. Steenhoek gave claimant information about how to begin work on her GED. Ms. Steenhoek also directed claimant to a job search assistance class with Job Service. Ms. Steenhoek only could meet with claimant when a person from claimant's

counsel's office was present. Ms. Steenhoek opined that this did not help her develop a relationship with claimant.

Ms. Steenhoek opined that generally the longer an individual is off work the more difficult it will then be to return to work. She stated that obtaining a GED will positively affect employability and that work on the GED was a form of gainful activity and, therefore, was a justifiable job placement effort. Ms. Steenhoek opined that there were jobs within the Waterloo labor market which claimant could perform. She reported that she had contacted employers in telemarketing, home shopping, and at Casey's Store, but had not advised those propspective employers as to claimant's permanent partial impairment rating or her restrictions. Ms. Steenhoek opined that claimant could do sales work, clerking, cashiering, telemarketing, light weight fast food delivery, order clerking, motel desk clerk, ticket sales, and receptionist work as well as bartending in very specific settings. Ms. Steenhoek characterized telemarketing as a growing, more reputable field in which individuals can sit or stand. She reported that a telemarketing personnel worker informed her on-site telemarketing work paying $150 to $200 per week for a thirty hour week was available in Waterloo. Ms. Steenhoek agreed she had not considered whether light weight delivery work would involve stair climbing. Ms. Steenhoek indicated that her wage survey had revealed that jobs within claimant's capacities would pay from $3.35 per hour to $8.00 per hour. The greater number of positions surveyed had salary ranges from $3.35 to $4.25 per hour. Claimant was earning $4.25 per hour when injured. Ms. Steinhoek testified that she is aware that employers are hesitant to hire persons with back problems because they fear further workers' compensation claims. She reported that she knew of no job where claimant would be able to lie down or bathe if needed for her pain.

Ms. Steenhoek characterized motivation as a most important factor in finding employment. She reported that claimant had not been highly motivated to seek employment from her injury date to her medical release, but that she had seen a slight improvement in claimant's motivation since she began working with her in November 1983.

The reports of Mr. Magner and Ms. Steenhoek were consistent with their testimony at hearing.

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

APPLICABLE LAW AND ANALYSIS

Our initial concern is with the causal connection issue.

The claimant has the burden of proving by a preponderance of

the evidence that the injury of August 13, 1981 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).

Subsequent to her work-related fall, claimant underwent three back surgeries. Generally after her surgeries, claimant's condition improved initially and then again deteriorated. Claimant continues with back and leg pain. Dr. Crouse opined that claimant's course is typical of that found in persons who develop adhesions following back surgery and that her back and leg pain persisted from her August 13, 1981 injury. Claimant has established the requisite causal connection between her claimed disability and her injury. Defendants raise the issue that claimant's condition somehow results from her abdominal surgery. The evidence including Dr. Crouse's express testimony does not support that, however.

Our next concern is the nature and extent of claimant's benefit entitlement and the related question of whether claimant is an odd-lot worker.

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."

In Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

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.

Proof that a defendant failed to retain claimant in its employ in any capacity after the work injury is one of the factors which determines whether the claimant made a prima facie case showing he is an odd-lot employee, although such proof is not necessarily conclusive. Chrysler Corp. v. Duff, 314 A.2d 915 (Delaware). See also 2A Larson, The Law of Workmen's Compensation, section 57.61 at 10-164.90.

Age is a relevant factor in determining industrial disability. However, a distinction must be drawn between a case where, for instance, persons age 45 to 50 are displaced from the only line of work for which they are trained or educationally qualified, and the case where the vast majority of claimant's earning years are passed. In the former case (of course dependent upon various factors) the injured worker's earning capacity has seriously been reduced due to age. He or she has been injured not at a time when they are younger and more easily retrainable, nor at an advanced working age when working earning capacity will be curtailed by the fact that a person will soon retire and that their earning capacity will not be based upon their work but upon their age, retirement schemes, etc. These people have been injured at the prime of their earning years, where they have many working years ahead of them-where their earning capacity is based upon their ability to work--to be employed. Industrial disability is based upon lack of earning capacity due to a compensable injury that has diminished the injured worker's ability to maintain the earning capacity he enjoyed prior to his injury. Haney v. Protein Blenders, Inc. and TransAmerican Insurance Services, (Appeal Decision October 18, 1985).

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 ex-

perience or capacity to perform. Shaw v. Gooch Feed Mill Corp., 210 Neb. 17, 312 N.W.2d 682 (1981).

Claimant has made a prima facie showing that she is an odd-lot worker. Claimant has restrictions on bending, lifting, sitting, standing, stooping and climbing. She continues to have significant back and leg discomfort which is not likely to diminish in the future. The discomfort and limitations in themselves would limit what claimant "can or cannot do," but alone would hardly be sufficient for a prima facie showing that claimant is incapable of obtaining employment in any well known branch of the labor market. Additionally, claimant is only thirty-eight years old. She appears to be a reasonably intelligent lady who was well motivated to work throughout her preinjury lifetime. Claimant's formal education is minimal, however. She has only completed ninth grade and a three month nurse's aide training course. Given those education limitations, her preinjury history of consistent work at lackluster jobs is remarkable. The greater weight of the evidence shows claimant cannot return to such employment, however. Both Dr. Crouse and Mr. Magner have opined claimant cannot do a whole series of manual jobs including nurse's aide, ward clerking, cashiering, waitressing, babysitting, receptionist and telephone answering, housecleaning and telemarketing. Defendants' vocational expert, Ms. Steenhoek, has opined that claimant could do sales work, clerking, cashiering, telemarketing, light weight, fast food delivery, order clerking, motel desk clerking, ticket sales, receptionist work and bartending in very specific settings. Ms. Steenhoek's opinions are rejected as contrary to the medical opinion of Dr. Crouse and because Ms. Steenhoek appears to not have considered all physical maneuvers required of claimant in each of the positions recommended. Further, she did not inform potential employers of claimant's restrictions. Hence, her testimony does not establish that claimant would actually be offered positions given claimant's restrictions. Ms. Steenhoek did not consider the climbing likely required in fast food delivery nor apparently the prolonged sitting and standing required in clerking, sales, and bartending. (Arguably, claimant might be able to do coupon counting under conditions like those under which she did that work in the past. We do not believe the evidence establishes that such work is so readily available in the general economy as to carry defendants' burden of showing suitable employment exists for claimant, however.)

Defendants argue claimant's failure to look for work and her failure to work on her GED show a lack of motivation on her part. In a more general case, we might well agree with defendants. Claimant testified, however, that she did not seek work because given her three back surgeries she felt she would not find work in the depressed Waterloo economy. Claimant's perception of her situation was in keeping with her education and life and work experience. If jobs were actually available for claimant in the Waterloo economy, defendants were in far better position than

claimant to ascertain that and direct claimant as to how to go about obtaining those positions. We do not believe that claimant should be penalized because they did not choose to actively involve themselves in claimant's rehabilitation until mere weeks before the hearing in this matter. Likewise, claimant left school almost twenty years ago, and but for her nurse's aide course, has not returned. Some insecurity about returning to school is understandable in a person with that educational history. Both defendants' and claimant's legal representative and claimant's vocational expert were in a position to encourage claimant to begin work on her GED and direct her as to how to do so. We find the fact that none took that very reasonable action until just days prior to hearing far from commendable. We do not believe that failure should be charged against claimant, however. Further, we are not convinced that claimant's obtaining her GED would appreciably enhance her employability given her significant physical problems and limitations. We note that claimant did begin work on the GED within days of Ms. Steenhoek's active involvement with her case. That fact speaks well of claimant's actual motivation. We encourage claimant to continue her educational efforts as doing so is likely to enhance her own self esteem and life satisfaction. Defendants have not produced evidence of suitable employment for claimant nor shown that claimant's failure to find work results from something other than her injury when all factors bearing on her actual employ-ability are considered. Claimant is a permanently totally disabled worker.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant, a nurse's aide, was injured on August 13, 1981 when she fell to the floor hitting her buttocks and back while attempting to prevent a confused patient from falling from her bed.

Claimant had an L5 disc protrusion on the left. Dr. Crouse performed an L5 disc excision on September 11, 1981.

Claimant initially did well but developed recurrent left leg pain.

Dr. Crouse re-explored the L5 disc and performed a laminectomy at L5-S1 on December 1, 1981.

Claimant attempted to return to work as a nurse's aide on February 8, 1982 but could only work two and one-half hours.

Claimant attempted to work four hours per day as a ward clerk in April 1982, but was unable to continue after two or three days.

Claimant has not otherwise been released to work.

Claimant's low back and leg pain returned.

On October 20, 1982, Dr. Crouse performed a decompression of L4, L5 on the left with bilateral, lateral fusion at L3 through the sacrum.

Claimant improved initially but had a subsequent return of low back and left leg pain.

Claimant has developed adhesions as a complication of her back surgeries.

Claimant will continue to have left leg and intermittent low back symptoms.

Claimant can frequently lift very light weights; can occasionally lift from ten to twenty pounds; cannot bend, stoop, climb, twist; and cannot sit or stand for prolonged periods.

Claimant has received only minimal vocational rehabilitative assistance.

Claimant's work experience is primarily as a nurse's aide; she has also done coupon counting, waitressing, bartending and like manual labor.

Claimant cannot return to those employments or other manual labor requiring physical maneuvers from which she is restricted.

Claimant has not actively sought work, but her perception that no work would be available to her was reasonable given her back surgeries, her minimal work skills, and the depressed local economy.

Claimant is 38 years old and has completed ninth grade.

Claimant enrolled in a GED program after being encouraged and assisted in doing so.

Claimant's motivation to work is reasonable given her physical condition, her current work skills, and her education level.

Claimant is incapable of obtaining employment in any well known branch of the labor market as a result of her work injury and not as a result of factors attributable to her but not otherwise bearing on her actual employability.

Claimant is an odd-lot worker.

Defendants have not shown suitable employment exists for claimant.

CONCLUSIONS OF LAW

THEREFORE, IT IS FOUND:

Claimant has established that her August 13, 1981 injury is the cause of the disability on which she bases her claim.

Claimant is entitled to permanent total disability benefits resulting from her injury from her injury date and through the period of her disability.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent total disability benefits at the rate of ninety-three and 82/100 dollars ($93.82) during the period of her disability.

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 29th day of January, 1987.

Helen Jean Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARVIN E. COLLENTINE, Claimant, vs. E.N.T. ASSOCIATES, Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	:	File No. 748675 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 Marvin E. Collentine, claimant, against E.N.T. Associates, employer, and Aetna Casualty & Surety Company, insurance carrier, for the recovery of benefits as a result of an alleged injury on September 22, 1983. This matter was heard before the undersigned at the Bicentennial Building in Davenport, Scott County, Iowa, on December 23, 1986. It was considered fully submitted at the conclusion of the hearing. The record consists of the testimony of claimant and Ellen K. Stebbens; and joint exhibits A through M, and C1 through C7.

STIPULATIONS AND ISSUES

Pursuant to the prehearing report filed by the parties, the following stipulations were made:

1. On September 22, 1983, there was an employer-employee relationship existing between the claimant and defendant.

2. On September 22, 1983, claimant suffered an injury arising out of and in the course of his employment.

3. As a result of the injury, claimant suffered temporary disability.

4. Claimant was off work as a result of his injury from

September 27, 1983 through December 4, 1983.

5. Claimant's rate of compensation is $518 per week.

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

7. Claimant has been paid 75 weeks of permanent partial disability benefits at his rate of $518. Further, claimant has been paid for all time off work.

8. Each party has actually paid the expenses which they now assert as the cost of this action.

The issues to be determined in this proceeding are whether or not the injury suffered by claimant resulted in permanent disability, the nature and extent of that disability, and whether claimant is precluded from permanent disability as a result of his return to work.

EVIDENCE PRESENTED

Claimant testified that he is 54 years old. He is employed by E.N.T. Associates, P.C., as an otolaryngologist, which he said is a subspecialty within the specialized field of ear, nose and throat medicine. Claimant said he attended the University of Iowa from 1950 to 1957 when he graduated with a medical degree. From 1958 to 1962 he served in the United States Navy as a flight surgeon at Portsmouth Naval Hospital. From 1962 to 1966, he obtain specialized training in otolaryngology. In 1966, he moved to Iowa. Claimant advised he is a board certified otolaryngologist and is licensed to practice medicine in Iowa, Wisconsin and Colorado.

In addition to his employment with E.N.T. Associates, P.C., claimant also works in his own medical practice, E.N.T. Allergy, P.C. He said this practice was established in July 1984.

Claimant recalled that he suffered his injury on September 22, 1983 following an ear operation on a large female patient. Following the operation, claimant was assisting the operating room staff to remove the patient from the table when he felt a sharp pain in his back. He walked around for about half an hour hoping the pain would subside.

Claimant said he continued to work for about a month though in considerable pain. He sought physical therapy treatments from the hospital physical therapist at Mercy Hospital. Because of continued pain and increasing severity of the pain, he consulted Byron W. Rovine, M.D., a neurosurgeon. Claimant reported that at that time there was no way he could continue to function.

Claimant stated that he had a CT scan the same day that he saw Dr. Rovine. The doctor reported to the claimant that he suffered a herniated disc and that surgery would be necessary if conservative treatment was unsuccessful. On November 4, 1983, claimant had a myleogram which revealed a herniated disc and he underwent a laminectomy immediately following. Claimant reported that the day following surgery he felt considerable relief.

Claimant testified that he has continued to suffer symptoms in the form of pain in the buttocks, leg and thigh. He said the pain is present on a daily basis, but is not continuous. He said the severity of the pain varies from day to day depending upon his activities.

Claimant stated that he no longer lifts patients and has decreased the stooping and bending he has to do while on the job. He has been able to return to jogging and within the past year returned to playing golf.

Claimant stated that since his injury he has attempted to change the nature of his practice. He said one of the reasons for establishing E.N.T. Allergy, P.C., was to further this goal. He stated, however, that he would earn more money as a surgeon than as an allergy specialist. Claimant outlined a number of surgical procedures that he no longer engages in due to the time involved. For example, he advised that he no longer does mastoidectomies which is a procedure that can take up to four to six hours. Claimant said he finds it difficult to sit for that period of time, and due to the risk involved by his patients he is unwilling to continue such practices and procedures. He said he has referred such patients to other doctors and word has circulated in the medical community that he no longer does these procedures, so he no longer receives referrals from other physicians. Claimant said he believed that the chronic back pain has affected his mental attitude as well in that he no longer desires to work as much as he did prior to the injury.

On cross-examination, claimant stated that he did not believe his skill has been reduced except to the extent that skills are lost as a result of not doing procedures. He summarized by saying he simply does not feel as comfortable with certain procedures as he did when his back was healthy. Claimant admitted that he has not advised any medical boards or hospitals at which he has privileges that he no longer does certain types of surgery. He indicated, however, that he has discussed changing his status from a Class IV to a Class II surgeon. On cross-examination, claimant explained in considerable detail certain types of operative procedures which he now has reservations about doing.

On redirect examination, claimant said his income from E.N.T. Associates will diminish as a result of the increased amount of

time he is devoting to his allergy practice. He added that he has referred some of the more lucrative operative procedures to his partners because he no longer feels as mentally or physically capable of doing those as he was prior to his injury.

Ellen K. Stebbens testified that she presently works for E.N.T. Associates as the office manager. As office manager, she maintains new patient accounts for each of the doctors in the practice. She explained her record keeping which is disclosed in exhibit C. She further testified that claimant's patient load has decreased at E.N.T. Associates since 1983. She stated, however, that that was not necessarily the case with E.N.T. Allergies.

On rebuttal, claimant testified that prior to his injury as senior associate of E.N.T., his earnings were greater than that of his associates. He said that since the injury his associates' earnings have exceeded that of his own.

John S. Koch, M.D., testified by way of deposition which was submitted into the record as defendants' exhibit J. Dr. Koch stated that he is an orthopedic surgeon practicing in Cedar Rapids, Iowa. He outlined his educational background and expertise in the field. He is licensed to practice medicine in the states of Iowa and Wisconsin.

Dr. Koch testified that he examined claimant in January 1986 for purposes of evaluating claimant's lower back difficulties. Dr. Koch explained the nature of the back problem that claimant had had and the medical treatment received by him in 1983. Dr. Koch explained that in evaluating a patient with a low back difficulty, he uses different standards which include the Guides For Evaluation of Permanent Impairment by the American Medical Association, and Occupational Grading. The doctor indicated that he also utilizes his own professional experience in such evaluations and incorporates therein such factors as general physical makeup, age, prior disease or injuries, health patterns, psychological factors, and economic features. He said he also considers the presence of insurance or litigation. Dr. Koch said that his first task in carrying out an examination of claimant was an interview with claimant in which he obtained a history and description of difficulties he was having at the time of the examination. The doctor said he conducted a physical examination of claimant and discussed with him the activities in which claimant had been involved since the injury. Dr. Koch said that he found claimant had virtually no limitation of the range of motion in his back, and minimal pain on bending. The doctor reviewed in considerable detail his findings of the x-rays which were supplied to him for examination.

Based upon Dr. Koch's physical findings, claimant's ability to return to work, the history relayed to the doctor by claimant, and the result of the surgical procedure which claimant underwent,

the doctor said that he believes claimant suffered a five percent permanent disability of the body as a whole as a result of the injury of September 1983. He indicated that with the passage of years claimant would have increasing impairment as a result of the continuing wear and tear process going on within his body. The doctor also stated that based upon the examination and his interviews of claimant, it was his opinion that claimant would be able to resume his regular labor practices. The doctor specifically opined that he found nothing which would interfere with claimant's ability to practice otolaryngology.

On cross-examination, Dr. Koch stated that it was his opinion that claimant suffered an injury to the L5-S1 disc in the incident that occurred in September 1983. Included in the deposition is deposition exhibit 1 which is a copy of the written evaluation Dr. Koch performed on claimant. In the written report, the doctor says claimant suffered an aggravation of a preexisting osteoarthritic condition as a result of the injury of September 1983. He also states that claimant would have a ten percent disability, but taking into account his ability to resume his regular practices, the doctor said he would consider claimant, at most, five percent disabled. Deposition exhibit 2 is page 30 of the manual published by the American Academy of Orthopedic Surgeons relating to impairment of the low back.

Byron W. Rovine, M.D., testified by way of deposition which was admitted as exhibit K. Dr. Rovine stated that he was a specialist in neurological surgery practicing in Davenport, Iowa. The doctor outlined his educational background and training. He is licensed to practice medicine in the states of Iowa and Illinois.

Dr. Rovine testified that he first treated claimant on October 19, 1983. Claimant presented to the doctor with complaints of severe left sciatic pain following some heavy lifting on September 22, 1983. Dr. Rovine said he conducted a physical examination of claimant at that time and concluded that claimant required immediate hospitalization. Additional diagnostic testing was undertaken while claimant was hospitalized and a diagnosis of herniated lumbar disc was made. The doctor said that conservative treatment was initiated, but this failed to improve claimant's condition.

Following the initial effort at conservative treament, claimant was readmitted to the hospital in early November 1983 and a myelogram confirmed a large defect at the L5-S1 disc. Shortly thereafter, Dr. Rovine performed a bilateral laminectomy at the L5-S1 level. The doctor went on to outline the postoperative treatment of claimant. Dr. Rovine last saw claimant as a patient on November 23, 1983.

Dr. Rovine said he examined claimant for purposes of evaluation of his condition on May 30, 1984. Based upon the examination and the Guides for Permanent Impairment of the AMA, Dr. Rovine assigned claimant an impairment rating equal to 20 percent of the body as a whole. He said the rating took into account limited motion and residual neurological symptoms.

On cross-examination, Dr. Rovine stated that the May 30, 1984 examination of claimant did not include a history of his post surgery activity level.

Maurice D. Schnell, M.D., testified by way of deposition which was admitted as exhibit L. Dr. Schnell testified that he was a specialist in physical medicine and rehabilitation. The doctor explained his educational background and training. Dr. Schnell said he is licensed to practice medicine in Iowa, Illinois and North Carolina.

Dr. Schnell advised that he had had occasion to treat claimant; his first contact with claimant being January 27, 1984. Dr. Schnell had been asked to evaluate the status of claimant's back following the September 1983 injury and subsequent surgery. He reviewed the history given to him by claimant as well as a description of the symptoms claimant was suffering at that time. Dr. Schnell also conducted a physical examination of claimant at that time and explained in detail his findings. As a result of that examination, Dr. Schnell concluded that claimant had a status post left hemilaminotomy with discectomy at the L5-S1 level; a mild residual low back discomfort secondary to back strain and incomplete rehabilitation of the lumbar spine post-operatively; there was, however, no evidence of acute lumbar radiculopathy. Dr. Schnell recommended that claimant initiate graduated situp exercises, use proper body mechanics, and use an analgesic for control of pain.

Dr. Schnell testified that he last saw claimant on May 23, 1984 at which time he performed an evaluation of claimant's permanent impairment. The doctor said that he utilized the Manual For Orthopedic Surgeons in Evaluating Permanent Physical Impairment and arrived at an impairment rating of 20 percent of the body as a whole. He explained the various factors which he considered in arriving at this rating which included continued pain in the low back and buttock, absent left ankle jerk, infrequent use of pain medication, and some degree of limited function. Dr. Schnell added that even though claimant had resumed a number of activities since his May 1984 examination, he did not believe the impairment rating should be reduced.

Joint exhibit M is a copy of the deposition testimony of claimant. A review of this deposition discloses no significant inconsistencies with claimant's testimony at hearing.

Joint exhibit A is a copy of the written report of Dr. Koch which was reviewed as a part of his testimony in exhibit J. Joint exhibit B is a written report concerning claimant dated September 7, 1984 and authored by Vijay Verma, M.D. Dr. Verma reviews claimant's history and sets forth his findings on examination. Utilizing the AMA Guides, Dr. Verma assessed claimant a 10 percent body as a whole impairment as a result of the injury.

Joint exhibit E is a copy of the office notes of Dr. Schnell, the substance of which was adequately discussed by the doctor in his deposition (see exhibit L). Exhibit F is a surgeon's report form signed by Dr. Schnell dated May 25, 1984 which reports the doctor's assessment of claimant's impairment. Exhibit G is a May 30, 1984 report from Dr. Rovine which assesses claimant as having a 20 percent whole man impairment. Exhibits H and I are copies of Mercy Hospital records which report the results of a CT scan and myelogram performed on claimant in October and November 1983. These reports establish that claimant was suffering from a herniated disc at L5-S1.

Exhibits C1 through C7 are various records concerning claimant's job activities both prior to and subsequent to his injury. C1 sets forth the new patient count for claimant for the years 1982 through 1985. According to that exhibit, claimant had 1,063 new patients at E.N.T. Associates in 1982; 841 in 1983; 1,003 in 1984; and, 803 in 1985. Exhibit C2 sets forth the number of surgical procedures performed by claimant for the same period of time as set forth in Exhibit C1. This exhibit discloses that in 1982 claimant performed 475 operative procedures; in 1983, 409; in 1984, 365; and, in 1985, 340. The exhibit also sets forth the specific nature of each of these operative procedures. Exhibit C3 outlines the gross receipts produced by claimant at E.N.T. Associates for the years 1982-1985. Those receipts are shown to be as follows: 1982 - $206,114; 1983 - $224,545; 1984 - $220,172.94; 1985 - $227,277.02.

Exhibits C4 and C5 are records concerning claimant's activities at E.N.T. Allergy, P.C. From July 1, 1984 through December 31, 1984, claimant attended 368 patients and for the year 1985 attended 716 patients. C5 sets forth the monthly record of new patients seen by claimant for the same period of time which total 302.

Exhibits C6 and C7 reflect claimant's gross receipt, consultations and surgical procedures for 1986 from January through November. Gross receipts over that period total $171,523.30. He attended approximately 1,945 patients.

Finally, exhibit D contains claimant's federal income tax returns for the years from 1979 through 1985. A review of claimant's wage income for those years shows a marked decrease

commencing in 1984 from E.N.T. Associates. There is, however, a corresponding increase from E.N.T. Allergy, P.C.

APPLICABLE LAW AND ANALYSIS

Claimant has established that he suffered permanent disability as a result of his injury. Although impairment and disability are not synonymous, the existence of impairment indicates disability. In this case it is evident that the claimant has had to change, and in some cases, limit, his practice to accomodate his physical impairment. The mere fact that he was able to return to work for the same employer does not mean no disability has been experienced. The difficult question is not whether he has suffered disability, but the extent of disability suffered.

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 is 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).

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 v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. McSpadden v. Big Ben Coal Co., supra.

Much of the evidence submitted in this case centers around the functional impairment rating assigned to the claimant. This, however, is but one of the several factors which are considered in assessing disability. The lowest rating, assigned by Dr. Koch, would appear to take into account many factors which relate to disability rather than impairment. Considerations such as claimant's age, education and work experience are properly the province of the industrial commissioner. Consequently, Dr. Koch's opinion is given less weight than that of those doctors who limited their assessment to the physical impact of claimant's injury. Those physicians establish an impairment rating of 10 to 20 per cent. The record as a whole indicates that claimant received, on the whole, a good result from the surgery on his back.

Unfortunately, there is little evidence of the physical limitations suffered by claimant beyond functional impairment. Lifting, bending, twisting, standing and sitting limitations are not clearly stated. It would appear that claimant has been able to assess such limitations on his own. There is not the slightest suggestion or indication that claimant imposes on himself any unjustified limitation. Claimant was at all times clear and forthright about his physical problems and did not at any time appear to exaggerate his symptoms.

The ultimate question is the extent to which claimant has demonstrated a loss of future earning capacity. Looking at the factors of industrial disability as set forth above, it would at

first glance appear that claimant has suffered little loss. He is highly educated, articulate, excellently motivated and has returned to work for the same employer. There is, however, considerable question as to whether claimant has or can return to substantially similar employment.

Office records from E.N.T. Associates support claimant's contention that he has reduced his surgical practice since his injury. Claimant asserts that this reduction is the result of his injury. In essence, although he could physically continue to perform, he has made a professional judgment that it is neither in his nor in his patients' best interests that he continue the same type of practice as he had prior to the injury. The claimant's professional judgment in this matter is given considerable weight. There is absolutely nothing to indicate that this judgment call by the claimant is motivated by any other factor than dedication to his chosen profession.

Claimant has undertaken the establishing of a new medical practice which will allow him to continue to practice in the general field of his specialty, but excluding long surgical procedures. It would appear he is achieving success at this, but it remains his contention that his earnings will suffer substantially. This does not appear to be evident at this time, however.

Based upon the record as a whole and all factors relevant to industrial disability, claimant has established an industrial disability of 20% of the body as a whole.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

1. On September 22, 1983, claimant suffered a herniated intervertebral disc at L5-S1 when he moved a patient off the operating table.

2. As a result of his injury, claimant was off work from September 27, 1983 to December 5, 1983.

3. As a result of his injury, claimant suffered permanent physical impairment of 10 to 20 per cent.

4. Claimant is well educated, highly motivated and intelligent.

5. Claimant has undertaken changing the nature of his medical practice as a result of his injury.

6. Claimant has reduced the surgical portion of his practice as a result of his injury.

7. Claimant is credible.

8. Claimant's rate of compensation is $518.

9. Claimant has been previously paid all healing period benefits and 75 weeks of permanent partial disability benefits.

10. As a result of his injury, claimant has suffered an industrial disability equal to 20 per cent of the body as a whole.

CONCLUSIONS OF LAW

IT IS THEREFORE CONCLUDED that claimant has proven, by a preponderance of the evidence, that he suffered an industrial disability equal to 20% of the body as a whole as a result of his injury of September 22, 1983.

ORDER

IT IS THEREFORE ORDERED that defendants pay unto claimant one hundred (100) weeks of permanent partial disability at his rate of five hundred eighteen dollars ($518.00) commencing December 5, 1983. Defendants shall be given credit for seventy-five (75) weeks of permanent partial disability previously paid. All accrued benefits shall be paid in a lump sum together with interest.

Costs are taxed to defendants.

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

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARVIN COX,

Claimant,

vs.

JOHN MORRELL & COMPANY,

Employer,
Self-Insured,
Defendant.

File No. 821620

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 Marvin Cox, 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, Laura Cox, and Harold Selberg; claimant's exhibits A through G; 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: Marvin Cox vs. John Morrell & Company - File #821620

Plaintiff's Exhibits:

A. Physical exam given workman for employment with John Morrell & Company - employed 11-15-56.

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. Report of C. B. Carignan, M.D. dated 12-15-86.

E. Report of C. B. Carignan, M.D., P.C. dated 10-11-86.

F. Letter and hearing report dated 5-16-86 from R. David

Nelson, M.A., Audiologist.

G. Photograph of claimant.

Defendant's Exhibits:

Report of Daniel L. Jorgensen dated 10-22-86. (Deposition Exhibit included in Defendant's Exhibit 1.)

1. Deposition of Daniel L. Jorgensen, M.D. dated 1-29-87.

The parties stipulated that claimant's weekly rate of compensation is $203.47 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 that he entered the U.S. Navy in 1951. At the time he entered the navy he had no hearing problem. He was discharged in 1955 and had no hearing problem at the time. He started work for Morrell in December 1956 and was given a physical examination which determined he had no hearing problem. See exhibit A. In 1956, claimant initially worked on the loading dock at the pork plant. He went to the "conversion room" after the loading dock; it was noisy in this room where he worked from about 1974 through 1980 "boning out loins, hams, and picnics." He also constructed cardboard

boxes for eighteen years at Morrell.

In 1982 or 1983, hearing protection devices were furnished by Morrell. Claimant talked to a plant nurse about his hearing loss at some point, but no hearing test was administered; he did not talk with a foreman about his hearing loss. In the conversion room it was almost impossible to carry on a conversation.

Claimant testified that his wife mentioned his hearing loss problem in the late 1970's. Claimant had ringing in his ears after working at Morrell and still has ringing in his ears; however, he has not noticed a change in his hearing since the plant closed in April 1985. Dr. Jorgensen told claimant that he needs a hearing aid.

On cross-examination, claimant acknowledged that in the navy he handed ammunition to another person while stationed on a destroyer; he wore rubber earplugs at the time. He stated that the "conversion room" he last worked in at Morrell was about one-half the size of the first "conversion room" he worked in at Morrell.

Claimant first noticed a hearing problem in the late 1970's. His hearing stopped getting worse after he got out of the Morrell plant, but it did not get better.

Laura Cox testified that she has been married to claimant for thirty-six years and that he had no hearing problem when he started working for Morrell. He also had no hearing problem when he came home from the navy. In the mid-1970's to the late 1970's, she noticed that claimant had a hearing problem. He would complain about ringing in his ears when he came home from work. His hearing has gotten a little worse between April 1985 and time of hearing.

Harold Selberg testified that he worked for Morrell from 1958 until the plant closed in 1985. He met claimant in 1958 and claimant had no hearing problem at that time. He worked with claimant in the "conversion room." The noise in the conversion room made it difficult to talk.

Exhibit D, page 1 (dated December 15, 1986), is authored by C. B. Carignan, Jr., M.D., and reads in part:

> In view of the report and the history and examination of Mr. Cox I feel that with reasonable medical certainty that Mr. Cox's hearing impairment occurred as a result of his continued exposure to high noise environment at his workplace at the John Morrell packing plant at Estherville, Iowa.

Exhibit E, page 1 (dated October 11, 1986), is authored by

Dr. Carignan and reads in part:

Employed by Morrell packing plant December of 1955. Initially worked on loading dock for 18 years, states noise level was not extreme at this job. Then was moved to a job in the conversion room and boning room where he worked with and near very noisy saws cutting bone, etcetera. No ear protection was provided. Noticed hearing loss and tinnitis after working in this area of high noise environment. He denies any history of other noise exposure. Does not hunt or shoot guns, etc. Denies any ear trauma or infection. No other family members have a hearing problem and all have normal hearing. OSHA measured noise levels in the plant area in which he osired [sic] since 1974 and found noise levels of average of 92 to 93 decibels. His hearing became impaired with tinnitis and loss of acuity after working in this high noise invirnment [sic] at the Morrell plant. He now has trouble understanding speech as described in Compaint, [sic] above. He denies any exposure to Alotoxic drugs or chemicals.

Exhibit E, page 2, describes a binaural hearing impairment of 19.4 percent.

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 October 20, 1986 and took a history. Deposition exhibit 1 describes an audiogram performed on October 20, 1986. On page 9, Dr. Jorgensen stated that claimant's binaural hearing loss is 8.9 percent, and on pages 9-10, he explained why this percentage is lower than Mr. Nelson's percentage. On page 12, Dr. Jorgensen stated a causal connection opinion favorble to claimant. On page 13, he stated that claimant's loss is permanent and also stated 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.

The agency has determined that the notice/actual knowledge provision of section 85.23 is an affirmative defense and that a defendant has the burden of proof on this issue. In this case claimant testified that his wife mentioned his hearing loss problem in the late 1970's. Claimant had ringing in his ears after working at Morrell. His hearing has not worsened after his separation from Morrell. Claimant's wife testified that claimant complained of ringing in his ears when he came home from work. She also testified that claimant had a hearing problem in the mid-1970's to the late 1970's.

Chapter 85B became effective on January 1, 1981. Claimant herein knew or should have known the compensable nature of his hearing loss when chapter 85B became effective given the testimony described above. However, claimant did not have a cause of action until April 27, 1985 or arguably until six months after April 27, 1985. He was not required to satisfy section 85.23 until he had a cause of action.

Defendant obtained actual knowledge of the compensable nature of claimant's hearing loss prior to the "triggering event" of April 27, 1985, see section 85B.8, because claimant talked to a plant nurse about his occupational hearing loss in 1982 or 1983. The notice/actual knowldge requirement of section 85.23 may be satisfied prior to the "occurrence of an injury." Dillinger, 368 N.W.2d at 180. The injury "occurred" in this case when the plant closed. Claimant's cause of action accrued at that time or arguably six months after the plant closure.

In sum, this action is not barred because of the application of section 85.23.

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 or perhaps six months later. 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." 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. Claimant's cause of action did not accrue until April 27, 1985 or arguably he did not have a cause of action until six months after April 27, 1985.

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).

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.

Claimant is entitled to 15.575 weeks (8.9 percent of 175 weeks) of permanent partial disability benefits commencing on April 27, 1985 at a rate of $203.47.

V.Claimant is entitled to the least expensive hearing aid provided by Dr. Jorgensen 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 Estherville, owa, in December 1956.

3. Claimant has sustained hearing loss and all of claimant's hearing loss was caused by his Morrell employment.

4. Morrell had actual knowledge of claimant's occupational hearing loss prior to April 27, 1985.

5. Claimant's binaural hearing loss is 8.9 percent.

6. Claimant's stipulated weekly rate of compensation is $203.47.

CONCLUSIONS OF LAW

1. Claimant has established entitlement to fifteen point five seventy-five (15.575) weeks of permanent partial disability benefits commencing on April 27, 1985 at a rate of two hundred three and 47/100 dollars ($203.47).

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 17th day of March, 1987.

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILTON CROFT, Claimant, vs. JOHN MORRELL & COMPANY, Employer, Self-Insured, Defendant.	:	FILE NO. 805211 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 Wilton Croft, claimant, against John Morrell & Company, employer and self-insured defendant, for benefits for an alleged occupational hearing loss under Iowa Code section 85B which occurred on April 27, 1985. 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 Ronald Mortensen (former co-employee); Wilton Croft (claimant); Darlene Croft (claimant's wife); Warren Evans (former co-employee); Dennis L. Howrey (employer's personnel and labor relations manager); claimant's exhibits 1 through 7; and defendant's exhibits A and B. Both attorneys submitted good briefs.

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 temporary disability is not an issue in this case.

That the commencement date for permanent disability, in the event such benefits are awarded, is April 27, 1985.

That the rate of weekly compensation, in the event of an award, is $193.46 per week.

That no credits or bifurcated claims are in issue.

ISSUES

The issues presented by the parties for determination at the

time of the hearing are as follows:

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

Whether the alleged occupational hearing loss is the cause of any permanent hearing loss is included in the issue of whether claimant received an occupational hearing loss in the foregoing paragraph.

Whether the claimant is entitled to any disability benefits for occupational hearing loss.

Whether the claimant is entitled to a hearing aid as a medical benefit under Iowa Code section 85B.12.

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

Whether the claimant's hearing loss is a result of a natural occurring disease process is also included in the first issue of whether claimant sustained an occupational hearing loss.

SUMMARY OF THE EVIDENCE

Claimant is 56 years old. He went to ninth or tenth grade in high school and finished high school by correspondence. He worked for John Morrell & Company for a short time in 1945 or 1946. He started to work full time for the employer in 1947 and continued for a period of 38 years until he retired on April 27, 1985, except for two years from 1951 to 1953 when he served in the military service in Korea. Claimant testified that he worked in loud noise continuously from the time he started until he retired. A preemployment physical examination dated May 19, 1947 did not indicate any hearing problems, nor did two other company physical examinations dated October 7, 1947 and May 25, 1953. Claimant worked in the Ottumwa plant until it closed in 1973. He then transferred to the Estherville plant at that time. Claimant testified that he could hear alright when he came to Estherville.

Claimant testified he first experienced pressure in his ear at home at night. He misunderstood what his daughter and wife said in conversation around the dinner table. He turned the TV up loud in order to hear it. If they played the radio and TV at the same time to get a storm warning the noise was confusing.

Claimant testified that at the Estherville plant he performed various jobs (the length and dates are approximations):

Job	Length	Dates
Cutting spermatic cords	6 yrs.	1973 - 1979
Popping kidneys and removing spreader hooks	2 yrs.	1979 - 1981
Splitting hogs	1 yr.	1981 - 1982
Cutting kidneys and marking leaf lard	1 yr.	1984 & 1985

Claimant's exhibit 3 contains two noise level surveys. Only the first one with the letterhead of John Morrell & Company was used at the hearing. Claimant testified that most of the time at Estherville he worked closest to the splitter. He circled the word splitter on exhibit 3 in blue ink to designate the station closest to where he worked. The survey shows that the noise level at this station was 94 to 95 decibels. After January of 1984, when claimant was cutting kidneys and marking leaf lard, he was closest to the wizard knives - head table. The exhibit shows that the noise level at this station was 95 decibels. Claimant testified that he worked in loud noise for eight hours a day, five or more days a week for approximately 11 years at the Estherville plant.

Dennis Howrey, personnel and labor relations manager for the employer, agreed that claimant's job of cutting spermatic cords was closest to the splitter which showed a noise level of 94 to 95 decibels. Howrey also agreed that the job of popping kidneys and removing spreader hooks was also closest to the splitter. Howrey differed with the claimant about the location of his job cutting kidneys and marking leaf lard. Howrey testified that this job was closest to the station marked chisel heads which showed a noise level of 90 decibels, rather than near the wizard knives - head table which showed a noise level of 95 decibels. Howrey, nevertheless, agreed that any reading over 80 decibels could cause hearing damage. He also granted that the kill floor is a very noisy place and that the noise is continuous.

Both claimant and Howrey agreed that hearing tests were administered by the employer to the employees in 1983. Claimant testified that the nurse told him that he had something the matter with his hearing. She made him sign a paper that he would wear earplugs or be subject to disciplinary action. Claimant testified he worked from 1973 to 1983 before hearing protection was provided. Howrey said earplugs were provided in 1978, but that they were made more available in 1983.

Claimant denied any major surgeries or operations, hunting, farming, listening to rock music, taking medications that would cause hearing loss or a family history of hearing loss. Claimant said that he did have his ear lanced as a child due to an ear infection.

A company doctor told him a hearing aid would help but he has not tried one yet. Claimant is now employed as a watchman.

Ronald Mortensen testified that he is an 18 year employee of John Morrell & Company from 1966 until the plant closed on April 27, 1985. He worked on the kill floor. It was very loud and noisy. The floor and ceiling were concrete. The building had steel beams. There were no baffles or barriers to control the noise. It was necessary to shout to be heard in many places. The witness said that he knew the claimant in 1973 and that the claimant had normal hearing at that time. Hearing protection was provided in 1982 or 1983 when OSHA made an issue of it but it was not strictly enforced. Witness said that he faithfully wore the hearing protection after it was provided but still suffered a hearing loss.

Warren Evans testified that he is a 21 year employee of the employer from 1964 to when the plant closed on April 27, 1985. He said the kill floor is one big room with a lot of noise with no blocking barriers from one station to the next. The De-hairer and wizard knives were very loud. Hearing protection was not provided until 1983.

Darlene Croft, wife of claimant, testified that she worked at John Morrell & Company from 1973 until the temporary plant shut down which occurred in about June of 1982. She said the plant is just one large room. It was real noisy with nothing to block noise from one station to the next. Earplugs were provided in the late 70's or early 80's. She only wore the ear protection part of the time. She did not like wearing the earplugs and therefore did not wear them. At home if two or more people would speak at the same time, or if the radio and TV were both on at the same time, it would confuse claimant's hearing. She said he had no other loud noise exposure other than the plant. She testified that she has buzzing in her ears a lot of the time.

R. David Nelson, M.A., an audiologist who operates Nelson Hearing Aid Service, performed an audiological evaluation on the claimant on July 23, 1986. He determined that claimant sustained a mild bilateral hearing impairment. The pattern of loss in the high frequencies is similar to those observed in individuals with a known history of noise exposure. The loss of hearing sensitivity in both ears would result in poor comprehension for speech in areas where there is competing noise or soft speech. He stated that hearing aids are recommended if claimant is to work in a situation where communication skills are an essential part of the employment. His audiogram test results are attached to his report (Exhibit 5). On November 7, 1986, Mr. Nelson stated that claimant would benefit from binaural amplification and estimated the cost of hearing aids as follows: (1) behind the ear hearing aids would cost $1,350, and (2) in the ear hearing aids would cost $1,250.

Claimant was examined by C. B. Carignan, Jr., M.D., a family practice physician, on November 4, 1986. Dr. Carignan's in-

terpretation of Mr. Nelson's audiogram determined that claimant sustained a 7.2 percent binaural hearing impairment. He declared that it is reasonably medically certain that claimant's present hearing loss was caused by exposure to loud noise at John Morrell packing plants. Dr. Carignan also mentioned that claimant was exposed to gunfire a few times while in the military service, exposed to his wife's woodworking equipment and claimant had a childhood ear infection.

Daniel L. Jorgensen, M.D., an otolaryngologist, examined claimant on April 2, 1986. He noted that claimant worked in a high noise level environment splitting hogs without earplugs for several years before hearing protection was provided. He also noted that the employer documented a hearing loss in both ears. He recorded that claimant had no trauma to his ears, no prior surgery, no chronic ear infection, no high dose IV antibiodics, and no family history of hearing loss. Claimant was in the Korean conflict with an artillery unit but he was in the communications portion of the battalion. Dr. Jorgensen concluded that claimant's hearing loss was consistent with a noise induced hearing loss. Claimant stated he was not interested in a hearing aid at that time (Ex. A). Dr. Jorgensen's evaluation of claimant's audiogram resulted in a .3 percent of total binaural loss of hearing (Ex. B).

APPLICABLE LAW AND ANALYSIS

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 worked in a high level noise continuously from the time he started at John Morrell & Company in 1947 until he retired on April 27, 1985. Howrey testified claimant worked closest to the splitter when he was cutting spermatic cords. The noise level survey shows the noise level at the splitter as 94 to 95 decibels. Claimant stated he worked there approximately six years from 1973 to 1979. Howrey also verified that claimant's job of popping kidneys and removing spreader hooks was closest to the splitter. Claimant said he performed this job for approximately two years from 1979 to 1981. Claimant then split hogs for approximately one year right at the splitter in 1981 and 1982. This represents approximately nine years of work at or near the splitter with the noise level of 94 to 95 decibels, eight hours a day, five or six days a week

before hearing protection was seriously offered to employees.

Claimant testified that his job of cutting kidneys and marking leaf lard from January of 1984 until his retirement on April 27, 1985 was nearest the wizard knives - head table which showed a noise level reading of 95 decibels on the noise level survey. Howrey, however, stated that claimant was closest to the chisel heads of which showed noise level readings of 90 decibels. Howrey did acknowledge, however, that any reading over 80 decibels can cause hearing loss. Hearing loss can sometimes result from noise exposure to even less than 90 decibels. Morrison v. County of Muscatine, No. 702385 (1985).

Mortensen, Evans and Darlene Croft all testified that the plant was a very noisy environment and that hearing loss was not uncommon. Mr. Nelson, Dr. Carignan and Dr. Jorgensen all believed that claimant's hearing loss was consistent with noise induced hearing loss from long exposure to high noise levels. Dr. Carignan actually attributed the claimant's loss of hearing to exposure to loud noise while employed by John Morrell & Company.

Defendant did not prove that claimant sustained a hearing loss from a natural occurring disease process or otherwise. Dr. Carignan referred to claimant's military service, his wife's woodworking equipment and claimant's childhood ear infection but attributed none of claimant's hearing loss to these conditions.

Dr. Jorgensen ruled out any loss from other trauma, surgeries, ear infections, medications, family history and military service. Claimant stated that he has never hunted or engaged in farming.

Claimant has 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 the employer due to prolonged exposure to excessive noise levels as specified in Iowa Code section 85B.5 and other harmful levels of noise for prolonged periods.

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 requirements of Iowa Code section 85.23 apply 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 the claimant's work related hearing loss than the employee. Claimant noticed that he misunderstood his wife and daughter at the dinner table, that he played the television loud to hear it, and that he had confusion of sounds when both the radio and television played at the same time. The employer on the other hand was aware of a plant wide noise problem; took noise level surveys; took audiograms of its employees; informed employees of their hearing loss; provided hearing protection to its employees; and in the case of the claimant had him sign a paper that required him to wear his earplugs under the threat of disciplinary action. The audiogram performed by the employer 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 claimant's occupational hearing loss and pursuant to Iowa Code section 85.23 claimant is relieved of giving notice to the 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 claimant retired on April 27, 1985. Therefore, the date of injury is April 27, 1985. The statute of limitations was not asserted as an affirmative defense in the answer nor was it designated as an issue on the hearing assignment order. The

fact that it was designated as a hearing issue on the prehearing report then is treated as an oversight or a clerical mistake.

Occupational hearing loss is measured by a statutory formula set out in Iowa Code section 85B.9. Both Dr. Carignan and Dr. Jorgensen followed the statutory formula to arrive at their respective evaluations of the claimant's percent of hearing loss.

Iowa Code section 85B.9 also provides, in part, as follows: "...If more than one audiogram is taken following notice of an occupational hearing loss claim, the audiogram having the lowest threshold shall be used to calculate occupational hearing loss."

Defendant asserts that the agency must accept the lowest audiogram as a statutory requirement. Claimant asserts that the agency is nevetheless empowered with discretion in determining which of two or more audiograms to accept. Both parties are correct. The agency is required to accept the lowest audiogram if it is first determined that all audiograms under consideration are equally reliable. The agency is also still required to use its fact finding power to determine if the audiograms under consideration are equally reliable. In the instant case, both audiograms appear to be equally reliable. Each one was prepared by a qualified audiologist and each one was interpreted by a medical doctor. There was no evidence that one audiogram was more or less reliable than the other audiogram. The audiogram produced by Mr. Nelson of Nelson Hearing Aid Service yielded a binaural hearing loss of 7.1 percent when it was interpreted by Dr. Carignan, a general practitioner. The audiogram of Jean Rudkin, MS, an audiologist in the office of Dr. Jorgensen, an otolaryngologist, yielded a total binaural hearing loss of .3 percent when it was interpreted by Dr. Jorgensen. Therefore, the audiogram of Ms. Rudkin as interpreted by Dr. Jorgensen is accepted to determine the defendant's liability in this case pursuant to Iowa Code section 85B.9. It might be added that Dr. Jorgensen is also the most qualified doctor in the area of hearing since he is an otolaryngologist and judging from the letterhead on the audiogram it appears that Ms. Rudkin works with him or under his supervision.

Claimant's entitlement then to compensation is calculated by applying the percentage of occupational hearing loss of .3 percent to the maximum allowance of 175 weeks resulting in an allowance of .525 weeks of compensation (175 x .3) pursuant to Iowa Code section 85B.6.

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 has 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."

Defendant did not demonstrate that a hearing aid would not materially improve the employee's ability to communicate. Dr. Jorgensen's report states that as of April 2, 1986, when he asked the claimant if he wanted a hearing aid, that claimant felt that it was not necessary at that time and that he would just as soon get along without it. Defendant also brought to light that claimant had not purchased a hearing aid on his own and was not wearing one at the time of the hearing. However, claimant at the time of the hearing on November 25, 1986 asserted that he was seeking a hearing aid.

Mr. Nelson stated, (1) a hearing aid was recommended if claimant is to work in a situation where communication skills are an essential part of the employment (Ex. 5); and, (2) that claimant would benefit from binaural amplification (Ex. 7). Additionally, it would seem that since defendant retained the services of an otolaryngologist it would have been a simple matter to obtain his opinion on this point but for reasons of their own choosing defendant did not do this (Ex. A. & B). Also, defendant could have obtained an opinion from Dr. Carignan on this point if it chose to do so, but did not introduce any direct evidence from Dr. Carignan. Therefore, it is found that defendant has failed to show that a hearing aid would not improve claimant's ability to communicate. Therefore, claimant is entitled to a binaural amplification hearing aid in the amount of $1,250 which is the lowest cost device for binaural amplification (Ex. 7).

FINDINGS OF FACT

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

That claimant was employed by the employer from 1947 until he retired on April 27, 1985.

That claimant was exposed to high noise levels during this entire 38 year period of employment.

That claimant was exposed to excessive noise levels of 94 to 95 decibels for nine years at the Estherville plant from 1973 to 1982 when he worked cutting spermatic cords; popping kidneys and removing spreader hooks; and splitting hogs before hearing protection was provided.

That claimant was exposed to high levels of noise of at least 90 decibels from January of 1984 until his retirement on April 27, 1985 when he performed the job of cutting kidneys and marking leaf lard.

That Mr. Nelson, Dr. Carignan and Dr. Jorgensen all concluded that claimant's hearing loss was consistent with prolonged exposure to high noise levels.

That Dr. Carignan found that it was reasonably, medically certain that claimant's hearing loss was caused by exposure to loud noise at his jobs at Morrell packing plants.

That defendant did not demonstrate any other cause for claimant's hearing loss or that it resulted from a natural occurring disease process.

That in 1983 defendant was aware of a plant wide problem; took noise level surveys; took audiograms of this employee and other employees; informed this employee of his hearing loss; provided this employee and other employees with hearing protection; and required this employee to wear hearing protection under the threat of disciplinary action.

That claimant retired on April 27, 1983.

That claimant sustained a binaural hearing loss of .3 percent.

That defendant did not show that a hearing aid would not materially improve claimant's ability to communicate.

CONCLUSIONS OF LAW

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

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

That the loss was caused by his employment with the employer.

That the amount of loss is .3 percent of a total loss of hearing (Iowa Code section 85B.9).

That claimant is entitled to .3 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 retired from employment with the 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 compensable hearing loss entitles claimant to a hearing aid (Iowa Code section 85B.12).

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant point five-two-five (.525) weeks (.3 x 175) of occupational hearing loss compensation at the rate of one hundred ninety-three and 46/100 dollars (193.46) per week in the total amount of one hundred one and 57/100 dollars ($101.57) ($193.46 x .525) commencing on April 27, 1985.

That these benefits be paid in a lump sum.

That interest will accrue under Iowa Code section 85.30.

That the defendant pay to claimant or to the provider of services one thousand two hundred fifty and no/100 dollars ($1,250.00) for the cost of a binaural hearing aid.

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

That defendant will remain liable for future medical expenses as a result of this 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 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

LANE L. CROSSON,

Claimant,

vs.

FORMAN FORD AND COMPANY,

Employer,

and

IOWA NATIONAL MUTUAL INSURANCE COMPANY and IOWA INSURANCE GUARANTY ASSOCIATION,

Insurance Carrier,
Defendants.

File No. 470570

R E V I E W -

R E O P E N I N G

D E C I S I O N

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Lane L. Crosson, claimant, against Forman Ford and Company (Forman), employer, and Iowa National Mutual Insurance Company/Iowa Insurance Guaranty Association, insurance carrier, for additional benefits as a result of an injury on April 26, 1977. A hearing was held in Ottumwa, Iowa, on January 14, 1987 on claimant's review-reopening petition that was filed on November 15, 1984. A prior review-reopening hearing was held on October 30, 1980 regarding a petition filed on November 15, 1979. The agency's file establishes that a memorandum of agreement was filed herein on June 14, 1977. It was not necessary to show a change of condition at the hearing held on October 30, 1980 merely because a memorandum of agreement had been filed. See Kevin R. Shoemaker v. Adams Door Co., etal, (Appeal Decision, filed on August 30, 1985; affirmed by the Iowa District Court on June 23, 1986). Defendants argue as follows on page 1 of their brief filed herein on February 18, 1987: "It is important for the Deputy to recall that this is the second Review-Reopening proceeding that the claimant has brought in the same litigation." (Original emphasis.) However, it is not important for this deputy to recall that this is the second review-reopening proceeding as no change of condition showing was required at the first review-reopening proceeding. The second review-reopening proceeding was fully submitted on January 14, 1987.

The record consists of the testimony of claimant and Betty Crosson; claimant's exhibits 1 through 6; and defendants' exhibits A through J. Defendants' brief was filed on February 18, 1987. The briefing period was extended by this deputy to February 18, 1987. The parties stipulated that claimant's weekly rate of compensation is $160 and that the medical benefits issue (Iowa Code section 85.27) was being withdrawn and, therefore, this issue need not be decided by the hearing deputy.

ISSUES

The contested issues are:

1) Whether claimant has shown a physical change of condition when his physical condition on October 30, 1980 (date of first review-reopening hearing) is compared with his physical condition on January 14, 1987 (date of second review-reopening hearing); at the close of the hearing on January 14, 1987, claimant's counsel on the record stated that claimant's sole theory is a physical change of condition theory. All other theories are therefore waived as not asserted at the agency level. See, e.g., Klein v. Furnas Electric Co., 384 N.W.2d 370, 375 (Iowa 1986); Armstrong v. State of Iowa Bldgs., 382 N.W.2d 161, 167 (Iowa 1986);

2) Whether there is a causal relationship between claimant's injury and asserted additional impairment or disability; at hearing, and in their brief, defendants argue that claimant has not shown a change of condition, but if it is determined that a physical change of condition has been shown, that this change of condition is not causally related to the work-related injury of April 26, 1977; defendants additionally or alternatively argue that there is no causal relationship between the injury of April 26, 1977 and claimant's alleged impairment or disability. Defendants conceded at hearing that their arguments may overlap; and

3) Nature and extent of disability; claimant asserted the odd-lot doctrine in this case at time of prehearing and at the January 14, 1987 hearing. Defendants argued at time of hearing and in their brief that the odd-lot doctrine has no application in this case for a number of reasons.

SUMMARY OF THE EVIDENCE

The following is a brief summary of pertinent evidence presented in this case. All the evidence elicited or received on January 14, 1987 was considered in arriving at this decision. Much of the evidence elicited by claimant at hearing on January 14, 1987 was not relevant or material to any issue in this second review-reopening proceeding.

Exhibit 1, page 1 (dated September 24, 1984), is authored by J. B. McCanville, M.D., and reads in part: "At this time he still has constant pain radiating down the posterior aspect of the right leg to the right calf." (Emphasis added.)

Exhibit 1, page 2, reads in part:

It is apparent that Mr. Crosson continues to have a significant back problem characterized by spinal stenosis with residual lumbar radiculopathy L5 to S1 despite two previous back surgeries and failed attempts at relief by various other treatment modalities. He continues to have significant pain, muscle spasm, limitation of motion of the spine with appropriate radicular motor, sensory and reflex changes such that he would appear to continue to be disabled under category of impairments 1.05: Disorders of the Spine C. Other Vertebrogenic Disorders (spinal stenosis). (Emphasis added.)

Exhibit 2 (dated September 24, 1984), is authored by Lawrence J. Gralek, M.D., and reads in part: "Lane Crosson was evaluated by me today because of low back pain with right leg radiation. It is felt that he has been totally disabled since the original date of injury". (Emphasis added.)

Exhibit 4, page 3 (dated January 13, 1984), is authored by Dr. Lehmann, and reads in part:

The patient has been totally disabled since the time of his original injury and currently perceives himself as totally disabled and unable, at this point, to return to full employment. He has had (2) surgeries for lumbar disc disease, with incomplete relief of his pain in the lumbosacral level. On examination today, he had a severely antalgic gait, with absence of a right ankle jerk. (Emphasis added.)

Exhibit 6, page 3 (dated July 18, 1985), is authored by G. Brian Paprocki, M.S., V.E., and reads in part:

And finally, Dr. Bakody, who performed both back surgeries, suggested in an August 21, 1979 letter report that any physical impairment rating "must be related to the industrial capacity or lack thereof which in this case appears to be 100 percent at this time." He recommended a referral to "Vocational Rehabilitation Services."

Exhibit 3 is the letter of August 21, 1979 authored by John Bakody, M.D., but this exhibit is incomplete because the

person photocopying the letter cut off part of the words. However, deposition exhibit 3 of exhibit F is intact and has all of Dr. Bakody's language.

Exhibit A, page I-1 (dated June 3, 1980), documents that claimant's first back surgery (a laminectomy) was in September 1977 and was done by Dr. Bakody; claimant's second back surgery also performed by Dr. Bakody was in December 1978. Exhibit A, page I-1 (dated June 3, 1980), is authored by Martin Aronow, M.D., and states in part after describing the two surgeries mentioned above:

> He has been unable to obtain any relief from his pains, however, and has been to Iowa City and sought other opinions. It is generally the consensus that nothing else surgical can be done for this gentleman. He presently continued to have rather constant, and at times, quite severe low back pains, which radiate into both legs with the right leg pain being constant.

Exhibit A, page II-1 (dated June 4, 1980), is authored by G. Charles Roland, M.D., and reads in part: "The patient denies any improvement from his second operation....Today he states that he has chronic low back pain."

Exhibit A, page V-2 and 3 (dated June 3, 1980), is authored by Kathy Beal, M.S.W., and reads in part:

> He related that he is beginning to worry more about his physical condition because he has been feeling worse since the first of the year and believes his condition is worsening.
>
> ....
>
> ...He indicated that he has no intention of doing any sort of work because he feels he was too severly [sic] injured.

Exhibit A, page VI-1 (dated June 4, 1980), is authored by Todd Hines, Ph.D., and reads in part: "He sees himself as completely disabled and it is very difficult for him to conceptualize a future."

Exhibit A, page VIII-1 (dated June 14, 1980), is authored by Jane Miiller-Hair, & reads in part:

> Mr. Crosson does <u>not</u> believe that he is capable of any gainful employment. He states, "I'll never be able to work like I once did and to make the kind of money, that I used to before I got hurt." Lane is very determined that his physical condition is

understood by all parties involved. He is relunctant [sic] to even consider full-time employment of any type, because he is uncertain as to his day to day medical status. (Original emphasis.)

Exhibit A, page VIII-3, reads in part: "[H]e would probably not be able to do any lifting of glass objects weighing over five pounds." Exhibit A, page VIII-4, reads in part: "Mr. Lane Crosson appears to be extremely doubtful of his physical ability to resume full-time work of any kind." (Original emphasis.)

Exhibit F is the deposition of Dr. Bakody taken on September 29, 1980. Dr. Bakody first saw claimant on September 7, 1977 when he was admitted to Mercy Hospital in Des Moines. On page 24, Dr. Bakody stated:

Q. When was your next visit after August the 8th, 1979?

A. This would have been October 5, 1979, when he indicated that he was awfully miserable, and he was still showing essentially the same findings. And it was at this time that I felt that he had a chronic pain problem, for which I wasn't finding the answers, and suggested he go over and see Dr. McDonnell, who is a neurosurgeon in the Department of Neurosurgery at the University in Iowa City, and this was arranged to be done.

On page 29, the following exchange took place:

Q. Dr. Bakody, when you are referring to industrial capacity of 100 percent, were you making references to this former employment?

A. Primarily, yes, sir.

On page 31, the following exchange is set out:

Q. And would you feel as if Mr. Crosson is likely to improve substantially?

A. I would hope that he would or might, but I don't have reasonable expectation that he will, and I think this is really what they mean by maximum recovery, isn't it?

Exhibit I is the transcript of the hearing held on October 30, 1980. Claimant stated on page 19:

Q. Explain to the Hearing Officer the type of activity that causes you pain?

A. I don't have to have any particular activity. I've got constant pain regardless of whether I do anything or not. But there is many times that I might get up in the morning and I'm always under aggravation when I get up for an hour or two. I might get up, get in the car, and go two blocks to the post office. And by the time I get back, I'm so miserable, I can't do nothing.

Q. Is your back sore now?

A. Absolutely sore.

Q. Can you walk without pain?

A. No.

Q. Can you stand without pain?

A. Nope, I can't, not any length of time. I'm not talking about any length of time. I'm talking about five, ten minutes. That's it. I enjoy talking to people, but if I can't stand, I've got to lay down. I just can't do it.

Q. Can you stand to sit for a long period of time?

A. No, I don't sit for over, probably, half an hour at the most. So I get up and move around.

On page 20, the following testimony by claimant appears:

Q. Let me rephrase the question. You have indicated how you felt when you told the Hearing Officer about the day or two after you tried to get out of bed in April of 1977. Do you recall that testimony?

A. Yes.

Q. Has your physical condition--how you felt--improved since that day?

A. No. I would say, if anything, it would have deteriorated because I went back to the doctors several times. And I had either physical therapy done on me to try to get rid of the soreness and the pain or I've had other medications prescribed to me. If anything, I would say it deteriorated.

On page 22, the following testimony by claimant appears:

Q. Are you able to do any of that and have you

been able to do any of that since April 26, 1977?

A. I haven't been able to do it. I can't hunt. I can't fish, which I enjoyed very much because I can't get around. I've done some bowling--not a whole lot--but I can't do that because I can't get around to do it.

On page 24, claimant stated he could not return to glazier work, the type of work he was doing on April 26, 1977. On page 25, claimant stated in part regarding shopping for groceries "It kills me." On page 64, Betty Crosson stated:

Q. After the injury, what has he been able to do?

A. Very little. Well, such as when it comes to winter weather, if either one of the boys aren't around, it's me that does the snow removal and so forth.

APPLIABLE LAW AND ANALYSIS

Lawyer and Higgs, Iowa Workers' Compensation-Law and Practice, section 20-2, page 158 (1984), reads as follows with the footnotes omitted:

> The operative phrase in a review-reopening proceeding is change of condition.* The employee bringing the review-reopening has the burden of establishing by a preponderance of the evidence that the increased incapacity on which he bases his claim is a result of the original injury.* The basis of a decision in a review-reopening is the employee's condition subsequent to the time being reviewed. The change may be from temporary total disability to permanent partial disability.* It may also be a change in degree of disability.* A redetermination of the condition of the claimant as it was adjudicated by a prior award is inappropriate.* A difference in expert opinion regarding degree of impairment stemming from the original injury is not sufficient justification for a different determination by the commissioner.* However, if there is "substantial evidence of a worsening of condition not contemplated at the time of the first award" a review-reopening is justified.* (Emphasis added.)

Claimant herein has clearly failed to establish a physical change of condition by a preponderance of the evidence. In fact, the exhibits that claimant introduced at hearing on January 14, 1987 document that there has been no physical change of condition between October 30, 1980 and January 14, 1987. It

would unduly prolong this decision to repeat the medical evidence set out in the "summary of the evidence" portion of this decision. In sum, there is no persuasive medical evidence of record to establish the requisite change of condition and, therefore, it is unnecessary to address the causal connection question set out at the beginning of this decision. It is also unnecessary to reach the nature and extent of disability issue, which includes the question of whether the odd-lot doctrine applies in this proceeding.

Given the evidence of record, it is also concluded that claimant should pay all the costs of this proceeding. The change of condition issue is not a close one. In effect, claimant in this proceeding is merely collaterally attacking the prior award of 35 percent, or asking this hearing deputy to exercise appellate jurisdiction to modify or reverse the prior award of 35 percent industrial disability. The applicable statutes do not authorize this deputy, given the record in this case, to award more permanency benefits than the 175 weeks previously awarded as a physical change of condition has not been shown.

FINDINGS OF FACT

1. Claimant injured his back on April 26, 1977 while working for Forman Ford and Company.

2. Claimant had back surgery in September 1977 performed by Dr. Bakody.

3. Claimant had another back surgery in December 1978 performed by Dr. Bakody.

4. Claimant was not physically able to do glazier work on October 30, 1980.

5. Claimant was not physically able to do glazier work on January 14, 1987.

6. On October 30, 1980, claimant was experiencing pain because of his low back condition.

7. On January 14, 1987, claimant was experiencing pain because of his low back condition.

8. On October 30, 1980, claimant had considerble difficulty engaging in any physical activity because of the condition of his back.

9. On January 14, 1987, claimant had considerable difficulty engaging in any physical activity because of the condition of his back.

10. Claimant's physical condition was the same on October 30, 1980 as compared with January 14, 1987.

CONCLUSION OF LAW

Claimant failed to establish the requisite change of condition by a preponderance of the evidence.

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, formerly Industrial Commissioner Rule 500-4.33.

Signed and filed this 26th day of February, 1987.

T. J. McSweeney

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANDREW CURRY, Claimant, vs. FLOYD VALLEY PACKING COMPANY, Employer, and ARGONAUT INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 751460 A R B I T R A T I O N D E C I S I O N FILED JUN 23 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Andrew Curry, against his employer, Floyd Valley Packing Company, and its insurance carrier, Argonaut Insurance Company, to recover benefits under the Iowa Workers' Compensation Act, as a result of an injury allegedly sustained November 4, 1983. This matter came on for hearing before the undersigned deputy industrial commissioner in Sioux City, Iowa, on April 28, 1987. A first report of injury was filed December 5, 1983. Defendants have paid claimant 3 1/7 weeks of disability with disability payments ending on December 13, 1983. The record was considered fully submitted at close of hearing.

The record in this proceeding consists of the testimony of claimant, as well as of claimant's exhibits 1 through 6, and defendants' exhibits A and B. All exhibits are identified on the exhibit list submitted by the parties as part of the official file in this matter.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant's rate of weekly compensation is $244.10, and that is commencement date for any additional benefits is December 4, 1983. The issues remaining to be decided are:

1) Whether claimant received an injury which arose out of nd in the course of his employment;

2) Whether there is a causal relationship between that injury and the claimed disability; and

3) Whether claimant is entitled to benefits.

The parties have stipulated that any permanency is to a scheduled member, that being claimant's left foot.

REVIEW OF THE EVIDENCE

Claimant is 30 years old and a high school graduate. He began work with Floyd Valley Packing in September 1982 and worked predominantly as a hog sorter who directed hog carcasses into a cooler. On November 4, 1983, claimant testified that a heavy stainless steel door hit his heel producing a sharp jolt and stinging pain. He indicated that the pain increased and that he had swelling and discoloration in the foot. Approximately three weeks following the injury claimant saw Milton Grossman, M.D., who subsequently referred him to William Krigsten, M.D., a board certified orthopedist. Claimant testified that Dr. Krigsten kept him off work for approximately three and one-half weeks and that Dr. Grossman subsequently released him to return to work at the same job. Claimant reported that on returning to work, he had continuing pain and stiffness in the foot as well as throbbing after an eight to ten hour day. He testified that those symptoms remain and that long walks and standing bother him. He reported that he can not jump or play basketball, apparently meaning "horse" with his son. Claimant has not had surgery.

Milton Grossman, M.D., saw claimant on November 16, 1983 with swelling of the left heel at insertion of achilles tendon. Claimant had no impairment of motion. The doctor's diagnosis was contusion of the left foot. Dr. Grossman released claimant to work on November 26, 1984 [sic]. On December 14, 1983, Dr. Gross stated that he had treated claimant for a condition due to his employment.

William Krigsten, M.D., a board certified orthopedist, initially saw claimant on November 22, 1983. He noted a walnut size swelling on the left to the midline where tendo achilles inserts. Claimant reported throbbing between the distal fibula and ankle. The area was inflamed and tender, but x-rays revealed no fracture or dislocation. The x-ray did reveal minimal narrowing of the first metatarsal phalangeal joint bilaterally. Claimant had no bony abnormality in the region of the marker of the left os calcis. The diagnosis was of a concussion of the left heel with hematoma and questionable cellulitis. The doctor then opined that claimant probably had swelling in his heel from birth onward even though claimant stated he had no swelling in the heel prior to the injury. On April 17, 1984, claimant appeared with complaints that his heel hurt and with a prominence on the lateral side of the left os calcis at the insertion of

the tendo achilles. Dr. Krigsten reported that there were no objective findings of infection or cysts; the area was firm; the bone not movable. He reported that there was no evidence of disease or bony injury to achilles [tendon] or to the os calcis, and that claimant had no permanent partial impairment.

On November 4, 1984, E. M. Mumford, M.D., diagnosed bursitis over a pump bump, that is, bursitis over exostosis which had been aggravated by injury. He prescribed a cut-out in claimant's shoe over the heel area. X-rays of December 13, 1985 confirmed the exostosis and revealed a much smaller exostosis on the right foot. The doctor's impression was that claimant had probably had a bilateral pump bump, but that the steel door injury had caused chronic bursitis with enlargement of the mass. He recommended a heel cup for claimant and stated that surgical removal of the bump pump was possible, but could interfere with the achilles tendon insertion and leave a painful scar. On March 3, 1986, Dr. Mumford opined that claimant's disability would result from his need to wear a shoe adjustment permanently. On June 23, 1986, Dr. Mumford opined that claimant had no great functional disability if he could get an adequate insert in his shoe, but that claimant could have "industrial disability" if required to do very heavy work.

On December 16, 1985, Dr. Krigsten stated that x-rays showed an enlargement at the developmental lateral surface of the os calcis. Krigsten opined this did not result from injury and that claimant's discomfort resulted from his boot rubbing about that area. Krigsten opined that the problem was not work-related.

Anil K. Agarwal, M.D., examined claimant on July 23, 1986. He then noted that claimant had very minimal puffiness in the left heel area and that the heel was tender on palpation near the tendo achilles insertion and just behind the tendo achilles proximally. Claimant had good dorsiflexion and plantar flexion of the left calcaneum with no gross bump either on palpation or visually. Lateral x-rays of both heels revealed no gross exostosis. No neurological deficits or vascular problems were evident. The doctor opined that claimant possibly had mild retro tendo achilles bursitis with associated mild tendonitis. He recommended that claimant use a heel cover pad which should be sufficient to relieve his symptoms. He reported that claimant could be employed to lifting tolerance and opined that claimant had a ten percent permanent partial impairment of the left foot with a good prognosis. The doctor did not recommend surgery as he found no exostosis.

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

APPLICABLE LAW AND ANALYSIS

We consider the question of whether claimant received an injury which arose out of and in the course of his employment.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on November 4, 1983 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe, 246 Iowa 402, 68 N.W.2d 63.

Testimony and medical records support claimant's contention that a work incident occurred on November 4, 1983 when a heavy stainless steel door hit claimant's left heel. Hence, claimant sustained his burden as regards this issue. The greater question is whether that work incident is causally related to any permanent imapirment to claimant's left foot.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 4, 1983 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 867. See also Musselman, 261 Iowa 352, 154 N.W.2d 128.

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).

Dr. Krigsten and Dr. Mumford describe claimant as having a prominence or pump bump or exostosis on the lateral side of the left os calcis at the insertion of the tendo achilles. Dr. Krigsten opines the condition is developmental and did not result from claimant's work injury. claimant has a similar though less enlarged condition on the right. Dr. Mumford has opined that while claimant's exostosis or pump bump exists bilaterally, claimant's steel door injury had caused chronic bursitis with enlargement of the mass. Dr. Mumford's opinion is accepted over Dr. Krigsten's as more consistent with claimant's history. Evidence presented does not suggest that claimant had problems on the left prior to his work incident nor that he has had problems with his right foot despite its apparently also having the pump bump or prominence. Dr. Agarwal's opinion that claimant has no prominence is rejected as inconsistent with the physical examination and x-ray findings of claimant's treating physicians, Krigsten and Mumford. Claimant has shown the causal relationship between his left foot condition and his work injury.

We consider the benefit question. The parties have agreed that any permanency relates to the left foot. As noted, Dr. Krigsten opines claimant has no permanency. Dr. Krigsten has been claimant's treating physician. Dr. Agarwal, an examining physician, opines claimant had a ten percent permanent partial impairment of the left foot with a good prognosis which impairment is attributed to bursitis and mild tendonitis but not to exostosis, that is pump bump or prominence. Dr. Mumford, who apparently has also treated claimant, opined claimant would have no great functional disability if claimant were to wear an adequate shoe adjustment permanently. Dr. Agarwal does also recommend a shoe adjustment. Claimant does have a left foot problem which did not predate his work injury. The problem is largely one of chronic bursitis, discomfort, and the need to wear a shoe adjustment. It involves no significant loss of motion or neurological or vascular problems. It does not rise to the level of permanent partial disability Dr. Agarwal suggests, however. Dr. Mumford's position appears to be the soundest of

the three presented. It apparently represents a balance between that of Krigsten and Agarwal. We find a "no great" functional disability to equal a slight disability, that is, less than ten percent permanent partial impairment, which is generally considered a moderate permanent partial impairment. Claimant's permanent partial impairment of the left foot is found to be five percent.

Section 85.34(2)(o) provides 150 weeks of permanent partial disability for loss of a foot. Therefore, a five percent permanent partial impairment of the foot equals 7.5 weeks of disability entitlement.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant hit his left heel on a heavy stairless steel door at work on or about November 4, 1983.

Claimant subsequently had swelling and pain in the heel and underwent medical treatment.

Claimant has a prominence or pump bump or exostosis on the lateral side of the left os calcis at the insertion of the tendo achilles.

Claimant has a similar though less large condition on the right.

Claimant's condition is likely developmental.

Claimant did not seek medical treatment for either the left or right condition prior to his injury.

Claimant's work injury caused claimant chronic bursitis with enlargement of the mass on the left.

Claimant will need to wear a shoe adjustment permanently.

Claimant has good range of motion and no neurological or vascular deficit.

Claimant's functional impairment of the left foot is "no great" or a slight permanent partial impairment.

A ten percent permanent partial impairment is generally considered a moderate impairment.

Claimant's permanent partial impairment is five percent of the left foot.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established an injury of November 4, 1983 which arose out of and in the course of his employment.

Claimant has established a causal relationship between that injury and the disability on which he bases his claim.

Claimant is entitled to permanent partial disability resulting from his November 3, 1983 injury of five percent of the left foot.

ORDER

THERFORE, IT IS ORDERED:

Defendants pay claimant seven point five (7.5) weeks of permanent partial disability benefits at the rate of two hundred forty-four and 10/100 dollars ($244.10) with those benefits to commence December 14, 1983.

Defendants pay accrued amounts in a lump sum and interest pursuant to section 85.30.

Claimant and defendants equally pay costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

Defendants file claim activity reports as required by the agency.

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

Helen Jean Walleser
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DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY E. DAVIS, Claimant, vs. J. M. STEEL ERECTORS, INC., Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	FILE No. 747153 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 Larry E. Davis, claimant, against J. M. Steel Erectors, Inc., (J. M. Steel), employer, and Wausau Insurance Companies, insurance carrier, for benefits as a result of an alleged injury on September 5, 1983. A hearing was held in Council Bluffs, Iowa, on December 12, 1986 and the case was submitted on that date.

The record consists of the testimony of claimant (live and by deposition taken on February 12, 1986, which has been marked as exhibit 16), John Rupp, Jerry Miller (live and by deposition taken on May 14, 1985, which has been marked as exhibit 15), and Anita Howell; and joint exhibits 1 through 31. Both parties filed a brief.

The parties stipulated that claimant was an employee of J.M. Steel on September 5, 1983; that claimant's alleged injury is a whole body injury; that the medical bills at issue are fair and reasonable in amount; and that defendants waived their intoxication defense (it is noted that this defense was waived in any event since it was not raised at time of prehearing and then set out as an issue on the hearing assignment order filed on December 2, 1986).

ISSUES

The contested issues are:

1) Whether claimant received an injury which arose out of and in the course of his employment; this issue presents several subissues which are (a) whether the alleged injury arose out of claimant's employment with J. M. Steel; (2) whether the alleged injury occurred in the course of claimant's employment with J. M. Steel; (3) whether the going and coming rule bars recovery in this case; and (4) whether any exceptions to the coming and going rule have application in this case;

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

3) Nature and extent of disability; claimant asserts the odd-lot doctrine in this regard;

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

5) The appropriate rate of weekly compensation.

SUMMARY OF THE EVIDENCE

Claimant testified by way of deposition (exhibit 16) that he lives in Shenandoah. Id. at 9. On September 5, 1983, claimant was told in the morning by a coworker (John Rupp) to be ready to travel to a job site that afternoon. Id. at 10. On September 5, 1983, claimant and John Rupp went to a festival in Essex, Iowa. Id. at 10. Claimant and John Rupp were in Essex from 9:00 a.m. to around 6:00 p.m. Id. at 11. It was claimant's idea to go to the festival in Essex. Id. at 11. After attending the festival in Essex, John Rupp drove a company truck, with claimant in the front seat, from Essex in the direction of Shenandoah in order to pick up a coworker by the name of Mike Haun. Id. at 12. John Rupp had an accident with the company truck prior to arriving in Shenandoah. Id. at 10. See also exhibit 22 for pictures of the damaged vehicle. This accident happened "right outside of Shenandoah, Iowa." Id. at 12. (Emphasis added.) The claimant was paid $4.50 an hour for travel time to a job site. Id. at 21. He expected to get paid for the drive between Essex and Shenandoah. Id. at 22.

Claimant had been working at a job site in Oblong, Illinois, immediately prior to returning to Iowa and attending the festival in Essex. The next job was in Clemons, Iowa. The following appears on pages 24-26 of his deposition.

Q. Well, ordinarily you were just paid travel time for what it would take to travel from one job to the next, weren't you?

A. Yes.

Q. You weren't paid travel time to go from your home to a job, were you?

A. He gives us so many hours from one destination to the next.

Q. Well, he would figure out what it would take to travel from Illinois to that Clermont [should read Clemons] job and would pay you--

A. So many hours.

Q. --for that travel time; isn't that right?

A. Yes.

Q. So if you had reported to Clermont [sic] you would have been paid for--

A. So many hours.

Q. --travel time from Illinois to Clermont [sic]; isn't--

A. No. I would have been paid travel time from Shenandoah to Clermont [sic].

Q. The usual rule was you were paid travel time from one job to the next job; is that right?

A. Yes, but we don't get paid travel time to go home.

Q. No. but you would get paid travel time to go from Illinois to home?

A. No.

Q. You thought you were just going to get paid from Shenandoah to Clermont [sic]?

A. Yes.

Q. So Jerry Miller would estimate how long it would take you to drive from Shenandoah to Clermont [sic] and would pay you four dollars and a half an hour for that time; is that right?

A. Yes.

Q. And if you drove your own car would you get paid anything for the use of the car or would you

just get an hourly rate?

A. We would just get the same thing, but he would pay for fuel.

Q. If you drove your own car he'd pay for the fuel?

A. Yes.

Q. So if you drove your own car you'd get the fuel plus four dollars and a half for travel time?

A. Yes.

Q. And if you rode in the company pickup you would just get the four dollars and a half an hour?

A. Yes.

Q. And he would figure it from wherever you lived to the job job site, would he?

A. He figured from home base Hamburg, his home base, is where it was--how he would figure everything.

Q. You mean if you lived in Shenandoah he would pay you as if you drove from Hamburg, you mean?

A. The reason is because everybody worked there--so many different people lived in so many different towns, probably wouldn't have the time to estimate from each place to the job, so he just would estimize it from Hamburg.

Q. Do you know how many hours he would have allowed for that if you had arrived in Clermont [sic]?

A. No, I don't.

Claimant stated on pages 40-41 of his deposition:

Q. Ordinarily if you would go from one job site to another you'd get travel time between the two job sites; isn't that right?

A. Yes.

Q. So if they had work for you, continuous work, you would just go from one job site to another during the summer; is that right?

A. Yes. We was allowed so much time at home after we'd been out for so long.

Q. Well, was it your understanding when you left Illinois that the next job site wasn't ready yet?

A. Yes.

Q. And who told you that?

A. The driver of the truck, John Rupp.

Q. John Rupp. And so it was your understanding that you had to go back home and wait until you were called; is that right?

A. Yes.

Q. And that's what John Rupp told you?

A. Yes.

Jerry A. Miller testified by way of deposition (exhibit 15) that he was president of J. M. Steel on September 5, 1983. Id. at 4. This corporation is no longer in existence.

The job in Oblong, Illinois was finished on the Saturday before September 5, 1983 (a Monday). Id. at 7. The job at Clemons, Iowa started on September 4, 1983 (a Sunday). Id. at 7. Miller returned to Iowa on September 3, 1983. Id. at 8. J. M. Steel paid for travel time between job sites, but did not pay for travel time to return home and then go to the next job site. Id. at 10. Miller did not talk to claimant over the 1983 Labor Day weekend. Id. at pages 12-13. Claimant and other workers "were supposed to leave Sunday and be on the job there [Clemons, Iowa] Monday morning." Id. at 13. At page 13, Miller also stated: "They had optional travel on Sunday, or if they wanted to, they could go home Saturday night. And then they were supposed to have traveled Sunday and be up there Monday morning to go to work." On pages 16-17, Miller stated: "I pay them from the last job we were on to the next job. If they come back they still get paid from the original job site the the next job site.... We were working in Oblong, Illinois. They would get paid from Oblong, Illinois to Clermont [sic], Iowa."

The following appears on page 17:

Q. Suppose you were not on a job and they were just in southwest Iowa, where I assume most of them live, and you obtained a job and you let them know that you had work for them. Would you pay them travel time to that job?

A. Yes. Anybody that was new, was just hired, would get travel time from Hamburg to the job site.

The following appears at pages 20-21:

Q. Have you discussed this matter with Larry Davis?

A. No.

Q. Had you discussed anything about where he had been or where he was going or what happened that day with him?

A. No.

Q. Have you discussed the matter with Johnny Rupp as to where they had been, where they were going and what happened?

A. Seems that we had talked about, you know, where they had been. They had been up to a bar in Essex. Jimmy Davis was there. That's Larry Davis' brother. And Jimmy said they got in a fight and he broke the fight up and they got chased out of town.

Q. When you say "they," who are you talking about?

A. Larry Davis and Johnny Rupp.

Q. And who is Jimmy Davis?

A. That's Larry Davis' brother.

Q. Had you talked to anyone else concerning what happened, where they were going and where they were before the accident?

A. Not that I recall.

The following appears at page 26:

Q. In other words, you expected some of them to leave Illinois and come to their homes in southwest Iowa, and then perhaps sometime on Monday, if they hadn't made it there on Sunday, that they would then travel the additional six hours to the job site close to Des Moines?

A. Yes. The understanding was, they were supposed to go up there Sunday night so they could be ready to go to work Monday morning early. As you can see by the time cards, they kind of straggled in. They didn't get an early start.

The following appears on pages 29-30:

Q. What about when you left Illinois? Was Mr. Rupp given possession of the vehicle in question?

A. Yes.

Q. And what was he supposed to do with it?

A. Drive it.

Q. To the new job site?

A. Or come home.

Q. You knew that he may be coming home first?

A. Yes.

Q. And then you knew that at some point he would come to the job site, either to get some hours in on Monday or at least be there by Tuesday for a full day?

A. Yes. They were supposed to be there Monday for a full day.

Q. Which would require them to travel sometime Sunday?

A. Either Sunday or early Monday morning.

The following appears at page 31:

Q. So would it be fair to say that Mr. Rupp had your permission when you left Illinois to drive the truck to his home and then later drive the truck to the job site in Des Moines?

A. Yes.

Q. And if he were asked by some of the other crew members, whoever they be, to pick them up and bring them to the job site so they could be there Monday morning, would that also be acceptable with you?

A. Yes.

At page 39, Mr. Miller stated again that claimant was supposed to travel on Sunday night or early Monday morning in order to work at Clemons on Monday. However, he stated at page 40 that claimant had been allowed to show up late for work

without being fired. At page 42, Miller stated it is a six or seven hour drive between Hamburg and the Clemons job site. Essex is thirty to forty-five minutes closer to Clemons. Id. at 43. The following appears at page 54:

> Q. And that that [sic] was all right with you and within your company policy that they go to Shenandoah, but they were to be back on the job site on Monday morning?
>
> A. Yes, that's correct. They had an option. The schedule wasn't that pressing and they had an option of whatever they wanted to do.

A partial hearing transcript was filed in this case on December 24, 1986. The following appears at page 10:

> THE DEPUTY COMMISSIONER: With reference to Marshalltown and Clermont, we're talking about the same jobsite. Is that correct?
>
> THE WITNESS: Yes. We stayed in Marshalltown, and that's how people relate to the jobsite.
>
> THE DEPUTY COMMISSIONER: How many miles is Clermont, Iowa, from Marshalltown, Iowa, if you know?
>
> THE WITNESS: About 10 or 15.

The following appears on page 12:

> THE DEPUTY COMMISSIONER: Was the claimant paid this -- we're using this 50-mile-an-hour formula from Oblong, Illinois, to Clermont, Iowa, even though he didn't go directly from Oblong, Illinois, to Clermont, Iowa?
>
> THE WITNESS: That's the basis of how it was done. If they went somewhere else, they still got the basis from Oblong to Clermont.
>
> THE DEPUTY COMMISSIONER: Let me ask my question again. My question was: Was this claimant paid on this 50-mile-an-hour basis even though he didn't go directly from Oblong, Illinois, to Clermont, Iowa, he went to Essex, Iowa? Was he paid as if he had gone from Oblong, Illinois, to Clermont, Iowa?
>
> THE WITNESS: He was paid as if he had gone from Oblong to Clermont.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on September 5, 1983 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe, 246 Iowa 402, 68 N.W.2d 63.

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298, 299 (Iowa 1979).

The Iowa Supreme Court stated in Halstead v. Johnson's Texaco, 264 N.W.2d 757, 759 (Iowa 1978):

> When a worker has a place and hours of work, ordinarily he is not considered to be acting within his employment while he is on his way to his place of employment or is returning to his home or going elsewhere after dark. This is the going and coming rule. Bulman v. Sanitary Farm Dairies, 247 Iowa 488, 73 N.W.2d 27.

Claimant argues as follows in his brief filed on January 20, 1987 at pages 4-5:

> Jerry Miller, principal owner of J. M. Steel, knew that the truck involved in the accident was going to the Shenandoah area and would take employees with it, and that Rupp was responsible for gathering the crew and returning them to the job site. (Exhibit 15 pp. 26, 29, 34 and 35.)
>
> When travel to work is made in the employer's pickup, the journey is in the course of employment, the reason being that the risks of the employment

continue throughout the journey. 1 Larsen, Workmans [sic] Compensation Law, §1700. When the employee is paid an identifiable amount of compensation for the time spent in travel, the travel is within the course of employment. 1 Larsen, Workmans [sic] Compensation Law, §1621.

Iowa law is in compliance with the above law. The Iowa Supreme Court found that where the employer provides, or in some way pays for the transportation going to and coming from work, the hazards encountered by the employee going to and returning from work are incident to his employment and therefore in the course of and arising out of such employment. Bulman v. Sanitary Farm Dairies, 73 N.W.2d 27 (Iowa). Also see Dorman v. Carroll County, 316 N.W.2d 423 (Iowa App. 1981); Lawyer and Higgs, Iowa Workers [sic] Compensation-Law and Practice, §6-12.

In this case, where Davis was an employee of J. M. Steel, and by agreement and custom the employer provided transportation to the job sites, and where it was the duty of the driver to obtain laborers and bring them to the job site, and the accident happened while traveling to pick up laborers and take them to the job site, the accident was in the course of and arose out of the employment.

The employer's statements that the workers were to proceed directly from the job site in Illinois to the job site near Des Moines is contradicted by his own statements that he knew many of the laborers would return to the Shenandoah area and the statement of the driver of the pickup, John Rupp, that he had to return to the Shenandoah area to pick up jacks for the next job. Exhibit 15 pp. 26, 35 and 54. Most of the laborers did return to the Shenandoah area and did not return to the job site until Tuesday, the day after the accident. The employers' deposition statement shows that the employer knew that Davis was going home to Shenandoah and that this was allowable. Other employees involved in the trip back with Rupp received pay for travel time going back to work. The travel was within the employment by J. M. Steel.

First of all, it is apparent that the Iowa job site involved in this case was located in Clemons, Iowa, not Clermont, Iowa.

After reviewing the evidence of record, it is my judgment that claimant's injury did not arise out of his employment with J. M. Steel nor did it occur in the course of his employment

with J. M. Steel. Also, it is my judgment that the going and coming rule has no application in this case and, therefore, it is not necessary to determine whether any exception to this rule applies to the facts of this case.

Claimant failed to establish liability in this case whether the dispute is characterized as a factual one or a legal one. The question presented to the agency in this case appears to be a legal one ("question of law") as the essential facts are not in dispute. The definition of a question of law, as opposed to fact, is found in such cases as Armstrong v. State of Iowa Bldg., 382 N.W.2d 161, 165 (Iowa 1986) ("[W]e agree with the employer that this is not a case in which the district court could determine the facts as a matter of law and modify the commissioner's award. In this case the relevant evidence was both contradicted and such that reasonable minds could draw different inferences from the evidence."); Green v. Iowa Dept. of Job Service, 299 N.W.2d 651, 655 (Iowa 1980) ("In this case the facts, and inference fairly to be drawn therefrom, are undisputed. The issue then becomes one of law, and the district court is not bound by the agency's legal conclusions. See Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980); Hawk v. Jim Hawk Chevrolet-Buick, Inc., 282 N.W.2d 84, 87 (Iowa 1979).").

Mr. Rupp and claimant decided to return from Oblong, Illinois, to their homes in Southwest Iowa. It is clear from the record that Jerry Miller gave them this option. However, he expected them to be at work on Monday morning (September 5, 1983). They elected to go to a festival in Essex, Iowa, on Monday morning rather than to report to work. Mr. Rupp and claimant then drove a company vehicle from Essex toward Shenandoah. They didn't quite make it to Shenandoah as the vehicle was involved in an accident. Claimant now argues that he sustained a work-related injury because 1) he was riding in a company vehicle at the time of the accident; 2) he was not required to go directly to the Clemons, Iowa, job site; 3) Rupp was going to pick up another employee at the time of the accident; 4) Rupp was required to pick up jacks for the Clemons, Iowa, job; and 5) other reasons stated at time of hearing and in his brief. Claimant is in error. Mr. Rupp and claimant took a gamble that they could go to the Essex festival and then return to Shenandoah without incident. This gamble failed. The fact that their employer was lax enough to allow his employees to use his vehicle for purposes other than work, or to come to work when they pleased, does not converse claimant's injury into a work-related injury.

As stated in Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298, 299 (Iowa 1979), "An injury occurs in the course of 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." (Emphasis added.) In short, claimant had permission to return to Shenandoah and then travel

to the job site at Clemons, Iowa. He was not authorized by his employer to use a company vehicle to attend a festival and then return home and then go to the Clemons, Iowa, job site. In any event, he should have been back in Shenandoah prior to 6:30 p.m. on September 5, 1983. He ignored his employer's request that he be at work on Monday morning. Claimant's testimony that he was told by Mr. Rupp that he could report later than Monday morning is not believed. It will be found that claimant knew he was supposed to be at work on the morning of September 5, 1983, but elected to start work on Tuesday morning instead.

FINDINGS OF FACT

1. On September 3, 1983, claimant was employed by J. M. Steel.

2. On September 3, 1983, a J. M. Steel project in Oblong, Illinois, was completed.

3. On September 4, 1983, a new J. M. Steel project was to started in Clemons, Iowa, near Marshalltown, Iowa.

4. Claimant was supposed to appear at the Clemons project on the morning of September 5, 1983.

5. Claimant's home is in Shenandoah, Iowa.

6. On September 5, 1983, claimant and a coworker, John Rupp, went to a festival in Essex, Iowa; it was claimant's idea to attend this festival.

7. Essex, Iowa is located near Shenandoah and a trip from Essex, Iowa, to Clemons, Iowa, is a shorter trip than a trip from Shenandoah, Iowa, to Clemons, Iowa.

8. J. M. Steel gave claimant and John Rupp the option of returning home prior to going to the Clemons job site; in other words, claimant and John Rupp were not required to go directly from the Oblong, Illinois, job site to the Clemons, Iowa, job site.

9. J. M. Steel employees were paid on an hourly basis for travel time to a job site.

10. On a new project the hourly rate was computed by determining the amount of time it would take to get from Hamburg, Iowa (the home of Jerry Miller, the president of J. M. Steel) to the new job site.

11. John Rupp and claimant were in Essex, Iowa, on September 5, 1983 from about 9:00 a.m. to about 6:00 p.m.

12. John Rupp started to drive a company truck, with

claimant in the front seat, from Essex, Iowa, to Shenandoah, Iowa, on September 5, 1983 commencing at about 6:00 p.m.

13. Prior to arriving in Shenandoah, where John Rupp was going to pick up another coworker, John Rupp had an accident with the company vehicle.

14. The accident described above occurred at about 6:30 p.m. on September 5, 1983.

15. Claimant injured his back in the truck accident on September 5, 1983.

16. There is a Clemons, Iowa, located in Marshall County, Iowa, near the city of Marshalltown, Iowa.

17. Clermont, Iowa, is located in Fayette County, Iowa, near the county seat of West Union, Iowa.

18. J. M. Steel only paid a worker his hourly rate for travel time if the worker arrived on the job site.

19. One of the reasons that claimant was not paid for the time it took to ride from Essex, Iowa, to near Shenandoah, Iowa, on September 5, 1983 was because claimant did not arrive at the Clemons job site due to the truck accident that occurred on September 5, 1983 at about 6:30 p.m.

20. Claimant's injury on September 5, 1983 did not arise out of his employment with J. M. Steel.

21. Claimant's injury on September 5, 1983 did not occur during the course of his employment with J. M. Steel.

CONCLUSIONS OF LAW

Claimant failed to establish by a preponderance of the evidence that he sustained an injury that arose out of and in the course of his employment on September 5, 1983.

ORDER

IT IS THEREFORE ORDERED:

That claimant take nothing from these proceedings.

That claimant 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 9th day of February, 1987.

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES A. DI MAIO, Claimant, vs. IOWA ESP PRODUCTS, INC., Employer, and INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	FILE NO. 722032 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 James A. Di Maio against Iowa EPS Products, Inc., his former employer, and Insurance Company of North America, its insurance carrier. The case was heard at Des Moines, Iowa on September 18, 1986 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from James A. Di Maio, Carol Larson, and Janet Beltz. Exhibits 1 through 14 and D-1, D-2 and D-3 were received into evidence. It was noted that exhibits 1 through 6 are the same as the numbered exhibits referred to in the depositions which are part of the record and marked as exhibits D-1, 2 and 3. Official notice was taken of the Guides to the Evaluation of Permanent Impairment, Second Edition, published by the American Medical Association.

ISSUES

Claimant seeks additional compensation for healing period for the time between two surgeries on claimant's left knee which was injured in the accident. Claimant also seeks compensation for permanent partial disability in his right shoulder which defendants admit was injured in the accident. Defendants deny that any additional healing period compensation is due. Defendants admit that claimant's right shoulder was injured in the accident but deny the existence of any permanent partial disability affecting the shoulder. The parties stipulated that claimant had a five percent permanent partial disability of the left leg for which he has been fully compensated by payment of 11 weeks

of permanent partial disability at the correct rate of $152.02 per week. The parties further stipulated that claimant had been paid healing period compensation from December 16, 1982 through April 30, 1983 and also from February 11, 1985 through April 3, 1985.

SUMMARY OF EVIDENCE

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

The underlying facts surrounding this case are largely uncontroverted. James A. Di Maio was employed as a truck driver by Iowa ESP Products, Inc., hauling fiberglass insulation on an interstate highway near Moline, Illinois. The weather was inclement and Di Maio was involved in an accident in which he injured his left knee and right shoulder. He received initial emergency care at the Moline Public Hospital where he voiced complaints of pain involving his right shoulder and left knee. X-rays revealed a non-displaced fracture that involved the greater tuberosity through the anatomical neck of his right humerus. X-rays did not reveal any abnormality in claimant's left knee (Exhibit 2).

Claimant returned home and placed himself under the care of his family physician, John P. Clark, D.O. Dr. Clark treated claimant's complaints and referred him to Peter Wertz, M.D., an orthopedic surgeon. On January 29, 1983, Dr. Wertz performed surgery on claimant's left knee (Ex. 9). Dr. Wertz released claimant to return to work on April 30, 1983. During the following months claimant continued to express complaints of discomfort involving his left knee and right shoulder for which he received treatment from Dr. Clark. After becoming dissatisfied with Dr. Wertz claimant consulted Sinesio Misol, M.D., another orthopedic surgeon, regarding his knee. Dr. Misol performed a second surgery on February 8, 1985 and released claimant to return to work on April 3, 1985. Claimant indicated that the second surgery did improve the condition of his knee. The parties stipulated that claimant had a five percent permanent partial disability of the left leg for which he has been fully compensated.

Claimant testified that his shoulder has bothered him continuously but that initially the knee problem was more acute and was the primary focus of attention. Claimant testified that he was initially advised that the recovery of the shoulder could be somewhat slow. He stated that it has not recovered and has actually worsened. Claimant testified that the shoulder is most troublesome when he attempts to raise his arm higher than his head, particularly to the side or to the front. He demonstrated his range of motion during the hearing and he was observed to be

able to raise the right arm, with the elbow straight, to where his hand was approximately even with the top of his head. Di Maio stated that he can lift forward or to the side to the height of approximately his head. He stated that he can pull with the arm but is unable to push. He described the sensation as if something in the shoulder were catching and described it as feeling like being stuck with a hot ice pick. Di Maio complained of difficulty performing activities around his home with the right arm such as holding a full spray paint gun, washing windows, and operating a vaccum cleaner. He stated that the shoulder is painful and that it awakens him at night if he rolls onto his right side.

When claimant was being treated by Dr. Wertz he had made complaint of pain in his shoulder but at the time Dr. Wertz released him he felt that the shoulder problem had resolved. On April 27, 1983, he found claimant to have a full range of motion in the shoulder area (Ex. 8, page 9). Dr. Wertz, who last saw claimant on June 27, 1984 (Ex. 8, p. 10) felt that claimant's shoulder injury had healed without any loss of motion or strength and that he therefore had no permanent impairment (Ex. 8, p. 1).

While claimant was seeing Dr. Misol on account of the knee he also voiced complaints regarding the right shoulder. Diagnostic procedures showed that a bump had formed on the greater tuberosity of claimant's right humerus at the point of the fracture (Ex. D-3, p. 8). Dr. Misol went on to state "...when this man raises the arm sideways, the little bump impinges or hits against the under surface of the other structures and that causes the pain." (Ex. D-3, p. 9) Dr. Misol did not take any measurements with which to make a rating of permanent impairment (Ex. D-3, p. 10). He would not offer an impairment rating because he felt that the rating would be based upon pain and that he was unable to make a rating which was based upon pain alone. Dr. Misol did agree that the impingement as shown by the x-rays would be consistent with pain and movement in abduction (Ex. D-3, pp. 18 & 19). Dr. Misol expressed the opinion that the shoulder impingement problem was causally related to the December 15, 1982 truck accident (Ex. D-3, pp. 9 & 10). With regard to the fracture and the bump that was observed in 1985, Dr. Misol stated:

> It coincides very nicely and did because that is the area that I thought when I first saw him in 1985 and took the x-ray that looked a little prominent, I said before, or bumpy, I said before. That would be exactly what you would expect three years after the fracture described in 1982 on this report.
> (Ex. D-3, p. 8)

Dr. Clark has treated claimant since the injury and running up to shortly before the hearing. Dr. Clark was of the opinion

that the problem with claimant's right shoulder and disability in the shoulder were causally related to the December 15, 1982 truck accident (Ex. D-2, pp. 7, 17 & 28). Dr. Clark stated that it was not unusual to see individuals improve following an injury and then subsequently have a worsening of symptoms which was due to the original injury. Claimant and his spouse denied any other trauma to his right shoulder and Dr. Clark was not aware of any other trauma or injury to claimant's right shoulder. On September 4, 1986, Dr. Clark performed measurements of the range of motion of claimant's right arm and shoulder for purposes of making an evaluation of permanent impairment under the Guides to the Evaluation of Permanent Impairment. He found claimant to have a normal range of motion for some movements but he found some restriction as follows:

Measurements	Degrees Retained	Percentage Impairment
Backward elevation	16	2.5
Abduction	84	7.5
Forward elevation	52	11
External rotation	72	0
Internal rotation	38	3

His percentage ratings are consistent with Table 16, 17, 18 and 19 found at pages 18 through 23 of the Guides (Ex. D-2, pp. 23 through 25) except that 72 degrees of external rotation would equate to a three percent impairment under Table 19. In addition to the loss of motion, Dr. Clark assessed a two percent impairment of the arm due to pain and a 17.5 percent impairment of the arm due to loss of strength. He made reference to Chapter 2 of the Guides in reaching those ratings (Ex. D-2, pp. 26 & 27). Dr. Clark found claimant to have a 43.5 percent permanent impairment of the right upper extremity (Ex. D-2, p. 43).

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 15, 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).

Both Drs. Misol and Clark agreed that the problem in claimant's right shoulder is the result of the truck accident. There is no conflicting expert medical opinion evidence in the record and their opinions are accepted as correct.

Where an injury is limited to a scheduled member the loss is measured functionally, not industrially. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983). In this case it appears that the physical derangement is located in the humerus of claimant's right arm. There is no evidence to show that the injury extends beyond the arm. All functional impairment found to exist deals with movement of the arm. It is therefore found that the injury is to a scheduled member and does not extend into the body as a whole. Lauhoff Grain Company v. McIntosh, 395 N.W.2d 834 (1986).

Dr. Wertz found no permanent impairment in claimant's shoulder, Dr. Misol declined to make a rating and Dr. Clark assessed a 43.5 percent rating. Since the case deals with a scheduled member it should be noted that loss of the scheduled member means loss of use of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W. 746 (1921). In making assessment in the loss of use the evaluation is not limited to use of a standardized guide for evaluating permanent impairment. The claimant's testimony and demonstrated difficulties may be considered in determining the actual loss of use which is compensable so long as loss of earning capacity is not considered. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936). The testimony from Dr. Misol regarding claimant having a bump on the greater tuberosity of his right humerus which impinges on other structures in the shoulder when the arm is elevated is accepted as correct. While Dr. Misol does not explain why the bump formed at the point of the fracture, it is common knowledge and within the expertise of this agency, as permitted by section 17A.14(5), to recognize that a build up of calcification frequently occurs at the site of a fracture. It is certainly quite possible that the bump had not fully formed at the time when claimant was evaluated by Dr. Wertz. It is important to note that Dr. Misol characterized the bump as "...exactly what you would expect three years after the fracture...." Dr. Misol agreed that the condition would cause pain when the arm was elevated. The fact that he did not make an impairment rating does not preclude claimant from a recovery for permanent partial disability where the loss of use of the member is found to exist. The only rating in the record comes from Dr. Clark but that rating is not fully adopted. At hearing claimant made no complaint with regard to shoulder motions in the nature of backward elevation or internal rotation. Dr. Clark's findings with regard to those two motions are rejected. At hearing claimant demonstrated a range of motion of approximately 110 degrees on both abduction and forward elevation. This is in conflict with the 84 degrees and 52 degrees respectively as found by Dr. Clark. When a 110 degree range of motion is applied to Tables 16 and 18 in the AMA Guides as found at pages 20 and 25, the result is a four percent impairment for each. In view of the physical abnormality described by Dr. Misol, it would be expected that claimant would have difficulty with external rotation. Dr. Clark found the range of motion to be 72 degrees. When applied to Table 19

found at page 23 of the Guides, the result is a three percent impairment. It is therefore found that claimant has an 11 percent impairment of the right upper extremity due to loss of range of motion. Dr. Clark also assigned a two percent impairment rating of the extremity due to pain and 17.5 percent due to loss of strength. Neither Dr. Misol nor Dr. Clark describe any injury to claimant's nervous system. Chapter 2 of the AMA Guides deals with injuries to nerves. Chapter 2, nevertheless, does provide support for the proposition that permanent impairment can result from pain and/or loss of strength. From the evidence it appears that the degree of pain which interferes with claimant's activities occurs when the arm is elevated and that the loss of strength likewise occurs when the arm is elevated and the impingement in the shoulder joint occurs. When all the appropriate factors are considered, it is found that claimant has sustained a 15 percent loss of the use of his right arm as a result of the accident of December 16, 1983.

Since claimant suffered both an injury to his leg and to his arm in the same accident, the entitlement to compensation should be computed under section 85.34(2)(s). When applying Table 44 found at page 46 of the Guides, a five percent impairment of the lower extremity is equivalent to a two percent impairment of the whole person. Under Table 20 found at page 23 of the Guides, a 15 percent impairment of the upper extremity is equivalent to a 9 percent impairment of the whole person. When combined using the Combined Values Chart found at pages 240 and 241, the result is a 11 percent permanent partial impairment of the body as a whole. The resulting entitlement is therefore 55 weeks of compensation. After deducting the 11 weeks previously paid, 44 weeks remain unpaid, past due and owing together with interest pursuant to section 85.30 computed from April 30, 1983, the end of claimant's first healing period. Teel v. McCord 394 N.W.2d 405 (Iowa 1986). From his complaints it appeared that he would, in fact, have some degree of permanent disability. The fact that Dr. Wertz may have incorrectly assessed the degree of permanent impairment does not change the fact that section 85.34(2) provides that compensation for permanent partial disability shall begin at the termination of the healing period and that section 85.30 provides for interest upon weekly compensation which is not paid when due. The employer and its insurance carrier clearly have the benefit of the use of whatever amounts are owed to claimant until such time as those amounts are in fact paid to claimant.

As indicated in the foregoing paragraph, it is found that claimant was not in a healing period status between April 30, 1983 and February 11, 1985. He had been released to return to work. He was performing gainful employment, albeit at a reduced level. The healing period compensation which has been paid is the correct amount. There is nothing in the record to indicate that any further recovery was medically indicated or actually

occurred after April 30, 1983, until active treatment was resumed on February 11, 1985.

FINDINGS OF FACT

1. On December 15, 1982, James A. Di Maio was a resident of the State of Iowa employed by Iowa ESP Products, Inc., as a truck driver working from the employer's principle place of business within the State of Iowa.

2. James A. Di Maio was injured on December 15, 1982 when the truck he was operating for his employer was involved in an accident.

3. Following the injury claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of injury from December 16, 1982 until April 30, 1983 when claimant reached the point that it was medically indicated that further significant improvement from the injury was not anticipated and he was released to return to work by Dr. Wertz.

4. Claimant was again medically incapable of performing work employment substantially similar to that he performed at the time of injury from February 11, 1985 until April 3, 1985 when he reached the point that it was medically indicated that further significant improvement from the injury was not anticipated and he was released to return to work by Dr. Misol.

5. The injury was a substantial factor in producing a five percent loss of use of claimant's left leg and a 15 percent loss of use of claimant's right arm. When converted and combined using the appropriate Tables, the result is a 11 percent permanent partial disability of the body as a whole.

CONCLUSIONS OF LAW

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

2. Claimant sustained injuries on December 15, 1982 which arose out of and in the course of his employment with Iowa ESP Products, Inc.

3. Claimant was not in a healing period status after he had been released to return to work by Dr. Wertz on April 30, 1983 until he was again disabled while under the care of Dr. Misol commencing February 11, 1985.

4. The injuries sustained on December 15, 1982 were a proximate cause of the disability which presently exists in claimant's left leg and right shoulder.

5. Claimant's permanent partial disability is to be compensated under section 85.34(2)(s). His entitlement is 55 weeks of compensation at the stipulated rate of $152.02 per week less the 11 weeks of such compensation previously paid.

6. The compensation for permanent partial disability was due and payable commencing April 30, 1983 and all past due amounts are subject to interest.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant forty-four (44) weeks of compensation for permanent partial disability at the rate of one hundred fifty-two and 02/100 dollars ($152.02) payable commencing July 17, 1983, after allowing for the eleven (11) weeks previously paid.

IT IS FURTHER ORDERED that all amounts are past due and subject to interest pursuant to section 85.30 of the Code and shall be paid in a lump sum together with accrued interest to date of payment.

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.

IT IS FURTHER ORDERED that defendants file claim activity reports as requested by the agency.

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

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES A. DI MAIO, Claimant, vs. IOWA ESP PRODUCTS, INC., Employer, and INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier, Defendants.	FILE NO. 722032 D E C I S I O N O N R E H E A R I N G F I L E D JAN 29 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

An arbitration decision was entered in this proceeding on January 16, 1987. Claimant's request for rehearing pursuant to Rule 343-4.24 was filed January 20, 1987. The request for rehearing raises three issues. The first issue is a request that the employer's liability for payment of medical expenses with John P. Clark, D.O., be addressed. The second issue is whether it was error to consider the range of motion which claimant demonstrated at hearing when determining the degree of permanent partial disability. The third issue urges that the award of healing period should have included the time between April, 1983 and February 11, 1985.

Upon review of the arbitration decision and the request for rehearing, it is determined that rehearing is granted to the extent that a reconsideration of the arbitration decision will be made based upon the evidence previously presented and without further submission of additional evidence, briefs or arguments from either party.

ANALYSIS

The first issue to be addressed is claimant's claim for expenses incurred with Dr. Clark in the amount of $586.50 as shown in exhibit 7. The hearing assignment order identified section 85.27 benefits as an issue for hearing. The prehearing report filed by the parties, at paragraph eight indicated that claimant's entitlement to medical benefits under Iowa Code

section 85.27 was no longer in dispute. This could only be interpreted as indicating either that claimant was waiving his claim, that defendants had agreed to pay the disputed expenses or that the parties had agreed that the expenses would be paid or denied based upon the ruling concerning permanent partial disability of claimant's right shoulder. Those medical expenses were addressed as an issue in claimant's brief but were not directly addressed in the brief filed on behalf of the defendants. The arbitration decision did not address the expenses incurred with Dr. Clark. Comparison of the dates and amounts charged as shown on exhibit 7 with Dr. Clark's progress notes, as contained in exhibit 1, shows that claimant received treatment for either his shoulder or knee on each of the dates for which charges appear on exhibit 7. Exhibit 1 shows that claimant also had other medical problems during the period of time covered on exhibit 7 for which no charges appear in exhibit 7. In the arbitration decision it was found that both claimant's knee and shoulder disability were causally related to the injury of December 15, 1982. Defendants have not urged that care under the direction of Dr. Clark was unauthorized, unreasonable or unnecessary in any manner. There has been no allegation that the amounts charged by Dr. Clark were unreasonable. The charges are consistent with those seen in other cases. At page 29 of exhibit D-2 the parties discussed Dr. Clark's expenses on the record and indicated that credit for the amounts paid by the group insurance carrier was due. It is therefore found that the treatment provided to James A. Di Maio by John P. Clark, D.O., as summarized in exhibit 1 was reasonable and necessary treatment for the injuries claimant sustained to his left knee and right shoulder in the truck accident that occurred on December 15, 1982. It is further found that the charges made by Dr. Clark for such care and treatment as shown in exhibit 7 are fair and reasonable and that defendants are responsible under section 85.27 of the Code for the payment of those expenses in the total amount of $855.50, less credit under section 85.38(2) in the amount of $269.00. The net balance for which defendants are directly responsible is $586.50.

The second issue to be addressed is whether it was error to consider claimant's demonstrated range of motion regarding his shoulder when determining the award for permanent partial disability. Measurements taken by a trained medical practitioner in a medical setting are generally to be preferred over estimates based upon observations made by a deputy industrial commissioner at hearing. Where claimant's counsel requested claimant to demonstrate his range of motion during the hearing, it can only be assumed that claimant's counsel intended that the results of those demonstrated abilities be considered when deciding the case. There is no other reason for entering such evidence into the record. As indicated at pages 2 and 3 of the arbitration decision claimant did clearly demonstrate a range of motion which showed him to be able to raise his right arm, with the

elbow extended, to the point that his right hand was approximately even with the top of his head. Claimant's own testimony confirmed his ability to perform the motions that he actually demonstrated. A finding of a range of motion of approximately 110 degrees was made in abduction and foreward elevation was made. Ninety degrees of motion in abduction or forward elevation places the arm in a position that is horizontal if the individual is in a standing position. A range of motion of less than 90 degrees would mean that the individual's hand would be lower than the shoulder. A range of motion of greater than 90 degrees would place the hand higher than the shoulder. Claimant demonstrated a range of motion in excess of 90 degrees in both abduction and forward elevation at hearing and further testified that he had the ability to move his arm in the manner in which he demonstrated. Such evidence is totally irreconcilable with the measurements taken by Dr. Clark and recorded as 84 degrees of abduction and 52 degrees of forward elevation. The evidence from Dr. Clark is therefore rejected. The findings made in the arbitration decision regarding claimant's range of motion of his right arm and shoulder and the degree of permanent disability are hereby ratified and confirmed.

The third issue concerns the healing period award. The recent case of Teel v. McCord, 394 N.W.2d 405 (Iowa 1986) recognizes that healing period compensation may be interrupted by periods of return to work. The case confirms that it is not necessary to continue paying healing period compensation even though further medical care maybe forthcoming. When claimant was released to return to work in April, 1983, no further improvement was anticipated. Therefore, further benefits for healing period were not payable. Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). It was at that time that it was medically indicated that further improvement was not anticipated. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984). Until the active treatment was instituted by Dr. Misol the only care that claimant received can be properly characterized as maintenance in nature. Care that is maintenance in nature does not extend the healing period. Thomas, 349 N.W.2d 124, 126 (Iowa App. 1984); Armstrong Tire & Rubber Co., 312 N.W.2d 60 (Iowa App. 1981). The conclusions reached in the original arbitration decision regarding claimant's entitlement to compensation for healing period are found to be correct and are therefore ratified and confirmed.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant five hundred eighty-six and 50/100 dollars ($586.50) representing the cost of treatment under John P. Clark, D.O.

IT IS FURTHER ORDERED that in all other respects the arbitration decision filed January 16, 1987 is ratified and confirmed.

Signed and filed this 29 +4 day of January, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHERYL ANN ENDERLE,	:	
	:	FILE NO. 693872
Claimant,	:	
	:	R E V I E W -
vs.	:	
	:	R E O P E N I N G
CITY OF DAVENPORT,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	MAR 31 1987
Defendant.,	:	

INTRODUCTION

This is a proceeding in review-reopening from a memorandum of agreement that was filed on February 16, 1982. The action is brought by Cheryl Ann Enderle, claimant, against the City of Davenport, employer and self-insured defendant for benefits as a result of an injury that occurred on January 13, 1982. 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 joint exhibits 1 through 16; the testimony of Cheryl Ann Enderle (claimant); and the testimony of defendant's witnesses Robert E. Garner (police officer), Larry Brown (health spa manager), and Larry W. Frey (police sergeant).

STIPULATIONS

At the time of the hearing the parties stipulated to the following matters:

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

That the claimant sustained an injury on January 13, 1982 which arose out of and in the course of her employment with the employer.

That the injury was the cause of temporary disability and that the claimant was entitled to and was paid temporary disability benefits intermittently between January 14, 1982 and November 1, 1982.

That the commencment date for permanent partial disability benefits in the event of an award is November 2, 1982.

That the rate of compensation in the event of an award is $131.17.

That the claimant was paid seven weeks of compensation at the rate of $131.17 per week prior to the hearing.

ISSUES

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

Whether the injury of January 13, 1982 was the cause of any permanent partial disability.

Whether the claimant is entitled to any permanent partial disability benefits.

Whether the claimant is entitled to the payment of certain medical expenses with two chiropractors, Kenneth J. Meyer, D.C., and J. Larry Troxell, D.C.

SUMMARY OF THE EVIDENCE

All of the evidence was examined and considered though only certain pertinent evidence is mentioned in this opinion.

Claimant is 48 years old. She began working for the City of Davenport in May of 1980. She was injured on January 13, 1982. She was employed as a records clerk in the police department at the time of the injury and returned to this job after the injury. Since returning to work she has been promoted from records clerk to senior records clerk. Her duties include typing, filing, microfilming, keeping books and records, and distributing supplies. She is performing the same duties now that she performed prior to the injury.

At approximately 3:45 p.m. on January 13, 1982, a power outage occurred at work. Claimant was proceeding into the electrical room next to her office to assist another employee to restore the power when she tripped on the carpet and fell on her right side. The evidence is in conflict as to whether she was unconscious for a short period of time or not. She said she twisted as she fell and hit her head, right arm, right hip and right leg when she fell.

Claimant received emergency treatment at Mercy Hospital in Davenport (Exhibit 2). She complained of headache, neck pain, right elbow pain and right hip pain at the emergency room. At the hearing she stated she also had right knee, right arm and low back pain. She told the nurse at the emergency room that it felt like her hip "went out." She told the doctor at the emergency room that she threw her hip out, which is something she does all of the time. She was on her way to the chiropractor

to get it fixed but instead came to the emergency room at the hospital on the advice of her supervisor. X-rays were normal except there was a question whether a dense line across the neck of the femur was an impacted fracture from the injury or whether it was a preexisting condition. It was later determined that it was not an impacted fracture due to this accident (Ex. 9). Claimant's supervisor, Major Robert E. Garner, filed an accident report with the City of Davenport on the following day on January 14, 1982 (Ex. 16).

At the hearing claimant testified that her current complaints were her right knee, hip and back. She can only stand or sit approximately one hour at a time because her back hurts. It is hard to turn her head to the left or the right or up and down. She cannot bend forward or backward without pain. She claimed to have pain down the right leg and that she limps when she walks. She cannot ride in a car for over an hour without either laying down or getting out to walk. She denied any injuries or physical health problems either before or after the instant injury. However, claimant's treatment record with Dr. Meyer shows a number of injuries and numerous other health problems. More specifically the office note of Dr. Meyer on April 26, 1972 mentions a fall from a bicycle; the office note of October 8, 1973 notes a fall off a bed; and the office note on March 10, 1975 states that she fell flat on her face just to mention a few of the injuries recorded there (Ex. 6). It was also brought out that she was rear ended in an automobile accident in June of 1986, but the claimant stated that this affected her upper back between her shoulder blades.

Sergeant Larry W. Frey, a Davenport police officer, testified that he is the claimant's supervisor. He is in daily contact with her and her desk is in his view. She has never complained of inability to do any job. She sits at her desk most of the day except to get up to wait on people or to go to the files. He has never had to assign any of her tasks to anyone else. Claimant's absences from work after the injury are no greater than they were before the injury (Ex. 13).

Claimant testified that she was first treated by J. H. Sunderbruch, M.D., who is a general surgeon in Davenport. Dr. Sunderbruch furnished a report on January 21, 1983. He saw the claimant several times between January of 1982 and January of 1983. In the course of her treatment he sent her to Richard L. Kreiter, M.D., an orthopedic surgeon; Byron R. Rovine, M.D., a neurologist; and the University of Iowa Hospitals and Clinics where she was examined in both the orthopedic and neurology departments. Dr. Sunderbruch stated that claimant was suffering from degenerative arthritis in her right hip, which may have been aggravated by her fall. However, he adds that there is a severe emotional overlay in this entire problem. He felt the accident of January 13, 1982 was not the precurser of her true complaints (Ex. 9).

Dr. Kreiter first saw claimant in January of 1982 and last saw her in February of 1985. He reports on October 21, 1985, that her chief complaint was low back pain. He reviewed the record of Kenneth J. Meyer, D.C., and determined claimant saw Meyer for right hip pain and sought chiropractic care from Dr. Meyer from 1972 through December of 1983. She continued to have chronic hip problems up until the present time. His x-rays demonstrated degenerative osteoarthritis of the hip. Dr. Kreiter concluded:

> ...In any event it would be my opinion that Ms. Enderle has had a longstanding history of recurrent back and hip problems dating back to 1972 and that the injury that is in question may well have aggravated a pre-existing condition, but from the physical findings, does not seem to have accelerated the condition to any significant degree. (Ex. 5)

Dr. Rovine, the neurologist, saw claimant on March 12, 1982 and December 6, 1982 for pain in the entire right side -- hand, arm, thigh, leg and foot. She had been on crutches for eight weeks. On March 12, 1982, Dr. Rovine concluded:

> I can find no evidence that this woman's pain is on the basis of sciatic radiculopathy or neuropathy. There is no evidence to suggest that she has a herniated or extruded disc. I get some impression from some of the conflicting statements and bizarre complaints that there may be a large functional element in this woman's clinical syndrome with complaining far beyond the scope of any organic findings clinically or by x-ray to explain her problem.
>
> Once it has been decided once and for all whether or not she has had any fractures and when full mobilization is again permitted, I would suggest a rigorous physical therapy program to attempt rapid rehabilitation to normal function. If she does not respond adequately and her complaints increase, in the absence of organic findings to back up her complaints, psychiatric evaluation may well be helpful. (Ex. 8).

Dr. Rovine reconfirmed the same findings on December 6, 1982. However, a CT scan ordered by Dr. Sunderbruch on November 22, 1982 (Ex. 2, page 5) indicated a protrusion of the left side of the L4-5 disc. Dr. Rovine did not think a myelogram was clinically indicated, but he informed the claimant that this would be her next step if she wanted to explore it further. Claimant indicated

that her doctor had told her that she had already received the maximum allowable amount of radiation for that year. Dr. Rovine again concluded his report by saying that claimant should be evaluated psychiatrically (Ex. 8).

On October 27, 1982, claimant was simply sitting and heard a popping sound in her back between her spine and her right hip. She reported to St. Luke's Hospital for emergency treatment (Ex. 3). St. Luke's told her it was her sciatic nerve.

Claimant was examined at the University of Iowa Hospitals and Clinics in January of 1983 in both the orthopedic and neurology departments. X-rays, CT scans, myelogram and EMG and MCV studies were all normal. The university doctors found that claimant had mild degenerative arthritis of the right hip. They recommended medication and physical therapy. Epidural steroid shots could be considered. No return was scheduled (Ex. 4).

On January 31, 1983, the City of Davenport informed the claimant by letter that they had gone to considerable expense to treat her complaints and that they had determined that her degenerative arthritis condition was the cause of her continued medical problems. Therefore, future medical claims would have to be submitted through the health insurance carrier and absences from work would be charged to her sick leave (Ex. 15).

Dr. Meyer, the chiropractor, submitted the claimant's chiropractic record from February 3, 1971 through December 16, 1983. Claimant saw him approximately 20 or 30 times every year for multiple complaints many of which were the right hip and back, neck and right shoulder pain, and leg pains.

Claimant begain seeing J. Larry Troxell, D.C., on December 13, 1983. He diagnosed soft tissue damage of the lumbar and sacroiliac region from the injury of January 13, 1982. He stated that the injuries that she received resulted in a 25 percent impairment. He recommended chiropractic treatment once a week for the rest of her life (Ex. 10). Claimant's total bill with him as of September 5, 1985 was $4,250 (Ex. 12). At the hearing claimant testified that she had continued to see Dr. Troxell and that her current bill was approximately $7,000. She stated that she sees him twice a week.

At the request of the employer claimant was examined by W. J. Robb, M.D., on August 9, 1985. Claimant complained of back and right leg pain and trouble sitting, standing, bending and reaching. She walked with a limp favoring her right leg. He performed an extensive examination and concluded as follows:

Diagnosis: 1. SPRAIN, LUMBOSACRAL SPINE, SECONDARY TO FALL AT WORK, JANUARY 13, 1982
2. DEGENERATIVE ARTHRITIS, RIGHT HIP

3. PSYCHOSOMATIC DISEASE, FUNCTIONAL OVERLAY SECONDARY TO TRAUMA

(Ex. 7)

Dr. Robb added that claimant continued to have back and leg pain because she did not adequately perform exercises that had been prescribed for her. Most of her pain is due to the degenerative arthritis in her hip and only a minimal amount of her pain was due to her back. He stated that settlement of her litigation would improve her condition. He gave claimant a five percent permanent impairment rating of her body as a whole as a result of the injury to the back, but added that this impairment was largely due to her failure to perform the exercises which had been prescribed and that she was not motivated to do so in the future. Dr. Robb stated that she also had an impairment of 20 percent of the body as a whole due to degenerative arthritis of the hip but it was not due to the accident nor did the accident significantly alter or aggravate her hip condition. She had no impairment due to her head, neck, right upper extremity or right knee complaints. In his opinion, further chiropractic manipulation is not necessary now or for the rest of her life. Rather her progress and improvement depends upon her own activities, exercise and physical fitness (Ex. 7).

Claimant testified that she went to a health spa twice a week to do her exercises. Larry Brown, manager of the spa, testified as to her attendance from his health spa records (Ex. 14) which showed that she attended about three or four times a month from September of 1985 to July of 1986 and then she quit attending.

F. Dale Wilson, M.D., conducted a very thorough and detailed examination of the claimant at the request of her attorney (Ex. 11). He also testified by deposition (Ex. 1). He thought claimant should have a weight lifting restriction of approximately five pounds to 15 pounds and that she should be allowed to change positions while working. He believed that all of her complaints were caused by the injury of January 13, 1982. Dr. Wilson gave the claimant the following impairment ratings:

		Person
To recapitulate:	I. Head and neck	3%
	II. Right upper extremity	5%
	III. Right hip	10%
	IV. Right knee	0%
	V. Lumbar spine	9%
		27% disability

Ex. 11)

It should be noted, however, that Dr. Wilson was operating under the false or mistaken notion that the claimant had never had any problems prior to her injury on January 13, 1982.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 13, 1982 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Claimant testified several times that she had never had any problems with her neck, back, hip or headaches prior to this injury. However, there are numerous treatments recorded by her chiropractor, Dr. Meyer, going as far back as 1971. His record shows that she received treatment for both hips, pain in her right hip, back pain, neck pain and headaches. His record directly contradictes her testimony. At the emergency room she told the nurse that it felt like her hip went out. She told the doctor that it does it all of the time. Degenerative arthritis of her right hip was established by x-rays. She apparently had an episode of it on October 27, 1982 when she was just sitting and her hip popped and she sought emergency care at St. Luke's Hospital.

Dr. Sunderbruch, Dr. Kreiter, Dr. Rovine and the University of Iowa Orthopedic and Neurology Departments all diagnosed degenerative arthritis of the claimant's right hip as their primary diagnosis for her complaints. Dr. Sunderbruch, Dr. Rovine and the Orthopedic and Neurology Department apparently were not specifically asked and therefore did not make a statement on whether the accident of January 13, 1982 (1) caused or aggravated her degenerative hip condition; (2) caused any permanent impairment; or (3) warranted an impairment rating. Dr. Kreiter did say that the injury did not accelerate her longstanding arthritis condition but it may well have aggravated it. Dr. Kreiter did not give an opinion on permanent impairment and did not give an impairment

rating. Dr. Meyer, claimant's chiropractor, found that all of her complaints were caused by the fall but did not make a finding of permanent impairment and he did not give an impairment rating.

Dr. Troxell, the second chiropractor that the claimant consulted, said the accident caused soft tissue damage and assessed an impairment rating of 25 percent of the body as a whole. He did not indicate how he arrived at this percentage.

Dr. Wilson found the accident was responsible for the claimant's complaints and found permanent impairment in the amount of 27 percent of the body as a whole. He gave an extremely detailed account of how he determined his ratings.

Dr. Robb found permanent impairment of the body as a whole. He said that five percent was for her back symptoms due to the injury on January 13, 1982, but 20 percent was not due to this injury, but rather was due to the degenerative arthritic hip disease. Varied Industries v. Sumner, 353 N.W.2d 402 (Iowa 1984). Of the five percent which Dr. Robb attributed to this injury he said most of that was due to the claimant's failure to do her prescribed exercises and her lack of motivation to do so in the future. Dr. Robb did not explain how he arrived at his ratings but normally orthopedic surgeons use either the orthopedic guide or the AMA Guide or both.

Dr. Wilson's percentage ratings must be discounted. He stated several times in his report and in his deposition testimony that the claimant had no problems preexisting this injury. However, this is not correct. Claimant, on the contrary, had many, many problems before this injury according to Dr. Meyer (Ex. 6) and her own remarks in the emergency room and the fact that her hip popped simply while sitting and caused her to go to the emergency room again on October 27, 1982.

Dr. Troxell's rating is 25 percent but he gives no underlying basis for his rating.

In addition, several doctors commented about the significant emotional overlay of the claimant. Dr. Rovine felt she needed psychiatric assistance. He also suggested secondary gain factors as affecting the claimant's many bizarre symptoms and statements. There were many indications from the doctors that the claimant's complaints exceeded her organic finding of disease.

Based primarily on the opinion of Dr. Robb, who is the defendants' own doctor, and who is the only one who directly addressed the impairment issue, it is found that there is some slight degree of permanent impairment, but it is not large, it is slight. Dr. Robb rated the claimant's permanent impairment

as five percent of the body as a whole due to her back complaints. Dr. Wilson and Dr. Troxell, who were claimant's doctors, also did find some impairment and gave ratings.

Claimant has numerous detailed subjective complaints. She has incurred $7,000 worth of chiropractic care expense to treat the symptoms. However, many of these symptoms and numerous other symptoms existed prior to this injury and she received chiropratic care for them. Her pattern of chiropractic care after the injury appears to be no different than her pattern of chiropractic care prior to the injury. In spite of her subjective complaints the claimant has returned to work and does her job in a normal manner. Frey testified that he observes her every day, all day. She sits at her desk without complaint or any physical signs of pain and does her work without any noticeable difficultly. He has never had to assign any of her tasks to anyone else.

THEREFORE, based upon the foregoing discussion, it is determined that the claimant has sustained an industrial disability of 10 percent of the body as a whole based primarily on Dr. Robb's determination that her back is impaired due to this injury, the claimant's subjective complaints of pain, and the supporting evidence from Dr. Wilson and Dr. Troxell.

Iowa Code section 85.27 provides that the employer shall furnish "reasonable" medical care. It is found that the employer did provide reasonable medical care in this case. They provided the services of Dr. Sunderbruch, a family practice physician and general surgeon; Dr. Kreiter, an orthopedic surgeon; Dr. Rovine, a neurosurgeon; and the expertise of the orthopedic department and the neurology department of the University of Iowa Hospitals and Clinics. The employer paid for x-rays, CT scans, a myelogram, and an EMG and NCR test. All of these tests proved negative for any disease other than degenerative arthritis of some longstanding that probably predated this injury. At this point the employer determined that reasonable care had been provided. This decision concurs with their decision for the reasons set forth above. Claimant was provided reasonable medical care at that point.

The care of Dr. Meyer and Dr. Troxell was not authorized by the employer as required by Iowa Code section 85.27 nor was it reasonable in view of the care that the employer had already provided. Furthermore, the effectiveness of this care is in question when the patient's condition does not improve or significantly change. Dr. Troxell has treated the claimant two or three times a week for over three years. Claimant owes him $7,000. Dr. Troxell feels that claimant will continue to need treatments on a regular basis for the rest of her life. It is noted also that the claimant saw Dr. Meyer approximately 20 or 30 times a year from 1971 through 1983 for these same or similar complaints. Dr. Robb states that further chiropractic manipulation was not necessary. Rather what this claimant needed was to

perform the exercises which had been prescribed for her (Ex. 7). Dr. Kreiter also opposed chronic constant chiropractic treatment in the case of this patient (Ex. 5). Dr. Wilson, the evaluating doctor for the claimant, also felt that no further rehabilitation was needed (Ex. 11).

Claimant appears to be entitled to certain mileage expenses. In her testimony she stated that she traveled 120 miles round trip from her home in Davenport to Iowa City and return. A claim also appears to be made for four miles to Mercy Hospital and six miles to Dr. Rovine (Ex. 12). Total mileage claimed is than 130 miles. This claim was not disputed by the defendants. Therefore, it is determined that the claimant is entitled to medical mileage of 130 miles at the rate of $.24 per mile and should be reimbursed in the amount of $31.20.

FINDINGS OF FACT

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

Based upon the testimony of Dr. Robb, Dr. Wilson and Dr. Troxell, the claimant did sustain some permanent impairment from this injury. Dr. Robb assessed a five percent permanent impairment rating of the body as a whole as a result of the injury to the back.

Claimant has been able to perform her regular job as well after the injury as before the injury from all outward appearances but with considerable difficulty according to the claimant's subjective complaints.

Claimant has sustained a 10 percent industrial disability to the body as a whole.

That the claimant incurred 130 miles of authorized medical mileage.

That the defendants did provide reasonable medical care to the claimant for this injury.

That the treatment of Dr. Meyer and Dr. Troxell was not authorized by the employer and was not reasonable under the circumstances.

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 January 13, 1982 was the cause of some

permanent disability.

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

That claimant is entitled to $31.20 of medical mileage as shown above.

That the defendants proved that reasonable medical care had been provided to the claimant as required by Iowa Code section 85.27.

That any other medical treatment incurred by the claimant without authorization, specifically Dr. Meyer and Dr. Troxell, was not reasonable medical expense within the context of Iowa Code section 85.27.

ORDER

WHEREFORE, IT IS ORDERED:

That defendants pay to claimant fifty (50) weeks of permanent partial disability benefits at the rate of one hundred thirty-one and 17/100 dollars ($131.17) per week in the total amount of six thousand five hundred fifty-eight and 50/100 dollars ($6,558.50) commencing on November 2, 1982. That the defendants pay this amount in a lump sum.

That interest will accrue under Iowa Code section 85.30.

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

That defendants pay claimant thirty-one and 20/100 dollars ($31.20) in medical mileage expense.

That defendants are to pay the cost of this proceeding pursuant to Division of Industrial Services Rule 343-4.33, 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 31st day of March, 1987.

Walter R. McManus Jr.

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES EVANS,	:	
Claimant,	:	File No. 806023
vs.	:	
KASER CORPORATION,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
UNITED STATES FIDELITY AND GUARANTY COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	JUN 26 1987
	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Charles Evans against Kaser Corporation, his former employer, and U S F & G, the employer's insurance carrier. The case was heard in Des Moines, Iowa on January 30, 1987 and was fully submitted upon conclusion of the hearing.

The record in the proceeding consists of testimony from Charles Evans, Elaine Evans, Kenneth Valentine and Ron Swan. Also received into evidence were claimant's exhibits 1, 2, 3, 4, 5, 6, 12, 13 and 14 and defendants' exhibits A, B, C, D, E and F.

ISSUES

The issues identified by the parties for determination are whether Evans sustained an injury which arose out of and in the course of his employment; whether the alleged injury is a proximate cause of temporary or permanent disability; whether the alleged injury is a proximate cause for medical expenses incurred by Evans; and, determination of the claimant's entitlement to compensation for healing period and permanent partial disability. Also an issue in the case is the rate of compensation. The employer has raised a defense of lack of notice under the provisions of section 85.23 of the Code. The employer also seeks credit, should there be an award, in the amount of unemployment benefits paid to Evans.

SUMMARY OF EVIDENCE

Charles Evans is a 46-year-old man who had been employed by Kaser Corporation since 1969.

Evans testified that in November of 1984 he experienced discomfort in his arms while swinging a sledge hammer as part of a crew removing hammers from a hammer mill at the employer's quarry. Evans testified that, at the time it occurred, he advised his supervisor, Ken Valentine, that he thought he had hurt his arms. Evans stated that Valentine told him to report it to Ron Swan, another supervisor. Evans testified that Swan told him to wait for a layoff before doing anything because he would draw more money on layoff than from workers' compensation.

Evans testified that he continued to work, but with difficulties and stated that at night his arms were so sore that he could hardly straighten them out. Activities such as shoveling and changing hammers aggravated his arms. No layoff occurred and Evans testified that he again talked with Swan on April 26, 1985. He reported that his elbows had continued to hurt and that he was then experiencing numbness in his hands and increased pain. Evans testified that he had informed Ken Valentine that he had a doctor's appointment on that Saturday, but that Valentine told him that he was scheduled to work and sent him to see Swan. Evans testified that Swan denied having any prior knowledge of any complaint regarding claimant's arms or any layoff that was intended to occur.

Evans kept his appointment with C. D. Vander Linden, M.D. on April 27, 1985 and was advised to stay off work for one week (defendants' exhibit A).

Evans testified that on the next day, Sunday, he gave the release from work slip to Ken Valentine and requested a one-week vacation, but that the request was denied. Claimant stayed off work and then, when he returned to the quarry to pick up his check, was told that he had been laid off.

Claimant testified that the time off work did not resolve the problems in his arms and he was then referred to Jerome G. Bashara, M.D. A diagnosis of bilateral ulnar nerve compression was made (claimant's exhibit 13, page 9). Surgical decompression of the condition was performed with surgery on the left arm performed on June 27, 1985 and surgery on the right performed on August 1, 1985 (defendants' exhibits B and C).

Dr. Bashara indicated that the cause of claimant's condition was repetitive movement or trauma (claimant's exhibit 13, page 10). He stated that sledge hammer use over a period of time could cause the condition, but that bow hunting would not cause it (claimant's exhibit 13, pages 17 and 18). He had never

previously seen the condition, in a bilaterial form, in a truck driver and stated that normal day to day living would not cause it (claimant's exhibit 13, page 23). Dr. Bashara stated that conservative treatment in the nature of restricted activity and medication is generally attempted prior to surgial treatment (claimant's exhibit 13, pages 11 and 12). He recommended that claimant not work after May 16, 1985 and stated that claimant was incapacitated from May 16 through September 27, 1985 (claimant's exhibit 13, pages 12 and 13). Dr. Bashara opined that claimant had a residual five percent permanent impairment of each arm as a result of the condition and treatment (claimant's exhibit 13, page 15).

In obtaining care for his arms, claimant incurred the following medical expenses:

Exhibit 12 -	Knoxville Area Hospital	$1,791.70
Exhibit 2 -	Mater Clinic	697.00
Exhibit 3 -	Physiatry Associates	150.00
Exhibit 4 -	Iowa Orthopaedics, P.C.	1,915.00
Exhibit 5 -	Schmaltz Med Shoppe	12.89
Total		$4,566.59

Claimant testified that he obtained employment driving a truck for Ben Shinn on October 1, 1985. He stated that he still has problems with his elbows in the nature of weakness and discomfort. He demonstrated inability to completely straighten his arms.

Between the time of claimant's layoff from Kaser and his return to employment with Shinn, he received unemployment benefits in the amount of $3,168.00. During that time, he applied for a number of jobs in order to receive unemployment. He certified that he was ready, willing and able to work within the context of his medical restrictions.

Evans stated that between November, 1984 and April, 1985 he tried to see if the condition in his arms would improve.

Elaine Evans, claimant's wife, testified that on a day in November, 1984, claimant complained to her that he had hurt his arm. She stated that she tried to get him to go to the doctor because he appeared to be in a lot of pain and that the condition seemed to slowly worsen.

Mrs. Evans testified that, following surgery, the condition of claimant's arms improved, but that he still has limitations in the use of his arms.

Ken Valentine and Ron Swan denied having any knowledge of Evans' making any allegation of injury to his arms until April, 1985. Valentine could not recall the exact day. Valentine confirmed that claimant brought the work release from the doctor to his home. Valentine stated that he took the slip to Ron Swan and on Monday, told claimant that he was to take three weeks of vacation and would then be laid off. Valentine testified that Evans was capable of being a good worker, but had a bad attitude. Valentine testified that he makes notes of whenever an injury is reported and had no record of claimant reporting any injury prior to April. He stated that the quarry has a waiting list of applicants for employment and that those people who are currently employed are reluctant to take time off. Valentine stated that claimant was a morale problem at the quarry, but that morale is now good and that no one has been hired to replace claimant.

Ron Swan testified that an injury report is filled out for all accidents, no matter how small, and that he had none from November of 1984 dealing with claimant's arms. He denied any recollection of claimant reporting injury to his arms in November. Swan testified that his son may have filled in at the quarry after Evans was laid off. He stated that the decision to lay Evans off was made together with Ken Valentine after they found out that Evans was going to be taking time off from work. Swan confirmed that, of those employed at the quarry, claimant was close to having the most seniority with the company.

APPLICABLE LAW AND ANALYSIS

The first issue to be addressed is that of notice under section 85.23. The defense is an affirmative defense with the burden of proof resting on the employer. Mefferd v. Ed Miller & Sons, Inc., 33 Biennial Report, Iowa Industrial Commissioner 191 (1977).

The discovery rule applies in order to determine the time at which the worker is required to give notice. It is that time when the worker realizes the nature, seriousness and probable compensable character of the injury. Robinson v. Dept. of Transportation, 296 N.W.2d 809 (Iowa 1980).

The rule is the same as that which applies to the statute of limitations under section 85.26. The normal rules governing statutes of limitations are that they generally do not begin to run until some type of recovery is possible. Stoller Fisheries, Inc. v. American Title Insurance Company, 258 N.W.2d 336 (Iowa 1977). In this case, Evans had no claim for any type of benefit prior to the time he incurred medical expenses with Dr. Vander Linden on April 27, 1985. He had not missed any time from work until that date. A close reading of McKeever Custom Cabinets v.

Smith, 379 N.W.2d 368 (Iowa 1985) indicates that cumulative injury rule is something that is part of the discovery rule. It is not something which is separate and distinct. In McKeever, the court ruled that a person would not be held to have realized the seriousness of a condition resulting, at least in part, from cumulative trauma, until the condition required the person to be absent from work for purposes of treatment or disability. It is found that in this case the injury is one which, in part, is a result of cumulative trauma with the event of November, 1984 being one of the major events. It is further found that Evans should not be held to have realized the seriousness of his condition until such time as it did not go away while he continued to work and it became necessary for him to seek medical care. This would therefore make the date of occurrence of injury for purposes of section 85.23 approximately April 27, 1985, the date claimant sought medical care and was advised to take off work by Dr. Vander Linden. There is no evidence in the record sufficient to hold Evans accountable for knowing that the condition in his arms would be sufficiently serious to require active treatment in the nature of taking time off work and surgery until he entered into the course of medical treatment. It was certainly not unreasonable for a worker to continue to work, even though experiencing pain, when the injury is one, such as in this case, which appears to be something in the nature of a relatively minor sprain or strain which could possibly resolve on its own with the mere passage of time. For the section 85.27 defense to be successful in this case, it would be incumbent upon the employer to show that claimant realized the seriousness of his condition more than 90 days prior to April 27, 1985. The only evidence of such in the record would come from claimant's own testimony of discussing a desire to take off work with Swan and Valentine, which testimony was vehemently denied and refuted by Swan and Valentine. It is therefore concluded that this claim is not barred by the provisions of section 85.23. In deciding this issue it is recognized that irreconcilable differences exist between the testimony of claimant and testimony from Swan and Valentine. The fact that claimant was laid off as a means of terminating his employment, even though he was one of the more senior employees, is ample evidence of animosity which casts a shadow of doubt upon the credibility of the testimony coming from the employer. In either event, however, either claimant gave notice as he testified or he did not and application of the discovery rule comes into play. It is therefore concluded that this claim is not barred by the provisions of section 85.23 of the code. It was conceded by the employer that claimant did give notice of injury on or about April 26, 1985.

Claimant urges application of the cumulative injury rule for determining the date of injury and the resulting date upon which it was necessary to give notice of injury. Claimant testified

of an event in November, 1984. He also testified concerning aggravations from shoveling and other activities during the several months that he continued to work leading up to his first appointment with Dr. Vander Linden on April 27, 1985. Claimant described a worsening of his symptoms including increasing pain in his elbows and fingers in each hand becoming numb. However the evidence is characterized, it is clear that the first day of disability was April 27, 1985. A close reading of McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985) shows the case to be a part of the discovery rule which is applied to cumulative trauma cases. It simply provides that a worker is not to be held to recognize the seriousness of the injury which results from cumulative trauma until it produces disability from working. In this regard, it is consistent with rules generally applied to statutes of limitations such as that the period of limitations runs from the occurrence of each injury in those circumstances where continuing injury exists. Anderson v. Yearous, 249 N.W.2d 855 (Iowa 1977). A statute does not generally begin to run until circumstances have evolved to the point that the injured party is entitled to a remedy. Stoller Fisheries, Inc. v. American Title Insurance Co., 258 N.W.2d 336, 341 (Iowa 1977). Evans certainly had nothing to recover prior to April 27, 1985 when he first missed work and sought medical care for his condition. The worsening of claimant's condition to the extent that he sought medical care is evidence which supports application of the cumulative injury rule. It is therefore found that claimant's injury was produced, at least in part, by cumulative trauma occurring up to and through April 26, 1985. It is therefore found and concluded that the bilateral ulnar nerve compression which affected claimant was an injury which arose out of and in the course of his employment. The date of occurrence of injury is fixed at April 26, 1985.

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).

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 27, 1985 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The causal connection is made by Dr. Bashara in his deposition and in

claimant's exhibit 1.

Claimant seeks compensation for healing period under section 85.34(1). Dr. Bashara indicated that claimant's period of incapacity ran until approximately October 1, 1985 (claimant's exhibit 1, page 2). In his deposition, Dr. Bashara placed the period of incapacity to run from May 16 through September 27, 1985 (claimant's exhibit 13, page 13). The deposition testimony is accepted as correct for purposes of marking the time at which claimant became medical incapable of returning to employment substantially similar to that in which he was engaged at the time of injury. This computes to a healing period of 22 weeks. There is nothing in the record to indicate that claimant's condition had changed substantially subsequent to April 27, 1985 when Dr. Vander Linden took him off work until the recovery from the surgery performed by Dr. Bashara.

The parties stipulated that in the event of liability, the proper recovery for permanent partial disability is 25 weeks representing five percent loss of use of each arm. This would appear to fall under section 85.34(2)(m). It could be urged that the disability should be compensated under section 85.34(2)(s), however, the stipulation made by the parties is accepted as correct.

Under the cumulative trauma rule, the rate of compensation is determined based upon the 13 weeks preceeding the date of injury. The parties stipulated that, if an injury date of April 27, 1985 was applicable, the rate of compensation would be $230.24. This would appear to be correct using the figures provided by claimant's exhibit 14.

Claimant seeks to recover expenses of treatment. Those expenses may be summarized as follows:

Knoxville Area Community Hospital	$1,791.70
Mater Clinic	697.00
Physiatry Associates, P.C.	150.00
Iowa Orthopaedics	1,915.00
Schmaltz Med Shoppe	12.89
Total	$4,566.59

A review of the medical records received into evidence shows all the charges contained in claimant's exhibits 2, 3, 4, 5 and 12 to have been incurred for treatment of the bilateral ulnar nerve compression. Those expenses are therefore found to be the responsibility of the defendants.

Defendants seek credit for the workers' compensation benefits

for the amount of unemployment compensation paid to Evans. The general rule, as codified in section 85.38(1) is that payments from collateral sources do not satisfy an employer's workers' compensation liability [IV Larson Workmen's Compensation Law, section 97.51(a)]. There is no statutory provision which provides for an offset of unemployment against the employer's workers' compensation liability. To the contrary, Code section 96.5(5)(b) provides that unemployment benefits are not payable for any week for which the individual is receiving compensation for temporary disability under the workers' compensation law and in subsection C, goes on to provide that the Division of Job Service shall recover any overpayment of unemployment compensation. The defendants' request, if granted, could result in Evans having to repay the Division of Job Service for the excess benefits paid and yet also allow the defendants to receive a credit for the payment of those same amounts which are being repaid to the Division of Job Service. The net result would be that Evans would end up with neither healing period nor unemployment compensation. The agency has previously ruled that no credit is due for unemployment benefits. [Redd v. Bil Mar Foods, Inc., I Iowa Industrial Commissioner Report, 275 (1981)]. Defendants' request for credit is therefore denied.

FINDINGS OF FACT

1. On April 26, 1985 Charles Evans was a resident of the state of Iowa employed by Kaser Corporation in the state of Iowa.

2. On April 26, 1985 Charles Evans sustained injury to his arms through a cumulative trauma process while working as a truck driver and performing other duties for his employer.

3. Following the injury Evans was medically incapable of performing work in employment substantially similar to that he performed at the time of injury from April 27, 1985 through September 27, 1985 when claimant became medically capable of returning to employment substantially similar to that in which he was engaged at the time of injury.

4. The injury was bilateral ulnar nerve compression in both of claimant's arms which resulted from use of a sledge hammer, shoveling, driving a truck and other activities in his employment, which occurrences continued and caused the condition to progressively worsen until April 27, 1985 when claimant first sought medical treatment.

5. Treatment before the injury was provided by C. D. Vander Linden, M.D. at the Mater Clinic, the Knoxville Area Community Hospital, Physiatry Associates, Iowa Orthopaedics, P.C. and Schmaltz Med Shoppe, in which total costs of $4,566.59 were

incurred.

6. As a result of the injury, claimant has a residual five percent impairment of each arm.

7. Charles Evans is found to be a credible witness and the credibility of the witnesses called by the defense is impaired.

CONCLUSIONS OF LAW

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

Charles Evans sustained injury to both arms which arose out of and in the course of his employment with Kaser Corporation through a cumulative trauma process which became disabling on April 27, 1985.

Evans is entitled to receive 22 weeks of compensation for healing period and 25 weeks of compensation for permanent partial disability, all at the stipulated rate of $230.24 per week.

Unemployment compensation benefits do not constitute a proper credit toward the employer's liability for paying compensation for healing period or permanent partial disability.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant twenty-two (22) weeks of compensation for healing period at the rate of two hundred thirty and 24/100 dollars ($230.24) per week commencing April 27, 1985.

IT IS FURTHER ORDERED that defendants pay claimant twenty-five (25) weeks of compensation for permanent partial disability at the rate of two hundred thirty and 24/100 dollars ($230.24) per week commencing September 28, 1985.

IT IS FURTHER ORDERED that defendants pay claimant four thousand five hundred sixty-six and 59/100 dollars ($4,566.59) in satisfaction of section 85.27 liability for the following expenses:

Mater Clinic	$ 697.00
Physiatry Associates	150.00
Iowa Orthopaedics, P.C.	1,915.00
Schmaltz Med Shoppe	12.89
Knoxville Area Community Hospital	1,791.70

IT IS FURTHER ORDERED that all amounts of compensation are past due and owing and shall be paid in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against defendants pursuant to Rule 343-4.33.

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

Signed and filed this 26 day of June, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WARREN EVANS,	:	
	:	
Claimant,	:	File No. 811414
	:	
vs.	:	A R B I T R A T I O N
JOHN MORRELL & COMPANY,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

This is a proceeding brought by Warren Evans, 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, Patricia Evans, Wayne Christophel and Larry Bebo; 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 the hearing reads as follows:

RE: Warren Evans vs. John Morrell & Company - File #811414

Plaintiff's Exhibits:

A. Physical examination given workman for employment with John Morrell & Company - employed 12-16-64.

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. Report from C. B. Carignan, M.A., dated 11-12-86.

E. Letter of R. David Nelson, M.A., Audiologist of Nelson Hearing Aid Service dated 5-6-86 with

hearing report attached.

F. Estimate of cost of hearing aid by R. David Nelson, Audiologist dated 7-15-86.

Defendant's Exhibits:

Report of Daniel L. Jorgensen dated 10-28-86. (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 $218.49 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 was born on March 21, 1942 and served nearly four years in the U.S. Air Force. In the military, he worked in an office and was discharged in 1964 without a hearing problem that he knew of. In 1964, he started work for Morrell and was given a physical examination which determined that his hearing was normal. See exhibit A. Initially, at Morrell he tied hides in the cellar but ultimately worked on a head table on the beef kill floor. He also worked in the fabrication department and on night cleanup at the pork plant.

Claimant testified that the noisiest area was in the pork

plant near a dehairer on the kill floor. In 1982 or 1983, hearing protection devices were first provided after noise level studies were done. A plant nurse gave claimant a hearing loss test and told him he had a "high hearing loss." He stated that it was not possible to carry on a normal conversation near the dehairer station. On cleanup, a grinder made a lot of noise. After leaving the fabrication room, claimant would have ringing in his ears. Dr. Jorgensen has attempted to sell claimant a hearing aid. His hearing is getting worse every year; his hearing problem started in 1980. He currently manages a coffee shop and pool hall in Estherville, Iowa.

Patricia Evans married claimant in 1966 and he had no hearing loss at that time. He had ringing in his ears when he came home from his work at Morrell and she knows of no other source of his hearing loss.

Wayne Christophel testified that he worked at Morrell in Estherville starting on December 3, 1956. He started on pork kill and then went to pork cut and then beef fabricating. He knows claimant; they first worked together at Morrell in 1964 at which time claimant had no hearing problem. Christophel testified that the beef fabricating room was the noisiest area.

Larry Bebo testified that he worked in both the beef plant and the pork plant. He met claimant in the 1960's and claimant had no hearing problem at the time they met. Claimant now has a hearing problem.

Exhibit D, page 1 (dated November 12, 1986), is authored by C. B. Carignan, Jr., M.D., and reads in part:

> When Mr. Evans was employed at the Morrell packing plant at Estherville, Iowa in October 1964 his hearing was normal. In May of 1965 he began working at the head table at the packing plant where he worked with and near power saws in an extremely noisy area. He was employed at this location until 1970 when he was transferred to fabrication, an equally noisy environment. He worked there until 1983 when he transferred to a general cleanup job at the beef plant.
>
> In 1982 or 1983 his hearing was tested at the plant and hearing protection was issued to the workers at the plant after that time until the plant closed.

Exhibit D, page 2, describes a binaural hearing impairment of 5.9 percent and also reads in part:

> In view of this report and the history I obtained from Mr. Evans I feel that with reasonable medical

certainty, Mr. Evans' 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 cost of a hearing aid.

Exhibit 1 is the deposition of Daniel Jorgensen, M.D., taken January 29, 1987. Dr. Jorgenson is an otolaryngologist. He a soundproof booth and an audiometer. He has a person with aster's degree in audiology do the audiograms. Dr. Jorgensen amined claimant on October 28, 1986 and took a history. position exhibit 1 describes and audiogram performed on ober 28, 1986.

On page 8-10, Dr. Jorgensen stated:

A. As I look at an audiogram like that I have to say that from his history noise has contributed to some of his hearing loss when we see this high frequency drop off as it does. Not having an upslope at 8000 doesn't make it classic. The fact that he is below normal in the lower frequencies again is not consistent with a noise-induced loss. It would imply some sort of predisposition either due to age or familial factors.

On page 11, Dr. Jorgensen stated that claimant's Morrell k was a "contributing factor" to his hearing loss. On page he stated that he did not know the extent of claimant's se exposure at Morrell nor did he know the condition of imant's hearing when he started Morrell.

APPLICABLE LAW AND ANALYSIS

I. Does Iowa Code section 85.23 apply to occupational ring loss cases? It is concluded that section 85.23 does ly to this class of case as it is not inconsistent with pter 85B. See Iowa Code section 85B.14. The Iowa Supreme rt stated in Dillinger v. City of Sioux City, 368 N.W.2d 176, (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 his hearing loss is attributable to his Morrell employment.

IV. Claimant's binaural hearing loss is 5.9 percent entitling him to 10.325 weeks (5.9 percent of 175 weeks) of permanent partial disability benefits at a rate of $218.49.

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 was born on March 21, 1942.

2. Claimant started working for Morrell in Estherville, Iowa in 1964.

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 defendant with actual knowledge of claimant's alleged occupational hearing loss.

5. Claimant's binaural hearing loss is 5.9 percent.

6. Claimant's stipulated weekly rate of compensation is $218.49.

CONCLUSIONS OF LAW

1. Claimant established entitlement to ten point three twenty-five (10.325) weeks of permanent partial disability benefits commencing on April 27, 1985 at a rate of two hundred eighteen and 49/100 dollars ($218.49).

2. Claimant 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 18th day of March, 1987.

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL SERVICES

DENNIS FITZPATRICK, surviving spouse of TERRA FITZPATRICK, Claimant, vs. HUPP ELECTRIC MOTORS, INC., Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 813668 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 Dennis Fitzpatrick, surviving spouse of Terra Fitzpatrick, claimant, against her employer, Hupp Electric Motors, Inc., and its insurance carrier, Travelers Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an alleged injury of January 10, 1986 with death ensuing on January 12, 1986. This matter came on for hearing before the undersigned deputy industrial commmissioner at the courthouse in Cedar Rapids, Iowa, on February 3, 1987. But for the briefs of the parties, the record was considered fully submitted at close of hearing. A first report of injury was filed January 15, 1986.

The record in this case consists of the testimony of Dennis Fitzpatrick, Robert Hupp, Herbert Andersen, Jill Marlowe, Casey Hupp, Linda Kuz, Randy Hampton, Gary Edwards, Charles Engler, Jetta Lea Klendworth, Sharon Stokes Dudley, as well as of joint exhibit 1 and defendants' exhibits A through G. Joint exhibit 1 is decedent's 1985-1986 monthly reminder calendar. Defendants' exhibit A is payroll records for decedent. Defendants' exhibit B is decedent's handwritten agenda for the week of January 6, 1986. Defendants' exhibit C is the Iowa Department of Transportation accident report. Defendants' exhibit D is a McGrath Pontiac bill for January 3, 1986. Defendants' exhibit E is a map of the City of Cedar Rapids, Iowa. Defendants' exhibit F is the deposition of John Dolan taken July 30, 1986. Defendants' exhibit G is the deposition of Herbert Andersen taken August 23, 1986.

ISSUES

The issues for resolution are:

1) Whether decedent received an injury which arose out of and in the course of her employment;

2) Whether decedent's surviving spouse is entitled to death benefits on account of his decedent's death; and

3) Decedent's rate of weekly compensation.

REVIEW OF THE EVIDENCE

Decedent, Terra Fitzpatrick, began work for Hupp Electric in October 1985 as an outside sales representative. As such, decedent called on shop foremen, plant owners and managers in major industrial plants in eastern Iowa in an attempt to sell them motors, generators or other major industrial parts. Decedent had taken over existing accounts in Clinton, Muscatine, Eddyville, and other points as well as three Cedar Rapids accounts, General Mills, ADM Corn Sweetners, and Quaker Oats, respectively. Decedent drove approximately 500 to 1000 miles per week as a sales representative. Client calls frequently involved a business lunch with the client as well. Hupp Electric supplied decedent with a Mazda automobile which Hupp leased from McGrath Pontiac. Decedent kept the car at her home and drove it to and from work. She had a Hupp Electric credit card and apparently used that for gas expenses related to business use of the car. Decedent paid for her own gas for personal use of the car, however. Personal use, with that restriction, was permitted. Hupp paid the insurance, license, and maintenance expenses for the car. On January 3, 1986, decedent had had her car serviced at McGrath Pontiac because it was out of alignment, pulling to the right.

Decedent's daily sales call calendar for January 10, 1986 reports scheduled business calls on Terry Thompson, at General Mills, and Jerry Eckler at ADM at 8:00 a.m. and 9:00 a.m., respectively. Decedent apparently made those calls. A notation of "McGrath" at 10:30 a.m. is crossed out. The calendar also contains nontimed scheduled notations as to "Parks Dept" and "Water Dept."

Decedent was involved in a fatal car accident on Interstate 380 and Wilson Avenue, in Cedar Rapids, Iowa, on January 10, 1986 at 1:18 p.m. Decedent died on January 12, 1986. The Hupp Electric building is located in Cedar Rapids at the junction of 33rd Avenue, SW, and Interstate 380. Decedent's home was on Pepperwood Drive, in northeast Cedar Rapids. First Avenue/Marion

Boulevard was the main thoroughfare nearest the Pepperwood Drive address. Interstate 380 runs north and south through Cedar Rapids, Iowa. Decedent was traveling north when the accident occurred.

Decedent and her husband were childless and owned a Irish Wheaton dog.

Decedent was employed at an annual salary of $20,000 per year with bonuses possible. Those bonuses would have equaled ten percent of the increase in gross profits from decedent's assigned accounts in any given year. Decedent's first payroll check with Hupp Electric was issued on November 12, 1985 and equaled $384.62. She subsequently received by bi-weekly checks in the amount of $769.24 on November 24, 1985, December 8, 1985, December 23, 1985, and January 7, 1986, respectively. A final check in the amount of $769.24 was issued January 21, 1986.

Dennis Fitzpatrick, surviving spouse of decedent, testified that the couple was married on May 4, 1975. Fitzpatrick testified that decedent had attempted to take a client to lunch every work day and that she had an active account list from which she made followup and luncheon calls. He reported that she also made cold calls to solicit business for Hupp Electric. He stated that decedent had a home office which she used daily for filling out sales call records, planning her schedule, and taping sales presentations. Mr. Fitzpatrick was employed as a salesman for the Cedar Rapids Gazette in January 1986. He was making sales calls from the Davenport area during the week of January 6, 1986. Fitzpatrick testified that he spoke to decedent on January 8, 1986 from Davenport and that she stated that she was returning her Mazda to McGrath for further alignment on January 10, 1986. Fitzpatrick testified that, during the week following the accident, he picked up decedent's personal items from the vehicle salvage area to which her car had been towed following the January 10, 1986 accident. He reported that the items included a briefcase containing a note pad and folder, business cards, flyers, sales materials, and work manuals.

Fitzpatrick opined that decedent would not go home to care for the family dog during the day because the dog did not need care during the day. He stated, however, that claimant was "going home for something." He also opined that decedent likely would not take Interstate 380 to and from work because that would have been the longer route. He agreed, however, that travel on Interstate 380 would be consistent with the family home's location. Fitzpatrick testified that decedent usually worked within Cedar Rapids on Friday's and that when decedent was working outside of Cedar Rapids, she checked in at Hupp Electric before leaving Cedar Rapids and on her return to Cedar Rapids.

Robert Hupp, president of Hupp Electric, testified that company policy is that salespersons should eat lunch with customers when they are out of town in that salespersons have little actual time available with out-of-town customers since a great deal of their time is spent driving, therefore, it is useful that they lunch with clients. He reported that salespersons are encouraged to lunch with clients when in Cedar Rapids, but doing so is not as crucial. Hupp also reported that luncheon appointments in Cedar Rapids are never scheduled past 1:00 p.m. because the Cedar Rapids sales accounts are generally on fixed plant schedules with lunches at 11:00 or 11:30 a.m. Hupp stated that decedent was not assigned to either the water department or the parks department accounts in that inside salespersons were assigned to those accounts. He agreed that exhibit B, decedent's handwritten agenda to her sales manager, Chuck Engler, contains a written request of decedent for permission to call on the parks department. Hupp stated that on January 10, 1986, he lunched with John Dolan, Casey Hupp, and Chuck Engler. He reported that he dropped those individuals off at Hupp Electric at approximately 1:10 p.m. and left for a downtown 1:30 p.m. meeting.

Linda Kuz worked for Hupp Electric from May 1982 through May 1986. She apparently had left to marry and moved to California in November 1985. Decedent had then taken her outside sales position with the company. Kuz reported that following decedent's death, Robert Hupp asked her to return and work decedent's position during the transition period. Kuz reported that she returned to Hupp Electric on Monday, January 13, 1986, at approximately 2:30 p.m. and then observed decedent's desk. She stated that materials were scattered about the desk. They included a brown leather folder for business cards, a black briefcase with an enclosed microswitch briefcase. She reported that the microswitch briefcase contained quotes, notes, and a mailing list. She stated that a black leather folder with pictures, specifications, sheets, handouts, and letters regarding Hupp was also on the desk. Kuz testified that it would be mandatory for a salesperson, particularly a new salesperson, to have the materials and the black leather folder in their car making sales calls. She opined that a salesperson could not function effectively without the folder and stated that she did not believe decedent would have made calls without the folder.

Kuz investigated decedent's activities on January 10, 1986. She confirmed that decedent had seen Thompson and Eckler but stated she had no knowledge whether decedent had called on the water or parks department on January 10, 1986. Kevin Hupp is assigned the water department. Kuz stated she never took Cedar Rapids clients to lunch after 1:00 p.m. in that those clients were "very emphatic" that they needed to be back by 1:00 p.m. She reported that when she was working as an outside salesperson and traveling outside of Cedar Rapids, she generally took clients to lunch three times per week; if she was in Cedar

Rapids, she would "definitely take" clients to lunch. Kuz reported that she worked in Cedar Rapids approximately two days per month.

Casey Hupp, wife of Robert Hupp, has a printing business in Hupp Electric's building. She testified that she lunched with her husband, Mr. Engler and Mr. Dolan on January 10, 1986 and returned to the Hupp building sometime past 1:00 p.m. Mrs. Hupp testified that decedent was dressed in a red coat with sunglasses and was preparing to leave for lunch. Mrs. Hupp observed no materials in decedent's hands.

Herbert Andersen, a salesperson with O'Brien Steel reported that he knew decedent and Dennis Fitzpatrick socially in that Dennis Fitzpatrick was his wife's cousin. He testified that he was at Hupp Electric on January 10, 1986 to make a sales call on Jill Marlowe, then a buyer in Hupp's purchasing department. Andersen testified that he asked Ms. Marlowe and decedent to lunch. Both declined. He testified that decedent said that she had to go home and feed her dog since her husband was out of town. Andersen testified that he was not entirely sure whether he or decedent brought up the subject of decedent's dog since he had joked with decedent on occasion and was aware of her affection for her dog. He "tended to believe" that decedent had first mentioned the dog, however. Jill Marlowe confirmed Andersen's testimony as to the conversation concerning lunch and decedent's statement that she had to go home and to feed her dog. Marlowe stated that she did not believe that Andersen had brought up the subject of her dog and that she felt that while decedent was "trying to lighten the conversation," decedent was not joking regarding the dog.

Charles Engler, executive vice president of Hupp Electric and decedent's sales manager, testified that he chatted briefly with decedent on his lunch return on January 10, 1986. Decedent stated she was going home for lunch to care for her dog. Engler stated that decedent did not tell him she intended to make calls on January 10, 1986 and did not discuss calling on the parks or water departments prior to January 10, 1986. Engler stated that decedent had approximately seventy-five regular customers. As of January 6, 1986, she had not yet called on approximately a third of those. He opined that decedent would not make cold calls prior to completing calls on regular customers.

John Dolan, former director of purchasing of Hupp Electric, who died December 13, 1986, testified by way of his deposition taken August 23, 1986. He reported he had discussed a sales problem with decedent before lunch time on January 10, 1986. He stated that he also owned an Irish Wheaton dog and decedent had then told him that she was going home to feed her dog at lunch.

Randy Hampton, who works in accounting at Hupp Electric and

apparently handles receptionist-type duties for the company's outside salespersons, testified that he has assisted decedent with an accounting problem at approximately 12:30 p.m. on January 10, 1986. He testified that decedent later told him she was going home to feed her dog and would be back within an hour.

Gary Edwards, an inside salesperson for Hupp Electric, stated that right before lunch on January 10, 1986, decedent was at the sales counter and there told him she was going home to let her dog out [over lunchtime].

Sharon Stokes Dudley was employed as a secretary for Hupp's outside salespersons from January 6, 1986 through September 30, 1986. She was decedent's secretary. Ms. Dudley stated that decedent gave Dudley a letter to type just before decedent left for lunch on January 10, 1986. Decedent said she would review the letter and sign it upon her lunch return.

Jetta Lea Klendworth, manager of shipping and receiving at Hupp Electric, testified that during the morning of January 10, 1986, decedent told her she was going home at lunch to care for her dog since her husband was out of town.

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

APPLICABLE LAW AND ANALYSIS

Our first concern is the arising out of and in the course of issues.

Claimant has the burden of proving by a preponderance of the evidence that claimant's decedent received an injury on January 10, 1986 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

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.

We consider the in the course of question. In Otto v. Independent School District, 237 Iowa 991, 994, 23 N.W.2d 915 (1946), the court stated:

> A case involving an injury from a "street accident" suffered while en route to or from work therefore requires a determination whether the employee was engaged in his employer's business at the time and whether there was casual relation between the injury and such employment. If the first condition be found not to exist it becomes unnecessary to consider the second.

In Halstead v. Johnson's Texaco, 264 N.W.2d 757, 759 (Iowa 1978), the court stated the following as regards employees having regular places and times of work who sustain injuries over their lunch period:

> When a worker has a place and hours of work, ordinarily he is not considered to be acting within his employment while he is on his way to his place of employment or is returning to his home or going elsewhere after work. This is the going and coming rule. Bulman v. Sanitary Farm Dairies, 247 Iowa 488, 73 N.W.2d 27. The same rule ordinarily applies when the employee has a place and hours of work, his hours of work do not include his meal period, and he leaves his place of employment to go to and return from his meal elsewhere. The author states the principle thus in 1 Larson, Workmen's Compensation, p. 4-26:
>
> [W]hen the employee has a definite place and time of work, and the time of work does not include the lunch hour, the trip away and back to the premises for the purpose of getting lunch is indistinguishable in principle from the trip at the beginning and end of the work day, and should be governed by the same rules and exceptions....

The author continues at p. 4-76:

> The going and coming rule has so far been treated as substantially identical whether the trip involves the lunch period or the beginning and end of the work day. This can be justified because normally the duration of the lunch period when lunch is taken off the premises is so substantial and the employee's freedom of movement so complete that the obligations and controls of employment can justifiably be said to be in suspension during the interval.

The Halstead court was concerned with a case where claimant on the day of injury simply went to and attempted to return from his own home at the lunch hour. At other times, the claimant, a mechanic, had taken his lunch hour at a different time or for less time or not at all or had picked up parts for the employer. The court, however, considered only the time and the facts of the injury itself and found that claimant's injury in a car-motorcycle accident while returning from lunch did not arise out of and in the course of his employment. Halstead at 760. The Halstead court noted the employee must show additional facts to bring the employee within an exception to the rule that off premise meals on the employee's time are not compensable. Halstead at 760.

An additional consideration in this case is that claimant was riding in an employer furnished conveyance when fatally injured. Larson states as a general proposition: "When the journey to or from work is made in the employer's conveyance, the journey is in the course of employment, the reason being that the risks of the employment continue throughout the journey." A. Larson, Workmen's Compensation, § 17:00.

In Bulman v. Sanitary Farm Dairies, 247 Iowa 488, 494, 73 N.W.2d 27, (1935), the court stated the going and coming rule is not dependent on the extent of the hazards of travel. Rather, it is based on contract, expressed or implied. "If the employer assumes the burden of the workman's [sic] coming and going expense, that is held to imply that the time of coming and going is part of the time of employment." Bulman at 494. In Scharf v. Hewitt Masonry, 32 Biennial Rep.) Iowa Indus. Comm'r 96 (a review dec. 1975), the commissioner stated the following regarding the employer-furnished transportation exception the going and coming rule:

> An exception to the above general rule is when the journey to and from work is made in the employer's conveyance. The journey is in the course of employment. The risk of employment continues through the journey because the vehicle is under the control of the employer and the employees ride in the vehicle at the direction of the employer.

The transportation duties are incidental to but outside the regular duties. The Iowa Court by implication, supported this proposition in Pribyl v. Standard Electric Co., 246 Iowa 333, 67 N.W.2d 438, when it compensated a union employee who was injured while riding to work. The employment contract between employer and employee specifically required the employer to provide transportation for employees when they were assigned jobs outside the employer's county. By a separate agreement employer agreed to pay 8 cents a mile to the employee when he drove his own vehicle. It should be noted that the employee was not compensated for time spent in travel, but only for a predetermined mileage between home and the work site. The court said: "It must be conceded that there must be something more than mere payment of such transporation cost." Pribyl, supra, p. 342. The "something more" was the fact that the employer had contracted to furnish transportation.

Professor Larson states that the rule that traveling to and from work in an employer-furnished conveyance is in the course of the employment is equally applicable to trips to and from lunch. 1 Larson, Workmen's Compensation Law, § 15.52.

In the instant case, the facts are little disputed. Decedent was traveling from her employment in the direction of her personal residence at 1:18 p.m. when injured. She had told a number of individuals she was going home over lunch to care for her dog. She was traveling in an automobile her employer provided for her business and personal use. The record is devoid of any inference that decedent was required to pay any car expenses related to using the car to travel to or from the employer's business place in Cedar Rapids. Apparently, the only automobile expenses decedent was required to pay were gas costs for personal use of the car for out-of-town travel. While this is apparently a case of first impression in Iowa, we believe that Professor Larson's position that the employer conveyance exception extends to lunch trips is the better rule as that rule promotes consistency in interpretation and application of our workers' compensation law. It is also consistent with the longstanding principle that the workers' compensation statute is to be construed liberally with a view of extending aid to every employee who can fairly be brought within its purview. When the above cited law is applied to the above recited facts, the reasonable conclusion is that decedent, when injured while driving her employer-provided vehicle from the employment site to her lunch site, was in the course of her employment.

We are left to consider whether decedent's injury arose out of her employment. To arise out of the employment, the injury

must be a natural incident of the work. It must be a natural consequence of a hazard connected with employment. Cedar Rapids Community Schools v. Cady, 278 N.W.2d 298, 299 (Iowa 1979). A causal connection must exist between the conditions which the employer puts about the employee and the resulting of injury. Crowe v. DeSoto Counsol. Sch. Dist., 248 Iowa 402, 408 (1955). All the circumstances in the whole employment situation are to be considered in determining whether the injury arose out of the employment. Burt v. John Deere Waterloo Tractor Works, 247 (Iowa 691, 700, 701 (1955).

Decedent was required to travel in the course of her employment. She was required to use an employer-provided car. She traveled to and from work in the car. She used the car throughout her work day for the employer's business. It could be contemplated that decedent, like most working persons, would have occasion to use a vehicle for lunch or other personal travel during breaks within her work day. It would have been most impractical, if not impossible, for decedent to have secured nonemployer-provided transportation for lunch or personal errands while otherwise traveling throughout her work day in an employer provided vehicle. The record is devoid of evidence suggesting decedent could have used a personal vehicle and not an employer-provided vehicle to fulfill her duties as a Hupp Electric sales representative. Travel in an employer-provided vehicle throughout the work day was a hazard connected with decedent's employment. It follows, therefore, that a natural consequence of that hazard was decedent's travel in the company-provided vehicle on personal errands, such as going to her own home to care for her dog over her lunch hour. Hence, the requisite causal connection exists between the condition decedent's employer put on her, namely, that she traveled in an employer-provided vehicle, and her injury of January 10, 1986, such that decedent's injury can be said to have arisen out of her employment.

As death resulted from decedent's injury, decedent's surviving spouse is entitled to benefits pursuant to section 85.31(1)(a) as well as payment of burial expenses not to exceed $1,000 pursuant to section 85.28.

We consider the rate issue. Decedent had been employed by Hupp Electric less than thirteen calendar weeks prior to her injury. Her rate is computed under section 85.36(7), therefore. Had decedent been in the employer's employ the full thirteen weeks she would have earned $5,000.06, or a gross weekly wage of $384.62. Decedent's rate then is $240.40. Claimant apparently argues that decedent's rate should be computed on an annual salary of $20,000 with several thousand additional dollars included because decedent could have received a sales bonus each year. We reject claimant's argument initially because section 85.36 requires us generally to look to the pay period basis and not annual earnings in determining the basis of computation.

Further, decedent's employer testified any bonus amount decedent might otherwise have earned could have been eliminated had she lost only one sales account. Bonus amounts under these circumstances are too speculative to form a basis of computation of decedent's weekly rate in this case.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Dennis Fitzpatrick is the surviving spouse of Terra Fitzpatrick (decedent).

Terra Fitzpatrick was an employee of Hupp Electric Motors, Inc., on January 10, 1986.

Terra Fitzpatrick was an outside salesperson for Hupp Electric.

Terra Fitzpatrick was required to travel throughout eastern Iowa and within the city of Cedar Rapids in furthering her employer's business.

The employer provided Terra Fitzpatrick with a vehicle to use in her employment.

Terra Fitzpatrick drove the employer-provided vehicle to and from her employment and used the vehicle to further her employer's business throughout her employment day.

Terra Fitzpatrick did not have personal transportation other than the employer-provided vehicle available to her throughout her employment day and arrangement for other transportation would likely have been impractical.

It was reasonably contemplatble under all the circumstances that Terra Fitzpatrick would use the employer-provided vehicle to travel to lunch or to travel on personal errands during permitted breaks in her employment day.

Terra Fitzpatrick was injured in a car accident on January 10, 1986 while traveling from the employer's place of business to her home to care for her dog. A causal connection exists between Terra Fitzpatrick's need to use employer-provided transportation to further her employer's business throughout her work day and her injury.

Terra Fitzpatrick's injury of January 10, 1986 resulted in her death on January 12, 1986.

Terra Fitzpatrick had been employed by Hupp Electric less than thirteen calendar weeks immediately preceding her injury.

Decedent would have earned $5000.06 had she worked the full thirteen weeks.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that his decedent's January 10, 1986 injury arose out of and in the course of decedent's employment and resulted in her death on January 12, 1986.

Claimant has established he is entitled to benefits on account of his decedent's death as provided in section 85.31(1)(a) and to burial expenses not to exceed one thousand dollars as provided in section 85.28.

Claimant has established that decedent's weekly rate of compensation is two hundred forty and 40/100 dollars ($240.40).

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant benefits as provided in section 85.31(1)(a) at the rate of two hundred forty and 40/100 dollars ($240.40).

Defendants pay claimant burial expenses not to exceed one thousand dollars ($1,000) as provided in section 85.28.

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 5th day of March, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES C. FULLERTON, Claimant, vs. CATERPILLAR TRACTOR COMPANY, Employer, Self-Insured, Defendant.	: File No. 655819 : R E V I E W - : R E O P E N I N G : D E C I S I O N	FILED JAN 30 1987 INDUSTRIAL SERVICES

INTRODUCTION

This is a proceeding in review-reopening filed by Caterpillar Tractor company, employer, against Charles C. Fullerton, claimant, seeking a determination of whether claimant established a change of condition in accordance with a district court ruling dated December 19, 1984.

The record consists of defendant's exhibits 1 and 2; official notice of the appeal decision of Robert C. Landess, industrial commissioner, dated March 21, 1984; and, the ruling of the district court dated December 19, 1984.

ISSUE

The issue in this case is whether claimant needs to or has shown a change of condition to support the appeal decision of December 19, 1984.

EVIDENCE PRESENTED

The evidence in exhibits 1 and 2 is the same as that reviewed in the appeal decision of March 21, 1984. That decision is incorporated herein and relied upon for review of this evidence.

A review of the appeal decision discloses that the commissioner found claimant to be thirty-seven and one-half percent industrially disabled. He further found that claimant had been unable to continue the duties of his previous job and that he had been laid off at work.

The district court ruling deals primarily with the construction of relevant statutes and analysis of case law thereunder. The district court affirmed the decision of the industrial commissioner.

APPLICABLE LAW AND ANALYSIS

The issue in this case is perhaps not understood by this deputy. It would appear, however, that defendant seeks a redetermination of the legal issue of whether a change of condition is necessary under the facts of this case; and, if so, whether the facts support such a change. It is not clear just how the district court resolved these issues. It did, however, affirm the industrial commissioner and it did so without any remand for a specific finding on the issue of a change of condition. It is thus fair to assume that the court was satisfied with the agency decision as written. The issues, whatever they may be, are res judicata.

Defendant has not presented evidence to show a change of condition since March 21, 1984;and accordingly, no diminishment of the award would be appropriate.

FINDING OF FACT

1. The claimant has not experienced a substantial change of condition since March 21, 1984.

CONCLUSIONS OF LAW

Defendant has failed to prove claimant has had a change of condition since March 21, 1984.

All other issues raised by defendant are res judicata.

ORDER

IT IS THEREFORE ORDERED that this matter be dismissed with costs taxed to defendant.

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

STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JESUS J. GARCIA, Claimant, vs. ARMSTRONG RUBBER COMPANY, Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 779854 A R B I T R A T I O N D E C I S I O N FILED MAR 23 1987 INDUSTRIAL SERVICES

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Jesus J. Garcia, against his employer, Armstrong Rubber Company, and its insurance carrier, Travelers Insurance Company, to recover benefits under the Iowa Workers' Compensation Act, as a result of an injury allegedly sustained November 2, 1984. This matter was submitted on a stipulated record on March 3, 1987. The record was considered fully submitted as of that date. A first report of injury was filed March 18, 1986.

The record in this matter consists of the stipulations to be outlined in the review of the evidence as well as of joint exhibits 1 through 36. Joint exhibit 1 is an audiological evaluation of June 18, 1976. Joint exhibit 2 is medical notes of Thomas Ericson, M.D., from June 18, 1976 through December 17, 1979. Joint exhibit 3 is a report of Dennis Kelly, Jr., M.D., of January 22, 1987. Joint exhibit 4 is an eye examination report of June 18, 1976. Joint exhibit 5 is an audiological evaluation of July 1, 1976. Joint exhibit 6 is an audiological evaluation of August 18, 1976. Joint exhibit 7 is an admission registration of October 24, 1976. Joint exhibit 8 is a consultation report of October 25, 1976. Joint exhibit 9 is an October 29, 1976 letter of Dr. Ericson. Joint exhibit 10 is the December 20, 1976 discharge summary. Joint exhibit 11 is progress notes of June 10, 1978. Joint exhibit 12 is a September 13, 1981 consultation report. Joint exhibit 13 is progress notes from April 10, 1981 through April 12, 1982. Joint exhibit 14 is a June 14, 1983 general consultation. Joint exhibit 15 is

page 2 of such general consultation. Joint exhibit 16 and 17 are pages 1 and 2 of a general consultation of May 28, 1984. Joint exhibit 18 is hearing test results of June 6, 1984. Joint exhibit 19 is a general consultation of November 2, 1984. Joint exhibit 20 is a letter report of Mary Lowder, M.A., and Tim Mickel, M.D., of November 29, 1984. Joint exhibit 21 is a clinical resume. Joint exhibits 22, 23, and 24 are undated hearing test results. Joint exhibit 25 and 26 are pages 1 and 2 of a medical report of Harold Adams, Jr., M.D., of February 1, 1983. Joint exhibit 27 is an application for disability pension with Armstrong. Joint exhibit 28 is page 2 of said application. Joint exhibit 29 is Armstrong hearing conservation audiograms of April 1, 1982, February 25, 1982, February 22, 1980, March 9, 1979, February 15, 1977, November 12, 1976, May 26, 1976, and July 8, 1975, respectively. Joint exhibit 30 is a February 20, 1985 report of Environmental Technology Corporation. Joint 31 is June 14, 1985 office notes of Robert T. Brown, M.D. Joint exhibit 32 is an August 2, 1985 report of Mary Lowder. Joint exhibits 33 and 34 are reports of Dr. Brown of April 21, 1986 and January 12, 1987, respectively. Joint exhibit 35 is a February 10, 1987 report of Dr. Ericson. Joint exhibit 36 is a March 12, 1987 report of Dr. Brown.

ISSUES

Pursuant to the prehearing report and the submission of the parties, the issues to be determined are:

1) Whether claimant has sustained an occupational hearing loss within the meaning of chapter 85B; and

2) If so, the extent of the hearing loss as measured by section 85B.9.

REVIEW OF THE EVIDENCE

Per the stipulated record, the parties agreed that had claimant testified he would have stated he began work for Armstrong Rubber Company on May 26, 1970 and took a disability retirement on June 30, 1983 due to Parkinson's Disease unrelated to his employment. Claimant was a factory worker holding jobs listed in the table of jobs and noise exposures. He usually worked a forty-hour week and considered the work place a noisy environment.

The parties further stipulated that if Robert K. Winslow, assistant industrial relations manager, safety engineer for Armstrong Rubber Company, had been called to testify, he would have testified that he was familiar with the plant's working environment and that claimant during his employment with Armstrong worked at jobs shown in the table of jobs and noise exposures. Occupational safety and health consultation groups regularly

performed testing for Armstrong to determine noise levels in the plant. The table of jobs and noise exposures shows employee noise exposures for jobs claimant held as determined by employee dosimeter results as of January 10, 1987. The parties stipulated that Mr. Winslow would state that noise levels in the plant had not changed appreciably since Mr. Garcia was an employee and, if anything, the noise levels have increased slightly because additional machines have been added in various areas of the plant since Mr. Garcia left employment with Armstrong.

The table of jobs and noise exposures is as follows:

TABLE OF JOBS AND NOISE EXPOSURE

Dates Worked	Jobs Title	Job Class	Range dBA	dba Average
5/09/83 - 6/30/83	Finish Tire Inspector	28-89	83.3-84.6	84.17
3/03/81 - 5/09/83	Finish Tire Inspector	86-71	Warehouse - Quiet area, no noise levels taken	
3/02/81 - 3/03/81	Tractor Spray	26-01-01	85.2 - 87.6	86.40
8/18/80 - 3/02/81	Finish Tire Inspector	86-71	Warehouse - quiet area, no noise levels taken	
7/22/80 - 8/18/80	Spray, sort & stores	16-02-02	84.8 - 87.6	86.20
5/09/80 - 7/22/80	LAY OFF			
12/31/79 - 5/09/80	Finish Tire Inspector	86-71	Warehouse - quiet area, no noise levels taken	
5/23/79 - 12/31/79	Spray, sort & store	16-02-01	85.2 - 87.6	86.40
5/23/79	Tire unloader	27-05	68.3 - 83.6	76.40
8/18/85 - 5/23/79	Trick soapstone pool	16-02-01	85.2 - 87.6	86.40
7/21/75 - 8/18/75	Palletizer	28-05	83.7 - 90.9	87.30
3/07/75 -	LAY OFF			
6/22/70 -	Truck	26-02-01	85.2 - 87.6	86.40

07/75 soapstone pool

26/70 - 22/70 Press service 26-72 86.4 - 87.3 86.85

26/70 NEW HIRE

We believe the date 8/18/85 contained on the table is a pographical error and that the correct date should be 8/18/75.

Claimant had a series of audiological evaluations in 1976 parently under the direction of either Dennis Kelly, Jr., M.D., Thomas A. Ericson, M.D. Hearing levels in DB at referenced tz are interpreted as follows for the listed testing dates:

tz	250	500	1000	2000	4000	6000	8000	
ht	20	20	10	-5	25		40	6/18/76
t	40	40	20/25	-5	20		30	
ht	15	15	0	0	25		30	7/1/76
t	35	35	20	12	35		30	
ht	20	15	5	0	0		30	8/18/76
t	55	45	40	30	30	40	30	

Armstrong also conducted audiological evaluations on claimant m July 18, 1975 onward. Those evaluations were conducted at plant during work days. Hearing levels in dB at referenced tz are interpreted as follows for the listed testing dates:

tz	500	1000	2000	3000	4000	6000	8000	
ht	25	15	5	15	25	25	30	7/18/76
t	10	10	5	10	25	25	35	
ht	20	5	-5	-5	20	20	35	5/26/76
t	25	10	0	15	20	15	30	
ht	10	10	0	15	25	25	15	11/12/76
t	25	10	0	15	30	30	45	
ht	20	5/10	0/-5	0/5	20	15/20	30/40	2/15/77
t	30	20	10/5	25	35/40	45/50	45/50	
ht	20	10	5	5	25	20		3/9/79
t	25	15	5	5	45	50		
ht	20	5/10	0/-5	5	20	15/25	35	2/22/79
t	30	20	10	25	40	50	50	

Right	20	15	0	10	25	25	2/25/81
Left	60	60	55	60	75	75	
Right	25	15	5	5	40	45	4/1/82
Left	55	45	45	55	85	85	

Claimant also received audiological evaluations through the University of Iowa Hospitals and Clinics. Hearing Levels in dB at referenced Hertz are interpreted as follows for the listed testing dates:

Hertz	250	500	750	1000	2000	4000	6000	8000	
Right	70	60		40	10/20	40	55/60	65	6/6/84
Left	70	75	50	60	50	65		60	
Right	65	60		40	15	40	55	65	Ex 22
Left	70	65		60	50	65	0	60	
Right	65	60		40	15	40	55	65	Ex 23
Left	70	65		60	50	65		60	

Like exhibit 18, both exhibit 22 and 23 are on standard forms carrying the designation "10/83." Both exhibits 22 and 23 also reference to Mary Lowder.

Claimant also received an audiologic evaluation at Iowa Head & Neck Associates with which Robert T. Brown, M.D., is associated on June 14, 1985. Hearing levels in dB at referenced Hertz are interpreted as follows:

Hertz	250	500	1000	2000	4000	8000
Right	70	60	55	40	50	60
Left	55	45	40	35	40	50

We are unable to interpret exhibit 24 designated as an additional audiological evaluation.

Claimant was having attacks of true vertigo from June 18, 1976 through November 10, 1976 for which Thomas A. Ericson, M.D., an ear, nose and throat specialist, treated him. Dr. Ericson diagnosed claimant's condition as Meniere's syndrome. He noted that claimant had both low and high frequency sensorineural hearing loss with the low frequency loss greatly supporting the Meniere's syndrome diagnosis. Claimant also had intermittent spells of diminished hearing with tinnitus of the ears during 1976. In 1976, Dr. Ericson apparently admitted claimant to Iowa Methodist Medical Center where Dennis H. Kelly, Jr., M.D., an internal medicine specialist, saw him in consultation. Claimant was found to have an abnormal glucose tolerance test with a high delayed curb and a positive VDRL test apparently indicative of

syphilis. Dr. Socarras had apprently seen claimant for treatment of his syphilis. There was then no evidence of central nervous system involvement with the syphilis.

On June 20, 1978, claimant sought treatment with an unidentified osteopathic physician with complaints of apparently left ear pain and tinnitus, among other symptoms. On December 6, 1979, claimant again saw Dr. Ericson complaining of increased vertigo. The doctor then reported that claimant had a positive VDRL test and received treatment from Dennis Kelly, M.D. Claimant's hearing level had not changed.

Claimant was treated in April 1981 for vertigo and noise "like motors" in his ears. The complaints were related to the conditions of otitis media, hypertension, and hyperglycemia. Treatment continued throughout 1981 with claimant occasionally continuing to report tinnitus. Claimant on occasion also had slight ear infections in both canals. Claimant continued to complain of tinnitus through February 1, 1982. Both ears continued to be slightly infected.

Claimant was evaluated for hearing loss and tinnitus at the University of Iowa Hospitals and Clinics on May 28, 1985. In a medical history of that date, Scott D. Blanke, M.D., stated that claimant reported that he began to notice a bilateral hearing loss, the right greater than the left approximately three years earlier. He reported that claimant stated that with the hearing loss, his tinnitus increased in severity. Claimant then denied any otalgia, otorrhea, or vertigo. He denied head trauma or balance problems. Dr. Blanke reported that claimant's audiogram revealed a severe, low frequency loss rising to mild and then sloping again to a moderate sensorineural hearing loss. His impression was of a sensorineural hearing loss of unknown etiology, possibly metabolic due to its symmetry. He reported that rheumatoid factors and syphilis should be ruled out with appropriate blood test.

On February 1, 1983, Harold P. Adams, Jr., M.D., Department of Neurology, University of Iowa Hospitals and Clinics, reported that claimant had Parkinson's syndrome and also had a weakly reactive VDRL and strongly reactive FTA. Dr. Adams recommended that if claimant had not received therapy for primary infection in the past, that such therapy should be implemented.

On November 29, 1984, Mary W. Lowder, M.A., Clinical Audiologist II, at the University of Iowa Hospitals and Clinics, reported that claimant had a moderate sensorineural hearing loss in both ears, worse left than right. She indicated that the etiology of the hearing loss was not clear, but it was possible the loss was caused, in part, by chronic noise exposure on the job. In a letter of August 2, 1985, Ms. Lowder indicated that while a very strong correlation exists between occupational

noise exposure and hearing loss, claimant's loss was not at all typical of noise induced hearing loss. She reported that such a loss would typically affect only frequencies above 1000 Hertz with the greatest hearing loss being at 4000 or 6000 Hertz. She noted that claimant shows a marked hearing loss across all frequencies with an improvement at the 2000 Hertz range. She noted that claimant's loss was "certainly not at all typical" of what was seen with 95 percent of patients with excessive occupational noise exposure and that it was highly unlikely that his hearing loss was entirely due to noise. She reported it was more likely claimant's hearing loss had some metabolic or inherited cause, but that it was very possible that loss present above 2000 Hertz might have been noise induced.

On February 20, 1985, Burt L. Scott, president of Environmental Technology Corporation, reported to Nancy Ray, Armstrong Rubber Company, that the Environmental Technology Corporation had reviewed claimant's medical history and did not find his hearing [loss] was caused by exposure to high noise consistent with the records. Scott indicated that claimant's 1976 diagnosis of Meniere's Disease and characterized the disease as a chronic, progressive condition exhibiting symptoms of (a) vertigo, (b) roaring tinnitus, and (c) hearing loss. Scott reported that while the etiology or causation of Meniere's Disease is unknown, the syndrome is thought to be related to viral infection, allergy, syphilis, abnormal glucose tolerance and other causes. Scott reported that claimant's medical history and findings and the plant clinic reports and audiometric findings were all consistent with the diagnosis of Meniere's Disease, and that audiologically, a unilateral, flat sensorineural hearing loss was quite typical [for the disease]. Scott characterized audiograms in 1975, prior to diagnosis of the disease, as showing symmetrical hearing thresholds in both ears with a slight high frequency loss. He reported that following the diagnosis, the hearing loss in the left ear progressed as an expected result of the progression of the disease.

On April 21, 1986, Robert T. Brown, M.D., of Iowa Head and Neck Associates, reported that claimant had a hearing loss in both ears, slightly worse on the right, with a 50 dB hearing loss on the right, 40 dB on the left. Dr. Brown then opined that claimant's hearing loss appeared to have both a congenital basis and likely was aggravated by noise exposure. He reported, however, that in the absence of preemployment hearing test, it would be very difficult to establish a causal relationship with claimant's Armstrong employment. In a report of January 12, 1985, Dr. Brown reported that claimant did have a hearing loss in both ears that had changed from his initial audiogram of 1975 through the most recent evaluation and the loss was a binaural "nerve type" loss likely noise related according to claimant's history. He opined the loss may likely be related to claimant's work activities and noise exposure. On March 2, 1987, Dr. Brown

reported that he had been unaware of claimant's previous diagnosis "of history" in both 1976 and again in 1983. Dr. Brown stated that syphilis could cause a fluctuating sensorineural hearing loss, and that Meniere's syndrome could also cause a fluctuating sensorineural loss. Dr. Brown concluded that given claimant's complicated history, many factors, in addition to noise exposure, could have contributed to his hearing loss.

On February 10, 1987, Dr. Ericson opined that multiple potential causes of claimant's hearing problems exist. He was unable to express an opinion to a reasonable degree of certainly that acoustic or noise trauma was a specific cause of claimant's hearing deficit.

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

APPLICABLE LAW AND ANALYSIS

We consider whether claimant has sustained an occupational hearing loss as defined in section 85B.4.

The definition of occupational hearing loss in section 85B.4 inextricably entwines the issues of arising out of and in the course of employment and causally related disability. Under the section an occupational hearing loss is a permanent sensorineural loss of hearing in one or both ears in excess of 25 decibels which arose out of and in the course of employment caused by prolonged exposure to excessive noise levels. An excessive noise level is sound capable of producing occupational hearing loss or sound exceeding the time and intensities listed in the table in section 85B.5 or both.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on November 2, 1984 which arose out of and in the course of employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The words "in the course of" refer to the time and place and rcumstances of the injury. McClure v. Union et al. Counties, 8 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 thin the period of employment at a place the employee may asonably be, and while he is doing his work or something cidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 8 (Iowa 1979), McClure, 188 N.W.2d 283, Musselman, 261 Iowa 2, 154 N.W.2d 128.

The claimant has the burden of proving by a preponderance of e evidence that the injury of November 2, 1984 is causally lated to the disability on which he now bases his claim. dish 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 thin the domain of expert testimony. Bradshaw v. Iowa Methodist spital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all her evidence introduced bearing on the causal connection. Burt, 7 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be uched in definite, positive or unequivocal language. Sondag v. rris Hardware, 220 N.W.2d 903 (Iowa 1974). However, the pert opinion may be accepted or rejected, in whole or in part, the trier of fact. Id. at 907. Further, the weight to be ven to such an opinion is for the finder of fact, and that may affected by the completeness of the premise given the expert d other surrounding circumstances. Bodish, 257 Iowa 516, 133 N.W.2d 7. See also Musselman, 261 Iowa 352, 154 N.W.2d 128.

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

Claimant has not carried his burden. While claimant, at es, was exposed to noise levels at work which possibly were fficient to produce noise induced hearing loss, claimant also times, especially in the last years of his employment, worked quiet areas. Furthermore, claimant has other diagnosed nditions, specifically Meniere's syndrome, syphilis and normal glucose tolerance (diabetes mellitus). Apparently, the niere's syndrome may result from the syphilis or from abnormal ucose tolerance. No evidence exists that claimant's syphilis s ever been adequately treated or controlled. He had positive RL in both 1976 and 1983. In 1976, Dr. Ericson opined that aimant's pattern of hearing loss greatly supported the Meniere's ndrome diagnosis. Dr. Brown has stated that both syphilis and

Meniere's can produce a fluctuating sensorineural hearing loss. Mr. Scott, while not properly qualified as an expert witness, characterized Meniere's related hearing loss as a flat, unilateral loss. We note that at different testing time and different Hertz frequencies, sharp distinctions appear between claimant's left and right ear hearing levels.

Dr. Brown opined that given claimant's complicated history many factors other than noise exposure could have contributed to his hearing loss. Dr. Ericson would not express any opinion that noise trauma was a specific cause of claimant's hearing loss given the multiple potential causes of claimant's hearing problems. Mary W. Lowder, M.A., a clinical audiologist, opined that claimant's hearing loss was "certainly not at all typical" of that seen in 95% (emphasis added) of patients with excessive occupational noise exposure. We note that at times claimant's hearing loss apparently progressed while claimant was working in a quiet environment. That finding also appears inconsistent with a true occupational hearing loss which is generally expected to stabilize or decrease in periods of non-noise exposure. See 17A.14(5). Given the multiple evidentiary factors and expert opinions mitigating against the conclusion that occupational noise was a substantial factor in claimant's hearing loss, we are unable to conclude claimant has sustained an occpational hearing loss as defined in section 85B.4. (We note that all opinions that consider noise as a factor in claimant's hearing loss are couched in terms of possibilities not probabilities. Without supporting nonexpert evidence, such opinion cannot carry claimant's burden.)

FINDINGS OF FACT:

THEREFORE, IT IS FOUND:

Claimant was diagnosed as having Meniere's syndrome in 1976.

Claimant was diagnosed as having both syphilis and abnormal glucose tolerance.

Meniere's syndrome can produce a fluctuating sensorineural hearing loss.

Syphilis can produce a fluctuating, sensorineural hearing loss.

Meniere's syndrome produces a flat, unilateral loss.

At different times and different Hertz frequencies, sharp distinctions have appeared between claimant's left and right ear hearing levels.

Claimant's pattern of hearing loss is not at all typical of

that found in 95 percent of people with excessive occupational noise exposure.

Claimant's hearing loss apparently continued to progress at times when claimant was working in quiet areas in the plant.

Occupational noise was not a substantial factor in claimant's hearing loss.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established an occupational hearing loss as defined in section 85B.4.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceeding.

Claimant pay costs of this proceeding pursuant to Division of Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33.

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

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY GEMMING,	:	
	:	
Claimant,	:	File No. 825105
	:	
vs.	:	
	:	A R B I T R A T I O N
CONSOLIDATED PACKAGING CORP.,	:	
	:	D E C I S I O N
and	:	
	:	
LIBERTY MUTUAL INSURANCE COMPANY,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Larry Gemming, against his employer, Consolidated Packaging Corp., and its insurance carrier, Liberty Mutual Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained May 8, 1986. This matter came on for hearing before the undersigned deputy industrial commissioner in Burlington, Iowa, on March 18, 1987. The record was considered fully submitted at close of hearing. A first report of injury was filed June 18, 1986.

The record in this proceeding consists of the stipulations of the parties and of defendants' exhibits 1 through 3. Claimant appeared through his counsel but not personally. Defendants' exhibit 1 is the deposition of Edward J. DeLashmutt, M.D., taken December 1, 1986. Defendants' exhibit 2 is a medical report of Artemio C. Santiago, M.D., of June 26, 1986. Defendants' exhibit 3 is an employee absentee report for claimant.

ISSUES

At hearing, the parties stipulated that claimant received an injury on May 8, 1986 which arose out of and in the course of his employment. They stipulated that claimant's injury was causally related to temporary total disability to claimant from June 26, 1986 to August 11, 1986. They further stipulated that claimant has been paid all temporary total disability benefits due him at the stipulated rate of $234.15. They further stipulated that claimant has been paid all medical benefits due claimant

and that claimant has no permanent partial impairment causally related to his injury and that claimant is not entitled to any award of industrial disability as a result of his injury. The parties asked that an order be entered relative to the above stipulations.

REVIEW OF THE EVIDENCE

Claimant sustained a left inguinal hernia, both direct and indirect. Each can be associated with lifting. Dr. DeLashmutt operated on claimant on June 27, 1986 and released him to return to work on August 11, 1986. Dr. DeLashmutt testified that claimant should be able to return to his presurgery employment provided that he bends with his knees as opposed to bending over without relaxing the muscles. He opined that claimant did not have any permanent "disability" on account of his hernia repair. Per the stipulation of the parties and per exhibit 3, claimant has returned to work since August 11, 1986 and has continued to work but for vacation time and time off for reasons other than his hernia repair.

APPLICABLE LAW AND ANALYSIS

The evidence presented is consistent with the stipulations reached by the parties as regards the legal issues. Therefore, an analysis is not warranted.

FINDINGS OF FACT

THEREFORE, IT IS FOUND:

Claimant sustained a left inguinal hernia on or about May 18, 1986.

Claimant received surgical repair of the hernia on June 27, 1986.

Claimant was released for work on August 11, 1986.

Claimant has continued to work for his employer from that date but for vacation time or time missed for reasons other than his inguinal hernia.

Claimant sustained no permanent partial impairment as a result of the inguinal hernia.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established that his injury of May 8, 1986 is causally related to any permanent partial disability on which

he bases his claim.

Claimant is not entitled to an award of permanent partial disability benefits.

ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing further from this proceeding.

Claimant pay the costs of this proceeding 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.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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1108.10; 4100
Filed: December 4, 1986
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLARD DUFFIELD,	:	
	:	
Claimant,	:	
	:	File No. 771083
vs.	:	
	:	A R B I T R A T I O N
IOWA STATE PENITENTIARY,	:	
	:	D E C I S I O N
Employer,	:	
	:	
and	:	
	:	
STATE OF IOWA,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

1108.10; 4100

Claimant was found to be permanently totally disabled as a result of a heart attack. It was found that stress from an internal investigation at a state prison medically caused the heart attack and that such stress was the type of stress not normally experienced by persons in everyday nonemployment life. It was further found that due to claimant's severe physical impairment caused by the heart condition, claimant established that he is odd lot without a showing that he made an unsuccessful job search. There being no showing by the defense of suitable employment available to the claimant within his geographical area, claimant was awarded permanent total disability benefits accordingly under the holding of Guyton v. Irving Jensen.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLARD DUFFIELD, Claimant, vs. IOWA STATE PENITENTIARY, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 771083 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 Willard Duffield, claimant, against Iowa State Penitentiary, hereinafter referred to as the prison, an agency of the state of Iowa, a self-insured defendant employer, for benefits as the result of an alleged injury on May 3, 1984. On October 29, 1986 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 suffered a heart attack as a result of performing activities in conjunction with his job at the prison. Claimant contends he is now permanently and totally disabled and is seeking weekly and medical benefits accordingly. Defendant contests the allegation that the heart attack is work related and denies that claimant is unable to work.

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: Niola Duffield, Raymond Wellmand, Harry Braboweski, Larry Moline, and Patricia Marshall. 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.

It is noted that defendant was informed at the prehearing conference that claimant was relying upon the odd-lot doctrine.

The prehearing report contains the following stipulations:

1. At the time of the alleged injury of May 3, 1984 an employer-employee relationship existed between the prison and claimant and claimant last worked for the prison on the day of this alleged injury;

2. The type of permanent disability, if permanent disability is found to have been caused by the alleged work injury herein, is an industrial disability to the body as a whole;

3. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $215.72; and,

4. The medical expenses for which claimant seeks reimbursement in this proceeding are fair and reasonable and connected to the condition upon which claimant is seeking compensation in this proceeding but that the issue of their causal connection to any work injury remains 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 employment;

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

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

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

FINDINGS OF FACT

1. Claimant and his wife were credible witnesses.

From their appearance and demeanor at the hearing claimant and his wife are found to have testified in a candid and truthful manner.

2. Claimant was employed as an electrical and refrigeration maintenance engineer by the prison from May 3, 1977 until October 19, 1984, at which time claimant retired.

During his employment at the prison claimant repaired and maintained electrical and refrigeration equipment. His electrical work involved the installation of equipment including performing necessary wiring pursuant to schematic diagrams. Claimant also

installed and repaired freezers, coolers, and air conditioning appliances. Claimant's job entailed a considerable amount of manual labor including frequent heavy physical labor especially in refrigeration work, extensive walking, and climbing of stairs.

3. On May 3, 1984 claimant suffered an injury which arose out of and in the course of his employment with the prison.

Claimant's injury, a heart attack, did not arise from the physical or emotional stress of his normal assigned work as a maintenance engineer but from emotional stress he experienced during an internal investigation of employees by prison officials which arose out of and in the course of his employment at the prison. Defendant argues in its brief that the investigation was not a normal duty for claimant and consequently any injury occurring as a result of the investigation process would not be in the course of claimant's employment. However, it is found that the investigation activity was for the sole benefit and advancement of defendant's interests at the state prison and that claimant's scope of employment was expanded to include participation in such activity by virtue of a specific direction to appear for investigation.

There is no dispute that claimant had prior existing heart disease or atherosclerotic, cardiovascular disease which was diagnosed in 1980. This disease resulted in various blocked coronary arteries. In 1980 claimant underwent surgery involving his heart termed a coronary artery bypass graft. The preponderance of the evidence in this case demonstrates that this operation was highly successful and claimant suffered no angina pain or heart difficulties after recovering from this bypass surgery until the day of injury herein. Also, claimant was not taking heart medications prior to May 3, 1984. Only one medical report suggests otherwise. This report is from the cardiovascular division of the University of Iowa Hospitals and Clinics dated June 18, 1984, exhibit 6, which states that claimant suffered from chest pains prior to the injury herein, during the winter of 1984. However, this report is contrary to the records of claimant's primary treating physician, a board certified internist, Artemio Santiago, M.D., and claimant's credible testimony. Also despite his prior existing heart disease, claimant had not suffered a heart attack or a myocardial infarction (the death of a portion of the heart muscle) prior to the date of injury on May 3, 1984.

Claimant's credible testimony and that of his wife along with the testimony of Major Harry Brabroweski, the head of the internal investigation section at the prison, and Captain Larry Moline, the assistant director of security, established the following scenario which led to a "inferior wall myocardial infarction" or a death of a portion of claimant's heart muscle. Beginning sometime in early 1984 the prison began an internal

investigation of employees as a result of allegations of wrong doing. Apparently, there had been other investigations in the past of both inmates and employees by internal and outside agencies such as the local grand jury and the state division of criminal investigation. Prior to April 1984, the investigation had resulted in several employees being suspended or what claimant termed in his testimony as "locked out" based upon charges that claimant felt were largely unfounded. Many of these employees have since returned to duty at the prison. Apparently, the investigation centered around staff relationships with the inmates such as providing inmates with contraband, gambling with inmates, acting as inmate banker, etc. The investigation eventually involved the maintenance department and claimant was called upon to testify at a formal inquiry. This upset claimant very much as he thought management was trying to take his job from him for no apparent reason.

In April 1984 claimant was called to a room where interrogations were being conducted by an investigation team of three or four individuals headed by Braboweski. According to Braboweski, although the investigation was not directed at any wrong doing by claimant, claimant was to be asked what he may know about some of the allegations involving other individuals and if he could be a witness against these employees. However, this fact was not related to the claimant at the time. Claimant believed that the investigation involved him, especially after asking the team why he was called upon to give testimony and received a reply which simply stated "we got our reasons." Before the interview began, claimant and his union stewart who attended the interview with him, expressed two concerns to the investigation team. First, claimant desired a copy of any tape recording of the interview and was told by the board that this may not be possible. Secondly, in a written statement, claimant expressed concern that a high pressure interrogation could have an adverse affect on his heart condition and asked if the interview could be suspended until a later date should any problems develop. See exhibit 15.

The claim of a heart condition concerned the members of the team and the interrogation was postponed. Later that day claimant was called to the personnel office and met with Captain Moline and the acting personnel director, Patricia Marshall. Claimant was then asked why he was so scared. Claimant responded that he felt like a "sick rabbit with hound dogs after him." Claimant was then asked to get a statement from his doctor as to his capabilities to perform his duties. The first statement claimant obtained from Dr. Santiago was deemed unsatisfactory but a later statement was accepted which indicated that stress "does not, or will not, prevent him [claimant] from doing his normal duties or any extra duties that may be required of him." See exhibit 23. Claimant stated that he perceived the process of obtaining these statements as a further attempt to remove him from his position.

A month later on May 3, 1984, Braboweski called claimant to his office to complete the interrogation. Claimant stated that he again became extremely upset and, as before, asked his union steward to be present during the interview. Braboweski testified that he observed claimant walking in the prison yard on his way to the interview and claimant appeared to him to be joking and not under stress. Upon his arrival at the interrogation, claimant again expressed his desire for a copy of any tape recording of the proceeding. There apparently was some discussion about this before the tape recorder was activated. During this discussion, claimant began to experience chest and arm pain and informed Braboweski. Braboweski turned on the recorder at that time and described claimant's physicial complaints on the tape recorded "record" and then terminated the interview. Claimant then left the interview site but his chest pain continued. He immediately was examined by the prison nursing staff who informed him that his blood pressure was very high. Claimant then drove to the hospital and was placed on heart monitors. After his chest pain subsided, claimant was released from the hospital. Claimant then went home and began to watch TV. After a short time his chest pain returned and he was readmitted to the hospital. Claimant this time remained in the hospital for almost two weeks after it was determined that claimant had suffered a myocardial infarction, or a heart attack. Claimant has not returned to work at the prison or any place else since the May 3, 1984 incident.

Subsequent to the May 3, 1984 heart attack, claimant's chest pains or angina pain along with shortness of breath became an everyday occurrence following any sort of activity. Claimant's use of heart medication such as Nitroglycerin tablets also have become a regular routine in claimant's daily life. In June 1984 claimant returned to the hospital after experiencing dizziness and shortness of breath in a barber shop. Claimant was then transferred to University of Iowa Hospitals and Clinics where he underwent a second coronary bypass procedure. However, this time the procedure did not improve claimant's condition and claimant's angina pain problem has not changed since the May 3, 1984 incident. At the present time claimant continues to experience recurrent chest pains three or four times per day and arm aching at night. Chest pain is precipitated by even the slighest amount of activity.

It is found that the deterioration of claimant's heart condition after May 3, 1984 is the result of the emotional stress claimant experienced as a result of the interrogation of claimant on May 3, 1984. This finding is based upon claimant's credible testimony and that of his wife concerning the type of stress claimant was experiencing at the time and the uncontroverted opinions of Dr. Santiago and Craig Blaine Rypma, Ph.D., a

clinical psychologist. Dr. Santiago, whose opinions are the only medical opinions submitted into the record which deal with the issue of causal connection, believes that the heart attack episode and claimant's current condition is causally related to the stress claimant experienced on May 3, 1984. The doctor places great emphasis on the time factor between claimant's distress immediately before the onset of his symptoms. This is consistent with a report on stress, strain, and heart disease from the American Heart Association submitted into the evidence, exhibit 14, which states in part as follows on page 107: "Such a determination [of causal connection to some specific stress], in a large part must be made by an analysis of the circumstances surrounding the occurrence of the pathology found." There is evidence in the record that claimant may have been placed under stress at the time he returned from his hospitalization following the heart attack in May 1984. At that time claimant discovered that his wife, who also works at the prison, had been severely assulted by an inmate at the prison during his hospitalization. However, the learning of this incident, although clearly stressful, did not appear to change claimant's physical condition.

Defendant argues in its brief that Dr. Santiago is not a cardiologist and that somehow this agency cannot rely upon his opinions when defendant fails to offer contrary evidence. Admittedly, the opinions of a heart specialist on causation are important in heart attack cases but they are not a condition precedent to a finding of causal connection. Certainly, it is appropriate to rely on the uncontroverted views of a board certified internist with experience with heart problems. Dr. Santiago's active participation in claimant's treatment during the May 3, 1984 hospitalization is indicative of a person who has considerable experience with heart conditions. Dr. Rypma also assisted this deputy commissioner in the causal connection finding when the doctor described claimant's personality as one who is dependent and passive but reacts with extreme anxiety to potential disapproval, even if it is minor, by superiors. Also, Dr. Rypma's uncontroverted views that a person such as claimant are not complainers or tend to mask physical or emotional complaints, explains why claimant appeared comfortable on his way to the May 3, 1984 interrogation. Dr. Rypma also cautioned that when such a person does complain, one should pay "extremely close attention to those complaints."

Finally, it is further found that the emotional stress which precipitated claimant's heart attack on May 3, 1984 is of the type which is not normally experienced in everyday nonemployment life. The significance of this finding is explained in the conclusion of law section of this decision. The stress which caused claimant's heart attack was the result of an internal investigation being conducted by an employer. It is simply not customary in everyday life to be subjected to formal interrogation conducted by persons in a supervisory role who have considerable

impact upon future economic well being, especially if the interrogations are perceived as unfounded. Most other high pressure situations in everyday life such as employment or loan interviews are by choice of the party. Claimant had no such choice on May 3, 1984. Furthermore, the style and setting in which the interrogation was conducted appeared to be unusually formal and rather unnecessarily stressful if indeed claimant was not the real subject of the inquiry. Also, as a general proposition, such interrogations as conducted by defendant in this case have few, if any, of the protections normally afforded to persons suspected of criminal behavior in normal nonemployment life. For example, a criminal suspect can choose to remain silent during any interrogation by police officers, but an employee in an internal investigation by management officials is at the mercy of those officials and must avoid even the appearance of a refusal to testify or to cooperate if he hopes to avoid their disfavor in the future employment relationship.

4. The work injury of May 3, 1984 is a cause of severe, permanent physical impairment.

Despite his prior heart condition, claimant was not severely impaired in his ability to perform physical tasks until after the heart attack on May 3, 1984. Claimant performed his job at the prison which involved heavy physical work on occasion with little or no problem according to claimant and his wife. Although the workers' compensation law does not compensate for a person's loss of ability to perform nonwork activity, a change in the ability to perform such activity after a work injury is indicative of the extent of claimant's impairment caused by the injury. Claimant's credible testimony and that of his wife established that before the injury claimant had virtually no physical limitations and was able to fully perform all of the everyday physical activities of a normal person such as carrying groceries, gardening, mowing the lawn, raking leaves, operating household cleaning equipment, hunting, and having a normal sex life. After the work injury, claimant became severely limited in the performance of all of these activities. He cannot lift or push heavy objects, climb stairs or ladders, walk for long distances, or even wear heavy boots while walking. Virtually any type of physical labor now precipitates angina pain.

Only two physicians have rendered opinions as to the extent of claimant's permanent impairment. Dr. Santiago believes claimant to be "totally disabled." His choice of words in unfortunate as there are various meanings given to the word "disabled" other than impairment. However, it is reasonable to conclude from the doctor's use of such terminology that claimant is severely limited in his ability to perform any activity. Defendant argues that claimant was not considered by Dr. Santiago as unable to perform any work in his report to a group disability insurance carrier, exhibit 1. Aside from the fact that this

report was made in October 1984, over a year before his last evaluation of claimant's condition, the reference to claimant's ability to perform other work was placed in a section entitled "prognosis," or the doctor's expectations regarding recovery. A prior optimistic prognosis before treatment is completed does little to reduce the weight given to Dr. Santiago's rather clear opinions in his deposition of October 1985.

Claimant was also evaluated by Randolph Rough, M.D., a cardiologist, who simply states in his September 16, 1985 report that claimant is "quite disabled by angina pectoris." Defendant points out that claimant refused to submit to a treadmill test by Dr. Rough. Claimant explained at the hearing that he was told to refrain from such tests by physicians at the University of Iowa Hospitals and that he did not wish to risk another heart attack. Claimant's contention as to the recommendations from physicians at the University Hospitals is verfied in one report from the University of Iowa on June 8, 1984, exhibit 9. Given claimant's past experience with the onset of angina pain, this deputy commissioner feels that claimant was acting reasonable in his wish not to undergo a treadmill test which, in the experience of this agency, normally takes a person to his physical limits. Claimant is naturally fearful of any activity which precipitates angina pain. Furthermore, it was to be conducted by a doctor who has had relatively little experience with claimant.

On the issue of the causal relationship of claimant's current condition to the work injury, the above described opinions of Dr. Santiago need not be reiterated here. However, one important matter should be discussed. After the injury and shortly before the second bypass operation, the physicians at the University of Iowa discovered further blockages of claimant's coronary arteries and attempted to further bypass these blockages. Arguably, if the cause of claimant's disabling angina pain was these subsequent blockages, claimant's condition would not be work related as it is the experience of this agency that such blockages occur over a period of many years not from a single isolated work incident. However, the fact that the angina pain did not begin until after May 3, 1984 and that the second bypass operation failed to alleviate this pain demonstrates by the greater weight of evidence that the myocardial infarction of May 3, 1984 clearly aggravated the condition sufficiently to render the angina pain problem incorrectable. It is also apparent from the most recent reports from the University of Iowa Hospitals that claimant's current angina pain condition is permanent and further surgery is not contemplated at this time.

6. The work injury of May 3, 1984 is a cause of claimant's current permanent and total loss of earning capacity.

Despite a prior existing heart condition, claimant was able to fully perform his work at the prison and had no loss of

earning capacity before May 3, 1984. As a result of his severe functional impairment and physician imposed physical restrictions following the May 3, 1984 work injury, claimant is now unable to return to the work he was performing at the time of the work injury or any other employment activity. Claimant has shown by the preponderance of the evidence that he is incapable of even light duty work. Sedentary jobs which require claimant to do walking, climbing up stairs, or other light activity would be a problem for him. Claimant's past employment history in jobs such as electrical and refrigeration repair, all require physical activity which claimant can no longer perform.

Claimant has clearly suffered a total loss in actual earnings from employment due to his work injury. Claimant has been unemployed since May 3, 1984. As a result of his heart condition, claimant has retired early from his employment at the prison. Claimant has not worked in any capacity since the injury. Admittedly, claimant has not looked for work since the injury. However, the lack of any effort to secure suitable work elsewhere is not evidence that such is available or that claimant does not want such work. Claimant in this case is justified in not looking for work because he is simply unable to perform even normal everyday activity without significant angina pain.

Claimant is fifty-eight years of age, has a high school education, and exhibited average intelligence at the hearing. Claimant was skilled in electrical and refrigeration work. However, given his physical condition, the transferability of his past employment skills to new occupations is extremely limited.

Given his age, past employment history, and physical impairments, claimant has no potential for successful vocational rehabilitation.

Given claimant's physical limitations, claimant is only able to perform services which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist and claimant is not employable in the competitive labor market within the geographical area of his residence.

7. Claimant has incurred reasonable medical expenses for the treatment of his work injury in the amount of $42,528.11 as listed in the list of medical expenses attached to the prehearing report filed in this case.

The above expenses were found to have been incurred by claimant for necessary treatment of his work injury after comparing the list of medical expenses in the prehearing report to the medical bills submitted into the evidence. This includes the treatment at the University of Iowa Hospitals for the second coronary bypass operation. This operation was designed to relieve the angina pain precipitated by the May 3, 1984 heart attack.

CONCLUSIONS OF LAW

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

I. and II. These two issues will be discussed together. 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.

Second, 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).

With reference to defendant's contention that the injury sustained by claimant was from activity not within the scope of his normal employment, such injuries are compensable when the activity is of benefit to or advances the interest of the employer. Bushing v. Iowa Railway & Light Co., 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929). Such injuries are also compensable when the scope of employment is enlarged by virtue of a specific direction or assignment. Petersen v. Corno Mills Co., 216 Iowa 894, 899, 249 N.W. 408, 410 (1933).

With reference to work injuries involving the heart, Iowa claimants with preexisting circulatory or heart conditions are permitted, upon proper medical proof, to recover workers' compensation benefits when the employment contributes something substantial to increase the risk of injury or death. The employment contribution must take the form of an exertion greater than nonemployment life. See Sondag, 220 N.W.2d 903. The comparison, however, is not with the employee's usual exertion in his employment but with exertions of normal nonemployment life of this or any other person. Id. Furthermore, it is not limited to only physical stress. Swalwell v. William Knudson & Son, Inc., 11 Iowa Industrial Commissioner Report 385 (Appeal Decision 1982). This is the rule favored by Professor Larson in his treatise on workers' compensation. See 1A Larson, The Law of Workmen's Compensation, §38.83 at 7-172. According to Professor Larson, the causative test is a two part analysis. First, there is a medical causation test in which the medical experts must be relied upon to causally relate the alleged stress (emotional or physical) to the heart injury. Second, there is a legal causation test to determine if the stress which caused the heart attack is more than the stress of everyday nonemployment life.

In the case sub judice, the medical causation test was clearly met by the opinions of Dr. Santiago. The finding that the stress precipitated by the internal investigation was more than that experienced in everyday nonemployment life satisfied the second legal causation test. Therefore, claimant's heart injury is fully compensable under law.

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 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).

No apportionment of loss of earning capacity between claimant's preexisting heart condition and the work injury was made in the findings of fact because such an apportionment is proper only when there is some ascertainable disability which existed independently before the injury occurred. Varied Industries v. Sumner, 353 N.W.2d 407 (Iowa 1984). In this case it was found that no such disability existed before May 3, 1984.

Despite claimant's severe physical impairment, it is certainly possible to conceive of a sedentary job that claimant could perform at the present time. However, there is no presumption that merely because a worker is physically able to do certain work, such work is available. Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985). Claimant has shown that he has not returned to work with his employer as a result of his disability. Claimant has further shown that by virtue of his inability to perform even everyday life activities without significant angina pain that the availability of suitable employment is speculative at best. Therefore, claimant has established a prima facie case of total disability by producing substantial evidence that he is not employable in the competitive labor market under the so called "odd-lot" doctrine. Id.

A worker becomes an "odd-lot" employee when an injury makes the worker incapable of obtaining employment in any well known branch of the labor market. Id. An odd-lot worker can only perform services that are so limited in quality, dependability, and quantity that a resonable stable market for them does not exist. Id. In Guyton, the supreme court quoted the following language from an Arizona case, Employers Mutual Life Ins. v. Industrial Commission, 25 Ariz.App. 117, 119, 541 P.2d 580, 582 (1975):

> 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 the evidence to show the availability of suitable employment is on the employer and carrier.

This, however, does not mean that claimants such as Duffield must always seek employment as a condition precedent to falling into the odd-lot category. In the particular Arizona case cited above, the court upheld a finding of permanent total disability despite a lack of effort to seek alternative employment when the claimant's work record and his physical and socialogical limitations made such a search unnecessary. See Employers Mutual, 25 Ariz. App. 117, 119, 541 P.2d 580, 582. Only when all of the factors of industrial disability do not place claimant into the odd-lot category does a claimant assume the burden of establishing a reasonable but unsuccessful search for employment in order to establish a prima facie case that he is not employable in the competitive labor market.

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

In the case sub judice, defendant did not go forward with the evidence despite a prima facie showing by claimant and it is found that claimant does fall into the odd-lot category. Therefore, claimant shall be awarded permanent total disability benefits accordingly.

IV. Employers are obligated to furnish all reasonable medical services for treatment of a work injury under Iowa Code section 85.27.

By virtue of the findings of fact pertaining to causal connection of the medical bills submitted in this proceeding to the work injury, claimant is entitled to reimbursement as provided by law.

ORDER

IT IS THEREFORE ORDERED, as follows:

1. Defendant shall pay to claimant permanent total disability benefits during the period of his disability at the rate of two hundred fifteen and 72/100 dollars ($215.72) per week from May 3, 1984.

2. Defendant shall pay claimant the medical expenses to the provider and in the amounts listed in the attachment to the prehearing report.

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

4. Defendant shall receive credit for previous payments of benefits under a nonoccupational group insurance plan, if applicable and appropriate under Iowa Code section 85.38(2).

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

6. Defendant shall pay costs of this action pursuant to Division of Industrial Services Rule 343-4.33 (formerly Industrial Commissioner Rule 500-4.33) and including but not limited to the following costs:

Court Reporter for the depositions of Dr. Santiago and Rypma	$181.42
Sheriff's fee	7.00
Witness/Report fees for Drs. Santiago and Rypma	350.00

7. Defendant shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1 (formerly Industrial Commissioner Rule 500-3.1).

Signed and filed this 4th day of December, 1986.

Larry P Walshire

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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001814

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT WALTER GEORGE,	:	
	:	FILE NO. 694775
Claimant,	:	
	:	R E V I E W -
vs.	:	
	:	R E O P E N I N G
DUBUQUE PACKING COMPANY,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	APR 21 1987
Defendant.	:	

FILED

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening from a memorandum of agreement brought by Robert Walter George, claimant, against Dubuque Packing Company, employer and self-insured defendant, for benefits as a result of an injury that occurred on February 2, 1982. A hearing was held on November 12, 1986 at Dubuque, Iowa and the case was fully submitted at the close of the hearing. The record consists of (1) the testimony of Robert Walter George (claimant); (2) the testimony of Robert L. Luthro (private employment agency proprietor); (3) claimant's exhibits 1 through 7; and (4) defendant's exhibits A through D.

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 injury.

That the claimant sustained an injury on February 2, 1982 which arose out of and in the course of his employment with the employer.

That the injury is the cause of temporary disability during a period of recovery and that the claimant is entitled to and has been paid temporary disability benefits from February 2, 1982 through March 14, 1985.

That the injury is the cause of permanent disability and that the claimant has received permanent partial disability benefits for 10 percent of the body as a whole for 50 weeks commencing on March 15, 1985.

That the weekly rate of compensation in the event of an

additional award is $272.30 per week.

That all requested medical benefits have been or will be paid by the defendant.

That the employer has paid and the employee has received $25,488.00 in benefits from a disability retirement plan with payments beginning in October of 1982.

That the defendant has paid the claimant 210 weeks of compensation at the rate of $272.32 per week prior to the hearing for which the defendant is entitled to a credit for benefits paid.

ISSUES

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

Whether the claimant is an odd-lot employee and entitled to permanent total disability benefits under the application of that principle of law.

Whether the claimant is entitled to additional permanent partial disability benefits and more specifically whether the claimant is permanently and totally disabled.

Whether the defendant is entitled to a credit under Iowa Code section 85.38(2) for $24,488.00 in disability retirement benefits paid to the claimant.

SUMMARY OF THE EVIDENCE

Claimant was 49 years old at the time of the injury and 54 years old at the time of the hearing. He has an eighth grade education and has completed no other formal education or training either through the union, the employer or otherwise. Claimant started to work for Dubuque Packing Company in 1947 as a messenger boy when he was 15 years old. Later he loaded and unloaded trucks and boxcars on the dock. After that he became an utility truck driver driving tankers, semitrailers and flatbed trucks. The job of truck driver included loading and unloading the trucks, usually alone but occasionally with help. Claimant has worked for this employer for 35 years and this employer has been his only employer.

At the time of the injury claimant was the driver of a flatbed straight truck. This job involved pushing, pulling, bending, lifting and other forms of manual labor generally to load and unload the trucks. Claimant handled bags, barrels, boxes and bundles of salt, sugar, spices and chemicals as well as machinery and equipment. He lifted cargo that weighed from

20 or 30 pounds up to 100 pounds. Barrels that weighed 500 to 600 pounds were tipped and rolled on the rims. Normally, claimant worked alone.

On February 2, 1982, claimant was picking up barrels that weighed approximately 70 to 75 pounds from the ground and was swinging them onto the bed of a truck. As he did so his back went out and he went down on his knees. He reported this to his supervisor who sent him to first aid. When hot packs did not alleviate his condition he was sent to L. C. Faber, M.D., the company physician who admitted claimant to Finley Hospital in Dubuque for conservative treatment of bedrest, medication, physical therapy and exercises. Claimant was hospitalized from February 15, 1982 to February 18, 1982 for lumbrosacral strain. Initially, he had no leg pain but later developed left anterior thigh pain (Exhibit 2, pages 51 & 58). A myelogram showed no evidence of a herniated disc (Ex. 2, p. 45). X-rays were negative for injury (Ex. 2, p. 46). The films however showed a lumbar hyperlordosis, kyposis, minimal L-5 subluxation, a left side L-5 spondylolysis and degenerative changes through the lumbar spine (Ex. 2, pp. 42, 45 & 46). The x-rays also showed an anomaly in that claimant had six lumbar vertebrae instead of five (Ex. 2, p. 46). A left leg venogram ordered by Dr. Faber on April 1, 1982 showed a normal left leg (Ex. 2, p. 3).

Dr. Faber referred claimant to Eugene E. Herzberger, M.D., a board certified neurosurgeon in Dubuque, Iowa. He first saw claimant on April 8, 1982 for low back pain and left leg pain. An EMG performed by Sarah Werner, M.D., a medical neurologist was normal (Ex. 3, p. 29). Claimant was hospitalized at Mercy Hospital on April 9, 1982. An epidural venogram ruled out a herniated disc in the upper lumbar region (Ex. 3, p. 30; Ex. A, pp. 6 & 7). This test along with the earlier myelogram done by Dr. Faber did not rule out a herniated disc, but greatly reduced the likelihood of it (Ex. 3, p. 28; Ex. A, p. 7). Dr. Herzberger said that the anomaly of the presence of a sixth lumbar vertebrae which continued to show up on later films probably had no significance as far as this injury is concerned (Ex. A, p. 9).

X-rays of the right knee on May 13, 1982 were normal and these right knee symptoms cleared eventually (Ex. 6, p. 22). A report from a CT scan in Davenport of a spondylolysthesis was determined to be false (Ex. A, p. 10; Ex. 6, p. 25). X-ray reports of a spondylolysis, which was a congenital condition, were not involved with this injury and they did not effect it (Ex. A, p. 11; Ex. 6, p. 25). However, the enhanced fourth generation CT scan done at Davenport on May 20, 1982 did show a bulging disc at L-6, S-1 (Ex. 6, p. 51). Claimant was hospitalized at Mercy Hospital in Dubuque and the herniated disc was excised and removed on June 3, 1982 but the protrusion was actually determined to be between L-5 and L-6 at the time of surgery (Ex. A, pp. 11, 12 & 13; Ex. 6, p. 42).

After the surgery claimant continued to complain of the same low back and left leg pain. Dr. Herzberger next considered whether the claimant had an infection between the discs or a neoplasm (tumor). A bone scan was performed at Mercy Hospital on August 6, 1982 and Dr. Herzberger ruled out both an infection and a neoplasm (Ex. A, p. 14; Ex. 6, p. 76). Physical therapy was ordered in September and October of 1982 (Ex. A., pp. 15 & 16; Ex. 6, pp. 80 & 83). Repeat x-rays, another CT scan and another myelogram done on December 6, 1982 showed no change over those done in May of 1982 and these tests revealed no evidence of injury (Ex. A, p. 16; Ex. 6, p. 87). Claimant was hospitalized again on May 17, 1983. Again another CT scan and another myelogram confirmed without any question that there were no herniated discs (Ex. A, pp. 17 & 18; Ex. 6, p. 91).

On May 18, 1983, claimant was evaluated by Lynn D. Kramer, M.D., a medical neurologist at Dubuque who reported to Dr. Herzberger as follows:

> Impression: There does appear to be some mild irritation of the L5 root on the left although this is mild as mentioned. The patient seems to be extremely pain sensitive at the time of the study. I see little on physical examination to confirm an existing radiculopathy and the EMG evaluation does not demonstrate anything particularily conclusive either.
> (Ex. 3, pp. 21 & 39)

Claimant was evaluated at the University of Iowa Hospitals and Clinics, Department of Neurology on June 13, 1983 by Thoru Yamada, M.D., for back and left leg pain who concluded as follows: "In summary, the patient appears to have an L3-L4 radiculopathy. He will be treated symptomatically with Naprosyn 250 mg po BID. He will be followed by his local physician. Thank you." (Ex. 3, pp., 32, 33 & 34).

Dr. Herzberger hospitalized claimant again on October 10, 1983 through October 15, 1983 for three epidural steroid blocks and extensive physical therapy (Ex. A, pp. 20 & 21; Ex. 6, pp. 122 through 152). The epidural steroid injections provided temporary relief; however, the old painful symptoms in his back and left leg returned by November 18, 1983 (Ex. A, p. 21). In addition, claimant's disability pension which had begun in October of 1982 (Ex. A, p. 20) was threatened by changes in company policy. Claimant had gained weight, complained of sleeplessness, and exhibited tension, stress and depression. Dr. Herzberger did not think his physical symptoms would improve until his social and economic problems resolve in a satisfactory manner. Dr. Herzberger suggested pain therapy and a psychiatrist in 1984, but claimant refused to follow either one of these two recommendations (Ex. A, pp. 21 & 22). Claimant continued to have what claimant considered

to be intractible low back and left sciatic pain but he denied any psychosomatic element.

Dr. Herzberger then decided that since a year and a half had transpired since the tests in May of 1983, that it was adviseable to hospitalize the claimant again for a metrizamide myelogram and CT scan and a bone scan on October 10 & 11, 1984 at Finley Hospital (Ex. A, p. 23; Ex. 2, pp. 2, 4, 5 & 6 through 40). Again these tests did not disclose any disc herniation but on the contrary produced normal results. They did not show any change from the 1982 and 1983 myelograms and CT scans other than to confirm the degenerative changes (Ex. A, pp. 23 & 24; Ex. 2, pp. 6 & 19 through 22). Dr. Herzberger did not consider that these degenerative changes were severe (Ex. A, p. 44).

Claimant continued to be nervous, sleepless and depressed and was dissatisfied with Dr. Herzberger because the doctor only gave him an impairment rating of 10 percent of the body as a whole. Dr. Herzberger suggested that claimant try the University of Wisconsin Industrial Medicine Department for a more detailed and objective assessment. Such an assessment was not introduced into evidence. Dr. Herzberger last saw claimant on April 11, 1985 (Ex. A, p. 25).

Dr. Herzberger had no explanation for claimant's persistent pain. When he ruled out all physical and objective explanations he followed the common practice of recommending pain therapy and a psychiatrist (Ex. A, pp. 26 & 27). Dr. Herzberger testified that he saw claimant for 30 outpatient visits and that he hospitalized claimant four times under his care (Ex. A, p. 27). Claimant's case was exceptional in that he never seemed to stablize (Ex. A, p. 28). The doctor said that a normal impairment evaluation for a person who underwent disc surgery and did well would be five percent, however, since claimant did not do well, even though there was no physical explanation for it, he allowed 10 percent. Dr. Herzberger said he has performed approximately 4,000 disc surgeries in his career practice (Ex. A, pp. 28 & 29). He admitted that a portion of an impairment rating is based on pain and therefore it tends to be somewhat arbitrary or approximate (Ex. A, pp. 22 & 31). Dr. Herzberger continued to recommend pain therapy and a psychiatrist to pinpoint the stresses which were triggering or amplifying the claimant's pain (Ex. A, pp. 30 & 31).

The following dialogue between Dr. Herzberger and counsel permitted Dr. Herzberger to give his insights into the claimant's failure to recover.

> Q. Is it your opinion, Doctor, that there may exist some sort of functional overlay with regard to Mr. George's current condition?

A. We have to speak about 1985 as the latest condition. I don't like to use the word "functional overlay" because it has been used traditionally in a noncomplimentary way in relation to patients. I don't like to use it therefore.

Q. What word would you -- what term or phrase would you prefer to use?

A. I would say that I was aware of the fact that Mr. George had the personality that made him inclined to worry a lot and to be rather nervous and that his financial situation, his work situation has created tremendous stresses and that he was living with an uncertainty of his future as far as pension or benefits is concerned. He realized he may not be able to do the heavy work. He didn't have light work available to him. He was too old in order to go to look for employment at least in Dubuque in 1982, '83. We had a recession. There were no jobs even for young very healthy people and I felt all along that his type of personality and whatever stresses he may have may play a role in this and I would have been very interested to have somebody delve into that area and find out.
(Ex. A, p. 37 & 38)

Dr. Herzberger reconfirmed that claimant was not able to do heavy physical work, which excluded driving a truck. He stated that the claimant was only capable of light work that would allow him to change the positions of sitting, bending and walking and that he would be qualified to do administrative work (Ex. A, p. 36; Ex. 3, p. 13).

Claimant testified that he last saw Dr. Herzberger in March of 1985. Dr. Herzberger was his only treating physician and that he has not sought medical attention from him or any other doctor since then. Claimant denied any other workers' compensation or bodily injury claims. He had no injuries prior to or after the injury of February 2, 1982 that affected his current condition. He has not worked since February 2, 1982. He has been receiving a disability retirement pension since October of 1982 in the amount of $1,062 per month (Ex. D).

Claimant conceded that he had not sought or applied for any employment of any kind since his injury on February 2, 1982. He admitted that if he took a full time job his disability retirement pension would be discontinued. Also, if he earned more than $6,000 in any kind of employment it would probably be reduced. Claimant applied for social security disability but his claim was denied. Vocational rehabilitation training was never

offered by the employer and was never requested by the claimant. He admitted that he refused to see the psychiatrist. He declined to go to a pain clinic because he would have to go out of town and be gone from home for five to six weeks and he was not told that the employer would pay for it.

The findings of the Social Security Administration were as follows:

> The following reports were used in deciding your claim: Dr. C. Schultz's report dated 10/22/82; Dr. E. Herzberger's report dated 9/30/82; Finley Hospital's report dated 2/18/82; Mercy Hospital's reports dated 5/13/82 to 6/6/82.
>
> You said you were unable to work because of a back condition. The medical evidence shows that you do have a back condition which has required surgery. While you do have some back pain, you have the satisfactory use and movement of your back. We realize that your condition prevents you from returning to your usual job as that of a truck driver, however, you should be able to perform a job requiring less physical exertion. You should be able to lift 20 pounds maximum with frequent lifting and/or carrying of objects weighing up to 10 pounds. You should also be able to walk and stand approximately 6 hours per an 8 hour working day. You should also be able to perform a job that does not require large amounts of pushing or pulling movements.
> (Ex. 5, p. 8)

Dr. Faber, the company doctor, said on April 19, 1983, that claimant did not get better because he chose instead to receive $279.30 per week in workers' compensation and $795.25 a month in disability retirement pension which amounts to $1,912.45 per month without doing any work (Defendant's Ex. C).

Claimant testified that many of his former activities have been eliminated or restricted because he is in constant pain 100 percent of the time in his back and left leg and the pain shoots down into his left foot. Treatment did not improve his condition, but instead he got worse and he testified that it continued to get worse at the time of the hearing.

Claimant testified that he saw F. Dale Wilson, M.D., of Davenport, Iowa, for an evaluation at the request of his attorney. Dr. Wilson testified that he is a general surgeon who is 75 years of age and currently specializes in doing impairment examinations and evaluations. He performs about eight examinations per week primarily for claimants and he performs about two or

three examinations per week for claimants' counsel specifically (Ex. 1, p. 9). A very respectable curriculum vitae is shown at exhibit 1, deposition exhibit 1.

Dr. Wilson examined and evaluated the claimant one time on March 18, 1986 for approximately an hour or one and one-half hours. Claimant had high blood pressure and should have been on medication but was not (Ex. 1, p. 12). Claimant was also 60 pounds overweight. He weighed 235 pounds and his height was five feet nine inches (Ex. 1, p. 13).

Claimant complained of continuous pain in his low back that radiated into his left leg and left foot which subjectively limited his ability to walk, sit, stand, run, jump, kneel, crouch, or lift (Ex. 1, pp. 20-22). He was also fearful, depressed and woefully discouraged (Ex. 1, p. 23). Dr. Wilson performed a very careful and extensive examination of the claimant (Ex. 1, pp. 24-57). He said in a written report dated March 18, 1986 that unless some method of relieving pain is found that claimant is totally and permanently disabled (Ex. 1, Dep. Ex. 2, p. 4). In his deposition, however, Dr. Wilson testified that claimant was not actually permanently and totally disabled, but rather had a 37 percent permanent impairment (Ex. 1, p. 65). Dr. Wilson's impairment rating is as follows:

Impairment evaluation:

Discectomy		5%
A. Motion loss:	Flexion	2 3
	Lateral	1
	Rotation	3 6
		15% Motion
B. Pain		7
C. Weakness for weight lifting, standing, sitting		7
D. Nerve control, sciatica, sensory loss		3
		37% Person

(Ex. 1, Dep. Ex. 1, p. 5)

Dr. Wilson added that it was his experience that the vocational rehabilitation people did not consider a man with an eighth grade education who has previously worked as an ordinary laborer or a truck driver as a good candidate for rehabilitation (Ex. 1, p. 70).

Robert L. Luthro, who has operated a private employment service for 26 years, had reviewed the deposition of Dr. Herzberger and the deposition of Dr. Wilson as well as the restrictions suggested by each of these doctors. He testified that there are some jobs that the claimant should be able to do. Sales representative, either telephone or in person visit sales, require little training, driving or walking and earnings would be based upon commissions. Plant assembly work could fit the claimant's condition and pay $3.35 to $7.00 per hour. Cashier jobs or ticket sales would pay pay $4.00 to $5.00 per hour. There were also opportunities driving small trucks. Claimant could also drive forklifts which are operated by buttons at $3.35 to $7.00 per hour. He could also spot trucks on a dock. Telephone solicitor or collector pays $3.35 to $5.00 per hour plus commissions. Entry pay in Dubuque runs about $5.50 to $6.00 per hour. He was not asked to find a job for this claimant but he has found jobs for persons in the fifties with an eighth grade education and within the prescribed medical restrictions.

Luthro conceded that telephone jobs are drive or campaign types of work which are short term, high turnover and unstable. It is not a career type of job. Cashier and ticket sale jobs tend to be automated and require some training. A plant assembly job would require a pre-employment physical and a 50 year old applicant with a medical history would be at a disadvantage. Partially impaired persons are not preferred and there is not a surplus of jobs in the Dubuque economy. If certain highway contracts come into being in the future then there could be jobs for counters, checkers and traffic control people.

Claimant's exhibit 7 is a letter from the employer to the claimant dated March 26, 1985, concerning his workers' compensation and disability retirement pension benefits. Among other things the letter states that claimant's workers' compensation benefits will not be effected by his pension benefits.

APPLICABLE LAW AND ANALYSIS

In order to be considered an odd-lot employee the burden of proof is upon the employee to produce substantial evidence that the worker is not employable in the competitive labor market. It is normally encumbent upon the injured worker to demonstrate a reasonable effort to secure employment in the area of residence. Guyton v. Irving Jensen Co., 373 N.W.2d 101, 104, 106 (1985). In this case claimant testified that he has made no effort to find any employment of any kind. Dr. Herzberger felt that claimant could do light work and administrative work. Luthro testified that there were a number of jobs which the claimant could do if he tried. The Social Security Administration also believes that there were a number of jobs which the claimant

could perform. Claimant, therefore, has failed to make a prima facie case by proving that he is not employable in any well known branch of the labor market. Claimant did not prove that he is an odd-lot employee. Therefore, the burden of proof did not shift to the employer to demonstrate that regular employment was available to claimant. Consequently, the claimant cannot be considered to be permanently and totally disabled under the odd-lot doctrine or otherwise.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 2, 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).

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

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

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 has not proven that he is permanently and totally disabled. Iowa Code section 85.34(3); Diederich, 219 Iowa 587, 593, 258 N.W. 899, 902 (1935).

None of the physicians suggested that claimant was permanently and totally disabled, except Dr. Wilson, in his written report (Ex. 1, Dep. Ex. 2, p. 4). However, Dr. Wilson retracted this statement in his deposition testimony (Ex. 1, pp. 64 & 65). Dr. Herzberger, Dr. Wilson and Dr. Yamada all felt that claimant was unable to return to truck driving or heavy manual work. However, Dr. Herzberger thought that claimant could do light work or adminstrative work. The Social Security Administration denied the claimant disability retirement because they felt that there were a number of jobs that the claimant could do. Luthro testified that there were a number of jobs that claimant could do. Therefore, it is determined that claimant is not permanently and totally disabled.

Claimant has proven that he is permanently and partially disabled as a result of the injury of February 2, 1982. Dr. Herzberger awarded a 10 percent permanent impairment rating. He said five percent would be a normal amount of impairment but due to the claimant's continuing severe subjective symptoms of pain, he allowed a 10 percent permanent impairment rating even though he could find no professional, medical, objective, physical reasons for the claimant's complaints of pain. He did say however, that they were related to the claimant's social and economic situation and he did not look for the claimant to improve until these problems were resolved. Dr. Wilson did award a 37 percent permanent impairment rating but in this case deference must be given to Dr. Herzberger who is a neurosurgeon and the treating physician. He saw the claimant approximately 30 times and hospitalized him four times. By comparison, Dr. Wilson is a general surgeon who only saw the claimant on one occasion for a short period of time and then specifically for the reason of giving an impairment rating for litigation purposes. Also, Dr. Wilson did not examine any of the many x-rays, CT scans or myelograms. In applying the weight to be given to the evidence of these two physicians the principles considered in Rockwell Graphics System, Inc. v. Prince, 366 N.W.2d 187 (Iowa 1985) were considered and applied.

Dr. Yamada and Dr. Kramer did not make a finding of permanent impairment and neither doctor gave an impairment rating.

Claimant is age 54 and has an eighth grade education. It would be difficult for a man this age to change jobs under any

circumstances. If training is required for a new job it will be more difficult to either complete the training or to obtain employment after the training is completed. In addition, claimant indicated that his reading and writing skills are not as good as he would like them to be because he did not use them in his former employment.

Claimant has few, if any, transferable skills. He started to work for this employer at age 15 doing manual labor and driving trucks. This is the only employment which he has ever had from age 15 up to age 49 when he was injured. Therefore his experience and qualifications are somewhat limited in the context of the total labor market opportunities and claimant cannot go back to the manual labor and truck driving he formerly performed.

Claimant's motivation to work was placed in question by Dr. Faber who pointed out that claimant would actually lose money if he returned to work. Claimant himself said that a full time job would terminate his disability retirement pension and indicated that if he took part time employment and earned over $6,000 per year it would reduce his disability retirement pension. Claimant's wife is employed. His children are all adults at this time, but one child is in college. Claimant has not seen a doctor for treatment for his back or leg complaints since March of 1985. Claimant refused to see a psychiatrist even though it was recommended by his treating physician. He refused to go to a pain clinic as recommended by his treating physician. Claimant has not sought out any vocational rehabilitation and none was offered. Claimant has not looked for any work or applied for any work of any kind. Claimant has become overweight and developed hypertension for which he should be taking medication since the injury but which is not due to the injury.

A number of witnesses testified that the Dubuque economy is bad and that it is difficult for young unimpaired persons to find a job. However, all workers are victims of an economic downturn and claimant should not be entitled to additional compensation because employment opportunities are restricted due to an economic downturn. Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430, 435 (Appl. Decn. 1981). (District Court Affirmed and Supreme Court Appeal dismissed.)

An employee making a claim for industrial disability will benefit by a showing of some attempt to find work. Hild v. Natkin & Company, I Iowa Industrial Commissioner Report 144 (Appl. Decn. 1981); Beintema v. Sioux City Engineering Company, II Iowa Industrial Commissioner Report 24 (1981); Cory v. Northeastern States Portland Cement Co., Thirty-three Bienniel Report, Iowa Industrial Commissioner 104 (1976).

Consideration may be given to an employee's plan for retirement.

Swan v. Industrial Engineering Equipment Co., IV Iowa Industrial Commissioner Report 353 (1984) as well as current retirement benefits being received. McDonough v. Dubuque Packing Co., I-1, Iowa Industrial Commissioner Decisions 152 (1984). There is sufficient evidence in this case summarized above from which it could be concluded that claimant has already retired. Employers are responsible for the 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 & Rubber Co., III Iowa Industrial Commissioner Reports 279 (1982).

Claimant has testified to continuing severe pain in his back and left leg that shoots down to his left foot 100 percent of the time. There is also evidence that claimant has suffered emotionally in the way of sleeplessness, tension, stress and depression. However, several hospitalizations, numerous x-rays, four myelograms and CT scans, two venograms, a bone scan and the expertise of a competent neurosurgeon failed to produce any medical explanation for claimant's symptoms. Pain that is not substantiated by physical findings is not a substitute for impairment. Waller v. Chamberlain Mfg. Company, II Iowa Industrial Commissioner Report 417, 425 (1981).

In making this decision it is also noted that the wage base in Dubuque and at this employer is considerably less than it was at the time of the injury.

Based on the foregoing factors it is determined that claimant has sustained a 40 percent industrial disability to the body as a whole due to this injury of February 2, 1982.

Defendant has claimed a credit under Iowa Code section 85.38(2). This section of the Code 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 nonocupational 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 chapter, chapter 85A or chapter 85B, then such amounts so paid to said employee from any such group plan shall be credited to or against 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.

The only evidence in support of a credit is exhibit D (however, exhibit D merely states that claimant retired on September 31, 1982 under disability retirement and receives $1,062 per month until it reduces upon the receipt of social security benefits. There is nothing in exhibit D to establish a credit for the defendant's payment of these benefits. This code section expressly states it does not apply to benefits which would have been payable even though a compensable injury occurred. No showing has been made that claimant would not have received his disability retirement benefits if an injury compensable under workers' compensation were the cause of the disability. Moreover, claimant introduced a letter from the employer which states that the workers' compensation benefits will not affect the claimant's right to disability retirement benefits (Ex. 7). The retirement plan document itself was not introduced into evidence. The plan document itself is the best evidence of what it provides. Consequently, it is determined that defendant has failed to prove by a preponderance of the evidence that they are entitled to a credit. On the contrary, the claimant has demonstrated that the defendant is not entitled to a credit. Hebensperger v. Motorola Communications and Electronics, Inc., II Iowa Industrial Commissioner Reports 187 (1981).

FINDINGS OF FACT

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

That claimant sustained an injury to his back on February 2, 1982 in the course of his employment while swinging 70 to 75 pound barrels from the ground onto a truck.

That the injury caused a permanent partial impairment to the body as a whole.

That claimant could not return to his old job as a truck driver or perform manual labor duties.

That claimant is receiving $1,062 per month from a disability retirement pension from the employer since September 31, 1982.

That claimant has not sought any work of any kind or applied

for any jobs since the date of the injury.

That claimant has not sought any medical treatment for this injury since March of 1985.

That claimant has sustained an industrial disability of 40 percent to the body as a whole.

That defendant has introduced no evidence to support entitlement to credit under Iowa Code section 85.38(2).

CONCLUSIONS OF LAW

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

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

That claimant is not permanently, totally disabled under the odd-lot doctrine or otherwise.

That the injury of February 2, 1982 was the cause of a 40 percent permanent partial disability as industrial disability to the body as a whole.

That defendants did not sustain the burden of proof by a preponderance of the evidence that they are entitled to a credit in the amount of $24,488.00 for disability retirement pension benefits paid to the claimant.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant two hundred (200) weeks of permanent partial disability benefits at the rate of two hundred seventy-two and 30/100 dollars ($272.30) per week commencing on March 15, 1985 in the total amount of fifty-four thousand four hundred sixty and no/100 dollars ($54,460.00) less credit for fifty (50) weeks of permanent partial disability benefits previously paid.

That defendant pay accrued benefits in a lump sum.

That interest will accrue under Iowa Code section 85.30.

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

That defendant file claim activity reports as required by

this agency pursuant to Division of Industrial Services Rule 343-3.1.

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

Walter R. McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES W. GIBSON,	:	
Claimant,	:	File No. 789945
vs.	:	
	:	A R B I T R A T I O N
GRIFFIN PIPE PRODUCTS CO.,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by James W. Gibson, claimant, against Griffin Pipe Products Co. (Griffin), self-insured employer, for benefits as a result of an alleged injury of March 12, 1985. A hearing was held in Council Bluffs, Iowa, on December 10, 1986 and the case was submitted on that date.

The record consists of the testimony of claimant, Jimmy Williams, Dorcas Gibson, Larry W. Beard, and Kenneth Jezierski; and joint exhibits 1 through 29.

The parties stipulated that claimant's weekly rate of compensation is $269.92; that claimant was off work from March 13, 1985 through June 2, 1985; that permanent partial disability benefits, if awarded, would commence on June 3, 1985; and that claimant's injury of March 12, 1985 arose out of and in the course of his employment with Griffin.

ISSUES

The contested issues are:

1) Whether there is a causal relationship between claimant's injury of March 12, 1985 and his asserted disability; and

2) Nature and extent of disability; specifically, claimant argues that this is a body as a whole case while defendant argues that this is a scheduled case.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 53 years of age having been born October 11, 1933. He is right handed. Claimant did not

complete high school and has no specialized training. He entered the armed services on January 12, 1951 and was a medic in Japan for seventeen months; he also served in Korea for nine months. He can read and write, but his math ability is only fair.

Claimant testified that he started working for Griffin on July 17, 1974 and that Griffin makes round pipe out of iron or other metals. He then described the jobs he has performed at Griffin, one of which is a "material handler." He has also worked as a "second helper" and was paid a different rate for this job than he was or is paid for the material handler job. Griffin is a union shop. He stated that he was a laborer for Griffin also. Prior to coming to work for Griffin, claimant worked in a freezer and also drove a forklift. He has had a job with county government and has dug water wells in the past. He also has farmed with his father. He did not receive any specialized training for any of these jobs.

Claimant testified that Griffin has three shifts and that there is a pay differential for these shifts. Jobs are bid on at Griffin and seniority is the determining factor in the bidding process. An individual can be bid out of a job.

Claimant testified that on March 12, 1985, he was a "second helper" for that day. His rate of pay for that day was $10.03. He was injured when hot iron "bubbled out" and caused burns on his body. He received injuries to his left hand, neck, and "all down the front of me" and to his left foot. He testified that his face was not affected as he had goggles on that were badly damaged. Claimant was hospitalized as a result of his burnS. He described the doctors that treated him in the hospital and was in the hospital for ten days. He was then "on therapy" until June 3, 1985. Subsequent to June 3, 1985, claimant was an outpatient and also had pigskin put on his left foot. Claimant described two particularly bad burns to his left foot. He described the burns on his neck, left hand, one of his shoulders, and on his "belly."

Claimant testified that when he returned to work in June 1985, he was assigned as a material handler as it was suggested that he stay away from hot iron. As a material handler, he drives a forklift. Claimant was shown exhibit 29 and then testified that he was paid $9.19 per hour on June 3, 1985. He testified that on June 3, 1985, a second helper would have been paid $9.63. He testified that his left foot and left hand bothered him on June 3, 1985. He has sustained loss of strength and grip in his left hand. He currently has problems with his left foot and his stomach itches when it gets warm where he works.

Claimant testified that after June 3, 1985, he bid on a job

working "on the trough." He was on this job for only a short period of time because it caused his left hand to swell up. He reported this swelling to his employer and was then reassigned to the material handler job after he was treated for this problem by Karen Proberts, M.D. A safety committee at Griffin recommended that claimant stay away from areas where it is hot. Claimant testified that the material handler job paid less than the trough job. Claimant testified that the material handler job now pays $9.59 plus a 30 1/2 cent raise. The trough job now pays $9.92 per hour plus a 30 1/2 cent raise.

Claimant testified that he worked the day prior to the hearing held on December 10, 1986 and that he was still experiencing physical problems. His left foot hurt around the top of the arch and he cannot stand as long as he used to. Climbing stairs is a problem for him. Claimant's left hand is currently stiff and sore and is sensitive to heat. He still has loss of strength and loss of ability to lift. Currently, the claimant has problems with his torso when he gets around too much heat. The area that was burned on March 12, 1985 starts to itch at work when he gets around too much heat. Also, temperature changes affect claimant's torso area, left hand and left foot. Claimant has very little exposure to heat at Griffin while working as a material handler. Claimant currently has a problem lifting with his left hand and a problem climbing because of his left foot. Claimant attributes all of his physical problems described above to the burn incident of March 12, 1985. Claimant acknowledged that he does have diabetes and that he takes medication for this condition. He then testified that the healing of his burns has been "awfully slow."

Claimant testified that in his opinion he is too old to seek retraining or find other work. Claimant commented that if Griffin closes, he would tell the truth about his physical condition on a job application. He then stated that his right foot is a club foot.

On cross-examination, claimant acknowledged that he has "worked regularly" from June 3, 1985 through December 9, 1986. He also acknowledged that in April 1986, he was off work for a week or two because of his diabetic condition. Claimant acknowledged that he "can handle" his material handler job. Claimant was shown exhibit 21 and then acknowledged that his job classification on March 12, 1985 was ductile iron treater and that he worked in a different capacity on that particular day pursuant to the union contract provision. Claimant was then shown exhibit 29 and testified that a ductile iron treater is in job class 5. Claimant was shown exhibit 22 and then testified regarding the jobs that he bid on after returning to work in 1985. In addition to listing the jobs that claimant did, in fact, bid on, this exhibit sets out the jobs claimant could have bid on. Claimant testified that his current job class is class

4. On March 12, 1985, as indicated above, claimant's job class was class 5. Claimant acknowledged that he could be a pipe inspector on the second or third shift and that this job pays more money than his current job. Claimant specifically acknowledged that he is physically able to do the pipe inspector job but that he bid out of this job.

Claimant testified that on September 9, 1985, he bid on a cast machinist job, but then testified that he bid on this job even though he was not physically able to do the job. Subsequently, claimant attempted to do the trough job but a "joint decision" was made that he should not do this job. On February 26, 1986, claimant bid on the job of Mag Tr Prep which he acknowledged as a "hot job."

Claimant testified on redirect that the second shift at Griffin starts in the afternoon and ends at midnight. He also testified that the first bid after he returned to work in 1985 was the bid of September 9, 1985 involving the cast machinist position. He then testified that in September 1985 he did not know that his hand would swell up if he worked in such a position. He then testified that he worked in the trough job for a short period of time in September 1985. On November 27, 1985, claimant bid on the trough job again and then changed his mind. He testified that he bid on the cast machinist job on January 7, 1986 even though he did not think he could handle the job; he would have to lift cores weighing 40 to 50 pounds and he would have to do this with both hands. He was of the opinion that he could not handle this job because of his burn injuries of March 12, 1985.

On recross-examination, claimant testified that he was a ductile iron treater on March 11, 1985. He then testified that on March 12, 1985, he was a ductile iron treater initially but then stepped into the second helper position on that date with a little extra pay. He acknowledged that on March 13, 1985, he would have been a ductile iron treater once again in all likelihood.

Jimmy Williams testified that he is a trough operator at Griffin. He knows claimant and testified that claimant's left hand swelled up in September 1985 when he was around heat at work. He testified that claimant was counseled to "get out of the hot areas" such as second helper or ductile iron worker. Williams testified that Griffin is good at getting people back to work. On cross-examination, he acknowledged that he is neither a foreman nor a shift supervisor.

Dorcas Gibson testified that she is claimant's spouse and that swelling resulted when claimant worked the trough job in September 1985. After June 1985, when claimant returned to work, he complained about stiffness in his left hand, that his

left foot hurt, that his torso bothered him, and that heat bothered him. She testified that claimant cannot now stand as long as he was able to prior to March 12, 1985. Claimant also has trouble walking. She then explained the family problems that would result if claimant worked the second or third shift at Griffin.

Larry W. Beard testified that he has known claimant since 1974. Beard has been employed by Griffin at Council Bluffs since October 1978. Beard did not witness the incident of March 12, 1985 but was called to the scene and observed claimant's injuries. Beard has observed that burn victims are sensitive to heat for as long as a year after their return to work. He then testified that, based on his observations, "most will come out of it." He testified that Griffin "puts people away from the heat" when they come back. He characterized claimant as a "good regular steady employee" after his return to work in 1985. He also testified that claimant was sensitive to heat in his hands prior to March 12, 1985. On cross-examination, Beard acknowledged that as a general rule Griffin employees do not have the heat sensitivity problems experienced by claimant prior to March 12, 1985.

Kenneth Jezierski testified that he is the plant personnel manager for Griffin at Council Bluffs and has worked in this capacity since October 1985. He has workers' compensation responsibilities and knows claimant. He was shown exhibit 21 and testified that claimant's job classification on March 12, 1985 was that of ductile iron treater with a rate of pay on that date of $9.30 per hour. On June 3, 1985, claimant returned to the first shift as a material handler with a rate of pay of $9.19 per hour. This witness then testified that exhibit 29 is a part of the local union agreement and sets the wage rate for various job classifications. A ductile iron treater is a class 5 job and material handler is a class 4. Since June 1985, claimant has remained in the position of material handler with a pay increase to $9.59 per hour effective November 18, 1985. He is now paid $9.59 per hour plus the 30 1/2 cent pay raise. A ductile iron treater is now paid ten dollars and one-half cent per hour. Currently, the difference in rate of pay between a material handler and a ductile iron treater is eleven cents per hour.

Jezierski testified that permanent job changes are made through the bidding system, and there is a trial period of up to five days on a particular job. Jezierski testified that he is the author of exhibit 22. Exhibit 22 lists job classes equal to or higher than claimant's job classification of 4.

On cross-examination, Jezierski acknowledged that an "upgrade" could be for one-half hour or a day with a maximum period of fourteen days. At the end of fourteen days, an individual would

have to bid on the job as a conditional job.

Exhibit 2 is claimant's deposition taken on June 12, 1986. On page 10, claimant testified that seniority was the reason for his temporary assignment on March 12, 1985 as a second helper. On page 12, claimant testified that he had no protective clothing on March 12, 1985 except goggles. On page 15, he stated that he got burned where the right arm joins the body.

Exhibit 3 is the deposition of Joel N. Bleicher, M.D., taken on September 18, 1986. He has been a plastic surgeon since 1980; he specializes in burns. He first saw claimant on June 13, 1985. His diagnosis is thermal burn injury caused by the incident of March 12, 1985. Claimant has had "occupational therapy" to improve the range of motion of his left hand. Claimant was seen again on June 10, 1986 with complaints of hyperesthesia of the skin of the abdomen and itching of the abdomen and left foot. On page 13, Dr. Bleicher testified: "He may have some residual stiffness and swelling in his hand forever. By the same token, he may gradually improve to the point where he has no extensive persistence of his problems." In June 1986, claimant still had swelling and he complained of stiffness in his left hand. On page 15, Dr. Bleicher testified that the loss of motion in claimant's left hand is probably permanent. Dr. Bleicher also testified that the impairment to claimant's left foot is probably permanent, but claimant's torso problem is probably not permanent. Dr. Bleicher gave claimant a ten percent whole body rating. The following exchange appears on page 20:

BY MR. SCIORTINO:

Q. What kind of complications in the future can arise from burn injuries like those that Mr. Gibson has?

A. I don't really foresee any future complications from this particular burn injury.

On page 21, Dr. Bleicher stated that no future treatment, surgery or medication was probably needed by claimant. On pages 24-25, Dr. Bleicher stated: "The hypersensitivity which the other burned areas have may make it more difficult for him to work, yes." (Emphasis added.) On page 26, he acknowledged the reduction of his whole body rating from ten to five percent.

Exhibit 6, page 23, shows the areas of claimant's body that were burned on March 12, 1985.

Exhibit 10, page 1, dated June 15, 1985, is authored by Dr. Proberts and reads in part: "Mr. James Gibson was first seen at the emergency room at Mercy Hospital on March 13, 1985 with

burns to the neck, right shoulder, abdomen, scrotum, legs and left foot." On page 2, Dr. Proberts stated: "His prognosis at this time is excellent." On page 2, Dr. Proberts stated:

> At this time I would be hesitant in recommending a percentage rating for permanent partial disability because he should have complete recovery of function and probably also sensation in all areas. However, I would recommend a referral to Dr. Joel Bleicher for more specific rating as to partial disability secondary to burn scarring.

Exhibit 11, dated July 1, 1985, is authored by Ronald K. Miller, M.D., and contains a three percent rating for claimant's left foot and a three percent rating for claimant's affected hand. Exhibit 13 also contains these three percent ratings.

Exhibit 14, dated in March 1986, is authored by Dr. Proberts and reads in part:

> I did examine James W. Gibson again on February 20, 1986. At that time Mr. Gibson, on examination, has some reddened areas on his left hand which are left over scars from the previous burn. However, there is good softness of the tissue, no contracture of the scars and no limitation of motion, sensation or function of the hand.
>
> ....
>
> In reviewing his examination at this time, I do feel like there is very little evidence of permanent disability in the hand, if any. I do feel that he has some limitation of the fourth and fifth toes of the left foot, possibly secondary to the injury from the burn, but again this should not cause significant permanent disability.

Exhibit 15, dated April 9, 1986, is authored by Dr. Proberts and therein she agrees with Dr. Miller's two three percent ratings, and states the basis for this opinion.

APPLICABLE LAW AND ANALYSIS

The claimant in this case bears the burden of showing that "there resulted an ailment extending beyond the scheduled loss...." Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 1262, 130 N.W.2d 667, 669 (1964). This is a question of fact determined from the record. Id. at 1257, 130 N.W.2d at 669. The Iowa Supreme Court held that such a showing had been made in Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). There the court stated that:

> [W]hile the trauma, the injury, was limited to the right foot, the Commissioner found claimant, as a result thereof, was affected with an ailment that extended beyond the scheduled loss of a foot, or the use thereof. The schedule is not applicable.

Id. at 292, 110 N.W.2d at 664.

The Iowa court reached a similar conclusion in Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). In Dailey, the claimant sustained an injury to his right femur. This injury caused a shortening of the leg, which in turn resulted in a tilting of the pelvis and curvature of the spine. Id. at 763, 10 N.W.2d at 571. On the basis of this evidence, the court held that claimant's initial scheduled injury resulted in a nonscheduled permanent ailment, and that he was entitled to nonscheduled permanent disability benefits. Id. at 765, 10 N.W.2d at 573-74.

The Iowa Court of Appeals stated in Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890, 893 (Iowa App. 1983):

> The statute which confers the right to collect disability compensation can also limit the amount of compensation payable for specifically enumerated disabilities. Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W.2d 660, 662 (1961). Thus, Iowa Code § 85.34(1) provides a statutory compensation schedule for the loss of specifically enumerated members. "The very purpose of the schedule is to make certain the amount of compensation in the case of specific injuries and to avoid controversies." Dailey v. Pooley Lumber Co., 233 Iowa 758, 760, 10 N.W.2d 569, 571 (1943).
>
> If a claimant's impairment is limited to a scheduled member "we are not concerned with the question of the extent of disability. The compensation in that event is definitely fixed according to the loss of use of the particular member." Dailey, 10 N.W.2d at 571. See also Graves v. Eagle Iron Works, 331 N.W.2d 116, 118-119 (Iowa 1983). "[W]here the result of an injury causes the loss of a foot, or eye, etc., such loss, together with its ensuing natural results upon the body, is declared to be a permanent partial disability and entitled only to the prescribed compensation." Barton, 253 Iowa at 290, 110 N.W.2d at 663. (Emphasis added.)

The claimant in this case clearly failed to establish a whole body injury. Assuming for purposes of discussion that claimant could not do the trough job because of the swelling of

his left hand, this does not establish a whole body injury because only a scheduled member is involved. The burns to claimant's shoulder and torso have not affected claimant's earning capacity, in my opinion, given the evidence of record. It is my judgment that claimant could now do the ductile iron treater job or the second helper job, or even the trough job, with the only possible physical problem being that of swelling of the left hand.

It will be found that claimant sustained permanent partial impairment to both his left foot and left hand. The three percent ratings of record are persuasive. Both Drs. Miller and Proberts have given these ratings. Iowa Code section 85.34(2)(s) therefore applies. See Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983). Using the impairment tables of record (exhibits 24-28), it is determined that claimant is entiled to fifteen weeks of permanent partial disability commencing on June 3, 1985. He is also entitled to healing period benefits from March 13, 1985 through June 2, 1985. The fifteen weeks of permanency benefits is computed by converting the three percent ratings of record into whole body ratings and then using the "combined values chart" to arrive at a three percent combined rating. Three percent of five hundred weeks is fifteen weeks.

It is also concluded that claimant established a causal connection between the impairment to his left foot and left hand. Dr. Bleicher's testimony in this regard is persuasive. Defendant's argument to the contrary is frivolous.

FINDINGS OF FACT

1. Claimant started working for Griffin on July 17, 1974.

2. On March 12, 1985, claimant's job classification was ductile iron treater, but he was working as a second helper on that particular day as a temporary assignment.

3. On March 12, 1985, claimant was burned by hot iron on his neck, right shoulder, abdomen, scrotum, legs, left foot, and left hand.

4. Claimant's injury of March 12, 1985 resulted in permanent impairment to claimant's left foot and left hand, but not to his abdomen, neck or right shoulder.

5. The impairment to claimant's left hand is three percent.

6. The impairment to claimant's left foot is three percent.

7. Claimant's stipulated weekly rate of compensation is $269.92.

CONCLUSIONS OF LAW

1. Claimant established by a preponderance of the evidence that there is a causal connection between his work-related injury of March 12, 1985 and some permanent partial impairment to his left hand and left foot.

2. Claimant established entitlement to healing period benefits from March 13, 1985 through June 2, 1985 and then fifteen (15) weeks of permanent partial disability benefits commencing on June 3, 1985, pursuant to Iowa Code section 85.34(2)(s) as interpreted in Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

ORDER

IT IS THEREFORE ORDERED:

That defendant pay the weekly benefits described above at a rate of two hundred sixty-nine and 92/100 dollars ($269.92).

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

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

That defendant pay the costs of this action, pursuant to Division of Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33.

That defendant 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 12th day of January, 1987.

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRANCIS R. GILE, SR.,	:	
	:	
Claimant,	:	File Nos. 816148
	:	816149
vs.	:	
	:	
BARTON SOLVENTS, INC.,	:	A R B I T R A T I O N
	:	
Employer,	:	D E C I S I O N
	:	
and	:	FILED
	:	
THE TRAVELERS,	:	AUG 25 1987
	:	
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Francis R. Gile, Sr., claimant, against Barton Solvents, Inc., employer, and The Travelers, insurance carrier, defendants, for benefits as a result of an alleged injury which occurred on April 12, 1984 and was later aggravated again on August 22, 1985. A hearing was held on January 7, 1987 in Davenport, Iowa, and the case was fully submitted at the close of the hearing. The record consists of the testimony of Francis R. Gile, Sr. (claimant), Jerry Collins (branch manager), claimant's exhibits 1 through 9, and defendants' exhibits A, B and C. Both attorneys submitted excellent briefs.

STIPULATIONS

The parties stipulated to the following matters:

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

2. That permanent disability is not an issue in this case.

3. That the extent of entitlement to weekly compensation for temporary total disability benefits, if defendants are liable for the injury, is from April 12, 1984 through June 3, 1984.

4. That the rate of weekly compensation, in the event of an

award, is $217.43.

5. That the medical expenses are fair and reasonable, were for reasonable and necessary treatment, and were caused by claimant's hernia problems.

6. That defendants are entitled to a credit under Iowa Code section 85.38(2) for income disability benefits paid prior to hearing under an employee nonoccupational group plan, but that the amount of the credit is in dispute.

7. That there is no claim for credits for workers' compensation benefits previously paid prior to the hearing.

8. That there are no bifurcated claims.

ISSUES

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

1. Whether claimant sustained an injury on April 12, 1984 which was aggravated again on August 22, 1985 which arose out of and in the course of his employment with employer.

2. Whether the alleged injury was the cause of any disability during a period of recovery from April 12, 1984 through June 3, 1984.

3. Whether claimant is entitled to temporary total disability benefits during a period of recovery from April 12, 1984 through June 3, 1984.

4. Whether claimant is entitled to medical expenses for the alleged injury of April 12, 1984 and the aggravation of the alleged injury on August 22, 1985.

5. Whether claimant gave notice or whether employer had actual notice as required by Iowa Code section 85.23.

6. Whether the amount of the credit under Iowa Code section 85.38(2) is the gross amount paid by the insurance company in the amount of $1,111.89, or whether the credit is the net amount received by claimant of $1,037.39 after the withholding of $74.50 for social security tax.

SUMMARY OF THE EVIDENCE

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

Claimant is 52 years old, married, and has no dependent

children. He started to work for employer in February 1977. He was a warehouseman for six months and then engaged in route sales for two and one-half years. Since then he has been a dock foreman. He is a working foreman. Approximately 50 percent of his work is supervisory and 50 percent of his work is physical labor as a warehouseman. Employer's plant is located in Bettendorf, but employer distributes chemicals such as solvents, lacquer thinner and alcohol in a five state area. As a warehouseman, claimant's job involved processing 55 gallon drums and loading and unloading trucks. An empty drum weighs about 45 pounds. Sometimes, they weigh up to 100 pounds if they are not completely empty. Claimant testified that he lifted these drums on a number of occasions. The weight of a full drum depends upon the contents and can vary from approximately 350 pounds to 750 pounds. Claimant testified that sometimes a full drum would be laying on its side and that he would manually lift it up on its rim to a standing position.

Processing an empty drum entails taking it off the truck, sucking out the remaining contents by vacuum, scraping, cleaning and testing the drum, repainting it, stenciling it, setting it out to dry, refilling it, and sending it out on a truck again. There are mechanical devices that set the drums on pallets with the employee maneuvering the weight of the load. However, when loading a pickup or a panel truck, you have to load it by hand. The customary method is to balance the drum with the foot, pull the top of the drum toward you, tilt the drum on the edge of the rim, and then roll it into the truck by hand. He testified that he has frequently handled 750 pound drums in this manner. However, now it sometimes gives him pain in the groin.

Jerry Collins, branch manager, confirmed claimant's description of his work. Collins stated that he performed the same duties when he began work for the employer twenty-one years ago as a drum cleaner. Collins did not, however, consider it heavy work. He stated that it is all balance. A woman could do it.

Claimant testified that he first noticed sharp pain in the abdominal area in approximately November of 1983, but he did not know what it was at that time other than a sharp pain in the groin. Then, when claimant saw Dr. Fesenmeyer (full name unknown), a company doctor, on March 20, 1984 for a physical examination in order to renew his ICC license, Dr. Fesenmeyer informed claimant that he had a hernia and that he should see his own personal physician about it. There is no report in evidence from Dr. Fesenmeyer. Claimant testified that Dr. Fesenmeyer always checks for hernias on his company physical examination.

Claimant followed this advice and contacted his personal physician, Mark Hermanson, M.D., on that same day, March 20, 1984. Dr. Hermanson's notes for March 20, 1984 record the

following:

> Pt. comes in after being seen by Dr. Fesenmeyer for a company physical who informed him that he had hernias on both sides, right greater than left. His works [sic] involves a lot of heavy lifting, states there is no such thing as light duty in his job or in that dept. He is a working foreman. (Ex. B, p. 2.)

Dr. Hermanson diagnosed bilateral inguinal hernia. He then commented as follows:

> Suggested that since he is having no symptoms that he may continue to work if he so desires. Suggested that he should inform his supervisor that he has hernias and that the doctor felt that it would be wise to avoid heavy lifting to delay or prevent symptoms from arising. If he becomes symptomatic will refer to surgeon for repair. (Ex. B, p. 2.)

Claimant testified at the hearing that Dr. Hermanson told him on March 20, 1984 that his hernias were probably caused by work when he told the doctor about what he did at work. Claimant testified that this was when he first learned that he had hernias and that they were caused by his work.

Claimant testified and Dr. Hermanson's notes reflect that claimant returned to Dr. Hermanson on April 12, 1984 for increasing pain with his inguinal hernias. The hernias were still present and painful to palpation. Dr. Hermanson referred claimant to Daniel P. Congreve, M.D., for an appointment on April 17, 1984 in order to schedule surgery (Ex. B, p. 2).

Claimant returned to Dr. Hermanson the following day on April 13, 1984 with increasing pain in the right inguinal region secondary to hernia. Dr. Hermanson ordered bedrest and no lifting at work until after claimant was evaluated and treated by Dr. Congreve on April 17, 1984. On April 20, 1984, Dr. Hermanson recorded that claimant was scheduled for hernia surgery by Dr. Congreve on April 24, 1984 (Ex. B., p. 2). Claimant testified at the hearing that he told either Larry Wedemeyer or Jerry Collins, whoever was his supervisor, about the hernias the same day he learned it from Dr. Hermanson on March 20, 1984. Claimant also testified that he notified Larry Wedemeyer that his hernias were caused by work in April 1984. Exhibit 6 is a weekly indemnity disability notice bearing the letterhead of The Travelers Group Health Claim in the upper right-hand corner. This form shows that it was signed by claimant on April 19, 1984 at the bottom. It is marked "yes" in answer to the question, "is condition work related?" On this form claimant stated that the condition occurred between October

and April 1984 at Barton Solvents due to heavy lifting. Claimant further described the condition which kept him from working as his dock man duties which required continual moving of empty 45 pound drums and moving full drums of liquid weighing between 400 and 700 pounds.

Collins testified that he first learned that a work-related claim was being made when claimant made out this report on April 19, 1984.

Dr. Congreve repaired both hernias on April 24, 1984 (Ex. 2).

Claimant admitted that company rules require a speed memo to report all injuries and that he did not make out a speed memo. However, he testified that he told supervisory personnel in person and that he made out a written report to David Akers on the insurance company's form from The Travelers when he completed the weekly indemnity notice dated April 19, 1984 (Cl. Ex. 6). Claimant testified that he informed employer that he wanted to make a workers' compensation claim at the same time he completed exhibit 6, but he was told he could not apply for workers' compensation for the reason that there was no proof that it was job related.

Exhibit 7 is a memo from Jerry Collins to claimant's personnel file with a copy to Travelers dated May 14, 1984. It reads as follows:

> Per our conversation with Francis R. Gile, Sr. today, we have come to the agreement that he is not sure if his hernia is or isn't work related. All he is sure of is that he had a physical last fall which didn't indicate any problem. (Ex. 7).

Claimant was off work from April 13, 1984, when Dr. Hermanson took him off work until June 4, 1984, when Dr. Congreve returned him to work after the surgery.

Claimant testified that after he returned to work he had a flareup of his hernia condition in August of 1985. He was moving drums and the cart tipped over. He went down with it and felt a sharp pain. He reported this to Larry Wedemeyer and was sent to see Andrew Edwards, M.D. Dr. Edwards reported that he saw claimant on December 6, 1985 at which time claimant com-plained of left inguinal pain on lifting. The doctor found a left inguinal area tender to palpation and that there was minimal bulging on valsalva maneuver. He diagnosed probable recurrent hernia and instructed claimant to go back to work, but he was to wear a truss for two to three weeks. If he had further difficulty, Dr. Edwards told him to see Dr. Congreve.

Exhibit 8 is a memo dated December 11, 1985 dictated by

Collins on the subject "hernia injury on Frank Gile, Sr." That memo reads as follows:

> Frank informed Jeff Kraft on approximately 8-22-85, that he hurt himself wheeling drums. Possible rupture has been bothering him on and off since then. He went to Dr. Andy Edwards and he recommended Frank wear a truss for one month to the middle of January then reschedule another appointment to check. If this does not work he will need further surgery to correct, putting mesh inside to support tissue. Frank would not be allowed to lift!!!
>
> While wearing truss, Frank has been ok'd for full time work, per conversation with Dr. Edwards on the phone 12-6-85. (Ex. 8.)

Claimant filed this petition for workers' compensation benefits on April 12, 1986 (original notice and petition). He testified that the reason he filed the petition was because the employer told him to pay Dr. Edwards himself. Claimant also testified he talked to Travelers' claim representatives on the telephone earlier and that they denied his workers' compensation claim for the hernia surgery on the telephone.

Exhibit 9 is a list of claimant's medical expenses which show that claimant personally paid $508.20 out-of-pocket for his medical expenses.

Exhibit C is an explanation of benefits from Travelers showing that the total income disability available under employers' nonoccupational group plan for income disability was $1,111.89, but they subtracted $74.50 for social security withholding tax, and that the total benefit paid to cliamant was $1,037.39.

On April 1, 1986, Dr. Hermanson stated:

> It is my opinion that in view of the type of work, which required a lot of heavy lifting, that there is a very reasonable chance that his herniae resulted from his work. (Ex. 4.)

On May 23, 1986, Dr. Hermanson altered those comments to read as follows:

> It is my opinion that in view of the type of work that the patient is frequently required to do, which involves heavy lifting and rolling of heavy barrels, that within a reasonable degree of medical probability the herniae were caused by his work. (Ex. 1.)

Dr. Congreve gave the following opinion to defendants' counsel on April 21, 1986:

> I first saw Mr. Gile on April 17, 1984 when he stated to me that he was found to have bilateral inguinal hernias by his "company doctor". He was referred to me by Dr. Hermanson for consideration of hernia repair. This was performed on April 24, 1984. Please find enclosed his history and physical, operative report, laboratory data and his path report. Of note, Mr. Gile did not relate a specific incident when these hernias were first noted, but did complain of increasing pressure and discomfort while at work. (Ex. 2.)

Dr. Congreve gave a later report on July 7, 1986 in which he stated he saw claimant on June 2, 1986 complaining of pain in both groins. However, he did not have recurrent inguinal herniation on either side at that time. He was given medication for this irritation and failed to keep his return appointment on July 1, 1986 (Ex. A).

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 April 12, 1984 and August 22, 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 Iowa Supreme Court has defined injury very broadly as any impairment to health which comes about not through the natural building up or tearing down of a human body. Almquist v. Shenandoah, Inc., 218 Iowa 724, 254 N.W. 35 (1934). Although many injuries are traumatic in nature, no accident is required. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1116, 125 N.W.2d 251, 254 (1963). Neither does there have to be a special incident or unusual occurrence. Ford v. Goode, 240 Iowa 1219, 1222, 38 N.W.2d 158, 159 (1949). A personal injury may develop gradually over an extended period of time. Black v. Creston Auto Company, 255 Iowa 671, 281 N.W. 189 (1938).

It has been held in Iowa that the cumulative injury concept may apply to factually appropriate cases. McKeever Custom Cabinets, Inc. v. Smith, 371 N.W.2d 368 (1985). In that case,

the Iowa Supreme Court made a distinction between the discovery rule and the cumulative injury rule at pages 372 and 373:

> These two rules are closely related, but they are not the same. The discovery rule may apply where a compensable injury occurs at one time but the employee, acting as a reasonable person, does not recognize its "nature, seriousness and probable compensable character" until later. Orr v. Lewis Central School District, 298 N.W.2d 256, 257 (Iowa 1980). The cumulative injury rule, however, treated by Professor Larson under the heading "gradual injury", may apply when the disability develops over a period of time; then the compensable injury itself is held to occur at the later time. 1B. A. Larson, Workmen's Compensation § 39.10 (1985).

The claimant has the burden of proving by a preponderance of the evidence that the injuries of April 12, 1984 and August 22, 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).

Claimant did sustain the burden of proof by a preponderance of the evidence that he sustained an injury which arose out of and in the course of his employment on two different dates as alleged. Claimant testified that his work as a warehouseman was quite strenuous at times. He handled empty drums weighing 45 pounds. If they were not fully empty, they could weigh as much as 100 pounds. Full drums weigh between 350 and 750 pounds. Sometimes it was necessary to stand a full drum upright that was laying on its side. Other times these drums were maneuvered while using mechanical devices. Other times full drums would be

tilted up on their rims and rolled in order to move them from place to place. Claimant testified that sometimes he would lift a freshly painted, empty drum off the ground and set it on top of another drum in order to dry. This testimony by claimant describing the sometimes strenuous nature of his job was not controverted. On the contrary, it was corroborated by Collins except that Collins did not personally classify it as heavy work.

Claimant described his work to Dr. Hermanson on March 20, 1984. Claimant said that Dr. Hermanson told him that his hernias were work related. This statement of course is hearsay, but Dr. Hermanson's notes for March 20, 1984 suggest that claimant should inform his supervisor that he has hernias and that it would be wise to avoid heavy lifting to delay or prevent symptoms from arising (Ex. B, p. 2). Dr. Hermanson stated on May 23, 1986 that the hernias were caused by claimant's work (Ex. 1).

Dr. Congreve does not give a definitive statement on causal connection. He said, however, that even though claimant did not relate a specific incident when these hernias were first noticed, he nevertheless did complain of increasing pressure and discomfort at work (Ex. 2).

Dr. Edwards did not give a specific opinion on causal connection (Ex. 3).

In brief then, claimant testified that he had some groin pain in November 1983, but he did not know what it was. On March 20, 1984, Dr. Fesenmeyer, during the course of a company physical examination, diagnosed right and left hernia even though claimant did not complain of any symptoms at that time. Claimant followed Dr. Fesenmeyer's instructions and saw his own personal physician, Dr. Hermanson, on this same day. On April 12, 1984, claimant did become symptomatic and saw Dr. Hermanson again. On April 13, 1984, Dr. Hermanson took claimant off work due to increasing hernia pain. On April 24, 1984, Dr. Congreve repaired a hernia. Claimant returned to work on June 4, 1984.

In summary, Dr. Hermanson says that claimant's hernias are work-related injuries. Dr. Congreve implies that they could be work-related injuries because of increasing pressure and discomfort while at work. Dr. Congreve did not say that the hernias were not work-related injuries. Dr. Edwards gives no opinion on this point.

Claimant's testimony indicated that he believes that his hernias were work-related injuries.

Collins did not testify that the hernias were not work-related injuries. Defendants did not offer any other cause for these hernias. No other cause other than the job is suggested

by any of the testimony, lay or expert. Consequently, it must be concluded and it is now determined that claimant did sustain the burden of proof by a preponderance of the evidence (1) that he did sustain an injury that arose out of and in the course of employment with employer; (2) that the injury caused claimant to be temporarily and totally disabled from April 12, 1984 through June 3, 1984; (3) that claimant is entitled to temporary total disability benefits from April 12, 1984 through June 3, 1984; and (4) that claimant is entitled to $508.22 of unpaid medical expenses for these injuries.

Claimant has advanced the cumulative injury theory as enunciated in the McKeever case. It is now determined that this is not a factually appropriate situation for the application of this rule. Claimant did not describe gradually increasing symptoms or several repeated traumas over time. Essentially, claimant testified that he experienced some pain in the groin in November 1983. Then, Dr. Fesenmeyer diagnosed bilateral inguinal hernias on March 20, 1984, but they wre not symptomatic at that time and claimant was not aware that he had them. On April 12, 1984, the hernias became symptomatic. Therefore, it is not possible to determine whether the condition occurred from numerous incidents over a period of time or simply from one or two events. McKeever at 374. It is equally as possible that the condition is a result of one or two events as it is from numerous incidents over a period of time. Consequently, it cannot be determined to be a cumulative injury under the evidence present in this case.

The discovery rule does apply to this case. Claimant testified that he first learned that he had hernias and that they were work related on March 20, 1984 from Dr. Hermanson. Therefore, it is determined that claimant recognized the nature, seriousness, and probable compensible character of this condition on March 20, 1984. Orr v. Lewis Central School District, 298 N.W.2d 256, 257 (Iowa 1980). Claimant testified that he told Larry Wedemeyer or Jerry Collins that day.

Collins, employer's branch manager, testified that he learned of the condition on April 19, 1984 when claimant filed a claim for income disability based on a work-related injury. Employer, then, both received notice from claimant and had actual knowledge of the injury on April 19, 1984 which is within ninety days of the time it was discovered on March 20, 1984 as required by Iowa Code section 85.23. Failure to give notice is an affirmative defense. DeLong v. Iowa State Highway Commissioner, 229 Iowa 700, 295 N.W. 91 (1940), Reddish v. Grand Union Tea Company, 230 Iowa 108, 295 N.W. 800 (1941). Defendants, therefore, failed to sustain the burden of proof by a preponderance of the evidence that claimant did not give proper notice as provided by Iowa Code section 85.23. Iowa Code section 85.38(2) provides:

> Credit for benefits under group plans. In the event the disabled employee shall receive 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 chapter, chapter 85A or chapter 85B, then such amounts so paid to said employee from any such group plan shall be credited to or against any compensation payments, including medical, surgical or hospital, made or to be made under this chapter, chapter 85A or chapter 85B.

A literal interpretation of this section would focus on the words "in the event the disabled employee shall receive any benefits" and the words "amounts so paid to said employee." In this case, the employee received and was paid only $1,037.39. It would appear that the purpose of this code section is to put the parties in the same position they would be in if the claim had been administered correctly in the first place. If this claim had been handled correctly in the first place, claimant would have received workers' compensation benefits instead of nonoccupational group plan income disability benefits. Workers' compensation benefits are not subject to social security withholding. It was the choice or determination of the employer or its representatives to pay nonoccupational group plan income disability benefits. Therefore, if employer or its representatives erroneously paid social security withholding tax to the federal government which was not, in fact, due to the social security administration, then it is incumbent upon employer or its representatives to file an amended return with the social security administration and recoup this $74.50 which was erroneously paid. It is, therefore, determined that defendants are entitled to a credit of $1,037.39, the net amount received by and paid to claimant.

According to (1) the testimony of claimant at the hearing, (2) exhibit 8, the memo from Jerry Collins, and (3) exhibit 3, the report of Dr. Edwards, there is no dispute that claimant reported that he reinjured his hernia on August 22, 1985 at work and saw Dr. Edwards, who diagnosed left inguinal tenderness and bulging with the valsalva maneuver. Therefore, it is determined that claimant did sustain a second injury on August 22, 1985 that arose out of and in the course of his employment with employer.

FINDINGS OF FACT

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

That claimant sustained an injury on March 20, 1984 when he was told by Dr. Hermanson that his bilateral inguinal hernias were related to his work as a working dock foreman for employer.

That claimant first learned of the nature, seriousness and probable compensable character of the injury on March 20, 1984 when he was so informed by Dr. Hermanson.

That the injury caused claimant to be off work from April 12, 1984 through June 3, 1984 for surgery and recuperation.

That claimant was off work from April 12, 1984 through June 3, 1984 due to this injury as stipulated.

That claimant incurred $508.22 in medical bills that were not paid by employer.

That claimant notified employer in writing of his injury on April 19, 1984.

That claimant received and was paid $1,037.39 in nonoccupational employee group plan income disability payments.

That claimant sustained an injury on August 22, 1984 when he had a recurrence of left inguinal hernia pain.

That claimant lost no time from work for the second injury.

That claimant is not permanently disabled as stipulated by the parties.

CONCLUSIONS OF LAW

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

That claimant did sustain an injury on March 20, 1984 and again on August 22, 1985 that arose out of and in the course of employment with employer.

That the injury of March 20, 1984 was the cause of temporary total disability for the period from April 12, 1984 through June 3, 1984.

That claimant is entitled to seven point five seven one (7.571) weeks of temporary total disability benefits for the period from April 12, 1984 through June 3, 1984.

That claimant is entitled to five hundred eight and 22/100 dollars ($508.22) of medical expenses which claimant paid himself.

That claimant did give proper notice of the injury of March 20, 1984 as required by Iowa Code section 85.23 based on the discovery rule.

That defendants are entitled to a credit of one thousand thirty-seven and 39/100 dollars ($1,037.39) pursuant to Iowa Code section 85.38(2).

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant seven point five seven one (7.571) weeks of temporary total disability benefits at the rate of two hundred seventeen and 43/100 dollars ($217.43) in the total amount of one thousand six hundred forty-six and 16/100 dollars ($1,646.16) for the period April 12, 1984 through June 3, 1984.

That defendants pay this amount in a lump sum.

That interest will accrue under Iowa Code section 85.30.

That defendants pay to claimant five hundred eight and 22/100 dollars ($508.22) in unpaid medical expenses.

That defendants are entitled to a credit in the amount of one thousand thirty-seven and 39/100 dollars ($1,037.39) pursuant to Iowa Code section 85.38(2).

That defendants will pay the costs of this action in accordance with the provisions of Division of Industrial Services Rule 343-4.33.

That defendants are to file first reports of injury for the injuries involved in this case.

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

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

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FAYE L. GOTT,	:	
	:	FILE NOS. 724356 & 798231
Claimant,	:	
	:	A T T O R N E Y
vs.	:	
	:	F E E
THOMAS B. READ,	:	
	:	D E C I S I O N
Attorney,	:	

STATEMENT OF THE CASE

This is a proceeding brought by Faye L. Gott, claimant, against her former attorney, Thomas B. Read, for review of attorney fees charged in the case of Faye Gott, claimant, against Wilson Foods Corporation, in which claimant sought workers' compensation benefits for alleged injuries on January 27, 1981 and July 18, 1983. The agency file indicates that on August 7, 1986, this agency approved a special case settlement between claimant and Wilson Foods pursuant to Iowa Code section 85.35 wherein claimant was paid the sum of $100,000 and upon payment of said sum, Wilson Foods was discharged from further liability under the Iowa Workers' Compensation Laws. In addition, Wilson agreed to give claimant credit toward her pension fund for the time period from August 19, 1983 through January 1, 1985 and to waive its right of subrogation in a pending third party suit brought by claimant as a result of an automobile accident in July, 1983. It was specifically found in the agency order of August 7, 1986 that there was a dispute among the parties on the question of liability and the compensability of the alleged work injuries.

On April 7, 1987, a hearing was held on claimant's petition to review attorney fees and the matter was considered fully submitted at the close of this hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Thomas Read, Margaret Harvol and Robert Larson. The exhibits received into the evidence consist of Read's exhibits A1 and A2, the alleged fee agreement, and the following exhibits offered by Gott: exhibit 1, a time statement; exhibit 2, the deposition of Read; exhibit 3, the deposition of Gott; exhibit 4, a letter report of David Naden, M.D.; exhibit 5, a docket information sheet; and, exhibit 6, a personal check of Gott made payable to Read dated May 4, 1982. All of the evidence received at the hearing was considered in arriving at this decision.

Claimant does not dispute that Read is entitled to at least

a fee equivalent to 25 percent of the $100,000 settlement and $25,000 has been paid to Read prior to the hearing. However, Read contends that under his agreement with claimant, he is entitled to 30 percent or an additional $5,000. This is disputed by claimant. Consequently, $5,000 of the settlement proceeds has been placed into an escrow account pending resolution of this dispute.

The only issue presented by the parties is whether the 30 percent attorney fee is fair and reasonable.

FINDINGS OF FACT

1. On or about May 4, 1982, claimant, Faye Gott, voluntarily entered into a written contingent fee agreement with attorney, Thomas Read, wherein Read was to be paid for services rendered to Gott in an amount equivalent to 30 percent of any amounts collected in a workers' compensation claim for an injury on or about January 27, 1981 if the claim was settled after filing a petition with this agency but before commencement of a hearing before this agency.

The written fee agreement referred to above is fully setforth in exhibit A1 and A2. The amount of the contingent fee as setforth in this agreement was on an escalating scale ranging from 25 percent to 42 percent, depending upon the extent of proceedings required to collect upon the claim. There was no dispute among the parties as to what this agreement provides and it was clear that the case was settled after filing a petition for arbitration but before the commencement of any hearing on the petition.

Claimant contended at the hearing and in her deposition that she signed no such agreement. Exhibit A1 and A2 is a two page contract. The exact fee percentages are contained on the first page. The second page contains, in addition to claimant's signature, only two paragraphs indicating where the fee should be paid and providing for a $25.00 advance by claimant for court costs at the time of the execution of the agreement. Claimant does not deny that page 2 of this document contains her signature. However, she states that she has never seen page one and that the page number "2" appearing on the second page, exhibit A2, was not present when she signed the document. Claimant stated that she agreed to pay Read only 25 percent if the claim was settled out of court but that the percentage would increase to one-third if it were necessary to "go to court." She testified at the hearing that her understanding of going to court was the filing of papers and that there would be a hearing and a ruling or decision after such a hearing. In her deposition, she believed that going to court was appearing before a judge. She stated further that she was unaware before the settlement of this agency's involvement in workers' compensation claim.

Claimant also makes reference to the existence of a "blue half page form" she signed in Read's office which contains her understanding of the agreement. Both Read and his secretary, Harvol, denied at the hearing that any such type of form existed at Read's office. Robert Larson, a qualified document examiner, testified at the hearing that from his analysis of page 2 of the fee agreement, exhibit A2, the number "2" appeared on the page at the time of Gott's signature. His testimony was very convincing that it was impossible for Read to photocopy a number to another photocopy after Gott had signed the document.

The preponderance of the above evidence presented establishes that claimant did, in fact, sign the two page document A1 and A2. It is hoped and believed by the undersigned that claimant's testimony in her deposition and at the hearing which is contrary to the preponderance of the evidence in this case arises from a lapse of memory and not an intentional effort to deceive. In any event, claimant's stated understanding of the fees was not much different than what was embodied in the written agreement. At the hearing she described her understanding of what constituted "going to court." She stated that she believed going to court was the filing of papers which would result in a hearing before a judge. This is very similar to contested case proceedings before this agency in which a petition for arbitration is filed, a hearing is held and a decision rendered by a deputy commissioner who serves as an initial judge of the compensation claim.

The only faulty practice found in Read's written contract procedures is the lack of his signature on the document. Although his consent to the contract was implied by his actions in representing claimant subsequent to the signing of the agreement, the agreement does create obligations on his part to represent Gott. Read should execute such documents if he expects his clients to do so. However, this aspect is not important to the issues of this case and Gott is not challenging Read's performance as an attorney under the fee agreement.

2. An attorney fee of $30,000 or 30 percent of the $100,000 settlement pursuant to the written fee agreement is fair and reasonable.

It should be noted at the outset that claimant herself requested a contingent fee agreement because she could not afford to pay Read on a hourly or time basis. The record demonstrated that claimant would have had to pay Read from $50 to $85 per hour on a time basis and claimant would be expected to pay Read periodically, probably monthly, for services rendered absent the contingency fee agreement. Claimant was out of work or only working part-time when she needed legal services to help her pursue the workers' compensation claim. Admittedly, Read is able under the contingent fee agreement to make more money than he would make on an hourly basis. However, Read also assumed a

significent risk that he would not be paid at all for services should the claim be denied by this agency or that he would not be paid adequately if the case dragged out through a long and complicated hearing or extensive appeal on judicial review.

It is clear that claimant's case was not easy to prosecute. Wilson Foods never admitted to claimant's work injury and did not do so even at the time of settlement. The settlement procedure utilized by the parties under Iowa Code section 85.35 allows employers to pay claimants for alleged claims without an admission of liability and with a full release of workers' compensation liability. Until the actual time of settlement, claimant was not paid any workers' compensation benefits by Wilson Foods. The $100,000 settlement was obtained solely as a result of Read's professional efforts on behalf of his client.

Gott's claim for workers' compensation benefits was based upon her back condition which allegedly was caused, at first, by her bending, lifting and twisting while performing her job as a packinghouse worker. Read testified that a major problem with the claim consisted of the fact that the medical records of treatment for the back condition began in January of 1981 but the first time there was any mention of a work injury in those records was in November of 1981. There was also some evidence indicating back problems prior to 1981. Furthermore, before she began treatment with John Walker, M.D., a physician not authorized by Wilson Foods, which ultimately led to extensive back surgery, examinations by orthopedic surgeons revealed nothing objectively wrong with claimant's spine and nothing more than conservative treatment was recommended. After explaining these problems to Gott, Gott agreed with Read that there would be an initial settlement demand in 1983 consisting of only $12,500. This demand was initially rejected by Wilson Foods. Furthermore, Read did not rush to file a petition for arbitration in claimant's workers' compensation claims in order to invoke the 30 percent contingency. Read waited until the very last moment before the expiration of the statute of limitations to file his petitions in these cases and even asked for and received from Wilson's attorney an extension of time to allow Wilson to respond to the initial settlement demand.

Another interesting and complicating feature of Gott's claim developed when she was involved in an automobile accident in February, 1983, while traveling to receive treatment from Dr. Walker whose treatment, again, was not authorized by Wilson Foods. This accident aggravated claimant's back condition. After extensive legal research, Read filed a second workers' compensation claim contending that the auto accident injury was work related. As a part of the settlement of both workers' compensation claim, Wilson Foods waived their rights to subrogation against the third party involved in this auto accident. Read therefore was able to obtain an additional $25,000 for Gott as a

result of pursuing a personal injury claim arising from this auto accident. Read was paid a contingent fee of one-third or approximately $6,667 for pursuing this personal injury claim. Read also pursued a social security disability claim for claimant but this claim is unrelated to the issues in this case.

Read stated that he spent approximately 51 hours on claimant's workers' compensation matters from August, 1983, the time when he began to keep time records in contingent fee cases. Read said that he estimates that at least 30 additional hours were spent on the Gott case before August, 1983. Claimant contends that Read's time records show overlapping among the various claims he was handling for Gott. Obviously, some overlapping is inevitable but on the whole, the estimate of time spent on Gott's claim appears reasonable from the material submitted into the evidence.

Read also demonstrated that the extent and quality of services rendered to Gott was excellent. The medical and legal issues involved were complicated and required the special skill and knowledge of a specialist in the field of workers' compensation. Workers' compensation is a recognized specialty in the practice of law, de facto if not de jure in most states. Workers' compensation law unlike other entitlement programs is primarily judge made rather than statutory. Also, the procedures before this agency are unlike court procedures or other administrative procedures and a close familiarity with the workings of this agency is an invaluable asset in the pursuit of a workers' compensation claim.

Read is a workers' compensation specialist. He stated that approximately 20 percent of his practice is devoted to such work. His knowledge and experience with workers' compensation extends over several years and began soon after he graduated from law school in 1975 when he apparently was a law clerk for a former industrial commissioner, Robert Landess.

Therefore, given the amount of time spent, the extent and quality of services rendered, the difficulty in handling the issues, the importance of the issues, the responsibilities assumed, and the professional standing of Gott's attorney, a fee of $30,000 or 30 percent of the $100,000 obtained is fair and reasonable.

CONCLUSIONS OF LAW

Although claimant has petitioned this agency to resolve a fee dispute with her attorney, the attorney had the burden of establishing by a preponderance of the evidence that the fee he wishes to charge is reasonable and should be approved. This burden arises from the ethical requirements of the legal profession. Attorneys are required under the Iowa Code of Professional

Responsibility for Lawyers (hereinafter referred to as ICPRFL) to only charge reasonable fees. See EC (ethical consideration) 2-19 and DR (disciplinary rule) 2-106, ICPRFL.

This agency's authority to review attorney fees arises by statute. Iowa Code section 86.39 states as follows:

> All fees or claims for legal, medical, hospital, and burial services rendered under this chapter and chapters 85, 85A, 85B, and 87 are subject to the approval of the industrial commissioner, and no lien for such service is enforceable without the approval of the amount of the lien by the industrial commissioner....

Resolution of a fee dispute contains two factual inquiries. The first consideration involves the nature of the fee agreement and the second consideration involves the reasonableness of the fee charged pursuant to that agreement. In this case, we are dealing with a contingent fee arrangement in which the fee is based upon a percentage of the recovery. Such fees have long been accepted in proceedings before the courts and administrative agencies. See EC 2-22, ICPRFL. However, despite ethical acceptance of such fee agreements and regardless of the embodiment of the fee agreement in written form as suggested in EC 2-21, such agreements are not binding upon a tribunal reviewing the appropriateness of the resulting fee. Kirkpatrick v. Patterson, 172 N.W.2d 259, 261 (Iowa 1969). In Kirkpatrick the court stated that a one-third contingent fee contract may be reasonable but any determination must be based upon the facts and circumstances of a particular case. The court listed the appropriate factors which have a bearing on the reasonableness of the fee. These factors are substantially the same as those contained in DR 2-106 of ICPRFL. These factors are as follows:

> ...time spent, the nature and extent of the services, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and the result obtain as well as the professional standing and experience of the attorney... Kirkpatrick Id. at 261.

Although the various evaluating factors are different for each case, this agency has in the past approved one-third contingent fee agreements when appropriate. See Francis v. Rider Truck Rental, IV Iowa Industrial Commissioner Report 129 (Appl. Decn. 1983).

At the hearing, claimant's attorney argued that this agency has recently held that contingent fees are improper in workers' compensation cases and cited for authority Rickett v. Hawkeye Building & Supply, case number 739306, filed July 24, 1986.

Claimant's reliance on this decision is improper. First, that decision is not a final agency decision but only a deputy decision which is currently on appeal. Secondly, even if it were binding on the undersigned, the Rickett decision only ruled that it was improper to charge a contingent fee against amounts which were not recovered as a result of the attorney's efforts. The decision essentially held that attorneys who wish to charge a contingent fee against voluntary payment of benefits have the burden to establish that the voluntary benefits were paid as a result of their efforts. Absent such a showing, such a fee is unreasonable and any commutation of benefits to pay such a fee is not in the best interest of claimant and should be denied.

Given the findings of fact in this case, as a matter of law, the fee and the attorney's lien under Chapter 602 of the Iowa Code to the extent of the fee of $30,000 should be approved.

ORDER

The fee of thirty thousand and no/100 dollars ($30,000.00) or thirty percent (30%) of the one hundred thousand and no/100 dollars ($100,000.00) special case settlement proceeds in this matter is hereby approved and the amount of the attorney lien asserted by Thomas Read against such proceeds shall be the full amount of the fee, less the twenty-five thousand and no/100 dollars ($25,000.00) already paid. Costs are assessed against claimant.

Signed and filed this 29 day of May, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY E. GRANT,	:	
	:	
Claimant,	:	
	:	FILE NO. 818215
vs.	:	
	:	A R B I T R A T I O N
QUAKER OATS COMPANY,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Mary E. Grant, claimant, against Quaker Oats Company, a self-insured employer (hereinafter referred to as Quaker), for benefits as a result of an alleged injury on September 16, 1984 and an accumulative trauma of unspecified date. On April 7, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as 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: Kevin Crist and Greg Smith. The exhibits received into the evidence at hearing are listed in the prehearing report. All of the evidence received at the hearing was considered in arriving at this decision. The prehearing report contains the following stipulations:

1. That there was an employer/employee relationship between claimant and Quaker at the time of the alleged injury.

2. Claimant seeks temporary total disability or healing period benefits for the following periods of time: 9-17-84; 10-8-84; 10-30-84 through 6-9-85; 1-6-86 through 11-3-86; 6 hours on 11-4-86; and, 11-5-86 to the present time. Defendant agreed that claimant was off work for these periods of time except for September 17, 1984 and October 8, 1984. The parties agreed that claimant was on economical off status from February 4, 1985 through June 9, 1985.

3. Claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $250.50.

4. The medical expenses for which claimant seeks reimbursement in this proceeding are fair and reasonable, except for the treatment by and under the direction of John R. Walker, M.D., but the issue of the causal connection of these expenses 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 employment;

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

III. The extent of claimant's entitlement to weekly benefits for temporary total disability or healing period;

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

Both parties have asked in their post-hearing briefs that this agency take "judicial" notice of various matters. First, "official notice" rather than judicial notice is permitted by Iowa Code section 17A.14(4). Aside from the rather dubious matters which were asked to be noticed, according to an agency rule, no evidence can be taken after the hearing. See Industrial Services Rule 343-4.31. Therefore, neither request for official notice was granted.

FINDINGS OF FACT

1. Claimant has been employed by Quaker since June, 1979 and last worked for Quaker on November 4, 1986 for a period of two hours.

The jobs claimant held at Quaker consisted of general labor work in Quaker's cereal plant in Cedar Rapids, Iowa. These jobs consisted mostly of duties involving the cleaning, monitoring and maintenance of machines and the handling of cereal products processed by these machines. There was some dispute at hearing between claimant and Kevin Crist, the safety and health manager at Quaker, as to the extent of the physical requirements for these various jobs. From a review of the hearing testimony and claimant's job descriptions contained in the employer's exhibits, the preponderance of the evidence indicates that she only occasionally was required to push, pull or lift in excess of 30 pounds, but on the other hand was regularly required to stoop, bend, push, pull, climb and twist as well as sit, stand and walk for prolonged periods of time.

2. The preponderance of the evidence did not establish

that claimant suffered an injury which arose out of and in the course of her employment.

Claimant does not prevail in this case primarily due to a lack of supportive medical opinions causally connecting her back and leg problems to anything that may have happened on September 16, 1984, the alleged injury date, or at any other time while working for Quaker.

From her medical records it appears that the alleged injury date in the petition is incorrect and that the correct alleged date should be Monday, September 17, 1984. On this date, claimant had just returned from a medical leave following minor surgery to correct a problem arising from another previous surgery for a condition unrelated to her work. Claimant had been off almost three weeks. According to her foreman, after approximately two hours claimant began to experience difficulty with her surgical incision while "pulling tanks." According to a measurement by Crist using a linear force indicator, although the tanks are very heavy, its movement requires a linear force of only 30 pounds or less. Claimant then was placed on a light duty job following her complaints to her foreman for the remainder of the shift. After a few hours claimant stated that she could hardly walk due to the onset of low back pain. She, however, did not report any back pain to her foreman at that time.

The next day, claimant telephoned William A. Audeh, M.D., the doctor who performed the non-work related surgery. He reports that claimant complained to him of incisional pain and nausea. There is no indication in his records that claimant complained of back pain at that time. Claimant was advised to remain off work and report to the office the next day. There are no office notes in the evidence for this next appointment. The record contains a return to work slip signed by Dr. Audeh on September 18, 1984 returning claimant to work on September 19, 1984 with a restriction that she not perform physical work for the remainder of the week.

Claimant testified that her low back and left hip pain persisted upon her return to regular duty and she sought treatment from an orthopedic surgeon, Earl Bickel, M.D. However, claimant was not able to schedule an appointment until October 8, 1984. According to Dr. Bickel in his deposition testimony, claimant did not report a specific injury when she came to his office except for a fall down a basement stairway in 1975. Claimant did, however, state that she was lifting up to 70 pounds at work and performed other strenuous bending and stooping. Dr. Bickel diagnosed lumbosacral sprain and recommended that she wear a back support and refrain from heavy lifting at work. Claimant was then placed by Quaker into a coupon inserting job for the next three weeks. Claimant's pain, however, persisted and Dr. Bickel took claimant completely off work and hospitalized her

for tests, physical therapy and traction. Following these tests which failed to reveal any physical disorder, Dr. Bickel finally diagnosed myofascial strain syndrome and treated claimant conservatively over the next several months. The only objective finding was a neurological abnormality which Dr. Bickel stated could be attributed to a peripheral polyneuropathy. According to Dr. Bickel's deposition testimony such a polyneuropathy is not trauma induced. During Dr. Bickel's treatment, claimant remained off work. In December, 1984, claimant asked for and received a second opinion from a neurologist, James Worrell, M.D., in Iowa City, Iowa. Dr. Worrell likewise found nothing objectively wrong with claimant other than muscle strain. Finally, on May 31, 1985, Dr. Bickel felt that he could do nothing further for claimant and told claimant that she would have to live with her difficulties. Dr. Bickel then returned claimant to light duty work.

Claimant did not immediately return to Quaker as she was on layoff status when Dr. Bickel released her for work. She subsequently was recalled from layoff and returned to work on June 10, 1985 with work restrictions against repetitive bending, lifting and stooping and no lifting over 10 to 20 pounds. Claimant testified that she returned to the coupon inserting job and other light duty jobs at the plant but occasionally was required to violate the restrictions in order to perform her assigned tasks. Claimant also testified that she continued to work despite her persistent back and leg pain. After being released by Dr. Bickel, claimant sought treatment from her family physician, Dr. Ahn, M.D., (first name unknown). Dr. Ahn treated claimant on three occasions with accupuncture. This procedure only provided temporary relief and she began to then receive regular chiropractic treatments from Donald Pattison, D.C., for low back pain between July, 1985 and February, 1986. She complained to Dr. Pattison of neck, shoulder, low back and left hip pain. In January, 1985, claimant was off work as a result of a plant wide reduction in force and went to Quaker's company physician, W. R. Basler, M.D. Dr. Basler then referred claimant to William J. Robb, M.D., an orthopedic surgeon and an associate of Dr. Bickel. Dr. Robb essentially agreed with Dr. Bickel's diagnosis of muscle and ligament strain but stated that claimant's problems are largely psychological. Dr. Robb recommended a fitness program and Quaker then sent claimant to a fitness program at a local racquet club. Claimant stated that she experienced a great deal of pain from this physical fitness program. Upon the advice of her attorney, claimant sought out another orthopedic surgeon, John R. Walker, M.D., from Waterloo, Iowa.

After his examination of claimant, Dr. Walker stated in his reports that he found low back and left leg pain and an inflammed coccyx (tailbone). Dr. Walker recommended that claimant end the exercise program and began treatment of her low back and leg

problem with injections into the lower spine and other therapy. He also recommended a coccygectomy. Dr. Walker did not believe claimant was able to work at this time. In May, 1986, claimant was hospitalized by Dr. Walker for conservative back therapy and the coccygectomy. Claimant and Dr. Walker assert that claimant significantly improved from this coccygectomy surgery. Claimant stated that she improved by 25 percent but the low back, hip and leg pain persist at the present time. Claimant was sent by Quaker subsequent to this surgery to Warren Verdeck, M.D., another orthopedic surgeon and an associate of Dr. Bickel. Dr. Verdeck's diagnosis was again the same as those of his other associates, that is chronic low back strain and pain down the left leg of unexplained etiology. He recommended either a pain clinic treatment or a TENS unit (an electrical device to relieve pain).

In February, 1987, claimant was rejected for pain management therapy by J. Dan Smeltzer, M.A., the corrodinator of the program at Iowa Methodist Medical Center in Des Moines, Iowa. The reasons for the rejection as stated by Smeltzer was that claimant's pain complaints were out of porportion to the nature of the tissual damage and a failure of claimant to assume personal responsibility for her own rehabilitation. According to Smeltzer requiring a patient to assume responsibility for their own rehabilitation is an essential element of pain management therapy. Also, according to this report from Smeltzer, an MMPI (Minnesota Multiphasic Personality Inventory) which was given to claimant in January, 1984, indicated that there was significant psychological component to claimant's pain complaints.

Following her recovery from the tailbone surgery, claimant remains under the care of Dr. Walker which has remained conservative to date for the low back, hip and leg pain. Claimant remains off work at this time. In November, 1986, claimant was called back to work for a light duty job consistent with restrictions imposed by Dr. Verdeck. The job consisted of sorting from a elevated sitting position to minimize bending. Claimant objected to this job on the grounds that the chair was not sufficiently elevated or padded and that she was not released to go to work by Dr. Walker. Dr. Walker opines that claimant would not be able to return to work due to chronic back pain until February, 1987. Claimant left the job offered to her in November, 1986, after only two hours and has not returned nor has any other job been offered by Quaker.

According to histories claimant has provided to treating physicians in this case, including Dr. Walker, claimant had back trouble for several years before the alleged work injury in this case. Claimant has had a scoliosis condition or curvature of the spine most of her life. What role, if any, this condition may play in precipitating claimant's current complaints is unknown. No physician who has treated claimant since 1984 mentions this condition as a possible cause. According to

claimant's history in the reports of Dr. Walker, claimant has had back problems since an injury in 1971 which required hospitalization for trigger point injections, traction and therapy. Following this hospitalization, claimant received periodic chiropractic treatments over the next five years. At the hearing claimant stated that her past back problems were unspecific. Claimant did not mention her past back problems in her application for employment to Quaker in 1979. Claimant also had an injury in 1975 from a fall down some steps. Dr. Walker tends to mention this fall mostly in conjunction with his discussion concerning claimant's tailbone problems. Reports from chiropractors in 1982 indicate that claimant was complaining at that time of severe neck pain and headaches following the 1975 fall.

Giving claimant's past history, this agency must rely heavily upon the expert opinions of physicians in this case to determine the question of causal connection. Claimant has been treated and examined by several physicians since 1984. However, only one orthopedic specialist, Dr. Walker, causally relates the back and tailbone problems to her work. Dr. Walker states in his report of April 16, 1986 that claimant's work activities at Quaker were the cause or at least an aggravating cause of any preexisting condition. Dr. Pattison, the chiropractor, also supports claimant's causal connection theories. On the other side Dr. Bickel, Dr. Robb, Dr. Verdeck and Dr. Worrell all fail to support claimant's causal connection theories in either their reports or deposition testimony. Most of these doctors opined that the cause of claimant's difficulties is unknown. This adverse concensus cannot be so easily rejected (as contended by claimant) by the fact that Bickel, Robb and Verdeck are all from the same orthopedic clinic. The evidence indicates that each of these doctors performed individual examinations and reviewed histories before rendering their opinions. Claimant simply has not shown that these doctors have ignored their own findings and professional judgment in order to support the views of their colleagues.

Aside from the medical opinions, the factual evidence and claimant's own testimony tends to show a sudden rather than gradual onset of problems in September, 1984, after which claimant's condition remained relatively unchanged and permanent work restrictions against strenuous work had to be imposed by physicians. What evidence there was of a prior back problem appears to have been precipitated by two non-work related injuries in the 1970's rather than claimant's work. There is no evidence of a continual pattern of low back pain complaints while at work despite a long history of other complaints and other work injuries unrelated to her back. However, this sudden onset of symptoms in September, 1984, occurred after a very brief encounter with relatively light work upon returning from an extended medical leave. It is simply difficult to believe that claimant's symptoms and her inability to work for several

months are attributable to such a minor incident, especially when there is no complaint of back injury to her employer or doctor at that time of the alleged injury and only a diagnoses of muscle strain. Therefore, the preponderance of the evidence presented does not show that either a single work event or a gradual or accumulative series of events at Quaker was a significant cause of her low back, hip and leg pain. It appears from the record that non-work related causes of claimant's symptoms such as peripheral polyneuropathy, non-work related injuries or congenital defects are just as likely as a work related cause.

Due to the lack of a finding that claimant's low back, hip and leg pains are causally connected to her work, findings pertaining to the issue of claimant's entitlement to medical benefits as a result of these conditions are unnecessary.

CONCLUSIONS OF LAW

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

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

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 attempted in the alternative to establish a gradual or accummulative injury. It is no longer necessary in this state that claimant prove that her disability results from a sudden unexpected traumatic event. It is sufficient to show that the disability developed gradually or progressively from work activity over a period of time. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). However, claimant failed to demonstrate such a gradual injury process either by medical opinion evidence or by lay testimony.

Although claimant did not prevail in this proceeding, she appeared sincere in her testimony presented at the hearing and her claim was argubly supported by some of the medical evidence. Therefore, claimant shall be awarded the costs of this action.

ORDER

Claimant shall take nothing from this proceeding except that defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 23 day of June, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ESTATE OF JEFFREY H. GREEN, Deceased, CURTIS H. GREEN, Administrator, CURTIS H. GREEN, and, PATRICIA GREEN, Individually,

Claimants,

vs.

FAIRFIELD ALUMINUM CASTINGS CO. (FALCO)

Employer, Self-Insured, Defendant.

File No. 767463

D E A T H

B E N E F I T S

D E C I S I O N

INTRODUCTION

This is a proceeding for death benefits under section 85.31(3) of the Code of Iowa. The case was heard in Des Moines, Iowa on May 5, 1987, and was fully submitted upon conclusion of the hearing. The only issue presented by the parties for determination is the determination of whether or not Curtis and Patricia Green, the parents of Jeffrey H. Green, deceased, were partially dependent upon him. The parties stipulated that, in the event of an award, the applicable rate of compensation is $30.04 per week.

STATEMENT OF THE CASE

Jeffrey H. Green died on June 19, 1984 as a result of injuries which arose out of and in course of his employment with Fairfield Aluminum Castings Company. His parents, Curtis and Patricia Green, seek to be compensated as persons partially dependent upon him. Curtis Green is employed at Ottumwa Ford Lincoln Mercury, where he reconditions used cars. He has held that employment since 1963. Mr. Green is 56 years of age, a graduate of Boys Town High School and attended William Penn College at Oskaloosa, Iowa, for one and one-half years. His normal earnings are in the range of $12,000 to $13,000 per year, but in 1984 they were $11,269.79 due to an extended illness.

Patricia Green is a 53 year-old high school graduate who has a two-year associates degree from Ottumwa Heights College and also attended three semesters at Parsons College in Fairfield, Iowa, but never received a degree. In 1984, she ran the night

chemistry department at the Ottumwa Hospital where she earned $22,655.15. Her income for 1984 was her highest and included a large bonus. Mrs. Green has had health problems with her knees, resigned from her well-paid position, drew her pension account and has now returned to work for the hospital in a position where she earns $380 per month.

Jeffrey Green was 24 years of age at the time of his death. After Jeffrey graduated from high school, he worked part-time at a filling station for approximately one year and, in approximately 1978, obtained a job at the John Deere Works in Ottumwa. Jeffrey resided in the Green family home until two or three months after obtaining the John Deere job. He then moved into an apartment and eventually began purchasing his own home. When Jeffrey was living in the family home and working at John Deere, he paid the family $50 per week. Prior to that time, he had contributed toward the family expenses. After he moved out of the family home, he continued to occasionally give money to his parents. After a few years, Jeffrey was laid off from his job at the John Deere Works, was unable to keep up the payments on his home and lost it. In approximately October of 1983 Jeffrey resumed residing with his parents. In December, 1983, he obtained the job with Fairfield Aluminum Castings Company and at that time he resumed the practice of paying his parents $50 weekly. Prior to that time, while residing in the family home, he made occasional contributions to his parents from money he earned repairing automobiles and motorcycles. Jeffrey also assisted in performing some of the household tasks, particularly laundry, and made direct payment of some household utility bills.

At the time of his death, Jeffrey was earning approximately $350 per week (exhibit 4). His father, Curtis, was earning approximately $216 weekly and his mother, Patricia, was earning approximately $435 weekly. The combined incomes of Curtis and Patricia totalled approximately $650 per week. When Jeffrey's $50 contribution is included, that contribution is seven per cent of the parents' total gross income. The monthly living expenses for the Green family, according to exhibit A, were $1,657 per month, or approximately $415 per week. Weekly taxes from Curtis' income were approximately $50 per week, and from Patricia's income they were approximately $130 per week. Patricia's income was also reduced to repay a loan against her pension plan by the amount of $180 per month or approximately $45 weekly. When taxes, loan repayment and living expenses are combined, the total is $640 weekly. The testimony that family finances were tight appears correct since the expenses appear to have been approximately equal to the incomes when Jeffrey's contribution is not included.

Curtis and Patricia both testified that, without the money from Jeffrey, they would have been unable to meet their financial obligations and that they relied upon the money from Jeffrey as a means of meeting those obligations. Jeffrey bought his own clothing, gasoline for his car and occasionally gave extra money

to buy special food items which he desired. They testified that they could not have maintained their standard of living without the money they received from Jeffrey. They both expressed concern that they may have defaulted on their obligations after Jeffrey's death if it were not for the life insurance proceeds and Patricia's pension fund. While living in the family home, Jeffrey ate his morning and evening meals in the home. His laundry was done in the home.

Jacqueline Green, Jeffrey's sister and the daughter of Curtis and Patricia, has resided in the Green family home at various times since her graduation from high school in 1970. Her two children have resided there with her. At times during 1981 and 1982 she was not employed. She testified that Jeffrey also gave money to her occasionally. Jacqueline testified that she also gave money to her parents and paid their utility bills when she was living with them. Jacqueline testified that her father was lousy at managing money, but that her mother tried to do a good job of it. Patricia and Curtis did not have a savings account of any type at the time of Jeffrey's death and it appears that they lived basically from paycheck to paycheck.

APPLICABLE LAW AND ANALYSIS

The status of dependency is determined in accordance with the facts that existed on the date of death. [Code section 85.44, Kramer v. Tone Brothers, 198 Iowa 1140, 199 N.W.2d 985 (1924)]

The issue of partial dependency of parents on their emancipated adult child when the parents are not incapacitated from being self supporting has not been frequently addressed by the Iowa courts. The only case on point found is Serrano v. Cudahy Packing Company, 194 Iowa 689, 190 N.W.2d 132 (1922). In finding parents to not be dependent upon an adult child, the court stated:

> What is the meaning of dependency? Clearly a person cannot at the same time be dependent and self-sustaining. The definition of 'dependent' as found in Webster's Dictionary is: 'Relying on, or subject to, something else for support; not able to exist, or sustain itself; not self-sustaining.' This definition has found judicial approval in many cases. See Rock Island Bridge & Iron Works v. Industrial Com. 287 Ill. 648 (122 N. E. 830).
>
> No person can be regarded as a dependent 'whose financial resources at his command or within his power to command by the exercise of such efforts on his part as he reasonably ought to exert in view of the existing conditions are sufficient to sustain himself and family in a manner befitting his class and position in life

without being supplemented by the outside assistance which has been received or some measure of it.' MacDonald v. Employers' Liability Assur. Corpn. (Me.) 112 Atl. 719. Unless the commissioner has applied an illegal standard or found a fact without evidence this court will not review his finding. The mere fact that the parents used certain earnings of the deceased son does not prove that they relied upon those earnings as their means of support. McDonald v. Great Atl. & Pac. Tea Co. 95 Conn. 160 (111 Atl. 65). No one is a dependent within the meaning of our Compensation Act who has sufficient means at hand to supply present necessities, rating them according to the dependent's class and position in life. Blanton v. Wheeler & Howes Co. 91 Conn. 226.

In the more recent case of Murphy v. Franklin County, 259 Iowa 703, 145 N.W.2d 465 (1966), the court found parents to be dependent upon their minor son and stated:

> [5] 'A showing of actual dependency does not require proof that, without decedent's contributions, claimant would have lacked the necessities of life. The test is whether his contributions were relied on by claimant to maintain claimant's accustomed mode of living.
>
> 'It follows that income from other sources is not necessarily inconsistent with a state of actual dependency.' Larson, Workmen's Compensation Law, Volume II, section 63.11, page 102, and cases cited.
>
> [6] ' 'Dependency' and 'support' under the workmen's compensation law are not capable of certain definition. The definition and application of these words should not be too severely restricted. If a contribution is made to the ordinary comforts and conveniences which are reasonably appropriate to parties in their station in life, it should be considered as support and the recipient regarded as a dependent.' (Emphasis in opinion) Lighthill v. McCurry, 175 Neb. 547, 552, 122 N.W.2d 468, 471.

The treatise, Larson, Workmen's Compensation Law, covers this topic beginning at section 63.00.

> § 63.00 Dependency in fact must be established in order to qualify for death benefits in all cases except those involving a conclusive presumption of dependency. Proof of actual dependency

> does not require a showing that the claimant relied on the deceased for the bare necessities of life and without his contribution would have been reduced to destitution; it is sufficient to show that the deceased's contributions were looked to by claimant for the maintenance of claimant's accustomed standard of living. Hence a claimant may be dependent although receiving other income from claimant's own work, from property or from other persons on whom claimant is also dependent. Usually, actual contribution to claimant's support is enough to establish dependency without evidence of legal obligation to support.

Evidence of the parent's expectation of future support is a consideration as well as past actions, Larson § 63.11(a).

> Partial dependency may be found when, although the claimant may have other substantial sources of support from his own work, from property, or from other persons on whom claimant is also dependent, the contributions made by the decedent were looked to by the claimant for the maintenance of his accustomed standard of living. [Larson § 63.12(a)]

In cases dealing with adult children residing with the parents, the child's contribution to the family may be viewed in relation to the cost of the child's own support, the other resources of the family and the economic needs of the family, Larson § 63.12(b), which states:

> In other similar cases, it has been frequently held that, if the decedent's contribution is offset by the value of the board and room received, he is doing no more than to 'pull his own weight'; he is merely supporting himself, with nothing left over to represent support of dependents.

Occasional gifts or contributions which are not relied upon for support do not establish dependency [Larson § 63.12(d)].

It is concluded that, in order to establish parents as partial dependents of their adult child, it is necessary to show that the economic contributions of the child were a substantial factor in providing support to maintain the parents in their accustomed standard of living. Non-economic contributions toward support such as performing repairs, maintenance and household chores may be considered in determining dependency status. The same standard applies to direct economic support and household service support, namely, whether the contributions exceeded the additional burdens created by the child residing in the household and whether the contributions were substantially relied upon for, and necessary to maintenance of, the parents'

accustomed standard of living.

Factors used in determining the extent of reliance on contributions from the child include the relationship between the amount of the contribution and the amount of other resources available to the parents; the ability of the parents to provide for themselves; the duration and regularity of the contributions; the impact of the loss of the contributions; and changes in the standard of living attributable to the contributions. It is important to distinguish between reliance on contributions and mere use of contributions or finding them to be helpful.

In the instant case Jeffrey's practice of regular contributions was of relatively recent origin, having existed for only approximately six months prior to his death. The parents did not receive regular contributions prior to that time and therefore could not have relied on them during the period of approximately five years when Jeffrey was living outside the Green family home. Many of the parents' monthly bills and expenses were incurred prior to the time Jeffrey returned to the family home and would not be affected by Jeffrey's place of residence. The impact of Jeffrey residing with his parents would have been primarily in the area of food, but one would also expect some impact on utilities and cleaning supplies. It would be expected that no less than one-half (and probably more) of Jeffrey's regular $50 weekly contribution merely offset the additional expense to the household which resulted from him residing in it. The net economic contribution from Jeffrey toward the household expenses is found to be no more than $25 per week after deducting the increase in expenses caused by his presence. While Jeffrey performed some services about the home, they do not appear to have exceeded the increase in household chores that have would have been caused by the fact that he was residing in the home.

In most families, any amount of economic contribution or assistance with household chores that is provided to the family is used and is helpful. The Green family appears to be normal in that regard.

Curtis and Patricia had established their standard of living during the years when Jeffrey was neither a member of the household nor regularly contributing to the household. Even though they testified that they relied on Jeffrey's contributions, the fact of the matter is that contributions from Jeffrey were not relied on when the standard of living was established since those contributions were not being received and were not anticipated when the standard of living was established. If there was any actual reliance on Jeffrey's contributions, it would have arisen, necessarily, no sooner than December, 1983. The evidence shows no substantial change in the parents' standard of living that can be related to the commencement of Jeffrey moving into the home or Jeffrey making the regular $50 weekly payments. It appears as though Jeffrey's parents had a problem with debt management, but the debts were not incurred at a time when

contributions from Jeffrey were being made or could have been anticipated as a source for paying those debts. Jeffrey's contributions to the family were clearly helpful to the process of debt payment, but were not necessarily relied upon.

Jeffrey's parents appear to have had a combined weekly net income after taxes of approximately $470.00. Jeffrey's net contribution to them of approximately $25 per week is only five per cent of that total. Without Jeffrey's contributions, his parents had what would be considered to be a normal middle-class income. The total adjusted gross income for them as shown on the W-2 forms (exhibit 5) is $33,924.94. It is difficult to conclude that Curtis and Patricia could reasonably be expected to have relied on a approximately $1,300 per year in net contributions from Jeffrey for maintaining their accustomed standard of living. The Green family was in the practice of spending all of its income. They had no savings despite the fact that they had a reasonably adequate gross income for a family of only two persons. There is no evidence in the record that Curtis and Patricia sustained any change in their standard of living when Jeffrey moved out of the family home in 1978 and ceased making regular payments to them. There is no evidence in the record of this case to indicate that any different result would occur in 1984 regardless of whether the lack of contributions from Jeffrey residing in the family home arose from his death or from him moving out into an apartment.

IT IS THEREFORE FOUND that Curtis Green and Patricia Green did not rely upon contributions from their son, Jeffrey Green, for maintenance of their accustomed standard of living.

IT IS THEREFORE CONCLUDED that Curtis Green and Patricia Green were not partially dependent upon Jeffrey H. Green for support at the time of his injury and death and are therefore not his dependents within the meaning of sections 85.31 and 85.44 of the Code of Iowa.

IT IS THEREFORE ORDERED that claimants take nothing from this proceeding. The costs of this action are assessed against claimants.

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

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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001878

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VALDO GROVER, Claimant, vs. PACEMAKER DRIVER SERVICE, Employer, and FIREMEN'S FUND INSURANCE, Insurance Carrier, Defendants.	:	File No. 734934 R E V I E W - R E O P E N I N G D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by the claimant, Valdo Grover, against his employer, Pacemaker Driver Service, and its insurance carrier, Firemen's Fund Insurance, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained February 4, 1983. This matter came on for hearing before the undersigned deputy industrial commissioner in Burlington, Iowa, on March 20, 1987. A first report of injury was filed June 8, 1983. The record was considered fully submitted at close of hearing.

The record in this proceeding consists of the testimony of claimant, as well as of joint exhibits 1 through 18; claimant's exhibits 19 through 30; and defendants' exhibits 1 through 6. All objections to exhibits are overruled. All exhibits are identified on the exhibit list submitted by the parties at time of hearing. Said exhibit list is incorporated by reference in this introduction. Claimant's motion to amend is overruled.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant's rate of weekly compensation in the event of an award is $406.88; that medical costs were fair and reasonable, that claimant has a condition of the right hand which has resulted in a five percent loss of use; and that defendants have paid claimant 9.9 weeks of permanent partial disability as a result of that condition. The issues remaining to be decided

are:

1) Whether claimant received an injury which arose out of and in the course of his employment;

2) Whether a causal relationship exists between claimant's claimed injury and claimed temporary total disability;

3) Whether claimant is entitled to temporary total disability benefits from June 21, 1985 through November 1, 1985; and

4) Whether claimant is entitled to payment of certain medical expenses as causally related to his injury and as authorized by defendants.

REVIEW OF THE EVIDENCE

Claimant testified that he began working for Pacemaker in 1977. Pacemaker leased drivers to Bandag Corporation. Claimant delivered freight for Bandag in equipment leased from the Ryder Truck Rental Company. He also drove under other lease arrangements with Pacemaker. Claimant reported that from 1979 or 1980 through February 1983 Bandag was using the same equipment. Claimant reported that he injured his hand while closing the latch door on Bandag's trailers. A bar rod with a handle which had to be pulled up and out closed the trailer. Claimant testified that at times the handle was bent and he had to force it with his hand. He pulled the rod across and then pushed it in order to latch and unlatch the latch. Claimant reported that on a number of occasions a bent or crooked tongue piece would cause resistance as he attempted to push in the rod handle and he felt pain in his hand just prior to getting the rod into the latch. Claimant stated that he bruised his hands trying to beat the latch in and had had pain, but had paid no attention to it until that last time when he could not shake the pain from his hand. Claimant reported that in February 1983, he had pain in his right arm and shoulder as well, and upon returning from a trip from North Carolina saw Robert Ingalls Carleton, D.O. He indicated that his hands also were tingling and drawn up as well. Claimant was hospitalized under the care of J. L. Jochims, M.D., whom claimant testified concluded that rods in the trailer door had produced his problem.

Claimant testified that in his first year of driving for Bandag, the rods made his hands sore, but it was hard to say how often but felt perhaps once a month. Claimant agreed that he filled out vehicle condition reports for Ryder on a routine basis, that is, after every trip or every time that he changed trailers. He reported that he filled out a vehicle condition report in 1981 regarding the door latch and one in 1982 because the bottom of a rod had dropped out. Claimant agreed he had never seen a doctor during the several years in which he de-

scribed his hand as hurting over time. He agreed that he had not had a problem with newer trailers, only with older trailers and characterized the trailer used in the North Carolina trip as an older trailer. Claimant agreed that he saw Terence McCormally, M.D., on January 9, 1983 with complaints of pain and stiffness in the right arm and shoulder during a trip to Canada which claimant then characterized as not particularly strenuous. He agreed that he had been in Dr. Carleton's office on January 12, 1983 reporting acute onset of right shoulder pain with forehand weakness and numbness and tingling in the digits. The doctor's medical note for that date reports no known trauma. Claimant stated that while he vaguely recalled the visit, he had made no reference to hitting his hand on a door latch at that time. Claimant agreed that he had seen Dr. Shivapour, neurologist, at the Burlington Hospital for nerve conduction studies. Claimant could not remember if he had told Shivapour he had had pain upon hitting his hand with a door latch. Claimant agreed that the February 12, 1983 history apparently given to Dr. Shivapour describes an incident of a 180 pound box having fallen very close to claimant, grazed his shoulder and arm, and part of it having landed on his right hand. Claimant described the incident as a not unusual occurrence. He agreed he had told Dr. McCormally and Dr. Carleton about the boxes as well as Dr. Shivapour and that he had not told Dr. Shivapour of the latches causing pain.

Claimant testified that he owns a number of firearms which he uses for hunting small game. He denies ever having used firearms at a firing range.

Claimant underwent exploration and decompression of the ulnar nerve, decompression Guyon's canal with secondary carpal tunnel release on February 28, 1983. He was released for work on April 11, 1983, but by June 1983 was reporting right handed pain again and was referred to Thomas L. Von Gillern, M.D., an orthopedic surgeon. Claimant saw Dr. Von Gillern until early 1984 and apparently did not need medical assistance for his hand condition again until June 1985. He then again experienced pain after shoveling at home. Claimant stated that he was digging out a sewer with the help of two young people. Claimant reported that he had only dug approximately one and one-half hours on the first day and approximately four hours on the second day. He was digging from three to four feet down to the sewer pipe with a straight hand shovel. Claimant was subsequently again hospitalized and received treatment including physical therapy and a second surgery per Dr. Von Gillern. He was off work to November 1, 1985.

Claimant reported that he has developed problems with his left hand which he attributed to favoring that hand because of his inability to use his right hand. Claimant is not making a claim for his left hand and agreed that he was not claiming a $200 charge for an EMG on the left hand performed March 6, 1986

as a medical expense.

Duane Carter, corporate traffic manager for Bandag Corporation, testified by way of his deposition taken March 17, 1987. Mr. Carter has had twenty-four years with Bandag and is currently responsible for all freight movements in Bandag's five plants. In February 1983, Carter was Bandag's senior dispatcher and as such was one of claimant's supervisors. Carter stated that from 1980 onward Bandag has used leased tractor-trailers to move freight with tractor-trailers leased predominantly from Ryder Truck Rental. Bandag has twenty tractors and sixty trailers leased from Ryder on a regular basis. Carter stated that truck drivers are required to daily check their equipment and make a vehicle condition report which is then turned into Ryder for correction and repair. He indicated that as senior dispatcher in 1983, he would have received driver complaints of faulty equipment and eventually would have heard of any problems with doors latching or unlatching. He stated that he could not recall any driver stating he hurt himself while opening and closing trailer gate latches. Carter agreed that while he did not routinely review the vehicle reports filed, he did oversee them and was concerned with such reports as he needed to ascertain whether Ryder properly performed maintenance on the tractor-trailers leased.

Robert S. Carleton, D.O., a board certified general practitioner, treated claimant generally. On January 12, 1983, claimant was seen in his office reporting acute onset of right shoulder pain and forearm and hand weakness and numbness and tingling in the digit. No new trauma was reported. J. L. Jochims, M.D., saw claimant on a consultation on February 18, 1983 with complaints of right arm pain. Dr. Jochims reported a history of claimant using his hand and palm to pound a gate system into place. Dr. Jochims' impression was of ulnar neuritis. Dr. Jochims performed a decompression of Guyon's canal with secondary carpal tunnel [release] on February 28, 1983. On March 22, 1983, he diagnosed claimant's condition as contusion of the ulnar nerve at Guyon's canal in the right wrist, and opined that claimant should fully recover. He released claimant to work on April 11, 1983 after stating on April 8, 1983 that no long-term impairment of claimant's hand was anticipated. On June 2, 1983, Dr. Jochims reported that claimant had returned with symptoms of right hand pain and little finger contracted. He indicated that the symptoms had increased after claimant had returned to work. Examination of June 6, 1983 showed no decrease in sensation, but poor wrist strength and no dysesthesias in the median nerve distribution.

Duane K. Nelson, M.D., apparently an orthopedic surgeon, examined claimant on June 16, 1983. In a report of July 12, 1983, he stated that that examination revealed mild skin discoloration indicative of vasomotor instability in the digits and stated that no specific diagnosis was made, but that claimant's

symptoms were well localized anatomically in the course of the ulnar innervation of the hand. He advised that claimant rest the hand and stated that claimant was unable to return to truck driving. He opined that as far as he knew the symptoms were from his work injury. On September 19, 1985, Dr. Nelson opined that claimant's shoveling incident, apparently the June 1985 incident, was an aggravation of his preexisting problem which aggravation was due to the original injury.

Bruce L. Sprague, M.D., of Surgery of The Hand and Upper Extremity, examined claimant on June 20, 1983. On testing around the wrist, claimant was reported as feinting weakness of the wrist extension secondary to pain and wrist function. Claimant had some mottling of the skin and some decreased sensibility involving the ulna nerve distribution of the right hand as compared to the left. He had a negative Tinel's sign at the elbow and positive Tinel's sign on the left. He had no real weakness of the intrinsic muscles involving the right hand. X-rays of both hands did not reveal any osteoporosis. Nerve conduction studies and EMG's apparently of June 23, 1983, did not reveal any decreased conductivity involving the median or ulna nerves at the elbow or wrist. No diagnosis was made.

Thomas Von Gillern, M.D., a board certified orthopedic surgeon, initially saw claimant August 3, 1983. He reported that claimant related a history that in January 1983, while on his job, he jammed his hand on a truck gate pin and noted acute onset of pain in his wrist and hand. His impression was ulnar nerve neuritis. On examination, claimant had slightly increased erythema on his right hand with the nail somewhat longer on the right hand. He had full range of motion actively and passively with profundus, sublumus and extensor tendon function noted. Some decreased strength in the function of the ring and little finger was noted. A tender hypothenar emminence and tenderness in the region of the hamate were noted. There was evidence of tenderness distal to the common digital branch of the ulnar nerve. Dr. Van Gillern advised strengthening and range of motion exercises and examined claimant periodically throughout Fall 1983 and early 1984.

E. A. Ricuarte, M.D., saw claimant for psychiatric consultation on September 5, 1983. Following the administration of a Minnesota Multiphasic Personality Inventory, he opined that claimant had no gross signs of psychological pathology.

William F. Blair, M.D., of the Department of Orthopaedic Surgery, Divison of Hand Surgery, University of Iowa, examined claimant on March 6, 1984. Among other things, he found a mild suggestion of hypothenar atrophy on the right but no evidence of intrinsic atrophy. His diagnoses were 1) Guyon's canal syndrome, probably secondary to repetitibve job-related trauma by history; 2) reflex sympathetic dystrophy by history; and 3) neuritis

ulnar nerve and palm with residuals of RSD and interneural fibrosis. He stated that the expected prognosis with or without treatment would be very poor and that further treatment was not recommended.

Robert S. Carleton, D.O., again saw claimant on June 24, 1985 with pain complaints and numbness in the wrist and hands following a shoveling incident. Dr. Von Gillern again saw claimant on August 14, 1985 following the shoveling incident. On August 19, 1985, Vijay Verma, M.D., reported that an EMG was normal. On August 23, 1985, Dr. Von Gillern opined that claimant's current symptoms likely related to his previous injury in that persistent pain was in the same distribution as claimant had previously had such pain. On September 6, 1985, Dr. Von Gillern performed ulnar nerve neurolysis with interneural neurolysis under magnification and flexor carpi ulnaris tenolysis. In an operative report of that date, he stated that there was moderate constriction of the ulnar nerve with severe scarring of both major tracts of the ulnar nerve. On September 11, 1985, Dr. Von Gillern reported that claimant was slightly improved following surgery and was able to fully extend his wrist and fingers without pain which he had been unable to do preoperatively. On September 25, 1985, Dr. Von Gillern opined that claimant's current symptoms related to the original injury of 1983 and was not a new injury.

In his deposition of November 11, 1986, Dr. Carleton opined that a fall such as the box fall claimant described could be a possible cause of claimant's complaints in the right arm and in wrist. He stated that if weight of 180 pounds had come in contact with claimant's hand, some evidence of trauma would be expected. None was found.

Dr. Von Gillern opined in his deposition of August 26, 1986 that the shoveling incident of June 20, 1985 may have aggravated claimant's condition as claimant had been symptom-free for more than a year, a fact which would likely infer that claimant would have remained symptom-free but for the aggravation. He reported that the nature of the aggravation was such that it may have represented aggravation of the preexisting condition resolved to a subclinical level only activity then brought the condition to a clinical level. The doctor was not able to distinguish whether the shoveling or the preexisting condition was the specific cause of claimant's need for further surgical treatment. Dr. Von Gillern opined that the scar tissue found during claimant's 1985 surgery could have been produced from postoperative changes following claimant's earlier surgery, could have antedated the first surgery, or could have been produced subsequent to the first surgery.

Dr. Von Gillern opined that problems with Guyon's canal typically result either from trauma or from nonspecific flexor tennosynovitis in the nerve region. He reported that ulnar

neuritis can be caused by a variety of nonspecific things or by trauma and that all the various histories claimant described were of sufficient magnitude to have produced his condition. The doctor characterized Guyon's canal as an area in the hand used frequently for shoveling and pushing, shifting gears, and for other activities from which it receives "a lot of pressure" in day-to-day activities. He opined that striking the hand with a hard object in the affected area could produce pain in the area.

Dr. Von Gillern stated that Dr. Blair felt claimant had reflex sympathetic dystrophy on the basis of one examination and that when that condition is present, the prognosis would be poor. Dr. Von Gillern opined that upon a number of examinations and treatment of claimant, he had come to believe that claimant did not have reflex sympathetic dystrophy.

The medical statements submitted were reviewed and will be be discussed further in the applicable law and analysis. The balance of the evidence was reviewed and considered in the disposition of this matter.

APPLICABLE LAW AND ANALYSIS

Our first concern is the arising out of and in the course of employment question.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on February 4, 1983 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63.

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe, 246 Iowa 402, 68 N.W.2d 63.

"An injury occurs in the course of the employment when it is

within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure, 188 N.W.2d 283, Musselman, 261 Iowa 352, 154 N.W.2d 128.

The 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.

We have some difficulty understanding what exactly defendants dispute as to this issue. Do they dispute the original injury as claimant described it or do they dispute a work-related aggravation in the June 1985 shoveling incident? If the dispute is to the initial injury, we find sufficient credible evidence to support claimant's contention he received an injury in early 1983 which resulted from his pounding the trailer latches. That finding is consistent with Dr. Von Gillern's testimony that the Guyon's canal hand area is used frequently

for shoveling and pushing and that striking the hand with a hard object in the affected area could produce pain. We do not find claimant's medical histories terribly troubling. Claimant appeared a credible witness overall. Histories given appear to be claimant's own attempts to find a source for his problems. We do not find it unusual for a workman to search out exceptional circumstances to account for his difficulties rather than look for their source in his daily work activities. Claimant's testimony that he only concluded his problems related to his latch pounding after discussion with Dr. Jochims is credible. It is also consistent with Dr. Jochim's medical history. Likewise, it is not incredible that a treating physician medically familiar with factors potentially producing conditions might make inquiry ferreting out the source of those troubles more readily than a layman attempting to explain the source of unexpected pain. Also, we do not find the absence of multiple vehicle condition reports concerning the latches unduly disturbing. Claimant testified the latches were only a problem on older tractor-trailers. In the absence of an understanding that the problem was producing injury to him, claimant might well have felt the bend or crooked equipment was only a minor nuisance related to his job and not of sufficient concern to warrant continuing complaints. Claimant prevails as to the existence of an initial injury. The question of a work-related June 1985 aggravation is best addressed under the causal relationship analysis.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 4, 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).

When a worker sustains an injury, later sustains another

injury, and subsequently seeks to reopen an award predicated on the first injury, he or she must prove one of two things: (a) that the disability for which he or she seeks additional compensation was proximately caused by the first injury, or (b) that the second injury (and ensuing disability) was proximately caused by the first injury. DeShaw v. Energy Manufacturing Company, 192 N.W.2d 777, 780 (Iowa 1971).

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., 270 N.W.2d 348, 354 (Iowa 1980).

Dr. Von Gillern testified Guyon's canal problems can result either from trauma or from nonspecific flexor tennosynovitis in the nerve region. He opined all claimant's various work-related histories were of sufficient magnitude to have produced his condition. He stated Guyon's canal is frequently used for pushing and that sticking the hand with a hard object in the affected area could produce pain. We find the doctor's testimony taken as a whole supports a finding that claimant's condition had its roots in his work activities. We also find that Dr. Von Gillern's testimony supports a finding that claimant's June 1985 injury and ensuing disability was proximately caused by the first injury. While it is true that claimant's condition remained symptom-free for more than a year and that, but for the aggravation in the June shoveling, claimant might well have remained symptom-free. The doctor also testified that the underlying (work related) condition may have been resolved only to a subclinical level and then again brought to a clinical level by the activity. Dr. Von Gillern also stated that the situs of the aggravation along the same pattern as the original injury indicated claimant's 1985 symptoms related to the original 1983 injury. He opined on September 25, 1985 that claimant's current symptoms related to his original injury.

As claimant has shown the requisite causal relationship between his original injury and his 1985 period of disability, claimant is entitled to tempoary total disability benefits during the stipulated period, that is, from June 21, 1985 to November 1, 1985.

Medical charges submitted are generally consistent with the record of treatment for claimant's right hand condition and treatment, therefore, in 1985. As defendants denied liability for the 1985 condition, their argument that the treatment was unauthorized fails. Claimant is entitled to payment of his medical expenses in evidence but for costs related to a left hand EMG of March 6, 1986 and costs of telephonic communications. Expenses for which payment is ordered are as follows:

Burlington Medical Center	$ 102.10
" " "	110.00

Franciscan Medical Center	338.00
" " "	200.00
" " "	1,523.56
" " "	434.50
Orthopaedic and Reconstructive Surgery Associates, P.C.	33.00
" "	33.00
Rock Island Radiology Associates, Ltd.	60.00
Gregory a. Love, M.D.	330.00
Moline Orthopedic	1,301.00
Carleton Clinic	16.00
" "	17.00
" "	16.00
" "	1.20
Carruthers Pharmacy	9.60
" "	9.60
" "	9.60
" "	17.10
" "	6.65
" "	5.95
" "	5.95
" "	17.70
" "	5.95
" "	5.95
" "	5.95
Franciscan Medical Center Pharmacy Services	6.25

Likewise, claimant is entitled to reimbursement of his medical mileage expenses for 1985 totaling 2,355 at the then applicable rate of $.24 per mile. We regret that claimant failed to itemize his medical expenses. Submission of the statements alone without accurate itemization leaves confusion as to the costs actually outstanding and claimed.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant worked for Pacemaker as a leased driver delivering freight for Bandag Corporation in tractor-trailers leased from Ryder Truck Rental Company from 1979 or 1980 to February 1983.

A bar rod with a handle which had to be pulled up and out closed the trailers.

At times in older trailers, a bent or crooked tongue piece would cause resistance and claimant would push in the rod handle and attempt to beat in the latch.

Claimant bruised his hands and hand pain following that

activity.

In early 1983 claimant could not shake the pain from his right hand and wrist and sought medical care.

Claimant gave varying histories relating possible sources for his right hand and wrist to his physicians.

Claimant underwent exploration and decompression of the ulnar nerve decompression Guyon's canal with secondary carpal tunnel release on the right on February 28, 1983.

J. L. Jochims, M.D., attributed claimant's ulnar nerve problem to his pounding on the trailer doors.

Claimant's condition resolved subsequent to early February 1984 and claimant remained symptom-free until he engaged in minimal shoveling in June 1985.

Claimant experienced a return of symptoms in June 1985 along the same situs as his original injury.

Claimant's condition had resolved to a subclinical level prior to June 1985 but was brought to a clinical level as a result of claimant's June 1985 activity.

Subsequent to the June 1985 aggravation, claimant required additional medical care and surgery and was off work on account of the return of his symptoms.

Claimant had to travel 2,355 miles in seeking medical care related to his 1985 symptom return.

Claimant is not claiming his left hand condition relates to his original injury.

Claimant's EMG on the left hand of March 6, 1986 does not relate to the original injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established a February 1983 injury which arose out of and in the course of his employment.

Claimant has established a causal relationship between his original February 1983 injury and his subsequent aggravation of that injury in June 1985 and the resulting disability.

Claimant is entitled to temporary total disability benefits from June 21, 1985 through November 1, 1985.

Claimant is entitled to payment of medical costs and medical mileage expenses as set forth in the above law and analysis.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant additional temporary total disability benefits at the rate of four hundred six and 88/100 dollars ($406.88) from June 4, 1985 to November 1, 1985.

Defendants pay claimant medical costs and medical mileage expenses as set forth in the above law and analysis.

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 22nd day of June, 1987.

Helen Jean Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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001891

FILED

JUN 29 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CRAIG ALLEN GULLETT,	:	
	:	
Claimant,	:	File No. 825147
	:	
vs.	:	
	:	A R B I T R A T I O N
GEORGE A. HORMEL & Co.,	:	
	:	
Employer,	:	D E C I S I O N
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Craig A. Gullett, claimant, against George A. Hormel & Company, a self-insured employer for the recovery of benefits as the result of an alleged injury on July 3, 1986. This matter was heard before the undersigned at the courthouse in Ottumwa, Wapello County, Iowa on March 30, 1987. It was considered fully submitted at the conclusion of the hearing. The record consists of the testimony of claimant, Mary Brooks and Mike McClain; claimant's exhibits 1 through 14 and defendant's exhibits A and B.

STIPULATIONS AND ISSUES

Pursuant to the pre-hearing report and order approving same, the parties stipulated that there was an employer-employee relationship between the claimant and the employer at the time of the alleged injury; that the claimant did receive an injury arising out of and in the course of his employment on July 3, 1986; that the claimant is married and entitled to three exemptions; that the fees charged for medical services were fair and reasonable and were reasonably necessary for the treatment of the condition; that the defendant is entitled to credit in the amount of $85.83 under section 85.38(2) for medical expenses paid in connection with the injury; and, that each party has actually paid items of cost which they seek to be assessed in this proceeding.

The issues to be resolved in this proceeding are whether or not the injury suffered by claimant was the cause of any temporary disability and/or permanent disability; the extent of any temporary disability or permanent disability suffered by the claimant; the nature of the disability suffered by the claimant; the rate of compensation to which claimant is entitled; and, whether or not claimant is entitled to medical expenses under the provisions of section 85.27. The issue of whether or not

the defendant should be assessed penalties for unreasonable denial or delay of payment of benefits remains asserted.

EVIDENCE PRESENTED

Claimant testified that he began his employment with the defendant on May 5, 1986. Claimant's employment was in the ham boning job where it was his duty to remove bones from hams with an air knife. Claimant stated he is right-handed.

Claimant advised that, prior to beginning his employment with the defendant, he had experienced no problems with either of his hands. He stated that on or about July 3, 1986, he began to experience severe pain in his hands. He went to see the company nurse who stated that he would be able to see the company doctor when the doctor visited the plant that day. Claimant stated that he had been to see the nurse prior to July 3, 1986 with the same problem.

Claimant said he saw Winn Gregory, M.D. on July 3, 1986 following referral from the nurse. He was advised by Dr. Gregory to return to work which he did for about an hour at which time a company official appeared and terminated him from his employment. Claimant has not been employed by defendant since.

Claimant was then referred to Donald D. Berg, M.D. whom he saw on July 15, 1986. Dr. Berg diagnosed tendonitis and prescribed medication for claimant's problems. Upon claimant's failure to improve, he was referred by Dr. Berg to Richard F. Neiman, M.D. whom he saw in August of 1986.

Claimant stated that Dr. Neiman treated him with medication, with some treatment at the YMCA, and with wrist splints. Claimant said his condition did not improve greatly and that he continues to suffer problems with his hands.

Claimant stated that after his discharge from the defendant's he obtained employment as a self-employed carpenter. Claimant said he checked with the doctors about doing light-duty work and, although they generally recommended against it, he felt he had no choice in order to earn a living. Claimant continued to work as a carpenter throughout the summer and had been continuing to do so at the time of the hearing. Claimant stated that in August, September, and October, 1986 he drew unemployment compensation which he was allowed to do because he was working less than 20 hours per week as a carpenter. Claimant outlined in considerable detail the nature and type of work he had done since leaving employment with the defendant.

Claimant testified that at the time of his discharge he was earning $8.82 per hour and that he had begun his employment at the rate of $8.55 per hour.

Claimant was questioned considerably on cross-examination about the nature of the carpentry work he was performing after his discharge by the defendant. Claimant described his employment as a carpenter as light-duty work involving mostly finishing work and very little hammering and heavy lifting. Claimant said he has also experienced arm, shoulder and neck pain.

Mary Brooks testified that she is employed as a nurse at the defendant's and has been so for nine years. She stated that claimant first presented himself with a complaint of pain in the right elbow on June 25, 1986. She reported that he returned again on July 3, 1986 with complaints of pain in the elbow, arms, hands and wrist. She said he was seen by Dr. Gregory that day who gave claimant some medication and directed him to return to work. She said the company files contained no other reports from Dr. Gregory. Ms. Brooks testified that all new employees at the plant are handed wrist bands with an explanation as to their use. She also stated that claimant's visit with Dr. Neiman in August of 1986 was arranged by the defendant.

Mike McClain testified that he is employed as a personnel manager by the defendant and has been so since 1978. He stated that during claimant's period of employment claimant was a probationary employee.

Donald D. Berg, M.D. testified by way of deposition which was marked as defendant's exhibit A. Dr. Berg stated that he is an orthopaedic surgeon practicing in Ottumwa, Iowa. He stated that he first saw the claimant on July 15, 1986 at which time he took a history disclosing the claimant had been employed at the defendant's as a ham boner. Claimant was complaining at that time of arm pain. According to the history given to the doctor by claimant, claimant was employed in carpentry work between July 2 and July 15. Dr. Berg said he examined claimant and diagnosed tendonitis in the arms. He prescribed medication of an anti-inflamatory character and told him, if at all possible, not to do a lot of work or use his arms. Claimant apparently told the doctor, however, that he needed money and had to work and so was continuing to do carpentry work. Dr. Berg stated that he did not make a diagnosis of carpal tunnel syndrome, but did not dispute the findings of Dr. Neiman. It was Dr. Berg's opinion that claimant's employment as a carpenter continued to aggravate the tendonitis that was diagnosed. The doctor stated that he last saw the claimant in November, 1986, at which time he was having continued complaints of pain in his arms, tenderness over the forearms and numbness in his fingers. It was Dr. Berg's opinion that claimant's condition arose from both his employment at Hormel and his carpentry work. He said it would be difficult to distinguish which of the two contributed most to the condition. He said he advised the claimant to not do carpentry work. The doctor also stated that he would not be surprised that someone doing ham boning work would develop carpal tunnel syndrome. He

indicated that claimant's recovery would have been quicker had he not been involved in the carpentry work.

Richard F. Neiman, M.D. testified by way of deposition which was submitted as claimant's exhibit 1. Dr. Neiman stated that he is a neurologist practicing in Cedar Rapids, Iowa. He stated that he first examined claimant on August 15, 1986 upon referral from Dr. Berg in Ottumwa. Dr. Neiman outlined the history which was given to him by the claimant which was essentially that which was given to Dr. Berg. Dr. Neiman diagnosed carpal tunnel syndrome on the right with borderline left carpal tunnel syndrome. Dr. Neiman also recommended that claimant limit the use of his hands, but was advised that claimant felt he had to work in order to earn a living. The doctor stated that, in his opinion, approximately 80% of claimant's problem was attributable to his employment at the defendant's and perhaps 20% related to his work as a carpenter. The doctor stated that there was a clear causal relationship between claimant's employment and the difficulty he was having with his hands. He stated, however, that had claimant not been employed at Hormel, he would not have had the problem with his hands. Dr. Neiman stated that he did not have an opinion at that time as to whether or not claimant suffered any permanent disability and indicated that it would be best to wait and see whether or not claimant's condition improved. The doctor indicated that his following of the claimant showed that improvement was slowly taking place.

A review of the exhibits submitted by the parties demonstrates essentially the same matters as were testified to by claimant and by the doctors. Statements from claimant's medical treatment are included in the exhibits. Defendant's exhibit B is a statement of claimant's earnings while in the employ of the defendant from May 11, 1986 through July 6, 1986. The pay slip indicates claimant's payment over a nine-week period.

APPLICABLE LAW AND ANALYSIS

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

Iowa Code section 85.33(1), which deals with temporary total and temporary partial disability, states:

> Except as provided in subsection 2 of this section, the employer shall pay to an employee for injury producing temporary total disability weekly compensation benefits, as provided in section 85.32, until the employee has returned to work or is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

This case presents an interesting fact pattern. It is evident that the claimant did, in fact, suffer an injury arising out of and in the course of his employment. It is also evident that it was the clear recommendation of claimant's treating physicians that he not work, in order to give his body a chance to recuperate from the injury. At the same time, however, defendant did not pay claimant and, in fact, discharged him from his employment and now claim to be relieved from their obligation due to the fact that the claimant was required to seek self-employment in order to support himself and his family. In short, the defendant now seeks to benefit from its own refusal to pay for what they have acknowledged they are responsible. As a consequence, claimant has suffered a continuing and ongoing problem with his hands which has failed to clear up and which continues to bother him. Unfortunately, the law does not contemplate such actions and an appropriate remedy for the claimant is difficult to find. The medical evidence clearly establishes a causal relationship and he is entitled to prevail on that point. He consequently prevails on the issue of section 85.27 benefits.

The sole issue in this case is whether or not claimant is entitled to disability benefits as a result of his injury. Certainly his return to work, even as a self-employed carpenter, precludes his recovery of temporary total disability and the record does not establish any permanent disability at this time. At the same time, however, it is the purpose of the compensation law to provide for the injured worker and his or her dependents and it is contemplated that he have adequate time to recover from the injuries. Accordingly, it will be ordered that the

defendant shall commence payment of temporary total disability upon notification by the claimant, filed with the office of the industrial commissioner, that he has ceased his self-employment as a carpenter. Such payments should continue until claimant achieves a maximum medical recovery or is capable of returning to substantially similar employment to that which he was engaged in at the time of the injury. It is the specific purpose of this decision to deny the defendant the benefit of having refused to pay claimant compensation owed when they were aware of the fact that claimant was not capable of employment. Claimant shall be entitled to file a review-reopening petition at the conclusion of his healing period if it becomes apparent at that time that he has suffered permanent disability.

Claimant's rate of compensation shall be based upon section 85.36(7). Utilizing defendant's exhibit B and applying that section, claimant's gross weekly earnings at the time of his injury were $368.09. His rate of compensation is accordingly $233.54.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On July 3, 1986 claimant suffered an injury arising out of and in the course of his employment with the defendant.

2. Claimant's injury is carpal tunnel syndrome on the right and borderline on the left.

3. Claimant's doctors recommended claimant not work in order to recover from his injury.

4. Due to defendant's discharge of claimant from employment and refusal to pay compensation, claimant was nevertheless required to work as a self-employed carpenter.

5. Claimant's self-employment has prolonged and aggravated his condition.

6. Claimant has not achieved maximum medical recovery.

7. Due to defendant's continued failure to pay compensation, claimant must continue self-employment.

8. Claimant needs to be off work to recover from his injury.

9. The medical expenses incurred by claimant as set forth in exhibits 3 through 7 are causally related to his injury.

10. Claimant's rate of compensation is $233.54.

11. It can not be determined at this time whether claimant suffered permanent disability.

12. Any aggravation of the injury which occurred as a result of claimant's self-employment was proximately caused by defendant's refusal to pay compensation.

IT IS THEREFORE CONCLUDED that claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits to recover from his injury upon ceasing the self-employment he was required to undertake as a result of defendant's refusal or failure to pay compensation.

IT IS FURTHER CONCLUDED that claimant has proven by a preponderance of the evidence that there is a causal relationship between his injury and the medical expenses set forth in exhibits 3 through 7.

ORDER

IT IS THEREFORE ORDERED that the defendant pay unto claimant temporary total disability benefits at his rate of $233.54 commencing immediately upon notice by claimant, filed with the Division of Industrial Services, of his cessation of self-employment. Such benefits shall continue until the conditions of section 85.33(1) are met.

IT IS FURTHER ORDERED that the defendant pay all medical expenses set forth in exhibits 3 through 7.

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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