Iowa Industrial Commissioner

Decisions

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES H. HANNAM, Claimant, vs. MEREDITH/BURDA CORPORATION, Employer, and TRAVELERS INSURANCE CO., Insurance Carrier, Defendants.	FILE NO. 775310 A R B I T R A T I O N D E C I S I O N FILED MAY 14 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Charles H. Hannam against Meredith/Burda Corporation, his employer, and Travelers Insurance Company, the insurance carrier. Hannam alleges that he sustained an injury to his back on July 25, 1984 and seeks compensation for temporary total disability. The issues identified by the parties for determination are whether Hannam sustained an injury that arose out of and in the course of his employment; whether any alleged injury is a proximate cause of any disability; and, ultimately, determination of his entitlement to compensation for temporary total disability. The existence of an employer/employee relationship, the appropriate rate of compensation and the amount of time that Hannam was off work commencing with July 26, 1984 and running through September 13, 1984 were established by stipulation of the parties.

SUMMARY OF EVIDENCE

Charles H. Hannam has been employed by Meredith/Burda for approximately 10 years. His present job consists primarily of loading mail sacks and bundles of printed materials onto trucks. The sacks and bundles vary in weight up to as much as 70 pounds each. On a typical work day he handles as many as 1000 of the articles. The lifting that he performs generally consists of moving the articles from waist level to a position which ranges from the floor to approximately head high. It involves picking up sacks and swinging them around. Hannam was performing this same job on July 25, 1984 and had been doing so for slightly more than a month prior thereto.

Hannam had been a forklift and tow operator prior to mid June of 1984 when a reorganization of staffing levels in the plant resulted in a reduction in the number of those positions. Hannam did not have enough seniority to remain in the equipment operator position. The company also disqualified him from operating the equipment in the future due to what company officials perceive as an unacceptable accident and safety record. During the intervening time between June of 1984 and the date of hearing Hannam had returned to an equipment operator position but had another accident and was again disqualified by the employer from the equipment operator position.

In 1980, while working as a forklift operator, the forklift which claimant was operating was rear ended by another forklift resulting in injury to claimant's spinal column and other parts of his body. Following that accident he was off work for a period of time and eventually returned. Hannam complained of continuing pain and discomfort with his back and neck ever since that accident.

Hannam testified that following his placement in the mail handling position, he had increased problems with his back and that the problems worsened as he continued to perform the job. He stated that when he went to bed at the end of the day on July 25, 1984, he took a muscle relaxer pain pill that had been previously prescribed for his back by Stuart R. Winston, M.D., one of the physicians who has treated his back condition. Hannam testified that he overslept on the following morning, phoned in to the plant and was told by Jess Rynearson, his foreman, that he should not come in to work that day. Hannam phoned the company a second time later on the 26th after making a doctor's appointment and requested that his absence from work be listed as the result of a work related accident rather than an unauthorized absence. At that time Hannam had previously been given a written warning for excessive unauthorized absences and was subject to a three day suspension as a penalty for additional unauthorized absences. Jess Rynearson, claimant's foreman, acknowledged that claimant had phoned in on the two occasions on July 26, 1984. He testified, however, that at the first call claimant advised him that his electricity had gone off and his alarm had not sounded. He also testified that claimant had indicated that he wanted to come to work but Rynearson stated that he told claimant not to come in because a replacement worker had already been obtained. Rynearson testified that claimant made no mention of any health problems during the first call but that at the second call claimant informed him that the absence should be treated as related to an on-the-job injury and that a doctor's appointment had been scheduled. Rynearson identified exhibit N as a memorandum of those calls.

Hannam was seen by Dr. Winston on August 6, 1984. The neurological examination was reported as negative. Dr. Winston

indicated that claimant would likely have chronic recurrent myofascial strain for so long as he continues to work as laborer. Dr. Winston recommended that claimant change occupations but stated that he saw no indication that further treatment was necessary (Exhibit G). In a report of September 18, 1984, Dr. Winston, when discussing the August 6, 1984 examination, stated: "...I certainly see no reason why he could not return to work but did not advise him one way or the other with respect to that fact." (Ex. J)

On August 17, 1984, claimant was seen by Jerome G. Bashara, M.D. Dr. Bashara scheduled claimant for x-rays and other diagnostic tests which were interpreted as normal. He diagnosed claimant as having a musculoligamentous strain of the cervical spine, secondary to the forklift accident. When Dr. Bashara examined Hannam on August 17 and September 25, 1984, he noted the existence of spasms in claimant's cervical spine region (Ex. H). The notes from August 17, 1984 contain the following statement: "...he will be rechecked in one week. He should not work in the meantime." A similar indication appears at exhibit M.

Claimant was subsequently evaluated by Joshua V. Kimmelman, M.D., on August 29, 1984. Dr. Kimmelman concluded that claimant had a chronic lumbrosacral strain with subjective complaints that were out of porportion to the objective findings. He felt that claimant should be encouraged to return to work and that he would not harm his physical condition by working (Ex. I).

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on July 25, 1984 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

Claimant injured his back in 1980 and it appears that he has continuing difficulties as a result of that injury. It would not be unusual or unexpected for work of the type that Hannam performs to cause him difficulties. Hannam's testimony with regard to experiencing back pain leading up to and following July 25, 1984 is accepted as correct.

Hannam seeks compensation for temporary total disability. Section 85.33(1) 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. (Emphasis added)

For Hannam to receive compensation for temporary total disability he must prove by a preponderance of the evidence that his absence from work was due to medical incapacity to perform his usual work.

Dr. Winston, in exhibits G and J, makes no indication that claimant was medically incapable of performing his normal work at any time during the period for which benefits are sought. Dr. Kimmelman likewise (Ex. I) indicates that claimant should return to work and makes no statement regarding medical inability to perform the duties of his normal work. Dr. Bashara's notes indicate that claimant should not work between August 17, 1984 and August 24, 1984 (Ex. H & M). Dr. Bashara does not, however, indicate that claimant was physically unable to work. It appears that the absence from work was as much for purposes of allowing evaluations to be performed and an opportunity for complaints to resolve as for any actual disability. The only objective indication of injury found by any of the three physicians is the spasm noted by Dr. Bashara. None of the diagnostic tests conducted showed any abnormality. Drs. Winston and Kimmelman indicated that there was no reason for claimant to be off work. Dr. Bashara recommended that claimant remain off work for approximately a week but at no point provided the reason for that recommendation. Under the record made the evidence from Drs. Winston and Kimmelman is found to be more persuasive than that from Dr. Bashara. The evidence from Dr. Bashara in this regard is not found to be persuasive and it is found that claimant has failed to establish by a preponderance of the evidence that he was medically incapable of engaging in employment substantially similar to that he performed on July 25, 1984 during the time for which benefits are sought, namely from July 26, 1984 through September 13, 1984.

While Hannam did, in all likelihood, aggravate his preexisting back condition, he has failed to prove that the aggravation was of sufficient severity to be disabling. The employer's contentions that claimant's seeking of medical care was something in the nature of an after thought in an attempt to avoid disciplinary action is supported by substantial evidence. When all the

evidence is viewed as a whole it is found that claimant did have discomfort, but the evidence fails to establish that claimant was medically incapable of performing employment substantially similar to that in which he had been engaged on and immediately prior to July 25, 1984.

FINDINGS OF FACT

1. Charles H. Hannam was a resident of the State of Iowa employed by Meredith/Burda in Des Moines, Iowa on July 25, 1984 when he aggravated a preexisting condition in his back by handling sacks and bales of printed materials.

2. At the time of injury Hannam was subject to disciplinary action if he incurred any further unauthorized absences from work.

3. The evidence introduced fails to establish that, between the dates of July 26, 1984 and September 13, 1984, Hannam was medically incapable of performing work in employment substantially similar to that in which he had been engaged on and prior to July 25, 1984.

CONCLUSIONS OF LAW

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

2. Charles H. Hannam sustained an injury in the nature of an aggravation of a preexisting condition on July 25, 1984 which injury arose out of and in the course of his employment with Meredith/Burda.

3. Claimant has failed to establish, by a preponderance of the evidence, that he was temporarily totally disabled within the meaning of section 85.33 of the Code at any time between the dates of July 26, 1984 and September 13, 1984, the period for which temporary total disability benefits are sought.

4. Where claimant established that he did sustain an injury which arose out of and in the course of his employment, even though benefits for weekly compensation were not awarded, he is nevertheless entitled to recover medical benefits under Code section 85.27 and costs under Division of Industrial Services 343-4.33.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding except costs which are assessed against defendants pursuant to Division of Industrial Services 343-4.33.

IT IS FURTHER ORDERED that defendants file a claim activity report as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 14TH day of May, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBRA L. HANSON, Claimant, vs. MERCY HOSPITAL MEDICAL CENTER, Employer, and AETNA CASUALTY AND SURETY COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 709232 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 28 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Debra L. Hanson, claimant, against Mercy Hospital Medical Center, employer, and Aetna Casualty and Surety Company, insurance carrier, for further benefits as a result of an injury which occurred on July 18, 1982. An earlier decision filed May 18, 1984 found that claimant did receive an injury which arose out of and in the course of her employment with the employer and awarded temporary total disability benefits from July 19, 1982 to October 18, 1982. A review-reopening hearing was held on November 21, 1986 at Des Moines, Iowa and the case was fully submitted at the close of the hearing. The record consists of joint exhibits A through Y and the testimony of Debra L. Hanson, claimant.

STIPULATIONS

The parties stipulated to the following matters:

That an employer/employee relationship existed between the claimant and the employer on the date of the injury.

That the claimant did sustain an injury on July 18, 1982 which arose out of and in the course of her employment with the employer.

That the rate of compensation in the event of an award is $199.19 per week.

That the provider of medical services would testify that the fees charged were reasonable and that the defendants are not offering contrary evidence.

That the medical expenses were incurred for reasonable and necessary medical treatment.

That defendants are entitled to a credit under Iowa Code section 85.38(2) for disability income and medical expenses paid under an employee non-occupational group plan but that the amount of these benefits is undetermined.

That the defendants paid certain benefits to the claimant prior to the earlier decision filed May 18, 1984 as shown in the attachment to the prehearing report.

That the issue of permanent disability is bifurcated.

ISSUES

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

Whether the injury of July 18, 1982 is the cause of any additional temporary disability during a period of recovery.

Whether the claimant is entitled to any additional temporary total or healing period disability benefits.

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

SUMMARY OF THE EVIDENCE

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

Claimant was employed as an intensive care nurse for the employer on July 18, 1982. Claimant testified that on that date she tried to reposition a disoriented patient. The woman grabbed her around the neck. Claimant then felt pain in her low back and down the inside of her right leg. Claimant was seen by a number of physicians after the injury including H. W. Halling, M.D.; John Zittergruen, D.O.; Marvin H. Dubansky, M.D.; Robert C. Jones, M.D.; Steven R. Adelman, D.O.; G. Bradley Klock, D.O.; and Thomas A. Carlstrom, M.D.

A workers' compensation contested case hearing was held on April 5, 1984. Deputy Industrial Commissioner Steven E. Ort issued a decision on May 18, 1985. Official notice is taken of that decision (Iowa Administrative Procedure Act section 17A.14(4)). He found that claimant did sustain an injury that arose

out of and in the course of her employment as to her low back and right leg pain. He allowed temporary total disability benefits from July 19, 1982 to October 18, 1982. He found that there was no evidence of permanent impairment due to the low back and right leg. Deputy Ort found that a neck and left arm complaint that arose approximately two months after July 18, 1982 were not causally connected to the injury of July 18, 1982 (Ort Decision, pages 7 & 8).

Deputy Ort mentioned that Dr. Jones, a neurosurgeon to whom claimant was eventually referred for low back care, performed a lumbar myelogram which failed to show any abnormalities (Exhibit P-1). Dr. Jones released claimant from his care of the low back and right leg pain and directed claimant to return to work on October 18, 1982. It was then that claimant for the first time complained of the neck and left arm symptoms (Ort Decn., p. 4). Claimant has always denied in both of her depositions and at both hearings that Dr. Jones had released her from his care in October of 1982. She asserts that she was actively taking physical therapy at his direction at that time.

Deputy Ort also commented that Dr. Carlstrom, who saw claimant primarily for the neck and left arm complaints, noted that claimants' low back pain resolved rather promptly after the injury (Ort Decn., p. 5; Ex. M-1; Ex. X, pp. 5, 6 & 7). Claimant has always denied in both of her depositions and at both hearings that she ever made such a statement to Dr. Carlstrom.

Claimant's consistent testimony has been that she has had persistent low back pain from the date of the injury on July 18, 1982 until the present time. She denied any intervening accidents or injuries which might have caused or contributed to this pain. She did admit to one miscarriage in March of 1983 (Ex. M-2) and the birth of a child on March 17, 1984 (Ex. D-1 & D-2). She stated that the second stage of labor pain hurt her back so bad that she requested and received a cesarean section. Ross J. Valone, M.D., stated that during the second stage of labor claimant had significant discomfort in her back and could feel the muscles pulling away from their attachments. She knew she was doing serious injury to her back by continuing the second stage of labor (Ex. D-1).

Claimant testified at this hearing that her low back and right leg pain gradually began to get worse in August of 1984. She went to see Dr. Adelman on September 18, 1984. Dr. Adelman said that he did not feel that she could work when he saw her in September, 1984. He did not say whether the cause of her disability was or was not the injury of July 18, 1982 (Ex. K-8). Dr. Adelman referred claimant to Jerome G. Bashara, M.D., an orthopedic surgeon.

Dr. Bashara's office notes corroborated claimant's testimony

that she saw him on December 11, 1984 (Ex. A-4). Dr. Bashara said he examined thoracic and cervical x-rays from the Des Moines Osteopathic School of Medicine dated December 15, 1982. He recorded that claimant had a mild thoracic scoliosis and a reversal of the normal cervical lordotic curve. A full set of spine x-rays from Dr. England (full name unknown), a chiropractor dated September 18, 1984 showed a mild double curve lumbar scoliosis which was compensated. No mention was made of a herniated disc for either of those dates (Cl. Ex. A-4). Dr. Bashara then orderd a CT scan of the lumbar spine and recorded on January 22, 1985 that it showed a fairly large herniated disc at L-5, S-1 centrally and to the right (Cl. Ex. A-5).

Claimant's testimony and Dr. Bashara's office records are in agreement that conservative treatment of medication, physical therapy and epidural Cortisone injections were not successful. Dr. Bashara noted on August 27, 1985 that claimant was to be admitted to Mercy Hospital for an EMG/NCV test, a lumbar myelogram and a lumbar laminectomy (Ex. A-6). On September 11, 1985 a lumbar laminectomy and a discectomy was performed on the right side at L-5, S-1 for a herniated disc and L4-L5 on the right was explored but appeared normal (Ex. A-6). Nevertheless, on January 31, 1986, Dr. Bashara's office notes show that claimant was again complaining of low back pain and left leg pain (Ex. A-7). On February 7, 1986, his office notes reflect a diagnosis of (1) recurrent disc herniation L5-S1, and (2) possible herniated disc L4-L5. Claimant was to be readmitted to Mercy Hospital for a lumbar myelogram, enhanced CT scan, EMG/NCV test and another possible lumbar laminectomy (Ex. A-7). Dr. Bashara stated that after a consultation with Robert Hayne, M.D., and Bill Boulden, M.D., a diagnosis of recurrent disc herniation with some development of mechanical instability was made. A second lumbar laminectomy and a lumbar fusion of L5-S1 was performed on July 9, 1986 (Ex. A-2). Prior to the first laminectomy on April 5, 1985, Dr. Bashara wrote the following letter relative to causal connection to claimant's attorney:

> Dear Mr. Oliver:
>
> Enclosed are the medical records on the patient, Debra L. Hanson.
>
> My final diagnosis is a herniated lumbar disc, L5-S1, centrally and to the right. It is my opinion that this is directly related to her work injury at the Mercy Hospital on July 19, 1982.
>
> I have recommended surgery to include a lumbar laminectomy to relieve the patient's symptoms.
>
> Hoping this will be of some help to you.

Thanking you,

Jerome G. Bashara, M.D.
(Ex. A-1)

The evidence in this case did not include any written material from Dr. Boulden but there is a report from Dr. Hayne dated June 10, 1986 to the insurance carrier. The letter reviews claimant's medical history but is silent on whether the injury of July 18, 1982 was the cause of her worsened condition in August of 1984 or the herniated disc that was first diagnosed after the first hearing by Dr. Bashara on January 22, 1985 (Ex. B-1).

Claimant was examined by S. L. Danielson, M.D., on December 12, 1985 after the first laminectomy and before the second one. He performed a very detailed examination of the claimant and his report very carefully reviewed claimant's medical history. He thought her back pain was ligamentous in nature rather than discogenic or neurogenic. Dr. Danielson was silent on whether the injury of July 12, 1982 was or was not the cause of the claimant's worsened condition in August of 1984 or the herniated disc problem (Ex. C-1).

Claimant was also seen at the Institute for Low Back Care in Minneapolis by Charles Burton, M.D., on March 21, 1986 after the first laminectomy and before the second one. He commented that claimant was born with significant structural difficulties regarding her back. He stated that she has poor support of the spine, a transitional S-1 vertebra, hyperdordosis and scoliosis. He stated that these conditions were aggravated by the work related injury. In association with this there has probably been longstanding degenerative disc disease at L4-L5 and L5-S1. With respect to the disc herniation he stated that her work related injury may have produced the disc herniation at L5-S1 which required the surgery (Ex. E-1).

Dr. Carlstrom, a board certified neurosurgeon, examined claimant in February of 1983 prior to the first hearing in regard to her neck and left arm complaints (Ex. M-1 through M-6) and then again in October of 1986 prior to the second hearing in regard to her low back and right leg pain (Ex. X, p. 4). Dr. Carlstrom testified that he examined a lumbar myelogram done by Dr. Jones which was taken on approximately October 5, 1982. It was his recollection that this myelogram showed no extradural defect, that is no herniated disc. He did not write it down but he felt his recollection was reliable because he was concerned about whether Dr. Jones' myelogram covered the cervical area or not (Ex. X, pp. 8 & 9). Dr. Carlstrom ordered a cevical myelogram for himself on April 12, 1983 (Ex. M-2). Dr. Carlstrom was confronted with the question of causal connection for the low

back and right leg pain and the following colloque transpired:

> Q. Doctor, within a reasonable degree of medical certainty, do you have an opinion as to whether Mrs. Hanson's present complaints of low back pain are caused by the incident of July 1982 at Mercy Hospital?
>
> A. Yes.
>
> Q. Can you tell us what that opinion is?
>
> A. I don't think they are caused by that incident.
>
> Q. Why do you think that, Doctor?
>
> A. Well, you didn't ask me about the myelogram that was done by Doctor Bashara in '85, but --
>
> Q. Does that play a part in your answer?
>
> A. Yes, it does, because that study showed a large herniated disk, and it would be my opinion that a large herniated disk would not have been missed on that initial myelogram, even if it had been there, and I think that she developed the herniated disk between the time of the initial myelogram and the second myelogram. And so I believe that taking that into consideration along with the history that I obtained that her back was not really bothering her anymore, I think she probably resolved the initial complaint before my exam in February of 1983 and sometime between then and 1984 or 1985 developed the herniated disk. (Ex. X, pp. 8 & 9)

Dr. Carlstrom may be mistaken in his statement that Dr. Bashara diagnosed claimant's herniated disc by a myelogram. Dr. Bashara diagnosed claimant's herniated disc by a CT scan initially (Ex. A-5). However, Dr. Bashara did order a lumbar myelogram and EMG/NCV test prior to the first surgery (Ex. A-5) and Dr. Bashara did indicate that all three tests -- the CT scan, the myelogram and the EMG/NCV test -- led him to a definitive diagnoses of a herniated lumbar disc at the L5, S1 space centerly and to the right (Ex. A-2).

Dr. Carlstrom further testified that the pregnancy could result in a low back problem or even a herniated disc (Ex. X, p. 9). He estimated claimant's physical impairment as 10 percent of the body as a whole according to the AMA criteria (Ex. X, p. 10).

Claimant's counsel challenged Dr. Carlstrom on his statement that the low back was resolved at the time Dr. Carlstrom first saw her (Ex. X, p. 6) and the following dialogue occurred:

> Q. Doctor, of what significance is it to you, if any, that Mrs. Hanson reported to you back in 1983 that she was still having pain in the low back and in the thigh areas and had had an incident of pain at least approximately one week before she saw you at that time?
>
> A. Well, it depends on what you're asking.
>
> Q. Is it of any significance to you that she had ongoing symptomology of pain in the low back area?
>
> A. I guess the best way to answer that is that yes, it is, and in particular when discussing a problem which has been diagnosed as a herniated disk, it is very unusual for a patient to have a herniated disk which comes up one day, goes away and comes back a week later, or something like that, and the fact that she was having pain at that time does not diagnose a herniated disk by any means. We all have our back pains, and fortunately most of us don't have herniated disks.
>
> Q. Unusual, Doctor, but not unheard of, I take it?
>
> A. What's unusual?
>
> Q. I believe your statement was that it's unusual to have a person with complaint of pain and not find some immediate evidence of herniated disk?
>
> A. I would say that it is rare for a patient to have a herniated disk and have intermittent symptoms.

(Ex. X, pp. 12 & 13).

Claimant testified that she is still recovering from the second surgery. She has not been able to work since the original injury on July 18, 1982. She looked at a number of jobs through her employer's personnel director and also through a vocational rehabilitation specialist. None of these jobs were within her limitations. She did however work as a bartender in a family operated tavern four hours a day, three or four times a week, from November of 1984 to November of 1985. She could do this job while sitting on a chair. The job involved no lifting or

standing. Claimant admitted that she has lifted her small children on some occasions. Claimant conceded in her testimony that the myelogram done by Dr. Jones in October of 1982 did not show a herniated disc. Claimant testified that she thought Dr. Hayne did give an opinion of causal connection, but after examining exhibit B-1, she admitted that Dr. Hayne did not relate her low back pain to the July 18, 1982 work incident.

APPLICABLE LAW AND ANALYSIS

The earlier decision of Deputy Ort filed May 18, 1984 found that claimant sustained an injury to her low back and right leg which arose out of and in the course of her employment; however, it also found that claimant suffered no permanent physical impairment due to this injury at that time (Ort Decn., pp. 7 & 8). This is a review-reopening proceeding under Iowa Code section 86.14. Claimant must demonstrate a change of condition subsequent to the earlier decision which is a result of the original injury of July 18, 1982. See Lawyer & Higgs, Iowa Workers' Compensation -- Law & Practice, section 20-2, p. 158 and the cases cited there.

Claimant has established that her low back condition became worse. On January 22, 1985, Dr. Bashara's CT scan of her lumbar spine revealed for the first time that claimant had a fairly large herniated disc at L5, S1, centrally and to the right (Ex. A-5).

Claimant did not, however, sustain the burden of proof by a preponderance of the evidence that her worsened condition in August of 1984 and the herniated disc that was discovered in January of 1985 were caused by the injury which occurred on July 18, 1982.

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

The lumbar myelogram of Dr. Jones in October of 1982 failed to show any abnormalities (Ex. P-1; Ort Decn., p. 4). Dr. Carlstrom reviewed this myelogram and testified that this myelogram showed no lumbar herniated disc (Ex. X, pp. 7 & 8). The full set of spine x-rays taken by Dr. England, the chiropractor, on September 18, 1984, did not disclose a lumbar herniated disc of any size, large or small (Ex. A-4).

It is true that Dr. Bashara wrote to claimant's counsel on April 5, 1985 and stated that the herniated lumbar disc at L5-S1 was directly related to the work injury on July 18, 1982. However, Dr. Bashara did not say that the injury of July 18, 1982 actually caused the lumbar herniated disc. Dr. Bashara did not say that there was a cause and effect relationship. What Dr. Bashara means by directly related to the work injury is not explained by him. No supporting factual or medical basis is offered for his opinion. Nor does he give any reasoning process leading up to it. He did not explain why it did not show up on prior x-rays or the prior myelogram. He did not explain why it did not show up until his CT scan revealed it on January 22, 1985, approximately two and one-half years after the injury of July 18, 1982. He did not explain how a patient grabbing the claimant around the neck would cause a herniated disc in her lumbar spine at L5, S1 which could not be proven radiographically for two and one-half years and then be fairly large when it could be seen for the first time. Dr. Bashara's statement stands as an opinion without any supporting basis either factually or medically and it raises more questions then it answers.

Although Dr. Bashara consulted with Dr. Boulden after the first surgery and before the second one, there is no medical evidence introduced from Dr. Boulden (Ex. A-2). Dr. Hayne, Dr. Bashara's other consultant, made a report but he offered no opinion on whether the worsened condition or the herniated disc was or was not causally related to the injury of January 18, 1982 (Ex. A-2; Ex. B-1). Dr. Danielson examined claimant extensively between the two laminectomies and he gave no opinion on whether the worsened condition or the herniated disc was or was not caused by the injury of July 18, 1982. Dr. Burton at the Institute for Low Back Care stated that the injury of July 18, 1982 may have produced the herniation at L5-S1 which required surgery. He also pointed out that claimant was born with very significant structural liabilities regarding her back. He also stated that there has probably been longstanding degenerative disc disease at L4, L5 and L5, S1 (Ex. E-1).

Dr. Carlstrom gave his professional medical opinion within a

reasonable degree of medical certainty that the herniated disc problem was not caused by the injury of July 18, 1982 for the reason that it was a fairly large bulge but did not show up on the myelogram of Dr. Jones done in October of 1982. Therefore, he concluded that the herniated disc occurred sometime after October of 1982 and before January of 1985 (Ex. X, pp. 8 & 9). Furthermore, claimant told him in February of 1983 that her low back problem was resolved. Dr. Carlstrom said that a herniated disc does not have intermittent symptoms (Ex. X, pp. 12 & 13). Dr. Carlstrom further testified that pregnancy and child birth could cause a herniated disc (Ex. X, p. 9). Therefore, based upon the foregoing considerations, it is determined that claimant did not sustain the burden of proof by a preponderance of the evidence that the alleged worsened condition in August of 1984 and the herniated disc discovered in January of 1985 by Dr. Bashara's CT scan were caused by the injury of July 18, 1982. Accordingly, claimant is not entitled to temporary or medical benefits for the alleged worsened conditions or the herniated disc condition.

FINDINGS OF FACT

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

That claimant testified that the condition of her low back and right leg worsened in August of 1984.

That Dr. Bashara determined in January of 1985 that claimant had a fairly large herniated disc.

That Dr. Bashara said that the herniated disc was directly related to her work injury on July 18, 1984, but that he did not say there was a cause and effect relationship; he did not explain why it did not appear on earlier radiographic studies and he did not explain why it did not manifest itself until his CT scan which was two and one-half years after the initial injury.

That Dr. Hayne and Dr. Danielson examined claimant but gave no opinion as to whether her worsened condition or herniated disc was or was not caused by the injury of July 18, 1982.

That Dr. Carlstrom testified that within a reasonable degree of medical certainty it was his opinion that the injury of July 18, 1982 did not cause claimant's subsequent herniated disc because (1) her low back and right leg problem had resolved when he first saw her in February of 1983, (2) the herniated disc did not appear on the myelogram taken by Dr. Jones on October 5, 1982, and (3) a herniated disc is not indicated by intermittent symptoms such as the claimant described to him.

CONCLUSIONS OF LAW

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

That claimant failed to sustain the burden of proof by a preponderance of the evidence that the alleged worsened condition she noticed in August of 1984 and the subsequent herniated disc problems she experienced after that were caused by the injury of July 18, 1982.

ORDER

THEREFORE, IT IS ORDERED:

That no amounts are due from the defendants to the claimant for disability or medical expenses.

That each party pay their own costs of this proceeding, except that defendants will pay the cost of the certified shorthand reporter at the hearing pursuant to Division of Industrial Services Rule 343-4.33.

That the defendants file any reports requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

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

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROGER E. HARTZLER, Claimant, vs: IOWA BEEF PROCESSORS, INC., Employer, and ARGONAUT INSURANCE COMPANIES, Insurance Carrier, Defendants.	FILE NO. 716000 A R B I T R A T I O N D E C I S I O N FILED JAN 14 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Roger E. Hartzler against Iowa Beef Processors, Inc., his former employer, and Argonaut Insurance Companies, the employer's insurance carrier. The case was heard at Fort Dodge, Iowa on September 23, 1986 and was fully submitted upon conclusion of the hearing. The record in this proceeding consists of testimony from Roger Hartzler and Ardan Walker. The record also contains claimant's exhibits 1 through 8 and defendants' exhibits A through O.

ISSUES

Claimant alleges that he sustained a compensable injury in 1974 while lugging quarters of beef. He seeks compensation for healing period, permanent partial disability, and benefits under section 85.27. Claimant urges a combination of the discovery rule and equitable estoppel, or either, to establish the timeliness of his claim. Defendants assert that the claim is barred by section 85.26 of the Code and dispute claimant's entitlement to benefits of any nature.

SUMMARY OF EVIDENCE

Roger Hartzler is a 49 year old man who graduated from high school in 1955. He has farmed, operated a service station, sold automobiles, serviced a milk route and spent two years in the army. Hartzler commenced employment with IBP in 1962 as a truck driver. By August 1965, he had joined management and became the Rendering Department foreman. In 1969, he became the assistant

kill floor foreman and in 1970 or 1971, he was made plant superintendent trainee, a position which he held for approximately one and one-half years. Claimant testified that in 1971 or 1972, he became one of two plant superintendents, a position which he held until his employment was terminated August 1, 1980. As plant superintendent the only person at the Fort Dodge IBP facility who was superior to claimant was Duane Vandestowe, the plant manager. The next higher level of IBP management was the carcass vice president, Bob Barnum, located at the main corporate offices in Dakota City, Nebraska. Claimant testified that most of his contact with the main office involved Bob Barnum and Ardan Walker, the industrial relations manager. Claimant considered both of them to be in a supervisory position over him. Claimant considered himself to be a very loyal employee. During his 18 years of employment with IBP he missed only one day of work due to sickness except for appendectomy surgery.

Claimant testified that when workers failed to show up for work the foreman and plant superintendent would sometimes fill in. He stated that in 1974 a problem arose which caused him to work to fill in as a beef lugger carrying quarters, which weighed in the range of 125 to 250 pounds, on his shoulder from the rail to load them onto a truck. He testified that he lugged beef off and on over a two or three month period for as much as four to six hours per day. He testified that he had no medical problems, other than the appendectomy, prior to the time that he lugged beef. He stated that while lugging beef he developed a problem with his right shoulder and described it as a sharp pain located between his shoulder and arm. Claimant testified that he discussed the problem with Geneva Sweeny, the plant nurse, and sought medical care from Paul Stitt, M.D. Hartzler testified that treatment consisted of a series of Cortisone shots and that he was eventually referred to the University of Iowa Hospitals in Iowa City where he was seen by a group of physicians. Hartzler understood the results of that examination to direct him to take a number of aspirins per day and predict that his discomfort would eventually go away. He stated that the pain has never gone away. Hartzler testified that he ceased seeking medical care for a period of time because he did not know that any other care was available. He stated that in 1976 he met John D. Calisesi, D.C., and entered into a course of care with Dr. Calisesi that consisted of primarily manipulation and sound impulses. Claimant stated that the treatments did provide some relief and that he has continued to receive them up to the present time.

Claimant testified that IBP had paid all of the medical expenses relating to his shoulder up to the time that he received exhibit 8, a letter from IBP's legal counsel dated May 14, 1982, which advises claimant that the care he has been receiving was not authorized; that the chiropractic treatments were not for a condition that was compensable under the workers' compensation

laws; and that his claim is extinguished due to the statute of limitations. Page 18 of exhibit N-1 shows that IBP and Argonaut paid claimant's bills with Dr. Calisesi through September 19, 1980. Other exhibits show earlier payments of other medical expenses.

Claimant and Ardan Walker provided similar testimony that in approximately 1976 claimant and Walker discussed the matter of workers' compensation for claimant's shoulder injury. Claimant recalled Walker's statement to him as indicating that he felt that Hartzler was not entitled to compensation for permanent disability because he had not missed any time from work but that he would inquire about the matter. Claimant was aware that Walker was not the person who handled workers' compensation claims but that Walker was a vice president whose duties included personnel and labor management. Hartzler stated that he does not know if Walker concealed anything intentionally. He stated that he told Walker in 1976 that he felt that he had a disability and that he was entitled to be compensated for it.

Claimant testified that he did not have a thorough knowledge of workers' compensation laws but was aware of the existence of the Industrial Commissioner's office to handle disputes. He stated that the Personnel Department was responsible for direct action on workers' compensation claims.

Claimant stated that he did not consult an attorney until receiving exhibit 8 at which time this action was then commenced.

Ardan Walker testified that he discussed the problem with claimant's shoulder on more than one occasion. He stated that in the first conversation claimant complained that the home office was giving him difficulty with his claim and that he agreed to check on it. Walker stated that he did check on the claim and reported to claimant that the Dakota City office did not feel that Hartzler was entitled to any compensation for disability but that the company was paying the medical bills. Walker testified that he may have commented to Hartzler that he was not entitled to disability benefits because he was still employed. Walker testified that he did not tell claimant that the medical bills would be paid indefinitely. Walker testified that he personally had little knowledge regarding workers' compensation and that the information he conveyed to Hartzler was what he had obtained from Larry Weaver, the person who handled workers' compensation for IBP. Walker stated that management personnel with IBP had a 90 day period of absence during which time they would lose no pay and would continue to receive full salary even if they were off from work to obtain medical care.

Claimant and Arden Walker were in basic agreement regarding claimant's job duties. Walker felt it was unlikely that claimant

would or should have been engaged in much beef lugging. He felt that it was inconsistent with his duties as plant superintendent because having management perform union work was always a subject of problems with the union and that doing it on a sustained basis would not be favored by the company. Walker further stated that lugging buggies were put into operation in the Fort Dodge plant in 1973 and that by 1974 beef lugging was not being done. Walker stated that a high turnover rate was a problem with beef lugging and that at one time it had been company policy for everyone to start with the company as a lugger. Hartzler did not recall injurying his shoulder while lugging beef during 1973.

At page 14 of exhibit A claimant testified that he ceased lugging and performing other types of manual labor at some point between July of 1974 and mid 1976. At page 18 of exhibit A Hartzler indicated that Dr. Calisesi told him that he had permanent disability in 1979 or 1980 and that after he had been under treatment for awhile the doctor had indicated that claimant would have a continuing problem (Exhibit A, page 18).

Reference to the record shows that claimant was injured in February, 1973, while lugging beef (Ex. C, H, K & M). It appears that he reinjured the shoulder in early 1974 (Ex. H, p. 3). On October 15, 1974, claimant was seen at the University of Iowa Hospitals where Dr. Brown indicated that more time was necessary for claimant's shoulder condition to resolve (Ex. I). On November 26, 1974, Dr. Stitt indicated to IBP that there was a good possibility that claimant's condition would resolve spontaneously and that a percentage of permanent partial disability could not be assigned (Ex. H, p. 1). Claimant commenced treatment with Dr. Calisesi on May 11, 1976 (Ex. N-1, p. 11). On July 27, 1979, Dr. Calisesi indicated that claimant had no permanent disability but that he was still under treatment and did have limitation of shoulder movement. He diagnosed claimant's condition as a chronic subluxation of C2 and the right sacroiliac (Ex. N-1, p. 17). Claimant underwent carpal tunnel surgery on December 10, 1980. In a report dated April 16, 1981, Ronald C. Evans, D.C., rated claimant as having a 50 percent impairment of the whole man based upon disabilities that he found to exist in claimant's shoulder, right hip, right leg, right arm, and right hand. Dr. Evans expressed the opinion that the disability was the result of work related trauma that occurred in May of 1974 (Ex. 2).

Hartzler testified that when at IBP his annual earnings were in the range of $35,000 per year and that he was in a supervisory position over the plant. Since leaving IBP he has had difficulty finding employment and that his earnings have not approached the level that he enjoyed while employed by IBP.

APPLICABLE LAW AND ANALYSIS

The first issue to be addressed is the affirmative defense provided by section 85.26 and claimant's allegation of estoppel. The first consideration is to determine when the two year limitation provided by section 85.26 began to run. The discovery rule was applicable to injuries that occurred in 1973 and 1974. The two year limitation began to run only when the employee, in the exercise of reasonable diligence, discovered or should have discovered (1) the nature of the injury; (2) its seriousness; and (3) its probable compensable character. Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 260 (Iowa 1980). In Mousel v. Bituminous Material & Supply Co., 169 N.W.2d 763, 767 (1969), the court refused to toll the running of the period of limitations where an injured employee, who had not been disabled from performing his employment due to his injury, delayed seeking medical care for the injury for approximately six years and did not file his petition until approximately eight years following the time the actual trauma was sustained. The court held that Mousel had failed to exercise reasonable care and that therefore the running of the period of limitation was not tolled. The reasonableness of a claimant's conduct is to be judged in light of his own education and intelligence. He must know enough about the injury to realize it is both serious and work connected. Positive medical information is unnecessary if he has information from any source which puts him on notice of its probable compensability. The term "probable compensable character" refers to the employee's knowledge that the injury or condition is work connected. It does not refer to his knowledge of legal matters such as the likelihood for success if an action with the industrial commissioner were filed. Robinson v. Department of Transp., 296 N.W.2d 809 (Iowa 1980).

Courts do not favor statutes of limitations. When two possible interpretations can be applied, the one giving the longer period to a litigant seeking relief is to be perferred. Sprung v. Rasmussen, 180 N.W.2d 430, 433 (Iowa 1970). A statute of limitations does not generally commence 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 Company, 258 N.W.2d 336, 341 (Iowa 1977). The case McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985) would seem to indicate that a statute of limitation does not begin to run until the injury produces an inability to perform the normal duties of employment. McKeever is interpreted to be an application of the discovery rule to cumulative trauma cases. It simply provides that a worker is not to be held to recognize the seriousness of the cumulative trauma injury until it produces disability from working.

Hartzler's injury was the result of cumulative trauma, however, the cumulative trauma appears to have ended at the time when he ceased lugging beef. This was either in 1973 or 1974. In exhibit A at page 14, Hartzler stated that after he quit

lugging beef he performed little in the way of manual labor and primarily performed paper work and supervisory activities. Hartzler never became disabled from performing his duties as a plant superintendent for IBP. There have been cases, however, where injuries occurred that did produce some degree of permanent partial disability without causing the employee to miss any time from work. This case is perceived to be one of those cases. McKeever is a case that prevents workers from losing their claim while they are continuing to be injured by continuing to work. McKeever is consistent with rulings in other type of cases where it has been held that the period of limitation runs from the occurrence of each injury in those circumstances where continuing injury exists. Anderson v. Yearous, 249 N.W.2d 855 (Iowa 1977). It is concluded that McKeever is not appliable to this case since the trauma ended when claimant ceased carrying beef quarters and further since the injury never made claimant unable to perform the normal duties of his employment with IBP.

The running of the period of limitation is therefore to be determined directly under the rules of Orr, including the rule that the burden of showing the appropriateness of applying the discovery rule rests with the claimant. The discovery rule is concluded to be appropriate in this case.

The injury did not produce an inability to perform the normal duties of employment. Further, the initial indications from the medical practitioners whom claimant consulted indicated that the condition was likely to resolve with the mere passage of time. It was only when the condition failed to resolve that claimant should be held accountable for realizing the seriousness of the condition. It could easily be argued that claimant realized that he had a condition that was likely to be permanent at some point in time during 1976 after he commenced treatmemt with Dr. Calisesi and spoke of his condition with Ardan Walker. In exhibit A at page 18, claimant agreed that at some point in 1979 or 1980, Dr. Calisesi indicated to him that he would in fact have a continuing problem with his shoulder. Exhibit L, a report from Dr. Calisesi dated March 14, 1980, shows claimant's condition as being improved but still restricted. He indicates that claimant is continuing to receive care that is maintenance in nature (Ex. L). An earlier report of July 27, 1979, indicates that Dr. Calisesi felt that there was no permanent disability but that claimant did have limited shoulder movement and was still under treatment (Ex. N-1, p. 17). It is likely that in the exercise of reasonable diligence, Hartzler should have realized that his shoulder condition was serious by the time he spoke with Ardan Walker regarding compensation for permanent disability in 1976. The time is also consistent with the time he entered into treatment with Dr. Calisesi. Furthermore, it is determined with absolute certainty, that claimant realized the seriousness of his condition no later than July 27, 1979, the time at which Dr. Calisesi reported to the employer that limitation

of shoulder movement was continuing. It is found that three years of treatment for a condition such as claimant's is certainly sufficient to make any reasonable person aware that the condition is not going to completely resolve. July 27, 1979 is found to be the date of occurrence of the injury for purposes of applying the discovery rule.

Even when the discovery rule is applied, the filing of claimant's petition on October 12, 1982, was not timely under the provisions of section 85.26. In those cases where only medical benefits have been paid, a two year limitation remains applicable. Beier Glass Co. v. Brundige, 329 N.W.2d 280 (Iowa 1983); Huntzinger v. Moore Business Forms, Inc., 320 N.W.2d 545 (Iowa 1982); Powell v. Bestwall Gypsum Co., 255 Iowa 937, 124 N.W.2d 448 (1963). This is a case in which there was no memorandum of agreement, agreement for settlement or award from which to commence the running of the period of limitation. It therefore confirms that the date of occurrence of injury as determined under the discovery rule is the appropriate date to be used. Under all statutes and rules in effect in 1973 and 1974, there was no requirement for the employer to file a first report of injury or a memorandum of agreement in this case since the claimant had not missed any time from work.

Claimant urges that the actions of Ardan Walker created a basis for finding that the employer is estopped from relying on the limitation provided by section 85.26. Equitable estoppel may, under proper circumstances, preclude the use of a statute of limitations as a defense. DeWall v. Prentice, 224 N.W.2d 428 (Iowa 1974); Paveglio v. Firestone Tire & Rubber Co., 167 N.W.2d 636 (1969). Where estoppel is urged the claimant must prove (1) a false representation or concealment of material facts made to the claimant by the employer or insurance carrier; (2) lack of knowledge of the true facts on the part of the claimant; (3) intent of the party making the representation that the claimant rely upon it; and (4) reliance on the fraudulent statement by the claimant resulting in his prejudice.

Claimant clearly knew that the workers' compensation remedy was available. He testified at page 42 of exhibit A that while he was plant superintendent there was usually litigation involving workers' compensation claims ongoing at all times. He obviously knew that the company did not always recognize and fully pay all workers' compensation claims. Claimant's contention appears to be that since he was a "company man" he had the right to rely upon the representation from Arden Walker that no compensation was due to him because he had not been disabled from working. The bottom line of Walker's communication to claimant is that he denied the claim. For some reason, whether it was a sincere belief that he could not make a claim, some feeling of loyalty to the company or fear of rocking the boat making him appear to be an undesireable employee (Ex. A, p. 76), claimant did not

commence a claim until October 21, 1982. Clearly, any motive in the nature of loyalty or fear of being considered being an undesireable employee would have disappeared when claimant was fired on August 1, 1980. The evidence in the case does not establish that Walker was aware that permanent partial disability compensation could be awarded where there was no lost time from work. While an award under those circumstances is not impossible, it is likewise not particularly common. Even though Walker was in a position of supervisory authority over the person who handled the workers' compensation claims, it is not necessarily apparent that Walker would have been aware of that intricacy of the workers' compensation system. If claimant's injury is one which is to be evaluated industrially, the fact that employment continued for approximately six years with no loss of pay or benefits due to the injury supports an arguement that there was no industrial disability for which compensation was payable. Under the circumstances of this case, it is clear that any award of industrial disability relating to the shoulder injury would have been small. The question of whether or not compensation for permanent disability was payable was a complex legal issue and it was not reasonable for claimant to rely on Ardan Walker to advise him concerning his rights on that issue. Further, it appears that if Walker made a misrepresentation that the misrepresentation was not intended to be fraudulent. The statement, even though possibly incorrect, is not an entirely unreasonable position for an employer to take under the circumstances that existed. As in the case of Carter v. Continental Telephone Co., 373 N.W.2d 524 (Iowa App. 1985), there is no indication that Walker, or anyone else employed by IBP, had any fraudulent intent when the communication made to claimant was conveyed to him. It appears that the company believed in good faith that any claim for permanent disability was not compensable. The mere making of an erroneous statement of fact to a claimant does not estoppe the employer from relying on a statute of limitations defense, Dierking v. Bellas Hess Super Store, Inc., 258 N.W.2d 312 (Iowa 1977). In making this analysis it should be noted that there is a difference between a statement of fact and an opinion of law. It is found that there was no false representation or concealment of material facts made by Ardan Walker. If his statement regarding claimant's right to compensation for permanent disability was in error, the claimant has failed to prove that there was any bad faith involved. It is further found that it was not reasonable for claimant to reply upon Ardan Walker to advise him of his legal rights and remedies against the company that employed both Walker and the claimant. While intent is not often easily determined, it is found that in this case Walker did not intend that the statements made to claimant prevent the claimant from seeking opinions on the matter from other sources. The fact that the medical expenses were paid continually under the workers' compensation payment system is perhaps the best evidence of a basis for applying the doctrine of estoppel. There was, however, no promise that the payments would continue

indefinitely. The payments were not in any way conditioned upon claimant refraining from commencing an action or consulting with others on the matter. The making of such payments does not constitute a false representation or concealment of material facts. It was not reasonable for claimant to rely upon the making of such payments as a basis for not commencing an action against the employer. It is therefore concluded that claimant has failed to carry the burden of proving the elements of estoppel in order to prevent the employer from relying upon the limitation provided by section 85.26.

A sense of loyalty to the employer is not a recognized basis for tolling a statute of limitations. Fear of falling into disfavor with the employer if a claim is filed is something which is present in most workers' compensation claims that exist. There is no reason why such should be considered a basis for tolling the running of a statute of limitations. It is therefore concluded that claimant's claim is barred by the provisions of section 85.26.

There is no credible evidence in the record that is sufficient to show that any of claimant's complaints, other than his right shoulder, are a result of an injury sustained in the course of his employment with IBP.

FINDINGS OF FACT

Roger Hartzler was a long-term employee of Iowa Beef Processors, Inc., who injured his right shoulder while lugging beef carcasses in 1973 or 1974. Thereafter, his duties were primarily supervisory and paper work in nature and did not produce further injury to the shoulder.

Following the injury the physicians who treated claimant initially indicated that the condition was likely to resolve but their expectations proved to be incorrect and claimant entered into a course of care with Dr. Calisesi which has continued up to the present time.

It is likely that claimant realized that his condition was serious and that it would not go away on its own as early as 1976 when he discussed the matter with Ardan Walker and entered into a course of treatment with Dr. Calisesi. It is certain that the claimant realized that the condition of his shoulder was both serious and work connected no later than July 27, 1979.

The injury did not cause claimant to miss any work, other than for doctors' appointments and he lost no pay as a result of the injury. No finding can be made regarding the amount of time that was involved in attending doctors' appointments.

In 1976 claimant discussed his shoulder problems with Ardan

Walker, a corporate vice president of the employer in charge of industrial relations and personnel. At claimant's request, Walker made inquiries regarding the handling of claimant's claim for his shoulder and informed the claimant that medical expenses were being paid but that he did not feel that claimant was entitled to compensation for disability since claimant had not missed any time from work due to the injury.

The statements made by Walker, while possibly incorrect, were not shown to have been made with any intent to deceive. The statements made regarding a lack of entitlement to compensation for disability was an expression of opinion and not a statement of material fact.

The payment of claimant's medical expenses did not constitute a misrepresentation of fact or a concealment of fact.

It was not reasonable for claimant to rely, to his detriment, upon the statements made by Ardan Walker regarding a lack of entitlement or upon the fact that payment of medical expenses had been made and was continuing to be made, as a basis for failing to commence a proceeding against the employer. The only injury of which claimant makes complaints that has been shown to be related to his employment is the injury to his right shoulder. The carpal tunnel syndrome and other problems are not shown to be work related.

Claimant failed to exercise reasonable diligence in prosecuting this claim where he did not file his petition until October 21, 1982.

CONCLUSIONS OF LAW

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

2. The claimant has failed to prove the elements of equitable estoppel and the employer is therefore not precluded from relying upon section 85.26 as a defense in this proceeding.

3. The date of occurrence of injury for purposes of commencing the running of the limitation provided by section 85.26 is July 27, 1979.

4. Recovery under the claim made by claimant is barred by the provisions of section 85.26 of the Code.

5. In cases where the injury is a result of cumulative trauma but the employee has ceased to be exposed to such trauma, the normal discovery rule applies to commence the running of the statute of limitations. It is not necessary for the employee to be disabled from performing his normal work in order to commence

the running of the period of limitation.

6. Neither a feeling of loyalty to the employer nor fear of repercussions from filing a claim constitutes a basis for tolling the running of a period of limitation.

7. The payment of medical expenses for an injury, where there has been no inability to perform the normal duties of employment, does not toll the running of a period of limitation.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding and his claim against the defendants is dismissed with prejudice.

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against the claimant pursuant to Division of Industrial Services Rule 343-4.33, formerly Iowa Industrial Commissioner Rule 500-4.33.

Signed and filed this 14th day of January, 1987.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILMA HINGTGEN,	:	
	:	
Claimant,	:	
	:	File No. 737771
vs.	:	
	:	A R B I T R A T I O N
MARY GOODMANN,	:	
	:	D E C I S I O N
Employer,	:	
	:	
and	:	
	:	
ECONOMY FIRE & CASUALTY,	:	
	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Wilma Hingtgen, claimant, against Mary Goodmann, employer, and Economy Fire and Casualty, insurance carrier, defendants, for benefits as the result of an alleged injury on April 12, 1983. On January 21, 1987 a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

Claimant is alleging in this proceeding that she injured her low back from a fall while working for Goodmann. Claimant seeks temporary total disability or healing period benefits during the times she was off work for treatment of the claimed injury and permanent disability benefits for alleged permanent physical impairment.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Connie McCoy, Colleen Payne, Connie Moran, Daniel Goodmann, and Shirley Johnson. The exhibits received into the evidence at the hearing are listed in the prehearing report except for claimant's exhibit C, a decision by a social security administrative law judge which was excluded as irrelevant to this proceeding. All of the evidence received at the hearing was considered in arriving at this decision.

The prehearing report contains the following stipulations:

1. On April 12, 1983 claimant received an injury which arose out of and in the course of employment with Goodmann;

2. The period of time off work for which claimant seeks either temporary total disability or healing period benefits is from April 12, 1983;

3. The injury was a cause of permanent disability and the type of disability is an industrial disability to the body as a whole;

4. Claimant was single at the time of the injury; and,

5. All requested medical benefits had been or will be paid by defendants.

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

I. The extent of claimant's entitlement to weekly disablity benefits; and,

II. The rate of weekly compensation to which claimant is entitled.

FINDINGS OF FACT

1. Claimant was a credible witness.

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

2. Claimant was employed by Mary Goodmann from either the latter part of November or early December 1982 until April 12, 1983 as a domestic helper and aide.

Claimant testified that her duties consisted of routinely giving Mrs. Goodmann, an elderly lady confined to a wheelchair, a morning bath which included washing her hair. Claimant would then dress Goodmann and fix lunch for both Goodmann and herself. She would then "take her hair down" and leave for the day. Claimant also performed other tasks including taking Goodmann to the doctor on occasion. All of claimant's duties were accomplished within a four hour period during a five day work week.

3. On April 12, 1983 claimant suffered an injury which arose out of and in the course of her employment with Goodmann.

Claimant's credible testimony and the histories she provided to treating physicians in this case establishes that claimant injured her back from a fall while she was attempting to pull Goodmann and her wheelchair up an incline. Claimant felt

immediate severe low back pain and was immediately transported to the hospital where she received treatment consisting of bed rest and medication from a board certified orthopedic surgeon, James A. Pearson, M.D. After initial x-rays of the lower spine revealed nothing unusual, claimant was discharged from the hospital on April 24, 1983 with a diagnosis of muscle strain. After only one day, claimant was readmitted because of severe back pain. After further x-rays of claimant's thoracic area in her mid back, claimant was diagnosed as suffering from a compression fracture of the T11 or T12 vertebra and she was fitted with a Jewett back brace. Using this brace along with medication improved claimant's condition and she was discharged from the hospital the second time on April 27, 1983.

4. The work injury was a cause of a temporary period of total disability while claimant was recovering the injury from April 12, 1983 through November 10, 1983.

Claimant's testimony and the medical reports submitted into the evidence established that claimant was off work following the injury at the direction of her physicians beginning on April 12, 1983 as a result of her hospitalizations. Following her last discharge from the hospital on April 27, 1983, claimant continued under the care of Dr. Pearson over the next several months and pursuant to Dr. Pearson's instructions, she never returned to work as a domestic aide. Claimant continued throughout this time to wear her back brace and to take medication in the evenings for sleeping. Claimant has not returned to work in any capacity since April 12, 1983. Despite some ambiguous verbage in his clinical notes, Dr. Pearson clearly states in his deposition testimony, exhibit 12, that he did not expect claimant to improve medically after his examination of claimant on November 10, 1983 and he gave his first "disability" rating at that time.

5. The work injury of April 12, 1983 was a cause of significant permanent partial impairment to claimant's body as a whole.

Claimant had a previous medical history of back difficulties on two occasions. In 1978 she attempted to lift her invalid son and experienced back pain. Later in 1981 she fell on some ice and again experienced back pain. Claimant established by her testimony that she recovered from these injuries and experienced no chronic back pain until after her injury of April 12, 1983. Consequently, it is found that she had no functional impairment as a result of back difficulties before the work injury in this case. Claimant's past medical records and claimant's credible testimony established that claimant was in excellent health for a woman of fifty-nine years of age at the time of the work injury except for hypertension and being mildly overweight.

As a result of the work injury in this case, claimant currently has permanent functional impairment to her body as a

whole and is restricted by her physicians from heavy lifting, repetitive lifting, bending, twisting, and stooping; and, prolonged sitting and standing. Claimant's primary treating physician, Dr. Pearson, has rated claimant as suffering from a thirty-five percent permanent partial impairment (whether this is to the body as a whole or to the spine is unclear from his deposition testimony). Dr. Field, another board certified orthopedic surgeon rates claimant as suffering from a twenty percent permanent partial impairment to her body as a whole. Both physicians profess to base their opinions on the Manual of Orthopaedic Surgeons for rating physical disability. However, a finding as to the exact percentage of impairment is unnecessary in an industrial disability case.

In his report submitted into evidence, claimant's primary treating physician, Dr. Pearson, opines that claimant's current difficulties and the permanent impairment are the result of the work injury in this case. This testimony is not controverted by Dr. Field.

6. The work injury of April 12, 1983 was a cause of a thirty percent permanent loss of claimant's earning capacity.

As a result of her functional impairment and, more importantly from an industrial disability standpoint, physician imposed physical restrictions, claimant is unable to return to the work she was performing at the time of the work injury and most other jobs she has held in the past. Claimant's past employment primarily consists of unskilled or semiskilled physical labor jobs such as factory work or nurse's aide positions which require either heavy lifting or repetitive lifting, bending, twisting, and stooping, prolonged sitting and prolonged standing. Claimant and Dr. Pearson testified that claimant would not be able to remain either standing or sitting for more than ten minutes at any one period of time. Dr. Pearson, however, felt that if claimant were allowed to move about or change positions periodically she could tolerate clerical type work.

It is important to find that claimant has not made a reasonable effort to find suitable employment and to a limited extent her current unemployment is in part due to this lack of effort and apparent withdrawal from the work force. Claimant has not shown by the greater weight of evidence that she is so disabled that any attempt to locate work would be unsuccessful. Claimant was working only twenty hours per week at the time of the injury and suitable replacement work for the loss of her job in April 1983 would likewise only amount to twenty hours per week. Therefore, claimant has not demonstrated, prima facie, that the services she can perform are so limited in quality, quantity, and dependability that a reasonably stable market for them does not exist within the Dubuque metropolitan area.

Claimant has suffered a significant loss in actual earnings from employment due to a work injury but again this is in part the result of her lack of effort to seek suitable work.

Claimant is sixty-three years of age (fifty-nine years of age at the time of the injury). Given her age, claimant's loss of earning capacity is not as great as that of a younger person.

Claimant has only a tenth grade education and exhibited average intelligence at the hearing. However, her limited formal education and age indicates that she has low potential for successful vocational rehabilitation.

7. Claimant's gross rate of weekly compensation was $79.50 per week at the time of the April 12, 1983 injury and she had no dependents other than herself at the time of the injury.

Claimant established by her credible testimony that the customary work she performed for Goodmann was accomplished over four hours per day, five days per week at the rate of $3.35 per hour. Claimant also said that she was paid on Friday of each week. Defendants offered considerable testimony as to the fact that Mrs. Goodmann's records did not verify claimant's contentions as to her rate of pay. Goodmann herself was not available as she is now incompetent. The fact that records including Goodmann's checks to claimant did not always reflect a constant amount of money was effectively explained by claimant's testimony that she received both cash and checks from Goodmann as payment of her salary. Claimant also testified that she received a free lunch while working for Goodmann valued at $2.50 each. The value of this free lunch was uncontroverted.

Claimant contends that her son was her dependent at the time of the work injury but she did not establish that she paid at least fifty percent of his support nor did she list him as a dependent on her 1982 tax return. Therefore, claimant has not established by the greater weight of the evidence that she is entitled to an additional exemption in calculating the rate of compensation.

The parties stipulated that claimant was single at the time of the work injury.

CONCLUSIONS OF LAW

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

I. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment

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

Claimant claims to be an odd-lot employee and entitled to permanent total disability benefits under the odd-lot theory expressed in Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). A worker becomes an "odd-lot" employee when an injury makes the worker encapable of obtaining employment in any well known branch of the labor market. Id. An odd-lot worker can only perform services that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist. Id. In Guyton at page 105 the supreme court quoted the following language from an Arizona case, Employers Mutual Life Ins. Co. v. Industrial Commission, 25 Ariz. App. 117, 119, 541 P.2d 580, 582 (1975):

> It is normally incumbent on an injured [worker], at a hearing to determine loss of earning capacity, to demonstrate a reasonable effort to secure employment in the area of ... residence. Where testimony discloses that a reasonable effort was made, the burden of going forward with evidence to show the availability of suitable employment is on the employer and carrier.

The Guyton court ultimately held that when a worker makes a prima facie case of total disability by producing substantial

evidence that worker was not employable in the competitive labor market, the burden to produce evidence shifts to the employer; if the employer fails to produce such evidence and the trial of fact finds that the worker does fall into the odd-lot category, the worker is entitled to a finding of total disability. Id., at 106.

In the case sub judice, although claimant demonstrated that she has not returned to work, she made no reasonable effort to locate suitable replacement employment in the area of her residence. The other evidence offered by claimant in support of her disability did not demonstrate a prima facie case that suitable work is not available to her. Therefore, claimant cannot rely upon the Guyton case to show entitlement to permanent total disability.

However, it was found that claimant suffered a serious loss of earning capacity. Based upon a finding of a thirty percent loss of earning capacity or an industrial disability as a result of an injury to the body as a whole, claimant is entitled as a matter of law to 150 weeks of permanent disability benefits under Iowa Code section 85.34(2)(u) which is thirty percent of the 500 weeks allowable for an injury to the body as a whole in that subsection.

As claimant has established entitlement to permanent partial disability, claimant may be entitled to weekly benefits for healing period under Iowa Code section 85.34(1) from the date of injury until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work she was performing at the time of the injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first.

Based upon the findings pertaining to times off work because of the work injury and the time she reached maximum healing, it is concluded that claimant is entitled under law to healing period benefits from April 12, 1983 through November 10 1983 or a total of thirty and three-sevenths (30 3/7) weeks.

II. Claimant has the burden to establish a rate of compensation. In Iowa, the basis of compensation is the weekly earnings of the injured employee at the time of the injury. Iowa Code section 85.36. Weekly earnings is defined as follows in chapter 85:

> Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured, as regularly required by his employer for the work or employment for which he was employed,.... (Section 85.36, Code)

Section 85.36 also provides various methods of computing weekly earnings depending upon the type of earnings and employment. If an employee is paid on a weekly basis, the weekly gross earnings shall be the basis of the compensation. Section 85.36(1), Code. If an employee is paid on a daily basis or hourly basis or by output, the weekly earnings are computed by dividing by thirteen the earnings over the thirteen week period prior to the work injury. Section 85.36(6), Code.

In the case sub judice, it was found that claimant customarily was paid $3.35 per hour for twenty hours per week and she was paid on Friday of each week. In addition to cash payment, it was found that claimant also received a lunch valued at $2.50. The value of this lunch must be included in the computation of gross weekly earnings. See Hoth v. Eilors, I Iowa Industrial Commissioner Report 156 (Appeal Decision 1980). Therefore, under the above cited provisions of 85.36, and applicable case law, claimant's gross weekly earnings for the purpose of computing the rate of compensation was found to be $79.50.

Defendants argue that subsection 10 of section 85.36, applies because claimant was only "part-time." That subsection reads as follows:

> If an employee earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fifieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury.

Claimant responds to this argument by stating that it would be unfair to apply that subsection to claimant and that this agency has discretion in applying the various alternative methods of compensation in 85.36 to arrive at "the most accurate measure of an employee's loss of earnings." It must be conceded that in many instances weekly earnings computed in this matter would not be truly representative of an injured part-time worker's weekly earnings. See Lawyer & Higgs, Iowa Workers' Compensation Law and Practice, §12-8, page 100. However, it is apparent from a reading of subsection 9 in Iowa Code section 85.36, which annualizes the income of seasonal employees, that the legislature intended to adversely discriminate against seasonal and part-time employees who only work part of a year. In addition, the commissioner has held that subsection 10 of 85.36 may adversely affect an injured worker if the worker is found to be earning less than a regular full-time worker and this decision is an agency precedent binding upon this deputy commissioner.

Winters v. Te Slaa I Iowa Industrial Commissioner Report 367 (Appeal Decision 1981).

In the alternative, claimant argues in her brief that defendants have not shown that she was earning less than "a regular full-time adult laborer in the line of industry...in that locality." This argument was much more persuasive. In every case that I have read where the agency has applied subsection 10, there was a specific finding that claimant was earning less than a full-time adult laborer. Clearly, a proponent of a proposition has the burden of proof. If defendants desire to apply subsection 10 to claimant's situation which is an exception to the customary method of computing weekly benefits, defendants assume the burden of demonstrating that she was earning less than the average full-time adult laborer in the Dubuque metropolitan area who performs the type of work claimant was performing at the time of her injury. Although claimant admitted that she only worked twenty hours per week, there is no evidence that there were other employees in the Dubuque area performing domestic care who earned more than claimant on a weekly basis. Given the numerous industries in this state in which part-time employment is the customary type of "full-time employment," e.g., grocery,, fast food, and general service businesses, this agency cannot assume, per se, that a forty hour work week is full time in every industry or that a twenty hour work week is part-time. Claimant was not engaged in nursing home care as her duties were limited to care of the elderly in the elderly person's own home. However, even if you could consider nursing home care as the same "line of industry," there was no evidence submitted by defendants of what the normal wage or hours are for such an industry. It is this deputy commissioner's experience that nursing home aides frequently work less than forty hours per week. Therefore, given the failure of defendants to carry their burden of proof, claimant is entitled to a computation of her rate under the customary method applicable to full-time employees.

Based upon a finding of a gross weekly compensation of $79.50 per week, single status with one exemption, claimant is entitled under law pursuant to the commissioner's benefit schedule published July 1, 1982 to a rate of compensation in the amount of $64.91 per week.

ORDER

IT IS THEREFORE ORDERED AS FOLLOWS:

1. Defendants shall pay to claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of sixty-four and 91/100 dollars ($64.91) per week from November 11, 1983.

2. Defendants shall pay to claimant healing period benefits from April 12, 1983 through November 10, 1983 at the rate of sixty-four dollars and 91/100 dollars ($64.91).

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

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

5. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 (formerly Industrial Commissioner Rule 500-4.33).

6. Defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1 (formerly Industrial Commissioner Rule 500-3.1).

Signed and filed this 9 day of March, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM J. HODGINS, Claimant, vs. FLOYD VALLEY PACKING CO., Employer, and NORTHWESTERN NATIONAL INSURANCE- CHUBB GROUP OF INSURANCE COMPANIES, and SECOND INJURY FUND OF IOWA, Insurance Carriers, Defendants.	:	File No. 798203 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, William J. Hodgins, against his employer, Floyd Valley Packing Company, and its insurance carrier, Northwestern National Insurance-Chubb Group of Insurance Companies, as well as against the Second Injury Fund of Iowa, to recover benefits as a result of an injury of January 18, 1985, as well as a result of an alleged first loss of May 6, 1980. Prior to hearing of this matter, the employer-insurance carrier paid the employee permanent partial disability to a scheduled member of ten percent of the left hand on account of the January 18, 1985 injury. Hearing as regards claimant's Second Injury Fund claim was held in Sioux City, Iowa on February 26, 1987. But for briefs, the record was considered fully submitted at close of hearing.

The record in this proceeding consists of the testimony of claimant and of joint exhibit 1, being a series of medical reports relative to claimant. Testimony of Richard D. Sturgeon, a paralegal employed by the law firm of Smith & Smith, was received relative to the issue of reports and testimony of Gail F. Leonhardt, a vocational expert. All testimony and report of Mr. Leonhardt were excluded per defendants' objection on the

grounds of failure to comply with the hearing assignment order and failure to supplement interrogatories in a timely fashion. Mr. Leonhardt's testimony and report were received for custodial purposes only by way of claimant's offer of proof. Said testimony and report will neither be reviewed nor considered in this decision.

ISSUES

The parties stipulated that claimant's rate of weekly compensation is $223.96; that claimant received an injury on January 18, 1985 which arose out of and in the course of his employment; that a causal relationship exists between the January 18, 1985 injury and a claimed disability; that claimant received healing period benefits from the employer from October 7, 1985 through October 10, 1985; that the employer paid claimant permanent partial disability equal to ten percent of the left hand as a result of the January 18, 1985 injury; and that the commencement date for any further permanent partial disability benefits due claimant was April 17, 1986. The issue remaining to be decided is whether claimant is entitled to benefits under our Second Injury Fund Act.

REVIEW OF THE EVIDENCE

Claimant testified that he was born February 5, 1941 and is a high school graduate. Claimant reported that he is a terrible speller and has difficulty reading some of the words in his seven year old daughter's books, however. Claimant has been a union steward. He testified he memorized the union contract and had his wife write grievances at home.

Claimant worked as a janitor, a factory worker, a Plumber and Fitters Union helper, as well as an ironworker, rodbuster, and in other packinghouses before beginning work at Floyd Valley Packing Co. in October 1972. Claimant testified that he had never been diagnosed or treated for carpal tunnel prior to his Floyd Valley work experience. Claimant generally earned wages averaging between $2.00 and $3.50 per hour at his non-Floyd Valley employments. He earned $7.25 per hour while working for the union contractors, however.

Claimant initially worked both on grading hams and on the rib line at Floyd Valley. In grading hams, claimant picked hams from a tub, put them on the scales, and then sorted them by weight. On the rib line, claimant packed ribs from the conveyer belt into thirty pound boxes and sent them further down the line. Claimant apparently spent the balance of his time wrapping loins on the boning line. As a loin wrapper, claimant reached above and grabbed plastic wrap from a roll. He wrapped individual loins weighing from four to fourteen pounds and placed seven to ten of them into a box. Claimant then carried the full box

which weighed from 40 to 70 pounds approximately ten feet and placed it on the line. Claimant reported that he performed this job ten hours a day, six days per week. Claimant apparently had to pick up each loin and push his wrist into it. He reported that his fists were clinched and he needed to make solid yanks and squeeze continually to get a solid loin wrap. Eight hundred to a thousand loins were wrapped per hour. The plant ran two boning lines. Sixty-four people worked on line one; thirty-two people worked on line two. Claimant worked as a wrapper on both lines at different times. He reported that two wrappers were used on line two; whereas line one had double the output but only one additional wrapper.

Claimant reported that he suffered his first injury in 1980 while working on line two. He reported that he had a knot on his right wrist and was examined by Milton Grossman, M.D., the company doctor. Grossman subsequently referred claimant to Dr. Vinont, described as a chiropractic doctor, and later to D. G. Paulsrud, M.D., who performed surgery on claimant's right hand. Claimant testified that the right hand has never returned to normal and it continues to clam up in cold conditions, in the morning, and after he has worked an eight or nine hour day. Claimant reported that he then must run warm water over the hand to regain mobility. Claimant testified his left hand and fingers became numb and clammed up while he was working on line one. He reported he saw Dr. Grossman who then referred him to A. Kleider, M.D. Claimant subsequently saw Dr. Paulsrud who performed left wrist surgery.

Claimant could not use his left hand for approximately six weeks following that surgery. During that period, claimant lifted sow bellies, weighing from twelve to fifty pounds, out of a tub with his right hand. Claimant returned to his loin wrapping job in approximately late December 1985 and continued to work that job until the plant's Spring 1986 closing. Claimant testified that it was necessary for him to have his hand wrapped every day in order to work without the hand clamming significantly. He reported that it did clam somewhat but that he refused medication. Claimant acknowledged that had the plant not closed, he would likely still be working on line one as he was top thirty in seniority on the cut floor at the plant's closing. He agreed that to his knowledge the only reason he was not working the line was the plant shut down. Claimant opined that the only jobs he could perform at Floyd Valley would be a janitor's job or a box job each of which would pay $.25 per hour less than he earned wrapping loins.

Claimant received unemployment benefits after the plant closing until he began work at Clover Leaf in November 1986. Claimant worked with a private employment agency to which he must pay a $830 fee to get this job. Claimant works on what is nominally a part-time basis there and receives $4.50 per hour. He reported that he generally works an eight to ten hour day and

averages forty hours per week, but by classifying employees as part time, the company avoids paying both insurance and holiday pay. He reported that at Clover Leaf, he has no job rights, no seniority, and no job protection. At Clover Leaf, claimant lifts a product into a tub and then places the tub on the scale. The tub then apparently goes down the line and needs to be lifted into a freezer. Claimant characterized tubs as weighing from 30 to 60 pounds at times and reported they must be lifted from table height to pallets, that is, approximately one or two steps, and then placed in the freezer. It was unclear exactly which part of this operation claimant performed. Claimant did report, however, that he attempted stacking and that it "just about tore his arms up."

On January 18, 1985, Milton D. Grossman, M.D., stated that claimant's wrists showed evidence of an old fracture of the distal radius and ulnar. Claimant admitted at hearing that he had fractured the wrist and had surgery in early childhood. On January 18, 1985, also, a note was made that claimant grabs meat with his left hand and puts it into a basket and that claimant was experiencing left wrist numbness and weakness. Dr. Grossman's diagnosis was of strained muscle and tendons of the left hand due to an old fracture of the distal radius and ulnar.

Nerve conduction studies conducted on March 25, 1985 were interpreted as showing motor and sensory distal latencies of the left median nerve markedly increased with the amplitude of the sensory action potentials decreased and slowing of conduction across the wrists consistent with severe median neuropathy due to wrist compression.

On October 4, 1985, D. G. Paulsrud, M.D., an orthopedist, released claimant's left carpal tunnel. Dr. Paulsrud returned claimant to one-handed work on October 11, 1985. On January 21, 1986, Dr. Paulsrud saw claimant and reported that he continued to have pain and a lot of synovitis in both hands with clicking and clutching in his fingers. On May 13, 1986, Dr. Paulsrud opined that claimant had a ten percent permanent partial impairment of both upper extremities due to chronic occupational synovitis involving both upper extremities.

On April 24, 1984, William M. Krigsten, M.D., an orthopedist, saw claimant apparently on an emergency basis. Dr. Krigsten then diagnosed claimant's condition as carpal tunnel syndrome on the left, probably secondary to a severe fracture of the left wrist at an early age. He did not recommend surgery. On August 20, 1986, Dr. Krigsten assigned claimant a ten percent permanent partial impairment of the left wrist or hand.

On May 12, 1980, Dr. Paulsrud diagnosed claimant as having stenosing tenosynovitis of the first dorsal compartment, acute DeQuervain's disease, right wrist. Dr. Paulsrud performed a

release of the right dorsal compartment on July 21, 1980. He released claimant to return to work on September 4, 1980.

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

APPLICABLE LAW AND ANALYSIS

Initially, we note that, defendant Second Injury Fund in its brief appears to argue that claimant's left hand condition did not result from his work but from a preexisting distal fracture. The point appears moot as the Fund joined in the prehearing report stipulation that claimant's January 18, 1985 injury was causally related to claimant's claimed disability. Further, ample medical and lay evidence exists supporting claimant on the causal connection issue. For that reason, also, the Fund's contention in its brief is rejected.

We reach the question of whether claimant is entitled to benefits under our Second Injury Fund Act, sections 85.63 through 85.69. Before the Second Injury Fund is triggered three requirements must be met. First, the employee must have lost or lost the use of a hand, foot, leg or eye. Second, the employer must sustain another loss or loss of use of another member or organ through a compensable injury. Third, permanent disability must exist as to both the initial injury and the second injury. See Allen v. Second Injury Fund, 34 Biennial Rep., Iowa Indus. Comm'r 15 (1980); Ross v. Servicemaster-Story Co., 34 Biennial Rep. Iowa Industrial Comm'r 273 (1979). The Act exists to encourage the hiring of handicapped persons by making the current employer responsible only for the amount of disability related to an injury occurring under his employ as if there were no preexisting disability. See Anderson v. Second Injury Fund, 262 N.W.2d 789, 791 (Iowa 1978); Lawyer and Higgs, Iowa Workers' Compensation-Law and Practice, section 17-1.

The fund is responsible for the difference between total disability and disability for which the employer at the time of the second injury is responsible. Section 85.64. Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300 (Iowa 1970), Fulton v. Jimmy Dean Meat Co., File No. 755039, filed July 28, 1986.

Claimant has shown a loss of use of his right hand as a result of claimant's right dorsal compartment release on July 21, 1980. The loss appears to be minor in that claimant returned to his same job shortly after his surgery and was able to perform it without serious difficulty. Indeed, claimant was able to work with his right hand only following his left wrist surgery. Claimant does report continued clamming of his right hand in a number of different circumstances including cold conditions and prolonged work. Dr. Paulsrud has opined claimant has a ten percent permanent partial impairment of the upper

extremities due to chronic occupational synovitis, an opinion which also supports claimant's argument that he had suffered a loss of use. An injury to the wrist is generally considered an injury to the hand and not to the upper extremity. Elam v. Midland Mfg., 2 Iowa Industrial Commissioner Report 141 (Appeal Dec. 1981) under the AMA Guides to permanent partial impairment, a ten percent permanent partial impairment to the upper extremity results in an eleven percent permanent partial impairment to the hand. Because claimant's first loss of use is to a scheduled member, permanent disability can be assessed under section 85.34(2)(1).

Claimant has also shown a loss of use of his left wrist following his 1986 carpal tunnel release. Again, the loss appears minor in that claimant returned to his loin wrapping job six weeks after surgery and worked that job to the plant closing. Our Act does not require a major impairment of the member, however; only that a loss of use actually exist.

The parties stipulated claimant's left wrist injury resulted in permanent partial disability of ten percent of the left hand. As the Fund joined in that stipulation, it is bound by the stipulation. We note, however, that Dr. Krigsten opined claimant had a ten percent permanent partial impairment to the left hand and Dr. Paulsrud that claimant had a ten percent permanent impairment of the upper extremity. As the loss is to a scheduled member, the opinions are sufficient to demonstrate permanent disability pursuant to section 85.34(2)(1).

The three prerequisites for Fund liablity are present. As claimant's present condition involves the combined effects of both his first and second injuries, it results in industrial disability to the body as a whole. The effects of the second injury are limited to the scheduled member, however. When the second injury is considered independently of any other conditions, claimant is limited to benefits under section 85.34(2)(1). Therefore, his employer is liable for that amount only without regard to consideration of the other factors for determining industrial disability. Mich Coal, Fulton Supra.

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 v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Claimant returned to work for his employer shortly after his second injury. He continued working until the employer's plant closed. He admits he likely would still be working for the employer had the plant not closed. Claimant testified he now could only work at a janitor's job or a box job with his previous employer. The fact that he continued work at his loin wrapping job until the plant's closing and the nature of claimant's current employment suggests claimant could perform other duties as well, however. Indeed, claimant is now employed and doing limited skills manual labor much as he would have used in his Floyd Valley job. While claimant's exact wage at Floyd Valley is not in the record, one suspects it was considerably more than the $4.50 per hour he is now earning and at least equal to the $7.25 per hour he earned as a union helper. Claimant also has lost union benefits and job security. However, these like claimant's wage decline itself, are more effects of the general economic loss to all former Floyd Valley workers than effects attributable to claimant's injuries. Claimant is a high school graduate with prior experience as a janitor. He apparently believes he could return to janitorial work if such were available. He has difficulties with literacy skills, but appears an intelligent man who has coped with these problems successfully in the past. While claimant's limited literacy skills certainly hamper his ability to be retrained for nonphysically demanding work, they do not appear to have seriously handicapped him in his prior work activities nor do they appear to handicap him in performing work for which he remains qualified. Nevertheless, claimant's job marketability is certainly less than that of a worker competing in the same job market who has had no prior injuries. When the overall pool of available workers is reviewed, claimant will likely be considered less favorably than a worker who has

no preexisting handicaps. Hence, claimant has a real loss of earning capacity on account of his injuries which is found to be 20 percent of the body as a whole or 100 benefit weeks. As noted, claimant's second injury is limited to the scheduled member and represents a permanent partial disability of 10 percent of the left hand or 19 benefit weeks. Claimant's first injury represents a permanent partial disability of 11 percent of the right hand or 20.9 benefit weeks. Both those amounts are deducted from the 100 benefit weeks to arrive at the Fund's liability which is 60.1 benefit weeks.

FINDINGS OF FACT

THEREFORE, IT IS FOUND:

Claimant injured his right hand in May 1980 and underwent a release of the right dorsal compartment on July 21, 1980.

Claimant was able to return to his loin wrapping job shortly after his dorsal compartment release.

Claimant continues to have clamming in his right hand in cold conditions and after working for prolonged periods.

Claimant had a carpel tunnel release of the left hand October 4, 1985.

Claimant worked one-handed with his right hand for six weeks following that release.

Claimant then returned to his loin wrapping job and continued working that job until Floyd Valley closed in Spring 1986.

Claimant has secured other employment at a lesser wage and with less employee benefits and security than he had at Floyd Valley.

Claimant has past experience as a janitor and could continue to work as a janitor.

Claimant has limited literacy skills but had functioned adequately in both prior and present employment despite that limitation.

Claimant's limited literacy skills would make retraining for less physically demanding work more difficult.

Claimant is 46 years old and a high school graduate.

Claimant has a 11 percent scheduled member permanent disability to the right hand; claimant has a 10 percent scheduled member permanent disability to the left hand.

Claimant is competing with noninjured workers for jobs in a limited job market.

Claimant has a loss of earnings capacity of 20 percent of the body as a whole as a result of the combined effects of his first and second injuries.

CONCLUSIONS OF LAW

Claimant's loss of use of his left hand and his loss of use if his right hand result in a total industrial disability of twenty percent (20%) permanent partial impairment of the body as a whole.

The compensable value of claimant's loss of use of his right hand is twenty point nine (20.9) weeks; the compensable value of claimant's loss of use of his left had is nineteen (19) weeks.

The obligation of the Second Injury Fund of Iowa is sixty point one (60.1) weeks at the rate of two hundred twenty-three and 96/100 dollars ($223.96) due after Floyd Valley Packing Co. has paid claimant its obligation as to the loss of use of the left hand and the expiration of twenty point nine (20.9) weeks thereafter.

ORDER

THEREFORE, IT IS ORDERED:

The Second Injury Fund of Iowa pay claimant permanent partial disability benefits for sixty point one (60.1) weeks at the rate of two hundred twenty-three and 96/100 dollars ($223.96) with those payments to commence as set forth in the above conclusions.

The Second Injury Fund of Iowa pay any accrued benefits in a lump sum together with interest pursuant to section 85.30.

The Second Injury Fund of Iowa pay costs of this action pursuant to Division of Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33.

Defendants file claim activity reports as requested by the agency.

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

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

YOUNG GEORGE HOUSTON,	:	FILED
	:	
Claimant,	:	JAN 30 1987
	: File No. 763157	
vs.	:	INDUSTRIAL SERVICES
	: A R B I T R A T I O N	
CATERPILLAR TRACTOR COMPANY,	:	
	: D E C I S I O N	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Young George Houston, claimant, against Caterpillar Tractor Company, a self-insured employer, for the recovery of benefits as the result of an alleged injury of March 1, 1984. This case was heard on October 22, 1986 at the Bicentennial Building in Davenport, Scott County, Iowa. It was considered fully submitted at the conclusion of the hearing.

The record in this case consists of the testimony of claimant and joint exhibits E, F, K, M, BB, CC, EE-HH, and KK-GGG.

STIPULATIONS AND ISSUES

Pursuant to the prehearing report and order approving the same, the parties stipulated as follows:

1. On March 1, 1984 there was in existence an employer-employee relationship between claimant and defendant.

2. On March 1, 1984 claimant received an injury arising out of and in the course of employment.

3. Claimant suffered temporary total disability from April 23, 1984 to June 10, 1984 as a result of his injury.

4. If claimant suffered permanent disability, it is to the body as a whole.

5. The proper commencement date for permanent disability payments, if any, is June 11, 1984.

6. Claimant's rate of compensation is $324.18.

7. All medical benefits requested by claimant have been or will be paid by defendant.

8. Claimant has been previously paid seven weeks of compensation at his rate of $324.18 totalling $2,269.26.

9. All costs incurred by the parties have actually been paid by them.

The issues to be determined in this proceeding are whether claimant suffered permanent disability and, if so, the extent thereof. There is an additional issue as to the payment of interest on any accrued permanent partial disability payments.

EVIDENCE PRESENTED

Claimant testified he is forty-six years old, married, and a high school graduate. He served for four years in the United States Air Force where he was a mechanic. He received an honorable discharge. Prior to going to work for defendant in March 1974 claimant had worked as a mechanic for a Ford dealer, an engine company, and been a farm laborer.

Claimant said he has had a variety of jobs with defendant operating a "substrand" machine for the past six or seven years. Claimant's present job is to set up machines, put the parts in it, and observe it as it runs to make sure it operates properly. He said that most of the pieces he places in the machine weigh less than twenty-five pounds. He picks the pieces up out of a metal tub. Claimant advised that placing the pieces in the machine requires him to extend his arms. He estimated that he has to extend his arms about ten percent of the time. Claimant said his job is not what he would call heavy physical labor.

Claimant recalled that on March 1, 1984 he was placing a new piece in his machine and while doing so was pulling on a wrench with his arm. He said he felt a pain in his shoulder which he thought was a pulled muscle. He reported the matter to his foreman and later saw the company doctor who prescribed muscle relaxers. Claimant was referred to Byron W. Rovine, M.D., by the company doctor. Dr. Rovine operated on claimant who said he was off work for seven weeks following the surgery. When he returned to work he was on light duty status for a period of time and then returned to his regular job.

Claimant recalled that when he first returned to regular duties he worked less than eight hours per day. He gradually worked his way up to a full eight hours but did experience soreness in his arm. He said that he received some physical therapy in October 1984 to treat this problem. He also utilized a TENS unit for awhile. Claimant said he continues to use Tylenol and muscle relaxers on occasions when he gets sore.

Claimant revealed that he does have continuing problems as a result of his injury. He noted that he has a limited range of motion in his neck, particularly to the left. He further noted right arm pain when extending his arms over his head. Claimant reported that on occasion he wakes up at night because of the pain. He indicated that he was uncertain whether his injury had affected the speed with which he does his work. He added that his foreman is aware of the problems he has and has not been pressured to do more than his limitations. He said that although he can still operate about eight of the machines in his area, he is precluded from some others because of pain.

Claimant testified that he believed he could return to work as a mechanic and presently continues to work on his own vehicles.

On cross-examination claimant said his earnings had increased since the injury due to a shift differential. Claimant did indicate that he would be reluctant to accept overtime work because of fear of overusing his arm. Claimant stated that he had not returned to see a doctor for treatment since he was released to return to work by Dr. Rovine. He did have a disability evaulation in May 1986.

Although all of the joint exhibits have been reviewed and considered, a full summary of each exhibit will not be set forth. It would appear that prior to his injury claimant suffered low back problems of a temporary nature. He was also treated for lateral epicondylitis of the left elbow subsequent to the injury in question here.

The general history and initial diagnosis concerning claimant's injury is set forth in Dr. Rovine's impression at that time as a probable cervical disc. On April 26, 1984 Dr. Rovine performed a myelographic examination of claimant's cervical spine and confirmed his initial diagnosis of problable extruded disc at C5-C6 on the right. (Exhibit AAA) On April 27, 1984 the doctor performed an anterior cervical discectomy and interbody fusion on claimant's neck at the affected level. (Ex. BBB) The progress of claimant following this surgery is set out in detail in the progress notes of Bruce D. Pauls, L.P.T. (Ex. OO)

Claimant was examined by Dr. Rovine in June 1985. The doctor noted that claimant had continuing and persistent inter-scapular pain. He said this would not be uncommon given the type of surgery claimant underwent. He added, however, that he thought it could be related to a winged scapula which would have no relationship to the cervical problem. (Ex. FFF)

Dr. Rovine conducted a final examination of claimant on May 19, 1986. (Ex. GGG) At that time the doctor noted that claimant had returned to work with unrestricted physical activity. Claimant's interscapular pain was persisting but there was no

weakness in the upper extremities. Dr. Rovine assigned to claimant a permanent impairment rating of eight percent of the body as a whole but added that his level of disability should not seriously affect his normal activities.

Claimant was also examined on April 29, 1986 by Richard A. Roski, M.D. (Ex. VV) Dr. Roski found no evidence of weakness or sensory loss in claimant's upper extremities indicating no neurological deficit. He found no evidence of any winging of the scapula. The doctor did find, however, that claimant suffered chronic pain in the cervical region. Dr. Roski opined that claimant had a good result from his surgery. In a letter dated July 21, 1986 Dr. Roski assigned to claimant a functional impairment rating of eight percent of the body as a whole. (Exhibit XX)

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 1, 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).

Dr. Rovine's surgeon's report of April 23, 1984 clearly and unequivocally relates claimant's cervical problems to the March 1, 1984 injury at work. (Ex. ZZ) The record contains other references by the doctor that the problems were secondary to the injury. This record thus establishes the causal relationship between the injury at work and claimant's subsequent cervical disc syndrome.

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).

There is no disagreement among the experts that claimant suffered permanent functional impairment as a result of his

injury. Both of the doctors who examined claimant arrived at the same functional impairment rating of eight percent of the body as a whole. It must be emphasized, however, that functional impairment is but one element of the many factors considered in a determination of industrial disability. The ultimate result sought is not bodily impairment but loss of future earning capacity.

There can be no question as to the credibility or integrity of this claimant. He has shown superb motivation and desire to continue in the work force. Claimant appears to be intelligent as well as emotionally suited for many types of employment. He has a high school education as well as military service vocational training. Claimant has been able to return to his former employment with defendant and has not suffered a reduction in earnings as a result of his injury. Claimant is, however, precluded from some of the more strenuous jobs he could have done and would not accept overtime work if offered to him.

Further, claimant's testimony at hearing discloses that he could return to work as a mechanic, consistent with his prior work experience. Claimant continues to work on his own automobiles. It must also be recognized that the defendant in this case returned claimant to work at his former job. Further, it would appear that claimant's supervisors at defendant have made reasonable efforts to accommodate his particular limits.

Claimant does not apparently have any specific limitations on his activities. He reports, however, that working with his hands overhead or extended does have a tendency to cause pain. Also, claimant continues to find it necessary to use an occasional analgesic or muscle relaxant to relieve pain.

All of the relevant factors, being fully considered, make it fair to say that claimant has proven a permanent industrial loss. The extent of that loss is, however, mitigated by many of the factors of industrial disability as discussed above. Accordingly, it will be found that claimant's industrial disability as a result of the injury has been shown to be ten percent of the body as a whole.

Defendant will be ordered to pay interest on claimant's award commencing June 11, 1984, the date of termination of his healing period. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986).

FINDINGS OF FACT

WHEREFORE, the following findings of fact are made:

1. On March 1, 1984 claimant suffered an injury to his neck while at work.

2. As a result of the injury, claimant was off work from April 23, 1984 through June 10, 1984.

3. Claimant has been paid compensation for his time off work.

4. As a result of his injury, claimant underwent a C5-C6 discectomy and interbody fusion.

5. As a result of the injury, claimant has suffered a permanent functional impairment to the body as a whole.

6. Claimant was able to return to work at defendant and could return to work as a mechanic.

7. Claimant suffers pain and discomfort if he overuses his upper extremities.

8. Claimant has a high school education, is intelligent, and well motivated.

9. Claimant has few physical restrictions.

10. Claimant's rate of compensation is $324.18.

11. Claimant has established an industrial disability of ten percent of the body as a whole.

CONCLUSIONS OF LAW

IT IS THEREFORE CONCLUDED that claimant has proven by a preponderance of the evidence that there is a causal relationship between claimant's injury and his disability.

IT IS FURTHER CONCLUDED that claimant has proven by a preponderance of the evidence that he has suffered an industrial disability equal to ten (10) percent of the body as a whole.

ORDER

IT IS THEREFORE ORDERED that defendant pay unto claimant fifty (50) weeks of compensation at his rate of three hundred twenty-four and 18/100 dollars ($324.18) commencing June 11, 1984 and continuing until paid in full. All accrued payments shall be made in a lump sum with interest.

Costs are taxed to defendant.

Defendant is to file an activity report upon completion of this award.

Signed and filed this 30th day of January 1987.

Steven E. Ort
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DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WALLACE HUBBARD, Claimant, vs. IOWA STATE PENITENTIARY, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	FILE NO. 790707 A R B I T R A T I O N D E C I S I O N FILED JAN 16 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration commenced under section 85.59 of the Code by Wallace Hubbard, an inmate, against Iowa State Penitentiary, and the State of Iowa. The case was heard at Burlington, Iowa on November 6, 1986, and was fully submitted upon conclusion of the hearing. The record consists of testimony from Wallace Hubbard and Donald J. Lynch. The record also includes claimant's exhibits 1, 2, 3 and 4. Final ruling upon defendants' exhibit A was deferred until the issuance of this decision.

Exhibit A is the written report of an investigation of the incident upon which Hubbard's claim is based. It contains a summary of statements from witnesses and also transcripts of tape recorded statements from witnesses. The report was prepared as part of the regularly conducted and regularly recorded activities of the Penitentiary. It would ordinarily be excluded from evidence by the operation of Iowa Rule of Evidence 803(8)(B)(ii). The exhibit contains statements from persons who were not subject to cross-examination. If cross-examination has not and cannot be conducted, it is difficult to make a finding that a full and true disclosure of the facts had been made without cross-examination.

Chapter 86 of the Code gives the industrial commissioner and the deputies appointed by the commissioner the responsibility and authority to administer the workers' compensation laws of this state. Section 86.8(1) of the Code specifically gives the commissioner the duty to establish and enforce all necessary

rules for carrying out the purposes of Chapters 85, 85A and 87 of the Code. Division of Industrial Services Rules 343-4.20 through 4.23 deal with the prehearing and assignment process. Rule 343-4.22 specifically provides for the entry of an order which controls the subsequent course of action of the case. Paragraph 6 of the hearing assignment order clearly states, in part, "...all other written evidence shall not be admitted as exhibits at the hearing unless they have been timely served upon an opposing party as ordered herein." The assignment order required service to be made within 10 days following the date of the order. This was clearly not accomplished. Timely objection was made. That objection is sustained. Defendants' counsel's brief urges that the service was late by only a few days and that the tremendous case load of the attorney handling the case and the clerical staff in the Attorney General's office prevented immediate attention to the matter. If inadequate staffing levels exist, the results of such must impact upon the party responsible for determining those staffing levels. If timely service of the exhibit had been made, claimant could have sought a continuance of the case or to depose the witnesses whose statements are contained in the exhibit. When served only seven days prior to trial, claimant's counsel was fully within his rights to decide to object to the evidence rather than to make a belated attempt at a last minute continuance or a last minute deposition of the witnesses. He clearly had no obligation to inform defense counsel that he intended to make the objection if the exhibit was, in fact, offered at hearing. As previously stated, the objection to exhibit A is sustained and exhibit A is part of the record of this case as an offer of proof only. Its contents will not be considered when deciding this case.

ISSUES

The primary issue in this case is whether compensation is disallowed due to the injury being the result of a willful act of a third party directed against Hubbard for reasons personal to Hubbard as provided by Code section 85.16(3). The parties stipulated that Hubbard is an inmate and that benefits, if payable, arise under Code section 85.59. It was further stipulated that claimant's disability is a 13 percent loss of use of the left arm which entitles him to 32.5 weeks of compensation for permanent partial disability in the event the injury is found to be compensable. Stipulations appear in the record to cover all other material issues.

ANALYSIS

From the stipulations and record made, it is clear that Wallace Hubbard was an inmate at the Iowa State Penitentiary on August 14, 1984. He was living at a prison farm at the time. His injury occurred on one of the prison farms where he had been working with a crew cutting weeds.

Hubbard testified that toward the end of the work day he and another inmate identified as "Thomas" began to engage in horseplay. Hubbard testified that he informed Thomas that he was about to be paroled and that Thomas then kicked Hubbard in the back. Hubbard stated that the two scuffled but no one was hurt. Hubbard testified that they resumed working and that approximately one-half hour later when he was returning his tools to the storage shed, Thomas came out from behind a tractor and swung a blade striking his left arm. Claimant was taken to the Iowa State Penitentiary Hospital and later transferred to the University of Iowa Hospitals and Clinics in Iowa City. The cut on claimant's arm included an injury to the ulnar nerve which has not fully recovered and has left claimant with weakness, decreased sensation and loss of grip strength. The impairment was rated by James V. Nepola, M.D., as 13 percent of the upper extremity (Exhibit 4).

Claimant testified that he thought Thomas was mad at him because he was going to be paroled. He further stated that after he and Thomas had wrestled things got out of hand but that he thought it was then over. Hubbard denied beating up Thomas or hitting him on that day when the incident occurred.

Section 85.59 provides workers' compensation benefits to an inmate "...while that person works in connection with the maintenance of the institution or in an industry maintained therein...." Work on the prison farm was clearly an activity which would bring claimant within the coverage afforded by the workers' compensation statutes. The defense provided by Code section 85.16(3) is an affirmative defense which must be established by the state. Reddick v. Grand Union Tea Co., 230 Iowa 108, 115, 296 N.W. 800, 803 (1941).

The normal rule regarding the burden of proving that an injury arose out of and in the course of employment should apply to a case of this nature with the employment being considered as the activities described in section 85.59. "An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971), Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Rest breaks are a common part of employment. So long as the individual remains on the employer's premises, he is generally considered to be within the course of his employment during a rest period. Watters v. Backman Steel Works, Thirty-third Bienniel Report, Iowa Industrial Commissioner 60 (App. Decn. 1977).

An employee who, of his own volition, initiates or engages in horseplay or practical joking maybe outside the course of his employment while engaging in such horseplay. Ford v. Barcus,

261 Iowa 616, 155 N.W.2d 507 (1968). Lawyer & Higgs, Iowa Workers' Compensation -- Law and Practice, section 6-8.

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 "arising out of" refer to causal connection. The injury must be a natural incident of the work. It must be a rational consequence of a hazard connected with the work. Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298, 299 (Iowa 1979).

It can be urged under the positional risk doctrine that every injury that occurs while a worker is in the course of his employment also arises out of the employment. I Larson Workmen's Compensation, section 10.00 at et.seq. A school district employee who was shot by a mentally inbalanced fellow employee has been awarded benefits. Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979). The basis of the court's ruling was that since the employment placed Cady in a position of contact with the mentally deranged co-employee, the injury arose out of the employment. It could be urged that the fact that the work assignment on the prison farm placed Hubbard in contact with Thomas makes any injury inflicted by Thomas upon Hubbard an injury that arose out of the employment.

The issue of dealing with whether or not assaults arise out of and in the course of employment is covered in I Larson Workmen's Compensation, section 11.00 at et.seq. The rule states:

> Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work, or if the reason for the assault was a quarrel having its origin in the work. A few jurisdictions deny compensation if the claimant himself was the aggressor; most reject this defense if the employment in fact caused the fight to break out. An increasing number accept the idea that the strain of enforced close contact may in itself provide the necessary work connection. Assaults for private reasons do not arise out of the employment unless, by facilitating an assault which would not otherwise be made, the employment becomes a contributing factor. Assaults by lunatics, drunks, and children have generally been found to arise out of the employment, and the same has been held by some courts in the case of unexplained or mistaken-identity assaults, although there is authority to the contrary.

The injury in this case did not arise from an attempted robbery, an arguement over the work in which Hubbard and Thomas had been engaged or from an irrational act committed by a mentally impaired individual. Thomas and Hubbard were in as close contact with each other in their residential area as they were when in the work area.

According to claimant's testimony, he had been engaging in horseplay with Thomas and the horseplay had gotten out of hand. Later, Thomas struck him with a blade causing the injury. The only motive for the attack that is suggested in the record is that Thomas was disgruntled with the fact that Hubbard was going to be paroled. Such circumstances have no relationship whatsoever to the work of cutting weeds on the prison farm. They are clearly a matter personal to the individuals concerned. Other inmates were present but it is only Thomas and Hubbard who were involved in the altercation and events which led up to the injury. The evidence fails to show that the injury to claimant's arm arose out of the employment. It is likely that the horseplay in which he had engaged precipitated Thomas' subsequent attack. It is further found that the attack was a willful act committed by Thomas due to a reason personal to Thomas and Hubbard upon Thomas being informed that Hubbard was going to be paroled.

FINDINGS OF FACT

1. On August 14, 1984, Marcus Thomas struck Wallace Hubbard on the left arm with a blade that produced a severe laceration and resulted in the permanent disability that currently exists in Hubbard's arm.

2. Shortly prior to the time of the attack, Wallace Hubbard and Marcus Thomas had engaged in horseplay that included wrestling or scuffling on the ground. Hubbard had voluntarily participated in the horseplay.

3. The scuffling was prompted, at least in part, by Hubbard informing Thomas that he was going to be paroled.

4. The attack that Thomas made upon Hubbard was made for reasons personal to Thomas and Hubbard and had no connection, whatsoever, with the work that either of them performed on the prison farm.

CONCLUSIONS OF LAW

1. Wallace Hubbard has failed to prove by a preponderance of the evidence that the injury to his left arm arose out of a hazard connected with the work he performed in connection with the maintenance of the prison farm. The injury is therefore not

compensable under section 85.59 of the Code.

2. It has been proven by a preponderance of the evidence that the attack by Marcus Thomas upon Wallace Hubbard was a willful act directed against Hubbard for reasons personal to Hubbard and Thomas. No compensation is therefore allowed in accordance with section 85.16(3) of the Code.

3. The positional risk doctrine does not make all injuries suffered by inmates compensable under Chapter 85 of the Code.

ORDER

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

IT IS FURTHER ORDERED that costs of this proceeding are assessed against claimant.

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

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DALE ISEMAN,	:	
	:	File No. 701889
Claimant,	:	
	:	R E V I E W -
vs.	:	
	:	R E O P E N I N G
AUTOMATIC SPRINKLER CORPORATION OF AMERICA,	:	D E C I S I O N
	:	
Employer,	:	
	:	
and	:	
	:	
KEMPER INSURANCE COMPANY,	:	
	:	
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Dale Iseman, claimant, against Automatic Sprinkler Corporation of America, employer, hereinafter referred to as ASC, and Kemper Insurance Company, insurance carrier, defendants, for further benefits as a result of an injury on May 3, 1982. A memorandum of agreement for this injury was filed on June 4, 1982. On December 30, 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 is permanently injured as a result of an injury to both of his wrists from a fall while working for ASC and is seeking permanent disability benefits in this proceeding. Defendants agree that they are liable for an injury in this case and that the injury caused both temporary and permanent disability, but disagrees as to the extent of permanent disability benefits to which claimant is entitled.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant. The exhibits received into the evidence at the time of 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 May 3, 1982 claimant received an injury which arose out of and in the course of his employment with ASC;

2. Claimant is entitled to healing period benefits from May 4, 1982 through July 3, 1985 and the commencement date for permanent disability benefits in this case shall be July 4, 1985; and,

3. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $359.12.

The prehearing report submits only the issue of the extent of claimant's entitlement to permanent disability benefits for determination in this decision.

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 has been employed by ASC since March 1974 as a pipe fitter foreman.

Claimant was a working foreman. In addition to his duties as a journeyman pipe fitter, claimant was responsible for directing the work of his crew and insuring that proper materials were available. Claimant stated in his testimony that he set the pace for his fellow workers. Claimant described pipe fitting as "back breaking," heavy work which involved the installation of air and water pipes for sprinkler systems. The materials were at times very heavy and much of the work was performed above ground, usually in excess of twenty to twenty-five feet. Pipe fitters are required to work both from ladders and power lifts. At the time of the work injury, claimant was earning approximately $17.70 per hour.

3. As stipulated, on May 3, 1982 claimant suffered an injury which arose out of and in the course of his employment with ASC.

Claimant's credible testimony and his medical records submitted into the evidence established that on the alleged injury date, claimant was working above ground on a boom of a power lift when he fell approximately twenty feet onto a hard "concrete like" surface crushing both of his wrists and injuring his face. The wrists injuries are described by his primary care physician, Thomas L. Von Gillern, M.D., an orthopedic surgeon, as "bilateral comminuted intra-articular distal radial fractures

with wrist dislocations." After the injury, both of claimant's arms were placed into hard casts extending from the hand to the elbow.

4. As stipulated, the work injury was a cause of a temporary period of total disability while claimant was recovering from the injury from May 4, 1982 through July 3, 1985.

Recovery from the injury was very slow. Although his face "healed pretty much" according to claimant's testimony, his wrists have been a continuous problem since the date of injury. Claimant developed post traumatic arthritis in both wrists which was worse on the left side. Claimant underwent several surgical procedures, the last of which involved a complete fusion of the left wrist. Although Dr. Von Gillern wishes to hold off a fusion of the right wrist at the present time, the doctor states that in all likelihood such a fusion will be necessary in the future. Upon a release to work "on a trial basis" by Dr. Von Gillern, claimant returned to pipe fitting work in the summer of 1986.

5. The work injury of May 3, 1982 was a cause of a fifty-three (53) percent permanent partial impairment to claimant's body as a whole as a result of a functional loss of his right and left arms.

No previous medical history of any wrist or arm problems or permanent impairment of either arms was offered into the evidence of this case. Claimant's credible testimony and the personal observations of the movement of claimant's wrists at the time of hearing by this deputy commissioner established that the loss of use of claimant's wrists and arms is very severe. Claimant has permanent loss not only in the movement of the wrists but in strength and dexterity of the hands and arms. Pain from arthritis and cold weather is a chronic problem which will probably never subside during the rest of claimant's life and work activity only aggravates this pain. Claimant is under a permanent restriction against heavy work and heavy use of his arms and hands according to his physician, Dr. Von Gillern.

The finding as to the specific percentage of functional impairment was calculated using the impairment ratings of the only physician offering opinions as to functional impairment in this case, Dr. Von Gillern. Dr. Von Gillern rated claimant as suffering from a thirty-six percent body as a whole impairment as a result of his left extremity problems and twenty-seven percent of the body as a whole impairment from his right extremity problems. Unfortunately, Dr. Von Gillern did not give a total body as a whole impairment rating. It therefore was necessary to use the Guidelines for Evaluating Functional Impairment published by the American Medical Association, Third Edition, which was officially noticed at the request of the parties to

arrive at a workable combined value figure of fifty-three percent of the body as a whole, using the combined value chart in exhibit 10.

Defendants in their brief argue that Dr. Von Gillern used the AMA Guidelines improperly in calculating the body as a whole impairments from the extremity problems. Defendants point out that in exhibit 1, Dr. Von Gillern rates the left upper extremity as twenty-seven percent and the right upper extremity as twenty percent which converts under the AMA Guidelines to a sixteen percent and tweleve percent body as a whole impairment respectively. Defendants, however, take issue with Dr. Von Gillern's addition of twenty percent body as a whole impairment for additional functional loss to the extremity due to a loss of strength. Defendants contend that under the guidelines, the additional twenty percent impairment to the extremities under the applicable table set forth in the guidelines would result in an additional body as a whole impairment of only twenty-four percent, not forty percent as the doctor calculates in his report.

Defendants' argument was rejected. First, the doctor at no time states in his written reports that he relied upon the AMA Guidelines for his ratings and his failure to strictly adhere to such guidelines is not dispositive of this issue. As will be noted in the conclusions of law section of this decision, the AMA Guidelines are not the only guidelines recognized by this agency as aids to arrive at impairment ratings. Secondly, loss of strength due to nerve loss is dealt with in chapter 2, pages 61 through 84 of the AMA Guidelines, an entirely different section than that which was reproduced in exhibit 10. After careful review of chapter 2 by this deputy commissioner, a rating of impairment for nerve loss in addition to loss of motion is certainly not as clear as defendants contend in their brief. Finally, the views of Dr. Von Gillern are the only opinions offered in this case as to the extent of claimant's functional impairment. This deputy commissioner has neither the desire nor the authority to "second guess" an experienced orthopedic surgeon as to the rating of functional impairment for an orthopedic problem without at least some other medical authority pointing out the alleged error of Dr. Von Gillern's methodology.

6. A finding could not be made that the work injury of May 3, 1987 was a cause of a total loss of earning capacity.

There is little question that, measured industrially, claimant has a very severe loss of earning capacity as a result of the work injury. After resonable efforts, claimant has been unable to locate work more suited to his disability. However, given the law of this case, the only issue before this deputy commissioner is whether or not the claimant has a total, not a partial, loss of earning capacity. Given the evidence in this

case, a finding of a total loss of earning capacity could not be made.

Since the summer of 1986, claimant has been able to overcome his severe injuries and return to substantially the same work he was performing at the time of the work injury. Claimant was unemployed at the time of hearing only because of a temporary layoff due to lack of available work. Claimant fully expected to return to work within a few weeks. Admittedly, claimant is unable to perform many of the work tasks that he was able to perform before May 1982, but through assistance from fellow employees and accommodations by his employers, he is able to function as a pipe fitter. Claimant is credible when he states that he does not know how much longer he will be able to function in this job. However, when and if his employability status changes, this agency can review such a change in status at that time to determine the effect such a change would have upon his earning capacity. Also, it is noted that Dr. Von Gillern believes that claimant will have to undergo further surgery on his right hand. If the surgery occurs, this agency can review the effects of such a surgery on his earning capacity at that time as well. It should be noted that this decision makes no attempt to measure claimant's disability should this second wrist fusion take place.

Claimant has suffered a loss in actual earnings from employment due to his work injury, but at the present time claimant earns only approximately $1.00 or $2.00 less per hour than he would be earning as a full working foreman.

Claimant is forty-one years of age, has earned his GED, and exhibited average intelligence at the hearing. His lack of formal education indicates a low potential for successful vocational rehabilitation. However, he has experience as a first level supervisor which can be transferrable to new lines of industry. Claimant has not demonstrated a prima facie case that the services he can perform are so limited in quality, quantity, and dependability that a reasonable, stable market for them does not exist.

CONCLUSIONS OF LAW

In this case there was no controversy raised by the parties concerning the applicable law to be followed in determination of the issue. The foregoing findings of fact were made under the following principles of law.

Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which he is entitled. As claimant has shown that the work injury involved a permanent impairment to two upper extremities from a single accident, the extent of disability is measured pursuant

to Iowa Code section 85.34(2)(s). Measurement of claimant's entitlement to disability benefits under this subsection is peculiar. Normally, if the injury is only to a single extremity, the amount of disability is measured only functionally as a percent of loss of use. This percentage of loss of use is then multiplied by the maximum allowable weeks of compensation set forth in the specific subsections in 85.34(2)(a-r) to arrive at the permanent disability benefit entitlement. These disabilities are termed "scheduled member" disabilities. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). For all other injuries, including those involving injuries to 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 industrial disability is determined from examintion 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 injury are also relevant. Olson v. Goodyear Service Stores, 225 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963); Peterson v. Truck Haven Cafe, Inc., (Appeal Decision Filed February 28, 1985).

Under Iowa Code section 85.34(2)(s), if the industrial disability is partial, then the extent of the permanent disability benefit entitlement is measured only functionally as a percentage of loss of use to each extremity which is then converted by medical opinion into a percentage of the body as a whole and combined together into one body as a whole value. If it is found that the industrial disability is total, or in other words, a total loss of earning capacity is found to have occurred from a loss of two extremities, then claimant is entitled to permanent total disability benefits under Iowa Code section 85.34(3). See Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa

1983); Burgett v. Man an So Corp., III Iowa Industrial Commissioner Report 38 (Appeal Decision 1982).

In the case sub judice, the findings of fact concerning functional impairment mentions that the AMA Guidelines are not the only guidelines considered by this agency in evaluating functional impairments. Division of Industrial Services Rule 343-2.4 (formerly Industrial Commissioner Rule 500-2.4) states as follows:

> The Guides to the Evaluation of Permanent Impairment published by the American Medical Association are adopted as a guide for determining permanent partial disabilities under section 85.34(2) "a" - "r" of the Code....Nothing in this rule shall be construed to prevent the presentations of other medical opinion or guides for the purpose of establishing that the degree of permanent impairment to which the claimant would be entitled would be more or less than entitlement indicated in the AMA guide.

In the case sub judice, it could not be found that claimant had suffered a total loss of earning capacity as a result of the May 1982 injury. Consequently, the extent of claimant's entitlement to permanent disability benefits was measured soley functionally. Based upon a finding of a combined fifty-three percent impairment to the body as a whole as a result of the permanent injuries to two scheduled members, claimant is entitled as a matter of law to 265 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(s) which is fifty-three percent of the 500 weeks allowable for a simultaneous injury to two extremities in that subsection.

ORDER

IT IS THEREFORE ORDERED as follows:

1. Defendants shall pay to claimant two hundred sixty-five (265) weeks of permanent partial disability benefits at the rate of three hundred fifty-nine and 12/100 dollars ($359.12) per week from July 4, 1985.

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

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

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

Industrial Commissioner Rule 500-4.33).

5. Defendants shall file activity reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1 (formerly Industrial Commissioner Rule 500-3.1).

Signed and filed this 27th day of February, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EUGENE K. KANOUR,	:	
	:	
Claimant,	:	File No. 808320
	:	
vs.	:	
	:	A R B I T R A T I O N
FISHER CONTROLS,	:	
	:	D E C I S I O N
Employer,	:	
	:	
and	:	
	:	
CIGNA,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Eugene K. Kanour, against his employer, Fisher Controls, and its insurance carrier, Cigna, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly discovered January 4, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner in Des Moines, Iowa, on January 7, 1987. The record was considered fully submitted at close of hearing. A first report of injury was filed December 18, 1985. No weekly benefits have been paid.

The record in this case consists of the testimony of claimant and Camilla Smith, R.N., as well as of joint exhibits A through D. Joint exhibit A is medical records from Marshalltown Area Community Hospital regarding treatment of claimant. Joint exhibit B is medical records of Ron C. Terrill, M.D., regarding treatment of claimant. Joint exhibit C is medical records of Thomas M. Foley, M.D., regarding treatment of claimant. Joint exhibit D is the personnel file from Fisher Controls regarding claimant.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant's rate of weekly compensation in the event of an award is $335.95; that claimant was off work from November 15, 1984 through January 2, 1985; and that the commencement date for any permanent partial disability would be January 3, 1985. The

issues remaining for resolution are:

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

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

3) Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement; and

4) Whether claimant gave his employer timely notice of his injury pursuant to section 85.23.

REVIEW OF THE EVIDENCE

Fifty-four year old claimant testified that he has worked as an electronic hydraulic assembler at the Fisher plant for the past five years. He described his work as piece work assembly in which he uses heavy wrenches and air guns and lifts from 80 to 120 pounds. Claimant reported that he uses the department hoist when it is available but otherwise lifts by hands. Claimant testified that in December 1983, he bent over to hand lift an SS100 weighing between 80 and 100 pounds from a flat onto a bench approximately 35 inches high and in doing so felt a sharp pain in his groin. Claimant testified that he continued work and that he told the plant substitute nurse what had happened and that she referred him to Ron C. Terrill, M.D.

Dr. Terrill's notes of January 4, 1984 indicate that he saw claimant on that date for nondescript symptoms, worse with coughing and sneezing, and gagging the last few days. Apparently, on leaving, claimant mentioned right inguinal pain after coughing. Dr. Terrill then checked him and found he had a hernia. Dr. Terrill instructed claimant in the reduction of the hernia and then recommended hernia repair. Claimant subsequently wore a hernia support until October 17, 1984 when Dr. Terrill again saw him with complaints of increase of symptomatic inguinal hernia.

Dr. Terrill referred claimant to Thomas M. Foley, M.D., and Robert L. Mandsager. Per Dr. Mandsager, claimant underwent a bilateral inguinal hernioplasty on November 16, 1984. Claimant had a diverticular hernia on the right and was found to have a small direct hernia on the left as well. Claimant was discharged on November 19, 1984, and made an uneventful recovery. On December 28, 1984, Thomas M. Foley, M.D., released him to return to work as of January 2, 1985 "full speed ahead."

Claimant testified that he told a number of persons working with him about the incident in December 1983, but stated he couldn't recall whom he told since a lot of people were taken from the area. He later stated that he had told a union president

and the union shop committee chair of the incident in January 1984. On cross-examination, claimant agreed that in response to interrogatory number 12 asking for the names of individuals with whom the December 1983 incident had been discussed, he had reported nothing concerning speaking with a company nurse.

Claimant received employer-provided disability pay while recuperating. Claimant reported that a company nurse completed the medical information required for disability forms. He testified that he told the company substitute nurse involved that his pain had begun at work, but stated he could not remember what her response to that statement was. Claimant agreed that he had checked "no" in response to a question on the disability benefit form as to whether his disability had resulted from his employment. Claimant explained that he did so because his union told him that he should use his disability to get his hospital and disability paid and then "go back" for workers' compensation.

Claimant testified that he was smoking approximately three packs of cigarettes per day when seen by Dr. Terrill in January 1984. He has worked as a stock car mechanic for approximately fifteen years and was doing so during 1983. He also owned and rode motorcycles until Spring 1986.

Camilla Smith, R.N., industrial nurse for Fisher Controls testified that she is in charge of workers' compensation, sick benefits, and insurance papers. She indicated that under plant procedure injured employees report their injury to the nurse who then records it on the individual's medical record. Ms. Smith had reviewed claimant's medical chart and had found no report of claimant advising the medical department of an injury on the job relative to his hernia. She recalled discussing claimant's hernia with him on both January 9, 1984 and November 1, 1984, but stated that on neither occasion had claimant indicated that the hernia was work related. She reported that it was probable that a report of pain in the right groin would be put on the employee's chart although it was possible that such a subjective complaint would not be charted. On rebuttal, claimant stated that he had told Ms. Smith about his hernia, but reported that in response she had told him it was not work related and "didn't happen here."

Dr. Terrill's initial note of January 4, 1984 gives no history of claimant's right inguinal pain having an onset at work. Dr. Terrill specifically states claimant "... mentioned right inguinal pain after coughing." On October 17, 1984, Dr. Terrill reported to Doctors Mandsager and Foley that claimant "mentioned on the way out the door something about how this should be a workmen's [sic] comp deal since it happened at work." Dr. Terrill stated a case could be made that claimant's hernia was caused by his smoking and respiratory tract infection. Hospital summaries dictated by both Doctors Mandsager and Foley

indicate that claimant reported a history of lifting a housing off a pallet at Fisher Controls in December 1983 and noticing a pulling sensation in his right groin but no pain. The note of Dr. Foley further states that a couple of days later claimant developed a cold and had coughing and a lot of pain in the right groin. He reported that claimant then saw Dr. Terrill who confirmed the diagnosis of right inguinal hernia. In a report to Dr. Terrill of October 31, 1984, Dr. Foley stated that "from what he tells me" maybe the episode of a year ago could have had something to do with it, "although it wasn't that definite to me. It may be his cold and cough that could have done it also."

Claimant is currently working at the same job he held in December 1983. He has no medical restrictions but subjectively reported that he can't and doesn't lift like he use to and that when he uses big wrenches he sometimes feels a pulling sensation as he pulls too hard toward himself. He reported that he is afraid to motorcycle and that he no longer lifts at home, plays softball, or works on stock cars.

APPLICABLE LAW AND ANALYSIS

We first consider whether claimant has established 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 January 4, 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 words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

Claimant has not sustained his burden. Initially, we find that claimant is not a credible witness. His unsubstantiated testimony is replete with inconsistencies and further explanations. Claimant could not remember whom he had told of his work injury other than the substitute nurse. Following Ms. Smith's testimony, he agreed, on rebuttal, that he had twice discussed the incident with her but stated that she had told him that it was not a work injury. We believe that had the conversations that claimant testified to actually taken place, it is more likely than not that claimant would have testified as to them on direct testimony rather than on rebuttal. Likewise, contrary to claimant's testimony, claimant did not see Dr. Terrill in January 1984 for

examination on account of pain resulting from any December 1983 incident. He saw Dr. Terrill for coughing and cold-like symptoms. Dr. Terrill only examined claimant for hernia after claimant mentioned almost in passing that he had right inguinal pain on coughing. Likewise, Dr. Terrill never reported a history of a lifting incident at work with onset of pain. That history only appears in Dr. Foley's and Dr. Mandsager's notes of November 1984 after claimant belatedly asserted to Dr. Terrill that it should be workers' compensation since it happened at work. Similarly, claimant denied that his disability was employment related on the disability forms he signed in November 1984 and collected company sponsored medical and disability benefits on account of his hernia. Claimant testified that he did this on the advice of his union with the intent of later collecting workers' compensation. Even if this were true, however, that action shows a reckless disregard for the truth and a blatant attempt to defraud others. It further undermines claimant's credibility as a witness. Claimant's individual medical record reports no complaint of either pain or pulling sensation in and around December 1983. We note that claimant does report a relatively minor incident in which he was unable to see for a few seconds after working on an electrical unit that shorted out. We suspect that had claimant reported the incident he testified to, that incident, even if viewed as apparently minor, would also have been recorded. Hence, the objective evidence does not support claimant's contention that he reported his work incident to a substitute nurse. Likewise, no physician has stated conclusively that the incident described, even if it had happened, would have resulted in claimant's hernia. His physicians believe claimant's excessive smoking and his respiratory infection with coughing could also have produced his hernia. Similarly, claimant has worked as a stock car mechanic for approximately fifteen years. Auto mechanic work involves lifting and other physical maneuvers, such as twisting and pulling, as well as tools not significantly different from those claimant described as involved in his work-related assembly. Such activities could also have produced claimant's hernia. Claimant simply has not sustained his burden.

Because claimant has failed to establish this threshold issue, we need not reach the other issues of notice, causation, and disability entitlement raised. We note that claimant would also have difficulty prevailing as regards each of those issues. Claimant at latest discovered his hernia on January 4, 1984. No evidence credibly suggests that he reported a work injury to his employer prior to filing his petition. Claimant is sufficiently intelligent that he can be charged with recognizing the nature, seriousness, and probable compensability of his injury well before then. Likewise, as noted above, no physician has conclusively stated that claimant's alleged work incident produced his hernia. Each physician has noted other possibilities from which the hernia could have resulted. Hence, claimant at best, would have established a

possibility of a relationship between any work incident and his hernia. Furthermore, under the relevant factors governing industrial disability, claimant simply has not shown a loss of earning capacity as a result of the alleged work incident. He has no stated functional impairment. He has returned to the same job and is apparently earning equal wages. His restrictions are only as personally reported and, like his other testimony, found lacking by his general lack of credibility.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant did not give a history of a December 1983 work incident to Dr. Terrill when he visited the doctor on January 4, 1984.

Claimant saw Dr. Terrill for respiratory infection-like symptoms and as he was leaving mentioned that he had right inguinal hernia pain on coughing.

Dr. Terrill then examined claimant and discovered his right inguinal hernia.

Claimant's individual medical record with Fisher Controls does not record claimant reporting experience of either pain or pulling sensation on picking up a unit to assemble in December 1983. The individual medical record does report a minor electrical unit incident in December 1983.

Claimant first reported the alleged work lifting incident to Drs. Mandsager and Foley in October 1984.

Claimant told Camilla Smith, R.N., the Fisher industrial nurse, of his hernia condition on January 9, 1984 and on November 1, 1984 but did not indicate that the hernia was work related.

Claimant denied that his disability resulted from his employment on disability application forms which he completed in order to receive health benefits and disability benefits while hospitalized and disabled on account of repair of his hernia.

Claimant was smoking up to three packs of cigarettes per day in January 1984.

Claimant had worked as a stock car mechanic for fifteen years and was working as a stock car mechanic in 1983.

Excessive smoking or coughing related to a respiratory infection could have produced an inguina hernia.

The physical maneuvers andlifting required of a stock car

mechanic are not significantly different from the physical maneuvers and lifting required in claimant's job as an electric hydraulic assembler at Fisher Controls. Claimant would likely be using similar tools with twisting and pulling maneuvers in both activities.

Claimant was not a credible witness.

Ms. Smith was a credible witness.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That claimant has not established an injury discovered on January 4, 1984 which arose out of and in the course of his employment.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceedings.

Claimant pay costs of this proceeding.

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

ROBERT H. KAUS, Claimant, vs. V-T INDUSTRIES, Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 753461 A R B I T R A T I O N D E C I S I O N FILED MAR 18 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Robert H. Kaus, claimant, against V-T Industries, Inc. (V-T), employer, and Wausau Insurance Companies, insurance carrier, for benefits as a result of an alleged injury on December 21, 1983. A hearing was held in Storm Lake, Iowa, on February 2, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant, Patricia L. Kaus, Douglas E. Clausen, Gary Henry, and Bruce Lingle; claimant's exhibits 1 through 13, except for exhibit 5 which was not offered; and defendants' exhibits A through C. Both parties filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $285.55; that claimant sustained a body as a whole injury; that claimant received healing period benefits from December 21, 1983 through June 6, 1985; that claimant received permanency benefits from June 7, 1985 through November 4, 1985; that claimant received healing period benefits from November 5, 1985 through February 17, 1986; that permanency benefits recommenced on February 18, 1986; that the contested medical bills are reasonable in amount; that the vocational rehabilitation issue noted at time of prehearing was informally resolved by the parties; and that claimant's injury of December 21, 1983 arose out of and in the course of his employment with V-T.

ISSUES

The contested issues are:

1) Whether there is a causal relationship between claimant's work-related injury of December 21, 1983 and his asserted disability;

2) Nature and extent of disability; and

3) 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 37 years old and that he graduated from high school in 1967. He has no additional formal education. He was in the military for two years and sustained no injuries while in the military; he drove a truck in the military.

Claimant testified that prior to December 21, 1983 his health was normal with no psychological or vision problems. Prior to December 21, 1983, he drove a truck for V-T and did some loading and unloading. He generally did not work weekends. He took great pride in his work and his physical abilities prior to December 21, 1983. He started working for V-T on a part-time basis in July 1982 and on full-time basis in November 1982. He characterized truck driving as his "only training."

Claimant described the accident of December 21, 1983 which was a head-on collision between two tractor trailers. His truck was loaded at the time of the accident. After the accident, claimant had no memory for five or six weeks. Claimant then described his physical injuries from the accident including his internal injuries. He sustained a head injury in the accident. Claimant is not now able to do his prior work because of physical restrictions or problems. He has received treatment for depression; he was not depressed prior to December 21, 1983. He currently takes medication for depression which he started in December 1986. Prior to starting this medication, he wanted to walk away from his office job. Claimant liked driving a truck because it allowed him to be his own boss. He now works in an office at V-T as a transportation dispatcher; that is, he tells the drivers where they are going each week. He is physicaly able to do this job, which requires some sitting and some walking. At one point, he was harrassed by a coworker (who was not his immediate supervisor) but this problem has apparently been resolved. Prior to obtaining depression medication, claimant could not keep his mind on what he was doing at work. After the medication this problem has lessened but he still has his ups and downs. He believes that things go too fast in his mind. If

he forgets to take his medication irritability results, his depression comes back, and his concentration is poor. On at least two occasions he has threatened suicide.

Claimant testified that he tried golfing and walking but this did not "work out at all" because it was hard on his legs and one of his hips. He doesn't "walk too good on uneven ground." He has trouble with his feet swelling and his right hip aching.

On cross-examination, claimant stated that he grossed $500-$600 per week (minus expenses for meals and such on the road) prior to the accident of December 21, 1983. His weekly gross is now less than it was prior to the accident of December 21, 1983. He currently does some record keeping for V-T.

Claimant testified that he has a doctor's appointment in March or April 1987. He "may need a new right knee."

Claimant stated that he has sent loads to the wrong spots because on occasion "he is at the job in body but not in mind."

Patricia L. Kaus testified that she has been married to claimant for about fifteen years. Prior to the accident of December 21, 1983, he was a "humerous guy who taught her how to laugh." He had many friends and was athletic. After the accident, claimant has bouts of depression. She then described his injuries sustained in the accident. He has trouble getting in and out of bed and has trouble driving a vehicle. In the spring of 1985, claimant stated "life would be better without him." This incident was triggered by a confrontation with a coworker and claimant was not intoxicated at the time. A second suicide incident occurred in the fall of 1985.

Ms. Kaus testified that claimant is exhausted and tired when he comes home from work. He "fights with his mind." The medication has "helped him think and to get things in the correct perspective." The medication has made his depression less deep but the "hills and valleys are still there." Claimant's income decreased after the accident. He is trying hard to do his dispatcher job.

On cross-examinaion, Ms. Kaus acknowledged that claimant had consumed some alcohol prior to the first suicide incident. The second suicide incident involved no alcohol.

Douglas E. Clausen testified that he is a vice president for V-T and is the secretary-treasurer for V-T Industries. He described claimant's current job as "coordinating mileage and weights of equipment." V-T has eight semi-tractor trailers and often uses contractual carriers. Claimant is paid $1,574.99 gross per month currently and receives quarterly incentives. The incentives are "formulated based on payroll to sales." At

time of the accident in December 1983, claimant was being about $23,600 minus expenses for meals and such. V-T paid the fuel. In 1983, claimant was paid $.18 base rate per , which was his gross pay.

Clausen stated his opinion that claimant is doing a satis-ory job currently as transportation coordinator. Claimant under his supervision about two weeks prior to the hearing ebruary 2, 1987.

Gary Henry testified that as purchasing manager for V-T he supervised claimant. He stopped supervising claimant about weeks prior to the hearing held on February 2, 1987. He ified that claimant has done a good job after the accident that his attendance has been regular. He had "no more lems with claimant than with any other employee." Henry ght claimant had handled himself well before he started g the depression medication.

Bruce Lingle testified that he is claimant's friend. Lingle ot an employee of V-T but has had V-T loads in a truck en by him. Lingle described claimant prior to the accident he "life of the party." Claimant is now short-tempered and ous, and after the accident is less interested in his work. le described the second suicide incident that occurred in fall of 1985. Claimant told Lingle that it was not fair Lingle could drive a truck but that he could not. Claimant ght it would be easier not to be around at all.

Exhibit 3, page 2 (dated March 29, 1985), is a record from University of Iowa Hospitals and Clinics and reads in part:

> Mr. Kaus is status post a truck accident in which he sustained multiple fractures in his right lower extremity including femoral neck fracture and knee fractures. He currently has minimal pain in his lower extremity but has some problems with range of motion.
>
> ....
>
> RADIOGRAPHIC EXAMINATION: Radiographs obtained today demonstrate healing of the left femoral neck, right femoral neck fracture and the right tibial plateau fractures are healed nicely. He has the above limitations in his motion and strength. He has improved in terms of his peroneal palsy.
>
> PLAN: Continue activites as tolerated. He will return for admission in November for hardware removal from his hips and knees.

Exhibit 3, page 58, reads in part: "He is to undergo colostomy closure on September 7, 1984." Exhibit 3, page 64 (dated April 26, 1985), is authored by Albert E. Cram, M.D., and reads in part: "I would limit his lifting activities to 40 lb or less at any given time....I would estimate it at 25% of the whole man." Exhibit 3, page 66, reads in part: "On January 12, 1984, we did a formal tracheostomy to replace the endotracheal tube." Exhibit 3, page 70, reads in part: "His renul failure has cleared after a long period of requiring dialysis. His liver function was improved markedly although it is still not normal."

Exhibit 3, page 75, reads in part:

Mr. Kaus is now eight and half months status post a serious motor vehicle accident in which he suffered multiple orthopaedic injuries including a right tibial plateau fracture, right femoral intertrochateric fracture and a right femoral midshaft fracture. She [sic] also suffered a left patellar fracture and a left fibular fracture. At the time of injury, it was also noted that he had a peroneal nerve injury. On 2-27-84, he refractured the femoral mishaft fracture and subsequently had removal of his intermedullary rod and a trochanteric osteotomy with internal fixation of his right intertrochanteric fracture and bone grafting at the distal fracture of his femur. He was placed in traction for two months. On March 27, he was placed in a right leg cast brace with the addition of a hip hinge and waist band and at his last clinic visit on 5-30-84, he was taken out of this case. His x-rays show good healing callus at that time and it was recommended that he could begin crutch ambulation with weightbearing as tolerated on his right side. He was also begun on an ankle foot orthosis for his persistent right peroneal nerve palsy. At this clinic visit, he states that he has been able to full weightbear on his right side and only uses his cane on occasions. He also claims new onset of dorsiflexion of his right foot for the last eight weeks. He states that his other injuries are not giving any particular difficulty at this time and that he is doing quite well at present. He is presently receiving workmen's [sic] compensation since the time of his injury.

Exhibit 3, page 86 (dated February 6, 1986), reads in part: "Mr Kaus is s/p removal of right tibia femur and left patella in November."

Exhibit 3, page 102 (dated June 27, 1986), is authored by Dr.

James Weinstein and reads in part: "The impression is that Mr. Kaus' impairment rating is estimated to be 35-40 percent."

Exhibit 4, page 3 (dated in June 1986), is authored by Nils Varney, Ph.D., and reads in part: "IMPRESSION: (1) Organic affective disorder with occasional suicidal intent. (2) Multiple psychosocial deficits of a type typically seen in patients with damage to the frontal lobes. (3) Possible partial complex seizures. All of the above are referable to his MVA and its medical sequelae."

Exhibit 6 is a medical summary from date of accident on December 21, 1983 until December 5, 1986.

Exhibit C is the deposition of Todd F. Hines, Ph.D, taken on January 28, 1987. Dr. Hines is a clinical psychologist and practices primarily with the psychological aspects of illness and injury. He has seen claimant on three occasions. Deposition exhibit 1 is a report authored by him. On pages 13-14 of his deposition, Dr. Hines stated:

> A. Well, the conclusions that I made in general from that battery of tests were that I could find no specific evidence of organic brain damage. He was functioning at basically an average level of intelligence. His memory functions were not only well within the normal range but in some ways better than the normal range.
>
> He was able to concentrate adequately. His attention span was good. His response and reaction times were good.
>
> There was no problem with spatial orientation; in other words, his ability to see and understand and place objects in relation to one another. And that's something that is typically disrupted if there is organic brain damage, and he did not show that kind of disruption.
>
> He did, however, show, from my testing, a great deal of depression and anxiety. It was a great deal of emotional disruption, even though I could find no evidence for organic brain damage.
>
> As I looked at the content of the testing and the content of my interview with him and with his wife, the conclusion that I drew from the whole package of data was that there were some environmental stressors and there were some stressors that were related to who he had been before the accident and who he found himself to be now.

There were some stressors of that type that certainly could, in my opinion, easily give rise to the depression and the anxiety that he was demonstrating.

So my conclusion was I could find no data support for organic brain damage. I could find a lot of support for a level of emotional turmoil that was very significant and very disruptive, and that would give rise to the kinds of symptoms that he had described.

On page 16, Dr. Hines linked alcohol with claimant's suicide incidents. On page 17, he stated his opinion that the suicidal episodes were not caused by an organic problem. On page 19, Dr. Hines stated claimant needs to work and that there is no psychological basis for him to not be working. On page 21, he stated: "I think he is very much capable of working and needs to be working." On page 21, he stated that there is no evidence of organic affective disorder, but that claimant has "affective disorder turmoil...from other stressors...." On page 22, he characterized these stressors as work-related and nonwork-related. On page 22, he stated his opinion that claimant is not suicidal and does not have a psychological disability or impairment. On page 23, he stated that claimant does not need psychological treatment.

On page 25, Dr. Hines stated: "[A]n organic brain syndrome essentially says there is some tissue damage, there is some damage in the structure of the central nervous system...." On pages 28-29, he defined post-traumatic stress disorder.

APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the injury of December 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).

The fighting issue in this case is the nature and extent of disbility. Claimant carried his burden of proof on the issue of causal connection between the accident of December 21, 1983 and the physical injuries described in the summary of the evidence section of this decision. However, I am not convinced that the accident of December 21, 1983 caused any "organic brain damage" as that term is defined by Dr. Todd Hines. The extent to which the accident of December 21, 1983 caused claimant to have

psychological problems will be discussed in the next division.

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).

This is a body as a whole case and, therefore, physical impairment does not equate with disability (loss of earning capacity).

The Iowa Supreme Court stated in Diederich v. Tri-City Railway Co., 219 Iowa 587, 258 N.W. 899 (1935):

> The principal and the most important question in the case at bar is to determine the meaning of "disability" as used in the Iowa Compensation Law....
>
> ....
>
> What is "permanent total disability"? Does this clause refer to "functional disability" or to "industrial disability"?
>
> For clearness we shall use the term "industrial disability" as referring to disability from carrying on a gainful occupation--inability to earn wages. By "functional disability" we shall refer to the physical movements which a normal human being can perform.
>
> ....
>
> It is obvious that "disability" as here used cannot refer to mere "functional disability",....
>
> ...[T]he legislature intended the term "disability" to mean "industrial disability" or loss of earning capacity and not a mere "functional disability" to be computed in terms of percentages of the total physical and mental ability of a normal man.
>
> ....
>
> ...[T]he Compensation Law was passed for the purpose of compensating the working man when injured. The loss which this claimant suffered due to the injury which he received while in the employ

of the company is the inability to carry on the work he was doing prior to the time of the injury, or any work which he could perform. This man at fifty-nine years of age, after thirty years as a street car motorman, with little education, cannot find or hold a position that would not require some manual labor, and, of course, due to the condition of his back, he cannot perform such work. To say that he might become a stenographer or a lawyer or a clerk or a bookkeeper is to suppose the impossible, for a fifty-nine-year old man, with no educaton, is not capable of securing or filling any such position. His disability may be only a twenty-five or thirty per cent disability compared with the one hundred per cent perfect man, but, from the standpoint of his ability to go back to work to earn a living for himself and his family, his disability is a total disability. (Emphasis added.)

On page 3 of his brief, claimant stated: "The combination the injuries to his lower extremities, as well as his frontal be brain damage, complex seizures, and depression result in bert Kaus being totally and permanently disabled."

Claimant stated on page 5 of his brief:

Additionally, no one disputes the gravity of the injuries Robert Kaus has sustained in his accident. The carrier offers no evidence other than the doctors treating Robert Kaus and in particular the Deputy's attention is called to Drs. Weinstein and Cram. Further, not even Dr. Hines, Defendant's clinical psychologist, does not say Robert Kaus has not sustained frontal lobe injuries or partial complex seizures, instead, he merely opines that further treatment will assist Robert Kaus in effectively controlling his depression and complex seizures. This however does not take away the fact that the injury is permanent in nature and will continuing and constantly affect Robert Kaus' ability to earn a living. When you combine these factors with the restriction on Robert Kaus' ability to lift, walk, function in a work atmosphere, the evidence is overwhelming that Robert Kaus is totally and permanently disabled.

The above quotes from claimant's brief demonstrate that he haps misunderstands the law in this jurisdiction. Physical airment does not equal with industrial disability in Iowa. imant is currently employed and is not permanently and ally disabled at this point in time.

Claimant acknowledges this on pages 8-9 of his brief:

> At the submission of this case, the Deputy asked the parties their belief as to the industrial disability sustained by Robert Kaus as a result of his accident on December 21, 1983. It is the opinion of the Claimant that so long as he is employed by V-T Industries and can be excused for further treatment of depression or when his legs or mind is affecting his ability to cope and maintain any assemblance of routine, Robert Kaus' disability is 75%. Assuming that he is not able to be further treated for his depression or in the alternative, is terminated from his employment at V-T Industries, Claimant believes his disability from his employment at V-T Industries would then ripen into 100% total permanent indisability.

Claimant did not plead the odd-lot doctrine in this case, nor was it noted as an issue at time of prehearing, but a recent appeal decision decided on November 25, 1985 and entitled Walter H. Farrant, Jr., v. Iowa Beef Processors, Inc. (Nos. 645545/703477) is instructive in this case.

The commissioner stated on page 1 of this decision:

> The evaluation of the evidence and application of the law thereto in the review-reopening decision is appropriate and correct. The recent Iowa supreme court decision in Guyton v. Irving Jensen Company, ___N.W.2d___ (Iowa 1985), is not on point as the claimant returned to regular employment subsequent to his injury. He has not terminated from employment with defendant for reasons related to his injury.
>
> It is further noted that a new review-reopening petition has been filed and is pending for an alleged deterioration of his condition since the proceeding sub judice. (Emphasis added.)

Claimant herein returned to "regular employment subsequent to his injury." In Iowa, the fact that he did not return to the same type of work he was performing on the date of injury does not entitle him to permanent total disability. See Henderson v. Iles, 248 Iowa 847, 856, 82 N.W.2d 731, 737 (1957).

In another recent appeal decision filed on February 20, 1987 entitled Thomas A. Stewart v. Crouse Cartage Company and Liberty Mutual Insurance Company (No. 738644), the commissioner stated on page 2-3:

> Under current conditions taking into account claimant's age, work experience, education and loss of earning capacity claimant's industrial disability is 50 percent. Defendants argue that if claimant finishes college and chooses business as a career, there are a multitude of career choices and the opportunities are limitless. However, it is claimant's present earning capacity which is relevant to determine claimant's industrial disability. At this point in time it is pure speculation to say what the earning potential of claimant would be if he indeed does complete college particularly considering his age. (Emphasis supplied.)

Claimant herein is asking the hearing deputy to speculate as to his earning capacity if he separates from his employment with V-T. On page 12 of defendants' brief, the following appears:

> Defendants maintain that if Dr. Todd Hines is not correct, and if claimant's work record for over a year and a half is not evidence of earning capacity, and if circumstances change from what we now know them to be, claimant has a remedy! That being review and reopening of his claim. Should claimant's earning capacity change, he is protected by that right. Blacksmith v. All American, Inc., 290 N.W.2d §348 (Iowa 1980).

I am unconvinced that claimant is unable to do his transportation coordinator job because of psychological difficulties. I also believe he can physically handle the job at the present time. In this regard, defendants stated on page 8:

> At the time of hearing, the Deputy posed the question as to whether or not he was bound by an objective or subjective standard. In other words, was it reasonable to expect the claimant to work where he felt he should not be. Defendants have tried to find an Iowa case specifically on point, and have not been able to do so. Defendants contend that the standard is neither totally subjective nor totally objective. Rather, the test, as in so many areas of the law, is one of reasonability.

I agree that a standard of reasonability should apply in this case and, as stated above, it is determined that claimant can physically and psychologically do his transportation coordinator job at V-T at this time. If a change of condition (physical or otherwise) occurs in the future, claimant can file a review-reopening petition.

Claimant in this case has demonstrated a loss of actual earnings which is only one factor in assessing industrial disability. Taking all appropriate factors into account, it is concluded that claimant's industrial disability at this time is 40 percent.

III. Claimant failed to prove by a preponderance of the evidence that defendants authorized the medical treatment at issue. Defendants in this case had the right to control the course of medical treatment.

FINDINGS OF FACT

1. Claimant is 37 years old.

2. Claimant graduated from high school in 1967 and has no other formal education.

3. Claimant engaged in football, track, and wrestling in his high school and received letters as a result.

4. Claimant did not have any physical or psychological problems prior to December 21, 1983.

5. Prior to December 21, 1983, claimant was employed by V-T as an over-the-road trucker doing some long hauls and some short hauls.

6. On December 21, 1983, claimant was involved in a truck accident with another truck and sustained massive physical injuries as a result.

7. Claimant is currently employed at V-T as a transportation coordinator and is currently physically and psychologically able to do this job.

8. Claimant earns less as a transportation coordinator as compared to his prior V-T employment as an over-the-road truck driver.

9. Claimant started working for V-T on a part-time basis in July 1982; he started working on a full-time basis in November 1982.

10. Claimant's industrial disability at this time is forty percent (40%).

11. Claimant's stipulated rate is $285.55.

CONCLUSIONS OF LAW

1. Claimant has established the requisite causal connection

by a preponderance of the evidence.

2. Claimant has established entitlement to two hundred (200) weeks of permanent partial disability benefits recommencing on February 18, 1986 at the stipulated rate of two hundred eighty-five and 55/100 dollars ($285.55).

3. Claimant failed to establish by a preponderance of the evidence that the contested medical treatment was authorized.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay the weekly disability benefits described above.

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

That defendants be given credit for benefits already paid to claimant.

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

That defendants 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 COMMISSIONER

ANDREW M. KENNEBECK,	:	
	:	
Claimant,	:	File No. 762999
	:	
vs.	:	
	:	A R B I T R A T I O N
IOWA BEEF PROCESSORS, INC.,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Andrew M. Kennebeck, claimant, against Iowa Beef Processors, Inc., Pork Division (IBP), self-insured employer, for benefits as a result of an alleged injury on April 25, 1984. A hearing was held in Storm Lake, Iowa, on February 5, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant, and joint exhibits 1 through 9. Neither party filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $153.94; that claimant was off work from April 26, 1984 through June 3, 1984; that permanency benefits, if awarded, would commence on June 4, 1984; and that claimant's injury of April 25, 1984 arose out of and in the course of his employment with IBP.

ISSUES

The contested issues are:

1) Whether there is a causal connection between the injury of April 25, 1984 and claimant's asserted disability; and

2) Nature and extent of disability.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 24 years of age and is not currently married as he was divorced in May 1986. He graduated from high school in 1980 and has no other formal education, including no trade school background. He has no military

experience. Claimant worked while in high school starting in his sophomore year doing farm work such as operating machinery. After high school, claimant was employed in Houston, Texas, using a nail gun and saws and was paid about $5.50 to $6.00 per hour during a one-year period of employment. He then returned to Iowa and worked on a farm for just over a year (this took him up to about 1983). He next worked for a ferilizer company mixing dry fertilizer and ran a small tractor and loader. He then did field work on a farm from June 1983 through October 1983.

Claimant testified that he was hired by IBP in October 1983 and that he is presently employed by this employer. He stated that he did not sustain any other injuries while working for the employers described above other than the injury in question. Prior to April 25, 1984, claimant had not been involved in any accidents nor was he ever hospitalized. He had never experienced any serious illness or chronic health problem prior to April 25, 1984. After April 25, 1984, he has not sustained any other injury other than the one in question.

When claimant started working for IBP, he started at grade 0 doing cleanup up as a floor janitor for $6.00 an hour. He worked on this job for three or four months and then "went on the line." He was paid $6.50 per hour on the line working at the IBP plant in Storm Lake, Iowa. He worked doing a gutter job which involved removing the insides of hogs and he used a six-inch gutter knife in order to accomplish this job. There were three gutters working the line and he would gut about one-third of 800 hogs per hour, eight hours per day. He did this job until he was injured on April 25, 1984.

On April 25, 1984, claimant accidently stuck a gutter knife into his abdomen. He was taken to the Buena Vista County Hospital by ambulance and was in the hospital for seven days. He described the doctors that treated him and stated that he had surgery as a result of his injury of April 25, 1984. He was released to return to work on June 4, 1984 without medically-imposed restrictions. However, he did not return to his gutter job, and instead returned to a cleanup job for two or three weeks. He then was sent back to the gutter job because he "was needed up there." Also, the cleanup job paid $.50 per hour less than the gutter job. The gutter job was classified as a grade 2 job. When the gutter job started "getting to be too much" claimant bid on another job. The gutter job made him worn out at the end of the day. As a gutter he experienced "overall weakness" and "stomach weakness." He thought this weakness affected his job performance and concluded he was not doing a good job as a gutter even though he was trying. The job he bid on in order to stop doing the gutter job involved working with two prongs (one in each hand). This job paid $.25 per hour less than the gutter job as it was classified as a grade 1 position.

This new job paid $6.25 per hour and he was on this job for two or three months. He then went to a shaver job which also was a grade 1 position and involved shaving the remaining hair off the side of hogs. He characterized this as much easier than the gutter job because you only have to use one knife and one hand. The gutter job requires the use of a knife in one hand plus pulling the gut which can weigh up to fifty pounds. Claimant is currently doing the shaver job and characterized this as easier than the gutter job and the job he was performing immediately prior to taking the shaving job.

At some point after returning to IBP in June 1984, claimant bid on a grade 3 job working with a split saw. In July 1986, he started working as a splitter but is presently not doing this job as "it was way too much work for this guy." He stated further that it "took a lot of effort which I could not do." He testified that he could have handled this job physically prior to the injury of April 25, 1984. The splitter job affected his shoulders and arms but not his stomach specifically.

Claimant is currently paid $7.75 per hour as a shaver for IBP. The gutter job currently pays $8.00 per hour.

Claimant testified that he last saw Dr. K. M. Johannsen, M.D., on June 1, 1984. On October 25, 1984, claimant saw a Dr. Arthur Ames and stated "Dr. Ames never did anything for me." Claimant testified that he now has problems with his lower back area. He also stated that he has problems at night when he sleeps. On July 11, 1986, claimant saw Paul From, M.D., and complained of weakness in the "midsection of his abdomen" and stated other physical problems in giving a history to Dr. From. On December 8, 1986, claimant saw David T. Sidney, M.D., and complained of weakness in his abdomen and a "problem in the lower left side."

Claimant testified that he currently feels weak and out of shape. He did not have this feeling prior to April 25, 1984. However, he did testify that he has returned to some sporting activities but that he is not able to play basketball as he used to be able to do. Claimant now feels weak and this weakness comes from the midsection of his body. This weakness problem has remained about the same since April 25, 1984. However, the six to eight week period after his surgery resulted in him being "real weak." Claimant stated as follows: "After the surgery I did not get any better and still haven't." Claimant is not taking any medication currently.

On cross-examination, claimant acknowledged that he can still do carpenter work and farming. He acknowledged that he can do the gutter job or the splitter job. Claimant is six feet tall and weighs about 170 pounds.

Claimant acknowledged that x-rays show no stomach or intestinal problems. He stated that there has been "no direct missing of work since his return" to IBP in June 1984. He also acknowledged that he can currently play baseball and basketball.

On redirect, claimant testified that he had no problem doing the gutter job prior to the injury of April 25, 1984. Prior to the injury of April 25, 1984, claimant was in good shape and now notices a difference in strength; that is, claimant is less strong today than he was prior to April 25, 1984. Regarding his sporting activities, claimant testified that he "doesn't last near as long." He is not now in the same shape as he was prior to April 25, 1984. Claimant has a ten-inch scar on his abdomen as a result of the injury of April 25, 1984.

Claimant acknowledged on cross-examination that he lost twenty pounds as a result of the injury immediately after the occurrence of the injury. He also stated that his lifestyle has not changed significantly after the April 25, 1984 injury and that he drinks alcohol moderately. He stated that on occasion he gets intoxicated.

Exhibit 2, page 2 (dated April 16, 1985), is authored by K. M. Johannsen, M.D., and reads in part:

> [P]atient incurred an accidental self-inflicted stab wound of the abdomen on 4/25/84 while at work at the IBP plant in Storm Lake, Iowa.
>
> Subsequently, at the time of operation, the patient was noted to have a perforated stab wound of the stomach with spillage of gastric contents and blood into the abdominal cavity. A repair of the stomach was done and incidental appendectomy was carried out.
>
> Mr. Kennebeck's recovery was uneventful, and he was discharged from the hospital on 5/3/84. Follow-up examinations at the Buena Vista Clinic were all of a routine nature and the patient had no complaints. The last examination by the undersigned was on 6/1/84 and at that time was returned to the care of his own physician. He was authorized to return to work without restrictions effective 6/4/84.
>
> The Buena Vista Clinic office records indicate that Mr. Kennebeck returned on 10/25/84 to see Dr. Arthur Ames requesting a general examination in reference to his previous abdominal injury. His complaints were those of intermittent backaches and some discomfort in his chest associated with hard work. Dr. Ames' examination was essentially negative but

Mr. Kennebeck did complain of lower back discomfort with flexion, extension and lateral bending. A blood count and urinalysis were normal. I do not associate the above mentioned complaints with his abdominal injury.

In summary then, based on my last examination of 6/1/84, Mr. Kennebeck has made an uneventful recovery from his injuries and without evidence of any permanent disability.

Exhibit 3, page 1, is a hospital record from the Buena Vista County Hospital and reads in part:

Final Diagnosis

Stab wound, abdomen with partial evisceration of omentum. Perforation of the stomach secondary to number one

Complications

None

Operation

Laparotomy with closure of gastric perforation. Incidental appendectomy

Exhibit 3, page 8, documents the surgery performed on claimant on April 26, 1984 and describes the procedure in detail. Exhibit 3, page 34 (dated May 22, 1984), is authored by Dr. Johannsen and reads as follows: "The above mentioned patient may return to work without restrictions on June 4, 1984." Exhibit 4 documents claimant's attendance at work from 1984 through 1987.

Exhibit 5, page 2 (dated December 8, 1986), is authored by David T. Sidney, M.D., and reads as follows:

Mr. Kennebeck has, indeed, suffered injury on the job. He, however, has returned to normal employment. He says he also is playing sports and bowling, and does not feel restricted in any of his activities. He does admit that he is basically a healthy fellow. I do not feel he has suffered any permanent disability from this injury. His symptoms, of which he does complain, are at least temporally related, but I cannot associate them with the incident themselves. I would expect him to continue on a fully recovered course without any resulting disability from this incident.

Exhibit 7, page 2 (dated July 15, 1986), is authored by Paul From, M.D., and reads in part: "Mr. Kennebeck does complain of a 'weakness' in the mid section of his abdomen. He states his abdominal area is of a constant bother to him." On page 4, Dr. From stated:

> Mr. Kennebeck did sustain a significant laceration of his intra-abdominal organs during a work injury of April 25, 1984. This did occasion an appendectomy as well as a laparotomy to repair the laceration. He has done well and has been able to return to work since the surgery, although he still has significant abdominal complaints. It would appear that he has either an irritable bowel syndrome, gastritis and/or duodenitis or duodenal ulcer, or is developing adhesions from the extensive inflammatory reaction that would have been present at the time his gastric contents spilled into the peritoneal cavity. He will need occasional and periodic evaluations to make sure that no obstruction develops or that any definite peptic ulcer disese is present. I would estimate his permanent partial impairment at this time of 5 to 10%.

APPLICABLE LAW AND ANALYSIS

I. The threshold fighting issue in this case is whether claimant sustained any permanent partial impairment as a result of the injury of April 25, 1984. This is a fact issue given the evidence of record. Dr. Johannsen and Dr. Sidney both state that claimant has sustained no permanent "disability." However, Dr. From has given claimant a five to ten percent permanent partial impairment rating.

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).

It is concluded that Dr. From's opinion that claimant has sustained some permanent partial impairment is persuasive. It is unnecessary to determine the exact percentage of impairment to the body as a whole because impairment and disability (loss of earning capacity) do not equate in a whole body case. See, e.g., McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 192 (Iowa 1980); Diederich v. Tri-City Railway Co., 219 Iowa 587, 591-594, 258 N.W. 899 (1935). However, it will be found that claimant sustained five percent whole body impairment as a result of the injury of April 25, 1984.

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 herein has not suffered a significant loss in actual earnings as a result of his injury other than the time he was off work during his healing period for which he has already been compensated. However, a showing that claimant has no actual loss of earning does not preclude a finding of industrial disability. See Michael v. Harrison County, 34 Biennial Reports, Iowa Industrial Commissioner 218, 220 (Appeal Decision 1979) and the cases discussed therein. Claimant's current employment with IBP is a consideration in assessing his industrial disability; his current employment lessens his industrial disability and defendant's resulting liability.

I am convinced that claimant has sustained some loss of earning capacity as a result of his injury of April 25, 1984 and resulting permanent partial impairment. Taking all appropriate factors into account, it is concluded that claimant is entitled to fifty weeks of permanent partial disability benefits commencing on June 4, 1984 at a rate of $153.94 based on an industrial disablity of ten percent.

FINDINGS OF FACT

1. Claimant is 24 years old.

2. Claimant is a high school graduate with no additional formal education.

3. Claimant worked on a farm and on manual labor jobs prior to starting work with IBP in October 1983.

4. On April 25, 1984, claimant cut himself with a knife

blade while working for IBP.

5. Claimant sustained a five percent whole body permanent partial impairment as a result of his work-related injury of April 25, 1984.

6. Claimant is currently employed at IBP.

7. Claimant has some difficulty currently doing some jobs at IBP that he handled without difficulty prior to his injury of April 25, 1984.

8. Claimant's industrial disability is ten percent.

9. Claimant's stipulated rate of weekly compensation is $153.94.

CONCLUSIONS OF LAW

1. Claimant established a causal connection between his work-related injury of April 25, 1984 and some permanent partial impairment.

2. Claimant established entitlement to fifty (50) weeks of permanent partial disability benefits based on an industrial disability of ten percent (10%) with such benefits commencing on June 4, 1984 at a rate of one hundred fifty-three and 94/100 dollars ($153.94).

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay the weekly benefits described above.

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 23rd day of March, 1987.

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN T. KARNS, Claimant, vs. FLOYD VALLEY PACKING CO., Employer, and ARGONAUT INSURANCE COMPANIES and CHUBB GROUP OF INSURANCE COMPANIES, and SECOND INJURY FUND OF IOWA, Insurance Carriers, Defendants.	:	File Nos. 806042 801714 735066 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 P. Karns, against his employer, Floyd Valley Packing Co., and its insurance carriers, Chubb Group of Insurance Companies, and Argonaut Insurance Companies, as well as against the Second Injury Fund of Iowa, to recover benefits under the Iowa Workers Compensation Act as a result of injuries allegedly sustained on March 31, 1983, November 15, 1984, and January 17, 1985. Prior to hearing, the employer and insurance carriers either paid full commutations or reached settlements with claimant in the respective files. The proceeding as regards the Second Injury Fund was held in Sioux City, Iowa, on February 25, 1987. But for briefs, the record was considered fully submitted at close of hearing.

The record in this proceeding consists of the testimony of claimant, and of joint exhibits 1 and 2. The exhibits consist of various medical records and reports relative to claimant.

ISSUES

The parties stipulated that claimant's rate of compensation in the event of an award is $215.03. Issues remaining for

resolution in all files 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 injuries and his claimed permanent disabilities;

3) Whether claimant is entitled to permanent partial or permanent total disability benefits including the related question of whether claimant is an odd-lot worker; and

4) Whether claimant is entitled to benefits under the Second Injury Fund Act.

REVIEW OF THE EVIDENCE

Forty-three year old claimant testified that he left school at age seventeen or eighteen after completing the fourth grade in a special education class. Claimant has worked predominantly in packinghouses, but has also done odd jobs and worked in demolition and construction. Many of his packinghouse positions involved either being a utility man or a roustabout. A roustabout is used throughout the packing plant as needed and, thereby, learns a variety of packinghouse jobs. Utility men also are used as needed and must know every job in the packinghouse. Claimant began work at Floyd Valley Packing in 1972 and worked for the company until the plant closed in March 1986. Claimant principally worked as a utility man. This involved both lifting barrels and running knives. Claimant used both hands when he ran knives in that if he ran the knife with his right hand he used his left hand to hold the required hook; if he ran the knife with his left hand, he then used his right hand to hold the hook.

Claimant testified that on March 31, 1983, he began to experience problems with his left hand while doing regular job duties. Claimant reported to the nurse's station and was subsequently referred to Milton A. Grossman, M.D., the company doctor. Dr. Grossman apparently then referred claimant to William Krigsten, M.D. Dr. Krigsten hospitalized claimant on May 25, 1983 and performed a left carpal tunnel decompression on that date. Dr. Krigsten released claimant to return to work on August 16, 1983. On August 11, 1983, Dr. Krigsten assigned a ten percent impairment of the left wrist. Claimant reported that following his work return, he was able to do his regular job although not as well as before. On January 27, 1984, claimant was pulling on a machine at work and tripped over a belt thereby twisting his left arm. Milton A. Grossman, M.D., initially examined claimant for that injury and subsequently referred claimant back to Dr. William Krigsten. A fracture of the distal radius, left, was diagnosed. Dr. Krigsten performed

a closed reduction of commuted fracture of distal radius on February 13, 1984. Claimant was released to work on April 23, 1984. Claimant also saw Dr. Grossman on September 19, 1984 after a stuck hog and trolley fell off a rail and hit claimant on the head and apparently the left shoulder. A contusion of the left forehead and shoulder was diagnosed. Dr. Krigsten saw claimant again on November 27, 1984. At that time, claimant was complaining of headaches on the left side of the head and face and left arm aching. Strength in the left arm, elbow, hand and fingers were normal. Claimant had normal neck motion, but rotation to the left caused left trapezius soreness. Left shoulder and elbow motions were normal. Krigsten ordered EMG studies as of November 30, 1984. Claimant had only minimal improvement of function of the left median nerve when those studies were compared to studies of May 24, 1983. The motor and sensory distal latencies of the left median nerve were markedly prolonged consistent with the presence of a compressive lesion of the left median nerve at the wrist. The EMG studies also revealed definite carpal tunnel syndrome on the right. Dr. Krigsten recommended conservative management and light work for claimant for at least four weeks. Dr. Krigsten examined claimant on December 17, 1984. Claimant reported aching and throbbing in both arms, mainly in the forearms. Claimant reported throbbing pain and aching on the left side of the face. He had definite clicking of the right AC joint. X-rays of the right shoulder revealed a healed fracture of the clavicle with degeneration of the AC joint with excess bone. The left shoulder x-rays showed peritendonitis.

Alexander Kleider, M.D., a neurosurgeon, first saw claimant on February 12, 1984. Claimant then was apparently having carpal tunnel symptoms bilaterally. Dr. Kleider performed a right carpal tunnel decompression on February 15, 1985 and a second left carpal tunnel decompression on March 27, 1985. On May 14, 1985, Dr. Kleider released claimant for work and from his care. Everything seemed well healed at that point. On July 15, 1985, Dr. Kleider responded to a July 2, 1985 letter from the Chubb Group Insurance Companies claims department that to his knowledge claimant had no [permanent partial] disabilities [as a result of either the right carpal tunnel surgery or the left carpal tunnel surgery].

Claimant returned to work as a utility man at Floyd Valley from his May 19, 1985 release until the plant's March 1986 closing. Claimant reported that he was always bothered when working but that his foreman helped him out quite a bit and that he was able to run the forklift. He helped out on the line, but did not work on the line as steadily as he had before his surgery He reported that he did not do as many knife jobs and did not have to stay on those jobs as steadily as he had to prior to his surgery. Claimant has not worked since the plant closing. He says that his left hand continues to bother him a

lot. At times he loses his grip on the left and drops things. He reported he has tingling from the left wrist into his fingers. He indicated he does not have these problems on the right although he had them before his right carpal tunnel decompression. Claimant agreed that no doctor has given him physical restrictions on account of his carpal tunnel syndrome.

Claimant reported that since the plant's closing, he has done babysitting; he has driven a car; he has worked about his home; he has helped other people move furniture and moved himself; and he has continued his involvement in union work. Claimant had once been a union sergeant-at-arms and a union steward. Claimant reported that in mowing his yard, he must quit intermittently because of problems with his left hand. He knew of no other nonemployment activities that his condition prevented him from doing. Clamant reported that he has sought work by applying and using Job Service's sixty day search program. He has sought vocational rehabilitation through state vocational rehabilitation. He has signed up for the Job Training Partnership Act. Claimant reported that he has applied for almost every job but has not been hired. He testified a personnel worker at John Morrell told him he was not hired for packinghouse work there on account of his left hand. He reported that he has not received results as regards the Job Training Partnership Act. Claimant is also attempting to learn to read and write. He reported that state vocational rehabilitation is going to send him to school and that he is now just waiting until he is told he can go to school. Claimant reported that packinghouse work is all that he knows as he has done that work all of his life. He opined that he could continue to do some packinghouse jobs. He can drive a forklift, could assist on the production line, and could make boxes. Claimant agreed that there were few good jobs in Sioux City and that he may have applied for jobs at Job Service for which he is not qualified. He stated, however, that he would not necessarily know whether he was capable of a job unless he tried doing the job.

A report of John A. McKeekin, Ed.D, licensed psychologist, indicates that on the WAIS-R, results for claimant indicated that claimant's full-scale IQ is in the borderline range with a verbal scale IQ towards the lower end of the borderline range and the nonverbal performance scale IQ towards the upper end of the borderline range. At hearing, it was apparent that claimant had difficulties thinking abstractly and recalling events in appropriate chronological order.

Horst G. Blume, M.D., a neurosurgeon, examined claimant on January 7, 1986. Dr. Blume stated that claimant then described his pain as to the flexor aspect of the forearms and "sharp, shooting pain" to the elbows after activity, especially during repetitious movements. He reported claimant described paresthesia at the site of the surgery in both flexor aspects of the wrists.

On examination, Dr. Blume found hypalgesia in the thenar area of the left hand extending a bit to the wrist area but not extending into the thumb or any of the other fingers. Claimant apparently reported that, from his initial left wrist surgery onward, he had persistent numbness in the thenar area. On examination, there was local tenderness in the right wrist with a small amount of aching on maximum flexion. A mild dysesthesia in the flexor aspect of the mid thumb territory was noted but sensation and strength were otherwise normal. Dr. Blume opined that claimant had permanent partial "disability" as a result of the carpal tunnel surgery in the right hand of two percent and six percent to the left hand, both related to work activities.

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

APPLICABLE LAW AND ANALYSIS

We first determine whether claimant received injuries 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 injuries on March 31, 1983, November 15, 1984 and January 17, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The 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.

While claimant was a very poor historian, claimant, through his testimony and the medical evidence, has established that he has undergone three carpal tunnel decompressions, one on the right, two on the left, and that his work duties at Floyd Valley produced the need for these surgeries. Claimant has established injuries arising out of and in the course of his employment on or about the designated injury dates of March 31, 1983, November 15, 1984s, or January 7, 1985.

We next consider whether a causal relationship exists

between claimant's injuries and his claimed disabilities.

The claimant has the burden of proving by a preponderance of the evidence that the injuries of March 31, 1983, November 15, 1984 and January 17, 1985 are 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. Krigsten assigned claimant a ten percent permanent partial impairment of the left wrist following his first carpal tunnel decompressions; that is, on August 11, 1983. Claimant returned to work following that surgery. Claimant had only minimally improved function in the left median nerve following that surgery, however. Dr. Kleider performed a second left carpal tunnel decompression March 27, 1985. On July 15, 1985, Dr. Kleider reported claimant had no permanent "disability" as a result of his left carpal tunnel surgery. Dr. Horst Blume, an examining physician only, opined claimant had a six percent permanent partial "disability" of the left hand, apparently on the basis of claimant's reports of paresthesia at his surgery site and a finding of hypalgesia in the thenor area of the left hand. Claimant reports he continues to have tingling in his left wrist into his fingers and he loses his grip and drops things with his left hand. Claimant continued to work at his utility man job from his return from his second left carpal tunnel release until the plant closing in Spring 1986, however. Claimant's self-reported complaints as well as Dr. Blume's finding of hypalgesia suggest claimant has some continuing impairment of his left wrist. His ability to continue work suggests that impairment is no greater than the six percent Dr. Blume assigned. Dr. Krigsten's original ten percent permanent partial impairment rating is discounted as it appears claimant's left wrist condition did improve following his second left wrist surgery.

Claimant has failed to establish a permanent disability to his right wrist resulting from his right carpal tunnel condition and release, however. Claimant testified he has had no problems with his right wrist from his right wrist release onward. Dr. Kleider opined claimant had no permanent partial "disability" on account of the right carpal tunnel surgery. Dr. Blume assigned claimant a two percent permanent partial "disability" of the right hand after examination. However, examination findings were minimal, at best, and the assigned rating appears a nominal rating not reflective of any true permanent disability. At any rate, claimant's own testimony that he had no current right hand problems and his treating physician's opinion that he has no right hand "disability" counter any weight to be given Dr. Blume's rating.

We consider the Second Injury Fund question.

There are three requirements for triggering the Second Injury Compensation Act found in Iowa Code section 85.63 through 85.69. The first is the loss or loss of use of the hand, arm, foot, leg or eye. The second is the loss or loss of use of another such member or organ through a compensable injury. The third is that there be permanent disability from both the initial and the second loss or loss of use.

Claimant has failed to establish he is entitled to benefits under the Second Injury Fund Act. Claimant has shown a loss of use of both his right and left hand. Claimant has shown permanent disability as to the left hand; as discussed above, he had not shown permanent disability as to the right hand. The Act, therefore, is not triggered.

Because the Act is not invoked and because claiamant has reached settlements or received commuted benefits from the employer and its insurers, we need not reach the question of permanent partial disability entitlement or the related odd-lot question.

FINDINGS OF FACT

THEREFORE, IT IS FOUND:

Claimant developed carpal tunnel syndrome in his left hand while working as a utility man at Floyd Valley Packing Co.

Claimant's left carpal tunnel was decompressed by Dr. Krigsten on May 25, 1983.

Claimant had only minimally improved function of the left median nerve following that decompression.

Claimant developed carpal tunnel syndrome on the right; Dr.

Kleider performed a right carpal tunnel decompression on February 15, 1985.

Dr. Kleider performed a second left carpal tunnel decompression on March 27, 1985.

Claimant returned to work at Floyd Valley after each of his surgeries and was able to perform his job duties to the plant's closing in Spring 1986.

Claimant's left hand continues to bother him. He has tingling from the left wrist into his fingers. He loses his grip on the left and drops things.

Claimant has not had similar problems with his right hand since his right carpal tunnel release.

On examination, claimant has some symptoms of neurological dysfunction on the left but only nominal findings on the right.

Claimant has a permanent loss of use of his left hand on account of his left carpal tunnel surgeries.

Claimant had a temporary loss of use of his right hand on account of his right carpal tunnel surgery.

Claimant has permanent disability on account of his left carpal tunnel syndrome.

Claimant does not have permanent disability on account of his right carpal tunnel syndrome.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant received injuries which arose out of and in the course of his employment on March 31, 1983, November 15, 1984, and January 7, 1985.

Claimant's injuries to his left hand were causally related to the permanent disability on which claimant bases his claim; claimant's injury to his right hand is not causally related to the permanent disability on which claimant bases his claim.

Claimant is not entitled to Second Injury Fund benefits.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing further from this proceeding.

Claimant and defendants share costs of this proceeding equally pursuant to Division of Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33.

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

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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002008

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALLEN E. KAUTZ,	:	
	:	FILE NO. 815285
Claimant,	:	
	:	A R B I T R A T I O N
vs.	:	
	:	D E C I S I O N
JOHN MORRELL & COMPANY,	:	
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Allen E. Kautz, claimant, against John Morrell & Company, employer, and self-insured defendant for benefits as a result of 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 Allen E. Kautz (claimant); Linda Kautz (claimant's wife); Dennis L. Howrey (employer's personnel and labor relations manager); claimant's exhibits 1 through 4; and, defendant's exhibits A and B. Counsel for both parties 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 $217.84 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 appears to be included within the foregoing issue of whether the claimant received an occupational hearing loss.

Whether the claimant is entitled to any disability benefits for permanent hearing loss.

Whether the claimant is entitled to a hearing aid as a medical benefit under Iowa Code section 85B.12.

Whether claimant gave notice of the loss as required by Iowa Code section 85.23.

Whether claimant commenced this action in a timely manner as required by Iowa Code section 85.26.

Whether claimant's hearing loss is a result of a natural occurring disease process as asserted by the defendant is included in the first issue of whether the claimant sustained an occupational hearing loss arising out of and in the course of his employment with the employer.

SUMMARY OF THE EVIDENCE

Claimant is 39 years old. He quit school after completing tenth grade in 1965 but later obtained a GED. He served in the navy as a machinist mate from 1965 to 1969. He repaired pumps and turbines above the engine room on a destroyer. The room where claimant worked was insulated from the noise of the engines of the ship. Claimant had no hearing disability when he left the navy. Claimant next worked for Arts-Way Manufacturing Company at Armstrong, Iowa for approximately five years from sometime in 1969 to sometime in 1973 building grinder--mixers. Claimant operated a grinder grinding metal shafts. Claimant had no hearing difficulties on this job.

Claimant then became employed by John Morrell & Company at the Estherville plant and worked there from 1973 until it closed on April 27, 1985. At that time he transferred to the Sioux Falls plant but resigned in September of 1985 before six months had expired in order to obtain severance pay due to the closing of the Estherville plant. Claimant testified that he took a pre-employment physical examination before starting work for the employer and that it disclosed no hearing problems and no hearing disability.

The jobs which claimant performed while working for the

employer are as follows: (periods and dates are approximate)

	Job	Length	Dates
1.	night cleanup	6 to 8 mos.	1973 & 1974
2.	beef kill	4 yrs.	1974 to 1978
3.	hog yards	4 yrs.	1978 to 1982
4.	feeding the chain	1 yr.	August 1983 to August 1984
5.	pet food job	8 mos.	August 1984 to April 1985
6.	cleanup on weiner deck	5 mos.	April 1985 to September 1985

The first five jobs were performed at the Estherville plant and the sixth job was performed at the Sioux Falls plant. Claimant testified that the most noisy jobs were the hog yards, feeding the chain and the pet food job.

Claimant testified that he first experienced a problem in about 1982 when he worked in the hog yards. He started in the hog yards in 1978. The hog yards contain 3,500 to 4,000 squealing hogs. The squeal of a hog is high pitched. The hog yards are a very noisy area. You cannot carry on a normal conversation there. You have to shout in order to be heard in the hog yards. At night at home claimant's ears would ring for about three to four hours then quit. If there was other noise in the room it was difficult to hear. Claimant stated that his hearing problem had a gradual onset over a period of years.

Linda Kautz, claimant's wife, testified that she noticed him develope a gradual loss of hearing. He did not have it before he went to work with the employer. She first noticed that claimant turned the television up too loud. Also, that she had to repeat what she said to him. He could not hear well if there was music or other room noise. He also complained of ringing in his ears in the evening for two or three hours. She did not know of any other exposure he might have had to high noise levels.

Claimant's exhibit one contains the noise level survey readings at the John Morrell plant in Estherville. Dennis L. Howrey, personnel and labor relations manager for the employer, testified that he performed the second survey shown in exhibit 1. Howrey's survey has no heading on it and it does not contain any pen markings from the hearing. Howrey did not know who performed the first survey in exhibit 1. He thought it might have been done by OSHA. This first survey in exhibit 1 shows a John Morrell & Company letterhead and it also contains red and blue pen markings made at the time of the hearing.

Claimant testified and circled in red on the first survey that his job of feeding the chain was closest to the following work stations with the following dosimeter readings:

Location	Meter Readings
De-hairer	92
Gambel Table	89-90
Trolley Wash	94
Scald Tub - Upper Level	95-97

Howrey's survey, the second survey in exhibit 1, shows that the noise level at the De-hairer station was 98 to 99 decibels and the noise level at the Gambel Table was 91 to 92 decibels. These readings are higher than the readings of OSHA shown on the first survey on exhibit 1.

Claimant testified that he worked six feet away from the De-hairer, which was a piece of equipment which was 75 years old with very noisy paddles. You had to yell to be heard.

Claimant testified that the pet food job was closest to the following work stations with the following dosimeter ratings on page 2 of the first survey in exhibit 1:

Location	Meter Readings
Upper Level - Livers/Gullet Bench	87
Upper Level - Holding Tanks	87-98

Jack Paulos, a fellow workman, was unable to attend the hearing and testify for the claimant due to illness. The parties stipulated that if Paulos was present that he would testify that the noise levels shown in the surveys in exhibit one did exist in the plant where the claimant worked.

Claimant testified that earplugs were provided in 1982. They were not mandatory, but he was informed that they were available if he wanted to go get them. You had to ask for them and you had to go get them.

Claimant testified that the plant nurse tested his hearing in 1985. Claimant stated that this is when he first learned what was causing the ringing in his ears. The nurse explained to him how the loss of little hairs in his ears adversely affected his hearing. After that he wore the earplugs, however, sometimes they fell out while he was working.

Howrey testified that the claimant was wrong about the date when hearing protection was provided. Howrey said that signs were posted and hearing protection was made available on an employee request basis in 1978 and thereafter. He further testified that the noise level surveys date back to 1983, but granted that there was no noise survey for the hog yards. Nevertheless, Howrey conceded that the hog yards are a very noisy place when hogs are getting pushed into the plant. Howrey

further controverted claimant's testimony by testifying that claimant worked closest to the Gambel Table, not the De-hairer, and that claimant was 12 to 15 feet away from the Gambel Table. Howrey placed a blue asterisk on claimant's exhibit 1 by the Gambel Table to designate the closest point to claimant's job of feeding the chain. This blue asterisk appears on the first survey in exhibit 1 believed to have been produced by OSHA. Howrey denied that claimant was near the De-hairer, Trolley Wash, or Scald Tub in his opinion. He said that claimant was 18 to 20 feet away from the De-hairer and approximately 25 to 28 feet distance from the Trolley Wash and Scald Tub. Howrey did admit that claimant worked at the station identified as Upper Level - Livers/Gullet area and he put a blue asterisk on it to designate where the claimant was located when he performed the pet food job.

Howrey further acknowledged that any reading in excess of 80 decibels on the surveys could cause hearing damage. He also agreed that practically every station on the first survey showed a noise level in excess of 90 decibels with the exception of the maintenance shop. Howrey verified that when management became more aware of the hearing problem in 1983, earplugs were made more readily accessible to the employees than in 1978.

Howrey said that all employees were tested for hearing loss in 1983, rather than in 1985, as claimant had testified. He said that some employees had hearing losses. They were instructed to see a hearing specialist. Howrey testified that he was unable to produce claimant's medical record that contained his preemployment physical examination and the company hearing test in 1983. Howrey indicated that the claimant's medical records were lost and that a search for them had not been able to produce them.

The noise level at the Sioux Falls plant was not introduced into evidence. However, claimant testified that ear protection was provided to employee's at that plant also.

Claimant denied any hearing loss due to listening to rock music, head injury or taking medication. He was not exposed to gunfire in the military service. He stated that he hunts two or three times a year. He said there was no family history of hearing loss except that his father did require a hearing aid approximately a year ago. His father is in his 70's. There is evidence that claimant operates a 16 inch chainsaw but that he wears safety lenses and earplugs when he does this (Claimant's Exhibit 3).

Claimant testified that Mr. R. David Nelson, an audiologist and operator of Nelson Hearing Aid Service, tested his hearing and told him that a hearing aid would help his hearing. Claimant's exhibit 4 is a letter from Mr. Nelson which states that he

tested claimant on May 20, 1986. Mr. Nelson stated that claimant would be a candidate for binaural amplification. Nelson stated that the cost of binaural hearing aids would be $1,350.00 for the type that fits behind the ear and $1,250 for the type that is worn in the ear.

Claimant's exhibit 3 is an interpretation of Mr. Nelson's audiogram done by C. B. Carnignan, Jr., M.D. Claimant acknowledged that in a deposition prior to hearing that it was stated that Dr. Carnignan told him that a hearing aid would not help at this time but there will come a time in the future when it will. Claimant also conceded that no one other than Mr. Nelson, who sells hearing aids, has recommended that he get one. Claimant granted that he did not wear a hearing aid at the present time. Dr. Carnignan found on August 15, 1986 that claimant suffered a 4.1 percent binaural hearing loss caused by loud noise exposure while employed by the employer. Dr. Carnignan added another 5 percent for tinnitis for a total binaural hearing impairment of 9.1 percent.

Claimant was examined by Jean Rudkin, MS, an audiologist, on September 9, 1986 (Defendant's Exhibit A). According to the heading on the stationary she practices with Daniel Jorgensen, M.D., an otolaryngologist and head and neck surgeon. Dr. Jorgensen determined that claimant sustained a .625 percent hearing loss (Def. Ex. B).

APPLICABLE LAW AND ANALYSIS

Chapter 85B, Code of Iowa, provides benefits for occupational hearing loss. Section 85B.4 I 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 specifies that excessive noise level is sound which exceeds the times and intensities published in that table and section of the Code.

Claimant testified that he was exposed to high levels of noise from squealing hogs when he worked in the hog yards from 1978 to 1982 before the employer really became serious about providing hearing protection, making noise level surveys and testing employees in 1983. When claimant worked feeding the chain he worked near excessive noise levels in excess of 90 decibels as defined by the statute according to the claimant's testimony. Even using Howrey's testimony that claimant was only near the Gambel Table and looking at Howrey's own noise level survey (the second survey) it shows a noise level of 91 to 92 decibels for the Gambel Table. Claimant worked at this job eight hours a day five or six days a week for a year from August

of 1983 to August of 1984. The table in Iowa Code section 85D.5 defines seven hours work at 91 decibels and six hours work at 92 decibels as an excessive noise level.

Claimant said his pet food job was near a station that produced 87 decibels and 87 to 98 decibels on the OSHA survey. Howrey agreed that claimant was only near the 87 decibel station. Howrey also said he knew that hearing damage could occur at any level over 80 decibels. Claimant did the pet food job for eight months from August of 1984 to April of 1985. Hearing loss can result from noise exposure of less than 90 decibels. Morrison v. Muscatine County Iowa, No. 702385 (1985).

Dr. Carnignan concluded his report by stating, "This history would seem to indicate that with reasonable medical certainty, Mr. Kautz'a [sic] impairment resulted from loud noise exposeure [sic] while employed at the Morrell pork plant." (Cl. Ex. 3).

Mr. Nelson, the audiologist, stated that the pattern observed in the claimant's hearing loss is similar to the hearing loss pattern observed in individuals who have known an exposure to noise (Cl. Ex. 2).

The claimant by the foregoing evidence demonstrated 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 of time.

Defendant did not demonstrate that any of claimant's former employments were performed in loud noise environments or were the cause or suspected cause of any hearing loss. Defendant did not demonstrate that any of claimant's private activities such as hunting three or four times a year or running a chainsaw with earplugs were the cause of or even suspected cause of any hearing loss. Defendant did not prove a family history of hearing loss even though claimant's father in his 70's did require a hearing aid in one ear. Finally, there is no evidence that claimant suffered from a natural occurring disease process.

Iowa Code section 85B.14 provides that the provisions of the workers' compensation law in Chapter 85 also apply to occupational hearing loss insofar as applicable and when not inconsistent with Chapter 85B. Therefore, the notice requirement of Iowa Code section 85.23 applies to occupational hearing losses because Chapter 85B has no specific notice requirement of its own. Iowa Code section 85.23 generally provides that unless the employer has actual knowledge, the employee must give notice within 90 days of the occurrence of an injury. The sole purpose of a notice requirement is to give the employer the opportunity to investigate the injury or hearing loss. Robinson v. Dept. of

Transportation, 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 is apparent that the employer was more aware of the claimant's possible work related hearing loss than was the claimant himself. Claimant was aware of some gradual loss and tinnitis but did not know what caused it. Defendant, on the other hand, was aware of a plant wide noise problem. Employer took noise surveys; had noise surveys performed by OSHA; took audiometric tests of its employees and referred them to hearing specialists; provided hearing protection in the way of earplugs when an employee requested them; and posted signs in its plant. The first audiometric test performed on the claimant was available to the employer before it was available to the employee. Claimant testified that his first knowledge that his tinnitis was work related was when the nurse explained it to him. The nurse, who is a representative of the employer, had actual knowledge of the claimant's hearing problems at the time she explained to the claimant that it was work related. The nurse also had knowledge of the audiometric tests results before she delivered them to the claimant. Consequently, it is determined that the employer had actual knowledge of the claimant's occupational hearing loss pursuant to Iowa Code section 85.23. Therefore, claimant is relieved from giving notice to the employer. This is true even though defendant had actual knowledge of an occupational hearing loss prior to the injury date which in this case is prescribed by statute in Iowa Code section 85B.8, 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 the claimant failed to give notice pursuant to Iowa Code section 85.23.

Again, Iowa Code section 85B.14 provides that the provisions of the workers' compensation law in Chapter 85 apply to occupational hearing loss cases insofar as applicable and when not inconsistent with Chapter 85B. Therefore, the statute of limitations of Iowa Code section 85.26(1) is applicable to this hearing loss claim because there is no separate statute of limitations in Iowa Code section 85B. Chapter 85.26(1) then is applicable and not inconsistent. Iowa Code section 85.26(1) requires an original proceeding to be commenced within two years of the date of injury. Iowa Code section 85B.8 provides special statutory dates of injury for occupational hearing loss cases:

> 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.

Defendant's contention that this claim is barred by the statute of limitations because the claimant did not file his claim within two years after he discovered or knew he had a hearing loss is not correct. Dale J. Furry v. John Deere Dubuque Works of Deere & Company, Filed November 12, 1986 (Appl. Decn.) held that the statute of limitations begins to run on the date of the injury and the date of the injury is any one of the three events specified in Iowa Code section 85B.8.

The date of injury in this case cannot be based upon the transfer from excessive noise level employment because there was no evidence submitted on what the level of noise was at the Sioux Falls plant after the claimant transferred to that plant. There is no noise level survey in evidence. The claimant did testify that hearing protection was required at the Sioux Falls plant which raises an inference that the Sioux Falls plant also was a high noise level area of employment.

Claimant's transfer to Sioux Falls was not proven to be a permanent transfer without reasonable expectation of being returned to a high noise level of work. Claimant still remained a member of the blue collar work force. He was subject to being required to work at either excessive or high noise levels at any time. Wilfred E. McVay v. John Deere Dubuque Works of Deere and Company (No. 799446) decided by Deputy Industrial Commissioner Michael G. Trier and filed August 20, 1986 and Donald Lueken v. John Deere Dubuque Works of Deer and Company, (No. 810114) decided by Deputy Industrial Commissioner Steven E. Ort and filed August 29, 1986. This decision adopts the four factors used in those two cases from which it would be determined that a transfer would constitute a date of injury under Iowa Code section 85B.8. Those factors are as follows: (1) a clearly recognizeable change in employment status; (2) which provides a reduction of noise exposure to a level not capable of producing occupational hearing loss; (3) that is permanent or indefinite in the sense that there is no reasonable expection that the worker will be returned to a position with excessive noise level exposure in the ordinary course of operations in the employer's business; and, (4) that the change must have actually continued for not less than six months.

There was no evidence that any of the claimant's transfers at the Estherville plant prior to April 27, 1985 were from a high noise level of employment. The date of injury cannot be based upon retirement because claimant did not retire. The date of injury then must be based upon the termination of the employer/ employee relationship in September of 1985.

This action was commenced on April 17, 1986. This date is more than six months after September of 1985 and less than two years after September of 1985. Therefore, claimant's action was timely commenced. The statute of limitations is an affirmative defense and defendant has not sustained the burden of proof by a preponderance of the evidence that the claimant's action was not timely commenced. The stipulations in this case, as shown on the prehearing report, seem to indicate some agreement between the parties that they believe that a transfer from excessive noise level of employment occurred on April 27, 1985, the date the Estherville plant closed. This was not established by the evidence introduced at the hearing. However, even if this date is used as the date of injury this action is still timely commenced more than six months after April 27, 1985 and less than two years after April 27, 1985, since it was commenced on April 17, 1986.

Hearing loss is measured by a statutory formula setout in Iowa Code section 85B.9. The addition of five percent for tinnitis by Dr. Carnignan is not part of the statutory formula for an occupational hearing loss. Therefore, this additional five percent must be disregarded for an evaluation of occupational hearing loss, even though it could be considered in the determination of loss due to an injury under Chapter 85 of the Code.

Iowa Code section 85B.9 further 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, nevertheless, empowered with discretion to determine which of two audiograms it will 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. This 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 one.

The audiogram produced by Mr. Nelson of Nelson Hearing Aid

Service yielded a binaural hearing loss of 4.1 percent when interpreted by Dr. Carnignan, a general practitioner. The audiogram of Ms. Rudkin, an audiologist in the office of Dr. Jorgenson, an otolaryngologist, yielded a total binaural hearing loss of .625 percent when it was interpreted by Dr. Jorgenson. Therefore, the audiogram of Ms. Rudkin, as interpreted by Dr. Jorgenson, is accepted to determine defendant's liability in this case pursuant to Iowa Code section 85B.9. It might be added that Dr. Jorgenson is also the most qualified doctor in the area of hearing loss since he is an otolaryngologist and apparently Ms. Rudkin works with him or under his supervision. Furthermore, it is probably the most reliable audiogram because it was the last one taken. Therefore, it afforded the claimant the greatest opportunity to recuperate from what has been described as temporary fatigue loss.

Claimant's entitlement then to compensation is calculated by applying the percentage of loss of .625 percent to the maximum allowance of 175 weeks resulting in an allowance of 1.09 weeks of compensation (175 x .625) 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. Defendant did elicit from claimant on cross-examination that Dr. Carnignan told claimant that a hearing aid would not help at this time but would help in the future. Defendant also brought out that claimant has not chosen to purchase a hearing aid on his own and was not wearing one at the time of the hearing. The heresay evidence of Dr. Carnignan, however, is rebutted by the direct evidence of Mr. Nelson that Mr. Kautz would be a candidate for "binaural amplification" (Cl. Ex. 4). 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 as the best evidence of whether a hearing aid would or would not materially improve the employee's ability to communicate. For reasons of their own choosing, defendant did not produce this evidence (Def. Ex. A & B). Also, defendants could have obtained an opinion of their own from Dr. Carnignan on this point if they chose to do so but did not introduce any direct evidence from Dr. Carnignan. Therefore, there is no reliable evidence that a hearing aid would not materially improve claimant's ability to communicate. Therefore, claimant is entitled to a binaural amplification hearing aid in the amount of $1,250.00 which is the lowest cost device for binaural amplification (Cl. Ex. 4).

FINDINGS OF FACT

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

That claimant was employed by the employer from 1973 until his termination of employment in September of 1985.

That claimant was exposed to a high level of noise in the hog yards from 1978 to 1982 before hearing protection was seriously provided and promoted by the employer.

That claimant was exposed to excessive noise levels from August of 1983 to August of 1984 in excess of 90 decibels when he performed the job of feeding the chain.

That claimant was exposed to high levels of noise from August of 1984 to April of 1985 when claimant performed the pet food job.

That Dr. Carnignan states that claimant's hearing impairment resulted from loud noise exposure while employed by the employer.

That Mr. Nelson stated that claimant's hearing loss is consistent with exposure to noise.

The evidence did not demonstrate any other cause for claimant's hearing loss including any natural occurring disease process.

That OSHA conducted a noise level survey in 1983.

That defendant conducted a noise level survey in 1983, posted signs, offered earplug ear protection, took audiograms of affected employees, and notified certain employees with hearing losses to see a hearing specialist.

That claimant terminated his employment with the employer in September of 1985.

That this action was commenced on April 17, 1986.

That claimant sustained a binaural hearing loss of .625 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 by Chapter 85B, Code of Iowa, which arose out of and in the course of his employment with the employer (Iowa Code section 85B.4).

That the loss was caused by his employment with the employer.

That the amount of loss is .625 percent of a total loss of hearing (Iowa Code section 85B.9).

That claimant is entitled to .625 percent of 175 weeks of compensation for occupational hearing loss (Iowa Code section 85B.6).

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

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

That this action was timely commenced on April 17, 1986 (Iowa Code section 85B.14 and 85.26(1).

That claimant has a compensable hearing loss and therefore is entitled to a hearing aid (Iowa Code section 85B.12).

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant one point zero nine (1.09) weeks (.625 x 175) of occupational hearing loss compensation at the rate of two hundred seventeen and 84/100 dollars ($217.84) per week in the total amount of two hundred thirty-seven and 45/100 dollars ($237.45) ($217.84 x 1.09) commencing on April 27, 1985 which is the date the parties stipulated to for the commencing of benefits even though it was found that the date of injury was September of 1985.

That these benefits be paid in a lump sum.

That interest will accrue under Iowa Code section 85.30.

That defendant pay to claimant or the provider of services the amount of one thousand two hundred fifty and no/100 dollars ($1,250.00) for the cost of a binaural hearing aid.

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

That defendant will remain liable for future medical expenses

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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.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JON KERNS, Claimant, vs. IOWA BEEF PROCESSORS, INC., Employer, Self-Insured, Defendant.	:	File No. 786482 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 Jon Kerns, claimant, against Iowa Beef Processors, Inc. (IBP), self-insured employer, for benefits as a result of an alleged injury on February 4, 1985. A hearing was held in Storm Lake, Iowa on February 5, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant, and joint exhibits 1 through 11. Neither party filed a brief.

The parties stipulated that claimant's rate of weekly compensation is $174.81; that claimant was off work from February 5, 1985 through May 1, 1985, and from June 27, 1985 through July 16, 1985; that permanency benefits, if awarded, would commence on July 17, 1985; that permanent partial disability benefits have been paid through October 31, 1985; that claimant's injury is scheduled; that claimant's injury of February 4, 1985 arose out of and in the course of his employment with IBP; and that the intoxication defense of Iowa Code section 85.16 was being waived by defendant. The first report of injury in this case states that the injury occurred on February 4, 1985; however, claimant's petition alleges an injury date of February 6, 1985. The parties stipulated that claimant started missing work on February 5, 1985.

ISSUES

The contested issues are:

1) Whether there is a causal connection between claimant's injury of February 4, 1985 and his asserted disability; and

2) Nature and extent of disability.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 25 years of age and graduated from high school in 1980. He started working for IBP in either 1983 or 1984 at its Storm Lake plant. He described a variety of jobs that he performed at the plant such as cutting picnics and cleaning toilets. He then described the injury that he sustained at IBP on February 4, 1985 while running a saw. Claimant is left-handed and he cut his left hand on February 4, 1985. He stated that he cut bones and tendons in his left hand and as a result was taken to a hospital in Storm Lake, and then was eventually taken to a hospital in Sioux City, Iowa. John J. Dougherty, M.D., performed surgery on claimant's left hand and he was off work for a period of time after his injury and resulting surgery. Dr. Dougherty eventually sent claimant back for "one handed duty." Claimant then showed the hearing deputy his left hand. Claimant then described some exercises he has done with his hand.

Claimant described the problems he is currently having with his left hand and complained of lack of flexibility in that he cannot make a fist with his left hand. He stated that he stopped going to rehabilitation because IBP stopped paying for physical therapy or rehabilitation and he could not afford to pay for this treatment out of his own pocket.

On cross-examination, claimant stated that neither Horst Blume, M.D., nor R. H. Miller, M.D., treated him. Dr. Dougherty treated claimant for his left hand injury on quite a few occasions. Dr. Dougherty has told claimant that his left hand is not going to get any better at this point.

Exhibit 2, pages 3-4 (dated February 4, 1985), is a medical record from Buena Vista County Hospital, authored by W. E. Erps, M.D., that reads in part:

> This 23 year old IBP worked [sic] was cut on the dorsal aspect of the left hand with a meat saw. He has an avulsion type laceration across the entire dorsal aspect of the hand severing all the tendons in that region plus several of the metacarpals. X-rays are pending. The degree of injury is severe and will require repair in the operating room.
>
> ....
>
> Extremities: All normal except for the dorsal aspect of the left hand with the severe laceration as mentioned above. This involves all the dorsal tendons just proximal to the MP joints and several metacarpals are severed.

Fingers are held in flexion.

....

DIAGNOSIS: SEvere [sic] avulsion saw injury of dorsal aspect of left hand with severed tendons and metacarpal trauma multiple

Exhibit 3, page 6 (dated February 4, 1985), is a medical record from Marian Health Center of Sioux City, Iowa that reads in part:

FINAL DIAGNOSIS (including complications)

Previous severe injury to the left upper extremity with multiple tendon injuries, metacrapal fractures, destruction of the MP joint of the little finger with marked loss of motion of the MP joints of the little, long and ring fingers.

OPERATIVE PROCEDURES:

Tenolysis on the dorsum of the hand of all of the extensor tendons; partial capsulectomy of the MP joints of the long, rign, [sic] and little fingers; resection of a portion of the collateral ligaments bilaterally of these fingers; closure with a splint.

Exhibit 3, page 8 (dated July 14, 1985), is authored by J. J. Dougherty, M.D., and reads in part:

The above patient was admitted to the hospital on 6-27-85. He had previously had a severe injury to the dorsum of his left hand, saw cut, with severe tendon and joint injuries, metacarpal fractures and injury to the interossei. At this point in time, he seems to be getting along better; however, we just can't get any significant motion out of the MP joints. Now he does not have much of a joint at the 5th finger. The thought had been considered about putting a prosthesis in his fifth finger, but I did not really feel this was indicated at this point in time.

He was taken to surgery and a tenolysis was carried out of the extensor tendons and a capsulotomy of the long, ring, and little fingers with a resection of a portion of the collateral ligaments bilaterally of these fingers.

....

FINAL DIAGNOSIS:
Previous severe injury to the upper left extremity with multiple tendon injuries, metacarpal fractures, destruction of the MP joint of the little finger with marked loss of motion of the MP joints of little, long and ring fingers.

Prognosis remains guarded here. It is still conceivable he might be a candidate for a prosthesis of the MP joint of the little finger, but did not as I mentioned above feel that it was indicated at this point in time.

Exhibit 3, page 10, reads in part regarding the surgery of June 28, 1985:

PREOPERATIVE DIAGNOSIS: Previous severe mutilative type of injury to the left upper extremity with an open saw cut, division of all tendons extending into, and loss of portion, of the MP joint of the little finger; loss of some of the interosseous muscles and tendons, now with marked extension contracture of the MP joints of the long, ring, and little fingers, and some of the index finger.

POSTOPERATIVE DIAGNOSIS: Same

NAME OF OPERATION: Tenolysis on the dorsum of the hand of all of the extensor tendons; partial capsulectomy of the MP joints of the long, ring, and little fingers; resection of a portion of the collateral ligaments bilaterally of these fingers; closure with a splint.

Exhibit 3, page 89 (dated February 4, 1985), is an x-ray report authored by T. A. Ware, M.D., that reads:

Examination of the left hand taken portable demonstrates a fracture of the midshaft of the 3rd metacarpal, a fracture of the distal shaft of the 4th metacarpal,

and a fracture of the proximal portion of the proximal phalanx of the little finger with a separated fragment measuring from 6 m.m.

Re-examination of the left hand demonstrates internal fixation through the 3rd & 4th metacarpals and through the proximal portion of the proximal phalanx of the little finger with segments maintained in good position and alignment.

Exhibit 4, page 1 (dated February 14, 1986), is authored by Dr. Dougherty and reads in part:

With regard to permanent partial disability, I think his main disability is in reference to his MP joints. I have felt he's probably reached his maximum improvement and that probably he's entitled to 8% of his hand or possibly slightly more, maybe 10%.

Exhibit 5, page 1 (dated April 2, 1986), is authored by R. H. Miller, M.D., and reads in part:

According to the AMA Guide for permanent impairment of the extremities, limitation of joint motion at the index finger gives him 18% disability of the finger and 5% of the hand. The middle finger gives him 18% disability of the finger, 4% of the entire hand. Limitation of motion at the ring finger gives him 24% disability for the finger and 3% for the entire hand and for the fifth finger, limitation gives him 37% disability for the finger and 2% for the hand. This adds up to 14% disability of the hand on his limitation of motion only, does not take into consideration the loss of sensation in the ulnar nerve distribution. In my opinion, this translates then into between 16 and 18% disability of his left upper extremity, again important to point out this is his dominant extremity.

Exhibit 9 is the deposition of claimant taken on November 8, 1985. On pages 8-9, he stated that he has had carpal tunnel surgery on his left hand or wrist and received workers' compensation benefits as a result. Also, the following exchange is set out on page 35:

Q. You apparently feel that you can use your hand in the types of work you've been looking for, would that be true?

A. I hope so.

Exhibit 10 is the deposition of Dr. Miller taken on November 12, 1986. On page 5, he gives claimant a five percent permanent partial impairment rating for his left hand. On page 9, there is a further rating discussion and on page 10 Dr. Miller corrected a percentage figure.

Exhibit 11 is the deposition of Dr. Dougherty taken on December 10, 1986. On page 5, Dr. Dougherty stated that he saw claimant on April 11, 1984 because of a carpal tunnel problem. On page 8, he restated his 8-10% rating for claimant's left hand, but admitted on page 10 that he did not take claimant's left-handedness into account. On page 15, Dr. Dougherty stated that Dr. Blume arrived at a ten percent rating for claimant's left hand.

APPLICABLE LAW AND ANALYSIS

The causal connection issue overlaps with the nature and extent issue in this scheduled member case. The incident of February 4, 1985 did cause some permanent partial impairment. The questions that need agency resolution are: 1) what member or members were affected by the incident of February 4, 1985, and 2) what is the degree of impairment; that is, a percentage of impairment for the affected member or members must be determined.

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

The disability in this case is limited to claimant's left hand. See William E. Jarrett, Jr. v. Churchill Truck Lines, Inc., (Appeal Decision, No. 737598 filed on December 22, 1986)(The facts in Jarrett are somewhat similar to the facts in this case.) I am persuaded that claimant has a ten percent permanent partial impairment or disability to his left hand entitling him to 19 weeks of permanent partial disability commencing on July 17, 1985. See Iowa Code section 85.34(2)(l).

FINDINGS OF FACT

1. Claimant injured his left hand with a saw on February 4, 1985 while working for IBP.

2. Claimant's work-related injury caused impairment or diability to his left hand only.

3. The degree of permanent partial impairment to his left hand is ten percent.

4. Claimant's stipulated rate is $174.81.

CONCLUSIONS OF LAW

1. Claimant established entitlement to nineteen (19) weeks of permanent partial disability benefits commencing on July 17, 1985 and defendant is entitled to credit for benefits already paid.

ORDER

IT IS THEREFORE ORDERED:

That defendant pay the weekly disability benefits described above.

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

That defendant be given credit for benefits already paid to claimant.

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 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 26th day of March, 1987.

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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002029

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BENJAMIN J. KOSTER, Claimant, vs. JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, Employer, Self-Insured, Defendant.	:	FILE NO. 806022 A R B I T R A T I O N D E C I S I O N FILED APR 30 1987 INDUSTRIAL SERVICES

INTRODUCTION

This is a proceeding in arbitration brought by Benjamin J. Koster, claimant, against John Deere Dubuque Works of Deere & Company, employer and self-insured defendant for an alleged occupational hearing loss and an occupational disease which occurred on December 1, 1984. A hearing was held on November 13, 1986 at Dubuque, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Mervin L. McClenahan, M.D., (employer's medical director), Benjamin J. Koster (claimant), Mary Koster (claimant's wife), Robert J. Kaiser (supervisor), Ronald D. Drish (supervisor), Gary W. Bundenthal (industrial engineer), and Clement J. Koerperich (supervisor); joint exhibits 1 through 20; and claimant's exhibits 21 and 22.

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 hearing loss and alleged occupational disease.

That the rate of weekly compensation in the event of an award is $345.30.

That the claimant's entitlement to medical benefits is no longer in dispute.

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 and an occupational disease on December 1, 1984, which arose out of and in the course of his employment with the employer.

Whether the occupational hearing loss and the occupational disease were the cause of any temporary or permanent disability.

Whether the claimant is entitled to temporary disability benefits or permanent disability benefits as a result of either the occupational hearing loss or the occupational disease.

Whether the alleged occupational hearing loss claim is barred by Iowa Code section 85.23 and 85B.14 because the employer did not have actual knowledge of the loss and the employee or someone on his behalf did not give notice within 90 days of the occurrence of the loss to the employer.

Whether the alleged occupational hearing loss is barred by Iowa Code section 85.26, 85B.8 and 85B.14 because it was not commenced within two years from the occurrence of the injury.

Whether the alleged occupational disease claim is barred by Iowa Code section 85.23, 85A.16 and 85A.18 because the employer did not have knowledge of the loss and the employee did not give written notice to the employer within 90 days of the first distinct manifestation of the occupational disease.

Whether the alleged occupational disease claim is barred by Iowa Code section 85.26 and 85A.16 because it was not commenced within two years from the occurrence of an occupational disease.

TRANSCRIPT

Defendant ordered a transcript of the hearing. It was made available to the agency in order to review the testimony more carefully in this very complex case and to show where in the record the pertinent evidence may be found. The transcript has been returned to the defendant and is not a part of the official industrial commissioner's file.

SUMMARY OF THE EVIDENCE

Claimant was born on November 28, 1923 and was 62 years old at the time of the hearing. He went to country school through the eighth grade. He has had no education or training after that and was not in the military service. He farmed on rented land until he was 35 years old. He started to work for John Deere on April 16, 1958. He worked in the foundry for approximately 18 years until June 13, 1976. On June 14, 1976, he transferred to the assembly change over department and worked there until he retired on December 1, 1984 after 26 years of laboring type of work with the employer. John Deere has been his only employer

since 1958 when he was 35 years of age. The assembly change over department is sometimes also referred to as the tractor repair department. The terms are used interchangeably (Transcript pages 101, 102 & 138).

Claimant was exposed to noise levels in excess of 90 dBA almost continuously from August 25, 1958 through June 13, 1976 which is a period of approximately 18 years when he worked in the foundry. From October 28, 1968 through June 13, 1976, which is a period of approximately eight years, claimant was exposed to 105 dBA for 1,832 days when he worked in the foundry. From June 14, 1976 to November 30, 1984 the exposure ranged from 80 dBA to 88 dBA (Exhibit 8).

A survey done on November 21, 1985 for several departments in the plant show generally high noise levels, many of which exceed 90 dBA (Ex. 13).

Four audiometric examinations of the claimant in evidence reveal the following results:

DATE	PERCENTAGE	SOURCE	EXHIBIT #
10-19-71	46.56	John Deere	12
05-24-74	45.90	John Deere	11
08-20-82	42.50	John Deere	10
08-27-82	40.32	Dr. Gschwendtner	9

Mervin L. McClenahan, M.D., who was the plant physician at that time, reviewed the audiogram that was taken on August 20, 1982. The doctor then notified the claimant on August 23, 1982 of his hearing loss (Ex. 5). (Iowa Code section 85B10). In addition, the doctor set up an appointment for claimant with John F. Gschwendtner, M.D., a hearing specialist in Dubuque. Dr. McClenahan entered in the claimant's dispensary notes at that time that the type of loss was probably sensorineural and probably work related (Ex. 4, p. 13).

Dr. Gschwendtner saw claimant on August 27, 1982. He confirmed that the loss was sensorineural and bilateral. He stated that claimant would benefit from the use of a hearing aid. Although Dr. Gschwendtner thought the loss was not related to the place of employment, Dr. McClenahan told Dr. Gschwendtner that it was work related because of the claimant's 18 years of employment in the foundry (Ex. 6 & 7). Claimant also testified that the noise in the foundry caused his hearing loss (Tr. 92). Claimant also testified that Dr. Gschwendtner told him that his hearing loss was noise induced and work related (Tr. 117).

Dr. McClenahan then recorded on the claimant's dispensary notes on August 31, 1982 that the loss was work related. He also made an entry on September 10, 1982 that he informed

claimant that his hearing loss was considered work related (Ex. 4, p. 13). Dr. McClenahan testified at the hearing that the claimant's hearing loss was due to the length of time that claimant spent in the foundry, that it was noise induced, that it was probably due to the noise to which he was exposed in the foundry without hearing protection and that the safety department of the company agreed with him (Tr. 46, 66 & 67). Furthermore, claimant's loss was sensorineural and permanent (Tr. 46).

Although claimant had farmed for about 20 years before working for the employer, the claimant's preemployment physical examination dated April 15, 1958, under the classification ears showed no otitis media or other deafness (Ex. 21). Claimant testified that he also worked part-time for approximately 10 years as a roofer installing asphalt shingles with a hammer and nails (Tr. 110-113) but there was no evidence that this affected claimant's hearing or his breathing. Claimant testified he wore an air hood for hearing protection after they were required to wear them in 1969 or 1971 until he left the foundry. Claimant was not sure of the exact year that air hoods became mandatory (Tr. 113-115). Claimant verified that his hearing problem dated back to before 1976 and before he left the foundry (Tr. 116). He also confirmed that Dr. McClenahan tested him, sent him to Dr. Gschwendtner and told him that the hearing problem was caused by work (Tr. 92, 116 & 117). The testimony of both claimant and Dr. McClenahan indicated that the results of the audiograms taken in 1971 and 1974 were not communicated to claimant (Tr. 44 & 91).

Gary W. Bundenthal, an industrial engineer, supervised claimant from mid 1974 until he left the foundry on June 13, 1976 when claimant was a chipper and grinder in the foundry. He said air hoods were mandatory then and testified that claimant wore his hood as required (Tr. 150-153). Bundenthal also testified that mandatory hearing protection was in effect and that claimant also wore a green rubber type earplug (Tr. 154). Claimant was never disciplined for a hearing protection violation (Tr. 155).

Clement J. Koerperich, production general supervisor, supervised claimant in 1974 and 1976. He said that mandatory hearing protection became effective December 15, 1971. He testified that claimant wore his protection and air hood until he left the foundry (Tr. 156-160).

Apparently, a hand bill was circulated by the union alerting workers to possible hearing loss claims. Claimant testified that he contacted the union about it on the day before Thanksgiving in 1982. The union president went with him to see the safety man at John Deere in January, February or March of 1983. This unknown safety man told claimant that he had some money coming due to his hearing loss and that he would figure it up and get in touch with him. When nothing happened, the union representative

told claimant to wait until he retired to make any further claim (Tr. 93-99). Claimant could not identify the safety man who promised him money. The union representative was with him when the promise was made. When he did not get paid the union representative told him to wait until he retired to make a claim. The claimant relied on what the union representative told him to do (Tr. 118-121).

Dennis W. Rajtora, M.D., an allergist, saw claimant on May 12, 1986, May 14, 1986 and May 19, 1986. Dr. Rajtora noted that claimant spent 16 years in the chip and grind process exposed to silica dust when at times the air was filled with dust (Ex. 14, p. 3). The doctor's history recorded that in 1968, 1969 and 1970 claimant worked 12 hours a day, six days a week for approximately three or four years where he had excessive and significant exposure to silica (Ex. 14, p. 3). Dr. Rajtora concluded his examination with the following diagnosis: "Patient's diagnosis is that of (1) pneumoconiosis (pulmonary silicosis); (2) obstructive airways disease secondary to smoking, aggravated and perpetuated by inhalation of non-organic dust." (Ex. 3, p. 2).

Dr. Rajtora awarded a 30 percent permanent impairment rating based on the silicosis and exclusive of the claimant's smoking difficulties (Ex. 2 & 3).

Dr. McClenahan stated on June 11, 1986 that claimant suffered from pulmonary silicosis that resulted from chronic exposure to foundry dust at the employer's place of employment over a number of years. He declared that claimant suffered a 35 percent permanent impairment but part of it was due to smoking (Ex. 1). The doctor testified that the employer either knew or should have known that foundry dust contained silica from sand and that it was harmful more than 15 years ago. Claimant's job of chip and grind in the foundry was both noisy and dusty, more so than the environment in general (Tr. 23-27). The extensive history taken by Dr. Rajtora disclosed that claimant had pulmonary problems of coughing, heaviness in the chest and would bring up black, dark sand after 15 years of exposure. This would be approximately 1973. In 1976, claimant had pneumonia and tests at that time disclosed some fibrosis. Claimant continued to have shortness of breath, coughing and wheezing and gradual progression of difficulties up to his retirement in 1984 (Ex. 14, p. 3). Claimant quit smoking after he had pneumonia in 1976 (Tr. 89).

When claimant had cataract surgery in October of 1982, a routine chest x-ray revealed spots on his lungs. At the time of a second cataract surgery in February or March of 1983, a specialist diagnosed this as silicosis (Tr. 88 & 107). On direct examination, claimant testified he was not told where it came from and that he did not know that he might have a workers' compensation claim available (Tr. 88). Nevertheless, on cross-examination the following colloquy transpired between claimant

and opposing council:

Q. Now, did they discuss with you where you worked?

A. Yes.

Q. Did they discuss with you your background and your history?

A. No. Yes, well, yes, he did in a way.

Q. Did he know you worked at the John Deere foundry?

A. Yes.

Q. And he was your treating physician?

A. Yes.

Q. He told you you had silicosis and that it was coming from working at the foundry?

A. Yes. Well, he didn't say directly, but that's what I got out of it anyhow.

Q. That was your understanding?

A. Yes.

Q. Now, did you go see the John Deere people at that time to tell them that your doctor was reporting that you had silicosis?

A. No, I didn't.

Q. Did you tell your bosses, Mr. Kaiser or Ron Drish?

A. No. No. That was when I was down in the foundry, in '76. I was down there when I had my cataract. No, I wasn't either. Oh, gee. I had

cataract operation before I got down there under Kaiser. There was other ones there before I got a hold of Drish or Kaiser.

(Tr. 107 & 108)

At the time of the cataract surgery by Dr. Pechous (full name unknown) claimant was also under the care of his own personal physician, John W. Moberly, M.D., an internist, who saw him every six months for silicosis (Tr. 104-108).

Dr. Moberly wrote a letter to claimant on November 1, 1982 and enclosed a copy of an x-ray report. Dr. Moberly's letter said:

> Attached is a copy of the chest examination of your x-ray done on January 6, 1982, which still reveals extensive nodular inflammatory process consistent with the silicosis that you have been aware of for a long period of time.
>
> There appears to be some slowly progressing changes, but there is no evidence that there is anything new in this process at this time.
> (Ex. 16)

Dr. Moberly wrote to the claimant again a year later on January 17, 1983 as follows: "The chest x-ray examination done on January 12, 1983, revealed no change from January of 1982. It would therefore appear that the silicosis is stable and is doing well at the present time." (Ex. 15).

Claimant gave the following testimony about these two letters:

Q. Exhibits 15 and 16 are Dr. Moberly's letters

that are addressed to you, January 11, 1982 and January 17, 1983. Do you remember those letters?

A. Yes, I do.

Q. What caused those to be written to you?

A. That was after I had the cataract taken out. The specialist there found out what I had.

Q. He told you in those letters that you had

silicosis?

A. Yes.

Q. And why did he write the letters to you?

A. To let me know. That's all I got out of it.

Q. What did you do with the letters?

A. I kept them.

Q. Did you take them to Dr. McClenahan?

A. No, I didn't. I didn't think I had to

Q. Pardon me?

A. I didn't think it was necessary.

(Tr. 117 & 118)

Dr. McClenahan testified that as his plant physician it was his opinion that claimant did not know that he had silicosis (Tr. 136).

Claimant testified that his first knowledge that silicosis was something involved with workers' compensation was when Dr. McClenahan called him out to the plant to discuss it in April of 1986 which was after the claimant had retired and after this action had been commenced (Tr. 88)

Dr. McClenahan testified his first knowledge of claimant's silicosis was when the original notice and petition was filed on November 7, 1985. There was nothing in claimant's entire dispensary record (Ex. 4) to indicate a history of silicosis or any breathing problems (Tr. 32, 33, 61 & 75).

Dr. McClenahan testified that a chest x-ray taken on June 26, 1973 was taken when the defendant started doing routine silica examinations. It indicated that claimant's lung fields were clear and that he had a normal chest at that time (Ex. 20; Tr. 75-80).

Another x-ray taken on June 11, 1976 at Finley Hospital when claimant was treated for hand fractures reported fibrotic and emphysematous changes bilaterally (Ex. 19). Dr. McClenahan said that this would be an indication that claimant may have had a silicotic process starting at that time (Tr. 78). Claimant's dispensary record showed no indication of the results of this chest x-ray but mentioned only the fractures to the hand (Ex. 4, p. 11). There was no evidence that this x-ray report or any

indications of the fibrotic condition of the lungs was or was not reported to the employer.

Another x-ray dated June 22, 1977, taken at John Deere showed an increased reticulo-nodular pattern in both mid lung fields (Ex. 18). Dr. McClenahan said that this was not a normal chest x-ray but that the reticulo-nodular pattern could be caused by sources other than silicosis such as from smoking (Tr. 81 & 82). He said that this x-ray report was equivocal (Tr. 134). The x-ray report that was the most indicative of silicosis was the one that was taken at Finley Hospital on June 11, 1976 (Tr. 133 & 134).

When Dr. McClenahan interviewed claimant for a blood lead test back on March 30, 1983, claimant reported that he had shortness of breath and he was taking a pill for shortness of breath but claimant did not mention silicosis (Ex. 17 & 22). Dr. McClenahan granted that shortness of breath is an indication of silicosis and that silicosis is a form of pneumoconiosis (Tr. 135).

Claimant testified that he never had any trouble doing his work and that he worked right up to the time that he retired on December 1, 1984. He never reported any breathing problems to the medical department (Tr. 104). He retired voluntarily and not because he could not handle the work (Tr. 108 & 109). Dr. McClenahan testified that the claimant would not be hired today to do unrestricted labor (Tr. 31) or just any work (Tr. 72 & 73) at John Deere, but claimant would not be incapacitated from performing the job he was doing at the time he retired (Tr. 64 & 72). In his opinion claimant could perform his former assembly repair work job and he exhibited this by doing it. Furthermore, he believed that the claimant could do his old change over and repair job at the time of the pulmonary examination in 1986 (Tr. 82 & 83).

Robert J. Kaiser, a production supervisor for whom claimant worked from November of 1982 until retirement at the end of November 1984, testified that claimant never exhibited breathing problems or any other problems that prevented him from doing his job except that his driving was restricted due to poor eyesight (Tr. 139, 144 & 145). Kaiser further testified that there were a lot of jobs claimant could do at John Deere (Tr. 143 & 144).

Ronald D. Drish, another supervisor during the same period of time, testified that claimant performed his duties up to the time he retired with no indication of breathing or other physical problems except for poor eyesight (Tr. 147 & 148).

APPLICABLE LAW AND ANALYSIS

At the close of the hearing claimant moved to amend the petition to conform to the proof. Claimant contended that defendant was estopped from denying claimant's hearing loss

claim because the unknown safety man had promised payment which was never forthcoming. Defendant objected to this motion because this issue was not raised at the prehearing conference and was not included on the hearing assignment order. Defendant further pointed out that paragraph eight of the hearing assignment order provides as follows: "Additional Amendments to Pleadings. No further amendments to a party's pleading which materially change the issues of the hearing will be allowed without a modification of this order."

Estoppel is a significant issue. An issue not raised at the prehearing conference and included on an hearing assignment order is waived. Joseph Presswood v. Iowa Beef Processors, Inc., filed November 14, 1986, (Appl. Decn). Therefore, claimant's motion to amend the pleadings to conform to the proof is denied.

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 excess noise level means sound capable of producing occupational hearing loss. Iowa Code section 85B.5 states that excess noise level is sound which exceeds the times and intensities published in that table and section of the Code.

Exhibit 8 demonstrates that claimant was exposed to excessive noise levels for 18 years from 1958 to 1976. The company apparently provided no hearing protection for the first 13 years until 1971. Iowa Code section 85B.5 shows that exposure to more than one hour of sound at 105 dBA is excessive, but claimant was exposed to this level of sound eight hours a day for 1,832 days from 1968 to 1976 (Ex. 8; Tr. 43). Much of this time was before hearing protection was provided in 1971. The first audiomoniter test in 1971 showed a 46.56 percent loss of hearing (Ex. 12). Dr. McClenahan tested claimant in 1982, sent him to a hearing specialist, talked with claimant, and talked with the employer's safety department and it was determined that claimant had sustained a permanent sensorineural bilateral hearing loss caused by his work in the foundry. Claimant testified that this was when his hearing loss occurred in his opinion. Claimant also testified that Dr. Gschwendtner told him the same thing. Dr. McClenahan considered that the claimant's other life time activities such as farming, roofing and hunting were not sufficient to cause this hearing loss.

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. In the instant case, all four of the audiometric examinations from 1971 through 1982 placed the employer on actual notice of the occurrence of a hearing loss. Dr. McClenahan had no problem in 1982 concluding that the claimant's years in the foundry before hearing protection was provided was the cause of the claimant's hearing loss. Dr. McClenahan even reversed Dr. Gschwendtner's opinion that it was not work related. Therefore, defendant had actual knowledge of the occurrence of this occupational hearing loss as required by Iowa Code sections 85.23 and 85B.14. In fact, from the evidence the employer was the first to know about it and to discover it but there is no evidence that they provided this information to the claimant as required by section 85B.10. Claimant denied that he had been informed of the results of the prior hearing tests before Dr. McClenahan notified him in 1982.

Iowa Code section 85B.14 makes the statutes of limitations of Iowa Code section 85.26(1) applicable to hearing loss claims. Iowa Code section 85.26(1) requires an original proceeding to be commenced within two years from the date of occurrence of an injury. 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.

Defendant's contention that this claim is barred by the statute of limitations because the claimant did not file his claim within two years after he discovered or knew he had a hearing loss is not correct. Dale J. Furry v. John Deere Dubuque Works of Deere & Company, filed November 12, 1986 (Appl. Decn.) held that the statute of limitations begins to run on the date of the injury and the date of the injury is any one of the three events specified in Iowa Code section 85B.8. In this case, the date of injury is retirement on December 1, 1984 and the claim was filed on November 15, 1985 within the two year period of limitations.

The claimant's transfer from the excessive noise level environment on June 14, 1976, and also all of the transfers shown on exhibit 8 cannot be considered the date of injury because it was not proven that any of these transfers were permanent transfers without reasonable expectation of being returned to a high noise level at work. Claimant still remained a member of the blue collar work force in a laboring capacity and could have been transferred back to the foundry or any other department described in exhibit 13 which has excessive noise levels or high noise levels approaching excessive noise levels that could also produce occupational hearing loss. Wilfred E. McVay v. John Deere Dubuque Works of Deere & Company, decided by Deputy Industrial Commissioner Michael G. Trier and filed August 20, 1986 and Donald Lueken v. John Deere Dubuque Works of Deere & Company, filed August 29, 1986 decided by Deputy Industrial Commissioner Steven E. Ort. The rationale and reasoning of these decisions will not be repeated in this decision because they have already been stated twice in almost identical form in those two cases.

This decision adopts the four factors used in those two cases from which it could be determined that a transfer would constitute a date of injury under Iowa Code section 85B.8. Those factors are as follows: (1) a clearly recognizeable change in employment status; (2) which provides a reduction of noise exposure to a level not capable of producing occupational hearing loss; (3) that is permanent or indefinite in the sense that there is no reasonable expection that the worker will be returned to a position with excessive noise level exposure in the ordinary course of operations in the employer's business; and (4) that the change must have actually continued for not less than six months.

Exhibits 8 and 13 demonstrate that as long as claimant remained a factory worker he was subject to noise levels that could possibly produce occupational hearing loss. Loss can sometimes result from noise exposure of less than 90 dBA. Morrison v. Muscatine County, Iowa, No. 702385 (1985).

It cannot be said that the date of injury was the date that mandatory hearing protection was provided to employees on December 15, 1971 because this is not one of the events specified in Iowa Code section 85B.8.

Consequently, it is determined that defendant had actual notice of the hearing loss and that this action is timely filed. Claimant did suffer a permanent sensorineural bilateral hearing loss in excess of 25 dBA 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.

Claimant's loss is determined to be 40.32 percent which is Dr. Gschwendtner's evaluation of August 27, 1982 because it is the only audiogram taken after Dr. McClenahan gave notice to claimant on August 23, 1982 that he had a hearing loss claim (Iowa Code section 85B.9). Furthermore, it is probably the most reliable since it was the last one taken and it therefore afforded the claimant the opportunity to recuperate from what has been described as temporary fatigue loss.

Chapter 85A, Code of Iowa, provides benefits for occupational disease. Section 85A.8 defines occupational disease in some detail. A shorter working definition is provided by Lawyer & Higgs, Iowa Workers' Compensation -- Law and Practice, section 18-1 where occupational disease is described as disease peculiar to employment typically resulting from exposure over a number of years.

To prove causation of an occupational disease, claimant need only meet two basic requirements imposed by the statutory definition of occupational disease: (1) the disease must be related to the exposure to harmful conditions in the field of employment and (2) the harmful condition must be more prevalent in the employment than in everyday life or in other occupations. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

Chapter 85A, Code of Iowa, provides both compensation and medical benefits (Iowa Code section 85A.5). The occupational disease law also provides for temporary disability and permanent total disability and permanent partial disability (Iowa Code section 85A.17). The same criteria that is used to determine industrial disability in an injury case under Chapter 85 can be applied in an occupational disease case under Chapter 85A of the Code. McSpadden, 288 N.W.2d 181 (Iowa 1980).

The report of Dr. Rajtora and Dr. McClenahan and the testimony of Dr. McClenahan proved that claimant did suffer an industrial disease as defined in Iowa Code section 85A.8 which was caused by his employment. Claimant acquired silicosis, a form of pneumoconiosis due to his work in the foundry and chronic exposure to silica dust (Ex. 1, 2, 3, 14; Tr. 23-27). Therefore, claimant has sustained the burden of proof by a preponderance of the evidence that he sustained an occupational disease.

The provisions of the workers' compensation law so far as applicable and not inconsistent with the occupational disease law shall apply (Iowa Code section 85A.16). Therefore, the 90 day notice requirement applicable to workers' compensation cases is also applicable to occupational disease cases. Furthermore, the discovery rule is applicable to occupational disease cases. Jacques v. Farmers Lbr. & Sup. Co., 242 Iowa 548, 552, 47 N.W 2d, 236, 239-40 (1951). Even though Iowa Code section 85A.18 imposes a specific obligation on an employee to give written

notice of an occupational disease within 90 days of the first manifestation of an occupational disease, a careful reading of this code section and a review of the workers' compensation cases indicate that actual knowledge of the employer is probably enough to satisfy the notice requirement in an occupational disease case. Robinson v. Department of Transp., 296 N.W.2d 809, 811 (Iowa 1980); Hobbs v. Sioux City, 231 Iowa 860, 861-62, 2 N.W.2d 275, 276 (1942). In this case, it is determined that the employer had actual knowledge of the occupational disease. Dr. McClenahan said that the employer knew or should have known of a silicosis problem at least 15 years ago (Tr. 25). That would be in 1973. Claimant had a chest x-ray in 1973 presumably as a silicosis evaluation according to Dr. McClenahan which was clear at that time (Ex. 20; Tr. 75 & 80). An x-ray taken at the time of the hand injury on June 11, 1976 definitely showed fibrotic changes indicative of silicosis, but since it was taken at Finley Hospital and there was no evidence of whether this information was given to the employer or was not given to the employer, then this x-ray cannot be used as evidence of actual knowledge (Ex. 19; Tr. 77 & 78). However, the x-ray taken at John Deere on April 22, 1977 was not a normal chest x-ray. It showed increased reticulo-nodular pattern in both mid lung fields. This information was not given to the claimant. It could have been evidence of silicosis or smoking or both (Ex. 18; Tr. 78-80). This result was equivocal. It should have been followed up but nobody did that back in 1977 (Tr. 134). When claimant reported shortness of breath and that he was taking a pill for shortness of breath at the time of the blood lead test on March 30, 1983, the employer was placed on reasonable notice of a possible case of silicosis when all of this evidence is considered together. Therefore, it is determined that there was actual knowledge of a possible occupational disease in this case to a reasonably conscientious employer that this might involve a potential compensation claim. Robinson, 296 N.W.2d 809, 811 (Iowa 1980).

Moreover, it is determined that claimant did not discover that his occupational disease was serious, work related and compensable until this action was filed for him by counsel on November 7, 1985. Actually, claimant personally did not realize or discover that he had a workers' compensation claim until Dr. McClenahan called him out to the plant in April of 1986 (Tr. 88).

The colloquy between claimant and opposing counsel at transcript pages 107 and 108 is considered more the testimony of counsel than the testimony of claimant because claimant was responding to leading questions. The last question and answer in the series shows how easily claimant became confused. He was confused also about the sequence of events and dates with the union representative and the safety man (Tr. 93-99). At one point he gave the wrong retirement date (Tr. 101). The claimant often demonstrated poor memory and recollection. His manner and

demeanor was that of a gentle, fragile man who spoke in a weak voice, with poor eyesight, poor hearing and who was easily confused. If he testified that he did not know that he had a workers' compensation claim until he talked with Dr. McClenahan at the plant in April of 1986, then this is believeable. Claimant's ingenousness was illustrated by the colloquy between him and opposing counsel when he said he kept the letters of Dr. Moberly because he did not think he had to give them to the employer (Tr. 117 & 118). Dr. McClenahan knew the claimant and dealt with him a number of times. Therefore, great weight is placed upon Dr. McClenahan's testimony when he said that the claimant did not know that he had silicosis (Tr. 136). Even if claimant knew that he had a lung ailment known as silicosis, there is nothing in the record to indicate that he knew or understood the nature, source or cause of the ailment. There is nothing which indicates that claimant was aware that silicosis was definitely a work related condition. Consequently, it is determined that claimant did not discover that he had a serious, work related and compensable claim until his counsel filed a petition on his behalf on November 7, 1985.

By the same token claimant filed this claim within two years of when he discovered it because the action was filed on the same day that his legal representative determined that he had a claim even though the claimant did not personally discover it until sometime later. Orr v. Lewis Cent. Sch. Dist., 298 N.W.2d 256, 261 (Iowa 1980).

Iowa Code section 85A.4 defines disablement for purposes of occupational disease as follows:

> ...Disablement as that term is used in this chapter is the event or condition where an employee becomes actually incapacitated from performing his work or from earning equal wages in other suitable employment because of an occupational disease as defined in this chapter in the last occupation in which such employee is injuriously exposed to the hazards of such disease.

Iowa Code section 85A.12 further provides that an employee is not liable for compensation for an occupational disease unless disablement results within three years after the last injurious exposure to pneumoconiosis.

Claimant has failed to sustain the burden of proof by preponderance of the evidence that he was disabled as that term is used in this chapter of the Code because he did not prove that he was actually incapacitated from performing his work or from earning equal wages in other suitable employment because of the occupational disease. The testimony of claimant was that he could perform his job right up to the time of retirement and

that he retired voluntarily and not because he could not do the work (Tr. 104, 108 & 109). Kaiser and Drish testified that claimant performed his job right up to the time of retirement and did not exhibit any breathing problems (Tr. 139, 144, 145, 147 & 148). Dr. McClenahan said claimant could still perform his old job and a number of other jobs for the employer at the time of the hearing (Tr. 64, 72, 82 & 83). Kaiser testified there were a lot of jobs that claimant could do at John Deere (Tr. 143 & 144). There was no evidence that claimant had tried any other jobs in the employment market since his retirement. Therefore, claimant has failed to prove by a preponderance of the evidence that he was "actually incapcitated from performing his work or from earning equal wages in other suitable employment" as disablement is defined in Iowa Code section 85A.4.

Since it has been determined that there is no disablement it is not necessary or possible to decide if disablement occurred within three years of the last injurious exposure as required by Iowa Code section 85A.12. Furthermore, the date of the last injurious exposure is not crystal clear. Dr. McClenahan testified that the last exposure to silica was in the foundry in 1976 (Tr. 133). However, since claimant's condition continued to worsen after that he may have had some other injurious exposure within the plant (Ex. 14, p. 3).

Even though claimant has not proven disablement for purposes of compensation, nevertheless, claimant has proven that he did sustain an occupational disease and that he is entitled to medical benefits (Iowa Code section 85A.5, paragraph 2).

FINDINGS OF FACT

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

That claimant was employed by the employer from April 16, 1958 until he retired on December 1, 1984.

That claimant was exposed to excessive noise levels in excess of the statutory standards for long periods of time. That claimant suffered a 40.32 percent permanent noise enduced sensorineural bilateral hearing loss due to his work in the foundry as a chipper and grinder before hearing protection was provided on December 15, 1971.

That defendant had actual knowledge of the hearing loss from the audiometric examinations that were conducted in 1971, 1974 and 1982.

That the date of injury for the hearing loss is the retirement date of December 1, 1984 and that this action was filed on November 7, 1985.

That claimant's transfer from the foundry or his other transfers were not proven to be permanent transfers with no reasonable expectation of being returned to a high level noise of work because claimant remained a laborer in the blue collar work force and actually remained in areas with a high level of noise even though it did not exceed 90 dBA.

That claimant suffered the occurrence of the industrial disease of silicosis, a form of pneumoconiosis, caused by his chronic exposure to silica dust in the foundry before air hoods and breathing protection was provided.

That the defendant had actual knowledge that the claimant sustained this disease at the time of the x-ray on April 22, 1977, which demonstrated a reticulo-nodular pattern in both mid lung fields, when this information is combined with the fact that the employer already considered the claimant a suspect for silicosis since an x-ray was taken for that purpose in 1973.

That claimant did not discover the significance of silicosis until April of 1986.

That counsel for claimant, however, did understand the significance and filed an original notice and petition on November 7, 1985.

That claimant did not prove that he was incapacitated from performing his work at the employer's plant or from earning equal wages in other suitable employment.

That claimant performed his job without difficulty or complaint up till his retirement on December 1, 1984.

That claimant has not sought any other work since he retired from the employer.

That there was no evidence that the claimant left the foundry due to breathing problems or silicosis.

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 by Chapter 85B, Code of Iowa, which arose out of and in the course of his employment with the employer.

That the loss was caused by his employment with the employer.

That the amount of the loss is 40.32 percent of 175 weeks

pursuant to Iowa Code section 85B.6.

That the employer had actual knowledge of the loss pursuant to Iowa Code section 85B.14 and Iowa Code section 85.23.

That the date of injury pursuant to Iowa Code section 85B.8 is the retirement date of the claimant of December 1, 1984 and since this action was commenced on November 7, 1985 it was timely filed to satisfy the limitation requirements of Iowa Code section 85B.14 and Iowa Code section 85.26(1).

That claimant sustained an occupational disease as defined by Chapter 85A, Code of Iowa, which arose out of and in the course of his employment with the employer.

That the disease was caused by his employment with the employer.

That the employer had actual knowledge of the occupational disease as required by Iowa Code section 85.23 and Iowa Code section 85A.18.

That claimant timely filed this action within two years of when he discovered he sustained an occupational disease as required by Iowa Code sections 85A.16, 85A.18 and 85.26(1) when his counsel filed the petition for him on November 7, 1985.

That claimant did not sustain the burden of proof by a preponderance of the evidence that he was disabled by the silicosis as defined in Iowa Code section 85A.4, Iowa Code section 85A.5, paragraph 1, and Iowa Code section 85A.12.

That since claimant did sustain the burden of proof that he sustained an occupational disease as defined by Chapter 85A of the Code of Iowa, he is entitled to medical benefits as provided by Iowa Code section 85A.5, paragraph 2.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant seventy point five-six (70.56) (40.32 x 175) weeks of compensation at the rate of three hundred forty-five and 30/100 dollars ($345.30) per week in the total amount of twenty-four thousand three hundred sixty-four and 37/100 dollars ($24,364.37) commencing on December 1, 1984 for occupational hearing loss.

That these benefits be paid in a lump sum.

That interest will accrue under Iowa Code section 85.30.

002048

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GERALD C. KUCHEMANN,	:	
	:	File No. 814506
Claimant,	:	
	:	A R B I T R A T I O N
JOHN DEERE DUBUQUE WORKS OF DEERE AND 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 Gerald C. Kuchemann, claimant, against John Deere and Company, a self-insured employer, hereinafter referred to as John Deere, defendant, for benefits as the result of an alleged occupational hearing loss on July 30, 1985. On January 22, 1987 a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

Claimant is alleging in this proceeding that he sustained an occupational hearing loss as the result of prolonged exposure to excessive noise during his employment at John Deere. Claimant seeks weekly compensation for his loss of hearing. Defendant asserts various defenses involving the timeliness of the claim and denies that claimant's hearing loss was noise induced.

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: Mervin Lee McClenahan, M.D., Pat Ready, Ronald Dillon, and Pat Gage. 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 parties have stipulated that claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $352.50.

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

I. Whether claimant received an occupational hearing loss arising out of and in the course of his employment with John Deere;

II. Whether the claim is barred by the limitation provisions of Iowa Code sections 85.26 and 85B.7;

III. Whether the claim is barred by the failure to give notice required by Iowa Code section 85.23; and,

IV. The extent of claimant's entitlement to weekly compensation benefits.

In the prehearing report, claimant raised the issue of his entitlement to reimbursement for two hearing aids. This issue was not raised at the time of th prehearing conference and cannot now be included in the issues assigned for hearing. Also, no evidence was received as to the amount of this claim or as to the reasonableness of the charges. Consequently, no decision can be rendered on such a new issue.

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 John Deere from May 15, 1947 until August 1, 1985, primarily as a machinist and a tool grinder.

Claimant's work at John Deere lasted approximately 38 years and involved the operation of equipment in areas devoted entirely to fabrication of metal parts. Most of the time this involved the operation of one or two machines at a single work area. During the last two years, claimant was a perishable tool investigator. This job was described by claimant and his superiors as a trouble shooter for tooling problems within the plant. The job allowed claimant to occasionally move about the plant, but still required him to remain at his work station for prolonged periods of time.

3. Throughout his employment at John Deere, claimant was exposed to excessive noise levels for prolonged periods of time.

Pat Gage, an occupational industrial hygenist, employed by John Deere, testified that she prepared exhibit 13, a listing of jobs held by claimant during his employment at John Deere and the noise exposure levels for each classification and department. According to this document, claimant was exposed to decibel levels ranging from 82 to 90 "measured by department." For some reason the noise levels for jobs held by claimant after his transfer from the radio drill operator job to tool grinder in

September 1974 are measured by classification. By classification, the noise levels range from 74 to 77 dBA. Throughout the remainder of claimant's employment after September 1974, claimant worked in department 38. Exhibit 14 is a list of noise exposure readings obtained from sound measuring devices attached to employees in department 38. The ranges extend from 63 to 87 dBA. There was an attempt by Gage at the hearing to average these readings but the mathematical propriety or statistical reliability of a normal averaging of these figures was not demonstrated by Gage. These were readings from various employees at various times between 1978 and 1984. Gage did not provide a sufficient foundation to justify the selection of the employees as a correct sampling under usual statistical standards. Also, averaging together various readings made at different times would likewise be questionable.

Claimant testified that department 38 was noisy. The description of claimant's primary work areas in department 38 was adjacent to very high noise areas (90+ dBA); a sandblasting area to the north and a heat treat dumping station across the aisle from claimant's work area. Although claimant would normally be approximately 50 to 100 feet away from such noise, either claimant or persons operating extremely noisy equipment would at times be considerably closer as both claimant and other employees moved about their work areas during the course of a work day.

Most important to this finding is the conclusion of James E. Spoden, M.D., an otolaryngologist, the only otolaryngologist to state that he reviewed noise level figures supplied by John Deere. It was the opinion of Dr. Spoden that such sound levels were capable of causing claimant's hearing loss. He based his decision not only on the figures supplied to him by John Deere as to noise levels in department 38 and throughout his employment history, but also upon a history supplied to him by claimant which included a number of transient temporal shifts of hearing; noise levels painful to claimant's ear; lack of noise exposure outside of the John Deere work area; and, the lack of any family history of premature hearing loss. Although the company doctor, Mervin McClenahan, M.D., a general practitioner opines that the injurious nature of such sound levels were inconclusive, such views cannot be given the same weight as that of an ear specialist.

4. On July 18, 1985 claimant was transferred from excessive noise level employment by the employer due to his retirement.

Although claimant officially retired on August 1, 1985, claimant lasted worked on July 17, 1985. His last job was in department 38. As found above, the department had excessive noise levels or sound capable of causing occupational hearing loss. As will be made apparent in the conclusions of law section, it is important to find that the claimant's petition

for benefits from filed with this agency on February 11, 1986, more than six months and less than two years after July 18, 1985.

5. Claimant suffers from a 34.92 percent binaural hearing loss which arose out of and in the course of his employment at John Deere caused by his prolonged exposure to excessive noise at John Deere.

Audiograms revealed the following history of claimant's hearing loss computed pursuant to Iowa Code section 85B.9:

Date	Binaural Loss
12-8-70	9.38%
10-1-75	19.69%
8-31-84	30.63%
10-5-84	28.75%
3-18-85	60.01%
4-26-85	58.76%
8-1-85 (Claimant's retirement)	
7-18-86	62.82%
7-18-86	46.56%
10-24-86	47.87%

Most questionable was the July 18, 1986 measurement of 62.82 percent performed on the same day as one performed under the direction of Craig C. Herther, M.D., an otolaryngologist. Dr. Herther's rating was very similar to a later measurement by Dr. Spoden in October 1986. Also, on the report for the 62.82 percent audiogram, the date of the audiogram was handwritten on a copy of the machine tape. Due to these various discrepancies, this audiogram was rejected as unrepresentative. Therefore, the most notable aspect of the post retirement audiograms is the improvement of claimant's hearing after he left department 38 in July 1985. This further evidences that department 38 was an area of excessive noise and that the noise was affecting claimant's hearing.

Three causation opinions were rendered in this case. One opinion was rendered by the company physician, Dr. McClenahan. His view was that either old age, termed presbycusis, or noise, caused claimant's hearing loss, neither possibility was greater than the other. Dr. Herther opines that the type of high frequency loss experienced by claimant makes identification of the cause difficult but likewise states that either noise or the aging process was a possible cause. However, Dr. Spoden, whose reports are much more detailed and who also was the only doctor to state that he reviewed the noise level figures furnished to him by John Deere, opines that presbycusis is undoubtedly somewhat of a factor but he would estimate that at least 75 percent of claimant's hearing loss is on a noise induced basis.

Again, Dr. Spoden notes that claimant experienced no other excessive noise levels other than at John Deere and had no history of a premature hearing loss in his family. Also, it is the experience of this agency that an improvement of hearing after leaving an excessive noise level is evidence that claimant's hearing loss was caused by the excessive noise. Therefore, on the whole record and given this agency's special expertise, the preponderance of the evidence establishes that excessive noise claimant experienced at John Deere in department 38 and throughout his 38 year career at John Deere was a cause of his occupational or binaural hearing loss.

The percentage of occupational hearing loss was arrived at by taking 75 percent of the lowest reading for binaural hearing loss among the audiograms taken after claimant filed his claim for occupational hearing. Use of the lower rating will be explained in the conclusions of law section of this decision.

CONCLUSIONS OF LAW

In this case there was no controversy raised by the parties concerning the applicable law to be followed in the determination of the issues. The foregoing findings of fact were made under the following principles of law:

I. Claimant must establish by a preponderance of the evidence that he sustained an occupational hearing loss. Occupational hearing loss is defined in Iowa Code section 85B.4(1) as "a permanent sensorineural loss of hearing in one or both ears in excess of twenty-five decibels..., which arises out of and in the course of employment caused by prolonged exposure to excessive noise levels." Excessive noise levels is defined by Iowa Code section 85B.4(2) as "sound capable of producing occupational hearing loss." 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). The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony

may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354.

In the case sub judice, there was a finding that claimant had improved after leaving John Deere. An improvement or a stablization of hearing after leaving an excessive noise area is recognized as one factor which supports a finding that the hearing loss was noise induced. See Exline v. Massey-Ferguson, Inc., case numbers 732635, 704104, appeal decision, filed September 24. 1985. Also, agency experience is recognized as a valid tool in evaluation of evidence. See Iowa Code section 17A.14(5). Also, it was found that claimant experienced excessive noise levels which were less than the decibel level set forth in Iowa Code section 85B.5. That Code section states that an excessive noise level is sound which exceeds the times and intensities listed in the table. Most of the sound experienced by claimant was below the minimum levels contained in this table. However, the commissioner has held that sound which equals or exceeds the decibel levels and intensities in this table is only presumptively "excessive noise levels." The table is not a minimum exposure level that is necessary in order to establish the occurrence of an occupational hearing loss. Marvin C. Morrison v. Muscatine County, Iowa, case number 702385, appeal decision, filed October 7, 1985.

II. Claimant must next establish that his claim has been filed with this agency in a timely manner. By virtue of Iowa Code section 85B.14, the time limitations provision of Iowa Code section 85.26 are applicable to occupational hearing loss cases except that the date of injury is determined by Iowa Code section 85B.8 which directs that the date of injury shall be the 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.

It has been held by this agency that the date of injury coincides with the occurrence of the first of the events listed in 85B.8. In Re Declaratory Ruling of John Deere Dubuque Works of Deere and Company, III Iowa Industrial Commissioner Report, 147 (1983). However, the transfer from excessive noise employment should be permanent or the last transfer from such employment. This would be consistent with the permanent nature of the other alternative

injury dates in that Code section. Such a view would also be consistent with the injury dates given to other compensable events which occur over a period of time such as a gradual injury under chapter 85 and an occupational disease under chapter 86. The injury or occupational disease date is the date of the last exposure to the harmful or injurious condition. See McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985); Doerfer Division of CCA v. Nicol, 359 N.W.2d 428 (Iowa 1984).

Many persons confuse the first sentence in Iowa Code section 85B.8 as a time limitation. This provision states 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 exposured to excessive noise levels." However, this provision specifies a "waiting period" not a "limitation period" for the filing of an occupational hearing loss claim. After the expiration of the six month period, a claimant is free to pursue his claim so long as there is compliance with Iowa Code section 85.26. The purpose of this waiting period is that normally there is an improvement in hearing in an occupational hearing loss situation. Iowa Code section 85.26 requires that claims for benefits must be filed within two years of the date injury or within three years of the date of the last payment of weekly benefits.

In the case sub judice, it is found that the date of injury was July 18, 1985, the date of claimant's last transfer from an excessive noise area because of his retirement. Given the finding of when claimant filed his claim in this case, February 11, 1986, claimant was well after the minimum but before the maximum time a claim can be filed with this agency. Therefore, under the law set forth above, claimant's claim was timely filed.

III. Defendant has raised the issue of lack of notice of a work injury within 90 days of the date of the occurrence of the injury under Iowa Code section 85.23. Lack of such notice is an affirmative defense. DeLong v. Iowa Highway Commission, 229 Iowa 700, 295 N.W. 91 (1940). This may be a questionable defense under chapter 85B given the statutory obligation of employers to provide notice to employees of excessive noise levels and the results of audiograms taken by the employer. However, in any event, the defendant clearly failed to carry his burden in this case. The injury date found for claimant in this case occurred well after the employer discovered by his own tests that claimant suffered from a hearing loss and had a potential claim for occupational hearing loss.

IV. As claimant has established that he suffered an occupational hearing loss, the extent of his entitlement to weekly compensation benefits must be determined. Iowa Code section 85B.6 limits the amount of weekly compensation that can be awarded for a total occupational hearing loss to 175 weeks with a proration

of benefits for partial occupational hearing loss. It was found that the extent of claimant's binaural hearing loss was 75 percent of the lowest rating after a claim had been filed in this case. The use of the lowest threshhold among the audiograms taken after claimant filed his claim to determine the extent of occupational hearing is required by Iowa Code section 85B.6. The apportionment of the hearing loss attributable to John Deere employment was made on the basis of the language contained in the first section of Iowa Code section 85B.11 which reads as follows: "An employer is liable...for an occupational hearing loss to which the employment has contributed...."

Therefore, given the finding of a 34.92 percent occupational hearing loss, claimant is entitled under law to 61.11 weeks of compensation which is 34.92 percent of 175 weeks, the maximum number of weeks allowed for occupational hearing loss under Iowa Code section 85B.6.

ORDER

IT IS THEREFORE ORDERED AS FOLLOWS:

1. Defendant shall pay to claimant sixty-one point eleven (61.11) weeks of compensation at the rate of three hundred fifty-two and 50/100 dollars ($352.50) per week from July 18, 1985.

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

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

4. Defendant shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 (formerly Industrial Commissioner Rule 500-4.33).

5. 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 2nd day of April, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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002057

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DOUGLAS J. LINN, Claimant vs. DODGEN INDUSTRIES, Employer, and ST. PAUL FIRE & MARINE, Insurance Carrier, Defendants.	:	FILE NO. 772048 O R D E R N U N C P R O FILED T U N C JAN 15 1987 IOWA INDUSTRIAL COMMISSIONER

An arbitration decision was filed on December 15, 1986.

On page 12, the seventh sentence in the fifth full paragraph, this sentence appears:

> ...There is also ample evidence through Torgerson and Renner that Arkansas is a low employment area and that there are several jobs there for a person with the claimant's work history and restrictions paying up to $9.00 per hour.

This sentence is amended and corrected to read as follows:

There is ample evidence through Torgerson and Renner that Arkansas is a low unemployment area and that there are several jobs there for a person with the claimant's work history and restrictions paying up to $9.00 per hour.

The decision filed on December 15, 1986 remains the same in all other respects.

Signed and filed this 13th day of January, 1987.

Walter R. McManus Jr.

WALTER R. McMANUS, JR.
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DANIEL J. LORING, Claimant, vs. JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY, Employer, Self-Insured, Defendant.	:	FILE NO. 802777 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 Daniel J. Loring, claimant, against John Deere Dubuque Works of Deere & Company, employer and self-insured defendant for benefits as a result of an alleged injury which occurred on July 19, 1985. A hearing was held on November 13, 1986 at Dubuque, Iowa and the case was fully submitted at the close of the hearing. The record consists of joint exhibits 1 through 24 and the testimony of Daniel J. Loring (claimant), Patricia J. Loring (claimant's wife), William C. Burgess (supervisor), and Charles D. Birkett (supervisor).

STIPULATIONS

The parties stipulated to the following matters:

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

That the rate of weekly compensation in the event of an award is $443.42.

That the time off work for which the claimant now seeks temporary disability benefits is from July 19, 1985 to December 2, 1985.

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

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 July 19, 1985 which arose out of and in the course of his employment with the employer.

Whether the alleged injury is the cause of any temporary disability during a period of recovery.

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

Whether the claimant is entitled to any weekly compensation for temporary disability benefits during a period of recovery.

Whether the claimant is entitled to weekly compensation for permanent disability benefits.

Whether the claimant is entitled to medical benefits.

SUMMARY OF THE EVIDENCE

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

Claimant is 36 years old and married. He began working for the employer on March 8, 1972. Initially, he poured in the foundry, became a machine operator, and has been a welder for approximately 11 years. He is a high school graduate and attended college for two and one-half years where he studied industrial safety. He was a general's aide in the military service. Prior to this employer he drove a milk semi for two years.

On December 3, 1979, a non-work related ruptured lumbar L-4 disc was excised by Julian Nemmers, M.D., (Exhibit 19). On November 3, 1983, a second non-work related excision of a recurrent rupture of the L-4 disc was excised by Dr. Nemmers as well as an exploration of the L-3 disc space (Ex. 20). Claimant recovered from both of these non-work related surgeries and continued to perform his job as a welder.

Claimant testified that he had back pain again in early 1985. It was not associated with any particular incident. He saw Dr. Nemmers about it but did not lose any work on account of it. The records of Dr. Nemmers show that he saw claimant on April 26, 1985 again for back pain and left leg pain that goes all the way down his left leg. An intravenous enhanced CT scan ordered by Dr. Nemmers showed a new massive L-4 recurrence of an extruded or ruptured disc (Ex. 16, page 2; Ex. 22, pages 10 & 11).

Dr. Nemmers recommended surgery at that time in May of 1985.

Claimant chose not to have surgery performed at that time but required Tylenol 3 quite consistently for relief of pain (Ex. 4, p. 1). Dr. Nemmers told claimant it was bad enough for surgery whenever he wanted it. Claimant elected to try to work with the pain. Dr. Nemmers gave claimant an instruction sheet on pinched nerve syndrome which, in effect, instructed claimant that he could live with it as long as he was not getting weakness in his leg (Ex. 22, pp. 12, 13 & 14).

Claimant continued to perform his job of welding heavy construction equipment which required a lot of movement and bending, stooping, squatting, working on his knees, climbing up and down ladders and crawling into and out of units on which he was working. He handled parts weighing from two pounds to 20 pounds. Shortly before this injury occurred claimant worked a 50 hour week and a 54 hour week earning $900 to $1,000 per week. Claimant testified that just prior to this injury he was fully performing his job to his employer's satisfaction and was making a lot of money.

Friday, July 19, 1985 was the last working day before a two week summer shut down. Claimant testified that on that day some steel bb shot came out of a part which caused him to fall and land on his left buttock. He reported this to his supervisor Bill Burgess; was taken by ambulance to the dispensary and seen by Mervin L. McClenahan, M.D.; then transported by ambulance to Finley Hospital for emergency care by Gerald L. Meester, M.D., (Ex. 17). X-rays showed narrowing of the L4-5 disc. Dr. Meester diagnosed massive nerve pressure and arranged for a CT scan on Monday, July 22, 1985 and for claimant to see Dr. Nemmers, his associate, on Tuesday, July 23, 1985. Dr. Meester's recorded note for July 19, 1985 reads as follows:

> This is a 35 year old white male with a long history of back pain. The patient has had 2 previous surgeries by Dr. Nemmers. He is coming in Tuesday to discuss repeat surgery. He has had a CT scan in May which showed a reherniation for the second time of L4-5. The patient has been seen by Dr. Lehman and I do not know the results of that consultation, but Dr. Nemmers had been planning, I believe, a re-excision of herniated disc material and an L4-5 fusion. At that time, however, there was a bulging disc at L4-5. It is at this point that the patient was out working today and slipped on some shot on the floor and both feet went out from under him. He landed on the left buttock and hit the ground pretty hard. He got up and walked about 10' and then had pretty severe pain and an ambulance was called. Prior to this the patient had been taking multiple doses of codeine per day trying to keep the pain under control so he could

keep working until shut down.
(Ex. 16, p. 1)

Claimant was not hospitalized but rather was examined and released.

E. J. Hannon, M.D., a radiologist, reported that the CT scan done on Monday, July 22, 1985, was unchanged from the earlier one done on April 29, 1985. Dr. Hannon reported as follows: "IMPRESSION: Unchanged lumbar CT. There is no improvement or worsening in the large left L4-5 HNP which is extruded downwards when compared to the April, 1985, study." (Ex. 5, p. 1)

Dr. Nemmers reported to Dr. McClenahan that the CT scan was reported as showing no change in the interval between April, 1985 and July, 1985 (Ex. 4, p. 1).

Dr. Nemmers testified that in his opinion there was no significant change in claimant's lumbar area and CT scans between April of 1985 and July of 1985 (Ex. 22, p. 18). More specifically, Dr. Nemmers testified as follows:

> Q. Were you able to determine whether the history of a fall that the patient had on July 19, 1985 worsened or made his lumbar back problem worse than before the accident?
>
> A. Well, I believe that he had more pain following the accident and more muscle spasm, limitation of motion in his back, but as far as the CAT scan was concerned, it was basically an unchanged CAT scan. So in my opinion, he still had the same problem that he had before but he was hurting worse.
> (Ex. 22, p. 18)

Dr. Nemmers said in the letter to Dr. McClenahan on August 27, 1985:

> In Answer to the questions in your letter of August 21, 1985, it is my opinion that the fall did not cause Mr. Loring's herniated disc. It is further my opinion that the fall did not aggravate the objective clinical evidence of ruptured disc and it is the radiologist's opinion that the fall did not aggravate the condition of the herniated disc as viewed on the CT scan. Mr. Loring had more pain after the fall, but there is no way that I can measure a degree of pain except by objective measurements.
> (Ex. 4, p. 1)

In his deposition Dr. Nemmers testified:

Q. In your medical judgment, was his condition such that he would have been required to have surgery in his lifetime irregardless of the July 19, 1985 fall at the John Deere Dubuque Works?

A. In all probability I believe he would have had to have surgery. I can't give you 100 percent. In probability I think he would have had to have surgery, but I can't be positive.

Q. But in medical probability, you would say that's true?

A. Yes, sir.
(Ex. 22, p. 26)

Dr. Nemmers than performed surgery for the third time for excision of the L4 lumbar disc on July 29, 1985 (Ex. 21; Ex. 22, pp. 18 & 19). Dr. Nemmers testified in his opinion the cause of the claimant's recurrent L-4 disc problem was wear and tear (Ex. 22, p. 21). A certain amount of recurrent disc problems are statistically predictable (Ex. 22, pp. 19 & 20). Claimant was released fully to go back to work on December 2, 1985 (Ex. 22, p. 21).

In his office notes on October 7, 1986, Dr. Nemmers expressed his opinion on disability in the following words:

It is my opinion that he has a 20% impairment of the whole body as a result of three lumbar disc excisions and persistent pain with heavy work. He is doing his regular work prior to lay-off and I suspect he can continue in same. I reviewed his x-rays and he does have quite marked narrowing of L4 and L5 disc spaces and he has retrospondylolisthesis of L3 on L4 and L4 on L5. It is my opinion he has a 20% whole body disability as a result of the three operated herniated discs at L4, degeneration of the L3 and L5 disc spaces, persistent pain associated with lifting. How much of this disability is allotted to which surgery at this point is up to his attorney and his employer.
(Ex. 16, p. 3).

In his deposition Dr. Nemmers said claimant had an overall impairment of 20 to 25 percent of the body as a whole due to his back. He further indicated that the increase in the impairment from the second to the third surgery was estimated to be five percent to 10 percent (Ex. 22, pp. 22, 23 & 29). But he also gave contradictory testimony in his deposition as follows:

Q. Did the fall which increased his pain, Doctor, increase his medical disability that you

found after the surgery?

A. I don't believe it would because he had a third operation done, and he did have a ruptured disc before the fall and he had one afterwards and he had to have surgery, so I don't believe it would have increased the disability.
(Ex. 22, pp. 26 & 27).

William C. Burgess testified that he was claimant's supervisor from June 1, 1985 to the shut down on July 20, 1985, as a replacement for the claimant's regular supervisor, Charles D. Birkett. Claimant told Burgess in early July that he was going to have his back checked and that he would let him know on July 23, 1985 whether or not he was going to have surgery. As a result of this conversation Burgess had another employee, Gary Bainbridge, train with the claimant to do his job in the event of the claimant's absence. This was how it was done at the time of the claimant's 1983 surgery. On July 19, 1985, an employee by the name of Chaffee reported to Burgess that claimant had a fall. Chaffee did not see the fall but saw claimant on the floor. Exhibit 23 is the record which Burgess made at the time of the incident. Burgess said that as far as he observed claimant performed his job without difficulty up until the time of the fall. Claimant pointed out an inconsistency in the note which Burgess made. The first part of the note said that claimant bumped his elbow, slipped and fell. The second part of the note said that claimant fell on some shot. Burgess also conceded that the numeral three in the number 23 had been written over on the note.

Charles D. Birkett testified he was the claimant's regular supervisor but was temporarily absent from July 1, 1985 to July 19, 1985 because he was working in another department. Birkett stated that claimant told him sometime in May of 1985 that he may have back surgery and that Birkett would have to break someone else in if that happened. Birkett verified that claimant had won a safety award for recommending the elimination of the shot problem that caused the claimant's fall before the fall actually occurred, but sometimes shot still came through in the parts. Since claimant returned to work in December of 1985, he has performed his old job full time without any limitations or weight restrictions. The witness said claimant did not complain of pain to him prior to the fall but he may have had some because he welded from the floor rather than get up on the fixtures on his hands and knees. Another employee reported to Birkett that claimant was high on pain pills but Birkett did not observe him do anything reckless. Claimant testified in rebuttal that he did this one welding job standing up because he was tall and had a long reach and it was more convenient for him to do it this way. It was not because of pain.

Claimant testified that he was training another person to do his job because it was just common practice to have someone else who can do your job if you have to be gone for eight hours for any reason. Claimant granted he could have made the request for a trainee but he denied that it was so that he could have surgery. Shut down was on Friday and he and his wife planned to leave on vacation on Sunday to go out west with no particular destination in mind other than maybe Colorado or Wyoming. He denied that he planned to have surgery during shut down or otherwise. He did not have surgery scheduled during shut down. Dr. Nemmers confirmed that there was no arrangement for surgery during shut down or otherwise (Ex. 22, pp. 16 & 31).

Claimant testified he could hardly get out of bed the day after the fall. There was tingling and numbness down his left leg into his toes. He denied any leg symptoms prior to the fall but Dr. Nemmers' office notes of April 26, 1985 reported pain all the way down his left leg (Ex. 16, p. 2). Claimant replied that his earlier leg pain would come and go. Claimant testified that Dr. Nemmers said to let him know if the claimant had leg symptoms. Dr. Nemmers testified that claimant did not have the leg weakness that he was talking about either before or after the fall on July 19, 1985 (Ex. 22, pp. 27 & 28).

Claimant testified that after the third surgery he returned to his old job and has performed it satisfactorily but he has to be more careful about what he does and how he does it. Claimant denied that he told Burgess that he would call him on July 23, 1985 to let him know if he was going to have surgery. Claimant did not think that anyone witnessed his fall but someone saw him lying on the floor afterwards.

Claimant conceded that he purchased a medical insurance and income disability insurance policy from Combined Insurance Company about a month or so before his surgery and dropped it again shortly after the surgery. Initially, the claimant's claim for benefits from this policy was denied (Ex. 1). However, claimant testified that as a result of a letter (Ex. 1), he did collect $500 for hospitalization and disability benefits. Exhibit 1 is a letter from Dr. Nemmers to Combined Insurance Company. However, Dr. Nemmers testified that this letter was not written by him but was written by his secretary at the request of the claimant. She wrote it and she signed it. The doctor said that he disagreed with the portion of the letter that said the claimant's symptoms were in remission prior to the fall. He did agree with the part of the letter that said the fall exacerbated his symptoms and prompted him to proceed with the surgery (Ex. 22, p. 30).

Patricia Jean Loring, wife of claimant, testified that claimant did not have any surgery scheduled. On the contrary, they were planning on going on vacation during shut down. She

had requested vacation time from her employer. They planned to go out west someplace but did not have any particular place in mind. She was in the emergency room with claimant on July 19, 1985 when Dr. Meester was present and there was no talk about surgery being scheduled on Tuesday, July 23, 1985. She testified that claimant had numbness in his legs and toes that he did not have before the fall. She admitted claimant took out a policy of insurance from Combined Insurance Company about a month before the injury and cancelled it a short time later because he no longer wanted the insurance.

Claimant obtained a consulting x-ray opinion from Michael T. Nelson, M.D., a radiologist, on November 27, 1985 for the CT scan that was taken on April 29, 1985 and the CT scan that was taken on July 22, 1985. Dr. Nelson found that the second x-ray was basically unchanged except there was more concavity to the bulging disc. He said these changes are quite subtle but may be indicative of more pressure on the subarachnoid space (Ex. 2).

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 July 19, 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).

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 19, 1985 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

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

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson 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). See also Barz v. Oler, 257 Iowa

508, 133 N.W.2d 704 (1965); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934).

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.

Claimant did sustain the burden of proof by a preponderance of the evidence that he sustained an injury on July 19, 1985 that arose out of and in the course of his employment with the employer. He testified that he fell on some steel bb shot and landed on his left buttock. Even though no one witnessed the actual fall Chaffee reported to Burgess that he found claimant on the floor. Burgess sent claimant to the dispensary by ambulance. Dr. McClenahan sent claimant to Finley Hospital by ambulance where he was examined by Dr. Meester. Dr. Meester reported claimant was having pain and diagnosed massive nerve pressure after the x-rays showed a narrowed L-4, L-5 disc. Dr. Nemmers testified that claimant did suffer more pain and was hurting worse after the fall than before the fall (Ex. 22, pp. 18, 22 & 26).

Claimant did not sustain the burden of proof by a preponderance of the evidence that the fall of July 19, 1985 caused the surgery performed on July 29, 1985 or any disability resulting from either the fall or the surgery. Nor did claimant present any evidence claiming medical expenses or any evidence of disability from the time of the fall on July 19, 1985 until the surgery on July 29, 1985.

It was established that claimant had two prior surgeries and that there was a new massive recurrence at the same L-4 disc space on April 26, 1985 which was not work related. This was the claimant's testimony and this was also Dr. Nemmers' testimony. Dr. Nemmers recommended surgery at the time of the April 26, 1985 examination and claimant declined to do it at that time (Ex. 4, p. 1; Ex. 22, pp. 12, 13 & 14). Even though claimant continued to do strenuous work and worked overtime and made a great deal of money, Dr. Meester indicated he was taking multiple doses of Codeine to keep the pain under control to keep working until shut down (Ex. 16, p. 1). Dr. Hannon, the radiologist, reported that the CT scan on July 22, 1985 was unchanged from the CT scan on April 29, 1985. There was no improvement or worsening (Ex. 5, pp. 1, 2 & 3). Dr. Nemmers reported the same information to Dr. McClenahan (Ex. 4, p. 1). Dr. Nemmers reconfirmed this information in his deposition testimony. He said claimant had the same problem in his opinion but he was hurting worse (Ex. 22, p. 18). Dr. Nemmers told Dr. McClenahan that it was his opinion that the fall did not cause the herniated disc and did not aggravate the objective clinical evidence of the ruptured disc (Ex. 4, p. 1).

Dr. Nemmers stated that it was his medical opinion that claimant probably would have been required to have the third herniated disc surgery irrespective of the fall on July 19, 1985 (Ex. 22, p. 26). He felt claimant had a wear and tear problem (Ex. 22, p. 21) and that a certain amount of recurrent disc problems are statistically predictable (Ex. 22, pp. 19 & 20).

In this case there is basically only one medical expert and that is Dr. Nemmers who has been the claimant's treating physician since 1979 up until the present time. Dr. Meester only examined claimant once at the emergency room at Finley Hospital on July 19, 1985. There is no opposing or evaluating physician in this case. Dr. Nelson, a radiologist, gave a slightly different report than Dr. Hannon, another radiologist (Ex. 2 & 5). However, Dr. Nelson's report did not establish that the fall of July 19, 1985 caused a change in claimant's preexisting back condition. Dr. Nelson appears to be speculating rather than making a definitive finding by indicating only that there may be subtle changes of increased concavity of the bulge between the two CT scan dates. But Dr. Nelson himself states the later scan is basically unchanged from the earlier scan (Ex. 2).

Dr. Nemmers' letter to the Combined Insurance Company cannot be used to support the claimant's workers' compensation claim. First, the letter was not written and signed by the doctor but rather it was written and signed by the doctor's secretary at the request of the claimant (Ex. 22, p. 30). Secondly, Dr. Nemmers said he did not agree with the portion of the letter that said the claimant's symptoms of a ruptured disc were in remission at the time of the injury. He did agree with the portion that said the injury of July 19, 1985 exacerbated his symptoms and prompted claimant to proceed with the sugerical excision of the ruptured disc (Ex. 1; Ex. 22, p. 30).

The clear weight of the evidence in this case is that claimant suffered from recurrent disc problems at the level of L-4 in his lumbar spine. From the evidence presented, remedial surgery was almost inevitable. Claimant denied he had already scheduled surgery during the shut down on July 23, 1985. Dr. Nemmers corroborated claimant on this point by testifying that surgery was not scheduled during shut down or otherwise (Ex. 22, pp. 16 & 31).

There is, however, evidence that the claimant may well have been contemplating surgery at or near the time of the fall on July 19, 1985. Both Burgess and Birkett testified that a trainee was being trained the week before shut down because claimant might be off work for back surgery. In addition, claimant purchased a medical and income disability insurance policy from Combined Insurance Company approximately one month before the surgery and discontinued it shortly after the surgery.

From the foregoing evidence it is determined that claimant did not sustain the burden of proof by a preponderance of the evidence that the fall at work on July 19, 1985 either caused, aggravated, accelerated, worsened or lit up his already preexisting recurrent extruded and herniated L-4 disc to cause the surgery on July 29, 1985. On the contrary, the weight of the evidence is that the third L-4 disc surgery was inevitable if not almost imminent as a result of non-work related factors. Claimant could have chosen to have the surgery any time. He could have had it before July 29, 1985 or he could have had it after July 29, 1985. As it happened, he chose to have it on that date due to the increased pain he was suffering shortly after the fall. Dr. Nemmers testified that the claimant did not have the kind of leg weakness after the fall that would have made surgery imperative (Ex. 22, pp. 27 & 28).

Furthermore, the evidence is in conflict as to whether there is any disability from this third surgery or from the fall. At one point Dr. Nemmers stated claimant has an overall 20 percent impairment of the body as a whole due to his total back condition and that five to 10 percent of that is attributable to the third surgery (Ex. 22, pp. 22, 23 & 29). However, in his office note of October 7, 1986, Dr. Nemmers said that how much disability is due to which surgery at that point was up to his attorney and his employer (Ex. 16, p. 3). Also, in his deposition testimony on November 4, 1986, Dr. Nemmers said that the fall, which increased his pain, did not increase his medical disability because he had a third surgery, because he had a ruptured disc before the fall and he had one after the fall, and he had to have the surgery so he did not believe it would have increased the disability (Ex. 22, p. 26 & 27).

Consequently, claimant has not proven by a preponderance of the evidence that the injury of July 19, 1985 caused the surgery on July 29, 1985 or that either the fall or the surgery caused any temporary or permanent disability.

No evidence was presented to support a claim for any medical expenses or disability from the date of the fall on July 19, 1985 to the date of the surgery on July 29, 1985. Therefore, no finding is in order. A handwritten noted dated August 7, 1985 at the bottom of exhibit 16 indicated claimant was told that the company would go along with workers' compensation up to July 28, 1985 but that the employer did not feel the surgery was due to the accident. Therefore, any medical or disability benefits for this period of time appear not to be in dispute and may have already been paid.

FINDINGS OF FACT

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

That claimant had two prior surgeries for excision of an L-4 disc.

That on April 29, 1985, claimant's doctor diagnosed a third recurrent massive extrusion and herniation of the L-4 disc and recommended surgery at that time.

That the extrusion and herniation discovered on April 29, 1985 were not work related.

That claimant chose not to have surgery at that time but instead took multiple doses of Codeine in order to continue to do his job.

That claimant demonstrated he may have been planning on having surgery in the near future by training a replacement at work and by the purchase of a medical insurance and income disability insurance policy a short time before the third surgery.

That on July 19, 1985, claimant fell on some steel bb shot at work and suffered increased pain and increased symptoms of his preexisting recurrent L-4 herniated disc.

That this fall and the ensuing pain prompted claimant to have the surgery which his doctor had recommended earlier in April of 1985.

That the surgery was performed on July 29, 1985.

That a CT scan after the fall in July showed no change in his bulging L-4 recurrent herniated disc from the CT scan taken in April before the fall.

That claimant's doctor found no change in his basic recurrent L-4 disc herniation before or after the fall.

That his doctor said the fall did not cause or aggravate his preexisting herniated disc other than to increase his pain and his subjective symptoms of it.

That claimant's doctor testified that it was medically probable that claimant would have to have a third surgery irrespective of the fall on July 19, 1985.

Tht claimant's doctor gave contradictory evidence of whether he sustained any additional impairment as a result of the third surgery.

That no claim is presented for medical benefits or disability benefits from the date of the fall on July 19, 1985 to the date of the surgery on July 29, 1985.

CONCLUSIONS OF LAW

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

That claimant did sustain an injury that arose out of and in the course of his employment when he slipped and fell on some steel bb shot at work on July 19, 1985 and fell on his left buttock.

That the fall was the cause of increased pain and increased subjective symptoms of his preexisting recurrent L-4 herniated disc.

That the injury did not cause the surgery which was performed on July 29, 1985.

That the injury was not the cause of any temporary or permanent disability either as a result of the fall or as a result of the third surgery.

That claimant is not entitled to any temporary or permanent disability benefits.

ORDER

THEREFORE, IT IS ORDERED:

That no amounts are due to the claimant from the defendant.

That each party is to pay their own respective costs of this action except the defendant is to pay for the attendance of the certified shorthand reporter at the hearing pursuant to Division of Industrial Services Rule 343-4.33.

That 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 20TH day of May, 1987.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

002073

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002074

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BONNIE L. LOTERBAUER, Claimant, vs. CON AGRA, INC./ARMOUR FOOD COMPANY, Employer, and THE TRAVELERS, Insurance Carrier, Defendants.	:	File No. 780519 A R B I T R A T I O N D E C I S I O N FILED FEB 16 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Bonnie L. Loterbauer, against her employer, Con Agra, Inc./Armour Food Company, and its insurance carrier, The Travelers, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained October 27, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner in Mason City, Iowa, on January 22, 1987. But for briefs, the record was considered fully submitted at close of hearing.

The record in this proceeding consists of the testimony of claimant, of Richard Rauzi, and of Richard K. Choate, as well as of joint exhibits 1 through 37. Joint exhibit 1 is progress notes of Dr. Miller. Joint 2 is a radiographic report of July 11, 1975. Joint exhibit 3 is a report of Dr. Miller of August 4, 1975. Joint exhibit 4 is a hospital admission and discharge summary for August 1975. Joint exhibit 5 is a report of Dr. Miller of August 22, 1975. Joint exhibit 6 is notes of Dr. Harlan with progress notes of Dr. Wolbrink from January 1984 to November 1985. Joint exhibit 7 is a pain drawing of January 3, 1985. Joint exhibit 8 is a report of Dr. Wolbrink of May 7, 1985. Joint exhibit 9 is report of Dr. Wolbrink of June 10, 1985. Joint exhibit 10 is progress notes of Dr. Hachfeld of June 13, 1985. Joint exhibit 11 is otherwise unidentified medical notes of July 3, 1985. Joint exhibit 12 is a report of Dr. McKenna to Dr. Wolbrink of July 11, 1985. Joint exhibit 13

is a history and physical report of Dr. Blessman of July 29, 1985. Joint exhibits 14 and 15 are discharge summaries of Dr. Blessman dated July 29, 1985 and July 30, 1985, respectively. Joint exhibits 16 and 17 are reports of Dr. Wolbrink of August 8, 1985 and September 18, 1985, respectively. Joint exhibit 18 is a report of Dr. McKenna of November 14, 1985. Joint exhibit 19 is a report of Dr. McCoy of January 3, 1986. Joint exhibit 20 is a report of Rehabilitation Education & Services Branch, State of Iowa, of February 18, 1986. Joint exhibit 21 is a letter from Joseph R. Lapointe to Dr. McCoy of March 28, 1986. Joint exhibit 22 is a report of Dr. McCoy of April 14, 1986. Joint exhibit 23 is progress report #14 of Maggie Covey, R.N., of April 29, 1986. Joint exhibit 24 is a report of Dr. Wolbrink of May 23, 1986 with attached progress notes. Joint exhibit 25 is a closure report of Maggie Covey of May 30, 1985. Joint exhibit 26 is progress notes of Dr. Wolbrink of July 23, 1986. Joint exhibit 27 is a report from Dr. Groff of August 18, 1986. Joint exhibit 28 is progress notes from the Manly Clinic from August 11, 1981 through March 7, 1986. Joint exhibit 29 is a radiographic report of August 17, 1981. Joint exhibit 30 is a radiographic report of February 21, 1982. Joint exhibit 31 is radiographic report of March 29, 1983. Joint exhibit 32 is a Medical Occupational Evaluation report of December 2, 1986. Joint exhibits 33 and 34 duplicate exhibit 23 and exhibit 25. Joint exhibit 35 is the deposition of of claimant. Joint exhibit 36 is a report of Richard Rauzi of April 10, 1986. Joint exhibit 37 is vocational rehabilitation file notes from the Vocational Rehabilitation Center from October 8, 1985 through April 4, 1986.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant's rate of weekly compensation is $172.54, and that she was entitled to and was paid healing period benefits from October 27, 1984 through November 26, 1985 with any permanent partial disability to commence on November 27, 1985. They further stipulated that claimant received an injury which arose out of and in the course of her employment, and that claimant is not an odd-lot employee. Claimant has been paid 35 weeks of permanent partial disability benefits representing a permanent partial disablity of seven percent of the body as a whole. The issues remaining for resolution are:

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

2) Whether claimant is entitled to permanent partial disability benefits.

REVIEW OF THE EVIDENCE

Fifty year old claimant gave a work history as a bartender, a nurse's aide, and of factory assembler before beginning work at Con Agra, Inc./Armour Food Co. within one year of her October 27, 1984 injury date. Claimant earned approximately $274 per week at Con Agra. Claimant worked in sausage pepperoni. Her chief job was to lift pepperoni racks containing seven or eight sticks of pepperoni each, approximately 36 inches long, and place them on a scale until 125 pounds of pepperoni were on the scale. Claimant stated that approximately five or six pepperoni racks are needed to reach that weight. Apparently, the pepperonis are then removed individually from the scale and skinned.

Claimant initially reported that on her injury date she was lifting boxes when she felt a sharp pain in her low back which increased in severity throughout the day such that she saw A. J. Wolbrink, M.D. after leaving work. Richard K. Choate, division superintendent at the Mason City Armour Foods plant, reported that time cards kept for employees reflect work done each day. Time cards reflect that on October 27, 1984, claimant was packing Christmas boxes with two and one-half pound pieces of meat. An employee would remove a two and one-half pound piece from a vat to the packing station on a tractor and there placed in the gift box. The gift box was then folded, labeled and placed in a twelve unit master box, which master box was then slid and lifted from the table to pallet level. Pallet level is approximately eight inches to forty-eight inches from the floor with each master box being approximately twelve inches high. Choate opined that the master boxes weighed slightly more than thirty pounds. Claimant stated that her injury occurred while lifting boxes weighing approximately 50 pounds.

Claimant also gave varying histories of her injury to her physicians, apparently reporting to Dr. Wolbrink on November 5, 1984 that she developed sudden pain in her back on October 27, 1984 while lifting boxes which weighed about 25 pounds at work. Dr. Wolbrink's note further indicates that that incident occurred at approximately 1:00 or 2:00 in the afternoon, but that claimant continued to work until her shift ended at about 3:30 and had worked regularly since that date, but on October 31, while lifting the same boxes developed a pain in her neck which had progressively worsened. Claimant told Wolbrink that she had no previous problems with her back. Claimant apparently reported to James Blessman, M.D., when examined on July 29, 1985 that she developed low back pain from lifting 250 pound groups of sausage. Claimant also reported to Blessman that there was no specific one time injury. Claimant's medical history with Dr. McCoy of January 3, 1986 is that she injured her back while lifting about 100 pounds of meat over her head to put on a scale. The doctor's note is that [she related] she didn't have immediate pain but later in the day had severe pain in her low back and in her dorsal spine. At hearing, claimant denied having ever lifted 250 pounds at once. She stated that she started hurting while

working on the pepperoni racks but ignored it and went to the boxes where she told a coworker she was hurting.

Claimant related that she was injured while lifting a patient at a nursing home approximately fifteen years ago. She made a claim for and received workers' compensation benefits at that time. Claimant agreed that she had had back pain at other times, but stated she had not missed work and had not been restricted in her activities on account of these injuries. She stated that she told Dr. Wolbrink that she had had no further back pain because she has just forgotten about it. She also could not remember reporting back complaints to her regular Manley, Iowa, clinic physicians.

Claimant explained that she had denied prior back problems when asked about those in her deposition because the question was asked very late in the deposition and she was in such pain that she forgot her prior complaints and only remembered them after the deposition was completed. Claimant's deposition commenced at 2:05 on August 8, 1986 and ended at 3:02 on that date. Review of the deposition reflects that claimant was asked questions concerning prior back problems and prior work injuries throughout the deposition and that she consistently denied any such problems.

On January 3, 1986, Robert E. McCoy, M.D., examined claimant. She then denied having had prior back problems. Dr. McCoy reminded her of her low back pain in July 1975. Claimant did not know whether she had ever told Dr. Wolbrink of her prior low back problems once Dr. McCoy "reminded her of them."

Records of Ray F. Miller, M.D., concerning claimant's 1975 injury report a history of previous low back injury two years earlier which claimant reported took four months to improve. Claimant did not remember that history. Neither did she remember being hospitalized on August 18, 1975 and checking herself out of the hospital against medical advice on August 19, 1975 because of a dispute with her compensation carrier concerning the origin of her low back pain.

Physical examination on July 11, 1975 revealed fairly good back motion with pain on full extension and lateral flexion to either side. Straight leg raising was normal as were hip, knee and ankle motion. Sensation, strength and circulation were intact in both legs. Claimant had a mild thoracic kyphosis and considerable tenderness to palpation over the thoracic and lumbar spine. She had no significant sciatic nerve nor notch tenderness. X-rays of the lumbosacral spine showed a mild narrowing of the L3-4 disc space with mild vertebral margin lipping and a minimal spina bifida occulta at S1. Dr. Miller's impression then was that claimant had a chronic low back strain with no evidence of a ruptured disc or other significant back

ailment. He characterized claimant's prognosis as somewhat guarded in that claimant believed she was unable to return to work.

Claimant also saw Helene K. Graff, D.C., in 1975 for dorsal lumbar pain.

Claimant has a history of significant depressive symptoms. Prior to her work, the depressive symptoms had related primarily to problems claimant had with her three sons. She stated that her preinjury depression had never interfered with her work and that her problems with her son had not affected her daily living; she stated she now worries a lot about paying her bills and being able to work again. Claimant agreed that pain clinic treatment had been recommended to her and stated that she was unwilling to undergo such treatment because she doesn't like it. She apparently stayed one day in the pain center in Des Moines and then checked herself out of the program. Claimant is currently not taking antidepressant medication. She has been treated with antidepressants in the past and was treated with them prior to her injury. She could not remember such treatment, however.

Claimant denied that any physician had ever discussed either kyphosis or lordosis as significant congenital defects which were primary factors in her low back pain.

A Manly clinic note of August 14, 1981 states that claimant had long standing complaints of numbness in the left arm and low back pain increasing in severity. A September 29, 1981 note of the clinic states claimant had a history of back trouble, quiet at the present. On January 25, 1982, claimant had discomfort around her midback on both sides with a probable urinary infection with some cystitis. Claimant was also reported with low back pain on February 8, 1982 with her examining doctor believing that vaginitis was the main cause of her symptoms. Clinic notes from December 14, 1982 through October 3, 1983 indicate that claimant was having serious difficulties with legal problems with one son and with her stepmother and was treated for depression and anxiety.

Dr. Wolbrink treated claimant for acute tunnel syndrome secondary to tendonitis in her hands, work-related, from April 11, 1984 through June 13, 1984. When Dr. Wolbrink saw claimant on November 5, 1984, initially following her work injury, he reported that her pain was predominantly in the paraspinal muscles of the lumbar spine and the cervical spine but without specific radiation into the arms or legs. On physical examination, claimant had somewhat diffused tenderness, especially in the left trapezius. Left bending and left rotation increased pain in the cervical spine. Claimant was limited about Grade II in all directions of motion. Claimant had tenderness diffusely

through the lumbar spine and only fair bending to forward flexion or sideways. She had fairly good extension. Reflexes and strengh were normal in the lower extremities with straight leg raising negative, both sitting and supine. X-rays of the cervical spine showed slight narrowing. X-rays of the lumbar spine showed some narrowing of the L5 disc, but were otherwise normal. T. C. Mead, M.D., an associate of Dr. Wolbrink, saw claimant on January 2, 1985. Low back examination showed quite a large amount of lumbar lordosis present. Claimant had tenderness along the spinus processes in the thoracolumbar and lumbosacral junction. Straight leg raising sitting was to 90 degrees against resistance without pain. Supine straight leg raising caused low back pain bilaterally but with no radicular symptoms. Claimant appeared to have an anxiety component in her perception of her disease and was very weepy and nervous. On January 4, 1985, Dr. Wolbrink noted that claimant had had an acute flareup as noted by Dr. Mead and that he was still not able to really find an incident which caused the increase, but it seemed to be more of a gradual thing. On February 11, 1985, Wolbrink stated that claimant seemed to be very fragile and subject to recurrent episodes. He said, "This may be just her kyphosis, small frame and so forth....She may have an underlying form of 'fibrositis.'" After examining claimant on February 15, 1985, R. B. Trimble, M.D., stated the following:

> Although I cannot be absolutely positive she doesn't have a small midline disc protrusion or other soft tissue injury, the discomfort and tenderness are clearly disproportionate to objective findings. I think this is probably more than just fibrositis, and probably is a full blown depression. Discussed this with her, and I was really quite flat in stating I thought this was depression....although there is a small possibility that some of the discomfort was on an organic basis, but the symptoms and findings were far disproportionate to any imaginable objective lesion. I emphasized the medical model of depression and pointed out that if this were depression she'd respond to medication by definitely feeling better. I encouraged the idea that she definitely did want to go back to work and that the depression was probably more treatable than a serious arthritis.

On February 19, 1985, Dr. Trimble prescribed antidepressant medication.

On March 6, 1985, Dr. Wolbrink stated that he thought the problem was more kyphosis and lordosis and not a significant disc. On March 8, 1985, Dr. Trimble indicated that claimant was clearly depressed and under a lot of personal stress. On June 10, 1985, Dr. Wolbrink stated that claimant had come in early

because of increasing problems and had had considerable significant pain since June 5. Claimant was unaware of any change in activities, although she had noticed she was quite weepy as well during that time. Pain was in the trapezius muscles as well as in the lower back.

On June 10, 1985, Dr. Wolbrink advised Maggie Covey, a rehabilitation consultant, that pain clinic treatment would probably be advantageous for claimant. On July 17, 1985, Dr. Wolbrink stated that he had advised Ms. Covey that claimant could not handle work at Armour. On September 16, 1985, Dr. Wolbrink stated claimant should avoid lifting, excessive bending, and so forth, and stated that claimant would likely need social security class sedentary work with opportunity to change position from continual sitting or standing. On September 18, 1985, Dr. Wolbrink indicated that claimant had a permanent impairment of seven percent of the whole person due to her back injury and subsequent problems. On November 18, 1985, Dr. Wolbrink stated that claimant still had some apparent discomfort with flexion and extension in the lumbar spine and that this was also related to her significant thoracic kyphosis. On May 23, 1986, he opined that claimant's healing period did not extend beyond November 27, 1985. Dr. Wolbrink's notes through July 1986 are consistent with his other medical notations.

A Dr. Hachfield, a psychiatrist, examined claimant on June 13, 1985. He described claimant as very upset, anxious, angry, and frustrated that she cannot do things she loves to do such as ride a motorcycle, go dancing, and other physical activities which she stated her back pain prevented her from doing. His diagnosis was of a major depression, neurotic type, secondary to stress from change in life style and chronic back pain.

Charles S. McKenna, M.D., examined claimant at the Mayo Clinic on July 11, 1985. He noted that claimant closed her eyes and sighed frequently during the examination. She gave away grossly and made no effort to exert force on muscle testing. She expessed equal indications of pain when her back was being examined, when her pelvic area was being examined, and when her abdomen was palpated. Claimant had no abnormality in her neurological examination, but had a slightly increased lumbar lordosis. Osteoporosis was noted and calcium supplements suggested. Electromyographic examination with nerve conduction studies revealed no radiculopathy. The overall clinic diagnosis was of chronic back pain disorder with central pain amplification and symptomatic gain with minimal osteoarthritis and with osteoporosis. In a letter of November 14, 1985, Dr. McKenna indicated that claimant had no objective evidence of organic back disease and, therefore, psychiatric consultation was indicated for an understanding of the cause, nature, and impact of her back problem.

Robert E. McCoy, M.D., examined claimant on January 3, 1986. He noted that while walking on that date, claimant had tripped on an object and fallen forward with a bruise on her right knee and increased back pain. Examination findings were consistent with those on other examinations with Dr. McCoy noting that claimant had quite prominant dorsal kyphosis and lumbar lordosis and osteoporosis. Dr. McCoy opined that claimant had a chronic structural problem in her back with the dorsal kyphosis and lumbar lordosis which was probably related to a chronic postural problem and slightly to her osteoporosis. He opined both would cause back discomfort and that claimant's prior back episodes in 1975 and 1973 would indicate considerable difficulty with her back through the years. In an April 14, 1986 report, Dr. McCoy stated that he believed claimant was being dishonest with him regarding her failure to recall her prior back condition. He further stated that with her considerable back deformity from the kyphosis and lordosis, it would be expected that she would have a high likelihood of symptomatic back [pain]. Hence, it was very difficult for him to believe that her underlying back condition, which also included the osteoporosis, was aggravated only by her described work condition.

James Blessman, M.D., examined claimant at the Mercy Hospital Pain Clinic on July 29, 1985 and diagnosed chronic myofascial low back strain with mild osteoarthritis and mild osteoporosis and depression in association with chronic pain syndrome. In a discharge summary of July 30, 1985, he noted that after admission to the pain center, claimant had checked herself out of the center on the first evening after deciding on her own that she was not emotionally ready for comprehenive pain management although he opined claimant could be helped by the program.

Joshua Kimelman, M.D., an orthopedist, examined claimant on November 5, 1986. His impression was chronic lumbosacral strain without evidence of neurologic deficit. He opined that claimant had really done quite well as regards her back in that she was currently working and performing work activitiy not requiring bending, twisting, or lifting which activity was appropriate for a five foot, fifty year old woman. He was unwilling to assign a permanency rating.

Claimant testified that she continues to have real sharp pain which shoots down her low back and interferes with her concentration.

Claimant has completed the eleventh grade and has a nurse's aide certification. Both Maggie Covey and Richard Rauzi have advised claimant that she should get her GED. Claimant stated that she attempted to work on the GED but that sitting to study caused her such back pain that she had to quit classes and that she, therefore, now studies at home. Claimant opined that she could not now do nurse's aide or factory work. She is currently

employed as a companion for an elderly lady. Claimant runs errands, talks with the lady, and transports her different places. Claimant receives $5.00 per hour and works approximately twenty hours per week at that job. Claimant also tends bar on Monday nights for a total of nine and one-half hours. She agreed that this involves some lifting and stated that on some Tuesdays she cannot work her regular job on account of pain. Claimant nets approximately $100 per week on those two employments.

Richard Rauzi, who holds a Masters Degree in rehabilitation counseling and works for the Iowa Division of Vocational Rehabilitation in its Mason City branch office, testified that he worked with claimant from November 1985 through May 1986. He reported that claimant was found eligible for vocational rehabilitation assistance as a result of three disabilities. He reported that a low back syndrome limits claimant to positions where she would do no repeated bending, twisting, or lifting, primarily sedentary occupations where she could change positions as needed. Carpal tunnel syndrome restricted claimant to sedentary work involving very minimal movements of her wrists. Major depression restricted claimant from work that involves frequent contacts with the public. He reported that Elworth Karayusuf, M.D., a psychiatrist, evaluated claimant's medical reports from Dr. Wolbrink and Dr. Hachfield and opined claimant was restricted to very simple work involving minimal contacts with fellow workers and supervisors and somewhat simple in nature that did not put emotional stress on her. Claimant also needed a job which required no decision making but rather following instructions from others. Rauzi opined that claimant could not again do nurse's aide or factory work, but stated she could do telemarketing and personal attendant work as she is doing now. He opined that jobs in which claimant could work would pay from $3.35 to $5.00 per hour. He agreed that claimant's bartending activity was inconsistent with Dr. Karayusuf's occupational recommendations for claimant. Mr. Rauzi stated that he heard of claimant's current job through a lead from his own secretary, that claimant enthusiastically pursued that job and that he knew of no other such jobs available. In a report of April 10, 1986, Mr. Rauzi opined that claimant's major depression had been more vocationally limiting to her than her low back syndrome. He further stated that claimant's physical limitations would not enable her to return to manual labor positions.

Claimant testified that Maggie Covey, a rehabilitaton counselor with ConServ Company, advised her of a telemarketing job. Claimant reported she did not pursue that option in that she did not feel that she would like that work. Claimant has not looked for worked other than her present employment.

The balance of the evidence was reviewed and considered in

the disposition of this matter.

APPLICABLE LAW AND ANALYSIS

Our first concern is whether a causal relationship exists between claimant's claimed injury and any permanent partial disability.

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

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

Preponderance of the evidence means greater weight of evidence; that is, the evidence of superior influence or efficacy. Bauer v. Reavell, 219 Iowa 1212, 260 N.W. 39 (1935).

Claimant has not shown a permanent disability resulting from her work injury. Initially, claimant's description of her alleged work injury to her physicians are so varied that it is difficult to ascertain whether a specific work incident actually occurred or, if one did occur, the exact nature of that incident and whether the incident was such that it could have produced

claimant's alleged problems. Further, claimant had had preexisting low back problems which she denied. Claimant apparently never revealed those problems to Dr. Wolbrink, the only physician expressly relating her current problems with her alleged work injury. Without knowledge of claimant's prior condition, Dr. Wolbrink could not properly assess whether claimant's complaints related to her preexisting problems or to the work injury or whether the work injury in some way aggravated the preexisting problems revealed in claimant's preinjury medical records. His opinion as to to causation is suspect for that reason. Furthermore, Dr. Wolbrink referred claimant to Dr. Trimble, an arthritic specialist, because Dr. Wolbrink felt little objective basis for claimant's symptoms existed and that, therefore, evaluation for an arthritic condition was in order. Dr. Trimble opined that claimant's condition resulted from a "full blown depression." He initiated treatment with antidepressant medication and not conventional low back treatment. Dr. McKenna, of the Mayo Clinic, noted, as had Dr. Trimble, that claimant's problems had no apparent organic basis and that, therefore, psychological evaluation was in order. Claimant denied having had serious problems with depression in the past. Numerous medical notations from the Manly Clinic suggests that that characterization is inaccurate, however. Therefore, we accept Dr. McKenna's and Dr. Trimble's opinions that claimant's psychiatric condition plays a significant role in her back pain and that that condition and not her alleged work injury is a basis for her current complaints. Furthermore, in 1975, Dr. Miller had noted that claimant had mild thoracic kyphosis. Dr. Wolbrink again noted claimant's kyphosis when she had an acute flareup in January 1985 and in March 1985 stated that her problem was perhaps her kyphosis and lordosis and not any significant disc. Dr. McCoy opined claimant had a chronic structural problem in her back with a dorsal kyphosis and lumbar lordosis and that given those problems it would be expected she would have a high likelihood of symptomatic back pain. He stated that given those underlying back conditions including claimant's osteoporosis, which was also documented at the Mayo Clinic, he found it very difficult to believe that claimant's back was aggravated only by her described work condition. The above physicians' references to claimant's osteoporosis, mild osteoarthritis, depression, and kyphosis and lordosis further undermine claimant's claim that any current disability relates to her alleged work injury. (We note that Dr. McCoy used the phrase "was aggravated only" by claimant's work condition. While that phrase might suggest that the work could have been a proximate cause of any claimed current permanent disability, we do not believe that the evidence as a whole supports that conclusion.) Dr. Kimelman declined to assign claimant a permanency rating on her back because she was functioning at a fairly high level given her age and height. We note that Dr. Wolbrink described claimant as fragile, and as having a small frame, and as having flareups without specific causation. Those flareups generally occurred at times of increased emotional

stress or increased emotional affect on claimant's part. That fact would further suggest that claimant's mental state together with her structural back problems and her mild osteoarthritis and osteoporosis creates her back complaints. The greater weight of medical evidence does not support claimant's claim of a causal relationship between her alleged permanent back condition and her stated work injury.

Because claimant has not established the necessary causal connection between her work injury and any current disability, we do not reach the issue of benefit entitlement. We note, however, that claimant's own vocational expert testified that he believed claimant's depressive disorder was a greater handicap to her employability than was her back condition. That expert testimony suggests that given claimant's current employment as as companion and a bartender, her industrial disability related to her back condition would be modest.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant had preexisting problems with depression prior to October 27, 1984 and has had problems with depression since that date.

Claimant had treatment for back conditions in 1973 and 1975 and had recurrent back complaints prior to October 27, 1984 which she did not remember at deposition and of which she generally did not inform her physicians.

Claimant gave her physicians varying medical histories concerning her stated work injury.

It is uncertain whether claimant experienced a specific work incident with onset of pain or, if so, the exact nature of any specific work incident or how any such work incident or claimant's normal work conditions might have produced her back complaints.

Claimant has thoracic kyphosis and lumbar lordosis which preexisted October 27, 1984.

Claimant has osteoporosis and mild osteoarthritis.

Claimant's physicians have found little organic basis for her back complaints.

Claimant's back complaints relate to her lumbar lordosis, thoracic kyphosis, osteoporosis, and mild osteoarthritis.

Claimant's back complaints apparently flare up at times with emotional stress or at times when claimant's emotional affect is

high.

Claimant's back complains relate to her depressive disorder.

Claimant was not a credible witness.

Claimant's alleged work injury is not a cause of her stated back complaints.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established that any injury sustained October 27, 1984 is the cause of her claimed permanent disability.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing further from this proceeding.

Claimant and defendants share equally the costs of this proceeding pursuant to Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33.

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

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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002087

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELDON L. LUNDY,	:	
Claimant,	:	File No. 777760
vs.	:	
MID-SEVEN TRANSPORTATION COMPANY,	:	N U N C
Employer,	:	P R O
and	:	T U N C
LIBERTY MUTUAL INSURANCE COMPANY,	:	O R D E R
Insurance Company, Defendants.	:	FILED
	:	JUL 13 1987
	:	IOWA INDUSTRIAL COMMISSIONER

Upon examination of the arbitration decision filed June 23, 1987, it is ascertained that line 6 of the first unnumbered paragraph of the introduction should read:

1984. This matter came on for hearing before the undersigned

It is further ascertained that line two of the 2nd finding of fact should read:

1984.

Signed and filed this 13th day of July, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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002088

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELDON L. LUNDY, Claimant, vs. MID-SEVEN TRANSPORTATION COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Company, Defendants.	:	File No. 777760 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, Eldon L. Lundy, against his employer, Mid-Seven Transportation Company, and its insurance carrier, Liberty Mutual Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained October 16, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner, in Des Moines, Iowa, on March 31, 1987. A first report of injury was filed October 22, 1984. A final report filed October 15, 1985 indicates that claimant was paid 46 weeks of benefits with those benefits ending September 24, 1985.

The record in this proceeding consists of the testimony of claimant, and of David Thomas Sterr, as well as of joint exhibits 1 through 4. Joint exhibit 1 is medical records relative to claimant; Joint exhibit 2 is medical bills relative to claimant; joint exhibit 3 is the deposition of Philip Kohler, M.D.; and joint exhibit 4 is the rate calculation sheet and wage itemization.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant's rate of compensation is $338.96 per week; that the provider of medical bills will testify that those bills were fair and reasonable; that claimant received an injury which

arose out of and in the course of his employment on October 16, 1984; and that a causal relationship exists between that injury and temporary total disability. The issue remaining to be decided is whether claimant is entitled to further temporary total or healing period benefits, as well as the issue of whether claimant is entitled to payment of certain medical costs under section 85.27 as causally connected to his injury and as reasonable, necessary, and authorized medical care.

REVIEW OF THE EVIDENCE

Claimant sustained a ruptured hernia on October 16, 1984 while lifting in the course of his employment as a truck driver. James Caterine, M.D., a general surgeon, performed hernia repair surgery on November 15, 1984. At hearing, claimant testified that he returned to Dr. Caterine approximately a month following the surgery and reported back, groin, and side pain. Claimant reported that Dr. Caterine referred him to Dr. Kohler, Dr. Misol, and Dr. Clemens. Claimant, himself, returned to Dr. Frahm, the company doctor. Dr. Frahm subsequently referred him to Dr. Hoffmann and Dr. Kohler. Claimant intially saw Dr. Kohler in December 1985 and treated with him through March 16, 1987 when claimant was released for work. R. W. Hoffmann, M.D., examined claimant on June 3, 1985 and noted that his right testis was swollen approximately one and one-half times that of the left. His impression was of a possible venus return blockage, that is, surgical constriction of the veins, or possible nerve entrapment. On June 24, 1985, Dr. Hoffmann surgically explored the right inguinal area and found marked scarring of the [spermatic] cord on the inferior surface of the cord down from the internal ring to the pubic bone with vein congestion about the cord. Claimant testified that the Hoffmann surgery relieved his testicle swelling, but did not relieve the pain in his groin, side or back.

J. A. Frahm, M.D., released claimant for work on September 25, 1985. Claimant reported that he called his employer and was told his job was terminated. Claimant agreed that he had had two accidents on November 5 and November 6, 1984, and that he was told these were basis for his termination. He agreed that he had had a ninety day loss of license for being a habitual speed violator. Claimant stated that he applied for jobs with trucking firms throughout the Des Moines area, but denied that his license loss inpacted on his ability to find work. He reported that he never completed applications at firms to which he applied as no jobs were available. Claimant worked subsequently for approximately four hours per week deliverying papers for the Metro Shopper with his grandson. Claimant also attempted to work for Super Valu in the summer of 1986, working from June 20, 1986 to prior to July 26, 1986. Total earnings were $815.94. Claimant testified that he worked only a total of five days, three being during the first week of work and two

being during the second week of work and that he left work on account of pain. Claimant stated that he had no new injury at Super Valu and that while his symptoms temporarily changed while working, his physical complaints remained the same before and after the Super Valu employment. Claimant has a history of angina and asthma and had a myocardial infarction in 1982. He denied that those medical conditions ever affected his ability to work but for six weeks off for "angina." Claimant was able to pass the DOT physicals.

James L. Blessman, M.D., saw claimant in May 1985. In his report of May 21, 1985, Dr. Blessman stated that he felt secondary gain factors significantly contributed to the perpetuation of claimant's right inguinal pain. He stated claimant's wife should ultimately be involved in comprehensive pain management therapy for claimant as claimant was not going to get well without his wife's permission. Claimant testified that he rejected the possibility of pain center therapy as he continued to have swelling in his testicle and, therefore, believed that he had a physical and not a psychological condition.

James Caterine, M.D., reported claimant's external genitalia was normal when claimant's hernia repair surgery was performed on November 15, 1984.

On February 7, 1985, Dr. Frahm diagnosed right epididymtis and possible prostatitis.

Philip H. Kohler, M.D., a board certified urologist, initially saw claimant on February 21, 1985. Claimant then had aching in the right testes and severe right inguinal pain. Examination revealed of very well healed, but very tender, hernia incision.

Sinesio Misol, M.D., an orthopedic surgeon, examined claimant on April 4, 1985. He found pain, numbness, and hypoesthesia extending from claimant's surgical scar down into the front of the thigh. On physical examination, claimant had anesthesia in an area extending from the surgical scar parallel to the right groin flexion crease. He had a positive Tinel sign approximately 3 cms. lateral to the start of the scar. Dr. Misol's diagnosis was of a painful herniorrhaphy scar with hypoesthesia distal to the scar, secondary to ilioinguinal nerve entrapment. Dr. Misol referred claimant to Albert L. Clemens, M.D., a general surgeon. Following physical examination of April 12, 1985, Dr. Clemens opined that claimant could well have nerve entrapment syndrome and suggested that surgical exploration of the area be considered.

Glen D. Hanson, M.D., examined claimant on May 2, 1985. He stated that claimant reported that he had had discomfort in the right scrotum from approximately a month to six weeks following his herniorrhaphy. Claimant then was reporting tenderness and swelling at the epididymis in the right groin and down to the

right testicle without tenderness in the testicle itself. On May 9, 1985, claimant was reporting only tenderness in the internal ring. Dr. Hanson's assessment then was a probable residual epididymitis. On April 22, 1985, J. R. Ritzman, M.D., performed ilioinguinal and iliohypogastric nerve blocks. Claimant developed numbness over the distribution of both blocks, but had no change in the nature or distribution of the pain.

Donald W. Blair, M.D., stated in a medical report of May 8, 1985, that claimant had subjective complaints of discomfort, apparently as a result of nerve entrapment at the hernia repair site. Dr. Blair indicated that general treatment of nerve entrapment would be to allow time to pass with the symptoms gradually diminishing. He reported that claimant could consider a work return with some discomfort tolerated and that his symptoms would likely decrease as he became accustomed to work.

On July 11, 1986, Dr. Kohler opined that claimant had chronic epididymitis with an onset after his November 15, 1984 hernia repair. He performed a right epididymectomy on July 15, 1986. Greenish purulent material was found in the vas during that surgery. Hyunchul Chem, M.D., a pathologist, apparently supported Dr. Kohler's postoperative diagnosis of chronic epididymitis and facitis with epididymal abscess cavities.

In his deposition of November 13, 1986, Dr. Kohler characterized epididymitis as an inflammation of the epididymis, which is located behind and attached to the testicle and connected to the vas. He reported that epididymectomies have a 25 percent failure rate and that continuing pain is a well-known aftereffect of an epididymectomy with additional surgery by way of removal of the testicle itself often required. On January 26, 1987, Dr. Kohler performed a right inguinal orchiectomy on claimant.

At hearing, claimant testified that he has had no pain since his January 1987 orchiectomy and can now do yard work. Claimant was released for work March 16, 1987 and, at hearing time, was on standby for Super Valu. Claimant testified that his wife's Blue Cross/Blue Shield health insurance coverage paid his medical costs for the July 1986 epididymectomy, but that medical bills remained outstanding for the January 1987 surgery.

David Thomas Sterr, a claims adjuster for Liberty Mutual, testified that on March 11, 1987, defendants paid $2,420.34 for claimant's surgery of January 27, 1987, and that defendants have also paid a medical center anesthesiologist bill for $330. He further testified that a medical payment for $705.60 was made on October 15, 1985. Claimant was not paid temporary total or healing period benefits for those time periods during which this medical treatment was rendered. Medical costs in evidence were reviewed and will be further discussed and considered in the law

and analysis below.

In his deposition, Dr. Kohler opined that epidimytis most commonly occurs spontaneously and is often accompanied by urinary tract infections. He further testified that postsurgical and traumatic causation is also possible. If a heavy object is lifted, urine can flow backwards down the vas into the epididymis, thereby creating a sterile inflammation. The doctor opined that claimant's surgical repair was the likely cause of his epididymis and it is unlikely that claimant would have developed the condition without the hernia and surgical repair. Dr. Kohler stated that his first indication that claimant had epididymis occurred in December 1985, approximately eight months after he initially had seen claimant and approximately six months after the Hoffmann exploratory surgery. He reported that medically he did not know why claimant did not have the condition until Dr. Hanson diagnosed it on May 2, 1985 as the condition can occur spontaneously. Dr. Kohler stated that the history of right scrotum pain within a month to six weeks following hernia surgery was not necessarily more consistent for epididymis following surgery and that problems with the testicle after hernia repair most often occur in the immediate postoperative course. Dr. Kohler stated that a six week recovery period could be anticipated from the exploratory surgery Dr. Hoffmann performed in June 1985, and that four months was the general recuperative period following an epididymectomy with five months as definitely a sufficient period. He then stated, however, that claimant had been unable to return to work since he had initially seen claimant in December 1985.

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

APPLICABLE LAW AND ANALYSIS

We consider whether claimant is entitled to temporary total disability or healing period benefits.

Section 85.34(1) provides:

> Healing period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs

first.

Section 85.33(1) provides:

Temporary total and temporary partial disability. 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 in which the employee was engaged at the time of injury, whichever occurs first.

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

The healing period generally terminates at the time the attending physician determines that the employee has recovered as far as possible from the effects of the injury. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60, 65 (Iowa 1981). Stated another way, it is only at the point at which a disability can be determined that the disability award can be made. Until such time, healing benefits are awarded the injured worker. Thomas v. William Knudson & Sons, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984).

Dr. Frahm apparently released claimant for work in August 1985. Claimant's temporary total disability or healing period benefits were terminated after September 24, 1985. Dr. Frahm had diagnosed claimant's right epididymitis February 7, 1985. Claimant's continuing problems ultimately were traced to that condition. The parties agreed by stipulation and Dr. Kohler's testimony supports a finding that the condition and claimant's treatment for it relate to his work injury. Dr. Kohler has opined claimant had been unable to return to work since Dr. Kohler initially treated claimant in December 1985. No evidence was presented suggesting claimant's condition changed significantly from August 1985 to December 1985. Evidence was presented showing claimant had voiced complaints consistent with the ultimate diagnosis of epididymitis from within four to six weeks of his hernia repair. Claimant was unable to continue work for Super Valu undertaken in July 1986 on account of his pain. We find no medical basis for defendants' argument that claimant was not entitled to healing period or temporary total disability

benefits from September 25, 1985 to his March 16, 1987 work release. Likewise, we find the reason for the employer's termination of claimant following his September 1985 work release and attempted work return irrelevant given claimant's continuing medical problems which precluded any finding that claimant had reached either maximum medical recovery or was medically capable of engaging in substantially similar work. Claimant is entitled to temporary total disability or healing period benefits from September 25, 1985 to his March 16, 1987 work release. The issue of any permanent disability, of course, remains for decision.

Section 85.27 provides that the employer shall provide claimant reasonable and necessary medical care for treatment of his work injury. Claimant is entitled to payment of still unpaid medical costs as follows:

Philip Kohler, M.D.	$1,448.00
J. Song Pathologists	220.00
Mercy Hospital Medical Center	2,930.54
Fontanelle Drug	147.00

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant sustained a right inguinal hernia while lifting in the course of his employment as a truck driver on October 16, 1984.

Claimant underwent hernia repair surgery on November 15, 1985.

Within four to six weeks of his surgery claimant voiced complaints of back, groin, and side pain.

Dr. Frahm diagnosed right epididymtis on February 7, 1985.

Claimant had various procedures to overcome his continuing pain through Spring and Summer 1985.

Dr. Frahm released claimant for work in August or September 1985.

Claimant saw Dr. Kohler in December 1985.

Dr. Kohler performed an epididymectomy on July 15, 1986 and an orchiectomy in January 1987.

Claimant was unable to work from the time Dr. Kohler first saw him in December 1985 until Dr. Kohler released claimant to work on March 16, 1987.

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Claimant's condition was not significantly different in December 1985 than on September 24, 1985.

Claimant's medical costs with Dr. Kohler, J. Song Pathologists, Mercy Hospital Medical Center, and Fontanelle Drug are costs for reasonable and necessary treatment of his work injury related condition.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant is entitled to additional healing period benefits from September 25, 1985 to March 16, 1987.

Claimant is entitled to payment of medical costs with Dr. Kohler, J. Song Pathologists, Mercy Medical Center, and Fontanelle Drug as set forth in the above law and analysis.

ORDER

THEREFORE, IT IS ORDERED

Defendants pay claimant additional healing period benefits or temporary total disability benefits at the rate of three hundred thirty-eight and 96/100 dollars ($338.96) per week from September 25, 1985 to March 16, 1987.

Defendants pay claimant medical costs with Dr. Kohler, J. Song Pathologists, Mercy Medical Center, and Fontanelle Drug, 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 23rd day of June, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS RAY LYNCH,	:	
Claimant,	:	File No. 810148
vs.	:	
CHAMPION INTERNATIONAL,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
AETNA CASUALTY,	:	FILED
Insurance Carrier, Defendants.	:	JUN 22 1987
	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Dennis Ray Lynch, against his employer, Champion International, and its insurance carrier, Aetna Casualty, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained July 23, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner in Sioux City, Iowa, on April 30, 1987. A first report of injury was filed April 14, 1987. No benefits have been paid.

The record in this proceeding consists of the testimony of claimant, of Charles Lynch, of Jack Hansel, and of Marilyn Romey, as well as claimant's exhibits A through C, Joint exhibits 1 through 14, and defendants' exhibits 1 through 14. All exhibits are identified in the various exhibit lists filed by the parties at time of hearing and incorporated by reference into this decision. All objections to exhibits are overruled.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant's rate of weekly compensation in the event of an award is $158.34; that medical costs are fair and reasonable; that claimant's healing period or temporary total disability entitlement, if liability is found, would run from September 1, 1984 to January 9, 1985 with any permanency to commence on January 9, 1985. 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 that alleged injury and claimant's claimed disabilities;

3) Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement; and

4) Whether claimant is entitled to payment of his medical costs under section 85.27 as causally connected to a work injury.

REVIEW OF THE EVIDENCE

Claimant is a 37 year old high school graduate who has spent two years in the navy reserve. Claimant has other training in a nine month radio and television repair course. He used that training for four years while working in the audiovisual store, but stated he was unable to find work in the field following the closing of the store. Claimant began work for the employer on November 11, 1976. The employer manufactures various sizes of corrugated containers. Initially, claimant was a utility man. Claimant testified he then worked as an off load corrugater bundling, tying, and stacking orders. Claimant testified this involved lifting of thirty to forty pounds with repetitive stooping and bending. Claimant testified that he is now a taper operator who runs a machine and feeds corrugated boards into the machine. Claimant testified this job involves lifting, bending, stooping, twisting, and standing. He described the job as requiring him to pick up a flat sheet of corrugated material, put it into the machine, and then push it through the front, grab it, fold it, and feed it into the machine. Claimant agreed that he does not handle bulk meat boxes on the taper. He also stated that there is generally a second person available to assist if he needs to lift forty pounds or more. Claimant had an auto accident in 1970 during which he was knocked unconscious briefly. Claimant denied that he had injured his back or neck in that incident or that he had needed to seek further medical treatment for the incident following hospital release. He stated that he had a pre-employment physical with John P. Tiedaman, M.D., in 1977, and that no back or neck problems were found. Claimant stated that he began seeing chiropractors for back pain in approximately 1979. A group health insurance form of December 22, 1981 indicates that claimant slipped on ice at home. On or about April 3, 1980, claimant sustained a work injury in which he strained his back while carrying large bulk meat boxes. I. A. Benson, M.D., subsequently released him for light duty work without heavy lifting or prolonged standing.

Claimant testified that on July 23, 1984, he was bending to pick up twenty to thirty pounds of stored containers from the floor at work and felt a tearing sensation in his back as he got

up. Claimant testified that he reported the injury to his foreman, Jack Hansel, before he left work. He reported that he had back pain and left leg numbness, a sensation he had not previously experienced.

Claimant saw David Felber, M.D., at the Family Practice Clinic. He reported that Gerald McGowan, M.D., the employer's company doctor, is also affiliated with the clinic. Claimant testified that Dr. McGowan subsequently referred him to Alexander Kleider, M.D., apparently a neurosurgeon. F. A. Qalbani, M.D., interpreted a myelogram of October 2, 1984 as having findings compatible with a midline bulging or herniated disc at L4-5, and L5-S1. He interpreted a CT scan of the same date as revealing a likely minimal midline bulge at L4-5 and a midline herniated disc with an extension to the left at L5-S1. On October 4, 1984, Dr. Kleider performed a diskectomy on the left side at both L4-5 and L5-S1. Claimant was subsequently released for work and returned to his preinjury job duties. Dr. Kleider has advised that claimant use caution with bending and lifting and twisting, but reported that claimant was able to perform [his job] quite well. Claimant testified that he is not currently treating for back pain, but he is stiff in the morning and that his back bothers him at the end of the work day. Claimant denied that he continues to ride his motorcycle although he agreed that he did ride it after his surgery. He stated that he has not rode his three wheeler in the last year. Claimant has been off work since a nonwork-related auto accident in February 1987. He agreed that his current absence from work is not related to his work injury. Claimant stated he is now experiencing right leg numbness but no left leg numbness. Claimant stated the right leg numbness occurred after the February 1987 auto accident.

Claimant testified that the employer-provided health insurance paid 80 percent of his medical costs and that he himself was required to pay 20 percent. Marilyn Roning, the employer's accounts payable clerk, testified that she had custody of the group benefit records. She reported that of Dr. Kleider's costs, the insurer had paid 80 percent of $80 and $25 office call statements and $200 of the $210 cost for a myelogram as well as 100 percent of the $2,040 surgical cost. She stated that the insurer then had paid $2,260 of $2,275 and 80 percent of $80. She reported, that of statements from Dr. McGowan, the insurer had paid 100 percent of the $25 cost and 80 percent of the $152 cost, with a total of $146.60 paid. She reported that of Marian Health Center costs totaling $4,430.75, the health insurer had paid $4,029. Medical charges in evidence include a $500 charge with Woodbury Anesthesia Group for anesthesia administered on October 4, 1984, a $2,355 charge with Dr. Kleider indicating costs of $80, $20, $210, and $2,040, all consistent with the services reported by Ms. Roming; a $172 statement from Dr. McGowan; and statements with the Marian Health Center in the

amount of $3,952.75, and the amount of $121.

Charles Lynch, claimant's father, testified that he lives with claimant and was aware of claimant's back complaints prior to July 1984. He recalled that claimant had left hip complaints before the July 1984 incident although he was uncertain when claimant had had those complaints. Claimant's father reported that on July 23, 1984, claimant stated he had back pain and stiffness and that he observed claimant having difficulty walking. Mr. Lynch described his son as more cautious and less active than he was preinjury and stated that claimant can no longer stand on the ladder to clean out the roof gutters.

Jack Hansel, finishing supervisor with the employer for the last fourteen years and claimant's supervisor, testified. He stated that prior to July 1984, claimant had often been on light duty on account of his back complaints and that there were jobs at that time that he wouldn't have placed claimant for that reason. Mr. Hansel stated that claimant's observable work habits had not changed after July 1984 and that claimant has not complained about his job since his postsurgery work return. He reported that claimant is reliable in work attendance and has received the same salary adjustments as other employees following his July 1984 alleged incident. Mr. Hansel stated that a number of better paying jobs in the plant are available to claimant physically now. He reported that there are some jobs which claimant could also do physically but for which he lacks knowledge. Mr. Hansel stated there are twenty to twenty-five job classifications in the plant with pay scale range from $7.50 to $9.00 or $10.00 per hour. Hansel described claimant as having always worked as a taper operator and as primarily feeding boxes through the machine. Hansel stated that the taper operator does not need to twist, turn, bend, stoop or use his back. He stated corrugated boards are fed into the machine at shoulder height. The machine is loaded four times per hour for approximately a five minute duration. Hansel stated that claimant would never lift greater than twenty to twenty-five pounds. Hansel could not remember if claimant missed work before July 23, 1984 as a result of a work injury and could not recall claimant requesting a doctor appointment in July 1984. He stated that he would have filled out the company's injury report in this case and stated that neither form which he was asked to identify was the company's first report of injury form. Hansel described claimant as having been a below average worker whose work standards were verbally discussed with him. He reported that claimant generally was receptive to those discussions and that his work would improve initially following such discussions.

Dean Poss, D.C., and Wallace Wagner, D.C., treated claimant chiropractically for an extended time. A note in 1981 indicates that claimant fell down stairs at home on February 27, 1981 with a condition at L5 right. The diagnosis was of lumbalgia, acute.

The condition was reported as resolved sometime in 1982. A note in 1982 indicates that claimant again had low back problems and was having a hard time getting up. Low back pain is also reported in other instances in 1982. While many of the dates on the Poss-Wagner office notes are nonintelligible, a January 14, 1984 note indicates low back pain and [1] hip. Claimant treated for acute lumbar facet syndrome with the chiropractors from December 21, 1981 through January 12, 1982. On June 23, 1983, claimant was again treated for acute lumbar facet syndrome as well as from December 22, 1983 through January 31, 1984. A group health insurance note of June 1983 reports that claimant had low back pain while bending over at home. Claimant could not remember whether that incident was similar to his July 1984 work incident. A group health insurance statement of March 6, 1981 reports the condition as pain and stiffness in the back, neck and shoulders and reports that claimant had an accident at home when he slipped on a slippery outside stairs and fell. A group health insurance statement of December 21, 1981 indicates soreness in the low back and left hip.

John P. Tiedeman, M.D., treated claimant from June 19, 1980 through June 24, 1980 with office examination and physical therapy and muscle spasm of the left buttock.

David Felber, M.D., saw claimant on July 24, 1984 with low back ache and pain in the left leg. The doctor reported a history of chiropractic care for four or five years with partial relief. He stated that claimant stated he had picked up a heavy item at work in the past several days and had experienced a pop and severe low back pain. Neurological examination was normal but with point tenderness paraspinally in midline at L4 and 5. On July 24, 1985, there was point tenderness at L4 and 5 with straight leg raising positive to 45 to 60 degrees. Claimant was released to light duty work on the following Monday. On July 31, 1981, claimant complained of radiation of pain from the low back over the gluteal muscle on the lateral aspect of the left leg under the heel. He had a positive straight leg test at 45 degrees, but no sensory deficit. On August 10, 1984, the complaint was of pain in the inferior left gluteal area with intermittent dull aching into the left posterior thigh. The assessment of Bryan Sitzmann, M.D., of August 30, 1984, was sciatica radiculitis, probably secondary to previous back injury and aggravated by present job.

A. Kleider, M.D., initially saw claimant on September 25, 1984. The medical history he received was of left back and left lower extremity pain beginning a little over a month ago when claimant rose up from the bent-over position at work and had tearing sensation in the back. Dr. Kleider reported that claimant had had episodes of low back pain in the past relieved with chiropractic manipulations beginning in 1979. He reported that claimant stated the previous low back pain had never been

as bad as the current pain. Claimant's physical examination was consistent with other physical examinations after July 24, 1984.

Dr. Kleider examined claimant on December 16, 1986 and reported that claimant had done quite well and was back to his usual work with heavy lifting. He reported that claimant still had some soreness and stiffness of the low back and head which was worse with lifting and constant standing, but that improved with a whirlpool bath. Straight leg raising was at 90 degrees bilaterally; claimant bent over easily with no weakness of the lower extremities. Deep tendon reflexes were symmetrical; claimant had no deficit to pinprick. Dr. Kleider stated that claimant's medical history would indicate that his surgery was work related, but that claimant had no permanent partial impairment under the AMA Guides.

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

APPLICABLE LAW AND ANALYSIS

We consider whether claimant has sustained an injury which arose out of and in the course of his employment.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on July 23, 1984 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

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 (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, Musselman, 261 Iowa 352, 154 N.W.2d 128.

While claimant had previous back problems and while defendants' witness could not recall claimant reporting a July 23, 1984 incident, claimant apparently did report a work incident to Dr. Felber when he visited him July 24, 1984. Likewise, claimant reported an incident to Dr. Kleider. While the doctors differently report the incident, both reports are generally consistent with claimant's testimony at hearing as to his injury incident. Claimant described both a bending and lifting process. Likewise, claimant's contention that the severity of his pain and problems was significantly greater following the July 1984 work incident is consistent with his need for greater medical care following that incident than previously. Claimant has established an injury which arose out of and in the course of his employment.

We consider the causal relationship issue.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 23, 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).

Dr. Kleider has opined that claimant's history indicates his surgery was work related. He also opines claimant has no permanent partial impairment under the AMA Guides, however. We find the doctor's testimony sufficient to show that claimant has sustained temporary total disability on account of his injury. We find it difficult to disagree with the doctor as regards the permanency question. Dr. Kleider's uncontroverted opinion is consistent with his findings on physical examination of claimant

and the work performance he attributes to claimant. Hence, we accept the doctor's view that claimant has no permanent partial impairment. While we agree with claimant's counsel that a finding of no permanent partial impairment does not necessarily equate to a finding of no industrial disability, claimant also does demonstrate other circumstances entitling him to industrial disability benefits.

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

Claimant has returned to his same job; his performance level is approximately as it was preinjury. He apparently was precluded from some jobs prior to his work injury on account of his preexisting back problems. Testimony does not establish that claimant's restrictions are more severe now than pre-July 1984 or that claimant is now precluded from jobs he could have performed prior to his work injury. Claimant has not shown a loss of earning capacity related to his work injury.

Claimant is, of course, entitled to temporary total disability benefits for the stipulated period, that is, from September 1, 1984 to January 9, 1985.

Claimant seeks payment of his medical costs under section 85.27. Claimant is entitled to payment of costs he actually paid if those costs relate to treatment of his work injury. Claimant then is entitled to payment of the following costs:

Marian Health Center	$ 44.75
Dr. Kleider	31.00
Dr. McGowan	25.40
Woodbury Anesthesia Group	500.00

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant had undergone chiropractic treatment for back problems and severe left hip problems prior to July 23, 1984.

Claimant saw Dr. Felber on July 24, 1983 and reported picking up a heavy item at work and experiencing a pop and low back pain.

Claimant reported back pain on coming up from a bending position to Dr. Kleider.

Claimant injured his back at work on July 23, 1983 when he bent to pick up containers weighing from twenty to thirty pounds.

Claimant's level of back pain following his work injury was more significant than prior to that point and did not resolve with conservative care as prior problems had.

Dr. Kleider performed a diskectomy on the left side at both L4-5 and L5-S1 on October 4, 1984.

Claimant was temporarily totally disabled from September 1, 1984 to January 1, 1984.

Claimant then was released to and returned to his preinjury duties with the same employer.

Claimant exercises caution with bending and lifting and twisting, but is getting along quite well.

Claimant continues to perform his work duties and is not more hindered in performing them than he was prior to his work injury.

Claimant's work injury does not preclude him from more jobs in the plant than his preinjury back condition precluded him from.

Claimant's straight leg raising is at 90 degrees bilaterally; claimant can bend over easily with no weakness in the lower extremities; claimant's deep tendon reflexes are symmetrical; and claimant has no deficit to pinprick.

Claimant has no permanent partial impairment on account of his work injury.

Claimant has no loss of earning capacity on account of his work injury.

Claimant actually paid medical costs of $500 with Woodbury Anesthesia; of $25.40 with Dr. McGowan; of $31.00 with Dr. Kleider; and of $44.75 with Marian Health Center. The aforementioned costs were incurred as a result of claimant's work injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established an injury of July 23, 1984 which arose out of and in the course of her employment.

Claimant has established that the injury of July 23, 1984 is the cause of temporary total disability to claimant.

Claimant is entitled to temporary total disability benefits from September 1, 1984 to January 9, 1985.

Claimant is not entitled to permanent partial disability benefits on account of his injury.

Claimant is entitled to payment of medical costs claimant actually paid as set forth in the above findings of fact.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant temporary total disability benefits from September 1, 1984 to January 9, 1985 at the rate of one hundred fifty-eight and 34/100 dollars ($158.34).

Defendants pay claimant medical costs claimant actually paid as set forth in the above findings of fact.

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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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUAN R. MARTINEZ, Claimant, vs. BIG RIVER RECYCLING, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Defendants.	FILE NO. 798078 A R B I T R A T I O N D E C I S I O N FILED NOV 18 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Juan R. Martinez, claimant, against Big River Recycling, employer, and United States Fidelity and Guaranty Company, for benefits as a result of an injury which occurred on June 18, 1985. A hearing was held on January 9, 1987 at Davenport, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Juan R. Martinez (claimant) and joint exhibits 1AB and 2A through 2I. Both attorneys submitted excellent briefs.

STIPULATIONS

The parties stipulated to the following matters:

That an employer/employee relationship existed between employer and claimant on the date of the injury.

That claimant sustained an injury on June 18, 1985 which arose out of and in the course of employment with employer.

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

That the extent of entitlement to weekly compensation for healing period benefits for the injury is from June 18, 1985 to August 19, 1985; March 4, 1986 to April 1, 1986; and September 2, 1986 to October 2, 1986.

That the type of permanent disability, if the injury is found to be a cause of permanent disability, is scheduled member disability to the thumb.

That the commencement date for permanent partial disability benefits in the event that such benefits are awarded is August 19, 1985.

That the rate of weekly compensation in the event of an award is $92.34 per week.

That all requested medical benefits have been or will be paid.

That defendants are entitled to a credit for workers' compensation benefits paid for 43 2/7 weeks at the rate of $92.34 per week prior to hearing.

ISSUES

The parties submitted the following issues for determination at the time of the hearing:

Claimant has been paid 30 weeks of permanent partial disability benefits for 50 percent of the left thumb. The issue is whether claimant is entitled to any additional permanent partial disability benefits for the left thumb.

SUMMARY OF THE EVIDENCE

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

Claimant amputated the tip of his left thumb in an automatic wire cutter at work on June 18, 1986. It was a complete laceration of the distal one-half of the distal phalange of the left thumb proximal to the nail. It was an oblique laceration leaving a longer volar flap than a dorsal flap. Claimant received emergency care that night by Dr. Vermeer (full name unknown) at St. Luke's Hospital. On June 21, 1985, William R. Irey, M.D., an orthopedic surgeon, excised the remaining nail remnants and sutured in a volar advancement flap on the left thumb at Mercy Hospital. Claimant was released to return to work on August 19, 1985.

Claimant continued to have trouble with pain and tenderness in the left thumb. It was determined that he had developed epidermoid cysts. Dr. Irey performed additional revision surgery on March 4, 1986 and at that time also trimmed back the prominent bone of the distal phalanx. Claimant was off work from March 4, 1986 to March 25, 1986.

On April 5, 1986, Dr. Irey evaluated claimant's impairment as follows:

Mr. Martinez sustained an amputation through the distal phalanx which leaves the flexor pollicis longus tendon intact. He has full range of motion of the IP joint which is 0-80°. An amputation through the joint would result in a 75% impairment of the thumb. Because this is less an impairment than that would be, I think 50% impairment of the thumb would be a reasonable estimation of his impairment. This information is obtained from the Guides to Evaluation of Permanent Impairment, published by the American Medical Association. Page 2, table 1. (Exhibit 2G)

Cysts then reoccurred again at the tip of the left thumb and Dr. Irey surgically excised them again on September 23, 1986. Claimant returned to work on October 2, 1986.

Claimant testified that he had not experienced any trouble with his left thumb prior to this injury and that he had not reinjured it since this accident. He stated that since the injury he has had trouble grabbing things, picking things up, and holding on to them. His left thumb is pain sensitive to the slightest touch. It is sore and numb from the interphangeal joint to the remaining tip of the thumb. It gives him trouble both at home and at work. If he touches the end of his thumb against anything it forces him to say ouch. It gives him pain even when he is doing nothing with it. He places objects between his fingers because he cannot use his left thumb. His thumb usedto be real strong but now it is weak. He cannot lift with it as well as he could formerly. If he bends (flexes) his thumb, then the tip of it flutters rapidly and involuntarily at the interphalangeal joint. In order to hold things he has to place them in the crotch of his thumb. When the weather is cold it feels like his left thumb is frozen. Claimant estimated that he lost approximately one-half of an inch to three-fourths of an inch off of the end of his left thumb. On cross-examination he granted that his other hand, the right hand is dominant. Claimant also acknowledged that from the interphalangeal joint of his left thumb to his hand works all right.

APPLICABLE LAW AND ANALYSIS

Claimant's counsel contended in his opening statement that claimant was paid for the portion of his thumb which was lost, but that he has not been paid for the loss of function and the loss of use of the portion of his thumb that is left. In his brief claimant's counsel framed the issue in this case as follows:

This is not a complex case. The only real question is whether or not Mr. Martinez' recovery is limited to 50 percent of the thumb which is statutorily prescribed due to his amputation. It is claimant's position that because the use of the remainder of the thumb is severely limited by the problems associated with his injury, there should be no limitation on the amount of his award; and under the facts and circumstances of this case, Mr. Martinez is entitled to a recovery of 65 to 75 percent of the thumb. Since he has been paid 50 percent of the thumb (30 weeks), claimant should be awarded an additional 9 to 15 weeks of compensation in this matter.

Claimant's brief contained no legal authorities. Defendants' brief however contained several legal authorities that very comprehensively, yet succinctly and accurately, applied to the issue proposed by claimant in this case. This decision is based on those legal precedents.

The evidence is undisputed that claimant amputated the distal portion of the distal phalange of the left thumb proximal to the fingernail. Claimant did not lose the entire distal phalange. Claimant estimated that he lost approximately one-half of an inch or three-fourths of an inch off of the end of his left thumb. The first joint, called the distal joint of the thumb and also called the interphalangeal joint of the thumb, is still present. This was visible to the deputy at the time of the hearing.

Iowa Code section 85.34(2)(a) provides that permanent partial disability for the loss of a thumb is 60 weeks. Claimant did not lose his entire thumb and therefore cannot be awarded 60 weeks of compensation under this code section.

Iowa Code section 85.34(2)(g) provides that the loss of more than one phalange shall equal the loss of the entire thumb. Claimant did not lose more than one phalange. Therefore, it is not possible to award 60 weeks of compensation under this code section.

Iowa Code section 85.34(2)(f) provides that the loss of the first distal phalange of the thumb shall be equal to the loss of one-half of the thumb and that benefits are to be paid for one-half of the statutorial allowance for a thumb, however, claimant did not suffer the loss of the entire first distal phalange. Rather, he suffered a loss of a portion of the first distal phalange. The proximal phalange is not impaired. Therefore, claimant cannot be awarded more than one-half of the allowance for a thumb under this code section.

The second paragraph of Iowa Code section 85.34(2)(u) provides as follows:

> If it is determined that an injury has produced a disability less than that specifically described in said schedule, compensation shall be paid during the lesser number of weeks of disability determined, as will not exceed a total amount equal to the same percentage proportion of said scheduled maximum compensation.

Since claimant has an injury which is less than any specifically described in the schedule, then claimant's loss is determined by subsection u. Blizek v. Eagle Signal Co., 164 N.W.2d 84 (Iowa 1969); Grigsby v. State of Iowa, III Iowa Industrial Commissioner Report 107, (1983).

"When the loss of a scheduled member is something less than total loss of function, benefits are paid for the number of weeks that the percentage of functional loss bears to the total loss of the member." Lawyer & Higgs, Iowa Workers' Compensation -- Law and Practice, section 13-4, page 112.

Dr. Irey awarded a 50 percent impairment of the left thumb as a reasonable estimation of the amount of claimant's impairment. Inasmuch as Iowa Code section 85.34(2)(f) requires the loss of the entire first or distal phalange of the thumb in order to be entitled to one-half of the statutory allowance for a thumb, then Dr. Irey's award was probably more than reasonable because claimant did not lose the entire distal phalange. Claimant only lost a portion of the distal phalange. It would then appear that he has taken into consideration other factors that claimant complained of such as pain, numbness, weakness, sensitivity to cold and fluttering when he flexes his left thumb. As the sole treating physician Dr. Irey saw claimant several times with respect to his left thumb and performed surgery on it three different times. The Guides to the Evaluation of Permanent Impairment, Second Edition, published by the American Medical Association at page 2 provide as follows: "In establishing the values for amputation, consideration was given both to loss of motor function and loss of sensation...."

Claimant produced no other impairment evaluations from any other doctors or medical specialists different or greater than the rating awarded by Dr. Irey. Dr. Irey's award is the only medical evidence of permanent functional impairment in this case and it stands uncontradicted. Claimant himself testified that from the interphalangeal joint of his thumb to his hand worked all right. Therefore, based on the foregoing evidence and principles of law it is determined that claimant has sustained a 50 percent permanent functional impairment of his left thumb and that claimant is entitled to 30 weeks of permanent partial

disability benefits for permanent partial disability to the left thumb.

Iowa Code section 85.34(2)(a), (f), (g) or (u) do not authorize the agency the discretion to supply a greater permanent impairment rating than the treating orthopedic surgeon. In determining the amount of disability that flows from a given impairment of a scheduled member the Iowa Court has determined that the optimum remedial benefits of the workers' compensation statute are obtained by an application of the literal meaning of the words used in Iowa Code section 85.34(2), Blizek, 164 N.W.2d 84, 87 (Iowa 1969); Starcevich v. Central Iowa Fuel Co., 208 Iowa 790, 793, 794, 226 N.W. 138 (1929).

If claimant's counsel thought that an award of industrial disability was possible for a scheduled member injury by his comment in his brief that there should be no limitation on the amount of this award, then it should be stated that such a result is not possible under the Iowa law. Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (1983); Simbro v. Delong's Sportswear, 332 N.W.2d 886, 887 (Iowa 1983); Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890, 893 (Iowa App. 1983); Soukup v. Shores Co., 222 Iowa 272, 277, 278, 268 N.W. 598 (1936).

The purpose of the scheduled member provisions of Iowa Code section 85.34(2) is to make the amount of compensation certain, to avoid controversies and expedite payment. Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569, 571 (1943); Schell v. Central Engineering Co., 232 Iowa 421, 4 N.W.2d 399, 401 (1942). There is no evidence that claimant, in this case, was not paid promptly and in full. On the contrary, it appears that defendants complied with both the spirit and the letter of the law. Claimant has not sustained the burden of proof by a preponderance of the evidence that he is entitled to any additional permanent partial disability benefits over and above the 30 weeks of benefits that have already been paid based upon a 50 percent permanent functional impairment and disability of the left thumb.

FINDINGS OF FACT

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

That claimant sustained the loss of a portion of the distal phalange of his left thumb.

That the distal (interphalangeal) joint is still present.

That Dr. Irey, claimant's treating physician, awarded claimant a 50 percent permanent functional impairment of the left thumb relying on The Guides to the Evaluation of Permanent Impairment, Second Edition, American Medical Association, Table

1, page 2, in conjunction with his own professional judgment in this matter

That claimant has not introduced any other impairment evaluations from any other medical practitioners or specialists.

That claimant testified that from the interphalangeal joint of his left thumb to his hand was all right.

CONCLUSIONS OF LAW

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

That claimant did not sustain the burden of proof by a preponderance of the evidence that he is entitled to any additional permanent partial disability benefits as a result of a partial loss of the distal phalange of the left thumb.

ORDER

THEREFORE, IT IS ORDERED:

That no additional permanent partial disability benefits are owed by defendants to claimant.

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

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

Signed and filed this 12th day of November, 1987.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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1402.40; 1803
Filed November 12, 1987
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUAN R. MARTINEZ, Claimant, vs. BIG RIVER RECYCLING, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Defendants.	FILE NO. 798078 A R B I T R A T I O N D E C I S I O N

1402.40; 1803

Claimant severed the distal portion of the first phalange of his left thumb proximal to the fingernail, which required three surgeries in all. Defendants paid healing period each time. Treating physician, who was the only physician in this case, awarded a 50 percent permanent impairment of the left thumb. Iowa Code section 85.34(2)(a) allows 60 weeks for a thumb. Defendants paid claimant 30 weeks permanent partial impairment for a 50 percent impairment of the left thumb, pursuant to Iowa Code section 85.34(2)(a) and (u). Claimant requested additional permanent partial disability. Claimant's attorney asserted that claimant was paid for the portion of the thumb that was lost, but that he was not paid for the disability to the portion of the thumb that was left. Claimant himself testified that the portion of his thumb that was left from the interphalangeal joint to the hand worked all right. Held: No additional benefits allowed. Statutory and case law reviewed.

002114

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JANICE A. MENDEZ, Claimant, vs. MERCY HOSPITAL MEDICAL CENTER, Employer, and THE AETNA CASUALTY AND SURETY COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 795862 A R B I T R A T I O N D E C I S I O N FILED AUG 28 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Janice A. Mendez, claimant, against Mercy Hospital Medical Center, employer (hereinafter referred to as Mercy), and Aetna Casualty and Surety Company, insurance carrier, for workers' compensation benefits as a result of an alleged injury on April 28, 1985. On June 30, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and Nancy DeVore. The exhibits received into the evidence at the hearing are listed in the prehearing report. All of the evidence received at the hearing was considered in arriving at this decision.

The prehearing report contains the following stipulations:

1. An employer/employee relationship existed between claimant and Mercy at the time of the alleged injury;

2. If Mercy is found liable for the alleged injury, claimant is entitled to temporary total disability or healing period benefits from May 16, 1985 through September 6, 1985;

3. The type of disability, if it is found that the work injury caused permanent disability, is an industrial disability to the body as a whole;

4. The commencement date for permanent partial disability benefits if awarded herein shall be September 7, 1985;

5. Claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $214.42; and,

6. The medical expenses for which claimant seeks reimbursement in this proceeding are fair and reasonable and causally connected to claimant's permanent back condition but that the causal connection of this back condition to a work injury in this case 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 her 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 permanent disability; and,

IV. The extent of claimant's entitlement to medical benefits.

FINDINGS OF FACT

1. Claimant was a credible witness.

From her demeanor while testifying, claimant appeared to be truthful. Claimant's testimony was consistent with histories provided to physicians during treatment and evaluation of her injury. Although the precise date of injury is probably two days earlier than alleged herein, the description of what happened as related by claimant at hearing and her physicians has always been consistent.

2. Claimant was employed by Mercy in a part-time capacity from February 11, 1985 to May 16, 1985 as a registered nurse.

There was little dispute among the parties as to the nature of claimant's part-time employment at Mercy. Claimant testified that after a period of initial training she was assigned as an RN or registered nurse to the Progressive Care Unit (PCU). This type of unit mostly handles cardiac patients after they are able to leave intensive care. The patients are normally very ill and

unable to move about without assistance. Claimant was assigned to perform the traditional nursing duties for these patients which included assisting these patients in moving to and from carts and chairs and to and from bathroom facilities. Usually, this was done with the assistance of fellow employees and with various lifting devices. However, claimant was credible when she testified that at times assistance was not available.

3. In April and May, 1985, claimant suffered injuries to her low back which arose out of and in the course of her employment with Mercy.

As mentioned above, there is some discrepancy as to the exact date of injury. Claimant alleges in the petition and initially told Mercy that the back injury occurred on April 28, 1985 but the report of injury completed by claimant was changed by claimant from April 28 to April 26 after being informed she was absent on the 28th. However, the exact date is immaterial as claimant has been rather consistent in both her testimony at hearing and to her physicians as to the particular injurious events. The medical records and claimant's testimony revealed that claimant twisted her back while lifting one unrulely patient who came out of his restrains and was about to fall from the bed. Claimant stated that she felt a slight pulling or pain in the back but continued to work thinking that the sensation or pain in the back was not serious. She left early that day for reasons unrelated to her injury and told no one of the incident, again, thinking that the problem was not serious. Claimant returned to work that week and the following week and experienced intermittent pain. On May 16, 1985, while "getting into her clothes locker" at Mercy for the purpose of dressing into her nurse's uniform, claimant felt a very sharp pain in her low back radiating down into her left leg. She was not lifting anything at the time but simply bent over to enter the locker.

4. The work injury referred to above was a cause of a temporary period of total disability while claimant was recovering from the injury extending from May 16, 1985 through September 6, 1985.

Following the May 16, 1985 incident, claimant left work and sought medical care from the emergency room at Mercy who referred claimant to Peter Wirtz, M.D., an orthopedic surgeon. Although no reports were submitted from Dr. Wirtz, other physicians submitting reports in this case indicate that Dr. Wirtz told claimant that everything was all right. After taking x-rays, Dr. Wirtz prescribed pain and muscle relaxant medication. After her pain failed to subside, claimant returned to the emergency room at Mercy and was referred for a second opinion to Marshall Flapan, M.D., another orthopedic surgeon. After his examination of claimant and noting various neurological deficits, he diagnosed that claimant was suffering from a herniated disc at the L4-5

level of her spine and prescribed physical therapy and continued use of anti-inflammatory medication. Claimant then underwent physical therapy from Dave Peterson from June 5, 1985 until September 6, 1985. In July, 1985, claimant was given a TENS unit which is an electrical device to reduce pain. Due to the onset of depression, claimant was referred by Dr. Flapan in August, 1985, to Judy Rinehart, ACSW. Rinehart had ten psychotherapy sessions with claimant for treatment of her mental depression which Rinehart attributes to claimant's serious back injury. On September 6, 1985, despite the continuance of claimant's back and leg pain, Dr. Flapan discharged claimant from periodic treatment. Claimant then returned to work but not at Mercy. Claimant obtained a job as an RN at a blood clinic which Dr. Flapan approved as it was less stressful on claimant's back.

5. The work injuries of April and May, 1985, was a cause of significant permanent partial impairment to claimant's body as a whole.

Claimant testified that prior to 1982 she had no back difficulties or any other serious physical impairments. Claimant stated that she had previous back injuries at Des Moines General Hospital during her employment as an RN in a Telemetry Unit prior to employment at Mercy. These injuries occurred while lifting various patients. However, claimant stated that she recovered from these incidents and experienced no problems with her work or social life. Claimant also could not recall missing work as a result of the two incidents of back pain at Des Moines General. The medical records submitted into the evidence appear to support claimant's testimony. Also, there is absolutely no indication in any of claimant's personnel records at Des Moines General that she was having any sort of physical problems at Des Moines General prior to her resignation in January, 1984. Claimant stated reason for resigning at that time was inadequate staffing in her area, not any sort of physical problem. In a job evaulation by Des Moines General upon her resignation, claimant was rated as satisfactory in all aspects of her employment and Des Moines General indicated that they would be willing to rehire her. Consequently, it is found that claimant had no permanent physical impairment prior to the work injuries of April and May, 1985.

In a report submitted into the evidence claimant's primary treating physician, Dr. Flapan, opines that claimant is suffering from a 10 percent permanent partial impairment to her body as a whole as a result of the April and May back injuries she has described to Dr. Flapan and to the undersigned at hearing. Dr. Flapan indicated that claimant's current work at the blood bank is appropriate because it is less stressful on claimant's spine. William Boulden, M.D., another orthopedic surgeon, following his three examinations of claimant in February and March, 1986,

opines that he cannot concur with Dr. Flapan's 10 percent rating. Dr. Boulden states that he could not find any objective evidence of injury. Dr. Flapan's response that although all the neurological deficits he original found have now subsided, using the manual of orthopedic surgeons published by the American Academy of Orthopedic Surgeons, claimant's history, physical findings and periodic exacerbations warrants a 10 percent rating. Aside from the percentage rating of impairment, Dr. Boulden does impose physical restrictions on claimant's activity consisting of no bending, stooping, lifting or prolonged sitting. These work restrictions rather than any percentage of impairment are far more significant from an industrial disability standpoint. Therefore, claimant has demonstrated that she has suffered to some extent a significant permanent partial impairment to her body as a whole.

6. The work injuries of April and May, 1985, are a cause of a 25 percent permanent loss of earning capacity.

Claimant's past employment primarly consists of nursing work. Claimant has worked her way up the ladder starting as a nurse's aide and eventually completing her training at a community college to qualify as a registered nurse. During all of her previous employment prior to her current job at the blood bank, claimant was required to lift, bend, twist and stoop along with sit and stand for prolonged periods of time in order to perform her nursing duties. Therefore, the evidence demonstrates that as a result of her functional impairment and physician imposed restrictions, claimant is unable to return to the type of nursing work she was performing at the time of the work injury and most other nursing jobs claimant has held in the past. Mercy's workers' compensation coordinator testified at hearing that Mercy has instituted a program since claimant left which is specifically developed to accommodate injured nurses and provide them with light duty work. Although claimant did not return to Mercy after resigning in September, 1985, to take the blood bank job to inquire as to such other light duty nursing jobs, Mercy, on the other hand did not offer employment either. Therefore, claimant has demonstrated a very significant loss of earning capacity as a result of her work related back difficulties.

On the other hand, claimant's rehabilitation is unnecessary because claimant has found suitable replacement employment. Although her back continues to give her problems, she is earning in her current job on a per hour rate close to the same money she was earning at Mercy.

Claimant is 28 years of age, has a post high school education and exhibited above average intelligence at the hearing. Claimant has high potential for successful vocational rehabilitation should she lose her current job at the blood bank.

Claimant is relatively young and is more apt to adjust to a new occupation. Her loss of earning capacity due to disability is less severe than would be the case for an older person without an educational background.

7. Claimant has incurred reasonable medical expenses for treatment of her work injury in the amount of $3,890.96.

Due to the above findings as to the work relativeness of claimant's back condition and given the parties' stipulations as to the requested medical expenses, the above finding was virtually automatic. The amount was arrived at by simply adding the medical expenses listed in exhibit 3. This amount coincides with the total amount requested by claimant.

CONCLUSIONS OF LAW

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

It is not necessary that claimant prove 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).

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

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

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

III. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment or limitation upon activity involving the body as a whole, the degree of permanent disability must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity resulting from the work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physical impairment or restriction on work activity may or may not result in such a loss of earning capacity. The extent to which a work injury and a resulting medical condition has resulted in an industrial disability is determined from examination of several factors. These factors include the employee's medical condition prior to

the injury, immediately after the injury and presently; the situs of the injury, its severity and the length of healing period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

No apportionment of loss of earning capacity between claimant's preexisting condition, if any, 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 work injury occurred. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). The evidence rather clearly shows that there was no such prior disability.

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

Based upon a finding of a 25 percent loss of earning capacity or industrial disability as a result of an injury to the body as a whole, claimant is entitled as a matter of law to 125 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 25 percent of the 500 weeks allowable for an injury to the body as a whole in that subsection. The parties stipulated that these benefits would be payable from September 7, 1985.

The parties stipulated as to the extent of healing period benefits to which claimant would be entitled if defendants were found liable for the claimant's back condition. Pursuant to this stipulation, defendants will be ordered to pay these benefits.

The parties further stipulated that no weekly benefits have been paid prior to the hearing.

IV. Employers are obligated to furnish all reasonable medical services for treatment of a work injury under Iowa Code section 85.27.

Given the findings and stipulations entered into, claimant is entitled to an order directing defendants to reimburse

claimant for all expenses listed in the prehearing report.

ORDER

1. Defendants shall pay to claimant one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of two hundred fourteen and 42/100 dollars ($214.42) per week from September 7, 1985.

2. Defendants shall pay to claimant healing period benefits from May 16, 1985 through September 6, 1985 at the rate of two hundred fourteen and 42/100 dollars ($214.42) per week.

3. Defendants shall reimburse claimant the sum of three thousand eight hundred ninety and 96/100 dollars ($3,890.96) for medical expenses caused by the injuries.

4. Defendants shall pay all accrued weekly benefits in a lump sum.

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

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

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

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

9. This matter shall be sent back into assignment for prehearing and hearing on the extent of additional weekly benefits to which claimant may be entitled based upon an alleged, unreasonable delay in commencement of payment of benefits pursuant to Iowa Code section 86.13.

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

LARRY P. WALSHIRE
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FILED

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IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES K. MILLER, Claimant, vs. CHENHALL PERSONNEL, Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 778494 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, Charles K. Miller, against his employer, Chenhall Personnel, and its insurance carrier, The Travelers Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained October 26, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner in Davenport, Iowa, on July 23, 1987. A first report of injury was filed November 1, 1984. Claimant received payments of temporary total disability or healing period from October 27, 1984 through March 17, 1985; from July 1, 1985 through July 30, 1985; and, from October 22, 1985 through April 29, 1986. Such payments total 51 6/7 weeks. Claimant has also been paid 39.6 weeks of permanent partial disability with those payments having commenced April 30, 1986.

The record in this case consists of the testimony of claimant, of claimant's exhibits one through eight and of defendants' exhibits A through G.

ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant's rate of weekly compensation is $97.40; that claimant received an injury which arose out of and in the course of his employment; that that injury is causally related to temporary total or healing period disability; and, that claimant's injury is to a scheduled member, the left leg. The issues

remaining for resolution are:

Whether a causal relationship exists between claimant's injury and claimed additional permanent partial disability; and,

Whether claimant is entitled to additional permanent partial disability benefits.

REVIEW OF THE EVIDENCE

Thirty-five-year-old male claimant testified that he dislocated his left knee while working as a landscaper for the employer, a temporary employment agency. Subsequent to his injury, claimant saw Frank Bishop, M.D., at the Davenport Clinic who initially immobilized claimant's leg. Dr. Bishop subsequently referred claimant to Ralph H. Congdon, M.D., an orthopaedic surgeon, who performed arthroscopic surgery with further immobilization and physical therapy. Claimant subsequently returned to warehouse work for the employer. He reported that he then experienced severe pain and weakness and that Dr. Congdon performed additional surgery. He was again treated with leg immobilization and physical therapy. After approximately four or five months, he was released to work and attempted to return to landscaping for one day. He indicated he could not lower wheelbarrows or carry trees and that he subsequently did not return.

Claimant now works as a grain sampler and barge inspector with Eastern Iowa Grain and Inspection Service. The job involves lifting, walking and ladder climbing. Claimant indicated that he has to be very slow on the ladder, using only one leg at a time. Claimant is required to lift approxiately 56 pounds of grain samples. He takes time to walk. Claimant's Iowa Grain job is seasonal, with claimant generally being laid off from approximately December 15 until April 1.

Claimant reported that he cannot run as he has no support in his left leg at the knee and that he cannot bowl because he cannot bend at the knee. He indicated that he has tried swimming, but cannot dive and that he walks with a limp as he cannot bend his knee. Claimant reported that he must take stairs one step at a time, leading with the right leg while ascending and leading with the left leg while descending. Claimant reported that he must have some assistance in getting up from a kneeling position as he then experiences severe pain. Claimant reported that he has severe swelling at day's end from his knee to his ankle and that he must elevate his leg every night. He reported that he soaks in the bathtub and takes Tylenol. Claimant indicated he has leg cramps now which he did not have preinjury. He characterized his left leg as weaker and as tiring more easily than prior to his injury. Claimant reported that riding a bike helps keep his leg limber and lessens his cramping, but does not increase his overall leg strength.

Claimant agreed that he had injured his right knee as a child and in a motorcycle accident. He reported that the right knee was treated with immobilization, but denied that he had injured his left knee prior to his work injury. Claimant reported that he had told Dr. Congdon of all his difficulties. He indicated that he saw F. Dale Wilson, M.D., once for evaluation purposes only.

Claimant's weight, as reported by Dr. Wilson on March 13, 1987, was 261 pounds with a height of five feet, eleven inches. Dr. Wilson indicated that a proper weight would be 185 pounds.

Davenport Clinic notes of _____ 17, 1979 indicate that claimant had injured both knees in a motorcycle accident. X-rays of both knees were negative. An undated report noting that the condition relates to the right knee and that claimant is age 30, reports that claimant had had surgery two years ago in which Dr. Beatty released muscles laterally and scraped the patella and (illegible) muscles. The report notes that the knee is weak and painful medially, that claimant has difficulty descending stairs and suffers from leg cramps and that the knee grinds and pops a lot in the morning. The report notes that it is worse at (illegible) especially if has been up a lot and that swelling is present. The report notes that claimant stated the left knee has had symptoms and has also hurt, but that claimant was just there for the right knee. A note of Dr. Congdon of October 27, 1982 indicates that claimant had had surgery on his right knee by Dr. Beatty for recurrent dislocation of his patella which surgery involved advancement of vastus medialis obliquus and lateral retinacular release. The note states that, since that time, claimant had had difficulty in returning his muscles to function and, in fact, had a knee manipulation. Claimant had had extreme difficulty with stair climbing, leg cramps, knee grinds and pops and the knee is very painful. The condition is worse at night, especially since his leg also swells since the surgical procedure.

An admission note of Dr. Congdon of October 22, 1985 indicates that claimant's right knee shows scars of arthrotomy with intact peripheral circulation.

In a report of January 14, 1984, Dr. Congdon opined that claimant's appropriate diagnosis is recurrent lateral dislocation of the patella and that such was causally related to stepping or falling off the terrace. He reported that claimant underwent operative arthroscopy and lateral retinacular release on November 29, 1984. Postoperatively, claimant was to retrain his quadriceps mechanism in the hope that control of his vastus medialis obliquus would keep the kneecap centered. Claimant remained extremely apprehensive and anxious about the knee and, as a result, success in controlling his quadriceps was somewhat limited. Claimant returned to work on March 18, 1985 per

release of Dr. Congdon. As of April 22, 1985, claimant had significant audible and palpable crepitation and reported pain trying to load his quadriceps in the doctor's presence. Despite "rather intensive scheduling for rehabilitation," claimant continued to have significant symptoms and did not recover. On October 22, 1985, claimant underwent a patellectomy which elevated the tibial tuberosity in an effort to preserve some of the quadriceps' strength. Postoperatively, claimant went through a period of immobilization followed by rehabilitation. The doctor reported that claimant continued to be apprehensive about feelings of popping, creaking and grinding in his knee, but thought the last procedure was more effective. He indicated that, at times, claimant reports his knee is doing quite well and that claimant was back at work as of January, 1987. The doctor reported that, as of January 14, 1987, claimant continued to have some awareness of symptomatology as he gets out of a chair and had nighttime cramping of his leg. Claimant's range of motion remained good with no extensive lag and full flexion to at least 115 degrees. The doctor reported that claimant had a stable knee and that claimant's impairment was 18% of his lower extremity.

On June 23, 1986, Dr. Congdon had noted that, while claimant did not think his knee was doing very well, he had been able to go swimming and had jumped off the diving board, although he was "not doing very well springing off the diving board."

Cybex test results for claimant of April 11, 1986 generally indicated a significant percentile difference between test results on the left extremity as opposed to the right. Craig Cox, a licensed physical therapist, noted that, although the results of the tests were poor, he felt claimant's lack of effort during exercise was a contributing factor. He reported that claimant would often work on the equipment without engaging any resistance other than the weight of the lever arm.

In a note to Dr. Congdon of October 3, 1985, Mr. Cox reported claimant could not use the Cybex because of pain and inability to terminally extend.

F. Dale Wilson, M.D., examined claimant on March 10, 1987 and issued an evaluation report on March 13, 1987. Dr. Wilson opined that claimant's injury of October, 1984 was a causative factor with respect to claimant's symptoms, pathology and impairment as reported on the exam either directly or indirectly. Dr. Wilson opined that claimant should not kneel on the left knee, should not squat, should not run, should not jump, and should not lift more than 50 pounds. Dr. Wilson rated claimant as having a 31% impairment of the extremity using the following formula:

Impairment evaluation:

Patellectomy		20%
A.	Motion loss	0
B.	Pain	2
C.	Weakness; this includes atrophy of the of the Quadriceps and Gastrocnemius	7
D.	Sensory loss, lateral aspect of the leg	2
E.	Deformity andchondromalacia, residual, of the femoral area; this is included in the patellectomy.	-
		31%

Impairment of the extremity.

In correspondence of April 20, 1987, Dr. Congdon reported that he believed Dr. Wilson had erred in the methodology used for Dr. Wilson's final impairment figure and that some of the doctor's statements were unsubstantiated. Dr. Congdon indicated he would quarrel with Dr. Wilson's allowances in several areas. Specifically, Dr. Congdon indicated that, if Dr. Wilson's evaluation figures were indeed correct (which he did not accept), it was incorrect to arrive at such figures by addition. He noted that instructions in the Second Edition of the Guides to the Evaluation of Permanent Impairment state that the numbers must be combined and that, under a combination methodology, the total impairment rating (Dr. Wilson found) would be 29%. Dr. Congdon noted that the impairment range of 15-20 percent which is allowed for a patellectomy usually takes into account associated symptoms. He noted that discomfort, mild sensory loss about incisions and motion loss would be included in that 15-20 percent range and stated that further allowances for motion loss were not indicated on the basis of claimant's function. Dr. Congdon reported that the concept of unsubstantiated claims would deal directly with weakness and pain making it very difficult to defend a 2% impairment to the lower extremity on the basis of claimant's pain symptoms.

With regard to Dr Wilson's measurement of claimant's two extremities, Dr. Congdon noted that significant variation from the normal progression of such measurements on the right as compared to the left would tend to make him suspect of other figures in the list. Dr. Congdon reported that a sensory loss allowance would not be contributory to a functional impairment for claimant because no named major nerves were damaged in claimant's patellectomy. He indicated that associated information

in Dr. Wilson's report about a weakness of the gastrocnemis complex was not understood as it was claimant's quadriceps mechanism which was altered (in his injury and sequalae). Dr. Congdon further noted that claimant's history shows that claimant had had problems recovering from surgical procedures making one somewhat hesitant to choose the maximum allowance in any range of impairment ratings. He characterized Dr. Wilson's figures as unreliable and not reproducable. Dr. Congdon further suggested that leeway of possibly up to 5% impairment as to his original figures might be possible depending upon the original allowance for the patellectomy and persistent symptoms.

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

APPLICABLE LAW AND ANALYSIS

Of first concern is whether a causal relationship exists between claimant's injury and claimed additional permanent partial disability.

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

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

recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812, 815 (1962).

A 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. Wilson, who examined claimant only, has reported that claimant has a 31% impairment of his extremity and that claimant's symptoms, pathology and impairment were either directly or indirectly causatively related to claimant's October, 1984 injury. Dr. Congdon, claimant's treating physician, has opined that claimant has an 18% impairment of the lower extremity. The record contains medical notes and other evidence suggesting that claimant had preexisting left knee problems. The record further suggests that such problems did not prevent claimant from working prior to his October, 1984 injury and that, but for that injury, claimant would not have needed his patellectomy. On January 14, 1984, Dr. Congdon opined that claimant's recurrent lateral dislocation of the patella related to his work injury. Dr. Congdon does not expressly state that the need for the patellectomy related to the original injury, but, in his April 20, 1987 correspondence, he intimates that his impairment rating related to the patellectomy. In that correspondence also, Dr. Congdon reports a number of areas where he would quarrel with Dr. Wilson's findings. He reports that Dr. Wilson's methodology in calculating the overall impairment is not as advised under the AMA guides. He indicates that motion loss, sensory loss and discomfort are items which would be included under the AMA guides' suggested impairment following a patellectomy. Dr. Congdon reported that it would be very difficult to defend a 2% impairment of the lower extremity on the basis of pain symptoms as the concept of unsubstantiated claims would deal directly with weakness and pain. Dr. Congdon noted a significant variation from the normal progression of measurements on the right as compared to the left extremity per Dr. Wilson's evaluation of claimant. He reported that such would tend to make Dr. Congdon suspicious of other

figures found in Dr. Wilson's measurements. Dr. Congdon felt that information Dr. Wilson reported as to weakness of the gastrocnemius complex was "not understood" as it was claimant's quadriceps mechanism which was altered (in his patellectomy). Dr. Congdon is an orthopaedic surgeon. This record does not reveal Dr. Wilson's expertise beyond that he is a medical doctor. We note that no area of specialization is noted on his report in evidence. Given Dr. Congdon's specialization in orthopaedic matters, his status as claimant's treating physician and his long-term relationship with claimant, we accept his assessment of claimant's disability over that of Dr. Wilson. We note that claimant did testify as to continuing limitations and restrictions, both in the course of his work and in carrying out life activities. The record, however, does not reflect that Dr. Congdon did not appropriately consider these in initially assessing claimant's permanent partial impairment rating. Nor does the record reflect that any such difficulties are not related to claimant's preexisting condition and not to his October, 1984 injury. For that reason also, we do not believe it necessary to defer to Dr. Wilson's opinion that claimant's permanent partial disability should be increased from 18% to 31% of his lower extremity and that all of such should be related to the October, 1984 injury. Claimant has not established any causal relationship between his injury and his alleged additional permanent partial disability.

As claimant has already received 39.6 weeks of permanent partial disability benefits reflecting an 18% impairment of the left lower extremity, claimant is not entitled to additional permanent partial disability benefits for his scheduled member injury. Section 85.34(2)(o).

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant received an injury to his left knee on October 16, 1984 when he stepped or fell from a terrace while working as a landscaper for the employer.

Claimant had had prior difficulties with his left knee, but such had not prevented his working as a landscaper or warehouser and such had not required that he undergo arthroscopy and lateral retinacular release or a patellectomy.

Claimant had a recurrent lateral dislocation of the patella resulting from his work injury.

Ralph H. Congdon, M.D., an orthopaedic surgeon, performed operative arthroscopy and lateral retinacular release on November 29, 1984.

Claimant returned to work on March 18, 1985 as a warehouser

for the employer.

Claimant was unable to continue such work and rehabilitation efforts were not successful.

On October 22, 1985, claimant underwent a patellectomy per Dr. Congdon.

As of January 14, 1987, claimant had continued symptomatology on arising from a chair and nighttime cramping of his leg.

Claimant then had good range of motion with no extensive lag and full flexion to at least 115 degrees.

As of January 14, 1987, Dr. Congdon opined that claimant had a stable knee with a permanent partial impairment of 18% of the lower extremity.

F. Dale Wilson, M.D., who examined claimant on March 10, 1987 and reported on his examination on March 13, 1987, opined that claimant had a 31% impairment of the extremity.

Dr. Wilson added, rather than combined, areas considered in his impairment evaluation.

Under the AMA guides, areas to be considered are to be combined and not simply added.

Under the AMA guides, evaluation of a patellectomy would normally include motion loss, discomfort and sensory loss in the percentage allowed for the patellectomy itself.

Dr. Congdon quarrels with Dr. Wilson's assignment of a 2% impairment of the lower extremity on the basis of pain symptoms.

Dr. Congdon quarrels with findings on measurement of Dr. Wilson of claimant's two extremities and believes such findings may lead to suspicion of other findings in Dr. Wilson's measurements.

Dr. Congdon quarrels with information contained in Dr. Wilson's report concerning weakness of the gastrocnemius as claimant's quadriceps mechanism was the area altered through claimant's patellectomy.

Dr. Wilson was claimant's evaluating physician only.

Dr. Congdon was claimant's treating physician and had a long history of involvement with claimant's orthopaedic problems in his lower extremity.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established a causal relationship between his October 26, 1984 and his claimed additional permanent partial disability.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing further from this proceeding.

Claimant pay costs of this proceeding.

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

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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002134

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS WAYNE MILLER, Claimant, vs. CITY OF DES MOINES, IOWA, Employer, and CIGNA, Insurance Carrier, Defendants.	:	FILE NO. 738184 R E V I E W - R E O P E N I N G D E C I S I O N FILED JUL 30 1987 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening brought by Dennis Wayne Miller, claimant, against the City of Des Moines, Iowa, employer, and CIGNA, insurance carrier, defendants, for further benefits as a result of an injury that occurred on March 3, 1983. The first hearing of this case was held on January 17, 1985 at Des Moines, Iowa before Deputy Industrial Commissioner Michael G. Trier. His decision was filed on April 2, 1985. It awarded claimant 75 weeks of permanent partial disability benefits based on an industrial disability of 15 percent to the body as a whole at the rate of $201.30 per week in the total amount of $15,097.50. This arbitration decision was affirmed by Industrial Commissioner Robert C. Landess in an appeal decision dated January 14, 1986. This hearing was held on December 4, 1986 at Des Moines, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Paul Black (personnel analyst for the city); Michael Peterson (safety administrator for the city); Dennis Miller (claimant); defendants' exhibits A through J; and claimant's exhibits 1 through 6. Both attorneys submitted excellent briefs.

PARTIAL TRANSCRIPT

Claimant ordered a partial transcript of this hearing which transcribed the testimony of Paul Black and of Michael Edward Peterson. Claimant has made a copy of this partial transcript available to the agency and it is included in the industrial commissioner's file in this case. In this decision, the term, transcript, refers to the transcript of the hearing which was

held on January 17, 1985. The term, partial transcript, refers to the partial transcript of the hearing which was held on December 4, 1986.

EVIDENCE EXCLUDED

Page five of defendants' exhibit I was excluded from evidence because it was not timely served. However, it is part of the record as an offer of proof. It was not considered in the determination of this case.

STIPULATIONS

The parties stipulated to the following matters at the hearing:

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

That the claimant sustained an injury on March 3, 1983 which arose out of and in the course of his employment with employer.

That causal connection of temporary disability and the claimant's entitlement to temporary disability benefits are not an issue in this case at this time.

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

That the commencement date for any additional permanent partial disability benefits is stipulated to commence immediately after the prior award terminated.

That in the event of an additional award of benefits the weekly rate of compensation is $201.30 per week.

That no affirmative defenses are asserted; that medical benefits are not in dispute; that no credits are claimed under Iowa Code section 85.38(2) for employee non-occupational group plans and no credit is claimed for prior benefits paid.

SPECIAL PREHEARING STIPULATION

The parties entered into a written stipulation prior to this hearing on or about October 15, 1986 that there was no competent medical evidence to support a change in the claimant's physical condition attributable to this work injury since the first hearing on January 17, 1985 (Defendants' Exhibit B).

ISSUES

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

Whether the injury is the cause of any additional permanent partial disability based upon a non-medical change of condition.

Whether the claimant is entitled to any additional permanent partial disability benefits based upon a non-medical change of condition.

SUMMARY OF THE EVIDENCE

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

At the first hearing on January 17, 1985, Michael Peterson, a representative of the city, testified that it is the unwritten policy of the City of Des Moines to rehire their injured employees. Their success rate at rehiring injured employees was excellent. They rehire a minimum of 95 percent of their injured employees. Of all employees ever injured Peterson only knew of three persons, including claimant, who were not returned to work for the city. Peterson enumerated a number of jobs that claimant might be eligible for such as storeroom clerk, custodial work, animal handler, truck driver, some types of maintenance work, parking meter enforcement, courier, light and medium equipment operator, housing inspector trainee, construction inspector trainee and humane officer (Transcript, pages 72 through 75).

The following question and answer appear at page 75 of the first hearing transcript. The question was asked by defendants' counsel and answered by Peterson:

> Q. Does the City of Des Moines at all times make accommodations with respect to injured employees in terms of modifying work?
>
> A. Yes, we do. If we can modify a job without significantly changing the structure of that position to accommodate a handicap or disability, we'll attempt to do that. We can't do it every time, but we'll make an effort to try to do that.

At pages 81 and 82 of the prior hearing transcript, the following questions and answers transpired between defendants' counsel and Peterson, the city's representative.

> Q. Now, you've gone through a series of jobs that were opened and either filled, or whatever. Is that a continuing process with the City?
>
> A. Yes. Every week there would be jobs posted.

Q. Okay. So this is a-- In terms of hiring him back, it's a continuous process of waiting until the right position comes up for him; is that right?

A. Yes.

Claimant testified that when he tried custodial jobs earlier that he injured his back and that he was unable to do the portion of the custodial work that required him to lift heavy barrels and dump them into a dumpster.

The following questions and answers transpired between claimant's counsel and Peterson on pages 84 and 85 of the first hearing transcript.

Q. Would those custodial jobs you're talking about be lifting the heavy barrels and dumping them into the dumpsters?

A. Custodial positions would generally require lifting more than 50 pounds, but it would be something where we could make a concession, I believe, in the jobs. For instance, the one custodial position he was appointed to required shoveling snow, and we appointed him to that position with the understanding with the supervisor he would not be required to scoop snow. The same with lifting weights. We make concessions that they would not have to lift those weights, that that would not be a part of their regular job.

Q. Okay. Would that include dumping the heavier barrels into the dumpster?

A. Yes.

Deputy Trier commented on the statements of Peterson on pages 4, 5 and 6 in his summary of facts and again on pages 8 and 9 in his application of the law and analysis. It would appear that Deputy Trier relied on these remarks because he concluded that claimant would be employed in custodial work and that as a result his disability would then be limited to decreased earnings in custodial work over what he would have been earning as a street laborer. Deputy Trier concluded his analysis on pages 9 and 10 of this decision with these words:

It would appear that claimant is capable of working as a truck driver and also of performing custodial work if concessions are made by the city

in regard to activities such as shoveling snow and dumping barrels of material into dumpsters. The city has indicated a willingness to make those concessions. In the custodial positions it appears that claimant would earn approximately ten percent less than he could earn as a street cleaning department laborer. As a truck driver he would earn more than he could earn as a laborer. From the evidence presented, it would appear that claimant does have a reasonable expectation of obtaining custodial work but that he does not presently have much chance of obtaining one of the truck driving jobs which would be consistent with his physical restrictions. It is more likely than not that he will in fact suffer an actual reduction in his rate of earnings as a result of his injury. It also appears likely that he will have intermittent absences from work as a result of his condition which will also reduce his total earnings. It is therefore found and concluded that when claimant's disability is measured industrially it is 15 percent of total disability.

At this hearing claimant testified that Paul Black, the personnel analysis for the city, told him that if he had the seniority for a job and if he could do the job, than he would get it. Claimant further testified that he told Black that he could do custodial work.

After the hearing on January 17, 1985, claimant applied for several jobs with the city. Claimant's exhibit 6 is a list of 29 job openings between February 4, 1985 and July 22, 1985. Claimant applied for all but seven of these 29 job openings on this list. However, three of the seven were not posted until after claimant was terminated on July 1, 1985 and one of them (custodian--building services) that he did not apply for was designated as a job which claimant was unable to do. Of the remaining 25 possible job openings then claimant applied for all of them except three of them after the hearing on January 17, 1985 and prior to his termination on July 1, 1985. Claimant then applied for 22 out of a possible 25 job openings. Claimant was rejected for nine of these jobs, mostly truck driving jobs, because claimant did not have enough seniority. On the remaining 13 jobs, many of which were custodial jobs, claimant was rejected because Peterson determined that claimant was unable to do them (Cl. Ex. 6, pages 2 and 3; Deft. Ex. A, pages 1&2; Partial Transcipt, page 9).

The most insight into what Peterson thought and did after the hearing on January 17, 1985 might best be illustrated by his own verbatim testimony in answer to questions of claimant's counsel.

Q. And following that hearing, are you aware, did Dennis Miller apply for custodial jobs?

A. Yes, he did.

Q. And did you play a part in making a determination that he was not capable of doing those custodial jobs after the last hearing?

A. Yes.

Q. Mr. Peterson, at the last hearing, Dennis Miller was on an unpaid leave of absence; is that correct?

A. Yes.

Q. Would you review for us briefly what the significance of an unpaid leave of absence is for a city employee?

A. Unpaid leave of absence allows an employee to retain their seniority that they had when they were first injured, thereby helping them or allowing them to use that seniority for bidding on other jobs.

Q. And Dennis Miller had over seven years seniority at the time he went on that unpaid leave of absence; is that correct?

A. Yes.

Q. Was that leave of absence later terminated?

A. Yes.

Q. At the hearing-- Strike that. What was the date that Dennis Miller's leave of absence was terminated?

A. July 1st of 1985, I believe.

Q. Okay. I'll show you Exhibit 5, which has been admitted into evidence. Did you provide this to me, first of all?

A. Yes.

Q. Would you explain for us what Exhibit 5 is?

A. Exhibit 5 is entitled "Personnel Action

Form," and is the mechanism the City uses to separate an employee from the City.

Q. All right. And that Exhibit 5 deals specifically with Dennis Miller and his separation from the City?

A. Yes.

Q. That termination of his unpaid leave of absence status was something unilaterally decided by the City; is that correct?

A. Yes.

Q. What does the form indicate the reason for the termination was?

A. Due to medical disability.

Q. Would that be his work injury?

A. It would have been his ability to--his restrictions he had which would have prevented him from being reemployable within a reasonable period of time.

Q. Those restrictions were due to his work injury?

A. Yes.

Q. So 5 1/2 months, basically, after the hearing, he was taken off of that unpaid leave of absence. Would you tell us the reason why?

A. It was approximately 5 1/2 months after the hearing. It was probably closer to a year after he first became eligible to return to work. We decided that although Dennis met the physical--met the physical limitations for a custodial job, it seemed very unlikely or illogical that we'd send him back to the same job he told us he couldn't do before, so we arbitrarily excluded him from applying for that particular type of position.

And the likelihood of him becoming employed in a promotional-type position was diminishing very rapidly, and there was a need to be able to fill that line-item position, so we decided to terminate him as of July.
(P.Tr., pp. 9-11)

The following colloquy is also informative:

Q. (BY MR. LAWYER) Mr. Peterson, you sat through Dennis's testimony at the last hearing, didn't you?

A. Yes.

Q. Have you reviewed his testimony recently?

A. Yes.

Q. In his testimony that you listened to and now you've reviewed, Dennis indicated a willingness to take on a custodial job; isn't that correct?

A. Yes.

Q. And at that first hearing, you didn't express the same thing that you're expressing today with respect to the fact that you were not going to consider him for a custodial job because you thought that he was not capable of that; correct?

A. Yes.

Q. So after you got done testifying at the first hearing, you determined that he no longer could be a custodian and disqualified him from any type of custodial job with the City; correct?

A. Yes.

(P.Tr., pp. 12 & 13)

This exchange is also pertinent:

Q. As long as you kept disqualifying him for custodial positions, he would never be eligible for custodial positions; is that true?

A. Correct.

Q. Even though he had the top seniority?

A. Correct.

(P.Tr., p. 24)

Some of Peterson's problems within the city employment system are revealed by the following dialogue with his own counsel.

Q. Now, at the time of the first hearing--I'm not going to read it verbatim, but I think the gist of your testimony was not so much that you could guarantee that Mr. Miller could get a custodial job, but the gist of your testimony was you thought there might be some concessions that might be made that would enable him to do the work with his restrictions?

A. Yes.

Q. Did you make an effort to do that?

A. We had tried to place Mr. Miller in two jobs prior to that time, prior to January of '85.

Q. Okay. And what happened?

A. We had discussed with the supervisor-- As a matter of fact, we had to virtually arm wrestle with the department to employ him even though he had the seniority, because they felt that, you know, he was damaged goods, and "you're just giving us your injured employees."

We argued, and successfully, that the doctors felt he could handle it and we needed to give him a fair chance at that. We subsequently did that twice, tried to give him a chance with the concession that he would not have to lift heavy objects, was told to get help when he had to lift something that he felt he couldn't handle. That's something we do very reasonably.

Q. How did those positions work out?

A. He was not able to do them. Both times he complained of severe pain, and subsequently we had to take him out of the positions.

Q. Is this an individual department head that was objecting to reemploying him?

A. Yes.

Q. It's not somebody in the city manager's office?

A. No. That would be division manager.

(P.Tr., pp. 38-40)

By this testimony Peterson also confirmed that his efforts to place claimant in a custodial job were both made prior to the first hearing on January 17, 1985 and not after the first hearing.

In answer to the questions of this deputy at this hearing Peterson specifically confirmed that the efforts to reemploy the claimant in custodial work were made prior to the first hearing and it was not done again after the first hearing (P.Tr., p. 40). Peterson gave the following explanation for his decision not to place the claimant in custodial work after the first hearing.

> Q. (BY MR. DUCKWORTH) What was the reason you didn't make those efforts after the last hearing?
>
> A. We honestly just decided that we tried it back in these departments, and Dennis could do the custodial job, and when he demonstrated he couldn't-- He made it very clear to us that he didn't think he could handle it. The doctor's report said he had a physical limitation that would have allowed that, but it didn't seem like it; he couldn't.
>
> (P.Tr., p. 40)

Peterson testified that if claimant had obtained a custodial job with the city that he would be earning about $7.00 per hour at the time of the second hearing (P.Tr., p. 45).

Peterson explained that after the injury on March 3, 1983, and prior to the hearing on January 17, 1987, claimant was given special concessions to do custodial work in the armory and the police department. He related that claimant did not have to lift over 50 pounds and he did not have to shovel snow. Nevertheless, each time claimant only worked a short time and complained of severe pain and had to be removed from each of these two jobs (P.Tr., pp. 46-50). The decision of Deputy Trier stated that claimant worked in the armory for one week and in the police station for one and one-half weeks.

Peterson enumerated a number of other factors that may have impacted on claimant's ability to be rehired. There was a hiring freeze in September of 1983 (P.Tr., pp. 23 & 35). There has been a steady decrease in the number of city employees (P.Tr., pp. 23 & 32). The city had approximately 2,200 employees in 1983 compared to approximately 2,000 employees in January of 1985 (P.Tr., p. 23). An arbitration decision in May of 1986 forced the city to reemploy 15 or 16 high seniority maintenance employees (P.Tr., pp. 34 & 35). Peterson also cited an economic downturn, loss of Federal funds and the restructuring of city government (P.Tr., p. 37). The primary reason and the recurring reason why claimant was not employed in a custodial job may be

epitomized in the following transaction between Peterson and defendants' counsel.

Q. And getting back to, I guess, the crux of the reason that you didn't put Mr. Miller in a custodial position or try very hard was what?

A. Physical. We didn't think he could physically handle it based on past practice or experience.

Q. That was after he had had jobs where so-called concessions had been made already.

A. Yes.

(P.Tr., p. 56)

Claimant testified that after the first hearing he also applied for about 50 other jobs other than at the City of Des Moines. He finally got a job on August 20, 1985 doing construction work for Western Waterproofing through his brother who was a superintendent there. It was general labor roofing work which involved carrying 20 pound buckets and rolling 85 pound rolls of asphalt. Claimant testified that his brother made concessions that enabled him to do that work. This job paid $6.00 per hour, except for one federally funded project on a fire station at which time he earned $14.00 per hour. Claimant worked there until October 22, 1985 when he slipped on a piece of plywood that was wet with dew and fell and reinjured his low back. Claimant received workers' compensation temporary disability benefits for this injury until August of 1986; but he did not receive permanent partial disability benefits for this injury.

Claimant did not find employment again until November 21, 1986. At that time he took a job with Younkers at $6.50 per hour as a warehouseman and had only worked there three weeks prior to the time of this hearing. Claimant's duties involved moving furniture on a four wheel flatbed cart between the warehouse storage areas and the dock. Some items of furniture weigh four to five pounds and other items of furniture weigh 50 or 60 pounds. Claimant explained that he was able to do this job by the use of body mechanics. He stated that he did not like the job particularly well but it improved his self-esteem to be employed. Claimant testified that the reason that he continued to apply for and perform labor jobs even though he has a back problem is because that is the only kind of work that he knows how to do. Claimant said that he sought help on his own to find a job through Iowa Vocational Rehabilitation Services. He only drew unemployment compensation for a few weeks after he was terminated by the city on July 1, 1985 until he went to work for Western Waterproofing on August 20, 1985. Claimant conceded

that the majority of the places were he looked for work were not hiring and that he actually only filled out a few application forms. He stated that he was able to do the manual labor for Western Waterproofing and also Younkers. He acknowledged that he played softball at a family picnic but he was in pain when he did it. He granted that he changed an automobile tire by himself. He conceded that William A. Boulden, M.D., an orthopedic surgeon, had recommended surgery but claimant declined to go through with it after it was scheduled and the anesthesia had been administered in preparation for the surgery.

Claimant's original injury occurred while he was driving an end loader for the city on Fleur Drive in Des Moines. He was struck from the rear by an intoxicated driver. Claimant is married and has three dependent children. He completed tenth grade but obtained a GED in 1979. Past employments include working in a parts department, production line manufacturing work, roof construction and repairs, garbage collection, general construction, automobile mechanic, gas pump operator, and operating equipment for the City of Des Moines Streets Department. Claimant disclaimed any serious low back problems prior to this injury.

Thomas A. Carlstrom, M.D., a neurosurgeon, examined claimant on December 4, 1984. On December 13, 1984, he wrote that a small bulging disc at L-4, L-5 was not the cause of claimant's symptoms. He found instead that claimant was suffering from chronic myofascial low back pain which was probably permanent. He found that claimant suffered a fairly significant impairment. He assessed a five-six percent permanent impairment of the body as a whole based upon diminished range of motion. Dr. Carlstrom recommended that claimant change occupations to a job which required no heavy lifting. He thought that claimant's weight lifting restriction should be 25 to 30 pounds and 10 to 15 pounds for repetitive work. He stated also that forward bending, prolonged sitting or standing, and stooping or crouching would need to be eliminated (Cl. Ex. 1, p. 1; Def. Ex. C). Dr. Carlstrom examined claimant again on January 2, 1986. On February 4, 1986, he reported no significant change from his earlier examination on December 4, 1984 (Cl. Ex. 1, p. 2; Def Ex. D). Dr. Carlstom did not specifically find that claimant's condition was caused by the accident on March 3, 1983, but he did cite this motor vehicle accident of March, 1983, as the medical history which was the basis of his report (Cl. Ex. 1, p. 1; Def. Ex. C).

Marshal Flappan, M.D., an orthopedic surgeon, both examined and treated claimant on a number of occasions. He found claimant sustained lumbosacral strain. He found that claimant suffered a five percent permanent impairment as a result of being rear ended on March 3, 1983. He imposed a 50 pound weight restriction. Claimant was not to do any repetitive bending, twisting, straining, pushing or pulling (Cl. Ex. 1, pp. 3, 4 & 5; Def. Ex. G).

On October 25, 1983, J. B. Bell, D.O., an orthopedic surgeon, stated that claimant suffered a lumbosacral strain which at that time was stable. He stated claimant had no permanent disability. He stated claimant should not be subjected to continual stooping, bending or riding for a significant period of time. He imposed no lifting restrictions in pounds, but cautioned against repetitive weight lifting. He too recommended a less strenuous job. His history for the claimant shows that claimant was rear ended while operating an end loader which injured his neck and back (Cl. Ex. 1, pp. 15-17).

APPLICABLE LAW AND ANALYSIS

In a proceeding for review-reopening under Iowa Code section 86.14(2) the proponent must sustain the burden of proof by a preponderance of the evidence of a change of condition as a result of the original injury. Stice v. Consolidated Ind. Coal Co., 228 Iowa 1031, 291 N.W. 452 (1940); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). An increase in industrial disability may occur without a change in physical condition. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 350 (Iowa 1980); McSpadden v. Big Ben Coal Co., 228 N.W.2d 181, 182 (Iowa 1980).

The required change of condition to satisfy the requirements of review-reopening need not rest solely upon a physical change of condition if economic hardship causally related to a compensable injury but not contemplated within the initial award or agreement are demonstrated. Rowe v. Dept. of Transportation, File No. 451058 (Appl. Decn. July 23, 1986).

Peterson's testimony at the hearing on January 17, 1985 created the expectation that claimant would be reemployed in stable and continuous employment by his former employer, the City of Des Moines, where he had seven years of seniority. Peterson said that 95 percent of the injured workers are reemployed. Only three employees, including claimant, had not been so reemployed. He enumerated a number of job possibilities that might be available to claimant (Tr. pp. 72-75). He indicated that the city modified jobs to accommodate injured workers (Tr. p. 75). Job opportunities are available every week (Tr. pp. 81 & 82). Claimant's counsel questioned whether Peterson could or would reemploy claimant in a custodial job since two earlier attempts had failed; but Peterson reassured him that concessions could be made and implied that they would be made (Tr. pp. 84 & 85).

Deputy Trier relied on these statements of Peterson (Decn. April 2, 1985, pp. 4, 5, 6, 8 & 9). He remarked that claimant had the seniority for custodial jobs and that defendant was willing to make concessions consistent with claimant's physical restrictions (Decn. April 2, 1985, pp. 9 & 10). Deputy Trier determined that claimant would be earning 10 percent less money

in a custodial job than as a street laborer and would have intermittent absences from work due to this injury. Based on these considerations, Trier allowed 15 percent permanent partial disability as industrial disability.

After the hearing Peterson had at least 13 opportunities to make the necessary accommodations and concessions in custodial jobs or other jobs that claimant applied for and for which he had seniority. However, each time Peterson decided that claimant was unable to do each of these jobs. No accommodations were made. No concessions were made. No attempts even, of any kind, were made to assist claimant in obtaining any of these 13 job opportunities, many of which were custodial jobs (Cl. Ex. 6; Def. Ex. A). There was no evidence that any attempt was made to employ claimant in any of the other 2,000 jobs in which the City of Des Moines employs various persons.

Peterson plainly stated that after the hearing on January 17, 1985, he decided that if claimant could not do the two earlier custodial jobs at the armory and at the police station, then he "arbitrarily excluded him from applying from that particular type of position" (P.Tr., p. 11). Peterson agreed with claimant's counsel that after he testified at the earlier hearing he determined that claimant could no longer be a custodian and disqualified claimant from any type of custodial job within the city (P.Tr., pp. 12 & 13). Peterson also conceded that as long as he kept disqualifying claimant from custodial positions, even though claimant had the seniority, then claimant would never be eligible for a custodial position (P.Tr., p. 24). Peterson acknowledged again that he did not try to place claimant in a custodial job because of the failure of his earlier attempts prior to the hearing on January 17, 1985. He said that department heads viewed injured employees as damaged goods and you had to arm wrestle with the department heads to employ them (P.Tr., pp. 38-40). Peterson again confirmed that he made no attempt to employ claimant after January 17, 1985 because the attempts to employ him in a custodial job prior to the hearing had failed (P. Tr., p. 40). Again, Peterson said the crux of the reason that he did not try to put claimant in a custodial position after the January 17, 1985 hearing was because "We didn't think he could physically handle it based on past practice or experience" (P.Tr., p. 56).

Deputy Trier in awarding 15 percent permanent partial disability as industrial disability contemplated that claimant would have stable and continuous employment with his former employer and suffer only a 10 percent loss of earnings and possibly some intermittent absences from work (Decn., April 2, 1985, p. 10).

What actually happened was that claimant applied for 13 jobs for which he had seniority. He was rejected for all of them

with no accommodation or concession being made or even attempted. This was in direct opposition and contravention of Peterson's testimony at the hearing on January 17, 1985 (Tr. pp. 84 & 85). Claimant was then fired on July 1, 1985. Claimant lost seven years of seniority with the City of Des Moines and was confronted with the open competitive job market in difficult economic times, in an impaired physical condition, qualifying only for labor work which is the only kind of work that he knew how to do.

In Blacksmith, cited above, industrial disability was found where claimant was transferred to a lower paying job. Deputy Trier proceeded on this basis. His decision is based on a 10 percent loss of earnings doing custodial work instead of street labor work.

However, in fact, this case is more analogus to McSpadden, cited above, where the employer refused to give any work to the employee and the employee could not find other suitable work after a diligent search. In this case claimant was totally unemployed from the date of the hearing on January 17, 1985 until he went to work for Western Waterproofing on August 20, 1985. Claimant kept applying for jobs with the city; apparently unaware of the fact that Peterson had already decided that claimant could not do any of these custodial jobs even before claimant applied for them.

This case is somewhat similar to Meyers v. Holiday Inn of Cedar Falls, Iowa, Iowa App., 272 N.W.2d 24, 25 (1978). In that case claimant's physical condition failed to improve to the extent anticipated at the earlier hearing. In this case, claimant's non-physical condition, his reemployment opportunity with the City of Des Moines, did not improve as was expected and represented by the city at the earlier hearing. To claimant's detriment the earlier deputy relied upon this representation and the expection that claimant would be reemployed by the city in a custodial job as shown by the earlier deputy's decision.

Therefore, it is determined that claimant has sustained the burden of proof by a preponderance of the evidence that the injury of March 3, 1983 is the cause of additional permanent disability as industrial disability based upon the non-physical change of condition. It was represented that there was a fair chance the claimant would be reemployed by the city. In fact no attempt of any kind was made by the city to accommodate or make any concessions as represented.

As a consequence, claimant had more than a 10 percent loss of earnings. He suffered a total loss of earnings from January to August of 1985. Claimant is still subject to intermittent absences from work in the future due to his back injury as recognized by Deputy Trier. In addition, since claimant has been forced into the competitive labor market in an impaired

condition where the only work he knows how to do is labor work, then claimant will be subject to periodic job changes due to this back injury because of claimant's inability to continue indefinitely in laboring type of work. It would also appear that eventually claimant will have to develop a less strenuous method of making a living. This could entail a period of unemployment or loss of earnings while learning new work.

Claimant testified that he could perform the roofing job. However, he also stated that his brother made concessions for him which enabled him to do so. Claimant testified that he is performing the manual labor job at the furniture warehouse. However, at the same time it violates the weight restriction of Dr. Carlstrom and Dr. Flappan, and the suggestion of Dr. Bell and Dr. Carlstrom that claimant change occupations from strenuous work.

The opinion of the supreme court in Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963) cited with approval a decision of the industrial commissioner for the following proposition:

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

Claimant is in his mid-thirties. He has a wife and three dependant children. He has serious financial responsibilites. At a time when claimant should be nearing the top of his earning capacity, the doctors have recommended that he no longer engage in the employment for which he is best suited. His high school qualification is a GED certificate. He is not qualified for skilled or semi-skilled jobs generally. His past employments had been unskilled labor jobs.

It should also be noted that this injury had a traumatic onset in a motor vehicle accident as distinguished from a simple back strain that simply occurred while doing ordinary tasks. Claimant was struck from behind by an intoxicated motorist while driving an end loader for the City of Des Moines.

Consequently, based on all of the foregoing considerations it is determinated that claimant's overall permanent partial disability is 25 percent as industrial disability. Therefore, claimant is entitled to an additional 10 percent permanent partial disability as industrial disability as a result of this hearing due to the non-physical or economic change of condition

that the expectation of employment in a custodial job was not fulfilled or even attempted after the prior hearing.

It is true that claimant is currently earning approximately the same compensation as a warehouseman that he would be earning in a custodial job for the city. This award is based upon (1) the fact that claimant had no employment or compensation from January of 1985 to August of 1985; (2) that claimant will be subject to intermittent absences from work from time to time due to this back injury; (3) that claimant will be subject to loss of earnings because he will not be able to continue in his current job indefinitely because it violates the weight restrictions of two doctors and the job recommendations of two doctors that claimant should abandon strenuous labor work; and, (4) claimant lost seven years of senority and the ability to bid on other jobs. Claimant will be subject to loss of earnings in between jobs as he tries to find suitable work or while he educates or retrains himself for more suitable skilled or semi-skilled work.

FINDINGS OF FACT

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

That claimant was employed by the City of Des Moines on March 3, 1983.

That claimant sustained an injury on March 3, 1983, when the end loader he was driving for the City of Des Moines was struck from behind by an intoxicated driver.

That claimant suffered a lumbosacral strain in this motor vehicle accident which caused a five percent permanent functional impairment of his lumbosacral spine.

That Dr. Flappan imposed a 50 pound weight restriction on claimant and Dr. Carlstrom imposed a 30 pound weight restriction on claimant.

That claimant's present job as a warehouseman requires him to handle as much as 50 or 60 pounds on occasions.

That Dr. Carlstrom recommended that claimant change occupations to eliminate heavy lifting and Dr. Bell recommended claimant change occupations to a less strenuous job.

That claimant was 31 years old at the time of the injury.

That claimant is married and has three dependent children.

That claimant has a high school equivalent education through GED qualifications.

That claimant has no education or training beyond high school.

That all of claimant's former jobs have been laboring types of work and that he is not trained at the present time for any skilled or semi-skilled jobs.

That Peterson created the expectation by his testimony at the earlier hearing that claimant would be reemployed in stable and continuous employment by the City of Des Moines in a custodial job and that his past seven years of employment with the city provided sufficient seniority to obtain a custodial job.

That after the hearing Peterson made no attempt to place claimant in a custodial job or any other job or to make any concessions or accommodations of any kind even though he had at least 13 opportunities to do so.

That defendants' failure to provide or attempt to provide a continuous and stable employment opportunity to claimant constitutes a non-physical or economic change of condition not anticipated or contemplated at the first hearing.

That claimant was totally unemployed from January of 1985 to August of 1985 and had a total loss of earnings during that period.

That claimant will be subject to intermittent absences from work due to this back injury and may suffer loss of earnings during these periods.

That claimant will be subject to job changes as he attempts to find suitable work consistent with his impairment and restrictions from this injury and may lose earnings for this reason.

That claimant will be subject to obtaining education or training to perform suitable work consistent with his impairment and his restrictions from this injury and may lose earnings for this reason.

CONCLUSIONS OF LAW

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

Claimant has established a substantial change of condition that was not anticipated at the time of the prior award.

That claimant has sustained the burden of proof by a preponderance of the evidence that the injury of March 3, 1983 was the cause of additional permanent partial disability as industrial disability.

That claimant is 25 percent industrially disabled which entitles him to an additional 50 weeks of permanent partial disability benefits based upon an additional 10 percent of industrial disability.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay claimant fifty (50) additional weeks of permanent partial disability benefits as industrial disability at the rate of two hundred one and 30/100 dollars ($201.30) in the total amount of ten thousand sixty-five and no/100 dollars ($10,065.00) commencing immediately after payments under the prior award terminated as stipulated by the parties.

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

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

That defendants are to pay the costs of this action as provided by Division of Industrial Services Rule 343-4.33.

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

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

Walter R. McManus Jr.
WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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002153

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD LEE MILLER,

Claimant,

vs.

CITY OF DAVENPORT,

Employer,
Self-Insured,
Defendant.

File No. 750109

A R B I T R A T I O N

D E C I S I O N

FILED

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IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Ronald Lee Miller, against his self-insured employer, the City of Davenport, to recover benefits under the Iowa Workers' Compensation Act, as a result of an injury sustained November 10, 1983. This matter came on for hearing before the undersigned deputy industrial commissioner in Davenport, Iowa, on May 18, 1987. A first report of injury was filed on November 17, 1983.

The record in this proceeding consists of the testimony of claimant, of William Case, and of David Geisler, as well as of joint exhibits 1 through 12.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant's rate of weekly compensation is $210.83; that the commencement date for any permanent partial disability award is January 5, 1985; that all healing period or temporary total disablity which was stipulated to be causally related to claimant's work injury has been paid; that claimant did receive an injury which arose out of and in the course of his employment on the injury date; and that defendant is entitled to a credit of $3,138.40 against any permanent partial disability benefits awarded claimant. The issues remaining for resolution are:

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

2) Whether claimant is entitled to permanent partial disability benefits; and

3) The affirmative claimant's failure to mitigate damages.

REVIEW OF THE EVIDENCE

Claimant testified that he is 36 years old and has completed ninth grade and has obtained a GED. Claimant's work history consists of factory labor, fire fighting, combat soldiering, and worked for the City of Davenport as a street department, sewage department, and sanitation department worker. All past work involved heavy labor with lifting of to 100 pounds and walking, carrying, bending, and stooping. Claimant was employed in the sanitation department on November 10, 1983 when he was injured when a refrigerator struck him in the low back and, apparently his head, while he was picking up discarded appliances. Claimant was then off work with conservative medical treatment for approximately two months. He returned to work with a light duty restriction involving no prolonged standing, stooping, lifting, or bending. Claimant aggravated his back condition in March 1984 while loading garbage. Claimant subsequently was off work for one and one-half years.

Claimant returned to work for the city initially working as a meter collector. Claimant collected coins, counted, rolled and wrapped them. Claimant subsequently worked as a meter checker in the traffic department. Claimant reported that he had back pain on entering and exiting cars, but otherwise could do that work. Claimant is now a swing man in the parking system. As such, he answers phones and takes complaints regarding needed meter repairs. Claimant refused an offered job in the city maintenance department with the city as he believed it involved work shoveling and lifting sheet rock.

Claimant agreed he has not sought vocational rehabilitation and characterized himself as happy where he is now. Claimant agreed that he irregularly does exercises his physicians prescribed and admitted that he had fallen off in performing these until physicians advised him to keep them up. He had not done them for several weeks prior to hearing. Claimant also stated that his doctors have advised weight loss and that he is now on a 1200 calory diet per his family physician. He stated he has carried his current weight of around 200 pounds since 1975.

Some disagreement exists in the record as to whether claimant has discontinued restoring old cars because of his back. Claimant agreed that in his deposition he had stated that he had finished an older Chevrolet vehicle and then sold it and was uncertain whether his back was a factor in that decision. He later stated that the car required only minimal work and that he had not completed another vehicle requiring much more work.

Claimant's rate of pay at his injury date was $8.08 per hour. He now receives $8.76 per hour. A sanitation worker with ten years' experience now earns $8.66 per hour. Claimant apparently has been employed by the city for approximately twelve years.

William Case, superintendent of the parking system for the City of Davenport, testified that he is claimant's supervisor and sees claimant daily. He agreed claimant has difficulty entering and exiting vehicles but was capable of walking his meter checking beats. He characterized claimant as now a backup meter checker who is on beat only when other checkers are off work. Claimant otherwise does clerical work in the meter shop. Mr. Case characterized him as doing this work satisfactorily. It involves no heavy lifting.

David Geisler, personnel generalist for the City of Davenport, monitors workers' compensation cases and is familiar with claimant and claimant's case. He reported that the personnel department recommended, and the city administrator approved, that claimant remain with the city and the city continue to provide claimant employment at or above his pay rate as of his injury date, if at possible, even if that required a subsidized job. The city's philosophy generally is to eliminate jobs subsidized in the general fund, which jobs are not revenue producing. Mr. Geisler stated that he, therefore, is trying to find other jobs in which to place claimant. He reported that claimant will have a job with the city if possible, but that claimant's position is subject to the same contingencies as that of other workers. Additionally, jobs must be available within claimant's limitations. Geisler stated he is familiar with claimant's medical background and feels there are a number of jobs for which claimant could be considered. He reported that he had interviewed claimant for a trade helper position but that claimant had not been provided the job after claimant expressed feelings of being unable to physically handle the job.

Medical records indicate that claimant had low back discomfort complaints on May 16, 1977, December 29, 1978, November 8, 1979, and September 30, 1983, prior to his work injury.

Gordon A. Flynn, M.D., treated claimant on November 10, 1983 for complaints of low back pain as well as abdominal and scrotum pain. Examination revealed mainly tenderness over the left sacroiliac and gluteal area as well as of the lower abdomen. X-rays showed no fractures or other abnormalities. Diagnosis as of November 14, 1983 was of contusion plus an acute low back strain. On November 18, 1983, Dr. Flynn referred claimant to Eugene Collins, M.D., a neurosurgeon. Claimant reappeared at Dr. Flynn's office on March 26, 1984 after doing some lifting at work on March 20, 1984 and spraining his lower back. Findings were essentially those of a low back sprain with tenderness of the paravertebral muscles, particularly on the right. Claimant was then referred to Dr. Collins. In a report of June 4, 1984, Dr. Flynn reported that he last saw claimant on May 14, 1984 with symptoms largely resolved. He reported that claimant had serious doubts of his ability to return to the work he had previously done and that the doctor could only "in part concur

with that assessment."

Dr. Collins reported that neurological examinations after the November 1983 and March 1984 incidents revealed decreased range of motion of the lower back in all directions as well as loss of lordosis and paraspinal tenderness. No discreet focal neurological deficit was present. A CT of the lumbar spine was within normal limits. After March 1984, claimant was placed on a physical therapy and exercise program with satisfactory results obtained. Claimant was seen by Dr. Collins on October 28, 1984 where physical examination documented a satisfactory range of motion with no complaints of pain. Neurological examination remained objectively intact. Dr. Collins felt that claimant had a deconditioned low back or a chronic low back strain which is exacerbated by activities such as heavy lifting, bending, pushing, pulling, etc. He felt claimant may not be able to function in a job that involved those actitities but may do quite well in a more sedentary position.

Robert J. Chesser, M.D., examined claimant on May 31, 1985. He reported that claimant's symptoms [likely] were due to an ongoing muscle strain with nothing found to indicate neurological deficit or bony abnormality. He recommended an exercise program for claimant to promote lumbar flexion, hamstring stretching and abdominal and back extensor strengthening. He reported that he could see nothing to indicate any permanent impairment. He later clarified by stating that while nothing could objectively account for claimant's ongoing pain, frequently problems with chronic muscle strain may produce ongoing symptoms.

W. J. Robb, M.D., examined claimant on August 18, 1985. His diagnosis was of recurring mild lumbar strain. Straight leg raising was essentially normal; neurological examination was within normal limits. He felt that claimant's condition was stabilized and did not anticipate any deterioration because of the November 1983 injury nor appreciable improvement. He stated that claimant's lack of participation in exercises and in an aggressive program of physical fitness would play a significant role in his lack of improvement or recovery of excellent function of the lumbosacral spine. He reported that objective findings were virtually absent while the subjective findings were moderate. He reported that, particularly in the face of claimant's lack of aggressive physical fitness, claimant should have no restrictions on his walking or his standing, but that repetitive bending or stooping should be limited to one-half hour at a time, lifting to not exceed 35 pounds, and sitting not restricted.

In his deposition taken February 21, 1986, Dr. Chesser identified himself as the attending physiatrist and medical director of the rehabilitation unit of the Franciscan Rehabilitation Center. He opined that, with an exercise program, claimant should be able to be rehabilitated to the point where

claimant has no permanent partial "disability"; that even though such program would not cure his chronic muscle strain, it would reduce its impingement on claimant's daily activities. The doctor later stated that claimant's prognosis was guarded for significant improvement, however, given the fact that claimant had been symptomatic for several years. The doctor opined that it was reasonable for claimant not to be able to return to heavy lifting, bending, or carrying on an eight hour per day basis if claimant's symptomatology of chronic muscle strain continued.

In his deposition of February 24, 1987, Dr. Robb identified himself as a board certified orthopedic surgeon. He defined heavy lifting as lifting of 75 pounds or more occasionally and lifting 50 pounds or more repetitively. He reported that a prolonged period of rehabilitation consisting of exercise and whole body physical fitness would be required to correct a condition such as claimant's. He reported that healing of claimant's condition will generally take place within four to six months but that restoration of function results from re-conditioning following the injury. He agreed that claimant is currently unable to lift weights of 35 to 100 pounds as required of a garbage man and is unable to return to heavy labor employment without an aggressive physical fitness program. He characterized claimant as not strongly motivated, but not as a malingerer. He reported that he could not rate claimant under the AMA Guides, but stated claimant cannot return to 100 percent normal functioning.

In a vocational rehabilitation report of May 14, 1987, Doug Nelson, rehabilitation consultant, concluded that prior to claimant's injury, claimant had access to approximately 40 percent of occupations requiring a high school equivalency for an entry level position. He reported that following the injury with his reduced functional capacity, claimant retained access to approximately 23 percent of such jobs, thereby losing, approximatly 17 percent of his access to realistic and feasible employment alternatives. Mr. Nelson stated that claimant's loss of access to the employment market is then 42 percent. He further stated that claimant needs to upgrade his skills for jobs seeking and interviewing as he has not appropriately learned how to accept and express his residual functioning capacity.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 10, 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).

The medical evidence generally reflects that claimant had had some preexisting back complaints but no long term disability from these prior to his November 1983 incident. Medical evidence also suggests that there are little or no objective findings at this time but moderate subjective findings. Likewise, medical evidence suggests that there is no permanent partial impairment to claimant but for that resulting from pain related to chronic muscle strain. All physicians appear to agree that claimant's unwillingness to pursue an aggressive physical fitness program is a significant factor in his continuing problems. No physician has expressly stated that claimant's current condition results from either the November 1983 incident or the March 1984 aggravation of the preexisting condition. It appears, however, that claimant was able to carry out his duties as a sanitation worker prior to the November injury and the March aggravation. We find, therefore, that the injury and the aggravation were factors causally related to cliamant's present condition. We also find, however, that claimant's lack of motivation to rehabilitate himself is a factor in his condition. That factor is properly considered in assessing claimant's permanent partial disability.

We now consider the issue of permanent partial disability benefit entitlement.

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

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

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

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

Claimant is a relatively younger worker and while he has not completed high school, has obtained a GED. He is not strongly motivated either to seek vocational rehabilitation or to restore his own functional capacity. He has restrictions which preclude his doing heavy lifting or being involved in bending or stooping. He apparently has no restrictions on walking, standing, or sitting. Claimant's employer has done a commendable job of retaining him in positions available and appears strongly motivated to continue to retain claimant. Claimant's earnings now are greater than his earnings on his injury date and greater than he would be earning were he still retained in the position he held at that time. Claimant is performing satisfactorily in the position he now holds. His employer continues to search for positions within city government which would be in less jeopardy for claimant than his current general fund subsidized position. Claimant has no permanent partial impairment rating, but physicians agree that he cannot return to 100 percent normal functioning given the prolonged time following his actual injury in which he has continued to be symptomatic and in which he has not completed any type of aggressive rehabilitation program. That fact likely precludes claimant's easily finding employment elsewhere should he, for personal reasons or for reasons related to the contingencies of all workers, need to leave work with the city. Were that to happen, claimant's access to the job market would be less than it would have been prior to his injury. As noted, part of that potential lack of access can be attributed to the injury itself and part to claimant's lack of motivation to engage in those recommended activities which would rehabilitate him. Claimant's lack of motivation and the probability of his long term security in city employment make his loss of earning capacity limited. We find that claimant has sustained a permanent partial disability of five percent on account of his injury.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant was a sanitation worker for the City of Davenport on November 10, 1983.

Claimant injured his back at work on November 10, 1983 when a refrigerator struck his low back.

Claimant aggravated his back in March 1984 in an attempt to return to his work as a sanitation engineer.

Claimant had preexisting back complaints but no long-term disability prior to his November 1983 work injury.

Claimant now has little or no objective neurological or other medical findings; claimant has moderate subjective findings generally of pain resulting from chronic muscle strain.

Claimant has not been assigned a permanent partial impairment rating but physicians agree he cannot return to one hundred percent normal functioning.

Claimant was able to perform his duties as a sanitation worker prior to November 10, 1983.

Claimant's unwillingness to pursue an aggressive physical fitness program is a significant factor in his continuing problems and demonstrates a lack of motivation to rehabilitate himself.

Claimant is 36 years old and has a work history as a heavy manual laborer.

Claimant completed ninth grade and has obtained a GED.

Claimant has no restrictions on walking, standing, or sitting.

Claimant has a 35 pound lifting restriction and has restrictions on bending, stooping and carrying.

Claimant's employer has retained him in city work and is committed to retaining him in city work.

Claimant is comfortable where he is at now and has not attempted vocational rehabilitation.

Claimant has been able to perform job duties assigned him since his injury although he has experienced discomfort on entering and exiting vehicles.

Claimant is earning more now than he earned when injured and more than a city sanitation worker with ten years of city employment earns.

Claimant has been a city employee for twelve years.

Claimant would have less access to non-city jobs than would a noninjured worker.

Claimant's lack of motivation is also a factor in any lack of access to non-city jobs.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established a causal relationship between his injury of November 10, 1983 and the permanent partial disability on which he bases his claim.

Claimant has established an entitlement to permanent partial disability on account of his injury of five percent (5%).

ORDER

THEREFORE, IT IS ORDERED:

Defendant pay claimant permanent partial disability benefits for twenty-five (25) weeks at the rate of two hundred ten and 83/100 dollars ($210.83). Defendant receive credit in the amount of three thousand one hundred thirty-eight and 40/100 dollars ($3,138.40) as stipulated by the parties.

Defendants pay any accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30.

Defendant and claimant 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 10th day of July, 1987.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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002163

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HANS R. MINOR,	:	
	:	FILE NOS. 719614 & 686275
Claimant,	:	
	:	A R B I T R A T I O N
vs.	:	
	:	A N D
SWIFT INDEPENDENT PACKING,	:	
	:	R E V I E W -
Employer,	:	
	:	R E O P E N I N G
and	:	
	:	FILED
NATIONAL UNION FIRE,	:	
	:	SEP 11 1987
Insurance Carrier,	:	
Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a combined proceeding in review-reopening and arbitration brought by Hans R. Minor, claimant, against Swift Independent Packing, employer (hereinafter referred to as Swift), and National Union Fire Insurance Company, insurance carrier, defendants, for workers' compensation benefits as a result of alleged injuries on October 26, 1981 and October 6, 1982. A memorandum of agreement for the October 26, 1981 injury was filed on November 13, 1981. On July 7, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant. The exhibits received into the evidence at the hearing are listed in the prehearing report except that claimant's exhibit 3 and pages 1A through 1F of exhibit A (medical reports of Joel D. Cotton, M.D., submitted by defendants). These reports are from expert witnesses retained by the parties subsequent to the prehearing conference. Both parties object to these exhibits on the basis of unfair surprise in that at the prehearing conference a hearing date was agreed to on the basis that no new evidence would be offered. However, each side obtained expert opinions and served those upon the opposing party only a few days before the hearing. Both parties are correct. Such surprise evidence should not be permitted. If the parties had planned on hiring additional expert witnesses for use at hearing they should have

so indicated at the time of the prehearing conference, not a few days before the hearing. All of the rest of the exhibits and oral testimony received into the evidence at the hearing was considered in arriving at this decision.

The prehearing report contains the following stipulations:

1. On October 26, 1981 and October 6, 1982, claimant received injuries which arose out of and in the course of employment with Swift;

2. Claimant is not seeking additional temporary total disability or healing period benefits in this proceeding; and,

3. Claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $233.91 for the October, 1981, injury and $231.06 for the October, 1982, injury.

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

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

II. The extent of claimant's entitlement to weekly benefits for permanent disability; 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 employed by Swift from February, 1971, to October, 1983, as a meat cutter.

There was little dispute among the parties as to the nature of claimant's employment with Swift. Claimant voluntarily left his employment with Swift in October, 1983, following a decrease in his wages under a new union contract. According to claimant's testimony in his deposition, claimant took early retirement because he did not wish to work for the lower wages.

2. On October 26, 1981, claimant suffered an injury to his neck and left shoulder which arose out of and in the course of his employment with Swift.

Claimant testified that he injured his neck and left shoulder during his employment with Swift when he fell from a platform approximately one foot off the floor and landed on his back and left shoulder. Claimant stated that he felt immediate pain in the neck and left shoulder. Claimant was initially treated by Arthur Gelfand, M.D., for a contused left shoulder. Dr. Gelfand prescribed heat treatment but the treatment proved ineffective

to relieve claimant's pain. Dr. Gelfand then referred claimant to M. E. Wheeler, M.D., an orthopedic surgeon, in November, 1981. Dr. Wheeler diagnosed tendinitis and a contused left shoulder. Dr. Wheeler prescribed muscle relaxants and rest for four to six weeks. Claimant was also seen by A. D. Blendermann, M.D., another orthopedic surgeon, for his problems in December, 1981. Dr. Blendermann diagnosed cervical, rhomboid ligaments sprain and a sprain of the rotator cuff in the left shoulder. Upon the advice of Dr. Blendermann, claimant underwent physical therapy for approximately a month consisting of heat, massage and ultrasound. Following claimant's return to work on January 18, 1982, Dr. Blenderman discharged claimant from his care with only "exceedingly mild" pain in the cervical spine. Dr. Blendermann suggested that claimant be careful lifting for approximately one month after his discharge.

3. The preponderance of the evidence does not establish that claimant suffered permanent impairment to his body as a whole as a result of the October 29, 1981 injury to his neck and shoulder.

Although claimant's credibility is somewhat suspect due to his erroneous answers to interrogatories (exhibit F) concerning past injuries, adequate medical evidence exists in the record independent of claimant's testimony to show that claimant does have continuing problems with his neck and left shoulder. However, claimant failed to meet his burden of proof that these problems are the result of the October, 1981, injury. This failure would exist even if claimant did not have any credibility problems.

Claimant has had two prior serious spinal injuries. In 1970, claimant was involved in a serious auto accident which injured his lower back requiring absence from work for several weeks. John J. Dougherty, M.D., the treating physician at that time, prescribed the use of a back brace for some period of time as a result of this accident. Claimant also was involved in a serious boating accident in 1973 when the boat in which he was riding was literally cut in half by another boater. Claimant stated that he was off work for approximately two weeks as a result of an injury to his left shoulder as a result of his accident.

Claimant testified that he now suffers from continuous pain, stiffness and lack of motion in his neck and left shoulder which has not changed since the 1981 work injury. Following the January, 1982 discharge by Dr. Blendermann, claimant has received treatment of his problems from Dr. Dougherty in September, 1982 and extensive physiotherapy, at the direction of another orthopedic surgeon, Horce Blume, M.D., a neurosurgeon, in 1985 and 1986.

Although claimant testified that he fully recovered from the

two prior injuries before the October, 1981, work injury, the evidence submitted in this case fails to demonstrate a causal connection between the work injury and claimant's continuing left shoulder and cervical spine complaints. First, the existence of the prior injuries requires this agency to rely heavily upon the opinions of experts. Only one physician in this case, Dr. Blume, opines that claimant's current cervical problems are due to the 1981 injury. However, at no time does Dr. Blume mention claimant's prior injuries in the reports he submitted in this case especially the prior left shoulder injury in 1973. Consequently, there is no way of knowing whether Dr. Blume knew of these prior injuries. Furthermore, despite being regularly treated by several orthopedic surgeons between January, 1982, and September, 1983, none of these physicians report that claimant was complaining of continuing neck and shoulder pain until September, 1983. In September, 1983, Dr. Dougherty opined that claimant's problems at that time were the result of "an aggravation of a preexisting condition." What is unclear from this report is what was the preexisting condition, the auto accident, the boating accident or the work injury of October, 1981.

Finally, even if claimant had established causal connection, the preponderance of the evidence fails to demonstrate that claimant suffers permanent impairment from the neck and back condition. Although Dr. Blume felt that claimant has a herniated disc which requires further evaluation and tests such as a myelogram and a CT scan, two orthopedic surgeons, Dr. Blendermann and Dr. Dougherty, both do not feel that there is much of anything permanently wrong with claimant's neck and do not recommend further treatment.

4. On October 6, 1982, claimant suffered injuries to his left and right wrist which arose out of and in the course of his employment with Swift.

Claimant testified that after a period of time operating a wizard knife, an electrically powered meat cutting tool, in his job at Swift during the summer and fall of 1982, claimant developed pain and numbness in his wrist and hands, initially on the left. Claimant reported to the company doctor, Michael Jennings, M.D., in October, 1982. Dr. Jennings suspected carpal tunnel syndrome and took claimant off work for a week and prescribed use of a wrist splint. Eventually, Dr. Jennings referred claimant to a neurologist, Dennis Nitz, M.D., when claimant's symptoms recurred after his return to work. After his examination of claimant on October 2, 1982 and a positive EMG test, Dr. Nitz diagnosed claimant as suffering from left carpal tunnel syndrome and referred claimant to A. Klieder, M.D., for further treatment. On November 5, 1982, Dr. Klieder performed a surgical decompression of the carpal tunnel syndrome in claimant's left wrist. Later that same month claimant noted similar symptoms on the right wrist and upon another positive

EMG test Dr. Klieder diagnosed right carpal tunnel syndrome and performed another decompression surgery on December 6, 1983. Claimant then returned to work in the latter part of January, 1983.

5. The injury of October 6, 1982, was a cause of a two percent permanent partial impairment to each of claimant's upper extremities.

Following recovery from the second decompression surgery, claimant's symptoms did not subside. Claimant has continually complained of numbness and swelling in both of his hands since that time. Dr. Klieder indicated in his report of May 9, 1983, that this condition is the result of a repeated trauma to the hands and there is nothing else he could do except recommend a change of employment. In May, 1984, Dr. Klieder opined that he felt the carpal tunnel syndrome problems were work related but stated that he would be surprised if claimant had permanency from the condition. However, Dr. Klieder stated at the time that he had not examined claimant recently. Dr. Dougherty began treating claimant's hand difficulties in the later part of May, 1983. This treatment consisted of use of an "exerciser" and medication. Claimant also had a recurring ganglion cyst on the right wrist. Finally, in October, 1983, Dr. Dougherty stated that claimant's wrists problems were the result of overuse syndrome and like Dr. Klieder he stated he could do nothing further for claimant. Dr. Dougherty opines that claimant has a "one-two" percent permanent partial impairment of each upper extremity as a result of his persistent carpal tunnel syndrome problems.

6. A finding could not be made as to the causal connection between claimant's requested medical expenses and a work injury found in this case.

All of the requested medical expense in this case were for evaluation and treatment of claimant's neck and left shoulder problems beginning in 1985 performed by Dr. Blume. For reasons stated above, none of these conditions were found to be causally connected to the October, 1981, work injury or anyother work injury in this case.

CONCLUSIONS 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).

II. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is

something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

The parties had stipulated to a single injury date of October 6, 1982 for claimant's bilateral wrist injuries. Based upon a finding of a two percent loss of use to both arms from this single injury to claimant's hands or arms, claimant is entitled to disability benefits as measured pursuant to Iowa Code section 85.34(2)(s). Under that code section, if the disability is partial, then the extent of permanent disability is measured only functionally as a percentage of the loss of use of each extremity which is then converted into a percentage of the body as a whole and the two ratings combined into one body of the whole value. If the disability is total or a total loss of earning capacity is found to have occurred from a multiple injury under 85.24(2)(s) loss, the disability is measured industially and claimant would be entitled to permanent total disability benefits under Iowa Code section 85.34(3). See Simbro, 332 N.W.2d 886 (Iowa 1983); Burgett v. Man An So, Corp., III Iowa Industrial Commissioner Reports, 30A (Appl. Decn. 1982).

In the case sub judice, it is rather obvious that claimant has not suffered permanent total disability. Therefore, the disability is measured only functionally. Using the AMA Guides for evaluating permanent impairment, recognized by this agency in determining functional disability, see Division of Industrial Services Rule 343-2.4, and utilized pursuant to this agency's special expertise in such matters, a two percent permanent partial impairment to an upper extremity converts to a one percent whole man impairment and the combined value of two such impairments converts under the Guides to a total of two percent of the body as a whole. Therefore, claimant is entitled to 10 weeks of permanent partial disability benefits which is two percent of the 500 weeks allowable for an injury in Iowa Code section 85.34(2)(s).

As stipulated in the prehearing report, claimant's healing period ended on January 23, 1983. Therefore, permanent partial disability benefits shall be awarded from January 24, 1983.

As no medical expenses were causally connected to a work injury, claimant is not entitled to an order from this agency directing reimbursement of those expenses.

ORDER

1. Defendants shall pay to claimant ten (10) weeks of permanent partial disability benefits at the rate of two hundred thirty-one and 06/100 dollars ($231.06) per week from January 24, 1983.

2. Defendants shall pay accrued weekly benefits in a lump

sum and shall receive credit against this award for permanent partial disability benefits previously paid, if any.

3. Defendants shall pay interest on benefits awarded herein as setforth in Iowa Code section 85.30.

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

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

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

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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FILED

SEP 14 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUDY L. MITCHELL,	:	
Claimant,	:	File No. 786976
vs.	:	
HERSCHEL MANUFACTURING CORPORATION,	:	A R B I T R A T I O N
Employer,	:	
and	:	D E C I S I O N
TRAVELERS INSURANCE,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Judy L. Mitchell, claimant, against Herschel Manufacturing Corporation, employer, and the Travelers Insurance Company, the employer's insurance carrier. Claimant alleges that she has developed tinnitus as a result of noise exposure in her employment and seeks compensation for permanent partial disability. Claimant presents her claim under Chapter 85 of the Code. The employer's position is that Chapter 85B provides the exclusive remedy for claimant's condition since the claim urges cumulative, rather than acute, trauma. The defense asserts that the claim is barred under the provisions of Code sections 85.23 and 85.26. It was stipulated that, in the event of an award, the rate of compensation is $163.28 per week. Claimant has lost no time from work as a result of the condition and makes no claim for healing period or for temporary total disability.

The case was heard at Des Moines, Iowa on February 20, 1987 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Judy L. Mitchell, Jack Kenney, Earl Davis, Robert R. Updegraff, M.D., Joe Poundstone, Joyce Brennan and John L. Dugan, Jr. The record also contains claimant's exhibits A through E and defendants' exhibits 1 through 7.

ISSUES

The issues presented by the parties are whether claimant sustained an injury which arose out of and in the course of her employment; whether a causal connection exists between the tinnitus and any employment noise exposure; and, determination of the degree of permanent partial disability that is related to any compensable injury. The issues raised by the defense are whether or not the claim is barred by the provision of Code sections 85.23 and 85.26 and whether Chapter 85B is the exclusive remedy.

SUMMARY OF EVIDENCE

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

Judy L. Mitchell is a 39-year-old lady who complains of tinnitus which she first noticed in 1982. She has been employed at Herschel Manufacturing Corporation since 1975 and has been employed there continuously with some interruptions for medical problems and layoffs. Claimant testified that the fact of her hearing difficulty was established in 1983 by tests which showed a hearing loss and recommended use of hearing protection. She testified that she had had prior hearing tests, but that the results were not disclosed to her.

Claimant testified that the first three years of her employment were in a parts alignment position and that she has worked primarily in the heat treatment area since 1978. Claimant described the heat treatment machine as a process which hardens metal and stated that the machine sometimes arcs out and causes a loud explosion noise. She stated that the machine is water cooled and has a noisy pump which is driven by an electric motor. Claimant testified that in 1982 the cooling tower and motor was moved from a location outside the building into the building near her work station. She stated that the motor had a loud squealing sound that continued until a period of layoff in 1985 when the factory shut down. She stated that, after the layoff, the motor no longer squealed.

Claimant testified that, in the past, she has hunted and that she also runs a lawn mower and garden tiller at her home, but that she has used hearing protection whenever engaging in those activities. She stated that she has had difficulty obtaining hearing protection at the Herschel Manufacturing Corporation, particularly in the earlier years of her employment, but that she now regularly uses hearing protection even though the tinnitus is sometimes exacerbated by the ear plugs.

Claimant described her current symptoms as a constant

ringing and buzzing. She stated that she hears noise from the pump motor all the time. She stated that it is stressful to her, causes her to lose sleep and causes her to be irritable. She stated that it affects her job only in the sense that it causes her to miss approximately one day of work each month. Claimant testified that the problem bothers her most when she is in a quiet area, and that she often obtains relief by having background noise such as a radio playing softly.

Jack Kenney testified that he has been employed at Herschel Manufacturing Corporation and that he lives with claimant. Kenney corroborated claimant's testimony that the pump motor made a loud noise and that, when the heat treatment machine arcs out, it makes a loud "bang" like a gun or a big firecracker. Kenney confirmed that claimant receives relief from her problem by playing a radio at a low volume.

Earl Davis, another Herschel Manufacturing Corporation employee, also complained of a constant buzzing in his ears and hearing problems. Davis confirmed that the heat treatment machine made a loud humming, whine type of noise and "bangs" when it arcs out. Davis stated that the noisy motor started in 1979 and that it was repaired after he left the heat treatment department in 1984 or 1985.

Joe Poundstone was claimant's supervisor during much of 1982 through 1984 when she worked in the heat treatment department. He stated that she never complained of noise from the motor and that he never noticed the motor to be particularly noisy. Poundstone testified that in August, 1983 the cooling tower was rebuilt and that it was moved inside the building. He felt that the change had not affected the noise level. He testified that no change was made in the pump motor or cooling equipment in 1985. Poundstone stated that the arcing is like what occurs with an electric arc welder and he did not consider it to be extremely loud or like an explosion. He described it as being more like a crackling noise.

Poundstone testified that claimant had never complained of ringing in her ears and had never requested hearing tests. He stated that the first he knew of her complaint of tinnitus being caused by her employment was in approximately 1984.

Poundstone stated that he believes claimant does wear hearing protection when in the plant and that a box of ear plugs is available in the office for use. Poundstone stated that claimant has demonstrated no performance problems in her job due to any hearing problem.

Joyce Brennan has also supervised claimant in the heat treatment department. Brennan stated that claimant never complained about motor noise and could not recall a time when

the motor seemed to be unusually noisy. Brennan stated that claimant never complained of ringing in her ears due to her work or asked for hearing protection. Brennan was not aware of this claim until the autumn of 1986. Brennan stated that, in 1983, hearing protection was always available in the office without a special request. Brennan testified that, when the heat treatment machine arcs, it makes a crackling noise or sound, but that she would not describe it as an explosion. She stated that claimant wears hearing protection now, but was unsure whether or not she did in 1983 or 1984.

John L. Dugan, Jr., the plant superintendent and personnel manager since 1979, stated that everyone in the factory has had hearing tests annually since 1983. He testified that, as shown in exhibit 3, a number of individuals who work in the noisiest areas of the plant were tested. Dugan had no knowledge of claimant's hearing being tested before 1983 or of her ever requesting a hearing test.

Dugan described exhibit 2 as the results of noise level testing that he conducted.

Like Poundstone and Brennan, Dugan did not recall a time when the motor at the tower was particularly noisy and stated that claimant had not made any complaints about motor noise. Dugan testified that the water cooling system pump and tower was moved inside the building in 1982, that it is approximately 15 feet from claimant's work station to the motor, but that the move in 1982 did not bring it any closer to her than what it had been previously. Dugan stated that his first notice of claimant's claim was a letter from her attorney. Dugan was not aware of claimant missing any work due to tinnitus.

Robert R. Updegraff, M.D., an otolaryngologist, testified that tinnitus is a common problem which he sees daily in his practice. He stated that it develops from a number of causes, including noise exposure. Dr. Updegraff concluded that claimant has non-vibratory tinnitus, a type that is very subjective. He characterized claimant's complaint as being relatively mild. Dr. Updegraff aided in drafting Chapter 85B of the Code, the occupational hearing loss chapter, and stated that tinnitus is not compensated under the occupational hearing loss chapter. He stated that the AMA guides do not provide a basis for providing an impairment rating for tinnitus due, primarily, to the subjective nature of the ailment. He disagreed with the impairment rating and method of rating employed by Eugene Peterson, M.D., who found claimant to have a 10% functional impairment of the body as a whole due to her tinnitus. Dr. Updegraff stated that tinnitus, from noise exposure, is not generally progressive once the person is removed from the noise. He stated, however, that if tinnitus is based upon noise exposure, the effect of noise tends to be cumulative. Dr. Updegraff stated that claimant's tinnitus

condition is compatable with exposure to excessive noise. He stated that, if her tinnitus developed at a time when she was working in loud noise, a connection between the tinnitus and the noise exposure is likely.

Dr. Updegraff stated that the common treatment for tinnitus such as claimant's is the use of background noise, such as a radio. He stated that the condition is seldom disabling and often has a tendency to dissipate once the person is removed from ongoing noise exposure.

In his examination, Dr. Updegraff found claimant to have a high-frequency bilateral hearing impairment of a type that is commensurate with high noise exposure over a period of time and that, with such a type of hearing impairment, tinnitus is not unusual (respondents' exhibit 4, page 2).

Claimant's exhibit A is the deposition of Eugene Peterson, M.D., another otolaryngologist. Dr. Peterson examined claimant for her complaints of tinnitus. He found her audiograms to show a pattern that he described as classical for noise trauma with a maximum hearing loss at the 4,000 to 6,000 cycle level. He stated that tinnitus occurs secondary to such hearing loss due to damage to the inner ear cell fibers. He expressed the opinion that claimant's tinnitus was caused by her exposure to noise at work (exhibit A, pages 7 and 8).

Dr. Peterson felt that claimant had a 10% permanent partial disability to the body as a whole related to the tinnitus (claimant's exhibit A, pages 10 and 11).

Donald Kurth, an industrial audiologist, testified by way of deposition (respondents' exhibit 1). Kurth has conducted audiograms of employees at the Herschel Manuafacturing Corporation plant and stated that the first audiogram for claimant was in 1983 and that subseqent tests were administered in 1984, 1985 and 1987. Kurth found claimant to have a high-frequency hearing loss, but that it would not impede her work activities (respondents' exhibit 1, page 19). He agreed that occupational noise exposure is one known cause of tinnitus, that he sees it in a good deal of the individuals he tests, but that it does not generally impede their ability to perform their work (respondents' exhibit 1, pages 20 and 21).

APPLICABLE LAW AND ANALYSIS

Claimant brought this claim only under Chapter 85 and not under Chapters 85A or 85B of the Code. The various audiograms which appear in the record show a bilateral high-frequency hearing loss that is classic for the type that results from long term exposure to high noise levels. The loss is not sufficient, however, to entitle claimant to any compensation for loss of

hearing under Chapter 85B of the Code as it appears that there is no actual hearing disability of the type that is compensated under Chapter 85B of the Code. Tinnitus, if compensable at all, is clearly not compensable under Chapter 85B of the Code.

Tinnitus is sometimes considered to be an injury. It is a condition which can arise either from an acute trauma or from long-term high level noise exposure. Tinnitus has been held to be a physical trauma. Dotolo v. FMC Corporation, 375 N.W.2d 25 (Minn 1985). The case was one where noise-induced tinnitus was a basis for awarding compensation for mental disability. Some authorities considered tinnitus which results from long-term noise exposure to be an occupational disease. Moore v. Ford Motor Co., 9 A.D.2d 165, 192 N.Y.S.2d 568 (1959). The line of demarcation between an injury produced by cumulative trauma and an occupational disease is often unclear. Carpal tunnel syndrome is currently treated in this state as an injury. Simbro v. Delong's Sportswear, 332 N.W.2d 886 (Iowa 1983). Before Chapter 85 was amended in 1972, however, conditions such as bursitis, synovitis and tenosynovitis were statutorily defined as an occupational disease (section 85A.9 1971 Code of Iowa). The current definition of occupational disease as found in section 85A.9 does not appear to exclude any of the diseases or conditions which were formerly considered to be an occupational disease under the prior statute. The Iowa Supreme Court has not specifically addressed the issue of whether carpal tunnel syndrome or tinnitus is an occupational disease compensable under Chapter 85A or an injury compensable under Chapter 85. In view of the uncertainty as to how tinnitus should be compensated, a dual analysis will be made.

Claimant has the burden of proving by a preponderance of the evidence that her injury, or occupational disease, arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976). See also Section 85A.8, Code of Iowa. The noise level studies as contained in respondents' exhibit 2 do not show particularly high levels of noise exposure. The accuracy of such testing, however, is not of the quality that is commonly seen when an industrial hygienist conducts a noise survey in order to arrive at a time-weighted average noise level exposure. Respondents' exhibit 3, the 1979 hearing test results for Herschel Manufacturing Corporation employees, shows approximately half of the work force to have been classified as AN which is a code which indicates that the employee has normal hearing at speech frequencies, but some hearing loss at higher frequencies which is often a first indication of a noise-induced hearing loss. The results are certainly consistent with the existence of a noise exposure hazard at the Herschel Manufacturing Corporation plant. Whether or not a noise level is injurious is something which is not readily ascertainable by casual observation. The perception of noise is often a relative matter and is based, to some degree, upon the individual's expectations. For example,

a manufacturing plant may be relatively quiet, as manufacturing plants go, but still a quite noisy place. Drs. Peterson and Updegraff have both indicated that claimant's tinnitus is consistent with her high-frequency hearing impairment, that the high-frequency hearing impairment is consistent with long-term noise exposure and that the tinnitus, if it arose during a period of high-level noise exposure, is likely related to that noise exposure. The only evidence of sustained long-term noise exposure for Judy Mitchell is that she experienced at the Herschel Manufacturing plant. The high-frequency hearing loss she exhibits is found to be a result of noise exposure at her place of employment and the tinnitus is likewise found to be a result of noise exposure at her place of employment. It is not necessary for a noise level to exceed the level specified in Code section 85B.5 in order to be injurious or compensable. Muscatine County v. Morrison, ____ N.W.2d ____(Iowa, 1987).

If claimant's tinnitus is treated as an occupational disease, she is not entitled to receive compensation for any degree of permanent disability because she has not reached the point of disablement as defined in section 85A.4. The employer is, however, responsible for payment of the expenses of medical treatment for the condition as provided by section 85A.5.

If claimant's ailment is treated as an injury under the provisions of Chapter 85 of the Code, the first question to be addressed is whether it is a scheduled disability under section 85.34(2)(r) or a non-scheduled disability compensable under section 85.34(2)(u). The very nature of tinnitus is not so much something which interferes with ability to hear as it is something which impairs the individual's ability to concentrate and their mental and emotional status. For these reasons, if tinnitus is treated as an injury arising from cumulative trauma, it is compensable under McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). McKeever is a case which essentially applies the discovery rule to hold that an individual will not be held to have discovered the seriousness of a condition until it becomes disabling. This avoids the running of the statute of limitations until the worker has something substantial to recover consistent with Sandbulte v. Farm Bureau Mutual Insurance Co., 343 N.W.2d 457 (Iowa 1984). Claimant's condition has not yet become disabling in the sense of McKeever and, if the discovery rule is applied, her claim is certainly timely under both the provisions of 85.23 and 85.26. There is a theory which provides that a cumulative trauma injury cannot be compensated until it produces disability in the sense of an inability to perform the individual's normal employment duties, and that any petition filed before such disability is premature and subject to dismissal. The history of this agency, however, has many cases where permanent partial disability was awarded without there being any loss of time from employment. It is concluded that it is not necessary for there to be actual inability to

perform a person's normal job in order to recover for permanent partial disability that results from cumulative trauma.

Since tinnitus is not a scheduled condition, it is to be compensated under the provisions of section 85.34(2) as a disability to the body as a whole. Hughes v. Pacific Northwest Bell, 61 Or. App. 566, 658 P.2d, 548 (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."

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).

It is of significance that the tinnitus condition has not caused claimant to be disabled from performing the normal duties of her employment. The condition is one which certainly is aggravating and bothersome, but none of the medical authorities has indicated that it seriously detracts from claimant's ability to be employed. In some cases tinnitus of a sufficiently severe degree may cause disability, but this does not appear to be one of those cases. Since claimant's tinnitus has not caused her any actual loss of earnings and does not appear to be disabling from an industrial standpoint, no compensation for permanent partial disability will be awarded. This is the same result as in the case of Hughes v. Pacific Northwest Bell, 61 Or. App. 566, 658 P.2nd 548 (1983). The employer is, of course, responsible for payment of treatment expenses under the provisions of section 85.27 of the Code.

The result in this case is the same regardless of whether claimant's tinnitus is considered to be an occupational disease or an unscheduled injury arising from cumulative trauma to be compensated industrially. Claimant's claim was made under Chapter 85 of the Code only. The defense has not urged that the condition is one which is compensable only under Chapter 85A, the occupational disease statute. It is concluded that tinnitus, arising from long-term noise exposure, is a cumulative trauma injury.

FINDINGS OF FACT

1. Judy L. Mitchell was exposed to injurious levels of noise in her employment with Herschel Manufacturing Corporation.

2. As a result of the noise exposure, Mitchell has developed a high-frequency hearing loss and a mild degree of tinnitus.

3. The tinnitus is not disabling from an industrial standpoint and claimant has suffered no loss of earning capacity as a result of the condition.

4. The tinnitus is a result of cumulative trauma resulting from noise.

5. The condition is not disabling in the sense that it has made claimant unable to perform the normal duties of her employment.

CONCLUSIONS OF LAW

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

2. Claimant sustained injury in the nature of tinnitus which arose out of and in the course of her employment with Herschel Manufacturing Corporation.

3. Since the injury is one resulting from cumulative trauma and it has never progressed to the point of disablement, claimant was not previously required to give notice or commence an action and the claim is not barred by the provisions of sections 85.23 or 85.26 of the Code.

4. Tinnitus is a condition which is not compensated under Chapter 85B of the Code; it is compensable as an injury to the body as a whole under section 85.34(2)(u).

5. Where there has been no demonstrated loss of earning capacity, an award for permanent partial disability is not warranted, but the defendants are responsible for medical expenses under the provisions of section 85.27.

ORDER

IT IS THEREFORE ORDERED that claimant has no entitlement to receive any compensation for permanent partial disability as the injury is not shown to have produced any permanent disability.

IT IS FURTHER ORDERED that defendants are responsible for payment of the expenses of treatment for claimant's tinnitus under the provisions of section 85.27.

IT IS FURTHER ORDERED that defendants pay the costs of this action under the provisions of Division of Industrial Services' Rule 343-4.33 in the amounts as follows:

Dr. Peterson Deposition	$147.20
Expert Witness Fee, Dr. Peterson	150.00
Cost of One Medical Report	25.00
Total	$322.20

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

Signed and filed this 14th day of September, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY F. MUMM, Claimant, vs. FARMLAND FOODS, Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	FILE NO. 816105 A R B I T R A T I O N D E C I S I O N FILED SEP 18 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Mary F. Mumm, claimant, against Farmland Foods, employer (hereinafter referred to as Farmland), and Aetna Casualty & Surety Company, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on February 10, 1986. On July 8, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Pat Scavone and Karen Stricklett. 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. The last day claimant was employed in any capacity was March 7, 1986;

2. The commencement date for permanent partial disability benefits if awarded herein shall be March 8, 1986; and,

3. Claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $234.57 per week.

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

I. Whether claimant received an injury arising out of and in the course of her employment:

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 permanent disability; and,

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

At the prehearing conference, the parties indicated that whether or not claimant's claim is barred by the time limitations of Iowa Code section 85.26 was an issue to be dealt with at the hearing. In paragraph seven of the prehearing report the parties failed to specify the current status of such an issue. However, in the description of disputes submitted by defendants and attached to the prehearing report, no mention is made of such an issue. Therefore, the issue will not be dealt with and it is assumed that the issue is no longer a dispute.

Claimant indicated prior to the reception of evidence that he was not seeking temporary total disability or healing period benefits in this proceeding.

Joint exhibits 8, 9 and 10 show that upon application filed in February, 1985, this agency approved a special case settlement under Iowa Code section 85.35 in March, 1985, for all injuries claimed to have been sustained by claimant including but not limited to injuries claimed to have been sustained by claimant on or about August 11, 1983.

FINDINGS OF FACT

1. Claimant was a credible witness.

From her demeanor while testifying, claimant appeared to be truthful. Claimant's testimony was consistent for the most part with histories provided to physicians during treatment and evaluation of her injuries.

2. Claimant was employed by Farmland from August, 1972, until March 7, 1986, at which time she left work indefinitely upon the advice of her treating health care practitioner.

There was little dispute among the parties as to the nature

of claimant's employment with Farmland. Claimant testified that during her entire employment she has been assigned to the bacon department primarily in "packing off". This job involves the repetitive folding of pre-formed cardboard boxes and repeated sealing and stacking of these boxes filled with bacon weighing approximately 15 to 25 pounds. However, claimant testified that she was occasionally moved to other jobs within the bacon department as needed. One of these jobs was the HRT bulk pack which involved the repetitive packing of bacon into 15 to 25 pound boxes and placing them on a nearby table for scaling. After returning from work following surgery on her neck and right wrist in December, 1984, claimant was assigned to scaling bacon which involved only repetitive handling of one pound plastic packages of bacon. However, in September, 1985, claimant testified that she was reassigned to HRT bulk. One of claimant's supervisors testified at the hearing that from his recollection of the events after claimant returned to work claimant was assigned only to scaling but admitted in cross-examination that claimant was in line two and persons in that line often switch jobs. Therefore, it is found that claimant did, in fact, perform the more difficult work in the fall of 1985.

3. On March 8, 1986, claimant suffered an injury which arose out of and in the course of her employment with Farmland.

The injury was in the form of a temporary aggravation of a preexisting condition of her neck, right shoulder, right arm, right wrist and hand. Claimant has had a long history of problems with her neck and chronic pain extending from her right hand and fingers to areas adjacent to the right shoulder blade.

According to the medical records and claimant's testimony and her deposition, she first received chiropractic treatment for neck and lower back problems in 1975. She stated that she first received treatment of right arm pain and numbness in 1978 or 1979 from a Dr. Bendixon (first name unknown). The medical evidence submitted shows that claimant was treated by Ron Dryer, D.C., for parathesia of the right median nerve and chronic cervical strain in January, 1980. Dr. James Flood, M.D., treated claimant for right arm tenosynovitis in April, 1980. Claimant was treated by Dr. Bendixon in October, 1980, for probable brachial plexis irritation of the right shoulder; probable thoracic outlet syndrome of the right shoulder; and, bilateral mild ulnar neuropathy in the right arm. At that time Dr. Bendixon referred claimant to a neurosurgeon, Walter Eckman, M.D. Dr. Eckman felt that claimant had bilateral mild ulnar neuropathy and probable thoracic syndrome. Dr. Eckman recommended conservative treatment including use of an elbow pad.

In September, 1982, claimant received treatment from a Dr. Pizarro (first name unknown) for right shoulder pain while lifting a 25 pound box at work. Dr. Pizarro treated claimant with anti-inflammatory

medication and recommended two days of lighter duty at Farmland. In August, 1983, claimant returned to Dr. Flood for treatment of what Dr. Flood felt was right shoulder bursitis. Dr. Flood referred claimant to an orthopedic surgeon, Patrick Bowman, M.D. After his examination of claimant, Dr. Bowman diagnosed cervical strain and carpal tunnel syndrome of the right wrist. At the time claimant was complaining of right sided pain and headaches. Following a period of conservative therapy consisting of rest and medication and a myelogram test which was concurred in a consultation report by E. M. Schima, M.D., Dr. Bowman performed surgery consisting of a cervical fusion at the C5/6 level of claimant's spine and right carpal tunnel release of the median nerve in the right wrist. Claimant underwent physical therapy from Noel Johnson, LPT, for several weeks following the surgery.

In May, 1984, Dr. Bowman indicated in his reports to defendant insurance carrier that claimant still had a lot of shoulder pain. He believed that there was some permanency from the injuries but that a specific rating was not possible at that time. Dr. Bowman also stated that the condition severely limits claimant's ability to get through a reasonably active day and if symptoms persist he will have to impose permanent physical restrictions on activity.

In June, 1984, claimant was examined again by Dr. Shima who found that claimant was still complaining of terrible pain in the shoulder and headaches and he felt that there was no change in her condition by the surgery. Claimant indicated to Dr. Shima that her condition had deteriorated gradually since the surgery.

On September 5, 1984, Dr. Bowman indicated that claimant had recovered from carpal tunnel syndrome but still was experiencing a lot of "mechanical" pain in the neck and right shoulder. Dr. Bowman stated as follows: "Physical demands of the job in general at the plant, make it unlikely that she will return to that in any form. I think the best solution is to change jobs." Dr. Bowman opined that claimant suffered a three percent impairment to the total body from the carpal tunnel syndrome. Also, on September 5, 1984, Dr. Bowman stated that he did not feel that claimant should do any work that would require holding a knife in her right hand and that any work which involves repetitive movement with arms in front of her body would be a significant problem for her. Finally Dr. Bowman again emphasized to defendant insurance carrier that it was "likely none of the jobs would work out for her and that any effort to get her back to the plant will meet with ultimate failure."

Dr. Bowman opined that claimant's shoulder pain is the result of her cervical problems and he rates claimant as suffering a five percent permanent partial impairment to the whole body as a result of the cervical problems. Despite all of his prior statements, he released claimant for work with a 25 pound

lifting restriction to the job of scaling bacon. Claimant then returned to work scaling bacon and settled the workers' compensation claim she had at the time for the sum of $12,500. Attached to the settlement papers were various reports on the history set forth above including specific reports from Dr. Bowman.

Claimant returned to work as stated above to scaling bacon, a lighter duty job in the bacon department. However, claimant testified that an older woman with more seniority bumped her from that job and she was reassigned to the heavier work on the HRT bulk pack job in September, 1985. Claimant then began to reexperience difficulties in her right shoulder. Claimant testified that in either October or November she returned to Dr. Bowman who, according to claimant, gave her injections into the shoulder with steriods and anti-inflammatory medication. In February, 1986, claimant began receiving ultrasound, moist heat and cryotherapy from her chiropractor, Dr. Dryer, for complaints of severe pain in the right shoulder due to repetitive work at Farmland according to the reports and claim forms submitted by claimant to Farmland. Dr. Dryer referred claimant to a neurologist, Ronald Cooper, M.D., who found no evidence of nerve compression. Dr. Cooper prescribed non-prescription Ibuprofen and to continue with ultrasound therapy with Dr. Dryer. Claimant then was taken off work indefinitely by Dr. Dryer and she has no plans at present to return to work at Farmland due to her physical problems.

Upon referral from Dr. Dryer in January, 1987, claimant was examined by Ronald Evans, D.C., a diplomate of the American Board of Chiropractic Orthopedics. The nature of such a board certification was not explained in this record. According to Dr. Evans, claimant has sustained a "moderate to severe right shoulder rotator cuff tenosynovitis" as a result of a "cumulative work trauma occuring on or about 1983."

The above medical history rather clearly establishes that in the fall of 1985, claimant suffered at least a temporary aggravation of her preexisting injury when she was moved to the HRT bulk pack job, a job not approved by Dr. Bowman. The injury is also a cumulative or gradual injury process and under the law that will be discussed in the next section, the injury date coincided with the date claimant was finally compelled to leave her employment. The alleged injury date in this case, February 10, 1986, bore no relation to any claimed disability.

4. Claimant has failed to establish that the work injury of March 8, 1986 was a cause of permanent disability.

Claimant states that she did not settle the shoulder condition difficulties in 1985. This understanding of the settlement is contrary to the written settlement agreement which states that all injuries claimed were finally settled. Claimant had chronic

shoulder difficulties as well as cervical and right arm impairment at the time of the settlement and had been claiming the work relatedness of these difficulties since 1980. The only dispute in the medical evidence concerns the cause of the shoulder difficulties. Initially doctors in 1980 and Dr. Evans in 1987 believe that claimant had tenosynovitis of the shoulder whereas Dr. Bowman, the primary treating physician in this case, opines that the shoulder difficulties were referred pain from the cervical problems. However, regardless of the cause, the evidence rather clearly demonstrates a permanent chronic shoulder condition before claimant returned to work in December, 1984, and before the March, 1985 settlement. The views of Dr. Bowman, the primary treating physician, must be given considerable weight. He predicted in no uncertain terms in the fall of 1984 that any effort to return claimant to her packinghouse work would not be successful. Claimant only experienced difficulties when she assumed a job in the fall of 1985 which was not approved by Dr. Bowman. Dr. Bowman only released her to the scaling job. Claimant relies on the views of Dr. Evans as to a new rating. However, Dr. Evans opines in his written report that the problems arose from the 1983 injury.

5. Claimant has incurred reasonable medical expenses for the treatment of her aggravation work injury in the amount of $1,167.00.

As found above, claimant suffered a compensable aggravation of a preexisting condition, albeit temporary, as a result of her work at Farmland. Claimant sought and received treatment of this aggravation injury from Dr. Dryer who referred claimant for consultation to Dr. Cooper and Dr. Evans. The above total amount was arrived at by adding the bills from each of these doctors as listed in the attachment to the prehearing report. All of these expenses related to the aggravation injury until January, 1987, when Dr. Dryer felt that claimant had reached maximum healing from the aggravation injury.

The charges for the above services were fair and reasonable.

CONCLUSIONS OF LAW

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

I. Claimant has the burden of proving by a preponderance of the evidence that claimant received an injury which arose out of and in the course of employment. The words "out of" refer to the cause or source of the injury. The words "in the course of" refer to the time and place and circumstances of the injury. See Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955). An employer takes an employee subject to any active

of dormant health impairments, and a work connected injury which more than slightly aggravates the condition is considered to be a personal injury. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591 (1960) and cases cited therein.

It is not necessary that claimant prove her disability results from a sudden unexpected traumatic event. It is sufficient to show that the disability developed gradually or progressively from work activity over a period of time. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). The McKeever court also held that the date of injury in gradual injury cases is a time when pain prevents the employee from continuing to work. Given the findings in this case the injury date was found to be March 8, 1986 which is the first day claimant was unable to work as a result of the aggravation injury.

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

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor,

not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

In the case sub judice no finding was made causally connecting the March 8, 1986 aggravation injury to permanent disability as claimant, after leaving Farmland, simply returned to the same condition that existed prior to her return to work in December, 1984. Claimant is prohibited from any further recovery of benefits as a result of a special case settlement under Iowa Code section 85.35. Such a settlement constitutes a full and complete bar to any further recovery of benefits as a result of those claimed injuries.

III. There being no causal connection finding the extent of entitlement to disability benefits under law need not be discussed.

IV. Employers are obligated to furnish all reasonable medical services for treatment of a work injury under Iowa Code section 85.27. Given the findings in this case, claimant is entitled as a matter of law to reimbursement for the sums expended for treatment of the aggravation injury.

ORDER

1. Defendants shall pay claimant the total sum of one thousand one hundred sixty-seven and no/100 dollars ($1,167.00) as reimbursement for work related medical expenses.

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

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

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

Signed and filed this 18 day of September, 1987.

Larry P Walshire

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RANDY R. MURKINS, Claimant, vs. IOWA DEPARTMENT OF TRANSPORTATION, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File Nos. 803246 809975 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 Randy R. Murkins, claimant, against the Iowa Department of Transportation (IDOT), employer, and the State of Iowa, insurance carrier, for benefits as a result of alleged injuries on March 20, 1985 (File No. 803246) and November 8, 1985 (File No. 809975). A hearing was held in Sioux City, Iowa on May 6, 1987 and the case was submitted on that date.

The record consists of the testimony of the claimant, Mary Murkins, Tom Brosamle, Jim Swanson, Kathy Duque, Cecil L. Sutliff, Donald E. Law, Robert Eugene Young and Darwin Huls; defendants' exhibits 1 through 9; claimant's exhibits A through Z; and claimant's exhibits AA through II. Deposition exhibits 1 through 6 (x-rays) from exhibit F were not introduced into evidence. Both parties filed briefs on June 15, 1987. Claimant filed a supplemental brief on October 26, 1987. Defendants filed a supplemental brief on October 28, 1987.

The parties stipulated that the weekly rate of compensation for the alleged injury of March 20, 1985 (File No. 803246) is $187.02; that the weekly rate of compensation for the alleged injury of November 8, 1985 (File No. 809975) is $193.77; that any new or additional permanent partial impairment would be attributable to the alleged injury of November 8, 1985; that any additional permanency benefits awarded would commence on January 17, 1987; that the contested medical bills are reasonable in amount; that claimant consented at time of hearing to resolution

by the agency of any "res judicata defense" (claim preclusion, issue preclusion or settlement/contract arguments) based on a 1981 special case settlement (claimant's exhibit BB); and that claimant is not permanently and totally disabled at this time.

ISSUES

The contested issues in these files are:

1) Whether claimant sustained a personal injury (new injury or material aggravation of a preexisting condition) on either March 20, 1985 or November 8, 1985; this issue includes the subissue of whether the alleged new injury or material aggravation of November 8, 1985 was a willful injury as defined by Iowa Code section 85.16(1);

2) Whether there is a causal connection between the alleged injury of March 20, 1985 and any temporary disability;

3) Whether there is a causal connection between the alleged injury of November 8, 1985 and any new or additional temporary or permanent disability (in addition to the disability compensated by the 1981 special case settlement);

4) Nature and extent of disability in both files; this issue overlaps with issues 2 and 3 set out above;

5) Whether claimant is entitled to medical benefits in either file under Iowa Code section 85.27 and, if so, the extent of those benefits; defendants assert a causal connection argument and authorization argument in this regard; and

6) The penalty issue pursuant to Iowa Code section 86.13 was bifurcated.

SUMMARY OF THE EVIDENCE

Claimant testified that he was born on May 1, 1954. He graduated from high school in 1972 and said that he got C's and D's in high school. Claimant described his various jobs after graduating from high school and then stated that he started working for IDOT in the maintenance department on April 25, 1975. Claimant testified that after high school he has had no formal education other than a two week night class in antique car upholstering at Western Iowa Tech. At IDOT he did not have any apprenticeship training. Claimant testified that he did not have any back or neck problems prior to starting work for IDOT.

Claimant then described his 1975 and 1976 injuries. He described the 1975 back injury and resulting treatment by a chiropractor. He stated he was off work for a short period of time due to the 1975 injury. Claimant characterized the 1976

injury as a "reoccurrence." He said he was off work for a short period of time because of the 1976 injury. Claimant eventually returned to work full time. Claimant stated that he settled the 1975 and 1976 injuries in 1981. He stated that in 1981 he was "getting along good but had to go in for periodic adjustments." He testified that in the early 1980's he had "regular adjustments" but he could do his regular duties.

Claimant testified that on March 20, 1985, he was fixing potholes on an interstate highway breaking pieces of concrete with a sledgehammer. He started this job at about 8:30 a.m. to 9:00 a.m. He stated that he had to "give it some force to break the concrete out." He testified that he developed pain in his lower back and left leg during the afternoon of March 20, 1985. He stated that he had not "experienced this kind of pain before." He stated that he felt "damn sore" the evening of March 20, 1985 in his lower back; he felt jabs in his lower back that night. Claimant worked as a flagman on March 22, 1985. Claimant stated that he did not see his chiropractor, Dr. Kruse, on either March 21, 1985 or March 22, 1985. Claimant testified that on March 23, 1985 he had "worsened a lot." He tried to call both Dr. Kruse and his boss on this date and eventually saw Dr. Kruse at 10:30 p.m. on March 23, 1985. Claimant was unable to work on March 25, 1985 because of his back problems. He was given a TENS unit because of his problems. Claimant was off work from March 20, 1985 through May 5, 1985. On May 6, 1985 (a Monday), claimant returned to work. Claimant was then able to do his job and went back to work on a full-time basis on his "regular job." Claimant did not receive any workers' compensation benefits because of this March 20, 1985 incident and used all his vacation and sick leave as a result.

Claimant testified regarding his alleged injury of November 8, 1985 and stated that he was loading paint at the time of his injury. Claimant stated that he was driving a truck and drove the truck up to a loader dock. Claimant stated that he got hurt on the loader when he caught his left heel. He stated that a platform was six to eight inches above the ground. He stated that when he fell, he landed "straight on his back and hit his head." He stated that this caused a tingling sensation in his left leg. Claimant was then helped into a truck and taken back to Sioux City. He said his back hurt "like hell" while he was driving back to Sioux City. Claimant put ice packs on his back that weekend, but he did not see Dr. Kruse because of the expense. On November 11, 1985, claimant saw David G. Paulsrud, M.D., in his office. Dr. Kruse had referred claimant to Dr. Paulsrud. Claimant also saw Dr. Paulsrud on another occasion. Claimant stated that "Dr. Paulsrud did not do a thing for me." Dr. Paulsrud gave claimant a work release but then subsequently changed his mind. Claimant saw Dennis Nitz, M.D. Claimant characterized Dr. Nitz as a very thorough doctor. Claimant was not authorized to see Dr. Nitz by defendants.

Claimant testified that he has not worked since November 8, 1985; however, he stated that he has received disability payments from Bankers Life. He also stated that he has sold some cars and made some money after November 8, 1985, but that he hasn't worked on these cars. Claimant then described what he characterized as a typical day. He stated that if he stands for five or ten minutes he has problems. He stated that he has a limp with his left leg, and can walk but must walk slow. He can drive for one-half hour without pain. Claimant described his present pain and stated that he has problems with his left leg. Claimant said he would like to go to either the Sister Kinney Institute or the Mayo Clinic. Claimant sees Dr. Kruse once a week. Claimant has not applied for a job since his November 8, 1985 injury because of his physical condition. Claimant testified that his wife's father owns a laundromat and his wife is thinking of leasing this business. Claimant testified that since January 1986, he has not received any workers' compensation and then used up all of his sick leave and vacation leave. Claimant is seeking temporary total disability benefits from March 20, 1985 through May 5, 1985, and healing period benefits from January 18, 1986 through January 16, 1987. Claimant asserts that he is entitled to additional permanent partial disability benefits commencing January 17, 1987.

On cross-examination, claimant acknowledged that after November 8, 1985 he has bought and sold some cars. He stated that he did sell cars in 1986, but denied that he was in the car business in 1985 or 1986.

Claimant testified on cross-examination that he has no job training, has not obtained vocational counseling, is not currently enrolled in any educational courses, and is not taking any correspondence course. He also acknowledged that he has not been filing any job applications. Claimant testified that Dr. Kruse and Dr. Nitz both concluded he should not be doing any kind of work.

Claimant acknowledged that he was involved in an automobile accident in Nebraska in December 1986 when he was rearended while he was a passenger in a pickup. claimant sustained a neck injury as a result of this automobile accident. Claimant acknowledged on cross-examination that he has done auto body work at some point and knows how to transfer titles to cars. However, claimant denied that he is a "salesperson type."

Mary Murkins testified that she is married to claimant. She testified to claimant's back condition in the 1970's. She testified that in 1982 and 1983, claimant was "pretty much back to normal."

Mary Murkins testified regarding the injury of March 20, 1985. She testified that claimant did not complain about his

back during the two week period immediately prior to March 20, 1985. On March 20, 1985, Mary Murkins picked up claimant from work at about 4:15 p.m. She described his physical problems as a result of the March 20, 1985 incident and stated that he was off work until early May 1985.

Mary Murkins then described the incident of November 8, 1985. She stated that in early 1986 claimant "did not get any better." She described a fall in which claimant fell because his "left leg went out." She stated further that he has a problem with his left leg giving out. She described claimant's pain in January and February 1986. She described claimant's symptoms and problems as not being able to sit or stand for long periods of time and that his left leg goes out periodically. She stated that claimant can walk for twenty minutes but not much longer. She testified that she normally did the snow removal work with the family truck. She stated that from November 8, 1985 until the present claimant has had no earned income. She denied that claimant or herself sell vehicles at a profit and that they sell vehicles so they can have "a second vehicle at a cheap rate." She said she or the family lost money on the snow removal business when the depreciation of the vehicle used is taken into account.

On cross-examination, Mary Murkins stated that she would manage her father's laundromat if she decided to lease it. She would start employees at minimum wage. She stated that "she will manage it and will own it." She stated that J & M Snow Removal Company is her company and has no checking account.

On redirect, Mary Murkins acknowledged that claimant has been too overweight for the last year and a half to use his back brace. On recross, Mary Murkins stated that during the 1985 and 1986 winters claimant gained weight.

Thomas Brosamle testified that in 1985 and 1986 he had a cleaning business in Sioux City. He testified that Mary Murkins worked for him for seven or eight years. Mr. Brosamle testified that he sold this cleaning business in November 1986. While Mary Murkins worked for him, they discussed things on a daily basis. Mr. Brosamle testified that Mary Murkins stated to him that she and claimant were very dissatisfied with the 1981 workers' compensation settlement and that Mary Murkins stated there would be another accident. Mr. Brosamle testified that he was not surprised about the incident of November 8, 1985 as a result of Mary Murkin's comments to him.

Mr. Brosamle testified that during the winter of 1985-1986 he saw claimant driving a truck. He also testified that he saw ads by claimant in which he was attempting to sell automobiles.

On cross-examination, Mr. Brosamle acknowledged that he had

an unemployment compensation dispute with Mary Murkins. He acknowledged that there was an unemployment compensation hearing and that he lost this hearing.

Jill Swanson testified that she is Thomas Brosamle's daughter and testified that she had worked at her father's cleaning business. Ms. Swanson testified that claimant is capable of doing quality body work on automobiles. She testified that she saw car ads in the Sioux City area from claimant.

Swanson testified that Mary Murkins told her after the March 20, 1985 incident the next time claimant would "do it right." Swanson testified that Mary Murkins told her "one of these days Randy will fall off a truck."

On cross-examination, Swanson acknowledged that she voluntarily testified at this hearing and was not subpoenaed. She also acknowledged that she has never actually seen claimant doing body work on cars.

Kathy Duque testified that she has worked with Mary Murkins. Mary Murkins talked with Mary Murkins about claimant's injuries and his car dealings. Duque stated that Mary Murkins told her after the March 20, 1985 incident that "next time Randy would do it right." Mary Murkins made this statement after claimant went back to work in May 1985. Duque testified that Mary Murkins stated that claimant wanted the money to set up a business and that this would be a used car business. Duque testified that Mary Murkins said that claimant did not like his IDOT job.

On cross-examination, Duque acknowledgeed that she did not "get along real well with Mary Murkins."

Cecil L. Sutliff testified that he is a resident maintenance engineer for IDOT in Sioux City. Sutliff testified that claimant started working for IDOT as an equipment operator I but that claimant was also qualified to be a mechanic. Mr. Sutliff testified that three or four years ago claimant turned down the chance to be a mechanic. He stated claimant turned down the chance to be a mechanic prior to the incident of March 20, 1985.

On cross-examination, Mr. Sutliff testified claimant did mechanical work for IDOT. Mr. Sutliff testified that he did not know whether claimant could currently do mechanical work.

Donald E. Law testified that he has worked for IDOT for thirteen years and that he knows claimant. Law testified that he was working with claimant on March 20, 1985. Law testified that he authored the exhibit marked as defendants' exhibit 3. Law testified that claimant told him he needed money from workers' compensation. Law testified that claimant is competent to do auto body work.

On cross-examination, Law testified that claimant complained about his back on March 21, 1985.

Robert Eugene Young testified that he is an equipment operator I for IDOT; Young worked in this capacity in 1985 and worked with claimant. On November 8, 1985, Young was working with claimant. Young could not say whether or not claimant fell on November 8, 1985; however, he did see claimant lying on his back on that date. Young did not hear claimant hit the ground. Young did not hear any yell out of claimant prior to seeing claimant lying on the ground.

On cross-examination, Young testified that he and claimant were loading a truck on November 8, 1985. Young helped the claimant up from the ground and claimant "looked like he had the air knocked out of him." Claimant complained to Young that his back was hurting.

Darwin Huls testified that he is an IDOT employee. He has worked for IDOT for seven years and graduated from the law enforcement academy. Huls investigates title transfers, odometer fraud, driver's licence fraud and tax fraud, as well as other things. In October 1986, Mr. Huls investigated used car dealings by claimant. He interviewed people in this investigation and also searched courthouse records. Mr. Huls testified that claimant put other people's names on titles. One of the names of individuals put on the car titles was the claimant's six-year old son. He also put his wife and mother on car titles. Mr. Huls then gave detailed testimony about the vehicles claimant bought and sold. See defendants' exhibit 5. Mr. Huls testified that in a five-year period (1982-1986) claimant purchased and sold thirty vehicles. Claimant does not have a dealer's license.

On cross-examination, Mr. Huls acknowledged that he did not know why claimant purchased the vehicles that he described in his testimony. Mr. Huls also acknowledged on cross-examination that exhibit 5 documents a loss rather than a profit. On redirect, Mr. Huls stated that he thought some of the prices on the documents he examined were "questionable" and stated that incorrect amounts on title applications result in the savings of taxes.

On rebuttal testimony, Mary Murkins testified that Thomas Brosamle told her that he would get her back if she won her unemployment compensation contested case.

Claimant's exhibit A, page 1, is authored by Mark A. Kruse, D.C., (dated October 16, 1985) and reads in part:

> As you are well aware of, Mr. Murkins has been suffering continually from an old injury which occurred in 1975. He has chronic subluxations in

his lumbar spine resulting in nerve root irritation, discogenic spondylosis, and hypertrophic arthritis at the level of L5-S1 intervertebral disc.

Exhibit F is the deposition of Dr. Kruse taken on October 21, 1986. On page 11 of his deposition, Dr. Kruse stated in part: "After I treated him from March, 1985 until October 7th of 1985, he did not present himself into our office until September of this year, 1986." On page 16, Dr. Kruse stated after a question regarding the incident of November 8, 1985:

> The findings that I have in the September of '86 examination does show that he has more degeneration, his condition has worsened. Exactly to say whether that accident caused it, I cannot say, because he was not in my office immediately following that accident.

On page 24, Dr. Kruse stated that claimant was able to do his job after the March 20, 1985 incident. Page 43 contains the following exchange:

> Q. Doctor, the problems at L-4 and 5 that you mentioned, were those present back in '76 and '77?
>
> A. No.

Exhibit T (dated December 4, 1985) is authored by D. G. Paulsrud, M.D., and reads in part:

> Diagnosis is degenerative disc disease. He was told to stay at bedrest and return to this office in two weeks for a recheck exam. I do feel his current complaints are an aggravation of previous problems he has had with his back. It is too early to determine a permanent functional impairment rating at this time. (Emphasis added.)

Exhibit CC is authored by John J. Dougherty, M.D., (dated July 27, 1981) and reads in part:

> It would be my opinion that this patient probably has sustained about a 10% permanent partial disability as a result of his apparent injuries. I think he probably is going to have more trouble in the future. (Emphasis added.)

Exhibit DD is authored by Dr. Kruse (dated June 17, 1981) and reads in part: "In conclusion the permanent impairment of whole man is 30%."

Exhibit GG (filed October 19, 1981) reads in part:

IT IS FURTHER ORDERED AND ADJUDGED that the Department of Transportation and the State of Iowa, upon payment of the sum hereinbefore mentioned to be paid to the Claimant under proposed settlement agreement, be and they are hereby discharged, released, and exonerated from any and all further liability to the Claimant and/or to any other person or persons, corporation or firm, by reason of any and all of the injuries sustained, by the Claimant on or about September 12, 1975, and November 24, 1976, arising out of the circumstances set forth in said Joint Application for Special Case Settlement, or which may hereafter arise out of or result therefrom except future medical benefits. (Emphasis added.)

Exhibit II is the deposition of Dr. Paulsrud taken on November 12, 1986, and the following exchange is set out on pages 10 and 11:

A. My answer was that he had a superimposed back injury or a contusion of his back superimposed on his previous problem plus this new injury of the 8th of November.

Q. Was his new injury in precisely the same place that his old injury was?

A. Well, it was--it was in his low back and there was then a subsequent examination that demonstrated no additional changes from what he had previously.

Page 14 contains a 10 percent whole body rating by Dr. Paulsrud. Dr. Paulsrud stated on page 19 "I think he just reinjured that same old degenerated disc for which he already has received a permanent rating." On pages 31 and 32, Dr. Paulsrud testified that when claimant was examined in November 1985, he did not mention an incident in March 1985.

Defendants' exhibit 2 is authored by Charles J. Golden, Ph.D., who is a clinical neuropsychologist and reads in part under the impression section: "MMPI within normal limits, although high indications that the patient is consciously presenting a picture for us to see rather than a true evaluation of his personality."

APPLICABLE LAW AND ANALYSIS

I. Res judicata is a latin term for claim preclusion. Claim preclusion is defined as the precluding of a plaintiff or claimant from relitigating the same claim against the same party which had been decided in a prior action. Collateal estoppel is another name for the doctrine of issue preclusion; this doctrine

prevents a party from relitigating an issue which had been decided in a prior action. Res judicata applies to all claims which might have been decided, while collateral estoppel applies only to those issues which were actually litigated and decided.

On pages 3 and 4 of defendants' brief filed on June 15, 1987, the following appears:

> [I]t is apparent that claimant's present medical problems are a continuation of his early low back injuries and pathological condition for which he has already been fully compensated....
>
> ....
>
> Clearly, the special case settlement anticipated that claimant would experience future problems and discomfort with his lower back. By accepting payment under that settlement, he therefore waived any claims for future degeneration of his lower back condition, since he had practically been guaranteed it would get worse. See Exhibits CC, DD, EE, FF.
>
> Moreover, if claimant is allowed to recover benefits for every "re-injury" or "aggravation" of his low back condition, the special case settlement will have no meaning whatsoever. Its intent was clearly to provide continued medical treatment only for the low back condition at L5-S1 and degeneration spreading to adjacent vertebrae. If claimant subsequently had a neck injury, or cut off a finger, the settlement would have no bearing on his entitlement to benefits. But where his claim involves an aggravation of his settled claim and injuries to the L5-S1 area, he is only entitled to payment of medical treatment. (Emphasis added.)

It is concluded that defendants' argument currently being addressed is more in the nature of a contract argument rather than an issue preclusion or claim preclusion argument. Also, the issue addressed in this division would appear to be a question of first impression in this jurisdiction. Defendants assert that the two 1985 claims are totally barred by the 1981 special case settlement or that at a minimum apportionment is appropriate. It is necessary to address only the total bar contention because of the disposition of this case. It is concluded that it is not permissible to contract away future liability under the Iowa Workers' Compensation Act. Iowa Code section 85.18 reads as follows:

> Contract to relieve not operative. No contract, rule, or device whatsoever shall operate to relieve

the employer, in whole or in part, from any liability created by this chapter except as herein provided.

In sum, it is concluded that the 1981 special case settlement does not bar claimant from receiving additional weekly benefits because of his back condition if he convinces this agency as a factual matter that he sustained either temporary disability or additional permanent impairment or disability because of a material aggravation of a back condition for which he was fully compensated. In this regard, it is noted that claimant did not sign a section 85.55 waiver.

II. Claimant has the burden of proving by a preponderance of the evidence that he received injuries on March 20, 1985 and/or November 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).

The claimant has the burden of proving by a preponderance of the evidence that the injuries of March 20, 1985 and/or November 8, 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).

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

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

I am convinced that on March 20, 1985 claimant materially aggravated his preexisting back condition. Therefore, it is concluded that he is entitled to temporary total disability benefits from March 20, 1985 through May 5, 1985. However, I am not convinced that claimant sustained a work-related injury on November 8, 1985 that caused any temporary or permanent disability.

I do not believe that claimant willfully injured himself on November 8, 1985. I simply believe, after reviewing the entire record in this case, that claimant falsely asserts that he injured himself on November 8, 1985. Therefore, a willful injury defense has no application to the facts of this case, but rather it is merely determined that claimant did not sustain an injury on November 8, 1985 that arose out of and in the course of his IDOT employment. Since claimant did not sustain any new or additional permanent impairment or disability on November 8, 1985, it is unnecessary to apportion his disability in this case.

III. Any medical bills connected with the incident of March 20, 1985 must be paid by defendants. On the other hand, any medical bills connected to the alleged incident of November 8, 1985 are not compensable and need not be paid.

FINDINGS OF FACT

1. Claimant was born on May 1, 1954.

2. Claimant graduated from high school in 1972 and was a poor student while attending high school.

3. Claimant started working for IDOT on April 25, 1975.

4. In 1975, claimant injured his back while working for IDOT.

5. In 1976, claimant reinjured his back or aggravated his 1975 back injury.

6. In 1981, claimant entered into a special case settlement regarding his 1975 and 1976 back injuries sustained while working for IDOT.

7. On March 20, 1985, claimant materially aggravated the portion of his back that was injured at work in 1975 and 1976; this material aggravation caused claimant to miss work from March 20, 1985 through May 5, 1985.

8. On November 11, 1985, claimant did not injure his back while working for IDOT.

9. Claimant's stipulated rate of weekly compensation regarding the material aggravation of March 20, 1985 is $187.02.

CONCLUSIONS OF LAW

1. The 1981 special case settlement does not totally bar the recovery of weekly benefits under the particular facts of this case.

2. Claimant is entitled to temporary total disability

benefits from March 20, 1985 through May 5, 1985 because he materially aggravated his preexisting back condition on March 20, 1985.

3. Claimant failed to prove by a preponderance of the evidence that he sustained an injury on November 11, 1985 that arose out of and in the course of his employment with IDOT.

4. Defendants shall pay any contested medical bills because of the temporary material aggravation of March 20, 1985 but will not be ordered to pay any medical bills arising out of the alleged injury of November 11, 1985.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay claimant temporary total disability benefits at a rate of one hundred eighty-seven and 02/100 dollars ($187.02) from March 20, 1985 through May 5, 1985.

That defendants pay any contested medical bills regarding the incident of March 20, 1985.

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

That defendants be given credit for benefits already paid.

That each party pay their own costs of this action as described in Division of Industrial Services Rule 343-4.33.

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

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

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

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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002204

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PHILLIP NAYLOR,	:	
Claimant,	:	
vs.	:	
	:	FILE NO. 738926
DUBUQUE PACKING,	:	
	:	A R B I T R A T I O N
Employer,	:	
	:	D E C I S I O N
and	:	
	:	FILED
U.S. INSURANCE GROUP,	:	
	:	NOV 30 1987
Insurance Carrier,	:	
Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Phillip Naylor, claimant, against Dubuque Packing, employer (hereinafter referred to as DP), and U.S. Insurance Group, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on July 15, 1983. On September 15, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

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

1. On July 15, 1983, claimant received an injury which arose out of and in the course of employment with DP.

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $146.81 per week.

3. Claimant is seeking temporary total disability or healing period benefits from July 15, 1983 through October 21, 1986 and defendants agree that he was not working during this time.

4. The injury of July 15, 1983 was a cause of both temporary disability during a period of recovery and permanent disability, the extent of which is at issue in this case.

ISSUE

The only issue submitted by the parties for decision is the extent of weekly disability benefits to which claimant is entitled.

SUMMARY OF THE EVIDENCE

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

Claimant testified that at the time of the work injury he was working as a laborer in a DP packing plant. On July 15, 1983 claimant was assisting in hanging animal hides and became entangled in a chain which wrapped around his arm and jostled him around resulting in extensive injuries. Claimant was immediately taken to a hospital for abrasions to the left side of the chest and multiple abrasions and lacerations of the left brachial region, elbow, forearm, wrist and hand. The primary diagnosis by the treating orthopedic surgeon at the hospital, Alan Pechacek, M.D., was a crush injury to the left arm from the shoulder to the hand with a fracture of the mid-chaft of the radius and ulna with anglugation and displacement in the left arm. Dr. Pechacek initially performed surgery for cleaning the wound in debridement. On July 18, 1983, Dr. Pechacek performed a second surgery to change the cast, inspect the wound and remove "drains." After leaving the hospital, claimant remained under the care of Dr. Pechacek. In August, 1983, Dr. Pechacek performed a third surgery called an open reduction with internal fixation in which a plate and screws were installed in claimant's lower arm to assist in healing the fracture of the radial and ulna bones of the left arm.

In November, 1983, at the direction of Dr. Pechacek, Dennis Nitz, M.D., performed an EMG test on the nerves of the left arm which demonstrated an ulnar nerve neuropathy in the left arm. Dr. Pechacek treated claimant for the rest of 1983 and into 1984 stating at the time that claimant was not ready to resume his regular work. In June, 1984, Dr. Pechacek referred claimant for a second opinion to E. M. Mumford, M.D., who ultimately agreed with Dr. Pechacek's course of treatment although he felt that claimant could do some work, he could not return to his regular duties at the packing plant. Efforts by Dr. Pechacek to return claimant to light duty work was not successful as DP had no such duty available. On October 23, 1984, Dr. Pechacek notes that

claimant's condition has "leveled off in his recovery" and rated claimant as suffering from a total permanent partial impairment of 44 percent of the left arm which he states "equates to a 26 percent impairment to the whole man." Due to apparently unexpected improvement in claimant's arm strength which he found in his examination of claimant on September 26, 1986, Dr. Pechacek lowered his impairment rating under the AMA Guides to a 22.4 percent loss of the left arm or 13 percent of the whole man. Dr. Pechacek has imposed permanent work restrictions against any heavy lifting, carrying, pushing or pulling on a sustained or repetitive basis.

Claimant testified at hearing that the injury was particularly devastating to him. His lifestyle has changed dramatically and he now is "less of a man." Claimant complains of continuing soreness in his arm and wrist. He states that his arm hurts after strenuous work and that he has to be very careful. He denies any symptoms above his arm or into his shoulder. Despite his pain, claimant proved to be well motivated and secured employment on his own which he states is both suitable and appropriate for him. Claimant testified that he simply has learned to "deal with his pain."

APPLICABLE LAW AND ANALYSIS

I. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

In the case sub judice, both the medical reports and claimant's testimony establishes that the injury was limited to the arm and did not extend into the shoulder joint or cup or into the body trunk. It is the anatomical situs of the permanent injury, not the situs of the disability caused by the injury or impairment, which determines whether or not to apply the schedules in Iowa Code section 85.34(2)(a-t). Lauhoff Grain v. McIntosh, 395 N.W.2d 834 Iowa 1986. Therefore, the disability must be measured

only functionally as a loss of use of the arm. This is largedly a matter of medical opinion.

Only one physician has offered an impairment rating and according to his last rating claimant suffers from a 22.4 percent permanent partial impairment of the arm. His rating as to the whole man is irrelevant as the issue of whether this is a scheduled member disability or an industrial disability as a matter of law and not a proper subject for medical opinion beyond a medical description of the injury or its impairment.

Claimant testified that the injury was devastating to him personally and socially. This deputy certainly does empathize with claimant's plight. However, the workers' compensation system was not designed to compensate claimant for such complaints. This deputy's statutory authority is limited to compensation for claimant's loss of use without regard for its economic or social impact.

From the evidence submitted, it is found as a matter of fact that the work injury is a cause of a 22.4 percent functional loss of use of the left arm. Based upon such a finding, claimant is entitled as a matter of law to 56 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(m) which is 22.4 percent of 250 weeks, the maximum allowable number of weeks for an injury to the arm 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 from the date of injury until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work he was performing at the time of the injury; or until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first.

Dr. Pechacek indicated that on October 23, 1984 claimant had leveled off in his recovery. However, he was apparently wrong and later admitted this fact on October 21, 1986 when he lowered the rating and issued a final rating. It is not unusual or precedent setting for this agency to look from hindsight in determining the appropriate healing period when initial rating ultimately proves incorrect. Carlson v. Carlson, Appeal Decision filed April 15, 1986. In Carlson, the commissioner affirmed a deputy commissioner's decision which had awarded healing period benefits during a time period between two impairment ratings by the same physician. In the case at bar according to the October, 1986 letter of Dr. Pechacek, he found after a second examination on September 26, 1986 that a lower rating was more appropriate. This is the most appropriate time to terminate claimant's healing period and consider claimant as having reached maximum

healing. Therefore, claimant has established entitlement to healing period benefits from July 15, 1983 through September 26, 1986.

FINDINGS OF FACT

1. Claimant was a credible witness.

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

3. On July 15, 1983, claimant suffered a crush injury to the right arm and other multiple abrasions and lacerations which arose on his left side and chest which arose out of and in the course of employment with DP.

4. The work injury of July 15, 1983 was a cause of a period of total disability from work beginning on July 15, 1983 and ending on September 26, 1986 at which time claimant reached maximum healing.

5. The work injury of July 15, 1983, was a cause of a 22.4 percent permanent partial impairment to the right arm and of permanent restrictions upon claimant's physical activity consisting of no heavy lifting, carrying, pushing or pulling on a sustained or repetitive basis.

CONCLUSIONS OF LAW

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

ORDER

1. Defendants shall pay to claimant fifty-six (56) weeks of permanent partial disability benefits at the rate of one hundred forty-six and 81/100 dollars ($146.81) per week from September 27, 1986.

2. Defendants shall pay to claimant healing period benefits from July 15, 1983 through September 26, 1986 at the rate of one hundred forty-six and 81/100 dollars ($146.81) per week.

3. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit againt this award for all weekly benefits previously paid.

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

5. Defendants shall pay the costs of this action pursuant

to Division of Industrial Services Rule 343-4.33 and specifically defendants are taxed claimant's costs listed in the prehearing report, that being twenty-five and no/100 dollars ($25.00) for a report from Dr. Pechacek and thirty-four and 73/100 dollars ($34.73) for the court reporter.

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

Signed and filed this 30 day of November, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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002210

FILED

AUG 31 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WAYNE E. OLESON,	:	
	:	
Claimant,	:	
	:	
vs.	:	File No. 721429
	:	
GEO. A. HORMEL & COMPANY,	:	
	:	
Employer,	:	A R B I T R A T I O N
	:	
and	:	
	:	D E C I S I O N
LIBERTY MUTUAL INSURANCE COMPANY,	:	
	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Wayne E. Oleson, claimant, against George A. Hormel & Company, employer, and Liberty Mutual Insurance Company, insurance carrier, for recovery of benefits as a result of an injury which occurred on December 13, 1982. The case was heard in Des Moines, Iowa, on February 26, 1987. The evidence consists of testimony from claimant and from Roger Franklin Marquardt. The evidence also contains claimant's exhibits one through eleven and defendants' exhibits one through four. The depositions include all deposition exhibits. It was stipulated that an employer-employee relationship existed between the claimant and the employer at the time of the injury, that claimant did sustain an injury on December 13, 1982 which arose out of and in the course of his employment with the employer, that the injury was the cause of some temporary disability for which claimant was entitled to receive weekly compensation benefits, that all weekly compensation benefits for which the employer is liable have been paid, that, in addition, defendants have paid 127.571 weeks of permanent partial disability through February 25, 1987 and that any additional permanent disability compensation that may be awarded should be commenced effective February 26, 1987. The rate of compensation was stipulated to be $321.18 per week.

ISSUE

The sole issue in this case is the degree of claimant's permanent disability.

SUMMARY OF EVIDENCE

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

Wayne E. Oleson is a 34-year-old man who is a 1970 graduate of Fort Dodge Senior High School and who has taken courses in management and retailing at the Iowa Central Community College in Fort Dodge. Claimant testified that he did well in these courses. During high school, claimant had worked for Kinney Shoes, Henry's Drive In and the Fort Dodge Food & Grocery. Claimant served two years in the army as a battalion clerk where he performed typing, kept battalion records and assisted a colonel. Following discharge from the service he returned to Fort Dodge, obtained a job at the Hormel plant on October 29, 1974 (defendants' exhibit 4, page 9) and resumed taking college courses. Claimant studied law enforcement and additional general business and management at the Iowa Central Community College.

When the Fort Dodge plant closed, claimant transferred to the Ottumwa, Iowa plant where he performed a variety of jobs. On December 13, 1982 he jerked while in the process of lifting a box and felt a pop in his back. After attempts at conservative treatment by local physicians had failed, claimant came under the treatment of Robert A. Hayne, M.D., a neurosurgeon, who diagnosed claimant's problem as a disc protrusion. A laminectomy was performed on March 4, 1983 at which time the 4th and 5th lumbar interspaces were explored and protruding discs were removed. On June 15, 1983 claimant returned to light work with a 35-pound weight restriction. Subsequently, he was rehospitalized in September, 1983 where diagnostic studies failed to show any evidence of recurring herniated discs. Claimant was referred to Joe Fellows, M.D., an orthopaedic surgeon, who felt that claimant had mechanical instability in his back due to the surgery that had been performed and recommended fusion of the affected levels of claimant's spine (exhibit 5). The medical authorities were not unanimous in considering whether or not a fusion should be performed and a fusion has not been performed.

Claimant was treated at the Mercy Pain Clinic in 1983. Upon discharge from the program, James L. Blessman, M.D., the director, indicated he expected that claimant would be able to return to full-time, full-duty work (claimant's exhibit 7).

Claimant worked intermittently at Hormel until January 24, 1985 when he took disability retirement (defendants' exhibit 4, page 7). It was necessary for claimant to have been employed by the Hormel company for ten years in order to qualify for disability retirement (defendants' exhibit 4, page 22).

Claimant applied for social security disability and, on January 24, 1986, a decision was issued which found claimant to have been under a disability as defined in the Social Security Act since December 13, 1982 and awarded him disability insurance benefits under the Social Security Act (claimant's exhibit 10).

Claimant has been treated by John C. VanGilder, a neurosurgeon and professor at the University of Iowa Hospitals. Dr. VanGilder attributed claimant's medical problem to the injury of December 13, 1982 (claimant's exhibit 3, pages 9 and 14). His examinations revealed no neurological abnormalities, but did discover the loss of normal spinal curvature and muscle spasm (claimant's exhibit 3, pages 14-18). Dr. VanGilder felt that the herniated disc, which was initially caused by the 1982 injury, produced damage to soft tissue structures and that the resulting surgery produced damage to bony structures in claimant's spine which are the cause of the pain of which claimant complains (claimant's exhibit 3, pages 18 and 19). Dr. VanGilder indicated that claimant's primary problem is pain and that the pain is supported by objective findings (claimant's exhibit 3, page 20). Dr. VanGilder felt that there was not a psychological component to claimant's perception of pain (claimant's exhibit 1e). He felt that claimant's condition is permanent and will not improve (claimant's exhibit 1f; exhibit 3, page 11).

Dr. VanGilder recommended that claimant lift no more than 20 pounds, avoid standing longer than one to two hours, limit walking to no more than one hour and avoid all climbing. He recommended a relatively sedentary occupation (claimant's exhibit 3, pages 10 and 11). Dr. VanGilder rated claimant as having a 20% permanent functional impairment to the body as a whole (claimant's exhibit 3, page 9; exhibit 1f).

Claimant was evaluated by Thomas A. Carlstrom, M.D., a neurosurgeon, on July 17, 1986. Dr. Carlstrom found mild to moderate muscle spasms, but his neurological examination was normal (claimant's exhibit 3b, pages 7-12).

Dr. Carlstrom indicated that claimant has chronic mechanical low back pain and that claimant has a failed back with permanent symptoms that need to be dealt with at their present levels. He recommended job rehabilitation but no further diagnostic tests or further treatment (claimant's exhibit 3a).

Dr. Carlstrom indicated that he would recommend an occupation where claimant would not be required to lift more than 30-35 pounds. He indicated that claimant could perform work which did not require heavy lifting, prolonged sitting or standing or work in any type of cramped posture. He felt that claimant could do factory jobs within the limitation such as light custodial work and assembly work where he would not be required to lift more than 10-15 pounds on a rapidly repetitive basis. The doctor

indicated that he felt claimant should be active and engaged in work (claimant's exhibit 3b, pages 20-21). Dr. Carlstrom assigned a permanent partial impairment rating of 10% of the body as a whole (claimant's exhibit 3d, page 19).

Claimant was evaluated by Van C. Owens, M.A., a clinical psychologist. IQ testing showed claimant to be functional in the low average range. There were indications of left hemisphere disfunction adversely affecting his verbal skills. An MMPI produced results consistent with a neurotic condition. Owens indicated that claimant saw himself as a person who was ill, but that he had accepted his disability status and that he would not be a good candidate for medical treatment (claimant's exhibit 4).

Claimant received the services of Clark H. Williams, a vocational rehabilitation consultant, for approximately a year beginning in March, 1985. A work hardening effort with claimant performing part-time volunteer typing and filing at his local union office was terminated due to claimant's complaints of increased symptoms. Williams did not present claimant with any actual job leads in the Ottumwa, Iowa area where claimant resides.

Williams concluded that it would be necessary for claimant to be able to tolerate at least four hours of work in order to become employed. He felt that claimant was not a candidate for returning to work (claimant's exhibit 9m; exhibit 9o).

Roger Marquardt, a vocational rehabilitation specialist, testified that he felt claimant could not return to any type of work which he had previously performed on a repetitive basis. Marquardt opined that claimant's condition was the same at the time of hearing in this case as it was at the time of the Social Security hearing and that claimant could not successfully seek competitive employment.

The record reflects that claimant was earning $11.32 per hour when injured in December, 1982 (defendants' exhibit 4, page 45). A series of collective bargaining contractual pay decreases reduced claimant's rate of earnings to $8.91 per hour as of June 18, 1984 (defendants' exhibit 4, page 54). Some contractual pay increases had raised claimant's rate of earnings to $10.18 per hour at the time of his retirement (defendants' exhibit 4, page 7).

Claimant described his experiences when he attempted to return to work. He worked trimming fat from meat from August 2 until August 19, 1983 when he ceased because, as he stated, he was hurting badly. After going through the pain center course, he returned to work in January, 1984 in a full-duty status on the "fast and easy" bacon line where he worked until February 25, 1984. He stated that he did so through use of a back brace,

TENS unit and medication, but that he gradually worsened and was taken off work again by Dr. Hayne. On March 12, 1984 he returned in a light-duty status on the "pick and fat" job where he worked two weeks until laid off. Claimant returned to work on May 30, 1984 in a light-duty status where he worked until July 11 or 12 when taken off by Dr. Gregory. On October 29, 1984 he again returned to light-duty work, four hours per day, in the "pick and fat" job. He testified that he handled it well and did not reinjure himself. After a visit with Dr. VanGilder on December 6, 1984, he changed to full-duty status until January 21, 1985 when Dr. VanGilder took him off work again.

Claimant worked at the union hall from October 30 through December 11, 1985 answering the phone, typing and filing for approximately two or two and one-half hours per day. He stated that his condition gradually worsened and that he quit working at the union hall with Dr. VanGilder's concurrence. Claimant stated that he has not sought work subsequently.

Claimant testified that he would like to get his back cured and get back to work in order to support his family. He currently takes prescription medication consisting of four or six Darvons daily and occasionally uses prescription and over-the-counter pain medications. Claimant testified that he becomes depressed and sometimes drinks alcoholic beverages. He stated that his alcohol consumption has increased since his injury. Claimant described a normal day as lying on the bed to watch television. He stated that he has experienced back spasms on six or seven occasions with the last following an attempt to use Windex to clean car windows. He stated that when they strike, his chest caves in, he can hardly breathe and he cannot straighten up.

Claimant testified that, when he left Hormel, he had a little over ten years of seniority and that he has not applied for any jobs since leaving Hormel. He stated that, at the time of injury, he was earning approximately $27,000 to $28,000 per year. He testified that his Hormel pension is offset by workers' compensation. Claimant testified that he would like to try to return to work at Hormel, but is not optimistic about doing so. He stated that his condition has not improved and is currently about the same as it was in January, 1986, which is approximately the time when he began receiving Social Security disability.

On cross-examination, claimant related that he went to the hospital emergency room on August 23, 1986 and has not seen a physician since then.

APPLICABLE LAW AND ANALYSIS

Since the occurrence of injury on December 13, 1982 which arose out of and in course of employment has been stipulated, the only issue to be resolved is the extent of permanent disability

for which the stipulated injury is a proximate cause.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 13, 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).

Dr. VanGilder related claimant's spinal problems to the injury. Dr. Carlstrom, in his deposition, indicated that he generally agreed with Dr. VanGilder's conclusions. There is no expert medical evidence in the record which indicates that claimant's spinal condition is not related to the 1982 injury. It is found that the 1982 injury is a substantial factor in bringing about the disability which claimant currently experiences in regard to his spine and that the injury is a proximate cause of that disability.

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

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

251, 257 (1963).

An odd-lot employee is one who an injury has made incapable of obtaining employment in any well-known branch of the labor market. Such a worker is totally disabled if the only services the worker can perform are so limited in quantity, quality or dependability that a reasonably stable market for them does not exist. Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985).

This case is one that is replete with what appears to be inconsistencies. The psychologist, Van Owens, found claimant's IQ test results to indicate a relatively low level of intelligence, yet claimant went through high school and successfully completed courses at the community college. Claimant's trauma does not appear to have been particularly severe, yet his physical ailment affected two levels of his spine. Claimant's symptoms are in excess of those that are commonly seen following an injury and surgery of the type he has undergone. Claimant was able to work on the production line for half days for a substantial period of time, but he was not able to do light office work for an equal amount of time. Claimant and others have testified that he is highly motivated to return to work, yet, exhibit 4 shows that, at the time of his last attempt to work for Hormel in late 1984, he would have been earning approximately $9.18 per hour which computes to gross earnings before taxes of $367.20 for a 40-hour week. At the same time, his workers' compensation benefit, after taxes, is $321.00 per week, an amount that is certainly more than what the take home wages from working would have been. Exhibit 10 showed that claimant's request for hearing on denial of his claim for Social Security disability was filed on October 25, 1984. The original claim for disability insurance benefits was filed on October 31, 1983, a date approximately the same as the date when claimant completed the Mercy Pain Center Clinic and Dr. Blessman indicated that he expected claimant would return to work full duty, full time. From October of 1983 until January of 1986, claimant was attempting to convince the Social Security Administration that he was totally disabled. Interestingly, the Social Security disability decision found claimant's physical afflictions to not be inherently disabling. His disability was granted on the basis that he was physically incapable of performing jobs that he had previously held. The Social Security determination appears to have not considered claimant's clerical skills acquired from the Army as a battalion clerk. It did not consider claimant's business management training because he had never worked in business management. Claimant testified regarding a desire to return to work at Hormel, but he did not express any desire to work elsewhere.

When all the inconsistencies are considered, it is found that claimant has failed to establish that his complaints and abilities are more limited or restricted than the activity

restrictions imposed by Drs. Carlstrom and VanGilder. The activity restrictions and recommendations imposed by those physicians are accepted as an accurate assessment of claimant's physical capabilities.

In accord with the Social Security determination, it is found that claimant's physical ailments are not in and of themselves totally disabling. Both Drs. Carlstrom and VanGilder have imposed activity restrictions which would be consistent with claimant working in a clerical position similar to that he performed in the Army. His business management training should be an additional asset to him in any such employment. Although claimant's verbal IQ test scores are relatively low, his performance scores are well within the range of average. The physical restrictions imposed by the physicians, however, are likely to exclude claimant from most of the relatively high-paying manual labor jobs such as work at Hormel. If he were to return to work in a clerical position his rate of earnings could probably be expected to be in the $4-$5 per hour range. When all the applicable factors of industrial disability are considered, it is determined that claimant has a 50% permanent partial disability in industrial terms.

FINDINGS OF FACT

1. On December 13, 1982 Wayne E. Oleson was a resident of the state of Iowa employed at George A. Hormel & Company in Ottumwa, Iowa.

2. On December 13, 1982 Oleson injured his back while lifting a box of meat.

3. Following the injury, claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of injury until September 15, 1984 when he reached the point it was medically indicated that further significant improvement from the injury was not anticipated.

4. Pursuant to the stipulation made by the parties, claimant has been paid all temporary total or healing period compensation to which he is entitled. The parties further stipulated that claimant has been paid 127.571 weeks of compensation for permanent partial disability through February 25, 1987. Based upon such stipulation, the healing period ended September 15, 1984 and compensation for permanent partial disability was due commencing September 16, 1984.

5. Wayne E. Oleson is a 34-year-old married man with two dependent children.

6. Oleson is a high school graduate and has completed college courses in management, retail marketing and criminal

justice.

7. Claimant has work experience outside the Hormel plant selling shoes, working in a grocery store and working as a battalion clerk in the army. At the time of injury claimant was earning $11.45 per hour.

8. Claimant's physical capabilities are in the range of the limitations imposed by Drs. Carlstrom and VanGilder.

9. Claimant's credibility and motivation is compromised by the inconsistencies previously noted in this decision, particularly the difference between his own assessment of his capabilities and that made by the physicians, the fact that he had already applied for Social Security disability at the time his attempts to return to work proved to be unsuccessful and the fact that his income from disability is greater than the income that could be expected if he were to perform clerical work.

10. There is no indication in the record that claimant is incapable of performing clerical types of employment or of successfully completing further advanced education which would qualify him for sedentary employment.

11. Claimant's disability, when evaluated industrially, is a 50% permanent partial disability.

12. Claimant failed to establish that the injury has made him incapable of obtaining employment in any well-known branch of the labor market or that the only services he can perform are so limited in quantity, quality or dependability that a reasonably stable market for them does not exist.

13. Claimant's intelligence falls within the average range.

CONCLUSIONS OF LAW

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

2. The injury claimant sustained to his back on December 13, 1982 is a proximate cause of the disability with which he is currently afflicted.

3. Claimant's disability is a 50% permanent partial disability under the provisions of section 85.34(2)(u) which provides him with a total entitlement of 250 weeks of compensation at the stipulated rate of $321.18, and a remaining balance of 122.429 weeks after credit is given for the benefits previously paid.

4. Claimant failed to make a prima facie showing of permanent total disability.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant one hundred twenty-two point four two nine (122.429) weeks of compensation for permanent partial disability at the rate of three hundred twenty-one and 18/100 dollars ($321.18) per week commencing February 26, 1987. Any amounts which are past due and accrued shall be paid in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that 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 division pursuant to Rule 343-3.1.

Signed and filed this 31st day of August, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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002220

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEAROLD I. PARKS,

Claimant,

vs.

OSCAR MAYER FOODS CORPORATION,

Employer,
Self-Insured,
Defendant.

File No. 799431

A R B I T R A T I O N

D E C I S I O

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IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Gearold I. Parks, claimant, against Oscar Mayer Foods Corporation, self-insured employer for benefits as the result of an alleged injury that occurred on January 11, 1985. A hearing was held in Des Moines, Iowa on January 26, 1987 and the case was fully submitted at the close of the hearing. The record consists of the testimony of Gearold I. Parks (claimant), Phil Schumacher (personnel manager) and joint exhibits 1 through 8.

STIPULATIONS

The parties stipulated to the following matters:

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

That no claim is made for temporary disability benefits.

That the type of permanent disability, if the injury is found to be a cause of permanent disability, is scheduled member disability to both upper extremities.

That the commencement date for permanent partial disability benefits in the event of an award such benefits, is January 11, 1985.

That the rate of compensation in the event of an award is $166.05 per week.

That all requested medical benefits have been or will be paid.

That defendant makes no claim for credit for benefits paid prior to the hearing.

That there are no bifurcated claims.

ISSUES

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

Whether claimant sustained an injury on January 11, 1985 which arose out of and in the course of his employment with employer.

Whether the alleged injury was the cause of any permanent disability.

Whether claimant is entitled to permanent partial disability benefits.

SUMMARY OF THE EVIDENCE

Claimant is age 25. His past employments include assembly line work for four months, smelter operator for three months, laborer for two months and a farm hand for two years (Exhibit 8, page 2). He began work for employer on November 26, 1984 as a body boner. This is a paced job. He removed the body bone from hams with a knife as they came down the line. He demonstrated a rather strenuous and extensive cut with the right arm across the top, down the side, then under the ham and back up the other side. He then threw the ham bone over his shoulder and sent the ham down the line. It was a hard job and he had to hurry to keep up. When the knife struck the bone it dulled the knife and made it hard to remove the bone. He also had to sharpen the knife with hand movements against a steel (sharpener). The room temperature was cool. Other employees did the same job at this point on the line.

In January of 1985 he noticed swelling in his fingers and numbness and tingling in his hands. He first detected symptoms in his right hand and arm and then shortly thereafter they occurred in the left hand and arm. He reported this to employer, was examined by the nurse twice and then she sent him to see Robert F. Deranleau, M.D. On January 11, 1985 Dr. Deranleau recorded that after two hours of work all of his fingers got numb. Both hands and both wrists hurt and cause pain up his arm to the elbows. On April 25, 1985 Dr. Deranleau recorded that claimant's fourth and fifth fingers were stiff and would lock up. His left shoulder hurt and his arm goes to sleep. The doctor diagnosed early trigger fingers and muscle strain. On May 6, 1985 claimant's fingers were worse and Dr. Deranleau referred claimant to Arnis R. Grundberg, M.D., an orthopedic surgeon (Exhibit 7).

On May 31, 1985 Dr. Grundberg reported that he examined claimant's hands and arms extensively and recorded his complaints and symptoms in detail. He concluded that claimant had bilateral carpal tunnel symdrome, bilateral ulnar tunnel syndrome and flexor synovitis of the right thumb, ring and little finger from gradual onset. He stated that the injury did occur at work. He stated that claimant was able to work and should continue working. He recommended cortisone shots, but claimant refused to take them (Exhibit 3). Claimant testified that he refused the cortisone shots because of certain information that other employees had told him. Claimant also felt that it would just cover up the pain and not heal it. An EMG ordered by Dr. Grundberg from Marvin Hurd, M.D., was normal (Exhibit 4).

Claimant then saw Peter D. Wirtz, M.D., an orthopedic surgeon, on June 17, 1985. Dr. Wirtz diagnosed thoracic outlet syndrome, which was temporary in nature, aggravated by body boning, and Dr. Wirtz recommended different employment (Exhibit 2, pages 6 and 7). Dr. Wirtz referred claimant to be examined by David H. Stubbs, M.D., a vascular surgeon. Dr. Stubbs could find no evidence of thoracic outlet syndrome but instead found carpal tunnel syndrome. He recommended a change of occupation, possible steroid injections and possible surgical relief (Exhibit 5, page 2). On November 20, 1985 Dr. Wirtz then changed his diagnosis from thoracic outlet syndrome to overuse syndrome of the muscles and tendons of the upper extremity. He recommended against continued repetitive hand activity. He added that claimant was not suffering any permanent impairment at that time (Exhibit 2, page 3).

Claimant was evalutated by Thomas B. Summers, M.D., a neurosurgeon on April 23, 1986. Dr. Summers rather comprehensively examined claimant and determined that claimant suffered from carpal tunnel syndrome bilaterally due to his work. He stated that claimant did not desire surgery and Dr. Summers did not think it was indicated either. Dr. Summers found claimant had a functional impairment of 10% of the right upper extremity and 5% of the left upper extremity. He did not characterize the impairment as permanent. On July 17, 1986 Dr. Summers wrote that claimant had carpal tunnel syndrome bilaterally that was work related due to repetitive trauma in his everyday activities (Exhibit 1, page 1).

Again on August 27, 1986 Dr. Wirtz stated that there are no signs and symptoms to support a permanent impairment in either extremity (Exhibit 2, page 1).

Defendant requested that claimant be evaluated by Alfredo D. Socarras, M.D., on November 3, 1986. Dr. Socarras reviewed the reports of Drs. Grundberg, Wirtz, Stubbs and Summers and also the EMG report of Dr. Hurd dated May 28, 1985. Claimant described his symptoms indicating that sometimes they bothered him and

sometimes they did not. He felt improved after transfer from body boning to trimming loins using a two handled knife instead of one knife in his right hand all of the time. It would appear that Dr. Socarras made a careful examination. He determined that claimant had a mild irritation of the median nerve at the level of the wrist bilaterally. He too commented that claimant's symptoms will persist as long as he performs repetitive manual activity in his job (Exhibit 6).

Claimant received a 15 day suspension on July 23, 1985 for missing work excessively and poor workmanship. Claimant testified that the pain in his hand caused the poor attendance and the poor workmanship. Claimant related that he felt better during the suspension but the problems returned when he returned to work. He now trims loins with a two handle knife. The loins are in a saddle. Each person makes a different cut. He trims the shine bevel. It is a different move from body boning. It is not repetitive and there is less bending and turning. He testified that he had far less problems trimming loins. Now he only suffers a light tingling that comes and goes. It is worse after he works a long time. It goes away after work. He does not notice it at night or on other occasions anymore. Claimant said that he planned to continue to work for employer. He did not plan to go to school or to take another job. The last doctor which he saw was Dr. Socarras in November of 1986. Prior to that he saw Dr. Summers in April of 1986. These examinations were for evaluation purposes rather than treatment. Claimant testified that he does not take medicine today for this condition. He stated that he did not have surgery and did not plan to have surgery in the future. He said he no longer has the "catching" effect in his fingers. The snapping made noise when it occurred but it did not cause pain. He added that since he has been trimming loins his condition has stabilized.

Schumacher, the personnel manager, testified that the pace of the line was approximately 1,266 hams per day. He added that this figured out to be 165 hams per hour. He calculated that claimant then processed slightly less than 3 hams per minute. Claimant was given a slower pace when the doctors ordered it. No doctor ever stated that claimant should be removed from the job entirely. Claimant has improved his attendance and has had no further disciplinary problems. Claimant is making more money now than he was on January 11, 1985. Schumacher related that practically all new employees start in as a body boner.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on January 11, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 11, 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.

Claimant did sustain the burden of proof by a preponderance of the evidence that he sustained an injury that arose out of and in the course of his employment with employer on January 11, 1985. There was no evidence that claimant had any related problems with his hands and wrists prior to this employment or prior to January of 1985. His job as a body boner involved repetitive use of both hands and wrists, especially his right dominant hand and wrist. The implication is that body boning must be one of the least desirable jobs because almost all of the new employees are hired for that job. Claimant followed proper procedures. He reported his early symptoms to employer. He saw the company nurse twice. He went to all of the doctors that the employer requested him to see which were Dr. Deranleau, Dr. Grundberg, Dr. Wirtz, Dr. Stubbs, and Dr. Socarras. Claimant's symptoms in his fingers, hands and wrists were all classic carpal tunnel syndrome symptoms. Dr. Deranleau described claimant's symptoms as work related, diagnosed early trigger fingers and sent claimant to Dr. Grundberg (Exhibit 7). Dr. Grundberg, an orthopedic surgeon, who further specializes in hand and arm surgery, diagnosed carpal tunnel syndrome from gradual onset. He stated that it did occur at work (Exhibits 3 and 4). Dr. Wirtz preferred to call it overuse syndrome after Dr. Stubbs ruled out thoracic outlet syndrome. By repeatedly associating claimant's condition with claimant's repetitive activities at work, Dr. Wirtz established by implication that the injury was work related (Exhibit 2).

Dr. Stubbs not only ruled out thoracic outlet syndrome but clearly ruled in that it was carpal tunnel syndrome. He recommended a change of occupation. This recomendation implicates claimant's work as the cause of his condition (Exhibit 5). Dr. Summers, claimant's evaluating doctor, identified claimant's condition as carpal tunnel syndrome caused by his work (Exhibit 1). Dr. Socarras, defendant's evaluating doctor, said that claimant had a mild median nerve irritation at the level of the wrist bilaterally. By stating that the symptoms would persist as long as claimant performs repetitive activity he indirectly attributes the cause of claimant's condition to claimant's job activities. All of the doctors then either directly or indirectly found that claimant suffered from carpal tunnel syndrome or overuse syndrome caused by the repetitive nature of his work. No other cause or reason for claimant's condition is raised or suggested by any of the evidence. Consequently claimant has established that he sustained an injury to this fingers, hands and wrists which arose out of and in the course of his employment with employer on January 11, 1985.

Claimant did not establish that the injury was the cause of either temporary or permanent disability. The parties stipulated that temporary disability was not an issue in this case. As to permanent disability claimant did not prove that he lost any time from work due to this injury. He testified that the injury was the cause of his absenteeism and poor workmanship but this statement was not corroborated by any other evidence. No doctor ever released claimant from work. Claimant is doing repetitive work now with his hands trimming loins and plans to continue to do this job for the indefinite and immediate future. He testified that this job gives him far less problems than body boning. He experiences only light tingling that comes and goes, and is only worse after working long hours. It goes away after work and he does not notice it at night anymore. He has not consulted a doctor about it. The last doctors which claimant saw for diagnosis and treatment were Dr. Wirtz and Dr. Stubbs in approximately June of 1985 more than one and one half years prior to the hearing. Claimant declined to take cortisone. Claimant declined the surgery option that was proposed. His EMG was normal.

Dr. Summers said that claimant was 10% impaired in the right upper extremity and 5% impaired in the left upper extremity. However, nothing in Dr. Summers narrative report supports these impairment ratings either factually or symptomatically. Furthermore, defendant's counsel points out that Dr. Summers did not state that claimant's impairment was permanent impairment. Auxier v Woodward State Hospital School, 266 N.W.2d 139 (Iowa 1978). Consequently it is determined that claimant did not sustain the burden of proof by the preponderence of the evidence that the injury was the cause of any permanent disability. Therefore, claimant is not entitled to any permanent partial disability benefits.

FINDINGS OF FACT

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

That claimant was employed by employer as a body boner on January 11, 1985.

That body boning requires extensive and strenuous use of the hands, especially the dominant hand.

That claimant experienced swelling in his fingers and numbness and tingling in his hands in January of 1985. That all six doctors who examined claimant described claimant's symptoms as carpal tunnel syndrome or overuse syndrome and either directly or indirectly related it to his repetitive hand activities in his employment with employer.

That claimant lost no time from work for the injury and was not released from work by any of the doctors, but on the contrary he was directed to continue to work.

That claimant continues to work for employer trimming loins which requires repetitive use of his hands but he encounters very few problems from this job.

That claimant has sought no medical attention since June of 1985.

That claimant's EMG was normal, he refused to take cortisone, and he declined surgery for his condition.

That Dr. Wirtz said there was no permanent impairment in either extremity.

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 the burden of proof by a preponderance of the evidence that he sustained an injury on January 11, 1985 that arose out of and in the course of his employment with employer.

That claimant did not sustain the burden of proof by a preponderance of the evidence that the injury was the cause of any permanent disability.

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

ORDER

THEREFORE, IT IS ORDERED:

That no amounts are due from defendant to claimant for this injury.

That each party is to pay their own respective costs and that defendant pay for the cost of the attendence of the court reporter at the hearing.

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

Signed and filed this 24 day of November, 1987.

WALTER R. McMANUS, JR.
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1106; 1108.50; 1401;
1402.20; 1402.30; 1402.40;
1801; 1803; 2209
Filed November 24, 1987
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GEAROLD I. PARKS, Claimant, vs. OSCAR MAYER FOODS CORPORATION, Employer, Self-Insured, Defendant.	:	File No. 799431 A R B I T R A T I O N D E C I S I O N

1106; 1108.50; 1401; 1402.20; 1402.30; 1402.40; 1801; 1803; 2209

It was found that claimant did sustain an injury arising out of and in the course of employment from body boning on the production line. Four employer doctors diagnosed bilateral carpel tunnel. One employer doctor called it overuse syndrome. All six doctors said either directly or indirectly that it was work related.

Claimant did not prove impairment or permanent partial disability. Four employer doctors did not comment on impairment. One employer doctor said there was no permanent impairment. Employee's doctor awarded some impairment but did not characterize it as permanent. Claimant continued to work for employer trimming loins on the production line without any real difficulty and planned to continue doing it into the indefinite future. Claimant refused cortisone shots and surgery. The treating physicians ordered claimant to continue working. The weight of the evidence was not impairment and no permanent partial disability.

002228

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWIN R. PENTICO, Claimant, vs. HAKES FOODS, INC., Employer, and ZURICH INSURANCE, SAFECO INSURANCE, KEMPER INSURANCE, Insurance Carriers, Defendants.	:	File Nos. 818119 818220 818221 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 Edwin Pentico, claimant, against Hakes Food, employer, and Zurich Insurance, Kemper Insurance, and Safeco Insurance, insurance carriers, to recover benefits under the Iowa Workers' Compensation Act as a result of alleged injuries sustained May 1985, September 1985 and March 12, 1986. This matter came on for hearing before the undersigned deputy industrial commissioner November 19, 1987. The record was considered fully submitted at the close of hearing. The record in this case consists of the testimony of claimant and Maureen Luchsinger; claimant's exhibits A-H; and defendants exhibits 1-10.

ISSUES

Pursuant to the prehearing report and order approved November 19, 1987, the issues which remain for decision are:

1. Whether the claimant's alleged injury arose out of and in the course of his employment;

2. Whether claimant is entitled to temporary total disability or healing period benefits for the period from September 22, 1985 to November 3, 1985;

3. Whether claimant's alleged injury is the cause of any permanent disability and, if so, the extend thereof; and,

4. Whether claimant is entitled to certain medical benefits under Iowa Code section 85.39.

FACTS PRESENTED

Sixty-three year old claimant testified he voluntarily retired from defendant employer Hakes Food in March 1986, for nonmedical reasons after working there approximately 19 1/2 years. He explained he was employed as a truck (semi) driver delivering merchandise to different stores often unloading by hand boxes of groceries weighing from 5 to 50 pounds. He described using his body as support for the boxes while moving them.

Claimant testiifed that on December 28, 1980, a hernia "popped out" while he was lying in bed. Although he could not associate this condition with any particular incident, he assumed it was the result of all the lifting he did. He also recalled he had felt pain just prior to that date when he lifted a heavy door on his reefer while at a food store in Montavideo, Minnesota. Claimant explained he initially saw his own physician (Dr. Frank Tepner) who referred him to a surgeon (Dr. Ben Bagon) for treatment. Claimant testified he was operated on for a hernia in February 1981, and was absent from work February 6 through April 18. He explained additional surgery to have sutures removed and replaced was performed in January 1984, again in May 1985 and last in September 1985. Claimant understood these further operations were necessary because his body was not accepting the sutures from the February 1981 operation and because the incision was irritated from cases of groceries and the steering wheel of the semi rubbing against it. Claimant acknowledged he was paid workers' compensation benefits for all but his last operation.

Maureen Luchsinger testified that, as the office manager, it is her responsibility to file claims and reports on injuries. She explained Kemper Insurance has been the employer's workers' compensation carrier since January 1, 1984, and that Safeco provided coverage from January 1, 1981 through December 31, 1983, with Zurich being its insurer before January 1, 1981.

Ben M. Bagon, M.D., testified by deposition that he performed a ventral herniorrhaphy on claimant February 9, 1981 as well as the three subsequent surgeries in May 1984, May 1985 and September 1985, because claimant's body was rejecting the original sutures. He explained:

> Q. Doctor, are you aware that Mr. Pentico has claimed that he rubbed his stomach area against a steering wheel while he drove his truck, and also rubbed cases of boxes against his stomach area during his work? Are you aware of that history?

A. Yes.

Q. What effect, if any, would that have on the area of the incision?

A. Well, it can aggravate the incision, but I don't think that's the main cause of you having a recurrent ventral hernia or draining sinus, you know.

(Cl. Ex. G, p. 16, ll. 22-25; p. 17, l. 1-7.)

He further stated:

A. ...So whether his work has something to do with having this, it's really hard to prove.

Q. You can't say one way or the other?

A. Well, it could aggravate it, but that's all I can say.

(Cl. Ex. G, p. 18, ll. 2-7.)

Asked whether claimant's problem was a continuing one going back to at least as early as 1984 or before, Dr. Bagon responded:

I think it was a problem from May of '84 up to September of '85, but it was a different location all the time, because you have to consider how long he had been suffering before we did the surgery, too, you know.

(Cl. Ex. G, p. 19, ll. 13-16.)

APPLICABLE LAW

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

Claimant has the burden of proving by a preponderance of the evidence that he received injuries on March 12, 1986 and in May 1985 and September 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

however, is that claimant has not presented any evidence of injury arising out of and in the course of his employment in May 1985, September 1985, or on March 12, 1986.

Claimant testified the 1985 operations were necessary because his body was not accepting the sutures put in during the 1981 operation. Dr. Bagon, claimant's surgeon, cited the same reason. While claimant also attributed his problems to irritations from the steering wheels and carrying the boxes of groceries, Dr. Bagon would acknowledge only that this could cause an aggravation of the initial incision, but it would not be the principal reason for the recurring problem.

The claimant has the burden of proving by a preponderance of the evidence that the injuries of March 12, 1986, May 1985, and September 1985 are 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 has presented only a possibility that the surgeries of 1985 were caused by the rubbing of the steering wheel and boxes of groceries. It is more probable than not that these problems were the result of his body rejecting the initial sutures from the February 1981 herniorrhaphy. It is also more probable than not that this would have occurred regardless of claimant's working situation.

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.

Therefore, claimant has established neither that a new injury nor an aggravation of a prior injury occurred in May or September 1985 which would entitle him to compensation from these proceedings and the other issue presented need not be addressed.

Claimant finally alleges an injury date of March 12, 1986. There is no testimony in the record with regard to this particular date but it is logical to assume this to be the day claimant retired. The record establishes claimant retired voluntarily and not as a result of any medical problem. Claimant has failed to present any evidence of an injury (regardless of whether it arose out of and in the course of the employment) on this date. An injury occurring on the date alleged is a fundamental element to establishing entitlement to benefits.

While claimant may have established his injury of December 1980 presented further complications in 1985, this is of no consequence when the injury of December 1980 is not subject to review. Each case must be reviewed independently. Claimant incurred no particular injury in May 1985 which resulted in surgery. Claimant incurred no particular injury in September 1985 which resulted in surgery. For these reasons, claimant shall take nothing from these proceedings and the other issues presented need not be addressed.

FINDINGS OF FACT

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

1. In February 1981, claimant was operated on for a ventral hernia.

2. Claimant underwent subsequent surgeries to remove and replace sutures in January 1984, May 1985 and September 1985.

3. The subsequent operations in 1984 and 1985 were as a result of claimant's body rejecting the sutures from the February 1981 herniorrhaphy.

4. Claimant incurred no injury in May 1985.

5. Claimant incurred no injury in September 1985.

6. Claimant retired from Hakes Food in March 1986 voluntarily and for no medical reason.

7. Claimant incurred no injury March 12, 1986.

CONCLUSIONS OF LAW

Therefore, based on the principles of law previously stated, the following conclusions of law are made:

Claimant has failed to sustain his burden of establishing that he sustained an injury May 1985, September 1985 and on March 12, 1986 which arose out of and in the course of his employment.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceeding.

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

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

Deborah A. Dubik

DEBORAH A. DUBIK
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD PETERS, Claimant, vs. SWIFT INDEPENDENT PACKING COMPANY, Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 699108 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 and for medical benefits brought by the claimant, Ronald Peters, against his employer, Swift Independent Packing Company, and its insurance carrier, National Union Fire Insurance Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained March 3, 1982. This matter came on for hearing before the undersigned deputy industrial commissioner in Sioux City, Iowa, on April 27, 1987. A first report of injury was filed April 5, 1982. An agreement for settlement was approved by this agency on December 12, 1984. The record in this proceeding consists of the testimony of claimant, of Rich Molden, and of Richard Sturgeon, as well as of claimant's exhibits 1 through 4, and defendants' exhibits A through K.

ISSUE

The issues to be decided are whether claimant is entitled to payment of a $40 medical bill with Mark Wheeler, M.D., under section 85.27, and whether claimant is entitled to payment of a $200 charge with Horst Blume, M.D., under section 85.39.

REVIEW OF THE EVIDENCE

Claimant's work injury occurred on March 3, 1982 when he slipped on fat and twisted his knee on stairs while leaving his

work station for break. Claimant had had prior knee problems. Claimant denied having had knee injuries since the March 1982 incident, however. He reported that, subsequent to the incident, his knee goes out when he turns the wrong way and swells at least once monthly. Claimant reported that he called his counsel and asked if he could see Dr. Wheeler. He reported that counsel advised that the insurer approved a visitation with Dr. Wheeler and that he subsequently saw Dr. Wheeler. Claimant agreed that he received no written approval for his visit with Dr. Wheeler. Claimant reported that he is self employed as a janitorial service operator at the present time and that while doing so, he mops and scrubs floors. Claimant cannot recall whether he had seen the physician concerning his knee from August 10, 1984 until he visited Dr. Wheeler in September 1985. Claimant could not remember whether he had seen Wheeler in the morning of September 4, 1985 and then had seen Rick Molden, insurance adjuster of Crawford and Company, that afternoon. Mr. Molden testified that he obtained a statement from claimant on September 4, 1985 in which claimant stated he had seen Dr. Wheeler that morning. Molden reported that neither claimant nor his counsel had contacted the insurance adjuster regarding the visitation with Dr. Wheeler. Molden testified that claimant had reported he saw Dr. Wheeler as he preferred Wheeler to the prior authorized physician. Molden stated that claimant had then described an incident with his son where his knee had gone out. Molden reported that he has no notes in his file nor any independent recollection of a call from Mr. Sturgeon regarding a proposed Wheeler exam.

Mr. Richard Sturgeon testified he is a paralegal in claimant's counsel's office and that he, by phone, contacted the insurance adjuster and requested permission for claimant to see Dr. Wheeler. He testified that this permission was given. Sturgeon agreed that he has no notes documenting such phone conversation.

Claimant testified that he saw Dr. Blume prior to the agreement for settlement for reexamination, and that as a result of the examination, Dr. Blume assessed a permanent partial impairment rating of ten percent. An agreement for settlement indicated permanent partial impairment of 8.5 percent. Claimant reported he subsequently obtained the Blume bill for $200 and advised his counsel of that cost. Mr. Molden testified that he was unaware of the Blume bill prior to December 12, 1984, and that the insurance adjuster had not received a request that Dr. Blume examine claimant. He reported that he had not been asked to pay the Blume bill prior to the agreement for settlement. He stated that other agreed to bills had been paid either prior to or with the agreement for settlement. Mr. Molden reported that Dr. Blume had not been paid as he was not an authorized physician; he was a neurologist, not an orthopedist; that claimant's problem was an orthopedic injury; and as it was felt that a thermogram which Dr. Blume performed was not helpful. He

reported that the insurance company adjuster would not have agreed to pay Blume as a precondition to the agreement for settlement, and that an additional $800.55 had been paid in the agreement for settlement. The agreement for settlement reflects $800.55 was paid reflecting the difference between a 7 percent and an 8.5 percent impairment of the leg. The agreement notes that section 85.27 medical benefits shall remain open. The agreement in paragraph 2 states that claimant has had all medical benefits and transportation expenses paid by the insurance carrier through the present time. Molden reported that the insurance adjuster may have taken the position that claimant cannot nominate Dr. Blume for an independent medical examination.

Office notes of Dr. Wheeler, apparently of September 4, 1985, give a history of claimant having had surgery following a slip and fall down some stairs. He reports that claimant has continued with more frequent giving out of the knee with effusions, but no true locking. He states the knee will buckle and cause him to go down with this happening approximately once a month. Examination showed moderate effusion. The doctor stated "He recently hurt it 2-3 days ago." The doctor's impression is of anterior cruciate deficient left knee. In a report of September 9, 1986, Dr. Wheeler states he cannot comment on the original injury and that he would recommend that the original treating physician be consulted as to such questions.

APPLICABLE LAW AND ANALYSIS

Section 85.27 requires employers to furnish employees reasonable medical care and permits the employer to choose and authorize such care. Only in an emergency situation can a claimant obtain nonauthorized medical care. The employee, additionally, has the burden of showing the treatment is related to the injury.

As regards the Wheeler bill, we find that claimant has not shown that any such care was authorized. Claimant's testimony that his counsel advised him that such care was authorized is only supported by counsel's paralegal's assertion that a phone conversation took place with the insurance adjuster in which the adjuster authorized said care. The adjuster has no independent recollection of such authorization and has no file notes concerning any such phone conversation. Likewise, the claimant, his counsel, and his paralegal, are unable to produce file notes or other documentation of any such phone conversation. We find that at best the evidence creates an equipoise and such is not sufficient to carry claimant's burden of showing an authorization of care. Hence, we find that payment of the $40 bill with Dr. Wheeler is not mandated.

As regards to the $200 charge with Dr. Blume, we note that section 85.39, in part, provides:

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. The physician chosen by the employee has the right to confer with and obtain from the employer-retained physician sufficient history of the injury to make a proper examination.

We note that section 85.39 does not require prior approval before the examination may take place, only that an application be made for reimbursement by the employer for a reasonable fee for the subsequent examination. We note that the physician is a physician of the employee's own choice; hence, defendants' argument that they would not have authorized Dr. Blume is illfounded. We note, however, that the section 85.39 examination is for examination only and not for treatment. Hence, we do not believe that a thermogram would be included as part of the section 85.39 examination. Nor do we believe that the thermogram could possibly be characterized as authorized medical treatment under section 85.27. We also do not believe that section 85.39 examination would properly be characterized as a medical benefit such that claimant's right for reimbursement of said examination would be obviated by the agreement for settlement. We find claimant entitled to payment of a $100 charge for the August 10, 1984 office visit with complete history, and complete physical and neurological examination and evaluation of Dr. Blume. We find claimant is not entitled to payment of the cost for the thermogram administered on August 10, 1984.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

No file notes of either the insurance adjuster or of claimant's counsel's legal office support claimant's contention that Dr. Wheeler's examination of claimant was authorized.

Dr. Wheeler's examination of claimant was not authorized.

Dr. Horst Blume's August 10, 1984 office visit with complete history and complete physical and neurological examination and evaluation of claimant was an independent medical examination.

Claimant has the right to choose his examining physician.

Section 85.39 examination is not a medical benefit.

Thermogram treatment is not part of a section 85.39 examination.

Thermogram treatment by Dr. Blume was not authorized.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant is not entitled to payment of a $40 medical charge with Mark Wheeler, M.D.

Claimant is entitled to payment of a $100 charge with Horst Blume, M.D., for physical examination and evaluation.

Claimant is not entitled to payment of a $100 charge with Horst Blume, M.D., for administration of a thermogram.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant the one hundred dollars ($100) charge with Horst Blume, M.D.

Claimant and defendants bear equally the costs of this action but for the cost of transcribing these proceedings, which shall be borne wholly by claimant's counsel.

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

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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FILED

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IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ED PETERSEN,	:	
	:	
Claimant,	:	File No. 426701
	:	
vs.	:	
	:	D E C I S I O N O N
WEST LIBERTY BUILDERS,	:	
	:	
Employer,	:	S E C T I O N 85.27
	:	
and	:	
	:	B E N E F I T S
IOWA MUTUAL INSURANCE,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

This is a proceeding for section 85.27 benefits brought by Ed Petersen against West Liberty Builders, his former employer, and Iowa Mutual Insurance Company, the employer's insurance carrier.

The case was heard at Davenport, Iowa, on May 12, 1987, and was fully submitted upon conclusion of the hearing. The record consists of testimony from Ed Petersen, claimant's exhibits 1 through 14 and defendants' exhibits A through J.

ISSUES

Claimant seeks section 85.27 benefits for payment of expenses he has incurred for complaints involving his lower back. The parties stipulated that claimant sustained injury on December 18, 1974 which arose out of and in the course of employment with the employer. The primary issue in the case is whether those injuries extended into claimant's spine and, resultingly, whether the employer is responsible for expenses incurred in treating claimant's spine.

SUMMARY OF THE EVIDENCE

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

Ed Petersen is a 32-year-old man who was injured on December 18, 1974 when he fell from the roof of a pole barn, a distance of approximately two and one-half stories. Claimant testified

that he landed in a standing position, dropped to his left knee and fell into a ball.

Claimant underwent extended treatment and an extended period of disability for the injuries. He suffered a crushed right ankle, crushed left foot, injury to his left kneecap and multiple other injuries. Claimant testified that it took three years for him to relearn how to walk.

Following recovery, claimant returned to employment and held a series of jobs with different employers commencing in September, 1976 and running through June, 1982. Claimant testified that he quit working because he was frustrated with his pain and has not worked since 1982. He has received social security disability benefits since May, 1984.

Claimant testified that he does not recall when he first complained to a physician about pain in his back. He testified that the back pain came on slowly and gradually. He stated that there was no incident or occurrence which marked the onset of his back pain.

Claimant has entered into chiropractic treatment for his back and testified that he finds it to be helpful. He testified that his condition has improved during the past years while he has been receiving chiropractic treatment.

Claimant has been treated and evaluated by a number of medical doctors and chiropractic physicians. Following the injury, claimant was treated by Anthony J. Piasecki, M.D., and by Webster B. Gellman, M.D. Reports from those physicians issued in 1975 and 1976 contain no reference to back complaints or to treatment of claimant's back (exhibits H and I). In 1977, claimant was evaluated by John R. Walker, M.D. The report of that examination does not contain any reference to claimant making complaints regarding his back (exhibit G).

Claimant was evaluated by Edward H. Boseker, M.D., in 1983. Dr. Boseker found claimant to have a left scoliotic curvature of about 10 degrees at L3 in his spine. A diagnosis was made of a strain of the lumbosacral disc. No objective findings were made to corroborate claimant's complaints of back pain (exhibit F).

Claimant was evaluated by Martin F. Roach, M.D., in 1986. Dr. Roach found nothing in his clinical examination or in x-rays to corroborate claimant's complaints of back pain. Dr. Roach expressed the opinion that claimant did not sustain a spinal injury as a result of the 1974 accident (exhibit A, pages 10-13, 17-20).

Claimant was treated and evaluated by James R. Slusher, D.C., in 1982 and in 1983. Dr. Slusher reported that claimant made complaints involving not only his lower extremities, but also his lower back, mid back and neck. Dr. Slusher characterized

claimant as having constant pain and discomfort due to a subluxation syndrome caused by trauma to the spine. He stated that claimant was totally disabled and would require lifetime medical care consisting of two or three chiropractic adjustments each week. Dr. Slusher opined that claimant's injuries were sustained in the accident of December 18, 1974 (exhibit 5).

Claimant was examined by Harvey Dannis, M.D., on December 22, 1982. Dr. Dannis reported that claimant made complaints running from his lower extremities and including his low back, mid back and neck. Dr. Dannis diagnosed a number of conditions and abnormalities, other than those located in claimant's lower extremities. He found straightening of the cervical spine, degenerative changes in the thoracic spine, narrowing at the L5-S1 intervertebral disc space, and herniation of intervertebral discs through the vertebral end plates in the lumbar spine (exhibit 2).

Claimant was evaluated by Charles R. Clark, M.D., on April 26, 1984. Dr. Clark diagnosed claimant as having a mechanical low back strain secondary to the other injuries claimant sustained in the fall that occurred in December, 1974. Dr. Clark explained that the back strain develops over a period of years due to claimant's abnormal gait. He indicated that claimant's back condition was most likely the result of degenerative changes (exhibit 1, pages 10-15). Dr. Clark's evaluation was made without the benefit of x-rays or reports and records from other medical practitioners (exhibit 1, pages 4 and 5).

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 18, 1974 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

An injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles claimant to industrial disability. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

Defendants are responsible for payment of all expenses of treatment, as provided by section 85.27 of The Code, for which the injury is the proximate cause. An injury of the type claimant sustained would, in all likelihood, have subjected his spine to significant trauma from the impact of striking the ground. Nevertheless, it appears to have been several years from the time of that trauma until any symptoms manifested themselves. Claimant was working during a substantial amount of time subsequent to 1976. Since he was working he would have been exposed to situations which could have injured his spine, even though he denied the occurrence of any such subsequent injury.

The medical authorities are in direct conflict with regard to causation for claimant's back complaints. Dr. Clark provides a very reasonable explanation for his opinion that connects the 1974 injury to the current back complaints. He did so, however, without the benefit of radiographic studies and without records of claimant's prior medical treatment. Interestingly, Dr. Clark relates little in the way of objective symptoms. Drs. Roach and Boseker found no objective basis for claimant's complaints. Drs. Dannis and Slusher found a multitude of conditions, some of which even claimant himself denied at hearing. Accordingly, the opinions from Drs. Roach and Boseker are accepted as correct since they are supported by the previous record from Drs. Walker, Gellman and Piasecki. Dr. Clark's explanation, while certainly reasonable, is found to be a less likely scenario. The conclusions reached by Drs. Dannis and Slusher find so many abnormalities and conditions in claimant that they are rejected as being inconsistent with the greater weight of the evidence, even that from Dr. Clark.

FINDINGS OF FACT

1. The evidence fails to establish that the injury claimant sustained on December 18, 1974 is a substantial factor in producing any problem in claimant's spine or any of the treatment provided to claimant for his spine.

2. The evidence fails to show that it is more likely than not that the consequences of the injuries claimant sustained on December 18, 1974 had some significant effect upon claimant's lumbar spine, rather than being limited to his lower extremities.

3. The assessments made by Drs. Boseker and Roach are accurate.

CONCLUSIONS OF LAW

1. Claimant has failed to prove, by a preponderance of the evidence, that the injuries he sustained on December 18, 1974 were a proximate cause for any of the treatment which claimant has received for his back.

2. Claimant has failed to prove, by a preponderance of the evidence, that the injuries he sustained on December 18, 1974 were a proximate cause of any ailment, affliction or injury to claimant's spine.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding. The costs of this proceeding are assessed against defendants pursuant to Division of Industrial Services' Rule 343-4.33.

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

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ERIC PETERSON, Claimant, vs. IOWA STATE UNIVERSITY, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 784998 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 Abbott, Jr., and Eric Peterson, claimants, against Iowa State University, employer and State of Iowa, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury occurring December 27, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner October 9, 1987, and was considered fully submitted at the close of the hearing. The record in this case consists of the testimony of the claimants and Eugene S. Lund, Jr., and joint exhibits A through L, inclusive.

ISSUES

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

FACTS PRESENTED

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

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

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

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

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

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

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

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

APPLICABLE LAW

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

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

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

ANALYSIS

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

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

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

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

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

ORDER

THEREFORE, IT IS ORDERED:

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

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

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

Deborah A. Dubik

DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

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002251

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. PHELAN,	:	
Claimant,	:	
vs.	:	
	:	FILE NO. 810124
DUBUQUE PACKING CO.,	:	
	:	A R B I T R A T I O N
Employer,	:	
	:	D E C I S I O N
and	:	FILED
	:	
SENTRY INSURANCE,	:	
	:	SEP 29 1987
Insurance Carrier,	:	
Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Robert Phelan, claimant, against Dubuque Packing Company, employer (hereinafter referred to as Dubuque Pack), and Sentry Insurance Company, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on November 16, 1985. On August 15, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as 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: Shirley Patterson and Richard Ernst. 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. Claimant is not seeking temporary total disability or healing period benefits in this proceeding and claimant last worked at Dubuque Pack on January 4, 1986.

2. Claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $209.00 per week.

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

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

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

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

FINDINGS OF FACT

1. Claimant was a credible witness.

From his demeanor while testifying claimant appeared to be truthful.

2. Claimant was employed by Dubuque Pack from September 8, 1975 through January 4, 1986, primarily as a shroud puller.

There was little dispute among the parties as to the nature of claimant's employment with Dubuque Pack. Claimant testified that, for the most part, he was a shroud puller for almost 10 years with Dubuque Pack and for two years with Iowa Beef, the previous owner of the Dubuque Pack plant in LeMars, Iowa. Claimant testified that most of his time he cut carcasses of beef lengthwise into two parts for approximately one-half of his eight hour shift. This work involved overhead reaching and the repetitive use of both hands and shoulders in the operation of a well saw. Claimant processed 850 to 1,000 carcasses each night. Also, for approximately one and one-half hours before meat cutting, he would load "offal" using a power lift and finished out his shift at the end of the night pushing carcasses on an overhead rail into a truck trailer. Claimant worked the graveyard shift during his employment at Dubuque Pack. Claimant resigned and last worked at Dubuque Pack on January 4, 1987. Claimant testified that he resigned due to his chronic neck and shoulder pain which he experienced from his work activity.

3. On January 4, 1986, claimant suffered an injury which arose out of and in the course of his employment with Dubuque Pack.

Claimant testified that beginning in 1984, he began to experience chronic pain and numbness in this neck, left shoulder and left arm. He sought treatment from a Dr. Krull, a chiropractor, after the pain became continuous. In June, he received treatment from Daryl Doorenbos, M.D., in the form of prescribed medication and physical therapy. In his office notes, Dr. Doorenbos stated that claimant had seen many doctors over the last two years and

that most of these doctors have related claimant's problems to claimant's physical activity at work which he states is entirely possible. Subsequently, Wayne Meylor, D.C., began to treat claimant.

In November, 1985, claimant asked for a medical leave to see if his left sided pain would subside and was denied this leave. Claimant then took vacation for two weeks. This rest improved claimant's condition but claimant's symptoms returned upon resuming work. Claimant then went to Horst Blume, M.D., a neurosurgeon. According to his report, Dr. Blume opines that claimant has a nerve root irritation in his cervical spine and myofascitis at the elbow. Dr. Blume suggests further testing of claimant's cervical spine. Dr. Blume could find no definite evidence of thoracic outlet syndrome and although he notes good range of motion, he states that claimant "may be 10 percent impaired."

Claimant left his employment at Dubuque Pack and looked for work in the geographical area of his residence but could find none. Finally, he recently acquired employment in the State of Alaska operating farm machinery for the last six months. Claimant testified that he works approximately 100 hours per week in the cultivating of crops and clearing of farmland.

The only causal connection medical opinion submitted into the evidence is from Dr. Meylor. Dr. Meylor states as follows: "In my opinion, the patient's neck, arm, shoulder condition is aggrevated [sic] by his employment, and is of a permanent nature." Without deciding the issue of permanency, claimant by the above uncontroverted opinion of Dr. Meylor has at least established that he suffered an aggravation injury to his neck, arm and shoulder condition from pulling shroud at Dubuque Pack. Claimant's credible testimony established that the injury process was gradual or the result of repeated use of his hands and arms at work.

The injury date found in this case coincides with the time claimant was finally compelled by his pain to leave his employment. The alleged injury date in claimant's petition bore little relation to the claimed disability in this proceeding.

4. The preponderance of the evidence does <u>not</u> establish that the work injury of January 4, 1986 was a cause of significant permanent partial impairment or disability.

Claimant's primary difficulty in establishing his case for permanency stems from his own testimony in which he indicated that he has had neck problems requiring chiropractic adjustments since high school and that he has had prior injuries to his neck unrelated to his employment. One such injury occurred in 1975 from a fall in the mud on his family farm. Claimant had 30

chiropractic treatments in 1977 following another injury to his neck and back. Given these prior complaints, this agency must rely heavily upon the views of the medical experts on the issue of causal connection.

The only causal connection opinion offered by claimant in support of his claim is that of Dr. Meylor. However, Dr. Meylor's written opinion set forth above is very vague. The doctor only called the injury an "aggrevation [sic]" of an apparent preexisting neck, arm and shoulder condition. Dr. Meylor had treated claimant for neck problems prior to 1984. His reference to permanency appears to be a reference to the preexisting condition rather than the aggravation. Admittedly, claimant was able to work for almost 10 years with this condition but his own testimony indicates that claimant has had neck problems for almost as long. Claimant's condition may have been preexisting to the extent that he experienced pain immediately during his initial employment and simply tolerated the pain over the years. On the other hand, the work may have aggravated his neck causing permanent damage to his spine. Claimant's testimony and the single opinion of Dr. Meylor leaves the undersigned in considerable doubt on the causal question. As claimant has the burden of persuasion, he cannot prevail on the question of the cause of his current chronic neck and shoulder problems.

CONCLUSIONS OF LAW

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

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

It is not necessary that claimant prove his disability results from a sudden unexpected traumatic event. It is sufficient to show that the disability developed gradually or progressively from work activity over a period of time. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). The McKeever court also held that the date of injury in gradual injury cases is the time when pain prevents the employee from continuing to work. In McKeever the injury date coincides with the time claimant was finally compelled to give up his job. This date

was then utilized in determining rate and the timeliness of claimant's claim under Iowa Code section 85.26 and notice under Iowa Code section 85.23.

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

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

In the case sub judice, a finding could not be made causally connecting the work injury to claimant's chronic neck, shoulder, arm and back difficulties or to permanent functional impairment to his body as a whole. As claimant is basing his claim upon such a causal connection, no further findings are necessary and

claimant cannot be awarded benefits from this proceeding.

Although claimant did not prevail in this proceeding, he was sincere in his testimony presented at the hearing and his claim was at least arguably supported by the medical evidence. Therefore, claimant shall be awarded the costs of this action.

ORDER

1. Claimant's claim and his petition is hereby dismissed.

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

Signed and filed this 29 day of September, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL W. PORTER, Claimant, vs. P & M STONE COMPANY, INC., Employer, and TRAVELERS INSURANCE, Co., Insurance Carrier, Defendants.	:	File No. 612800 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 Michael W. Porter, claimant, against P & M Stone Company, Inc., employer, and Travelers Insurance Company, insurance carrier for benefits as a result of an injury that occurred on August 7, 1979. A memorandum of agreement was filed on September 12, 1979. An agreement for settlement was signed on February 12, 1981 and was approved by the industrial commissioner on March 2, 1981. A hearing was held in Fort Dodge, Iowa on February 12, 1987 and the case was fully submitted at the close of the hearing. The record consists of the testimony of Michael W. Porter (claimant), Pam Porter (claimant's wife), claimant's exhibits 1 and 2 (claimant's exhibit 1 contains 86 pages and claimant's exhibit 2 contains 5 pages), and defendants' exhibits A through E. A transcript was voluntarily provided by defendants. Official notice is taken of the settlement papers in the industrial commissioner's file. Iowa Administrative Procedure Act 17A.14(4).

BRIEFS

The deputy requested briefs from each attorney. The attorneys agreed on a simultaneous filing date of March 16, 1987. Claimant's brief was filed on March 16, 1987. Defendants' brief was filed on March 24, 1987. On April 16, 1987 claimant's attorney objected to the late filing of defendants' brief without his permission or permission from the agency. Claimant's attorney said it was unfair for defendants to file a brief after defendants had claimant's brief in hand. Claimant's attorney claimed prejudice and moved that defendants' brief be stricken and

removed from the record. Claimant's objection and motion to strike was not resisted by defendants. Wherefore, claimant's motion is now granted and defendants' brief is stricken and removed from the record and will not be considered in the determination of this case. Defendants' brief will, however, remain a part of the industrial commissioner's file in the event that defendants should appeal this ruling.

STIPULATIONS

The parties stipulated to the following matters at the time of the hearing.

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

That claimant sustained an injury on August 7, 1979 which arose out of and in the course of his employment with employer.

That the injury was the cause of both temporary and permanent disability.

That claimant's temporary disability benefits are not in dispute and that all temporary disability benefits which are due to claimant have been paid under the agreement for settlement approved on March 2, 1981.

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

That the commencement date for permanent partial disability benefits, in the event such benefits are awarded, is to be the day following the last payment of permanent partial disability under the settlement agreement. (Actually the commencement date should be the date of the award, Bousfield v Sisters of Mercy, 249 Iowa 64 86 N.W.2d 109 [1957]).

That the rate of compensation in the event of an award is $205.61 per week.

That all requested medical benefits have been or will be paid by defendants.

That claimant was previously paid 150 weeks of workers' compensation at the rate of $205.61 per week as permanent partial disability pursuant to the agreement for settlement.

ISSUE

The parties submitted the following issue for determination at the time of the hearing.

Whether claimant is entitled to any additional permanent partial disability benefits.

SUMMARY OF THE EVIDENCE

Claimant received multiple injuries and was severely injured on August 7, 1979 when a huge boom fell on him. The boom struck him and forced him forward and pinned him to the ground in a flexed position with his face between his feet pushed into the rough ground. Claimant was pinned in that position for several minutes.

One of the early reports by his treating physician, M. L. Northup, M.D., dated August 28, 1979, fairly, succinctly and comprehensively summarized claimant's situation shortly after the injury.

> Mike Porter was injured at work on August 7, 1979 by a boom from a crane striking him and pinning him to the ground. He sustained a cerebral concussion, lacertaion [sic] of the eyebrow and nose a blow out fracture of the roof of the right maxillary sinus with resultant diplopia, fracture of the tallus right ankle and multiple contusions of the legs and arms.
>
> Michael was admitted, the wounds were repaired and a cast applied to the right ankle. X-Ray confirmed the fracture of the roof of the maxillar sinus. Thence he was referred to Dr. Smith, McFarland Clinic, Ames, Iowa for corrective surgery. He has done well but still has visual difficulty with upward gaze, and of course, the cast has not been removed.
>
> I feel that his recovery will be slow but he may develop traumatic arthritis of the right ankle, and Dr. Smith was not certain if he would have a complete and full recovery.

(Exhibit 1, page 65)

Claimant settled this case by an agreement for settlement dated February 12, 1981 which was approved by the industrial commissioner on March 2, 1981, in the amount of $41,356.98.

The settlement agreement specifically mentioned the condition of claimant's back and right ankle injury in the following words:

> WHEREAS, claimant has received appropriate treatment for all of these injuries from various doctors in various specialties including surgical

correction for a blowout fracture of the right orbit, fracture of the right ankle joint, and lumbar disc surgery, and

WHEREAS, claimant continues to have pain particularly with the back and ankle injury on almost a daily basis, consisting of stiffness in his back when he arises in the morning, sit too long, bends or squats over, but denies any radiation to either leg, and the right ankle and foot swells if he stands for excessive periods of time; and

WHEREAS, claimant is no longer employed by the employer where the injury occurred, and claimant is unable to any longer perform the manual and physical labor in a construction company required in his previous occupation; and

WHEREAS, claimant is currently involved in vocational rehabilitation and is attending a welding school to prepare him for alternative employment; and

(Ex. B)

The settlement was based on the following impairment and disability factors in paragraph 4 of the settlement agreement.

4. That in accordance with the medical reports, copies of which are attached hereto and made a part hereof, the claimant has no disability as a result of the injury to the right eye, he has a 15% permanent partial physical impairment rating of the body as a whole for the back surgery, and he has a 14% disability of the leg as a result of the ankle injury, which converts to 6% disability of the body as a whole, and combining the 15% and 6% disability in accordance with the Guides to the Evaluation of Permanent Impairment equals total disability to the body as 18%, claimant has an agreed industrial disability of an additional 12% of the body as a whole, making claimant's total disability 30% of the body as a whole, which shall be inclusive of any and all kinds of disability, including functional physical disabilities.

(Ex. B)

In a medical report dated October 21, 1980, which is attached to the settlement papers, claimant's eye surgeon, Tom E. Smith, Jr., M.D., stated that claimant had permanent diplopia (double vision) if he looked overhead. On December 23, 1980 Dr. Smith

said that claimant's diplopia in upward gaze above 30% constituted a zero percentage of loss of ocular mobility using the AMA Guides to the Evaluation of Permanent Impairment. Dr. Smith also stated that claimant had no visual field defect.

In another medical report dated September 17, 1980, claimant's orthopedic surgeon for his ankle and back, A. J. Wolbrink, M.D., previewed some of the future working limitations that claimant would encounter.

> If Mr. Porter's work situation can be controlled adequately, he may be able to return to work when I see him in a few days. He should avoid lifting over 40 lbs. on a regular basis and 75 lbs. on an occasional basis. Operating a machine where he has to sit continuously and ride over excessively bumpy ground may cause some difficulties. Also, activities such as shoveling may be tolerated for a short time but avoided on a continuous basis.

(Ex. 1, p. 31)

When Dr. Wolbrink rated the ankle on January 23, 1981 he specifically called attention to the possibility of future posttraumatic arthritis which would require treatment.

> I saw and examined Mr. Porter again on December 17, 1980. This exam included examination of his right ankle. It is my opinion that he has a permanent impairment of 14% of the right lower extremity due to his ankle injury. The possibility does exist that he will develop further difficulties consisting of post traumatic arthritis which would require further treatment several years from now.

(Ex. 1, p. 34)

There was no medical evidence or other evidence of any kind of a hearing loss caused by the injury of August 7, 1979 prior to the settlement agreement. Nevertheless, claimant alleges a hearing loss in his review-reopening original notice and petition. Claimant testified in his deposition on August 7, 1986, that he first learned of a hearing loss through an OSHA inspection of his present employer, however, no doctor had attributed it to the industrial accident which occurred on August 7, 1979. Claimant also admitted to some hunting and some motorcycle riding (Ex. A, pp. 14, 15, 16).

Dr. Smith, in a letter to claimant's counsel dated February 26, 1986, addressed both the proposed hearing loss and claimant's diplopia in the following words:

I have reevaluated Mr. Mike Porter on January 27 and February 6. He represented with a history of a hearing problem which had shown up on an employment audiogram. Evaluation of his hearing did reveal a bilateral sensorineural hearing loss of mild to moderate degree more predominant in the left ear. Because of this mild asymmetry, I performed more diagnostic procedures in order to rule out a more serious condition. These tests were unremarkable. It therefore appears that his problem is in the inner ears. The question of course is could this hearing loss be related to the injury he sustained in 1979. I think this is unlikely owing to the fact that at that time Mike had no complaints relative to his ears. He has had a history of noise exposure as a diesel mechanic and as a hunter and motorcycle enthusiast in the past which could explain his hearing loss. In all fairness, it is really difficult to say whether the head injury could have played a role in this. His diplopia, that is his double vision, is still unchanged from his previous examination. He does have mild diplopia on upward gaze above 30 degrees of gaze. This is also a mild condition and not terribly disabling. I hope this information is satisfactory for your purposes.

(Ex. E)

The events that have occurred subsequent to the settlement agreement approved on March 2, 1981 may best be summarized by the words of claimant's own counsel in his summary of the evidence in his post-trial brief.

> On March 4, 1981, two days after the Commissioner had approved the Agreement for Settlement, Mr. Porter was readmitted to the hospital in Mason City with complaints of severe low back pain. This recurrent pain from the previous laminectomy occurred while he was attending welding school at the Iowa Central Community College in Fort Dodge, Iowa. Mr. Porter was hospitalized from March 4, 1981, to March 15, 1981 in Mason City and was then transferred to Iowa Methodist Medical Center for diagnostic testing of his low back on March 17, 1981. Dr. Frank Hudson admitted Mr. Porter at that time and stated:
>
> > "He began with a recurrence of low back pain two weeks prior to the present admission with numbness down the right leg when he put pressure on it. He said he has had a burning sensation in the right

> leg starting on March 3rd and he has had pain along the back of the calf, posterior thigh and up into the bottock."

This admisson note of Dr. Hudson's (Claimant Exh. 1) reflects the fact that additional symptoms were experienced by Claimant within a matter of days after the Agreement for Settlement was approved. Diagnostic studies found "minimal blunting of the nerve root on the right between L-4 and L-5. This is the site of previous surgery." The Claimant was followed then by Dr. Joe Fellows, orthopedic surgeon, and remained on a conservative program with physical therapy throughout his stay at Iowa Methodist Medical Center. He was discharged on March 31, 1981. He was placed in a lumbosacral support at the time of discharge and was to be seen again in four months. (Claimant Exh. 1).

Claimant was again seen by Dr. Wolbrink in Mason City on April 17, 1981. His notes indicate that the Claimant was fitted with a foot drop brace for his ankle and received injections of cortisone and cortisone pills for a few days following his release from the hospital in Des Moines. (Clmt. Exh. 1). At that time claimant was continuing to wear a lumbosacral corset for his back and a foot drop brace for his ankle. The office notes of Drs. Wolbrink and Adams contained in Claimant Exh. 1 are relevant to show the extensive treatment Claimant has received <u>since</u> the date of the Agreement for Settlement.

In a letter of February 25, 1986, (Defendants' Exh. D), Dr. Wolbrink stated:

> "On January 23, 1981, I rated Mr. Porter as having a permanent impairment of 14% of the right lower extremity due to his ankle injury. I believe that you also have a copy of that letter. Present measurements would not change that permanent impairment rating. <u>However, he has developed the additional post traumatic arthritis, which is frequently seen after this type of injury."</u> (Emphasis added)

Claimant has not undergone further surgery on his ankle since 1981, but in that regard Dr. Wolbrink has stated:

> "I probably also did mention the possibility

of a fusion for his ankle. However that is not a procedure to be taken lightly. Therefore, the other procedures which are prescribed are definately indicated first. These, at the time, did seem to provide some relief of his symptoms. The fusion can be done at any time in the future, even several years down the road when all of these other measures are not adequate and he is having sufficient problems to warrant such an extensive procedure."

At the time of his injury Claimant was a foreman with the company then known as P & M Stone Company which operated a rock quarry in Humboldt, Iowa. One week prior to his injury a supervisor of the Company offered Mr. Porter a position as supervisor of two quarries in the Waterloo area with a substantial increase in pay. Due to the injury which intervened however, Mr. Porter was unable to take the new position. Following his injuries Mr. Porter returned to work with P & M Stone Company driving heavy equipment. He was laid off by the Company shortly prior to his back surgery and returned to work six weeks following his back surgery in February of 1980. He worked from March to August of 1980 when the Company was purchased by Weaver Construction Company. The Claimant had worked for P & M Stone Company since April of 1972.

The Claimant attempted truck driving but was unable to do so because of the continued aggravation of his low back. He subsequently found employment at Harklau Industries where he is presently employed at the same rate of pay he had at the time of his injury in 1979. The Claimant is presently a diesel mechanic for Harklau Industries and works a considerable number of hours per week based on the Company's needs for his services. The Claimant testified as to the erratic and unusual work hours in which he must service trucks at various times of the day and night. He is constantly on call for such services. His present job requires him to be on his feet constantly on a concrete surface which continually aggravates his ankle, causing it to swell and become painful.

In June of 1981 the Claimant began work with Harklau Industries of Humboldt, Iowa, driving semitractor-trailers. He worked at this job despite continuing pain and stiffness for four

years. In June of 1985 the Claimant quit driving because of continued low back pain, stiffness and inability to pull on the tarps, unload freight and sit for long periods of time. He quit Harklau Industries at that time and went to work for Swans, Inc., of Humboldt, attempting door to door sales. He was unable to continue this because the daily walking caused his ankle to swell to the point that he was unable to walk. The Claimant then returned to Harklau Industries seeking employment in July of 1985 and was hired as a welder. He lasted at welding for a period of three weeks and had to give that up because of the lifting of the items that he was required to weld. He was unable to do this because of his back. He was then placed in his present position in the shop as a diesel mechanic where he has been since August of 1985. The Claimant testified that since August of 1985 he has had a great deal of difficulty with his low back and ankle because of the bending required of a mechanic. In addition, the long hours on hard concrete floors has caused him continued pain and swelling of the right ankle.

The Claimant's present rate of pay is $6.50 per hour, which is the same rate of pay he was receiving as a foreman at the time of his injury in August of 1979. He has no other outside benefits, no security for the future and no hopes of promotion to easier or more financially rewarding employment.

The Claimant and his wife testified as to the effect of these injuries on their home life and marriage. Claimant virtually lives in order to work. After work he is essentially confined to recuperating for the next day's work.

When claimant was hospitalized at Iowa Methodist Hospital in Des Moines a few days after the settlement agreement his x-ray and myelogram results were as follows:

3-17-81 Lumbosacral spine: The alignment of the lumbosacral spine is satisfactory and the disc spaces are maintained. The pedicles are intact and the sacroiliac joints are normal. (SKL)

(Ex. 1, p. 62)

3/18/81 Lumbar myelogram: An Amipaque lumbar myelogram was performed. There is minimal blunting of the nerve root on the right between L 4 and L 5. This is the site of previous surgery. I doubt if

the findings on this examination are sufficient to diagnosis continued or recurrent disc protrusion. Essentially normal lumbar myelogram. (M)

(Ex. 1, p. 60)

3-18-81 Right ankle: There is no evidence of recent bony disease or injury. Some minimal soft tissue calcification is noted adjacent the distal end of the lateral malleolus and most likely represents the residual of old trauma. (JH)

(Ex. 1, p. 61)

Claimant testified in his deposition and at the hearing that he recently received a raise making his current wage $7.00 per hour (transcript, p. 28; Ex. A, p. 4). Claimant further testified that when he started for this employer he was earning $4.35 per hour plus expenses (Tr., pp. 28 & 29; Ex. A, p 4). Claimant related that he goes to work at 7 a.m., but sometimes is required to work until 10 p.m. or later and might be called out at 2 a.m. or 3 a.m. in the morning to do mechanical work in order to keep the trucks running on schedule (Tr., p. 39). Claimant asserted that his long hours of 55 hours per week involve strenuous work, bending, and being on his feet which cause pain and other difficulty with his back and ankle (Tr., pp. 40 - 45). Claimant had not sought any treatment from Dr. Wolbrink since January of 1986, approximately one year before the hearing (Tr., pp. 57 & 58). Claimant admitted that he fell off a truck and injured himself while working for his present employer, but he did not file a workers' compensation claim on account of this injury (Tr., p. 60).

Pam Porter, claimant's wife, corroborated claimant's testimony on several points, in particular the difficulties claimant has encountered in performing his present job from the observations that she has been able to make at home (Tr., pp. 68 - 72). Claimant granted that he has not had any additional surgeries since the settlement (Ex. A, p. 12). Claimant conceded that his back and ankle condition were the same now as they were described in the settlement agreement, except that he was not working when he signed the agreement, and that after he started to work he had more trouble than he had anticipated (Ex. A, pp. 11 - 14). Claimant acknowledged that no doctor had attributed his hearing loss to the injury of August 7, 1979 (Ex. A, pp. 13, 14 and 16). Claimant granted that the diplopia problem had not changed since the settlement (Ex. A, p. 15).

APPLICABLE LAW AND ANALYSIS

In a proceeding for review-reopening under Iowa Code section 86.14(2) the proponent must sustain the burden of proof by a

preponderance of the evidence of a change of condition as a result of the original injury. Stice v. Consolidated Ind. Coal Co., 228 Iowa 1031, 291 N.W. 452 (1940); Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). An increase in industrial disability may occur without a change in physical condition. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 350 (Iowa 1980); McSpadden v. Big Ben Coal Co., 228 N.W.2d 181, 182 (Iowa 1980).

Claimant did not sustain the burden of proof by a preponderance of the evidence that he has sustained either a medical or a nonmedical change of condition as a result of the original injury after the settlement agreement on March 2, 1981. As to the alleged hearing loss, it was not part of the settlement agreement. Nor is there any medical evidence of a hearing loss due to this injury in the voluminous medical data in Exhibit 1. The hearing loss was actually discovered on an OSHA survey while claimant was working for his present employer (Ex. 1, p. 7). Dr. Smith, the otolaryngologist, who treated claimant both before and after the injury of August 7, 1979 confirmed that claimant did not have any hearing complaints from that injury (Ex. E). Dr. Smith suggested that the hearing loss could possibly be explained by claimant's history to noise exposure as a diesel mechanic, as a hunter, or as a motorcycle enthusiast. In his own testimony claimant acquiesced that no doctor had ever told him that his hearing loss was attributable to the industrial accident that occurred on August 7, 1979 (Ex. A, pp. 13, 14, and 16). Consequently claimant failed to prove that he sustained a hearing loss in the original injury of August 7, 1979 in the first place, let alone suffer any change of condition after the settlement of that injury.

As to the diplopia, claimant stated in his own testimony that the diplopia problem had not changed since the settlement (Ex. A, p. 5). Dr. Smith, claimant's eye specialist, also stated that claimant's condition was unchanged since the settlement. Dr. Smith also added "this is a mild condition and not terribly disabling" (Ex. E). Claimant then has not proven any change of condition with respect to his diplopia after the settlement.

As to claimant's right ankle injury, Dr. Northup predicted the possible future development of traumatic arthritis only a few days after the injury occurred on August 28, 1979 (Ex 1, p. 65). Posttraumatic arthritis was again prognosticated by Dr. Wolbrink on January 23, 1981 (Ex. 1, p. 34). Both of these documents are attached to the settlement papers in the industrial commissioner's file. The settlement itself acknowledged that claimant had pain and difficulties on a daily basis and that his right ankle and foot swell if he stands for excessive periods of time (Ex. B). Furthermore, the settlement agreement states that it includes all kinds of disability, including functional physical disability (Ex. B, par 4). The x-ray at Iowa Methodist Hospital on March

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, 1981 was negative for any change in condition (Ex. 1, p. 61).
. Wolbrink affirmed on February 25, 1986 that the posttraumatic
thritis which had been expected, had in fact developed, but
inted out that the increase in arthritis had not changed his
tion in such a way that it would change his impairment on the
A Guides to Evaluation to Permanent Impairment (Ex. 1, p. 5;
. D). Moreover, claimant admitted in his testimony in his
position and in his testimony at the hearing his condition was
e same as it was described in the settlement agreement.
wever, he added that he was in school at the time of the
ttlement and failed to anticipate the difficulty that these
juries actually caused when he tried to work (Ex. A, pp. 11-14;
anscript pp. 58 - 62). Consequently, it is determined that
aimant failed to sustain the burden of proof by a preponderance
the evidence that he suffered a change of condition of his
ght ankle after the settlement.

to the back injury, the x-rays at Iowa Methodist Hospital
mediately after the settlement agreement on March 17, 1981 and
e lumbar myelogram performed on March 18, 1981 were normal.
to the myelogram, the radiologist stated "I doubt if the
ndings on this examination are sufficient to diagnose continued
recurrent disk protrusion" (Ex. 1, pp. 60 & 62). Again
aimant admitted in his testimony both in the deposition and at
e hearing that the condition of his back was the same as
scribed in the settlement papers (Ex. A, pp. 11-14; (Tr., pp.
-62). The fact that claimant failed to anticipate the exact
ture of his pain and suffering when he returned to the job
cket does not constitute a medical or a nonmedical change of
ndition. His condition has been generally the same at all
nes. What changed was the claimant's understanding and
perience of what this condition meant when he attempted to
k. Claimant's counsel stated that he was not asserting a
stake of fact or law with regard to the settlement agreement
., p. 14).

The limitations which claimant encountered driving a truck,
ing door to door sales and survey work, as a welder and as a
hanic were all forecast either before or at the time of the
tlement by Dr. Wolbrink (Ex. 1, p. 31). This document was
ached to the settlement agreement. If claimant cannot lift
r 40 pounds on a regular basis or 75 pounds on an occasional
is this precludes many truck driving, welding and mechanic
s. It is amazing, and a tribute to claimant's initiative and
serverence, that he has been able to work the long hours that
has worked and done the strenuous types of work that he has
fact accomplished in spite of his limitations. It is to his
dit that he could drive a truck over the road for approximately
e years since Dr. Wolbrink said he could not sit continuously
ride over excessively bumpy ground (Ex. 1, p. 31). Although
imant has established that he has done an exceptional job of
king numerous jobs in spite of his limitations, nevertheless

it must be determined that claimant has not demonstrated that a change in condition has occurred since the original settlement agreement as to either his right ankle or his back or otherwise.

As to earning capacity, claimant was awarded an industrial disability of 30%. This is a significant loss of earning capacity. It amounts to almost one-third of claimant's earning capacity. Nevertheless, claimant has managed to earn as much in actual earnings after the settlement as he was earning before the injury, if actual wages are any indication of earning capacity. Claimant testified that he began at $4.35 per hour with his current employer and had received a raise to $7.00 per hour just before his deposition taken on August 7, 1986. It has been contended that claimant has sustained a nonmedical change of condition due to the fact that an opportunity for promotion or an advancement was offered to claimant one week prior to the injury, but after the injury he was precluded from taking this job. Even if this were accepted as true, it is not something that occurred after the settlement. This information was known at the time of the settlement. Furthermore, whether claimant would have actually been given that job and whether claimant could subsequently perform it successfully is a matter of speculation since it did not in fact occur. It is claimant's earning capacity at the time of an award or settlement that is relevent to industrial disability. What claimant's earning capacity might have been at some future date under different circumstances is purely speculation. (Stewart v. Crouse Cartage Co., file number 738644, appeal decision filed February 20, 1987)

No surgery has been performed since the settlement agreement. No impairment rating has been increased since the settlement agreement. Medically imposed physical restrictions have not changed. Claimant is not currently undergoing any treatment. Claimant last sought medical treatment for his complaints in January of 1986 which was over a year prior to this hearing. Claimant's economic state has not changed substantially since the settlement.

In conclusion then, the evidence is insufficient to sustain the burden of proof by a preponderance of the evidence that claimant has sustained either a medical or a nonmedical change of condition since the settlement was approved on March 2, 1981.

FINDINGS OF FACT

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

That Dr. Smith established that claimant did not sustain a hearing loss as a result of the injury that occurred on August 7, 1979.

That Dr. Smith established that claimant did not encounter any change of condition with respect to his diplopia after the settlement agreement and that claimant also admitted that his diplopia had not changed.

That posttraumatic arthritis of the right ankle was predicted and prognosticated by at least two of claimant's physicians prior to settlement.

That posttraumatic arthritis did occur, but the increase did not result in a change in the impairment rating of his right ankle according to Dr. Wolbrink.

That claimant did not establish a change of condition with respect to his back, but rather the limitations which he has encountered were forecast prior to his settlement by Dr. Wolbrink and this information was included in the settlement papers.

That claimant himself confirmed, in his testimony at the hearing and in his deposition testimony prior to hearing, that the condition of his right ankle and his back were the same as they were described in the settlement papers.

That claimant was not working at the time of settlement and failed to anticipate how much difficulty he would have when he actually worked.

That claimant's back x-rays and myelogram were negative for any change in condition.

That claimant has not had any surgeries subsequent to the settlement agreement nor has there been any increase in his impairment ratings.

That claimant was not currently under treatment by a doctor and had not seen a doctor for over one year prior to hearing.

That claimant did not prove that he would have been promoted or advanced on his job and would have successfully completed this job. In addition, he knew this before the settlement agreement.

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 failed to sustain the burden of proof by a preponderance of the evidence that he sustained either a medical or a nonmedical change of condition.

That claimant's disability has not increased over the disability agreed upon at the time of settlement on March 2, 1981.

That claimant is not entitled to any additional permanent partial disability benefits based upon a change of condition.

ORDER

THEREFORE, IT IS ORDERED:

That no additional amounts are owed by defendants to claimant due to a change of condition.

The costs of this action are charged to claimant pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 14th day of December, 1987.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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FILED

AUG 31 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JERRY RACKLEY, Claimant, vs. ORBA JOHNSON TRANSSHIPMENT COMPANY, Employer, and WAUSAU INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 710994 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 Jerry W. Rackley, claimant, against Orba Johnson Transshipment Company, employer, and Wausau Insurance Companies, insurance carrier. The parties captioned the case as one in review-reopening, but there is no prior settlement, award or memorandum of agreement from which to reopen and it is therefore an arbitration proceeding.

Claimant seeks compensation for temporary total disability or healing period since he has been off work up to the date of hearing. The primary issue, however, is that claimant desires to have surgery and defendants have declined to send claimant to a physician who will perform the desired surgery and defendants will not authorize claimant to select a physician of his own choice at defendants' expense. Claimant requests that defendants be required to furnish a physician who will perform the desired surgery or to authorize him to select his own physician. Defendants urge that there is no causal relationship between the 1982 injury and claimant's current complaints. Alternatively, defendants allege that claimant's benefits should be suspended due to an alleged failure to cooperate with the physicians who have previously treated or examined him.

The hearing commenced at Des Moines, Iowa on March 10, 1987 and was fully submitted. The record consists of claimant's exhibits 1 through 51, defendants' exhibits A, B and C and claimant's testimony. Official notice was taken of the most recent form 2A in the agency file which is dated December 10, 1984 and which shows weekly compensation payments paid, including

50 weeks of permanent partial disability, in the total amount of $14,915.97 and medical benefits paid in the amount of $9,377.69. The date of last payment of weekly compensation is shown as December 10, 1984.

ISSUES AND STIPULATIONS

It was stipulated that claimant sustained an injury on August 6, 1982 which arose out of and in the course of his employment and that the rate of compensation, in the event of an award of weekly benefits, is $187.79 per week. The primary issue is whether defendants are to be required to provide claimant further medical treatment, in particular, the surgery which he requests. The defense to the claim is a lack of causal connection and failure of claimant to cooperate with the previously authorized physicians.

SUMMARY OF EVIDENCE

All evidence received at the hearing was considered when deciding this case even though it may not necessarily be referred to in this decision.

Jerry W. Rackley is a 39-year-old married man who fell from a bulldozer on August 6, 1982 resulting in an injury to his back. While seeking medical care under the direction of Jerry L. Jochims, M.D., a disagreement arose and claimant's care was transferred to the Steindler Clinic at Iowa City, Iowa (claimant's exhibit 33). After diagnostic tests were completed, surgery upon claimant's back was performed on November 10, 1982 by Webster B. Gelman, M.D., an orthopaedic surgeon. The surgery was a "Partial laminotomy, right, L5-S1, removal of lateral recess stensosis [sic]. Laminotomy, L4-5, left, and correction of L4-5 lateral recess stenosis bilaterally." (Claimant's exhibit 36). After a period of recuperation, Dr. Gelman authorized claimant to return to work on February 14, 1983 (claimant's exhibit 45). Dr. Gelman's office notes indicate that claimant had a follow-up visit on May 12, 1983 at which time it appears claimant stated he was doing very well except occasional cramping in his right leg. A diminished right ankle reflex was noted and a 10% body as a whole permanent partial disability rating was given. Subsequently, on September 22, 1983, Dr. Gelman noted that claimant made complaint of cramping in both calves, but Dr. Gelman felt that those symptoms were not related to the back injury. The next entry in the record of claimant seeking medical care is found at claimant's exhibit 24 which indicates that, on July 19, 1984, claimant again saw Dr. Gelman and reported that approximately two weeks earlier, he experienced "a bad 'popping' sensation in his lower back and developed a tender catch with motion and burning in both legs." Dr. Gelman noted that claimant had reduced his activity level and had improved somewhat. He recommended that claimant increase his activity and return to work on July 23, 1984, but that if symptoms persist to the end

of the month, a CT scan should be performed. The next entry in the record of claimant seeking medical care is his first appointment with Donald Mackenzie, M.D., which occurred on May 15, 1985 when claimant made complaint of a gradual worsening of his condition ever since the time of surgery. Five days later, on May 20, 1985, claimant discontinued any further work-up and indicated that he was going to live with his problem. Claimant testified that he was involved in a motor vehicle accident in July, 1985. His next medical visit was August 1, 1985 when he returned to Dr. Mackenzie. Diagnostic tests which had been performed led Dr. Mackenzie to diagnose disc herniation and to recommend surgery. On September 17, Dr. Mackenzie ordered physical therapy for claimant's complaints of neck pain which apparently had started at the time of the motor vehicle accident (MVA) (claimant's exhibit 8). Due to a disagreement with claimant, Dr. Mackenzie took himself off the case on November 13, 1985.

Claimant was then examined by Koert Smith, M.D., on January 7, 1986 and, in his report, Dr. Smith stated as follows:

> I would feel that at this time, assuming it can be documented, that he has had continued symptoms since his last surgery, that he would rate a 20% impairment for surgical excision of a disc without fusion with moderate persistent pain and stiffness, aggravated by heavy lifting. If, however, it can be documented that after his last surgery, that he got along well for two years and only recently began to develop symptoms; I would think that his initial impairment should have been 10% and unless a new injury can be documented at work, any additional impairment, namely the additional 10%, would be simply due to wear and tear in the natural course of the disease and not necessarily work related. (Claimant's exhibit 4)

In a subsequent report dated October 15, 1986, issued after Dr. Smith discovered that claimant had engaged in riding mules at the time of his earlier report, he then went on to state:

> He then apparently did well enough that he was able to return to work sometime in 1983, and at that time would have assumed that his impairment rating would have been 10%, based on surgical excision of a disc with good result. Certainly without any documented sudden worsening of his condition with a new injury at work, especially in light of activities such as riding mules and riding 3-wheelers, his present worsened symptoms and subsequent increase impairment rating from 10% to 20%, would be difficult if not impossible to causally relate to any work injury, based on records available to me. (Defendants' exhibit C)

Dr. Mackenzie initially indicated that possible causes of claimant's complaints were further disc injury unrecognized at the time of surgery, scarring from the previous surgery that was impinging on nerve roots or spinal instability (defendants' exhibit C, report dated 5-21-85). After conducting diagnostic tests, Dr. Mackenzie again diagnosed worsening low back pain radiating to both legs and stated that it was "probably due to a combination of retained disc fragment and epineural scarring." (defendants' exhibit C, report dated 8-13-85). In a report dated September 4, 1985, Dr. Mackenzie stated that claimant's previous discectomy surgery was successful and that his problem is now degeneration of a second disc, which was undoubtedly injured at the time of the initial injury and which has now become sufficiently symptomatic to be causing claimant's problems (defendants' exhibit C). Subsequently, however, in a report dated December 5, 1986, issued after reviewing claimant's deposition testimony regarding riding mules and a 3-wheel all-terrain cycle, Dr. Mackenzie expressed disagreement with Dr. Smith's conclusion that claimant's permanent partial impairment rating had increased from 10% to 20%. Dr. Mackenzie explained that damage from a spinal injury may not manifest itself for as much as 24 months after the injury was sustained. He stated that deterioration of the spine occurs through a series of micro-traumatic events throughout life, but that, if it is possible to identify an episode of rather severe trauma which is followed by rapid deterioration within 24 months, then a causal relationship has been established within a reasonable degree of medical certainty. With regard to this case, Dr. Mackenzie stated:

> After two years, based on current medical knowledge, I think there is little way to establish this connection and this is particularly true when the patient's recreational or home activities have been as demanding as those in his work place.
>
> The above discussion leads me to believe that there is an equal likelihood of his current symptoms being caused by his continued presence in the work place, as there is of them being caused as a result of his other activities.

Claimant testified that his symptoms had gradually worsened since the time of surgery in 1982 (defendants' exhibit A, pages 29-31). He denied the occurrence of any event which had any appreciable effect upon his back, be it at work or otherwise (defendants' exhibit A, pages 26-28). Claimant stated that, after being involved in the auto accident, he went to Dr. Mackenzie on the following day, but that supervisors at work would not let him return to work (defendants' exhibit A, page 27). Rackley testified that he hurt his upper back and shoulder in the auto accident. He stated in his deposition that he also hurt his low back in the accident (defendants' exhibit A, page

28, lines 9-12). At hearing he denied injuring his low back in the accident.

When deposed, claimant characterized his mule and 3-wheel cycle riding as what could be considered infrequent. He indicated that the mule riding was not particularly troublesome for his back, but that riding the 3-wheeler did aggravate it considerably (defendants' exhibit A, pages 39-51).

APPLICABLE LAW AND ANALYSIS

The occurrence of injury was stipulated. Claimant's description of the accident which occurred on August 6, 1982 when he injured his back when he fell from a bulldozer is accepted as correct. Claimant has established that he received an injury which arose out of and in the course of his employment.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 6, 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).

With regard to his initial treatment leading up to and including the surgery and post-operative care from Dr. Gelman, the sequence of events is such that there is no question but that a causal connection exists between the fall, the initial disability, the treatment and some resulting degree of permanent partial disability. From the form 2A which is in evidence, it appears (without actually hereby deciding) that claimant was paid all healing period and medical benefits which were due up to the time that he returned to work in early 1983. The sufficiency of the amount of permanency that has been paid is not an issue to be addressed in this decision.

The crucial issue in this case is whether that original August 6, 1982 injury is a proximate cause of the worsening of claimant's condition of which he complains and for which he seeks authorization for surgery.

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).

In the sense that the fall from the bulldozer injured claimant's back and left it in a weakened condition, it can be urged that anything that happens to claimant's back subsequent thereto was proximately caused by that original injury. Such is not, however, believed to be an appropriate rule of law. The increased susceptibility to injury is a matter to be compensated by an award of permanent partial disability rather than a lifetime of causal connection. The record in this case provides no expert medical testimony which relates the original injury to the worsening of claimant's complaints. In fact, evidence from Drs. Smith and Mackenzie is to the effect that it is not possible to determine whether the worsening is a result of the original injury or some intervening event or events. It appears that, at the time claimant was last seen by Dr. Gelman in 1983, he was continuing to have symptoms. He did not, however, seek further medical care until July of 1984 when he reported an incident of a "popping" sensation in his back and enhanced symptoms. Interestingly, this coincides with a period of payment of healing period compensation as reported on the form 2A even though there is no indication in the record identifying when, where or under what circumstances that "popping" sensation occurred. In his testimony, however, claimant denied experiencing any such events (defendants' exhibit A, page 26, lines 15-20). The record does not reflect the precise date on which the 1985 auto accident occurred. When claimant saw Dr. Mackenzie for the second time in May of 1985, he indicated that he was going to discontinue any attempts at treatment and was going to live with his condition. At some point in time shortly after the auto accident which apparently occurred in July, claimant was again under treatment by Dr. Mackenzie for purposes of diagnostic tests. Apparently, something occurred to cause claimant to return to Dr. Mackenzie. The only things in the record which could explain that timing are either the July automobile accident or the letter giving Dr. Mackenzie authorization to perform diagnostic tests (claimant's exhibit 8) and the letter from Dr. Mackenzie to claimant informing him that further testing could be arranged (claimant's exhibit 17).

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

Claimant must prove by a preponderance of the evidence that there is a causal connection between the employment incident or activity and the injury upon which his claim is based. A possibility is insufficient; a probability is necessary. Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974). Whether a disability has a direct causal connection with

the claimant's employment is essentially within the domain of expert testimony. Bodish v. Fisher, Inc., 257 Iowa 516, 133 N.W.2d 867, 870 (1965). Expert testimony that a condition could possibly be related to a claimant's employment, although insufficient alone to support a finding of causal connection, could be coupled with nonexpert testimony to show causation and be sufficient to 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 (1974).

When all the evidence in the case is considered, it is not possible to determine whether the increase in symptoms resulted from the original injury or whether it resulted from intervening events. Claimant has failed to introduce evidence showing it to be more likely than not that the increase in his symptoms was proximately caused by the original injury as opposed to intervening events. He has therefore failed to prove by a preponderance of the evidence that the injury of August 6, 1982 is a proximate cause of his increased symptoms and of any surgery or other procedures which would be reasonable and necessary in treating the increased symptoms.

FINDINGS OF FACT

1. Jerry W. Rackley injured his back in a fall from a bulldozer while engaged in his employment with Orba Johnson Transshipment Company on August 6, 1982.

2. The injury produced a need for surgery which was performed by Webster B. Gelman, M.D. Following a period of recuperation, claimant returned to work in February of 1983.

3. Claimant was never completely free of symptoms following that surgery and, in July of 1984, experienced an aggravation of his back condition for which he was off work approximately three weeks.

4. In May, 1985, claimant entered into treatment with Donald Mackenzie, M.D., but discontinued treatment and did not resume it until after being involved in an automobile accident in July, 1985.

5. The original injury of August 6, 1982 left claimant's back in a weakened condition which was more susceptible to injury than it had been prior to August 6, 1982.

6. The evidence in the case does not establish a cause for the worsening of symptoms which has occurred. The evidence shows it as likely to be due to the automobile accident or to claimant's recreational activities of mule riding or all-terrain vehicle riding as it is to the original injury or to some other intervening employment-related trauma.

7. Claimant has failed to establish that the injury of August 6, 1982 was a substantial factor in bringing about the increased symptoms which currently afflict him.

CONCLUSIONS OF LAW

1. The fact that an injury has produced a permanently weakened or impaired physical condition does not establish that the injury is a proximate cause of all subsequent ailments affecting the injured part of the body. The question of causation is a question of fact and the original source of a weakened or impaired condition is evidence of causation, but it must be viewed together with all other evidence, such as intervening causes or aggravating traumas.

2. Claimant has failed to prove by a preponderance of the evidence that the injury of August 6, 1982 is a proximate cause of the worsening of claimant's symptoms that has occurred subsequent to his return to work in early 1983.

3. Defendants are not responsible for providing treatment for claimant's current spinal complaints or the surgery for which he requests authorization.

ORDER

IT IS THEREFORE ORDERED that defendants have no responsibility to provide surgical treatment for claimant's current spinal affliction.

IT IS FURTHER ORDERED that claimant is not entitled to further weekly compensation for healing period for times subsequent to the July, 1985 automobile accident.

IT IS FURTHER ORDERED that costs of this proceeding are assessed against claimant.

Signed and filed this 31st day of August, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID RAHN,

Claimant,

vs.

SIOUXLAND AUTO BODY,

Employer,
Defendant.

File No. 797004

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 David Rahn, claimant, against Siouxland Auto Body, employer, for benefits as a result of an alleged injury of April 5, 1984. A hearing was held in Sioux City, Iowa, on May 5, 1987, and the case was submitted on that date.

The record consists of the testimony of claimant, Jo Ann Addison, and Lester H. Pederson; claimant's exhibits 1 through 13; and defendant's exhibits A through D. Neither party filed a brief. Neither party filed the required prehearing report at time of hearing as neither party had prepared this report. A proposed amendment to the petition was denied at time of hearing.

The parties stipulated that only medical benefits are at issue in this proceeding and that the contested medical bills are reasonable in amount. At time of hearing, the defendant attempted to raise the issue of employer-employee relationship, but was told that this issue was waived because defendant failed to raise it at time of prehearing and have the issue noted on the hearing assignment order filed on April 16, 1987. See Joseph Presswood v. Iowa Beef Processors, Appeal Decision dated November 14, 1986. The Presswood decision specifically holds that if an issue is not noted on the hearing assignment order, it is waived.

ISSUES

The contested issues are:

1) Whether claimant received an injury on April 5, 1984 that arose out of and in the course of his employment with Siouxland Auto Body;

2) Whether there is a causal relationship between the alleged injury of April 5, 1984 and claimant's asserted disability; and

3) Whether claimant is entitled to medical benefits under Iowa Code section 85.27 and, if so, the extent of those benefits. The six contested medical bills have been marked as exhibits 1 through 6.

SUMMARY OF THE EVIDENCE

Claimant testified that he worked for Lester H. Pederson (Siouxland Auto Body) on a "weekly commission basis." Claimant testified that on April 5, 1984, while working for Siouxland Auto Body, a piece of slag passed through his right ear tympanic membrane while he was welding on the job. At the time of injury, claimant was working on a van and had been instructed to do so by Mr. Pederson. Claimant was lying under the van cutting off panels when the injury occurred. Claimant testified that "stuff was flying back at me." Claimant testified that he washed his ear after the incident at about noon on April 5, 1984. He went back to work the same day and did not immediately see a doctor. However, he did not do any auto body work the night of April 5, 1984.

Claimant testified that on April 6, 1984, he went to work and worked all day. On April 6, 1984, he decided to go to the hospital to have his ear seen because of the pain. He received medical attention about 8:00 to 9:00 p.m. on that Friday night. At the time, this facility was called St. Luke's and is now called Marian Health Center. The doctor who initially saw him called in a specialist. It was determined that claimant had a hole in his ear drum and he stayed in the hospital overnight. Approximately a month after the injury, it was determined that the injury had not healed and that surgery was needed to repair it. However, claimant continued working for Mr. Pederson at Siouxland Auto Body. See Exhibit 9 (job tickets). Claimant testified that his last day at Siouxland Auto Body was May 1, 1984. Claimant had surgery on May 2, 1984. The surgery repaired the hole.

Claimant testified that his ear surgery was a success. The surgeon performing the surgery was John F. Pallanch, M.D., and his bill was marked as Exhibit 3.

Jo Ann Addison testified that she is claimant's mother. Claimant called his mother on Friday, April 6, 1984, and told her about the work-related injury to his right ear. Claimant told his mother that this injury happened on Thursday, April 5, 1984. Addison testified that she took her son to the Marian Health Center for treatment of his right ear injury.

Leslie H. Pederson testified that he once owned Siouxland Auto Body, which he bought in 1975. Pederson testified that he subsegently sold the business. See Exhibit 1, which is a bill of sale dated August 1, 1983. Pederson testified that an amendment to claimant's petition was delivered to him on May 4, 1987 (the night before this hearing) at about 10:30 p.m. (This is the amendment to petition that was denied by the hearing deputy at time of hearing).

On cross-examination, Pederson was shown claimant's exhibit 12 and acknowledged that he was served with the original petition filed herein on May 30, 1985. Pederson was shown claimant's Exhibit 13 (specifically interrogatory 4) that reads in part: "Claimant no longer worked for me after about April 13, 1984."

On redirect examination, Pederson stated that he thought he was being sued personally when he was served with the original notice and petition rather than being sued in his alleged capacity as owner of Siouxland Auto Body.

Exhibit 7, page 1, describes claimant's injury of April 5, 1984 and gives a diagnosis.

APPLICABLE LAW AND ANALYSIS

I. Joseph Presswood v. Iowa Beef Processors, supra, reads in part on page 3 thereof:

> The second issue is whether defendant waived the section 85.23 notice defense by failing to raise it at pretrial. Failure to give notice is an affirmative defense. Mefferd v. Ed Miller & Sons, Inc., Thirty-third Biennial Report of the Industrial Commissioner 191 (Appeal Decision 1977). As such it must be pled and is subject to pretrial. Here, defendant amended its answer to raise the notice defense on October 12, 1983 but failed to pursue it at pretrial. The issue was thereby waived at the arbitration hearing.

The industrial commissioner made it clear in the Presswood decision that issues not asserted at time of pretrial are waived. Therefore, it is determined that the employer-employee relationship issue was waived in this case.

II. Claimant has the burden of proving by a preponderance of the evidence that he received an injury on April 5, 1984 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Claimant's testimony that he sustained a work-related injury

on April 5, 1984 is believed. Therefore, it is determined that claimant has met his burden on this contested issue.

III. The claimant has the burden of proving by a preponderance of the evidence that the injury of April 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).

The medical evidence of record as well as the supporting lay testimony support a determination that claimant has established the requisite causal connection. The injury of April 5, 1984 clearly caused the medical problems which resulted in the medical treatment received by claimant.

IV. It was stipulated that the contested medical bills are reasonable in amount. All the barriers to an order for payment of the contested medical bills have been disposed of in the first three divisions of this decision. Therefore, an order for payment of these bills, or reimbursement to claimant if he paid the contested bills, will be issued in this case.

FINDINGS OF FACT

1. On April 5, 1984, claimant injured his right ear in a work-related incident at Siouxland Auto Body.

2. Surgery was required in order to remedy the medical problems resulting from the work-related injury of April 5, 1984 and John Pallanch, M.D., performed this surgery.

3. There is a causal connection between the work-related injury of April 5, 1984 and the impairment to the right ear that was remedied by the surgery performed by Dr. Pallanch; the other contested medical bills are also causally related to the work-related injury of April 5, 1984.

CONCLUSIONS OF LAW

1. Defendant employer waived any employer-employee relationship argument or issue by failing to assert the same at time of pretrial; failure to assert such an issue at that time resulted in its absence from the hearing assignment order. Hearing deputies decide only issues noted on the hearing assignment order.

2. Claimant established by a preponderance of the evidence

that he received an injury on April 5, 1984 that arose out of and in the course of his employment with Siouxland Auto Body.

3. Claimant established by a preponderance of the evidence that there is a causal relationship between the work-related injury of April 5, 1984 and the damage or impairment to his right ear.

4. Claimant established that the defendant employer should pay the contested medical bills or that the defendant employer should reimburse claimant if claimant has in fact already paid these bills out of his own pocket in whole or in part.

ORDER

IT IS THEREFORE ORDERED:

That defendant employer pay the contested medical bills or reimburse claimant for the same, whichever is appropriate.

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

That defendant employer shall file claim activity reports pursuant to Division of Industrial Services Rule 343-3.1(2) as requested by the agency.

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

T. J. McSweeney

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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1402.60; 2001; 2906
Filed 10-20-87
T. J. McSweeney

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID RAHN,	:	
	:	
Claimant,	:	
	:	File No. 797004
vs.	:	
	:	
SIOUXLAND AUTO BODY,	:	A R B I T R A T I O N
	:	
Employer,	:	D E C I S I O N
Defendant.	:	

1402.60; 2001; 2906

Held in arbitration that defendant employer waived employer-employee issue by failing to assert the same at time of prehearing; this issue was not noted on the hearing assignment order as a result.

Defendant employer was held liable for contested medical bills and claimant's eye injury was determined to be work-related. No weekly benefits were sought by claimant.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

REVA RAUCH,	:	
	:	
Claimant,	:	
	:	
vs.	:	
	:	FILE NO. 828457
O'BRYAN BROTHERS INC.,	:	
	:	A R B I T R A T I O N
Employer,	:	
	:	D E C I S I O N
and	:	FILED
	:	
KEMPER INSURANCE,	:	NOV 18 1987
	:	
Insurance Carrier,	:	
Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Reva Rauch, claimant, against O'Bryan Brothers, Inc., employer (hereinafter referred to as O'Bryan), and Kemper Insurance, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on June 17, 1986. On August 20, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing. The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and Shirley Stockwell. 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. Claimant was employed at O'Bryan's at the time of the alleged injury herein.

2. Claimant seeks temporary total disability or healing period benefits for the period of time from June 17, 1986 through March 8, 1987 and claimant was off work for this period of time.

3. The commencement date for permanent partial disability benefits if awarded herein shall be March 9, 1987.

4. Claimant's rate of compensation in the event of an award of weekly benefits shall be $254.46 per week.

5. With reference to the requested medical expenses, it was stipulated that the provider of the services would testify as to the reasonableness of their charges and of the treatment that they rendered and that defendants are not offering contrary evidence. Also, the medical expenses for which claimant seeks reimbursement are causally connected to the back condition upon which she is basing her claim but that the causal connection of this condition to a work injury was an issue to be decided herein.

ISSUES

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

I. Whether claimant received an injury arising out of and in the course of her employment at O'Bryan;

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

III. The extent of weekly disability benefits to which claimant is entitled; and

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

SUMMARY OF THE EVIDENCE

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

Claimant testified that she has worked for O'Bryan for the last 13 years as a sewing machine operator. In this job, claimant sews various portions of garments using an industrial sewing machine. Claimant normally sits in this job throughout the course of a day and operates the machine with foot pedals using her hands to guide the material. Before a recent modernization of the sewing machine work area, claimant was required to turn and twist to lay finished garments on a "horse" behind and to the left of her work station. She also was required to bend slightly to view and perform the sewing operations. She also was required to periodically lift a bundle of finished garments weighing from five to 20 pounds. Claimant has always been a good employee according to Shirley Stockwell, the human resources manager. Claimant has been the fastest and most productive operator in the sewing department. As the employees in this

department are paid in portion to their output, claimant earned the most money as well. Claimant testified that she earned approximately $10.00 to $10.50 per hour from her work before the claimed work injury in this case.

The facts surrounding the work injury are not in real dispute. Claimant testified that no unusual event or sudden trauma occurred at work. She states that she simply began to experience back pain at work in June, 1986, and initially she did not know the cause. Beginning on June 6, 1986, claimant began to receive chiropractic adjustments for back pain but continued to work. After two weeks the chiropractor suspected claimant was suffering from a herniated disc and referred claimant to a medical doctor. On June 18, 1986, claimant saw C. E. Rouse, M.D., who noted in his records that claimant had no history of trauma or unusual activity. Claimant complained to him of low back pain extending down into the right thigh and of tingling and numbness in the left leg. Dr. Rouse felt that claimant suffered from low back strain with right sciatica and prescribed medication and bed rest. Claimant remained off work and followed the advice of Dr. Rouse. With no improvement in her condition, Dr. Rouse referred claimant a week later to John Kelly, M.D., an orthopedic surgeon.

Dr. Kelly, after his examination of claimant, suspected a herniated disc and scheduled a myelogram with possible surgery. Claimant then sought and received a second opinion from Scott Neff, D.O., another orthopedic surgeon, on July 2, 1986. Dr. Neff began to treat claimant's symptoms conservatively and ordered a CT scan which revealed herniated discs at two levels in claimant's lower spine. Dr. Neff attempted to treat claimant's symptoms with injections of steroid medication but this did not relieve claimant's pain. Consequently, on July 29, 1986, Dr. Neff performed surgery on the two herniated discs called a laminectomy and disc excision. Claimant reached maximum healing from this surgery six months later in the opinion of Dr. Neff.

Dr. Neff opined in March, 1987, that his treatment of claimant's condition and claimant's difficulties with her work over the last 13 years was the cause of her back problems. He notes the absence of any other activity or injuries to cause the problem. In his early office notes Dr. Neff stated that claimant reported to him that she did a considerable amount of sewing at home. Claimant testified that Dr. Neff initially misinterpreted her description of her sewing thinking it was done at home rather than at work. This misconception, she explains, later was corrected in later discussions with the doctor.

Claimant testified that she had no chronic difficulties with her back pain before June of 1986. She said at the hearing and to her physicians that she had similar back pain several years before that time but the pain did not last. After considerable

effort on the part of Dr. Neff which included receiving a video tape of claimant's job at O'Bryan, Dr. Neff opined that claimant could return to her former work with modifications in the location of the horse and to her chair in order to avoid repetitive twisting and bending. Also, Dr. Neff indicated he would not be able to release her to lift the bundles. With these modifications, claimant returned to work on March 9, 1987. Initially, O'Bryan indicated that claimant would have to execute a waiver of liability form under Iowa Code section 85.55 in order to return to work. However, O'Bryan eventually allowed claimant to return to work without executing such a waiver.

Dr. Neff finally opined that claimant suffers from a 20 percent permanent partial impairment to her body as a whole as a result of her back difficulties and that 15 percent of this impairment is due to her work activity at O'Bryan over the last 13 years. Dr. Neff indicates that claimant's future activities are permanently limited to light lifting and that she must avoid repetitive lifting, twisting or bending. This is the only opinion offered into the evidence as to the extent of claimant's permanent impairment.

Luckily, there was a modernization of the sewing department in July, 1987, to the advantage of claimant. These modifications made the job easier. Now with the new equipment, garments come to all sewing machine operators on a conveyor system using an overhead rail. Claimant remains seated for most of the time and takes the garments from the rail, performs the sewing activity and returns the garment back to the rail and merely pushes a button to transport the garment to the next work station. Claimant no longer has to twist or lift bundles. According to the video tape of this activity viewed at the hearing, claimant still has to bend slightly to perform her work and obviously must remain seated for very long periods of time.

A comparison of claimant's earnings received into the evidence representing earnings before and after June, 1986, and upon claimant's return to work in March, 1987, shows a slight decrease in weekly earnings varying from $5.00 to $20.00 per week (comparing weeks having the similar number of hours worked) after the onset of back pain in June, 1986. For a while claimant, along with other sewing machine operators, were on a 32 hour week upon a return in March, 1987, but this was only temporary. Claimant testified that she now earns approximately $9.00 per hour. Claimant said that she is now not "quite as fast as before."

Stockwell testified that claimant has not complained to her of her work since returning and remains the fastest worker in the department. Stockwell points out that all of the employees in the sewing department are earning less due to the new modern equipment being used and there is currently an adjustment

process going on in the piece rate in order to compensate for their sewing machine operators' loss of earnings as a result of the new system.

Claimant stated that she currently gets more fatigued after walking and standing. She has suffered atrophy of the left leg which was demonstrated at the hearing. Claimant continues to experience "some back pain."

Claimant testified that she is 31 years of age and her only other employment was as an accounting clerk and as a night manager of an A & W drive-in restraurant while she was in high school. As a night manager she was responsible for seeing that the work was completed and that money was delivered to the owner after the restrauant closed. Claimant has a high school education but no other formal training. Claimant continues to work at O'Bryan at the present time.

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

APPLICABLE LAW AND ANALYSIS

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

It is not necessary that claimants prove their disability results from sudden unexpected traumatic events. It is sufficient to show that the disability developed gradually or progressively from work activity over a period of time. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). The McKeever court also held that the date of injury in gradual injury cases is a time when pain prevents the employer from continuing to work.

In the case sub judice, claimant demonstrated by her uncontroverted testimony and the uncontroverted testimony of her primary physician, Dr. Neff, that she has suffered a gradual injury and was compelled to leave her work on June 17, 1986 to recuperate and receive treatment for her gradual injury. Consequently, the injury date will be found to be June 17, 1986. The only possible conflict in the evidence concerns Dr. Neff's reference during one of her first visits to him that she did a

lot of sewing at home. Claimant explains that this was a misunderstanding and this is a reasonable explanation for the discrepancy given Dr. Neff's subsequent statements and opinions.

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

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

In the case sub judice, claimant contends that she has suffered disability as a result of a work injury due to a permanent impairment to the body as a whole. First, the uncontroverted evidence established that she has suffered a 15 percent permanent partial impairment. The uncontroverted evidence also established

that she suffers from permanent restrictions effecting her future work activity. Second, the uncontroverted evidence in the form of the opinions of Dr. Neff show the requisite causal connection between the work injury and permanent impairment.

However, a finding that claimant has suffered permanent impairment does not by itself entitle claimant to permanent partial disability benefits in an industrial disability case. The law on such an entitlement is discussed 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, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Claimant's medical condition before the work injury was excellent and she had no functional impairments or assertainable disabilities. Claimant was able to fully perform physical tasks involving lifting, repetitive lifting, bending, twisting and stooping and prolonged sitting. As a result of her gradual injuries the functioning of her whole body has been effected and she was required to undergo painful surgery. Recovery from the injury and the surgery took several months. Claimant has experienced back pain in varying degrees since the injury.

Claimant's medical condition prevents her from returning to the type of work she was performing at the time of the work injury. However, claimant has returned to work due to a initial modification of her job and modifications resulting from modernization of plant equipment.

Claimant is relatively young, 31 years of age. Her loss of future earnings from employment due to disability is not as severe as would be the case for an older individual. Walton v. B & H Tank Corp., II Iowa Industrial Commissioner Report 426 (1981).

Claimant has a high school education and exhibited average intelligence at the hearing. Little was shown to indicate claimant's actual potential for vocational rehabilitation. However, such rehabilitation is unnecessary as claimant's current employment appears to be suitable and stable at the present time.

Claimant has not demonstrated that she has suffered a significant loss in actual earnings. Claimant's testimony as to her loss of earnings since before the onset of her pain in June, 1986, was sufficiently rebutted by the testimony of the personnel manager in that all of the employees in the department are suffering reduced earnings due to the new equipment.

In her trial brief, claimant's counsel argues that claimant would experience difficulty finding replacement work should she lose her current job for any reason given her physical limitations. For this reason, claimant argues for a substantial award of industrial disability.

However, an award of this deputy commissioner was recently modified on appeal to the industrial commissioner because this deputy based an award upon what may occur to the claimant in the future as opposed to his present condition. See Umphress v. Armstrong Rubber Co., Appeal Decision filed August 27, 1987. In the Umphress case this deputy stated that despite his current employment, claimant who was a semi-skilled heavy laborer at the time of the injury has been significantly impaired by the work injury and his ability to perform semi-skilled heavy labor. This deputy concluded that should claimant lose his current light duty job for any reason, he probably will experience great difficulty in finding replacement employment. The commissioner in his appeal decision stated that such a conclusion was mere speculation and that it was improper to base an award upon what may occur to claimant in the future as opposed to his present condition. This is a binding agency precedent.

In the case sub judice, claimant has demonstrated a significant permanent partial impairment as a result of her work injury, but looking at only her current condition, claimant has only suffered

a five percent loss of earning capacity. This entitles claimant to 25 weeks of permanent partial disability benefits.

Claimant is also entitled to weekly benefits for healing period under Iowa Code section 85.33(1) from the first date of her absence from work until claimant returned to work. The causal connection of this temporary period of disability following the onset of her pain in June, 1986, was established by the uncontroverted testimony of Dr. Neff.

IV. Claimant is entitled to reasonable medical expenses incurred as a result of a work injury under Iowa Code section 85.27. Given the stipulations of the parties with reference to these expenses in the prehearing report, it shall be concluded that they are reasonable and causally connected to the work injury found herein.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. Claimant was in the employ of O'Bryan at all times material herein.

3. On June 17, 1986, claimant suffered a gradual injury to her lower spine which arose out of and in the course of her employment with O'Bryan over the previous 13 years as a sewing machine operator. Claimant suffered at least two herniated discs requiring surgery as a result of this employment.

4. The work injury of June 17, 1986 was a cause of a temporary period of disability from work beginning on June 17, 1986 and ending on March 8, 1987 at which time claimant returned to work.

5. The work injury of June 17, 1986 was a cause of a 15 percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no heavy lifting or repetitive lifting, bending or twisting.

6. Claimant has suffered a five percent permanent industrial disability as a result of the June 17, 1986 injury. Claimant is relatively young, 31 years of age, has a high school education and appears to possess average intelligence. Claimant has never worked in jobs requiring heavy lifting. Claimant has 15 percent permanent partial disability due to the work injury. Claimant cannot return to the type of work she was performing at the time of the injury, but due to plant modernization and other modifications of her job, claimant was able to return to suitable and stable employment. It could not be found that claimant has suffered actual loss of earnings as a result of her work injury other

than during the time she was recuperating from the injury which will be compensated by temporary total disability benefits.

7. The medical expenses listed in the prehearing report which total $642.00 are fair and reasonable and were incurred by claimant for reasonable necessary treatment of the June 17, 1986 work injury.

CONCLUSIONS OF LAW

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

ORDER

1. Defendants shall pay to claimant twenty-five (25) weeks of permanent partial disability benefits at the rate of two hundred fifty-four and 46/100 dollars ($254.46) per week from March 9, 1987.

2. Defendants shall pay to claimant healing period benefits from June 17, 1986 through March 8, 1987 at the rate of two hundred fifty-four and 46/100 dollars ($254.46) per week.

3. Defendants shall pay to claimant the sum of six hundred forty-two and no/100 dollars ($642.00) as reimbursement for medical expenses.

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

5. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and specifically defendants are taxed the costs listed in the attachment to the prehearing report which total two hundred seventy and 35/100 dollars ($270.35).

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

7. This matter shall be set back into immediate assignment for prehearing and hearing on the extent of additional weekly benefits to which claimant may be entitled under Iowa Code section 86.13 for an alleged unreasonable delay in commencement of weekly benefits.

Signed and filed this 18 day of November, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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002297

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD G. REED, Claimant, vs. VAN GORP CORPORATION, Employer, and LIBERTY MUTUAL INSURANCE CO. Insurance Carrier, Defendants.	:	File No. 826902 A R B I T R A T I O N D E C I S I O N FILED NOV 18 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Donald G. Reed, claimant, against Van Gorp Corporation, employer, hereinafter referred to as Van Gorp, and Liberty Mutual Insurance Company, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on Feburary 8, 1985. On August 25, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

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

1. On February 8, 1985, claimant received an injury which arose out of and in the course of his employment with Van Gorp.

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $247.10 per week.

3. Claimant is only seeking temporary total disability or healing period benefits for sixty-nine days after February 21, 1985 (claimant made several attempts to return to work which

proved unsuccessful), and defense agreed that he was not working for sixty-nine days after February 21, 1985 but before he finally terminated his employment at Van Gorp.

4. If permanent partial disability benefits are awarded herein, they shall begin as of August 29, 1985.

5. The medical bills submitted by claimant at hearing were causally connected to the medical condition upon which the claim is based but that the issue of the causal connection of this condition to any work injury remains an issue to be decided herein.

ISSUES

The parties submitted the following issues for determination in this proceeding in the prehearing report.

1) Whether there is a causal relationship between the work injury and the claimed disability;

2) The extent of weekly disability benefits to which claimant is entitled; and

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

SUMMARY OF THE EVIDENCE

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

Claimant testified that he worked for Van Gorp from April 15, 1974 until October 28, 1985 as a welder. He stated that his duties consisted of welding, either while standing or seated, various sizes of pulleys ranging in weight from a few pounds to several thousand pounds or a few tons. Claimant earned $10.21 per hour in this job at the time of the alleged injury. Claimant's supervisor testified that prior to the work injury claimant missed work for only the "usual stuff." Claimant testified at hearing that he left his employment on October 28, 1985 on the recommendation of his treating physicians because he could no longer tolerate bending, stooping and lifting on the job and there was no light duty available at Van Gorp Corporation. The lack of availability of light duty work was verified by claimant's supervisor at hearing.

The facts surrounding the work injury are not in real dispute. Claimant testified that on February 8, 1985 while

attempting to weld a pulley weighing approximately 600 pounds from a seated position, the pulley, which was resting on a welding stand, fell onto claimant pushing him backwards over the chair on which he was seated. Claimant said that he landed on the floor striking his left lower back and left side. Claimant said that he immediately felt low back pain and left-sided pain. Claimant stated that he rested until quitting time on the day of this injury which was the end of the week and rested in bed over the ensuing weekend. The following Monday he returned to work but had difficulties continuing to work because of back and leg pain. Claimant then complained to his foreman and an appointment was made with Kurt Vander Ploeg, M.D. Dr. Vander Ploeg treated claimant with medication and physical therapy for a period of time while claimant continued on his job. Claimant made several unsuccessful attempts to return to work during the course of his treatment. Claimant's symptoms, however, always reappeared after he began performing his regular duties. Claimant was eventually referred to Dr. Berg and later to an orthopedic surgeon, William R. Boulden, M.D.

According to the medical reports submitted into the evidence, claimant was first seen by Dr. Boulden on April 30, 1985 with complaints of low back and lower extremity pain. Dr. Boulden treated claimant conservatively with physical therapy and medication. Upon a persistence of symptoms in May 1985, he ordered a CAT scan of claimant's lower spine which revealed a probable herniated disc at the L5,S1 level of claimant's lower spine. In June 1985, Dr. Boulden ordered a metrizamide CAT scan which failed to show evidence of any neural impingement in claimant's spine. In July 1985, given claimant's symptomatology after heavy work, Dr. Boulden felt that claimant should have permanent restrictions against repetitive bending, stooping or lifting. Later in July 1985, after another flareup following bending at work, claimant received trigger point injections which helped to alleviate some of the pain. Finally, in October 1985, given claimant's history of problems at work, he imposed permanent restrictions against any bending, stooping or lifting and recommended claimant consider retirement. Claimant then left his employment at Van Gorp, never to return.

Claimant's testimony and the medical reports submitted into evidence indicate that claimant had no prior chronic back problems before the alleged work injury upon which he bases his claim. Claimant testified (and his supervisor concurred) that claimant only missed work for the usual number of sicknesses and illnesses. Claimant said that he had a few muscle strains in the past but was able to recover fully from each episode and missed little if any work as a result of these various muscle strains.

Claimant described his current medical conditions as follows: He cannot lift, bend or carry objects without experi-

encing pain. He claims to have poor grips in his hands since the accident. Claimant is unable to sit comfortably in a car for more than fifteen to twenty miles. He has trouble now with sitting and walking. He has a problem reaching and extending his arms. He has difficulty standing for prolonged periods of time.

Claimant contends his whole lifestyle has now changed and he can no longer participate in the sports and other physical activities that he had participated in before February 1985. Dr. Boulden rates claimant as suffering from a 5 percent "disability" to the body as a whole. Dr. Boulden stated in his reports that he was only able to diagnose a bulging rather than a herniated disc. As claimant is able to be somewhat comfortable as long as he reduces his physical activity, Dr. Boulden does not recommend surgery. Claimant was examined by another orthopedic surgeon, Scott Neff, D.O., who is an associate of Dr. Boulden. Dr. Neff agrees with the rating and restrictions imposed by Dr. Boulden. He would consider surgery only if symptoms persist and such a procedure is desired by claimant to improve his lifestyle. Neither Dr. Boulden nor Dr. Neff specifically opines in their reports as to the causal connection of this impairment to the February 1985 work injury.

Claimant received another orthopedic evaluation from Daniel B. McClain, D.O. From his examination of claimant, Dr. McClain opined that as a result of the February 8, 1985 injury, claimant suffers from a 15 percent permanent partial impairment of the body as a whole. An evaluation apparently without examination of claimant was performed by Donald W. Blair, M.D., (specialty unknown). Dr. Blair initially rated claimant as suffering from a 5 percent permanent partial impairment to the body as a whole but later changed this rating to 10 percent under the American Orthopedic Academy Guidelines because claimant was required to permanently modify his activities. Dr. Blair recommends that claimant undergoes further diagnostic studies.

Since July 1986, claimant has been treated by Lawrence Merrick, D.O., (specialty unknown) for chronic low back and leg pain (secondary to a work related injury). This treatment is limited to medication. He notes that he has treated claimant in the past and that claimant is totally disabled from gainful employment at the present time.

Claimant testified that his past employment primarily consists of jobs involving welding, heavy labor, heavy work as a foreman, and truck driving. Claimant has been evaluated by two vocational rehabilitation consultants. Claimant was first evaluated by Kathryn Bennett, from North Central Rehabilitation Service, in January 1986. Bennett was retained by defendant insurance carrier in this case. Her expert qualifications in vocational rehabilitation was stipulated to by the parties in

the prehearing report. Bennett reports that although claimant has considerable transferable skills in truck driving, supervisory duties, paperwork, heavy equipment operation, and welding, none of these skills fall within claimant's physical abilities at the present time. It was concluded by Bennett after performing a labor market survey in the area of claimant's residence that claimant is unemployable due to his age, physical restrictions and potential for additional difficulties in any work environment. She did not believe that retraining or education was a realistic possibility due to claimant's age. Bennett stated in her report that "at this time, he [referring to claimant] indicates that he would need a minimum of $20,000 per year or $8.00 or $9.00 per hour." Defendants argue that claimant meant that he would only consider employment having such a high income. Claimant testified at hearing that he only meant by such a statement that he would like to have that type of income. It does not appear in Bennett's report that her conclusions or job market survey were limited to any certain type of employment or salary levels. Claimant returned to Bennett in April 1986 asking her if she had located employment for him and she stated that his file had been closed since the initial evaluation. She notes that his file was closed at the request of defendant insurance carrier. Bennett also notes that claimant has made an unsuccessful attempt to locate work in his community.

Carma Mitchell, from Crawford Rehabilitation Services, another rehabilitation consultant, testified at hearing. She has a B.S. in psychology and social work and and M.S. in counselling and personnel services. She has been working in vocational rehabilitation or related work since 1982. Mitchell testified that she agrees in the most part with Bennett's evaluation. She opines that claimant is not competitively employable in Marion County due to his age and physical limitations. Marion County is the county of claimant's residence. She also noted the depressed economic state in the area of claimant's residence.

Claimant has applied for social security benefits but to date they have been denied. Claimant remains unemployed at the present time. Claimant testified that he has looked for various types of employment in his community such as trucking and farming and was not limited in his search to any particular type of work or expected salary. Claimant is receiving $46.22 in pension benefits from Van Gorp due to taking early retirement.

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

APPLICABLE LAW AND ANSLYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent.

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

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

In the case sub judice, claimant contends that he has suffered permanent disability as a result of a work injury due to permanent impairment to the body as a whole. First, the evidence established he has suffered a significant permanent impairment. Claimant's physicians opine that his permanent partial impairment ranges from 5 to 15 percent of the body as a whole due to his lower back difficulties. Claimant did not demonstrate by the evidence any permanent impairment as a result of his arm or hand difficulties as no physician discusses these conditions in the context of their impairment ratings.

Second, the greater weight of evidence shows the requisite

causal connection between the work injury and the permanent impairment. Unfortunately, neither the primary treating physician, Dr. Boulden, nor his associate, Dr. Neff, specifically gives a causal connection opinion. However, Dr. McClain did specifically causally relate his findings of permanent impairment to the February 1985 work injury and this opinion is uncontroverted.

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 v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Claimant's medical condition before the work injury was excellent and he had no functional impairment or ascertainable disabilities. Claimant was able to fully perform physical tasks involving heavy lifting, repetitive lifting, bending, twisting and stooping, and prolonged standing and sitting before the work injury. All of claimant's prior back strains appeared minor.

It should be specifically noted that no weight was given to the "disability" opinions expressed by Dr. Merrick. Dr. Merrick simply is not qualified to render an opinion as to industrial disability or as to whether or not claimant is able to obtain gainful employment. He is only able to give opinions as to the extent of claimant's physical impairment and restrictions of

work activities.

Apart from impairment ratings, in an industrial case, claimant's permanent activity restrictions are much more informative. Claimant's physicians in this case have severely restricted claimant's work activities by prohibiting tasks involving any bending, stooping or lifting. Claimant's medical condition prevents him from not only returning to his former work but to any other work he has performed in the past for which he is best suited.

Apart from his lost earnings during his healing period, claimant has suffered a significant permanent loss in actual earnings as a result of his work injury because he has to date been unable to return to work in any capacity.

Claimant was 55 years old at the time of the work injury. Although claimant was approaching retirement, the evidence presented by claimant does not indicate he voluntarily left the labor market or had plans to leave the labor market at the time of the work injury. Claimant is only receiving a pension of $46 a month and certainly this is no motivation to remain unemployed. Claimant has unsuccessfully looked for work in his community and fully cooperated with rehabilitation counselors in an attempt to find employment. Unfortunately, his vocational counselors, including those retained by defendants, indicate that claimant simply is not employable.

Defendants argued that claimant's disability in part is due to the state of the poor economy at claimant's place of residence. Indeed, a disability resulting from the state of economy is not compensable. See Webb v. Lovejoy Construction Company, II Iowa Industrial Commissioner Reports 430 (Appeal Decision 1981). However, the rehabilitation reports of Bennett, which are the most convincing in this case, does not appear to be contingent upon the state of the local economy.

Claimant has an eleventh grade education and exhibited average intelligence at the hearing. According to the uncontroverted reports of the vocational rehabilitation counselors in this case, due to his age claimant has has no potential for a retraining.

Claimant argues for application of the odd-lot doctrine, a procedural device designed to shift the burden of proof with respect to employability to the employer in certain factual situationss. Klein v. Furnas Electric Company, 384 N.W.2d 370, 375 (Iowa 1986). Due to the fact that claimant is not currently employed, an inquiry as to the availability of suitable employment to claimant is necessary to measure the extent of his loss of earning capacity. It is clear from the evidence presented that claimant is capable of some light duty work. However,

there is no presumption that merely because the worker is physically able to perform certain work, such work is available. Guyton v. Irving Jensen Company, 373 N.W.2d 101, 105 (Iowa 1985).

In this case, claimant has shown that he was not returned to work by the employer as a result of disability. Claimant has not returned to work in any capacity. Claimant has further shown that he made a reasonable effort albeit unsuccessful to locate suitable replacement employment in the area of his residence. What is interesting in this case is that defendants did go forward with the evidence in this case. However, their own rehabilitation counselor verifies that claimant is not employable in that no employment is available within the geographical area of his residence. Therefore, claimant has established by the evidence presented without the automatic applicaton of the burden shifting rule a case for total disability by producing substantial evidence that he is not employable in the competitive labor market and there remains no reasonable likelihood that he will obtain suitable employment in the foreseeable future.

The next question is whether claimant's advanced age at the time of the work injury precludes him from permanent total disability benefits despite a showing he is not employable. This deputy commissioner believes that this may be possible if claimant is shown to have voluntarily retired or removed himself from the work force after the injury or had specific plans to do so before the injury. However, without such a showing it is mere speculation to say that claimant would have retired at any particular age in the future. Therefore, at least in this case, claimant's age was not shown to prevent an award of permanent total disability benefits.

After examination of all the factors, it is found as a matter of fact that claimant has suffered a total loss in his earning capacity as a result of his work injury on February 8, 1985. Based upon such a finding, claimant is entited to as a matter of law permanent total disability benefits under Iowa Code section 85.34(3) during the period of his disability. The parties stipulated that claimant lost 69 days of work at various times after the work injury but before he permanently leaving Van Gorp on October 28, 1985. Therefore, permanent total disability benefits shall begin 69 days prior to October 28, 1985.

III. Claimant is entitled to reimbursement for reasonable medical expenses occurred for treatment of a work injury under Iowa Code section 85.27. According to the prehearing report, claimant seeks a total of $154 for eleven vists to Dr. Merrick. Defendants contend that these expenses were not incurred for reasonable treatment and were not authorized.

With reference to the reasonableness of the treatment, the single report from Dr. Merrick indicates that such treatment was in response to continuing pain complaints and the treatment appeared to be maintenance in nature. No medical opinions were offered by defendants in support of its contention that the treatment was unreasonable. Defendants stipulated that Dr. Merrick would testify as to the reasonableness of the charges and defendants are not offering contrary evidence. Therefore, it must be concluded as a matter of fact that the amounts requested by claimant in the prehearing report are reasonable.

Defendants claim that treatment by Dr. Merrick was not authorized and claimant is not entitled to reimbursement for such treatment under Iowa Code section 85.27 which provides employers with the right to choose the care. However, section 85.27 applies only to injuries compensable under chapters 85 and 85A of the Code and obligates the employers to furnish reasonable medical care. This agency has held that it is consistent to deny liability of the obligation to furnish care on one hand and at the same time claim a right to choose the care. Kindhart v. Fort Des Moines Hotel, (Appeal Decision filed March 27, 1985); Barnhart v. Mag, Inc., I Iowa Industrial Commissioner Report 16 (Appeal Decision 1981).

The right to control the medical care must be conditioned upon the establishment of liability for an injury either by admission or final agency decision. Iowa Code section 85.27 does not give the employer the right to choose the care without affording claimant the right to petition the commissioner to resolve disputes concerning such care. However, this agency does not have authority to order an employer to furnish any particular care unless the employer's liability for an injury or a condition under chapters 85, 85A or 85B has been established. Therefore, the right to control the care must coincide with this agency's jurisdiction over the matter.

Defendants in this case have admitted a work injury. However, in the prehearing report they deny that the work injury was a cause of permanent disability. Obviously, they are denying liability for the chronic problems claimant is experiencing. For that reason and absent a change in defendants' legal position on the issue of liability, defendants do not have the right to choose the medical care for claimant's injury until a decision of this agency establisheing a causal connection of claimant's chronic problems to the work injury becomes final. Therefore, the expenses of Dr. Merrick are reimbursable.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. Claimant was in the employ of Van Gorp at all times

material herein.

3. On February 8, 1985, claimant suffered an injury to the low back which arose out of and in the course of employment with Van Gorp. The injury consisted of a bulging disc at the L5-S1 level of claimant's spine resulting in chronic low back and leg pain.

4. The work injury of February 8, 1985 was a cause of a significant permanent partial impairment ranging from 5 to 15 percent of the body as a whole and permanent restrictions against any bending, stooping or lifting. Claimant had no chronic back difficulties before February 8, 1985.

5. The work injury of February 8, 1985 and the resulting permanent partial impairment and work restrictions is a cause of a total loss of earning capacity. Claimant had no prior existing ascertainable disabilities before February 8, 1985. Claimant was 55 years old at the time of the work injury and had no retirement plans or other plans to leave the work force at the time. Claimant is physically unable to return to the work he was performing at the time of the work injury or any other work which claimant had performed in the past to which he is best suited. No light duty work or light duty program was available at Van Gorp and claimant was forced to take early retirement as a result of the work injury. Claimant has a number of transferable skills but none can be utilized due to his extensive physical physician-imposed restrictions. Claimant has made a reasonable but unsuccessful effort to find suitable work within the geographical area of his residence. Claimant is not employable in any well-known branch of the labor market in the geographical area of his residence. There remains no reasonable likelihood that claimant will find replacement employment in the foreseeable future. Claimant can only perform services that are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist.

6. The medical expenses of Dr. Merrick listed in the prehearing report are fair and reasonable and were incurred by claimant for reasonable and necessary treatment of chronic low back condition as a result of a work injury on February 8, 1985.

CONCLUSIONS OF LAW

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

ORDER

Defendants shall pay to claimant permanent total disability benefits at a rate of two hundred forty-seven and 10/100 dollars

($247.10) per week during the period of his disability beginning sixty-nine (69) days prior to October 28, 1985.

Defendants shall pay to claimant the sum of one hundred fifty-four dollars ($154.00) as reimbursement for medical expenses.

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

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

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

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

Signed and filed this 18 day of November, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BERL R. REES, Claimant, vs. GEORGE A. HORMEL & COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 766436 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 Berl R. Rees, claimant, against George A. Hormel & Company, employer, and Liberty Mutual Insurance Company, insurance carrier, defendants, for benefits as the result of an injury which occurred on June 2, 1984. A hearing was held on February 17, 1987 at Des Moines, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Berl R. Rees (claimant), Terri Rees (claimant's wife), G. Brian Paprocki (vocational consultant), H. Shelby Swain (vocational rehabilitation consultant), claimant's exhibits 1 through 8 and defendants' exhibits 1 through 4. Both attorneys submitted excellant briefs.

STIPULATIONS

The parties stipulated to the following matters at the time of the hearing:

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

That claimant sustained an injury on June 2, 1984 which arose out of and in the course of his employment with employer.

That the injury was the cause of temporary disability and that employer paid claimant healing period benefits from June 3, 1984 to January 17, 1985 and that claimant has received all of the temporary disability benefits to which he is entitled.

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

That the commencement date for permanent partial disability benefits, if such benefits are awarded, is January 18, 1985 and that defendants have already paid claimant 50 weeks of permanent partial disability benefits from January 18, 1985 to January 2, 1986.

That the rate of compensation in the event of an award of weekly benefits is $268.11 per week.

That all of claimant's medical expenses have been or will be paid by defendants.

That defendants are not entitled to a credit under Iowa Code section 85.38(2) and that the entries appearing on the prehearing report are incorrect and do not apply to this injury.

That defendants are entitled to a credit for 50 weeks of permanent partial disability benefits at the rate of $268.11 per week.

ISSUES

The parties submitted the following issues for determination at the time of the hearing:

Whether the injury is the cause of permanent disability.

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

SUMMARY OF THE EVIDENCE

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

Claimant was age 35, married, and had three children at the time of the injury. He was age 37 at the time of the hearing. He dropped out of school at age 16 in the 8th grade due to a spelling problem which continues to give him difficulty up until the present time. Claimant's attorney had claimant demonstrate his inability to spell several times during the hearing. Due to his spelling disability claimant has never written checks.

Prior employments include washing cars for an automobile dealership and working as an apprentice mechanic for his uncle. Claimant worked for another meat packer, John Morrell & Company, for approximately eight years in the smoked meat department

until the plant closed in 1971 or 1972. Then he worked as an auto mechanic for seven or eight years. In October of 1979 he started to work for George A. Hormel & Co. doing manual labor at $9.00 per hour and worked until his injury on June 2, 1984 at which time he testified that he was earning $10.00 per hour for manual labor type work. Other evidence showed that the base rate of pay was $8.25 and that on certain occasions over the years claimant had earned as much as $12.00 per hour. Claimant testified that he was not promoted, learned no trade, acquired no special skills, and received no special training of any kind during his employment with employer.

In 1981 or 1982 claimant had a nonwork-related back injury while helping his nephew break up concrete sidewalks and moving concrete slabs. His back continued to get worse after that. Ronald K. Bunten, M.D., performed surgery on claimant's back on June 7, 1983. Dr. Bunten is a board certified orthopedic surgeon (Defendants' Exhibit 2, pages 4 and 5). Claimant was off work for two to three months, then worked on light duty for two to three weeks, and then returned to manual labor work again. The foregoing incident and surgery were not work related. Claimant then performed his regular manual labor job up until the instant injury. The foregoing incident and surgery were not work related.

On June 2, 1984 claimant was standing on a platform two or three feet high filling the sausage grinder. He was pulling meat from the back part of it to the front to level it out. He fell off the platform and struck his back partially on the stuffer machine. Claimant was taken to the hospital for emergency care. Winn Gregory, M.D., the company doctor, referred claimant to Dr. Bunten. Claimant saw Dr. Bunten several times and last saw Dr. Bunten in November of 1985. Claimant is released from the doctor, wears no brace and was taking no medications at the time of the hearing.

Dr. Bunten was the only treating physician in this case. He was also the only evaluating physician. Claimant's back history prior to this injury as recorded by Dr. Bunten is as follows. Claimant saw him on May 11, 1983. Claimant had a year long history of intermittent low back pain radiating into the left buttock and left hamstring from an incident that occurred at home. X-rays showed a spinal anomaly of a lumbarized first segment, which gave claimant six lumbar vertebrae instead of the normal five (Def. Ex. 2, p. 7). X-rays also disclosed some mild degenerative changes at the two lower segments. Dr. Bunten said that he walked with a limp and had a slight list to the right when standing (Def. Ex. 2, pp. 7 & 8). A CAT scan dated May 19, 1983 showed spinal stenosis and mild disc protrusion (Claimant's Exhibit 2, page 1). Dr. Bunten performed a decompressive laminectomy at L-4 on the left on June 7, 1983. This relieved claimant's preoperative discomfort until he fell down approximately

two weeks later which increased the pain in his back, left buttock and hamstring area (Clmt. Ex. 2, p. 2). Dr. Bunten said claimant was better again on August 17, 1983; he returned to light duty on September 14, 1983; and he returned to full activity by November 9, 1983 (Clmt. Ex. 2, pp. 3 and 4).

All of this predated the injury now under consideration, which occurred when claimant fell at work on June 2, 1984 as described above and was sent to see Dr. Bunten again.

This time claimant saw Dr. Bunten on June 29, 1984. Dr. Bunten's records show that after this fall claimant developed low back pain again radiating into the left buttock and hamstring. Dr. Bunten's examination showed some mild restriction of motion, but negative neurologic signs and negative straight leg raising test. X-rays of the lumbar spine remained unchanged from the postoperative x-rays. Dr. Bunten diagnosed an aggravation of claimant's underlying degenerative disc disease without any encroachment or impingement (Clmt. Ex. 2, p. 4). On July 27, 1984 claimant had some stiffness in the low back but negative neurologic signs. Dr. Bunten prescribed a back corset. On August 31, 1984 claimant stated that the corset did not help. A CAT scan was ordered again and showed his old underlying degenerative and developmental abnormalities, but no encroachment, impingement or additional disc rupture was identified. Additional surgery was not indicated (Clmt. Ex. 2, pp. 6 & 7; Def. Ex. 2, pp. 13 - 16).

Claimant continued to see Dr. Bunten on October 3, 1984; November 14, 1984; and December 21, 1984 for low back pain. Dr. Bunten prescribed salicylates and rest (Clmt. Ex. 2, pp. 8, 9 and 10). On January 16, 1985 Dr. Bunten (1) found mild stiffness but no neurologic signs; (2) stated claimant had achieved maximum medical improvement; (3) issued restrictions; (4) awarded an impairment rating. Dr. Bunten concluded as follows:

> I think he has reached his maximum improvement. I would regard him as suited for full-time sedentary sorts of work activities, but do not feel he could carry out work which involves repeated stooping, bending, lifting, or reaching sorts of work, as apparently required in his usual duties. I would regard him as having a 20% permanent partial impairment of his total body function, based on the condition of his low back. I would feel 10% of his permanent impairment pre-existed the injury of June 2, 1984. I do not think he is suited for work in the packing plant, as I understand it, but could likely carry out sedentary sorts of work activities, if vocationally retrained. I would be glad to see him on an as needed basis. BUNTEN/drr

(Clmt. Ex. 2, p. 18)

Dr. Bunten issued a very similar report in a letter dated February 5, 1985. The letter very comprehensively, yet succinctly, summarizes the entire case including the history, injury and impairment status of claimant in the fewest possible words.

> Mr. Rees has developmental abnormalities in the lumbar spine, with secondary degenerative disc disease and spinal stenosis, for which he underwent laminectomy on June 7, 1983, with improvement and return to work. On June 2, 1984 he fell and injured the low back again, and has been troubled with persistent low back, and intermittent buttock and hamstring discomfort, which has required him to modify his activities to full sedentary sorts of activities.
>
> I think he has reached his point of maximum improvement, and is not likely to be able to return to his usual type of work activity. I think he could work full-time in a sedentary sort of job, which did not require repeated stooping, bending, lifting, and reaching sorts of activities, if vocationally retrained. I feel he has a 20% permanent partial impairment of his low back, 10% of which pre-existed the fall of June 2, 1984. I would consider him industrially disabled.
>
> No additional investigation or treatment is comtemplated, [sic] and I plan to see him on an as needed basis.

(Clmt. Ex. 2, p. 19)

Claimant saw Dr. Bunten one more time on November 22, 1985 after he started college. At that time, his low back was stiff. Claimant was developing sciatic symptoms on the right or opposite side of his back (Clmt. Ex. 2, p. 16).

Dr. Bunten's deposition taken on February 4, 1987 corroborate his office records and reports which are also in the record and which have been summarized above.

Claimant saw several vocational rehabilitation consultants from the state of Iowa and private firms. H. Shelby Swain testified by deposition of June 10, 1986 and the reports of the state of Iowa consultants are exhibits to his deposition (Clmt. Ex. 1, Deposition Exhibits 1-11; Def. Ex. 1, Depo. Ex. 1-11). Both parties introduced this deposition and all of it's exhibits. Swain also testified at the hearing.

In the course of his testing and evaluation by the state of

Iowa, claimant did take and successfully complete the tests which qualified him for a GED. Swain identified sedentary work as hotel-motel clerk, telephone sales and possibly a parts clerk, if an employer could meet claimant's restrictions (Ex. 1, p. 22), at possibly $3.35 to $4.00 per hour (Ex. 1, pp. 23 and 39).

Claimant chose to go to school because he wanted a career for the future and not just a job. Claimant favorably impressed all of the counselors and all of them either directly or indirectly indicated that it was a good choice for claimant to continue his education (Ex. 1, Depo. Ex. 1-11). Swain determined claimant was a motivated individual with a good employment history. Claimant stated that after his surgery in 1983, he did return to work and perform all of the duties of his job for employer. However, he has not been able to return to work and perform these duties since the injury of June 2, 1984 due to Dr. Bunten's restrictions and because of the pain he has had ever since.

With help from a number of sources, including state aid, claimant embarked upon a four year Bachelor of Arts program at William Penn College in his home town to become a social worker (Ex. 1, pp. 24 and 25). Swain testified at the hearing that he thought that this was the right thing for claimant to do.

Claimant testified that his wife is enrolled in the same program and also attends the same school and they have most of the same classes together. She helps him with his spelling and types up his homework. The professors also help him with his spelling. He is currently a second semester sophomore. His grades are C's and D's; it is difficult; but he works hard and is passing. Swain stated and claimant confirmed, that claimant's biggest problem is financial because his wife is also in school and they have three children at home. Swain also added that claimant has constant back pain (Ex. 1, p. 27). Claimant testified that his only income was workers' compensation benefits until January of 1986. He and his wife have also been receiving aid to dependant children benefits and food stamps. His education is financed by school grants and guaranteed student loans.

Claimant and his wife have also served as foster parents because of their desire to help children. On December 25, 1986 the foster children were removed because he and his wife were depressed. He sees a mental health counselor on a periodic basis; but he takes no medications at the present time. He does not like to take pills or wear a back brace. Their oldest daughter is a diabetic and requires insulin and other special care.

Claimant testified that his chief current complaint is constant pain in his low back that runs down one leg or the other. It is worse with exertion. He alternates standing,

sitting and walking in order to relieve the pain. He cannot participate in sports or dancing anymore. He can drive for only short distances. On long distances, even if he is riding and not driving, it is necessary for him to get out and walk around a little bit. It was this injury that restarted the pain down his leg which had cleared up after his surgery on June 7, 1983. He has not seen Dr. Bunten since November of 1985. Claimant denied any other falls or accidents since the injury of June 2, 1984. Claimant said that he hoped to earn $13,000 per year as a social worker. He hoped to graduate with a Bachelor of Arts degree in human relations from William Penn College in May of 1989.

Terry Rees, claimant's wife, testified that after the surgery on his back in 1983 claimant returned to work full time, danced and could do other things. However, since the injury of June 2, 1984 claimant's activities have been severely limited. He can't dance, play on the floor with the children or bowl with the family. She has observed his pain and knows he walks the floor at night. He can only drive short distances without a break. He sits differently and often finds it necessary to stand in class. Claimant was always gainfully employed up until June 2, 1984. He has not been employed at all since this injury. They both go to college full time nine months out of the year on borrowed funds. Neither spouse is gainfully employed. They are both on ADC. Claimant did very little in the summer except to sit in the house or in the yard and watch the kids. They are both studying sociology and human relations and have practically all of the same classes. She types up his homework and helps him with his spelling. She hopes to continue with college after she receives her Bachelor of Arts degree and to eventually obtain a Masters degree.

Swain testified that the outlook for claimant's future employability was good. He could do social work with his restrictions and earn between $12,000 to $15,000 per year (Ex. 1, p. 26). The consultant thought that claimant could complete the course and become a social worker (Ex. 1, pp. 29, 30 and 34). Swain estimated claimant might be making $30,000 in ten years if he advances at an average rate (Ex. 1, pp. 31 and 32). Swain thought that a social worker out of college for five years would be earning approximately $20,000 to $25,000 per year as a guess (Ex. 1, p. 38). Swain acknowledged that he had no crystal ball. Claimant might not graduate. It was not known how long it might take for claimant to graduate. It was impossible to say what the employment market would be for social workers at that time (Ex. 1, p. 37). But it was his professional judgment that claimant would finish school and that social worker jobs would be available at that time (Ex. 1, p. 41). Swain granted that claimant would be out of a job for approximately four, five or six years and that he would not be earning any money at all while he was in school.

At the hearing Swain testified that a college degree would open up other opportunities such as a claim representative at $18,000 to $20,000 per year. Human relations is an important field. These jobs are well paid. Jobs are available in Iowa. Five years from now with a Bachelor of Arts degree, claimant might realistically expect $16,000 as a starting salary and $20,000 to $25,000 in five years as a personnel manager.

G. Brian Paprocki, another vocational consultant, was hired by claimant for an examination and evaluation. He testified at the hearing and his written report is claimant's exhibit four. He saw claimant for one and one-half hours on November 13, 1986. He studied claimant's work and educational background. Claimant was always gainfully employed up until this injury. He read Swain's deposition. Paprocki agreed with Swain except that he did not believe that claimant could earn $30,000 after ten years as a social worker. Paprocki believed that it would take a Masters degree to earn $30,000. A portion of Paprocki's report is very informative.

> Briefly, as I verbally indicated, I agree with many of the findings of Mr. H. Shelby Swain, the rehabilitation consultant with Management Consulting and Rehabilitation Services, Inc., as expressed in his deposition of 6/10/86. Specifically, I concur:
>
> 1) that Dr. Bunten's report of 1/16/85 is the key medical document in this case, which suggests restriction to full-time sedentary work not requiring repetitive spooping [sic], bending, lifting or reaching activities;
>
> 2) that Mr. Rees' job developed mechanical skills are basically non-transferable to sedentary occupations;
>
> 3) that without vocational retraining this man is essentially limited to entry-level jobs of an unskilled - minimally skilled nature paying in the range of $3.35- $4.00/hr.;
>
> 4) that the batchelor's [sic] degree in social work that Mr. Rees' [sic] is actively pursuing will substantially enhance his future earning potential, as well as his employability;
>
> and 5) that the current entry level wage in the social work field is generally within the $12,000-$15,000/ yr. range at this time.
>
> However, I must disagree with Mr. Swain's opinion as to the probable subsequent wage increases

one might realistically expect in this field.

(Clmt. Ex. 4)

Paprocki alleged and provided data that the supply of social workers was greater than the demand. Also, in a tight economy, government and other employers expend less money for these services.

Paprocki was not allowed to testify on the degree of industrial disability which claimant had sustained as a result of this injury. Furthermore, so much of his written report that purported to award a degree of industrial disability was excluded, disregarded and not considered as evidence in the decision of this case. Paprocki's qualifications as a vocational consultant appear as claimant's exhibit six. Paprocki is not qualified to assess industrial disability in a workers' compensation case.

Paprocki was helpful by identifying some other unskilled sedentary jobs as being a cashier in a self-service gas station and a gate guard. The entry wage level for this kind of work is approximately $3.35 to $4.00 per hour. At the present time claimant has no transferable or saleable skills. He cannot use his mechanical ability in most sedentary jobs. The college education that he has undertaken would give him some saleable qualities and would enable him to command a higher salary. Poor spelling would always be a handicap to claimant in social work because social workers deal with words and are required to make many reports. Poor spelling would make it diffucult to complete an application to get a job. Paprocki agreed that with the help of his wife and the school staff, claimant would graduate and would be employable; however, he disagreed with Swain on the amount of future earnings that claimant could expect.

APPLICABLE LAW AND ANALYSIS

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

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber, Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960). See also Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934).

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 2, 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).

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

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

At age 35 claimant was nearing the peak of his earnings expectancy as a laborer in the meat packing industry. He worked for Morrell for approximately eight years previously and another five years for Hormel for a total of 13 years in the meat packing industry. With respect to his earnings, the base rate at employer was $8.25 per hour. Claimant was earning $10.00 per hour when he was injured. He had earned up to $12.00 per hour on certain occasions. Swain and Paprocki said that after his injury the sedentary work within claimant's qualifications would only pay approximately $3.35 to $4.00 per hour. However, the operative phrase in industrial disability is loss of earning

capacity, not actual loss of earnings. Ver Steegh v. Rolscreen Company, IV Industrial Commissioner Reports, 337 (1984).

As mentioned above an employer takes an employee the way he finds him. In this case, claimant had at best an eighth grade education, a spelling handicap and a developmental and degenerative condition in his back.

With respect to claimant's experience and qualifications claimant's only transferable skill, according to the consultant for the defendants as well as the consultant for the claimant, was his mechanical skill. However, the restrictions placed on claimant by Dr. Bunten prevented claimant from doing either mechanical work or packing house work. In determining industrial disability and loss of earning capacity the words of the industrial commission in Michael v. Harrison County, Thirty-fourth Biennial Report of the Industrial Commissioner 218, 219 (1979) apply to this case: "It is clear from claimant's testimony and that of the medical experts who testified that claimant's earning capacity has been impaired in that certain employment opportunities will be foreclosed to claimant."

Claimant then, can no longer engage in the employment for which he is suited either as a packing house worker or as a mechanic. This is a very considerable loss in earning capacity.

Limited to only sedentary with no real job market competitive skills, claimant was reduced to minimum wage unskilled labor work. Dr. Bunten clearly stated that claimant could no longer perform the work he had been doing in the meat packing industry.

Defendants accommodated and reemployed claimant after his first nonwork-related back condition and surgery; but they were not able to do so after his work-related injury on June 2, 1984 because of Dr. Bunten's recommendation that claimant not return to his old job and Dr. Bunten's restrictions of no repeated stooping, bending, lifting or reaching. Claimant's choice to obtain additional education and training to become a social worker was affirmed, either directly or indirectly, by all of the many state of Iowa vocational rehabilitation persons that he talked to as well as Swain and Paprocki. No one recommended against obtaining further education even though it was acknowledged that it contained several uncertainties, took several years to accomplish and places a severe financial strain on claimant and his young family as acknowledged by claimant, claimant's wife, and Swain. Claimant himself used good judgment in looking for a career instead of a minimum wage job with no future or enhancement of his abilities.

Dr. Bunten very fairly and clearly described claimant's nonwork related developmental condition of six vertebrae instead of five. He also candidly related that claimant also had a mild

preexisting degenerative condition. Even though claimant's former condition required a lumbar laminectomy, nevertheless, this current injury did not bring about any change to claimant's spine that could be demonstrated by x-rays; or could be determined by clinical diagnosis by claimant's highly competent, board certified orthopedic surgeon. Nevertheless, claimant complained of constant unrelenting pain after the second surgery up to the date of the hearing. Claimant was a credible witness and his testimony is not disputed. Yet, pain that is not substantiated by clinical findings is no substitute for impairment. Waller v. Chamberlain Manufacturing, II Iowa Industrial Commissioner Reports 419, 425, (1981). Claimant was able to do what needed to be done in spite of his pain. The following excerpt appears in one of the reports from the Iowa Rehabilitation and Education Services Bureau:

> Client commented that "If I stopped every time the pain got bad, I wouldn't be doing anything". He reported "constant pain" but that it didnt' [sic] effect his work. Concentration and attention to task did seem to be good. As evaluation progresses does pain seem to interfere in any way with performances? (Note: standing tolerances in IPD was about 30 minutes, sitting was about 45 minutes.)
>
> He has pain that will affect any physical activities he participate in or tries to do. 8/2/85

(Ex. 1, depo. ex. 12)

From this it is determined that claimant does quite well in spite of his pain, but he does have certain physical limitations on how long he can stand (30 minutes), or sit (45 minutes) which is corroborated by disinterested witnesses. This does constitute impairment.

At the present time claimant is not actively treating with a physician for his pain condition and he is not taking any prescription medications; however, he does see a mental health counselor for depression and possibly other matters periodically. His depression was not causally connected to this injury by any of the medical evidence or any other evidence in the record.

Dr. Bunten did prorate the impairment rating. He is the only physician in this case and he said ten percent of the permanent impairment is attributable to the injury of June 2, 1984 even though this injury did not entail surgery and no spinal changes were recorded on claimant's x-ray. The objective physical symptoms that he could find on physical examination were only stiffness and that claimant had no neurological deficits.

Claimant is still at an age when retraining is feasible. Observation of claimant at the hearing leads one to believe that he is a sincere person who is dedicated in his effort to improve his employability through education. Conrad v. Marquette School Inc., IV Iowa Industrial Commissioner Reports 74, 78 (1984). Claimant confirmed his potential for futher education by taking and passing the GED test during his vocational rehabilitation counseling and evaulation and also by his passing grades so far in school.

In the employer's favor is the fact that employer offered serious vocational rehabilitation to claimant and paid claimant a reasonable amount of workers' compensation benefits for this injury. Schill v. Hygrade Food Products, Thirty-third Biennial Report of the Industrial Commissioner 121 (1977). It is also to the credit of the employee that he pursued vocational rehabilitation, cooperated with it, and favorably impressed all of those who assisted him. McKelvey v. Dubuque Packing Company, Thirty-third Biennial Report of the Industrial Commissioner 227 (1976); Rapp v. Eagle Mills, Inc., Thirty-Fourth Biennial Report of the Iowa Industrial Commissioner 264 (1979), Curtis v. Swift Independent Packing, IV Iowa Industrial Commissioner Reports 88 (1984). Both vocational experts affirmed claimant's attempt to obtain a four year education and endeavor to become a social worker and they thought he could do it in spite of the uncertainties. Webb v. Lovejoy Construction Co., II Iowa Industrial Commissioner Report 430, 435 (Appeal Decision 1984).

Swain said that in his professional judgment claimant made the right choice by enrolling in college. He further prognosticated that claimant would finish the course and obtain better employment. Paprocki thought that Swain's prediction of earning $25,000 after five years on the job and $30,000 after ten years on the job was not realistic. In that regard, future earnings at this time are speculative at best as was pointed out by the industrial commissioner in Stewart v. Crouse Cartage Company, file number 738644 (Appeal Decision Febuary 20, 1987) in these words:

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

It would appear that claimant will be totally unemployed for at least four years while he is retraining himself. It was speculated that it might take five or six years. It is understandable that with grades of C's and D's that claimant should be studying

during the school year rather than being employed; however, why claimant was not motivated to work in the summer was not satisfactorily explained anywhere in the record.

Claimant was earning $10.00 per hour when he was injured. If claimant were to work with his present skills at $4.00 per hour he would have a 60 percent reduction in actual earnings. The actual loss of earnings, if he successfully completes college and is hired at $12,000 per year, would be 42 percent. Dropping out of school at age 16 in the eighth grade, a lifetime spelling handicap, and college grades of C's and D's do not demonstrate a high degree of academic aptitude. There may be a problem in obtaining high paying employment even if one assumes claimant does graduate and get his degree.

Based upon the evidence of Dr. Bunten, it is determined that the injury of June 2, 1984 was the cause of some permanent disability. Based upon the evidence of Dr. Bunten and all of the evidence in the record it is determined that claimant sustained a 50% industrial disability to the body as a whole and is entitled to 250 weeks of permanent partial disability benefits.

Paprocki was not allowed to testify on the degree of industrial disability which claimant had sustained and so much of his report on that point is disregarded and not considered as evidence in this case. Paprocki, whose curriculum vitae appears at claimant's exhibit eight, did not demonstrate the qualifications to make a determination on the degree of industrial disability which claimant had sustained. The comments of Deputy Industrial Commissioner Michael G. Trier in the case of Ver Steegh v. Rolscreen Company, IV Iowa Industrial Commissioner Report 377, 381 (1984), apply also in this case.

> The record of this case contains a report and testimony from G. Brian Paprocki, M.S., V.E. His letterhead indentifies him as a vocational consultant specializing in industrial disability appraisal. No weight is given to the opinion concering [sic] industrial disability which was expressed by Paprocki in his report and deposition. The matter of industrial disability is a mixed question of law and fact and, as such, it is not a proper subject of expert testimony. Dougherty v. Boyken, 261 Iowa 602, 607, 155 N.W.2d 488, 491 (1968). The expression of an opinion upon the issue of industrial disability invades the province of the industrial commissioner and his deputies who have been assigned that duty through chapters 85 and 86 of the Code of Iowa. A review of Paprocki's resume does not show him to be qualified to express an opinion upon the issue of industrial disability even if such were a proper matter of expert testimony in this proceeding.

Also the comments of Deputy Industrial Commissioner Larry P. Walshire in the case of Pape v. United Parcel Service, file numbers 695355/742725 dated October 22, 1985 also apply to this case.

A so called "disability evaluation" was submitted into the evidence which was prepared by Mr. Paprocki, a rehabilitation consultant. Mr. Paprocki was retained by claimant apparently to evaluate the extent of his disability in this case. However, Mr. Paprocki was not shown to have the qualifications to render an evaluation of industrial disability. Mr. Paprocki has no legal training and his report clearly indicates that he is unfamiliar with the concept of industrial disability in the state of Iowa.

Therefore, Paprocki, although qualified as a vocational consultant, is never-the-less not qualified to make a determination of industrial disability. Therefore his opinions and remarks on this point are excluded and disregarded.

FINDINGS OF FACT

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

That claimant sustained an injury on June 2, 1984 which arose out of and in the course of his employment with employer when he fell from a platform and struck his back against the stuffer machine.

That claimant had a preexisting developmental and degenerative back condition that required a lumbar laminectomy a year earlier on June 7, 1983 which was not work related and for which Dr. Bunten said resulted in a ten percent permanent partial impairment.

That the work-related injury of June 2, 1984 was the cause of another ten percent permanent partial impairment according to Dr. Bunten who was the only treating and evaluating physician.

That claimant was earning $10.00 per hour at the time of the injury and had earned as much as $12.00 per hour on occasion prior to that and that the wage base for his job was $8.25 per hour.

That Dr. Bunten restricted claimant to sedentary work and instructed him not to return to his job in the meat packing industry.

That two vocational specialists testified that sedentary

work would yield approximately $3.35 per hour to $4.00 per hour.

That the injury prohibits claimant from his previous income in the meat packing industry and also from performing his previous skills as a mechanic.

That it was recommended by several competent vocational rehabilitation specialists that claimant take a four year college course to become a social worker and that he has done so.

That claimant suffers constant back pain and that he cannot sit or stand for a prolonged period of time.

That defendants paid claimant reasonable workers' compensation benefits and assisted him with vocational rehabilitation.

That claimant has seriously pursued the vocational rehabilitation recommendations that were made to him.

That claimant will be unemployed for approximately four years while he completes his vocational rehabilitation training, provided he is able to complete it.

That if and when claimant finishes his college education as a social worker such a job would pay approximately $12,000 to $15,000 per year if the claimant can find a job as a social worker or another job paying that much.

CONCLUSIONS OF LAW

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

That the injury of June 2, 1984 was the cause of permanent disability.

That claimant is entitled to 250 weeks of permanent partial disability benefits based upon the 50 percent industrial disability to the body as a whole.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant two hundered fifty (250) weeks of permanent partial disability benefits at the rate of two hundred sixty-eight and 11/100 dollars ($268.11) per week in the total amount of sixty-seven thousand twenty-seven and 75/100 dollars ($67,027.75) commencing on January 18, 1985 as stipulated by the parties.

That defendants are entitled to a credit for 50 weeks of permanent partial disability benefits at the rate of two hundred sixty-eight and 11/100 dollars ($268.11) per week paid prior to hearing in the total amount of thirteen thousand four hundred five and 50/100 dollars ($13,405.50) as stipulated by the parties.

That all accrued benefits be paid in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

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

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

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

Walter R. McManus Jr.

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD J. REEVE, Claimant, vs. UNIVERSITY OF IOWA, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	FILE NO. 689122 A R B I T R A T I O N D E C I S I O N FILED NOV 24 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Richard J. Reeve, claimant, against University of Iowa, an agency of the State of Iowa, employer (hereinafter referred to as U of I), for workers' compensation benefits as a result of an alleged injury on November 17, 1981. On August 31, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

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

1. On November 17, 1981, claimant received an injury which arose out of and in the course of employment with U of I.

2. The work injury was a cause of both temporary and permanent disability.

3. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $181.32 per week.

4. Claimant is entitled to temporary total disability or ealing period benefits from November 17, 1981 through November , 1982 and from July 13, 1983 through October 9, 1983.

5. If permanent partial disability benefits are awarded erein, they shall begin as of October 10, 1983.

6. The medical bills submitted by claimant at the hearing ere fair and reasonable and causally connected to the medical ondition upon which the claim herein is based, but that the ssue of their causal connection to any work injury and whether r not they were authorized remains an issue to be decided erein.

ISSUES

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

I. Whether there is a causal relationship between the ork injury and the claimed disability;

II. If a neck injury is found, whether claimant is precluded rom benefits under Iowa Code section 85.23 for failure to give 90 day notice of injury;

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

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

SUMMARY OF THE EVIDENCE

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

Claimant testified that he has worked for U of I since 1979. laimant initially started as a repairman but was later promoted o carpentry in October, 1981. Claimant continues to work as a arpenter at the present time. Claimant was performing duties s a carpenter at the time of the alleged work injury in this ase.

The facts surrounding the work injury are not in dispute. laimant testified that while transporting 20 sheets of drywall aterial, weighing approximately 1500 pounds, a wheel on the art he was using fell into a hole in the floor dumping the rywall material onto claimant striking claimant about the head, ody and legs. Claimant testified that he immediately lost onsciousness as his head struck a wall.

According to the medical reports, claimant was immediately admitted to the University of Iowa Hospitals and Clinics upon a primary diagnosis of right ankle bimalleolar fracture with severe comminution and dislocation. Claimant immediately underwent open reduction surgery on his right ankle and a plate and screws were attached to the bone fracture area to assist in healing. Claimant was discharged from the hospital approximately a week later. After his discharge he continued under the care of the orthopedic surgeon who handled his case at the hospital, William R. Pontarelli, M.D.

Dr. Pontarelli treated claimant over the next several months gradually increasing claimant's activities along with physical therapy. In January, 1982, the cast was removed and in May, 1982, claimant was off his crutches and only using a cane. In October, 1982, claimant was told he should try to return to work part-time and claimant was fitted with a leather "lacer" support which he used during his work. On December 3, 1982, Dr. Pontarelli rated claimant as suffering from a 15 percent permanent partial impairment to the right extremity or six percent of the body as a whole as a result of the injury. In July, 1983, Dr. Pontarelli surgically removed the hardware from claimant's ankle and recovery from the second surgery lasted until October 7, 1983 according to Dr. Pontarelli.

Throughout the course of claimant's treatment by Dr. Pontarelli and the University of Iowa, the records do not reflect any complaint of back, neck or shoulder pain. Claimant testified that he initially did not notice any neck problems due to his bed rest and medicatiOn but later he said that he told Dr. Pontarelli of neck pain and was told that a referral would be made. Claimant explains that Dr. Pontarelli failed to provide any referral. The only reference at all in University of Iowa reports to any back pain was a note from an anesthesiologist in a preanesthetic summary just prior to the November 18, 1981 surgery on claimant's ankle which states that claimant "has had back problems recently."

Claimant returned to work full time on October 10, 1983, but continued to experience chronic ankle pain and swelling. In December, 1983, Dr. Pontarelli imposed restrictions that claimant should not walk long distances and should only work in a job that would allow him to change positions frequently so he can elevate his leg in the event of pain and swelling.

On May 5, 1983, Dr. Dystra of the Steindler Orthopedic Clinic reported that claimant was suffering neck pain along with his leg pain. He referred claimant to a Dr. Christiansen but no reports have been submitted from such a doctor. In December, 1984, upon referral from his attorney, claimant began to see John R. Walker, M.D., another orthopedic surgeon. The records are clear that this treatment was not authorized by defendants.

After his examination of claimant, Dr. Walker opines that claimant has a 22 percent permanent partial impairment to the right lower extremity. Also, he notes that claimant stated that he had neck pain and headache difficulties since the 1981 work injury and rated claimant as suffering from a two percent permanent partial impairment to the body as a whole as a result of his neck problems. In a later report Dr. Walker opines that since claimant had no history of neck problems before the work injury, he probably experienced a neck injury in the November, 1981 injury at U of I.

Claimant stated that he had muscle spasms prior to his work injury in 1981 but missed only a day or so of work as a result. He admitted to Dr. Walker that he had had prior headaches before 1981, but they appeared to be more severe after the 1981 injury. There is no evidence in the case that claimant had any prior right leg or ankle pain.

Claimant testified that he first noticed that he had a stiff neck and headache two days after the work injury. The neck had a dull rather than a sharp pain. This pain has apparently continued to the present day but he has never received treatment of this condition from any physician. Claimant states that his neck pain has grown worse over the last six months.

Claimant testified that 95 percent of his difficulties at work are attributable to his right ankle rather than his neck problems. The ankle still swells and hurts on occasion especially with work involving walking and climbing. He states that he cannot tolerate cold. Claimant said that he is only able to perform light or medium carpentry work.

In exhibit 11A presented by claimant, claimant sets forth his monetary earnings at the time of the injury and the actual earnings during various times he was only employed part-time after the work injury but before he returned to full employment after each surgery. This exhibit arrives at a figure of $3,022.74 which represents 66.6 percent of the total difference between claimant's gross earnings at the time of the work injury and his actual earnings during his period of temporary partial disability extending from November, 1983, through June, 1983 and again from August, 1983, through February, 1984.

APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an

initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be awarded without a showing of a causal connection to a physical change of condition. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

In the case sub judice, claimant contends that he has suffered permanent disability as a result of a work injury due to permanent impairment to both the ankle and neck. First the evidence is uncontroverted that claimant suffered permanent impairment to the leg as a result of the work injury. However, the causal connection of claimant's neck, shoulder and headache problems was not established by the greater weight of evidence.

First, on the day of surgery, claimant indicated to the anesthesiologist that he was suffering from recent back problems. Second, there is absolutely no evidence that claimant had complaints of neck, shoulder or back pain during the almost two years of treatment by Dr. Pontarelli and other staff members at the University of Iowa Hospitals and Clinics. The first report from any medical practitioner of neck pain occurred in May, 1983, from the Steindler Orthopedic Clinic. There apparently

was a referral after this visit but apparently the referral did not actually take place. Admittedly, claimant testified that he had neck pain immediately after the injury but he also testified that he had muscle spasms before the work injury as well. The only causal connection opinion in the record is from Dr. Walker. Dr. Walker bases his opinion on the lack of prior incidents of neck pain. However, claimant testified that he had prior muscle spasms before the work injury which is not reflected in Dr. Walker's report. Also, the statement of claimant to the anesthesiologist at the time of the initial surgery in November, 1981, indicates a prior problem. There must be a permanent injury extending beyond the scheduled member to support a finding as a body as a whole injury. See Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943). Consequently, claimant has established only causal connection of the work injury to a scheduled member disability of the right leg.

II. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

From the evidence submitted, it is found as a matter of fact that claimant's work injury was a cause of a 22 percent loss of use to his right leg. Although the primary treating physician in this case only rated claimant as having a 15 percent loss, this rating was before the second surgery in 1982. On the other hand, Dr. Walker's rating occurred in the latter part of 1984 and Dr. Walker has not been shown to possess fewer qualifications than Dr. Pontarelli. Due to the more recent nature of Dr. Walker's rating, it will be given the greater weight.

Based upon such a finding, claimant is entitled as a matter of law to 48.4 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(o) which is 22 percent of 220 weeks, the maximum allowable number of weeks for an injury to a leg in that subsection.

The parties have stipulated as to the extent of claimant's entitlement to healing period benefits. However, claimant is also entitled to temporary partial disability benefits under Iowa Code section 85.33(2) in that claimant was not capable of returning to full duty but was able to perform part-time duty consistent with his disability. According to Iowa Code section 85.33(4), these benefits consist of 66 2/3 percent of the difference between the employee's weekly earnings at the time of the injury and the employee's actual earnings during the period of temporary partial disability. Consequently, the figure arrived at in claimant's exhibit 11A referred to in the summary above is a correct computation of claimant's temporary partial disability entitlement and the facts stated therein are uncontroverted in the record.

III. Claimant seeks reimbursement of medical expenses performed and prescribed by Dr. Walker under Iowa Code section 85.27. Defendants deny liability of this claim on grounds that the treatment was neither causally connected to the work injury or authorized. With reference to the causal connection of treatment, the failure of claimant to causally connect the neck difficulties to the work injury precludes reimbursement of treatment for any neck condition. With reference to authorization, defendants are correct in that they have the right to choose the care under Iowa Code section 85.27. The only exception to this general rule is according to agency precedent is that defendants lose the right to chose the care when they deny liability for a work injury. See Barnhart v. MAQ, Inc., I Iowa Industrial Commissioner Report 1 (1981). However, in this case, defendants have always admitted to a work injury and to liability in this case. No request was made to defendants or this agency prior to seeking care or evaluation by Dr. Walker. Claimants, under Iowa Code section 85.27, are required to make prior application for a change in care if they expect to have the employers pay for such care. Therefore, the expenses are not reimburseable.

FINDINGS OF FACT

1. Claimant was in the employ of U of I at all times material herein.

2. On November 17, 1981, claimant suffered an injury to the right ankle which arose out of and in the course of his employment with U of I. The injury consisted of a bimalleolar fracture with severe comminution and dislocation requiring reduction surgery and the installation of a metal plate and screws to assist in healing.

3. The work injury of November 17, 1981 was a cause of a period of temporary partial disability while working part-time

from November, 1982 through June, 1983 and from June, 1983 through February, 1984. Sixty-six and two-thirths percent of the difference between claimant's gross earnings at the time of the work injury and claimant's actual earnings during this time is the sum of $3,022.74.

4. The work injury of November 17, 1981 was a cause of a 22 percent permanent partial impairment to the right leg and of permanent restrictions upon claimant's physical activity consisting of no extensive walking or climbing.

(It could not be found from the evidence that claimant suffered any disability due to neck, back, or headache problems as the result of the November 17, 1981 injury.)

CONCLUSIONS OF LAW

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

ORDER

1. Defendants shall pay to claimant forty-eight point four (48.4) weeks of permanent partial disability benefits at the rate of one hundred eighty-one and 32/100 dollars ($181.32) per week from October 10, 1983.

2. Defendants shall pay healing period benefits as set forth in the parties stipulation in the prehearing report.

3. Defendants shall pay to claimant temporary partial disability benefits in the total amount of three thousand twenty-two and 74/100 dollars ($3,022.74) for the periods of time listed in claimant's exhibit 11A.

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

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

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

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

Signed and filed this 24 day of November, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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002335

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN A. RILEY,	:	
Claimant,	:	FILE NO. 718611
vs.	:	A R B I T R A T I O N
MARTIN MARIETTA CEMENT,	:	D E C I S I O N
Employer,	:	FILED
and	:	SEP 30 1987
HOME INSURANCE CO.,	:	IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by John A. Riley, claimant, against Martin Marietta Cement, employer, and Home Insurance Company, insurance carrier, defendants, for benefits as the result of an alleged injury on November 3, 1982. 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 John A. Riley (claimant), Lillian Charlotte Riley (claimant's wife), Cheryl Scott (personnel director), Timothy J. Duszynski, D.A. (educational-vocational consultant), claimant's exhibits 1 through 38 and defendants' exhibits A through E. Both attorneys filed excellent briefs.

PARTIAL TRANSCRIPT

Defendants ordered and supplied the agency with a partial transcript which is primarily the testimony of Cheryl Scott and Timothy J. Duszynski. In this decision it is cited with the initials PT.

PRELIMINARY MATTER

The following information is helpful in understanding the stipulations and issues in this case. Claimant's left leg was caught in an auger at work and was severely damaged resulting in disability to the left leg. A large amount of skin and muscle were transplanted from the left arm to the left leg resulting in disability to the left arm. It is contended that the left leg injury changed claimant's gait which in turn caused an aggravation

of arthritis in claimant's back. Disability is claimed for the left leg, left arm and back.

STIPULATIONS

The parties stipulated to the following matters at the time of the hearing:

That an employer/employee relationship existed between claimant and employer at the time of all three of the alleged injuries -- the left leg, left arm and back.

That claimant sustained an injury on November 3, 1982 which arose out of and in the course of employment with employer with respect to the left leg and left arm.

That the injury to the left leg and left arm were the cause of both temporary and permanent disability.

That claimant's entitlement to weekly compensation for temporary disability benefits for the left leg and left arm is stipulated to be from November 3, 1982 to November 1, 1984.

That the type of permanent disability is in dispute and depends upon the ultimate findings of fact and conclusions of law with respect to whether the alleged injury to claimant's back is compensable or not.

That if the back is not compensable then the extent of entitlement to weekly compensation for permanent disability benefits for the left leg is 110 weeks for a 50 percent loss of use of the left leg and 20 weeks for an eight percent loss of use of the left arm; that the rule of the Simbro case applies in that the values should be converted to body as a whole, combined and applied to 500 weeks under Iowa Code section 85.34(2)(s).

That the commencement date for permanent partial disability benefits, in the event such benefits are awarded, is stipulated to be from November 1, 1984.

That the weekly rate of compensation in the event of an award of benefits is stipulated to be $368.16 per week.

That claimant's entitlement to medical benefits is not in dispute and that all requested benefits have been or will be paid.

That defendants seek a credit under Iowa Code section 85.38(2) for payments made from an employee group plan for retirement disability benefits in an unknown amount. Claimant does not dispute that payments have been made, but disputes that defendants are entitled to a credit for the amounts so paid.

ISSUES

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

Whether claimant sustained an injury which arose out of and in the course of employment with employer with respect to his back.

Whether the back injury was the cause of temporary or permanent disability.

Whether claimant is entitled to temporary or permanent disability benefits with respect to his back and, if so, the nature and extent of benefits to which he is entitled.

Whether claimant is an odd-lot employee.

Whether defendants are entitled to a credit under Iowa Code section 85.38(2) for retirement disability benefits paid to claimant as payments made under an employee non-occupational group plan.

Whether claimant is entitled to certain costs listed in exhibit 38.

SUMMARY OF THE EVIDENCE

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

Claimant was 57 years old at the time of the injury and married. He completed nine and one-half years of school. He obtained a GED in 1979 at age 54 at the request of and to please his daughter. All of his early employments were strenuous laboring types of work. Claimant worked for employer for approximately 33 years before he retired on November 1, 1983. At that time, he was number six in seniority out of 94 employees.

Claimant started to work for employer on March 2, 1951 as a laborer. He became a kiln helper and then worked as a kiln burner for 23 years. After that he worked as a shift breaker which required him to learn and to be able to perform four different jobs. At the time of the injury on November 3, 1982, claimant was assistant foreman of the packhouse. He had been doing this job for about one and one-half years. The packhouse is where cement is packed and shipped on railroad cars (Exhibit 1). Ninety percent of this job is standing, moving, climbing and 10 percent is sitting. It involves some bookwork and checking feed tanks (Ex. 1 & Ex. C). Claimant testified that he also manually assisted his employees in preparing sacks and bags of cement for shipment and that it was also necessary to climb silos.

On November 3, 1982, at approximately 1:00 p.m., claimant was told to explode a chunk in silo number 24. A chunk is a charge of gunpowder in a plastic casing with a fuse. The mine safety and health inspectors investigated and described the accident as follows:

> At approximately 1325 hours, Riley and Dobbs left the control area and proceeded toward the No. 24 silo. Dobbs was in front of Riley. As they approached the crossover section of the cross screw conveyor, Dobbs walked up the 2- by 12- by 8-foot board, and seeing the opening of the screw conveyor was not covered, stepped over the opening and proceeded forward. Riley walked up the ramp, and not noticing that the opening was not covered, stepped directly into the screw with his left foot. His foot became engangled with the screw. Dobbs stated that he heard Riley yell and immediately turned around. Riley was hanging onto the handrails with his left foot entangled in the screw. Dobbs immediately had Alfred McClain, the operator, shut off the screw conveyor. Riley's foot was freed from the screw and first aid was administered.
>
> Riley was transported by the Buffalo City ambulance service to Mercy Hospital in Davenport Iowa under the care of the ambulance attendant. His injuries were confined to his lower left leg and foot. He suffered fractures of the foot and ankle, and damage to tendons, muscles and tissue. (Ex. 31-3 & 31-4)

Claimant was treated at the emergency room by Richard L. Kreiter, M.D., who debrided and irrigated a severe avulsion laceration and severe soft tissue destruction injury of the posterior one-half of the left calf. Dr. Kreiter described skin loss, gross contamination and exposed tendons. Claimant also suffered a fracture of the medial malleolus (Ex. 2-3). Dr. Kreiter stated that the gastroc's soleus muscles and Achilles tendon were destroyed (Ex. 2-8).

John Syverud, M.D., did a debridement and split thick skin graft of this massive soft tissue avulsion injury of the posterior aspect of the left calf on November 5, 1982. The entire defect measured 25 cm by 15 cm (Ex. 2-10). Dr. Syverud was assisted by William Irey, M.D., an orthopedic surgeon. The bony areas were not covered at this time (Ex. 2-11).

Dr. Irey, who became claimant's main treating physician in Davenport, then referred claimant to Michael Wood, M.D., at the

Mayo Clinic (Ex. 3-2). At the Mayo Clinic a sensory type of free flap transfer to his left leg from his left arm was performed on November 30, 1983. Dr. Wood used a radial-type flap from his left forearm and attempted to innervate it with an anastomosis (grafting) of the lateral antebrachial cutaneous nerve of the flap to the saphenous nerve of the leg (Ex. 4-1). The flap transfer was successful, but claimant did not receive the hoped for sensory restoration (Ex. 11-1). Claimant's heel pad was necrotic and had to be resected by Dr. Wood also (Ex. 4-1).

Approximately 11 months after the injury occurred Dr. Irey wrote to the insurance company on October 12, 1983, that he guessed that claimant was getting close to the time that he could give an impairment rating. He felt that it would not be long until claimant could return to work in some supervisory capacity, but that he would have difficulty doing any strenuous manual labor (Ex. 10). Claimant did not return to work, however, but instead returned to Mayo Clinic and Dr. Wood performed a tendo-Achilles reconstruction (reconstruction of the heel cord) using irradiated tendon allografts on April 17, 1984 (Ex. 11-1, 13-1 & 15-1). Even before the surgery on November 10, 1983, the Mayo Clinic estimated that claimant would have restrictions prohibiting prolonged standing (more than three hours in an eight hour shift or more than 30 minutes at one time) as well as no climbing, no excessive walking, no running and no stooping, but that claimant could do a job in a sitting position without restrictions (Ex. 12-1). After the surgery, Dr. Wood, however, personally completed an Estimated Functional Capacity Form on July 20, 1984 which estimated that in an eight hour work day claimant could: (1) sit eight hours continuously; (2) stand two hours with rests; and, (3) walk one hour with rests. He could never lift or carry 51 to 100 pounds or squat or climb. He could not use his foot for repetitive movements for operating foot controls. He was totally restricted from unprotected heights. Dr. Wood estimated that claimant could work full time on October 1, 1984 (Ex. 16). Dr. Wood succinctly summarized claimant's treatment at Mayo Clinic in a letter to claimant's counsel on July 25, 1984 and stated that he did not anticipate any further surgery (Ex. 17). Claimant continued to complain of pain, swelling and lack of sensation in his left foot and ankle but Dr. Wood thought that these would gradually improve over time (Ex. 18). Dr. Wood repeated on October 18, 1984, that claimant was capable of employment provided it was basically sitting and complied with his above restrictions (Ex. 19).

Dr. Irey calculated his permanent physical impairment ratings using the Second Edition of the Guides to Evaluation of Permanent Impairment and mailed them to claimant on October 29, 1984. Dr. Irey found as follows:

> ...The impairment of his upper extremity due to his forearm surgery results in a 6% impairment in

palmar flexion, zero% impairment in dorsiflexion, about 1% impairment of radial and ulnar deviation each for a total of 8% impairment of the upper extremity.

For his lower extremity, an amputation at the ankle joint would be about a 70% impairment. I feel that he has certainly a better leg than that although he does have significant limitations. He has lost a significant portion of his heel pad and posterior musculature. I think his effective foot motion is extremely limited. Although it is somewhat difficult to calculate, my best estimation would be a 50% impairment of his lower extremity due to his leg injury.
(Ex. 20-2)

Dr. Irey did not treat or rate claimant's back. Dr. Wood did not treat claimant's back or rate any of claimant's impairments (Ex. 21).

Claimant testified that he first noticed pain in his back and hips after the walking cast was installed in 1984.

Larry L. Swank, D.C., saw claimant on April 19, 1985. He wrote a report and evaluation on July 11, 1985. Claimant told Dr. Swank that he stepped into a 16 inch screw conveyor at a walkway over the screw conveyor. In addition to pain in his foot, claimant complained of low back pain on the right. Lumbar spine x-rays showed pelvic unlevelling and lateral lumbar tilt to the right with advanced spondylosis throughout the lumbar spine. He determined that claimant's low back pain was complicated by abnormal gait movements due to the injury to the left lower leg. The lower left leg injury prevents normal dorsiflexion and plantar-flexion to propel the body forward. Thus, claimant shifts his weight to the right during gait movement. He stated that claimant would need a cane indefinitely. Dr. Swank issued impairment ratings for the left lower extremity, left upper extremity and the spinal column, converted them to body as a whole, combined them, and arrived at a final whole man impairment of 50 percent which is permanent (Ex. 22 & 23).

Claimant saw Jan Koehler, M.D., for examination, evaluation and rating on August 21, 1985 (Ex. 24). The doctor noticed that claimant walked with a halting gait with decreased weight bearing on the left foot and moderate instability requiring the use of a cane (Ex. 24-3). Dr. Koehler concluded as follows:

IMPRESSION:
1) Essential hypertension with evidence of arteriosclerotic cardiovascular disease.
2) Chronic obstructive pulmonary disease.

3) History of carcinoma of the colon.
4) Diffuse spinal osteoarthritis of the cervical, thoracic and lumbosacral spine with chronic neck and low back pain.
5) Extensive soft tissue injury of the left leg, ankle and foot, with post surgical soft tissue deficit of left forearm secondary to tissue graft.

(Ex. 24-5)

Dr. Koehler concluded that the sum total of the left leg, left arm and back impairments resulted in a 40 percent permanent partial impairment using the AMA Guides to Evaluation of Permanent Impairment (Ex. 24-6). Dr. Koehler wrote claimant's counsel on May 13, 1986 with the following additional information:

> With regard to the condition of his back, x-rays revealed osteoarthritic changes throughout the spine. In my report I clearly note that Mr. Riley complained of back pain prior to the injury; his symptoms seemed to increase following the accident on November 3, 1982. On observing Mr. Riley's gait with the favoring of the injured left leg, it is quite clear that the normal biomechanics of his back are significantly altered. It is impossible to know how much of the degenerative changes seen on his x-rays were present before his leg injury. However, any degenerative changes and associated back pain would be significantly aggravated by the abnormal gait now present. I cannot say with certainty whether he sustained any direct injury to his back in November of 1982.
> (Ex. 26)

Dr. Koehler also testified by deposition on August 4, 1986, that his training is in internal medicine but his experience is primarily in emergency medicine, family practice and general medicine. He stated that claimant had a history of blood pressure problems, chronic lung disease, carcinoma of the colon, spinal arthritis and two episodes when he collapsed on the job which were presumed to be heat and dehydration. He stated that claimant's current leg, arm and back condition were caused by the injury on November 3, 1982 (Ex. 37, pages 7 & 8). More specifically the back symptoms are clearly secondary to the abnormal gait caused by his leg injury (Ex. 37, pp. 9, 10, 11, 20, 28 & 42). Claimant is not capable of performing a job eight hours a day that involves bending, walking distances, twisting and some lifting (Ex. 37, p. 13). Dr. Koehler commented that there had been some speculation that claimant would have had less pain and disability if the left leg and foot had been amputated rather than salvaged (Ex. 37, p. 34).

Dr. Irey testified by deposition on September 17, 1986 that

he is an orthopedic surgeon and treated claimant for this injury in conjunction with Dr. Wood at the Mayo Clinic (Ex. D, pp. 1-12). He described claimant's ankle brace as two supports inside and outside of his ankle attached to his shoe and calf that extend from his ankle to his knee to stablize this area (Ex. D, pp. 12 & 13). He testified that claimant did not complain to him of any back pain in 1983 or 1984 that he recalled or noted in his records. Claimant first complained of back pain on December 2, 1985 (Ex. D, pp. 13-17). Dr. Irey testified that he discussed with claimant the fact that his abnormal gait was probably aggravating the underlying arthritis in his back and that it would be an expected sequela of his abnormal walking (Ex. D, p. 18). He stated that claimant's back hurts and bothers him on a fairly regular basis. It is not severe, but does bother him on a day to day basis from the pain (Ex. D, p. 22). The etiology of degenerative arthritis is unknown, but injury, surgery, congenital deformities, unequal leg lengths, and major problems with walking are possible causes (Ex. D, p. 25). He confirmed that claimant did have degenerative arthritis in his entire spine (Ex. D, pp. 26 & 27). The following dialogue concerning causal connection transpired between defendants' counsel and Dr. Irey, the treating physician.

> Q. Doctor, can you say how the ambulation problem he has, the walking problem he has, affects that spinal column?
>
> A. It causes abnormal motion in usually the lumbar area of the spine and if there were structural abnormalities higher in the spine, this could conceivably cause enough minor degrees of abnormal motion or stress to cause pain in those areas as well.
> (Ex. D, p. 27)

In answer to defense counsel's question, Dr. Irey said that claimant's gait disturbance probably at least increased his symptoms of degenerative arthritis in the lumbar spine and has caused physical impairment of his spine (Ex. D, pp. 29, 35 & 36). It is not possible to pro rate how much of the pain is due to the degenerative arthritis and how much is due to the gait problem (Ex. D, pp. 29, 30, 35 & 36). The back condition is permanent (Ex. D, p. 36). Dr. Irey felt that even without the gait problem claimant probably would have had some lumbar back pain from the arthritis anyway (Ex. D, p. 39).

Claimant testified that he tried to return to work in May or June of 1983. He only needed one more day of work in order to qualify for additional paid vacation. The company, however, told him no. Again in October of 1983 when the insurance company told him that his healing period was ending, claimant testified that he tried to return to work. The company looked

at Dr. Wood's restrictions and told him that they did not have any job that he could do. After that he never applied for or looked for a job, but rather took disability retirement on November 1, 1983 (Ex. A, B & C).

Claimant testified that he had eight surgeries in all. His left foot is shorter than the right foot. He spends his day watching television and trying to get comfortable. He can drive his van. He has given up many of his former activities of golf, horseshoes, baseball, darts and swimming. About all he can do now is fish. He is a camping enthusiast and he still does some camping since the injury. He testified that he was not physically capable of doing his old job at the cement plant.

Roger Marquardt, an experienced vocational rehabilitation consultant, saw claimant for one and one-half to two hours on July 10, 1986 in Cedar Rapids, Iowa. Marquardt wrote a report on September 3, 1986 and gave a deposition on December 15, 1986. In his report Marquardt commented that claimant had a difficult time walking. He was aided by a cane, foot brace, wore a hearing aid and glasses and appeared older than his stated age of 61. Claimant was earning $13.25 per hour plus overtime monitoring silos, keeping their inventory, transferring their flow, figuring the sack crew's assignments and sometimes assisting them. His work ranged from semi-skilled to skilled, from light (20 pounds) to heavy (100 pounds) all with required walking, standing, reaching, handling and occasional climbing. Marquardt concluded that claimant could not perform his old job and that his job skills were not transferable. He also stated that claimant has been released to return to work with restrictions and that employment may exist within these restrictions. However, claimant told Marquardt that he would only return to work for his former employer provided they would assign him a job within his physical capacity. If that is not possible then he would retire. Claimant believed, and Marquardt concurred, that considering claimant's age of 61, his restrictions, and possible salary, it was not worth the effort to make a vocational adjustment into another line of work (Ex. 27-2). In his deposition Marquardt repeated that claimant could not return to his old job and there was no likelihood he could do any job in the cement industry. Claimant had no skills to be self-employed. Claimant was extremely limited in doing any kind of work in competitive employment (Ex. 35, pp. 41-44). Claimant was not completely unemployable (Ex. 35, p. 32). Claimant could do sedentary, light or medium work, with alternate standing or sitting (Ex. 35, pp. 17-19). He could do a number of minimum wage type jobs such as hotel clerk and parking lot clerk (Ex. 35, p. 43). Claimant had little or no motivation to work because he was receiving $622 a month in retirement benefits and $1,473 every four weeks in workers' compensation benefits for a total of $2,095 approximately each month (Ex. 35, pp. 36 & 37). In addition, he would be eligible for early social security in March of 1987 (Ex. 35, p. 46).

Timothy J. Duszynski, D.A., an educational vocational consultant, saw claimant for approximately two and one-fourth hours on December 10, 1986 (Ex. 36, p. 6 & 7). He prepared an exceptionally detailed report on December 15, 1986 (Ex. E). He gave a deposition on December 22, 1986 (Ex. 36) and he testified at the hearing on January 17, 1987. Claimant told Duszynski that he had not worked since the injury, that he had not sought employment since the injury and that he had not sought additional education or training since the injury because he has been unable to work since the injury (Ex. E, pp. 6 & 7; PT, pp. 42 & 43). Claimant stated that he tried several times to be reemployed by employer, even begged to go back to work, but employer has no work for which he is qualified in his present condition (Ex. E, p. 8). Claimant's wife is retired from Sears Roebuck & Company (Ex. E, p. 9). Claimant did not believe he had any obligation to seek employment with any other employer than Martin Marietta at the exact same plant at the same compensation he earned at the time of the injury and he did not have to settle for anything less. He felt that he was too old and was not interested in a program of education or training to qualify him for other employment (Ex. E, p. 10; PT, pp. 45 & 46). Claimant refused to take four commonly used career and vocational assessment tests at defendants' expense in order for Duszynski to complete his evaluation (Ex. E, pp. 12-14; PT, pp. 43-45). Therefore, the witness could not determine what present or future employment claimant could do or what education and training would be necessary to prepare for employment (Ex. E, p. 14). Duszynski concluded that claimant has always lead a productive life and had demonstrated his ability to advance himself, but since the injury claimant had attempted no rehabilitation and declined to be tested for any further employment possibilities. Duszynski stated that claimant was able to engage in some kind of employment, but just what could not be determined due to claimant's refusal to cooperate with the assessment tests (Ex. E, p. 15; PT, pp. 46 & 47).

In his deposition Duszynski conceded that he was not engaged in placement and had never placed anyone in a job and that this was his first workers' compensation case (Ex. 36, pp. 9 & 10). Claimant has been released to return to work (Ex. 36, pp. 12 & 13). There are a number of things that claimant could do such as telephone sales or service jobs that pay approximately $4.00 to $5.00 per hour (Ex. 36, pp. 27 & 28).

At the hearing Duszynski testified that his expertise was not finding jobs, but rather evaluating people and preparing training for changing occupations (PT, p. 33).

Lillian Charlotte Riley, wife of claimant, testified that she now mows the grass and operates the snowblower and does other home maintenance jobs. About all claimant can do is to trim the hedge. She carries the groceries. They do more

camping now, but are more restricted in what claimant can do. They do less walking and do not walk as far. Claimant cannot bicycle or toboggan now. At home claimant climbs the stairs one step at a time using the handrail.

Cheryl Scott testified that she is director of personnel for employer and prepared the retirement documents marked exhibits B and C. Claimant was eligible for early retirement after 30 years of service or for disability retirement. He chose disability retirement because it paid more. Disability retirement was $709.50 per month whereas early retirement was $676.50 per month. She testified that during shut down everybody has to do manual labor work and that claimant would probably be unable to perform those tasks at this time with his present limitations.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 3, 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).

An injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles claimant to industrial disability. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

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).

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

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber, Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960). See also Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934).

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 did sustain the burden of proof by a preponderance of the evidence that he sustained an injury to his back that arose out of and in the course of his employment with employer. Dr. Swank reported that his x-rays demonstrated pelvic unleveling and lateral lumbar tilt to the right superimposed on claimant's advanced spondylosis throughout the lumbar spine. He indicated that this was caused by claimant's abnormal gait which was caused by the injury to his lower left leg (Ex. 22). Dr. Koehler confirmed causal connection by his letter of May 13, 1986 by stating that claimant's gait, favoring the left leg, significantly altered the biomechanics of his back. Any degenerative changes and associated back pain would be sufficiently aggravated by the abnormal gait now present (Ex. 26). In his deposition he testified several times that the back symptoms were clearly secondary to the abnormal gait which was caused by his leg injury (Ex. 37, pp. 9, 10, 11, 20, 28 & 42).

Dr. Irey, claimant's treating physician, confirmed several times also that the altered gait increased claimant's degenerative arthritis symptoms and caused impairment to his spine (Ex. D, pp. 18, 27, 29, 35 & 36).

Dr. Swank (Ex. 22 & 23), Dr. Koehler (Ex. 24-6) and Dr. Irey (Ex. D, p. 36) all confirmed that the back injury is permanent. Therefore, claimant is entitled to permanent disability benefits for his left leg and left arm as stipulated by the parties and it is now determined that he is entitled to permanent disability benefits for his back also. In fact, there is no medical evidence that claimant did not sustain a back injury caused by the altered gait caused by the leg injury. Defense counsel

suggested that claimant's weight gain since the injury and his protruding abdomen may be the cause of his back pain, but the doctors felt that these conditions were not significant. Even though claimant may have had arthritis of his entire spine for some time prior to this injury, no ascertainable portion was proven by defendants. In fact, there was no evidence that it caused any disability at all prior to this injury.

Claimant is not entitled to permanent total disability. Dr. Wood said that claimant could work with restrictions (Ex. 16 & 17). Dr. Irey's ratings of eight percent for the left arm and 50 percent for the left leg imply only permanent partial disability of these two scheduled members (Ex. 20-2). Dr. Swank rated claimant with a 50 percent impairment of the body as a whole (Ex. 23) and Dr. Koehler rated claimant with a 40 percent impairment of the body as a whole (Ex. 24-6), but neither doctor suggested that claimant was incapable of gainful employment (Ex. 22, 23, 24, 26, & 37). Marquardt thought claimant was capable of some employment (Ex. 27-2; Ex. 35, pp. 17-19, 32 & 34). Duszynski felt that claimant was capable of some employment (Ex. E, p. 15; PT, pp. 46 & 47).

Considering claimant was capable of some kind of employment, but has made no attempt to find any employment, then claimant cannot be said to be an odd-lot employee. The only employment claimant would agree to was to work for his old employer at the same plant at the same earnings doing some work within his physical capabilities. If he could not do this then it was his choice to retire. Claimant testified and Scott testified and it appears in the reports of Marquardt and Duszynski that claimant was unable to return to his old job or any work in the cement industry. To be entitled to the odd-lot doctrine normally a claimant, who is capable of working, must demonstrate a bona fide effort to find work in the area of residence. The evidence is uncontroverted that claimant made absolutely no effort to seek out any employment or rehabilitation for employment within his capabilities. Guyton v. Irving Jensen Company, 373 N.W.2d 101 (Iowa 1985); Emshoff v. Petroleum Transportation and Great West Casualty Company, File No. 753723 (Appeal Decision March 31, 1987). Certainly claimant is not one of the hardcore unemployed. Umphress v. Armstrong Rubber Company, File No. 723184 (Appeal Decision August 27, 1987). In his fifties claimant obtained a GED and learned the jobs of shift breaker and assistant packhouse foreman.

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

percentages of the total physical and mental ability of a normal man."

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

Claimant was 57 years old at the time of the injury. He has a ninth grade education but later acquired a GED in 1979. He is unable to return to his old job or to the cement industry in general. He has few, if any, significant transferable skills, possibly a little book work experience and a little supervisory experience peculiar to the cement plant industry. His experience is basically strenuous or manual labor work and he can no longer do that type of work. It is not too likely that he could just go job hunting at age 57, severly crippled, and step into immediate employment other than possibly some very menial task at minimum wage or less. It is true that he is adaptable and has proven his potential to learn and adjust even in his later years. He completed the course of training and passed all the examinations to obtain a GED at age 54 in 1979. At some time in his mid 50's he bid and learned how to do four new, different and diverse jobs as a shift breaker. Then at approximately age 56 he bid on and was learning the job of assistant packhouse foreman and all indications are that he was doing very well at it. Therefore, claimant has demonstrated that he can learn and adapt to new and different employment opportunities. However, when he weighed the effort against how much money he could make and the short time left to use new employment skills, he decided instead to retire on November 1, 1983 on disability approximately one year after his injury. To learn new skills with a crippled leg and daily back pain no doubt influenced his decision to retire. Also, his other health conditions may have influenced his decision to retire at age 58 on disability. He suffered two drop attacks at work -- one in 1979 and one in 1980. He suffered from essential hypertension and had evidence of arteriosclerotic cardiovascular disease. He had chronic obstructive pulmonary disease. He had a history of carcinoma of the colon with a resection in 1978. He suffered from diffuse spinal osteoarthritis of the cervical, thoracic and lumbosacral spine with chronic neck and low back pain (Ex. 24-5).

Claimant's wife is retired. Claimant could retire on disability. He was also entitled to and had begun to receive substantial workers' compensation benefits. In March of 1987, he became eligible for early social security benefits. The decision to retire on disability may have been the wisest decision when all of the foregoing factors are considered.

However, then it is not possible to say that claimant is totally and permanently disabled when it was possible to do some gainful work, but he instead chose to use his retirement assets rather than his employability for his future income needs. Swan v. Industrial Engineering Company, IV Iowa Industrial Commissioner Reports 88, (1984); McDonough v. Dubuque Packing Company, I-1 Iowa Industrial Commissioner Decisions 152 (1984).

Nevertheless, claimant has sustained a terrible injury which is severely debilitating. The photographs (Ex. 32) and a personal view of the leg and arm verify this fact. Iowa Administrative Procedure Act 17A14(5). Claimant is severely disabled from most kinds of competitive employment. He is crippled for life. Claimant walks with a cane. He has to wear a brace on his foot and leg for the rest of his life. Two of his members are effected as well as his back. All of the doctors' permanent impairment ratings are quite high. Claimant is entitled to a substantial award. It is determined that claimant has sustained an industrial disability of 65 percent of the body as a whole.

Defendants claim a credit under Iowa Code section 85.38(2) for the retirement disability payments that they have made. Defendants assert that these are non-occupational employee group benefits paid prior to the hearing. However, there is absolutely no evidence to support the defendants' claim to a credit. Scott testified that she handled the retirement of the claimant and she asserted no entitlement to a credit on the part of employer. Even if she had asserted a claim for a credit, the best evidence of entitlement to a credit is the plan document itself. Nothing in exhibit A, the pension agreement, mentions a credit for workers' compensation payments. Furthermore, Iowa Code section 85.38(2) expressly states it does not apply to benefits which would have been payable even though a compensable injury occurred. A reading of the pension agreement, since it contains no offset or credit for workers' compensation benefits, appears to indicate that claimant is entitled to the retirement benefits of the plan irrespective of whether claimant receives workers' compensation or not. The plan does not indicate that benefits should not have been paid if workers' compensation entitlement also existed. Hebensperger v. Motorola Communications and Electronics, Inc., II Iowa Industrial Commissioner Reports 187 (1981). Therefore, defendants have not sustained the burden of proof by a preponderance of the evidence that they are entitled to a credit under Iowa Code section 85.38(2) for the disability retirement benefits paid to claimant.

Exhibit 38 is a statement of costs submitted by claimant. Claimant is entitled to an examination under Iowa Code section 85.39 because Dr. Irey had previously rated claimant for defendants. Either Dr. Swank or Dr. Koehler could be considered as an independent examination. Since Dr. Koehler is a medical doctor and appeared to give the most extensive examination, so much of

his fee of $722 that is for his examination and report of that examination is allowed now as the cost of an Iowa Code section 85.39 examination. Any other reports included in this $722 amount are disallowed. Likewise, the $150 witness fee for Dr. Koehler for deposition is allowed as a witness fee pursuant to Division of Industrial Services Rule 343-4.33(4). So much of Roger Marquardt's fee of $689.30 that constitutes his testimony in his deposition up to $150 is allowed as an expert witness fee pursuant to Division of Industrial Services Rule 343-4.33(4). The Mayo Clinic charge of $80 for two medical reports from Dr. Wood at $40 each as explained at the hearing is allowed pursuant to Division of Industrial Services Rule 343-4.33(6). (PT, p. 56). Although Dr. Swank, Dr. Koehler and Roger Marquardt may have also given reports, the costs of these individual reports cannot be isolated out from their overall charge. Therefore, it is not possible to determine what the cost of a report was or to make an allowance for it. All of the deposition and court reporter fees itemized out in the total amount of $577.23 are allowed pursuant to Division of Industrial Services Rule 343-4.33(2) for the reason that all of these depositions appear to have been introduced into evidence at the hearing. Woody v. Machin, 380 N.W.2d 727 (Iowa 1986).

FINDINGS OF FACT

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

That the injury to claimant's leg changed his gait and this in turn aggravated the arthritis in his back.

That the injury to claimant's leg, left arm and back are all permanent injuries.

That Dr. Irey awarded claimant a permanent functional impairment rating of eight percent on his left arm and 50 percent on his left leg.

That Dr. Swank found claimant sustained a 50 percent permanent functional impairment to the body as a whole.

That Dr. Koehler determined that claimant sustained a 40 percent permanent impairment to the body as a whole.

That claimant was age 57 at the time of the injury; had nine years of formal education and a GED; had few, if any, transferable skills; his past employments have all been manual labor work and he can no longer perform manual labor; and that claimant cannot return to his old job or to the cement industry.

That claimant has potential for some employment at minimum wage or slightly higher and could be educated and trained for a different career.

That claimant chose instead to retire on disability one year after his injury.

That claimant has sustained an extremely disabling injury; he is crippled for life; he walks with a cane and must wear a foot and leg brace for the rest of his life.

That he has sustained an industrial disability of 65 percent of the body as a whole.

That defendants introduced no evidence to demonstrate entitlement to a credit for benefits paid under a non-occupational group plan.

CONCLUSIONS OF LAW

THEREFORE, based upon the evidence presented at the hearing and the foregoing principles of law, the following conclusions of law are made:

That claimant sustained an injury to his back that arose out of and in the course of his employment with employer.

That the injury to claimant's leg, arm and back were the cause of severe permanent disability.

That claimant is entitled to a 65 percent industrial disability as permanent partial disability to the body as a whole.

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

That defendants did not sustain the burden of proof by a preponderance of the evidence that they are entitled to a credit under Iowa Code section 85.38(2).

That claimant is entitled to the costs listed in exhibit 38 as previously determined in the body of this decision.

ORDER

WHEREFORE, IT IS ORDERED:

That defendants pay to claimant three hundred twenty-five (325) weeks of permanent partial disability benefits at the rate of $368.16 per week in the total amount of one hundred nineteen thousand six hundred fifty-two and no/100 dollars ($119,652.00) commencing on November 1, 1984, the stipulated commencement date.

That defendants pay all accrued benefits in a lump sum.

That interest will accrue under Iowa Code section 85.30.

That defendants are to pay the costs of this action as provided by Division of Industrial Services Rule 343-4.33 and those itemized expenses in Exhibit 38 as specified in the body of this decision.

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

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

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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1106; 1401; 1402; 1402.20
1402.30; 1402.40; 1701
1703; 1803; 1803.1; 1804
1806; 2206; 2207; 2502
2907; 3102; 4100
Filed September 30, 1987
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN A. RILEY, Claimant, vs. MARTIN MARIETTA CEMENT, Employer, and HOME INSURANCE CO., Insurance Carrier, Defendants.	:	FILE NO. 718611 A R B I T R A T I O N D E C I S I O N

1106; 1401; 1402; 1402.20; 1402.30; 1402.30; 1402.40; 1803; 1803.1; 1804; 1806; 2206; 2207

Claimant's leg was caught in a 16 inch moving auger. He suffered a very severe avulsion type of injury that destroyed the posterior one-half of his lower left calf, broke his ankle and shortened his foot at the heel. Impairment to the left lower extremity was 50 percent. A skin, muscle and nerve graft from his left arm resulted in an 8 percent impairment of his left upper extremity. He was forced to wear a leg brace and to walk with a cane. The foot injury changed his gait which aggravated the preexisting arthritis in his back causing daily pain which was permanent. Held: Claimant sustained an injury to his back which arose out of and in the course of his employment which caused permanent partial disability and was entitled to 65 percent industrial disability to the body as a whole.

3102; 4100

Claimant was not odd-lot. He chose to retire rather than look for other employment or try vocational rehabilitation. Both vocational rehabilitation specialists said claimant was

employable in some minimum wage type of employment. Claimant, age 57, had many other preexisting chronic health problems such as heart disease, hypertension, emphysema, arthritis, and carcinoma of the colon.

1701; 1703

Defendants were not entitled to a credit for retirement disability payments because there was no provision for it in the pension plan document.

2502; 2907

Claimant was allowed the cost of one examiner as an 85.39 examination and all costs that could be identified as falling within the provisions of Division of Industrial Services Rule 343-4.33.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRENDA RIPPERGER,	:	
	:	
Claimant,	:	
	:	
vs.	:	
	:	FILE NO. 789484
BUNN-O-MATIC CORPORATION,	:	
	:	A R B I T R A T I O N
Employer,	:	
	:	D E C I S I O N
and	:	
	:	
AETNA CASUALTY & SURETY COMPANY,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Brenda Ripperger, claimant, against Bunn-O-Matic Corporation, employer, and Aetna Casualty & Surety Company, insurance carrier, defendants for benefits as the result of an alleged injury that occurred on January 9, 1985. A hearing was held in Des Moines, Iowa on January 22, 1987 and the case was fully submitted at the close of the hearing. The record consists of the testimony of Brenda Ripperger, claimant, David Pontious, supervisor, claimant's exhibit 1 consisting of 25 consecutive pages and claimant's exhibit 2, the deposition of James Frasina, and defendants' exhibits A and B which are two factory parts held in the custody of the defendants until all appellate periods have expired, but photographs of the parts are also marked defendants' exhibits A and B and are found with the other exhibits in the file. Both attorneys submitted excellent briefs.

STIPULATIONS

The parties stipulated to the following matters:

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

That if it is found that claimant sustained an injury arising out of and in the course of employment on January 9, 1985, then the injury is the cause of some temporary disability.

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

That the rate of compensation in the event of an award is $142.31 per week.

That medical expenses are no longer in dispute and that all requested medical benefits have been or will be paid by defendants.

That no claim is made for credits under Iowa Code section 85.38(2).

That defendants are entitled to a credit for 19 weeks of compensation at the rate of $142.31 per week paid to claimant prior to the hearing.

ISSUES

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

Whether claimant sustained an injury on January 9, 1985 which arose out of and in the course of her employment with employer.

Whether the injury is the cause of any permanent disability.

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

SUMMARY OF THE EVIDENCE

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

Claimant was 23 years old at the time of the injury. She graduated from high school in 1980 in the upper one-half of her class. She was also married in 1980 and became a mother in 1981. Past employments include working as a cashier in a convenience store and she was a sales clerk in a department store. She was unemployed outside of her home from 1981 to 1983 in order to be a mother and wife. She started to work for employer on January 8, 1984 as a welder in the production of coffee and tea making machines. Her job was to spot weld two thin metal panels, put them in a box, and put the filled box on a pallet. A filled box weighed approximately 25 to 30 pounds. A component of this job was to peel off a plastic protective covering, like contact paper, from the metal panels. Claimant denied any problem with her neck, back or shoulders prior to this injury.

On Wednesday, January 9, 1985, while she was welding and

packing, claimant experienced pain in her shoulders. She reported this to Dave Pontious, her supervisor. He sent her to the office. The office sent her to Creston Medical Clinic where she saw John L. Hoyt, M.D., who coincidentally was her family physician. He noted that she had been working 10 hour days and had neck and mid-back pain. He took her off work that day.

Claimant stated that she was off on Thursday and Friday, January 10 and 11, 1985. She returned to work on Saturday, January 12, 1985 and worked also on Monday, Tuesday and Wednesday, January 14, 15 and 16, 1985. However, she was forced to leave work again on Thursday, January 17, 1985 and did not return to work until June 3, 1985. During this period of time she was treated by William R. Boulden, M.D., and Thomas A. Carlstrom, M.D., in addition to Dr. Hoyt.

Claimant testified that on May 31, 1985, she was told by the employer that the insurance company said that it was time to come back to work. She then returned to work on June 3, 1985. Pontious asked for a return to work slip from a doctor but claimant told him that she did not have one. She told him that she was there because the insurance company told her to go back to work. Claimant stated that she did her former job of welding, stacking and stripping plastic. The pain came back again and she reported this to Pontious, who sent her to the office, who sent her to Creston Medical Clinic again. Claimant saw Dr. Hoyt on the following day, June 4, 1985. Claimant testified that James Frasina, plant manager, called her at home that evening at 6:00 p.m. He was angry. He said that he had talked to Dr. Hoyt and if she did not come back to work she was terminated. Claimant testified that she did not return to work because three doctors told her not to return to work. Claimant further testified that she knew that employer had found jobs for a number of other previously injured and disabled employees but that she did not try to work because she understood that she was fired.

Claimant investigated vocational rehabilitation as suggested by Dr. Hoyt. She registered at the Area Community College as a full time student in August of 1985. She finished a course of secretarial studies in July of 1986. She studied typing, shorthand, accounting, english, business communications, and mathematics. Her grade point average was 3.5 out of a possible 4.0. Claimant testified that she worked as a secretary at a real estate firm during the year that she attended college. She stated that she learns fast. After completion of the secretarial course she contacted the school placement office but that she was not able to get a job using these skills. She applied for secretarial jobs about 35 times but could not find a secretarial job because she had no previous experience as a secretary. Claimant granted that she had made no effort to get a secretarial job in Des Moines because she had no car. She had just recently

acquired a car prior to the hearing.

Claimant testified that she eventually got a full time job with the local community school system as a teacher's aid working 37 hours per week during the school year with blind, retarded and handicapped students. She teaches mathematics, english and acts as a sighted guide for a blind girl. Claimant earns $5.25 per hour in this job with no employee benefits. Claimant estimated that if she had stayed with employer she would be earning $6.85 per hour and would have full employee benefits. Claimant estimated that secretarial jobs pay from minimum wage up to $7 or $8 per hour. Claimant testified that the teacher's aid job will terminate in May of 1987.

Defendants' attorney suggested that since claimant had acquired secretarial skills as a result of this injury, then it is the best thing that ever happened to her. Claimant stated that the injury is the worst thing that ever happened to her.

Claimant testified that she still has pain in her right shoulder but it is not aggravated by her current work activities. Volleyball, bowling and aerobics now hurt her shoulder and she has given up these activities. She has had no surgery, takes no prescription drugs and she last saw Dr. Hoyt on June 4, 1985. She has received no treatment for her shoulders since then. She wears no neck brace or neck collar. She does do her own housework.

Pontious, claimant's supervisor, testified that she was only a fair employee. She had the potential to do a lot better. He thought that she could have been better motivated. He corroborated much of claimant's testimony about the nature of her work and the reporting of the injury. He testified that the work she did on June 3, 1985 was within the doctor's restrictions. He testified that her job that day was pulling plastic off of the metal panels. Her regular job of welding, boxing and stripping are considered to be light duty. He verified that employer has found employment for possibly 10 to 15 other previously injured workers within their doctor's restrictions. Light duty work receives the same pay as regular duty work. He stated that employer made an effort to accommodate claimant with work within her restrictions on January 17, 1985 and June 3, 1985. Employer would have tried again if she would have come back to work and tried to work a third time, but claimant did not come back. The two metal panels which claimant handled weighed one pound and approximately 10 to 12 ounces respectively (Ex. A & B). He said claimant would probably be earning $6.80 per hour if she had stayed with employer. She would also have had overtime available to her as in the past. When he asked the front office why claimant did not have a return to work slip, they told him to put her to work on light duty. He tried to accommodate her by giving her the lightest possible work. However, he acknowledged that there were lighter jobs such as lettering parts, handling

literature, doing decals, and cleaning machines. Pontious said that Creston's economy is very bad. Employer laid off seven persons recently. Approximately seven or eight downtown businesses have closed recently. Creston has the highest unemployment rate in Iowa.

Frasina, the plant manager, testified by deposition that claimant came to the plant after seeing Dr. Hoyt on June 4, 1985 and told other employees that she was not going to be able to work. She had a note from Dr. Hoyt to that effect. Frasina called Dr. Hoyt that afternoon. He stated that the doctor admitted that he could not find anything wrong with her. The doctor thought she had a low tolerance for pain. Frasina had examined the medical reports from Dr. Boulden and Dr. Carlstrom. He was aware of claimant's restrictions that she was not to work with her hands above her head and not to lift more than 25 pounds. Frasina said he called claimant after he talked to Dr. Hoyt. He told claimant that two specialists said she could work and that Dr. Hoyt admitted that he could not find anything wrong with her. There was no reason why she could not come back to work. He told her to come back to work or she would be discharged. The company policy is that if you have an unexcused absence for three days, it is grounds for termination. He told her to report on June 5, 1985. The following Monday, June 10, 1985, she was discharged because she did not return to work. She has not sought reemployment with employer since then (Ex. 2, pp. 5-10 & 25).

Frasina said they had made employment for five or six other injured workers making glass and doing other jobs, but he did not specifically offer one of these jobs to claimant at the time of his telephone conversation with her. He simply stated that she could come back to work. If claimant was working now she would be making $6.80 per hour and would be covered with employee benefit plans. Frasina described claimant as only a fair worker. He would rate her as average. Now that she is no longer an employee, he would not hire her with these restrictions. He feels obligated to take care of people hurt on the job, but he likes to start with new employees who are healthy. Frasina said that Dr. Hoyt has some idea of the jobs available at the plant but he has never visited the plant and was not familiar with the entire operation. He stated that after his conversation with Dr. Hoyt, he concluded that there was nothing wrong with claimant. She had a low tolerance for pain and she just really did not want to work. If she had come back to work when he told her, she could still be working there (Ex. 2, pp. 20-30).

The medical evidence is that claimant saw Dr. Hoyt a number of times. On the injury date of January 9, 1985, he diagnosed mild back strain and took her off work that day. Dr. Hoyt tried several medications, a soft cervical collar and physical therapy in January and February of 1985. He referred claimant to Dr.

Boulden, an orthopedic surgeon, on February 12, 1985. Dr. Boulden stated that he saw claimant for shoulder pain, the right one being worse than the left. Dr. Boulden proceeded to treat claimant on the history of the repetitive nature of her work described by claimant. He found that she had a full range of motion and her neurological examination was normal. She was tender in the paraspinous muscles in the cervical region down to the superomedial border of both scapulae. He diagnosed overuse syndrome (scapular syndrome) secondary to repetitive lifting. He changed her physical therapy and medications. Claimant also used a TENS unit at this time. Dr. Boulden predicted that once recovered, if she goes back to repetitive lifting, she will redevelope these same symptoms. He recommended that she find a different kind of work (Ex. 1, p. 13).

On February 22, 1985, Dr. Boulden commented that claimant continued to have bilateral scapular syndrome, right worse than left, and she was not able to return to work (Ex. 1, p. 15). On March 8, 1985, Dr. Boulden recommended to Dr. Hoyt that claimant not return to repetitive work. If she would avoid repetitive use of her shoulders, her symptoms would decrease and she could live a normal life. He said there was no physical damage at that time, but he would not release her back to her previous work (Ex. 1, p. 16). On March 28, 1985, Dr. Boulden prescribed restrictions. She should not use her shoulder in foreward flexion or abduction. As long as she works with her arms at her side, just basically using her hands and forearms, she will probably tolerate things well. If she starts lifting forward over her head or to the side, her symptoms will be aggravated. If these restrictions are met, she can return to work (Ex. 1, p. 17). However, physician's assistant Jerri McGee, who is employed by Dr. Hoyt, reinstituted physical therapy on April 4, 1985 and stated that claimant should not work (Ex. 1, p. 18). In Dr. Boulden's final report dated April 9, 1985, he simply continued his restrictions against forward flexion and abduction of her shoulder (Ex. 1, p. 19).

Claimant next saw Dr. Carlstrom, a neurosurgeon, on April 18, 1985. He too proceeded on the history of the repetitive nature of her work given by claimant. Claimant continued to have pain in her neck and shoulder but no radicular symptoms or weakness in her extremities. She had a good range of motion and her neurological examination was normal. He concurred with Dr. Boulden in the diagnosis of scapular syndrome. He had no specific recommendations. He felt in due time the symptom complex would resolve. He stated that claimant had not reached maximum medical benefits of healing and expected symptoms to continue for another two or three months. He concurred in Dr. Boulden's permanent restrictions of no lifting greater than 20 to 25 pounds and no lifting above the shoulder (Ex. 1, p. 20). Later on January 8, 1987, Dr. Carlstrom awarded a one to two percent permanent impairment rating which he stated was caused

by the January, 1985, incident while spot welding. He removed any arbitrary restrictions, but cautioned against heavy lifting of the upper extremities bilaterally (Ex. 1, p. 25).

Dr. Hoyt noted that claimant had returned to work on June 3, 1985 and had suffered a recurrence of right shoulder pain after three hours of light work pulling installation off wires. He examined claimant the following June 4, 1985. He added that he felt that she is not going to be able to do this strenuous type of work. He recorded that he recommended disabling her and vocational rehabilitation (Ex. 1, pp. 21 & 22).

In a letter to the plant manager dated June 7, 1985, Dr. Hoyt said that her problem relates back to the incident in January of 1985 when she was lifting a box and experienced pain in the shoulder and mid-back region. He said that on June 4, 1985, she had supra scapular tenderness on the right and tenderness in the right upper arm. She had a full range of motion of the neck. He concluded his report by saying: "It was my opinion then that if she was unable to tolerate even simple repetitive things, such as wire stripping, that she probably had very little hope to return to any type of employment at the plant, and she was so advised." (Ex. 1, p.24)

Claimant testified that this examination by Dr. Hoyt on June 4, 1985, was the last time that she saw any doctor for this condition.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on January 9, 1985 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 9, 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 (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."

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

Claimant's demeanor was observed and she is found credible.

Claimant sustained the burden of proof by a preponderance of the evidence that she sustained an injury on January 9, 1985 which arose out of and in the course of her employment with employer. Dr. Hoyt (Ex. 1, p. 23) and Dr. Carlstrom (Ex. 1, p. 25) specifically relate her condition to the work incident of lifting a box at work in January of 1985. Dr. Boulden, although he made no direct statement, proceeded to treat claimant on the basis of the history of the repetitive nature of her work (Ex. 1, p. 13). He recommended different work three different times (Ex. 1, pp. 13, 16 & 17). There was no evidence to suggest that claimant did not receive an injury arising out of and in the course of her employment with employer on January 9, 1985.

The injury was the cause of temporary disability on January 9, 10 and 11, 1985. Dr. Hoyt said he took her off work on January 9, 1985 (Ex. 1, p. 4). Claimant is not entitled to temporary disability benefits for the dates January 14, 15 and 16, 1985 because she returned to work and did work on those dates. Dr. Hoyt's notes and report for January 17, 1985, state that claimant was returned to full duty on that date (Ex. 1, p. 3 & 6). However, claimant testified that she tried to work on January 17, 1985, but could not do it and was off work until June 3, 1985. This was not controverted by defendants. Dr. Boulden said claimant could return to work if his restrictions

were met in his letter dated March 28, 1985 (Ex. 1, p. 17). The first indication that employer met these restrictions and reemployed her within these restrictions was on June 3, 1985, when claimant then in fact tried to work again (Ex. 1, pp. 22, 23 & 24). Dr. Carlstrom said the unsuccessful attempt to return to work did not end the healing period. Dr. Carlstrom said on April 24, 1985, he anticipated that her symptoms would continue for approximately two or three months. An application of his estimate would then provide a maximum medical improvement point based on his estimate of June 24, 1985 or July 24, 1985. However, after claimant saw Dr. Hoyt on June 4, 1985, she never again sought any medical treatment for this injury. Therefore, claimant has established by her own conduct of not seeking any further medical treatment that she achieved maximum medical improvement on her last doctor visit on June 4, 1985. Therefore, it is determined that the injury was the cause of healing period disability on January 9, 10 and 11, 1985 and again from January 17, 1985 to June 4, 1985. Claimant is entitled to temporary disability benefits for these dates.

Dr. Carlstrom awarded a one percent to two percent permanent functional impairment rating. Claimant is young, bright, attractive, has experience as a cashier, sales clerk and as a secretary while she attended college. Claimant has a high school education where she was in the upper one-half of her class and she has completed a one year course in secretarial skills at the Area Community College and achieved a three point five grade point average at that time. Claimant has experience as a teacher's aid. Claimant could not find a secretarial job near home due to her lack of previous experience as a secretary and due to the economy in Creston. Claimant also testified that she did not want to be a secretary. She acknowledged that she did not try to find a secretarial job in Des Moines, which is within commuting distance, because she did not have a car until shortly before the hearing.

Claimant was awarded a permanent functional impairment rating of one or two percent by Dr. Carlstrom. This is quite minimal. Dr. Boulden did not award any permanent functional impairment rating, nor did Dr. Hoyt. Claimant's range of motion tests and neurological examinations were always normal. Her chief diagnosis was sprain and tenderness. Fortunately, claimant was not severely physically impaired by this injury. Nevertheless, all of the doctors make it clear that claimant should adbandon repetitive type of work that requires lifting with her shoulders and lifting more than 25 pounds and lifting over head. Unfortunately, this eliminates much of the job market for many persons including this claimant. However, claimant does have secretarial skills if she chooses to use them and is within commuting distance of Des Moines which would provide a number of job opportunities within her restrictions either as a secretary or otherwise.

It is difficult to say whether claimant refused to return to work for employer at a job within her restrictions, or whether employer made it appear that there was no work within her restrictions that she could do. This point is moot, however, since it is abundantly clear that claimant should not perform repetitive work based on the recommendation of all three doctors. It also appears that she has quite reasonably chosen to follow this advice. In conclusion then based on all of the foregoing considerations, it is determined that claimant's injury is the cause of permanent impairment and a 10 percent industrial disability to the body as a whole. Claimant is entitled to 50 weeks of permanent partial disability benefits.

FINDINGS OF FACT

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

That claimant sustained an injury on January 9, 1985, which arose out of and in the course of her employment with employer when she lifted a box at work and experienced pain in her neck and shoulders.

That Dr. Hoyt and Dr. Carlstrom stated that the injury was the cause of her disability.

That Dr. Hoyt's medical records and claimant's testimony established that she was temporarily disabled on January 9, 10 and 11, 1985 and again from January 17, 1985 through June 4, 1985.

That Dr. Carlstrom awarded claimant a permanent functional impairment rating of one to two percent.

That claimant was age 23, has a high school education and one year of college and that she is bright, attractive and learns fast.

That claimant has experience as a cashier, sales clerk, secretary, teacher's aid and production worker.

That claimant acquired secretarial skills at the Area Community College and completed a one year course with a three point five grade point average.

That the economy is very bad in Creston, Iowa.

That claimant is within commuting distance of Des Moines where there may be a number of job opportunities within claimant's qualifications.

That claimant cannot return to repetitive work with her

shoulders, should not lift over 25 pounds, and should not work with her arms overhead.

CONCLUSIONS OF LAW

Based upon the evidence presented and the foregoing principles of law, the following conclusions of law are made:

That claimant sustained the burden of proof by a preponderance of the evidence that she sustained an injury on January 9, 1985 that arose out of and in the course of her employment with employer.

That the injury was a cause of both temporary and permanent disability.

That claimant is entitled to healing period benefits for January 9, 10 and 11, 1985 and from January 17, 1985 through June 4, 1985.

That claimant is entitled to 50 weeks of permanent partial disability for 10 percent industrial disability to the body as a whole.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant twenty point two-eight-six (20.286) weeks of healing period benefits for January 9, 10 and 11, 1985 and from January 17, 1985 through June 4, 1985 at the rate of one hundred forty-two and 31/100 dollars ($142.31) per week in the total amount of two thousand eight hundred eighty-six and 90/100 dollars ($2,886.90).

That defendants pay to claimant fifty (50) weeks of permanent partial disability benefits for a ten percent (10%) industrial disability of the body as a whole at the rate of one hundred forty-two and 31/100 dollars ($142.31) per week in the total amount of seven thousand one hundred fifteen and 50/100 dollars ($7,115.50).

That defendants pay these benefits in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That defendants are entitled to credit for 19 weeks of compensation paid prior to hearing at the rate of one hundred forty-two and 31/100 dollars ($142.31) per week.

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

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

Signed and filed this 12th day of November, 1987.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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1106; 1108.50; 1401;
1402.20; 1402.30; 1402.40
1701; 1802; 1803; 2209
Filed November 12, 1987
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRENDA RIPPERGER, Claimant, vs. BUNN-O-MATIC CORPORATION, Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	FILE NO. 789484 A R B I T R A T I O N D E C I S I O N

1106; 1108.50; 1401; 1402.20; 1402.30; 1402.40; 1701; 1802; 1803; 2209

Claimant, age 23, suffered a repetitive injury to both shoulders, right worse than left, that was described as tenderness and strain, with full range of motion and no neurological deficit. Claimant was awarded 20.2 weeks of healing period benefits for her time off work. Awarded 50 weeks of permanent partial disability benefits for a 10 percent industrial disability, based upon a one to two percent permanent impairment rating and restrictions of a 25 pound weight restriction, no more repetitive work with shoulders, and no more work with her arms overhead. Claimant was young, bright, attractive and had completed a one year secretarial course at the community college after her injury and was within driving distance of Des Moines. Credit given for healing period benefits paid prior to hearing.

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IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLINTON RUBY, Claimant, vs. GEORGE A. HORMEL & COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 733406 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 Clinton Ruby, claimant, against George A. Hormel & Company, his former employer, and Liberty Mutual Insurance Company, its insurance carrier. The case was heard at Fort Dodge, Iowa on June 30, 1987 and was fully submitted on conclusion of the hearing. The record in the proceeding consists of testimony from the claimant, claimant's exhibits one and two and defendants' exhibits A, B and C.

ISSUES

Claimant seeks 12 weeks of healing period compensation benefits connected with a surgery which was performed on January 30, 1986. Claimant also seeks an award of compensation for a 50% permanent partial disability of his right hand. The parties stipulated that claimant's rate of compensation is $271.12 per week.

SUMMARY OF EVIDENCE

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

Clinton Ruby is a 66-year-old gentlemen who retired from the George A. Hormel & Company plant in Fort Dodge, Iowa. The evidence in the case is uncontroverted with regard to the events

that have occurred. Claimant sustained a serious injury to the little finger on his right hand when it was crushed against a cart when an automatic door closed against it. Claimant developed a flexion contracture in the finger which, on April 4, 1984, led his treating orthopaedic surgeon, Samir Wahby, M.D., to rate claimant as having a 20-25% disability of the right hand and a 100% disability of the right little finger (claimant's exhibit 1, part 5).

The little finger, in its flexed condition, caused claimant numerous problems and was actually felt to be of little benefit to claimant. Accordingly, Dr. Wahby and claimant agreed to amputate the finger. Claimant entered Trinity Regional Hospital at Fort Dodge, Iowa on January 29, 1986. The amputation was performed on January 30, 1986. The procedure amputated the little finger and also included a ray amputation of the right fifth metacarpal head and part of its shaft (claimant's exhibit 1). Claimant testified that he was released from the physician's care approximately 12 weeks following the surgery. Dr. Wahby's office notes show that claimant was seen on February 14, 1986 and was scheduled for a recheck six weeks thereafter. At the time of the February 14, 1986 visit, the notes indicate that claimant's wound was dry and healing well and that claimant was advised to exercise his hand and fingers (claimant's exhibit 1, part 7). Six weeks from February 14, 1986 would be March 28, 1986, a date that is 8 2/7 weeks following the date claimant entered the hospital for the amputation surgery.

Dr. Wahby has rated claimant as having a 50% permanent impairment of his right hand as a result of the injury and resulting amputation. He bases that rating in part upon the AMA Guides to the Evaluation of Permanent Impairment and also upon the phantom pain of which claimant complained, the loss of balance for the hand through what he called the "feathering mechanism," and the loss of ability to use the hand in general.

The impairment of claimant's right hand was also evaluated by Thomas W. Bower, L.P.T., who found claimant's fifth finger to be amputated and also found him to exhibit a loss of approximately 50% of his grip strength in the hand. In reaching his 5% impairment rating, Bower simply used the AMA guides to convert the 100% loss of the right little finger into a 5% impairment of the hand. Bower indicated that he based his rating strictly upon the AMA guides (defendants' exhibits B and C). In defendants' exhibit B, it is noted that a doctor, identified only as Dr. Blair, had apparently given a 10% rating of the hand.

APPLICABLE LAW AND ANALYSIS

Claimant seeks 12 weeks of compensation for healing period under section 85.34(1). The evidence is not definite regarding the time when claimant reached maximum significant improvement

following the last surgery. Claimant estimated his recovery period from the last surgery at 12 weeks. The better evidence is the doctor's notes. According to the notes, the healing period would have ended on March 28, 1986. It is therefore found and concluded that claimant is entitled to 8 2/7 weeks of compensation for healing period, commencing January 29, 1986.

Iowa Code section 85.34(2)(e) provides 20 weeks of compensation for the loss of the little finger. Section 85.34(2)(l) provides 190 weeks of compensation for loss of the hand. The parties correctly agreed that claimant's permanent disability should be evaluated as a part of the hand since the last surgery clearly impaired the metacarpal bone in claimant's right hand. Mr. Bower and Dr. Wahby agreed that claimant has lost part of the grip strength in his hand. Additionally, claimant complains of pain in the hand.

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).

Loss of, as used in section 85.34, means loss of use of the member. Moses v. National Union C. M. Co., 194 Iowa 819, 184 N.W.2d 746 (1921). Where the injury is limited to a scheduled member, the loss is measured functionally. Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983). In making assessment of the loss of use, the evaluation is not limited to use of the AMA guides. A 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. Lauhoff Grain v. McIntosh, 395 N.W.2d 834 (Iowa 1986). Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Use of the AMA guides as indicated by Bower shows that the complete loss of the little finger is equal to a 5% loss of use of the hand (chapter 1, table 8, page 8). Bower's rating, however, fails to provide any assessment of impairment resulting from the loss of balance from the partial loss of the metacarpal. It does not allow for pain. More importantly, it does not provide any allowance for loss of grip strength, even though Bower clearly found a loss of approximately 50% of normal grip strength. Chapter 2 of the AMA guides, at table 5 found at page 74, indicates that a grading system exists for grading loss of strength. The evidence shows that claimant's loss would fall within grade 2 which provides for a 5-20% impairment of the member involved. Since claimant's loss of strength is approximately 50%, the mid-point of the range would seem appropriate, namely approximately 12 1/2%. Claimant's complaints of pain seem to be

something which should be characterized as aggravating, rather than disabling.

Clearly, the 5% rating from Mr. Bower is too low. On the other hand, the 50% rating from Dr. Wahby seems excessive. His original rating of 20-25% seems to be much more reasonable. One would expect that the purpose of the amputation surgery was to make claimant's hand more, rather than less, usable. When the overall loss of use of claimant's right hand is considered, it is found to be a 20% loss of use.

It was stipulated by the parties that claimant had been paid 47.5 weeks of compensation for permanent partial disability as well as all healing period compensation which was due prior to the time of the last surgery. Payment of compensation for healing period and payment of compensation for permanent partial disability are paid weekly in the same amount each week without regard to which type of compensation is being paid. Section 85.34(4) specifically provides for credit of excess payments of healing period against the award for permanent partial disability. There is no statutory basis, however, for the reverse situation. The statute was adopted following the decision of the Iowa Supreme Court in Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982). The same rationale that the court applied when crediting overpaid healing period compensation against permanent partial disability should be applied in this case to credit overpaid permanent partial disability against underpaid healing period compensation.

FINDINGS OF FACT

1. Claimant was paid all healing period compensation that was due him prior to the third surgery.

2. At the time of the third surgery, claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of injury from January 29, 1986 through March 28, 1986 when claimant reached the point that it was medically indicated that further significant improvement from the injury was not anticipated.

3. Claimant has a 20% loss of use of his right hand as a result of the injuries sustained on May 17, 1983.

CONCLUSIONS OF LAW

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

2. Claimant is entitled to receive 8 2/7 weeks of compensation for healing period at the stipulated rate payable commencing January 29, 1986.

3. Claimant is entitled to receive 38 weeks of compensation for permanent partial disability.

4. Where an overpayment of permanent partial disability has been made, it may be credited against an underpayment of healing period compensation.

5. Claimant has been fully paid for all healing period and permanent partial disability compensation which is due as a result of the injury he sustained on May 17, 1983.

ORDER

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

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against claimant pursuant to Division of Industrial Services Rule 343-4.33.

IT IS FURTHER ORDERED that defendants file a Final Payment Report showing payment consistent with this decision and otherwise file Claim Activity Reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

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

MICHAEL G. TRIER
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HAROLD E. SCADDEN, SR., Claimant, vs. NASH FINCH COMPANY, Employer, and MID CENTURY INSURANCE, Insurance Carrier, Defendants.	:	File No. 753208 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 Harold E. Scadden, Sr., against Nash Finch Company, his former employer, and Mid Century Insurance, the employer's insurance carrier. The case was heard at Cedar Rapids, Iowa on April 16, 1987 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of exhibits 1 through 32. The record also contains testimony from Harold E. Scadden, Sr., Roger Kromphardt and Patricia McCollom.

ISSUES

The issues presented by the parties for determination are the duration of the healing period and the extent of permanent partial disability. It was stipulated that claimant sustained an injury on December 14, 1983 which arose out of and in the course of his employment and that the injury was a proximate cause of the healing period which is claimed and of the permanent partial disability which exists. The stipulated rate of compensation is $356.21 per week. The case involved a third party claim which was settled for $100,000, of which $80,000 was apportioned by agreement of the parties between claimant and the insurance carrier with the insurance carrier receiving $62,291.51. No issue was identified with regard to the propriety of the division of the proceeds from the third party settlement or with regard to the method by which the division was accomplished.

APPLICABLE LAW AND ANALYSIS

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.

The issues of injury arising out of and in the course of employment and causation were established by stipulation of the parties. They are clearly supported by the evidence in the record (exhibits 20, 21 and 23, page 18).

Under the provision of section 85.34(1) the claimant is entitled to receive compensation for healing period until he returns to work, it is medically indicated that he is capable of returning to employment substantially similar to that in which he was engaged at the time of injury or it is medically indicated that significant improvement from the injury is not anticipated, whichever event occurs first. The healing period, when it ends by reaching maximum medical improvement, terminates contemporaneously with the time at which the physician determines that no further improvement is going to occur. It is not determined in retrospect where a physician, through hindsight, determines that improvement ceased to occur at some particular time in the past. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984). Armstrong Tire and Rubber Co. v. Kubli, 312 N.W.2d 60, 65 (Iowa App. 1981). It is the point at which the physician makes the determination that no further improvement will be forthcoming. The only substantial evidence relative to healing period in the record of this case is that which comes from William John Robb, M.D. Dr. Robb had been treating claimant and, subsequent to an examination on March 20, 1984, recommended a CT scan of his lumbar spine, prescribed medication, exercises and a back support and directed a return visit in three weeks (exhibit 11). Clearly, when Dr. Robb authored the exhibit, which is dated March 22, 1984, various treatment methods were being employed and hope of improvement existed. In exhibit 14, a letter from Dr. Robb dated May 7, 1984, he indicates to the employer that he does not expect that claimant will be able to return to his truck driving position. In exhibit 15, dated July 25, 1984, Dr. Robb states that it is his impression that claimant will carry a 15% permanent impairment of function of the body as a whole and confirms his opinion that claimant will not be able to return to truck driving. Exhibit 16 is a report from Dr. Robb dated August 8, 1984 with regard to an examination he performed on August 3, 1984. Dr. Robb again confirms that claimant has not shown any substantial improvement since April. The last paragraph of exhibit 16 states:

> Prognosis: I do not anticipate that this patient will return to his previous occupation as a truck driver. On previous examination I had felt that

> his leg pain and impairment of dorsiflexion of the foot would improve. Since it has not, his permanent impairment of function, I would anticipate, would be 20% of the body as a whole.

Exhibit 16 clearly shows that, at the time of claimant's previous examination, which was May 25, 1984, Dr. Robb expected further improvement in claimant's leg pain, but that such did not occur. Under the appropriate rules, exhibit 16 establishes the end of the healing period since it clearly shows it was on August 8, 1984 that Dr. Robb concluded that further significant improvement was not forthcoming. The fact that hindsight shows that actual improvement ceased in late March of 1984 does not alter the result. It was not until August of 1984 that it was medically indicated that further significant improvement from the injury was not anticipated.

Since claimant's injury is to his spine he has an impairment to the body as a whole and 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).

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.

There is no rule of law which requires any employer to give a recommendation, favorable or unfavorable, for a former employee. Where an employee is forced to seek a new occupation as the result of an occupational injury, however, anything which affects the worker's ability to obtain new employment may ultimately have some bearing upon the industrial disability award. Generally speaking, those workers who are able to return

to gainful employment at a good wage receive a lower award for industrial disability than those who are unable, through bona fide efforts, to obtain new employment.

Claimant described his current complaints as numbness in his left leg, pain in his low back and stiffness in his neck. He stated that his symptoms have changed little since the accident. He feels that his abilities are greatly impaired. Claimant testified that he can drive an automobile for approximately one hour before he has to get out and walk. He stated that his condition varies with the weather. He testified that he has very little ability to lift and relies upon others. Claimant has declined to have surgery, feels that the physicians have not guaranteed a favorable result from surgery and feels that they do not disagree with his decision to decline surgery.

Scadden has looked for work as a car salesman, security guard, truck dispatcher and teacher at Kirkwood Community College. Claimant has completed a home study locksmith course. He serves on the volunteer fire department at Center Point, Iowa and has taught first aid to the fire department and boy scout troop. He testified that he is unable to work as an ambulance attendant because it would require lifting in excess of his capabilities. Claimant has enrolled in a course at the Mental Health Institute at Independence, Iowa which, when completed, will certify him as a drug and alcohol counselor and will enable him to be employed at a drug and alcohol treatment center. Scadden testified that he expects an entry level salary of approximately $15,000 per year in such a position.

Dr. Robb, who treated claimant, has expressed his opinion that claimant's functional capabilities are such that he should avoid riding which would result in him being bounced up and down or jarred, that he avoid bending over and picking up things which weigh more than 35 pounds and that he avoid repetitive lifting of more than 20 pounds (exhibit 23, page 19; exhibits 22 and 17).

Claimant has been evaluated by Warren N. Verdeck, M.D., who assigned a 7% impairment rating due to the accident and by John R. Walker, M.D., who assigned a 20-25% impairment rating. Neither provided any estimate of claimant's functional capabilities. Accordingly, the capabilities expressed by Dr. Robb are accepted as correct.

Claimant has been thoroughly evaluated by the Rehabilitation Education and Services Branch of the Iowa Department of Public Instruction. The conclusion reached by the counselor, Gary Widdel, was that claimant was essentially unemployable without further training (exhibits 27 and 28).

Claimant has been evaluated by Roger Kromphardt, a qualified

vocational consultant, who concluded that claimant's interest in alcohol and drug counseling is appropriate and will provide him entry level employment in the $13,000-16,000 per year range. Kromphardt felt that claimant had lost access to 75% of the jobs in the labor market to which he would have had access prior to his injury.

Patricia McCollom, a highly qualified vocational consultant, expressed a more optimistic outlook for claimant than Kromphardt. McCollom listed a number of positions which she felt claimant was capable of performing. The wage scales for such positions, as provided by her, are generally no more than the wage level of the drug and alcohol counselor position which claimant expects to attain. McCollom agreed that Scadden was participating in an appropriate educational program which would enable him to return to gainful employment in an area of his interest that is consistent with his skills and abilities.

Kromphardt, McCollom and Widdel disagree regarding claimant's access to the job market. The conclusions reached by Kromphardt and McCollom agree that claimant's current course of study and his interest in the drug and alcohol counseling field constitute an appropriate endeavor and career goal. There appears every reason to believe that claimant will be successful in this field if he should choose to pursue it. The drug and alcohol counselor position is found to be a reasonably accurate indicator of claimant's earning capacity. As such a counselor, he would earn approximately $15,000 per year. As a truck driver, he earned approximately $30,000 per year (exhibits 24, 25 and 26). The only possibility suggested in the record of a higher income for claimant is that of a car salesman. Such is a position which many attempt to perform, but in which few are successful. Claimant's first aid skills are skills for which there is no known full-time gainful employment for individuals who do not have the physical capacity to lift and handle patients. Teaching boy scout troops and volunteer fire departments is customarily performed as a community service, without pay, or as a part-time, intermittent type of employment. When all the factors of industrial disability are considered, it is found and concluded that claimant has a 50% permanent partial disability.

FINDINGS OF FACT

1. Following the injury of December 14, 1983, claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of injury from December 14, 1983 until August 8, 1984, when it was medically indicated that further significant improvement from the injury was not anticipated. This computes to a span of 34 1/7 weeks.

2. Prior to the injury, claimant was capable of earning in excess of $30,000 per year. His current level of anticipated

earning ability, consistent with his age, education, training, qualifications and physical capabilities, is approximately $15,000 per year, resulting in a 50% loss of earning capacity.

3. The witnesses who testified at hearing are credible witnesses.

4. Claimant is well-motivated to return to work.

5. Claimant's injury was an aggravation of a preexisting condition which rendered him incapable of continuing in employment as a truck driver with Nash Finch Company.

CONCLUSIONS OF LAW

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

2. Claimant is entitled to receive healing period under the provisions of section 85.34(1) of the Code commencing December 14, 1983 and running through August 8, 1984, a span of 34 1/7 weeks.

3. Claimant has a 50% industrial disability which, under the provisions of section 85.34(2)(u), entitles him to receive 250 weeks of compensation for permanent partial disability.

4. An employer is under no legal obligation to provide a recommendation for a former employee and failure to do so is not a basis for imposing a penalty or other adverse treatment against the employer. If such, however, results in decreased employability or otherwise impairs the former employee's ability to obtain employment, the refusal may have some bearing on the extent of industrial disability.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant thirty-four and one-seventh (34/17) weeks of compensation for healing period at the stipulated rate of three hundred fifty-six and 21/100 dollars ($356.21) per week commencing December 14, 1983.

IT IS FURTHER ORDERED that defendants pay claimant two hundred fifty (250) weeks of compensation for permanent partial disability at the stipulated rate of three hundred fifty-six and 21/100 dollars ($356.21) per week commencing August 9, 1984.

IT IS FURTHER ORDERED that all past due amounts, remaining after subrogation offsets are applied, are to be paid in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants pay the costs of this

action pursuant to Division of Industrial Services' Rule 343-4.33.

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

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

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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002377

FILED

AUG 19 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RACHELLE R. SCHARPING, Claimant, vs. ALEXANDER MANUFACTURING CO., Employer, and KEMPER GROUP, Insurance Carrier, Defendants.	:	File No. 808823 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 Rachelle R. Scharping, claimant, against Alexander Manufacturing Company, employer, hereinafter referred to as Alexander, and Kemper Group, insurance carrier, for benefits as a result of an alleged injury on November 6, 1985. On June 24, 1987 the case was submitted on a stipulated written record.

The parties have submitted a pre-hearing report of contested issues and stipulations which is now approved and accepted as part of the record of this case. The exhibits constituting the stipulated record as listed in the pre-hearing report submitted on June 24, 1987 are now received into the evidence of this case. All of this evidence was considered in arriving at this decision.

The pre-hearing report contains the following stipulations:

1. On November 6, 1985, claimant received an injury which arose out of and in the course of her employment with Alexander.

2. The November 6, 1985 work injury was a cause of both temporary disability during a period of healing and permanent scheduled member disability to the right index finger.

3. The commencement date for permanent partial disability benefits, if awarded herein, shall be January 28, 1986.

4. Claimant's rate of compensation, in the event of an award of weekly benefits from this proceeding, shall be $118.22.

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

The only issue submitted by the parties for determination in this decision is the extent of claimant's entitlement to weekly benefits for permanent disability and claimant's entitlement to interest on those benefits.

FINDINGS OF FACT

1. As stipulated, on November 6, 1985 claimant suffered an injury to her right index finger which arose out of and in the course of her employment with Alexander.

The medical records submitted into evidence show that claimant suffered a "crush injury to the right index fingertip extensor disruption and open fracture of the distal portion of the middle phalanx." Claimant was immediately treated by an orthpaedic surgeon, R. L. Emerson, M.D., and claimant underwent a surgical procedure described by Dr. Emerson as "debridement of wound", "repair of extensor tendon", and "K-wire fixation of the IP joint." There was an initial attempt by Dr. Emerson to avoid an arthrodesis or fusion of the distal interphalangeal (DIP) joint, but claimant failed to improve as hoped by Dr. Emerson. On January 15, 1986, Dr. Emerson surgically fused the DIP joint. The parties stipulated that claimant's healing period ended on January 28, 1986.

2. The work injury of November 6, 1985 was a cause of a 30% permanent partial impairment to claimant's right index finger.

Claimant's primary treating physician, Dr. Emerson, opined that claimant, as a result of the work injury, suffers from a 30% permanent partial impairment to the right index finger. Claimant argues that a fusion of the DIP joint constitutes a total loss of function of the distal phalanx. Dr. Emerson, in his letter report of September 18, 1986, disagreed. He stated the following:

> I have reviewed our rating scales which we make reference to for evaluation of permanent impairment. In our scales, there is a difference in percentage of impairment between an amputation at the distal interphalangeal joint and ankylosis or fusion of that joint. Ms. Scharping has not had an amputation at the joint and thereby still has present her distal phalanx. However, it is fused at the distal interphalangeal joint; that is the joint between the middle and distal phalanx bones. The impairment rating for a fused joint in the position which she is fused in is 30% of that finger. Amputation at that joint, thereby losing

the length of the distal phalanx, would result in a 45% impairment to that finger. The 30% impairment applies to loss of joint function. The 45% impairment due to amputation takes into account loss of finger length and function. She has lost the use of her distal interphalangeal joint. She still has the length of that bone but not the functional use of the joint.

Dr. Emerson's views are uncontroverted in the record.

CONCLUSIONS OF LAW

Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

Based upon a finding of a 30% loss of use of the right index finger, claimant is entitled as a matter of law to 10.5 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(b) which is 30% of the 45 weeks allowable for an injury to the index or first finger in that subsection. It was stipulated that claimant was paid this amount of permanent partial disability benefits in April, 1986.

Claimant argues that she should be entitled as a matter of law to 50% of the index finger under section 85.34(2)(f) which states that the loss of the first distal phalange shall equal the loss of one-half of a finger. However, the undersigned agrees with Dr. Emerson in that the loss by amputation is not equivalent to a loss by fusion of the DIP joint. It is apparent that Dr. Emerson was making reference to the AMA or similar guidelines for rating impairments. In the AMA guide, impairment of the finger by fusion of the DIP joint can be from 30-45% depending upon the position of the fused distal phalange. See Guides to the Evaluation of Permanent Impairment, Second Edition,

American Medical Association, page 6.

Claimant argues that she should be entitled to interest between the time of the termination of her healing period and the time she was paid permanent partial disability benefits in April, 1986. On this issue, claimant is correct. Iowa Code section 85.34(2) states that permanent partial disability benefits should begin at the termination of the healing period. The Iowa Supreme Court has ruled that interest upon permanent partial disability benefits begins at that time. Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); Farmers Elevator Company v. Manning, 286 N.W.2d 174 (Iowa 1979). Defendant argues that Dr. Emerson did not give an impairment rating until April, 1986 and that they should not be expected to pay interest before they know the full extent of the impairment. This argument was rejected in Teel, 394 N.W.2d 407. As in Teel there was no question that claimant would suffer some extent of permanent impairment from the fusion on January 15, 1986, two weeks before the end of healing period. A defendant should not delay the payment of benefits simply because the full extent of the impairment is not known.

Claimant seeks reimbursement for the costs of a report from Dr. Emerson, exhibit 5. This request is appropriate under Division of Industrial Services Rule 343-4.33.

ORDER

1. Defendants shall pay to claimant interest at the statutory rate upon ten point five (10.5) weeks of permanent partial disability benefits at the rate of one hundred eighteen and 22/100 dollars ($118.22) per week from January 28, 1986 until the time claimant actually received those benefits in April, 1986.

2. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33. Specifically the sum of thirty five dollars ($35.00) shall be paid to claimant for the cost of Dr. Emerson's September, 1986 report and defendants are ordered to pay this amount accordingly.

3. Defendants shall file Claim Activity Reports of the payment of this award as requested by the agency pursuant to Division of Industrial Services Rule 343-3.1.

4. This matter shall be set back into assignment for pre-hearing and hearing on the extent of additional permanent disability benefits to which claimant may be entitled for an alleged unreasonable delay in the commencement of benefits under Iowa Code section 86.13.

Signed and filed this 19 day of August, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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002382

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EUGENE W. SCHATTSCHNEIDER, Claimant, vs. JOE BRADLEY EQUIPMENT, Employer, and UNIVERSAL UNDERWRITERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 792208 A R B I T R A T I O N D E C I S I O N FILED JUL 15 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Eugene W. Schattschneider, claimant, against Joe Bradley Equipment, employer, and Universal Underwriters Insurance Company, insurance carrier, for benefits as a result of an alleged injury of April 8, 1985. A hearing was held in Mason City, Iowa, on April 1, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant and LaVon Schattschneider; claimant's exhibits 1 through 10; and defendants' exhibits A and B. Both parties filed briefs. Defendants' brief withdrew the section 85.39 issue.

The parties stipulated that there is no dispute as to temporary total and/or healing period benefits; that any permanency benefits awarded would commence on September 6, 1985; and that claimant's injury is scheduled. The parties stated other stipulations on the record.

ISSUES

The contested issues are:

1) The applicable rate of weekly compensation;

2) The amount of statutory interest owing, if any; and

3) Nature and extent of disability. The fighting issue is whether claimant's disability is isolated to claimant's right hand or whether it extends to claimant's right arm (this is obviously a fact question).

SUMMARY OF THE EVIDENCE

The relevant evidence is mentioned in the parties' briefs.

APPLICABLE LAW AND ANALYSIS

I. The standards to determine weekly rate of compensation will now be determined. The rate portion of claimant's brief reads in part:

> The legal issue thus is whether the dependency exemption for rate purposes is determined by actual principal dependency [See 85.42(2): "A stepchild... shall be regarded the same as issue of the body only when the stepparent has actually provided the principal support for such child."] or whether the dependency status is related to tax considerations only [See 85.61(10)(a)(b)].

It is concluded that the alleged dependent's status for tax purposes does not as a matter of law resolve the rate dependency matter at issue here. As a factual matter, it is determined that the child in question (Shane) was dependent,for purposes of rate computation,under the Iowa Workers' Compensation Act. However, the gross earnings aspect of the rate issue is determined favorable to defendants in this action. The parties shall compute the rate in accordance with the above determinations.

II. Regarding the question of statutory interest, defendants' position on this issue as set out on page 2 of their brief is found to be persuasive.

III. The nature and extent of the disability issue will now be resolved. A finding of fact will be made that claimant's stipulated work-related injury caused impairment to his right arm rather than solely his right hand. Dr. Bartolo's 37 percent rating is found to be persuasive. See Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985) (appropriate factors for evaluating medical opinions are set out therein).

FINDINGS OF FACT

1. Claimant's stepson, Shane, was a dependent on April 8, 1985.

2. Claimant's injury of April 8, 1985 caused impairment to claimant's right arm and not solely his right hand.

3. Claimant's injury of April 8, 1985 caused claimant to sustain a 37 percent permanent partial impairment to his right arm.

CONCLUSIONS OF LAW

1. The parties shall determine the appropriate rate of weekly compensation in accordance with the provisions of this decision.

2. The parties shall determine the amount of statutory interest owing in accordance with the provisions of this decision.

3. The parties shall compute the amount of weekly benefits owing in accordance with the provisions of this decision.

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) as requested by this agency.

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

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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002386

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRANCES C. SCHON,	:	
	:	
Claimant,	:	File No. 735433
	:	
vs.	:	
	:	A R B I T R A T I O N
DEPARTMENT OF HUMAN SERVICES,	:	
	:	D E C I S I O N
Employer,	:	
	:	FILED
and	:	
	:	OCT 16 1987
STATE OF IOWA,	:	
	:	IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier, Defendants.	:	

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Frances C. Schon, claimant, against the Iowa Department of Human Services, employer, and the State of Iowa, insurance carrier, for benefits as the result of an alleged injury of July 30, 1981. No memorandum of agreement has been filed in this case. A hearing was held in Sioux City, Iowa, on May 5, 1987 and the case was submitted on that date.

The record consists of the testimony of claimant, Lela Tweet, Lucille Harky, and Patricia A. Huxsol; claimant's exhibits 1 through 15; and defendants' exhibits A through G. Both parties filed briefs. Claimant filed a supplemental brief on July 24, 1987.

The parties stipulated that claimant's weekly rate of compensation is $11.57; that the contested medical bills are reasonable in amount; and that a credit issue regarding a third party action has been informally resolved.

ISSUES

The contested issues are:

1) Whether this action does not lie because of Iowa Code section 85.1(1) which excludes certain individuals from the coverage of the Iowa Workers' Compensation Act;

2) Whether claimant established an employer-employee relationship;

3) Whether claimant received an injury on July 30, 1981 that arose out of and in the course of her employment;

4) Whether claimant gave proper notice to the defendants, or the defendants had actual knowledge of the alleged injury, as required by Iowa Code section 85.23;

5) Whether there is a causal relationship between the alleged injury of July 30, 1981 and claimant's asserted disability;

6) Nature and extent of disability; and

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

SUMMARY OF THE EVIDENCE

Claimant testified that she cleaned the home of Louis and Lela Tweet on Thursdays. She also testified that her total earnings for working at this private dwelling and other private dwelling was less than $200 during the thirteen weeks preceding July 30, 1981.

Claimant testified that she worked in a chore-service program that was created to assist recipients of public assistance to help them maintain sanitary living conditions. Claimant testified that she performed chore services in a total of five homes, one of which was Louis and Lela Tweet's home. On July 30, 1981, claimant fell at the Tweet residence in Sioux City, Iowa, injuring her back, neck, upper thighs and other body parts.

Lucille Harty (formerly employed by defendants) testified that the claimant performed the domestic duty of cleaning the private dwelling of Louis and Lela Tweet and that the Tweet residence was a private dwelling. Harty testified that claimant cleaned other private dwellings as well.

Patricia Huxsol (an employee of Woodbury County, Iowa) testified that the chore-service program was discontinued in 1982. This witness testified that the Tweet residence was a private dwelling on July 30, 1981. Huxsol made reference to Exhibit E which documents that claimant made less than $200 in the thirteen weeks preceding July 30, 1981 performing chores in the Tweet private dwelling and other private dwellings.

Exhibit A, deposition exhibits 2 through 4, sets out the contract that deliniated claimant's duties on July 30, 1981

performing services for the chore-service program.

APPLICABLE LAW AND ANALYSIS

Iowa Code section 85.1(1) reads as follows:

> Any employee engaged in any type of service in or about a private dwelling except that after July 1, 1974, this chapter shall apply to such persons who earn two hundred dollars or more from such employer for whom employed at the time of the injury during the thirteen consecutive weeks prior to the injury, provided said employee is not a regular member of the household. For purposes of this subsection "member of the household" is defined to be the spouse of the employer or relatives of either the employer or spouse residing on the premises of the employer.

Claimant argues that the above-quoted provision does not exclude coverage in this particular case because she worked in more than one private dwelling. This argument is rejected. See Iowa Code section 4.1(3). Claimant's argument that she was not a household or domestic servant is also without merit. Also, it is undisputed in this case that claimant earned less than $200 during the thirteen week period preceding the alleged injury of July 30, 1981. Claimant is excluded from coverage in this particular case, and is denied benefits, because under the undisputed facts she is excluded from coverage by the clear language of Iowa Code section 85.1(1).

FINDINGS OF FACT

1. The claimant was a household or domestic servant on July 30, 1981 and also worked in such a capacity during the thirteen week preceding July 30, 1981.

2. The claimant earned less than $200 in her capacity as a household or domestic servant during the thirteen weeks preceding July 30, 1981.

CONCLUSIONS OF LAW

1. The dispositive issue in this case is whether or not claimant is excluded from coverage pursuant to Iowa Code section 85.1(1), and it is concluded that claimant is excluded from coverage in accordance with the plain language of that Code section.

ORDER

IT IS THEREFORE ORDERED:

that claimant taken nothing from these proceedings.

That claimant is ordered to pay all costs in this action.

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

T. J. McSweeney

T. J. McSWEENEY
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002390

FILED

NOV 23 1987

BEFORE THE IOWA INDUSTRIAL COMMISSIONER IOWA INDUSTRIAL COMMISSIONER

LUCILLE A. SCHULTZ, Individually and as Executor of the Estate of Edwin A. Schultz,	:	File No. 752752
Claimant,	:	A R B I T R A T I O N
vs.	:	A N D
DUNHAM-BUSH, INC.,	:	D E A T H
Employer, Self-Insured, Defendant.	:	B E N E F I T S
	:	D E C I S I O N

INTRODUCTION

This is a proceeding in arbitration and for death benefits brought by the claimant, Lucille A. Schultz, individually and as executor of the Estate of Edwin A. Schultz, deceased, against decedent's self-insured employer, Dunham-Bush, Inc., to recover benefits under the Iowa Workers' Compensation Act as the result of an injury allegedly sustained November 14, 1983 with an alleged ensuing death on September 7, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner at Des Moines, Iowa, on June 22, 1987. A first report of injury was filed December 19, 1983. The parties stipulated that the defendant has paid claimant 8 4/7 weeks of compensation at the stipulated rate of $221.42.

The record in this case consists of the testimony of claimant, of Bruce Tuttle and of James B. Hart as well as of joint exhibits 1 through 20, claimant's exhibits A and B and defendant's exhibit I.

ISSUES

Pursuant to the pre-hearing report, the parties stipulated that decedent's rate of weekly compensation was $221.42, that medical costs were fair and reasonable, that decedent was off work from August 22, 1985 through September 7, 1985 on account of his injury, that any permanent partial disability benefits due commence on February 13, 1984, and that death benefits, if due, are due from the date of decedent's death. The issues remaining for resolution are:

Whether decedent received an injury which arose out of and

in the course of his employment;

Whether there is a causal relationship between the alleged injury and ensuing disability and death;

Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement;

Whether claimant is entitled to payment of certain medical costs as causally related to the alleged injury; and,

Whether claimant is entitled to payment of burial expenses pursuant to section 85.28.

REVIEW OF THE EVIDENCE

Decedent Edwin A. Schultz, spouse of claimant Lucille A. Schultz, was born July 30, 1919 and died September 7, 1985. Decedent began work for Dunham-Bush Company on November 8, 1979 and worked for the company until his May 3, 1985 retirement. He initially worked as a janitor and then as a machine operator. Decedent had prior experience in the seed corn and seed corn sales business. On November 14, 1983, decedent reported that he had hurt his back while lifting a large impeller in the course of his machine operator duties. An impeller weighs approximately 75-80 pounds, is 14 inches in diameter and 3 inches thick. Decedent did not initially miss work following that incident. He sought no medical treatment, but did Williams exercises that had been originally prescribed in 1971 when he had visited the Conrad Clinic on account of back complaints. Decedent's wife also administered aloa vera back rubs to decedent, after November 14, 1983, to relieve what she characterized as back pain. Mrs. Schultz testified that her husband continued to have back complaints until December 6, 1983. On December 6, 1983, decedent reported that his leg had gone numb and that he had had difficulty rising from a seated position at the end of his work break. Mrs. Schultz, who also worked at Dunham-Bush, left work and drove decedent to the Conrad Clinic. Decedent subsequently left work on December 15, 1983 and remained off work until February 13, 1984. Decedent subsequently worked at Dunham-Bush until his retirement date.

On the morning of December 6, 1983, decedent had run a turret lathe and had changed a chuck. He reported he had not noticed anything particular (in the course of changing the chuck). A chuck weighs approximately 75 pounds and must be loosened from the turret lathe and then lifted from the lathe.

Subsequent to December 6, 1983, decedent's Conrad Clinic physicians referred him to Mark Brodersen, M.D., an orthopaedist. Mrs. Schultz testified that decedent continued to have back pains and a lack of left leg control from December 6, 1983

onward. A laminectomy was performed on August 22, 1985. Following his hospital discharge, decedent developed a fever and breathing difficulties. Decedent expired on September 7, 1985.

Decedent had a number of health problems not directly related to his lower back complaints: He had preexisting severe kyphoscoliosis; he had ulcers, which his wife reported were controlled with medication; he had diabetes, also controlled with oral medication; and, he had a malignant kidney removed in 1980. His wife reported he had no further problems on account of the kidney cancer. Medical records also did not reflect continuing problems on account of that condition. James B. Hart, Dunham-Bush industrial relations manager, reported that decedent had had backaches, that decedent shuffled when he walked and that decedent was overweight.

Mark Brodersen, M.D., a board-certified orthopaedic surgeon, testified by way of his April 29, 1986 deposition. Dr. Brodersen testified that he first saw decedent on December 23, 1983 with complaints of back and left leg difficulties. Dr. Brodersen indicated that decedent gave a history of having seen John A. Grant, M.D., some 12 years earlier with back problems and that exercises were then prescribed. Decedent reported that he had problems when he skipped his exercises, but that his condition was now gradually getting worse with more problems "all the time," and with back soreness. He reported decedent stated that, on November 14, 1983, he had pulled a muscle in the right flank area and that, on December 6, 1983, his left foot had gone asleep.

Upon physical examination, flexion was to 70 degrees; extension to 10 degrees; side bending to 10 degrees; and, twisting to 15 degrees bilaterally. Dr. Brodersen's diagnosis was of left radiculopathy related to a fifth lumbar nerve root condition causing numbness and weakness of the left leg with pain. Dr. Brodersen then advised decedent to remain off work, to rest, and to continue his Williams exercises. Decedent was fitted with a left leg splint to control his foot and was able to return to work without significant discomfort. In May, 1985, decedent returned with complaints that he still lacked control of the foot and Dr. Brodersen referred him to _____ Kitchell, M.D., a neurologist.

A CT scan performed July 30, 1985 revealed a large extradural defect at L4-5 on the right consistent with a fairly large disc; a smaller herniated disc on the left at L4-5; and, a possible small herniated disc on the right at L3-4. An epidural steroid block was performed on July 31, 1985 with surgery performed August 22, 1985 and hospital discharge on August 27, 1985. On August 29, 1985, decedent had complaints of fever and congestion for which Dr. Brodersen referred him to Dr. Button. Decedent had a low-grade temperature from August 22, 1985 through August

25, 1985 with a decrease in the temperature as of August 26, 1985.

Glendon D. Button, M.D., a board-certified family practitioner, testified by way of his April 17, 1986 deposition. He reported that he saw decedent on September 5, 1985 with a fever, shortness of breath and complaints of chest pain. A physical examination revealed minimal crepitant rales in the left base of the chest. Dr. Button apparently referred decedent to Louis W. Banitt, M.D., apparently an internal medicine specialist. Dr. Bannitt's impression was probable atelectasis bronchitis, minimal pneumonitis.

Dr. Button arrived at claimant's home on September 7, 1985 at approximately 10:20 p.m. He accompanied decedent to the Marshalltown Hospital by ambulance. Decedent died shortly thereafter. The certificate of death stated the immediate cause of death was bilateral pulmonary thromboemboli due to a laminectomy, ruptured L4-5 disc.

Dr. Button opined that decedent's death was caused by bilateral pulmonary emboli, probably secondary to a laminectomy, with probable development of blood clots in the large veins of the leg or pelvis. He indicated that an autopsy performed following decedent's death revealed that blood clots blocked decedent's lungs. Dr. Button reported that such occasionally happens following major surgery, especially of the back or of the pelvic organs. Dr. Button indicated that the autopsy revealed that clots were found in the pulmonary artery with one clot representing a fusion of two smaller clots. He reported that, from that finding, it could be surmised that the clot was from a smaller vein, probably in the upper leg or pelvis.

Dr. Button testified that physicians at the Conrad Clinic had seen decedent approximately every three or four months from 1975 through 1985 and that he himself had seen decedent several times each year, but that decedent had not had back complaints until 1983. Dr. Button agreed that a Dr. Patterson had treated decedent for back discomfort in February, 1973, with a medical note of "probable IRVD" contained in clinic files. Button interpreted the note to mean probable ruptured intervertebral disc. Dr. Button agreed that x-rays of February 22, 1971 reported that decedent had significant degenerative disc disease of the lower thoracic spine; pronounced lumbar lordosis in the horizontal position in the sacrum as well as narrowing of the L4-5 and L5-S1 interspaces. Considerable degenerative arthritis in the zygapophysis joints in the lumbosacral area was also found.

Dr. Brodersen reported that blood clots are known and recognized complications of surgery. In response to an extensive hypothetical question, Dr. Brodersen opined that decedent sustained a work-related injury which subsequently caused him to

develop numbness and weakness in the leg for which surgery was performed. Dr. Brodersen explained that, while decedent had a long history of back problems, he believed that the work-related injury caused the disc to pinch the nerve in such a way that numbness and weakness developed. He reported that decedent had not previously had problems in that regard and that "that problem occurred at work." Dr. Brodersen later stated that he could not really say whether decedent's injury occurred on November 14, 1983 or on December 6, 1983. He agreed that decedent had had pain starting on November 14, but reported that the significant episode or occurrence was as of December 6, 1983 when the leg numbness began. He later stated that there may certainly be a connection to the (November 14) incident, but that he thought the December 6, 1983 (episode) was most significant.

Dr. Brodersen subsequently stated that, if decedent continued to have a sore back from (November 14) to the time that his leg went numb, that fact was significant in that there was probably some relationship to the numbness that later developed. He reiterated, however, his feeling that the most likely source of decedent's problem was the December 6 episode and opined to a reasonable degree of medical certainty that the 1985 surgery was directly related to the December 6, 1983 incident.

Dr. Brodersen indicated that, while decedent may have fallen on ice on December 15, 1983, his understanding was that decedent had had the onset of numbness and weakness prior to that fall.

Dr. Brodersen indicated that a disc herniation would occur at the same time an individual would first notice foot or leg drop unless some other process was ongoing. He opined that, in some cases, diabetes can affect and cause leg numbness with later disc herniation. Dr. Brodersen described diabetic neuropathy as a condition in which diabetes affects and influences the speed at which electrical signals travel through the nerves. He reported that the condition can produce numbness, pain or weakness in the leg. He indicated, however, that Dr. Kitchell had felt decedent's problem related to a disc condition and not to his diabetes. Dr. Brodersen agreed that decedent did have degenerative disc disease.

Dr. Brodersen further opined that it was not unreasonable to relate decedent's death to his surgery "in some degree" given that decedent's blood clot occurred within a couple of weeks of the surgery. He subsequently stated that he was unsure of the connection given the number of factors involved. He stated that decedent had other health problems and a history of diabetes. He then reiterated "certainly there is a relationship there but I don't know how much of a role that the surgery played in regards to the development of the pulmonary embolism." Subsequently, the doctor testified that he would consider surgery the most likely cause of the blood clotting resulting in decedent's death.

Claimant's counsel contacted Thomas B. Summers, M.D., a neurologist, on July 29, 1986 by way of a written report. The report contains the division entitled "Facts Relating to His Work History and Death." The facts related are substantially as revealed at hearing, but for the omission of any reference to the lifting of the chuck on December 6, 1983. In a letter report of October 7, 1986, Dr. Summers opined to a reasonable degree of medical certainty that decedent's demise was causally related to the injury incurred in the course of his work on or about November 14, 1983. He reported that decedent did develop a herniated intervertebral disc with nerve root compression at the L4-5 interspace with resulting classical symptoms and signs. Dr. Summers concluded by stating that surgical treatment for the condition was carried out with subsequent symptoms and signs of pulmonary compromise with decedent expiring on September 7, 1985 as a result of massive pulmonary embolism.

In his deposition, Dr. Summers indicated that he is a board-certified neurologist and has been such since 1956. Dr. Summers then testified that decedent had probably had disc degeneration at one or more levels prior to 1983, but had no clinical evidence of a ruptured disc until 1983. He reported that, on November 14, 1983, decedent experienced the onset of low back pain with continued back pain. He concluded that decedent's L4-5 disc ruptured on November 14, 1983 with numbness coming on suddenly on December 6, 1983. Dr. Summers stated he suspected that, as of that date, a portion of the disc or a fragment of the disc protruded and compressed on the nerve root on the left side resulting in impingement or compression of the nerve. Dr. Summers, however, explained that a disc once weakened can rupture almost without trauma. He agreed that decedent's back had been in a weakened state since 1971 and that it was possible that sitting on a bench or standing may have been enough to rupture the disc.

Dr. Summers reported that numbness with diabetic neuropathy is usually bilateral and symmetrical, whereas numbness with disc herniation tends to be unilateral. He reported that decedent's symptoms were consistent with a herniated disc and not with diabetic neuropathy. Dr. Summers further opined that diabetic neuropathy usually develops where diabetes is severe and not under control.

In a March 4, 1986 report, Paul From, M.D., FACP, FACCP, opined that there did appear to be a connection between decedent's surgery and the pulmonary emboli.

Decedent's medical expenses are as follows:

Glendon D. Button, M.D.	$257.50
Mach Ambulance Service	372.00
Mary Greeley Medical Center	286.00
Marshalltown Medical Center	35.00

Decedent's wife paid burial expenses totalling $3,550.00.

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

APPLICABLE LAW AND ANALYSIS

We consider whether decedent received an injury which arose out of and in the course of his employment on November 14, 1983.

Claimant has the burden of proving by a preponderance of the evidence that decedent received an injury on November 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).

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

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971), Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The evidence establishes that decedent experienced back pain on November 14, 1983 while lifting a large impeller in the course of his machine operator duties. Decedent did not seek medical treatment immediately following that incident and decedent lost no work time immediately following that incident. Decedent's spouse, who was a credible witness, reported that she

administered back rubs to decedent because of difficulties decedent was having following the incident, which difficulties were beyond his normal back complaints. Such is sufficient to establish an injury which arose out of and in the course of decedent's employment on November 14, 1983.

The fighting issue remains, however, that is: Whether a causal relationship exists between decedent's November 14, 1983 injury and his subsequent herniated disc and laminectomy and his ensuing death.

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

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

A treating physician's testimony is not entitled to greater weight as a matter of law than that of a physician who later examines a claimant in anticipation of litigation. 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).

An expert's opinion based on an incomplete history is not necessarily binding on the commissioner, but must be weighed with other facts and circumstances. Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128, 133 (1967).

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).

Decedent did not have an onset of leg numbness and what has been characterized as foot drop until December 6, 1983. Decedent's initial experience of that condition occurred when he rose from a seated position on a bench while on work break. As noted, the fighting issue between the parties is whether the onset of numbness and foot drop can be traced to the November 14, 1983 experience of back pain after changing an impeller at work. Both Drs. Summers and Brodersen have rendered opinions as to that issue. Dr. Summers deposition establishes him as a board-certified neurologist with extensive expertise in his field as well as training in orthopaedics. Dr. Brodersen is a board-certified orthopaedic surgeon with substantially less experience than Dr. Summers. Dr. Brodersen was decedent's treating physician. That fact appears to be less significant where the question is one of causation as established by history rather than one of decedent's actual abilities, limitations and impairment. Dr. Summers, after reviewing a history of decedent's incidents, symptomatology and treatment opined that decedent's lifting of the impeller on November 14, 1983 ultimately resulted in a disc herniation which was made manifest with the onset of numbness and foot drop on December 6, 1983. Dr. Brodersen equivocated somewhat as to his opinion, but generally felt that the signficant incident, as far as the disc herniation, was the onset of foot drop and numbness as of December 6, 1983. Neither physician was apparently aware that decedent had lifted the chuck, weighing approximately 75 pounds, on the morning of December 6, 1983. We find this somewhat troubling. We note that decedent apparently did not have symptoms immediately following such and that little significance was apparently attached to that activity. It was mentioned only in passing in decedent's transcribed interview by telephone with apparently a representative of the insurance carrier. It was never included as a significant event in decedent's medical history. The foregoing suggests that the chuck-lifting incident was not a primary factor in decedent's overall condition even though it occurred in close proximity to

the onset of numbness and foot drop. Likewise, decedent's preexisting back problems do not appear to have been a significant factor in the development of his symptoms. Decedent had apparently functioned without significant difficulty from 1971 until November 14, 1983. It was only thereafter that his spouse reported he needed at-home back care in addition to his self regimen of Williams exercises. We accept Dr. Summers' opinion that a causal relationship exists between the November 14, 1983 incident and the onset of symptoms on December 6, 1983 as we give deferrence to Dr. Summers' greater experience and expertise. We note that, while decedent was able to return to work in February, 1984, he did so while wearing a leg splint and apparently continued to have trouble with numbness and foot drop until his laminectomy of August 22, 1985. Claimant has established a causal relationship between decedent's November 14, 1983 work injury and his subsequent herniated disc, and his August 22, 1985 laminectomy.

Decedent expired on September 7, 1985 as the result of pulmonary emboli. Drs. Summers, From and Button all relate the pulmonary emboli to the laminectomy. Dr. Brodersen indicates that the laminectomy was a likely factor in the development of the emboli, but cites decedent's other medical conditions. The physicians, as a whole, indicate the close proximity between the surgery and death; the fact that the surgery was in the pelvic area; and, the fact that emboli are known complications of surgery, especially in older patients. Sufficient evidence exists to establish a causal connection between decedent's laminectomy, his pulmonary embolism and subsequent death.

We consider the benefit question. Initially, we need to ascertain whether claimant is entitled to temporary total or healing period benefits. Decedent had returned to work on February 13, 1984 and continued to work, apparently not missing time on account of his work injury, to his retirement on May 3, 1985. Decedent was apparently not supplementing his retirement income from whatever source by any type of work at the time he entered the hospital on August 21, 1985 for his laminectomy. Section 85.33(1) provides that the employer pay temporary total disability weekly compensation benefits until the employee has returned to work 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 the injury, whichever occurs first. Section 85.34(1) provides that, where an employee has suffered permanent partial disability on account of a work-related injury, the employee shall be paid healing period weekly compensation until the employee returns to work, it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which engaged at the time of the injury, whichever occurs first. Neither of the above-cited sections makes retirement

or non-work at the time of additional medical treatment requiring the employee to be off work on account of the injury a barrier to the payment of weekly compensation benefits during the time in which the employee is off work on account of the injury-related condition and not simply off work because the employee has voluntarily retired or the employee has been unable to obtain work. But for the requirement of additional medical treatment on account of the work injury and the ensuing physical incapacity, an injured worker, even if retired or otherwise off work, could seek employment. Decedent's estate is entitled to payment of weekly compensation benefits from August 21, 1985 through decedent's September 7, 1985 death. As decedent had not reached maximum medical healing at the time of his death, those benefits should be characterized as temporary total disability benefits.

We consider whether claimant has any permanent partial disability benefit entitlement. Any such entitlement, of course, would have accrued prior to decedent's demise and would not represent a benefit to decedent's estate. Hence, we are only concerned with any permanent partial disability which might have existed from decedent's February 13, 1984 work return onward.

If decedent had an impairment to the body as a whole, an industrial disability was 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).

We have little information in this regard. Decedent did return to work in February, 1984, and wore a leg splint. He apparently continued to work until his May 3, 1985 retirement while wearing the splint, but was able to perform his duties. He apparently earned the same wage and performed his duties without restrictions. No permanent partial impairment rating is in the record. Hence, while conceivably claimant might have had some permanent partial disability after his February 13, 1984 work return, we do not have sufficient information in this record on which to establish such. Nor do we have sufficient information to establish that decedent had actually reached

permanency as of the February, 1984 return to work. Evidence in the record demonstrates that decedent's symptomatology continued to demonstrate itself until his August 21, 1985 surgery. For the reasons cited, an award of permanency will not be made.

Decedent's surviving spouse is, of course, entitled to death benefits as provided in section 85.31(1)(a) as decedent's death occurred from a condition causally related to an injury which arose out of and in the course of decedent's employment.

Likewise, claimant is entitled to payment for the medical costs in evidence as the evidence establishes that they result from compensable injury (see section 85.27). Similarly, decedent's spouse is entitled to reimbursement of reasonable burial expenses which, pursuant to section 85.28, shall not exceed $1,000. A reimbursement of $1,000 is awarded.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Decedent experienced back pain on November 14, 1983 after he had lifted a large impeller in the course of his duties as a machine operator for employer, Dunham-Bush Company.

Decedent had had prior back complaints and had done Williams exercises on a regular basis since 1971.

Decedent sought no medical treatment in the immediate interval following the November 14, 1983 incident.

Decedent continued to have difficulties through December 6, 1983 for which decedent's spouse treated him with back rubs. Decedent also continued to do his Williams exercises.

Decedent's spouse was a credible witness.

An impeller weighs approximately 75-80 pounds and is 14 inches in diameter and 3 inches thick.

On December 6, 1983, decedent changed a chuck on a turret lathe in the morning.

A chuck weighs approximately 75 pounds. Lifting is required in changing a chuck.

Decedent did not have symptoms immediately following lifting the chuck. Little apparent significance was attached to the lifting of the chuck.

Upon rising from a seated position at the end of his work break on the morning of December 6, 1983, decedent experienced

leg numbness and foot drop.

Decedent subsequently sought medical treatment and was off work from December 15, 1983 through February 13, 1984.

Decedent returned to work on February 13, 1984 wearing a leg splint.

Decedent continued to work until his May 3, 1985 retirement without restriction and apparently at the same duties he had held prior to the development of his back and leg condition.

Decedent continued to experience numbness and foot drop and myelographic studies and CT scan studies indicated a herniated disc at L4-5.

On August 21, 1985, decedent entered the hospital where Dr. Brodersen performed a laminectomy on August 22, 1985.

On September 5, 1985, decedent had fever, shortness of breath and complaints of chest pain.

On September 7, 1985, decedent died.

An autopsy revealed clots in the pulmonary artery with one clot representing a fusion of two smaller clots indicating that the clot was from a small vein, probably in the upper leg or pelvis.

Blood clots are known complications of surgery in the leg or pelvic area, especially in older persons.

Decedent was born July 30, 1919.

Dr. Summers is a board-certified neurologist with long-term expertise in that field as well as experience in orthpaedics.

Dr. Brodersen is a board-certified orthopaedic surgeon who has substantially less experience than has Dr. Summers.

Decedent's disc herniation was proximately caused by his November 14, 1983 work incident.

Decedent's laminectomy was occasioned by his disc herniation.

Decedent's death was caused by bilateral pulmonary emboli due to his laminectomy.

Decedent was off work and unable to seek other employment on account of his work-related injury from August 21, 1985 until his September 7, 1985 death.

Lucille Schultz is the surviving spouse of decedent.

Medical expenses to Glendon D. Button, M.D., Mach Ambulance Service, Mary Greeley Medical Center and Marshalltown Medical Center relate to decedent's work-related injury.

Decedent's reasonable burial expenses exceeded $1,000.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

That decedent received an injury which arose out of and in the course of decedent's employment on November 14, 1983 is established.

That the injury of November 14, 1983 was a proximate cause of decedent's disability and his ensuing death is established.

That decedent's estate is entitled to payment of temporary total disability benefits from August 21, 1985 through September 7, 1985 is established.

That decedent's surviving spouse is entitled to benefits as provided in section 85.31(1)(a) is established.

That decedent's claimant is entitled to payment of medical costs as enumerated in the order below is established.

That decedent's claimant is entitled to payment of reasonable burial expenses in the amount of $1,000 is established.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant as surviving spouse of decedent Edwin A. Schultz benefits as provided in section 85.31(1)(a) at the rate of two hundred twenty-one and 42/100 dollars ($221.42) per week.

Defendants pay claimant as executor of the estate of Edwin A. Schultz temporary total disability benefits from August 21, 1985 through September 7, 1985 at the rate of two hundred twenty-one and 42/100 dollars ($221.42).

Defendants pay medical expenses as follows:

Glendon D. Button, M.D.	$257.50
Mach Ambulance Service	372.00
Mary Greeley Medical Center	286.00
Marshalltown Medical Center	35.00

Defendants pay claimant reasonable burial expenses in the amount of one thousand dollars ($1,000).

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30 as amended.

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

Defendants file Claim Activity Reports as requested by the agency.

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

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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002405

FILED

OCT 1 [illegible] 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLAUDE SEIDEL,	:	
Claimant,	:	
vs.	:	File No. 785932
WOODLAND, INC.,	:	
Employer,	:	A R B I T R A T I O N
and	:	
U. S. INSURANCE GROUP,	:	D E C I S I O N
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Claude Seidel against Woodland, Inc., his former employer, and U. S. Insurance Group, the employer's insurance carrier. The case was heard at Burlington, Iowa, on May 27, 1987 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Claude Seidel, claimant's exhibits 1 through 16 and defendants' exhibits A and B.

ISSUES

The parties stipulated that claimant sustained an injury which arose out of and in the course of his employment on January 4, 1985; that the injury produced a period of temporary disability during a period of recovery; and, that all temporary total disability or healing period benefits which were due had been paid at the rate of $138.58 per week.

The issues presented for determination are the proper rate of compensation, the extent of permanent disability that resulted from the injury and assessment of costs of the action.

SUMMARY OF THE EVIDENCE

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

this case even though it may not necessarily be referred to in this decision.

Claude Seidel, the claimant, testified that he is married, has two dependent children and is 38 years of age. Claimant related that he has an eighth grade education and that he does not read or write well. He has no admitted vocational training or work experience other than within the logging industry.

Claimant testified that, prior to the accident in issue, his health was good. He testified that he worked as a log cutter and was able to operate a chain saw all day and also operate other heavy equipment. He reported having a severe fracture of his leg prior to the accident in question, but did not recall any other prior serious injuries.

Seidel testified that, on January 4, 1985, he was a passenger in the rear seat of a car which collided with a semi. One of the other occupants of the car was killed in the accident. Claimant was taken to the Henry County Health Center in Mt. Pleasant, Iowa, where he was examined and released (exhibit 8). Later that day he entered Fort Madison Community Hospital where he remained for approximately seven days under the care of James Kannenberg, M.D. (exhibit 9). The primary injuries identified at the hospital included a fracture of the left scapula (exhibit 9, pages 29 and 35). After being released from the hospital, claimant continued under the treatment of Dr. Kannenberg. He complained of continuing headaches and back pain. Further radiographic studies showed claimant to have mild wedging of the left side of the L4 vertebral body with a non-displaced fracture through the superior end plate laterally. A deformity of the pedicle on the left at L5 was also identified (exhibit 10, page 70). Claimant was referred to E. Torage Shivapour, M.D., a neurologist, for his complaints of headache. A diagnosis of posttraumatic headaches and stress disorder was made and treatment with medication was prescribed (exhibit 10, page 71). Claimant was referred to Donald Mackenzie, M.D., who treated the vertebral fracture with a brace. In a report dated April 18, 1985, Dr. Mackenzie noted that x-rays showed good healing and use of the brace had been discontinued (exhibit 10, pages 73 and 74; exhibit 15). When Dr. Mackenzie last saw claimant, he reported that claimant's spine had healed in good alignment with no permanent impairment (exhibit 14).

Shortly after being released from Dr. Mackenzie, claimant was evaluated by Koert R. Smith, M.D. Dr. Smith diagnosed claimant's condition as a compression fracture of the left side of the body of L4 which was most likely accident-related and a left unilateral spondylolysis involving the pars interarticularis on the left side which was most likely preexisting. Dr. Smith

concluded that claimant could continue working (exhibit 2).

Dr. Smith reevaluated claimant on April 22, 1987. His report indicates that claimant continues to take prescription medication and to obtain chiropractic care. The report indicates that claimant's condition would likely be permanent, that x-rays taken were interpreted as showing no change and that the fractures were healed (exhibit 16). On May 21, 1987, Dr. Smith rated claimant as having a 3% impairment of the whole man as a result of the compression fracture. He indicated that the unilateral spondylolisis was a preexisting problem unrelated to the accident (exhibit A).

Claimant entered into chiropractic treatment under Rick C. Courtney, D.C. Dr. Courtney diagnosed a number of conditions including pelvic unleveling, left lateral wedging of the L5 vertebral body, mild scoliosis of the thoracic spine, grade 1 spondylolisthesis of L5, and an L5 compression fracture of the posterior part of the vertebral body (exhibit 12, page 10). Dr. Courtney provided chiropractic manipulative treatment and indicated that claimant will need such treatment for the remainder of his life (exhibit 12, page 19). Dr. Courtney did indicate, however, that claimant's condition had improved during the period that he has provided treatment (exhibit 12, pages 26 and 27). Dr. Courtney rated claimant as having a 55% permanent impairment of the body as a whole under the AMA guidelines, Second Edition (exhibit 12, pages 12 and 31). Dr. Courtney has indicated that claimant should wear a support belt for his low back whenever he is working and that he should not lift, push or pull more than 40 or 50 pounds at any time (exhibit 12, page 13).

Exhibit B is a report from Dr. Kannenberg dated May 22, 1987, which summarizes the course of claimant's medical treatment for the injury through early 1985.

Claimant testified that he was paid $200 per week from Woodland, Inc. from which withholding taxes were deducted. He testified that he was also paid an additional $255 per week from Howard & Sons, another company owned by James Howard, the same person as the one who owned Woodland, Inc. Claimant testified that he was told the practice of using two checks was a way to pay him without the employer paying a lot of taxes. He stated that it was characterized as payment for rent of tools, but that claimant had no tools to rent and that the payment was actually wages for his work.

Claimant testified that he still wears a back brace at times when his back bothers and that he continues to take prescription medication. He stated that he restricts his activities to avoid lifting more than 40 or 50 pounds and that it causes pain if he

tries to do the type of work he did prior to the injury. He testified that he is now unable to bend over and cut with a chain saw. He stated that bouncing around on heavy equipment bothers as does extended sitting and driving a car. Claimant testified that, prior to the injury, he worked as much as nine hours per day and could cut five to six loads of logs per day, but that his current capability is only approximately two loads per day and that he has quit cutting logs.

Claimant testified that he is still in the logging business, but hires help to do part of the work. He is in a partnership and pays himself $250 per week. Claimant testified that he has not tried for any other jobs because he does not know of anything else he is qualified to do.

APPLICABLE LAW AND ANALYSIS

The stipulations made in claimant's testimony clearly establish that he was an employee of Woodland, Inc. Claimant's testimony regarding his $200 per week salary and the $255 per week "tool rent" payment, even though he had no tools to rent, stands uncontradicted. Claimant's testimony in this case is accepted as being true and accurate. It is found and determined that claimant was paid $455 per week for the services he performed for Woodland, Inc. The record establishes an identity of interest between Howard & Sons and Woodland, Inc. sufficient that payment from Howard & Sons to an employee of Woodland, Inc. can be considered to have been paid by either or both of the companies. The record discloses that no tools were rented. It discloses services being performed only for Woodland, Inc., although such may have also indirectly constituted services for Howard & Sons. It is found that the procedure of issuing two paychecks to claimant from two different sources was a device used to reduce the amount of taxes paid by the employer. It is further found that the practice was something imposed by the employer, rather than requested or demanded by claimant. If the relationship between Woodland, Inc. and Howard & Sons, and claimant was to be considered joint employment, both employers would be jointly and severally liable. 1C Larson's Workmen's Compensation, section 48.45. The same result occurs if claimant's relationship with Woodland, Inc. and Howard & Sons was considered to be related concurrent employment. 2 Larson's Workmen's Compensation, section 60.31. It is true that, if a payment is made attributable to the value of equipment furnished, such amount should be deducted when determining the wage upon which compensation is based (2 Larson's Workmen's Compensation, section 60.12b), but application of that rule is not proper under the evidence presented.

To base the compensation upon only the $200 per week salary

would produce inequitable results. The wrongdoing employer would benefit by paying reduced workers' compensation premiums, reduced workers' compensation liability and reduced employment taxes, when compared to what would have been the situation if the entire payment had been paid and reported as wages. Such a result should not be encouraged by basing the rate of compensation upon only what was reported as wages when, in fact, the entire payment of $455 per week was wages. It is of material importance in this case that claimant was only an employee and neither a part-owner of either business nor a partner in either business. Since claimant was married and had two dependent children, he would be entitled to four exemptions. With gross weekly wages of $455, the rate of compensation is $285.25 per week. The rate of compensation is determined under sections 85.36(1) and 85.61(12).

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

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

Claimant has a quite limited education and limited work experience. He is currently earning $250 as opposed to the $455 per week he was earning at the time of injury. The record does not give any indication regarding whether or not the partnership is profitable. Claimant's physical restrictions are significant, but do not appear to be such that they would prohibit him from performing any type of manual labor, except that which would be characterized as heavy. Claimant was forced out of his prior employment due to his injuries and is clearly unable to fully perform in his prior occupation. When all the material factors of industrial disability are considered, it is found and concluded that claimant sustained a 25% permanent partial disability in the accident that occurred January 4, 1985.

Since claimant is successful, he will be awarded costs of $150 for an expert witness fee for Dr. Courtney and $130 for the fees of the court reporter, totalling $280.

On the pre-hearing report, the parties stipulated that all temporary total disability or healing period had been paid, but at the rate of $138.58 per week. The correct rate of compensation has been determined to be $285.25 per week which leaves an underpayment of $146.67 per week. A Form 2 in the file dated April 23, 1985 shows that 14 4/7 weeks had been paid. Whether or not the Form 2 in fact reports all payments which have been made cannot be determined from the record. Defendants will, however, be ordered to pay the difference of $146.67 per week in healing period compensation based upon however many weeks were in fact paid.

FINDINGS OF FACT

1. Claude Seidel is a 38-year-old married man who had two dependent children and his spouse residing with him on January 4, 1985.

2. On January 4, 1985, Claude Seidel was injured while performing duties that were part of his employment with Woodland, Inc.

3. Woodland, Inc. is a corporation which was owned by the same individual, namely James Howard, as Howard & Sons, another business entity.

4. Claimant performed no substantial work activity for Howard & Sons, other than that which incidentally occurred as a result of the work he performed for Woodland, Inc.

5. Claimant's gross weekly earnings were $455 of which $200 was paid by Woodland, Inc. and $255 was paid by Howard & Sons.

6. Claimant provided no tools to Woodland, Inc. or to Howard & Sons and the entire amount of the payments made to him was compensation for his personal services. No part thereof was reimbursement of expenses, an expense allowance or a fee for rental of tools or equipment.

7. The practice of issuing two separate payments from the two separate business entities was a device used by James Howard, the owner of both business entities, in order to reduce his tax liability.

8. Claimant's current employment is a reasonably accurate indicator of his actual earning capacity.

9. Claimant sustained a 25% loss of earning capacity as a result of the injuries he suffered in the accident that occurred on January 4, 1985.

CONCLUSIONS OF LAW

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

2. Claimant's rate of compensation, under the provisions of section 85.36(1) is $285.25 per week.

3. Defendants owe claimant additional healing period compensation in the amount of $146.67 for each week previously paid.

4. Defendants owe claimant 125 weeks of compensation for permanent partial disability payable at the rate of $285.25 per week commencing June 1, 1985 in accordance with the stipulation.

5. Defendants are responsible for costs in the amount of $280.

6. When an employee performs services for one employer, but is paid by two different business entities which are closely related, as through common ownership, the entire amount of payments made to the employee for his personal services is to be considered in determining his gross weekly earnings for purposes of determining the rate of compensation, regardless of how the payments are characterized.

7. Where a portion of an employee's earnings is characterized as equipment rental, such amount is used in determining and is considered part of the employee's gross weekly wages if the payment is in fact compensation for personal services rather than a bona fide payment for rental of equipment.

8. Claimant has an industrial disability of 25% which entitles him to 125 weeks of compensation under the provisions of section 85.34(2)(u) of The Code.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant additional healing period compensation in the amount of one hundred forty-six and 67/100 dollars ($146.67) per week for each week for which healing period or temporary total disability compensation has been paid.

IT IS FURTHER ORDERED tnat defendants pay claimant one hundred twenty-five (125) weeks of compensation for permanent partial disability at the rate of two hundred eighty-five and 25/100 dollars ($285.25) per week payable commencing June 1, 1985 as stipulated by the parties.

IT IS FURTHER ORDERED that all past due amounts be paid in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants pay the costs of this action pursuant to Division of Industrial Services' Rule 343-4.33 in the amount of two hundred eighty dollars ($280.00).

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 19th day of October, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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002413

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD W. SEVERT, Claimant, vs. GENERAL DIESEL & SERVICE, INC., Employer, and JOHN DEERE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 818906 A R B I T R A T I O N D E C I S I O N FILED OCT 14 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitraion brought by Ronald Severt, claimant, against General Diesel & Service, Inc., employer, and John Deere Insurance Company, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained February 18, 1986. This proceeding was held before the undersigned deputy industrial commissioner September 30, 1987. The matter was considered fully submitted at close of the hearing.

The record in this case consists of the testimony of the claimant and Sue Severt, his wife, and Kris Nelson, substitute bookkeeper, and Brian McKee, parts manager. Claimant's exhibits 1 through 23 inclusive, and defendants' exhibits A through D, inclusive, were received in evidence.

ISSUES

Pursuant to prehearing report and order filed and approved September 30, 1987, the issues thus remaining for decision are whether claimant's injury arose out of and in the course of his employment; the extent of claimant's entitlement to permanent partial disability benefits, if any; and whether claimant is entitled to payment of certain medical costs pursuant to Iowa Code section 85.27.

REVIEW OF THE EVIDENCE

The claimant testified: He began working for defendant employer in approximately 1984, and was the service manager and mechanic. He recalled that he did not work on Monday, February 17, 1986, due to gout but awoke on February 18 at his usual time of 5:30 a.m. to go to work. He described his house as a split level with a garage in the basement accessible by interior steps. He described a front "stoop" even with the front door. Two steps down from the stoop is the front grass.

As was his usual practice, claimant testified he left for work at approximately 7:20 or 7:25 a.m. on February 18. He recalled using the interior steps to access his vehicle with his wife opening the garage door for him and shutting it after he drove out. He described the weather as clear although cold with no newly fallen snow. He maintained he had not been outside before his drive to work but recalled seeing some patches of "left over" ice around the house and driveway.

He remembered driving directly to work that morning, making no stops in the half mile distance. He recalled parking in the defendant employer's lot next to the dumpster, approximately ten to fifteen feet from the side door. He got out of the car and then reached back in to get the parts manager's work shirt which had been included with his own laundry by mistake. As he reached over to the front passenger seat where the shirt was, he described his feet slipping on a patch of ice causing him to fall backwards and onto his outstretched left arm as he attempted to break his fall. Afterwards, he maintained he sat on the seat of the car for a few minutes and then walked into work carrying the parts manager's shirt.

As he walked into the employer's service area, he could recall only seeing Brian McKee, parts manager, standing near the office, and Ken Nelson who was at the far end of the three bay area working on a tractor. Claimant recalled speaking only to Brian McKee and relating that his wrist hurt and he was going to see the doctor. He testified he told McKee he fell outside the door and then discussed with him the issue of insurance. Claimant offered that he did not know if such an injury was work related or not and that McKee did not know either. He inferred he hoped it would be covered by "workmens" compensation as the payments are better. He asked Ken Nelson who the compensation carrier was but to no avail as Nelson did not know either. Claimant acknowledged he was in pain and was belligerent. He recalled making a specific trip into the office area to see if anyone was there but found it empty.

Claimant felt he had returned home by 8:00 a.m. After explaining the situation to his wife and making arrangement to meet his doctor, claimant reported to Mercy Hospital with a Time insurance form he had at home. He presented the insurance form to a receptionist who asked him the questions on it and recorded

the responses. Claimant then signed it.

Defendants' exhibit B is a copy of that form. Questions 7 and 8 read in part: "7. Was condition related to Employment? 8. Are you covered by Workers' Compensation?" Both questions are answered in the negative. Claimant asserted that when he was asked those questions he responded that he did not know if his injury was work related. He recalled being told the answers could always be changed later.

Owner of defendant employer later contacted claimant to advise of a letter from the workers' compensation carrier that coverage for his injury had been denied. Claimant went into the work place and explained he fell coming into work. Defendant owner relayed he understood the injury occurred at home and if that was not the case, claimant should write a rebuttal to the denial. Claimant did so on March 19, 1986.

Claimant recalled being released to return to work with restrictions September 5, 1986, but not returning. He had another medical appointment two weeks later and hoped for a more complete release. When he did eventually return and offer his services to the employer, he was advised further employment was not available. He began working as a crane mechanic for Herman M. Brown of Milan January 15, 1987.

Sue Severt, claimant's wife of twenty-two years, testified she and her husband got up on February 18, 1986, at their usual time of 6:00 a.m. Although she could not recall their specific actions that morning, she offered that her husband's usual practice was to get to the garage in the basement by going through the house's utility room and down the five or six steps to the basement. She would then open the garage door for him to exit and close it after he left. She testified this all generally took place at around 7:20 a.m.

She did recall claimant returned home approximately thirty minutes later and told her he slipped by the garbage dumpster at work. She accompanied claimant to the hospital and sat with him as he spoke to the receptionist. She thought claimant told receptionist he fell on the ice outside his company, although she could not really recall. She offered she neither spoke nor read English very well and often has difficulty in understanding.

Kris Nelson, who works as a bookeeper when the regular bookkeeper (her mother) does not, testified she is the daughter of defendant employer owner. She recalled working February 18, 1986 and seeing claimant in the office that day sometime between 8:00 and 9:00 a.m. She testified claimant came into the office with his arm raised and swollen. Laurie, the other office worker, asked him what happened. In response, she heard claimant say he slipped on ice coming out the door at home. He questioned

Laurie about insurance. Because Ms. Nelson does not deal with insurance questions, she paid no attention to the remainder of the conversation which she estimated lasted about five minutes. She described claimant as in pain but not upset.

Upon being shown defendants' exhibit D, a map of the employer's location, Ms. Nelson testified that the location where claimant asserts he parked on the morning of February 18 is not the usual location utilized for employee parking.

Brian McKee, parts manager for defendant employer, testified he has worked for the company for about seven years and was at work the morning of February 18, 1986. He relayed that all employees are required to report for work by 8:00 a.m. and supervisors are expected to be there by 7:45 a.m., but most employees arrive about 7:30 a.m. McKee recalled the day of claimant's injury. He described the weather as cold, icy with some new snow fallen. When he arrived at work, another employee, Ken Nelson, was scooping the lot and so he recalled shoveling the walks and throwing salt throughout the parking lot. McKee recalled being in the area of the first bay with Chris Gammack, former engine salesman, when approached by the claimant the morning of February 18, 1986. He thought the claimant looked like he had been crying and in pain.

He recalled Chris Gammack first asked claimant what happened to which claimant responded he fell on the (expletive deleted) ice. McKee asserted he specifically asked the claimant where (his direct response was relayed as "you're kidding. Where?") because he was sure he had spread salt on all icy patches in the parking lot. Claimant then, in response, offered he had fallen coming out of his house on the steps and he further described coming down the steps, falling backwards and trying to catch himself with one arm. He continued explaining that he caught the stoop (steps) with that arm and that when he came down he yelled so loud "mama" (claimant's wife) heard him and looked out.

McKee testified he told the claimant to go home and that he could now get workers' compensation to stay home and play cards. McKee understood workers' compensation insurance in some way covered all injuries. McKee could not recall being given any work shirt by the claimant that morning and further, did not believe such an exchange would take place on a Tuesday (February 18) as uniforms come on Wednesday. McKee explained that it is the employer's policy that employees are to park across from the building and specifically not where claimant parked that morning because of traffic flow and the service bays.

The emergency records of Mercy Hospital (claimant's exhibit 1 and defendants' exhibit A) states: "(Left) wrist injury. Pt. slipped on ice coming down steps and tried to catch self (with) hand."

Both the office notes of claimant's treating physician (claimant's exhibit 2) and the notes of the emergency room doctor (exhibit 11) refer only to a fall on the ice without more specifically identifying the location.

APPLIABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on February 18, 1986 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955) and cases cited at pp. 405-406 of the Iowa Report. See also Sister Mary Benedict v. St. Mary's Corp., 255 Iowa 847, 124 N.W.2d 548 (1963) and Hansen v. State of Iowa, 249 Iowa 1147, 91 N.W.2d 555 (1958).

The principal issue for decision in this case is whether claimant's injury arose out of and in the course of employment.

ANALYSIS

The evidence in the record is in dispute as to where claimant's accident occurred. However, the greater weight of evidence establishes claimant did not sustain his injury in the defendant employer's parking lot. Thus, claimant's injury did not arise out of and in the course of his employment.

Claimant alleges that on the morning of February 18, 1986, he did not go outside before leaving for work but used the interior steps to get to his car sitting in the basement garage and fell as he was retrieving the parts manager's shirt after parking in the employer lot. There is too much evidence in the record contrary to this scenario that makes claimant's recitation of the accident unlikely.

Of first consideration is where claimant parked his car on the morning of February 18. Both Kris Nelson and Brian McKee testified that parking a car by the dumpster was not where employees were to park. It is clear from defendants' exhibit D that parking a car there for the entire day would disrupt traffic flow and patterns into and out of at least the first service bay. If claimant had already injured his wrist and was either going to report for work until he realized the severity of his injury or merely reporting to work to inform the company

and inquire about insurance, it is more likely the claimant would park near the dumpster.

Second, both Kris Nelson and Brian McKee, who have no personal stake in the outcome of this case, testified claimant told them he slipped outside his house. When this testimony is considered with the emergency room nurse's notes that claimant slipped on ice coming down steps, it is difficult, at best, to believe claimant fell in the parking lot at work. Based on a misunderstanding of the program, Brian McKee appeared willing to allow claimant the opportunity to collect workers' compensation benefits. It thus seems unlikely he would invent claimant's reference to falling outside his house. Although the nurse's notes do not mention claimant's home, claimant's own testimony establishes there were no steps at or near the place where he parked in the lot. The nurse could not have simply created the steps.

Brian McKee was a very credible witness. Although he could not recall claimant bringing him a uniform shirt the morning of the injury, it is undisputed uniforms arrived on Wednesday. The greater weight of the evidence indicates it unlikely claimant would be bringing in this shirt on a Tuesday.

Final comment must be made on claimant's own credibility. On direct examination, it appeared claimant had no difficulty recalling the morning of February 18. Yet, on cross-examination, he appeared to have some difficulty in recollection. Claimant's selective memory did not instill confidence in his scenario.

Since the greater weight of the evidence establishes claimant did not sustain an injury which arose out of and in the course of his employment, claimant has failed to meet his burden of proof and other issues raised will not be discussed.

FINDINGS OF FACT

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

1. Claimant sustained an injury in a fall February 18, 1986.

2. On reporting to work, claimant parked his car near the dumpster at the building side entrance.

3. Employees are to park in a designated area across from the building and not near the side entrance so traffic flow and patterns into and out of the building and service bays is not disrupted.

4. After entering the building, claimant told Brian McKee, parts manager, he fell coming out of his house on the steps.

5. On entering the office, claimant relayed he slipped on ice coming out of the door at home.

6. On reporting to Mercy Hospital emergency room, claimant told the nurse he slipped on ice coming down steps.

7. There are no steps at or near the place claimant parked on the morning of February 18, 1986.

8. Claimant did not fall on the ice at defendant employer's parking lot.

9. Claimant fell on the steps of his home.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has failed to prove the injury sustained February 18, 1986 arose out of and in the course of his employment.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from this proceeding. Costs of this action are assessed against claimant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 14th day of October, 1987.

Deborah A. Dubik

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1402.20; 1402.30
Filed 10-14-87
Deborah A. Dubik

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD W. SEVERT, Claimant, vs. GENERAL DIESEL & SERVICE, INC., Employer, and JOHN DEERE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 818906 A R B I T R A T I O N D E C I S I O N

1402.20; 1402.30

Claimant failed to establish injury arising out of and in the course of employment. Claimant's testimony on the circumstances of his injury were uncorroborated and distinctly contrary to the greater weight of evidence presented.

002420

FILED

JUL 9 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN SHEEHAN,	:	
	:	File No. 768048
Claimant,	:	
	:	
vs.	:	A R B I T R A T I O N
	:	
CARGILL, INC.,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by John Sheehan, claimant, against Cargill, Inc., a self-insured employer, for the recovery of benefits as a result of an alleged injury on June 14, 1984. This matter was heard before the undersigned in Clarion, Wright County, Iowa on June 18, 1987. It was considered fully submitted at the conclusion of the hearing.

The record consists of the testimony of claimant, Peter Range, Donald Aldrich, Candace Sheehan, Tom Olridge and Steve Ramon; claimant's exhibits 1 through 10; and, defendant's exhibit A.

STIPULATIONS AND ISSUES

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

1. There is an employer-employee relationship between the claimant and defendant in this matter.

2. The claimant received an injury arising out of and in the course of his employment on June 14, 1984.

3. The injury suffered by claimant caused temporary total disability.

4. Claimant's rate of compensation is $204.55.

5. There is no issue in this matter concerning unpaid medical expenses.

6. The defendant is entitled to credit for benefits previously paid equal to three weeks and one day of healing period and 35

weeks of permanent partial disability.

The issues to be determined in this hearing are whether or not the injury suffered by claimant was the cause of any permanent disability and the extent of any disability suffered by the claimant.

EVIDENCE PRESENTED

John Sheehan, claimant, testified that he is 37 years old and has a high school diploma from Clarion High School. He testified that he is married and has two children. Claimant said he worked at a produce store in Clarion while he was in high school. He stated that he had suffered from no prior back problems except in 1971 when he was treated for bad arches. This treatment apparently relieved the back problem.

Claimant stated that on June 14, 1984 he was working loading trucks with bags of feed at the defendant's place of employment. At approximately 9:00 a.m. he began to develop low back pain which continued to get worse as the day went on. Claimant said he called in the next day and reported an injury and was advised to seek medical attention. Claimant said he sought medical attention from a local physician and later, at the Mayo Clinic at Rochester, Minnesota.

Claimant testified that prior to his injury in June, 1984, he was involved in a variety of activities including softball, volleyball and some outside employment. Since the date of the injury, he has restricted these activities. Claimant said he was initially off work for five or six weeks and returned to work at Cargill where he remains employed at the present time. Claimant added, however, that in 1986 he was laid off for a period of about three months from June to September when he was off work following a medical report from Mayo Clinic which recommended he not lift more than 20 pounds. Claimant was reexamined at the Mayo Clinic, the lifting limits were raised to 50 pounds and claimant returned to employment. Claimant remains employed at the defendant's.

Candace Sheehan testified that she is married to the claimant and has been for 15 years. She stated that claimant was employed with the defendant prior to their marriage and has continued in their employ. She reported that claimant suffered no major back problems between 1971 and 1984, although he did occasionally go to a chiropractor for some back pain. She said that, on June 14, 1984, she was not home when the claimant arrived at home, but was aware of the fact he had injured himself at work. She stated that, prior to June, 1984, claimant was involved in softball, golf, camping and occasional farm work. She said that he has reduced those activities since the date of the injury and seems to tire more quickly than before. She said claimant has

quit playing golf. She also reported that claimant now wears a back brace and sometimes has trouble getting to sleep at night. She said she was uncertain how long claimant was off work in 1984 following his injury.

Peter Range testified that he is a middle manager at the Clarion Coop and has known the claimant for several years. He reported that, prior to June, 1984, the claimant was an active person and that he was unaware of any back problems from which the claimant suffered. He said that since then claimant has given up many of his activities and occasionally complains of back pain.

Donald Aldrich testified that he has known the claimant since 1969. He stated that, while the claimant was employed at the defendant's, he was a supervisor of the claimant until 1986. He recalled that claimant received an injury in June, 1984 and stated that he was unaware of any back problems suffered by the claimant prior to that time. He stated he was not sure how long claimant was off work following the injury. He said the claimant did return to work after June, 1984, but his performance level was not as good as it had been prior to the injury.

Mr. Aldrich stated that in June, 1986, claimant was discharged from the defendant's after he brought in a letter from the Mayo Clinic which stated he had a lifting limit of 20 pounds. He said that, after consultation with higher management at the defendant's, it was decided that claimant should be terminated for fear of risking further damage to his back. He stated that he was uncertain when in 1986 claimant returned to work for the defendant.

Tom Olridge testified that he is a branch manager with the defendant and has been so since July, 1986. Mr. Olridge said that at the time he started his employment with the defendant, the claimant was not working on the job. He stated that, after the defendant received a new evaluation concerning the claimant's back, the claimant was returned to work and is handling the job satisfactorily at the present time. He stated that claimant has received pay increases since his return to work. Mr. Olridge stated the claimant has a good record as an employee with the defendant.

Steve Ramon testified that he is employed by GAB, an adjusting company employed by the defendant. He reported having several phone calls and discussions between the parties concerning claimant's entitlement to permanent disability benefits. He denied having advised claimant to discharge his attorney. He stated that it was the defendant's policy to have the claimant reevaluated periodically to ensure that he is capable of doing the job. He stated he was unaware of any reports indicating that claimant was having any difficulty with the job.

Claimant's exhibits 1, 2, 3 and 4 are copies of reports from J. D. Bartleson, M.D., of the Mayo Clinic, concerning the claimant. According to those reports, Dr. Bartleson concluded that claimant suffers from spondylolysis of L3 of the right and a mild bulging disc at the lumbrosacral area. The doctor indicated claimant is intact neurologically and would be assigned a disability rating of approximately 7% of the body as a whole. In his May 27, 1986 letter, the doctor indicated that claimant should have a 20-pound lifting limit. In September, 1986, Dr. Bartleson indicated that claimant should be allowed to return to his place of employment at the defendant's. In July, 1986, Lon S. Weiland, D.C., stated that he had examined claimant most recently and found that the lower extremity reflexes and sensations were normal, muscle strength was normal and range of motion was normal. He does indicate possible pain in the lumbosacral joint with lumbar extension. Dr. Weiland also recommended a 50-pound lifting restriction on the claimant.

The reports from Dr. Bartleson clearly state that it is his opinion there is a causal relationship between the injury suffered by the claimant in 1984 and the symptomatic L3 spondylolysis from which claimant suffered. The remaining exhibits contain various correspondence, bills and progress notes concerning claimant's treatment for his back condition.

Defendant's exhibit A is a copy of the deposition testimony of John D. Bartleson, M.D. According to Dr. Bartleson's curriculum vitae he is a specialist in neurology. Dr. Bartleson testified that he first examined the claimant in January, 1986. At that time he took a history from the claimant concerning his condition which indicated claimant suffered an injury in June of 1984 and continued to suffer problems through the date of Dr. Bartleson's examination. Dr. Bartleson stated that after taking into account the history and x-ray findings of the claimant as well as the result of his neurologic examination, he could not be sure of the cause of claimant's pain, but later stated it was his best medical opinion it was a result of the June, 1984 injury.

Dr. Bartleson stated that his permanent disability rating of the claimant was based upon the Minnesota compensation schedule. He further stated that since his initial examination of the claimant, he has noted continued improvement by the claimant and has anticipated that the claimant would be able to continue in his present employment. The doctor stated that, as a general rule, it would be best for an individual such as the claimant to not engage in heavy employment, however based upon his assessment of the claimant and claimant's personality, he believed that, in this particular case, it would be advantageous for the claimant to be able to continue in his employment. The doctor added, however, that because of the back condition from which claimant suffers, he would be more susceptible to further injury.

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 June 14, 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).

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

Claimant has met his burden with regard to whether or not the condition from which he suffers is permanent in character. Since the injury suffered by the claimant is to the body as a whole, the law requires that his disability be assessed in terms of industrial disability. This requires consideration of not only the nature of the injury and functional impairment as a result, but also such factors as age, education, qualifications for other employment, ability to return to the same employment and motivation. Claimant is a credible witness. It is clear he is a hard-working individual and is in no way a malingerer or seeking to make more of his disability than he has.

The functional impairment assigned to claimant is not pursuant to the AMA guides. It is clear the claimant does not have restrictions as to range of motion or a neurological deficit. He does, however, continue to have a 50-pound lifting restriction and it is apparent that his work performance has decreased as a result of his injury. Claimant has been able to return to full-time employment in the same occupation he was engaged in at the time of the injury, however, he has had to reduce his outside employment. It is noted that, since the initial functional impairment rating, Dr. Bartleson has found claimant's condition to have improved somewhat. Claimant is obviously well-motivated to remain in the work force and at his current job.

It is difficult, if not impossible, at this time to determine what the future course of claimant's injury may be. While he may have a greater propensity toward further injury to his back, it is by no means clear that such injury will occur. This decision is based entirely upon claimant's condition as it

presently exists and does not take into consideration any future disability from which claimant may suffer as a result of this condition. The employer's continued evaluation of the claimant should allow continued monitoring of his condition and should it in any way worsen, he would be entitled to review-reopening.

Based upon all the factors relative to industrial disability, considering claimant's condition as it presently exists and not anticipating any further disability of any nature, it is found that claimant's industrial disability as a result of his injury is equal to 12% of the body as a whole. Defendant is entitled to credit for 35 weeks previously paid leaving a remaining 25 weeks of permanent partial disability to be paid.

The record reflects that claimant has not been fully paid for the healing period benefits for which he is entitled. There were apparently two weeks not paid to claimant during the time he was on vacation. The records of the Clarion Clinic, however, Richard A. Young, M.D., treating physician, indicate claimant was off work from June 15, 1984 and was released to return to work on July 20, 1984. This would indicate a healing period of five weeks and one day. Thus, claimant is entitled to an additional two weeks of healing period benefits giving the defendant appropriate credit for the three weeks and one day of healing period previously paid.

FINDINGS OF FACT

1. On June 14, 1984 claimant suffered an injury to his low back (L3) while lifting sacks of feed at work.

2. As a result of his injury, claimant was off work from June 15, 1984 to July 21, 1984, a period of five weeks and one day.

3. As a result of his injury, claimant materially aggravated a preexisting spondylolysis at L3.

4. Claimant has minimal to moderate functional impairment as a result of his injury and should not lift in excess of 50 pounds.

5. Claimant was able to return to work following his injury, but was discharged in 1986 when a 20-pound lifting limit was established.

6. Claimant was reinstated at work when his lifting limit was increased to 50 pounds.

7. Claimant remains employed and is well motivated.

8. Claimant has reduced his recreational activities and

eliminated some outside employment as a result of his injury.

9. It cannot be determined at present whether or how quickly claimant's condition might deteriorate.

10. Claimant's rate of compensation is $204.55.

11. Claimant has been previously paid three weeks and one day of healing period and 35 weeks of permanent disability.

12. Claimant suffered permanent disability as a result of his injury equal to 12% 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 temporary total disability of five weeks and one day and permanent partial disability equal to 12% of the body as a whole as a result of his injury.

ORDER

IT IS THEREFORE ORDERED that the defendant pay unto claimant five (5) weeks and one (1) day of healing period and sixty (60) weeks of permanent disability benefits at his rate of $204.55. Such payments to commence June 15, 1984 and continue until paid in full.

IT IS FURTHER ORDERED that all accrued payments shall be paid in a lump sum together with interest thereon.

IT IS FURTHER ORDERED that the defendant shall be given credit for all weekly compensation benefits previously paid.

IT IS FURTHER ORDERED that costs are taxed to the defendant.

Signed and filed this 9th day of July, 1987.

S/STEVEN E. ORT
DEPUTY INDUSTRIAL COMMISSIONER

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002429

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT SNYDER,

Claimant,

vs.

FIRESTONE TIRE & RUBBER COMPANY,

Employer,

and

CIGNA,

Insurance Carrier,
Defendants.

File 834049

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 Snyder, claimant, against Firestone Tire & Rubber Company, employer, and Cigna, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained December 28, 1983. This matter came on for hearing before the undersigned deputy industrial commissioner September 17, 1987. The record was considered fully submitted at the close of the hearing. Both parties have submitted briefs. The record in this case consists of the testimony of the claimant, joint exhibits 1 through 3, inclusive, and defendants' exhibit B. (Defendants' exhibit A was included as part of the joint exhibits.)

ISSUES

Pursuant to the prehearing report submitted and approved September 17, 1987, the issues that remain for determination are whether or not the claimant's permanent disability is confined to the upper extremity or extends to the body as a whole and the extent of the disability that is present.

FACTS PRESENTED

Thirty-eight year old claimant both at hearing and by deposition, testified: He graduated from Dowling High School in 1967 with no specialized training. He had no other formal education until approximately January 1987, when he attended

classes at Area 11 in automotive training to update his skills in newer technology. He received, after approximately 100 hours of training, a certificate of completion in what he termed a crafts course for car computers.

Claimant explained that after graduating from high school he worked as a tire buster in the service department at Goodyear for approximately $5 per hour. He described the work of mounting, dismounting, delivering, and servicing tires as heavy and very physical requiring that he lift varying weights. He explained he then worked for International Harvester as a warehouseman for about $6.50 per hour where he drove a jeep to load trucks and did some manual lifting. Claimant recalled that he quit this job to begin working at Armstrong as a quality control auditor where he received on-the-job training to learn how to check specifications for tolerance of the tires. Claimant explained that he was laid off after approximately two years and did odd jobs until he was hired by Firestone January 12, 1976, as a quality control auditor. For over three years, his job duties remained the same and he recalled he very seldom any lifting.

Claimant testified he was then promoted to shift leader (supervisor of the quality control auditors) and was responsible for the quality of work produced plantwide during the 11:00 to 7:00 shift. He described his job duties as "lightened" in that he no longer had to make certain specification checks himself, but rather was a "troubleshooter" and reviewed the checks made by the auditors. Other than off and on picking up a tire, there was essentially no lifting or manual labor in the job which last paid him $2,405 per month.

Claimant recalled that it was in approximately September 1983 that lifting became a regular part of his responsibilities when he was told to assist on the TSIS job. He described TSIS as a tire that has a problem with bulging or bumps in the side. The tires are lifted off of a pallet or conveyor and put on a quick mount machine (a two piece tire machine that goes together) where they are inflated, checked, then removed and stacked back on the pallet or conveyor. This was the only manual labor claimant felt he did on a regular basis. From September through December 1983, claimant offered he began experiencing inflammation of his upper left arm and elbow. He testified he never missed any work as a result of any problems with his left arm or elbow but was removed from the TSIS job by Dr. Gustafson in late December 1983. He then returned to his regular supervisory job until he was laid off January 30, 1985.

Since then, claimant has devoted his time and effort to self-employment doing what he described as light pain and body work and light mecahnical work. For definition, claimant asserted such work is anything which can be done by one person working alone (tuneup, distributor cap replacement, oil and

filter changes, and minor body repair) and which would not require heavy lifting (valve, transmission, clutch, ball joint or suspension work or major crash body repair). Claimant acknowledged that outside the training he recently received from Area 11, he has no formal training in automotive work. He testified he owns this business himself, fully intends to continue with it, and is able to carry out all the duties required of it. He described his business as good, increasing, providing full-time steady work with regular customers and getting new customers "constantly." He has not gone into debt and it is providing him with sufficient income to meet all of his obligations.

Claimant began seeing Marshall Flapan, M.D., in January 1984, whose office notes reflects he should continue treatment of the left shoulder, elbow, and wrist discomfort with Feldene, Nalfon, tennis elbow splint, and injection of Depo Medrol and Lidocaine. (Exhibit 1, pages 1-5) Claimant was sent to the hospital (after evaluation on March 4, 1985) for an arthrogram of his left shoulder. Performed March 5, 1985, it did not reflect any evidence of a rotator cuff tear. Dr. Falpan wrote: "He's been having trouble long enough with this that we need to schedule him for an excisional arthroplasty of the left acromio-clavicular joint." (Jt. Ex. 1, p. 7) Following surgery, claimant was released to return to work June 14, 1985. He testified the surgery as helping somewhat in that the aching is gone and he can now use his arm and elbow, but maintained he still has difficulty when he attempts to move his arm in front of this face or over his head and that he does not have full strength in it. He alleges pain from his shoulder to his body to his neck and elbow with some numbness in his hand up to three times per week and that this can last up to five seconds. Claimant described that the pain comes and goes and is not associated with any particular activity or inactivity. He testified the particular activities which are still troublesome to him are lifting, leaning on his left arm, softball and golf (neither of which he plays anymore). Notwithstanding his present conditions, claimant testified he could perform his regular supervisory job at Firestone if it were available.

Dr. Flapan's assessment, reflected in his office notes of June 13, 1985, (Jt. Ex. 1, p. 10) was "impingement syndrome left shoulder. Degenerative arthritis, left A/C joint." At the time of final evaluation November 1, 1985, Dr. Flapan wrote: "As a result of this work related injury, I believe that he has sustained a permanent partial impairment of 10% of the left upper extremity." (Jt. Ex. 1, p. 11)

Claimant was later seen by physical therapy consultants for impairment evaluation as well as Cybex evaluation. Thomas W. Bower, L.P.T., wrote to claimant's counsel March 17, 1986: "In terms of a disability, the range of motion loss accounted for in

the AMA guides would be a 6 percent impairment to the left upper extremity which would convert to a 4 percent body as a whole." (Jt. Ex. 1, p. 19) In a letter to defendants' counsel, dated February 4, 1987, the same individual wrote "[S]ince this problem is an impingement type of problem and does not encompass the rotator cuff area, it should be left in an upper extremity rating of 6 percent. Therefore, the 4 percent should be excluded or ignored at this time and the 6 percent should be considered for the impairment rating of this gentleman." (Jt. Ex. 1, p. 20)

APPLICABLE LAW

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

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

If 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 Company, 256 Iowa 1257, 130 N.W.2d 667 (1964). A shoulder injury, however, is not scheduled, being an injury to the body as a whole. Alm v. Morris Barrick Cattle Company, 240 Iowa 1174, 38 N.W.2d 161 (1949).

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).

ANALYSIS

It has been stipulated that the claimant suffered a permanent partial disability. What is in dispute is whether claimant's disability is limited to the upper extremity or extends to the body as a whole. Based upon the situs of the injury and the surgery (excision of the outer end of the clavicle), as well as claimant's own testimony of subjective symptoms beyond the upper extremity, it is found claimant sustained an injury to his shoulder which constitutes, under Alm supra, an injury to the body as a whole. See also Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Reports 281 (Appeal Decision 1982). In Alm, claimant had a rating of 25-30 percent impairment to the arm and the court, noting the anatomical location of the injury extended from the arm into the shoulder, ruled that the injury was not restricted to a schedule, thus, by law, an injury to the shoulder which produces permanent impairment entitled the claimant to an industrial disability. See also Lauhoff Grain

Co., v. McIntosh, 395 N.W.2d 834 (Iowa 1986).

The mere fact that the rating pertains to a scheduled member does not mean the disability is restricted to a schedule. Pullen v. Brown & Lambrecht Earthmoving, Incorporated, II Iowa Industrial Commissioner Reports 308 (Appeal Decision 1982). There are two impairment ratings in the record. Dr. Flapan, who was the treating physician and operated on the injury, rated the claimant as having a 10 percent permanent partial impairment of the upper left extremity; Thomas Bower, L.P.T., rated the claimant's impairment at 6 percent of the upper left extremity.

Functional impairment, however, is but one factor used to determine industrial disability. Claimant's prior medical history is scant with the exception of some athletic/recreational injuries to other parts of his body. Until he began working for Armstrong in 1973, the claimant made his way exclusively as a manual laborer but, since then, his positions as a quality control auditor/supervisor have not required the same physical exertion although they have required some. Claimant acknowledged that were it not for the reduction in force at Firestone, he feels capable of performing his job as supervisor of the auditors. Claimant is 38 years old and appears to be well motivated as evidenced by his initiative in opening an auto repair business without any prior formal training. Clearly, claimant's income has decreased, however, it is difficult, at best, to attribute this loss of earnings to claimant's injury since he was affected by a reduction in force and therefore could not return to his regular job and has not sought any type of comparable work, devoting his attention instead, to his own business endeavor. Claimant's capacity to earn has, however, been hampered as a result of his injury. It is accepted he cannot now perform to the same degree as before his injury. Considering the elements of industrial disability in light of the medical evidence as well as the testimony, it is found claimant sustained a permanent partial disability of 10 percent for industrial purposes.

FINDINGS OF FACT

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

1. Claimant is 38 years old and has worked in manual labor, supervision, and a combination of both.

2. Claimant incurred an injury to his shoulder as a result of repetitive use between September and December 1983.

3. Claimant underwent excisional arthroplasty of the left acromiac clavicular joint as a result of the injury.

4. Claimant has a permanent partial disability to the body

as a whole.

5. Claimant is limited in the use of his left arm but is capable of performing the job he held at the time of his layoff from Firestone.

6. Claimant has limited training in the auto repair business.

7. Claimant is currently employed in his own auto repair business but is limited in the type of work he can accept because of his injury.

8. Claimant's capacity to earn has been hampered.

9. Claimant's decrease in earnings cannot be attributed exclusively to his injury since he was laid off from Firestone and he has not sought work outside of his self-employment endeavor.

10. Claimant has a 10 percent industrial disability as a result of his injury.

CONCLUSIONS OF LAW

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

1. Claimant has met his burden of proving an injury to the body as a whole.

2. Claimant has established an industrial disability of ten percent (10%) as a result of his injury.

ORDER

THEREFORE, IT IS ORDERED:

Defendants are to pay unto claimant fifty (50) weeks of permanent partial disability benefits at a rate of three hundred six and 04/100 dollars ($306.04) per week commencing August 20, 1985.

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

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

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

Costs of this action are assessed against the defendants

pursuant to Division of Industrial Services Rule 343-4.33.

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

Deborah A. Dubik

DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

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[redacted]

002437

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CARL SPEER,	:	
	:	
Claimant,	:	
	:	FILE NO. 792171
vs.	:	
	:	A R B I T R A T I O N
SUPER VALU STORES, INC.,	:	
	:	D E C I S I O N
Employer,	:	
	:	FILED
and	:	
	:	NOV 03 1987
LIBERTY MUTUAL INSURANCE CO.,	:	
	:	IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier,	:	
Defendants.	:	

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Carl Speer, claimant, against Super Valu Stores, Inc., employer (hereinafter referred to as Super Valu), and Liberty Mutual Insurance Company, the insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on April 11, 1985. On September 1, 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 were approved and accepted as a part of the record in this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Alice Speer, H. Shelby Swain and Rhonda Hartley. 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.

After the hearing, defendants informed the undersigned that they inadvertently failed to offer into evidence the deposition of Peter Wirtz, D.O. There was no objection from claimant to the late submission of this exhibit which had been identified clearly as an exhibit in prehearing discussions. Therefore, the undersigned has received the exhibit as exhibit S and added it to the exhibit list contained in the prehearing report.

The prehearing report contains the following stipulations:

1. On April 11, 1985, claimant received an injury which arose out of and in the course of employment with Super Valu;

2. Claimant does not seek temporary total disability or healing period benefits in this proceeding and has been paid healing period benefits from April 12, 1985 through October 10, 1985;

3. The commencement date for permanent partial disability benefits if awarded herein shall be January 7, 1986; and,

4. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $396.50.

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

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

II. The extent of claimant's entitlement to weekly benefits for permanent disability.

SUMMARY AND ANALYSIS OF THE EVIDENCE

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

Claimant testified at hearing that at the time of the work injury he was a truck driver of an 18 wheel semi tractor trailer truck for Super Valu. He said that he had been so employed for 36 years. An important requirement of this job according to claimant is the unloading of cargo using pallet jacks for pallets loaded with grocery stock and hand carts. The hand jack required the back and forth motion of his arms to engage the hydraulic pump on the jack. Claimant stated that he is right handed and mostly used his right hand in this work. Claimant testified that on April 11, 1985, while attempting to unload cargo in the State of Illinois, he reached down to lift up a steel plate with his right hand and something "popped" in his right shoulder and he immediately felt pain. According to the histories contained in medical reports, claimant told his doctor that the steel plate weighed from 100 to 200 pounds.

After the injury, claimant drove home to Des Moines, Iowa and saw John C. Tapp, D.O., the company authorized physician. According to the medical records, claimant was given medication by Dr. Tapp and upon a persistence in pain, claimant was referred

to Mark Kirkland, D.O., an orthopedic surgeon. Dr. Kirkland prescribed additional medication and directed that claimant undergo physical therapy and remain off work because claimant had indicated to him that light duty was not available at Super Valu. In July, 1981, claimant sought and received a second opinion from Scott Neff, D.O., another orthopedic surgeon. Dr. Neff ordered an arthrogram which failed to show a rotator cuff tear. Dr. Neff recommended that claimant undergo a surgical procedure called a subacromial impingement decompression. This procedure was not done for reasons unclear in the record and claimant was referred to another orthopedic surgeon, Peter Wirtz, M.D. After Dr. Wirtz's examination of claimant, the doctor diagnosed rotator cuff tendonitis and prescribed Cortizone injections and physical therapy. Dr. Wirtz likewise felt that claimant was only able to perform light duty work. Claimant remained off work as light duty was not available at the time at Super Valu.

In October, 1985, Dr. Wirtz opined that claimant reached maximum healing, although he termed the event "maximum medical benefit." Claimant, however, still experienced pain and upon advice of his attorney sought out and received an evaluation by Jerome Bashara, M.D., who is also an orthopedic surgeon. According to his deposition, Dr. Bashara diagnosed many problems including an incomplete tear of the rotator cuff along with tendonitis. Dr. Bashara recommended that claimant receive manipulation of his shoulder while under general anesthesia. This procedure was also not performed by Dr. Bashara. Claimant returned to Dr. Wirtz for a reevaluation in May, 1987. Dr. Wirtz felt that additional physical therapy may be needed to improve claimant's condition. Dr. Wirtz performed range of motion tests which indicated that claimant's condition had deteriorated but Dr. Wirtz explains this as faking on the part of claimant.

Claimant testified that he had no previous medical history of any shoulder problems and no prior functional impairment or disability due to a shoulder problem or any other physical problem before the work injury herein. This aspect of claimant's testimony is not controverted by any other testimony or any of claimant's past medical records submitted into the evidence.

There has been two reported incidents of aggravation of claimant's shoulder difficulties since April, 1985. Once while claimant opened a screen door at his residence and another while attempting to rake leaves in his yard. Although all physicians were aware of these incidents, none place any significance on these subsequent aggravations apparently because the activity was so minor.

Only two physicians in this case have given opinions as to the permanency of claimant's injury. There was considerable discussion in the record by both Dr. Wirtz and Dr. Bashara as to

the exact percentage of permanent physical impairment claimant suffered as a result of the work injury. However, in an industrial case such as this one, the exact percentage of impairment is not as important as the physician imposed activity restrictions. The evidence indicates that no physician has released claimant for heavy work or to return to his truck driving job. Dr. Wirtz stated in his deposition that claimant is able to drive a truck for at least six hours a day. Both physicians find significant limitations in claimant's range of motion of his right arm. Dr. Bashara states that claimant is unable to lift above his shoulder or behind his back, nor can he reach forward. Claimant personally demonstrated these physical impairments at the hearing.

Claimant testified that he continues to experience considerable pain with activity in the area of his shoulder "most everyday." After his last physical with Dr. Wirtz, the doctor recommended that claimant continue to receive physical therapy to relieve this persistent stiffness.

The above evidence rather clearly demonstrates that claimant was compelled by the work injury to leave his employment at the time of the injury and that he continues to suffer significant permanent partial impairment from the injury. The subsequent aggravation injuries appear to be quite minor and none of the physicians mention these injuries when rating claimant's permanent impairment as a result of the work injury in this case. Dr. Wirtz's views that claimant was somehow faking in his last examination of claimant are not convincing in the record. Claimant and his wife appeared very credible at hearing. Also, regardless of the extent of the additional disability found by Dr. Wirtz in his last examination, the permanent impairment that Dr. Wirtz found before was sufficient to prevent claimant from returning to work.

Claimant testified that he was born on January 29, 1924 and only has a tenth grade education. He said that his past employment for the last 38 years consists only of truck driving requiring heavy lifting and repetitive lifting and extensive use of his shoulders, hands and arms. Claimant testified that he would have considerable difficulty returning to truck driving work. Claimant stated that he could not pass a DOT physical as he cannot reach across a large steering wheel such as would be found in a semi tractor trailer truck. However, claimant admitted that he can operate his motor home on trips due to power steering and the ability to stop as needed for rest.

Claimant testified that when he learned that he could not return to truck driving at Super Valu, he requested light duty work from Super Valu but was not offered any. Claimant states that he was forced to retire early due to his shoulder problems and due to the fact that Super Valu was not willing to return him to suitable work. The claimant testified that representatives of the insurance carrier in this case actually suggested that he take early retirement.

Rhonda Harris, the personnel director testified that claimant did not indicate to her that his shoulder problems were the cause of his early retirement at the time he retired in December, 1985. She stated that claimant only informed her of his plans for trips in his camper and driving his snowmobile during his retirement. Harris testified that there is now a light duty work program available at Super Valu but admitted that this program was not available to claimant before he retired.

Claimant testified that he had no interest in retiring early and only did so because of the work injury. He had planned to work to age 65 to receive maximum benefits from Social Security and his pension. He stated that his wife had health problems and that he would lose insurance that would cover her if he quit defendants' employ and sought employment elsewhere.

Two vocational rehabilitation specialists have rendered opinions as to claimant's employability in the labor market. H. Shelby Swain who was retained by defendants testified that if claimant were able to drive a truck there would be a number of suitable opportunities available to him. However, if driving is not possible, claimant would have difficulty given his age, lack of transferrable skills and the fact that he was not a good candidate for retraining. Swain also stated that claimant told him that even if Super Valu had created a job for him, he would not have returned to work for fear of jeopardizing his pension. Katheryn Bennett, another vocational specialist, submitted a written report which indicated that in her opinion from claimant's age, lack of education and transferable skills, he is not a good candidate for rehabilitation and would not be employable in today's labor market.

With reference to the extent of claimant's disability, it is clear that claimant did, in fact, retire four years early due to his work injury. Harris's testimony appears only to be a foggy recollection of statements made to her at a retirement party. Such statements the undersigned does not find to be particularly informative of the real reasons for his retirement. Claimant and his wife appeared very credible in explaining that they were forced to retire because Super Valu failed to return Mr. Speer to work. The fact that claimant was not returned to work at Super Valu was of great importance in the disability rating found in this case. The statement made by defendants' rehabilitation specialists that claimant would not have returned to work anyway is really much too speculative to have any probative value in this proceeding and for the further reason that it is not clear that his pension would have actually been jeopardized. The fact that claimant now has lost some motivation to secure employment because of his early retirement does not escape the fact that claimant was forced into early retirement by Super Valu and the

work injury. What is clear from the rehabilitation experts is that claimant is really not employable in the labor market due to his age, lack of education, lack of transferable skills and lack of rehabilitation potential.

It should be noted that from their demeanor while testifying at the hearing, claimant and his wife appear to be credible and considerable weight was given to their testimony.

FINDINGS OF FACT

Claimant was a credible witness.

Claimant was in the employ of Super Valu at all times material herein.

Claimant's job on April 11, 1985, consisted of over-the-road truck driving.

On April 11, 1985, while performing his work for Super Valu, claimant injured his right shoulder and continued to suffer symptoms from either chronic tendonitis or an incomplete tear of the rotator cuff caused by the injury.

Prior to the work injury herein, claimant had no shoulder problems, no physical impairments or ascertainable disabilities.

Prior to the work injury herein, claimant was able to perform physical tasks involving heavy lifting, repetitive lifting, bending, twisting and stooping along with prolonged sitting.

As a result of the work injury herein, claimant has suffered a significant permanent partial impairment to his body as a whole and is restricted by his physicians from heavy work and extensive use of his right shoulder and arm.

As a result of his functional impairment and physical restrictions, claimant is unable to perform his normal work activity as a truck driver or in any other position for which he is best suited given his education and experience.

Claimant's work history consists of regular gainful employment in the type of work he can no longer perform.

Claimant has suffered a significant loss in actual earnings from employment due to his work injury.

Claimant is now retired but was forced to retire approximately four years early due to his work injury and claimant was not offered continued employment at Super Valu after the injury as a result of the work injury.

Claimant is 63 years of age, has only a tenth grade education and exhibited average intelligence at the hearing.

Claimant has a very low potential for successful vocational rehabilitation.

Due to his age, claimant's loss of earning capacity is not as great as would be the case for a younger individual.

As a result of his work injury herein, claimant has suffered a loss of earning capacity in the amount of 50 percent.

CONCLUSIONS 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, there is dispute as to whether there was an injury to the arm or to the body as a whole. Admittedly, there is a conceptual problem in determining whether we are dealing with a disability to the body or to a scheduled member when a joint is involved. A shoulder injury can be a loss of an arm or a loss of the body as a whole and the determination depends upon the extent of the injury. However, it is the anatomical situs of the permanent injury or impairment, not the situs of the disability caused by the injury or impairment which determines whether or not to apply the schedules. In Iowa Code section 85.34(2)(a-t). Dailey v. Poole Lumber Company, 233 Iowa 758, 10 N.W.2d 569 (1943); Blacksmith, 290 N.W.2d 248 (Iowa 1980). Finally, it is well established in Iowa that a shoulder rotator cuff injury is an injury to the body as a whole and not to a scheduled member simply because the function of those joints impact upon a scheduled member. Alm v. Morris Barrick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Reports 281 (1982); Godwin v. Hicklin GM Power, II Iowa Industrial Commissioner Reports 170 (1981).

Given the findings of fact previously made and the above applicable law, it is concluded that claimant has established that the work injury was a cause of significant permanent partial impairment and permanent disability.

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

after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

At the prehearing conference in this case, claimant indicated that he was relying upon the so-called "odd-lot" doctrine under the holding in Guyton v. Irving Jensen Company, 373 N.W.2d 101, 105 (Iowa 1985). Although the undersigned appreciates claimant's motivation for not applying for work and that he was forced to take early retirement as a result of the work injury, a failure to make a reasonable attempt to secure employment outside of Super Valu is necessary to invoke the burden shifting provisions contained in the above cited Guyton decision. Claimant is not otherwise entitled to permanent total disability benefits primarily because of the fact that he was so close to retirement at the time of the injury. It is found that claimant's advanced age and retirement plans also adversedly impacted on his earning capacity. Claimant argues that in Diederich v. Tri-City Ry. Co., 219 Iowa 587, 258 N.W. 899 (1935) which involved a 59 year old streetcar motorman, the Supreme Court demonstrated that advanced age does not prohibit a finding of permanent total disability. However, it was not found in Diederich that claimant had already made plans to retire or to leave the work force within a few years at the time of the work injury. It is clear that age is one of the factors to be considered in assessing the extent of industrial disability or loss of earning capacity. Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). The approaching of later years when it can be anticipated that under normal circumstances a worker would be retiring is, without some clear indication to the contrary, a factor that can be considered in determining the loss of earning capacity which is causally related to the injury. Becke v. Turner-Busch, Inc., Thirty-four Bienniel Reports, Iowa Industrial Commissioner 34 (Appeal Decision 1979). However, all of the above law does not mean to imply that claimant has not suffered a very severe industrial disability in this case.

Although there was considerable evidence of claimant's loss of pension benefits as a result of early retirement, such evidence is not appropriate to measure industrial disability which is a loss of earning capacity, not a loss from an entitlement or benefit program or a loss due to outside investment for retirement. By the same token the evidence that claimant is currently receiving pension benefits is not an indication that he has not suffered a substantial loss of earning capacity.

Finally, refusal of an employer to return claimant to work in any capacity is evidence of a serious disability. See Larson, Law of Workers' Compensation, section 57.61, pages 10-164.90-.95.

Based upon a finding of a 50 percent loss of earning capacity or an industrial disability as a result of the injury to the body as a whole, claimant is entitled as a matter of law to 250 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 50 percent of the 500 weeks allowable for an injury to the body as a whole in that subsection.

ORDER

1. Defendants shall pay to claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of three hundred ninety-six and 50/100 dollars ($396.50) per week from January 7, 1986.

2. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all benefits previously paid as stipulated in the prehearing report.

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

4. Defendants shall pay the cost of this action pursuant to Division of Industrial Services Rule 343-4.33 and specifically defendants are taxed the following costs set forth in the prehearing report the sum of seventy-two and no/100 dollars ($72.00) for the Eishen Rehabilitation Services report; one hundred fifty and no/100 dollars ($150.00) as a fee to Jerome Bashara, M.D., for his deposition; sum of one hundred four and 40/100 dollars ($104.40) for the court reporter of the deposition of Jerome Bashara; and, forty-nine and 50/100 dollars ($49.50) transcription cost for the deposition of Rhonda Hartley.

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

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

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM K. STEPPUHN, JR.,	:	
Claimant,	:	File Nos. 830443 830444
vs.	:	
FARMLAND FOODS, INC.,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
AETNA CASUALTY & SURETY COMPANY,	:	FILED
Insurance Carrier, Defendants.	:	OCT 23 1987
		IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by William K. Steppuhn, Jr., claimant, against Farmland Foods, Inc., (Farmland), employer, and Aetna Casualty & Surety Company, insurance carrier, for benefits as a result of an alleged injury in mid-March 1986 (File No. 830443), and on September 25, 1986 (File No. 830444). The petition in file 830443 pled an injury date of on or about May 15, 1986. At time of hearing, claimant was allowed to amend his petition in file 830443 to allege an injury date of mid-March 1986. A hearing was held in Sioux City, Iowa, on May 7, 1987, and these cases were submitted on that date.

The record consists of the testimony of claimant and Nancy Naab; claimant's exhibits 1 through 14; and defendants' exhibits A and B. Claimant filed a brief on June 1, 1987. Defendants filed a brief on June 10, 1987.

The parties stipulated that claimant is seeking weekly benefits in file 830444 only (alleged injury date September 25, 1986); that the stipulated weekly rate of compensation regarding the alleged injury of September 25, 1986 is $224.96; that claimant was off work from September 29, 1986 through October 5, 1986; that claimant worked on October 6, 1986; that claimant was off work from October 7, 1986 through October 19, 1986; that claimant worked October 20, 1986; that claimant is seeking only temporary total disability benefits in file 830444 and that no permanency benefits are sought in either of the present contested cases; and that the contested medical bills are reasonable in amount.

ISSUES

The contested issues are:

1) Whether recovery is barred in both files because of the statute of limitations contained in Iowa Code section 85.26; specifically, defendants assert that any physical problems which claimant has are attributable to an injury in July 1983, and that the two claims presently being considered are therefore barred from recovery by the applicable statute of limitations;

2) Whether claimant received injuries in mid-March 1986 and/or September 25, 1986 that arose out of and in the course of his Farmland employment;

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

4) Nature and extent of disability; specifically, whether claimant is entitled to about two months of temporary total disability benefits in file 830444, which is the file relating to the September 25, 1986 injury; and

5) Whether claimant is entitled to medical benefits under Iowa Code section 85.27, and, if so, the extent of those benefits. The only contested medical bill in file 830443 was marked as Exhibit 5. The contested medical bills in file 830443 were marked as Exhibit 6, 7, 8, 9, 10, 11, 12 and 13.

SUMMARY OF THE EVIDENCE

Claimant testified that he is 28 years of age and obtained a GED in 1977. Claimant testified that he started working for Farmland on September 22, 1980 in Denison, Iowa, at a packing plant. Prior to working for Farmland, claimant had not sustained any serious or injury. Claimant pulled lard for Farmland and then bid on a night cleanup job. Claimant testified that he injured his back while working for Farmland in "early 1983." Claimant testified that he "came down on his tailbone" and that this incident did not immediately cause pain. He continued to work; however, he was stiff the morning after the accident. He ultimately talked to a company nurse and told her that his July 1983 injury was getting worse and as a result claimant was sent to a physician. Claimant was given three injections in his back and some medication; however, he was not taken off his job. Claimant thinks he only saw this company physician once. Claimant then went to his family doctor who recommended therapy. Claimant went to the Crawford County Hospital for physical therapy for four to six weeks. Claimant's 1983 medical bills have been paid. Claimant worked from 1984 through 1986 and

testified that his back was better from this injury except it was still stiff. Claimant would be stiff in the morning but he would able to do his job. Claimant testified that in 1985 he had no problems, but "his back was not like it was before." He testified that his back was "still stiff but did not need to go to a doctor."

Claimant testified that in March 1986, he was pulling bellies and injured his lower back as a result. He had continuous pain as he worked and told a nurse about his physical problems. In April 1986, claimant had a two week vacation and took this vacation in order to get away from his job. In mid-May 1986, claimant went to see Dr. Sol who put him on light duty. Claimant did not miss any work.

Claimant testified that in September 1986, he was turning around to work with some butts and injured his back. He had numbness in his legs as a result. Claimant saw Alan H. Fruin, M.D., as a result of this incident. This incident occurred late in the week (specifically, Thursday, September 25, 1986) and claimant testified he got worse over the weekend. On Tuesday, September 30, 1986, claimant saw Dr. Fruin. Dr. Fruin gave claimant the rest of the week off. Claimant returned to work the following Monday and his back "flared up" and he was unable to work as a result. He told the company nurse he was not coming back to work the following day.

Claimant testified that in April 1986, he was given a back support as a result of the incident of mid-March 1986. Claimant testified that his medical bills have not been paid which resulted from the September 25, 1986 incident. Claimant testified on cross-examination, that he reported the early 1983 injury to his employer. Claimant also stated that the pain never went away from the 1983 incident. The 1983 incident caused pain in his lower back down into his legs. Claimant has had shooting pains in his legs since 1983. Claimant testified that he is very poor at remembering dates. Claimant testified that in late May 1986, he talked to a company nurse after his return from vacation. Claimant testified on redirect examination that his back was "never totally better" from the 1983 injury.

Nancy Naab testified that she is a registered nurse and has worked for Farmland since January 1984. Naab testified that she works with both work-related and nonwork-related health problems. She makes referrals to physicians for work-related injuries and nonwork-related injuries or matters. Naab testified that it is not her responsibility to determine whether or not an injury is work related. She characterized this type of decision as Aetna's role. Naab testified that Exhibit A, page 3, was authored by her; the May 7, 1985 entry reads as follows: "States continues to have pain in lower back has never completely gone away since he fell in July of '83. Denies any new

injury or different activity - will try losing wt...if pain persists." Naab referred to Exhibit A, page 2, and stated there is no notation of a March 1986 work injury. Naab testified that she does not recall claimant coming to her in March 1986 and telling her about a work-related injury. One of her duties is to make notes of work-related injuries. Naab testified that she authored the following notation found in Exhibit A, page 2 (under the April 9, 1986 entry): "Continues to have pain in low back sometimes worse than others - had fall 7/83 & has had problems off & on since then - worse now since on cut floor. Will see patient after vacation for possible referral to M.D." Naab testified that she scheduled a doctor's appointment for claimant in May 1986 and that she also referred claimant to Dr. Fruin. In Exhibit 1, Dr. Fruin refers to "recurrent lumbar pain" from the 1983 incident. Exhibit 3 is authored by Dr. Fruin (dated October 7, 1986) and reads in part: "He has an acute exacerbation of a chronic lumbar strain....There is no evidence of nerve root compression or disc disease." Exhibit 8, which apparently relates to the alleged injury of March 1986, reads in part: "Fell backwards and sustained a blow to his sacrum and coccyx that jarred his entire spine."

APPLICABLE LAW AND AND ANALYSIS

I. Defendants' brief reads:

Claimant has failed to meet his burden of proof in this case. The claim is barred by the statute of limitations contained in § 85.26 and no evidence presented by the claimant allows him to avoid the bar contained in § 85.26. Claimant was injured in July of 1983 and no claim was filed until September 30, 1986 over three years later. Defendants can only speculate and assume claimant intended to rely upn McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985) to avoid the clear mandates of § 85.26, but McKeever simply does not apply. McKeever involved not only an initial specific injury (or two), but it also repeated cumulative trauma thereafter which the Deputy found aggravated and worsened the underlying medical condition. The medical evidence supported this conclusion. McKeever supra at 374. We do not have a McKeever cumulative trauma case. We have a specific identifiable injury with no medical evidence the condition was worsened due to claimant's continuing to work.

The key to this case is Dr. Fruin's response to the undersigned's letter to Dr. Fruin of November 6, 1986. In that letter, Dr. Fruin was asked about the basis for claimant's current complaints: "Has

Mr. Steppuhn suffered a permanent or even a temporary worsening of his underlying medical condition or is Mr. Steppuhn suffering from a flareup in only his symptomatology?" Dr. Fruin's response was that claimant's complaints were merely the result of a flareup of symptoms, nothing more. This becomes crucial since the original injury occurred more than three years before claimant filed the current action. If these current complaints are only a flareup of symptoms related to the July 1983 incident, the claim is barred. The only medical doctor to address the question says that is exactly what we have here. There is no medical evidence claimant suffered any new injury or even an aggravation of his condition. A flareup of symptoms is not a worsening of the underlying condition.

The key to McKeever is that it involved a cumulative injury. Once that fact finding was made, many legal theories became applicable to allow the claimant to succeed. Had there not been a cumulative injury in addition to the original injury, McKeever would have been much different. We have such a "different" case.

There is no medical evidence claimant's work worsened his underlying condition whatsoever. There was direct medical evidence it did not. This simply is not a McKeever cumulative injury-type case. Simply because claimant missed a week of work after the original claim was barred does not "convert" it to a McKeever case.

The claim should be denied in its entirety. It is barred completely by virtue of § 85.26 and claimant failed to prove that section does not bar the claim. The unrebutted medical evidence is clear the claim is barred.

First of all, it is determined that claimant was not a credible witness at hearing. He testified at hearing that he has a poor memory for such things as dates. I don't think his memory is as flawed as he represents. Secondly, it is determined that based on the evidence of record, the claims in file numbers 830443 and 830444 are both barred by the statute of limitations found in Iowa Code section 85.26. Defendants' arguments in their brief filed June 10, 1987 are found to be persuasive. The nurse's notes in this case (Ex. A, pp. 2 and 3) are particularly damaging to claimant's assertions that he either sustained a new injury or injuries in 1986 or that he materially aggravated the 1983 injury in 1986 or that he has proven a cumulative injury in accordance with the holding in McKeever Custom Cabinets v.

Smith, 379 N.W.2d 368 (Iowa 1985).

II. The question of taxation of costs remains. On October 21, 1987, the Iowa Supreme Court stated at pages 25 and 26 of the slip opinion in Richards v. Iowa Department of Revenue, _____N.W.2d _____(Iowa 1987) regarding the taxation of costs:

> Richards asks that we tax costs to the department, regardless of our decision on the merits. We must reject his request. As the district court properly said, once Richards brought his claim into a judicial forum, the usual rule pertaining to costs must be followed: they are recoverable by the successful party against the losing party. See Eller v. Needham, 247 Iowa 565, 569, 73 N.W.2d 31, 33 (1955); Iowa Code § 625.1; accord 20 C.J.S. Costs § 8, at 266 (1940).

In accordance with the above-quoted language in Richards, the costs of this action are taxed to the claimant.

FINDINGS OF FACT

1. In July of 1983, claimant injured his back as a result of a work-related incident at Farmland.

2. Claimant was not a credible witness at hearing.

3. Claimant did not sustain a new injury or injuries to his back or whole body in 1986.

4. Claimant did not materially aggravate his 1983 injury in 1986.

5. Claimant did not sustain a cumulative injury that culminated in disability in 1986.

CONCLUSIONS OF LAW

1. Both claims at issue in this proceeding are barred by Iowa Code section 85.26.

ORDER

IT IS THEREFORE ORDERED:

That claimant take nothing from these proceeding.

That claimant is ordered to pay all costs in this action.

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

T. J. McSweeney

T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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FILED

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IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEITH L. STOLP, Claimant, vs. GREEN FIELD TRANSPORT COMPANY, INC., Employer, and CARRIERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 782410 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 Keith L. Stolp, claimant, against Green Field Transport Company, Inc., employer, hereinafter referred to as Green Field, and Carriers Insurance Company, insurance carrier, defendants, for workers' compensation benefits as a result of alleged injury on December 7, 1984. On September 21, 1987 the hearing was held on claimant's petition and the matter was considered fully submitted at the close of the hearing.

The parties have submitted a pre-hearing report of contested issues and stipulations which was approved and accepted 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: Sharon Stolp and Gregg Rude. Exhibits received into evidence at the hearing are listed in the pre-hearing report. According to the pre-hearing report, the parties have stipulated to the following matters:

1. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $303.17.

2. Claimant is not seeking further temporary total disability or healing period benefits as claimant has been paid his entitlement to 12 2/7 weeks of weekly benefits during a period of recovery following the alleged injury.

3. If the injury is found to have caused a disability, the type of disability is a scheduled member disability to the right eye.

4. Claimant has been off work since December 7, 1984 and currently has a 100% loss of use of his right eye.

5. With reference to the reasonableness of the medical bills submitted for reimbursement at the hearing by claimant, it was stipulated that the medical providers involved would testify as to the reasonableness of their charges and of the treatment they performed upon claimant and defendants are not offering contrary evidence. Also, the expenses requested by claimant are causally connected to the medical condition upon which the claim is based in this case, but the issue of their causal connection to any work injury remains an issue to be decided herein.

ISSUES

According to the pre-hearing report, the parties submitted 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 claimant's disability;

III. The extent of weekly disability benefits to which claimant is entitled; and,

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

SUMMARY OF THE EVIDENCE

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

Official notice was taken of prior proceedings before this agency in file number 352882, in which this agency approved, on April 28, 1971, an uncontested full commutation of workers' compensation benefits for a 100% loss of use of claimant's right eye. The injury described in these documents occurred on December 19, 1969, while claimant was working as a mechanic at Nall Motors in Iowa City, Iowa. In this injury, a piece of steel flew off a gear claimant was hammering and the steel entered into claimant's right eye, piercing the inner wall of the eye. There was an immediate decrease in vision at the time which apparently did not improve prior to the commutation of benefits.

Claimant testified that he did indeed have a total loss of vision in his right eye at the time of the commutation from scarring in his eye following the work injury at Nall Motors. Claimant and his wife testified that, in 1974, his right eye began to improve. Later, in 1975, claimant noticed he was able to use his right eye in aiming his gun while hunting. According to claimant and his wife, this improvement continued over the next several years.

Claimant has apparently never been without a driver's license. In 1979, claimant applied for another license and passed. However, both eyes are tested at the same time by the Department of Transportation Driver's License Examiners and claimant admitted that it was possible to pass the test with only one eye. In 1980, claimant applied for and received a chauffeur's license and bought a truck to begin over-the-road trucking. On October 7, 1980, Horace M. Don, D.O., performed a DOT physical, which was required before claimant could become an over-the-road trucker. According to the examination report, claimant passed the vision test in his right eye with 20/20 vision and Dr. Don did not find any evidence of prior disease or injury in claimant's eye. Also, on May 10, 1983, upon reexamination of claimant's eyes by another physician, Yang Ahn, M.D., claimant's vision in his right eye was again found to be 20/20 with no evidence of prior injury or disease. Dr. Ahn, in his deposition testimony, testified that the vision test is performed in his office by his nurse, using an eye chart on the examination room wall and admitted that it was possible for a patient to memorize the chart before the exam. Neither Dr. Ahn nor claimant could explain why the scar tissue present in claimant's right eye after 1969 was not noticed by physicians who performed these DOT examinations.

An Iowa State Trooper, Gregg Rude, testified at hearing that he had stopped claimant for speeding sometime in 1984. He specifically recalled claimant because claimant refused to sign the citation he issued and Rude was forced to place claimant under arrest. Rude explained that this is rather unusual in his normal issuance of speeding tickets. Claimant also apparently had a trial on the speeding citation following the arrest. Officer Rude testified that, after claimant was arrested by him, claimant was very talkative and told him that he was blind in one eye. This statement sparked Rude's curiosity as claimant exhibited a chauffeur's license when he was stopped and told Rude that he was an over-the-road truck driver. Officer Rude then contacted the Federal Department of Transportation who indicated to him that they would perform an investigation because vision in both eyes is necessary in order to be an over-the-road truck driver. There is no evidence in the record of this case that would indicate what, if any, action was taken by the Federal Department of Transportation.

Claimant testified that, on December 7, 1984, he was involved in a motor vehicle accident in which his truck slipped off an icy roadway and claimant became pinned between the door and steering wheel inside the truck cab. Claimant was then assisted by a passing motorist. Claimant was treated for bruised ribs and other bruises and abrasions in an emergency room at a local hospital and was released the same evening of the accident. Claimant admitted that he did not report any eye injury at the time as he was unaware that his eye had been injured.

Claimant was treated following the accident by Dr. Ahn and his associates on several occasions between December 7, 1984 and January 25, 1985 and claimant did not mention any eye injury or vision problems. Claimant testified that, although he did not seek immediate treatment of his eyes, he did notice light sensitivity and double vision approximately two to three weeks following the accident. In an apparent request by claimant's employer for another eye examination on January 25, 1985 to maintain his DOT permit, another DOT physical examination was performed in Dr. Ahn's office and, this time, claimant was found to have only 20/100 vision in the right eye. Dr. Ahn then sent claimant to Robert Keller, M.D., an eye specialist who confirmed claimant's loss of vision. Dr. Keller then referred claimant to the University of Iowa Hospitals and Clinics, Department of Opthalmology. After his examination of claimant, James C. Folk, M.D., Associate Professor of the Vitreoretinal Service, concluded, in June, 1985, as follows:

> I think that it is a certainty that the visual loss in the right eye was caused by the truck accident in December 1984.
>
> In addition, Dr. Folk stated the following:
>
> This scarring process typically takes 3-4 weeks to occur. Therefore, I think that Mr. Stolp's history is very consistent with this injury. The type of injury also is very consistent with a blunt type of trauma which would occur in a truck accident. On the other hand, if scar tissue is going to grow in the eye, it will do so certainly within the first 6 months after the injury. Therefore, because the patient had 20/20 vision 19 years of [sic] so after the intraocular foreign body, I believe there is no way the foreign body injury could have caused these ocular findings or the visual loss. The fact that Mr. Stolp had documented 20/20 vision in the right eye in 1983 is conclusive evidence that the injury was of recent onset.

APPLICABLE LAW AND ANALYSIS

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

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, it

need 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, at first glance, claimant appears to have a sound case as the causal connection opinions of Dr. Folk are uncontroverted in the record. However, the evidence proffered by claimant in support of his claim does not stand the weight of close examination. First, this deputy is not convinced that the two DOT physicians' physicals performed in 1980 and in 1983 were valid. Dr. Ahn admitted it was possible to cheat on vision tests by memorizing the eye chart in the examination room. Also, the quality of the examinations must be questioned due to the failure of both doctors to notice scarring in claimant's right eye which claimant admits was present. Also, it is quite apparent that claimant failed to inform any of the DOT physicians of the 1969 injury and resultant total loss of vision in the eye at that time.

Second, the statements regarding the 1969 injury, in the opinion of Dr. Folk, calls into question Dr. Folk's true awareness of the 1969 injury. He indicates that claimant did not suffer a vision loss after the incident and had normal vision for approximately "19 years of [sic] so." This simply is not true. Claimant did suffer a total loss of vision and did not allegedly regain his vision until many years later. Also, the doctor speaks of scarring in claimant's right eye, but at no time does he relate this scarring to or differentiate this scarring from the scarring claimant had from the 1969 injury, which claimant has admitted has been present since that time.

Finally, the fatal blow to claimant's case was delivered by State Trooper Rude. In assessing credibility of a witness, a trier of fact must consider the demeanor of witnesses at hearing as well as the interest of the witness in the outcome of the case. Both in terms of demeanor and in terms of the interest consideration, Rude wins out over claimant. In the credibility contest, this deputy is convinced that claimant did indeed admit to Rude that he was blind in one eye.

Given claimant's lack of credibility and the inconsistencies mentioned above, claimant has failed to carry his burden of proof and persuasion by the greater weight of the credible evidence presented. Consequently, claimant does not prevail in this proceeding on the right eye issue. However, claimant has established a work injury which resulted in bruises and contusions about his body requiring treatment by Dr. Ahn.

The medical expenses requested by claimant for treatment by Dr. Keller and Dr. Folk relate to treatment of the right eye which is not found to have been injured in the December, 1984 injury. The treatment of Dr. Ahn in the amount of $213.00 relates to multiple bruises and contusions according to the bills submitted. The medical mileage requested by claimant has to be denied because it could not be deciphered from the evidence presented the number of medical miles for only the treatment by Dr. Ahn.

Although claimant has a small award in this decision, he will be assessed the costs for his failure to establish his primary claim.

FINDINGS OF FACT

1. Claimant is not found to be a credible witness. Trooper Rude was found to be credible.

2. Claimant was in the employ of Green Field Transport at all times material herein.

3. On December 7, 1984, claimant suffered an injury which arose out of and in the course of his employment with Green Field Transport as a result of a truck accident. Claimant received multiple lacerations and abrasions along with bruised ribs as a result of the accident requiring treatment. It could not be found that claimant suffered an eye injury in this accident or that any claimed eye injury resulted in permanent disability to claimant's right eye.

4. In 1969, claimant had suffered a total loss of vision in his right eye from a work injury during his employment with another employer and it could not be found that claimant's vision had subsequently improved.

5. The medical expenses incurred by claimant for treatment of his work-related injuries by Dr. Ahn in the amount of $213.00 are fair and reasonable charges for the services rendered and the treatment was reasonable and necessary.

CONCLUSIONS OF LAW

1. Claimant has established entitlement only to the medical benefits awarded below.

ORDER

IT IS THEREFORE ORDERED that defendants shall pay to claimant the sum of two hundred thirteen dollars ($213.00) as reimbursement for medical expenses and claimant shall take nothing further from this proceeding.

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

Signed and filed this 30 day of Nov, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CONNIE M. STUFFLEBEAM, Claimant, vs. IOWA DEPARTMENT OF TRANSPORTATION, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 752191 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 Connie M. Stufflebeam against the Iowa Department of Transportation and the State of Iowa. Claimant contends that she injured her back while performing shoveling in her employment during the period of November 7, 8, and 9, 1983. Claimant seeks compensation for healing period, permanent disability, section 85.27 benefits and costs.

The case was heard at Des Moines, Iowa on March 31, 1987 and was fully submitted upon conclusion of the hearing. The evidence in the case consists of testimony from Connie M. Stufflebeam, Kenny Stewart, Fred Morris, Leon Craig McCombs and Steven Vannoni. The record also contains claimant's exhibits one through ten and defendants' exhibit A.

ISSUES

The issues presented by the parties for determination are:

1. Whether claimant sustained injury on or about November 9, 1983 which arose out of and in the course of her employment;

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

3. Determination of claimant's entitlement to compensation for healing period or temporary total disability;

4. Determination of claimant's entitlement to compensation for permanent disability;

5. Determination of claimant's rate of compensation;

6. Determination of claimant's entitlement to section 85.27 benefits; and,

7. Determination of the employer's right to credit under section 85.38(2).

STATEMENT OF THE CASE

Connie M. Stufflebeam is a 29-year-old lady with a high school education who had been employed by the Department of Transportation since November, 1980. Her prior employments had generally involved semi-skilled, manual labor. Claimant has experienced a tragic life which includes the death of her husband in Viet Nam, the death of her young daughter, serious health problems of her own and the back problems which are the basis for this action.

Claimant's work for the Department of Transportation involved a number of duties, including operating a snow plow, tractor, jack hammer, endloader, and tractor-mower, installing road signs, performing highway maintenance and doing other related functions. The work sometimes involved manually digging holes and a lot of shoveling. She stated that, at times, she would lift as much as 100 pounds.

Claimant has suffered several injuries in her employment. In 1981, she slipped on ice while using a pickaxe. On another occasion, she injured herself while carrying 100-pound bags of chloride. In 1983, she was injured while operating a manual hydraulic auger. She was once injured while pulling temporary road signs off a truck. Claimant felt that the 1981 injury had resulted in permanent damage to her, but she has not filed a claim for any of those prior injuries. She stated that it still bothers her and is in the same part of her body as the injuries which are the basis for this claim.

Claimant testified that, in late October or early November, a date which she estimated to be approximately November 1, 1983, she slipped from a small stool while hanging curtains at her home. She stated that she caught herself in an odd position and felt pain in her upper back between her shoulders. She testified that the following morning she again felt pain while combing her hair. She testified that it hurt for two or three days, but that it resolved itself and did not cause her to miss any work. Claimant testified that, following the incident, her supervisor, Steven Vannoni, could tell that her back was bothering her and assigned her to perform light duty. She stated that her immediate

supervisor, Leon Craig McCombs, kept her on regular duty. Claimant testified that she did as she was told and shoveled for eight hours a day for approximately ten days. She testified that, on November 5, 1983, Vannoni came to the job site where they were working and that she reported to him that she had been shoveling. Claimant testified that Vannoni replied he could not verify that she had been shoveling and indicated he would talk with McCombs. Claimant testified that, on November 9, 1983, she told Vannoni to expect a telephone call from a doctor about an appointment and also that her low back was bothering her badly. She stated that when the time for the appointment arrived, Vannoni came to the work site and got her. Claimant testified that she saw Randall Hart, D.O., was taken off work for two weeks, was treated with therapy and was then hospitalized.

Claimant testified that she had no back problems before the 1981 injury, but that after it, every subsequent injury made her back a little worse and that she did experience back problems intermittently. She stated that, in November, 1983, she was shoveling thirty to thirty-five pounds of sand, lifting, twisting and putting it into the bucket of an endloader. She stated that she was twisting with a shovel full of sand when she felt a sharp, severe pain in the small of her back which radiated down the outside of her left leg to her ankle and to the outside of her foot. She described it as a "popping" sensation in her back and stated that the pain was really bad.

Claimant testified that she turned around when it happened and told Kenny Stewart she had just hurt her back, but that he instructed her to continue working. She stated that she did so because Stewart was second in the line of command and that if she refused to, it would be grounds for discipline. Claimant testified that the injury actually occurred on the seventh or eighth of November. Claimant testified that she was shoveling sand on the ninth before she went to the doctor. She did not recall being assigned to clean up the shop on the ninth before going to the doctor.

Claimant testified that she told McCombs and Stewart that she had pulled something in her back. She testified that she filled out an injury report and placed it on Steve Vannoni's desk, but that he did not acknowledge receiving the report.

Claimant testified that the history she gave to Dr. Hart is not accurately reflected in his report, claimant's exhibit 9. She testified that the history that she gave to the physicians when she was seen at the Mayo Clinic is accurately reported in their reports, but that she did discuss shoveling with them. She stated that the portion which states that her back had not bothered her since the 1981 injury is inaccurate. Claimant testified that, when she worked following October 25, 1983, her low back pain became increasingly worse.

Kenny Stewart and Leon Craig McCombs both testified that, on November 7 and 8, 1983, claimant and the two of them all performed the same activity, namely shoveling, operating the sign and operating the tractor. Stewart testified that claimant made a statement that the shoveling was harder on her back than scrubbing floors, but made no mention of any injury. McCombs testified that claimant did not make any mention of an injury.

Fred Morris, claimant's fiance who has lived with her for eight or nine years, did not recall any incident of her slipping off a stool, but did recall something of a problem when she was combing her hair. Morris stated that claimant has had back problems since 1981 and attributed a change in her lifestyle to a 1981 injury. Morris testified that, since November, 1983, she has been in a lot of pain. He stated that he obtained an accident report form, took it to her while she was in the hospital and then returned it to the Department of Transportation office in Oskaloosa.

Steven Vannoni, the Department of Transportation highway maintenance supervisor at Oskaloosa, testified that, in the morning of October 25, 1983, claimant spoke with him about falling from a stool while hanging curtains at her home the preceeding evening. He stated that she had indicated she may not be able to endure working the entire day. Vannoni testified that she phoned in on the 26th of October and indicated that her back was still bothering and that she did not work on that day. Vannoni indicated that claimant did work on the 27th of October without making any complaints, but that she did indicate her back still bothered a little. Vannoni indicated that claimant took a day of vacation on November 1, 1983.

Vannoni testified that, on November 7 and 8, 1983, claimant was assigned with Stewart and McCombs to clean gutters near Fremont and that claimant was to perform traffic control using the stop and go panel. He testified that, at approximately 10:00 a.m. on the seventh, he went to the work site and, while there, claimant indicated that her back was still hurting and asked about group insurance paying for an examination. Vannoni stated that, on November 8, claimant worked the last two hours of the day cleaning up in the shop and that she informed him she had a doctor's appointment at 11:00 on the following day. Vannoni testified that he kept her in the shop until the time for the appointment. He testified that claimant did not ask for an accident report form.

Vannoni further testified that, on the evening of November 21, claimant phoned his home and indicated that her sister would be in to pick up her paycheck and an accident report form. He stated that she made no mention of an earlier accident report form. Vannoni stated that he gave the form to the woman and told her to bring it back to him. The completed form, which was

handwritten, was sent to the Department of Transportation office in Ames rather than to Vannoni, but he eventually received a copy of the form.

Claimant's exhibit 9 is a collection of her medical records and reports. At page one it is indicated she injured her back while using a pick on March 4, 1981 and was taken off work for three days. Page four contains an entry of December 10, 1982 which reports an injury while lifting bags of chloride. It seems to indicate that claimant was to remain off work until December 13, 1983. Page six contains an office note dated November 9, 1983 which reads as follows:

> In with back and neck discomfort. Has been present the past 2 weeks. Hurt back 2 years ago and has not been since [sic]. Works heavy manual laboring, shoveling, heavy lifting, for the Depart. of Transportation. Two weeks ago, states was lifting up to comb her hair when suddenly had back pain in the lower and upper back. Has taken Motrin the past week or so without any improvement. Headache also present.

When claimant did not recover under conservative treatment, she was hospitalized. The history upon admission is found in claimant's exhibit 3 which states:

> HISTORY OF PRESENT ILLNESS: This 29 year old female admitted to the hospital through the Family Medical Center with increasing severe low back pain, unresponsive to out-patient physical therapy over the past week daily. She has had the pain for about the past three weeks. She stated that about the time before the pain began, she has been lifting a comb to comb her hair when she suddenly had severe pain and upper back pain as well. She gives a history of two years ago hurting her back and states has not been bothering since then until the present above reported episode.

A note from a physical therapist dated November 11, 1983 is found at page 19 of exhibit 9. It states:

> The patient stated she hurt her back approximately two years ago doing maintenance work for the highway department. She states that it basically hurts in the midback and also up high into the neck region. She does have some radiating buttock pain and also hip joint pain.

The therapist notes that claimant is in subacute back and

upper neck distress due to a work-related injury. No mention is made of any recent incident.

A lumbar CT scan was performed on November 22, 1983 and was interpreted as showing nothing abnormal (claimant's exhibit 9, page 22).

Claimant was examined by Donald D. Berg, M.D., on December 2, 1983. The report states:

> She is complaining of back pain. She has shoveling wet sand and dirt away from a curb and was putting this in an endloader bucket on November 20 [sic], 1983 in Fremont, Iowa when she developed back pain with pain in the lumbar spine which radiates down into her buttocks and back of her legs. (Claimant's exhibit 9, page 23).

Later in the record the incorrect date is clarified (claimant's exhibit 9, page 26).

Claimant was seen at the University of Iowa Hospitals and Clinics on February 6, 1984. At that time she gave a history of developing severe, sharp low back pains as a result of shoveling wet sand on approximately November 9, 1983 (claimant's exhibit 6). No mention is made of falling from a stool.

On April 16, 1985, claimant was evaluated at the Mayo Clinic. The report states, in part:

> She indicated that she did not have any back or leg problem until January of 1981 when she fell at work and developed back pain. She reported persistence of this pain with periods of aggravation. In late October of 1983, she fell at home while standing on a stool of about six inches high, hanging curtains. She slipped but caught herself and landed on her feet. There were no immediate problems, but the next morning while getting ready in front of the mirror as she lifted her arm to comb her hair, she experienced severe low interscapular pain which extended down to the left buttock and posterior aspect of the left thigh. (Claimant's exhibit 4).

Claimant was evaulated at the Mercy Hospital Medical Occupational Evaluation Center on October 30, 1985. The significant past history reported by Joshua Kimelman, D.O., states that claimant reported to him that she had worked in constant and severe back pain during the last two years she had worked for the Department of Transportation and that she attributed the pain to multiple episodes of job-related injuries. In claimant's exhibit 7, Dr.

Hart indicates that he received from Dr. Berg a history of claimant injuring her back while shoveling wet sand and dirt.

In a report dated July 15, 1986, R. R. Reschly, M.D., an orthopaedic surgeon, indicates that claimant has reported having six or seven different accidents and that it would be impossible for him to determine how much of her current problems should be assigned to each of those various accidents (claimant's exhibit 8).

Claimant has been thoroughly evaluated by a number of physicians at a number of medical facilities. She suffers from a number of medical ailments, including her back problems. Dr. Reschly has rated her as having a 20% permanent partial impairment (claimant's exhibit 2). He did not believe that she was malingering even though her subjective complaints seemed to outweigh the objective medical findings that had been made. Thomas H. Stanzel, D.C., has rated claimant as having a 15% permanent partial impairment (claimant's exhibit 1).

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on or about November 9, 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 v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

The words "in the course of" refer to the time and place and circumstances of the injury. McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971); Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

The evidence is conflicting on several important matters concerning the events of November 7, 8 and 9, 1983. At hearing, claimant admitted falling from a stool at her home while hanging curtains and experiencing pain in her upper back the following morning. In claimant's exhibit 4, however, the history includes pain running into the left buttock and thigh while combing the hair. In her testimony, claimant stated she did not miss any

work as a result of the fall from the stool, but Vannoni indicated she missed work on October 26 and that she took vacation on November 1. At one point in her testimony, claimant stated that the problems from falling off the stool resolved, but at another point she states that her low back pain increased during the period of time commencing with October 25, 1983. Claimant stated that she had been assigned to shoveling for eight hours a day for approximately ten days prior to November 9, 1983, but that testimony is clearly contradicted by testimony from Vannoni, Stewart and McCombs. Claimant testified that she reported the injury immediately to Stewart and McCombs, but they both denied any such report. Only Stewart, who is himself now disabled and retired from the Department of Transportation, could recall any complaint of back discomfort and he indicated that it was in the nature of claimant saying that shoveling bothered her back more than scrubbing floors. Claimant testified that she had been assigned to perform shoveling up until the time Vannoni came to get her for the doctor's appointment, but Vannoni testified that she had been in the shop all morning prior to the doctor's appointment and also for the last two hours of the preceeding day. Similar inconsistencies exist regarding an accident report. The initial medical records show claimant's initial history to have dealt with combing her hair (claimant's exhibit 9, page 6; claimant's exhibit 3). The early records from Dr. Hart make no mention of injury while shoveling or from slipping off a stool. Claimant's records with Dr. Berg deal with injury by shoveling and make no mention of any problems in falling from a stool or while combing her hair (claimant's exhibit 9, page 23). The Mayo Clinic report refers to falling from a stool and makes no mention of any injury while shoveling.

Claimant testified to having problems getting along with co-employees in her early years of employment with the Department of Transportation, but stated that during the last year or more she had gotten along well with the other employees. She stated that she did not have any problems whatsoever with Vannoni.

Falling from a stool could produce a substantial impact to a person's spine if they landed in the wrong position. If such an injury had occurred, it would be expected that an activity such as shoveling or any other lifting would produce discomfort. Falling from the stool is found to have produced significant injury in the sense that it did cause claimant to take off work on October 26, 1983. The fact that she took vacation on November 1, 1983 is unexplained, but it clearly shows that she did not work on that day. In short, claimant's testimony regarding her activities of November 7, 8 and 9, 1983 are not well corroborated by other evidence in the record. In fact, her testimony is contradicted in several ways. The evidence in this case shows a significant possibility that claimant sustained a serious and permanent injury in 1981, but that event is not being adjudicated. The results of any prior permanent injury could likely make

claimant more susceptible to injury than an average person or than what she herself had previously been. When all the evidence is considered, it is determined that claimant has failed to prove by a preponderance of the evidence that she sustained injury on November 7, 8 or 9, 1983 which arose out of and in the course of her employment. While such an occurrence of injury is possible under the evidence presented, it is not shown to be any more likely a source of her current problems than the incident of falling from the stool at her home. In fact, the fall from the stool seems to be the primary precipitating event for the problems for which claimant seeks benefits.

FINDINGS OF FACT

1. Connie M. Stufflebeam has experienced a series of injuries while she was employed by the Department of Transportation, some of which produced an undetermined degree of permanent disability.

2. On or about October 24, 1983, Connie M. Stufflebeam fell from a stool while hanging curtains at her home and injured her back.

3. As a result of that back injury, Stufflebeam was absent from work on October 26, 1983.

4. In the days following October 24, 1983, claimant's back problems worsened.

5. On November 7 and 8, 1983, Stufflebeam worked as part of a three-person crew cleaning sand and dirt from highway gutters near Fremont, Iowa. In doing so, she shoveled, operated a tractor and operated a traffic control sign.

6. Stufflebeam experienced discomfort while working on November 7 and 8, 1983, but did not make any report of injury to her immediate supervisor, McCombs, or to Vannoni, the highway maintenance supervisor, until she requested an accident report form from him on November 21, 1983.

7. When claimant initially sought treatment from Dr. Hart on November 9, 1983, she did not report falling from a stool, but did report difficulty while combing her hair. She also related that her job involved shoveling and physical labor, but did not relate any recent incident of injury while shoveling.

8. Claimant has failed to introduce evidence showing it to be more likely than not that she injured herself while shoveling on November 7, 8 or 9, 1983.

9. Claimant has failed to establish the credibility of her testimony.

10. The testimony from Stewart, McCombs and Vannoni is accepted as being correct.

CONCLUSIONS OF LAW

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

2. Claimant has failed to carry the burden of proving that she sustained an injury which arose out of and in the course of her employment with the Iowa Department of Transportation on November 7, 8 or 9, 1983.

3. Claimant has failed to prove an entitlement to any benefit provided under Chapter 85 of the Code.

ORDER

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

IT IS FURTHER ORDERED that costs of this action are assessed against defendants pursuant to Division of Industrial Services' Rule 343-4.33.

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

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES D. SUMNER, Claimant, vs. VARIED ENTERPRISES, INC., Employer, and SAFECO INSURANCE COMPANY OF AMERICA, Insurance Carrier, Defendants.	: : : : : : : : : : : : :	FILE NO. 618350 R E V I E W - R E O P E N I N G D E C I S I O N FILED OCT 28 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Varied Enterprises, Inc., and Safeco Insurance Company of America against Charles D. Sumner for a reduction in workers' compensation benefits now being received by claimant as a result of an injury on October 11, 1979. On July 21, 1987, a hearing was held on the review-reopening petition and the matter was considered fully submitted at the close of this hearing.

Claimant's original petition for workers' compensation benefits was heard by a deputy commissioner in August, 1981. A decision by that deputy denying benefits was reversed on appeal by former Industrial Commissioner Robert Landess in a final agency decision filed December 30, 1982. That decision was appealed to the Iowa Supreme Court which affirmed the commissioner's decision to award to claimant permanent total disability benefits.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: Kathryn Bennett, Billie Sumner, and Judy Steenhoek. 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 only issue in this case is whether claimant has undergone a change of condition since the last arbitration proceeding to warrant a reduction in the permanent total disability

benefits previously awarded by this agency.

Upon the advice of his treating cardiologist, David Gordon, M.D., claimant did not testify in this proceeding and was not available for deposition testimony. Dr. Gordon felt that the risk of another heart attack from the stress of testifying was too great. In their post-hearing brief defendants challenged the propriety of considering the testimony and reports of Judy Steenhoek and others which were based in part upon heresay or out of court statements made by claimant to these individuals for which defense has been denied the opportunity of cross-examination.

Aside from the timeliness of this challenge, it is clearly that heresay evidence is admissible in an administrative proceeding and can form the basis of a final agency decision in appropriate circumstances. McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234 (Iowa 1982). This is especially true when a witness is unavailable for health reasons. Defendants' interest in this proceeding can be protected, given the lack of opportunity to cross-exam claimant, by weighing the credibility of those who are testifying and give the heresay evidence only the weight that it is due. In response to defendants' complaints, this is what the undersigned deputy commissioner has attempted to do in this decision.

SUMMARY AND ANALYSIS OF THE EVIDENCE

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

With reference to the alleged change of physical condition, claimant's wife, Billie, testified that claimant's physical condition has changed little since August, 1981. Claimant cannot perform heavy labor or any extensive standing, walking or climbing bothers him. She stated that claimant cannot walk over a block without resting. Claimant is unable to climb stairs. Any fast walking over 50 feet causes shortness of breath requiring claimant to sit for five to ten minutes in order to recover. Upon the advice of his physicians, claimant is still unable to lift over five pounds. On a normal day, she testified that claimant must sleep two to three hours in the afternoon. Occasionally, on bad days claimant needs to take an additional nap in the morning. She stated that emotional stress bothers him and the family must screen his mail, phone calls and visitors to avoid unanticipated stress. All of these symptoms and limitations upon claimant's physical and emotional activity are similar to those described by claimant and his wife in testimony

at the previous arbitration hearing in August, 1981. Claimant's wife admitted that claimant now, unlike before, bowls in two organized bowling leagues. She said that claimant started bowling slowly and must still only bowl with large groups so he can rest in-between turns.

In his deposition taken in June, 1985, claimant's primary treating physician, Dr. Gordon, testified that from his review of treadmill tests over the years and other data, he has observed "no worsening of claimant's symptoms." In a written report dated February 2, 1985, R. M. Carney, M.D., from the Internal Medicine Department at the University of Iowa Hospitals and Clinics in Iowa City, Iowa opines from his review of treadmill tests taken in 1980 and the one he performed in 1985, claimant's disability "does not appear to have changed."

Defendants rely heavily upon the deposition testimony submitted at the last hearing of L. A. Ionnone, M.D., another cardiologist, who painted a very bleak picture of claimant's physical condition in December, 1979. The testimony was quoted by Commissioner Landess in the appeal decision of 1982.

> Dr. Iannone's examination of December 6, 1979, which included a coronary angiography, found the claimant suffered a "large anterior wall myocardial infarction with residual compensated congestive heart failure" and "significant left ventricular dysfunction which means the pumping power of the ventricle was significantly deteriorated because of the heart attack." (Iannone dep., p. 11, l. 2-8) In short, Dr. Iannone believes one-half of claimant's heart was destroyed whereby the amount of blood flow is reduced to half of its normal capacity. (Iannone dep., p. 12) Dr. Iannone feels the claimant's condition is "most assuredly" permanent. (Iannone dep., pp. 13-15) A treadmill test performed in April 1980 showed "minimal capabilities." (Iannone dep., p. 18, l. 14) A subsequent treadmill test performed in September 1980 showed the alive parts of claimant's heart are now showing evidence of ischemia, which means the claimant's condition is getting progressively worse. (Iannone dep., p. 19)

Also, Landess stated as follows:

> Dr. Kreamer stated that studies have shown that a patient with the three coronary vessel disease, ventrical aneurysm and congestive heart failure, all of which the claimant possesses, will probably die in one to two years. (Tr., p. 279) Defendants' medical testimony suggests possible surgery potential, however, this testimony is not

based upon the most recent medical records and is speculative.

Defendants argue in their brief that claimant failed to deteriorate as invisioned by Commissioner Landess and consequently, there has been a change of physical condition. First, it is very difficult to identify from a reading of the final agency decision the exact nature of the physical condition found by Commissioner Landess. Despite the above quotations, the actual findings of fact in a decision do not specifically deal with claimant's physical condition to any great extent. Secondly, there is a lack of medical expert opinion to support defendants' contention that claimant's physical condition has improved on the basis that he has not deteriorated as expected. The opinions of Dr. Gordon and Dr. Carney that claimant's condition is unchanged is based solely upon the results of a treadmill test not upon an invasive test such as an angiogram which is discussed by Dr. Ionnone when he gave his opinions in 1979. What is unclear in defendants' case is whether the ischemia and other physical problems with claimant's heart discussed by Dr. Ionnone has changed. The fact that claimant is alive today is not by itself evidence that he has improved or has experienced a change in condition without the supportive opinions by medical experts. Most notably absent is any further testimony by Dr. Ionnone or an explanation why such was not offered.

Therefore, on the whole record defendants have not shown factually that claimant's physical condition has changed since August of 1981.

With reference to the alleged improved earning capacity at the arbitration hearing in 1981, claimant and his wife testified that they had acquired a computer and claimant was attempting to make some money selling an abstract search program developed by a Grinnell college professor. This professor was David Renaud. Claimant's wife testified in the hearing in this proceeding that claimant's computer knowledge is essentially self-taught although claimant did attend a couple of courses in basic programming at a local community college. She stated that she originally bought the computer for claimant to give claimant something to do. The first computer and related supplies costed her approximately $11,000.

The venture involving computer software for abstract searching was carried forward after the 1981 hearing. Claimant and Renaud entered into a partnership business relationship. According to Renaud in his deposition, he furnished the technical expertise and claimant furnished the business knowledge. They attempted together to market their software to abstract companies within the state. Claimant and his wife traveled to various conferences to demonstrate and market the software to abstractors. Claimant handled the sales portion of the business and provided follow-up

training and advice to customers on the use of the software. One customer testified that claimant actually delivered and carried the equipment into his business establishment but had asked for assistance to place the equipment on the table. All of the customers of this software appear to have been satisfied with the system and claimant's assistance but, according to the customers who were contacted by vocational rehabilitation persons in this case, all were aware that claimant was only part-time and not always available for assistance due to his heart condition. Claimant still needed to take extensive naps during the day.

Despite the initial interest in the new software, this venture, according to Mrs. Sumner and Renaud, ultimately proved to be a failure and both partners lost money on the project. The program soon became out-of-date and sales ended. Renaud sold his interest to claimant for $1,000 when he terminated his consulting operations and sought out full-time employment. Claimant's wife stated that claimant now is no longer actively attempting to sell the software but still occasionally answers calls as to its use for no charge. Claimant and his wife ended advertising for the program in 1985.

The evidence shows that claimant was a bit more successful in marketing his own programs. Between 1981 and 1985, upon referral by a local Radio Shack salesman, claimant was able to contract with two customers to develop computer software on a part-time basis. Claimant wrote a check writing program and a billing invoice program for Tama Pack. Claimant received approximately $15,000 for these services. Claimant also developed a program for Mid America Telephone Company for $10,000. However, both of these customers indicated that either in direct testimony or in statements to vocational rehabilitation counselors that they would not retain claimant again for programming purposes. Don Ried from Tama Pack testified in his deposition that claimant was too slow in developing the program and they have plans for a more sophisticated program in the future which claimant would not be able to handle. Mid America told vocational rehabilitation persons in this case that they now purchase "canned" programs and would not use claimant in the future. The "canned" programs are cheaper and are backed by a large company.

Claimant's wife testified that claimant ended his computer software business approximately a year and a-half ago. The abstract program was not selling and claimant had not secured any other programming contracts. Apparently, the referrals from the Radio Shack ended. Claimant and his wife have sold the larger computer used by claimant in his business and now only have a small one for personal use. Claimant's wife explains that claimant simply has not been able to keep up with the advances in technology in the computer field and programming. Claimant only knows one computer language called "basic." More

advanced programs use a language called "pascal" with which claimant is not familiar. Also, claimant's wife testified that customers are now able to by cheap "canned" software and claimant cannot compete with these large software companies.

Claimant's lack of expertise in computer programming and the inability of a small independent programmer to compete with large software companies was emphasized in the testimony of Renaud, an expert in the field of computer programming who now helps manage a software company which develops programs exclusively for a Grinnel insurance company. Renaud states that although claimant is cleaver and a very good amateur, he is still an amateur. Claimant has neither the education or experience in full time programming in a large company to become gainfully employed in the computer software business. Renaud, a college graduate, testified that he attempted to become self-employed as a computer consultant and programmer in the 1980's at the time he first became involved with claimant but was unable to make a living in the business. Renaud stated that for a brief period of time in the late 70's and early 80's, a home garage programmer was able to make some money but now the big software companies have taken over due to economies of scale. He testified that the market has now dried up for the small independent contractor in the area of programming.

According to exhibit B, claimant's tax return since 1982, there was an initial flurry of gross income which gradually declined. The following table reflects claimant's self-employment income on schedule C of his income tax returns:

Year	Gross Sales	Net Income (Loss)
1982	$ 590	($1,535)
1983	25,740	2,968
1984	16,005	(4,015)
1985	32,478	(5,272)

In 1986, claimant's wife testified that claimant retired. The 1986 returns reflect self-employment income from a business called "Photo Computer Business." Claimant's wife had over the same time period as set forth in the columns above had a separate photography business which grosses from $26,000 to $31,000 in annual sales. In 1986, the new business called Photo Computer Business gross $51,013 but there was a net loss of $10,230.

Defendants contend during the cross-examination of claimant's wife at hearing that claimant must have had approximately $20,000 in sales for 1986 due to the jump in income despite the fact that claimant states on his return that he is retired and that he did not report any self-employment income for 1986. However, the "cost of good sold" (film processing fees) contained in income tax returns, Schedule C, for the photography business

has always consistently amounted to a figure ranging from one-third to almost one-half of the gross sales. The "cost of good sold" (lab fees) in 1986 is $32,422, an amount one would expect if claimant's wife's photography business had grossed $50,000 in sales given the past tax returns of the photography business. Therefore, it is found that the income statistics in these tax returns are consistent with the testimony of claimant's wife and others as to the profitability of claimant's computer business since 1981. It should be noted that regardless of the gross sales, only once since 1981 has claimant experienced a profit in the computer programming and sales business and in that year, 1983, the profit did not exceed $3,000.

Two vocational rehabilitation specialists testified at the hearing. Kathryn Bennett testified that although claimant's physical problems and need for rest during the day would rule out outside full-time employment, he would be employable as a part-time independent contractor. Although such employment is not available in the Grinnell area, claimant's residence, there are possibilities of such employment in Newton and Marshalltown. Two out of 27 potential employers contacted indicated there may be employment available and that they would consider home employment. Eight out of 27 believed that there was a market for programmers generally. Bennett admitted, however, that she was unaware of the potential income from such part-time employment and admitted that it would be sporadic. What was unclear about Bennett's assessment of the availability of work for claimant is that she never apparently inquired about or appeared to understand claimant's level of skills and those which were required of the employer she contracted. What is left wanting in Bennett's analysis is an assessment of claimant's ability to compete with more educated and experienced programmers who would be familiar with more complicated computer languages.

Judy Steenhoek, another vocational rehabilitation consultant, testified that although claimant does have a number of transferable skills from his past employment, claimant is not "gainfully" employable in the labor market due to his health and lack of education and experience. She likewise discussed claimant's employability with potential employers in the Grinnell, Newton and Des Moines areas. She also discussed claimant's employment with his former customers and associates including Renaud. Renaud indicated to her that claimant had actually applied for work with him and despite his past association with claimant and the fact that he considers claimant his friend, Renaud would not consider claimant for employment due to the lack of his education and appropriate work experience. The problem according to Steenhoek is that claimant is "out-of-date" and cannot compete with younger, better educated workers in the programming field. Steenhoek also notes that claimant cannot compete due to his inability to tolerate stress. From her discussions with people who were performing independent contracting, they state that the

pressures are very high and the competition fierce. Claimant simply, according to Steenhoek, would not be able to remain in such an environment.

With reference to the statements that claimant may have made to Steenhoek about his "employability", the undersigned finds that Steenhoek's opinions in this case are not based upon anything in particular that claimant may have said to her but based upon what she found concerning his employability from her investigation with potential employers. Also, Steenhoek's analysis appears to cover the issue of claimant's ability to actually compete in the labor market, a matter lacking in Bennett's analysis. In the opinion of Steenhoek, retraining was not possible given claimant's background, history and lack of inability to tolerate stress. Therefore, Steenhoek's views were the most convincing in the record.

Defendants had attempted to attack claimant and his wife's credibility at hearing by referring to answers to interrogatories concerning past earnings. Apparently, in many cases the answers were incomplete and failed to reveal all the income for various years. As claimant's wife did not prepare the answers, she could not be expected to explain the discrepancies. It is, however, not convincing that claimant or his wife would purposely lie in these interrogatories as the nature of their income was easily discoverable from their income tax returns. Given the arbitration proceedings in this matter, both claimant and his wife are fully aware that such returns are discoverable by the defense. Finally, claimant's wife appeared credible at the hearing and for that reason considerable weight was given to her testimony.

Therefore, although claimant is able to work in a limited capacity in sedentary, part-time work out of his home, there is no suitable or stable gainful employment available within the geographical area of his residence or within reasonable commuting distance. Regardless of whether claimant's physical condition improved or not, his earning capacity has not changed since August, 1981.

FINDINGS OF FACT

Claimant's physical limitations remain unchanged since August, 1981. Claimant continues to be unable to perform heavy labor or any extensive standing, walking or climbing; to become exhausted if he walks over a block or fast walks over 50 feet; and to need to take a nap for two or three hours each afternoon and occasionally in the morning. Claimant cannot handle stress and outside contact must be screened by his family. All of these limitations existed in August, 1981.

As evidenced by treadmill tests, claimant's endurance levels

have remained unchanged since August, 1981.

No findings could be made due to lack of evidence of the current status of his ischemia or the condition of his heart muscles using invasive testing.

Claimant's computer activity and plans to attempt to market computer software were discussed in evidence presented at the August, 1981 arbitration hearing.

Although claimant was able to have gross earnings and sales from a computer software business for a few years since August, 1981, he only once earned a profit and that profit did not exceed $3,000.

Claimant is not employable in the labor market as a software programmer in full time employment due his physical condition, lack of education and lack of experience.

It is unlikely that claimant would be able to be gainfully self-employed as an independent contractor out of his home due to his lack of expertise in computer programming, the competition from large "canned" software companies and his inability to work long hours and handle the stress involved.

CONCLUSIONS OF LAW

In a review-reopening proceeding initated by the employer, the employer has the burden of establishing by a preponderance of the evidence that claimant suffered a change of condition or a failure to deteriorate as medically anticipated, subsequent to the date of the prior award. Fischer v. W. F. Priebe and Company, 178 Iowa 611, 118 N.W.2d 570 (1962). Such a change of condition is not limited to a physical change of condition. A change in earning capacity subsequent to the original award which is approximate subject to the original award also constitutes a change of condition under Iowa Code section 85.26(2) and 86.14(2). See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980).

In the case sub judice, Varied Enterprises and its insurer failed to show by the greater weight of evidence that such a change of condition occurred. No change of earning capacity was found despite the existence of some actual earnings since 1981. However, a person is eligible for permanent total disability benefits without having to show that he is totally void of an ability to work. He must only show that he cannot be gainfully employed and is unable to compete for available sedentary jobs in the labor market. This concept was first recognized by the Iowa Supreme Court in Diederich v. Tri-City Ry. Co., 219 Iowa 587; 258 N.W. 899 (1935). In that case, the court stated as follows with reference to a 59 year old streetcar motorman:

His disability may be only a 25 or 30 percent disability compared with the 100 percent perfect man but, from the standpoint of his ability to go back to work to earn a living for himself and his family, his disability is a total disability, for he is not able again to operate a streetcar and perform the work which the company demanded of him prior to the time of the accident.

Claimant is what is known as an odd-lot or that despite his ability to work in a light duty job, there is no suitable or light duty work available for him in the area of his residence or within reasonable computing distance and is therefore permanently and totally disabled. Although a procedure to shift the burden within an odd-lot case was newly adopted recently by the Iowa Supreme Court in Guyton v. Irving Jensen Company, 373 N.W.2d 101 (Iowa 1985), the Guyton court recognized that the odd-lot doctrine was not new law in Iowa. A person can still be available for light duty work within his physical limitation but permanently and totally disabled because suitable work was not available to him given his work experience, age, education and rehabilitation potential. Claimant has made a good but unsuccessful attempt in this case at becoming employed as an independent contractor and, at least on one occasion, made an attempt to secure full time employment with Renaud. Even his friend, Renaud, would not consider him for a job due to his lack of education and experience. Claimant's unsuccessful attempts to secure a useful and gainful employment life since 1981 is added proof of the correctness of former Commissioner Landess's decision in this matter.

ORDER

1. The prior award of this agency shall not be modified.

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

Signed and filed this 28 day of October, 1987.

Larry P. Walshire

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLIFFORD L. VANNATTA,

Claimant,

vs.

YELLOW FREIGHT SYSTEM, INC.,

Employer,
Self-Insured,
Defendant.

File No. 700050

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 from a memorandum of agreement which was filed June 1, 1982 brought by Clifford L. Vannatta, claimant, against Yellow Freight System, Inc., employer, and self-insured defendant, for benefits as the result of an injury that occurred on March 30, 1982. A hearing was held at Sioux City, Iowa, on December 17, 1986, and the case was fully submitted at the close of the hearing. The record consists of claimant's exhibits 1 through 17; defendant's exhibits A through M; the testimony of Clifford L. Vannatta (claimant), Marian Vannatta (claimant's wife), and Duane Behrens (terminal manager). Both attorneys submitted outstanding 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 injury.

2. That claimant sustained an injury on March 30, 1982 that arose out of and in the course of his employment with the employer.

3. That the injury was the cause of temporary disability and that the claimant was entitled to and was paid temporary disability from March 31, 1982 through July 4, 1982, and again from July 14, 1982 through March 14, 1983.

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

5. That the commencement date of permanent disability benefits, in the event such benefits are awarded, is March 15, 1983.

6. That all requested medical benefits have been or will be paid by defendant.

7. That defendant claims no credit for any nonoccupational group plan payments.

8. That defendant is entitled to a credit for 48 4/7 weeks of compensation benefits paid at the rate of $196.77 per week prior to the hearing for temporary disability benefits.

ISSUES

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

1. Whether the injury is the cause of any permanent disability.

2. Whether claimant is entitled to any permanent disability benefits.

3. Whether claimant is an odd-lot employee and entitled to the application of the so-called odd-lot doctrine.

4. What is the proper rate of weekly compensation for the period beginning on March 30, 1982.

5. Whether claimant is entitled to a different rate of compensation after he quit working on November 15, 1985 on the theory of a cumulative injury.

SUMMARY OF THE EVIDENCE

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

Claimant is 62 1/2 years old, married, and has four adult children. He is six foot four inches tall and weighs approximately 240 pounds. He does not smoke or drink. He is a high school graduate. Most of his past employments are as a short haul truck driver, which involved loading and unloading trucks and handling freight on the dock (Ex. 11). Claimant also has the ability to repair trucks as a mechanic and to repair refrigeration units. In 1977, claimant attended a two week course to learn to repair refrigeration units. Most of his adult life claimant has been a licensed amateur radio operator. He likes and is good at anything electrical. He has constructed some primitive homemade computers as a hobby. Claimant started to

work for employer part time in 1978 or 1979 and went on the seniority list in the fall of 1980. In the spring of 1982, just prior to his injury, claimant was working three days a week for employer. This is as much time as he could work based on his seniority at that time.

On March 30, 1982, at approximately 5:00 p.m., claimant was involved in a one motor vehicle accident near Sioux Falls, South Dakota. The tractor and trailer that he was driving were almost empty. Claimant was driving south on Interstate 29 returning home to Sioux City, Iowa. As claimant crossed a bridge overpass that crossed over Interstate 229, his vehicle went through the bridge guardrail on the west side of the road, fell several feet, and landed upright on the roadway below. The distance of the fall appears in different exhibits variously between 25 feet and 57 feet. In any event, it was a long way to be airborne in a tractor and trailer before landing on the roadway below. There was a dispute as to whether claimant was blown off the bridge or was not blown off the bridge. In any event, it is a fact, based upon the newspaper photograph and a snapshop, claimant's vehicle did pass through the guardrail and landed upright on the roadway below (Ex. 1 & 1A). Other snapshots show that the tractor and trailer were damaged extensively and that both units were a total loss (Ex. 2-6). Other snapshots show that claimant received a severe vertical laceration on his right forehead and ecchymosis and swelling of both eyes (Ex. 7-10).

Claimant crawled out through the windshield and was ambulatory at the scene of the accident. A passing motorist took claimant to Sioux Valley Hospital in Sioux Falls, South Dakota. He was seen there by Merit G. Warren, M.D., and Dr. Delperdang (full name unknown), the emergency room physicians. Dr. Warren reported that claimant received a six to seven centimeter laceration to the right forehead, hematoma of the nose, abrasion of the right knee, and contusion of the right anterior ribs. X-rays of claimant's spine and chest were normal. Both eyes were markedly ecchymotic and the upper eyelids were beginning to swell shut with edema fluid. Otherwise, claimant's physical examination was normal. Dr. Warren estimated claimant could return to light work in about five days. Claimant was admitted overnight and released to his wife the following day (Ex. D, pp. 1-4).

Claimant then consulted his family physician of many years standing, H. E. Rudersdorf, M.D., a family practitioner in Sioux City, Iowa. Dr. Rudersdorf's records show twenty-three typed office note entries from April 1, 1982 through November 14, 1985 (Ex. C). Sutures were removed as an outpatient on April 5, 1982 (exhibit H, page 4). On April 19, 1982, Dr. Rudersdorf found the laceration well healed and that the clinically diagnosed fractured ribs on the right were resolving. On April 20, 1987 and April 21, 1987, claimant was hospitalized after an episode

of headaches, nausea, and vomiting at home. R. Hiemstra, M.D., said claimant related to him that he had a flu-like headache, but he just could not get the patient to describe it as throbbing, sharp or dull. A CT scan ruled out a subdural hematoma. Dr. Hiemstra said claimant's symptoms disappeared rapidly after learning that there was no intercranial bleeding. Dr. Hiemstra stated that the headaches, nausea and vomiting were due to stress (Ex. H, p. 1-4).

On May 17, 1982, Dr. Rudersdorf noted that claimant complained of recurring headaches and that they were either caused or associated with the previous trauma (Ex. C, p. 2). On June 3, 1982, he recorded that claimant was to increase his activities and to return to work in two weeks time (Ex. C, p. 2). On June 17, 1982, the doctor told claimant to continue to increase his activities to be able to return to work (Ex. C, p. 3). Then, on July 1, 1982, Dr. Rudersdorf released claimant to return to work on July 6, 1982 (Ex. C, p. 4).

Claimant only worked for a few days, more specifically, July 5, 6, and 7, and then again on July 12 and 13. On July 16, 1982, claimant came to see Mike Jung, M.D., an associate of Dr. Rudersdorf. Dr. Jung reported as follows:

> Patient of Dr. Rudersdorf who comes in stating that he's had some dizzy weak spells at work and feels that it is unsafe to his health to continue working. He states that he feels that this is related to the injuries that he received in the accident back in late March. He wishes to get an excuse from work until this gets resolved. States that his vision comes and goes, the dizzy spells come and go, describes no true vertigo, no true syncopal or fainting episodes. No chest pain or shortness of breath. He does state that he sweats quite a bit. (Ex. C, p. 4)

Dr. Jung's examination was essentially normal and disclosed no organic reason for claimant's symptoms. He diagnosed dizziness of unknown etiology. He instructed claimant that he was probably out of shape and needed to increase his muscle tone to tolerate working. He recommended claimant take a week from the job to build himself back up. He did not feel the dizziness would cause any permanent disability, that rather it was transient. He recommended claimant build up his work tolerance and return to work in one week (Ex. C, p. 4).

Claimant then saw Dr. Rudersdorf again on July 23, 1982. The doctor stated that claimant is a very nervous, anxious type patient who never takes a positive attitude. His impression was that claimant had a great deal of anxiety. He recommended claimant take two to four more weeks to lift weights, bicycle,

run, lift, and generally improve his work tolerance. Dr. Rudersdorf concluded as follows:

> Dizziness of unknown etiology 780.4. 2) Anxiety, acute. 3000. I do not feel there is a good organic explanation for these symptoms at all and I have known the patient over 30 years and his wife agrees that he has never looked on the bright side of things. Has been nervous, anxious, and tense. Feel that he needs mainly reassurance because he will worry about anything and everything. He is reassured that there wasn't any brain tumor or brain injury at this time as far as we know. Cat scans and all the other tests are all within normal limits. Is taking no medications at this time outside of the new Valium (Ex. C, p. 5).

On August 6, 1982, Dr. Rudersdorf made the following notes:

> This is a man who was involved in a truck accident March 30, 1982. Continues to complain vehemently and out of proportion of pain in his right lower ribs anterior and laterally. Complains of headaches over his left eye, tenderness in the scar that goes obliquely across his forehead from left to the right eyebrow. Clearly out of proportion to his findings (Ex. C, p. 6).

On August 27, 1982, Dr. Rudersdorf began to consider a neurologic consultation (Ex. C, p. 6), and did arrange for a complete neurological examination September 10, 1982 to determine whether these complaints were trauma syndrome or if he just has an inadequate personality. Dr. Rudersdorf said he explained to claimant that these are probably muskuloskeletal type headaches which are called tension headaches (Ex. C, p. 7).

Claimant saw William P. Isgreen, M.D., a neurologist, on September 15, 1982 who hospitalized claimant for various tests. Dr. Isgreen wrote to Dr. Rudersdorf on September 15, 1982 that the headache pattern was a bit unusual for post-traumatic syndrome (Ex. B, p. 14). Dr. Isgreen wrote to the employer's claims examiner on September 18, 1982 that claimant's story was a little bit suspect for functional problems (Ex. B, p. 13). At the time claimant saw Dr. Isgreen he was complaining of sinus drainage. Therefore, Dr. Isgreen was exploring a possible diagnosis of hypoliquorrhea, secondary to a dural tear, leaking CSF (cerebral spinal fluid) out of the nose (Ex. B, p. 17). Claimant was hospitalized from September 27, 1982 to October 2, 1982 (Ex. H, pp. 5-8). Michael Jones, M.D., an otolaryngologist and head and neck surgeon, found that claimant had normal sinuses (Ex. H, pp. 6 & 7). Also, a radioactive ytterbium test conducted by Dr. Jones was normal and ruled a chronic CSF leak

(Ex. H, p. 5). Also, an EEG, hypertensive IVP, chest x-ray, skull x-rays, and a CAT scan of the brain were all normal. The ytterbium scan failed to demonstrate a dural tear with a CSF leak. The MMPI was also normal (exhibit H, page 8). Dr. Isgreen concluded on October 25, 1982 as follows:

> The only thing then that we can come up with is complaints of discomfort. One obviously can't reject the man's complaints out of hand, but on the other hand, there is no obvious structural change to account for the complaints. Since the complaints followed the accident, it's not altogether unfair to blame the injury for the headaches.
>
> However, in the face of no structural damage, the problem should resolve itself without any permanent impairment. Any impairment that he has now as a matter of fact would only be secondary to pain and that in a sense stretches the definition of impairment (Ex. B, p. 11).

Dr. Isgreen's office note for October 26, 1982 commented that all of the studies on claimant were totally unremarkable. He recommended the pain clinic in Omaha because a lot of claimant's problems stem from an inability to deal with frustration (Ex. B, p. 9).

On January 7, 1983, Dr. Rudersdorf strongly urged claimant to drop his opposition and to attend the pain clinic with a view toward getting back to work. He pointed out to claimant that he was actually better a few weeks after the accident and that he had not been able to find any organic cause for his headaches. Dr. Rudersdorf's continuing diagnosis was headache, post-traumatic celphalgia (Ex. C, p. 8).

Claimant was seen by F. Miles Skultety, M.D., at the University of Nebraska Pain Management Center, Omaha, beginning January 30, 1983 and was discharged on February 25, 1983. Dr. Skultety noted that claimant had difficulty giving a clear cut history of the development of his pain. When asked to describe the pain in his head he made a number of statements which were not pain descriptions (Ex. E, p. 1). It was pointed out to claimant that he was a "catastrophizer" and that this increased his tension level. It was also noted that he was probably receiving some benefit or secondary gain from this (Ex. E, p. 11). Claimant's condition improved immensely at the pain center. He exercised a great deal. He quit taking Tylenol. His attitude changed. He returned to work in mid-March 1983. At the time of his discharge from the Pain Management Center, Dr. Skultety concluded as follows:

> I also feel that the prognosis is fair to good.

The possibility exists that he may have problems at some time in the future because of his tendency to catastrophize everything, thus increasing his stress level. On the other hand, considering the fact that he has probably been like this all of his life, even prior to his original injury and had no serious problem I think the chances are that he will continue to do well (Ex. E, p. 12).

Dr. Rudersdorf noted on March 14, 1983 that claimant had returned to work (Ex. C, p. 10). On April 8, 1983, he commented that claimant was tolerating and handling work well with only slight headaches and some pain in his right side (Ex. C, p. 11). On June 10, 1983, claimant continued to have numerous complaints such as (1) numb ache in his forehead; (2) when he talks he can hear his voice echo in his ears; and (3) right side pain. Dr. Rudersdorf attributed this to a low tolerance for pain and being an unhappy person (Ex. C, p. 12). He finally discharged claimant on August 26, 1983 (Ex. C, p. 13).

About a year later, on October 19, 1984, claimant again saw Dr. Rudersdorf complaining of tiredness and headaches (Ex. C, p. 14). Then, a year after that, on August 27, 1985, he saw Dr. Rudersdorf complaining of headaches and right side aches and stated he was thinking about a lawsuit. At this time, Dr. Rudersdorf sent claimant to the pain clinic in Iowa City (Ex. C, p. 15). At Iowa City, Viney Kumar, M.D., a neurologist, administered a supraorbital nerve block injection (Ex. F, pp. 1 & 2). Claimant testified that the shots relieved his headaches but caused him unbearable dizziness, nausea and emotional turmoil.

Claimant testified and other evidence shows that claimant actually returned to work on March 14, 1983. He regularly worked approximately 40 or more hours per week driving trucks and loading and unloading trucks on the dock. He performed his job as a driver and freight handler for approximately two years and nine months until he voluntarily retired on November 15, 1985 with a termination date of November 30, 1985 (Ex. J, p. 69-72). Claimant testified that he quit because his head hurt, his right side hurt, and his back hurt. Each day it got worse. It was killing him to continue working. He testified that he had planned to work until age 65 in order to get a pension of $1,000 per month from the Teamsters. However, since he retired early, he only receives $765 per month.

On November 13, 1985, just three days before he retired, claimant was found physically sound on an ICC physical examination for the DOT in order to maintain his license to drive a truck. However, the examining physician, Randy Asmin, M.D., referred claimant to his own personal physician for chronic pain syndrome (Ex. C, p. 16; Ex. J., p. 70).

Dr. Rudersdorf commented on November 14, 1985 that claimant planned to retire on disability and also requested treatment at the Mayo Clinic (Ex. C, p. 16). Dr. Rudersdorf wrote to claimant's counsel on December 13, 1985 that claimant's wife had cancer of the female genital system, had surgery, and was receiving chemotherapy. Her prognosis was very guarded. The doctor believed that the illness of claimant's wife aggravated his condition and that partly due to this was his reasoning for retiring at this time. Claimant's diagnosis continued to be post-traumatic celphalgia. Dr. Rudersdorf thought claimant could continue to work if he avoided continuous lifting over twenty-five pounds and continuous long-haul truck driving. The doctor thought claimant would benefit from behavioral modification therapy from a neurologist by the name of Dr. Nitz (full name unknown), but felt claimant probably would not cooperate with it (Ex. C, pp. 18 & 19).

In his deposition on December 9, 1986, which was a few days prior to this hearing, Dr. Rudersdorf testified that he has been a family practitioner since 1943. He has cared for claimant and his family since 1960. Claimant did not have any complaints of headache pain or right side pain prior to the injury of March 30, 1982 (Ex. 17, pp. 1-5). Dr. Rudersdorf reaffirmed that his diagnosis was post-traumatic celphalgia due to the injury of March 30, 1982 because claimant did not have these symptoms or headaches prior to that time (Ex. 17, p. 17). Dr. Rudersdorf stated that he believes claimant's condition will be permanent and not temporary (Ex. 17, pp. 18 & 19) and that claimant cannot return to his former employment of driving, loading and un-loading trucks. Furthermore, Dr. Rudersdorf now believes that claimant cannot do any kind of job (Ex. 17, p. 21). Even though there is no organic injury and the impairment is based entirely on subjective symptoms, Dr. Rudersdorf believed his opinion was correct because claimant is believable and honest. Simply because we cannot see or measure pain doesn't mean it isn't there (Ex. 17, pp. 18 & 21). The doctor conceded on cross-examination that he could not give an organic explanation of claimant's pain (Ex. 17, p. 25); that anxiety and tension aggravated his condition (Ex. 17, p. 32); his wife's cancer probably increased his anxiety (Ex. 17, p. 33); that all of Dr. Isgreen's objective tests were normal (Ex. 17, pp. 34-36); and that Dr. Asmin thought claimant could safely drive a truck even though he had chronic pain (Ex. 17, pp. 37 & 38).

Dr. Isgreen, who had discontinued seeing claimant in October 1982, saw him again at the request of claimant's counsel on May 20, 1986. His office notes end as follows:

DISCUSSION:

The man has been decimated by his headache.

I don't have really a good explanation for why the headaches other than my initial notion of dural tear and hypoliquorrhea with persistance [sic] of the headache problem, perhaps due to receptor sensitivity set.

IMPRESSION: Post-traumatic headache syndrome. (Ex. 15, pp. 6 & 7; Ex. B, pp. 6 & 7.)

In his report to claimant's counsel, Dr. Isgreen states that he, too, thought claimant's headaches were believable even though they were subjective and could not be quantitated or qualitated. He concluded his letter as follows:

> I think the man has a moderate permanent impairment on the basis of his injury, and using the second edition of the AMA Guidebook, because of the intrusion into his activities of daily living on a moderate basis, and the independent description of the problem by his wife, I don't think a permanent impairment number of 25 per cent is an unjust figure.
>
> Certainly the man has reached maximum medical recovery. There are no further neurodiagnostic studies that I would suggest. (Ex. 15, p. 2; Ex. B, p. 2.)

Claimant was examined and evaluated by David J. Boarini, M.D., a neurosurgeon in Des Moines, on November 17, 1986. He gave a deposition two days prior to hearing on December 15, 1986. Dr. Boarini gave a final diagnosis of chronic intractible headache which he stated could not be described as post-traumatic (Ex. L, Dep. Ex. 4). He testified that he had examined all of the medical evidence previously summarized in this decision (Ex. L, Dep. Ex. 2). Dr. Boarini reviewed and briefly explained the significance of claimant's prior tests and his own office examination, all of which were normal. He concluded as follows:

> Based on his history and his own reports, he's got chronic headache, but he's got an entirely normal neurological exam, and I could find no underlying abnormality to explain those headaches. (Ex. L, p. 12.)

Dr. Boarini said he did not believe claimant has a dural tear or a cerebral spinal fluid leak (Ex. L, p. 12). The following colloquy then transpired:

> Q. Do you have an opinion with reasonable medical certainty as to what's causing his headaches that he complains of?

A. Well, these are chronic headaches with essentially an entirely normal finding and all normal tests, so I think they're a tension headache, a muscle headache related to stress, anxiety.

Q. Did Mr. Vannatta tell you at the time of your examination that his wife was suffering from cancer?

A. I don't recall that he mentioned that, no.

Q. Would concern over that kind of a problem also produce tension headaches or stress headaches, or could it?

A. Yes, it could.

Q. Do you have an opinion, Doctor, with reasonable medical certainty, based on your examination and review of the records, as to whether or not Mr. Vannatta's headaches should be described as post-traumatic?

A. No, I don't believe they should be.

Q. Why do you say that?

A. Well, for two reasons. One is the type of headaches he has, but more importantly is their history in relationship to the accident. These headaches were not disabling, in the sense that he was able to return to work for quite a long time after the accident occurred, and then subsequently he feels they're incapacitating. In fact, the history of posttraumatic headaches is almost always that they shorten the--after the accident they are severe and then will get better over time, and these have been virtually the opposite of that. (Ex. L, pp. 12-14.)

Dr. Boarini thought claimant could be gainfully employed and that he could drive a truck as he did before, be a mechanic or a radio operator. He said claimant had no work restrictions and he could not find any permanent impairment. He stated that the AMA Guides provide no impairment rating for chronic intractible headache (Ex. L, pp. 14-16). Dr. Boarini reiterated that post-traumatic headaches almost always are worse right after the trauma, and then over time, diminish and disappear completely in a matter of months (Ex. L, p. 17). He testified that he would not expect post-traumatic headaches to persist for four years and he would not expect them to worsen after claimant was able to work for a couple of years (Ex. L, p. 18).

Claimant testified that he did not have headaches or right rib pain before the injury. Now, his daily activities are to watch TV, do dishes, walk two and one-half miles a day, but usually after two and one-half hours he has to sit down due to headache, dizziness, and backache. He reads, works on his car a little, and works with his amateur radio a little bit. He tries to lie down and sleep. He states he could drive a semi now, but he could not do it all day long. He would like to work today if he could. He testified that he has not applied for employment or attempted to find employment since his retirement in November 1985. Claimant admitted that after he returned to work in March 1983, he worked five days a week whereas before the accident he only worked about three days a week. His Teamsters retirement is regular retirement, not disability retirement. He is not receiving social security benefits because he wants to wait until he is age 65 in order to draw a larger benefit. Claimant testified that the pay stubs in claimant's exhibit 16 are his pay stubs before he terminated his employment on November 15, 1985. The pay records in claimant's exhibit are his pay records before March 30, 1982 (Ex. 16A).

Marian Vannatta testified that claimant never missed worked or complained of headache prior to his accident of March 30, 1982. He has a headache all the time now. He does not mow the yard because he cannot stand the noise and jerk of the mower. On road trips for the chemotherapy at Iowa City for her, she does most of the driving. She granted that claimant had other stresses in his life after the injury of March 30, 1982. Their son-in-law had made threats against their daughter and grandchildren and eventually committed suicide. Also, claimant's father died and both of her parents died after claimant's accident.

Duane Behrens testified that he is terminal manager for employer. He was not there at the time of the accident on March 30, 1982. He stated that the hours shown on exhibit 16A are the employer's payroll records for this employee. He stated that these hours were not full-time hours because claimant did not have enough seniority to work full time at that time. After claimant came back to work in March 1983, he did have enough seniority and did bid and got a full-time job until he decided to terminate his employment. During the two years and nine months when claimant worked full time, from March 1983 to November 1985, claimant did everything that he was told to do and met all of his expectations. Claimant did complain of headache and the witness believed that he did have headaches, but claimant did get the job done. During that period, claimant drove trucks, loaded and unloaded on the dock, and operated a forklift. If claimant wished to return to work today, his seniority would allow him to work full time. Claimant's seniority makes him fourth in seniority for five full-time bid jobs.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of March 30, 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).

Claimant did sustain the burden of proof by a preponderance of the evidence that the injury of March 30, 1982 was the cause of some permanent disability. Dr. Rudersdorf, the treating physician, testified that claimant suffered from post-traumatic celphalgia. The patient was complaining of headaches when he was hospitalized on April 20, 1982. Dr. Rudersdorf's office notes first mentioned headache pain on May 17, 1982 and he did say that he believed they were caused by or associated with the previous trauma at that time (Ex. C, p. 2). And, although his office notes (1) mention acute anxiety and that he has "known the patient over 30 years and his wife agrees that he has never looked on the bright side of things. He has been nervous, anxious and tense" (Ex. C, p. 5); (2) that claimant needs "to try to think positively which he hasn't been doing" (Ex. C, p. 6); and (3) that his subjective complaints are clearly out of proportion to his physical findings (Ex. C, p. 6); nevertheless, Dr. Rudersdorf recorded on August 27, 1982 that he believed the headaches and tension were post-trauma (Ex. C, p. 6). He also consistently recorded this same diagnosis of headache, post-traumatic celphalgia on October 18, 1982; January 7, 1983; January 17, 1983; February 28, 1983; March 4, 1983; April 8, 1983; June 10, 1983; August 26, 1983; October 19, 1984; August 27, 1985; and November 14, 1985 (Ex. C, p. 8-16) even though the headaches were combined with chronic endogenous anxiety and depression (Ex. C, pp. 14-15). Therefore, Dr. Rudersdorf's opinion in his deposition a few days prior to the hearing of

post-traumatic celphalgia due to the injury of March 30, 1982 was entirely consistent with his recorded opinion over the preceding years ever since shortly after the injury of March 30, 1982.

In September and October of 1982, Dr. Isgreen performed extensive tests and put a great deal of thought into claimant's complaints of pain, but he could find no organic cause for the headaches. Nevertheless, he did say that since the headaches follow the accident it is not unfair to blame the injury of March 30, 1982 for the headaches (Ex. B, p. 11). Again, in May of 1986, Dr. Isgreen still had no good explanation for the headaches, but his impression of post-traumatic headache syndrome is nevertheless consistent with earlier findings (Ex. 15, pp. 6 & 7; Ex. B, pp. 6-7). His assessment, then, of permanent partial impairment on the basis of the injury of March 30, 1982 which he made on May 20, 1986 is consistent with his earlier findings of causal connection (Ex. 15, p. 2; Ex. B, p. 2).

Therefore, based on the testimony of the two treating physicians, Dr. Rudersdorf and Dr. Isgreen, who tested, studied and treated claimant's condition extensively, it is determined that the injury of March 30, 1982 did cause some permanent partial disability.

This determination in no way discounts the testimony of Dr. Boarini, who examined the medical records and the claimant and concluded that claimant's symptoms did not follow a pattern of post-traumatic headache in his opinion. Dr. Boarini stated that claimant's headaches were tension headaches related to stress and anxiety. Dr. Boarini may be entirely correct. The evidence certainly establishes that claimant has a personality highly susceptible to stess and anxiety. In addition, since the injury of March 30, 1982, claimant has been subject to several very difficult stresses. His father died. His wife's parents have both died. His son-in-law made threats on his daughter and his grandchildren and eventually committed suicide. And, his wife has become ill with female genital cancer which has required surgery and repeated chemotherapy. However, the preponderance of the evidence in this case, the greater weight of the evidence, lies with Dr. Rudersdorf and Dr. Isgreen, who treated claimant extensively and were responsible for his recovery or failure to recover. Deference, then, in this case is given to the two treating physicians who found that the headaches were post-traumatic, which means they were caused by the trauma of the accident of March 30, 1982. See Rockwell Graphics Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

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. * * * *

Dr. Rudersdorf agreed that even without the accident claimant would have been one to stew and fret about his wife's condition (Ex. 17, p. 33). The pain center characterized claimant as a "catastrophizer" and that this personality trait will increase his tension level, and that he was probably receiving some benefit or secondary gain from it (Ex. E, p. 11). From the standpoint of his physical injuries, Dr. Warren thought claimant could return to light duty work approximately five days after the injury (Ex. D, pp. 1-4). Dr. Rudersdorf attempted to get claimant back to work a short time after the accident, but claimant resisted vehemently due to his many subjective symptoms. Claimant did return to work in July 1982, but left after only working five days and convinced Dr. Asmin and Dr. Rudersdorf that he could not work due to his subjective symptoms. After the pain clinic experience, claimant did work full time, five days a week, for two years and nine months from March 1983 to November 1985. This is more than he worked before the injury because he only worked three days a week at that time. Behrens said that claimant performed all the duties of his job as a driver and freight dock worker. Claimant voluntarily retired at the end of November 1985. He retired as a matter of his own voluntary, personal, individual decision and took a Teamsters pension in the amount of $765 per month. None of the doctors that he had seen previously, in particular his treating physicians Dr. Rudersdorf and Dr. Isgreen, ordered, recommended, or even suggested that he quit his job. No other medical practitioners recommended that claimant quit his job. Even though it is advanced that claimant quit on November 15, 1985 because he could no longer stand the pain, claimant never consulted a physician for his pain after his retirement. He last saw Dr. Rudersdorf on November 14, 1985, the day before he retired. Nor is there any evidence that he consulted any other health practi-

tioner for this pain. Claimant's retirement seems to be entirely his own personal choice. Dr. Rudersdorf thought it was influenced by the the discovery of his wife's illness earlier that year.

Claimant is age 62 and many people do retire at that age. In determining permanent partial disability consideration must be given to an employee's plans for retirement. Swan v. Industrial Engineering Equipment Co., IV Iowa Industrial Commissioner Report, 353 (1984) and his retirement benefits. McDonough v. Dubuque Packing Co., I-1 Iowa Industrial Commissioner Decisions 152 (1984).

If claimant were permanently and totally disabled and not able to perform any job or gainful occupation as Dr. Rudersdorf testified in his deposition, then claimant would be clearly eligible for social security disability benefits. Yet, at the hearing claimant testified that he had not applied for social security benefits of any kind. His testimony was that he wanted to wait until age 65 in order to receive a larger amount of money. However, if claimant were, in fact, totally and permanently disabled, he is eligible for and could be drawing the maximum amount of social security as social security disability benefits. But, claimant has not applied for any social security benefits and did not indicate any intention of doing so.

It should also be noted that Behrens testified claimant is fourth on the seniority list for five bid jobs. He stated that claimant could be working full time now if he chose to do so. Dr. Rudersdorf's opinion that claimant can not do any job is not reasonable inasmuch as claimant was fully performing a five day a week job until he chose to retire from it. There was no evidence that claimant's condition has worsened since his retirement. In fact, he has not sought any medical treatment since November 14, 1985, the day before he retired. It is also noted that Dr. Rudersdorf previously recommended that claimant see a neurologist by the name of Dr. Nitz for behaviorial modification therapy (Ex. C, pp. 18 & 19).

As far as permanent impairment ratings, Dr. Rudersdorf did not give a specific permanent impairment rating as such. He simply stated that claimant could no longer do his old truck driving job and that he did not think he could do any job at this time. Dr. Isgreen rather generally stated "I don't think a permanent impairment number of 25 percent is an unjust figure" (Ex. 15, p. 2; Ex. B, p. 2).

There is a common misconception that industrial disablity is greater than functional impairment and that it is an add-on; i.e., something to be examined on top of functional impairment but such is not the case. Industrial disablity can be the same as, less than, or greater than functional impairment. Lawyer & Higgs, Iowa Workers' Compensation---Law and Practice, § 13-5. In this

case, claimant's industrial disability is found to be less than the rather general impairment rating advanced by Dr. Isgreen above.

It is possible and proper to allow permanent partial disability for physical trauma which causes nervous injury, Newman v. John Deere, 372 N.W.2d 199 (Iowa 1985), Larson, Workers' Compensation Law, § 42.22, page 7-601. Larson does not cite any Iowa cases and claimant's brief does not cite any Iowa cases. In this case, however, claimant's primary complaint and the object of his very comprehensive medical treatment and testing is headache pain. Dr. Rudersdorf, Dr. Isgreen, Dr. Jung, Dr. Hiemstra, Dr. Asmin, Dr. Skultety, and Dr. Boarini could not find any organic, physical, objective, medical cause for claimant's headache pain. Indeed, claimant's own description of the headache pain varied from doctor to doctor and from time to time. Dr. Skultety said that claimant could not describe a clear cut history of how this pain developed and he made a number of statements that were not pain descriptions at all (Ex. E, p. 1). It has been held by this agency that pain that is not substantiated by clinical findings is not a substitute for impairment, Waller v. Chamberlain Manufacturing, II Iowa Industrial Commissioner Report 419, 425 (1981).

There is an abundance of evidence from Dr. Rudersdorf that claimant's long time personality has been one of tension and anxiety and that claimant has been basically a tense, nervous, and anxious person. Dr. Skultety and other members of his staff at the Pain Management Center characterized claimant as a catastrophizer. There is no evidence that the injury of March 30, 1982 was the cause of this personality or character trait which appears to be largely the cause of claimant's current suffering. There is a great deal of evidence that other factors such as aging, illness, and death in claimant's personal life may be a significant influence on his current condition. Also, Dr. Skultety predicted that claimant would have problems in the future because of his tendency to catastrophize everything which increased his stress level. He felt that claimant had probably been like this all of his life and even prior to the injury of March 30, 1982 (Ex. E, p. 12).

As for claimant's ability to work, in spite of his chronic pain syndrome, Dr. Asmin found claimant physically sound to drive a tractor and trailer over the road and approved his ICC license on November 12, 1985, just three days before claimant retired (Ex. C, p. 16; Ex. J, p. 70). Claimant is not drawing a disability pension from the Teamsters. It is a regular retirement pension. Claimant has not applied for social security disability benefits.

At the same it must be remembered that claimant was involved in a very serious motor vehicle accident. His tractor and

trailer fell several feet airborne to the lower level and landed upright on its wheels. The tractor and trailer each were a total loss. Claimant suffered a seven centimeter laceration on his right forehead that took eighteen stitches to close and left a visible scar. Claimant's face received a traumatic blow that caused both of his eyes to be ecchymotic and swollen for several days. Claimant had a hematoma on his nose. He was clinically diagnosed as having fractured ribs. Claimant testified that he still suffers with headaches and right rib pain. Claimant testified that he consumes as many as sixteen aspirins or Tyelnol a day in order to control his pain. There was no evidence that he does not actually experience this pain. Claimant's wife, Behrens, Dr. Rudersdorf, Dr. Isgreen, and Dr. Asmin all believed that he actually experienced this headache pain. Claimant testified that it is true that he was able to work, but it was very difficult and he suffered a great deal and consumed a lot of analgesics in order to do so. Therefore, based on all of the foregoing considerations, it is determined that claimant has sustained a 15 percent industrial disability to the body as a whole.

Claimant asserts that he is an odd-lot employee citing Guyton v. Irving Jensen Company, 373 N.W.2d 101 (Iowa 1985). The Guyton principle is triggered when the employee makes prima facie showing that he cannot find any employment in any well-known branch of the labor market. In order to apply the Guyton rule, it is normally incumbent upon the injured worker to demonstrate a reasonable effort to secure employment in the area residence. In this case, claimant testified that he has not applied for employment or made any attempt to find employment since he retired in November 1985. Therefore, the Guyton principle cannot be applied to this case. The ICC physical examination that claimant passed three days prior to his retirement indicates that claimant was capable of continuing in the full-time job that he was performing at that time, but he chose to retire instead of continuing to work. Behrens further testified that with claimant's seniority he could be employed now full time if he chose to work. Thus, it is determined that claimant did not make out a prima facie case. Claimant is not permanently disabled under the odd-lot principle of the Guyton case.

Claimant asserts that his rate of compensation beginning on March 30, 1982 should be determined by only using the thirteen weeks in which claimant completed thirty or more hours of work. Claimant then went back through thirty-four weeks of employment in order to isolate out thirteen weeks in which he had more than thirty hours of employment. Claimant asserts that only thirty hour weeks comply with the wording of the first unnumbered paragraph of Iowa Code section 85.36 that states the rate is to be based on "earnings of an employee to which such employee would have been entitled had he worked the customary hours for the full pay period in which he was injured." The testimony of

claimant and Behrens indicated that claimant worked the hours at that time which claimant's seniority permitted. The hours for the thirteen weeks prior to the injury look very similar to the hours worked in the thirteen weeks prior to that (Ex. 16A, p. 3). Therefore, the thirteen week period prior to the injury represents claimant's customary wages at that time. The evidence is insufficient to show that claimant's customary work week prior to the injury was a thirty hour work week as asserted by claimant. Therefore, claimant's contention that the proper rate of compensation as illustrated on exhibit 16A, pages 1 and 2, cannot be accepted as correct.

Neither can defendant's rate calculation in his brief be applied to this case. This is a correct method of calculation, but it does not result in the highest rate that can be applied to this case under the Code. Defendant applied Iowa Code section 85.36(10) and divided the last twelve calendar months earnings by twelve. This resulted in a gross wage of $314.27 per week and a weekly compensation rate of $193.09.

The employer's claims examiner made a calculation which used Iowa Code section 85.36(6). This also is a correct method of computation, and it also allows claimant the highest weekly rate of compensation. It divides the earnings for the thirteen weeks immediately preceding the injury by thirteen and arrives at a gross weekly rate of $321 per week and a weekly compensation rate of $196.70 per week. Therefore, it is determined that $196.70 is the weekly rate of compensation to be applied to this case.

Claimant asserts that he received a cumulative injury and, therefore, his rate of compensation after he quit working allegedly due to the pain should be based on the thirteen week period prior to November 15, 1985. This contention must be rejected because there is no evidence that claimant suffered a gradual or cumulative injury. The evidence is that claimant was injured in the motor vehicle accident on March 30, 1982. On April 20, 1982, he was hospitalized for headache pain. He first mentioned headache pain in Dr. Rudersdorf's notes on May 17, 1982. He has complained of this same headache pain ever since. There was no evidence of repeated traumas or gradual onset. Therefore, the weekly rate of compensation is $196.70 as previously determined. Claimant's calculations on the rate as proposed in exhibit 16 then cannot be accepted as the proper rate in this case based upon the cumulative injury theory.

FINDINGS OF FACT

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

That claimant sustained an injury on March 30, 1982 in a serious one vehicle truck accident.

That shortly after the accident, claimant began to complain of headaches and has continued to complain of headaches until the present time.

That numerous and very comprehensive medical testing and evaluating failed to establish an organic cause for claimant's headaches.

That claimant did sustain serious trauma to his whole body and in particular to his face and head in the motor vehicle accident.

That Dr. Rudersdorf and Dr. Isgreen, claimant's two treating physicians, stated that in their opinion the injury of March 30, 1982 was the cause of claimant's continuing headaches which Dr. Rudersdorf called post-traumatic celphalgia and Dr. Isgreen called post-traumatic headache syndrome.

That both of these doctors and Dr. Skultety acknowledged claimant was tense, nervous, and anxious by nature.

That Dr. Skultety and the Pain Management Center personnel characterized claimant as a catastrophizer type personality, and that this characteristic would increase his tension level in the future.

That claimant eventually returned to work on March 14, 1983 and performed all of the duties of a truck driver and freight dock employee for two years and nine months until his voluntary retirement on November 15, 1985.

That no medical practitioner ordered, recommended, or even suggested that claimant quit his employment on November 15, 1985.

That claimant did not seek any medical attention or treatment for headaches after he retired on November 15, 1985 with Dr. Rudersdorf or anyone else.

That claimant began drawing a pension of $765 per month from the Teamsters in November 1985 at age 62.

That the Teamsters pension is a regular pension and not a disability pension.

That claimant has not applied for social security disability benefits.

That claimant has not applied for regular social security benefits at age 62.

That claimant has not sought or attempted to find any employment since he retired on November 15, 1985.

That claimant's rate of compensation is properly calculated for the highest benefit pursuant to Iowa Code section 85.36(6) using the thirteen weeks prior to his injury for the calculation.

That there is no evidence of repeated trauma or gradual onset of injury, but rather the only injury date in evidence is March 30, 1982.

That claimant suffered a severe laceration of the forehead, ecchymotic and swollen eyes, a hematoma of the nose, and right anterior rib injuries.

That claimant's physical injuries appeared to heal well, but that claimant still complains of headache pain and right rib pain as a result of the accident on March 30, 1982.

That claimant takes as many as sixteen aspirins or Tylenol per day in order to alleviate his subjective symptoms of pain.

That even though claimant worked full time for two years and nine months after the injury, nevertheless, claimant's wife, Behrens, Dr. Rudersdorf and Dr. Isgreen testified that they believed claimant suffered the headache pain he claimed in his testimony.

That claimant sustained an industrial disability of 15 percent of the body as a whole.

CONCLUSIONS OF LAW

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

That the injury of March 30, 1982 was the cause of some permanent disability.

That claimant is entitled to seventy-five (75) weeks of permanent partial disability as industrial disability to the body as a whole.

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

That the proper rate of weekly compensation is calculated by using Iowa Code section 85.36(6), using the thirteen weeks of employment immediately preceding the injury.

That claimant did not sustain a cumulative injury that would entitle him to a rate of compensation based upon his earnings at the time he retired from employment.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant seventy-five (75) weeks of permanent partial disability benefits as industrial disability to the body as a whole at the rate of one hundred ninety-six and 70/100 dollars ($196.70) per week commencing on March 15, 1983 in the total amount of fourteen thousand seven hundred fifty-two and 50/100 dollars ($14,752.50).

That defendant pay this amount 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 requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

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

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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FILED

SEP 16 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEO WATERS, Claimant, vs. AUTO CONVOY COMPANY, Employer, and LIBERTY MUTUAL INSURANCE, Insurance Carrier, Defendants.	File No. 803244 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 Leo Waters against Auto Convoy Company, employer, and Liberty Mutual Insurance Company, the employer's insurance carrier. Claimant seeks benefits as a result of an alleged injury that occurred March 4, 1985 in Stronghurst, Illinois.

The case was heard at Des Moines, Iowa on April 23, 1987 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Leo Waters and joint exhibit one.

ISSUES

The sole issue presented by the parties is whether or not the state of Iowa has subject matter jurisdiction over this claim.

SUMMARY OF EVIDENCE

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

The evidence submitted by claimant in his testimony stands uncontradicted. The matters of which he testified which were based upon his own personal observation are accepted as correct.

Claimant is a resident of Des Moines, Iowa and has lived for

14 years at 1810 34th Street, Des Moines, Iowa. On May 29, 1974 claimant commenced employment as a truck driver for Leroy Wade. His duties consisted of driving a tractor-trailer and delivering new cars. He worked from the Des Moines terminal of Leroy Wade and was a member of the Teamsters Union.

In July, 1982, Leroy Wade merged with Associated, a company owned by Leroy Wade. Associated assumed the contractual obligations of Leroy Wade with the union. Claimant continued to work from the Des Moines terminal.

In 1983, Associated was purchased by Auto Convoy. Auto Convoy, as successor to Associated and Leroy Wade, assumed the contractual obligations of Associated with the union. Claimant continued to work from the Des Moines terminal until September, 1984, when the Des Moines terminal was closed. Auto Convoy continued to operate a terminal in Council Bluffs, Iowa.

From September, 1984 through the date of the injury on March 4, 1985, claimant has worked from the Kansas City terminal. Dispatch for Auto Convoy during this period was described by claimant to be "A, B, C dispatch." Dispatch for destination A is from Kansas City and destinations B and C are from central dispatch in Dallas, Texas. Pay was received from the home office of Auto Convoy in Dallas, Texas. State income taxes for Iowa were withheld by Auto Convoy as reflected by the W-2 form for 1985.

Claimant estimated that more than 40% of the work he performed for Auto Convoy was performed in Iowa. The remainder of the work was performed in other states which included Minnesota, Illinois, Wisconsin, Nebraska, Kansas, Missouri, Texas and Oklahoma. The percentage of work performed in these states ranged from 20% to only a few percent.

On March 4, 1985, claimant left Des Moines at approximately 5:00 a.m. with a load of new cars. He dropped cars off in the Quad Cities area and in Illinois. He sustained an injury at Stronghurst, Illinois which is the subject of this litigation. Following the injury, he went to Fort Madison, Iowa and delivered cars. After staying overnight in Fort Madison, he returned to the Kansas City terminal and sought medical treatment.

Joint exhibit one is a copy of claimant's W-2 statement for calendar year 1985. It shows claimant's address to be within the state of Iowa, income tax withholding for the state of Iowa and the employer's address to be in Dallas, Texas.

APPLICABLE LAW AND ANALYSIS

The jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings

belong. Green v. Sherman, 173 N.W.2d 843, 846 (Iowa 1970). When a court acts without legal authority to do so, it lacks jurisdiction of the subject matter. In Re Adoption of Gardiner, 287 N.W.2d 555, 559 (Iowa 1980). Jurisdiction of the subject matter cannot be conferred by waiver, estoppel or consent. It can therefore be raised at any time and need not be pled. Steffens v. Proehl, 171 N.W.2d 279 (Iowa 1969). The issue of subject matter jurisdiction is not a typical affirmative defense. In Federal practice, a plaintiff is required to specifically plead the statutory basis for the court's subject matter jurisdiction of the case. No such rule exists in the Iowa courts or before this agency. The lack of a pleading requirement, however, does not relieve the claimant from the burden of proving that the agency has subject matter jurisdiction to determine his claim. The proposition that the burden of proving an entitlement to anything rests on the proponent is so well settled that Rule 14(f)(5) of the Rules of Appellate Procedure provides that the citation of authority for that proposition is not necessary. The same rule regarding burden of proof applies to administrative proceedings. Wonder Life Company v. Liddy, 207 N.W.2d 27 (Iowa 1973). If the facts necessary to establish subject matter jurisdiction are absent, an order dismissing the petition is the only appropriate disposition. Lloyd v. State, 251 N.W.2d 551, 558 (Iowa 1977).

The Iowa Industrial Commissioner has subject matter jurisdiction over all injuries suffered by employees within the geographical boundaries of the state of Iowa. [Code section 85.3(2)]. Where an employee is injured outside the territorial limits of this state, the Iowa Industrial Commissioner has subject matter jurisdiction only if one of the four criteria established in Code section 85.71 is present. Those four criteria provide as follows:

> 1. His employment is principally localized in this state, that is, his employer has a place of business in this or some other state and he regularly works in this state, or if he is domiciled in this state, or
>
> 2. He is working under a contract of hire made in this state in employment not principally localized in any state, or
>
> 3. He is working under a contract of hire made in this state in employment principally localized in another state, whose workers' compensation law is not applicable to his employer, or
>
> 4. He is working under a contract of hire made in this state for employment outside the United States.

The test for determining whether or not the Iowa statute applies to an out-of-state injury is whether Iowa has sufficient interest based upon its statutes. George H. Wentz, Inc. v. Sabasta, 337 N.W.2d 495, 498 (Iowa 1982). In that case the Iowa Supreme Court stated:

> ...a state where the employment is principally localized...is the state where the employee spends most of his time while on the job.

Further, the Court stated:

> Although the legislature clearly contemplated a claimant's employment may not be localized in any state, see Iowa Code § 85.71(2), we think it similarly contemplated a claimant's employment may be localized in but one principal state. See Iowa Code § 85.71(3); Council of State Governments Model Act commentary; Restatement (Second) of Conflict of Laws at § 181, comment a.

It is concluded that if the majority of an employee's working hours are spent in one state, then the employment is principally localized in that state. If there is no one state within which a majority of the employee's working time is spent, then the employment is not principally localized in any state.

The term "principally localized" refers to a majority rather than a plurality of the working time. Any other interpretation would result in section 85.71(2) being applicable in only those rare cases where the employee worked a precisely equal amount of time in each of the two or more states where the greater portion of work was performed.

In Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa 1981), the court seems to rule that the employee's performance of the primary portion of his work in a state is the test and that the location of the employer's place of business or the employee's domicile is of no effect. There is some authority to the effect that the job of an over-the-road trucker, by its very nature, is not principally localized in any state. Albertson v. I-29 Country Diesel, IV Iowa Industrial Commissioner Report, 5 (1984).

It can be reasonably argued that the employment of an over-the-road truck driver is principally localized at the place of the terminal from whch he is dispatched. It can be argued that the employment of an over-the-road truck driver is principally localized at his place of residence or such other place, if any, to which he returns when there is no work to be performed and from which he leaves when a work assignment is issued. It is believed, however, that the better rule is the one followed

herein.

While Auto Convoy Company did maintain a place of business in the state of Iowa at Council Bluffs at the time of injury, claimant did not work from that place of business. This is a similar situation to that which existed in the case of Iowa Beef Processors, Inc. v. Miller, 312 N.W.2d 530 (Iowa 1981) since the employer in that case had one or more places of business in the state of Iowa, but Miller was not employed at any of those places.

Waters estimated that 40% of the work he performed for Auto Convoy was performed in Iowa. He estimated that the figure could be as high as 50%. He did not introduce any evidence whatsoever that the figure would exceed 50%. The remainder of the work was performed in other states. While more of claimant's working time was spent in the state of Iowa than in any other state, there is no one state in which more than 50% of his work was performed. Accordingly, claimant's employment by Auto Convoy Company was not principally localized in any state. If subject matter jurisdiction exists, it exists under section 85.71(2).

The direct evidence in the case contains little about the manner in which claimant became employed by Leroy Wade. The evidence does reflect, however, that claimant resided in Des Moines, Iowa at the time he commenced working for Leroy Wade and that his job was hauling automobiles from Wade's Des Moines, Iowa terminal. It can therefore be reasonably inferred that claimant was hired by Wade in or near Des Moines, Iowa. It would be highly unlikely for claimant and Wade to have somehow met and created an employer-employee relationship in some state other than Iowa since there is no evidence in the record to indicate that claimant and Wade ever communicated with each other at any place other than the Des Moines, Iowa area in establishing the employer-employee relationship.

The merger with "Associated" apparently did not terminate the prior employer-employee relationship, and, if it did, a new one was apparently immediately created, again, with such occurring in the Des Moines, Iowa area, since claimant continued to reside in Des Moines, Iowa and to work out of the employer's Des Moines, Iowa terminal.

The purchase of Associated by Auto Convoy Company, in which the contractual obligations were apparently assumed, appears to have transferred, rather than terminated the employer-employee relationship which was then in existence. If there was in fact some sort of termination, a new employer-employee relationship was again created since there was no substantial change in claimant's working conditions. If a new employer-employee relationship was created, it is again inferred that such occurred in Des Moines, Iowa the place of claimant's residence and the

place of the terminal out of which he worked. The closing of the Des Moines terminal and the transfer of its operations to Kansas City did not terminate the employer-employee relationship between claimant and Auto Convoy Company. Under the evidence introduced, it appears more likely than not that claimant was working under a contract of hire made in the state of Iowa at the time of his injury that occurred in Stronghurst, Illinois. It is therefore concluded that this agency has subject matter jurisdiction of this proceeding under the provisions of Code section 85.71(2).

FINDINGS OF FACT

1. On March 4, 1985 Leo Waters was a resident of the state of Iowa.

2. On March 4, 1985 Leo Waters was injured in a fall that occurred at Stronghurst, Illinois.

3. At the time of injury, claimant was employed as a truck driver working for Auto Convoy Company, dispatched out of its Kansas City terminal.

4. Claimant's contract of hire with Auto Convoy Company was made in the state of Iowa.

5. Claimant spent more of his working time in the state of Iowa than in any other state, but there is no one state in which a majority of his work was performed.

CONCLUSIONS OF LAW

1. If the majority of an employee's working time is spent in one state, then the employment is principally localized in that state. If there is no one state within which a majority of the employee's working time is spent, then the employment is not principally localized in any state.

2. This agency has jurisdiction of the subject matter of this proceeding under the provisions of section 85.71(2) based upon claimant's contract of hire having been made in the state of Iowa and the employment not being principally localized in any state.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant compensation for healing period at the appropriate rate for the stipulated period of from March 5, 1985 through January 12, 1986, a period of forty-four and six-sevenths (44 6/7) weeks.

IT IS FURTHER ORDERED that defendants shall receive credit for all benefits previously paid on this claim in the state of

Illinois and that any past due amounts be paid in a lump sum together with interest pursuant to section 85.30.

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

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

IT IS FURTHER ORDERED that this file be assigned for prehearing on the claim made under section 86.13 of the Code.

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

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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002512

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARTY WEILAND, Claimant, vs. DUBUQUE PACKING COMPANY, Employer, and SENTRY INSURANCE COMPANY, Insurance Carrier, Defendants.	: : : : : : : : : : : : : : :	FILE NOS. 812429, 796135 & 781613 A R B I T R A T I O N D E C I S I O N FILED SEP 30 1987 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a combined proceeding in arbitration brought by Marty Weiland, claimant, against Dubuque Packing Company, employer (hereinafter referred to as Dubuque Pack), and Sentry Insurance Company, insurance carrier, defendants, for workers compensation benefits as a result of alleged injuries on January 14, 1984, June 5, 1985 and January 15, 1986. On July 9, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of the hearing.

The parties have submitted a 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 Daryl Smith. 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. Claimant seeks temporary total disability or healing period benefits for the period from February 25, 1985 through March 3, 1985 and claimant was off work for this period of time;

2. Claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $215.80 for the alleged January 14, 1984 injury; $232.36 for June 5, 1985 alleged injury; and, $228.32 for the alleged injury on January 15, 1986; and,

s a credible witness.

or while testifying, claimant appeared to be
's testimony was consistent with histories
ans during treatment and evaluation of his
claimant has been previously convicted of
d arson in 1977, these convictions are 10
is no evidence of subsequent convictions.
ord did not overshadow his appearance of
ing. Furthermore, the record shows that he
his apparent alcoholism and prior drug abuse
ving treatment for these conditions in 1984.
attempt to rehabilitate himself by seeking
g demonstrates to the undersigned that
r has changed in a favorable manner over the

s employed by Dubuque Pack from December,
1986, primarily as a beef lugger.

e dispute among the parties as to the nature
yment with Dubuque Pack. Claimant testified
me he was employed as a beef lugger. This
g approximately 15 trucks a day with beef

disease entity. The significance of this report to Dr. Nitz is unknown as no other reports were submitted into evidence subsequent to the University of Iowa report. Throughout the subsequence notes and reports of Dr. Duncan, he makes reference to a diagnosis of myotonia congenita but does not explain how he may have arrived at such a diagnosis given the incomplete views of Dr. Nitz and the report from Dr. Schelper. Dr. Duncan is only a general practitioner. An orthopedist, Scott B. Neff, D.O., also makes reference in reports he has authored to a specific diagnosis of myotonia congenita but only made reference to some testing during a hospital stay. Consequently, the evidence is confused and it cannot be found from the evidence presented that claimant does have such a prior existing disease process.

Whether or not claimant has myotonia congenita, Dr. Duncan does not back away from his early diagnosis of carpal tunnel syndrome in the right wrist. Claimant was released for work on January 9, 1985 but only worked until January 16. At that time claimant left work with additional complaints in the left wrist. At that time claimant was diagnosed as suffering from bilateral carpal tunnel syndrome along with whatever claimant's underlying muscle disorder may be, if any. After further rest and treatment with medication, claimant again returned to work on February 4, 1985 but was only able to work until February 13, 1985 before a recurrence of his pain and numbness returned. Throughout this period of time, claimant was told by Dr. Duncan that he should seek alternative employment through vocational rehabilitation or consider surgery. Also, during this time Dr. Duncan suggested that claimant seek permanent disability benefits through his job rather than undergo surgery especially in light of his possible muscle disorder. On March 6, 1985, claimant desired to return to work and asked for surgery on his wrist. Claimant was then referred to an orthopedic surgeon, D. G. Paulsrud, M.D. After his examination and diagnosis of bilateral carpal tunnel syndrome, Dr. Paulsrud told claimant to either change jobs or undergo surgery. Claimant apparently chose surgery because carpal tunnel release surgery was performed on March 29, 1985 on the right wrist by Dr. Paulsrud. Claimant was released for work after the surgery on May 13, 1985. According to reports submitted by Dr. Paulsrud, he was aware of the possible myotonia congenita problem but this did not prevent him from recommending surgery. In a report dated April 3, 1985, in answer to a question on an insurance company form, Dr. Paulsrud indicated that the right carpal tunnel problem was not work related. However, in a subsequent report dated July 24, 1985, Dr. Paulsrud stated that claimant was treated for bilateral carpal tunnel syndrome "occupationally related."

Given the confused medical evidence regarding even the existence of the myotonia congenita condition and the rather consistent diagnosis of carpal tunnel syndrome, the preponderance of the evidence clearly establishes that claimant suffered

carpal tunnel syndrome as a result of his work at Dubuque Pack in the opinion of both Dr. Duncan and Dr. Paulsrud, the treating physicians.

4. The work injury of February 13, 1985, was a cause of a temporary period of total disability while claimant was recovering from injury a portion of which extended from February 25, 1985 through March 3, 1985.

According to the prehearing report, claimant is seeking in addition to the healing period benefits already paid, healing period benefits for the time period from February 25, 1985 through March 3, 1985. The parties have stipulated that claimant was off work for that period of time. According to the medical records submitted he was being treated by Dr. Duncan for the bilateral carpal tunnel syndrome during this time and according to the office note of February 13, 1985, claimant was to remain off work. Claimant was not given a release for work until May 13, 1985 by Dr. Paulsrud following the release surgery.

The injury date found for this temporary period of disability was chosen from among the almost limitless dates of injury in a gradual injury process because it was the most recent time claimant was compelled by pain to leave his job which bore a relation to the claimed period of healing.

5. The work injury of February 13, 1985, was a cause of a 12.5 percent permanent partial impairment to claimant's right hand.

In a report submitted into the evidence dated July 24, 1985, claimant's primary treating physician for the right wrist, Dr. Paulsrud, opined that claimant has suffered a five percent permanent partial impairment to the right hand as a result of the carpal tunnel syndrome. In a report of examination conducted on November 12, 1985, another physician retained by claimant, Horst Blume, M.D., a neurosurgeon, has rated claimant's impairment as constituting a 20 percent permanent partial impairment to the right hand. Given the evidence presented, both physicians appear to possess equal qualifications to rate the carpal tunnel syndrome problem as such a condition involves an interaction of both muscle tendons and nerves. Therefore, their ratings were averaged for the purpose of the finding of impairment in this decision.

The work injury date chosen for this permanent impairment was the most recent injury date from the limitless possibilities in a gradual injury process that bore a relation to the time when it became apparent to Dr. Paulsrud that claimant would have to undergo surgery and suffer permanent impairment as the result of the carpal tunnel syndrome.

6. On or about June 5, 1985 and again on January 15, 1986, claimant suffered an injury to his lower back which arose out of and in the course of his employment at Dubuque Pack.

Aside from the issue of whether claimant suffers from myotonia congenita, there is little question from the evidence presented that claimant suffered back strains while performing his lugging job at Dubuque Pack on or about the above stated dates. The back injuries from the facts presented were not in the nature of a gradual or accumulative injury but the result of a sudden traumatic events.

According to claimant's testimony and histories he provided to all of his physicians, claimant suffered low back pain on June 5, 1985 when a handle broke on a large heavy barrel that he was attempting to lift at work. Claimant stated that he immediately experienced popping and burning sensation in this low back. Claimant reported the injury to his foreman. This account of the injury was not controverted in the evidence. Claimant sought out and received treatment the same day from a local hospital and was referred to see Dr. Duncan the next day and later he saw Dr. Paulsrud. These physicians prescribed medication, use of a back brace and physical therapy. Claimant failed to improve and claimant was ultimately hospitalized by Dr. Duncan from June 10, 1985 through June 17, 1985, upon a diagnosis of a possible herniated disc, right buttock pain and radiation down the leg. Claimant also was told by Dr. Duncan and Dr. Paulsrud to remain bedridden for a full six weeks. Dr. Paulsrud felt that the problem would then clear up. Claimant was returned to work on July 17, 1985, with the restriction that he not lift over 40 pounds for three weeks. Claimant requested and received a release to return to full duty by Dr. Duncan on August 7, 1985.

On January 15, 1986, claimant experienced another episode of acute back strain after a beef carcass fell pinning him against a wall at Dubuque Pack. Claimant returned to Dr. Duncan and the doctor prescribed medication and physical therapy. Claimant returned to work on February 3, 1986.

On March 14, 1986, claimant simply walked under a beef carcass and experienced severe back pain and left work. Claimant stated that no accident actually occurred. After returning to Dr. Duncan, claimant received from Dr. Duncan a permanent restriction against all work activity requiring heavy lifting and sudden movements or any other work that would put stress or strain on his back. Claimant then quit his employment on that same day. According to the plant manager who testified at the hearing, he discussed his leaving with claimant the day he quit and the availability of light duty jobs was not discussed by anyone at the time. Claimant then attempted to return to work a few days later but was denied the job. Claimant filed a grievance but did not follow through with the procedures. Claimant

ultimately lost this attempt return to work.

7. The work injury of June 5, 1985 was a cause of a significant permanent partial impairment to claimant's body as a whole.

First, claimant had a back injury in 1979 while lugging beef for another employer. Claimant testified that he received both medical and chiropractic treatment after this injury but returned to full duty after eight days. Claimant testified that he had no other problems with his back while lugging beef until the incident in June, 1985. No medical records have been submitted to contradict this testimony.

Claimant's credible testimony and the medical records establish that claimant suffers at the present time from chronic low back difficulties and is susceptable to frequent back strains following strenuous work stemming from the June 5, 1985 injury. Claimant's complaints that he simply is unable to perform heavy work requiring heavy lifting, bending or any other activity requiring extensive use of his back.

According to a report on March 12, 1986, Dr. Duncan states as follows with reference to his condition:

> As you know, Marty has had recurrent episodes of back strain--which at times has been incapacitating. From previous evaluation approximately 1 year ago it is known that Marty has a muscle disorder. I think, because of this, that Marty's more prone to recurrent muscle strain type of injuries, and I think he should consider a less-physical occupation.

This opinion is confusing because of the doctor's use of the phrase "because of this" in the second sentence. We do not know whether the good doctor is referring to recurrent episodes of back strain or the muscle disorder. However, luckily we have another opinion report from Dr. Duncan which is less ambiguous. On May 28, 1986, Dr. Duncan stated as follows to the defendant insurance carrier:

> In summary, Marty suffers from recurrent back strains and muscle spasms <u>that are secondary to previous injury in his employment</u> with Dubuque Pack; and I think the likelihood of recurrent injury makes returning to his job functions inadviseable; and whereas he does have a diagnosis of muscular dystrophy, I cannot absolutely state that this has contributed to his problems. (Emphasis added)

In August, 1986, Scott Neff, M.D., another orthopedic surgeon, submitted two reports on behalf of defendants. Based

upon a diagnosis that claimant had myotonia congenita which he does not personally make, it was the opinion of Dr. Neff that claimant had not aggravated or worsened this condition by the repeated injuries at work and has not suffered permanent disability from these muscle strains. Dr. Blume submitted a report dated January 13, 1987, which indicated Dr. Blume has diagnosed from a CT scan of claimant's spine taken in November, 1986, that he suffers from protruded discs at the L5-S1 and L4-5 levels of claimant's lower spine and irritation of the nerve roots in those areas. Although Dr. Blume was informed of the back injury in 1979, Dr. Blume causally related the protruded disc and nerve root problems to the June, 1985, incident as claimant had indicated to him that there had been no problems since the 1979 incident. Dr. Blume points out that the diagnosis of myotonia congenita is not confirmed and in any event has nothing to do with the ruptured discs which he discovered from the CT scan.

The greater weight of the above evidence establishes that claimant suffered significant permanent partial impairment from the June, 1985, incident. The instances of back strains after that time including the one in January, 1986, are insignificant in comparison and claimant's complaints and susceptibility to strains began in June, 1985. The causal connection of this permanent impairment to the June, 1985 injury was supported by Dr. Blume and the primary treating physician, Dr. Duncan. Only Dr. Neff disagrees and appears to causally relate claimant's susceptibility to back strains to the myotonia congenita condition. However, Dr. Neff did not have the benefit of the CT scan taken under the direction of Dr. Blume and Dr. Neff's views are largely dependent upon the actual existence of the myotonia congenita disorder. As stated above, the evidence submitted does not establish that such a condition actually exists and therefore the views of Dr. Neff cannot take precedence over the views of the treating physician and Dr. Blume.

Dr. Blume opines that claimant has a five percent permanent partial impairment as a result of the June, 1985, work injury. Dr. Duncan does not give a rating but has imposed significant work restrictions against heavy lifting, bending and other activities that would strain claimant's back.

8. The work injury of June 5, 1985 is a cause of a 20 percent permanent partial loss of earning capacity.

Claimant's past employment primary consists of unskilled physical labor requiring heavy lifting, repetitive lifting, bending, twisting and stooping primarily as a beef lugger since 1978. Therefore, the evidence shows that as a result of his functional impairment and physician imposed physical restrictions relating to the back injury, claimant is unable to return to work that he was performing at the time of the work injury or to other gainful employment. Prior to quitting his job at Dubuque

Pack due to his physical problems, claimant attempted almost foolhardily to maintain his employment at Dubuque Pack. Claimant, even after he quit, attempted to return to work but was turned down by Dubuque Pack.

On the other hand, claimant testified that he is making reasonable efforts to rehabilitate himself and it is likely that his efforts will succeed. Claimant appeared to have above average intelligence at the hearing and was quite articulate and is currently attending a community college studying telecommunications. Claimant anticipates receiving an Associate of Arts degree to qualify him as a telecommunications technician in the near future. Claimant testified that he expects to earn approximately $6.50 per hour. However, such a wage is still well below the wage he received at Dubuque Pack.

Claimant is only 27 years of age. Due to his relative youth, he is more apt to adjust to a new occupation. His loss of earning capacity due to disability is less severe than would be the case for an older, less malleable person.

Therefore, it is found that claimant currently has a 40 percent loss of earning capacity from his inability to perform heavy work. However, claimant at the time of the June, 1985, injury had a significant prior existing industrial disability which existed independently prior to June, 1985. This disability did not arise from any claimed myotonia congenita condition but from his carpal tunnel syndrome problems in his right hand. As stated above, Dr. Duncan long before claimant injured his back advised claimant to leave packinghouse work and apply for permanent disability. It therefore is found that claimant had a 20 percent loss of earning capacity before June, 1985, due to the prior existing carpal tunnel syndrome. Consequently, one-half of the total amount of industrial disability existing after June, 1985, is apportioned out of the final award in this decision. Although defendant may argue that all of the loss occurred before June, 1985, given the statements of Dr. Duncan, this ignores the fact that claimant was indeed able to return to work following the carpal tunnel release. Dr. Duncan did not finally impose permanent restrictions until after the back injury. Therefore, only a 20 percent loss of earning capacity is found to have been caused by the back injury in June, 1985.

9. Claimant has incurred reasonable medical expenses for treatment of his work injury in the amount of $1,515.75.

The above expenses were incurred by claimant for necessary treatment of his injury as the medical tests and treatment appear reasonable and there is no conflicting evidence offered by defense. The total amount found above is the sum of the expenses requested by claimant in the prehearing report. The parties stipulated in the prehearing report that these expenses

are related to either the wrist or back conditions upon which claimant is basing his claims herein.

CONCLUSIONS OF LAW

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

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

It is not necessary that claimant prove his disability results from a sudden unexpected traumatic event. It is sufficient to show that a disability developed gradually or progressively from work activity over a period of time. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). The McKeever court also held that the date of injury in a gradual injury case is the time when pain prevents the employee from continuing to work. In McKeever the injury date coincides with the time claimant was finally compelled to give up his job. This date was then utilized in determining rate and the timeliness of the claimant's claim under Iowa Code section 85.26 and notice under Iowa Code section 85.23.

In the case sub judice, two compensible injuries were found in the findings of fact one being a gradual injury in which there was a development of a permanent condition following the disability caused by the injury on February 13, 1985. The second was a sudden traumatic event injury to claimant's back in June, 1985.

II. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be

awarded without a showing of a causal connection to a physical change of condition. Blacksmith v. All-American, Inc., 290 N.W.2d 348, 354 (Iowa 1980); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

In the case sub judice, although a finding was made causally connecting the work injury of June 5, 1985 to claimant's permanent functional impairment of his body as a whole, such a finding does not, as a matter of law, automatically entitle claimant to benefits for permanent industrial disability. The extent to which this physical impairment results in body as a whole 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. Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983); Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry

Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

Based upon a finding of a 12.5 percent loss of use to the right hand, claimant is entitled as a matter of law to 23.75 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(1) which is 12.5 percent of the 190 weeks allowable for an injury to the hand in that subsection. As claimant's healing period ended upon his return to work after the February 13, 1985 injury on May 13, 1985, these disability benefits will be awarded from that date. The stipulated rate for the alleged hand injury was $215.80.

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

In the case sub judice, an apportionment for a preexisting right hand condition was made. Apportionment of disability between a preexisting condition and a compensable injury is proper only when there is some ascertainable disability which existed independently before the injury occurred. Varied Enterprises,

Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984). Such a prior loss of earning capacity was found in this case. The fact that the prior condition was a work related condition does not change the need for apportionment. The prior injury was a scheduled member disability and claimant cannot be compensated for any loss of earning capacity occasioned by such a scheduled member injury.

Based upon a finding of a 20 percent loss of earning capacity or industrial disability as a result of an injury to the body as a whole, claimant is entitled as a matter of law to 100 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 20 percent of the 500 weeks allowable for an injury to the body as a whole in that subsection. As claimant's healing period ended upon his return to work after the June, 1985 injury on August 7, 1985, these permanent disability benefits will be awarded from that date.

As claimant has established entitlement to permanent partial disability to his right hand, claimant may be entitled to weekly benefits for healing period under Iowa Code section 85.34(1) from the date of injury until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work he was performing at the time of the injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first.

Given the findings pertaining to times off work during recovery from the right hand work injury, claimant is entitled under law to healing period benefits for a period of time which includes the additional period of time requested by claimant, that is from February 25, 1985 through March 3, 1985 or a total of one week.

IV. Employers are obligated to furnish all reasonable medical services for accumulated work injuries under Iowa Code section 85.27.

Given the findings as to the medical expenses incurred by claimant, claimant will be awarded medical expenses requested accordingly.

V. The industrial commissioner may award up to 26 consecutive weeks of vocational rehabilitation benefits in the amount of $20 per week if claimant has suffered permanent disability and is unable to return to gainful employment as a result of the work injury.

Given the findings in this case, claimant is entitled to these benefits and shall be awarded.

ORDER

1. Defendants shall pay to claimant twenty-three point seven-five (23.75) weeks of permanent partial disability benefits at the rate of two hundred fifteen and 80/100 dollars ($215.80) per week from May 13, 1985. Defendants shall pay to claimant in addition one hundred (100) weeks of permanent partial disability benefits at the rate of two hundred thirty-two and 36/100 dollars ($232.36) per week from August 7, 1985.

2. Defendants shall pay to claimant additional healing period benefits from February 25, 1985 through March 3, 1985 at the rate of two hundred fifteen and 80/100 dollars ($215.80) per week.

3. Defendants shall pay to claimant the total sum of one thousand five hundred fifteen and 75/100 dollars ($1,515.75) for medical expenses.

4. Defendants shall pay vocational rehabilitation benefits for twenty-six (26) consecutive weeks at the rate of twenty and no/100 dollars ($20.00) per week during the time claimant was actively participating in vocational rehabilitation training that he is currently involved in.

5. Defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for weekly benefits previously paid.

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.

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

Signed and filed this 30 day of September, 1987.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELVA L. WELCHER, Claimant, vs. MASON & HANGER-SILAS MASON COMPANY, INC., Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 818246 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 Elva L. Welcher against her employer, Mason & Hanger-Silas Mason Company, Inc., and its insurance carrier, The Travelers Insurance Company. The case was heard at Burlington, Iowa, on May 28, 1987, and was fully submitted. The record in the proceeding consists of testimony from Elva L. Welcher, Eugene Welcher and Oakley Carlson, Jr. The record also contains claimant's exhibit 1 through 8 and 10 through 20 and defendants' exhibits A through D.

ISSUES

Claimant alleges that she slipped at the employer's plant on or about February 4, 1985, and, in doing so, injured her left foot. She seeks compensation for temporary total disability or healing period, permanent partial disability and section 85.27 benefits. It was stipulated that, in the event of an award, the time claimant was off work ran from May 6, 1985 through August 4, 1985 and that the rate of compensation is $238.55 per week. Defendants seek credit for paid sick leave in the amount of $228.48 which the parties agree was, in fact, paid, but a dispute exists as to credit entitlement. The issues identified include whether claimant sustained an injury which arose out of and in the course of employment and whether the alleged injury is cause of any temporary or permanent disability or of any of the medical expenses she has incurred.

SUMMARY OF THE EVIDENCE

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

Elva L. Welcher is a 61-year-old, married lady who has been employed by the Mason & Hanger-Silas Mason Company, Inc. since 1951 as a production operator at the Iowa Army Ammunition Plant at Middleton, Iowa. She works standing on a cement floor for essentially her entire eight-hour work day.

Claimant testified that, on February 4, 1985, she had changed into her work clothes in the changing house and was going over snow drifts to the building where she actually worked, slipped, injured her left foot and reported the injury to her foreman, Dave Wilson. She was referred to the company field hospital where she was seen by the company physician. The company notes indicate that claimant was treated regularly until dismissed by the physician on February 12, 1985. The exhibit notes an injury date of January 29, 1985. The history indicates an injury from slipping on snow on an unspecified date and also another slipping incident on Thursday of the previous week. X-rays were reported as being normal and the physician's examination noted tenderness in the mid portion of the fourth metatarsal on the left foot (exhibits 11, 20 and B).

Claimant testified that she was treated by the company physician for approximately two weeks and that, at the end of the course of treatment, he advised her that her foot would get better with time and that she need not see him again.

Over the following weeks, claimant continued to work, but testified that she experienced continuing and increasing pain while she did so. On May 5, 1985, a Sunday afternoon, claimant's husband took her to the Burlington Medical Center where she was seen by Todd C. Sommer, D.P.M. X-rays taken at that time indicated a stress fracture of the first metatarsal of her left foot (exhibit 1). Claimant did not request alternate care from the employer in accordance with established company policy. She testified that she did not go back to the company physician because she felt that he had not done any good for her and that he had told her that her foot would get better, but it did not. Claimant testified that her pain had worsened since the preceeding Friday and that she could not endure to wait until Monday to see the company physician.

Claimant's left lower extremity was placed in a short-leg walking cast for approximately five and one-half weeks. Follow-up x-rays showed the stress fracture to be healing and claimant was released to return to light-duty work effective August 5, 1985 (exhibits 1 and 3).

Claimant eventually returned to regular-duty employment, but has continuing complaints of pain in her left foot. She testified that she has subsequently missed other days of work due to problems with her left foot. She stated that she has pain daily and limps.

Claimant testified that, in 1974, she fractured her left ankle in a fall down basement steps at her home. She stated that a surgical repair was performed and that she was off work approxiately five months following the incident. She denied having any problems from that injury subsequent to the period of healing.

Eugene Welcher, claimant's husband, testified that he is also employed at the Iowa Army Ammunition Plant as a supervisor. He testified that, during the period of time subsequent to claimant's injury and prior to the time she went to the Burlington Medical Center Emergency Room, he spoke with the company physician on several occasions and was informed that claimant's foot would be sore and that there was nothing the physician could do. Eugene Welcher testified that, on May 5, 1985, he was at home with claimant and that she was crying. He testified that he got upset and took her to the hospital because he felt that an emergency existed and that something needed to be done.

Eugene Welcher corroborated claimant's testimony of limping and other problems with her left foot.

Oakley Carlson, Jr., personnel manager for the employer, testified that employees are instructed that, if injured on the job, they need to make arrangements for medical care through the field hospital and that claimant's going directly to Burlington Medical Center is not in keeping with company policy.

Carlson testified that, between the period of May 6, 1985 and August 4, 1985, claimant used three days of sick leave and that the leave would not have been granted if claimant had not signed a request form.

Carlson testified that sick leave benefits are not payable when the disability is due to an on-the-job injury. Carlson testified, however, that the collective bargaining agreement also provides that injured employees will receive full pay for the first 20 weeks while they are receiving workers' compensation.

Carlson testified that the group medical insurance is for non-work-related injuries and that claimant had not submitted any medical bills for payment under the workers' compensation coverage. Carlson stated that, if the history that appeared on exhibit B is what actually happened (in conformity with claimant's testimony at hearing), the company would treat the incident as compensable under workers' compensation.

Koert R. Smith, M.D., examined claimant on February 16, 1987. He found the metatarsal fracture to have healed. He found no degenerative changes anywhere in claimant's left foot, even in relation to the prior fractured ankle. Dr. Smith found some limitation of motion, but was unable to determine whether it was due to the metatarsal fracture or to the earlier ankle fracture (exhibit A).

Claimant has received treatment for her feet from Tom M. Yard, D.P.M., since September 15, 1986.

Claimant has incurred a number of medical expenses as shown in exhibits 12 through 18. The total of the charges is $819.35, of which $278.16 has been paid by insurance, $148.04 has been paid by claimant and $35.00 owed to Dr. Sommer is known to be unpaid. Claimant testified that she has not paid any of the bills at Burlington Medical Center and believes they were paid by the group insurance. Those bills total $358.15.

Claimant testified that she incurred an expense of $48.83 in purchasing shoes as recommended by Dr. Sommer. She stated that she has had to replace them as they wear out and that the replacements cost $51.00 each, but she did not have bills or receipts available at hearing (exhibits 2 and 19).

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on February 4, 1985 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Elva L. Welcher has been employed with this employer since 1951, a period of 36 years. Her appearance and demeanor, as well as that of her husband, were observed as they testified at the hearing. Claimant has worked continuously since the injury, except for those times when physicians have authorized her to be off work. There is no indication of malingering. Claimant is found to be a credible witness with regard to the onset of the pain in her left foot. There are indications in the record that she may not be particularly good with dates or in estimating the amount of time which has elapsed since an occurrence, but she is found to be a credible witness. Her testimony of injuring her foot on February 4, 1985 is accepted as correct as is her testimony regarding the course of treatment under the direction of the company physician and the other matters of which she testified.

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 4, 1985 is causally related to the disability on which she now bases her claim.

Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

An expert witness may testify as to the possibility, probability or the actuality of the causal connection between claimant's employment and the injury. If the expert testimony shows probability or actuality of causal connection, this will suffice to support an award. If the opinion shows a possibility of causal connection, it must be buttressed with other evidence, such as lay testimony, that the described condition of which complaint is made did not exist before the occurrence of those facts alleged to be the cause thereof. Becker v. D & E Distributing Company, 247 N.W.2d 727 (Iowa 1976).

A close reading of Dr. Sommer's report indicates that claimant's stress fracture could have been initiated by the trauma of February 4, 1985. Dr. Sommer explained that stress fractures do not always show up at the time when the pain symptoms begin (exhibit 1). It could also have been produced by the cumulative effect of (1) standing on concrete all day, [If it was, the injury would be a cumulative trauma injury under the theory of McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).]; (2) the traumatic event; and, (3) the flat foot condition with which she is afflicted. (This would be a preexisting condition which would be subject to aggravation by standing on concrete or by trauma.) It can be reasonably argued that Dr. Sommer's assessment expresses an opinion of probability. It certainly expresses an opinion of a strong possibility. Claimant's testimony, which has been found to be credible, establishes that she did not have the problem before the injury occurred. It is therefore found and concluded that the slipping of which claimant testified that occurred on February 4, 1985 was a proximate cause of the fractured metatarsal in her left foot and of the treatment which was rendered for the fracture.

The employer is responsible, under the provisions of section 85.27, for the expenses of treatment for a work-related injury. The expenses contained in exhibits 12 through 18, which total $819.35 are the responsibility of the employer. Since claimant paid $148.04 from her own funds, she is entitled to be reimbursed. The employer is entitled to credit under section 85.38(2) for the amounts paid by the group insurance. Any unpaid bills are the responsibility of the employer. Since the work shoes were needed to accomodate orthotics, the initial purchase will be the responsibility of the employer. Since all shoes wear out and need replacement, the employer and insurance carrier are not responsible for further purchases of work shoes for claimant. Claimant is to be reimbursed $48.83.

Since claimant was off work under Dr. Sommer's direction from May 6, 1985 through August 4, 1985, a span of 13 weeks, she is entitled to receive weekly compensation during those 13 weeks at the stipulated rate of $238.55.

The employer's sick leave plan clearly qualifies for credit under section 85.38(2). Since the terms of the collective bargaining agreement provide for full pay during the first 20 weeks, the amount of the credit is limited to three days of workers' compensation benefits. It is not applied dollar-for-dollar to the workers' compensation liability. [Division of Industrial Services' Rule 343-8.4; Beeler v. Union Electric Company, III Iowa Industrial Commissioner Report 22 (1983)]. Claimant's remaining entitlement is therefore 12 4/7 weeks of compensation.

Claimant also seeks compensation for permanent partial disability. The record contains no rating from any physician as to the impairment of claimant's left foot or leg. Dr. Smith did indicate that some impairment existed, but he was unable to determine if it was due to the metatarsal fracture or to the ankle fracture. From all indications, it would appear that the ankle fracture was a much more serious injury than the metatarsal fracture. Claimant has failed to prove that any permanent partial disability affecting her left foot or leg was proximately caused by the 1985 injury.

FINDINGS OF FACT

1. Elva L. Welcher fractured her first metatarsal when she slipped on snow at the employer's plant on February 4, 1985.

2. The injury was not promptly diagnosed.

3. Claimant is a credible witness.

4. Following the injury, claimant continued to work until May 6, 1985 when she first missed work due to the injury and she

thereafter remained medically incapable of returning to employment substantially simlar to that in which she was engaged at the time of injury until she returned to work on August 5, 1985.

5. The medical care which claimant received for the fracture from Radiologist Services, Burlington Medical Center, and Burlington Podiatry Center (Todd C. Sommer, D.P.M.) was reasonable and necessary treatment for the injury of February 4, 1985 and the charges rendered by those providers of services, in the total amount of $819.35, are fair and reasonable.

6. Claimant has some impairment in her left ankle, but it is not possible to determine whether that impairment and pain resulted from the injury of February 4, 1985, from the ankle injury that occurred in 1974 or from aging and her flat-foot condition.

CONCLUSIONS OF LAW

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

2. Claimant sustained injury to her left foot which arose out of and in the course of her employment with Mason & Hanger-Silas Mason Company, Inc. on February 4, 1985.

3. Claimant is entitled to receive 12 4/7 weeks of compensation for temporary total disability at the stipulated rate of $238.55 per week payable commencing May 9, 1985 after allowing credit for the employer's group sick pay plan.

4. Claimant is entitled to recover the sum of $148.04 which she has paid in medical expenses and $48.83 for one pair of work shoes.

5. The employer is responsible for payment of the remaining balance of claimant's medical expenses, namely $671.31 less credit for amounts thereof paid by the employer's group insurance carrier.

6. Claimant has failed to prove an entitlement to any compensation for permanent partial disability.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant twelve and four-sevenths (12 4/7) weeks of compensation for temporary total disability at the stipulated rate of two hundred thirty-eight and 55/100 dollars ($238.55) per week commencing May 9, 1985. All past due amounts shall be paid in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants pay claimant one hundred forty-eight and 04/100 dollars ($148.04) for reimbursement of medical expenses and that defendants shall pay the remainder of claimant's medical expenses, less credit for any group plan payments, as follows:

Radiologist Services	$ 15.20
Burlington Medical Center	358.15
Burlington Podiatry Center (Todd C. Sommer, D.P.M.)	287.96

IT IS FURTHER ORDERED that defendants reimburse claimant for the cost of one pair of work shoes in the amount of forty-eight and 83/100 dollars ($48.83), but they are not responsible for purchasing replacement shoes.

IT IS FURTHER ORDERED that the costs of this action 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 20th day of October, 1987.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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1402.20, 1402.30, 1402.40
1402.60, 1701, 1801
Filed October 20, 1987
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELVA L. WELCHER, Claimant, vs. MASON & HANGER-SILAS MASON COMPANY, INC., Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 818246 A R B I T R A T I O N D E C I S I O N

1402.20, 1402.30, 1402.40, 1402.60, 1701, 1801

Claimant was found to be a credible witness and her description of the injury-producing event was accepted as correct. Her testimony, coupled with expert testimony of possibility of injury from trauma, was held sufficient to establish her claim.

Employer awarded credit for sick leave on a day-for-day, rather than dollar-for-dollar basis, particularly where a collective bargaining agreement provided that injured employees would receive full pay for the first 20 weeks of any job-related disability. Claimant awarded temporary total disability and 85.27 benefits.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES WENTHE, Claimant, vs. FRENCH & HECHT, Employer, Self-insured, Defendant.	: : : : : : : : : :	FILE NO. 727198 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 James Wenthe, claimant against French & Hecht, employer (hereinafter referred to as FH) for workers' compensation benefits as a result of an alleged injury on February 18, 1983. On October 7, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

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

1. On February 18, 1983, claimant received an injury which arose out of and in the course of his employment with FH.

2. The injury of February 18, 1983, was a cause of a temporary disability during a period of recovery and of permanent disability.

3. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $314.66 per week.

4. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

5. If permanent partial disability benefits are awarded herein, they shall begin as of January 14, 1987.

6. All requested medical benefits have been or will be paid by defendant.

ISSUE

The issue submitted by the parties for determination in this proceeding according to the prehearing report is the extent of claimant's entitlement to weekly benefits for permanent disability.

SUMMARY OF THE EVIDENCE

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

Claimant testified that he has worked for FH since 1969 and continues to work at FH at the present time. Although claimant performed other jobs at FH, most of the time he drove a tow motor or forklift truck. Claimant earned over $12.00 per hour at the time of the alleged injury. However, since the injury all of the employees at FH have taken a pay cut pursuant to collective bargaining agreements. Claimant earns today what he would have earned had he continued on the same job that he had at the time of the work injury, however, this is considerably less per hour than he was earning before. Claimant's job at the time of the work injury required claimant to lift heavy weights on occasion. Claimant currently works in a light duty job at FH involving janitor work such as dumping wastepaper baskets, changing toilet paper and hand towels along with dusting and moping the floor. Claimant also drives in this job a power sweeper and power scrubber which resembles a tow motor in general appearance and operation.

The facts surrounding the work injury are not in real dispute. Claimant testified that while delivering rims to the paint line with his lift truck, the load stuck between two pallets and one of the rims fell off. While attempting to pick up this rim which was heavy with his outstretched left hand, he felt a "snap" and immediate pain but claimant testified that this was not a sharp pain. Claimant's left hand then began to swell. Claimant immediately reported to the company doctor, Paul H. Beckman, M.D., who felt at the time that claimant suffered a strain of his left shoulder and chest along with left numbness and swelling. Dr. Beckman also noted that claimant lost sensation in three fingers in his left hand. Dr. Beckman then prescribed heat and heat packs and muscle relaxant medication.

Claimant attempted to return to work on several occasions during the weeks and months following the injury but the pain persisted. Claimant was also treated initially by F. Dale Wilson, M.D., who reported that claimant suffered a right and left shoulder injury. Claimant was eventually referred to Steven R. Jarrett, M.D., and later to Eugene Collins, M.D., who are neurologists for EMG testing. As claimant was obese with a large upper torso, a proper EMG test could not be accomplished at that time.

Claimant continued to experience left hand numbness and pain along with severe headaches after physical activity with his left arm during the latter part of 1983. It was the opinion of Dr. Beckman in November, 1983, that claimant sustained a "brachial plexus stretch type injury." In October, 1983, claimant was treated by a hand and arm surgeon, Bruce Sprague, M.D., who felt that claimant suffered a cervical stretch type injury and prescribed cervical traction. With no improvement in symptoms, Dr. Sprague ordered a third EMG test and claimant was referred to R. F. Neiman, M.D., a neurosurgeon. Testing by Dr. Neiman demonstrated a substantial radiculopathy and probable one or more herniated cervical discs in claimant's neck. Dr. Neiman then ordered a myelogram of claimant's spine. This myelogram was performed in December, 1983, on both claimant's upper and lower spine. The myelogram found that claimant's lower spine was normal but that the cervical spine was "totally blocked at one level." In December, 1983, claimant also began treating with an orthopedic surgeon, G. E. Howe, M.D., from the Steinler Clinic. Over the next several months, claimant continued treating with both Dr. Neiman and Dr. Howe. Initially, these doctors were quite reluctant to consider surgery due to claimant's obesity despite the evidence of herniated discs at various levels of claimant's spine. However, by October, 1984, claimant had lost some weight at their request and expressed a desire for surgery so he could return to work.

Finally, in October, 1984, Dr. Howe performed a "cloward anterior disc excision and dowel graft fusion" at three levels in claimant's neck and cervical spine, C3-4, C5-6 and C6-7. Following this surgery, claimant had a slow recovery but by January 6, 1986, Dr. Howe and Dr. Neiman released claimant for sedentary work with no lifting over 15 pounds. This restriction was later increased to 30 pounds in June, 1986. In January, 1987, Dr. Howe opined in a letter report that claimant suffers from a 35 percent permanent partial impairment to the body as a whole as a result of the three level back fusion. Dr. Howe finally imposed permanent restrictions against lifting over 40 pounds. Dr. Howe's primary diagnosis was cervical disc disease due to the presence of arthritis in claimant's spine aggravated by injury. He also recommended that claimant continue an exercise program including swimming. Dr. Neiman did not give a percentage rating of claimant's disability but concurred with the restrictions imposed by Dr. Howe. Richard Roski, M.D.,

another neurosurgeon evaluated claimant on a Cybex machine in October, 1987, and concluded that claimant was at extreme risk in moderate to heavy lifting but was able to perform light lifting up to 48 inches in height but with no overhead use of outstretched hands.

FH has worked extensively with claimant and his physicians in returning claimant to gainful employment at FH. Since the release by Drs. Howe and Neiman in January, 1986, claimant has worked full time at FH in various light duty jobs but receives the same wage as he would receive had he remained on the job he was performing at the time of the work injury. Claimant initially performed clerical work sorting papers and making stencils. Claimant was then moved to light janitorial work in operating the power sweeper and scrubber as described above. There was one attempt on the part of FH to move claimant to his former job as a tow truck operator but without the need for occasional lifting. However, claimant's physicians disapproved of this move as it would involve extensive movement of the neck. Claimant had tried to perform other light duty jobs within the plant since his return but these jobs involve extensive use of his arms and it resulted in headaches and pain in the neck. The plant manager, Robert Williams, testified during a video tape presentation, that there are several light duty jobs within the FH plant that would fit within claimant's physician imposed retrictions which have a higher rate of pay then claimant currently receives. However, claimant's seniority does not permit his assignment to many of these jobs at the current time. Claimant continues on his janitor/sweeper/scrubber job and expresses satisfaction with the cooperation by FH to date in returning him to work.

Claimant's current complaints consist of headaches with excessive use of his arms along with continued pain in the neck and arms along with limited motion of the neck. Claimant also describes a loss of strength in both of his arms and back. Claimant denies any past back or neck trouble before February 18, 1983. Claimant, his wife and several witnesses testified that claimant was very strong before the work injury and could easily lift and throw objects in excess of 200 pounds before February 18, 1983. Claimant, however, has significant prior health problems. Claimant had a heart attack in 1982 resulting in permanent damage to his right ventricle according to claimant's testimony. Also, since 1982, claimant has been diagnosed as suffering from diabetes and is currently taking insulin injections. According to his medical records, claimant has been diagnosed as suffering from hyperlipidemia which is being treated with Lopid, a history of gout and alopecia totalis and obesity. However, claimant testified that he had no restrictions on his physical activity either self-imposed or imposed by physicians before February 18, 1983 and the medical evidence submitted supports this testimony. The only causal connection opinion in the

record is from Dr. Sprague who states in a letter of March 9, 1984, that although claimant had osteoarthritis before the injury, the injury is what aggravated and produced claimant's symptoms.

It is unclear in the record exactly when claimant first began to complain of low back pain and leg pain. The myelogram performed in December, 1983, certainly did test both claimant's upper and lower back apparently for some reason. Dr. Neiman's notes first reflect some back pain complaints in February, 1984 and again in April, 1984, but Dr. Neiman initially felt that claimant's primary difficulties was with his upper spine rather than his low back. In April, 1984, G. T. Bozek, M.D., who had consulted with Dr. Neiman on claimant's case, noted claimant's leg discomfort at that time which he stated may be related to the December, 1983, myelogram. Dr. Howe states that claimant complained to him of low back pain on a couple of occasions during his course of treatment but found no correlation between the cervical problems and claimant's back or leg pain complaints.

Claimant testified that his employment prior to FH primarily consisted of machine operator jobs in a manufacturing environment. Claimant occasionally was required to lift heavy weights in these jobs and was required to stand for prolonged periods of time.

Claimant testified that he is 47 years of age. He quit formal schooling during the eleventh grade. Claimant testified that he had a C average in school.

Patrick Doherty, a vocational consultant, submitted a report into the evidence. According to Doherty claimant performs at the low average range of intelligence and describes claimant's physical limitations submitted to him by Drs. Neiman and Howe consisting of no lifting over 20 pounds and no climbing or balancing. Given these restrictions, after reviewing the dictionary of occupational titles of jobs claimant could pursue, Doherty performed a labor market access study in the quad city metropolitan area. According to Doherty before the work injury claimant had access to 29 percent of the available jobs but post injury claimant's access has been reduced to zero. Doherty believes that claimant has a 100 percent loss of earning capacity.

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

APPLICABLE LAW AND ANALYSIS

I. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment

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

In the case sub judice, claimant's medical condition before the work injury was certainly not excellent given all of his medical problems but he had no functional impairments or ascertainable disabilities at the time of the work injury. Claimant was able to fully performed physical tasks involving heavy lifting; repetitive lifting, bending, twisting and stooping; and, prolonged standing and sitting. As a result of painful injuries the function of his whole body has now been permanently modified.

Claimant's treating physician, Dr. Howe, has given claimant a significant permanent impairment rating of 35 percent to the body as a whole. Any impairment prior to the work injury is not important as the record does not indicate that such impairment resulted in any work disability. Apportionment of disability between a preexisting condition and an injury is proper only when there was some ascertainable disability which existed independently before the injury occurred. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984).

Claimant's physicians have restricted claimant's work activities by prohibiting tasks such as heavy lifting and repetitive use of his arms and neck. Claimant's medical condition prevents him from returning to his former work as a lift truck driver where he was required to occasionally lift objects or

extensive use of his arms and neck. Claimant is an unskilled or semi-skilled laborer with little education. He is best suited for physical labor jobs for which he can now only perform on a limited basis.

Apart from his lost earnings during his healing period which was compensated by healing period benefits, claimant has not suffered a permanent loss in actual earnings as a result of his disability at least at the current time. Defendant FH has admirably worked with claimant in a successful attempt to return claimant to employment. These efforts will not go unawarded as the award in this case is significantly lower because claimant has not suffered a loss of earnings as a result of the work injury. However, a showing that claimant has no loss of actual earnings does not preclude a finding of industrial disability. See Michael v. Harrison County, Thirty-Fourth Biennial Report of the Iowa Industrial Commissioner 218, 220 (1979).

Claimant is 47 years old and in the middle of his working career. He should be at the most productive years of his life. His loss of future earnings from employment due to disability is more severe than would be the case for a younger or an older individual.

See Becke v. Turner-Busch, Inc., Thirty-Fourth Biennial Report of the Iowa Industrial Commissioner 34 (1979); Walton v. B & H Tank Corp., II Iowa Industrial Commissioner Report 426 (1981).

Claimant has shown motivation to remain employed and insisting upon surgery in an attempt to return to work. However, claimant has only a tenth grade education and exhibited average intelligence at the hearing. Although his intelligence performance according to the rehabilitation consultant was in a low range, little was shown in the form of actual testing to indicate claimant's potential for vocational rehabilitation via additional formal schooling.

Claimant's current employment is suitable although its stability is unknown at the present time. Claimant has clearly shown that he would experience considerable difficulty finding replacement employment should he lose his current job.

The views of the vocational rehabilitation consultant, Doherty, as to the loss of earning capacity is not a proper subject for vocational consultants and was not given any weight. However, his job availability study was quite useful. Although both doctors, Neiman and Howe, have increased the lifting restriction to 40 pounds since the evaluation, the report was given considerable weight in light of the most recent evaluation of claimant's condition by Dr. Roski.

After examination of all the factors, it is found as a matter of fact that claimant has suffered a 30 percent loss of earning capacity from his work injury. Based upon such a finding, claimant is entitled as a matter of law to 150 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 30 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

It should be noted that no part of the award for claimant in this case was based upon claimant's low back or leg pain as it could not be found that such problems stemmed from the work injury found in this case due to a lack of supportive medical expert opinion. However, it should also be noted that no work restrictions have been imposed upon claimant as a result of his low back or leg pain.

FINDINGS OF FACT

1. Claimant was a credible witness.

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

3. On February 18, 1983, claimant suffered an injury to the upper back or neck which arose out of and in the course of employment with FH. Claimant was eventually compelled by his pain to seek surgery in order to return to work which resulted in a fusion of three vertebras in his neck.

4. The work injury of February 18, 1983, was a cause of a 35 percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no lifting, no median or heavy lifting and no extensive use of his neck or arms especially above shoulder level.

5. The work injury of February 18, 1983 and the resulting permanent partial impairment was a cause of a 30 percent loss of earning capacity. Claimant is 47 years of age with only a tenth grade education. Claimant performs at the low average intelligence range. Claimant is unable to perform medium or heavy physical labor employment, the type of employment best suited to him given his lack of education and past experience. However, claimant has not suffered a loss of actual earnings at the present time due to the cooperation of FH in returning claimant to work.

CONCLUSIONS OF LAW

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

ORDER

1. Defendant shall pay to claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of three hundred fourteen and 66/100 dollars ($314.66) per week from January 14, 1987.

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

3. Defendant shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30 and the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 15 day of December, 1987.

LARRY P. WALSHIRE
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002544

FILED

AUG 4 1987

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAWRENCE WHIPPIE,	:	
	:	
Claimant,	:	
	:	File No. 816941
vs.	:	
	:	
MORSE RUBBER PRODUCTS,	:	
	:	A R B I T R A T I O N
Employer,	:	
	:	
and	:	
	:	D E C I S I O N
MARYLAND CASUALTY COMPANY,	:	
	:	
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Lawrence Whippie against Morse Rubber Products, employer, and Maryland Casualty Company, insurance carrier. The case was heard at Burlington, Iowa on March 26, 1987 and was fully submitted upon conclusion of the hearing. The record in the case consists of testimony from Betty Whippie, Larry Whippie, Don Gregory and Joyce Patterson. The record also contains claimant's exhibits 1 through 8.

ISSUES

The issues presented by the parties are whether claimant sustained an injury which arose out of and in the course of employment, whether there is a causal relationship between the alleged injury and any disability, determination of claimant's entitlement to compensation for temporary disability, healing period or permanent partial disability, and also determination of claimant's entitlement to section 85.27 benefits. It was stipulated that any permanent disability found should be evaluated industrially and that, in the event of an award, the rate of compensation is $222.18 per week. It was stipulated that the fees charged for the medical services shown in the exhibits are fair and reasonable: It was stipulated that the providers of those services would testify that the fees are fair and reasonable and that the services were reasonable and necessary treatment for the alleged injury. It was stipulated that a causal connection existed between the medical services and the hernia condition upon which this claim is based.

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 even though it may not be referred to in this decision.

Larry Whippie is a 41-year-old married man who has been employed by Morse Rubber Products Company for 12 or 13 years. He has a GED which he obtained in the military service, but denied having any further vocational training. At the time of hearing, he was laid off from his normal job of press operator.

In March, 1984, Larry Whippie sustained a Hernia which was surgically treated by David Siroospour, M.D. The hernia occurred while Whippie was working on a mold in the pressure room. Workers' compensation benefits were paid to include all of the medical expenses and weekly compensation while Whippie was off work. He was not paid any compensation for permanent partial disability. Whippie testified that, following recovery from that surgery, he returned to work, without restrictions and without any difficulties, and performed the job of press operator, as he had prior to the time of the first hernia.

In March, 1986, Whippie was still working as a press operator. He testified that the employer has five presses which, on March 12, 1986, were being operated by three operators. He stated that, until approximately three weeks prior to that date, four operators had been used to run the five presses. Whippie stated that, on Wednesday, March 12, 1986, he was working the second shift which started at 3 p.m. He stated that, at approximately 7 p.m., he was helping operate presses on the French line. He stated that he unloaded a machine and put inserts into the machine to reload it. In doing so, pieces of the stock he was handling stuck together and while pulling them apart he felt sharp pain in the lower abdomen. Whippie testified that he reported to Don Young that he had hurt himself. Claimant stated that he reported the occurrence to his foreman who asked him to try to complete the shift and that he did complete the work shift. Claimant testified that, on the following day, he came to work and tried to contact Don Gregory, the plant manager. Whippie stated he was told to see Joyce (apparently Joyce Patterson), but that she was not there. He stated that he subsequently saw her on Friday and that she made an appointment with him to see Dr. Siroospour on the 18th of March. Whippie stated that he saw Don Gregory at approximately 5 p.m. on March 13 and Joyce Patterson on March 14. He stated that he told Gregory in detail what had happened, but gave Patterson only a summary. Whippie stated that he received a layoff notice on Friday, March 14, earlier in the day and that it was effective to begin at the end of the work shift on the 14th.

Whippie testified that Dr. Siroospour diagnosed his condition as a double hernia and advised surgery. Whippie stated that the

two workers' compensation companies were in a feud and that he had the surgery and it was paid for by Blue Cross/Blue Shield. The surgery was performed by Dr. Siroospour at the Keokuk Area Hospital on April 24, 1986. Claimant testified that, following the surgery, he was released to return to normal activity on approximately July 6, 1986. He subsequently returned to work, and was again laid off. He stated that the layoff was not due to his injury.

Claimant testified that he has customarily been employed performing heavy manual labor, including the jobs he performed before starting work with Morse Rubber Products Company. He has done construction work, performed foundry work and driven a truck.

Claimant testified that he had no residual problems following recovery from the first hernia surgery, but that the second has left him with a lot of things he is now unable to do but which he could have done prior to the time the second hernia occurred. Examples that he related are shoveling snow, changing car tires, driving a vehicle with a clutch, rowing a boat, swimming, using a chain saw, lifting, pushing and pulling. He stated that, when at work, it feels as if something is going to give. He stated that he can do his job, but now does it in a different manner than he had previously. He stated that he uses a cheater bar with the pipe wrench, a device which he had not used before the second surgery.

Betty Whippie, claimant's spouse of 18 years, stated that, following claimant's first surgery, he was able to return to work and had no problems. She stated that, since the second injury of approximately March 12, 1986, he seemed to be restless and still is. She stated that, in the winter, he has difficulty shoveling snow and that, in the summer, she does most of the mowing of their one-acre yard. Mrs. Whippie related that claimant does not swim well, finds it painful to ride a horse, has difficulty chopping wood and also has difficulty picking up grandchildren. She stated that, on March 12, 1986, claimant phoned her from work and told her that he thought he had injured himself again. She stated he told her that he thought had a hernia and that it felt the same as the last time he had been injured. Mrs. Whippie stated that claimant was recalled to work from a layoff in October, 1986, but that he had been released to return to work earlier, approximately three months after the surgery.

Don Gregory, the Morse Rubber Products Company plant superintendent, testified that, at approximately 4 p.m. on March 13, 1986, he was informed of claimant's alleged injury by Dick Jackson, the second shift foreman. Gregory testified that the second shift foreman had been given the layoff notices at approximately 3 or 4 p.m. on March 13 and that claimant had already received the layoff notice when they talked with each

other. Gregory testified that claimant told him he was hurting again in the area of the hernia which had occurred previously. Gregory stated that claimant told him he did not know what caused it and did not know if it was something new or if it was simply the old hernia hurting.

Gregory testified that he saw claimant again after claimant had seen Dr. Siroospour and that claimant then told him that he had a hernia and that it was bothering him, but that he still did not know what caused it. Gregory stated that claimant did not tell whether the hernia was old or new until he returned to work. Gregory also stated that the March 18, 1986 conversation between them was casual rather than investigatory, but that he would have expected an employee to report a problem as being work-related if the employee felt it was work-related. Gregory agreed that claimant had been sent to Dr. Siroospour by the company.

Gregory testified that, when claimant returned to work in October, 1986, it was to the first shift, that he has observed claimant on the job and that he has not noticed any indication of problems with claimant's ability to do his job. He stated that, since claimant's return to work, he has not seen claimant use a cheater bar, but also that he has not seen claimant use a pipe wrench.

Joyce Patterson, the personnel manager at Morse Rubber Products Company, testified that she first talked to claimant regarding this alleged injury on March 14, but that on March 13 Don Gregory had told her that Whippie needed to see a doctor. Patterson testified that claimant told her he thought the problem was an on-going problem from his previous hernia and that she did not fill out an injury report because she considered the condition to be a continuation of his prior hernia rather than a new injury. Patterson confirmed that she sent claimant to Dr. Siroospour.

Patterson testified that, on March 18, 1986, she talked with claimant again and also had claimant talk over the telephone with a person from Maryland Casualty. She stated that claimant did not relate or describe any incident occurring on March 12, 1986. She stated that claimant had brought exhibit 7 to her on april 9, 1986, the date shown on the note which she attached (exhibit 7A), and that it was her first indication this problem was a new injury or incident. Patterson stated that, when claimant was sent to Dr. Siroospour, her intent was to see if claimant had a new injury or had aggravated the prior injury and to find out the nature of the problem. Claimant indicated that he felt the appointment with Dr. Siroospour was for purposes of treatment as well as for diagnosis. He also indicated that, when he talked with the representative of Maryland Casualty and with Patterson, he told them that the doctor thought the condition was new. He stated that he also told Maryland Casualty and Dr.

Siroospour that the pain had come on while he was working at the plant.

The record contains, as exhibit 1, a statement from Dr. Siroospour dated July 23, 1986 wherein he indicated that claimant appeared to be asymptomatic and was released to return to work on July 15, 1986. He also rated claimant as having a 3% impairment of the whole person as a result of the injury (exhibit 1).

Dr. Siroospour's deposition appears in the record as exhibit 2. Dr. Siroospour testified that he saw claimant on March 18, 1986 and diagnosed a recurrent right inguinal hernia and a left inguinal hernia (page 4). Dr. Siroospour had no notes in his charts, but believed that, at that time, claimant had given him a history of experiencing the onset of pain while working (page 5). On April 24, 1986, surgery was performed to repair both hernias (page 5). At the time the deposition was taken, June 30, 1986, claimant had not yet been released to return to work (page 6).

Dr. Siroospour felt that claimant had made a complete recovery from the 1984 surgery because claimant had not come back to the office following the release from care (page 11). He felt that the 1984 surgery had left no permanent defect or impairment (pages 14-16).

Dr. Siroospour felt that both the recurrence of the right hernia and the occurrence of the left hernia were new injuries (pages 6 and 10). Dr. Siroospour stated that it was too early to tell if claimant would have any permanent impairment from the hernias, but that he expected claimant would be substantially more susceptible to development of additional hernias on the right and that he would be slightly more susceptible to development of subsequent hernias on the left, although he did not anticipate any permanent impairment related to the left hernia (pages 7-10).

Exhibit 7 is a statement written by claimant in which he indicated that Dr. Siroospour had told him the hernias were new injuries. On exhibit 7A, Joyce Patterson indicated that the statement was given to her by claimant on April 9, 1986.

Exhibit 8 is the return to work release issued by Dr. Siroospour when claimant was recalled in October, 1986, following the layoff.

Exhibits 4, 5 and 6 are medical expenses as follows:

Keokuk Anesthesia Assoc.	$ 560.00
Dr. David Siroospour	1,904.00
Keokuk Area Hospital	1,949.00
Total	$4,413.00

Exhibit 3 is a statement for court reporter fees in the

amount of $122.50.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on March 12, 1986 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Although the injury date alleged in the petition is March 14, 1986, the evidence claimant presented indicates an alleged injury occurring only on March 12, 1986. The variance is not substantial and does not appear to have been prejudicial or a matter of surprise to the employer. The case will therefore be determined as dealing with an alleged injury of March 12, 1986.

Claimant's testimony regarding an incident while pulling stock on March 12, 1986 appears reasonable in the sense that no evidence was introduced to indicate that such an activity would not have been performed by him. There is evidence, however, regarding whether the injury that claimant has alleged was reported before or after a layoff notice was given. The sequence of those events is not considered particularly compelling, however, simply because plant rumors of layoffs commonly preceed the actual giving of formal notice. More importantly, however, the medical evidence in this record clearly shows that claimant did have bilateral hernias. Those findings are not something which claimant could have faked or intentially conjured after being given a layoff notice. They may, however, have existed prior to March 12, 1986 and have been something with which claimant was working, even though they were causing him difficulties. It is possible that the layoff notice convinced claimant that he should seek medical treatment for the hernias. The record reflects that claimant worked in a setting that required strenuous activity. The development of hernias under such circumstances is not an uncommon occurrence. When all the conflicting factors are considered, claimant's testimony regarding experiencing the onset of pain while pulling stock is accepted as correct. The testimony from the defendants regarding the reporting of that pain after claimant was given notice of layoff is also accepted as correct. It is therefore found and concluded that claimant has sustained the burden of proving by a preponderance of the evidence that he received injury in the form of bilateral hernias on March 12, 1986 which arose out of and in the course of his employment.

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).

There is no indication in the record that claimant had any permanent impairment or permanent disability following the 1984 hernia and repairative surgery. It is therefore found that all of the current disability with which he is afflicted is a result of the 1986 injury.

Under the provisions of section 85.34(1) claimant is entitled to receive compensation for healing period running from the date of injury until he is determined to be medically capable of returning to employment sustantially similar to that in which he was engaged at the time of injury. He is not, of course, entitled to receive compensation for the time he is actually working. The last day of work was March 14, 1986. His compensation therefore begins to run on March 15, 1986. The healing period ended July 15, 1986 when Dr. Siroospour released him to return to work (exhibit 1). This provides a span of 17 4/7 weeks.

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

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

Claimant has residual difficulties from the 1986 hernias. He is, however, capable of performing his regular employment and the record does not show any loss of actual earnings resulting from the injury. He does, however, have susceptibility to further injury and Dr. Siroospour has rated him as having a 3% permanent partial impairment of the body as a whole (exhibit 1). When claimant's age, education, qualifications, experience and the nature of his injury are all considered together with all the other factors of industrial disability, it is determined that he has a 5% permanent partial disability in industrial terms.

In view of the stipulations made by the parties, it is clear that all the medical expenses shown in exhibits 4, 5 and 6 are

the responsibility of the employer. These total $4,413.00.

FINDINGS OF FACT

1. On March 12, 1986 Larry Whippie was a resident of the state of Iowa and employed by Morse Rubber Products Company in the state of Iowa.

2. On March 12, 1986 Whippie suffered bilateral hernias while engaging in strenuous activity in his employment.

3. Following the injury, Whippie was medically incapable of performing work in employment substantially similar to that he performed at the time of injury from March 15, 1986 until July 15, 1986 when he became medically capable of returning to employment substantially similar to that in which he was engaged at the time of injury.

4. Larry Whippie is a 41-year-old married man who has been employed as a press operator for approximately 12 or 13 years. He remains employed in that same position and has not suffered any loss of actual earnings as a result of the injury.

5. Whippie has suffered a 5% loss of earning capacity, however, as a result of the 1986 hernias.

6. Claimant is able to perform his job as a press operator, but has difficulty in performing various types of strenuous activities.

7. Whippie has a GED educational background and all of his prior work experience has been in the field of manual labor.

8. Claimant is a credible witness with regard to the onset of symptoms on March 12, 1986.

9. Claimant had a prior hernia in 1984, but it was repaired by surgery and left no permanent functional impairment or permanent partial disability in industrial terms.

10. The injury of March 12, 1986 was an aggravation of a preexisting condition as it relates to the right inguinal hernia, but the left was a completely new injury.

CONCLUSIONS OF LAW

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

2. Larry Whippie sustained injury in the form of bilateral inguinal hernias which arose out of and in the course of his employment on March 12, 1986.

3. Whippie is entitled to receive 17 4/7 weeks compensation for healing period and 25 weeks of compensation for permanent partial disability.

4. Whippie is entitled to receive section 85.27 benefits in the amount of $4,413.00.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant seventeen and four-sevenths (17 4/7) weeks of compensation for healing period at the stipulated rate of two hundred twenty-two and 18/100 dollars ($222.18) per week commencing March 15, 1986.

IT IS FURTHER ORDERED that defendants pay claimant twenty-five (25) weeks of compensation for permanent partial disability at the stipulated rate of two hundred twenty-two and 18/100 dollars ($222.18) per week commencing July 16, 1986.

IT IS FURTHER ORDERED that all amounts are past due and owing and shall be paid to claimant in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants pay claimant for his medical expenses as follows:

Keokuk Anesthesia Assoc.	$ 560.00
Dr. David Siroospour	1,904.00
Keokuk Area Hospital	1,949.00
Total	$4,413.00

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against defendants, including one hundred twenty-two and 50/100 dollars ($122.50) for the fees of Cheryl Newman Liles, Certified Shorthand Report.

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

Signed and filed this 4th day of August, 1987.

Michael G. Trier

MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LAWRENCE WHIPPIE,	:	
Claimant,	:	File No. 816940
vs.	:	
MORSE RUBBER PRODUCTS,	:	
Employer,	:	A R B I T R A T I O N
and	:	
MARYLAND CASUALTY COMPANY,	:	D E C I S I O N
Insurance Carrier, Defendants.	:	

INTRODUCTION

This proceeding is based upon an alleged injury date of March 1, 1986 and is a companion case to file number 816941 which alleges an injury date of March 14, 1986. At the commencement of the hearing, claimant's counsel advised that there should be only one file and that only one injury was being claimed, that being an injury of March 12 or March 13, 1986. A dismissal of file number 816940 has never been made, however, and it is necessary to close the file by ruling.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on March 1, 1986 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The evidence presented by claimant at hearing is consistent with the statements made by his counsel. All evidence dealt with an injury occurring in the time frame of March 12, 13 or 14 of 1986. There was no evidence whatsoever to establish an injury occurring on or about March 1, 1986. The entire claim is therefore covered by file number 816941. Claimant has failed to carry the burden of proving that he received an injury on March 1, 1986 which arose out of and in the course of his employment.

ORDER

IT IS THEREFORE ORDERED that this claim, file number 816940 which alleges an injury date of March 1, 1986, be and hereby is dismissed with prejudice at claimant's cost. Claimant shall take nothing from this proceeding.

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

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DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLIFFORD WILSON, Claimant, vs. J. I. CASE CORPORATE FLEET, Employer, Self-Insured, Defendant.	:	File No. 808308 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, Clifford L. Wilson, against his self-insured employer, J. I. Case Corporate Fleet, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained August 26, 1985. 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 January 23, 1986. Pursuant to the prehearing report, the parties agreed that claimant had been paid benefits to March 14, 1987 at the stipulated rate of $271.41.

The record in this proceeding consists of the testimony of claimant and of Marian Jacobs, as well as of exhibits 1 through 27 as identified on the submitted exhibit list.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant did receive an injury which arose out of and in the course of his employment on the alleged injury date, and that that injury is causally related to temporary total disability to claimant. They further stipulated that the commencement date for any permanency benefits due claimant is March 18, 1986, and that defendant is to receive a $560 credit for Wisconsin workers' compensation benefits overpaid to claimant. The issues remaining for resolution are:

1) Whether claimant is entitled to permanent partial disability benefits; and

2) Whether a causal relationship exists between claimant's

alleged injury and any permanent disability.

REVIEW OF THE EVIDENCE

Thirty-nine year old claimant was a dock worker for the J. I. Case Corporate Fleet on August 26, 1985. He was injured when a semi driver moved the trailer on which he was riding a forklift. Claimant, while in the forklift, fell approximately six feet. Claimant described himself as in a paralytic state for approximately ten to fifteen minutes following the incident. He stated he developed sharp pain and burning sensation in his right leg within an hour. Claimant saw a variety of physicians and was advised to lose seventy-five pounds, to do exercises, and to wear a back brace. Claimant stated that the back brace was too uncomfortable to wear; that he was unable to do the exercises and that he had reduced his weight from 300 pounds to 228 pounds from May 1985 to approximately time of hearing. Claimant weighed 233 pounds and was five feet ten inches tall at time of hearing. He agreed his physicians had told him that his weight affected his back. Claimant self-described himself as having poor hearing in both ears and as being unable to see well enough to read.

Various medications were prescribed for claimant; he subsequently sought chiropractic treatment with Raymond Hanks, Jr., D.C. Neurological examination was performed by Mark Hines, M.D., upon referral of Dr. Hanks. Claimant reported that Dr. Hines recommended surgery, but that claimant, himself, decided against such because claimant had had a severe asthmatic type allergetic reaction to IVP dye on a prior occasion. Claimant understood the dye was needed for a myelogram. On cross-examination, it became apparent that medical records establishing claimant's allergetic reaction to the dye were not readily available. Claimant's description of his reaction with the dye administered on a prior occasion was consistent with a subsequent description of a like reaction contained in Dr. Hines' deposition, however. Claimant did agree that he had elected not to have surgery for other reasons as well.

Claimant is a high school graduate who self-described himself as an average student with C's, D's and F's. Claimant is now taking a gunsmithing course at Southeast Community College. He has completed two semesters, but reported that the courses were getting harder and that he would likely not be able to complete them. Claimant stated that were he to complete the course, he could earn from minimum wage to approximately $5.00 per hour as a gunsmith. Claimant stated that his past history is all as a manual laborer with prior work experience involving lifting from 65 to 110 pounds while loading and unloading freight. He has also worked as a diesel mechanic and as a farm laborer. Claimant reported that he has difficulty driving his pickup, mowing the lawn, splitting wood, raking his lawn,

snowshoveling, changing oil, climbing stairs, and walking. He stated he has no problems driving his van. Claimant now lives with his girlfriend and stated he runs her gunsmithing business with her. He agreed he has participated in gun shows outside Iowa and has also visited relatives in Missouri following his incident. Claimant reported he receives no income from his gunsmithing activities, but simply helps out in the shop. Claimant agreed that he had a prior upper back injury in 1979 for which he received a ten percent body as a whole settlement while continuing to work for J.I. Case.

Marian Jacobs, a rehabilitaton placement specialist, opined that if claimant did not complete his gunsmithing course, there were no heavy manual labor or medium or very heavy labor jobs for which claimant qualifies. She reported that claimant could do specific sedentary work not requiring all day sitting or standing or lifting of over 25 pounds. She indicated he could be a self service gas station attendant, a security guard with periodic walkabouts, or small establishment bartender, or an auto or light parts salesperson. She indicated that the medium wage for such provisions range from minimum wage to $4.20 per hour. She indicated that gunsmithing would also be available for claimant should he complete the course and that he could then earn approximately $8.00 per hour. She characterized gunsmithing as seasonal work only, however. Jacobs characterized claimant as highly motivated regarding his gunsmithing. She opined that the job market was such that claimant would be competing with healthy persons seeking the same jobs as he is. Claimant earned $11.50 per hour when injured. Jacobs' written report in evidence was consistent with her oral testimony.

University of Iowa clinical notes of May 17, 1982 note that claimant has chronic thoracic pain with mild degenerative changes in the thoracolumbar junction on x-ray. Mild wedging of the T12 vertebral body is revealed. A May 9, 1983 examination revealed similar complaints with claimant remaining neurologically intact. Notes of J. J. Kivlahan, M.D., F.A.C.S., also note mild mid-back and lumbar problems pre-August 26, 1985. On November 13, 1985, a Dr. Weinstein, of the University of Iowa Hospitals and Clinics, noted an impression that claimant had a combination soft tissue injury from the accident and degenerative disc disease with the possibility of spondyloylsis related to his injury.

On April 21, 1986, Marc E. Hines, a board certified neurologist, stated that an EMG revealed upper motor, neuron-type pattern as frequently seen with spinal cord contusion. He advised that lower extremity distal denervation worsening as present in claimant's case may have related to claimant's borderline diabetes or to a subclinical neuropathy.

On March 19, 1987, R. G. Day, M.D., a radiologist, interpreted

an x-ray as showing mild diffuse degenerative arthritic changes throughout the lumbar spine with slight progression [of such changes] when compared with October 27, 1979 films.

In his deposition of September 25, 1986, Raymond Hanks, Jr., D.C., opined that claimant reached maximum medical improvement on March 18, 1986 with a 30 percent body as a whole permanent partial impairment rating under the AMA Guides without including any impairment values for thoracic 10, thoracic 11, since claimant had previous subjective symptoms in that area. The doctor noted that even had he included such symptoms, the rating would not change from 30 percent. The doctor's impairment rating included loss of range of motion in the cervical area and the thoracic lumbar area as well as impairment for intervertebral disc lesions and sensory impairments. Dr. Hanks reported that a CT scan advised by Dr. Hines had revealed a central herniated disc at the L4, L5 level. He opined that a central disc herniation is most severe and opined that if claimant's stage 3 central disc herniation were to progress to a stage 4 disc herniation, surgery would be required or claimant would lose bladder function and would probably be paralyzed from the point where the nerves were affected. Dr. Hanks advised that claimant not lift over 25 pounds; not work in a flex position; not stand over one-half hour without resting for approximately ten minutes; not ride over one hour; not sit over thirty minutes on a firm surface; not receive jolts or jars; and not operate equipment with foot controls for over fifteen minutes without resting.

In his deposition of July 3, 1986, Marc E. Hines, M.D., opined that claimant's spinal cord contusion and his L4, L5 disc herniation resulted from the August 26, 1985 incident. He reported his understanding that claimant had an allergy problem regarding the IVP dye which might produce additional risk for standard procedures in treating disc herniation. The doctor opined that it was reasonable for claimant to elect not to have a myelogram, but stated that were he claimant, he might choose differently. Dr. Hines agreed that regardless of whether the myelogram was performed, claimant was unwilling to have either chymopapain injections or back surgery. The doctor stated that the actual incident of IVP reaction in myelogram was much lower than incident of reaction when IVP dye is injected into the vein; the risk of an asthma-like reaction and heart stoppage can be reduced considerably with medication given either at the time of the reaction or prior to testing. Dr. Hines opined that overzealous chiropractic manipulations can produce further disc protrusion. In July 1986, claimant was receiving chiropractic manipulations every other day and apparently had been receiving them every day initially following his incident. Hines reported that weight loss would improve the long term outcome for back pain and arthritis. Dr. Hines saw claimant on four occasions.

The balance of the evidence was reviewed in the disposition

of this matter.

APPLICABLE LAW AND ANALYSIS

We consider the causal connection issue.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 26, 1985 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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).

Claimant had preexisting left thoracic and lumbar back problem. Dr. Hines has opined that claimant had a spinal cord contusion and L4, L5 disc herniation as a result of the August 1985 incident. Dr. Weinstein's impression was that claimant had a combination soft tissue injury from the accident and degenerative disc disease with the possibility of spondylolysis related to his injury. An x-ray of March 1987 noted mild diffuse degenerative arthritic changes throughout the lumbar spine but only slight progression of those changes when compared with films of October 25, 1979. Claimant's prior medical records are replete with evidence of complaints of thoracic and lumbar problems prior to the August 1985 incident. Hence, we are unable to find that all

of claimant's lumbar complaints relate to the incident or were activated by the incident. We do find that problems related to the spinal cord contusion and the L4, L5 disc herniation as well as any soft tissue damage relate to that incident. Because we do not find that virtually all of claimant's complaints relate to his injury, we also reject Dr. Hanks' impairment rating of 30 percent permanent partial impairment as a result of the injury. We do believe that the L4, L5 disc hernation and soft tissue damage would generally result in a moderate to moderately severe permanent partial impairment.

We consider the permanent impairment question.

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

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

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.

We are unable to determine from the record whether claimant voluntarily left his position with the employer or whether claimant ever sought to return to his position or whether defendants ever attempted to accommodate claimant's restrictions. The record does suggest that claimant and Ms. Jacobs are correct

in stating that claimant can no longer do heavy manual labor. Despite his two semesters in gunsmithing courses and his attainment of straight A grades at one time, he made several attempts at hearing to present his condition as far worse than it objectively appears. We note that claimant testified he is unable to read without his glasses. Medical evidence suggests, however, that within the last decade, claimant's vision was near normal. Claimant presented no explanation for that discrepancy. Hence, we find claimant's credibility as far as his actual life restrictions also lacking. We note that while claimant suggests he has trouble driving his pickup, he has not had problems traveling long distances in his van. Likewise, we note that claimant has remained involved in his girlfriend's gun shop business. We do not accept claimant's assertion that his work in that business is purely gratis and does not result in any income. We believe that that fact and the employment options Ms. Jacobs outlined indicate claimant has abilitities and could use them more productively than he currently presents himself as able to do. Likewise, while claimant may have restricions related to his preexisting thoracic and lumbar complaints, we do not consider those in assessing any industrial disability resulting from his August 26, 1985 injury. When that injury alone is considered, claimant appears to be a younger worker with both business acumen as evidenced in his ability to work in a gun shop and run gun shows and mechanical ability as evidenced in his ability to complete two semesters of gunsmithing course. We find, however, that claimant's lack of credibility as well as his attempts to attribute all of his conditions to the August 26, 1985 incident make it difficult to assess exactly what claimant's earnings and employment potentials are. We do not find it unreasonable, however, for claimant to refuse back surgery, chymopapain injections, or myelographic treatment under the circumstances. Claimant's overall lack of credibility is troubling, however. We find that, at best, claimant's moderate-severe permanent partial impairment and any work restrictions imposed on claimant wholly as a result of the August 26, 1985 incident are such that claimant has shown a loss of earnings capacity related to that incident of 30 percent.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant was injured in the course of his employment on August 26, 1985 when the forklift he was driving fell approximately six feet from a semi tractor trailer to the ground.

Claimant sustained a spinal cord contusion and an L4-L5 disc herniation as well as soft tissue injury in his work injury.

Claimant had preexisting thoracic and lumbar back complaints and degenerative arthritic changes not attributable to his

injury.

Not all conditions Dr. Hanks considered in assessing claimant's permanent partial impairment are attributable to claimant's injury.

Claimant has had a prior reaction to IVP dye, which reaction is consistent with allergic reaction to IVP dye.

IVP dye is used in myelographic studies.

The dangers of IVP reaction are less in myelographic studies than in direct vein injection procedures and those dangers can be lessened by appropriate medical procedures.

Claimant chose to forego back surgery or chymopapain injections for a number of reasons, some of which are not related to his IVP dye reaction.

Claimant's decision to forego myelographic studies, back surgery, or chymopapain injections was reasonable.

Claimant has a moderate to moderately severe permanent partial impairment related to his spinal cord contusion, his L4-L5 disc hernation, and his injury-produced soft tissue damage

Claimant is 39 years old.

Claimant is a high school graduate.

Claimant is enrolled in a gunsmithing course and received straight A's in the course one semester.

Claimant works in his girlfriend's gun shop and has driven his van long distances to participate in gun shows since his injury.

Dr. Hanks has advised claimant not to lift over 25 pounds; not to work in a flex position; not to stand over one-half hour without ten minutes rest; not to ride over an hour; not to sit over thirty minutes; not to receive jolts or jars; and not to operate equipment with foot controls for over fifteen minutes without rest.

The restrictions relate to both claimant's work injury and to his unrelated preexisting conditions.

Claimant cannot return to heavy manual labor.

Claimant lacks credibility in his self-description of his post injury work and life restrictions.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established that his injury of August 26, 1985 is the cause of the permanent disability on which he bases his claim.

Claimant is entitled to permanent partial disability resulting from his injury of August 26, 1985 of thirty percent (30%).

Defendant is entitled to a credit for benefits already paid on or after the permanent partial disability commencement date of March 18, 1986.

Defendant is entitled to a credit of five hundred sixty dollars ($560) for Wisconsin Workers' Compensation benefits overpaid.

ORDER

THEREFORE, IT IS ORDERED:

Defendant pay claimant permanent partial disability benefits for one hundred fifty (150) weeks at the rate of two hundred seventy-one and 41/100 dollars ($271.41) with those payments to commence on March 18, 1986.

Defendant receive credit for permanent partial disability payments made on or after March 18, 1986. Defendant receive credit for overpayment of Wisconsin Workers' Compensation benefits paid claimant in the amount of five hundred sixty dollars ($560).

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.

Defendant file claim activity reports as required by the agency.

Signed and filed this 13th day of July, 1987.

Helen Jean Walleser

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[redacted]

002566

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM E. SHELTON, Deceased, BARBARA SHELTON, Surviving Spouse, Claimant, vs. RUAN TRANSPORT CORPORTATION, Employer, and CARRIERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 738188 A P P E A L D E C I S I O N

FILED

MAR 18 1987

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Barbara Shelton, surviving spouse of William Shelton, appeals from an arbitration decision denying her all compensation for her husband's death because his intoxication was a substantial factor in causing his work-related injury.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits 1 through 11; and defendants' exhibits A through K, N through Q, and S through Z. Both parties filed briefs on appeal.

ISSUES

Claimant states the issues on appeal as:

I. Whether Defendants have shown by a preponderance of the evidence that Mr. Shelton was intoxicated at the time he fell.

II. If Defendants are found to have met their burden on Issue I, whether Defendants have shown by a preponderance of the evidence that the intoxication was a substantial factor in Mr. Shelton's fatal injury.

REVIEW OF THE EVIDENCE

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

Briefly stated, on July 12, 1983 William Shelton died shortly after he fell from the top of a "pneumatic bulk trailer" he was driving. Shelton had, as a regular part of his duties, climbed on top of the bulk trailer to close the dome lid. There were six latches around the dome lid which drivers would close with their hand and/or feet and/or a hammer. The top of the trailer was covered with an accumulation of cement dust which may have actually improved traction. The weather conditions that day were described as warm, clear with little wind by Kenneth Mersereau, a claims adjuster who investigated the accident.

No one actually saw Shelton fall from the top of the bulk trailer. However Melvin B. Lyons, another Ruan driver, states that he saw Shelton closing the hatch then he looked away for a minute and when looked back again Shelton was on the ground and one of the latches on the dome lid was standing straight up. About two hours after Shelton's fall Lyons closed the latch that was standing up with his hands.

Charles Buchanan, a bulk loader, states that he saw Shelton closing the dome lid on July 12, 1983 and that Shelton would close each latch with both hands and then he would stand up "like he was out of breath" and rest.

The autopsy report signed by Robert J. Ketelaar, M.D., lists among the final diagnosis "6. Acute ethanol intoxication, blood alcohol 384 mg/dl." This diagnosis is the result of blood alcohol obtained at the time Shelton was brought to the emergency room. Another blood alcohol examination performed at the time of the post mortem examination showed 275 mg/dl; however, the change was attributed to the dilutional effect of intervenous fluids administered while in the emergency room.

However, to Shelton's coworkers who saw Shelton before the accident, he did not appear to have been drinking although his eyes were very red. Additionally, Barbara Shelton states that her husband had a very high tolerance for alcohol and that he could drink a lot before anyone would notice.

Robert Baughman, Ph.D., and Peter Stephens, M.D., opine that Shelton was intoxicated on July 12, 1983. Johathan D. Cowan, Ph.D., opines, however, that Shelton was not intoxicated and that if he was that, his intoxication was not a substantial factor in causing his injury. Dr. Stephens opines that Shelton's intoxication was a substantial factor.

APPLICABLE LAW AND ANALYSIS

There is conflicting evidence here concerning whether Shelton was intoxicated at the time of his injury. Claimant notes that to his coworkers Shelton appeared outwardly normal and he was able to maneuver his truck into the loading area and complete the necessary paperwork without difficulty. However, medical reports indicate that Shelton's blood alcohol level was 384 mg/dl at the time he entered the emergency room. Also Barbara Shelton states that her husband was drinking the night before the accident and that he had been depressed because his uncle had died. She also states that depression usually preceded her husband's drinking episodes. Claimant argues however, that "evidence that a person has drank alcohol is not evidence that they are intoxicated."

However, when the record as a whole is considered it can reasonably be inferred that Shelton was in fact intoxicated on July 12, 1983 and that his intoxication was a substantial factor in causing his injury. The following citations lend persuasive authority for this inference:

> Reduced to its simplest terms this case involves a severely intoxicated individual working in an area and under circumstances familiar to him who, without being pushed, shoved or interfered with in any way, falls to the floor in such a manner as to injure himself.
>
> ....
>
> The effect of alcohol, especially the amount of alcohol which must be consummed to produce a .429 blood alcohol level on an individual's reaction, coordination and muscular control is a matter of common knowledge. No reasonable person, under the above set of circumstances, could reach any conclusion other than that the intoxication was a substantial factor in causing the individual to fall and injure himself.
>
> ....
>
> On the other hand, in the case of a slip and fall such as the one at bench or any accident not involving external trauma or force but involving only the reactions, coordination or muscular control of the applicant, intoxication which substantially impairs those functions must necessarily be viewed as a substantial factor in causing the accident.

Republic Indemnity Company of America v. Workers' Compensation Appeals Board, 187 Cal.Rptr. 636, 639, 138 Cal.App.3d 44, 47

(App. 1982).

> There is conflicting evidence in the record regarding intoxication. Petitioner cites uncontradicted testimony of witnesses that Smith drove up to the mountain, spent nearly two hours outside in very cold, wet conditions, supervising and assisting in efforts to retrieve the backhoe. He appeared sober to his coworkers and functioned normally. He went down the muddy, slippery bank, without difficulty, to put slings on the backhoe, whereas Morris slipped going down. No one was drinking at the site. Such evidence indicates Smith was not intoxicated.
>
> However, other evidence supports the conclusion of intoxication. The coroner's report states that Smith's blood contained .25 percent by weight of alcohol. Dr. Hayes testified that anyone, whether he had tolerance to alcohol or not, would be intoxicated at this high blood alcohol level, and that, at such a blood alcohol level, a person would have impaired judgment, impaired sensory perception, and slowed reaction time. Although the results of blood tests are not conclusive and must be weighed with all other evidence (Pacific Employers Insurance Co. v. Workmen's Comp. Appeals Bd. (1966) 31 Cal. Comp.Cases 214, 216), based on the conflicting evidence, the board's finding that decedent was intoxicated is clearly supported by substantial evidence.
>
> ....
>
> Once the board found, on ample evidence, that decedent was intoxicated, the testimony of Dr. Hayes that anyone's judgment and reaction time would be impaired seriously at that blood alcohol level provides the basis for an inference that such impairment was a substantial factor in bringing about the accident. We cannot say such an inference is unreasonable. The existence of numerous circumstances that would support other, conflicting inferences is not a basis for overturning the decision.

Smith v. Workers' Compensation Appeals Board, 176 Cal.Rptr. 843, 849-850, 123 Cal.App.3d 763, 774-775 (App. 1981). See also Country Pride v. Holly, 624 S.W.2d 443 (Ark.App. 1981); Davis v. C & M Tractor Company, 627 S.W.2d 561 (Ark.App. 1982).

In all other respects the applicable law and analysis of the

arbitration decision are adopted herein.

The findings of fact conclusions of law and order are also adopted herein.

FINDINGS OF FACT

1. That William E. Shelton started driving trucks for Ruan Transport Corporation in 1979 and was employed in that capacity on July 12, 1983.

2. That William E. Shelton reported to work at the Ruan's Buffalo, Iowa, terminal at about 1:00 p.m. on July 12, 1983.

3. That William E. Shelton was assigned a job at Davenport Cement Company about one-quarter mile from Ruan's Buffalo, Iowa terminal and drove a pneumatic bulk trailer to the site.

4. That while attempting to close one of six latches used to seal a dome lid on top of the pneumatic bulk trailer, William E. Shelton fell off the trailer between 1:00 p.m. and 2:00 p.m. on July 12, 1983.

5. That William E. Shelton had been ill for the two or three weeks prior to July 12, 1983 with the flu and because of the consumption of alcohol.

6. That the flu illness had for the most part resolved itself about a week prior to July 12, 1983.

7. That William E. Shelton engaged in "drinking periods" or "drinking sessions" that lasted ten days to two weeks.

8. That William E. Shelton was going through one of his drinking sessions or periods at the time of his injury from his fall on July 12, 1983.

9. That July 12, 1983 was a clear, warm day with very little wind.

10. That William E. Shelton's uncle died on July 9, 1983 and was buried on July 11, 1983 in Illinois, and he attended the funeral.

11. That William E. Shelton purchased whiskey in Illinois and returned to his home in Iowa, after attending his uncle's funeral, at about 8:00 p.m. on July 11, 1983.

12. That William E. Shelton was upset about his uncle's death and drank whiskey the evening of July 11, 1983.

13. That a partially empty pint bottle of whiskey was found

in William E. Shelton's suitcase that he took to work with him on July 12, 1983 and he had other whiskey bottles at his home.

14. That Ed Binke, an ambulance attendant who gave mouth-to-mouth resuscitation to William E. Shelton, after his fall on July 12, 1983, stated that his breath had a strong odor of alcohol.

15. That a blood alcohol test taken from William E. Shelton after his fall at an emergency room showed a result of 384 mg/dl.

16. That tests administered at an autopsy of William E. Shelton performed on July 13, 1983 showed a blood alcohol level of 275 mg/dl, with much of the drop from 384 mg/dl attributable to the dilutional effect of intravenous fluids given to William E. Shelton on July 12, 1983, and urine test showing an alcohol level of 297 mg/dl.

17. That William E. Shelton was intoxicated on July 12, 1983 at the time he fell off a pneumtic bulk trailer owned by Ruan Transport Corporation.

18. That the cement dust, on top of the trailer that William E. Shelton fell off of, improved traction.

19. Kenneth Mersereau, a claims adjustor, was able to walk on top of the trailer that William E. Shelton fell off of, shortly after Shelton's fall, even though Mersereau had "smooth-soled" leather shoes on.

20. That William E. Shelton's intoxication on July 12, 1983, at the time he fell off the trailer, was a substantial factor in causing his injury that resulted from the fall.

CONCLUSIONS OF LAW

That William E. Shelton sustained an injury on July 12, 1983 that arose out of and in the course of his employment with Ruan Transport Corporation.

That Ruan Transport Corporation has established by a preponderance of the evidence that William E. Shelton's intoxication on July 12, 1983 was a substantial factor in causing his work-related injury and, therefore, recovery is barred in accordance with section 85.16(2), The Code.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That the costs of this action are assessed against the claimant pursuant to Industrial Services Rule 343-4.33, formerly Industrial Commissioner Rule 500-4.33.

Signed and filed this 18 day of March, 1987.

ROBERT C. LANDESS
INDUSTRIAL COMMISSIONER

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