Iowa Industrial Commissioner

Decisions

1988

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IOWA INDUSTRIAL COMMISSIONER
1988

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY ACKERMAN, Claimant, vs. WEISS CONSTRUCTION CO., Employer, and FIREMAN'S FUND INSURANCE CO., Insurance Carrier, Defendants.	:	File Nos. 806005 806006 A P P E A L D E C I S I O N

FILED
JUN 2? 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding healing period benefits, permanent partial disability benefits representing an industrial disability of 40 percent, and medical expenses.

The record on appeal consists of the written decision of the deputy of the arbitration hearing; claimant's exhibits 1 through 10; and defendants' exhibits A and B.

ISSUES

The issues on appeal are whether claimant received an injury that arose out of and in the course of his employment; whether there is a causal connection between claimant's alleged injury and his alleged disability; when healing period ended; and the extent of permanent partial disability.

REVIEW OF THE EVIDENCE

It should be noted that in a stipulation and order dated December 17, 1986, which was signed by representatives of both parties, it was stipulated that for purposes of review on appeal, the only official record of the oral proceeding will be the exhibits received into evidence and the written decision of the deputy. The court reporter provided by defendants to report the hearing was not certified. Defendants, in a motion filed April 29, 1987, requested that the transcript of the hearing be allowed as part of the evidence. That motion was overruled in a

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ruling dated May 11, 1987.

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

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

Claimant testified that on January 6, 1986, he saw Raymond W. Dasso, M.D., and was ultimately evaluated by Barry Lake Fischer, M.D. On April 6, 1986, claimant felt he could go back to work and did so doing "light cleanup" for $230 per week. His medical restrictions "limited the amount of work" he could do. In January 1986, claimant had a 25 pound weight restriction with no repetitive lifting or squatting. Claimant was paid $550 per week prior to October 17, 1986. Claimant currently has severe pain in his lower back. After October 17, 1985, claimant no longer hunted, fished, or "roughhoused" with his children.

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

On cross-examination, claimant acknowledged that he "returned" to work for a construction company other than defendant employer; this company called claimant.

Claimant testified that he went to see Dr. Dasso; D.D. Stierwalt, D.C.; Thomas A. Brozovich, D.C.; and Irwin T. Barnett, M.D., for evaluations rather than treatment or therapy.

Claimant was seen and treated by Steven L. Funk, D.O. In a letter dated January 8, 1986, Dr. Funk wrote:

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

(Claimant's Exhibit 1)

In a letter dated April 22, 1986, Dr. Funk wrote:

> It is my impression that Larry has suffered a very serious lumbar injury which caused straining and tearing of the musculature and the ligaments of the lumbar area and the restraining ligaments of the fourth and fifth lumbar discs with resultant bulging of the fifth lumbar disc, creating nerve symptoms. This chronic lumbar strain creates pain and reduction of range-of-motion and muscle strength and stability throughout the lumbar spine. I feel that this injury represents 30% disability to the body as a whole....I feel that Larry will never improve to the point that he can do heavy labor without severe back pain....and certainly [I] would not certify him able to return to his original work.

(Cl. Ex. 2, p. 3)

Dr. Funk's office notes read in part in chronological order:

> 11/18/85 S: Was improved for a few days and then lifted an automobile battery which put him back in the same condition he was several treatments ago.
>
> 12/23/85 S: Broke left great toe when he dropped a large log on it while cutting wood. Cutting wood did not, however, inflame back. Back is tender, but improved.
>
> 1/6/86 S: Continues to improve, wants to try return to original job as brick layer. Has job opportunity at this point he can't miss, financial problems from being out of work and apparent loss of workman's [sic] compensation payments. Still has aching with exertion with activity such as

> cutting firewood, but no severe pain and he does indicate persistent improvement in the injured area as well as marked improvement in other areas of his spine.
>
> 1/29/86 S: Returned to work pooring [sic] concrete as planned. He states that when any amount of forward bending, whether bearing weight or not, is doen [sic] that the upper lumbar spine aches severely and it's only through endurance and fear or loss of his job that he continues through the day. He says that the pain begins within the first hour of the work day and is relieved by standing up or laying down, but immediately returns on forward bending.
>
> 2/12/86 S: Larry had to go back to work for financial reasons, was pitching hay and had upper lumbar pain while throwing hay bales to the left.
>
> 3/18/86 S: Has been working at light construction with tolerable amount of pain which persists through his rest period in the evening into the next day's work.

(Defendants' Exhibit A)

Claimant was examined by Barry L. Fischer, M.D., on May 1, 1986. In a letter dated May 20, 1986, Dr. Fischer opined: "[T]his patient sustained an injury to his lower back which has resulted in permanent partial functional impairment to the person as a whole of 30%" (Cl. Ex. 3, p. 3)

Claimant was examined by Raymond W. Dasso, M.D., on February 28, 1986 and in a letter dated the same day, Dr. Dasso stated:

> SURGERY: The patient states that he has had no surgery on his spine.
>
> HOSPITALIZATION: The patient states that he has not been hospitalized for care of his back.
>
> ....
>
> DISABILITY: The patient has totally been disabled from the date of the injury until the present time. In my opinion he has permanent partial disability with no restrictions of no lifting over 25 pounds and no excessive bending, stooping or twisting; however, he will probably have an additional six months or so of total disability before recovering to the degree that he

can do light work.

(Cl. Ex. 5, pp. 2,3)

Claimant was examined by Thomas A. Brozovich, D.C., and in a letter dated March 14, 1986, Dr. Brozovich wrote: "At the date of this report, with respect to the loss of lumbar range of motion only, I have calculated a temporary impairment of the whole man to be 13%. Some six to twelve months should be permitted before a competent estimation of any degree of permanent impairment can be made." (Cl. Ex. 4) Claimant was examined by Irwin T. Barnett, M.D., on September 2, 1986 and in a letter dated the same day, Dr. Barnett opined: "Mr. Ackerman has a moderate loss of use of the man as a whole on an industrial basis." (Cl. Ex. 6, p. 2) On August 5, 1986, claimant was examined by D.D. Stierwalt, D.C., who wrote in a letter dated August 6, 1986: "Based on findings at the time of examination, I place the permanent impairment level at 22 to 25% of the whole man. It is my opinion that with this corrective surgery or corrective rehabilitation, he will still be faced with a minimum of 15% whole man impairment." (Cl. Ex. 7, p. 2)

APPLICABLE LAW

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

ANALYSIS

Before discussing the issues raised on appeal one thing should be emphasized. Defendants, in their appeal brief, make reference to facts that are not in the record, particularly facts that are given in the transcript. As noted earlier, the record in this matter is limited to the written decision of the deputy and to exhibits received into evidence. The issues raised on appeal will be resolved based upon only those facts that are in the record.

The evidence is uncontroverted that claimant injured his low back at work on October 17, 1985 and that he aggravated his low back injury at work on October 22, 1985. Claimant sought medical treatment within two days of each of the injuries. The history claimant gave, the medical treatment he received, and the impressions given by doctors all are consistent with an injury to the lower back. Claimant has established by a preponderance of the evidence that he sustained injuries that arose out of and in the course of his employment.

The medical evidence is uncontroverted that claimant has sustained a permanent impairment because of his injury. Impairment ratings by examining doctors range from "moderate" to 30 percent of the body as a whole. Claimant's treating doctor

gives a "disability" rating of 30 percent. It should be noted that a physician is not qualified to make a determination of a claimant's disability, but is only qualified to make a determination of impairment. Claimant has sustained a permanent impairment because of his injury.

The next issue to be decided is when the healing period ended. Claimant has the burden of proving the extent of his healing period. Claimant acknowledged that he returned to work for a construction company. Dr. Funk states in his notes that on January 6, 1986 claimant wanted to try to return to his original job as bricklayer and on January 29, 1986 and March 18, 1986 claimant returned to construction work as planned. From this it can be concluded that claimant planned to return to work and did so. In the absence of any proof by the claimant to the contrary, it is concluded that claimant returned to work on January 7, 1986. Claimant's healing period ended on January 6, 1986.

The last issue to be discussed is the extent of claimant's industrial disability. Claimant's permanent impairment is only one of the factors used to determine industrial disability Claimant is 36 years of age and has a high school education and has had experience as a jet engine mechanic in his four years of service with the U.S. Navy. He has a work history of manual labor jobs and was able to perform these jobs prior to October 1985. The treating physician, Dr. Funk, stated that claimant cannot return to heavy labor without severe back pain. Claimant did, however, return to manual labor in the construction job within approximately three months of his injury. Prior to that time he did engage in cutting firewood and lifting an automobile battery. Lifting the battery did affect his back but cutting the firewood did not inflame his back. Shortly after returning to his construction job he undertook other physical work of throwing hay bales and light construction, both of which caused him some pain. Also, claimant has had no surgery and has not been hospitalized for his back. Although there is evidence that claimant should not return to heavy labor but limit himself to sedentary-type work claimant has returned to heavy labor. Claimant is well motivated. The fact that claimant has not required surgery and has continued to be employed in construction demonstrates that his injury is not as severe as what his restrictions may indicate. Taking all appropriate factors into account, it is concluded that claimant's industrial disability is 25 percent.

FINDINGS OF FACT

1. Claimant is 36 years old.

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

3. On October 17, 1985, claimant injured his back while working for defendant employer.

4. On October 22, 1985, claimant aggravated his low back while working for defendant employer.

5. As a result of the work incidents of October 17, 1985 and October 22, 1985, claimant sustained a whole body impairment of 30 percent.

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

7. Work restrictions were imposed on claimant because of the work-related injuries sustained in October 1985.

8. Claimant returned to his construction job within approximately three months of his injury even though he continued to have some pain.

9. Claimant has had no surgery nor has he been hospitalized for his back.

10. Defendant employer informed claimant that he could choose his own treating physician and he did so.

11. Claimant returned to work on January 7, 1986.

12. Claimant's industrial disability is 25 percent.

13. Claimant's stipulated weekly rate of compensation is $331.19.

CONCLUSIONS OF LAW

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

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

Claimant has established entitlement to healing period benefits and permanent partial disability with permanent partial disability benefits commencing on January 7, 1986.

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

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

ORDER

THEREFORE, it is ordered:

That defendants pay healing period benefits from October 17, 1985 through January 6, 1986, and then pay one hundred twenty-five (125) weeks of permanent partial disability benefits commencing on January 7, 1986 at the stipulated rate of three hundred thirty-one and 19/100 dollars ($331.19).

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

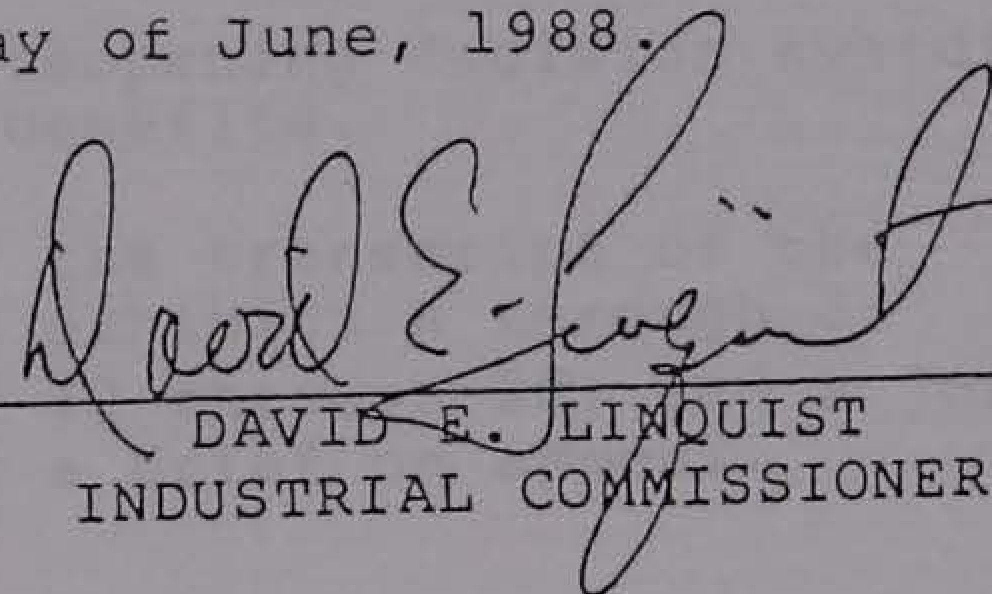
That defendants be given credit for benefits already paid.

That defendants pay the contested medical bills.

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

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

Signed and filed this 28th day of June, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONNA CLARK ADAIR, Claimant, vs. FURNAS ELECTRIC COMPANY, Employer, and AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 468417 A P P E A L D E C I S I O N

FILED
FEB 22 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding claimant permanent total disability benefits.

The record on appeal consists of the transcript of the review-reopening hearing; claimant's exhibits A through J; defendants' exhibits 1 through 8 and 10 through 20; and a joint exhibit. Only appellants have filed a brief on appeal.

ISSUES

Defendants state the following issues on appeal:

I. Deputy commissioner Ort should have recused himself.

II. As a matter of law, there is no causal relationship between Adair's job injury in 1977 at Furnas and Adair's disability resulting from her second tos [thoracic outlet syndrome] episode.

III. As a matter of law, there is no causal relationship between Adair's job injury in 1977 at Furnas and Adair's disability resulting from her third (and current) tos episode.

IV. Assuming, arguendo, that Adair's second and third tos' are compensable, is the injury to the

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body as a whole?

V. Assuming, arguendo, that Adair's second and third tos' are compensable, were the medical bills of Hines and Toon authorized by defendants?

VI. Assuming, arguendo, that Adair's second and third tos' are compensable, did Adair act with willful intent to injure herself?

VII. Assuming, arguendo, that Adair's second and third tos' are compensable, is Adair entitled to additional healing period benefits?

VIII. Was Adair ever mentally disabled by her work at Furnas?

IX. Assuming, arguendo, that Adair's second and third tos' are compensable, is Adair totally permanently disabled?

REVIEW OF THE EVIDENCE

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

Briefly stated, claimant sustained a work injury on January 31, 1977 resulting in thoracic outlet syndrome, carpal tunnel syndrome and an aggravation of a preexisting psychological condition. In an appeal decision filed September 14, 1982 defendants were ordered to pay a running award of healing period benefits for claimant's psychological benefits.

APPLICABLE LAW

The citations of law in the review-reopening decision are appropriate to the issues and evidence.

ANALYSIS

Defendants argue that remarks made by the deputy during an offer of proof by defendants reveal that the deputy was biased and prejudiced. Review of the remarks which defendants consider prejudicial (Vol III Transcript, pages 373-378) reveals nothing which would suggest that the hearing was not fair and impartial. The undersigned reviewed the voluminous record and re-reviewed the voluminous record. It is noted that the deputy allowed defendants to proceed with their offer of proof. Moreover, the de novo review afforded defendants on appeal assures that the findings of fact are fair.

The review-reopening decision adequately and accurately analyzes the other arguments presented by defendants on appeal

and it is adopted herein.

The findings of fact, conclusions of law and order of the deputy are adopted herein.

FINDINGS OF FACT

1. Claimant received an injury arising out of and in the course of her employment on January 31, 1977.

2. The nature of the injury received by claimant was a thoracic outlet syndrome, carpal tunnel syndrome, and a disabling aggravation of a preexisting psychological condition.

3. On September 14, 1982 the industrial commissioner filed a final agency decision requiring defendants to pay a running award of benefits pursuant to section 85.34(1), The Code, because of claimant's psychological disability.

4. In late 1983 or early 1984 defendants authorized Dr. Hines to treat claimant's psychological disability.

5. Claimant recovered from her psychological disability in July or August 1985.

6. By the time claimant recovered from her psychological disability, claimant was suffering from a recurrent thoracic outlet syndrome.

7. Claimant's recurrent thoracic outlet syndrome would not have occurred but for the first thoracic outlet syndrome.

8. Defendants authorized Dr. Blessman to treat claimant's injuries.

9. Dr. Blessman referred claimant to a number of different physicians.

10. In February 1985 claimant was operated on for the recurrent thoracic outlet syndrome.

11. The surgery performed in February 1985 was of urgent character.

12. Defendants did not offer claimant alternative treatment from that which had been recommended by Dr. Blessman and his collegues.

13. Defendants denied any liability for claimant's recurrent thoracic outlet syndrome.

14. Claimant may need further surgery for thoracic outlet

syndrome in the future.

15. Claimant is not medically capable of returning to gainful employment.

16. Claimant has been totally disabled since September 14, 1982 and will continue to be so for an indefinite period into the future.

17. Claimant has not achieved medical recovery from her injury for nine years.

18. Claimant is credible and is well motivated to recover from her injury.

19. Claimant has at no time made any misrepresentation of material facts concerning this matter.

20. Claimant's physical and psychological condition would not have improved without the treatment given by Dr. Blessman and his collegues.

21. Claimant's rate of compensation is $74.44.

22. Claimant did not willfully intend to injure herself.

23. Claimant is 27 years old, married, and has four children. She was single at the time of her injury.

24. As a result of her injury, claimant incurred the following medical expenses which remain unpaid:

a. City of Des Moines	$ 75.00
b. Steven Adelman, D.O.	200.00
c. Osceola Drug	239.57
d. Todd Hines, Ph.D.	2,400.00
e. Medical Center Anesthesiologists, P.C.	468.00
f. J. Song, M.D.	60.00
g. David Friedgood, D.O.	200.00
h. Cardiac Surgery Associates, P.C.	2,000.00
i. Mercy Hospital Medical Center	4,473.40
j. Paul From, M.D.	200.00
k. Clark Medical Center	60.00
l. James Blessman, M.D.	20.00

25. As a result of her injury, claimant has incurred transportation expenses for medical treatment in the amount of $1,410.96.

26. Claimant has incurred litigation expenses in the amount of $57.95.

27. The medical expenses incurred by claimant are fair and

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reasonable.

28. The medical expenses incurred by claimant were reasonably necessary.

29. Claimant has not been underpaid weekly benefits.

30. As a result of her injury, claimant will continue to require psychological treatment of a maintenance nature.

CONCLUSIONS OF LAW

Claimant has proven by a preponderance of the evidence that she received an injury arising out of and in the course of her employment on January 31, 1977.

Claimant has proven by a preponderance of the evidence that the proximate cause of her present disability is the work injury of January 31, 1977.

Claimant has proven by a preponderance of the evidence that as a result of her work injury of January 31, 1977 she is permanently and totally disabled for industrial purposes.

Claimant has proven by a preponderance of the evidence that the medical expenses incurred by her were causally connected to her work injury of January 31, 1977; that they were reasonably necessary for the treatment of her injury; that they were fair and reasonable; and that she was authorized, within the meaning of section 85.27, The Code, to incur those expenses.

Defendants have failed to prove by a preponderance of the evidence that claimant willfully intended to injure herself.

WHEREFORE the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants shall pay unto claimant weekly compensation benefits at the rate of seventy-four and 44/100 dollars (74.44) commencing September 14, 1982 and continuing during the period of claimant's disability pursuant to section 85.34(3). Defendants shall take credit for all weekly benefits paid to claimant between September 14, 1982 and the date of this decision.

That defendants shall pay claimant medical expenses as outlined in paragraph 24 of the above findings of fact.

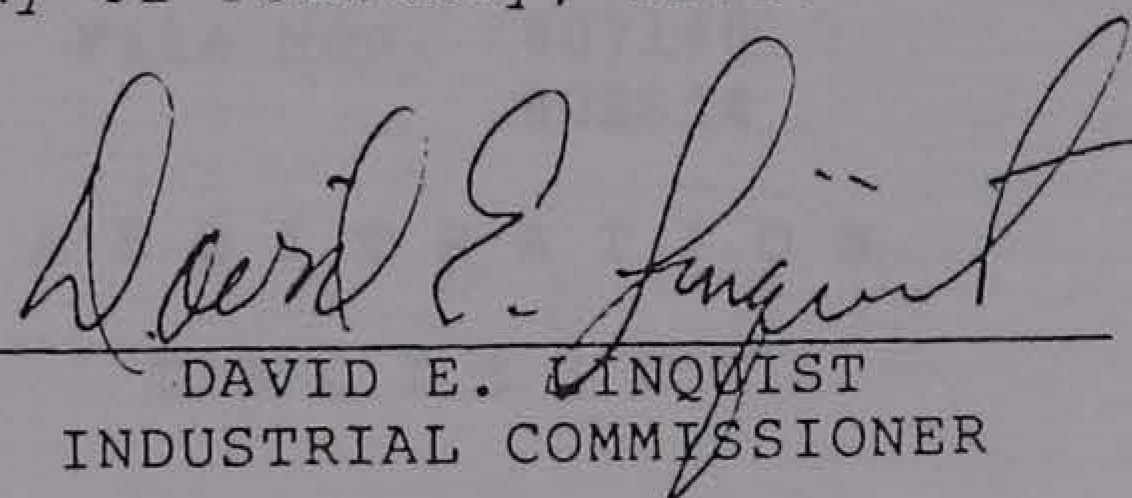
That defendants shall pay unto claimant as reimbursement for transportation expenses the sum of one thousand four hundred ten

and 96/100 dollars ($1,410.96).

That defendants shall pay the costs of this action, including fifty-seven and 95/100 dollars ($57.95) to claimant's counsel for the deposition of Dr. Hines.

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

Signed and filed this 22nd day of February, 1988.



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1401; 1402.40; 1803;
2502; 2501
Filed May 19, 1988
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLARIBEL ANDERSON, Claimant, vs. YOUNKERS, INC., Employer, and AETNA CASUALTY, Insurance Carrier, Defendants.	:	File Nos. 807140 802854 A R B I T R A T I O N D E C I S I O N

1401; 1402.40; 1803

Claimant failed to sustain the burden of proof by a preponderance of the evidence that either (1) an injury to her ankle on one date or (2) another injury to her back on another date was the cause of any permanent disability. Treating physicians said no impairment. Claimant's evaluating physician botched his report in several respects and it had to be ignored as unreliable and his percentage could not be used. Claimant not awarded any permanent partial disability benefits.

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Claimant was allowed $320.00 for an independent medical examination, but denied another $146.00 when the doctor called her back a second time because something went wrong with his first x-rays.

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Claimant not allowed the additional $146.00 charged by the section 85.39 examiner as a medical expense under Iowa Code section 85.27 because (1) examiner did not treat claimant, but only evaluated her and (2) examiner was not an authorized physician.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLARIBEL ANDERSON,	:	
Claimant,	:	File Nos. 807140 802854
vs.	:	A R B I T R A T I O N
YOUNKERS, INC.,	:	D E C I S I O N
Employer,	:	
and	:	FILED
AETNA CASUALTY,	:	MAY 19 1988
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Claribel Anderson, claimant, against Younkers, Inc., employer, and Aetna Casualty, insurance carrier, defendants, for benefits as the result of an injury that occurred on July 15, 1985 and another injury that occurred on October 5, 1985. A hearing was held on January 25, 1988 at Sioux City, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Claribel Anderson (claimant) and Joint Exhibits 1 through 21. Both attorneys submitted excellent briefs.

STIPULATIONS

The parties stipulated to the following matters:

That an employer-employee relationship existed between claimant and employer at the time of the both injuries;

That claimant sustained an injury on July 15, 1985 and another injury on October 5, 1985 which arose out of and in the course of employment with employer;

That temporary disability benefits have been paid and that entitlement to additional temporary disability benefits is not an issue in dispute in this case at this time;

That the commencement date for permanent partial disability benefits, if the injury is found to be a cause of permanent disability, is November 5, 1985;

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That the rate of compensation, in the event of an award, is $85.02 per weeks;

That the provider of medical services and supplies would testify that the fees charged are fair and reasonable and defendants are not offering contrary evidence;

That defendants claim no credit for benefits paid prior to hearing either under an employee nonoccupational group health plan or as permanent partial disability benefits; and

That there are no bifurcated claims.

ISSUES

The parties submitted the following issues for determination at the time of the hearing:

Whether the injury of July 15, 1985, or the injury of October 5, 1985, was the cause of permanent disability;

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

Whether claimant is entitled to an independent medical examination under Iowa Code section 85.39; and

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 53 years old at the time of the injuries and 55 years old at the time of the hearing. She is single and lives with her adult son. She graduated from high school in 1950. Later, she took night courses for six weeks and studied bookkeeping and advanced typing. Claimant has a driver's license and can drive. Early employments included cooking, baking and working in an ice cream parlor. She also pumped gas in her parents' gasoline station. She candled, washed, packed and buffered eggs at an egg plant. She was also self-employed as a furniture upholsterer. In addition to all of these employments, she raised three children.

When claimant worked for the Laurel, Nebraska public schools as a kitchen helper, cooking and washing dishes in August of 1973, she pinched the sciatic nerve in her leg by twisting her body (Exhibit 18, page 33; Ex. 19, p. 1). This caused pain in her left leg from her buttocks down to her left heel. Claimant

testified that when she speaks of sciatic nerve pain, she means pain to her low back going down her left leg to the left foot (Ex. 18, pp. 41 & 42). Claimant was treated for this injury by Wayne Benthack, M.D. She missed 23 weeks of work and then returned to work for the rest of the school year. Dr. Benthack recorded that he saw claimant on August 29, 1973. In his personal history he wrote down that she had complained of low back pain for a number of years. She had positive straight leg raising in both legs with decreased vibratory sense on the left. X-rays were taken and claimant was diagnosed as having minimal osteoarthritis (Ex. 1, pp. 1 & 2). There was no evidence of fracture of L-2.

Claimant also testified that she twisted her right foot, fell and fractured her right ankle on August 25, 1976, getting out of bed at home (Ex. 9, p. 1; Ex. 18, pp. 34 & 35; Ex. 19, p. 1).

Claimant worked for Burweiler Oil Company for approximately six years from 1974 until 1980 as a secretary, bookkeeper and warehouse worker. She testified that she loaded cars and trucks with 50 pound bags of seeds and chemicals. She testified that she performed these duties without any physical problems in her back or legs.

From 1980 until 1983, claimant worked at Aalfs Manufacturing Company inspecting blue jeans. Claimant testified that she pushed carts weighing 50 to 100 pounds with broken wheels one-fourth of a block and that she often lifted 15 to 20 pairs of blue jeans at one time.

In January of 1982, while working for Aalfs, she had a nonwork-related injury. At that time, she slipped on the ice at a local restaurant, did the splits, and injured her right groin, hip, arm and side. She missed six weeks of work but returned to work at Aalfs and missed no time from work after that. She continued to push the carts and lift the blue jeans (Ex. 19, p. 1). Claimant was treated at Marion Health Center on January 28, 1982 for her right wrist and right femur (Ex. 2). John J. Dougherty, M.D., saw claimant on April 7, 1982 after she had been treated by other physicians. Dr. Doughtery concluded that claimant had sustained a fracture of the inferior pubic ramus on the right in the pelvis and a little fracture of the radial styloid. He made no mention of any back or spinal complaints or injury. He did not foresee any permanent disability from this injury (Ex. 3).

Claimant testified that she started to work for Younkers on January 4, 1983. She added that she was terminated on January 10, 1986 on a false charge of misconduct. Claimant related that she performed various sales clerk jobs in draperies, men's department and women's sportswear from 9 a.m. until 5:30 p.m., 35 hours a week.

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Claimant denied that she had suffered any serious physical complaints prior to working for Younkers. Her personal medical records, however, show that she had encountered menstrual, thyroid, osteoporosis and thrombophlebitis problems and that she had also received an appendectomy and hysterectomy (Ex. 9).

Claimant testified that on July 15, 1985 she caught her heel in a piece of tape on the floor, twisted her ankle and fell down "on all fours". She received outpatient treatment at Marion Health Center by Milton D. Grossman, M.D., and missed two weeks of work. She stated that she received bruises and abrasions to her arms, legs, knees and ankles. She also twisted her left ankle. Claimant testified that she did not have any back pain or sciatic nerve pain from this fall. She returned to work with her ankle in an ace bandage and was allowed to do a sit down job filling out forms in August and September of 1985. Then, she performed her normal duties again (Ex. 19, p. 2).

Claimant testified that on October 5, 1985, she was removing an arm load of clothes from the dressing rooms, simply turned her body, and "something gave" in her low back and she went straight down on her buttocks. (Ex. 9, p. 2). This was after lunch when they were not busy. No one else was around and there were no witnesses. She became nauseated, faint and felt pain in her lower back. A co-employee checked out her cash register and claimant went home. Claimant testified that she felt like she would pass out driving home. That night she crawled to the telephone and called Dr. Grossman. He told her to come in on Monday. Claimant also described this injury in her deposition (Ex. 18, pp. 38-41).

Dr. Grossman reported that he saw claimant on October 7, 1985. She was treated with heat and medication. X-rays of the lumbar spine on October 22, 1985, read by William Krigsten, M.D., showed (1) marked scoliosis at the throacic lumbar junction; (2) what appeared to be an old fracture at L-2; (3) minimal compression but extensive degenerative changes and (4) a marked sclerosis of the abdominal aorta. Claimant was seen a number of times in October of 1985 and returned to work on November 4, 1985. Her diagnosis was marked spasm of the lumbar muscles and aggravation of the old L-2 fracture. He added that claimant's prognosis was guarded (Ex. 5).

On February 19, 1986, Dr. Grossman reported that claimant was also seen at his office on October 24, 1985 by Dr. William Krigsten, an orthopedic surgeon. Dr. William Krigsten diagnosed that the injury of October 5, 1985 aggravated the old fracture of L-2 with sciatica. He advised claimant to wear a lumbar corset and to raise her right heel one-half inch because her right leg was shorter than her left leg. He recorded that she had no radiation and straight leg raising showed no limitations (Ex. 7).

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Claimant testified that she was released to return to work in November of 1985 and performed her job with light duty limitations of only waiting on customers, wrapping and doing paper work.

Claimant testified that she was terminated on January 10, 1986. She applied for unemployment compensation and began to look for full-time work. She became employed by Pioneer Technologies in Sergeant Bluff on May 5, 1986. She performs various sitting down types of jobs 22 hours per week. Her duties include special projects, telephone sales and collection work. She started out at $5.00 per hour and was earning $6.61 per hour at the time of the hearing plus prizes and cash awards. She stated that this was the best job that she has ever had. She said that she was earning $3.87 at Younkers when her employment was terminated (Ex. 18, p. 26).

Dr. William Krigsten made a report on March 18, 1986. He stated that there was no evidence of any permanent impairment or disability from the back injury of October 5, 1985. This was a temporary condition due to work-related back pain. He concurred in the diagnosis and prognosis of Dr. Grossman (Ex. 8).

On September 10, 1986, Dr. William Krigsten made an extensive review of claimant's initial history for both the left ankle injury of July 15, 1985 and the lumbar spine injury of October 5, 1985. On the same date, he performed a comprehensive physical examination which included numerous x-rays. Dr. Krigsten concluded as follows:

> In conclusions, it is my opinion that the patient did suffer a temporary aggravation of a pre-existing condition on 10-5-85. The fracture of her back, I am sure, occurred while working in the school kitchen in Laurel, NE in 1973. X-rays showed rather advanced osteoporosis throughout with a fracture of L-2. The discomfort which she is having could very well be due to the degeneration of the bone structures--called osteoporosis as well as the residuals of the compression fracture of the body of L-2. She also has rather advanced arteriosclerosis with decreased circulation in both legs due to varicosities of the veins. One of the patient's unfortunate conditions is due to a mild depression. I asked her if she was taking calcium and she said she couldn't afford it. There is no evidence of any residual injury of the left foot and ankle. The injury suffered in 10-5-85 probably did cause a temporary aggravation of the pre-existing condition. However, this temporary disability or discomfort should not have lasted longer that 8 weeks. There is no evidence of any permanent impairment or

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> disability resulting from the injury which occurred on 10-5-85.

(Ex. 10)

Claimant said that she saw Horst G. Blume, M.D., P.H.D., in July of 1986 for approximately two hours. His assistant took a history for approximately one-half hour. X-rays were taken. She then saw the doctor who did pin pricks, had her push levers and tested her grip. She was not scheduled to return. Nevertheless, the doctor called and asked her to return in January of 1987 because there was something wrong with his x-rays. She said Dr. Blume took one x-ray and just looked at her. She denied that he treated her on either occasion.

Claimant was examined by Dr. Blume for an independent medical examination on July 8, 1986. He did not prepare a report, however, until February 8, 1987. He opened his report as follows:

> This patient was first seen on July 8, 1986, with complaints of mild thoracic pain, left more than right. She also has numbness and paresthesia in the fourth and fifth fingers of the left hand and to the ulnar aspect of the lower arm. She stated that she also had a dull ache in the left side of her neck, but this was not a significant problem. She was also complaining of low back pain which occurs with activity, as well as some radicular pain into the left posterior aspect of the thigh, and some pain into the heel.

(Ex. 11)

Dr. Blume said that the L-2 fracture did not occur at the time claimant was injured while working as a kitchen helper at the Laurel school in 1973 because it did not appear on the x-rays described by Dr. Benthack on August 29, 1973. That particular x-ray only mentioned minimal osteoarthritis (Ex. 1, p. 2). Dr. Blume then added:

> I do not know when the compression fracture at L2 occurred, but based on the information given to me by the patient that the only other accident involving the low back occurred on October 5, 1985, while she was working at Younkers so I have to make the presumption, within reasonable medical probability, that this accident is responsible for the compression fracture of the vertebral body of L2.

(Ex. 11, p. 2)

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Dr. Blume then described in some detail an injury to the cervical, thoracic and upper spine.

Then he addressed the lower spine and the old L-2 fracture one more time as follows:

> The patient has also suffered an injury to the lumbar spine and within reasonable medical probability, I have to say there are no other accidents that we know of and no abnormal x-ray film report in 1973 that this compression fracture occured at the time of the accident of October 5, 1985, even though the patient may have had some osteoporosis prior to it, and some mild osteoarthritis.

(Ex. 1, p.2)

Dr. Blume concluded his report with the following words:

> It is my opinion within reasonable medical probability that the patient has a total disability to the body as a whole as a result of the injuries to the cervical, thoracic and lumbar spine of approximately 18% which is directly due to the accident in October, 1985. This rating has nothing to with the ankle injury for which she was treated by another physician, after a fall in July, 1985.

(Ex. 11, p. 2)

Dr. William Krigsten reported one more time on July 2, 1987, that claimant did not tell him about the fall at the restaurant on January 28, 1982. Dr. Krigsten concluded that claimant injured her back and that the L-2 compression factor probably occurred at that time because (1) after she fell she was unable to walk; (2) Dr. Dougherty said claimant suffered a wrist fracture and pelvic fracture at that time and (3) compression fractures do occur in persons with osteoporosis and do not show up until later because their bones are soft (Ex. 12). Dr. William Krigsten added that he diagnosed the L-2 fracture as "old" because there was no evidence of any recent reaction to the bone and because there was a definite history of a severe injury on January 28, 1982 (Ex. 12, p. 2).

After the injuries, which are the subject of this decision, claimant broke her left ankle on June 27, 1987, in a nonwork-related accident when she missed a step at a friend's house (Ex. 18, p. 46). She was using a cane at the hearing due to this accident. This injury was treated by Alan Pechacek, M.D., an orthopedic surgeon, who performed an open reduction of this fracture.

Claimant testified that her sciatic nerve problem recurred

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again after the fall on October 5, 1985. She had pain again from her lower back down to her left heel (Ex. 18, pp. 41-43). Claimant testified at the hearing that she currently feels a dull, pulling ache in her lower back that radiates down to the left heel. This makes it difficult to do her housework and it makes her feel weak. She stated that this pain is precipitated now by walking or strenuous work (Ex. 18, p. 44). At the time of her deposition she stated that it was a sharp pain (Ex. 18, p. 44). At the time of the hearing she said it was a dull, pulling ache. She related that she uses a heat pad and wears a waist band for relief (Ex. 18, p. 44).

Dr. Blume submitted the following statement of charges for his independent medical examination on July 8, 1986, and the follow-up examination on January 28, 1987:

7-8-86	90020	Comprehensive office visit	$150.00
7-8-86	72070	X-ray - thoracic	50.00
7-8-86	72100	X-ray - lumbar	60.00
7-8-86	72052	X-ray	60.00
1-28-87	90050	Office visit	110.00
1-28-87	72070	X-ray - thoracic (1)	36.00
		Total charges	$466.00

(Ex. 16)

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injuries of July 15, 1985 and October 5, 1985 are causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist 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).

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There was no evidence from either Dr. William M. Krigsten or Dr. Blume which indicated that the injury to the left ankle on July 15, 1985 was the cause of any permanent disability. Claimant was treated on July 16 and July 18, 1985 and was returned to work on July 22, 1985. She was dismissed from Dr. Grossman's care at that time. He made no mention of any permanent impairment or permanent disability. Dr. William Krigsten stated on September 10, 1986, "There is no evidence of any residual injury of the left foot and ankle." (Ex. 10, p. 2). Dr. Blume said his rating had nothing to do with the left ankle injury in July of 1985 (Ex. 11, p. 2). Therefore, claimant did not sustain the burden of proof by a preponderance of the evidence that the injury to the left ankle of July 15, 1985 was the cause of permanent disability. Consequently, claimant is not entitled to any permanent disability benefits for the left ankle injury.

Claimant did not sustain the burden of proof by a preponderance of the evidence that the injury of October 5, 1985, to her lumbar spine, was the cause of any permanent disability. Dr. Grossman and Dr. Joe Krigsten did not indicate that there was any permanent impairment or disability. Dr. William Krigsten said on March 18, 1986, that there was no evidence of permanent impairment from the back injury (Ex. 8). He conducted an extensive physical examination on September 10, 1986. He traced much of claimant's initial health history and said that the injury of October 5, 1985 caused only a temporary aggravation of a preexisting condition. He specifically stated, "There is no evidence of any permanent impairment or disability resulting from this injury which occurred on October 5, 1985." (Ex. 10, p. 2).

Dr. Blume's examination appears to have centered on claimant's cervical, thoracic and left arm and hand complaints. However, claimant made no mention of these matters at the time of the injury on October 5, 1985. She was treated by three doctors, Dr. Grossman, Dr. Joe Krigsten and Dr. William Krigsten. None of these doctors recorded any cervical, thoracic or upper extremity complaints in October of 1985. Claimant first mentioned upper extremity complaints to Dr. William Krigsten at the time of his extensive physical examination on September 10, 1986. Even then, they were not specifically related to the injury of either July 15, 1985 or October 5, 1985. It was simply mentioned that claimant had left arm complaints at that time.

Dr. Blume did not allocate how much, it any, of the 18 percent impairment rating was attributable to the lumbar spine, as distinguished from the cervical and thoracic spine and the upper extremity complaints. Dr. Blume states that the injury of October 5, 1985, caused an injury to the cervical, thoracic and lumbar spine. However, claimant made no complaints of injuries to her cervical or thoracic spine during the period of her treatment for the injury of October 5, 1985 (Ex. 10, p. 2). Therefore, it would appear that Dr. Blume is mistaken on this

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point.

Dr. Blume also testified that claimant suffered the compression fracture of L-2 at the time of the injury on October 5, 1985. However, Dr. Blume was not informed by claimant that she had a severe fall on January 28, 1982 at the restaurant when she did the splits, was unable to walk and fractured her pelvic bone and right wrist. Therefore, since the basis for Dr. Blume's opinion is not accurate then his opinion on this point is not very reliable.

In comparing the testimony of Dr. Blume to the testimony of Dr. William Krigsten, in this case, deference is given to the treating physician, Dr. William Krigsten. Prince v. Rockwell Graphic Systems, Inc., IV Iowa Industrial Commissioner Report 280 (1983).

In addition, it should be noted that back on August 29, 1973, Dr. Benthack recorded that claimant has had back pain for many years. In her own testimony, claimant described her sciatic nerve pain as a pain which begins in her buttocks and runs down her left leg to her left heel. She testified that she had suffered with this pain for a number of years even prior to these injuries in this case. Therefore, this pain was not caused by the injury of October 5, 1985, but appears to be only aggravated by it, as it was from time to time for other reasons. She stated that it usually recurs when she does something strenuous or she stands too long. Her own testimony is consistant with Dr William Krigsten's opinion that she simply temporarily aggravated her preexisting condition. Therefore, it is determined that claimant did not sustain the burden of proof by a preponderance of the evidence that the injury of October 5, 1985 was the cause of any permanent impairment or disability. Consequently, claimant is not entitled to any permanent disabilty benefits as a result of this injury.

Claimant is entitled to an independent medical examination from Dr. Blume. However, neither Dr. Blume nor claimant offered any justification for why claimant had to make a second trip, other than claimant's testimony that Dr. Blume told her that there was something wrong with his first x-rays. Defendants should not be required to pay for Dr. Blume's failure to acquire satisfactory x-rays on the first visit. Therefore, claimant is entitled to recover the sum of $320.00 for the initial independent medical examination on July 8, 1986. The charges for the second office visit, in the aount of $110.00, on January 28, 1987, and for the second x-ray of the thoracic area in the amount of $36.00, are not allowed.

Nor can there be an allowance for this $146.00 amount under Iowa Code section 85.27 as a reasonable medical expense for the reason that Dr. Blume did not provide treatment to the claimant,

but according to her own testimony he only examined and evaluated her. In addition, he was not an authorized physician. Iowa Code section 85.27 provides that the employer must provide reasonable medical treatment but at the same time, authorizes the employer to chose the physician. Dr. Blume was not an authorized physician.

FINDINGS OF FACT

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

That Dr. Grossman and Dr. Joe Krigsten did not indicate that the injury to the left ankle on July 15, 1985 caused any permanent impairment;

That Dr. William Krigsten definitely stated that the injury of July 15, 1985 resulted in no residual injury to the left foot or ankle;

That Dr. Blume said that his rating had nothing to do with the left foot or ankle;

That Dr. Grossman diagnosed this injury as marked spasm of the lumbar muscles, aggravation of an old fracture of L-2;

That Dr. William Krigsten stated that the injury of October 5, 1985 was only a temporary aggravation of claimant's preexisting old L-2 fracture;

That Dr. William Krigsten stated that there was no evidence of permanent disability or impairment from the injury to the lumbar spine on October 5, 1985;

That Dr. Blume's opinion that the injury of October 5, 1985 caused the L-2 fracture is unreliable because he was not informed of the fact that claimant sustained a serious fall with other fractures on January 28, 1982;

That Dr. Blume's opinion that the injury of October 5, 1985 caused cervical, thoracic and lumbar impairment is probably incorrect because there is no evidence that claimant was treated for cervical or thoracic complaints at the time of the injury in October of 1985;

That Dr. Blume's impairment of 18 percent is of no value because he did not say how much, if any of it, was attributable to the lumbar spine; and

That Dr. Blume performed an independent medical examination on July 8, 1986, for a charge of $320.00.

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CONCLUSIONS OF LAW

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

That the injury of July 15, 1985 was not the cause of any permanent disability;

That the injury of October 5, 1985 was not the cause of any permanent disability;

That claimant is not entitled to permanent disability benefits due to either of these two injuries;

That claimant is entitled to the charges of Dr. Blume in the amount of $320.00 for an independent medical examination on July 8, 1986 under Iowa Code section 85.39; but claimant is not entitled to the charge of $146.00 for additional examination by Dr. Blume on January 28, 1987; and

That claimant is not entitled to payment of the additional $146.00 charged by Dr. Blume on January 28, 1987 as a medical expense under Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

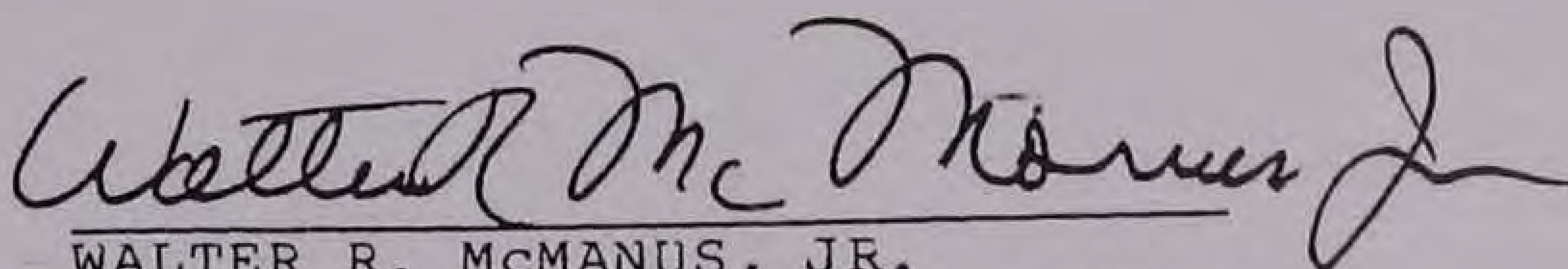
That no amounts are due from defendants to claimant for permanent partial disability benefits;

That defendants pay to claimant or Dr. Blume the sum of three hundred twenty dollars ($320.00) for the independent medical examination that was performed on July 8, 1986;

That the costs of this action are charged to defendants pursuant to Division of Industrial Services Rule 343-4.33; and

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 May, 1988.



WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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1802; 1803; 2206
Filed 4-19-88
T. J. McSweeney

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAM ATTERBERG, Claimant, vs. SHELLER-GLOBE CORPORATION, Employer, Self-Insured, Defendant.	:	File No. 814741 A R B I T R A T I O N D E C I S I O N

1802; 1803; 2206

Held in arbitration that claimant was entitled to healing period benefits and 375 weeks of permanent partial disability benefits based on industrial disability of 75 percent. Claimant was physically able to do some full-time jobs for Sheller-Globe; however, Sheller-Globe decided not to allow her to return because of fear she would injure herself again.

Liability was imposed in this case on a material aggravation theory because claimant had a preexisting back condition and had injured her back at home. Apportionment was not allowed as it was concluded that defendant had the burden on this issue and failed to carry its burden.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAM ATTERBERG,	:	
	:	
Claimant,	:	File No. 814741
	:	
vs.	:	
	:	A R B I T R A T I O N
SHELLER-GLOBE CORPORATION,	:	D E C I S I O N
	:	
Employer, Self-Insured, Defendant.	:	

FILED
APR 19 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Pam Atterberg, claimant, against Sheller-Globe Corporation (Sheller-Globe), self-insured employer, for benefits as a result of an alleged material aggravation of a preexisting back condition on February 19, 1986. A hearing was held in Burlington, Iowa on March 8, 1988 and the case was submitted on that date.

The record consists of the testimony of Mike Jones, Cindy Jones, Jerry Kearns, Pam Atterberg, Barbara Crane and Andy Edgar; claimant's exhibits 1 through 18; and defendant's exhibits A through D. Claimant filed a brief on March 17, 1988. Defendant's brief was filed on April 4, 1988.

The parties stipulated that the weekly rate of compensation is $245.36; that on June 18, 1984, claimant again started working for Sheller-Globe; that on September 28, 1984, claimant was laid off due to a reduction in the work force; that on November 27, 1984, claimant was recalled to work by Sheller-Globe; that on February 7, 1985, claimant injured her back at home and had to take a leave of absence from Sheller-Globe as a result; that on January 29, 1986, claimant's leave of absence ended and she returned to work for Sheller-Globe; that on February 19, 1986, claimant left her employment with Sheller-Globe except for a return to work at Sheller-Globe from June 16, 1986 through June 17, 1986 for one and one-half days of work.

ISSUES

The contested issues are:

1) Whether claimant received an injury on or about February 19, 1986 which arose out of and in the course of her Sheller-Globe

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employment; that is, whether claimant materially aggravated her preexisting back condition on or about February 19, 1986 while employed by Sheller-Globe;

2) Whether there is a causal connection between claimant's alleged work-related injury and her asserted disability; and

3) Nature and extent of disability. In this regard, claimant asserts the odd-lot doctrine; also, defendant argues that permanent partial disability benefits, if awarded, should commence on June 16, 1986 while claimant asserts that any permanent partial disability benefits awarded should commence on April 8, 1987.

SUMMARY OF THE EVIDENCE

Michael Jones testified that he is the ten year old son of claimant and that he is in fifth grade. Jones testified that his mother fell at home in 1985 and went to the hospital, and untimately had surgery as a result. After her 1985 surgery, claimant was able to help him and his father, but this was before she went back to work with Sheller-Globe. Michael Jones testified that claimant did such things as cleaning the house and carrying wood before she went back to work for Sheller-Globe on January 29, 1986.

Michael Jones testified that after an incident at work in February 1986 at Sheller-Globe his mother was "basically off work." He also testified that claimant could not vacuum the floor, had trouble washing dishes, and could not mow the lawn anymore after the work incident in early 1986.

On cross-examination, Michael Jones testified that his mother started working at a gas station in November 1987.

Cindy Jones testified that she is the sister of claimant. She testified that claimant had an early 1985 injury at home and had surgery in Iowa City as a result. This home incident caused claimant to be off work for about a year. Claimant then returned to work at Sheller-Globe. Cindy Jones testified that after claimant's back surgery, which resulted from the 1985 incident at home, claimant was able to do "most things" prior to returning to work for Sheller-Globe in early 1986. She said that claimant appeared normal prior to returning to work for Sheller-Globe in early 1986 and could do such things as swim, go for walks, mow the lawn, and play games.

Cindy Jones testified that after February 19, 1986, claimant missed work and could no longer do such things as swim; throw a frisbee, clean her house, and mow grass. Claimant no longer takes walks and doesn't do any mopping or carrying wood. Claimant currently complains of her back; claimant did not

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complain of her back after her 1985 back surgery.

Jerry Kearns testified that he is the union president at Sheller-Globe and that claimant is a union member. Kearns testified that claimant had a lower back injury at home in 1985. Kearns testified that claimant's last day of work at Sheller-Globe was February 19, 1986, except for one and one-half days of work in June 1986. Kearns testified that claimant is presently attempting to go back to work at Sheller-Globe. Kearns testified that the union has filed a grievance on behalf of claimant asking Sheller-Globe to take claimant back. Sheller-Globe has taken the position that there is no work available for claimant given her work restrictions imposed by medical personnel. Kearns testified that similarly situated individuals have been taken back by Sheller-Globe, however. He described two other women with problems similar to claimant's problem that have been taken back by Sheller-Globe. He described one woman who had surgery at the Mayo Clinic and was allowed to return to Sheller-Globe working four-hour days initially, and ultimately was allowed to complete eight-hour days. Kearns also described another woman who returned to work at Sheller-Globe after being in the hospital for 46 days with a back injury and being off work for a total of ten and one-half months. The second woman had restricted hours initially and then ultimately worked her way into full days of work. Kearns stated that claimant is willing to go back to work at Sheller-Globe.

On cross-examination, Kearns was shown claimant's lifting and motion restrictions. Kearns testified that in 1986 claimant was a finish operator. Kearns testified that 50 to 60 percent of the jobs at Sheller-Globe are finish operator jobs. Many of these finish operator jobs require twisting and lifting. It was pointed out that the various doctors involved in this matter had given different opinions on the appropriate lifting restrictions for claimant. Kearns stated his opinion that claimant would be capable of working as a finish operator in some capacity at Sheller-Globe.

On redirect, Kearns testified that claimant would be willing to work a four-hour day at Sheller-Globe.

Claimant testified that she is 29 years old with a ten year old son residing with her. Claimant testified that she has an eighth grade education and obtained a GED. Claimant testified that she again started working at Sheller-Globe on June 18, 1984; she had worked there on a prior occasion but quit because of a pregnancy. Claimant testified that she was a waitress at A & W as a teenager. Claimant characterized the job after June 18, 1984 at Sheller-Globe as press operator and finish operator. She characterized this work as labor production work or manual work.

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Claimant testified that on February 7, 1985, she fell at home with a resulting lumbar back injury and ultimately had surgery for this problem in Iowa City in 1985. Claimant testified she was off work for approximately one year as a result of the 1985 back injury, and that she ultimately got to the point where she could do "most everything" after her surgery. Specifically, claimant testified that after the surgery she could mow lawns, do housework, go for walks, and go swimming; she could also run after the surgery but not very fast. She was also able to haul wood after her 1985 surgery.

Claimant testified that she went back to work at Sheller-Globe on January 29, 1986 as a finish operator and her specific duty was to put clips on inserts. Claimant testified this job should have taken two or three people rather than just herself, and that she got hurt as a result of having to do a job that should have been assigned to more than one person. Claimant testified that after she got hurt doing this finish operator job, Sheller-Globe modified the job. Claimant testified this job performed by her at the time of her injury in early 1986 was hard on both the hands and the body as a whole. Claimant testified that her middle to lower back was hurt as a result of doing this finish operator job in early 1986. Her problem started in the middle back and she was put on medication for two months. William R. Pontarelli, M.D., prescribed this medication for claimant and ultimately referred her to James Worrell, M.D. Claimant was released to return to work on April 8, 1987.

Claimant testified that her left leg was affected by her 1986 work injury at Sheller-Globe. Claimant testified that she has to rest when she does things and that she limps if she overdoes it. Claimant testified that in February 1986, she saw a chiropractor. Claimant also testified that she did not limp after her 1985 surgery, but that she would limp on occasion after the 1986 Sheller-Globe work-related incident. Claimant currently cannot do much vacuuming. She now has pain medication, but was not taking medication when she returned to Sheller-Globe on January 29, 1986. Claimant testified that she had no problem reaching until her return to work for Sheller-Globe on January 29, 1986.

Claimant testified that she would like to return to work for Sheller-Globe. She stated that she was paid $10.36 per hour at Sheller-Globe. Claimant described a grievance she filed because Sheller-Globe will not allow her to return to work at Sheller-Globe. Claimant's gas station job that she currently has pays $3.50 per hour and has no fringe benefits; she started this job in November 1987. Claimant had 80 percent-20 percent coinsurance medical coverage at Sheller-Globe. They also paid her dental bills, and she had life insurance coverage. Claimant stated that she has done a work search and that she would accept a job anywhere. Claimant stated that she also applied for work at a mall and for

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a factory job. She stated that she had gone to Job Service to seek employment. Claimant testified that she had a conversation with Barbara Crane, but that she has not heard back from Ms. Crane.

Claimant described in further detail what she was doing on February 19, 1986. Claimant stated she was putting clips on inserts and that this process involved a belt moving at a high rate of speed. Claimant stated that there was twisting involved and that she was getting behind. She stated that two persons had previously helped her with this task.

Claimant testified that in October 1987 she had some "medical tests" by a chiropractor and she thought she did well on these tests. Claimant saw Peter D. Wirtz, M.D., in Des Moines, Iowa, at Sheller-Globe's request.

In regard to the February 1986 incident, claimant testified it began in a "different spot" than her 1985 injury and then moved to the 1985 surgery spot. Claimant described her current job as a checkout clerk and a person who stocks the cooler. Claimant testified that she does not currently work with industrial equipment and that she stands all day, but is allowed to walk around.

On cross-examination, claimant described her current physical problems as "getting it in the back and left leg" when she overdoes it. She has left leg pain when she overdoes it and also experiences neck pain. Claimant was unable to state her medical restrictions on cross-examination because she said she has seen so many doctors she doesn't know what they have all said. Claimant stated that she can lift from 15 to 25 pounds currently, but cannot do a great deal of twisting. She testified that there are jobs at Sheller-Globe that she could currently perform such as a trimming job where she could move around. Claimant stated that she didn't know whether these jobs are filled on a seniority basis or not. Claimant stated that she is five foot nine inches and weighs 120 pounds.

Claimant admitted on cross-examination that she changes her residence a lot and that she moved several times in 1986. She acknowledged that she did some packing and unpacking during these moves. Claimant stated that she currently cleans her house and does some cooking. Claimant acknowledged that she could be a cook in a restaurant.

Claimant described her 1985 incident at home and the resulting left leg pain. Claimant stated that the surgery took away her left leg pain. She further testified that she could do the job performed by one of the women described by Mr. Kearns; she described this as a four-hour-a-day job. Claimant stated that she thinks she could do a washer-and-paint spray job at Sheller-Globe. Claimant acknowleded that she could get reinjured if she returned

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to work at Sheller-Globe. Claimant testified that she went to Job Service three or four months ago in order to look for work and was told that jobs were scarce in the Keokuk area. Claimant was aware of the scarceness of jobs in the area from her own job search.

Barbara Crane testified that she is a registered nurse and is hired to assist mentally or physically disabled individuals with vocational rehabilitation. Crane evaluated claimant and is qualified to read medical reports in order to define a claimant's restrictions. Crane testified that she also knows about the availability of jobs; she testified that there is a job search specialist in the Des Moines home office of her employer that assists her in this regard. Crane testified that she uses newspapers, Job Service, radio hot lines, and contacts with employers to obtain a job within a claimant's physical or mental capabilities. Crane testified that she had a conference with claimant on February 19, 1988 and has reviewed claimant's medical history. Crane stated her opinion that claimant is able to do housework given her 10 to 15 pound weight restriction and that she has other restrictions, but that there are differences of opinion by the various doctors as to what restrictions are appropriate in claimant's case. Crane testifid that claimant felt fine at the time of the interview she had with claimant. Crane also commented that some medical personnel have limited claimant's stooping and bending. Crane testified that claimant currently works for a gas station in Keokuk and lifts some cases of pop to restock shelves. Crane testified this is a 40 hour a week job and that she has interviewed claimant about her past jobs.

Crane testified that given claimant's age, experience, and other factors, claimant is able to find restaurant work or assembly line/factory work. Crane testified that claimant is well motivated and states that obtaining a GED in 1987 is evidence of that motivation.

Crane testified that she talked to a Job Service counselor in Keokuk and was told that the Keokuk unemployment rate is 10.5 percent. Crane was shown some of the jobs available in the Keokuk area by Job Service. Crane personally went out and talked to various employers and felt that there were jobs available for claimant at restaurants and discount stores in the Keokuk area doing waitress or clerk work. Crane testified there is also grocery store jobs available, and most of these jobs pay $3.35 per hour. Crane testified about retraining opportunities at an area college in Keokuk; it was pointed out that claimant currently resides in Illinois, however. Crane also testified that claimant had returned to Sheller-Globe in June 1986 for a brief period but could not handle the work. Crane testified that given claimant's age and motivation, she could go to an area college and that a rehabilitation program could pay her

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tuition. Crane testified that claimant could become a medical assistant after a year in an area college.

On cross-examination, Crane was asked whether Sheller-Globe paid for retraining and Crane testified she didn't know. Crane admitted on cross-examination that she does not know claimant's "intelligence level." Crane testified that claimant is trained to be an assembler, but that she might not physically be able to do such a job currently. Crane acknowledged on cross-examination that she has not talked to Sheller-Globe at all and that she was not asked to talk to them. Crane acknowledged on cross-examination that without retraining claimant would have a difficult time making the same wages she was making while at Sheller-Globe. It was also pointed out to Crane that claimant got C's and D's in school. Crane stated her opinion that claimant has "normal intelligence."

Andy Edgar testified that he is the environmental and safety supervisor at Sheller-Globe in Keokuk and that he administers their workers' compensation program. He then stated his educational background. Edgar acknowledged that a grievance is pending as to whether claimant will return to work for Sheller-Globe and he described in broad terms the grievance procedure and the stage it is currently in. Edgar stated there is no position currently available to claimant at Sheller-Globe given claimant's restrictions and time of service with Sheller-Globe. Edgar did acknowledge, however, that 28 new people will be hired by Sheller-Globe in the near future; Edgar then stated that given claimant's medical restrictions, she could not fill the positions that the 28 new people would be filling. Edgar stated his opinion that the two women described by other witnesses, that had returned to Sheller-Globe after medical problems, were different in some respects from claimant. Specifically, he stated that these two women had no restrictions except for a limitation to work only four hours a day. He stated regarding any proposed return to work that "seniority is the big issue." Edgar also described the clip job that claimant was doing at the time of her alleged injury.

On cross-examination, Edgar acknowledged that the union contract has a provision in it for employees with work-related injuries. He stated, however, that claimant would not be allowed to return to work for Sheller-Globe unless she prevailed through the grievance procedure. On redirect, he stated that Sheller-Globe was not taking claimant back because they want to prevent further injury to her. On recross-examination, Edgar acknowledged that Sheller-Globe was not taking claimant back because they want to protect the company as well as claimant.

William R. Pontarelli, M.D., states in exhibit 2 that claimant injured her back on February 7, 1985 at home and had surgery on May 20, 1985 as a result. Exhibit 5 (dated January

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29, 1986) contains the following statement from Dr. Pontarelli: "Pam Atterberg may return to her regular job, with the only restriction being a 40 hour work week - 8 hours per day." Exhibit 5 states that the May 1985 surgery was for decompression of the lumbar spine because of a fractured coccyx; claimant had been experiencing increasingly severe pain in the left leg. Exhibit 9 (dated September 26, 1986) contains the following statement from James B. Worrell, M.D.: "About 2 years ago you (Dr. Pontarelli) did a laminectomy on her following a fall down some stairs with excellent results. She had a pinched nerve down her left leg then. She went back to work feeling fine. She twisted and bent at work quite a bit and her pain returned very quickly." Dr. Worrell stated in a report dated October 10, 1986 that his impression was that claimant had recurrent left lumbosacral radiculitis with some L-5 findings. Exhibit 12 is the results of tests done by chiropractor Gary M. Crank, which are dated October 19, 1987. Exhibit 13 is a report dated May 27, 1987 by Keith W. Riggins, M.D., and contains the following diagnosis: "Herniated intervertebral disk with sciatica." Exhibit 14 contains the restrictions given by Peter D. Wirtz, M.D. Exhibit 15 contains a five to eight percent whole body rating from Dr. Worrell.

Exhibit 15 reads in part, from Dr. Worrell, and is dated July 16, 1987:

> I would like very much to see the official consultation dictated by Dr. Riggins. You indeed have had lumbar disc disease as evidenced by your previous surgery but at this time you were doing well and there is no current evidence of disc rupture. Dr. Riggins evidently felt that if you tried to go back to work you would precipitate your symptomatology again. This means simply that if you tried to work you would re-rupture a disc and pinch the sciatic nerve. He felt your restrictions in that likelihood were permanent and therefore Sheller Globe will not let you return. According to his notes, even very light duty was not acceptable. I feel that light duty status would be perfectly acceptable and you should be able to get back to some type of activity. Please take this up with your attorney.

Dr. Worrell also stated on November 20, 1987 as part of Exhibit 15: "I would tend to agree with the opinion of Dr. Peter Wirtz that you could return to work but that you limit the degree of heavy activities that you do."

Exhibit 17 is the deposition of Dr. Worrell taken on May 21, 1987. This deposition reads in part on pages 6-8:

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Q. Doctor, do you have an opinion within a reasonable degree of medical certainty as to whether or not she has a permanent partial impairment of the body as a whole.

A. Yes, I would be able to state that.

Q. Do you at this time have an opinion as to what percentage of the body of the whole that would be?

A. I would have to look that up specifically in the AMA guidelines. I would be able to estimate it at approximately five or six percent, but I would have to look that up in the guidelines specifically.

Q. All right. Could that be done and that just sent to me?

A. Yes.

Q. All right. Doctor, do you have an opinion within a reasonable degree of medical cerrtainty as to whether or not this lady given her medical history that she related to you, taking it as truthful and factual, as to whether or not she did in fact either suffer an independent injury of the laminectomy she previously had or aggravated that pre-existing condition?

A. I would --

MR. DAHL: First of all, Doctor, would you just say whether you have an opinion?

THE WITNESS: Yes, I would have an opinion.

BY MR. HOFFMAN (Continuing):

MR. DAHL: I would object to that. There's no proper foundation laid as to what, if anything, occurred at work or elsewhere after the surgery by Dr. Pontarelli; and, therefore, any opinion by the Doctor would be without proper foundation, irrelevant and not sufficient to support an award.

BY MR. HOFFMAN (Continuing):

Q. You can go ahead, Doctor.

A. I would feel that her situation aggravated her previous condition.

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MR. HOFFMAN: That's all, Doctor.

Exhibit 17, page 12, reads in part:

Q. And as far as you can tell, probably the fractured coccyx resulted from this fall in February of 1985; would that be reasonable?

A. That would be reasonable.

Q. And how about the rest of these conditions that Dr. Pontarelli had diagnosed or given an impression of? Would you have an opinion as to whether or not those resulted from injury or from congenital or growth matters?

A. Yes.

Q. What would be your opinion?

A. Basically most of the findings that he describes there would be longstanding or perhaps, you know, partly congenital. Generally what happens with those people, there is a certain amount of congenital stenosis, especially the retrolisthesis of L4 on 5 and that congenitally bad disk. With time there's a gradual buildup of arthritic spurs and things which produces the symptomatology.

Q. What is the retrolisthesis?

A. That simply means that instead of the lumbar bodies sitting one on top of the other like they normally do, one is sort of slid back on the other.

Q. Somebody has described that to me in another deposition as a person sliding off his or her own lap. Is that about what it amounts to?

A. That is really virtually something like that.

Q. I think Dr. Pontarelli at one point diagnosed these or stated these as congenital spine stenosis. Is that pretty much a short way of stating that the conditions were besides the fractured coccyx.

A. Yes, most of the -- the basic abnormality would have been congenital.

Q. Was it your impression then that what Dr. Pontarelli did in his surgery was to relieve pressure on the spinal cord or spinal nerves that were resulting

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from either a congenital condition or boney [sic] growth as a result of the way she was put together?

A. That would be basically his intent with that. I did not -- and this it [sic] not in here. The operative note is not really in here to say if he found a ruptured disk in addition to that. It was not included in the discharge summary anyway.

On page 15 of Exhibit 17, the following appears:

Q. You, of course, did not see her right after the surgery to evaluate what her permanent impairment would be, so you wouldn't have any way of separating what permanent impairment would be from the coccydual [sic] fracture plus Dr. Pontarelli's operation as opposed to any symptoms of pain she might have when she went back to work; right?

A. No. I did not evaluate her at that time, so I could not state accurately.

On page 16 of Exhibit 17, Dr. Worrell stated: There's no way to separate the two out."

Exhibit B, page 4, lists claimant's jobs down through the years.

APPLICABLE LAW AND ANALYSIS

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

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

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

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Claimant herein had a congenital back condition and sustained a back injury at home prior to her alleged work-related injury of February 19, 1986. Claimant had surgery in 1985 due to her back injury at home and this remedied her problems to the extent she was able to return to work at Sheller-Globe. Claimant testified that in February 1986 Sheller-Globe had her perform a job that should have been performed by more than one person and that after her back injury the job was modified. A finding of fact will be made that claimant was required to perform a job by herself that should have been performed by more than one person. An additional finding of fact will be made that claimant materially aggravated her preexisting back condition on February 19, 1986. Claimant was able to do her job when she returned to work at Sheller-Globe on January 29, 1986. The performance of her job duties on February 19, 1986 materially aggravated her condition when she was required to twist at a fast pace to put clips on inserts.

II. The claimant has the burden of proving by a preponderance of the evidence that the injury of February 19, 1986 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

A 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 (Iowa 1980).

The question arises whether apportionment is appropriate in this case as a finding of fact will be made that only a portion of claimant's permanent whole body impairment is causally related to her work-related injury of February 19, 1986.

In Darrel L. Crain v. Nevada Rural Fire Protection Association and AID Insurance Service (Appeal Decision, File No. 719428, filed February 26, 1988), the following appears on page 12: "Apportionment is appropriate where a prior injury or illness independently produces some ascertainable portion of the ultimate industrial disability which exists following the current injury. Varied Enterprises, Inc. v. Sumner, 343 N.W.2d 407 (Iowa 1984)."

In Dean Creasy v. Peterson Business Accounting and American Mutual Ins. Co. (Appeal Decision, file No. 725325, filed January 28, 1988), the following appears on pages 3 and 4:

> When all factors, including claimant's limited motivation, are considered, claimant has a permanent

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partial disability of 45% overall.

It is necessary to consider what portion, if any, of the overall disability resulted from his pre-injury condition. Although claimant argues otherwise, there is evidence on which to base such a decision. The record discloses claimant's age before his injury as well as his education. The record discloses the type of work he had been performing and any working restrictions. The record shows clearly that the deputy was not basing a decision on speculation, but on facts received into evidence. Dr. Arford opined claimant had a permanent partial impairment of five percent of the body as a whole from his Colorado injury, but claimant worked in Iowa at his earlier vocation of truck driving. His Iowa injury now precludes him from doing certain activities, such as driving a truck. The deputy correctly concluded "that 10 percent of claimant's current industrial disability results from his preexisting disability and not from his December 1981 work injury." The deputy further correctly concluded:

> Defendants, therefore, are liable for permanent partial disability benefits of 35 percent. Defendants have paid claimant permanent partial disability benefits of 20 percent for which they receive credit. Defendants, therefore, are liable for an additional 15 percent permanent partial disability benefits.

The majority opinion in Marose v. Maislin Transport, 413 N.W.2d 507, 513 (Minn.1987) reads in part:

> Employee must also prove on remand the quantum of disability attributable to each injury. The WCCA has affirmed the compensation judge's determination that the employee's present permanent partial disability is 35% of the back, but the portion of that disability attributable to each injury must be determined so that the amount of permanent partial disability compensation payable on account of each injury can be calculated properly. While the scheduled compensation for permanent injury to the back (percentage of 350 weeks) has not changed from the time of the first to that of the last of employee's injuries, his wages undoubtedly have changed from time to time. The process of attributing a specific permanency rating to each of several work-related injuries for which the employee seeks compensation in a single proceeding is sometimes

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> termed "apportionment." That process, however, has nothing to do with equitable apportionment--the proportionate allocation of liability among various employers and insurers--and arguments based on equitable apportionment are inapposite here. While the amount of compensation payable is unaffected by equitable apportionment, to relieve the employee of his obligation to assign a percentage of disability to each injury might change the amount of permanent partial disability compensation to which he is entitled. The amount of compensation payable for permanent partial disability should not depend on the number of employers or insurers implicated in the contributing injuries. Although employee's medical history spans both several years and several injuries, none of the medical experts were unable to rate the disability resulting from his various injuries. The disparity in the ratings seems to be attributable primarily to the employee's apparent inability to give a consistent account of his injuries--a problem which can no doubt be resolved on remand by furnishing the examining physicians an accurate medical history. (Emphasis added.)

Justice Scott concurred in part and dissented in part and stated on page 513 in Marose:

> I respectfully dissent from the conclusion that the employee's permanent partial disability must be apportioned among his various injuries.
>
> Here, the employee suffered a variety of injuries for which he never received permanent partial disability but which the employer now claims contributed to this disability. I would hold that any uncompensated disability resulting from these earlier injuries is a preexisting condition, which, if substantially aggravated by his last work injury, should be fully compensable at the rate applicable to that final injury. In Vanda v. Minnesota Mining & Manufacturing Co., 300 Minn. 515, 516, 218 N.W.2d 458, 458 (1974), we stated:
>
>> [W]hen the usual tasks ordinary to an employee's work substantially aggravate, accelerate, or combine with a preexisting disease or latent condition to produce a disability, the entire disability is compensable, no apportionment being made on the basis of relative causal contribution of the preexisting condition and the work activitis.

> (Citations omitted). I would, therefore, reverse the WCCA with regard to apportioment and hold that, in this case, there should be no apportionment of the employee's permanent partial disability but instead the whole permanent partial disability should be compensated at the rate applicable to the last compensable personal injury. (Emphasis added.)

The medical experts in this case did not apportion claimant's whole body impairment between her congenital condition, her 1985 injury at home and her 1986 work-related injury. The appeal decision in Crain states that apportionment is appropriate "where a prior injury or illness independently produces some ascertainable portion of the ultimate industrial disability which exists following the current injury." (Emphasis added.) In Creasy, a medical expert stated the whole body permanent partial impairment attributable to claimant's "first injury" or "prior condition." A finding of fact will be made, in this case, based on Dr. Worrell's testimony, that it is not medically possible in this case to ascertain the portion of claimant's whole body impairment attributable to claimant's congenital back condition and/or 1985 back injury at home. The question then confronting this deputy is whether or not to adopt the majority opinion in Marose, or whether Justice Scott's position is found to be more persuasive. I adopt Justice Scott's position. This conclusion is supported by the following language from Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407, 410-11 (Iowa 1984):

> PCP's last contention is that the commissioner erred in not limiting the award of benefits to only that part of Sumner's total disability caused by the aggravation which his experts related to the continued driving. Stated somewhat differently, it is their position that the commissioner and the court were required to carve out some portion of the total disability as attributable to the original onset of the infarction which all parties agree was a noncompensable event.
>
> The primary authority relied upon by appellants in making this contention pertains to circumstances where two distinct injuries are suffered, each with a correlative measure of disability. See Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956).
>
> A clear and helpful discussion of the precision problem which is presented is contained in 2 A. Larson, The Law of Workmen's Compensation § 59.22, at 10-365 (1981) where the author states:

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> Apart from special statute, apportionable "disability" does not include a prior nondisabling defect or disease that contributes to the end result. Nothing is better established in compensation law than the rule that, when industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable....
>
> The essential distinction at stake here is between a pre-existing disability that independently produces all or part of the final disability, and the pre-existing condition that in some way combines with or is acted upon by the industrial injury....
>
> To be apportionable, then, an impairment must have been independently producing some degree of disability before the accident....

(Emphasis by the court.)

The principle which Larson describes limits apportionment to those situations where a prior injury or illness, unrelated to the employment, independently produces some ascertainable portion of the ultimate industrial disability which exists following the employment related aggravation. This is consistent with the rule which we adopted in Rose, 247 Iowa at 908, 76 N.W.2d at 760-61.

In the present case, the employer's claim for apportionment is not based upon Sumner's prior atherosclerotic condition which precipitated the myocardial infarction. The industrial commissioner found that there was no evidence from which it could be found that this diseased condition of Sumner's arteries independently produced an ascertainable industrial disablity. That finding, which is not challenged, precludes apportionment based on the evidence of previously diseased arteries. But the employer argues that the initial infarction produced by the diseased arteries, which the parties agree was not a compensable event under Sondag, would have independently provided some portion of Sumner's ultimate industrial disability even in the absence of the aggravating activities upon which his claim has been allowed.

While we believe that the legal premises upon which the employer's arguments are based state a claim for apportionment under the principles

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previously discussed, we are convinced that the commissioner declined to apportion the disability because of his view of the facts rather than any misapplication of legal theory. The commissioner spoke directly to this point, stating:

> Since the medical opinions could not differentiate between the amount of damage caused by the continued exertions, this agency cannot interject or speculate on the apportionment of damage between the onset of the infarction and the aggravation caused by continued exertion.

We believe that this is a negative finding of fact by the commissioner which undercuts the legal premise upon which any claim of apportionment must rest. The appellants have presented no basis for overturning the decision of the commissioner or the district court.

In this case, claimant's congenital condition and/or 1985 back injury produced part of what Professor Larson calls the "final disability;" however, the percentage of the final functional impairment attributable to claimant's congenital back condition and/or 1985 back injury, as opposed to her 1986 work-related injury, is not ascertainable. It is concluded that under the circumstances of this case, it was defendant's burden to produce sufficient evidence to allow the finder of fact to ascertain the percentage of functional impairment attributable to the various conditions or incidents in this case. Defendant failed to carry its burden in this regard. It is therefore not possible to apportion claimant's industrial disability in this case. The extent of claimant's industrial disability will now be determined.

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

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

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(1961).

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

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

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985); Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

First of all, it is determined that permanent partial disability benefits commence on June 16, 1986 because claimant returned to work on that date.

Secondly, it is concluded that as a matter of law claimant is not an odd-lot employee as she is currently employed. See Walter H. Ferrand, Jr. v. Iowa Beef Processors, Inc., (Appeal Decision, in File Numbers 645545 and 703477, filed Novemer 25,

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1985).

This case could be labeled a reverse odd-lot case. The claimant is seeking to return to work while the employer is barring her from returning to work because it is concerned that further injury will cause her to become an odd-lot worker or otherwise render her permanently totally disabled. However, a defendant employer's refusal to give any sort of work to a claimant after he or she suffers an 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. Id.

In Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner stated after analyzing the decisions of McSpadden, 228 N.W.2d 181 and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980):

> 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.

A finding of fact will be made that claimant is currently physically able to do some of the full-time finish operator jobs being performed at Sheller-Globe. It is unclear whether seniority is a total bar to claimant's return to work as the defendant did not introduce sufficient evidence for a determination to be made on this fact question. The refusal of Sheller-Globe to return claimant to work at its Keokuk plant has resulted in a substantial loss of earning capacity by claimant. Taking all appropriate factors into account, it is concluded that claimant's industrial disability is 75 percent.

FINDINGS OF FACT

1. Claimant is 29 years old.

2. Claimant obtained an eighth grade education and then subsequently obtained a GED.

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3. Claimant has a congenital back condition.

4. Claimant injured her back at home in 1985.

5. Claimant had back surgery in 1985 as a result of her 1985 back injury at home.

6. Claimant was off work from February 7, 1985 through January 28, 1986 because of her back injury at home in 1985.

7. Claimant's 1985 surgery was a success and as a result she was able to do her job when she returned to Sheller-Globe on January 29, 1986.

8. Claimant was required to do a job at Sheller-Globe on February 19, 1986 at a high rate of speed that should have been performed by more than one person.

9. Claimant materially aggravated a preexisting back condition on February 19, 1986 while working for Sheller-Globe with resulting whole body impairment.

10. The job that claimant was performing at Sheller-Globe on February 19, 1986 was modified after claimant injured herself on that date.

11. Claimant's current whole body impairment is attributable in part to 1) her congenital back condition; 2) her 1985 back injury at home; and 3) her 1986 work-related injury.

12. Claimant is currently physically able to do some full-time jobs at Sheller-Globe.

13. Sheller-Globe currently refuses to allow claimant to do a full-time job at its Keokuk plant because of fear of further injury to claimant.

14. Claimant returned to work at Sheller-Globe on June 16, 1986.

15. Claimant's industrial disability is 75 percent.

16. Claimant's stipulated weekly rate of compensation is $245.36.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence that she materially aggravated her preexisting back condition on February 19, 1986 while working for Sheller-Globe.

Claimant has established by a preponderance of the evidence

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that there is a causal connection between her work-related injury of February 19, 1986 and some of her whole body impairment.

Defendant herein had the burden to produce sufficient evidence to allow for apportionment in this case and it failed to carry its burden in this regard. Claimant has established by a preponderance of the evidence that she is entitled to healing period benefits from February 19, 1986 through June 15, 1986.

Claimant has established by a preponderance of the evidence that she is entitled to 375 weeks of permanent partial disability benefits commencing on June 16, 1986 at a rate of $245.36.

ORDER

IT IS THEREFORE ORDERED:

That defendant pay healing period benefits from February 19, 1986 through June 15, 1986 at a weekly rate of two hundred forty-five and 36/100 dollars ($245.36).

That defendant pay claimant three hundred seventy-five (375) weeks of permanent partial disability benefits commencing on June 16, 1986 at a weekly rate of two hundred forty-five and 36/100 dollars ($245.36).

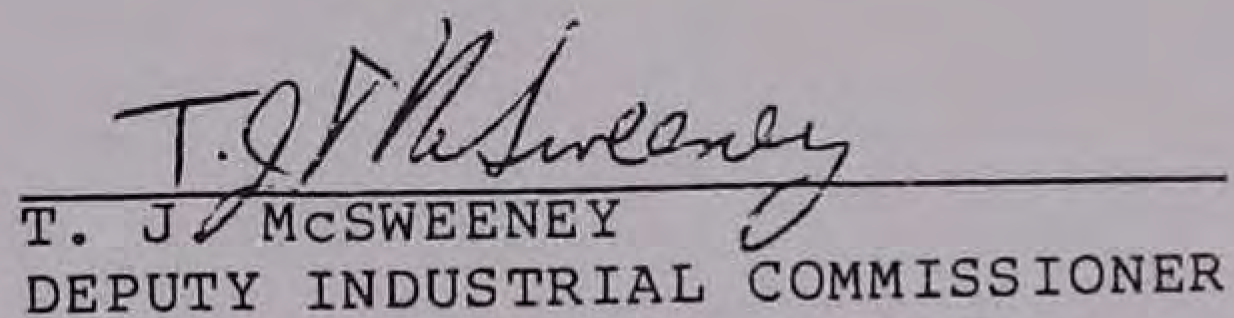
That defendant pay accrued benefits in a lump sum and pay interest pursuant to section 85.30, The Code.

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

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

That defendant shall file claim activity reports, pursuant to Division of Industrial Services Rule 343-3.1(2), as requested by the agency.

Signed and filed this 19th day of April, 1988.



T. J. McSWEENEY
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES E. BABE, Claimant,	:	File Nos. 706132 790714
vs.		A P P E A L
GREYHOUND LINES, INC.,		D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
FEB 29 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision and a review-reopening decision awarding permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 16, 22 and 23; and claimant's exhibits 17 through 21, with the exception of exhibit 17(a), 18(a), 19(a), and 21(a). Both parties filed briefs on appeal, and defendant filed a reply brief.

ISSUES

Defendant states the following issues on appeal:

1. Whether claimant incurred a "gradual injury" or a "cumulative injury" under the standards of McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

2. Whether claimant's injury, if it is a cumulative injury, "occurred" when his employment terminated for reasons unrelated to his injury.

3. Whether there is sufficient evidence to support an award of 30 percent loss of earning capacity or industrial disability.

REVIEW OF THE EVIDENCE

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

Briefly stated, claimant was 36 years old at the time of the

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hearing, with a high school education. Claimant attempted college but did not obtain passing grades. Claimant was employed by defendant Greyhound Lines in Sioux City, Iowa, from July 6, 1970 through November 30, 1984 as a ticket and baggage agent. Claimant's duties at Greyhound included ticket sales, and also required him to lift baggage and freight items up to 100 pounds. Claimant's duties remained the same the entire time he worked for Greyhound.

Claimant had no back problems prior to January 20, 1979. Claimant was unloading 80 pound sacks of iron from a bus on January 20, 1979 when he felt pain in his back and could not stand up straight. Claimant was off work for nine days. Claimant was treated by R. L. Morgan, M.D., who found claimant to have acute tenderness over the lumbosacral spine and over the right sciatic notch. X-rays of claimant's back were negative. Claimant was paid workers' compensation benefits for this injury pursuant to a memorandum of agreement.

In October 1979, claimant was off work for five weeks due to low back pain following lifting heavy freight at work. Dr. Morgan found a pelvic tilt to the right with an acute muscle spasm on the right sciatic notch. His x-rays were again negative.

He was also seen by Dr. Morgan in November 1980 for back pain, as well as right leg and left arm pain, following lifting heavy boxes at work. Claimant indicated when his back pain was severe, it would radiate into his arm or leg. Claimant was prescribed a low back support, but did not miss any work.

On June 11, 1982, after lifting baggage weighing 30 to 40 pounds at work, claimant again experienced pain in his lower back and legs. Claimant missed eight days of work. Defendant filed a memorandum of agreement for the June 11, 1982 injury. The last date of payment of benefits was June 29, 1982.

In November 1982, claimant slipped on stairs at home and was off work. Claimant was seen by Dr. Morgan again and referred to A. D. Blenderman, M.D., who diagnosed a possible disc herniation and restricted claimant's lifting activities. Dr. Blenderman concluded "It may very well be that the patient has a minimal disc herniation at the level of L-4 on the right, which is not a large bulging disc and therefore, responds to rest and inactivity for a period of time." (Claimant's Exhibit 7) Dr. Blenderman forwarded a letter to defendant advising that claimant should not lift over 50 pounds. (Cl. Ex. 7) Claimant was off work for approximately two weeks.

On October 26, 1983, claimant felt a pull in his back while lifting a package for a customer. He later felt stiffness in his back, and sought medical attention from Dr. Morgan. Dr. Morgan again found muscle spasm over the left sciatic notch. Dr. Morgan

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concluded that "[i]mpression is probably that of a chronic myofasial [sic] strain although the possibility of discogenic disease still must be entertained." (Cl. Ex. 12) Claimant was off work for over one month as a result of the October 26, 1983 incident.

Claimant testified that throughout his employment with Greyhound he suffered numerous additional incidents of back pain, but only reported the incidents or sought medical attention when the pain prevented him from working. (Transcript, pages 48-49, 51) Claimant also noticed incidents at home where he experienced back pain while lifting his children. (Tr., p. 50) Claimant testified that his fellow employees assisted him with loading or unloading the heaviest packages and boxes because of his back.

Claimant worked throughout 1984 without further report of injury. On November 30, 1984, claimant's employment was terminated when the bus terminal changed over to a system using a "commission" agent rather than Greyhound employees. Claimant was given an option to either transfer to another location or be terminated and receive severence pay. Claimant chose to be terminated rather than transfer, based in part on his wife's employment in the Sioux City area. Claimant unsuccessfully sought to be the commission agent, a position that would have entailed many of the same lifting duties he was already performing. (Tr., p. 74) He did not list any physical restrictions on his application for that position, and claimant's district manager stated his application was not denied due to any physical restrictions. Claimant indicated that if the terminal system had not changed, he would probably still be employed by defendant. (Tr., p. 71) Claimant's district manager stated claimant would have been able to work at the same duties in another Greyhound facility. (Tr., p. 98)

In March 1985, claimant reported to Dr. Morgan that he had pain in his back after cutting firewood. Claimant underwent a CT scan in December 1985, which showed a "small posterior herniation at L5-S1 which may not be of clinical significance." (Cl. Ex. 14) Dr. Morgan opined on February 13, 1986 that:

> My feeling is that patient has a herniated disc at the level of L5-S1 which is symptomatic. I do feel that the disc herniation is the result of the repeated traumatic events of the low back, weakening the ligaments and the cartilages which allow the disc to pop out and press the sacral nerve. Patient has been advised that he should limit lifting to 25 lbs.; avoid the repetetive [sic] bending, squatting or trunk twisting.

(Cl. Ex. 16)

In his opinion, claimant had a five percent permanent partial impairment to the whole body. (Cl. Ex. 15)

Claimant filed a petition in arbitration for the injury allegedly occurring on October 26, 1983 (File No. 790714), and a petition for review-reopening for the injury alleged to have occurred on June 11, 1982 (File No. 706131). Claimant filed both petitions on April 24, 1985.

Claimant testified that his back condition has remained stable since his employment ended and he continues to suffer pain. Claimant stated that prior to January 1979, he could lift weight of 100-150 pounds, but now cannot comfortably lift over 25 to 30 pounds. (Tr., p. 56) Claimant presently does light duty construction on a self-employed basis and cares for his children so that his wife can work.

The parties stipulated to the following: Claimant's weekly rate of compensation was $231.05; the commencement date of permanent partial disability for the 1983 alleged injury would be December 11, 1985, and for the alleged 1982 injury, June 26, 1982; and claimant last received a payment of weekly compensation benefits for the October 26, 1983 injury on April 6, 1984.

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that claimant received injuries on June 11, 1982 and October 26, 1983 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The "cumulative injury" rule applies when disability develops gradually or as a result of repeated trauma. The compensable injury is held to occur at the later time. For time limitation purposes, the injury in such cases occurs when, because of pain or physical disability, the claimant can no longer work. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

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

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recover to the extent of the impairment. Ziegler v. United States Gypsum Co., 252 Iowa 613, 620, 106 N.W.2d 591, 595 (1960).

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

When a worker sustains an injury, later sustains another injury, and subsequently seeks to reopen an award predicated on the first injury, he or she must prove one of two things: (a) that the disability for which he or she seeks additional compensation was proximately caused by the first injury, or (b) that the second injury (and ensuing disability) was proximately caused by the first injury. DeShaw v. Energy Manufacturing Company, 192 N.W.2d 777, 780 (Iowa 1971).

ANALYSIS

Claimant maintains that the record shows a cumulative injury to his back under McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). Defendant argues that the January 20, 1979 incident was a preexisting condition, the subsequent incidents represent only minimal aggravations of that condition, and any award should be limited to the extent subsequent incidents aggravated the January 20, 1979 injury. Defendant also argues that viewing claimant's condition as the result of a cumulative injury in effect grants compensation for the January 20, 1979 injury, circumventing the statute of limitations under section 85.26, The Code.

The McKeever case dealt with a situation where the employee suffered two traumatic work injuries. The first injury did not result in any time off work, and the employee only missed one-half day's work after the second injury. He did not pursue a workers' compensation claim for either injury. Subsequent to the second injury, the employee in the McKeever case experienced discomfort in his wrist caused by the repetitive use of a hammer and power tools over the course of his employment. He did not seek medical attention or take time off work, "believing the discomfort to be a normal result of the pounding and vibrating which his job entailed." Id. at 370. The pain grew worse, and eventually the employee sought medical attention, underwent surgery, and quit his job because of his wrist condition. In the McKeever decision, the supreme court adopted the "cumulative injury" rule for Iowa, and determined that liability could exist for disability which gradually came about over a period of time.

In the case sub judice, claimant suffered an injury on January 20, 1979. Unlike the first injury in McKeever, however, claimant did miss time from work. In McKeever, the repetitive

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nature of claimant's work and the gradual worsening of the condition meant that the employee had no single, identifying event putting him on notice of a work-related injury. The supreme court held that such an employee would not be held to have known he had a serious work-related injury until the pain from the gradual injury increased to the point the employee was compelled to leave work, at which time the statute of limitations would start running.

In the present case, by contrast, claimant can clearly identify January 20, 1979 as the date on which he first suffered a serious work-related injury to his back. (Tr., pp. 45, 46) He missed nine days of work as a result of that incident. Clearly, he was on notice in January 1979 that he had suffered a serious work-related injury.

In October 1979, claimant again experienced an incident of back pain after lifting heavy items and was off work for five weeks. This incident occurred as a result of a particular set of circumstances--specifically the weight of the baggage claimant was required to lift that day. It was therefore a separate and distinct injury or aggravation of a preexisting condition and not a gradual worsening of the January 20, 1979 injury caused by repetitive activity. Again, since claimant missed a substantial period of time off work, he was on notice that he had suffered a serious work injury in October of 1979.

In November 1980, claimant again suffered back pain after heavy lifting at work. There is no indication that claimant missed any time off work as a result of this injury.

On June 11, 1982, claimant suffered back pain and missed eight days of work. Claimant's pain was caused by a particular set of circumstances, lifting the baggage or freight presented by customers of the employer that day, and was not the result of a gradual worsening of the original injury through repetitive activity. As such, it constitutes a separate and distinct injury or aggravation of a preexisting condition. A memorandum of agreement was filed, and claimant received benefits. Claimant was clearly on notice that he had received a serious work injury on June 11, 1982.

On October 26, 1983, claimant once again injured his back at work by heavy lifting, indicating a separate and distinct injury or aggravation of a preexisting condition. His injury on that date was not the gradual worsening of a prior injury caused by repetitive activity, but a consequence of the heavy freight or baggage he was required to lift on that particular day. He missed a month of work as a result. Claimant's absence from work constitutes knowledge that he had suffered a serious work injury.

Claimant also experienced an increase in back pain from nonwork activities, such as lifting his children. This suggests that activity at work was not the sole cause of the back problems he experienced.

In addition, claimant continues to experience incidents of back pain even after his employment with Greyhound has ceased. This also tends to show that his present condition is not the result of repetitive, gradual injuries while employed by Greyhound.

It is determined that claimant's back injuries of June 11, 1982 and October 26, 1983, the injuries involved in these two actions, are not cumulative injuries. The effect of these injuries on his back was not gradual, but rather was traumatic. They were not the results of repetitive small injuries, such as the hammering in McKeever, but rather were caused by varying activities that involved heavy weights on June 11, 1982 and October 26, 1983. The mere fact that the subsequent injuries were numerous or that claimant was frequently required to lift heavy weights does not make those injuries cumulative in nature.

This conclusion is reached even though the opinion of Dr. Morgan stated that claimant's back condition was caused by "repeated traumatic events." "Repetitive" has a particular legal meaning in this context. Dr. Morgan's opinion is read to mean that numerous incidents caused claimant's condition.

Even if the incidents of June 11, 1982 and October 26, 1983 are viewed as cumulative injuries, they are separate cumulative injuries. Thus, claimant would have suffered a cumulative injury that culminated in an absence from work on June 11, 1982, and a second cumulative injury that culminated in an absence from work on October 26, 1983.

The determination that the injuries of June 11, 1982 and October 26, 1983 were not cumulative then poses the question whether these incidents were separate injuries causing new impairment, or whether they constitute aggravations of a pre-existing condition. Prior to the June 11, 1982 incident, claimant had injured his back on January 20, 1979, in October 1979, and in November 1980. Prior to the October 27, 1983 incident, claimant had suffered injuries to his back on January 20, 1979, in October 1979, in November 1980, on June 11, 1982, as well as during a fall at home in November 1982. Since claimant acknowledges that he experienced limitations on his ability to lift heavy items prior to both the June 11, 1982 incident and the October 26, 1983 incident, claimant clearly had a preexisting condition prior to June 11, 1982 and prior to October 26, 1983.

Generally, all the injuries subsequent to January 20, 1979 resulted in pain and impairment to the same area of the body,

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claimant's lower back, with occasional radiation to the arm and leg. Claimant did not indicate that the resulting pain of any of the incidents extended to another part of the back other than that which was involved in the January 20, 1979 injury. Each incident resulted in the same impairment, the inability to bend or lift heavy weights. Claimant's back condition appears to have remained the same from January 20, 1979 onward.

Claimant's own testimony relates his condition to his January 20, 1979 injury. His memory is vague on the other alleged injuries, with the exception of the October 26, 1983 incident. Claimant refers to the January 20, 1979 incident as the starting point of his condition:

> Q. Now, after January of 1979 and the years that followed right up through November 30th, 1984, do you find that there are things that you can't do physically that you could do before?
>
> A. Just a lot of different types of lifting -- As far as how it relates to me nowadays or just overall, general picture of it? You just don't lift the things you used to lift. You don't do the same, exact type of --
>
> Q. I mean, in what way? Describe for us, Mr. Babe, some of the things that you can't do now, if you want to talk about it in the lifting, that you used to be able to do before these incidents that began in '79?
>
> A. I used to do roofing, roofed houses and stuff like that. Now I can still roof houses, but I have -- you know, people have to help me get the roofing up. There's no way I can carry up bundles of roofing on the roof.

(Tr., p. 55)

> Q. All right. With respect to the lifting process that you described at Greyhound, you were able to do that work before 1979?
>
> A. Yeah. right.
>
> Q. All right. So after 1979 and after the period that begins in 1979, do you find -- Will you describe whether or not you're able to do that kind of bending and twisting now that you used to be able to do?
>
> A. I can still do that same bending and twisting,

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but in a lot different light. I didn't -- You had to be more careful about sliding, you know, heavier objects instead of just literally physically picking them up and literally manhandling this freight. It was a matter of -- just a more controlled situation. You'd have to be a lot more careful the way you handle this.

(Tr., pp. 58-59)

Q. Would this be the kind of work, however, that you could do before 1979?

A. Before '79, I could -- In fact, I used to, years ago, do concrete work. I could do a sidewalk by myself. I could screen a sidewalk off.

(Tr., p. 61)

Q. This condition in your back that -- that you presently have, when it began in 19 -- Did it begin in 1979?

A. That's the first time I ever had any problems, right.

Q. And did it -- has it increased in -- in its effect upon you -- and its adverse effect on you, or has it remained the same?

A. The type of problem I have with my back is, sometimes you can do work and not have any problems at all for a period of time. I'm talking about just regular type of work, what anybody would do, yard work, lifting, even in this small contracting stuff, as long as it isn't extremely heavy, you know, just basic.

And, then all of a sudden, you 'll lift something that's not even a 25-or 30-pound object, and then it'll -- sometimes that -- when you injure it at that time, it might last two or three days; sometimes it might two or three months. It's just a matter of it's -- I can't say as it's ever been a worse or better time to it. It's not -- it's not an all-entailing thing, where it's, you know, night and day. But then there's a lot of times where it lasts for a long period of time. I've had it for four or five months easily. And at that time you're just a lot more careful.

Q. Well, then will the symptoms of your back

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problems be brought upon by all kinds of things, and sometimes not even heavy?

A. Numerous things, right. I've picked up stuff, sometimes 25 or 30 pounds -- It's just a matter of how that weight is. It's -- The -- Boy, it's just hard to pinpoint any type of -- I've had a lot of -- a lot of injury to it, you know, when I was working for Greyhound, and since -- since I've been unemployed by -- or not employed by Greyhound, you know, I've had problems with my back. It's just the same thing.

Two or three times a year, you're going to have a problem with it. It's not anything that lasts all the time. Sometimes, like I said, it's two or three days; sometimes it continually nags at you for two or three months.

(Tr., p. 62-63)

Claimant acknowledged that his condition has gone basically unchanged from the January 20, 1979 incident until the present time:

Q. That injury stemmed from the 1979 incident?

A. Yeah. Truthfully, I just never had too much trouble -- in fact, I had no trouble at all doing physical activities, and I can remember that '79 incident because I couldn't believe it. When you have some kind of traumatic incident, you just remember it. I mean, I have never been out where I couldn't stand up straight or anything like that, and that's when it -- in '79, that's the type of injury I had.

And I continued to have that injury from '79 until present day, and I'll probably have it the rest of my life. It's not -- at this time, hopefully, it's not a serious injury, and hopefully, the rest of my life isn't -- who's to say -- I'm 36 now -- that by the time I'm 46, I'll even be walking around.

Q. There isn't any significant difference between your condition now and immediately following the injury, is there?

A. I'd say, basically, it's the same type of -- It's just a nagging, reoccurring type of deal where you can be walking along the sidewalk or stoop to

pick something up and that's it.

Q. And it really wasn't any different in '82 than it was in '79?

A. I would say, basically, it's the same - same thing, just -- It's the same place in my back. If it's worse, it's more in my leg and hip; it's -- You look like Chester in --

Q. It was about the same in '83 as in '79?

A. Basically the same exact thing, all the same location, all the same type of hurt and problem and inability to do some -- some less inability to work, correct.

(Tr., pp. 106-108)

Thus, based on the above, it is determined that on June 11, 1982 claimant aggravated a preexisting back condition. It is also determined that on October 26, 1983 claimant aggravated a preexisting back condition.

Any award of benefits is limited to the extent the incidents of June 11, 1982 and October 26, 1983 materially aggravated a preexisting condition. No award of benefits can be made in these proceedings as the result of any injury received on January 20, 1979, in October 1979, and November 1980, as these actions are not based on those incidents and because an action for those incidents was not timely pursued under section 85.26 of the Code.

Claimant has not shown by a preponderance of the evidence that the incident of June 11, 1982 materially aggravated a preexisting condition. Claimant was able to return to the same duties he performed prior to that incident. Five months after his return to work, claimant slipped at home and was off work again. It was only then that Dr. Blenderman diagnosed claimant's possible disc herniation and assigned a lifting restriction. The record would indicate that the slip at home was the likely cause of claimant's disc herniation and resulting lifting restrictions rather than the June 11, 1982 work incident.

Similarly, claimant has not shown by a preponderance of the evidence that the incident of October 26, 1983 materially aggravated a preexisting back condition. Again, claimant was able to return to the same duties he performed prior to that incident. Over sixteen months later claimant injured his back cutting firewood, and at that point Dr. Morgan diagnosed a herniated disc. The record would indicate that the wood cutting injury was at least as likely a cause of claimant's back con-

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dition as the incident at work over a year earlier.

Claimant has failed to show that his present condition is causally connected to the June 11, 1982 incident or the October 26, 1983 incident.

Claimant testified that his back condition was virtually the same from the injury of January 20, 1979 to the present. Claimant's ability to lift and perform his job duties was the same after he returned to work following the June 11, 1982 incident as it was before the incident. Claimant's ability to lift and perform his job duties was the same after he returned to work following the October 26, 1983 incident as it was before the incident.

Thus, even if his present condition were proved related to his work incidents and not to his fall at home, it does not appear that claimant suffered any permanent impairment or disability as a result of his June 11, 1982 injury or his October 26, 1983 injury. Although those injuries undoubtedly caused claimant pain and discomfort on a temporary basis, they do not appear to have increased his impairment from what it was before those events.

Claimant is entitled to temporary total disability benefits from June 14, 1982 through June 27, 1982. Claimant is also entitled to temporary total disability benefits from October 27, 1983 through December 8, 1983. Claimant is not entitled to any permanent partial disability benefits from these proceedings as he has failed to show by a preponderance of the evidence either a cumulative injury or a material aggravation of a preexisting injury on either June 11, 1982 or October 26, 1983.

FINDINGS OF FACT

1. Claimant was employed by defendant Greyhound from July 6, 1970 until November 30, 1984.

2. Claimant's duties required him to lift freight and baggage weighing from one pound up to 100 pounds.

3. Claimant first experienced back pain after lifting at work on January 20, 1979.

4. Claimant was off work for nine days following the January 20, 1979 incident.

5. Claimant's coworkers assisted him with lifting heavy baggage and freight.

6. Claimant began experiencing back pain after lifting at work in October 1979.

7. Claimant was off work approximately five weeks following

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an October 1979 incident but did not miss work.

8. Claimant again experienced back pain after lifting at work in November 1980 but did not miss work.

9. Claimant was prescribed back support.

10. Claimant again experienced back pain after lifting at work on June 11, 1982.

11. Claimant was off work for eight days as a result of the June 11, 1982 incident.

12. Claimant slipped and injured his back at home in November 1982.

13. Claimant received a medical lifting restriction not to lift over 50 pounds following the November 1982 incident.

14. Claimant again experienced back pain after lifting at work on October 26, 1983.

15. Claimant was off work for approximately five weeks following the October 26, 1983 incident.

16. Claimant's employment was terminated November 30, 1984.

17. Claimant was laid off because of a general layoff.

18. Claimant was not laid off because of his impairment.

19. Claimant was diagnosed as having a herniated disc in February 1986.

20. Claimant's back impairment did not materially change following the January 20, 1979 incident.

21. Claimant does not have any permanent impairment as a result of his June 11, 1982 injury.

22. Claimant does not have any permanent impairment as a result of his October 26, 1983 injury.

CONCLUSIONS OF LAW

Claimant has not shown by a preponderance of the evidence that he has suffered a cumulative injury to his lower back that arose out of and in the course of his employment with defendant.

Claimant's injury of June 11, 1982 aggravated a preexisting back impairment.

Claimant's injury of October 26, 1983 aggravated a preexisting back impairment.

Claimant failed to show he has any permanent partial disability as a result of the injury of June 11, 1982.

Claimant failed to show he has any permanent partial disability as a result of the injury of October 26, 1983.

Claimant has not shown by a preponderance of the evidence that his present condition is caused by the injury of June 11, 1982.

Claimant has not shown by a preponderance of the evidence that his present condition is caused by the injury of October 26, 1983.

Claimant has shown entitlement to temporary total disability benefits from June 11, 1982 through June 22, 1982, and from October 27, 1983 through December 8, 1983.

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

ORDER

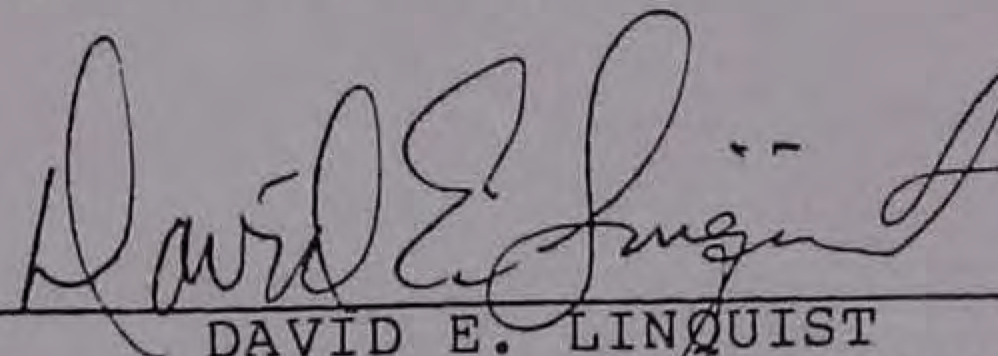
THEREFORE, it is ordered:

That defendant shall pay claimant temporary total disability benefits at the rate of two hundred thirty-one and 05/100 dollars ($231.05) from June 11, 1982 through June 22, 1982, and from October 27, 1983 through December 8, 1983.

That defendant is to pay the costs of this action.

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

Signed and filed this 29th day of February, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILLIAM BAKER,	:	
	:	
Claimant,	:	File No. 798226
	:	
vs.	:	A P P E A L
	:	
ARMOUR DIAL, INC.,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

FILED
MAY 20 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from an aribtration decision awarding permanent partial disability benefits.

The record on appeal consists of the transcript of the proceeding, and joint exhibits 1 through 22. Both parties filed briefs on appeal.

ISSUES

Defendant states the following issues on appeal:

1. Whether the claimant established a causal connection between his alleged disability and the injury of December 21, 1984.

2. Whether the claimant suffered a cumulative injury.

3. The extent of claimant's alleged disability as a result of his injury of December 21, 1984.

REVIEW OF THE EVIDENCE

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

Briefly stated, claimant worked for defendant Armour Dial for 25 years. His job for the years prior to December 21, 1984 was as a bean inspector. Claimant's duties involved standing or sitting while inspecting a moving line of beans for debris. Claimant was also required to lift boxes of cans of corn beef weighing approximately 36 pounds, open them and dump them into a

vat as part of the bean inspection duties. Claimant testified that although bean inspector was his primary occupation, he was also assigned to other jobs within the plant, one of which required him to lift weights of up to 100 pounds.

Prior to December 21, 1984, claimant suffered lumbosacral strain after lifting boxes at work in 1976, and was hospitalized. In January 1982, claimant fell from a ladder and underwent chiropractic treatment to his upper and lower back. Claimant missed five days of work in 1983 due to lumbosacral strain. Claimant was able to return to full duty work after each of these episodes.

On December 21, 1984, claimant was assigned to the "rework area," lifting boxes of meat weighing approximately 60 pounds, when he felt the onset of immediate low back pain. Claimant reported the injury but continued to work until the plant was closed shortly thereafter for two weeks for the holiday season. Claimant returned to work when the plant reopened, but continued to experience pain.

Claimant was treated with muscle relaxants and physical therapy by Dr. Kannenberg, and was given a lifting restriction of not over 25 pounds and light duty. Dr. Kannenberg referred claimant to Koert R. Smith, M.D., an orthopedic surgeon. On February 7, 1985, Dr. Smith examined claimant's x-rays and concurred with the course of treatment recommended by Dr. Kannenberg. Claimant continued under the care of both Dr. Kannenberg and Dr. Smith, and engaged in a regimen of physical exercise throughout the summer and fall of 1985. Claimant's lifting restriction was later reduced to not over 10 pounds when his pain persisted.

Dr. Smith diagnosed degenerative disc disease based on the history provided by claimant and the x-rays of claimant's lower spine in 1984, and made the following opinions on claimant's condition:

> Q. Okay. Now, Doctor, with regard to the history that was given to you as far as his being injured on December 21st, 1985 (Sic) do you have an opinion within a reasonable degree of medical certainty as to whether or not he, as of the last time you saw him, has a permanent partial impairment of the body as a whole?
>
> A. Yes, I have an opinion.
>
> Q. And what is that opinion?
>
> A. The opinion is that he does have a permanent partial impairment of 5 percent.

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Q. Okay. And do you, within a reasonable degree of medical certainty, have an opinion as to whether or not it is consistent with and causally connected to the medical history that was given to you of his injury of December 21st, 1985? (Sic)

A. Yes.

Q. Okay. And what is that opinion?

A. I think it at least partially is causally connected to that.

Q. Okay.

A. At the time I saw him, which was two months after his injury, he did have X ray changes of disk space narrowing. At that time those X ray changes would have been present -- or pre-existed his injury in December because they don't occur that rapidly.

Q. Okay.

A. Symptom-wise he was not symptomatic with his disk space narrowing as evidenced the X rays, but was symptomatic and has continued to be symptomatic since his injury.

Q. And is it the symptomotology [sic] that you're relating as the causally connected aspect?

A. That's correct.

....

Q. Based on the various examinations you've made of Mr. Baker and the tests you've done thus far, do you find any suggestion of a herniated disk in his low back?

A. The suggestion of the herniated disk is the fact that he has narrowing of the disk space at the lumbosacral junction. That in and of itself to me means that at some point in time he's had a herniated disk. If your question is does he have neurologic deficit or radiating pain down his leg as a result of that, at no time during the several times I've examined him was there any evidence of nerve root irritation as a result of the herniated disk.

Q. Were the X ray findings that you alluded to

such that it was your opinion that the narrowed disk space would have been present prior to whatever injury or trauma was sustained on December 21st, '84?

A. That's correct.

....

Q. Have you reached an opinion based on your last exam as to what is actually the cause of Mr. Baker's ongoing complaint of low back pain at the belt level?

A. Yes.

Q. What is that?

A. The cause of his pain or his diagnosis is degenerative disk disease.

Q. Would that degenerative disk disease, Doctor, have pre-existed to some extent his injury of December, '84?

A. Yes.

Q. And I take it that's in part because of the narrowed disk space that we just visited about?

A. That's based on the knowledge that those X ray changes were present when I saw him between one and two months after his injury. Those X ray changes take at least a year if not two years to develop. Therefore they must have been there prior to the onset of his symptoms on his injury in December of 1984.

....

A. My opinion is that most probable course of events was or is that Mr. Baker had a longstanding degenerative disk disease that was symptomatic in '82 and '83 and aggravated again in 1984.

Q. That's entirely consistent with the normal pattern you see in degenerative backs, isn't it, Doctor? That is, periods of exacerbation followed by period when the patient can get along relatively asymptomatic?

A. Yes.

> Q. Doctor, I notice in your very first examination of the patient you were fairly optimistic in your recommendations. You offered the written observation that Mr. Baker should go ahead and recover without any long term difficulty. He has obviously had long term difficulty. Is that due in major part to these degenerative changes we've been visiting about, or is it due to the nature of the basic lumbar strain that he sustained?
>
> A. It's more due to the underlying degenerative disk disease process.
>
> Q. Do you find, based on your last examination, any continued signs of a true lumbar strain?
>
> A. At the last time I saw him?
>
> Q. Yes.
>
> A. No.

(Smith Deposition, pages 9-10, 12-13, 18-19)

At his final medical examination in March 1986, claimant was placed on a permanent work restriction prohibiting lifting over 20 or 30 pounds, and no "repetitive twisting, bending, and prolonged standing." (Joint Exhibit 12) Claimant's wife testified that claimant can no longer perform household chores or travel or sit for prolonged periods of time due to his back.

Claimant continues in his bean inspection job, but no longer lifts, opens and dumps the boxes of canned corn beef. Claimant testified that prior to December 21, 1984, he occasionally worked in the "smoke house," which required him to lift sticks of sausage weighing 35 pounds, but after December 21, 1984, he can no longer perform those lifting duties. Claimant stated that he cannot sit or stand for a prolonged period of time, and cannot lift heavy items. Larry Hawes, claimant's coworker, testified that prior to December 21, 1984, claimant would trade off jobs with him, requiring claimant to lift and empty 100 pound bags, but since December 21, 1984 claimant is no longer able to do so.

Claimant attempted to bid into another job with defendant, but was denied this position due to his medical restrictions. Claimant testified that approximately two-thirds of the positions at Armour-Dial are not available to him because of his medical restrictions. Claimant has not suffered a loss of earnings, and now earns more per hour than he did on December 21, 1984.

Claimant also earned approximately $2,000 per year as a

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self-employed auctioneer, which he indicated has been somewhat affected by his present inability to lift auction items. Claimant was 48 years old at the time of the hearing and had a high school education. Claimant's past work experience over the previous 25 years has been limited to manual labor.

The parties stipulated that claimant received an injury which arose out of and in the course of his employment; that claimant suffered no loss of work as a result of the December 21, 1984 injury; that claimant was not seeking any temporary total disability or healing period benefits; that the commencement date for permanent partial disability benefits should be December 27, 1984; that if a permanent disability exists it is a disability of the body as a whole; that claimant's rate of compensation would be $222.00; and that all medical benefits have been paid by defendant.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 21, 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).

Our supreme court has stated many times that a claimant may recover for a work connected aggravation of a preexisting condition. Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934). See also Auxier v. Woodward State Hosp. Sch., 266 N.W.2d 139 (Iowa 1978); Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler, 252 Iowa 613, 106 N.W.2d

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591.

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

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson, 255 Iowa 1112, 125 N.W.2d 251; Yeager, 253 Iowa 369, 112 N.W.2d 299; Ziegler, 252 Iowa 613, 106 N.W.2d 591. See also Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Almquist, 218 Iowa 724, 254 N.W. 35.

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

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

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

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

The opinion of the supreme court in Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 cited with approval a decision of the industrial commissioner for the following proposition:

Disability * * * as defined by the Compensation Act

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> 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. * * * *

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, 255 Iowa 1112, 125 N.W.2d 251. 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

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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).

The "cumulative injury rule" may apply when disability develops over a period of time. The compensable injury is held to occur at the later time. For time limitation purposes, the injury in such cases occurs when, because of pain or physical disability, the claimant can no longer work. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985).

Apportionment is limited to those situations where a prior injury or illness independently produces some ascertainable portion of the ultimate industrial disability which exists following the employment-related aggravation. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984).

Expert testimony that a condition could be caused by a given injury coupled with additional, non-expert testimony that claimant was not afflicted with the same condition prior to the injury may be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966). Mere speculation on future employment events cannot be a basis for determining one's industrial disability. A determination of industrial disability is limited to an analysis of the claimant's present condition. Umphress v. Armstrong Rubber Company, Appeal Decision, August 1987.

Industrial disability relates to a reduction in earning capacity rather than a change in actual earnings. Michael v. Harrison County, 34 Biennial Report, Iowa Industrial Commissioner 218 (Appeal Decision 1979).

ANALYSIS

Claimant has the burden to prove that his disability is causally related to his injury of December 21, 1984. The record shows by the testimony of Dr. Smith that claimant suffers from degenerative disc disease which predated his December 21, 1984 injury. Dr. Smith also testified that claimant's present disability is at least in part caused by the injury of December 21, 1984. This testimony is uncontroverted in the record.

Although the weight to be given the testimony has been affected by Dr. Smith's statement on cross-examination that he was unaware of claimant's prior back injuries in 1982 and 1983, Dr. Smith did not retract his statement as to causal connection. Instead, he opined that claimant's back strains in 1982 and 1983 were symptomatic of his preexisting degenerative disc disease,

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and that the injury of December 21, 1984 aggravated that disease. Dr. Smith has given claimant a permanent lifting restriction and a restriction on bending, twisting and prolonged standing based on claimant's symptomatology after the December 21, 1984 injury and the failure of that condition to improve. Claimant's present back condition is causally connected to his injury on December 21, 1984.

The deputy's decision found that claimant had suffered a gradual or cumulative injury. On appeal, defendant asserts that the record contains no medical evidence that establishes the kind of repetitive trauma necessary for application of the McKeever case. Claimant urges that the record shows an aggravation of a preexisting condition occurring on December 21, 1984.

As contemplated by McKeever, a gradual injury is caused by a series of small traumatic injuries which have a cumulative effect that eventually forces claimant to leave work. Claimant's present physical impairment is not the result of a cumulative injury. Claimant has suffered an aggravation of his preexisting degenerative disc disease.

The extent of claimant's disability must be determined as well. Claimant has not suffered a loss of earning as a result of his injury of December 21, 1984, and has not lost work as a result of that injury. He now has a permanent lifting restriction and a restriction on bending, twisting and prolonged standing. Claimant has a five percent impairment rating of the body as a whole. He has returned to his old job, but only with accommodations by fellow workers.

The decision of the deputy addressed the issue of the "odd lot" doctrine as set forth in Guyton v. Irving Jensen Co., 323 N.W.2d 101, 105 (Iowa 1985). Claimant is employed. His employment is substantially the same as it existed prior to the injury. It is not a "make work" position. The fact that claimant may at some point in the futue no longer be employed by Armour Dial has no effect on the determination of the extent of industrial disability at the present, as this factor necessarily requires speculation as to future events. Claimant's industrial disability is to be determined based on his present condition. Claimant is not part of the hard core unemployed and any implication that claimant is part of that group is inaccurate. The odd-lot doctrine is not applicable in this case.

Although he has not experienced a loss of earnings as a result of the injury of December 21, 1984, claimant has experienced a loss of earning capacity. Presently, employers would have to take claimant's physical restrictions into account in any hiring decision in claimant's case. Claimant's work history is confined to manual labor jobs. He has lost a portion of his ability to perform those jobs. Claimant was 48 at the time of

the hearing and had a high school education. Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 20 percent.

Claimant's degenerative disc disease predated his injury of December 21, 1984. However, the record shows that claimant was able to return to full duty after each of his prior incidents of lumbar strain. Claimant had no work restrictions prior to December 21, 1984. Claimant was able to perform all of the tasks assigned to him by his employer prior to December 21, 1984, including an assignment that required him to lift weights of up to 100 pounds. Subsequent to his injury of December 21, 1984, claimant has not been able to bid for jobs with defendant because of his medical restrictions and claimant testified that he is now unable to perform two-thirds of the jobs at defendant's plant. Thus, it is concluded that claimant's preexisting degenerative disc disease did not cause claimant disability prior to December 21, 1984. An apportionment is not appropriate.

FINDINGS OF FACT

1. Claimant received an injury arising out of and in the course of his employment with defendant Armour-Dial on December 21, 1984.

2. Claimant's normal work was as a bean inspector and required him to stand or sit while inspecting bean products for debris and foreign objects.

3. Claimant's work also occasionally required him to work in other departments, and occasionally required him to engage in lifting weights from 35 to 100 pounds.

4. Claimant's work as a bean inspector occasionally required him to lift boxes of canned corn beef weighing approximately 36 pounds and to open and empty the cans.

5. Claimant injured his back in 1976 and received medical treatment.

6. Claimant injured his back in 1982 and received chiropractic treatment.

7. Claimant injured his back in 1983 and was off work.

8. Claimant was able to return to full duty work after his back injuries in 1976, 1982 and 1983.

9. Claimant had no medical restrictions on the use of his back or medical restrictions on bending, twisting or prolonged standing prior to December 21, 1984.

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10. Claimant was able to perform all of the duties of his employment with defendant prior to December 21, 1984.

11. Claimant had degenerative disc disease prior to December 21, 1984.

12. On December 21, 1984, claimant injured his back while lifting items weighing approximately 60 pounds.

13. Claimant's injury of December 21, 1984 aggravated his preexisting degenerative disc disease.

14. Claimant has a five percent impairment of the body as a whole as a result of the injury on December 21, 1984.

15. Subsequent to December 21, 1984, claimant has a lifting restriction not to lift over 25-30 pounds and not to bend, twist or stand for a prolonged period of time.

16. Subsequent to December 21, 1984, claimant can no longer perform the duties of bean inspector without accommodation by his fellow employees.

17. Subsequent to December 21, 1984, claimant can no longer perform duties he previously performed for defendant in other departments that involve heavy lifting.

18. Claimant cannot perform two-thirds of the jobs available at defendant's plant because of his medical restrictions subsequent to his injury of December 21, 1984.

19. Claimant has not suffered a loss of earnings subsequent to his injury of December 21, 1984.

20. Claimant has suffered a loss of earning capacity subsequent to his injury of December 21, 1984.

21. Claimant was 48 years old at the time of the hearing and had a high school education.

22. Claimant's rate of compensation was $222.00.

23. Claimant's preexisting degenerative disc disease did not cause disability prior to December 21, 1984.

24. Claimant has a 20 percent industrial disability as a result of his injury of December 21, 1984.

CONCLUSIONS OF LAW

On December 21, 1984, claimant suffered an injury which aggravated a preexisting degenerative disc disease.

Claimant did not suffer a gradual or cumulative injury.

Claimant's present disability is causally related to his injury of December 21, 1984.

Claimant's preexisting degenerative disc disease did not cause any industrial disability to claimant prior to December 21, 1984.

Claimant has an industrial disability of 20 percent as a result of his injury of December 21, 1984.

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

ORDER

THEREFORE, it is ordered:

That defendant pay unto claimant one hundred (100) weeks of permanent partial disability benefits at a rate of two hundred twenty-two and no/100 dollars ($222.00) per week from December 27, 1984.

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

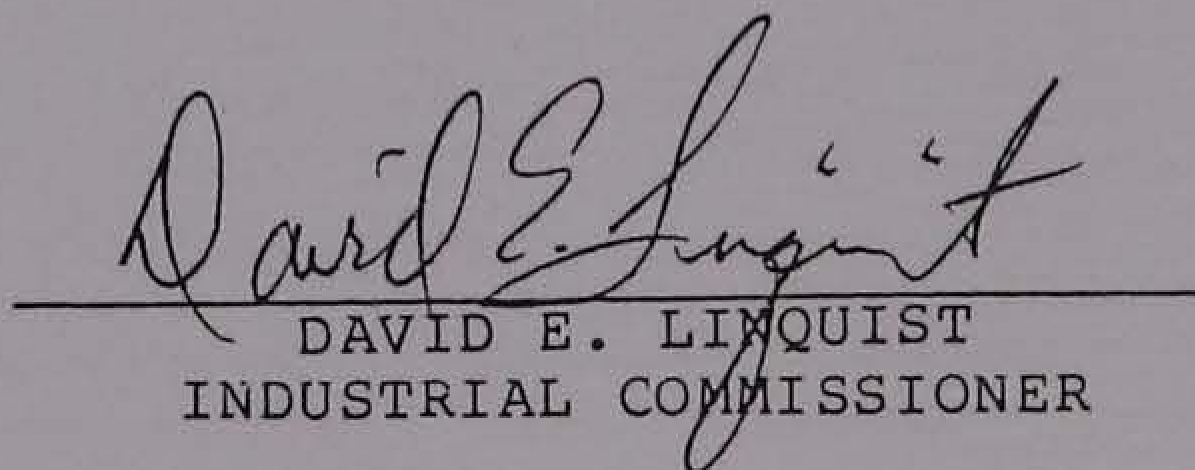
That defendant shall pay interest on benefits awarded herein as set forth in Iowa Code section 85.30.

That defendant is to be given credit for benefits previously paid.

That defendant is to pay the costs of this action.

That defendant shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 20th day of May, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KARL BARKDOLL,	:	
Claimant,	:	File Nos. 816913 778471
vs.	:	
AMERICAN FREIGHT SYSTEM, INC.,	:	A P P E A L
Employer, Self-Insured, Defendant.	:	D E C I S I O N

FILED
JUN 26 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals and claimant cross-appeals from an arbitration decision awarding permanent partial disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 12; and defendant's exhibits A through D. Both parties filed briefs on appeal.

ISSUES

Defendant states the following issues on appeal:

1. Whether the employer is liable for disability benefits during the periods when claimant failed or refused to obtain the medical care authorized by the employer under section 85.39.

2. Whether the employer is liable for either temporary or permanent disability benefits when the claimant failed and refused to follow the medical advice of the physicians to whom he had been referred.

3. Whether the available medical and other expert testimony, coupled with claimant's testimony, supports the industrial disability awarded by the deputy commissioner.

4. Whether the record as a whole contains substantial evidence to support the deputy commissioner's conclusions as to facts and the application of the law.

Claimant states the following issues on cross-appeal:

1. The finding of industrial disability is too low and unsupported by substantial evidence in the record made before

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the Iowa Industrial Commissioner when the record is viewed as a whole.

2. The limitation assessed on loss of earning capacity due to claimant's age is in error of law.

REVIEW OF THE EVIDENCE

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

Briefly stated, claimant's duties at American Freight involved freight handling and truck driving. The weight of the freight that was handled by claimant ranged from only a few pounds to over 1000 pounds. Claimant used lift trucks and other devices to handle the heavier freight. Claimant testified that this job required repetitive bending, balancing, kneeling and crawling.

On April 11, 1984, while attempting to unhook a trailer from a truck-tractor, a step on the tractor broke and claimant fell two feet to the ground on his right side. Claimant felt pain in the right shoulder and arm and saw Michael Stark, D.O., the company doctor. Claimant missed a few days of work over the next two months as a result of this incident.

On August 30, 1984, claimant was unloading a trailer and a 30 pound box fell on his right shoulder and arm. Claimant again felt severe pain in his right shoulder and arm. He then attempted to return to Dr. Stark but became impatient about having to wait more than an hour for the appointment and went to his own family doctor, Yang Ahn, M.D. Dr. Ahn told claimant to take a week off from work and referred claimant to an orthopedic surgeon, W.J. Robb, M.D.

Claimant was seen by Dr. Robb on October 9, 1984 with complaints of neck and right shoulder pain radiating into his right arm and numbness in his right little finger. Dr. Robb diagnosed a sprain to the cervical spine and probable protruded disc at the C-6 level. Dr. Robb concluded on April 18, 1985 that claimant would not be able to return to his job at American Freight and gave claimant a permanent impairment rating to his right upper extremity:

> Karl Barkdoll is not going to be able to resume his previous occupation which is truck driving largely because of the nature of the stress to his low back. He, however, will be able to persue [sic] a relatively sedentary type of work, clerical work, or that which requires merely walking, standing and occasional sitting. He will not be

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> able to do any job that requires heavy lifting or repetitive bending, stooping and lifting.

(Joint Exhibit 1, page 40)

On April 23, 1985, Dr. Robb stated: "I estimate that he will have a 10-15% permanent impairment of function of the right upper extremity as a result of the secondary radiculitis and involvement of the nerves to the right shoulder and right arm." (Jt. Ex. 1, p. 35)

Richard Neiman, M.D., who specializes in neurology, examined claimant in May 1985, and also felt that claimant's condition was permanent at that time:

> Based on his refusal to have further medical care, I would have to think that he has probably reached maximum healing around the first of May. I think he will probably have a permanent disability of approximately 15% based upon the Manual of Orthopedic Surgeons recommendation....I think he should avoid heavy lifting, particularly jobs that require excessive flexion and extension and hyperextension of the neck. Light type duty such as lifting 15-20 pounds certainly would not be a problem.

(Jt. Ex. 1, p. 57)

Dr. Neiman suggested a myelogram and surgery. Claimant refused this treatment and chose to live with the pain.

Dr. Neiman also stated that the permanent impairment was caused by the August 1984 injury as the earlier injury in April appeared minor:

> Mr. Barkdoll's 15% permanent disability is based on the body as a whole. It is my contention that his injury of April, 1984, really was a minor one and the major insult occurred in August, 1984, in which a carton fell 3 1/2 feet upon him weighing approximately 30 pounds. Obviously his permanent disability would then be related to this accident.

(Jt. Ex. 1, p. 56)

On August 4, 1986, John Walker, M.D., an orthopedic surgeon from Waterloo, Iowa, stated:

> This patient undoubtedly has a cervical disc problem producing a headache and radicular pain down the right arm....This problem arises of course as a result of his two injuries which occurred on

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> the job. As far as the sciatica of the right lower extremity is concerned, this is probably a sciatica with a so called pinched nerve syndrome on the basis of a lumbar disc, but I cannot relate it to any industrial accident. This is something which has come on for what reason I cannot explain. As far as the cervical spine and cervical disc problem is concerned, I believe that he has a permanent, partial impairment of 15% of the body as a whole. He apparently is able to live with this and apparently it is not severe enough for him to undergo myelographic study and surgery. This is a completely understandable attitude in my opinion and I do not believe in doing myelographic studies unless surgery is contemplated....I believe that he probably cannot do the heavy unloading and the heavy lifting which is required in his job....

(Jt. Ex. 1, p. 45)

On October 23, 1986, Dr. Walker stated:

> I have re-read my August 4, 1986 report to you and I note that he was injured first on April 11, 1984 and then again on August 30, 1984. Since this time the patient has had symptomatology in the form of headache, neck pain and radicular pain down the right arm, which I have related to the industrial accident. It is my opinion that this patient has a permanent, partial disability of 7% of the body as a whole based on the cervical problem, however, I also note that the sciatica I could not relate to any industrial accident, therefore, that 8% of the body as a whole, would not be related to either of the accidents as I review my writing and my report to you as of August 4, 1986.

(Jt. Ex. 1, p. 50)

Claimant owns and operates a caterpillar and a backhoe used in earth moving projects. Claimant testified that he has not used this equipment extensively in recent years. Surveillance evidence was introduced showing claimant operating a bulldozer and other equipment. Claimant testified that he was able to operate this equipment without difficulty. Claimant earned $350 to $400 with his equipment in 1986.

Claimant also testified that prior to his injuries, his earnings were $35,000 per year. Claimant can no longer work on the dock due to his medical restrictions, and cannot drive a truck, in part due to Department of Transportation regulations. Subsequent to his injuries, claimant's income is $9000 annually

from a pension. Claimant stated that the amount of the pension is much lower due to his early retirement than it would have been had he continued to work. Claimant has purchased two computers in order to learn a new trade, but has not taken any instructional courses in their use.

Claimant also refused a request to pick up and transport his x-rays to Dr. Neiman which would have required claimant to deviate nine miles from his route. Claimant was referred by Dr. Robb to a doctor for his headaches, but claimant did not make an appointment. Claimant is 59 years of age and has a sixth grade education.

The parties stipulated: (1) on April 11, 1984 and August 30, 1984, claimant received injuries which arose out of and in the course of his employment with American Freight; and, (2) claimant was off work from March 20, 1985 through April 30, 1985. Although some confusion existed at the hearing, the parties have stipulated that the rate of compensation is $275.37 per week.

APPLICABLE LAW

Section 85.27, Code of Iowa (1983), states, in part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonable necessary transportation expenses incurred for such services....
>
> ....
>
> For purposes of this section, the employer...has the right to choose the care....If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and employee may agree to alternate care reasonably suited to treat the injury.

Section 85.39 states, in part:

> After an injury, the employee, if requested by the employer, shall submit for examination at some reasonable time and place and as often as reasonably requested, to a physician or physicians authorized to practice under the laws of this state or another state, without cost to the employee; but if the

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> employee requests, the employee, at the employee's own cost, is entitled to have a physician or physicians of the employee's own selection present to participate in the examination. If an employee is required to leave work for which the employee is being paid wages to attend the requested examination, the employee shall be compensated at the employee's regular rate for the time the employee is required to leave work, and the employee shall be furnished transporation to and from the place of examination, or the employer may elect to pay the employee the reasonable cost of the transportation. The refusal of the employee to submit to the examination shall suspend the employee's right to any compensation for the period of the refusal. Compensation shall not be payable for the period of suspension.

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

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

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. * * * *

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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,

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March 26, 1985).

Section 85.39 refers to a medical examination, and a refusal to submit to an examination under that section may result in suspension of the claimant's benefits. Section 85.39 does not refer to treatment. A claimant will not suffer suspension of benefits under section 85.39 for failure to attend treatment. Assmann v. Blue Star Food (Declaratory Ruling, May 18, 1988).

The approach of later years when it can be anticipated that under normal circumstances a worker would be retiring is, without some clear indication to the contrary, a factor which can be considered in determining the loss of earning capacity or industrial disability which is causally related to the injury. Becke v. Turner-Busch, Inc., 34 Report of the Iowa Industrial Commissioner 34 (Appeal Decision 1979).

ANALYSIS

Defendant's first two issues on appeal essentially raise the same question, that is, whether claimant's conduct constitutes a refusal of medical care such that claimant should suffer a suspension, reduction or forfeiture of disability benefits. Defendant recites a refusal of medical care under section 85.39. However, section 85.39 refers to a medical examination, not treatment. Treatment is contemplated by section 85.27.

The record does not show a refusal of medical examination under section 85.39. Claimant declined a myelogram and surgery for his condition, in part because of a subjective perception of the dangers involved in the procedures. There is no showing that if claimant had undergone surgery his disability would have been less or that it would have improved function. Dr. Walker stated that this was a reasonable choice of treatment on the part of claimant. See Arnamon v. Mid-American Freight Lines, 1 State of Iowa Industrial Commissioner Decisions 497 (Arbitration Decision February 28, 1985). Claimant failed to set up an appointment with a specialist to treat his headaches. Again, there is no showing that if the appointment had been kept that claimant's disability would have been less. Finally, claimant is alleged to have refused medical treatment because he refused to transport some of his medical records with him to an appointment with a physician. Claimant declined on the ground that to do so would have taken him nine miles out of his way, and he was not being paid to provide courier service. Although claimant's course of conduct may reflect on his motivation, it is not so unreasonable as to justify a suspension, reduction or forfeiture of benefits. In addition, since the records in question were in fact eventually made available to the treating physician, there is no showing that claimant's actions affected his treatment or examination.

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Defendant's issues 3 and 4 on appeal and claimant's issue 1 on cross-appeal all deal with the extent of industrial disability. The medical evidence indicates that claimant's injury on April 11, 1984 was minor and the August 30, 1984 injury was more major. Claimant returned to work after the April injury but did not return to work after the August injury. Claimant has not undergone surgery.

Dr. Robb concluded that claimant would be restricted to no heavy lifting or repetitive bending, stooping or lifting "largely because of the nature of the stress to his low back." (Jt. Ex. 1, p. 40) There is no indication in the record that claimant's low back problem is causally related to his injury of April 11, 1984 or his injury of August 30, 1984. All of claimant's complaints from both injuries were to his neck and his right shoulder and arm. Dr. Robb's rating of impairment was limited to 15 percent of the right upper extremity. The lower back problem is determined to be unrelated to claimant's work injuries.

Dr. Neiman gave claimant an impairment rating of 15 percent of the body as a whole, and attributed this to claimant's August 30, 1984 injury to his right shoulder and arm. Dr. Neiman does not indicate to what extent claimant's lower back problems may have contributed to this rating.

Dr. Walker did distinguish between claimant's cervical and lumbar problems. Dr. Walker rated claimant's impairment of the body as a whole at 15 percent also, but Dr. Walker attributed eight percent to claimant's lower back problem, of unknown origin and which Dr. Walker could not causally relate to either of claimant's injuries. The other seven percent was attributed by Dr. Walker to claimant's cervical problem. The opinion of Dr. Walker is given the greater weight. It is determined that claimant has a permanent partial impairment as a result of his injury on August 30, 1984.

A rating of impairment is but one factor in the determination of industrial disability. Claimant's work experience is limited to truck driving and freight moving. Claimant's education is limited to the 6th grade.

Claimant has experienced a loss of earnings as a result of his injuries. Defendant has been unable to provide him with substitute employment due to his restrictions but those restrictions are because of his low back complaints which have not been causally connected to his injuries at work. Claimant presently has no earned income.

Claimant is able to operate heavy equipment that he owns even with his restrictions. Claimant testified that he had not done very much of this type of work while he was on workers' compensation. It appears that at least part of the reason

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claimant did not engage in heavy equipment work was because he was collecting workers' compensation benefits at the time. Claimant would have some earning capacity in the field of heavy equipment operation.

Claimant's investment in computers, which he indicated was for the purposes of learning a new marketable skill suggests motivation on the part of claimant to earn an income. However, claimant has not taken any further steps such as undergoing training in computer use or applying for computer-related jobs. Claimant's limited education would indicate that intensive training would be needed to enable claimant to realistically compete for jobs in the computer field.

Claimant's age is also a relevant factor in determining the extent of industrial disability. Claimant alleges, in his issue 2 on cross-appeal that the deputy improperly considered claimant's age of 59 in determining industrial disability. Age is a proper factor in determining industrial disability. In addition, this agency has held in the past that a claimant's proximity in age to the age at which retirement can normally be expected is a factor to be considered in determining industrial disability.

Several factors presented in evidence indicate that claimant's motivation is questionable. Claimant is now receiving pension income. Claimant has been less than cooperative in the course of his medical treatment and has a reduced need for income as a result of his pension.

Based on these and all other appropriate factors for determining industrial disability, claimant's industrial disability is determined to be 15 percent as a result of his injuries on April 11, 1984 and August 30, 1984.

FINDINGS OF FACT

1. Claimant was employed as a truck driver and freight mover, which required him to lift, bend, kneel and crawl.

2. Claimant suffered an injury on April 11, 1984 which arose out of and in the course of his employment with defendant.

3. Claimant suffered an injury on August 30, 1984 which arose out of and in the course of his employment with defendant.

4. As a result of his injuries, claimant has received a medical rating of physical impairment of seven percent of the body as a whole.

5. Claimant was able to return to his job after his injury of April 11, 1984.

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6. Claimant was not able to return to his job after his injury of August 30, 1984.

7. Subsequent to his injury of August 30, 1984, claimant has a lifting restriction of not over 15 to 20 pounds, and a restriction on repetitive lifting, bending and stooping.

8. Claimant's restrictions are the result of his low back complaints which were not causally connected to his injuries on April 11, 1984 and August 30, 1984.

9. Claimant has been advised by his physicians not to return to his work as a truck driver and freight mover.

10. Claimant is able to operate some heavy equipment.

11. Claimant has a sixth grade education.

12. Claimant was 59 years old at the time of the hearing.

13. Claimant's work experience is limited to truck driving and freight moving.

14. Claimant earned approximately $35,000 per year prior to his work injuries.

15. Claimant has pension income of $9,000 per year subsequent to his work injury.

16. Claimant has lost earnings as a result of his work injuries.

17. Claimant did not unreasonably refuse medical treatment.

18. Claimant is not well motivated to return to work.

19. As a result of his injuries of April 11, 1984 and August 30, 1984, claimant has an industrial disability of 15 percent.

CONCLUSIONS OF LAW

Claimant did not unreasonably refuse medical treatment and should not suffer a suspension, reduction or forfeiture of disability benefits.

Claimant's proximity to retirement age is properly a factor in the determination of claimant's industrial disability.

Claimant has an industrial disability of 15 percent as a

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result of his injuries on April 11, 1984 and August 30, 1984.

The medical treatment by Dr. Ahn was not authorized by defendant.

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

ORDER

THEREFORE, it is ordered:

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

That defendant pay claimant seventy-five (75) weeks of permanent partial disability benefits at a rate of two hundred seventy-five and 37/100 dollars ($275.37) per week from April 19, 1985.

That defendant pay to claimant the following medical expenses:

Medical mileage	$ 38.40
Fee for Dr. Walker's exam	671.00

That claimant shall pay the medical expenses of Dr. Ahn.

That defendant pay accrued weekly benefits in a lump sum.

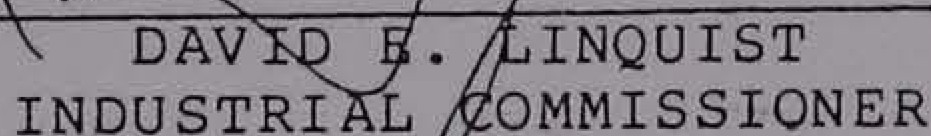
That defendant pay interest on weekly benefits pursuant to Iowa Code section 85.30.

That defendant be given credit for benefits previously paid.

That defendant pay the costs of this action, including the costs enumerated in the attachment to the prehearing report.

Defendant shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 28th day of June, 1988.



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1402.20, 1402.30, 1801
1802, 1803, 2206, 2209
Filed March 14, 1988
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONALD L. BARTUSEK, Claimant,	
vs.	File Nos. 814703 816949
LEHIGH PORTLAND CEMENT, Employer,	A R B I T R A T I O N
and	D E C I S I O N
TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	

1402.20, 1402.30, 1801, 1802, 1803, 2206, 2209

Claimant had a preexisting lumbar insufficiency which caused exacerbations whenever he engaged in heavy physical activity. During the month of January, 1986, he experienced two incidents of what appeared to be relatively minor trauma, but which exacerbated his back. The first cleared in four days and he was awarded one-seventh week of temporary total disability. The second did not resolve as promptly and claimant never returned to his employment with this employer upon the recommendation of his physicians. Similar recommendations had been made in the past following other exacerbations, but he had always previously been released to return to that employment. One of the authorized physicians indicated that claimant had a five percent impairment due to the accumulative effect of the multiple exacerbations which he has suffered over the years. Claimant awarded 25% permanent partial disability under theories of Blacksmith and McKeever even though the last injury was not shown to have produced any discernable change in the condition of claimant's spine.

FILED

MAR 14 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

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RONALD L. BARTUSEK, Claimant, vs. LEHIGH PORTLAND CEMENT, Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	File Nos. 814703 816949 A R B I T R A T I O N D E C I S I O N

INTRODUCTION

This decision resolves two proceedings in arbitration brought by Ronald L. Bartusek, claimant, against Lehigh Portland Cement Company, his former employer, and The Travelers Insurance Company, its insurance carrier.

The case was heard and fully submitted on August 21, 1987 at Mason City, Iowa.

The record in this proceeding includes testimony from Ronald L. Bartusek, Roger Marquardt and Lou Fasing. The record also includes claimant's exhibits 1, 2 and 3 and defendants' exhibits A through F. A view of the endloaders referred to in the testimony dealing with the alleged January 22, 1986 injury was made by the undersigned and counsel for both parties.

Gary Lloyd was not listed as a witness. His testimony was corroborative of claimant's. Calling him as a rebuttal witness will not be permitted. Blakely v. Bates, 394 N.W.2d 320 (Iowa 1986); Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986). The objection to his testimony is sustained and it is not considered in this decision.

ISSUES

The issues presented for determination are:

Whether claimant sustained injury on January 2, 1986 and/or January 22, 1986 which arose out of and in the course of employment;

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Determination of claimant's entitlement to compensation for temporary total disability, healing period or permanent partial disability; and,

Determination of claimant's entitlement under section 85.27. Defendants contend that the medical expenses incurred were unauthorized and also that they are not causally connected to any compensable injury.

It was stipulated that, in the event of an award, the rate of compensation should be determined based upon claimant's average gross weekly earnings of $421.78 and his status of married with four exemptions. It was further stipulated that claimant was off work from January 2, 1986 through January 5, 1986 and again from January 22, 1986 up to the present time. It was further stipulated that, in the event of an award, the employer is entitled to a credit for benefits paid under a nonoccupational group plan in the amount of $8,682.19 in sick pay or disability income.

SUMMARY OF EVIDENCE

The following is a summary of evidence presented in this case. Only the evidence most pertinent to this decision is discussed, but all of the evidence received at the hearing was considered in arriving at this decision. Conclusions about what the evidence showed are inevitable with any summarization. The conclusions in the following summary should be considered to be preliminary findings of fact.

Ronald L. Bartusek testified that he was born on January 9, 1954 and that he is married with two children. Bartusek testified that he had been an average student in high school and that he graduated early in December, 1971.

After high school, claimant was employed as a line worker at Winnebago Industries for a time and then began employment with Lehigh Portland Cement Company on February 7, 1978 where he remained employed until February 1, 1987. Claimant indicated that he has held a number of positions with the employer.

Bartusek testified that, on January 2, 1986, he was working as a heavy equipment operator. He testified that, while checking the fluid levels in his machine, he slipped on ice, that his feet went out from under him, and that, in falling, he grabbed a ladder with his left hand which jerked his back and slammed his body against the ladder. Claimant indicated that it happened in the evening in the middle of his work shift. Claimant testified that he reported the incident to his supervisor and was seen on the following day by one of the plant physicians, whom he identified as Jon R. Yankey, M.D., and David A. Ruen, M.D. Claimant testified that he was examined by Dr. Yankey, told that he had a back strain and, on January 5, was released to return

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to work. Exhibit 1-8 and exhibit A, page 31 indicate that claimant was reevaluated on January 6, 1986 and was released to return to work at that time.

Claimant testified that, on January 22, 1986, he was operating an endloader on the day shift. Claimant testified that material being moved had a tendency to freeze in the bucket of the loader and that he employed a practice of banging the bucket against its stop to remove the frozen material. Bartusek testified that, while doing so, the seat back adjustment came unlatched which allowed the lower part of the seat back to move forward into his lower back causing pain. Claimant testified that he reported the incident to his supervisor and then completed his work shift upon the supervisor's request.

Claimant testified that he returned to see Dr. Yankey or Dr. Ruen on January 23, 1986 and was taken off work, given prescribed medication and directed to rest. Claimant indicated that, on the following visit, he had made some slight improvement. Claimant testified that he was referred to William R. Boulden, M.D., for an examination. Claimant related that, in March, 1986, he began treating with Robert E. McCoy, M.D.

Claimant testified that the physicians have advised him to find lighter work and that none of the physicians has released him to return to work at Lehigh. Claimant has not done so. Claimant testified that, to his knowledge, the diagnostic tests have not disclosed anything which the physicians have offered to treat and it has been indicated there is nothing further they can do for his condition.

Claimant testified that he has paid some of his medical bills himself, namely:

St. Joseph Mercy Hospital -- CT scan	$ 439.00
Dr. McCoy	179.00
Drs. Yankey and Ruen	63.00
Total	$ 681.00

Claimant indicated that he has no claim for travel or mileage.

Claimant testified that, effective February 1, 1987, he began receiving a monthly disability pension from the employer in the amount of $439.16 as shown in exhibit 3.

Claimant testified that he is physically unable to do the kind of work which Lehigh requires.

Claimant testified that he is not now employed, but has looked for work and has worked through the State Vocational Rehabilitation department. Claimant does not want to attend further schooling, but sees no alternative. Claimant indicated

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that his physical restrictions prohibit him from bending and stooping or from lifting more than 10 pounds, but that he is not currently under active treatment from any physician.

Exhibit B was identified as a collection of operators' daily report forms for the endloader machines. Claimant testified that he had noticed a problem with the seat prior to January 22, 1986 and reported it verbally. He indicated that he had listed it on the form in the past, but that it had not been repaired. Claimant indicated that the procedure was to quit listing a defect as the foreman was responsible for getting it repaired once it had been listed. Claimant indicated that the seat first came unlatched early in 1985. Claimant testified that he did not note the problem with the seat on the form on January 22, 1986 because it had been previously reported. Claimant testified that the photographs, exhibits D and E, show the seat in a model 51B loader and that the seat is similar to the seat in the model 31B loader, which he was operating on January 22, 1986, but that the seat in the 51B is larger and more comfortable. Claimant testified that a seat belt is worn when operating the loaders. Claimant testified that the seat pivots at the point of the screw which is shown at the top of the metal bracket on the side of the seat on exhibit E. He testified that the top would have moved back and the bottom moved forward into his lower back when he was injured. Exhibit B, page 199, indicates that, on February 23, 1986, an operator indicated that the seat of the 31B loader was broken. A daily report of March 4, 1986, found at page 208 of exhibit B, indicates that the seat needed to be replaced. Exhibit B does not show any prior indications of a problem with the seat.

Claimant testified that he has a history of back trouble that began when he was in junior high school and that he has known Dr. McCoy since 1968. Claimant testified that, in 1969, Dr. McCoy advised him to avoid work that involved heavy lifting or that was performed in a bent position.

Claimant testified that he was involved in a motorcycle accident in July, 1986 in which he fractured his wrist, but that he did not injure his back in that incident.

Lou Fasing, the safety and training supervisor at Lehigh since 1980, testified that he is familiar with and has operated both the 31B and 51B loaders. Fasing testified that he inspected the 31B on January 22, 1986 and that a representative from The Travelers operated the machine to bang the bucket in the manner claimant described. Fasing testified that it would bounce the front end of the loader when doing it.

Fasing testified that exhibits D and E are photographs of the seat in the 31B loader which he personally had taken. Fasing testified that the back of the seat pivots at the bottom where the "x" is drawn on exhibit E. He stated that there is a

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finger and pin assembly which allows the tilt of the back of the seat to be adjusted and that it is necessary to lift the back of the seat to change the position. Fasing indicated that the entire seat assembly can be slid forward or backward. Fasing stated that the screw at the top of the metal plate as shown in exhibit E is not a pivot point, but that it is the place where the fingers and pin which are involved in the tilting mechanism are located. Fasing testified that bolts were added in the bracket at the top of the instruction plate to prevent the back of the seat from tilting. Fasing stated that, if the seat tilts back, it can only go to the back of the cab, a distance of approxiately three-fourths of an inch. He stated that the seat is well padded and that, from his experience with it, he did not believe an injury could occur in the manner which claimant had described.

Fasing stated that the photos, exhibits D and E, were taken a month or two after January 22, 1986. He stated that the seats in the 51B and 31B loaders are identical and that it is not possible to tell the difference between them from the photos.

Fasing did not dispute claimant's injury of January 2, 1986.

A view of the machines showed that the finger and pin assembly was located at the bottom of the seat back with the fingers pointing down. The view also showed that the back of the seat pivoted at the point of the screw which was located at the top of the metal bracket assembly. The view also showed that the distance the bottom of the seat back would move forward would depend upon how far the seat assembly was slid away from the back of the cab and it was observed that it could easily move forward as much as three or four inches. The photos, exhibits D and E, were observed to depict the seat in the 31B loader and it was bolted in a stationary position to prevent movement. The seat in the 51B loader was observed to be substantially identical to the seat in the 31B loader. The movement of the seat back adjustment mechanism in the 51B was noted and it was observed that it would not be difficult to jar the seat back adjustment out of position which would permit the lower portion of the back of the seat to move forward into what would be the operator's low back.

Claimant testified that he was earning $10.00 per hour at the time of his injury and that, if still employed at Lehigh, he would be earning approximately $30,000 per year and that he would also have a full fringe benefit package.

Roger F. Marquardt, a qualified vocational rehabilitation counselor, testified that he has evaluated claimant's case. Marquardt indicated that claimant has the ability to use specific vocational preparation programs in order to enable him to earn a decent living. He felt that claimant's current earning capacity is in the minimum wage area, but that, if claimant completes a

rehabilitation plan, he should be able to earn somewhere in the range of $15,000 to $22,000 per year within four years. Marquardt identified claimant's transferable skills and work history as involving heavy to medium exertion and unskilled to semi-skilled work. Marquardt felt that the 10-pound lifting restriction was uncommonly restrictive in comparison to what he commonly sees in cases involving individuals with similar physical ailments (exhibit 2).

Dr. Boulden indicated that claimant had a chronic back strain and recommended diagnostic studies (exhibit 1-3). In a report dated September 22, 1983, Dr. Boulden indicated that claimant had a recurrent lumbar strain, but that he had no permanent impairment and no physical restrictions (exhibit 1-1).

Claimant was seen by Dr. Yankey on April 29, 1986. Notes of that examination contain the following statement:

> I told him that I think he has very little disability that is ratable at the present time. I remarked about his last CAT scan being essentially completely negative. I note that I first saw him for the pain of Scheurmann's disease back in September of 1968, again in August of 1970 and March of 1971. I saw him in September of 1976 for the first time for low lumbar pain which was related to work at Lehigh. I have not seen him for low back pain for the last 10 years. The history that he gives me says that in 1983 another episode of pain in his low back and was off for 3-4 week [sic] and saw Dr. Bolden [sic] in Des Moines on consultation. I would say that at the present time he has 5% permanent partial impairment of the whole man from his back but think it is impairment that has been accumulative from the various episodes of low back pain that he has had through the years. (Exhibit 1-2, page 3; also exhibit A, page 44).

On September 12, 1986, Dr. Ruen issued a report which includes the following statement:

> I feel that it is difficult to answer exactly whether Mr. Bartusek's current problems are related to his incidents at work on January 2 and January 22, 1986. Certainly, on both occasions he had acute back strains with decreased range of motion and strength compared to his baseline. It is also apparent that he has had problems with his back dating into his teenage years. I certainly feel without currently working because of his arm fractures that his back symptoms are much less. I feel that he will always be prone to back problems and exacerbations and really should not be engaged

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> in work that involves any bending or lifting particuarly [sic] repetitious bending or lifting. I feel that he should not be lifting objects over twenty pounds or any weights repetitiously. (Exhibit 1-8; also exhibit A, page 69).

Office notes of Drs. Ruen and Yankey found at page 33 of exhibit A indicate that The Travelers Insurance Company had denied coverage of this case, that Dr. Yankey advised claimant to see a local orthopedist and that an appointment was made with Dr. McCoy for March 25. The complete date of that office note is not present, but in view of its sequence and the dates shown in other reports, it is believed that note deals with a March 7, 1986 examination.

At page 34 of exhibit A is found a note which appears to refer to April 29, 1986. The note indicates that claimant had a CT scan performed on April 18, 1986 and that he had seen Dr. McCoy. The plan indicated is that claimant's condition is essentially unchanged, that claimant should seek other job opportunities and that he obtain schooling. The report from Dr. Yankey further indicates that claimant would be continued on restricted activities and would be obtaining his future care from Dr. McCoy (exhibit A, page 34).

Claimant had been seen by James K. Coddington, M.D., in May, 1983 at which time Dr. Coddington recommended that claimant follow a 20-pound lifting restriction and avoid repetitive shoveling due to recurrent back strains (exhibit A, page 22). Dr. Coddington declined to give claimant a disability rating, however (exhibit A, page 23).

X-rays taken on January 3, 1986 noted no change when compared with x-rays from 1981 (exhibit A, page 26). A CT scan taken April 18, 1986 was interpreted as being normal (exhibit A, page 27).

A report from Dr. McCoy dated September 3, 1986 relates claimant's history of back problems since 1968. In the report, Dr. McCoy states:

> I think his injuries in January exacerbated a pre-existing problem but feel that his underlying tolerance of heavy work is something that has been demonstrated several times in the past and that therefore his recent episode is an exacerbation of a continuing problem. The best advice I could give him was to change his type of work in order to avoid episodes of back difficulty in the future which might cause gradually increasing difficulty. (Exhibit 1-7; also exhibit A, pages 62 and 63).

In a report dated May 30, 1986, Dr. McCoy stated:

> I think Mr. Bartusek has had enough difficulty over the span of years to indicate that he should not be engaged in work that involves any bending or lifting, particularly repetitious bending or lifting. He should not be lifting objects over 20 lbs. and shouldn't be lifting that amount of weight repetitiously. I think he will be unable to go back to his previous work at LeHigh and would benefit from training by Vocational Rehabilitation. (Exhibit 4; also exhibit A, page 48).

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury which arose out of and in the course of 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 employer, through Mr. Fasing, did not dispute the January 2, 1986 injury even though it had been disputed in the pleadings and raised as an issue at the pre-hearing conference. Claimant's testimony is corroborated by the fact that he immediately sought medical care, apparently improved and returned to work. It is detemined that claimant was injured on January 2, 1986 as he described. From the record made, it is clear that claimant returned to work following the January 6, 1986 medical appointment. He is therefore entitled to receive one day of temporary total disability compensation under section 85.33 of The Code as a result of the January 2, 1986 injury. There is no evidence that the injury of January 2, 1986 was anything other than a minor exacerbation from which claimant recovered.

With regard to the alleged injury of January 22, 1986, Fasing indicated he did not believe that claimant could have been injured in the manner that claimant described. Having viewed the models 31B and 51B loaders, it appears that exhibits D and E are photos of the model 31B loader as Fasing testified. The view also showed, however, that the seat pivots at the point of the screw which is located at the top of the metal bracket and not at the bottom of the seat back cushion. This is consistent with claimant's testimony and inconsistent with that from Fasing. In view of what was observed, it is readily apparent that the seat could have moved in the manner which claimant described as producing his injury. Exhibit B indicates that, shortly after the date of claimant's January 22, 1986 alleged injury, the seat was noted to be defective by other operators of the machine. All the witnesses who testified at hearing are found to be honest and credible witnesses, but it is further found that Fasing and claimant were both either mistaken or misunderstood by the undersigned in some parts of their testimony concerning the seat in the 31B loader. It is therefore found that claimant was injured on January 22, 1986 while operating the model 31B

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loader as he described in his testimony.

Claimant's healing period commences on the date of injury and extends until one of the three events listed in Iowa Code section 85.34(1) occurs. The healing period ends at the time the physicians determine that further significant improvement from the injury is not anticipated. Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984); Armstrong Tire & Rubber Company v. Kubli, 312 N.W.2d 60, 65 (Iowa App. 1981). A review of the evidence indicates that, on April 29, 1986, Dr. Yankey found claimant's condition to be essentially unchanged and he encouraged claimant to engage in job retraining (exhibit A, page 34). At the same time, Dr. Yankey indicated that claimant had a five percent permanent partial impairment (exhibit A, page 44; exhibit 1-2, page 3). The record does not indicate that claimant made any further significant medical improvement subsequent to that date. April 29, 1986 is determined to be the end of claimant's healing period.

Claimant seeks compensation for permanent partial disability. It is apparent that claimant has had a long history of back problems. The evidence indicates that he has some type of lumbar insufficiency which makes him particularly susceptible to exacerbations. It is noted that the physical restrictions from Dr. Coddington issued in 1983 are not substantially different from the physical restrictions indicated by Dr. McCoy in 1986 (exhibit 4; exhibit A, pages 22 and 48). X-rays taken on January 3, 1986 noted no change from others taken in 1981 (exhibit A, page 26). There is no medical evidence in the record which establishes that claimant's physical condition has changed substantially as a result of the January 22, 1986 incident. In his notes of April 29, 1986 (exhibit 1-2, page 3; also exhibit A, page 44), Dr. Yankey speaks of claimant having a five percent permanent partial impairment of the whole man from his back that has been accumulative from the various episodes of low back pain that he has had through the years.

After all of the prior back injuries, claimant was released by the treating physicians to return to his employment, but a similar release did not occur following the January 22, 1986 injury. Injuries resulting from cumulative trauma can be compensable. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). Where the injury is to the body as a whole, it is not necessary for functional physical impairment to result if there has been a change in earning capacity as evidenced by a change in the circumstances of employment. Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980); McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980).

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, the mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 908, 76 N.W.2d 756,

760-761 (1956). If the claimant had a preexisting condition or disability that is aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812, 815 (1962).

For a cause to be proximate, it must be a substantial factor in producing the result, but it need not be the only cause. Blacksmith, Supra.

The claims in this case arise from identifiable acute traumas rather than from simple heavy exertion. Claimant had a preexisting lumbar insufficiency, but it did not prevent him from holding gainful employment. Now, after a series of exacerbations, claimant has been advised by his physicians to seek other employment. He had, however, been so advised prior to the most recent injury. Dr. Yankey, in his note of April 29, 1986, indicates that there is some accumulative effect from the various exacerbations that have occurred and that claimant does have some permanent partial impairment from the accumulative effect. Claimant did not have any physical restrictions from the physicians when he commenced employment at Lehigh, but he does currently. The assessment of the case as made by Dr. Yankey in his April 29, 1986 notes is accepted as correct. The restrictions indicated by Dr. McCoy in his September 12, 1986 report are likewise accepted as correct. Claimant does not, however, appear to be substantially more susceptible to exacerbations now than he was ten years ago. It is determined that claimant is entitled to receive some compensation for permanent partial disability based upon the accumulative effect of the various exacerbations that occurred while in the employment of Lehigh Portland Cement Company, particularly since it has required him to seek other employment.

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).

A defendant employer's refusal to give any sort of work to a

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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.

When all the applicable factors of industrial disability are considered, it is determined that Ronald L. Bartusek has a 25% permanent partial disability that was proximately caused by the accumulative effect of his various episodes of exacerbation of his back condition at Lehigh Portland Cement Company, with the last exacerbation and last day of work being January 22, 1986.

With regard to the claimed section 85.27 benefits, it is clear that Drs. Yankey and Ruen authorized claimant to seek care from Dr. McCoy and the employer is therefore responsible for the cost of that care. Limoges v. Meier Auto Salvage, I Iowa Industrial Commissioner Reports, 207 (1981). This includes the CT scan arranged by Dr. McCoy. Defendants are, of course, responsible for the cost of the treatment provided by Drs. Yankey and Ruen, the authorized physicians to whom claimant was directed. This totals $681.00.

FINDINGS OF FACT

1. During the month of January, 1986, Ronald L. Bartusek was a resident of the state of Iowa employed by Lehigh Portland Cement Company at Mason City, Iowa.

2. Ronald L. Bartusek injured his back on January 2, 1986 when he slipped on ice while checking fluid levels in a piece of equipment as he testified at hearing.

3. Ronald L. Bartusek injured his back on January 22, 1986 while operating a model 31B endloader and the back of the seat in the machine pivoted forward into his low back as he described at hearing.

4. At the time of both injuries, Bartusek was on the premises of his employer engaged in activities which were part of the duties of his employment with Lehigh Portland Cement Company.

5. Following the injury of January 2, 1986, claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of injury from January 2, 1986 until January 6, 1986 when he returned to work.

6. Following the injury of January 22, 1986, claimant was medically incapable of performing work in employment substantially

similar to that he performed at the time of injury from January 22, 1986 until April 29, 1986 when he had recuperated to the point that it was medically indicated that further significant improvement from the injury was not anticipated.

7. All the witnesses who testified at hearing were credible and honest in their testimony, but claimant was mistaken with regard to the model of the endloader from which the photographs, exhibits D and E, were taken and Fasing was mistaken with regard to the manner in which the seat back adjustment mechanism operates.

8. Claimant had a preexisting lumbar insufficiency problem which had been identified when he was in high school. He has had a number of exacerbations since that time. The condition causes claimant to become symptomatic when he engages in heavy physical exertion.

9. The injury of January 22, 1986 did not produce any discernable change in the condition of claimant's spine.

10. Claimant has a five percent permanent functional impairment of his spine as a result of the accumulative effect of the various episodes of exacerbations that he has experienced throughout the years, of which a substantial part occurred in his employment with Lehigh Portland Cement Company.

11. Prior to the injury of January 22, 1986, the physicians had routinely advised claimant to seek less strenous work, but they also released him to resume his employment with Lehigh Portland Cement Company. Following the January 22, 1986 injury, he has not been released to resume his employment with Lehigh.

12. Claimant's functional restrictions are that he should avoid lifting objects weighing more than 20 pounds and that he should avoid work which involves bending or lifting, particularly repetitive bending or lifting. Similar activity restrictions had been recommended prior to the occurrence of either of the 1986 injuries.

13. The expenses claimant incurred with St. Joseph Mercy Hospital, Dr. McCoy and Drs. Yankey and Ruen were reasonable and necessary expenses for treatment of the injury he sustained on January 22, 1986 and the charges made for that treatment, in the amount of $681.00, that were paid by claimant, are fair and reasonable charges for the services provided.

14. Claimant is of at least average intelligence, emotionally stable and reasonably motivated to be gainfully employed.

15. Claimant will require substantial rehabilitation or education in order to enable him to regain a level of earnings comparable to the level he experienced with Lehigh Portland

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Cement Company.

16. Claimant has sustained a 25% loss of earning capacity as a result of the cumulative effect of the injuries he sustained to his back while employed by the Lehigh Portland Cement Company.

CONCLUSIONS OF LAW

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

2. Claimant sustained injuries to his back on January 2, 1986 and January 22, 1986 which arose out of and in the course of his employment with Lehigh Portland Cement Company.

3. As a result of the injury of January 2, 1986, claimant is entitled to receive 1/7 week of compensation for temporary total disability under the provisions of Iowa Code section 85.33(1).

4. As a result of the injury of January 22, 1986, claimant is entitled to receive healing period compensation under the provisions of Iowa Code section 85.34(1) for a period of 14 weeks commencing January 22, 1986 and running through April 29, 1986. Claimant is also entitled to receive 125 weeks of compensation for permanent partial disability under the provisions of Iowa Code section 85.34(2)(u) payable commencing April 30, 1986.

5. Based upon the stipulation made by the parties, claimant's rate of compensation is $266.78 per week under Iowa Code section 85.36(6).

6. Claimant is entitled to recover $681.00 in section 85.27 benefits and defendants are responsible for all medical expenses claimant incurred in obtaining treatment for either of the injuries that occured in January, 1986.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant one-seventh (1/7) week of compensation for temporary total disability at the rate of two hundred sixty-six and 78/100 dollars ($266.78) per week commencing January 5, 1986.

IT IS FURTHER ORDERED that defendants pay claimant fourteen (14) weeks of compensation for healing period at the rate of two hundred sixty-six and 78/100 dollars ($266.78) per week payable commencing January 22, 1986.

IT IS FURTHER ORDERED that defendants pay claimant one hundred twenty-five (125) weeks of compensation for permanent partial disability at the rate of two hundred sixty-six and 78/100 dollars ($266.78) per week payable commencing April 30, 1986.

1106; 1108.50; 1401;
1402.20; 1402.30;
1402.40
Filed May 11, 1988
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JANE BEDET, Claimant,	:	
VS	:	File No. 789006
CHASE BAG COMPANY, Employer,	:	A R B I T R A T I O N D E C I S I O N
and	:	
AMERICAN MOTORISTS INS. Insurance Carrier, Defendants.	:	

1106; 1108.50; 1401; 1402.20; 1402.30; 1402.40

Claimant alleged that she sustained a rotator cuff tear by abruptly raising her arm to shield her face when someone coming out of the locker room pulled the door open just as claimant had leaned her shoulder against the door to enter the locker room. At first claimant did not describe an incident to the doctors. Then she gave differing versions. She could not recall if or when she actually reported a work-related injury to employer. Claimant did not endeavor to explain any of these many inconsistencies by her testimony at the hearing. The woman coming out of the locker room was unaware of any incident and claimant never reported an incident to her.

Held: Claimant did not sustain the burden of proof by a preponderance of the evidence that she sustained an injury which arose out of and in the course of employment.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
MAY 11 1988
IOWA INDUSTRIAL COMMISSIONER

JANE BEDET, Claimant,	:	File No. 789006
VS	:	
CHASE BAG COMPANY, Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
AMERICAN MOTORISTS INS. Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Jane Bedet, claimant, against Chase Bag Co., employer, and American Motorist Insurance Co., insurance carrier, defendants for benefits as a result of an alleged injury on February 8, 1985. A hearing was held in Storm Lake, Iowa on March 28, 1988 and the case was fully submitted at the close of the hearing. The record consists of the testimony of Jane Bedet (claimant), Donald Bedet (claimant's husband), Gladys Christians (employer's witness), Randy Freerks (plant manager), Chester R. Sprague (employer's supervisor) and Joint Exhibits one through nine. Both attorneys submitted excellent briefs.

STIPULATIONS

The parties stipulated to the following matters.

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

That the time off work for which claimant now seeks temporary disability benefits is from February 11, 1985 to March 26, 1985.

That the rate of compensation, in the event of an award, is $162.76 per week.

That the provider of medical services and supplies would testify that the fees charged for medical services and supplies are fair and reasonable and defendants are not offering contrary

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evidence.

That defendants claim no credit for benefits paid prior to hearing under either an employee nonoccupational group health plan or as workers' compensation benefits.

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 February 8, 1985 which arose out of and in the course of employment with employer.

Whether the alleged injury was the cause of either temporary or permanent disability.

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

Whether claimant is entitled to certain medical expenses.

SUMMARY OF THE EVIDENCE

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

Claimant was 29 years old at the time of the alleged injury. She has a high school education and one and one-half years of college. She is currently enrolled in college and has 12 more hours to go in order to obtain and AA degree in General Education. Past employments include sales clerk, soldering and packaging candy. Claimant started with employer in December of 1980. Her jobs have been (1) table stacker (2) inspector of the sewing line (3) inspector of the small bag department and (4) feeder of the bottom line. Claimant started as a feeder of the bottom line in November of 1984. Most of these jobs required movements with her hands and arms. Claimant testified that prior to this alleged injury that she had no trouble with her arms.

Claimant testified that her regular hours were from 7:30 a.m. until 4 p.m. On Friday, February 8, 1985, claimant went to work at the usual time at approximately 7:20 a.m. to 7:25 a.m. She stated that she was injured as she entered the locker room to put her coat and lunch in her locker. Claimant testified that she went to the door and pushed it open with her right shoulder. At that very same moment another employee was coming out of the locker room and pulled the door open from the other side. Claimant said this caused her to stumble forward into the locker room. As she stumbled forward, she quickly raised her right arm

to shield her face from striking the wall inside the door. The wall was only two and one-half feet or three feet inside the door. Claimant testified that she brought her arm up to approximately eye level instinctively and very quickly. She added that in the process she dropped her purse and water jug that she was carrying in her left hand. She picked up her property and went to work as usual. She had no trouble at that time.

When claimant got home from work that night she had a throbbing pain in her right arm. Her right arm was stiff and she could not move it. It bothered her all night. The following morning claimant went to see Robert O. Eiselt, D.O., because she felt that he would see her on Saturday and because she wanted to see him because she had seen him before. Claimant said that Dr. Eiselt told her that she injured the bursa in her arm and gave her a note not to work which reads as follows:

2-9-85

To Whom It Concern:

Mrs. Jane Bedet has injured her right bursa. The cartilage has been severely damaged from overuse of the right arm and shoulder.

She is being given physio-therapy and depro-medral for her Bursitis.

She may need, or will have to rest the shoulder for several weeks and be treated.

(Ehibit 3K)

Claimant testified that she gave this note to her supervisor, Chester Sprague, on Monday, February 11, 1985. Sprague gave her a different job reclaiming bags. She said that she did this for about two hours by using her left hand most of the time. Then Sprague told her to go home. She asked why she had to go home. She testified that she was told it was because she could not do that job. Claimant said that she asked why another injured employee was allowed to do it and she was not. She related that she was told that they do not discuss the situation with other employees.

Claimant testified that she went home. Next, she called the company and asked to see the company doctor and she was told to go see S. R. Helmers, M.D. Claimant saw Dr. Helmers on Tuesday, February 12, 1985. Dr. Helmers was both a company doctor and also a family physician of claimant. Dr. Helmers' office note for this date reads as follows:

2-12-85 Bedet, Jane Complains of right shoulder

> pain. Saw a D.O. physician in Spirit Lake and received an unknown injection in it on Saturday, two days ago. Has tenderness with motion. Has inability to abduct the arm. Xray was done of shoulder. IMP: Acute right shoulder inflammation, generalized.

(Ex. 3I)

The x-ray report from Dr. Helmers vist reads as follows:

> INTERPRETATION: 2-12-85 Bedet, Jane #5502
>
> Right shoulder: No fracture identified. No dislocation.

(Ex. 3J)

Dr. Helmers gave claimant a note taking her off work which reads as follows: "Due to acute shoulder inflammation, Jane Bedet may not currently use her right upper extremity for work. I expect this disability to last 1-2 weeks." (Ex. 3H).

Dr. Helmers later confirmed in a letter to defendants' attorney that he did not ask claimant for a detailed history of her complaint on the day that he saw her on February 12, 1985 (Ex. 3B).

Claimant testified that she gave this note to Jan Runia at work on February 12, 1985. Claimant added that she did not talk to anyone else but simply delivered the note and went home.

Claimant continued to see Dr. Eiselt. She saw him a total of 13 times on February 8, 9, 13, 16, 19, 21, 23, 25, and March 6, 13, 19 for office visits, ultrasound treatments and osteopathic manipulative therapy treatments (Ex. 3L).

Claimant testified that Dr. Eiselt then referred her to David L. Hoversten, M.D., an orthopedic surgeon in Sioux Falls, South Dakota. Dr. Hoversten's first office notes on February 26 read as follows:

> Jane is a 29 yr old who was well until 8 Feb 1985. She fell, striking her shoulder against the bathroom door. She continued to work. She had a lot of pain and saw the doctor the next day and since then has not worked because of severe pain in her right shoulder. She says her job requires a lot of lifting and work with that right shoulder and it just has not been recovered to the point she could work.

> The exam shows pain and restricted passive motion of that right shoulder. She has limited internal as well as external rotation. She does have strong abduction of the shoulder.
>
> IMPRESSION: Post-traumatic bursitis, rt shoulder.

(Ex. 3F)

Dr. Hoversten gave claimant a slip excussing her from work for three weeks on February 26, 1985 (Ex. 3G). He found her to be much better on March 26, 1985. At that time, she had a full range of motion and returned to work on that date (Ex. 3E and F; Ex. 1, page 7).

Dr. Eiselt wrote an undated letter to the claimant herself as follows:

> Jane Bedet, Ocheyedan, Iowa is a 29 yr. old who was in good health until Feb. 8, 1985. On that date she fell when she was working at the Chase Bag Company in Sibley, Iowa. In falling she struck her right shoulder against the bathroom door causing her to fall to the floor. Someone had opened the door from the other side causing Jane to fall into the locker room. Jane continued to work that day. When she called me Feb. 8th she was in a great deal of pain. I saw her in my office on Feb. 9th. She was unable to go to work because of the severe pain in her right shoulder. Her job required her to lift heavy boxes or bags.
>
> I treated Jane with ULS, microtherm, and diathermy in 9 subsequent visits I also injected 2cc depro medrol and 2cc xylocaine into the shoulder on 2 visits.
>
> I then referred her to the Orthopedic Associates in Sioux Falls, S. Dak. She was referred back to me for PT. I treated her 4-times before she returned to Sioux Falls.
>
> Although the shoulder is well enough to return to work, it may cause some trouble in her later years.

(Ex. 3L)

At the hearing claimant testified that she did not strike her shoulder on the door or on the wall. She stated that she did not fall to the floor. Nevertheless, both Dr. Eiselt and Dr. Hoversten reported that claimant had struck her shoulder against the door. Dr. Eiselt in addition, reported that claimant fell to

the floor. Claimant admitted that she gave a telephone statement to an insurance company representative, Bob Flaherty, on March 18, 1985. In that statement she stated that she did not hit anything with her shoulder and that she did not fall to the floor (Ex. 2, pp. 3 & 5).

Claimant made no explanation at the hearing for these various accounts of how the injury actually occurred. Nor did claimant try to reconcile these various different accounts of how the alleged injury occurred.

Claimant's counsel wrote to Dr. Hoversten on April 18, 1986. He quoted excerpts of claimant's recorded telephone statement with Flaherty in which claimant said that she did not fall to the floor, that she did not hit anything, and that she did not contact anything with her right shoulder. Dr. Hoversten was then asked in writing if that factual situation would or could have caused claimant's injury (Ex. 5). Dr. Hoversten replied to claimant's counsel as follows on April 28, 1986.

> I received your letter dated 18 April 1986 about Mrs. Jane Bedet. In it you ask if the above described history were true, could Mrs. Bedet have injured her shoulder without actually hitting anything.
>
> Yes, she could have. A sudden stress as she had where she would suddenly fling her arm up to protect her against hitting her face when she fell would cause a severe impingement of the shoulder bone against the arm bone and result in this type of bursitis. I think her history is entirely compatible with her resulting injury.

(Ex. 3D)

Dr. Hoversten also made a written report on May 27, 1987 after he saw claimant again approximately two years after the original alleged injury. He said that claimant complained of shoulder pain when she worked with her arm at shoulder level or in an elevated position. He added that occasionally it aches at night. His clinical examination disclosed some crepitation grating noise in the subacromial bursa. X-rays of the bony structures were relatively normal. He ordered an arthrogram which revealed a small tear of the rotator cuff near the insertion of the supraspinatous to the humerus. He said the tear was quite small and confined to scarring of the bursa. Surgery was not recommended at the time of his report but might be necessary in the next five to ten years. Dr. Hoversten felt that claimant had a 25 percent permanent functional impairment of the right upper extremity which he said converted to 15 percent of the body as a whole. Dr. Hoversten acknowledged that this rating

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was not clearly spelled out in the AMA Guides to the Evaluation of Permanent Impairment, second edition. Instead, he said it was based upon his general knowledge of shoulder function and the weakness and pain that a rotator cuff tendon can cause (Ex. 3C).

Dr. Hoversten also testified by deposition on January 14, 1988. He said that he saw claimant again on May 28, 1987. She still had a full range of motion and x-rays were still essentially negative; however, claimant had a crepitus sound and Dr. Hoversten was suspicious of why a bursitis would last two years. Therefore, he ordered an arthrogram which disclosed a small rotator cuff tear near the insertion of the supraspinatous to the humerus. Dr. Hoversten explained that bursitis and rotator cuff injury could give the patient the same pain (Ex. 1, pp. 8 & 9). Dr. Hoversten said after the arthrogram that he thought the earlier bursitis had disappeared and that claimant's current problem was the rotator cuff or a hole in the tendons in the top of her arm bone (Ex. 1, p. 11). The arthrogram report reads as follows:

> 5/28/87 RIGHT SHOULDER ARTHROGRAM: There is a very small amount of extravasation of contrast material outside of the upper lateral aspect of the shoulder joint thought to be due to a small rotator cuff tear.

(Ex. 1, deposition ex. 2)

Dr. Hoversten testified that a sudden active abduction of a healthy shoulder is unlikely to cause a rotator cuff tear. If claimant had a previous impingement through repeated rubbing of the ligament and the bony bridge then a sudden abduction could cause a rotator cuff tear. Any activity which causes the shoulder to rub a lot could weaken it (Ex. 1, pp. 15 & 16).

Dr. Hoversten said that a tear, or hole, in the tendon is permanent. It can widen and enlarge in later years. Much of his rating of 25 percent permanent functional impairment of the right upper extremity was based on his experience of what claimant might encounter in the future rather than the strict application of the AMA Guides (Ex. 1, pp. 18 & 19). Dr. Hoversten reiterated that it is very conceiveable that either striking or not striking the shoulder could result in bursitis of the shoulder (Ex. 1, p. 21).

Dr. Hoversten did verify that claimant told him on two occasions that she struck her shoulder on the bathroom door (Ex. 1, pp. 23 & 24). Dr. Hoversten conceded that claimant had never told him that she injured her arm simply by raising it quickly. This version came from claimant's attorney a year or so after the actual event (Ex. 1, pp. 23 & 24). Dr. Hoversten testified that he relied on claimant's account of how the injury occurred. He believed she was telling the truth (Ex. 1, pp. 23-28). He

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felt that whether claimant hit the door or did not hit the door, the basic event was the same. He stated that it was not markedly different. He said that either event could have caused her injury. A worn through tendon could be injured by a shoulder abduction of the arm (Ex. 1, pp. 28 & 29).

On cross-examination Dr. Hoversten granted that the actual permanent functional impairment, without taking into consideration the future possible trouble that claimant would have, would be only three to five percent rather than 25 percent of the right upper extremity because she has almost complete use of her arms except for the pain that she endures. He added that things may develop in the future which may get it up to 25 percent impairment. It depends on future events (Ex. 1, p. 33).

Claimant was examined by John L. Dougherty, M.D., an orthopedic surgeon, on October 2, 1987. He examined most of the exhibits in this case and personally examined the claimant. He found that both arms were essentially the same (Ex. 4, pp. 10-12). The crepitus was not significant and was about equal in both arms (Ex. 4, p. 12). He found a little calcification of the greater tuberosity on the right than was seen in earlier films. His diagnosis was pain in the right shoulder with a questionable mild tear in the rotator cuff (Ex. 4, pp. 13-15).

Dr. Dougherty said he would be surprised if the history claimant gave would cause a small tear in the rotator cuff, especially in a female age 30-31 (Ex. 4, pp. 15 & 16). He felt that any impairment would be minimal and not more than five percent of the right upper extremity. He added that using the AMA _Guides_, which are based mostly on range of motion, claimant would have practically zero impairment (Ex. 4, pp. 16 & 17). Dr. Doughtery also pointed out the inconsistency in Dr. Eiselt's reports where on one occasion he said that claimant damaged her bursa from overuse and in another report he says she struck her shoulder against the door and fell to the floor (Ex. 4, p. 19).

Dr. Dougherty did not think he could relate the history she gave (using her arm suddenly) to a rotator cuff tear (Ex. 4, p. 18). It would be more likely to come from using her arm or working with the arm. But in a 30 year old woman it would require some marked trauma. He did not think a tear would occur in a 30 year old woman from overuse (Ex. 4, p. 21). Dr. Dougherty disagreed with Dr. Hoversten's opinion that lifting her arm to shield her face could cause an injury like this (Ex. 4, p. 24). He said that claimant would not need any further treatment (Ex. 4, p. 30).

In the statement which claimant gave to Flaherty on March 18, 1985, and again in her testimony at the hearing she said that Gladys Christians was the person coming out of the locker room as she was going in. Gladys Christians testified that she has worked for employer for 15 years, seven months and 11 days.

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She was employed there on February 8, 1985, the date of this alleged injury. She has no recollection of the incident that claimant relates. The witness did not see claimant get injured. The witness did not see claimant stumble, fall or drop her purse or water jug. She did not see claimant hit the door or fall to the floor. Christians testified that she never talked to claimant about an injury of any kind. Christians testified that she herself has been injured twice. Once she injured her eye. Another time she injured her knee. She reported these incidents, she was believed, and the injuries were handled promptly and properly by employer.

Claimant said that she did return to work on April 17, 1985. She has continued to work there ever since. She testified that she has been able to perform the job of feeding the bottom line even though she does have problems in doing it. Her shoulder gets stiff and sore off and on if she over uses it or if the weather is damp and cold. It is worse in the spring and the fall. She takes aspirin and Tylenol for pain relief about once a week up to three times a day. Working with her hand or arm elevated overhead causes the most weakness and pain. Claimant testified that Dr. Hoversten said she could have surgery but he recommended against it at this time. Claimant testified that Dr. Dougherty's examination was rough and made her arm real sore afterwards. Claimant denied any other incident before or after this incident that might have injured her shoulder.

Claimant testified that she has been attending college since November of 1984. She hopes to obtain an Associate of Arts degree in General Education.

Claimant admitted that the bags which she transfers from the table to the conveyer are light. They only weigh one pound more or less. Claimant testified that she was earning about $5.96 per hour at the time of the alleged injury and that she was earning $6.30 per hour at the time of the hearing.

Donald Bedet, claimant's husband, testified that he is a ten year employee of employer. He sees his wife for lunch at work. She complains that her shoulder is sore and she gets tired after four to five hours of work. She takes aspirin for the pain approximately two or three times a week. He stated that claimant can no longer bowl since this injury occurred. He contended that employer had a poor reporting procedure for work related injuries. They write it up according to their own version irrespective of what the employee tells them. Furthermore, an employee who gets hurt also gets chewed out.

Claimant testified that initially Dr. Eiselt did not ask how this injury occurred. She told him on one of her later visits like the second or third visit. She could not recall whether Dr. Helmers asked her how it occurred or not or whether he took a

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history. The report of Dr. Hoversten said that claimant fell striking her shoulder on the bathroom door and also that she did a lot of heavy lifting and work with her right shoulder (Ex. 3F).

Claimant said that she brought in the note from Dr. Eiselt on Monday, February 11, 1985, and said that she had a problem with her shoulder. She cannot recall if she told the employer why her shoulder hurt.

Claimant said that she first saw Randy Freerks on Friday, February 15, 1985. He had not been there until then. She did not believe that she told him how it happened. She said he became angry with her. He told her that she was not a good employee. He told her that she did not have a workers' compensation claim. She said that Freerks did not tell her why she did not have a workers' compensation claim. He just said that she did not. Claimant felt that Freerks was unnecessarily abusive to her.

Claimant could not recall when she first told employer that she had a work injury. It might have been on Monday, February 11, 1985 or Tuesday, February 12, 1985 when she asked if she needed a note to get back to work. She thought possibly she had reported it by February 15, 1985 when Freerks chewed her out. Claimant could not recall why she asked Jan Runia if she could see a company doctor on February 12, 1985.

Randy Freerks testified that he is plant manager. He is a 17 year employee of employer. He was plant superintendant on February 8, 1985 the date of the alleged injury. He was in charge of production and personnel at that time. He learned of the situation sometime during the week of February 11, 1985. He could not recall if claimant said it was work related on February 15, 1985 or not. Freerks said that he first learned it was claimed as a work related injury on February 27, 1985 by reading the undated medical report of Dr. Eiselt. A first report of injury was then filed the following day on February 28, 1985. He testified that prior to February 28, 1985 employer had no knowledge of a work-related injury.

Freerks said that he called Dr. Eiselt and confirmed that claimant saw him on Saturday, February 9, 1985. Freerks called Dr. Helmers and confirmed that claimant did not tell him that work caused her injury. Freerks stated that all injuries are to be reported promptly no matter how slight. They are to be reported to the supervisor. He explained that the employee who got chewed out for reporting an injury was an individual who in his opinion was accident prone. Freerks denied that he yelled at, hollered at or chewed out claimant. Freerks stated that claimant had two prior claims and she reported them promptly and they were handled properly by the employer.

Chester A. Sprague testified that he is a 29 year employee of employer. He was claimant's supervisor on February 8, 1985. He said he first learned that claimant was alleging a work-related injury just two weeks before the hearing when he was asked to testify. He testified that claimant never reported a work-related injury to him. He contended that he keeps good notes and documents everything. He checked his records and found no report of a work injury. He said the employees know how to report work-related injuries. They know they need a slip from the doctor to return to work after being off work. He said that if claimant said she brought her note from the doctor on February 11, 1985 then he would accept that she did so. If she had stated that she had a work-related injury at that time he would have inquired and found out how she was injured. He stated that he got two slips from claimant taking her off work. Neither slip said it was a work-related injury. If claimant had reported a work-related injury he would have made a record of it and reported it to his boss immediately.

Claimant asserts medical expenses as follows:

1. Dr. Robert O. Eiselt - Statements Total:	$475.00
2. Orthopaedic Associates - Statements Total:	243.00
3. Medical X-Ray Center - Statements Total:	129.50
TOTAL MEDICAL EXPENSES SOUGHT BY CLAIMANT:	$847.50

Claimant seeks costs as follows:

1. May Reporting Services, Inc.	$117.15
2. Dr. Hoversten, M.D. Deposition	408.30
TOTAL	$525.45

Defendants seek the following costs:

Defendants' Costs:

1. Cassel, Inc. - $125.00 - Court Reporter costs for Dougherty deposition dated 10/14/87.

2. Dr. John J. Dougherty - $450.00 - charges for deposition given 10/14/87.

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).

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Claimant has the burden of proving by a preponderance of the evidence that she received an injury on February 8, 1985 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Claimant did not sustain the burden of proof by a preponderance of the evidence that she sustained an injury which arose out of and in the course of employment with employer.

When claimant saw Dr. Eiselt on Saturday, February 9, 1985 the day after the alleged injury, she did not tell him how the alleged injury occurred. Her recollection is that she did not describe the alleged injury until the second or third time that she saw him.

On Monday, February 11, 1985, when claimant brought the note from Eiselt taking her off work, she cannot recall if she reported a work-related injury to employer or not.

Sprague said that claimant delivered two notes to him but never did report a work-related injury to him. Sprague said that claimant knew that injuries were to be reported promptly. If she had reported an injury, then he would have told his superior and treated this as a work-related claim.

Claimant testified that she asked Jan Runia if she could see the company doctor on Tuesday, February 12, 1985 but claimant could not recall if she told Runia it was for a work-related injury or not.

On Tuesday, February 12, 1985 claimant saw Dr. Helmers, the company physician. Claimant testified that she could not recall if she told Dr. Helmers that she had a work-related claim or not. Dr. Helmers said that he did not take a history and he made no notes of how her complaints originated (Ex. 3B). He also gave claimant a note to be off work which she took to employer.

Claimant said that she could not recall if she reported a work-related injury or not when she delivered this note to employer.

Sprague confirmed that he did receive two notes taking claimant off work but on neither occasion did claimant inform him that she sustained a work-related injury. Sprague said that neither slip said that the time off was due to a work connected injury.

Claimant saw Freerks on February 15, 1985 but she could not recall if she reported a work-related injury to him or not at that time. She could not recall telling Freerks how the injury occurred.

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Claimant could not recall when she told employer that she had a work-related injury. She speculated that it might have been February 15, 1985.

Freerks said that he first learned claimant was claiming a work-related injury when he read a medical report from Dr. Eiselt. A first report of injury was filed the following day on Feburary 28, 1985. Dr. Eiselt's first report dated February 9, 1985 stated that claimant injured her right bursa and the cartilage had been severly damaged from overuse of the right arm and shoulder (Ex. 3K). Then Dr. Eiselt wrote an undated letter to claimant that the etiology of this alleged injury was that she fell and struck her shoulder against the bathroom door causing her to fall to the floor (Ex. 3L).

Claimant saw Dr. Hoversten on February 26, 1985. He reported and testified that claimant told him on two occasions that she fell striking her right shoulder against the bathroom door (Ex. 1, pp. 23 & 24). She did not mention falling to the floor (Ex. 3F).

Claimant told Flaherty in a recorded telephone interview on March 18, 1985 that she did not fall to the floor. She did not hit anything with her right shoulder and that her shoulder did not come in contact with anything (Ex. 2, pp. 3&5).

At the hearing on March 28, 1988 claimant related that she did not strike that locker room door with her shoulder and that she did not hit the wall inside the door and she did not fall to the floor. She testified that she simply raised her right arm instinctively and abrubtly to protect her face from stumbling into the locker room wall. She testified that she felt no pain or any other trouble at that time. Claimant also said that she dropped her purse and water jug that she was carrying in her left hand.

Gladys Christian, the person that claimant said opened the door from the inside of the locker room and came out at the time that claimant was going in, testified that she has no recollection of this incident. Claimant never reported it or discussed it with her. Christian did not see claimant stumble or pick up her purse or water jug off the floor.

After reviewing all of the nonmedical evidence it cannot be determined that claimant ever personally reported this injury to employer or any employer representatives based upon the testimony of all the live witnesses including claimant herself. Claimant knew the injury reporting procedures and had successfully reported two other claims earlier.

Dr. Eiselt first reported an overuse injury. Then he changed that to a fall striking the locker room door with her shoulder which caused her to fall to the floor.

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Dr. Helmers had no history and claimant could not recall if she gave him one.

Dr. Hoversten said that either event could have caused claimant's shoulder rotator cuff tear. However, he did say that in order for a quick abduction motion to cause such a tear would require a previous impingement through repeated rubbing of the ligament and the bony bridge. The evidence in this case does not disclose any prior impingement in the claimant's shoulder. On the contrary, claimant testified that she had no prior shoulder problems.

Dr. Hoversten also stated that a rotator cuff tear from a quick motion of the arm could happen and that it was very conceivable. Dr. Hoversten did not testify that it did happen. He did not testify that it probably did happen. He only stated that it was possible or conceivable. There was no medical evidence that it actually did happen or probably did happen this way.

In addition, Dr. Dougherty testified that the history that claimant gave could not cause a tear in the rotator cuff of a woman age 30 to 31 (Ex. 4, pp. 15, 16 & 18). He said that a rotator cuff tear in a person this age would require some marked trauma (Ex. 4, p. 21). He found that the crepitus was not significant and it was almost the same in both arms (Ex. 4, pp. 10-13).

Dr. Dougherty disagreed with Dr. Hoversten. Dr. Dougherty said that lifting the arm to shield her face would not cause a rotator cuff tear, bursitis or adhesive capsulitis (Ex. 4, pp. 23 & 24). Dr. Dougherty testified that claimant should not need any future treatment (Ex. 4, p. 30).

Based on the foregoing evidence claimant failed to sustain the burden of proof by a preponderance of the evidence that she sustained an injury which arose out of and in the course of her employment with employer on February 8, 1985. Claimant failed to promptly report a work-related injury at the time it occurred. She could not recall when, if or how and to whom she reported this alleged injury even though she had numerous opportunities to report it.

Dr. Eiselt first reported the alleged injury as an overuse injury. Then he reported in a letter to claimant herself, bearing no date, that the injury occurred by striking her shoulder against the door which caused her to fall to the floor. Claimant then gave a statement that she did not strike the door, fall to the floor or contact anything. She testified that she only raised her right arm suddenly in a protective move. The only possible witness to this incident, Christian, had no recollection of any of the events described by claimant. Claimant never reported to Christian what had happened.

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Claimant did not sustain the burden of proof by a preponderance of the evidence that she sustained an injury which arose out of and in the course of her employment on February 8, 1985.

Since claimant has not proven an injury arising out of and in the course of employment, then, it is not necessary to discuss causal connection to disability or entitlement to weekly compensation or medical benefits.

Claimant's costs are not allowed. Rather costs are assessed against claimant since claimant is the nonprevailing party. Division of Industrial Services Rule 343-4.33. The expert witness fee for Dr. Doughterty is limited to $150.00 by Iowa Code section 622.72.

FINDINGS OF FACT

THEREFORE, based upon the evidence presented the following findings of fact are made.

That claimant did not promptly and properly report a work-related injury.

That claimant gave several differing versions of how the alleged injury occurred.

That claimant made no attempt in her testimony at the hearing to explain or reconcile these various versions of how the accident occurred.

CONCLUSIONS OF LAW

WHEREFORE, based upon the evidence presented and the foregoing principles of law the following conclusion of law is made.

That claimant did not sustain the burden of proof by a preponderance of the evidence that she sustained an injury which arose out of and in the course of her employment with employer on February 8, 1985.

ORDER

THEREFORE, IT IS ORDERED:

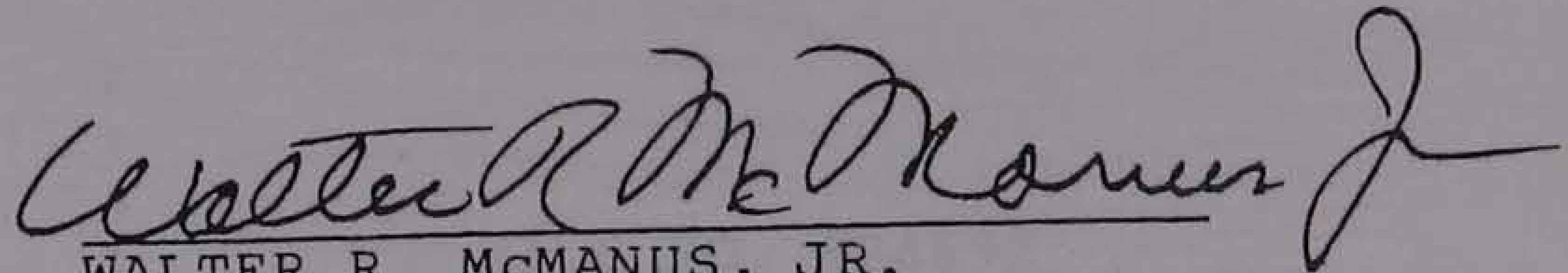
That claimant take nothing from this proceeding.

That the costs of this action are assessed against claimant pursuant to Division of Industrial Services Rule 343-4.33 including the costs presented by defendants at the hearing in the amount of two hundred seventy-five dollars ($275.00).

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 11th day of May, 1988.



WALTER R. McMANUS, JR.
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Filed April 21, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBRA A. (NYREEN) BELL, Claimant, vs. JOHN MORRELL & CO., Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	FILE NO. 824692 A R B I T R A T I O N D E C I S I O N

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Claimant failed to establish causal connection of her carpal tunnel problems to her work at defendants' packing plant after only three days on the job. Claimant lacked credibility in denying the extent of her prior problems which seem to stem from a work injury while working for a previous employer several years before the alleged work injury in this case. All benefits were denied.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEBRA A. (NYREEN) BELL, Claimant,	:	FILE NO. 824692
vs.	:	A R B I T R A T I O N
JOHN MORRELL & CO., Employer,	:	D E C I S I O N
and	:	FILED
NATIONAL UNION FIRE INSURANCE COMPANY,	:	APR 21 1988
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Debra A. Bell formerly known as Debra A. Nyreen, claimant, against John Morrell & Company, employer (hereinafter referred to as Morrell), and National Union Fire Insurance Company, insurance carrier, for workers' compensation benefits as a result of an alleged injury on April 3, 1986. On February 11, 1988, 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: Sandra Jordan and Perry McCaskill. The exhibits received into the evidence at the hearing are listed in the prehearing report.

ISSUES

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

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

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

III. The extent of weekly disability benefits to which claimant is entitled; and,

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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 specially referred to in this summary, all of the evidence received at the hearing was reviewed and considered in arriving at this decision. As will be the case in any attempted summarization, conclusions about what the evidence offered may show are inevitable. Such conclusions, if any, in the following summary should be considered as preliminary findings of fact.

Claimant contains that she received an injury in the form of carpal tunnel syndrome to her right wrist during her third day of employment at defendants' packing plant in April of 1986. Claimant testified that prior to her alleged injury she was moved to five different jobs in the plant, including such jobs as grading bellies, wrapping butt, trimming fat, trimming knuckles and boning picnic hams. It was while performing the boning of hams job that she claims to have injured her wrist. Claimant was terminated by defendants after approximately one week on the job. Claimant testified that she was not told any reason for this termination. Claimant's supervisor testified that her termination was due to the fact that she could not keep up with the work and that she was only a probationary employee.

Claimant testified at hearing that on April 3, 1986, while boning hams she tossed a boned ham onto an overhead conveyor belt and in the process, the sleeve of her smock became caught in a conveyor belt mechanism which tightened the sleeve around her right wrist squeezing her hand between the conveyor belt and a support bar. While pulling to free her right hand from the conveyor mechanism, she felt pain in her right arm and when she finally was able to remove the hand from the mechanism, it began to swell around the right wrist area according to claimant. Sandra Jordan, a fellow employee, testified that she knows claimant personally and worked with claimant in 1985 at a previous packing plant called "Pakfab." Jordan testified that although she didn't see the entire sequence of events as she was working in a different area, she was able to observe claimant from her work station and that she saw claimant's hand "go up" and claimant "taking ahold of her other arm." Claimant testified that she reported her wrist injury to her foreman immediately and that he told her that she was only a probationary employee. She claims that the foreman told her that if she reported the injury she would be fired. The foreman denied such statements in his testimony and stated that he first became aware of claimant's claim of injury only after being contacted by defense counsel in the fall of 1987.

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Claimant said that after the April 3, 1986 incident referred to above, the wrist swelling and shooting pains into the elbow continued and she had never before experienced such problems. She stated that her problems then became worse with a loss of strength and an inability to hold objects. Claimant did not immediately seek medical treatment for this condition. Claimant was examined on May 20, 1986 by John J. Dougherty, M.D., upon referral for examination by the Nebraska State Department of Rehabilitation. According to Dr. Dougherty, claimant reported to him that she had carpal tunnel surgery in 1982 for prior right hand wrist problems and that "she didn't do well after surgery." Dr. Dougherty reports that claimant told him that before she began working for Morrell she had worked for a previous packing plant called Pakfab and that she expressed problems with this job in that she "couldn't do any lifting." Claimant told Dr. Dougherty that she was fired at Morrell because she couldn't do the job. She also told him that "they required lifting, but because of the previous problem she did not see any doctor." There was no mention of any injury in April, 1986, to Dr. Dougherty in Dr. Dougherty's history. Claimant explained in her deposition that Dr. Dougherty's reports are inaccurate.

Claimant then sought treatment from C. Robert Adams, M.D., a neurologist, on July 18, 1986 for persistent pain and weakness of the right arm. She told Dr. Adams that she did reasonably well until April of 1986, when she was throwing a piece of meat on a table and "hit her hand on the table." She stated that she has numbness, tingling and weakness of the right hand since that time. Dr. Adams felt that claimant may have carpal tunnel syndrome. In August, 1986, Dr. Adams performed an EMG test which proved to be normal. According to the medical records in the latter part of 1986 and the early part of 1987, claimant received pain medication for her wrist problems from a previous physician, Jay Walston, M.D. In June, 1987, claimant returned to Dr. Adams who noted an increase in claimant's symptoms in the right wrist and a second EMG test confirmed a worsening of a carpal tunnel problem. Dr. Adams now recommends surgery to alleviate some of claimant's right wrist problems.

Initially in her deposition taken by defendants in March, 1987, claimant denied any prior wrist or arm problems. However, she admitted upon further questioning about her prior surgery in 1982 that she suffered numbness and tingling of her fingers in 1982 while working for another meat packing plant, IBP. These problems led to surgery on her right wrist in March of 1982. She, however, stated in her deposition that she had no problems after July or August of 1982, contrary to what she told Dr. Dougherty in May of 1986. According to claimant's medical records, claimant was treated in the latter part of 1981 and during 1982 for DeQuervains syndrome of the right wrist which eventually led to release surgery of the tendon sheath over the

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thumb tendon. Claimant still had a visible scar from this surgery which was performed by a Dr. Mumford (first name unknown). According to Dr. Mumford's records, after claimant was released from his care in 1982, claimant called him in June of 1984, complaining that her right wrist "continues to shake since the surgery" and that she "can't hold job."

Claimant also denied any prior wrist problems, surgery or receipt of workers' compensation benefits for the 1982 injury in her application for employment with Morrell in March of 1986. Claimant responded negatively to inquiries in written and oral form as to prior injuries or surgeries to the examining physician Milton Grossman, M.D. Claimant stated in her deposition that she was advised to answer in that manner by Dr. Grossman because he told her that her prior injury and surgery was not the business of Morrell. Dr. Grossman in correspondence to defendants' attorneys, after being informed of claimant's statements in her deposition, denies giving any such advice to claimant. He states that the patients fill out the inquiries before he even talks to them.

Claimant testified that she left IBP in 1982 during a strike and moved to the State of Washington. In the State of Washington, claimant states that she performed meat packing and bakery work. She said that she had no problems with this work. In 1985, she returned to Iowa to care for her mother and worked for three or four months at Pakfab performing meat cutting work. Claimant stated in her deposition that she left Pakfab because they reduced her weekly number of hours. She however had no explanation why she would leave a full time permanent job at Pakfab to except only a one month temporary job to replace striking workers at a bakery called Interbake. In her employment application to Morrell she said that she lelt Pakfab due to a layoff. According to Pakfab's records she was terminated due to absenteeism. Claimant said in the deposition that she only missed a few days due to colds and flu.

In his reports, Dr. Adams felt that there is a causal connection between claimant's current carpal tunnel syndrome problems and the events of April 3 related to him by claimant at Morrell. Dr. Dougherty, when confronted with the records in this case, states as follows:

> She told me she got it caught in a belt. That is what she told Dr. Adams. However, the first time she saw Dr. Adams, she apparently told him she got hit in the hand and this is what she told Dr. Walston. Also, she had an EMG by Dr. Adams on 8-8-86 which was normal. At that time, when Dr. Adams saw her first in July of 1986, she said she hit her hand on a table. On reviewing Dr. Mumford's old notes and Dr. Butler's notes, you can see very readily that

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> she has had trouble before. She really didn't have a carpal tunnel release by Dr. Mumford, rather she had a release of DeQuervains disease, which is totally different. Probably she never really had any flexor tendonitis. It is rather interesting also that she said she didn't do well after the surgery for her carpal tunnel, which really wasn't a carpal tunnel at all. Then at another time, she said she had no trouble after the surgery. According to your note, apparently after Dr. Adams saw her in November of 1987, he indicates that the nerve conduction studies and EMG revealed worsening medial neuropathy at the carpal tunnel or carpal tunnel syndrome on the right, from when the tests were done on 8-8-86. They called the 8-8-86 EMG normal, I believe, so if there is anything, it would be worse.
>
> . . .
>
> On attempting to evaluate this whole thing, I would concur that there is an awful lot of inconsistencies. She may have a carpal tunnel syndrome now, but I don't think this is related to the incident of 4/3/86....

APPLICABLE LAW AND ANALYSIS

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

In the case sub judice, claimant has not demonstrated by the greater weight of credible evidence that she suffered a work injury to her right wrist at Morrell in April of 1986. Dr. Adams' views are not convincing. The doctor did not sufficiently explain his causal connection views when the records clearly show a worsening of claimant's condition after she had left John Morrell in April of 1986. Also, Dr. Adams is relying upon the histories provided to him by claimant and claimant is not found to be credible. The inconsistencies in claimant's various stories and repeated attempts to deceive in her deposition cannot be explained away by an understandable exaggeration as is

observed in many claimants who appear before this agency. Also, the clear views of Dr. Dougherty are the most convincing. If claimant does have carpal tunnel syndrome, it is not due to anything that may have happened to her at Morrell. The testimony of claimant's acquaintance, Jordan, was not of much help to claimant. First, it appeared quite impausible that a busy packinghouse worker would, without reason, simply look up at a very convenient time observe the work injury. However, assuming that Jordan is credible and she is correct in her observations she saw very little of the events and only observed the swelling which could have began at any time. Her testimony that claimant had no problems at Pakfab appear quite inconsistent with prior past medical records.

FINDINGS OF FACT

1. Claimant could not be found to be a credible witness.

2. In 1982, while working for a meat packing firm, claimant injured her right wrist consisting of numbness, tingling and loss of strength in her right hand and was diagnosed as suffering from a DeQuervains release syndrome and a release surgery was performed. Claimant suffered shooting pains into her arm both before and after this surgery.

3. Claimant has only worked intermittently since 1982 and continues to suffer problems in her right wrist consisting of pain, numbness, tingling and loss of strength. She also continues to have right arm shooting pain.

It could not be found that any of the claimant's current right wrist problems were due to her work at Morrell.

CONCLUSIONS OF LAW

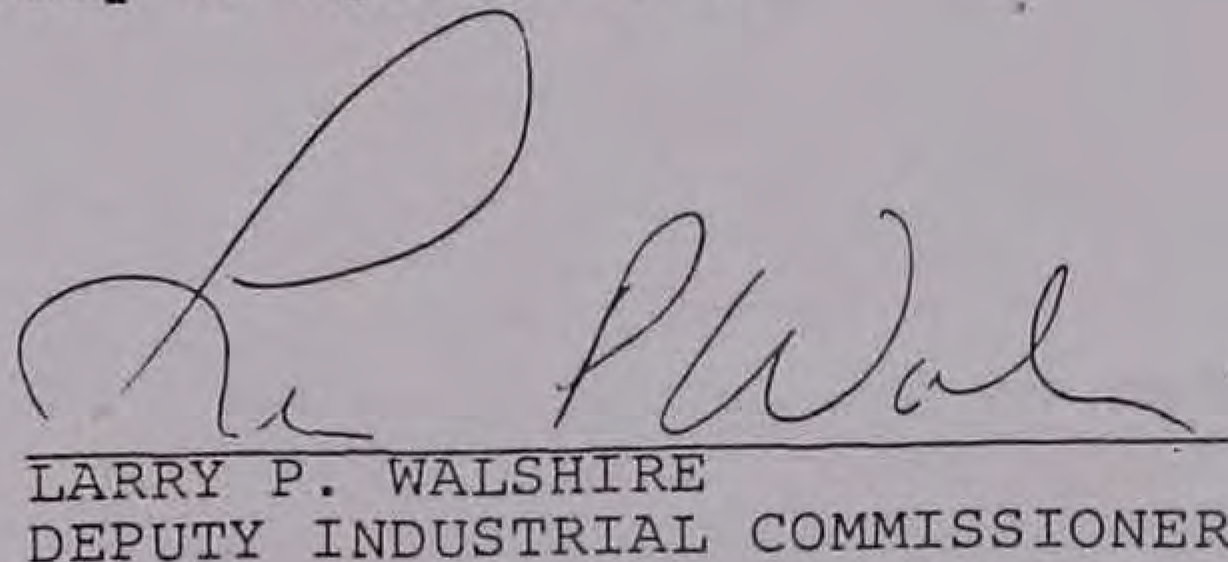
Claimant has not established entitlement to workers' compensation benefits.

ORDER

1. Claimant shall take nothing from these proceedings.

2. Due to her lack of credibility, claimant shall pay the cost of this action pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 21 day of April, 1988.



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FILED

JUN 6 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

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ESTOLIA BERNAL, Claimant,	
vs.	
FIRESTONE TIRE & RUBBER COMPANY, Employer,	File No. 784318
and	A R B I T R A T I O N
CIGNA INSURANCE COMPANY, Insurance Carrier, Defendants.	D E C I S I O N

INTRODUCTION

This is a proceeding in arbitration brought by Estolia Bernal against Firestone Tire & Rubber Company, her employer, and Cigna, the employer's insurance carrier.

The case was heard and fully submitted on October 26, 1987 at Des Moines, Iowa. The record in this proceeding consists of testimony from Sherry Lundquist, Estolia Bernal, Lino G. Bernal and Roger Marquardt. The record also contains claimant's exhibits 1, 2, 4 and 7 and defendants' exhibit 3.

ISSUES

It was stipulated that claimant sustained an injury which arose out of and in the course of her employment and that she had been paid all healing period compensation which was due at the stipulated rate of compensation of $306.06 per week. Claimant seeks additional compensation for permanent partial disability and alleges that her disability extends into the body as a whole and should be evaluated industrially. Defendants contend that claimant's permanent disability is a scheduled member disability of the arm for which claimant has been fully compensated by payment of 50 weeks of permanent partial disability compensation benefits.

SUMMARY OF EVIDENCE

The following is a summary of evidence presented in this case. Only the evidence most pertinent to this decision is discussed, but all of the evidence received at the hearing was considered in arriving at this decision. Conclusions about what the evidence showed are inevitable with any summarization. The conclusions in the following summary should be considered to be preliminary findings of fact.

Estolia Bernal is a 54-year-old, married lady who has been employed by Firestone Tire & Rubber Company since 1974. She related that her formal education, which she had obtained in Mexico, was equivalent to the sixth grade. Prior to working at Firestone, she had been employed as a housekeeper, as a sewing machine operator and in a department store retail warehouse.

According to claimant's testimony, she has held a number of different positions at Firestone, including that of tire builder, janitor and bead builder.

On January 2, 1985, she was working in the reroll liner department training another employee when her left arm was caught in the machine and pulled into it up to her shoulder. Sherry Lundquist, a co-worker, released claimant from the machine and requested medical service.

Claimant testified that most of the pain she felt was in her back and shoulder and that it felt like her arm had been pulled out. She stated that she had pain in her wrist and in her entire arm.

Claimant was taken to Methodist Hospital where x-rays revealed a fracture of the left distal ulna. Claimant was treated by Stephen G. Taylor, M.D., an orthopaedic surgeon. Claimant was treated by cast immobilization and was released to return to work on July 9, 1985. During the course of treatment, claimant complained of pain in her left shoulder which Dr. Taylor attributed to the period of immobilization and the weight of the cast. Dr. Taylor felt that claimant had not sustained any permanent partial impairment as a result of the injury. Claimant was released to return to work without any restrictions on July 9, 1985 (exhibit 1--Dr. Taylor report dated July 30, 1985).

Claimant worked with a great deal of discomfort in her shoulder and was allowed to seek treatment from Marvin H. Dubansky, M.D., an orthopaedic surgeon, who first saw her on October 2, 1985. Diagnostic tests revealed a tear of her left rotator cuff which was surgically repaired by Dr. Dubansky on January 17, 1986 (exhibit 1--Dr. Dubansky, pages 1-4; exhibit 1--Mercy Hospital, report of operation, page 9).

After a period of recuperation, claimant was authorized to return to employment at Firestone in a light-duty status. There were some problems with the job to which she was initially assigned. Eventually, she obtained her present job assignment of driving a forklift truck. Claimant testified that, if a tire falls off a skid on the forklift, she has to replace it on the skid. She stated that she operates the steering and the raising and lowering of the forklift with her right arm and that she operates the forward or backward directional lever with her left arm. Claimant currently earns $9.82 per hour, the same amount as she would be earning in the reroll department if she had remained there without being injured. Claimant testified that she plans to remain employed and working at Firestone until age 60 when she can obtain her pension.

Claimant complained that she continues to experience pain and discomfort in her entire left arm and shoulder. She stated that the fingers in her left hand become numb and cold. She stated that the pain is usually mild, but that, at times, it becomes sharp. She described the pain as starting at the base of her neck. Claimant's husband massages her and she takes aspirin to help relieve the pain. Claimant demonstrated restricted motion of her left arm and complained of restriction and weakness when attempting to lift with the left arm. Claimant's complaints regarding her pain and use of her left arm were corroborated by her husband, Lino G. Bernal.

Roger Marquardt, a qualified vocational consultant, evaluated claimant's vocational capabilities. Marquardt classified claimant as being limited to unskilled or semi-skilled light or sedentary work. Marquardt indicated that, if claimant were forced out of her job at Firestone, she would likely sustain a very substantial loss in earnings unless she were able to obtain another forklift operator job at another industrial plant. He estimated that, if she were forced out at Firestone and could not obtain a similar forklift operator job, her earnings would be less than 50% of her current pay level.

Dr. Dubansky evaluated claimant's permanent physical impairment. He found her to have an 8% impairment of the left upper extremity as a result of loss of range of motion and an additional 12% permanent impairment of that extremity as a result of pain and weakness (exhibit 7, pages 23, 24 and 27). He found the impairment to be equivalent to a 12% impairment of the body as a whole (exhibit 7, pages 17 and 18). Dr. Dubansky indicated that the surgery had improved claimant's condition, but that her residual complaints were consistent with the type of injury that she had sustained and that full strength is never regained following a rotator cuff tear injury (exhibit 7, pages 7-13).

Dr. Dubansky opined that claimant's rotator cuff tear was sustained in the accident that occurred at Firestone on January

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2, 1985 (exhibit 7, page 14). Dr. Dubansky found that claimant had no permanent impairment as a result of the fractured ulna (exhibit 7, page 19). He declined to relate claimant's neck complaints to the January 2, 1985 injury (exhibit 7, page 17).

APPLICABLE LAW AND ANALYSIS

It was stipulated that claimant sustained an injury which arose out of and in the course of her employment as she alleged. The evidence from Drs. Taylor and Dubansky agreed that the fracture of the left ulna had not produced any permanent impairment and their determination is accepted as correct.

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 2, 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).

Dr. Dubansky attributes the rotator cuff tear to the injury that occurred on January 2, 1985. His assessment is accepted as correct. Claimant's neck complaints are not shown to have resulted from the January 2, 1985 accident.

The primary issue in this case is whether claimant's disability should be compensated as a scheduled member disability of the arm under the provisions of Iowa Code section 85.34(2)(m) as defendants contend or whether it should be compensated industrially as an injury to the body as a whole under the provisions of Iowa Code section 85.34(2)(u) as claimant contends. For an injury which results from trauma to a scheduled member to be compensated industrially, claimant must prove (1) that there is physical injury or derangement that is anatomically located at a site other than the scheduled member; (2) that the physical injury or derangement produces functional impairment and disability; and, (3) that the physical injury, derangement, functional impairment and disability were proximately caused by the trauma to the scheduled member. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986); Kellogg v. Shute & Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964); Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

It has been found that the tear of claimant's left rotator cuff occurred in the trauma that occurred on January 2, 1985. The rotator cuff is defined in Schmidt's Attorneys' Dictionary of Medicine as:

> A structure consisting of muscle and tendon fibers blending with and thus strengthening the upper half of the capsule of the shoulder joint. The shoulder joint is formed by the head of the humerus (bone of upper arm) and the glenoid cavity of the scapula (shoulder blade). The tendons which contribute to the formation of the cuff are those of the supraspinatus, infraspinatus, teres minor, and subscapularis muscles. The capsule is a tough sac surrounding and strengthening a joint. The rotator cuff is also known as the musculotendinous cuff.

Dorland's and Stedman's medical dictionaries generally refer to the arm as a part of the upper extremity that runs from the shoulder to the hand. Those references also define the shoulder as the junction of the clavicle and the scapula or the point where the arm joins the trunk. Agency expertise, pursuant to Iowa Code section 17A.14(5), is relied upon to acknowledge that the medical profession normally includes the scapula and the entire shoulder girdle within its definition of the upper extremity. While the arm is part of the upper extremity, the upper extremity is not limited to the arm. If the arm is considered to end at the head of the humerus, the operative report from Dr. Dubansky and Mercy Hospital clearly shows that claimant's physical injury and derangement includes the anatomical parts of the body which are located on the trunk side of the shoulder joint and which include part of the trunk side of the shoulder joint.

The operative report and other evidence in the record fail to show any significant anatomical change in claimant's arm which is responsible for her weakness and restricted motion. It is the defect in the trunk side of the shoulder joint that is primarily responsible for producing the pain, weakness and general loss of use of claimant's left arm. It is therefore concluded that claimant's injury is an injury to the body as a whole to be compensated industrially under the provisions of Iowa Code section 85.34(2)(u).

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).

Post-injury earnings create a presumption of earning capacity commensurate with them, but it is rebutable by evidence showing them to be an unreliable basis for estimating earning capacity. Michael v. Harrison County, 34th Biennial Report, 218 (1979). Post-injury earnings are not synonymous with earning capacity. 2 Larson Workmen's Compensation, sections 57.21 and 57.31. Industrial disability or loss of earning capacity in a workers' compensation case is quite similar to impairment of earning capacity, an element of damages in a tort case. Impairment of physical capacity creates an inference of lessened earning capacity. The basic element to be determined, however, is the reduction in value of the general earning capacity of the person rather than the loss of wages or earnings in a specific occupation. Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa App. 1977) 100 A.L.R.3d 143; 2 Larson Workmen's Compensation, sections 57.21 and 57.31.

Claimant has been able to continue with her employment at Firestone and has not suffered the loss of earnings which Marquardt quite accurately indicated would likely occur if she were to lose her employment at Firestone. It must be noted that she would likely suffer a comparable loss of earnings if she were to lose her employment at Firestone, even if the injury which is the subject of this litigation had not occurred. Claimant's continued employment at Firestone does not appear to be in jeopardy. It does not appear likely that she will be forced to take the actual reduction in wages which would confront her if her Firestone employment ended. The only thing which is certain about the future, however, is its inherent uncertainty. It cannot be concluded that claimant has suffered no industrial disability in view of the fact that she does have a substantial loss of use of her left arm. It would detract from her employability in many positions which would otherwise be open to her. When all the applicable factors of industrial disability are considered, it is found and concluded that Estolia Bernal has sustained a 15% permanent partial disability as a result of the injuries she sustained on January 2, 1985 at the Firestone plant.

FINDINGS OF FACT

1. Estolia Bernal is a resident of the state of Iowa who was injured on January 2, 1985 at the Firestone plant in Des Moines, Iowa.

2. The accident in which she was injured produced a fracture of her distal left ulna and a tear of the rotator cuff in her left shoulder.

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3. The fracture of the left ulna healed without any residual permanent functional impairment or disability.

4. The rotator cuff tear was surgically repaired, but has left claimant with residual loss of range of motion, weakness and discomfort in her left upper extremity.

5. The residual impairment and disability is manifested primarily in claimant's ability to use her left arm, but the physiological injury which is responsible for the loss of her ability to use her left arm is located on the trunk side of the shoulder joint and its associated structures. There is little, if any, actual impairment, disability or physical derangement of the structures which comprise claimant's left arm.

6. The assessment and disability ratings as made in this case by Dr. Dubansky are accepted as correct.

7. The term "upper extremity" includes the arm, but is not limited to the arm, and also includes the scapula and shoulder girdle.

8. Claimant has a 15% loss of earning capacity as a result of the injuries of January 2, 1985.

CONCLUSIONS OF LAW

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

2. The rotator cuff tear which claimant sustained constitutes an injury to the body as a whole and proximately caused permanent disability which affects the body as a whole.

3. Claimant is entitled to receive compensation under the provisions of Iowa Code section 85.34(2)(u).

4. When claimant's permanent disability is evaluated industrially, it is determined to be a 15% permanent partial disability.

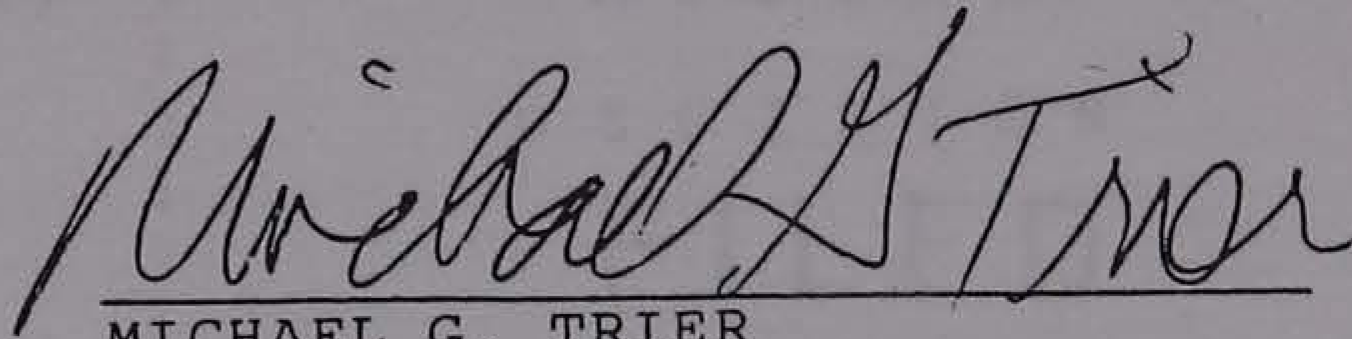
ORDER

IT IS THEREFORE ORDERED that defendants pay claimant seventy-five (75) weeks of compensation for permanent partial disability at the stipulated rate of three hundred six and 06/100 dollars ($306.06) per week payable commencing April 10, 1986. Defendants are granted credit for the fifty (50) weeks of permanent partial disability compensation previously paid. The remaining twenty-five (25) weeks are past due and owing and shall be paid to claimant in a lump sum together with interest pursuant to Iowa Code section 85.30.

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

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

Signed and filed this 6th day of June, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GARY L. BLANKENSHIP,	:	
Claimant,	:	File No. 798884
vs.	:	
SMITHWAY MOTOR EXPRESS, INC.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	FILED
LIBERTY MUTUAL INSURANCE CO.,	:	MAY 20 1988
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying temporary total disability and medical benefits.

The record on appeal consists of the transcript of the arbitration proceeding; claimant's exhibits A through J, N, O and P; and defendants' exhibits 1 and 2. Both parties filed briefs on appeal.

ISSUE

Claimant states the following issue on appeal:

Whether a causal relationship exists between claimant's injury of July 5, 1985 and his medical treatment and his time lost from work.

REVIEW OF THE EVIDENCE

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

Briefly stated, 49 year old claimant was employed as an over-the-road truck driver for approximately three to four months in 1985. Claimant testified that on July 5, 1985, he fell off the back of a trailer in Oshkosh, Wisconsin, landing first on his feet and going into a crouch position, and then falling onto his buttocks. Claimant described a belt buckle he

was wearing at the time which had a sharp protrusion that pinched his stomach and produced pain when he fell, but did not puncture the skin. Claimant testified that a painful red spot appeared where the belt buckle injured his stomach, and that the spot grew larger over the next few days.

Claimant's wife testified that claimant called her from Wisconsin and told her of the injury and that he was experiencing pain and would be returning home early to see a doctor, and that when he returned home claimant had a large bulge on his stomach next to his navel.

Claimant obtained emergency treatment, then returned to Fort Dodge, Iowa, where he sought medical attention from Kyle R. Ver Steeg, M.D., and was admitted to the hospital for emergency surgery on July 9, 1985. Although a strangulated hernia was first suspected, during the surgery on July 9, 1985, claimant's condition was found to be an abdominal wall abscess. Claimant was off work from July 9, 1985 until September 10, 1985.

Claimant testified that one month prior to the July 5, 1985 injury, he had experienced abdominal pain while tightening a chain on the truck. Claimant was previously found to have Crohn's disease during a surgical repair of a umbilical hernia in 1984. Dr. Ver Steeg testified that Crohn's disease involved inflammation of the intestine, resulting in blockage and bleeding.

On July 25, 1985, Dr. Ver Steeg stated that claimant's fall on July 5, 1985 resulted in "an abscess which was forced through the abdominal wall at the time of the fall. The abscess originated from a perforation of the small intestine involved with Crohn's disease." (Claimant's Exhibit H) On August 9, 1985, Dr. Ver Steeg opined:

> Regarding your letter dated August 7th, 1985 on Gary Blankenship. The exacerbation of Mr. Blankenship's Crohn's disease happened precisely at the time of the fall from the truck at work. His bowel was involved with Crohn's disease which certainly is not work related. However, since the timing of the exacerbation is so historically precise, it is conceivable the fall could have caused the abnormal bowel in its fixed position to perforate and form the abscess, and/or cause an abscess already present to perforate thru the abdominal wall forming what appeared to be, but actually was not, a strangulated hernia.
>
> I am unable to give an opinion with 100% certainty since I saw the problem retrospectively. But the exacerbation or complication of his Crohn's disease occured [sic] at the precise time of the fall at

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work, according to the patient.

(Cl. Ex. J)

In his deposition, Dr. Ver Steeg testified:

Q. And can you tell us, Doctor, what you later found out were his problems?

A. I found -- upon making a surgical incision over the mass in the right lower abdomen, I found a large collection of pus, which I had entered with the knife and then drained. This pus had come through the old incision that had been performed about a year before. And it was actually an extension of what appeared to be an intra-abdominal -- inside the abdomen -- abscess, which was caused by perforation of the lower small intestine from this Crohn's disease.

....

Q. In your opinion, Doctor, is it possible that Mr. Blankenship, suffering from Crohn's disease as he was, falling from the truck and with his intestine in the condition that it is and falling on his belt buckle as he related to you could have caused this perforation to the intestinal wall?

A. It's conceivable that a fall with either a belt buckle pushing in to there or a tremendous increase in abdominal pressure caused by a muscular contraction of the abdomen in reaction to the fall could have increased the pressure around that bad area of bowel enough to cause it to perforate.

....

Q. ....In other words, there wouldn't be an effort by the body to heal itself through the formation of this abscess if there weren't already a perforation present?

A. Correct.

Q. Okay. So we've got to have the perforation there first. And is that perforation that you described a part of the Crohn's disease that you've earlier described--

A. Yes.

Q. --the presence of that perforation in Mr. Blankenship's intestine?

A. The perforation-- Crohn's disease, the definition of Crohn's disease does not include perforation, but the perforation was present in bowel that was involved by Crohn's disease.

Q. Okay. Is there any way of determining how long that perforation had been prsent?

A. Not for sure, not for sure. It would not have been present for months.

Q. Okay.

A. It's very difficult to pin it down exactly when the perforation would definitely have occurred.

Q. Okay. As well as the fact as how far progressed the abscess was when you opened him up? It's probably not -- it probably differs from person to person; would it not?

A. Yes, probably.

Q. Okay. So I mean by looking at the degree or extent of the abscess that you found, it wouldn't be possible to backdate and say this is when it started, the abscess started reacting to the perforation that was present in the intestine?

A. Certainly I couldn't tell by looking at it. I would have to take the history into consideration as well.

Q. Okay. Now you were asked the question -- or you answered the question as to whether this belt buckle incident had anything to do with it, and you used the term conceivable, that it could have put enough pressure in the abdominal area to in essence force this perforation to take place.

Now my question to you is: Can you state that to a reasonable degree of medical certainty?

A. The -- a perforation in Crohn's disease does not require the a high intra-abdominal pressure or something hitting it in order to perforate. It can perforate without any trauma being inflicted. Historically, his symptoms started right at the time he fell from the truck so I can be reasonably

sure that something -- some event occurred at that time.

Q. Okay.

A. Whether it was -- whether it was an abscess that had already formed inside the abdominal cavity that perforated out through the abdominal wall or whether it actually -- the fall actually caused the perforation itself, I cannot say with any medical certainty.

Q. Okay. So essentially, we could be looking at, if you're satisfied that by history something occurred at that time of this fall, we still don't know what it is that occurred at that time? It could have been one of several things; right?

A. Yes, yes. One of two or three things, I think.

Q. It could have been the actual perforation taking place, it could have been the -- it could have been the abscess going through the old incision?

A. Yes.

Q. What else could it have been?

A. Well, I think those two things are the most likely possibilities, but which one of those it was, I can't be certain.

....

Q. But that -- but that process of going through the abdominal wall is a process that had already started-- Had it not? --as far as the presence of the abscess? The abscess was there? There had to be an abscess there in order to go-- If we assume something happened when he fell and the abscess was already present, but it was forced through the abdominal wall at that injury with this incident, then I guess my question is: Wouldn't he have needed surgery anyway?

A. If we're assuming that that's the event that occurred.

Q. Yes.

A. And there was already an abscess inside the abdominal cavity, he would have required surgery

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anyway.

(Ex. P, pp. 6-7; 9-10; 14-17; 18)

Defendants stipulated that the medical treatment claimant received was reasonable and necessary. The parties stipulated that there was no permanent impairment, that claimant received an injury on July 5, 1985 that arose out of and the course of his employment, and that claimant's rate of compensation was $311.35 per week.

APPLICABLE LAW

Section 85.27, Code of Iowa, states in part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 5, 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

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disability that is aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812, 815 (1962).

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

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber, Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler, 252 Iowa 613, 106 N.W.2d 591. 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).

Expert testimony that a condition could be caused by a given injury coupled with additional, non-expert testimony that claimant was not afflicted with the same condition prior to the injury was sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911 (1966).

ANALYSIS

The sole issue on appeal is whether the medical treatment claimant underwent and the time he missed from work are causally connected to his fall on July 5, 1985.

Claimant's fall on July 5, 1985 was not a serious incident. The incident on that date did not cause claimant's Crohn's disease, or the abscess, as the evidence shows both preexisted the incident. At most, the fall on July 5, 1985 merely brought to light the need for surgery to remove the abscess. Dr. Ver Steeg testified that this surgery would have needed to be performed even absent the fall.

Dr. Ver Steeg was equivocal in his statement as to causation. He stated that the perforation could occur without any trauma. He listed two possible likely causes for claimant's condition. A probability is required. A possibility is insufficient. Claimant also experienced pain in his abdomen a month before his

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fall on July 5, 1985. Claimant has failed to carry his burden to causally connect his fall on July 5, 1985 to the disability he presently suffers.

In addition, even if a causal connection were to be assumed, claimant has failed to show that the fall of July 5, 1985 materially aggravated his condition. The medical testimony indicates that the abscess existed prior to the fall on July 5, 1985, and that surgery would have been required to correct the abscess even absent the fall. At most, the fall on July 5, 1985 only slightly aggravated claimant's preexisting condition. More than a slight aggravation is required under the law.

Thus, claimant is not entitled to medical benefits related to treatment of the abscess. Claimant is not entitled to temporary total disability benefits for the time off work following the surgery to treat the abscess. Claimant is entitled to $39.00 for emergency treatment in Oshkosh, Wisconsin, and $80.00 for the initial visit with Dr. Ver Steeg prior to the discovery that claimant's condition was not a work-related hernia, but rather a nonwork-related abscess stemming from his Crohn's disease.

FINDINGS OF FACT

1. Claimant was employed by defendant employer as an over-the-road truck driver.

2. Claimant suffered an injury that arose out of and in the course of his employment with defendant employer on July 5, 1985.

3. Claimant underwent surgery on July 9, 1985 and was found to have a perforation of the abdominal wall.

4. Prior to July 5, 1985, claimant was diagnosed as having Crohn's disease.

5. Claimant's perforation of the abdominal wall was caused by an abscess that existed prior to July 5, 1985.

6. Claimant's medical bills except $39.00 to Oshkosh Emergency Services and an initial charge by Dr. Ver Steeg in the amount of $80.00 were for surgery and treatment of the abdominal wall perforation and abscess.

7. Claimant did not suffer any permanent disability as a result of his fall on July 5, 1985.

8. Claimant was off work from July 9, 1985 until September 10, 1985 as a result of his surgery on July 9, 1985.

9. Claimant's rate of compensation was $311.35 per week.

CONCLUSIONS OF LAW

Claimant has failed to prove that his medical bills for diagnosis, surgery, and treatment of his abdominal wall perforation and intestinal abscess and his time off work are causally related to his injury of July 5, 1985.

Defendants are responsible for claimant's medical bills for $39.00 to Oshkosh Emergency Services and $80.00 to Dr. Ver Steeg for diagnosis of claimant's condition.

WHEREFORE, the decision of the deputy is affirmed.

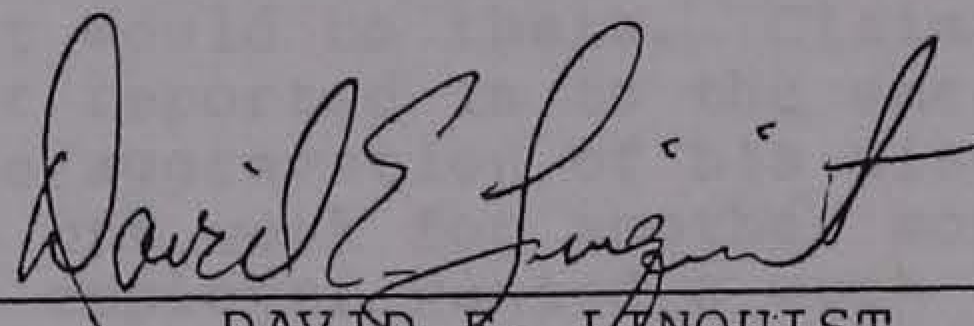
ORDER

THEREFORE, it is ordered:

That defendants are to pay claimant's medical bills in the amount of thirty-nine dollars ($39.00) to Oshkosh Emergency Services and eighty dollars ($80.00) to Dr. Ver Steeg for the diagnosis of claimant's condition.

That claimant is to pay the costs of the appeal including the transcription of the hearing procedure.

Signed and filed this 20th day of May, 1988.



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1402.20; 1802; 1803;
2905;
Filed April 6, 1988
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN L. BOATMAN,	:	
Claimant,	:	File No. 772267
vs.	:	R E V I E W -
GRIFFIN WHEEL CO.,	:	R E O P E N I N G
Employer, Self-insured, Defendant.	:	D E C I S I O N

1402.20; 1802; 1803; 2905

At the first hearing employer testified that a job for claimant within his restrictions was waiting for him if he reported for work the following morning at 7:00 a.m. Claimant or his counsel stated that claimant would be there. Claimant did not show up at work, but rather reported in to the emergency room at 4:00 a.m. with a recurrence/aggravation of his disc condition. His physician took him off work for another month due to the recurrence. After that employer wanted a work capacity evaluation before allowing claimant to return to work. Clamant did not show up for either work capacity evaluation scheduled by employer. Claimant was a full-time student during the period after the first hearing which he said consumed 18 hours a day.

Held: Claimant was allowed additional healing period benefits for the one month after the hearing when the physician took him off work. Claimant submitted no evidence of a change of physical or medical condition by way of impairment, diagnosis, prognosis, restrictions or limitations. On the contrary, one physician lowered his impairment rating. Employer's requirement of a work capacity evaluation after claimant's recurrence of his disc condition did not constitute a nonmedical or economic change of condition but was considered reasonable because of the recurrence and a number of other reasons.

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FILED

APR 6 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN L. BOATMAN,	:	
Claimant,	:	File No. 772267
VS.	:	R E V I E W -
GRIFFIN WHEEL CO.,	:	R E O P E N I N G
Employer, Self-insured, Defendant.	:	D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by Steven L. Boatman, claimant, against Griffin Wheel Co., employer and self-insured defendant for benefits as a result of an injury that occurred on August 13, 1984. A prior hearing was held on August 19, 1986 and a decision was filed on October 31, 1986 awarding claimant 41 and 2/7 weeks of healing period benefits and 125 weeks of permanent partial disability benefits. This hearing was held on August 3, 1987 at Burlington, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Steven L. Boatman (claimant), Jerome Neyens (assistant plant controller), Betty Leeper (timekeeper), Jane Watson (receptionist) and Rose Harmon (personnel and safety coordinator), joint exhibits one through six and joint exhibit seven, and defendant's exhibits B and C.

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 claimant sustained an injury on August 13, 1984 which arose out of and in the course of employment with employer.

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 of benefits, is $276.38 per week.

That defendant claims no credit for previous payment of

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benefits under an employee nonoccupational group health plan and claims no credit for workers' compensation 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 the injury is the cause of any temporary disability based upon a change of condition after the prior hearing on August 19, 1986.

Whether the injury is the cause of any additional permanent disability based upon a change of condition after the prior hearing on August 19, 1986.

Whether claimant is entitled to additional compensation for temporary disability benefits.

Whether claimant is entitled to additional compensation for permanent disability benefits.

Whether claimant is entitled to certain medical mileage was resolved by the parties at the conclusion of the hearing and therefore requires no determination at this time.

RULING ON MOTION

Defendant objected to the fact that claimant alleged a change of medical condition in his original notice and petition and then presented evidence of both medical and nonmedical (economic) change of condition at the hearing. Claimant then moved to amend the petition to conform to the proof. A ruling on that motion was deferred until this decision.

It is now determined that it is not necessary to amend the petition to conform to the proof. The petition in this case is sufficient on it's face. Even though the petition states at item number ten, "Change in circumstances. Medical condition being worse.", it also states at item 16 that one of the disputed issues is "Industrial disability" and also specifies "Extent of disability" in item 16. It is now determined that item 16 fairly put defendant on notice that both medical and nonmedical change of condition were possible issues in this case. Defendant did not claim surprise. On the contrary, it is apparent from the presentation of the evidence by both parties that both of them were fully cognizant of the issues and were well prepared to present evidence on both issues. Therefore, it is not necessary to amend the petition to conform to the proof because

the petition itself fully apprised defendant of the issues in this case. Defendant's objection is overruled.

Futhermore, workers' compensation practice does not require the parties to observe technical forms of pleading. The petition need only state the claim in general terms and formal rules of procedure need not be observed. Alm v. Morris Barrick Cattle Co., 240 Iowa 1174, 1177, 38 N.W.2d 161, 163 (1949); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Cross v. Hermansen Bros., 235 Iowa 739, 16 N.W.2d 616 (1944). From the evidence presented at the hearing it is evident that employer was generally informed of the basic facts upon which the employee relied and had an opportunity to prepare and defend. Hoenig v. Mason & Hanger, Inc., 162 N.W.2d 188, 192 (Iowa 1968).

SUMMARY OF THE EVIDENCE

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

Official notice is taken of the decision of Deputy Industrial Commissioner Steven E. Ort on October 31, 1986 [Iowa Administrative Procedure Act 17A.14(4)]. After the injury on August 13, 1984 and at the time of the first hearing on August 19, 1986, claimant was enrolled in college at Southeastern Community College. He only needed five months to complete his chosen course of study and receive an Associate of Arts degree (Decision page 2, paragraph 5). Employer provided claimant a full-time job within his restrictions after the injury and the surgery. Claimant worked for a few days in August of 1985 and again for a few days in September of 1985. Claimant testified that it was his understanding that this job was only temporary; however, employer testified that it was available as long as claimant wanted it. Deputy Ort concluded that employer did make full-time employment available to claimant within his restrictions, but claimant did not avail himself of the opportunity and that claimant may well have opted to make a career change (Dec. p. 13, par. 2). Deputy Ort further found that claimant had pursued a successful academic career since the injury (Dec. p. 14, par 7).

Claimant's injury on August 13, 1984 was a herniated disc at L-5, S-1 that was surgically corrected at the Univeristy of Iowa Hospitals and Clinics. After the surgery certain restrictions were imposed on claimant which are typical following a laminectomy (Dec. p. 8, par 1 & 3). These restrictions have never been changed.

At the first hearing, Rose Harmon, personnel and safety coordinator, testified that claimant would be put to work within his restrictions if he showed up at work on 7 a.m. the morning following the hearing (Dec. p. 7, par 3). It was indicated by

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way of argument at this hearing that either claimant or his attorney indicated that he would be there.

Claimant did not appear at employer's place of business at 7 a.m. the following morning. To the contrary, claimant testified that the prior hearing lasted several hours from approximately 1 p.m. to 7:30 p.m. Claimant testified that he had problems standing and sitting at that hearing. He said that he suffered a recurrence of the back pain caused by the injury of August 13, 1984. He related that he went to the Keokuk Area Hospital at 4 a.m. on August 20, 1987, the morning after the first hearing. The medical doctor there reported that he saw claimant in the emergency room for a ruptured lumbar disc aggravation. The doctor directed that claimant needed to be off work that day, August 20, 1987, and perhaps longer. He said claimant should check with his own doctor regarding when to return to work. The name of this doctor appears to be Dr. Barrows (Joint exhibit 1).

Claimant then saw his authorized treating physician, D. Mackenzie, M.D., an orthopedic surgeon, the following day on August 21, 1987. Dr. Mackenzie diagnosed possible recurrent L-5 disc herniation on the right and indicated claimant would be totally disabled from August 21, 1986 through September 21, 1986 (Jt. ex. 2).

This flare-up may explain why the petition in this case was signed on August 28, 1986, only nine days after the first hearing, by claimant's counsel and was marked "Change in circumstances. Medical condition being worse." (original notice and petition)

At this time Dr. Mackenzie moved to Texas. He referred claimant and his other patients to Dr. Weinstein (full name unknown) at the University of Iowa, Hospitals and Clinics. Dr. Weinstein said on October 2, 1986 that claimant presents with occasional back pain but that he did not have much right buttock or right leg pain. His physical examination was essentially normal. A CT scan showed the old laminectomy at L-5, S-1. No obvious pathologies were seen. Dr. Weinstein estimated claimant's impairment to be approximately eight to ten percent. He concluded by saying "I recommend the patient continue his treatment through Vocational Rehabilitiation learning a new occupation which he seems to be happy with." (Jt. ex. 3).

Claimant testified that when Dr. Weinstein learned that he had a workers' compensation claim, Dr. Weinstein told him that there was nothing he could do for him.

Claimant testified that after he saw Dr. Weinstein on October 2, 1986, that he went to the plant three times and asked to see Rose. Defendant's counsel pointed out that in his deposition taken on May 21, 1987 that claimant testified that he only went to the plant twice (Ex. C, p. 82, line 21). Claimant

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continued to testify that he never did get to see Rose because it was either her one-half day off or because she had gone to lunch or because she was in a meeting. Claimant testified at this hearing that the reason he wanted to see Rose was to get the name of an authorized physician and to make arrangements to return to work. Claimant said that in August and November of 1986 that he either called or went to the plant two times a week. He estimated that he tried to make contact a total of approximately eight times in October and another eight times in November. Claimant said that most of the time he called on the telephone from a neighbor's house. He stated that each time he left his neighbor's telephone number but that he never received a call back from Rose. Defendant's counsel pointed out that in his deposition claimant said that he only made two or three telephone calls to Rose (Ex. C, p. 64, line 18). Claimant testified that these telephone calls were on his neighbor's telephone bill. He stated that he has a copy of this bill in his possesion but he forgot to bring it with him to the hearing. Claimant continued that when he heard nothing from employer by December of 1986 that his lawyer wrote two letters to employer which claimant signed. A letter requesting the name of a physician was dated December 10, 1986 and reads as follows:

> I am hereby requesting that I be sent to a doctor because of present complaints from my workman's compensation injury of August 13, 1984, and since the company doctor, Dr. Mackenzie has now moved to Texas and is no longer available. Please advise me who I should see. It is imminent that I see a doctor right away.

(Ex. 4)

A letter requesting to return to work was dated December 19, 1986 and it reads as follows: "I have attempted to contact you on numerous occasions before including leaving messages. I have not received any response. Please advise when and what time I can report to work." (Ex. 5). As a result of his letter for the name of a physician employer arranged an appointment for claimant with O. Gerald Orth, M.D., a neurosurgeon, at Columbia, Missouri which is 220 miles away. Claimant testified that he was unable to keep the first appointment on January 19, 1987 due to weather conditions but that he did see Dr. Orth on February 4, 1987.

Dr. Orth reported that claimant stated that he had low back pain. A CT scan of May of 1986 demonstrated either a retained disc fragment or secondary scarring from his earlier L-5, S-1 disc excision. Dr. Orth said there was no evidence of nerve root compression. He did not believe further surgery would relieve claimant's current subjective complaints. Dr. Orth concluded as follows:

> At the present time he is capable of returning to full time employment with the exception that he will again experience muscle spasm and pain in the low back. If he wishes to tolerate this discomfort, then he is capable of returning to his previous job. If he is not capable of tolerating his discomfort, then he will not be able to tolerate work related situation. I do not believe returning to work would necessarily increase his chances for additional disc problems.
>
> The patient is in terrible physical conditioning as a result of non-use of his back and leg muscles over the past year. He would certainly benefit from an exercise program which would put stress on weekly improvement. Whether he would benefit from antidepressant medication or Tens Unit is questionable.

(Ex. 7)

Employer arranged a work capacity evaluation for claimant at the University of Iowa on April 21, 1987. Claimant testified that he missed this evaluation because he had chicken pox.

A second examination was scheduled for June 16, 1987 but claimant also failed to keep this appointment.

Claimant testified that he last worked for employer in September of 1985. Claimant testified that it was his understanding that if he did not return to work to this special job that employer had created for him that he was in effect laidoff. He said that this is why he never returned to work after September of 1985. He testified that he then became a full-time student 18 hours a day. He also testified that he was a full-time student from January of 1987 to May of 1987. He attended classes which lasted three or four hours per day during that period of time. He also testified that if employer had offered him a job during that period of time he would have gone back to work.

Claimant testified that after the flare-up of his back on August 20, 1986 his back returned to about the same condition that it was in at the time of the first hearing.

Claimant testified that he could not find a job near home. It was brought out however, that he did not make any job applications, but simply asked several employers if they were hiring. Claimant averred that the only job that he could find was in Temple, Texas for the Kirby Company at $1,200.00 per month knocking on doors and setting up sales interviews for vacuum sweeper salesmen. Claimant said that at Griffin Wheel he earned $17,000.00 to $18,000.00 per year, plus shift differential, overtime pay and employee

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benefits of medical insurance, sick pay, pension benefits and vacation time. He stated that his present job has none of these additional benefits. Claimant stated that he hopes to find better employment later which is more suited to his Associate of Arts degree in pyschology. He was hoping to find a job working with the mentally retarded.

Jerome Neyens, assistant plant controller, testified that after the hearing on August 19, 1986 he only saw claimant at the plant on one occasion and that was during the lunch hour on November 6, 1986. It was an unusual encounter and therefore he made a note of it. Claimant was wearing a plaid shirt and was wearing a device like a corset, girdle or brace outside of his shirt. Claimant said he needed a doctor, or wanted to see a doctor or wanted the name of a doctor. Neyens testified that Rose Harmon, who normally handles these matters, was out of the office that day. Claimant did not appear to be in pain and when Neyens determined it was not an emergency situation he told claimant to call Rose Harmon on the following day. Neyens further testified that claimant did not ask for work on that occasion. The witness stated that he left a note for Harmon to the effect that claimant was in and inquired about a doctor.

Betty Leeper testified that she is the timekeeper for employer. Since the last hearing on August 19, 1986 she only saw claimant at the plant on one occasion and that was during the lunch hour. Claimant was wearing a plaid shirt with a corset over his outer clothing. He said he was in need of medical attention and wanted to know who he should go see. Rose was not there so she had him talk to Neyens. Claimant did not ask for work on that occasion. Leeper further testified that she did not receive any subsequent telephone calls from claimant.

Jane Watson testified that she is the receptionist at the plant. Visitors see her first and she also answers the incoming telephone calls, except during the lunch hour. She testified that after the hearing on August 19, 1986 claimant never appeared in person at the plant to ask for Rose Harmon or anyone else. She further testified that she did not receive any telephone calls from claimant to the best of her knowledge. She testified that claimant has never come to the plant to ask for a doctor or a job, either one, to the best of her knowledge.

Rose Harmon testified that she has been the coordinator of personnel and safety since June of 1981. She attended and testified at the first hearing on August 19, 1986. She said that claimant appeared to be in severe pain at the previous hearing. He shuffled when he walked. He alternated standing up and sitting down. He held his back with his hand and made grunt noises. She stated that he wore his back brace on the outside of his clothing at the hearing. Harmon acknowledged that she did testify that a job was available for claimant the following

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morning after the hearing. Claimant did not appear to go to work. Instead she received a slip from a doctor that he was unable to work because of a disc problem. Dr. Mackenzie then wrote that claimant was to be off work until September 21, 1986 because of a disc problem. Next she received a bill from Dr. Weinstein, who was not an authorized physician at that time. She requested claimant to come to the plant on October 15, 1986 or October 16, 1986 to sign a medical release so she could pay Dr. Weinstein. This is the first and only time she saw claimant at the plant after the hearing on August 19, 1986. She related that claimant said nothing about (1) coming back to work (2) did not ask if a job was still available for him (3) if that restricted duty job still was available to him. The next time he was in the plant was November 6, 1986 when he talked to Neyens and Leeper. She said Neyens instructed claimant to call her the following morning. She further testified that claimant did not call her the following morning. She stated that she did not call claimant because claimant does not have a telephone. She said that claimant had never furnished her with a telephone number where he could be called at the neighbors.

Harmon then testified that she received the petition in this case on November 13, 1986. The petition said that claimant's medical condition had worsened. Next, on December 15, 1986 she received claimant's letter dated December 10, 1986 that he wanted the name of a doctor and that it is imminent that he see a doctor right away. This letter said nothing about a return to work. Harmon testified that she next received the information that claimant wanted to know when and what time he could return to work. This letter was dated December 9, 1986 but, it was postmarked January 8 or 9, 1987 and she did not actually receive it until January 12, 1987.

Harmon stated that with respect to claimant's first request to see a doctor she arranged an appointment with O. Gerald Orth, M.D., a neurosurgeon, at Columbia, Missouri. She said she picked Dr. Orth at that distance of 220 miles away because the local doctor had recently misdiagnosed patients on two different occasions. Therefore, the company did not want to continue to use him. Furthermore, claimant was also displeased with this very same local doctor. Both Harmon and claimant had been happy with Dr. Mackenzie but he had left town and someone new had to be selected. Another patient who had seen Dr. Orth came out real well. Dr. Orth being a neurosurgeon was well qualified. Therefore, she sent claimant to see Dr. Orth.

With respect to claimant's second request to return to work, Harmon thought she should have an evaluation from the University of Iowa concerning claimant's ability to return to work. Claimant had not actually worked for about one and one-half years. Also, claimant's two requests in December of 1986 "did not jibe". Claimant said he wanted a doctor for immediate

medical attention and he also wanted to return to work immediately at the same time. Under these circumstances Harmon felt a medical evaluation was in order before allowing claimant to return to work. She also thought she should have a medical evaluation because Dr. Barrows and Dr. Mackenzie indicated claimant had a possible disc problem. In addition, Dr. Orth said that claimant was in very poor physical condition and needed an exercise program. Therefore, she set up an appointment for a job capacity evaluation at the University of Iowa. Harmon added that she set up two seperate appointments and that claimant did not show up for either one of these appointments.

Harmon maintained that employer has had a light duty job within claimant's restrictions available to him ever since he voluntarily left it in September of 1985. She also confirmed that it was still available at the time of this second hearing. She also testified that she was aware of the fact that claimant was a full-time student even though claimant had not informed her of it himself.

Harmon testified that claimant did not call her at any time between the first and second hearing with a request to return to work. Furthermore, she had not received any telephone notes or messages that claimant had called her requesting a return to work. She added that if she had received a request from claimant she would not have allowed him to return to work because after the first hearing there was evidence from Dr. Mackenzie that said that claimant might have a disc problem that was diagnosed on August 20, 1986.

APPLICABLE LAW AND ANALYSIS

The operative phrase in a reveiw-reopening proceding is change of condition. Lawyer & Higgs, Iowa Workers' Compensation -- Law and Practice, section 20-2.

The employee must prove by a preponderance of the evidence that the increase in incapacity on which he bases his claim is the result of the original injury. Wagner v. Otis Radio & Electric Co., 254 Iowa 990, 993-94, 119 N.W.2d 751, 753 (1963); Henderson v. Isles, 250 Iowa 787, 793-94, 96 N.W.2d 321, 324 (1959).

If there is substantial evidence of a worsening of condition not contemplated at the first award then a review-reopening is justified. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957).

A change of condition may be something other than a physical one or a medical one. A change in earning capacity, subsequent to the initial award caused by the original injury, can also constitute a change of condition. Blacksmith v. All-American Inc.,

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290 N.W.2d 348 (Iowa 1980); McSpadden v. Big Ben Coal Co., 2888 N.W.2d 181 (Iowa 1980). Since these later two decisions a number of other nonmedical or economic changes of conditions have been entertained by the industrial commissioner.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 13, 1984 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Claimant did sustain the burden of proof by a preponderance of the evidence that he suffered a temporary aggravation or change of condition of his earlier injury of August 13, 1984. Dr. Barrows, the emergency room physician, on August 20, 1986 said that claimant aggravated his ruptured lumbar disc and needed to be off work that day (Ex. 1). Dr. Mackenzie said on August 21, 1986 that claimant had a recurrence of the L-5 disc laminectomy (Ex. 2). This was also confirmed by Dr. Weinstein by virtue of using the August 13, 1984 injury and resultant surgery as the basis of the history for claimant's complaints when he saw him on October 2, 1986 (Ex. 3). Also, Dr. Orth could only rely on the same history for claimant's complaints (Ex. 7). No other cause is suggested by any of the evidence. Claimant was off work from August 20, 1986 through September 21, 1986 (Exs. 1 & 2). Therefore, it is determined that the injury on August 13, 1984 and resultant surgery from the injury was the cause of claimant's inability to work during that period of time. Therefore, claimant is entitled to additional healing period benefits from August 20, 1986 through September 21, 1986.

Claimant did not sustain the burden of proof by a preponderance of the evidence that he has sustained a change of condition that caused any additional permanent partial disability based on

either a medical or nonmedical (economic) change of condition.

The first injury was a herniated disc at L-5, S-1. It was repaired. Certain restrictions were placed on claimant (Dec. p. 8, par. 1 & 3). Dr. Barrows said that claimant had an aggravation of this condition (Ex. 1). Dr. Mackenzie said claimant had a recurrence of this condition (Ex. 2). Dr. Weinstein merely recorded claimant's complaints of back pain but not much leg pain (Ex. 3). Dr. Orth stated that claimant's CT scan showed a small defect which was either a retained disc fragment or secondary scarring from his previous surgery (Ex. 7). Dr. Weinstein actually decreased claimant's permanent functional impairment rating from the 20 percent which was considered at the first hearing to eight to ten percent (Ex. 3). Dr. Orth did not award a permanent impairment rating at all (Ex. 7).

None of the doctors imposed any additional limitations or restrictions on claimant. Dr. Orth said that claimant could return to full-time employment if he could tolerate the discomfort. If he could not tolerate discomfort, then he could not return to the work related situation. In any event, he did not believe that returning to work would necessarily increase claimant's chances for additional disc problems (Ex. 7).

At the time of the hearing on August 19, 1986, claimant was a full-time college student. After the hearing and up until May of 1987, claimant continued to be a full-time college student. This was claimant's own personal choice of the endeavor that he should follow. He was medically able to be a student before and after the hearing. Therefore, based on the foregoing evidence it is determined that claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained a change of medical condition after the hearing on August 19, 1986.

Claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained a nonmedical change of condition after the hearing on August 19, 1986. If claimant had reported for work at 7 a.m. on the morning after the previous hearing and defendant had refused to employ him on the former tailor-made job that had been designed to his restrictions, then it could be grounds for a nonmedical or economic change of condition. Claimant did not however, report to work the following morning.

If claimant had reported to work at 7 a.m. on the morning after the hearing and defendant had required a work capacity evaluation, work hardening program or possible physical therapy it could be grounds for a nonmedical or economic change of condition. Claimant did not however, report for work.

Instead, claimant reported to the emergency room. Dr. Barrows said he aggravated his ruptured lumbar disc. Dr. Mackenzie said he had a recurrence of his L-5 disc lamination

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and needed to be off work for a month. Under these circumstances employer was justified in asking for an evaluation of work capacity since claimant had already suffered one serious on-the-job injury while working for defendant employer. Dr. Orth also pointed out that claimant was out of condition which further justified defendant's request for a work capacity evaluation. Furthermore, Harmon observed that claimant had not done any physical work since September of 1985 when he told employer he could not perform the job that had been tailor-made for him within the doctor's restrictions. In addition, the double messsage which claimant sent to employer by requesting to be put back to work immediately and also requesting immediate medical attention, "did not jibe" as Harmon phrased it. An evaluation for work capacity under the facts of this case, considering what transpired after the first hearing, was not unreasonable.

Claimant testified that he made numerous attempts to return to work in October and November of 1986. He testified that he made three trips to the plant and numerous telephone calls. Defendant's counsel impeached claimant on his hearing testimony by the testimony that claimant gave at the time of his deposition on March 21, 1987. Also, Neyens, Leeper, Watson and Harmon contradicted and controverted claimant's testimony. Neyens and Leeper saw him at the plant once. He wanted a doctor at that time. He did not ask to return to work. Watson testified that she never did see him at the plant but Neyens and Leeper testified that claimant was there during Watson's lunch hour. Watson testified that she never received any telephone calls from claimant either. Harmon testified that she never saw him in person at the plant nor did she get any telephone calls or telephone messages from him about returning to work. Claimant testified that the telephone calls were on his neighbor's telephone bill but he nevertheless, neglected to bring the bill to the hearing.

Claimant admitted that he was a full-time student, 18 hours a day, after the hearing on August 19, 1986 until he graduated with an Associate of Arts degree in pyschology in May of 1987. His class hours ranged from three to four hours per day and he also testified that the total work effort required 18 hours per day. This testimony is inconsistant with claimant's statement that he desired to return to work during this same period of time. It would appear that claimant was immersed in the full-time job of being a college student.

The greater weight of the evidence is that claimant did not sustain the burden of proof of a nonmedical or economic change of condition after the hearing on August 19, 1986 which was caused by either defendant's failure to employee him or for any other reason. Claimant therefore, is not entitled to any additional permanent partial disability benefits.

FINDINGS OF FACT

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

That claimant was suffering from the residuals of a herniated disc and it's corrective surgery at the time of the hearing on August 19, 1986 and was suffering from the same condition at the time of the hearing on August 3, 1987.

That claimant did have an apparent temporary aggravation or recurrence of this back condition from August 20, 1986 to September 21, 1986 which rendered him unable to work during that period of time.

That claimant did not prove facts that show a change in impairment, diagnosis, prognosis, limitations or restrictions that occurred after the hearing on August 19, 1986.

That claimant did not prove facts that show a change in nonmedical or economic condition after the hearing on August 19, 1986.

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 the burden of proof by a preponderance of the evidence that the recurrence of his back condition caused a temporary inability to work from August 20, 1986 through September 21, 1986.

That claimant is entitled to additional healing period benefits from August 20, 1986 through September 21, 1986.

That claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained a change of condition which caused any additional disability after the hearing of August 19, 1986.

That claimant is not entitled to any additional permanent partial disablity benefits.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant four point seven one four (4.714) weeks of additional healing period benefits for the period from August 20, 1986 through September 21, 1986 at the rate of two hundred seventy-six and 38/100 dollars ($276.38) per week in the

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total amount of one thousand three hundred two and 86/100 dollars ($1,302.86).

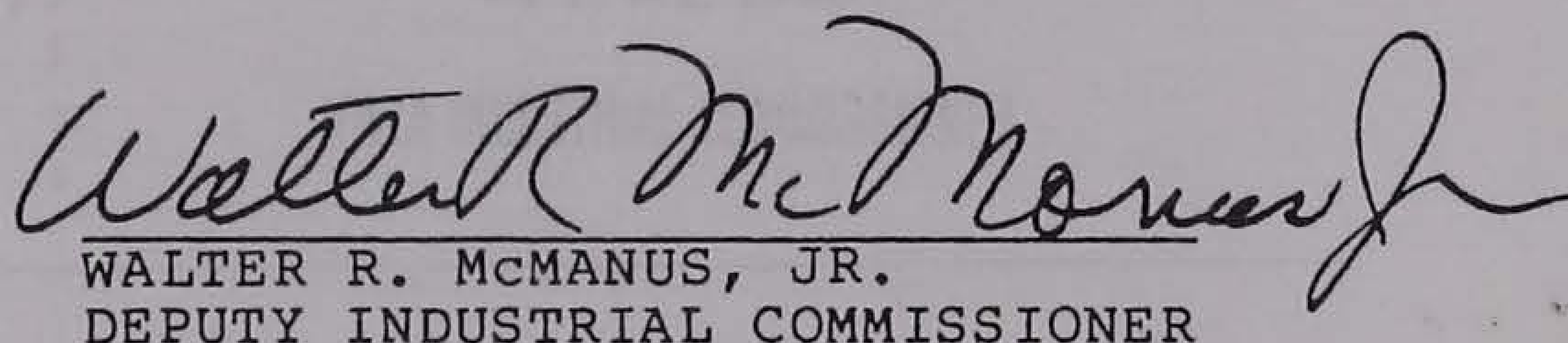
That defendant pay this amount in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That defendant pay the costs of this proceding 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 6th day of April, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD BOWMAN, Claimant, vs. EAST UNION COMMUNITY SCHOOL DISTRICT, Employer, and THE HARTFORD INSURANCE COMPANY, Insurance Carrier, Defendants.	:	FILE NO. 453292 A R B I T R A T I O N D E C I S I O N

FILED
APR 22 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Donald Bowman, claimant, against East Union Community School District, employer (hereinafter referred to as East Union), and The Hartford Insurance Company, insurance carrier, for workers' compensation benefits as a result of an alleged injury on March 1, 1976. On February 23, 1988, 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 the 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 in 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 March 1, 1976, claimant received an injury which arose out of and in the course of employment with East Union.

2. The injury of March 1, 1976 was a cause of both temporary disability during a period of recovery and permanent disability.

3. The medical bills submitted by claimant at hearing were causally connected to the medical condition upon which the claim herein is based but that the issue of their causal connection to the work injury remains an issue to be decided herein.

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ISSUE

The only issue submitted by the parties for determination in this proceeding is 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. As will be the case in any attempted summarization, conclusions about what the evidence offered may show are inevitable. Such conclusions, if any, in the following summary should be considered as preliminary findings of fact.

Claimant is a retired school teacher. According to uncontroverted medical records submitted into the evidence, claimant first injured his low back following an incident on March 1, 1976, involving an altercation with a student and claimant was pushed to the floor striking his lower back. After a period of conservative treatment, claimant's physicians diagnosed that he suffered a herniated disc at the L3-4 level in the incident. This herniation was surgically corrected by a discectomy and fusion surgery in 1976 and 1977. Claimant returned to work but in 1980, claimant reported to his physicians that he had again injured his low back after being tripped by a disturbed student. Claimant then underwent additional treatment of therapy including evaluation and treatment by Charles Burton, M.D., at the Sister Kenny Institute in Minneapolis, Minnesota. Claimant was then rated as suffering from a 20 percent permanent partial impairment to his low back as a result of his chronic low back difficulties. Dr. Burton from the Sister Kenny Institute makes the following diagnosis:

DIAGNOSTIC IMPRESSIONS:

1. Lumbar degenerative disc disease.

2. Failed low back surgery snydrome, status post L3-4 discectomy 11-76, and L3-4 fusion 7-77.

3. Chronic herniated disc L5-S1, left.

4. Left sciatic radiculitis secondary to the above.

5. Possible lumbosacral adhesive arachnoiditis and epidural fibrosis.

6. Possible post left CVA residual.

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7. History of hypertension.

8. Chronic pain patient.

Dr. Bowman has given claimant permanent prescriptions for therapy including hydrotherapy and the implantation of a PENS unit in claimant's back which is an electrical nerve stimulation device to reduce pain. Claimant continues to use this electrical nerve stimulation device at the present time.

In November, 1984, claimant and defendants entered into a special case settlement under Iowa Code section 85.35 for all claims arising from the 1980 back injury. This special case settlement was approved by order of this agency on November 14, 1984. At the same time claimant and defendants entered into another agreement regarding the medical expenses from the 1976 injury. According to exhibit 1, claimant and defendants agreed that the back condition treated at the Sister Kenny Institute was related to the 1976 altercation. The parties also agreed that certain medical payments will continue. The agreement provided that defendants were not agreeing that all future back problems claimant may experience are causally connected to the 1976 injury. Defendants then agreed to pay some outstanding bills and to pay claimant a sum of $302.95 per year as reimbursement for nonprescription medications and batteries for his PENS unit. There was no showing in the evidence of this case that this portion of the settlement was approved by this agency or that it was even submitted to this agency. The order approving the 85.35 settlement did not refer to the 1976 injury or to the payments made under this auxiliary agreement. The action filed herein is a result of an allegation that defendants are refusing to live up to this agreement.

Claimant testified in 1986 on a trip to Kansas City, Missouri he met a Richard Yennie, D.C., who noted that claimant had back problems and suggested that he try his chiropractic clinic which specializes in giving acupressure treatments as opposed to acupuncture treatment. Claimant testified that he has traveled from his home in Des Moines to the Yennie Clinic in Kansas City, Missouri on several occasions during 1986 and 1987 and continues to do so at the present time. Claimant states that he obtains relief, albeit temporary, from such treatment and must return every three or four months. Defendants refuse to pay for this treatment and in the prehearing report denied the causal connection of claimant's current medical expenses and medical condition to the 1976 work injury.

In a report dated June 7, 1986, Dr. Yennie and his partner, Katherine Smith, D.C., opined that claimant suffers from a lumbar nerve root compression resulting in bilateral sciatic neuralgia. "Onset, accident, March 1976."

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

APPLICABLE LAW AND ANALYSIS

Pursuant to Iowa Code section 85.27, claimant is entitled to either an order directing defendants to pay reasonable medical expenses for treatment of a work injury or an order of reimbursement. Claimant is entitled to an order for reimbursement only for those expenses which he has previously paid. Krohn v. State, ___ N.W.2d ___ (Iowa 1988) decision filed March 16, 1988.

First, claimant seeks enforcement of the 1984 settlement agreement. This deputy industrial commissioner is without statutory authority to enforce a contract by awarding damages by ordering specific performance as a result of any alleged breach of contract. Such matters are proper only before the Iowa District Court.

Second, this agency did not participate in the 1984 agreement, nor was there any approval of the agreement to the knowledge of this deputy commissioner. Iowa Code section 86.13 specifically states that compensation agreements are not valid unless approved by this agency. Although it could be argued under some recent decisions of the courts, that the agreements with reference to medical benefits are not 86.13 "compensation" agreements requiring agency approval. However, without participation by this agency it is not binding on this agency in any event. Whether or not the parties are estopped from asserting matters contrary to the agreement before this agency is a matter again for the courts not for this deputy commissioner.

Third, defendants claim that treatment by Dr. Yennie was not authorized and claimant is not entitled to reimbursement for such expenses or 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 inconsistent to deny liability and the obligation to furnish care on the one hand and at the same time claimant's right to choose the care. Kindhart v. Fort Des Moines Hotel, I Iowa Industrial Commissioner Decisions No. 3, 611 (1985); Barnhardt v. MAQ, Inc., I Iowa Industrial Commissioner Report 16 (1981).

The right to control the medical care must be conditioned upon the establishment of liability for an injury or a condition related to 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 offering claimant the right to petition the commissioner to resolve disputes concerning such care.

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However, this agency does not have authority to order an employer to furnish any particular care unless the employer's liability for the injury under 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 denied the causal connection of claimant's current low back problems to the work injury. For that reason and absent a future change in defendants legal position on the issue of liability, defendants will not have the right to choose the care for claimant's injuries until a decision of this agency establishing a work relatedness of claimant's current medical expenses becomes final. As the views of Dr. Yennie and his associate that their treatment is causally connected to the 1976 injury is uncontroverted, the required causal connection can be found in this case. Therefore, the full expenses, including travel expenses for the treatment of claimant by Dr. Yennie are reimburseable. The hydrotherapy treatment expenses is also clearly causally connected due to the prescription for such therapy by doctors at the Sister Kinney Institute. In his testimony, claimant stated that he had paid all of the requested expenses and therefore defendant will be ordered to reimburse claimant.

All the medical expenses and travel expenses appear reasonable. The treatment was offered by a medical practitioner whose qualifications were not challenged by defendants. Although the agreement of settlement in 1984 could not be enforced, the amounts in the agreement to reimburse claimant for nonprescription medication and batteries for the PENS unit appear to be a reasonable approach to the problem and will be adopted as a part of claimant's entitlement to expenses under 85.27 in the future.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. On March 1, 1976, claimant suffered an injury to his low back which arose out of and in the course of his employment with East Union.

3. The work injury of March 1, 1976, was a cause of permanent disability and of physical activity restrictions.

4. The expenses listed by claimant in the prehearing report are necessary and reasonable expenses for medical treatment of the work injury of March 1, 1976.

5. As of the date of this decision, defendants have denied liability for the condition which necessitated the expenses incurred by claimant listed in the prehearing report.

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CONCLUSIONS OF LAW

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

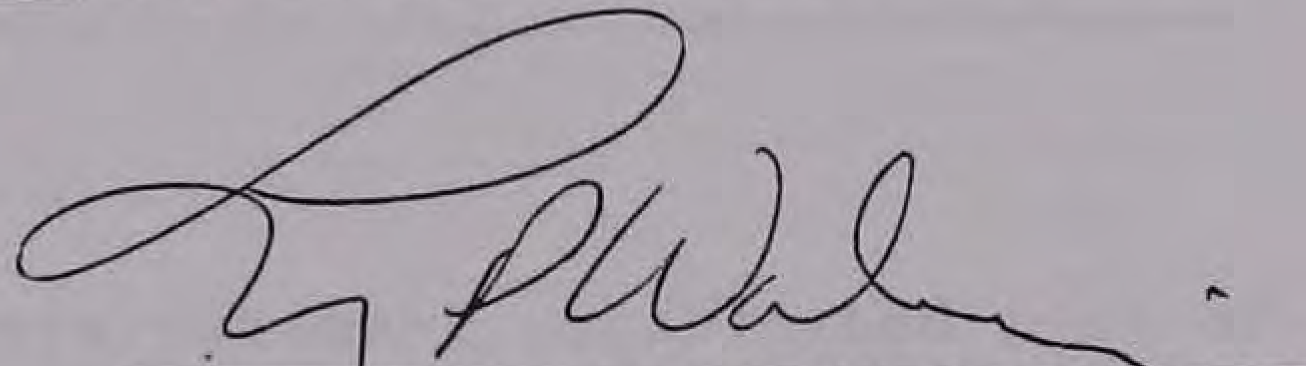
ORDER

1. Defendants shall pay to claimant the sum of three thousand six hundred seventy-three and 45/100 dollars ($3,673.45) as reimbursement for medical expenses previously paid and defendants are directed to pay all future treatment and travel expenses by claimant for continued treatment by Dr. Yennie. Defendants may apply to this agency to change the care but shall continue to provide such care during the pendancy of such proceedings. Defendants shall also pay the sum of three hundred two and 95/100 dollars ($302.95) per year as a result of claimant's nonprescription medication and battery expenses. This amount may be adjusted by the parties as needed upon application of this agency.

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

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

Signed and filed this 22 day of April, 1988.



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3202
Filed May 18, 1988
Deborah A. Dubik

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DUAINE A. BRADEN, Claimant, vs. BIG "W" WELDING SERVICE, Employer, and UNDERWRITERS ADJUSTING CO., Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File No. 785744 A R B T R A T I O N D E C I S I O N

3202

Second Injury Fund case where claimant established loss of use of first and second member and permanent disability from each. Sixty percent permanent partial disability benefits awarded with second injury fund liable for 212 weeks.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DUAINE A. BRADEN,	:	
Claimant,	:	File No. 785744
vs.	:	
BIG "W" WELDING SERVICE,	:	A R B T R A T I O N
Employer,	:	D E C I S I O N
and	:	
UNDERWRITERS ADJUSTING CO.,	:	FILED
Insurance Carrier,	:	MAY 18 1988
and	:	IOWA INDUSTRIAL COMMISSIONER
SECOND INJURY FUND OF IOWA,	:	
Defendants.	:	

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Duaine A. Braden, claimant, against Big "W" Welding Service, employer, Underwriters Adjusting Co., insurance carrier, and Second Injury Fund of Iowa, defendants, to recover benefits under the Iowa Workers' Compensation Act as a result of injuries sustained October 13, 1980 and January 18, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner March 17, 1988. The record was considered fully submitted at the close of the hearing. The record in this case consists of the testimony of the claimant; claimant's exhibits A, B and C and Second Injury Fund's exhibits 1 and 2; and the claim activity report dated October 5, 1987.

ISSUES

The essential issues presented for resolution are:

1. The extent of claimant's entitlement to permanent partial disability benefits for an industrial disability, if any; and,

2. The liability of the second injury fund.

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back to work because he did not think, even if the osteotomy was successful, it would handle the daily stress that claimant would give it by his old occupation. Dr. Boulden did not, however, go ahead with the osteotomy because arthroscopy examination revealed significant degeneration was already occurring. On June 3, 1986, Dr. Boulden stated: "As I stated earlier, I feel that we need to find him work where he is off his feet and/or basically sedentary type work." (Claimant's Exhibit A, part 1, page 3) Dr. Boulden opined claimant had a 20 percent impairment of the knee and stated:

> It is my feeling that some day Duaine Braden will need a total knee replacement, but obviously, at this point in time, he is in no need of such an operation.
>
> Therefore, it also is my opinion that the injury that he sustained on January 18, 1985 was an underlying trauma to his knee and whether it caused all of the damage or just aggravated it further is unknown to me, since I did not have the opportunity to do the first surgery.
>
> Therefore, I feel that Dr. Brindley can give you more of an insight to that as he was the treating primary physician.

(Cl. Ex. A, Pt. 1, p. 4)

Medical records of Jack W. Brindley, M.D., showed that after claimant's fall on October 13, 1980, claimant had an arthrogram which showed a tear in the medical capsule. The medical collateral ligament was found to be intact but claimant was also found to have a tear in his medical meniscus posteriorally which was removed. Claimant was also noted to have some degenerative changes in the joints. Arthroscopy examination of the left knee on March 10, 1982 confirmed the degenerative arthritic changes. Dr. Brindley found claimant's impairment to the left leg to be 20 percent and stated he felt claimant should stay away from work that has to do with a great deal of stair climbing, squatting, standing or walking constantly. Dr. Brindley again treated claimant after his fall in January 1985. A right knee arthroscopy was done and Dr. Brindley noted some synovitis in the knee as well as a great deal of chondromalacia and degenerative change. On November 15, 1985, Dr. Brindley wrote:

> [T]his patient has been treated for an injury that he sustained in January of 1984....I had seen him before the other problems but had not ever treated him for right knee pain. He does have arthritis of the knee which is what is causing him difficulty but he was asymptomatic as far as I know up until

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> his injury in January of 1984.
>
> I do not feel that this patient is going to be able to return to work at the type of work that he was previously doing.
>
> I do think that there is a permanency rating for his right knee. I would ate his percent of permanent physical impairment and loss of physical function to his lower extremity at 20%.

(Cl. Ex. A, pt. 2, p. 41)

Dr. Brindley later corrected himself stating:

> There is a mistake in my letter to you of November 15, 1985. The patient fell while at work on January 17, 1985....I feel that the patient was asymptomatic prior to his fall. I doubt if all of the degenerative changes in his knee are secondary to the fall but I do feel that he was not symptomatic until he did fall. The fall was what disables him from doing the work that he used to be able to do.

(Cl. Ex. A, pt. 2, p. 42)

The Career Assessment Report of Pat MacLean, vocational counselor, dated December 1, 1986, reveals claimant's test results:

Differential Aptitude Tests (DAT): using high school senior norms

Verbal Reasoning	15 percentile
Numerical Ability	20 percentile
VR + NA (overall scholastic aptitude)	15 percentile
Abstract Reasoning	25 percentile
Clerical Speed & Accuracy	Absent
Mechanical Reasoning	50 percentile
Space Relations	65 percentile
Spelling	75 percentile
Language Usage	65 percentile

Tests of Adult Basic Education (TABE)

Reading:

Vocabulary	10.7 grade level
Comprehension	12.0 grade level
Total Score (71 items correct out of 85)	11.4 grade level

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Math:

Computation	10.0 grade level
Concepts & Problems	10.4 grade level
Total Score	10.2 grade level
(73 items correct out of 98)	

Wide Range Achievement Test (untimed)

Math	9.3 grade level

(Cl. Ex. C)

MacLean stated claimant did not fully comprehend the amount of education needed to prepare for jobs like a parole officer and opined claimant has the aptitude to successfully complete a mechanical drafting program.

APPLICABLE LAW AND ANALYSIS

Iowa Code section 85.64 provides, in part:

> If an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no pre-existing disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second Injury Fund" created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Claimant clearly sustained injuries which arose out of and in the course of his employment on October 13, 1980, when he fell on his left knee and on January 17, 1985, when he fell on his right knee. Although defendant Second Injury Fund disputes the work injury of January 17, 1985 is the cause of claimant's disability, ample medical and lay evidence exists on the record which supports claimant on the issue of causal connection. Dr. Brindley, claimant's treating physician, acknowledges claimant's degenerative changes but that claimant was asymptomatic until the fall. Dr. Boulden opines the fall in January 1985 caused either all the damage or further aggravation of the preexisting condition. The operative question here, as defendant Second Injury Fund states, is

whether there is fund liability.

Under Iowa Code sections 85.63 through 85.69, three requirements must be met in order to establish fund liability: First, claimant must have previously lost or lost the use of a hand, an arm, a foot, a leg or an eye; second, through another compensable injury, claimant must sustain another loss or loss of use of another member; and third, permanent disablity must exist as to both injuries. As appropriately argued by defendant employer, if the second injury is limited to a scheduled member, then the employer's liability is limited to the schedule and the fund is responsible for the excess industrial disability over the combined scheduled losses of the the first and second injuries. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983) and Fulton v. Jimmy Dean Meat Company, file number 755039, appeal decision filed January 28, 1986.

Claimant has established a loss of use of his left leg as a result of the work-related fall on October 13, 1980. Claimant was found to have a 20 percent permanent partial impairment and testified that after returning to work he favored this leg and relied on his right leg for support. Claimant has also established a loss of use of his right leg as a result of the work-related fall on January 17, 1985. Again, claimant was found to have a 20 percent permanent partial impairment of the lower right extremity by Dr. Brindley and a 20 percent of the knee by Dr. Boulden. Both injuries resulted in loss to a scheduled member and claimant was paid permanent partial disability benefits each time of 44 weeks based on these ratings. Therefore, these opinions are sufficient to demonstrate permanent disability under Iowa Code section 85.34(2)(o).

Accordingly, the liability of the second injury fund has been established. Clearly, after the first injury claimant was capable of returning to his regular employment having been released by Dr. Brindley to return to work without restrictions. However, claimant was clearly advised he could not return to his regular occupation after the second injury. Claimant's present condition involves the combined effects of the first and second injury scheduled losses and therfore it results in an industrial disability to the body as a whole.

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

A finding of impairment to the body as a whole by a medical

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

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

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985); Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Claimant is 45 years old with a ninth grade education and no other completed formal training. Claimant's test scores show he was "indifferent" to more than 30 percent of the career assessment inventory items giving him many scores in the mid-range. Claimant has earned his living primarily doing heavy labor work as a journeyman millwright, requiring lifting, bending, stooping, climbing, walking and in general being on his feet throughout the course of his shift. Since his second injury, claimant has clearly been precluded from returning to this class of work. Both Dr. Brindley and Dr. Boulden conclude claimant is not capable of returning to employment that would require such

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physical exertion and both recommended sedentary work. Because of the combined effects of injuries, claimant no longer has available to him the type of work in which he has earned his living for over 20 years. Claimant is currently attending Indian Hills Community College and is working toward a goal of becoming a parole officer. While it is believed vocational rehabilitation is probably claimant's best alternative and his ambitions are admirable, one wonders if such goals are realistic in light of claimant's failure to as yet complete a GED program. Further, a review of claimant's general scholastic aptitude leads to serious questions of claimant's capability, overall, to complete the amount of education necessary to reach this goal. However, claimant's motivation appears to be sincere and well placed. Without some type of vocational training, claimant cannot think of any jobs for which he is currently qualified. Claimant does appear, however, to have some transferable skills, due to, if for no other reasons, his mechanical background as a millwright. Testimony establishes claimant had earnings of approximately $20,000 in 1984 and $11,500 in 1983. Claimant has not been employed since his last injury on January 17, 1985. Claimant's capacity to earn has clearly been hampered as a result of his injuries.

Defendant Second Injury Fund went to great lengths in questioning claimant on his job searches as shown by job service records asserting claimant was not sincere in his search for work as the records did not show claimant was seeking work for which he was qualified and capable. While counsel may have made a good case for job service fraud, claimant has not been restricted from performing some type of work and cannot be faulted (under the Iowa Workers' Compensation Act) for continuing to look for that work from which he has always made his living. As previously stated, while claimant has lost his ability to do the heavy labor of a millwright, he has not lost his knowledge of how the job is performed. Considering then all the elements of industrial disability, it is found claimant has, as a result of his injuries, sustained a permanent partial disability for industrial purposes of 60 percent or 300 benefit weeks. As already noted, claimant's second injury was limited to a scheduled member having been found to be a permanent partial disability of 20 percent of the lower right extremity entitling claimant to 44 weeks of benefits. Further, claimant's first injury also represented a permanent partial disablity of 20 percent to the left lower extremity entitling claimant to 44 weeks of benefits. Pursuant to the industrial commissioner's decision in Fulton, supra, the liability of the employer is limited to 20 percent of the lower right extremity or 44 weeks of benefits which have already been paid. The second injury fund is therefore liable for 212 weeks of benefits, the amount remaining after deducting the benefits already paid (300 weeks minus 44 weeks for the 1980 injury minus 44 weeks for the 1985 injury).

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FINDINGS OF FACT

Wherefore, based on the evidence presented, the following findings of fact are made:

1. Claimant sustained a work injury on October 13, 1980 to his left knee resulting in a 20 percent impairment to the lower left extremeity for which claimant was paid 44 weeks of benefits.

2. Claimant, subsequent to this injury, was able to return to work in his usual occupation although he favored his left leg and relied on his right leg for additional support.

3. Claimant continues to have difficulty with his left knee.

4. Claimant sustained a work injury January 17, 1985, to his right knee resulting in a 20 percent impairment to the lower right extremity for which he was paid 44 weeks of permanent partial disability benefits.

5. Claimant has worked for the past 22 years as a millwright which requires physical exertion including climbing, lifting, bending, stooping, squatting, walking, working an entire shift on his feet, and additional manual labor.

6. Claimant's work restrictions preclude him from engaging in his usual occupation as a result of his injuries.

7. Claimant has limited ability to stand, walk, climb, lift, and his knees are stiff, sore, painful, weak and cause him to fall down.

8. Claimant is 45 years old with a ninth grade education and has not yet acquired a GED.

9. Claimant has been unsuccessful in his attempts to secure work and has not worked since his last injury on January 17, 1985.

10. Claimant is currently enrolled at Indian Hills Community College and is working toward employment as a parole officer.

11. Serious questions exist as to whether or not claimant has the capability of reaching his goal.

12. Claimant's capacity to earn has been hampered as a result of the combined effects of the injuries of 1980 and 1985.

13. Claimant has sustained an industrial disaiblity as a result of the combined effects of the two injuries.

14. The present condition of the claimant as a result of

the combined permanent partial disabilities to the right and left lower extremities results in an industrial disability of 60 percent to the body as a whole.

CONCLUSIONS OF LAW

Wherefore, based on the principles of law previously stated, the following conclusions of law are made:

1. The compensable value of the permanent injury to the left lower extremity is 44 weeks.

2. The compensable value of the permanent injury to the right lower extremity is 44 weeks.

3. Claimant has established an overall industrial disability as a result of the combined effects of both permanent injuries as 60 percent or 300 weeks of permanent partial disability benefits.

4. The obligation of the second injury fund is 212 weeks of permanent partial disability benefits.

5. The obligation of the second injury fund commences April 11, 1987.

ORDER

THEREFORE, IT IS ORDERED:

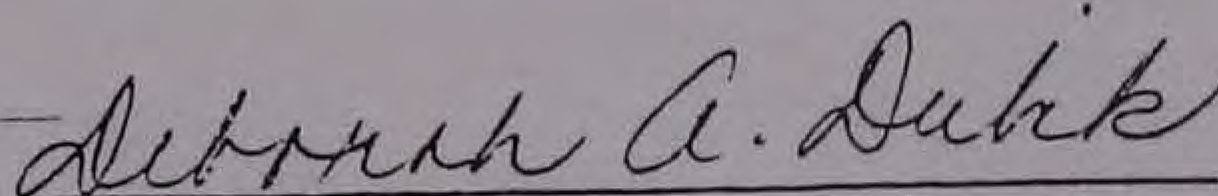
That the Second Injury Fund of Iowa pay to claimant two hundred twelve (212) weeks of permanent partial disability benefits commencing April 11, 1987 at the stipulated rate of two hundred sixty-eight and 83/100 dollars ($268.83).

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

That the Second Injury Fund of Iowa pay costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

That defendants file claim activity reports as required by the division.

Signed and filed this 18th day of May, 1988.



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000185

1400; 1402
Filed 2-1-88
Deborah A. Dubik

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWARD L. BRIGGS, Claimant, vs. DELAVAN, INC., Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	:	File No. 817016 A R B I T R A T I O N D E C I S I O N

1400; 1402

Neither claimant nor counsel appeared at the hearing. No evidence in support of allegations of a compensable work injury was presented and claimant therefore failed to meet his burden of proof.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

EDWARD L. BRIGGS,	:	
Claimant,	:	File No. 817016
vs.	:	
DELAVAN, 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,	:	
Insurance Carrier, Defendants.	:	

FILED
FEB 1 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Edward L. Briggs, claimant, against Delavan Corporation, employer, and Aetna Casualty & Surety Co., insurance carrier, to recover benefits under the Iowa Workers' Compensation Act for an alleged injury occurring on or about December 6, 1985. This matter was to come on for hearing January 29, 1988 at the Industrial Commissioner's office in Des Moines, Iowa.

The undersigned was present. Neither claimant nor defendants appeared.

Claimant failed to present any evidence in support of the allegations found in his original notice and petition. Neither an agreement for settlement nor a request for continuance are on file.

Claimant has the burden of proving by a preponderance of the evidence that he sustained an injury which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976).

WHEREFORE, it is found:

1. Neither claimant nor defendants appeared at the scheduled time and place of hearing.

2. The undersigned deputy industrial commissioner was present and prepared to proceed to hearing.

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3. Neither an agreement for settlement nor a request for continuance is on file with the industrial commissioner.

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

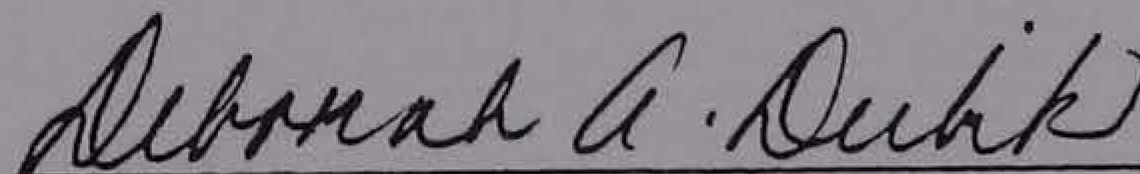
THEREFORE, it is ordered:

Claimant has failed to meet his burden of proof that he sustained an injury which arose out of and in the course of his employment.

Claimant take nothing from this proceeding.

Costs are taxed to the claimant. Division of Industrial Services Rule 343-4.33.

Signed and filed this 1st day of February, 1988.



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1404, 1804, 1806
2209, 4100
Filed June 29, 1988
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CICELY BROWN, Claimant, vs. NISSEN CORPORATION, Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 837608 A R B I T R A T I O N D E C I S I O N

1404, 1804, 1806, 2209, 4100

Claimant suffered from a degenerative condition which had worsened during her term of employment. She had a number of apparently minor back injuries, but in 1984, suffered a major injury which produced her first radicular symptoms and which the treating orthopaedic surgeon found to be the major cause of her disability. Following recovery, she returned to work for approximately six months and was then reinjured and has never returned to gainful employment since.

The brightest employment outlook that was available was part-time work at or near minimum wage pay scales.

It was held that the claimant was permanently and totally disabled since she was unable to be self-supporting. It was held that the burden of proof of apportionment of disability rests upon an employer who asserts it. It was further held that, where an injury produces permanent, total disability, the extent of any preexisting permanent partial disability is immaterial since there is no practical way that is consistent with the intent of the workers' compensation laws to apportion out that preexisting disability. The odd-lot doctrine was applied since the claimant had made a prima facie showing of total disability and had both sought education through vocational rehabilitation and had actually sought work.

FILED 000189

JUN 29 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CICELY BROWN, Claimant,	
vs.	File No. 837608
NISSEN CORPORATION, Employer,	ARBITRATION DECISION
and	
NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	

INTRODUCTION

This is a proceeding in arbitration brought by Cicely Brown against Nissen Corporation, employer, and National Union Fire Insurance Company, insurance carrier.

The case was heard and fully submitted on November 5, 1987 at Cedar Rapids, Iowa. The record in this proceeding consists of exhibits 1 through 18 and testimony from Cicely Brown, Dennis Mahan, Scott Puryear and Allen Vikdal.

ISSUES

Claimant alleges that she sustained injury which arose out of and in the course of her employment on July 11, 1985 through July 15, 1985. Claimant seeks compensation for permanent total disability. The issues presented by the parties for determination include whether claimant sustained an injury which arose out of and in the course of employment; whether the alleged injury is a cause of temporary or permanent disability; and, determination of the nature and extent of any permanent disability which exists. Defendants raise an apportionment issue asserting that any disability resulting from an injury that occurred on August 17, 1984 or from a preexisting degenerative disc condition should not be included in any disability award. The parties stipulated that, in the event of an award, claimant's healing period commences on July 17, 1985 and runs through April 23, 1986. It was further stipulated that the correct rate of compensation is $269.03. It was noted that defendants have paid 120 2/7 weeks of compensation at the incorrect rate of $354.76.

SUMMARY OF EVIDENCE

The following is a summary of evidence presented in this case. Only the evidence most pertinent to this decision is discussed, but all of the evidence received at the hearing was considered in arriving at this decision. Conclusions about what the evidence showed are inevitable with any summarization. The conclusions in the following summary should be considered to be preliminary findings of fact.

Cicely Brown is a 50-year-old lady who lives at Center Point, Iowa with her husband and two children. Claimant is a high school graduate who attended one-half of a semester at the University of Iowa following high school. Recently, on two occasions, she has enrolled at the Kirkwood Community College Skill Center, but she dropped out of the programs after a few weeks on each occasion.

In the past, claimant has held a number of different employments. She has been a department store sales clerk, order clerk, messenger, youth group program advisor, production line assembler, fast food restaurant manager, dance instructor and aerobics instructor.

Claimant commenced employment with Nissen Corporation in September, 1978 as an assembler. Within one year, she became a polisher, the position she held until July 16, 1985, her last day of work (exhibit 9).

Claimant has a history of back complaints for which she has sought medical care. On December 1, 1978, she complained of a backache (exhibit 1C, page 5). On May 24, 1979, she was diagnosed as having a lumbosacral strain (exhibit 1C, page 7). She was hospitalized and taken off work for two weeks commencing on June 24, 1980 due to a back strain (exhibit 1I; exhibits 3G, H, I and J). On April 18, 1981, she was seen at St. Lukes Emergency Room with back complaints. Radiographic studies showed mild degenerative disc disease in her lower lumbar spine (exhibits 3L and M). Claimant had further back problems on September 25, 1981 (exhibit 1C, pages 13 and 14; exhibit 3N).

On November 7, 1983, claimant was hospitalized for back pain and other complaints (exhibits 3Q, R and S). Radiographic studies taken November 15, 1983 showed mild degenerative changes in her lumbar spine which had progressed slightly since April 18, 1981 (exhibit 1C, pages 18 and 19; exhibit 3U).

On August 17, 1984, claimant presented herself at the Mercy Hospital Emergency Room with complaints of pain in her right upper lumbar area and pain in her left leg and buttock. The history recorded is that she had lifted a heavy pan at work that morning and had experienced increasing discomfort (exhibit 2E, page 38). A CT scan performed on August 20, 1984 revealed a

minimally bulging disc at L4-5 and a similar bulging disc at L5-S1 (exhibit 2F, page 39).

Claimant was subsequently hospitalized from September 22, 1984 to September 29, 1984. She improved with conservative treatment, traction, physical therapy and medication. The final diagnosis was herniation of the fifth lumbar disc, right (exhibit 2J, page 43).

Claimant remained off work under the care of William John Robb, M.D., an orthopaedic surgeon, until released to return to work on a trial basis on January 7, 1985. Initially, she did well, but experienced a recurrence of symptoms in early March (exhibit 4A, pages 98 and 99). She was again taken off work from April 2 until April 9, 1985 (exhibits 4P, Q and R).

Claimant resumed working. On May 24, 1985, Dr. Robb indicated to the insurance carrier that overtime work could compromise claimant's recovery (exhibits 4T and U).

On July 9, 1985, claimant presented herself at Dr. Robb's office with complaints of severe pain which had started while picking up a piece of steel on July 8, 1985 (exhibit 4W). Claimant continued to work until she was taken off work by Dr. Robb on July 17, 1985 (exhibit 4X; exhibit 9). Claimant has not since resumed regular, full-time employment of any type (exhibits 9 and 14).

Claimant was hospitalized from August 2, 1985 until August 7, 1985. She improved with traction, bedrest, physical therapy and medication. A CT scan revealed no appreciable change from the results of the scan which had been performed on August 20, 1984 (exhibits 2Q, R, S, T and U).

A myelogram was performed on January 27, 1986 which showed moderate bulging of the L2-3, L3-4 and L4-5 intervertebral discs and protrusion of the L5-S1 disc on the right, displacing the L5 nerve root. A TENS Unit was provided (exhibits 2W, X, Y, Z and AA).

Claimant remained under the treatment of Dr. Robb on a regular basis until July 29, 1986 when he determined that she had reached maximum recovery and that she would carry a 15% permanent impairment of the body as a whole as a result of the herniated disc. Dr. Robb had recommended surgery (exhibit 4A, page 102).

On July 31, 1986, claimant was evaluated by Martin F. Roach, M.D., an orthopaedic surgeon. Dr. Roach found claimant to have degenerative disc disease. He concluded that claimant was affected by the residuals from a lumbosacral sprain and that a lot of her symptoms were functional. He did not feel that the region of her fifth lumbar disc was a significant factor in her

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condition. Dr. Roach recommended pain clinic treatment. Dr. Roach felt that claimant did not have any permanent impairment, but that, because she had been out of work for a long time, her prognosis for a return to work was very good. He also indicated that he felt she was capable of light work, lifting up to 15 or 25 pounds and that a sedentary type of job would be beneficial (exhibit 5A). Dr. Roach did not explain the apparent inconsistency between recommending activity restrictions and finding no permanent impairment.

Claimant described her job as a polisher as smoothing metal edges to prepare them for chrome plating. She stated that pieces ranged from quite small to as large as 17 feet long and as having various shapes. She stated that she generally handled the pieces by herself, one at a time. She related that the job involved lifting, bending and stooping and that most of the time was spent in a standing position or moving around. She was unable to estimate the weights that she handled, but she stated that she had been capable of easily lifting 100 pounds or more. Claimant stated that she was paid $8.80 per hour and that she enjoyed her work and the good working relationship that she had with other employees.

Claimant testified that, on July 11, 1985, a Thursday, she was working with volleyball uprights. She stated that, when she picked up the third one of the day, her back made a loud "crack." Claimant stated that the upright poles were heavier than normal. She stated that, following the incident, her pain began to increase, but that she was able to work through the remainder of the day. Claimant stated that she worked the following Friday, but that it had been a short day due to an employee meeting. Claimant testified that she rested at home over the weekend and tried to work on the following Monday, but that, by noon, she was unable to handle the pain, reported it and went home.

Claimant testified that, prior to July, 1985, her prior significant back problem had occurred in August, 1984 when she was lifting a pan of heavy parts from the table to the floor. Claimant testified that it was while receiving treatment for that injury that she began receiving treatment with Dr. Robb. Claimant testified that, following a period of recuperation, she returned to work in January, 1985. She stated that her back was sore, but that she worked in spite of it.

Claimant testified that she entered the Kirkwood Skills Center with a plan to enter office work. She stated that, for three weeks, she attended five days per week from 8:00 a.m. until 2:30 p.m. She indicated that she had missed some days due to her back. Claimant stated that she discontinued the program because she was unable to concentrate, function or sleep due to pain in her lower back and down her leg.

Claimant testified that she subsequently resumed vocational

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rehabilitation in a different capacity. She had completed the 20-day evaluation period and had started into the program on a four hours per day, three days per week basis and found that she was able to cope with it better. She increased her attendance to five days per week and found that she had trouble retaining information. She cut her attendance back to four days per week and then discontinued the program approximately one week prior to hearing. Claimant testified that she was crying alot and unable to handle things. She stated that she has entered into treatment with a psychiatrist and is in deep depression. She stated that she has been treated with anti-depressant medication which she stated makes her head feel like it is in ether, but that it makes her sleep better and relieves the pain in her back.

Claimant testified that vocational rehabilitation was her hope, but that she was having difficulty with it due to her pain interfering with her mind. She stated that, at her home, she is unable to function to do laundry, cook or perform other household chores.

Claimant testified that she is never free from pain and that, at night, it extends into her legs. She stated that her pain increases with activity and that she obtains relief by concentrating on other things or by lying down. Claimant testified that she is able to operate a car for short distances. She stated that she cannot bend or lift and is unable to perform the polishing job at Nissen or to perform assembly work. She felt that she was unable to be on her feet long enough to manage a fast food restaurant and that her inability to lift prohibited her from babysitting with a small child. Claimant related that she had performed some volunteer work for nearly a year answering a hotline crisis phone for three- to five-hour shifts. She stated that the line was never busy. Claimant related that, on one occasion, she washed dishes at a restaurant for two and one-half hours, but had to go home because her back hurt. She related that she applied at a Caseys convenience store, but was not hired and that the job would have required her to unload a truck one day each week. Claimant felt that she was able to drive from her home to Cedar Rapids regularly.

Claimant testified that, in 1984, she had pain in her back and buttock and that her right leg was numb. She related that she had experienced pain in her right leg prior to August, 1984, but that it had not previously been numb.

Claimant related that her back was essentially the same from January through July of 1985, but that there may have been some days that were worse than others. She stated that she would have done the work until she dropped, even if she were in pain.

Dennis Mahan, claimant's former supervisor at Nissen, testified that she had been an above-average employee and would have handled weights that range from 1-85 pounds. Mahan seemed

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to recall claimant speaking of injuring her back outside the plant in 1985, but could be no more specific. He stated that claimant had sometimes complained of her back at work, but did not indicate that the work was aggravating her back.

Scott Puryear, Director of Personnel at Nissen, indicated that claimant's overtime work was voluntary and that she had not requested a lighter job. He stated that jobs are assigned on a bid basis, but that it would be possible to modify a job where it would not be subject to bidding.

Puryear stated that he had observed claimant in the plant to pick up her compensation check as recently as two weeks prior to hearing and he did not indicate anything unusual about the way in which she moved.

Allen Vikdal testified that he is the consultant in charge of the Crawford & Company office in Davenport, Iowa. Vikdal first contacted claimant regarding vocational rehabilitation on July 13, 1987 and performed a vocational evaluation. Vikdal indicated that claimant currently has been released to return to work by Dr. Robb with restrictions as specified in a letter dated January 18, 1987 (exhibit 4CCC, pages 163-165). Vikdal also indicated that he relied upon restrictions as specified by Dr. Robb in his deposition taken June 2, 1987. Vikdal indicated that he has reviewed claimant's test results from the Kirkwood Skills Center and that she is in the upper 10% with regard to numerical and clerical skills and aptitudes. He felt that she had a high aptitude for occupations which involve handling numbers or finger dexterity.

Vikdal expressed the opinion that claimant is competitively employable on a full-time basis. Upon cross-examination, Vikdal agreed that Dr. Robb had limited claimant to four to eight hours per day. Vikdal also indicated that the jobs he identified are not necessarily available in the Cedar Rapids, Iowa area or within claimant's restrictions. Vikdal indicated that, with conditioning, claimant could increase her endurance in order to be able to work a full eight hours per day (see also joint exhibit 16).

Claimant entered the Kirkwood Community Skills Center on April 8, 1987 and went through a comprehensive testing program. The tests showed claimant to have an extremely high degree of aptitude in numerical and clerical fields as well as finger dexterity. She exhibited a high degree of verbal and spatial perception aptitudes. She scored near average with regard to form perception, manual dexterity and eye/hand/foot coordination. Claimant was referred to the business and office program. She was present for seven days, absent for 14 and then dropped out of the program by May 14, 1987 (exhibit 16).

On or about August 26, 1987, claimant reentered the program.

The records indicate that claimant did well in the typing and bookkeeping courses. Claimant did not attend regularly, however. The final discharge report indicates that the personnel in charge of the program felt that claimant had demonstrated the potential skills to perform part-time clerical tasks in a competitive environment, but that any potential position would require that claimant have the ability to follow through with long-term participation and that she be able to handle the physical pain and emotional stress which would be associated with regular employment (joint exhibit 16).

Exhibit 4DDD is the deposition of William John Robb, M.D., taken June 2, 1987. Dr. Robb stated that the origin of claimant's symptoms is related to the herniated disc that occurred at work in August, 1984 and that the problem was then reaggravated thereafter on numerous occasions while she was at work (exhibit 4DDD, pages 12 and 13). Dr. Robb indicated that claimant's restrictions and functional limitations are as set out in his letter of January 18, 1987 (deposition exhibit G; exhibit 4CCC). Dr. Robb went on to indicate that, following the 1984 incident, claimant had been released to return to work with a 40-pound lifting restriction (exhibit 4DDD, page 14). Dr. Robb stated that claimant is now unable to resume the type of work that she performed at Nissen (exhibit 4DDD, page 19). Dr. Robb stated that claimant had sustained cumulative trauma injury in the performance of her job at Nissen. He indicated that the cumulative trauma contributed to claimant's condition primarily in that it prevented her from healing following the 1984 injury (exhibit 4DDD, pages 16, 48 and 49).

Dr. Robb stated that he had discussed the surgical option with claimant. He stated that he felt surgery would likely resolve her leg pain, but that it may or may not resolve her back pain. Dr. Robb indicated that the severity of her symptoms would be the determinative factor as to whether or not surgery should be performed (exhibit 4DDD, pages 19 and 20).

Dr. Robb explained that claimant suffers from both disc degeneration and disc herniation, conditions which may exist together, but can also be independent. Dr. Robb did not attribute any of claimant's impairment to the degenerative disease because it had not been disabling to her prior to August of 1984. He indicated that the 1984 injury was the major cause of her disc protrusion problem because it is the first time at which true radicular symptoms were exhibited. Dr. Robb assigned a 15% impairment rating of the whole person (exhibit 4DDD, pages 32-42).

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on or about July 16, 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 supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury....The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.
>
> ....
>
> A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

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

812, 815 (1962).

Injury resulting from cumulative trauma is compensable. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). The record in this case shows a marked deterioration of claimant's condition. As indicated by Dr. Robb, the August 17, 1984 incident seems to be the most notable of all the incidents which appear in the record. The incidents as a group, however, also show a long-term history of stress upon claimant's spine which resulted from repetitive bending, twisting and lifting as indicated by Dr. Robb (exhibit 4DDD, page 29). It is therefore found that claimant did sustain injury to her back on or about July 16, 1985 which arose out of and in the course of her employment with Nissen Corporation. Since this case involves a cumulative injury process, the last day of work is the correct injury date to be used, rather than the date of specific trauma. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). The variation in dates is found to not be prejudicial to defendants.

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 16, 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).

Claimant clearly had a degenerative condition which progressed while she was employed by Nissen. She also developed a herniated disc during the course of her employment with Nissen. Dr. Robb attributes the change in claimant's condition to her employment and his opinion is adopted as being correct. Defendants seek apportionment of disability between that caused by the injury of July 16, 1985 and the prior degenerative condition in the 1984 injury. Apportionment of disability between a preexisting condition and an injury is proper only when there was some ascertainable disability which existed independently before the

njury occurred. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 07 (Iowa 1984). Dr. Robb declined to assign any preexisting isability to claimant's degenerative disc disease and his ssessment is accepted as correct. Accordingly, no apportionment s made for the degenerative condition which preexisted July of 985. The burden of showing that disability is attributable to preexisting condition is, of course, placed upon the defendant. ecker v. D & E Distributing Co., 247 N.W.2d 727, 731 (Iowa 976); 2A Larson Workmen's Compensation Law, section 59.22.

At this point, it should be noted that claimant's condition id deteriorate subsequent to her recovery from the 1984 injury. n January of 1985, she returned to work with a 40-pound lifting estriction and was able to work eight hours per day. In fact, he worked considerable overtime. At the present time, claimant s much more restricted. Dr. Robb has restricted her lifting to 0-20 pounds. He has limited her to working four to six hours er day. In spite of the fact that the CT scans have not shown ny particular clarification, it is clear that claimant's ondition has worsened. From the evidence in the case, even hough it is not well developed, it appears that there may be ome functional overlay or emotional problem which is contributing o claimant's current state of disability.

Claimant seeks an award of permanent total disability and elies upon the odd-lot doctrine as adopted by the Iowa Supreme ourt in the case Guyton v. Irving Jensen Co., 373 N.W.2d 101, 03 (Iowa 1985). Total disability, under workers' compensation aw, is not utter and abject helplessness. The ability to earn ome wages creates a presumption that a person has earning apacity commensurate with the wages that have been earned, but that presumption may be rebutted by evidence which shows that the post-injury earnings are an unreliable indicator of actual earning capacity. Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa App. 1977) 100 A.L.R.3d 143; 2 Larson Workmen's Compensation Law, section 57.21, 57.31; Michael v. Harrison County, 34th Biennial Report, Iowa Industrial Commissioner 218 (1979). The test of permanent total disability in a workers' compensation setting has long been established and may be summarized as follows: When the combination of the factors considered in determining industrial disability precludes the worker from obtaining regular employment in which the worker can earn a living for himself or herself, his disability is a total disability. Guyton v. Irving Jensen Co., 373 N.W.2d 101, 103 (Iowa 1985); McSpadden v. Big Ben Coal Co., 282 N.W.2d 181, 192 (Iowa 1980); Diederich v. Tri-City Railway, 219 Iowa 587, 594, 258 N.W. 899, 902 (1935).

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

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offensive about a defense such as the one raised in this case, where the existence of a prior injury, occurring with the same employer, is raised as a defense to avoid payment. It would seem that, where the employer has failed to compensate the disability that resulted from the prior injury, the employer should be estopped from raising that disability as a defense in a subsequent claim. Principles of estoppel are applied in workers' compensation proceedings. Paveglio v. Firestone Tire & Rubber Co., 167 N.W.2d 636 (Iowa 1969).

Defendants are obviously entitled to credit for the excess payments paid prior to hearing resulting from use of an incorrect rate of compensation. [Iowa Code section 85.34(4)].

FINDINGS OF FACT

1. On July 16, 1985, Cicely Brown was a resident of the state of Iowa employed by Nissen Corporation within the state of Iowa.

2. Claimant was injured on or about July 16, 1985. The injury occurred as part of a cumulative injury process resulting from her bending, twisting and lifting that she performed as part of her employment duties. The injury also involved a significant incident while lifting a volleyball pole.

3. Following the injury, claimant became permanently medically incapable of performing work in employment substantially similar to that she performed at the time of injury. Claimant reached maximum medical recuperation on April 23, 1986 as stipulated by the parties in the pre-hearing report.

4. Cicely Brown is a 50-year-old, married lady with two children.

5. At the time of injury, claimant was earning $8.80 per hour.

6. Claimant has a high school education and aptitude for clerical work.

7. Claimant is of at least average intelligence; however she appears to be emotionally unstable.

8. The assessment of this case as made by Dr. Robb is correct in all respects, including the physical limitations which he has provided.

9. Claimant is a credible witness; however her perceptions and memory may be affected by an emotional disorder and/or functional overlay. She has some confusion regarding dates.

10. Claimant does not have sufficient earning capacity at

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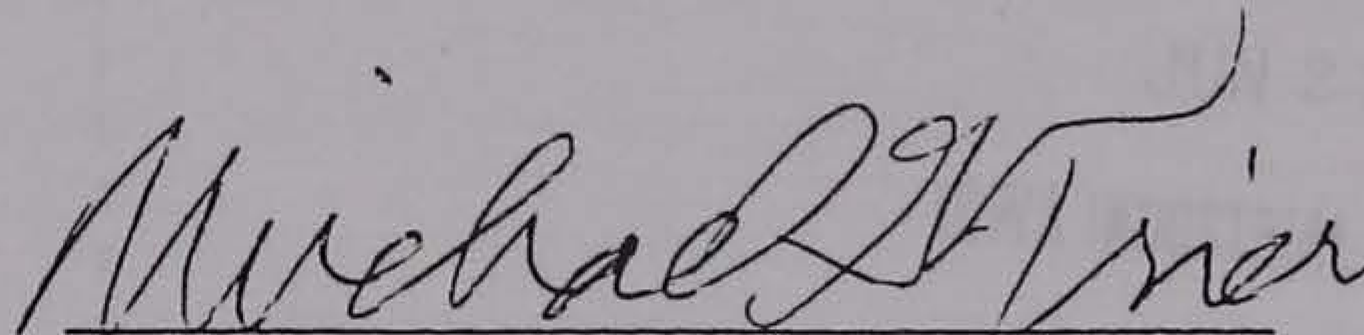
action pursuant to Division of Industrial Services Rule 343-4.33, including the following:

Dr. Robb report	$100.00
Dr. Robb deposition transcript	173.00
Dr. Robb expert witness fee for deposition	150.00
Certified mailing fees	3.34
Total	$426.34

IT IS FURTHER ORDERED that defendants pay claimant's mileage expenses under Iowa Code section 85.27 in the total amount of four hundred twenty-six and 00/100 dollars ($426.00).

Signed and filed this 29th day of June, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES BROWN, Claimant, vs. DES MOINES ASPHALT & PAVING COMPANY, Employer, and UNITED STATES FIDELITY AND GUARANTY COMPANY, Insurance Carrier, Defendants.	:	File No. 688217 A P P E A L D E C I S I O N

FILED
JUN 29 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision denying additional healing period benefits.

The record on appeal consists of the transcript of the review-reopening hearing, claimant's exhibits 1 through 9 and defendants' exhibits 1 through 3. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

1. Whether or not Claimant is entitled to healing period from May 11, 1982 until September 6, 1983.

2. Whether the Claimant was entitled for [sic] healing period from March 15, 1985 to December 16, 1985.

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

The citations of law contained in the review-reopening decision are appropriate to the issues and evidence.

ANALYSIS

The analysis of the deputy in conjunction with the issues and evidence presented is adequate and accurate and adopted herein.

The findings of fact and conclusions of law and order of the deputy is adopted herein.

FINDINGS OF FACT

1. On September 9, 1981 claimant received an injury to his right arm.

2. As a result of the injury claimant was off work from September 9, 1981 to May 11, 1982.

3. Claimant returned to work for defendants on May 11, 1982 and voluntarily quit on July 9, 1982.

4. Claimant quit working for defendants on July 9, 1982 for personal or unknown reasons.

5. On August 6, 1982 claimant obtained a partial commutation of benefits at which time he represented to the industrial commissioner that his healing period terminated May 10, 1982.

6. As a result of his injury claimant suffered a permanent partial impairment of his right upper extremity equal to ten percent.

7. Between May 10, 1982 and November 18, 1982 claimant did not seek medical treatment or consultation.

8. Claimant consulted a physician on November 18, 1982.

9. Between July 9, 1982 and September 6, 1983 claimant was capable of engaging in employment substantially similar to that in which he was engaged at the time of his injury.

10. On September 6, 1983 claimant sought additional medical treatment which resulted in surgery to resect the distal clavicle of his right shoulder.

11. As a result of his surgery, claimant was temporarily totally disabled from September 6, 1983 to July 1, 1984.

12. On July 1, 1984 claimant returned to work for Weaver Construction Company.

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13. Claimant has been less than candid.

14. Claimant returned to work on July 1, 1984 without a release from his doctor.

15. Claimant failed to disclose to his doctor that he returned to work on July 1, 1984.

16. In December 1984 claimant underwent surgery for chronic tendonitis and bursitis of the right shoulder.

17. The opinion of Dr. Crouse that claimant's second surgery was the result of his injury of September 9, 1981 is not reliable because of claimant's failure to provide Dr. Crouse with a complete and accurate history of his activities prior thereto.

18. Claimant has been paid all permanent partial disability benefits to which he is entitled.

19. Claimant has been paid the following temporary total and/or healing period benefits:

September 10, 1981 to May 10, 1982
August 7, 1983 to May 10, 1984
September 26, 1984 to May 23, 1986

CONCLUSIONS OF LAW

Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from September 6, 1983 to July 1, 1984.

Defendants are entitled to credit against any additional or future benefits due claimant in an amount equal to the excess benefits they have paid to claimant.

WHEREFORE, the decision of the deputy is affirmed.

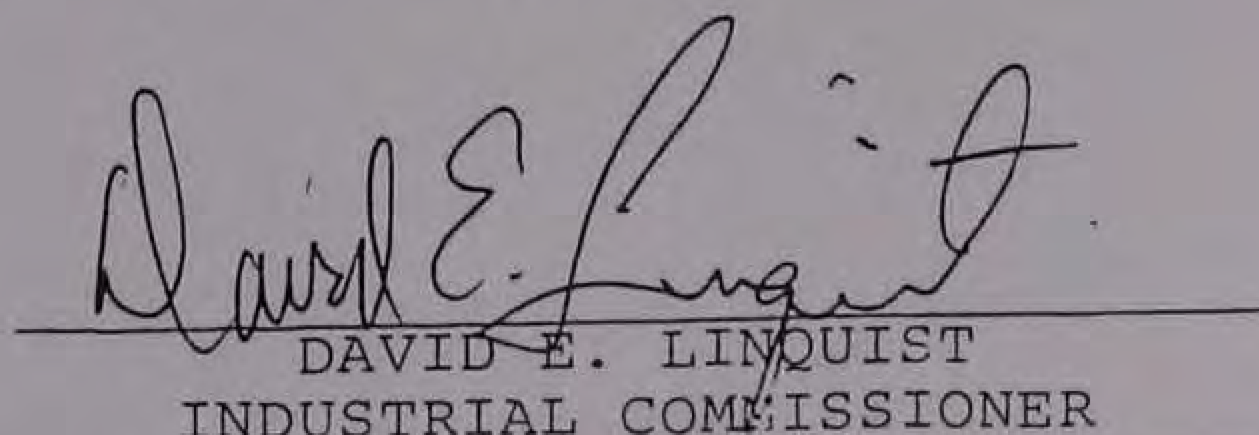
ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from these proceedings.

That all costs are taxed to claimant including the cost of the transcription of the hearing proceeding.

Signed and filed this 29th day of June, 1988.



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1100; 1402.30; 14022.40;
1803
Filed 3-28-88
Deborah A. Dubik

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL BRUNS, Claimant, vs. TWO GUYS PLUMBING & HEATING, Employer, and USF&G FIRE & CASUALTY, Insurance Carrier, Defendants.	File No. 811654 A R B I T R A T I O N D E C I S I O N

1100; 1402.30

Where there was no dispute in the testimony that claimant stored pipe in his barn for the benefit of the employer and claimant was attempting to retrieve this pipe when he was injured, claimant sustained his burden of proof that his injury arose out of and in the course of his employment.

1402.40

Although claimant had a history of back trouble, medical evidence established claimant had a complete recovery after each previous treatment, with no residual impairment. Claimant established the work injury was the cause of the disability.

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Where claimant had no permanent work restrictions, no limitations in his work activity, no permanent impairment, has been able to engage in his regular occupations, has missed no work as a result of the injury, has neither sought nor needed medical attention since his release to return to work, claimant failed to establish the work injury is the cause of any permanent disability.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAUL BRUNS,	:	
Claimant,	:	File No. 811654
vs.	:	
TWO GUYS PLUMBING & HEATING,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
USF&G FIRE & CASUALTY,	:	
Insurance Carrier, Defendants.	:	

FILED
MAR 2 8 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Paul Bruns, claimant, against Two Guys Plumbing & Heating, employer, and USF&G Fire & Casualty, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an alleged injury sustained November 3, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner February 29, 1988. The record was considered fully submitted at the close of the hearing. The record in this case consists of the testimony of claimant; Daniel Bruns, his son; and Darlene Bruns, his wife; joint exhibits 1 through 15, inclusive; and defendants' exhibits A and B.

ISSUES

Pursuant to the prehearing report and order submitted and approved February 29, 1988, the issues for resolution are:

1. Whether claimant sustained an injury November 3, 1985 which arose out of and in the course of his employment;

2. Whether the alleged injury is the cause of the disability on which claimant now bases his claim;

3. The extent of claimant's entitlement to temporary total disability/healing period benefits, if any;

4. The extent of claimant's entitlement to permanent partial disability benefits, if any; and,

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5. Claimant's entitlement to certain medical benefits pursuant to Iowa Code section 85.27, if any.

Also disputed is the defendants' entitlement to credit under Iowa Code section 85.38(2) for previous benefits which may have been paid. This issue, however, was not listed as an issue on the hearing assignment order and, accordingly, the undersigned is without jurisdiction to determine the amount of credit to which defendants are entitled. See Joseph Presswood v. Iowa Beef Processors, (Appeal Decison filed November 14, 1986) holding an issue not noted on the hearing assignment order is waived.

FACTS PRESENTED

Claimant, at the time of his alleged injury, was a 50 percent shareholder in Two Guys Plumbing & Heating and at all times relevant herein received his regular wages of $275 per week. Claimant testified he was injured November 3, 1985, when he lifted a baler in order to get at some pipe which was stored in his barn for the employer. Claimant explained he had, in the past, stored items in the barn which could not be stored at the employer's shop and that the bundle of pipe he attempted to retrieve on November 3 was the last bundle left in the barn. Claimant stated that upon lifting the baler, under which the pipe was wedged, his back immediately "gave out," that he was stooped over, could not stand up, and that he felt severe pain in his lower back and groin.

Claimant acknowledged he has had recurring back problems since 1980 and had periodically been treated by Tom Hoogestraat, D.C., since then. At the time of his deposition, claimant testified that the pain he felt on November 3 was in the same place as the pain for which he had sought previous treatment. However, at the time of hearing, claimant testified his pain was in a different place, perhaps one vertebra higher. Claimant returned to see Dr. Hoogestratt November 4, 1985 and was off work pursuant to Dr. Hoogestraat's order of bed rest from November 4 through November 18, 1985. Claimant returned to work November 22 on light duty through December 16, 1985. He testified that he was still having problems with his back and was referred by Dr. Hoogestratt to Dr. Jitu Kothari, an orthopedic surgeon. Claimant explained Dr. Kothari treated him with a cortisone injection and bed rest from December 18, 1985 through January 5, 1986. Claimant was released to return to work without restriction January 6 and worked light duty through January 27 when he returned to full duty. Claimant acknowledged that since his release to return to work from Dr. Kothari, he has neither seen nor been treated by any health care provider for any problems with his back. Claimant acknowledged he is able to lift, although perhaps not as much nor for as long as he could before his injury; and that he has returned to work for a plumbing and heating company doing essentially the same kind of work as he

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did for defendant employer, having sold his interest in Two Guys Plumbing & Heating in October 1987. Claimant acknowledged he has worked without restriction, has missed no work as a result of his back, is able to perform all his responsibilities of his job, and that his back is fairly stable. Claimant, who at the time of his injury was farming 40 acres, now farms approximately 100 acres and is able to do most of the work but not for "long periods of time." Claimant testified that after approximately one hour on the tractor his back begins to bother him whereas it was only after two or three hours that he felt discomfort before November 1985.

Claimant denied any further injury to his back since November 1985 and describes his current symptoms as severe stiffness in the morning, soreness if strenuous lifting is done, and a continual aching. For the treatment of this condition, claimant explained that he incurred medical expenses of $183 with the Parkersburg Chiropractic Clinic, $23 with Dr. Garry Teigland (whom he saw on only one occasion for the purposes of securing pain medication), $307 with Dr. Kothari, and $27.83 with the Parkersburg Pharmacy.

Daniel Bruns testified he was assisting claiment on November 3, 1985 and essentially confirmed claimant's description of how the injury occurred. Daniel was aware of previous problems claimant had had with his back, but asserted claimant's current condition was different in that claimant had previously been able to stand up straight and had no difficulty walking. He opined claimant appeared to be in more pain after the November 3, 1985 incident than at any time before and that claimant is now stiff in the morning and needs to stretch and walk around after waking. Daniel stated claimant can ride on the tractor a maximum of two to three hours, but that he must stop occasionally during this period of time.

Darlene Bruns confirmed the testimony of claimant and Daniel Bruns although she did acknowledge she did not actually observe the incident, having arrived at the barn when claimant was stooped over complaining of back pain.

Jitu Kothari, M.D., orthopedic surgeon, testified he first saw claimant December 18, 1985 on referral from Dr. Hoogestraat with a medical history that five years previously claimant was hospitalized with back pain and left leg pain and had had no problems with his back since that time. After examination, Dr. Kothari explained he felt claimant probably had a central lumbar disc and treated claimant with an injection of epidural cortisone in the lower back and complete bed rest for about a week. When claimant was last seen January 3, 1986, Dr. Kothari's notes reflect claimant was improving, did not have any leg pain, and that neurological examinations were normal. Dr. Kothari opined that claimant reached maximum medical healing as of January 3,

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1986 and claimant was released to return to work without restriction the following Monday, January 6. Dr. Kothari gave no opinion on impairment at the time of his deposition, but did state on September 29, 1986: "There is no permanent disability and there is no work restriction as per the office visit on 1-3-86." (Joint Exhibit 8)

Dr. Kothari stated the injury for which he was treating claimant was caused by lifting the baler on November 3, 1985. When presented with some evidence that claimant may have sustained injuries subsequent to November 3, 1985, Dr. Kothari testified:

> Q. Okay. Now, Doctor, once again my question will be, based upon the history that Mr. Bruns apparently started to have some back problems after lifting the baler and then he stepped down a step and twisted his back and started to feel some sharp pain in his low back, and then subsequent to that on November 29, 1985, slipped on some ice and landed sharply on his knee and developed some back pain, is there a possibility that both of those particular incidents after lifting the baler aggravated his condition and would not be related to the incident with the baler?
>
> A. Yeah, with that history, which I wasn't -- I did not have the information with that history. Yes, I mean his first incident of lifting the baler was subsequently aggravated by the second incident and the third incident when he fell on the ice, yes.
>
> Q. Okay. So all the problems which he described to you when you first saw him may not be entirely out of that baler incident, assuming those facts?
>
> A. That's correct.
>
> Q. And you wouldn't have any way at this point in time in apportioning what problems arose out of the baler incident and what problems may have arose out of the other two incidents?
>
> A. No, I would not. And, like I said, I did not -- I have not seen Mr. Bruns since January of '86, so --

(Jt. Ex. 1, pp. 19-20)

However, Dr. Kothari subsequently stated:

> Q. Assuming, you know, what we have gone through

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before here that Mr. Bruns related to you, would you assume that his action of lifting that baler, which he may testify to be a hundred to two hundred pounds, would be more likely to have resulted in this herniated disc that you have treated him for than stepping down and twisting, you know, his back on the step, or slipping onto one knee on ice?

A. If I understand your question right, is the act of lifting the baler, or injury while he lifted the baler is more likely to cause him to have back condition or back problem than the other two?

Q. Yes.

A. Yes, he had the -- according to my note, and according to what Mr. Bruns told me, that was the onset, onset of his symptoms. And the other two things were just an aggravation of his pre-existing condition, which I am aware of now, but I was not before.

Q. Yes. I was comparing the three incidents and asking which one would be more probable, you know, to be the result?

A. Definitely, I mean the incident of the baler did cause him to have back pain and more likely to cause his symptoms, yes.

(Jt. Ex. 1, pp. 30-31)

Tom Hoogestraat, D.C., testified he first began treating claimant December 5, 1979 for a low back involvement (subluxation lifting) although earlier records indicate claimant was treated beginning in February 1971 by a different chiropractor for sore lumbar and stiffness in the lower dorsals (thoracic spine). Dr. Hoogestraat's records show claimant was treated for low back pain three times in 1980, twice in 1981, three times in 1982, three times in 1983, three times in 1984, and twice in 1985 before the incident of November 3, 1985. When first seen on November 4, 1985, claimant was treated conservatively using ice, heat therapy, ultrasound and chiropractic manipulation. Claimant was last seen by Dr. Hoogestraat December 14, 1985 at which time he was referred to Dr. Kothari for evaluation and treatment.

On February 10, 1987, Dr. Hoogestraat wrote:

PROGNOSIS: Having not seen Mr. Bruns since December 14, 1985, it would be difficult to make an accurate evaluation of his present and future disabilities. However upon clinical experiences

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and speculation, I would expect him to possibly have further pain and discomfort and would possibly require either chiropractic or medical care for his low back during his lifetime.

....

It is my opinion that Mr. Bruns's [sic] injury did occur while lifting the baler on November 1, 1985, based on the fact that in previous back problems he has had, he has responded positively and rapidly to treatment and returned to work in a few days. However with this injury, that was not the case.

In regards to questions as to whether the 1981 back strain was a contributing factor, I do not recall or am familiar with that particular incident, however it may have been a contributing factor, but highly unlikely in my opinion.

In regards to questions on prognosis, since I have not examined Mr. Bruns since December 14, 1985 it is difficult to determine whether he had lost any range of motion in the lumbar spine.

....

In regards to question is this condition one that stabilizes or may it get worse over a period of time. It is my opinion that yes it may stabilize and never bother Mr. Bruns again. However, based upon clinical experience, it is my opinion that it may possibly reoccur and even become progressively worse during his life time, with or without chiropractic or medical care.

Regards any work restrictions, it is my opinion, that as long as the individual is pain free and asymtomatic, that patient should be able to do all normal activities. However if pain does occur he should restrict himself to a pain free range of motion in all areas of his lifestyle.

(Jt. Ex. 6)

Dr. Hoogestraat opined that claimant's stepping down a step and slipping on the ice were not separate and distinct injuries, but rather were aggravations of the previous on-the-job injury. With regard to a permanent partial impairment rating, Dr. Hoogestraat states a two to three percent whole body disability all attributable to the November 3, 1985 injury "should be

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considered." Dr. Hoogestraat expressed his belief that each time claimant was seen prior to the November 3, 1985 incident, claimant made a complete recovery and that his current problems are not in any way related to the problems for which he was seen previously.

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 an injury on November 3, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

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

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure, 188 N.W.2d 283, Musselman, 261 Iowa 352, 154 N.W.2d 128.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 8, 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). 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

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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.

Iowa Code section 85.33(1) provides:

> 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.

Iowa Code section 85.27 provides, in part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.

ANALYSIS

The uncontroverted evidence in the record establishes claimant stored pipe in his barn for the benefit of the employer and, while attempting to retrieve the pipe which was needed at the shop, claimant injured his back. Claimant established that but for the necessity to retrieve the pipe, he would have had no reason to move the baler. It was claimant's action in moving the baler that caused his injury. Claimant has, therefore, sustained his burden of establishing the injury of November 3, 1985 arose out of and in the course of his employment.

As stated above, the question of causal connection is essentially within the domain of expert testimony. Both Dr. Kothari and Dr. Hoogestraat opine the injury for which claimant was treated was caused by the lifting of the baler on November 3, 1985. Although Dr. Kothari admits the later incident of stepping down a step and falling on the ice may have aggravated claimant's condition, he opines it is more probable than not that the incident with the baler caused his symptoms. Dr. Hoogestraat does not consider either subsequent incident as separate or distinct and further opines it highly unlikely claimant's previous back strain would have been a contributing factor in claimant's current condition. There is no question claimant suffered from preexisting back pain and was regularly

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treated by Dr. Hoogestraat for that pain. However, 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.

Regardless of whether claimant's injury of November 3, 1985 is considered a new injury or an aggravation of his preexisting back problem, claimant has established the work injury of November 3, 1985 is the cause of the disability on which he now bases his claim.

Of primary concern is whether or not claimant has sustained any diability as a result of the work injury of November 3, 1985. A disability may be either temporary or permanent. Generally, a claim of permanent disability invokes an initial determination of whether the work injury is the cause of a permanent physical impairment or permanent limitation in work activity. Neither Dr. Kothari nor Dr. Hoogestraat imposed any work restrictions or limitations on claimant's work activities. Claimant was able, after a period of recuperation, to return to work for defendant employer in his regular job. After claimant sold his shares in defendant employer's corporation, claimant has been able to perform comparable work for another plumbing and heating company. Claimant has missed no work as a result of this injury and is not under the care of any medical practitioner. Indeed, even though claimant was periodically treated by Dr. Hoogestraat from 1979 through 1985, claimant has not returned for any type of treatment for his back since he was referred to Dr. Kothari in January 1986. Further, while claimant farmed only about 40 acres at the time of his injury, he is now farming two and one-half times that many acres. Clearly, his work injury has not hampered his ability to farm although claimant may be inconvenienced by having to occasionally get off his tractor and stretch. Clearly, claimant's current symptoms of stiffness in the morning which are relieved by stretching, soreness after strenuous lifting, and achiness have not impaired his ability to secure and retain employment.

On September 29, 1986, Dr. Kothari wrote to claimant's counsel "there is no permanent disability...." At the time of his deposition, Dr. Kothari declined to render any opinion on functional disability. On February 10, 1987, Dr. Hoogestraat stated "it would be difficult to make an accurate evaluation of his present and future disabilities. However upon clinical experiences and speculation, I would expect him to possibly have further pain and discomfort and would possibly require either chiropractic or medical care for his low back during his lifetime." At this time, Dr. Hoogestraat gave no rating and based his opinion on expectations, speculations and possibilities rather than on actualities. On August 25, 1987, Dr. Hoogestraat

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wrote: "Disability rating of approximately 5 to 7 percent to the extremities and 2 to 3 percent to the whole body should be considered." Dr. Hoogestraat attempts to explain how this "disability" rating was arrived at beginning at page 18 of his deposition. Again, Dr. Hoogestraat appears to base his rating on less than clinical conclusions. Further, Dr. Hoogestraat appears to be invading the province of the industrial commissioner by rating "disability" rather than "impairment" which is within the domain of the expert witness. Therefore, the opinion of Dr. Hoogenstraat is given little weight.

The parties have stipulated that if claimant has a permanent disability, it is an industrial disability. The legislature intended the term disability to mean industrial disability or loss of earning capacity. Diederich v. Tri-City R. Company of Iowa, 219 Iowa 587, 258 N.W.2d 899 (1935). As claimant has failed to show any permanent limitations imposed on his work activity, any permanent work restrictions, any permanent physical impairment or any loss of earning capacity, claimant has failed to establish his entitlement to an award of permanent partial disability benefits.

Pursuant to Iowa Code section 85.33, claimant is entitled to an award of temporary total disability benefits until he has returned to work or is medically capable of returning to substantially similar employment. Therefore, claimant has established his entitlement to an award of temporary total disability benefits for the periods from November 4, 1985 through November 21, 1985 and December 18, 1985 through January 5, 1986. However, as claimant was paid his regular wages of $275 per week for the periods of his absences and this wage exceeds the stipulated compensation of $183.49 per week, defendants would be entitled to a week-for-week credit as the wages are considered to be in lieu of workers' compensation benefit payments.

Finally, as claimant's injury has been found to be compensable under the Iowa Workers' Compensation Act, defendants are liable for the medical expenses incurred by claimant for the treatment of the work-related injury on November 3, 1985.

FINDINGS OF FACT

Wherefore, based on all the evidence presented, the following facts are found:

1. Claimant stored pipe in the barn on his property for the benefit of the employer.

2. On November 3, 1985, claimant, while attempting to retrieve pipe to be used in the employer's shop, lifted a baler causing pain in his back and groin.

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3. Claimant, who had been treated by a chiropractor periodically since 1980 for low back pain, returned to see the chiropractor November 5, 1985 and was unable to work from November 4 through December 15, 1985.

4. Claimant received his regular wages of $275 per week while he was unable to work.

5. Claimant returned to light duty work December 16, 1985 but continued to experience pain.

6. Claimant was referred to an orthopedic surgeon and was treated with an injection of cortisone and bed rest.

7. Claimant was unable to work from December 18, 1985 through January 5, 1986.

8. Claimant received his regular wages of $275 per week while he was unable to work.

9. Claimant was released to return to work without restriction effective January 6, 1986.

10. Claimant returned to work and was able to perform all the responsibilities of his regular job by January 27, 1986.

11. Claimant has since changed jobs and begun working at another plumbing and heating company with essentially the same responsibilities as he had for defendant employer.

12. Claimant has been able to perform all the responsibilities of his new job, has missed no work as a result of his back problem, and has neither sought nor received medical treatment for any back problem since his release to return to work January 6, 1986.

13. Claimant, who farmed 40 acres at the time of the injury, is still able to continue in that endeavor and now farms approximately 100 acres.

14. Medical treatment which claimant received was as a result of the injury November 3, 1985.

15. Claimant has not established any permanent restrictions, permanent limitations in his work activity, or permanent impairment as a result of the injury.

16. Claimant incurred medical expenses in the following amounts for the treatment of his injury:

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Parkersburg Chiropractic Clinic	$183.00
Garry Teigland, D.O.	23.00
Jitu Kothari, M.D.	307.00
Parkersburg Pharmacy (Prescriptions)	27.83

CONCLUSIONS OF LAW

Wherefore, based on the principles of law previously stated, the following conclusions of law are made:

1. Claimant sustained an injury arising out of and in the course of his employment November 3, 1985.

2. Claimant has established that the work injury was the cause of his disablity.

3. Claimant has failed to establish he sustained any permanent partial disability as a result of the work injury.

4. Claimant has established his entitlement to temporary total disability benefits for the periods from November 4 through November 21, 1985, and December 18, 1985 through January 5, 1986, and defendants are entitled to a week-for-week credit for the wages paid to claimant during these periods.

5. Claimant has established his entitlement to medical expenses under Iowa Code section 85.27 for the treatment of his work injury.

ORDER

THEREFORE, IT IS ORDERED:

Claimant is entitled to no further weekly benefits as a result of this proceeding.

Defendants shall pay the following medical expenses:

Parkersburg Chiropractic Clinic	$183.00
Garry Teigland, D.O.	23.00
Jitu Kothari, M.D.	307.00
Parkersburg Pharmacy (Prescriptions)	27.83

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

Signed and filed this 28th day of March, 1988.

DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES J. CAMPOLO, Claimant,	:	File No. 669181
vs.	:	A P P E A L
BRIAR CLIFF COLLEGE, Employer,	:	D E C I S I O N
and	:	
UNITED STATES FIDELITY & GUARANTY COMPANY, Insurance Carrier, Defendants.	:	

FILED
FEB 26 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a commutation decision denying commutation of benefits.

The record on appeal consists of the transcript of the commutation proceeding; claimant's exhibits 1 through 4; defendants' exhibits A through H. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

1. The deputy erred in not determining the period for which compensation is payable is definitely determinable.

2. Claimant's issues I through IV raise the issue of whether the deputy erred in determining commutation was not in claimant's best interest.

REVIEW OF THE EVIDENCE

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

Briefly stated, claimant seeks a full commutation of benefits under an award recovered as a result of her husband's death. Claimant has not remarried, and was 44 years old on the date of

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the hearing, December 16, 1985. Her children were 17, 15 and 14 years old on that date. She stated she has no plans to remarry.

Claimant is employed part time as a counselor for Briar Cliff College earning $13,665 per year. She holds a Masters Degree in clinical psychology. Claimant's salary is expected to increase approximately 3.8 percent per year. Claimant stated an intention to return to full-time employment when her children are graduated from high school. Claimant's employment benefits include a pension plan whereby her employer would match up to five percent of her salary, although claimant does not utilize this benefit. Other benefits include medical insurance for herself, including 80 percent medical coverage, life insurance of two and one-half times her salary, and 60 percent salary long-term disability insurance less social security benefits received.

In addition, claimant's employment entitles her children to attend Briar Cliff College or several other colleges tuition-free (up to $6,400 annually) under a reciprocal agreement. Under this plan, her children would only need to pay for books, transportation and fees which were estimated to be $400 to $450 per year, and personal expenses which were estimated to be $900 to $1,000 per year. Claimant indicated her oldest child desired to attend Creighton University, which is not part of the reciprocal agreement, where her estimated cost, including tuition, housing and books, would be $9,000 annually. Tuition costs at Briar Cliff College are approximately $4,800 annually.

Claimant received a lump sum distribution of workers' compensation benefits in 1985 totaling approximately $57,661. She receives benefits of $303.26 per week, or $15,779.52 annually. One-half of her workers' compensation payments go toward attorney fees. Claimant receives social security payments for her three children of $13,536 annually which will decrease by one-third as each child reaches age 18 or graduates from high school, whichever is later.

Prior to her husband's death, claimant and her husband had $27,000 in savings. Claimant received $36,000 in life insurance upon her husband's death, which has been invested so that the principal remains intact and the interest is also largely preserved. She spent $10,000 for a van. She and her children now have in excess of $95,000 in immediate withdrawal accounts bearing interest at the rate of 5.25 percent annually. She also has in excess of $99,000 in money market certificates, earning an unknown amount of interest described by claimant as originally nine percent but now less, for a total savings of $194,615.82. She stated she earns approximately $13,704 annually in interest.

Claimant's present monthly income from all sources, including workers' compensation payments, is $4,722.11, or $58,539.79

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annually. Her financial affidavit shows total yearly expenses for claimant and her children as $20,220. She owns a home valued at $35,000, with an encumbrance of $19,600, and a life insurance policy with a face value of $2,000. She has a net worth of $222,115.82.

Claimant's monthly expenses include $290 for her house payment, $89 per month for parochial school tuition, and $94.50 for health insurance for her children. Claimant testified as to plans to improve the home with needed additional kitchen space costing approximately $6,000, kitchen appliances costing $1,900, replacement of a furnace costing approximately $5,000, replacement of carpeting costing approximately $1,500, exterior painting costing approximately $2,000, and interior remodeling and painting costing approximately $1,000. Claimant's oldest daughter was treated for cancer which has resulted in extraordinary medical expenses of $2,500 not covered by insurance. Claimant described her efforts to keep expenses to a minimum by doing much of the household repairs and remodeling herself.

Claimant's proposal for the commuted funds would involve payments of $58,703.61 for attorney fees, and the remaining $88,055.42 would be invested in a trust for the parochial and post high school education of claimant's children, for remodeling of the home, a retirement fund for claimant, and for unexpected medical expenses for her daughter's illness.

Claimant has consulted members of the Briar Cliff College business department about her plans, as well as with John C. Kelley, a professional financial investment broker. Mr. Kelley assumed a principal of $50,000 to $60,000 for the educational trust and recommended three alternatives: (1) Triple A bonds with an interest rate of 10.2 percent; (2) a Kemper Corporation government bond fund with interest of 11.79 percent and a penalty for early withdrawal; and (3) a Putman government bond fund with interest of 12.18 percent, with an additional 7.3 percent purchase commission. All three funds would provide monthly payments, and all three would result in increased state and federal income tax obligations for claimant. Mr. Kelly also expressed doubts that claimant was earning as high as nine percent on any of her savings.

APPLICABLE LAW

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

ANALYSIS

Claimant requested a commutation at a time when she still had three minor children who were dependents of decedent. If claimant does not remarry, she is entitled to benefits for life

under section 85.31(1)(a) of the Code. If she remarries without dependent children, she is entitled to a lump sum payment equivalent to two years' benefits. If she remarries while her children are dependent, the children are entitled to receive the benefits until they are no longer eligible. Her children are eligible as dependents under section 85.31(1)(b) until the age of 18, or until the age of 25 if actually enrolled as full-time students. Claimant testified that all three of her children have expressed an interest in pursuing a college education.

Thus, it is clear that the period during which compensation is payable is not definitely determinable, as contemplated by section 85.45(1). Dependent children have a contingent right as successor beneficiaries in the event of remarriage. The existence of dependent children, their ages, and whether they are attending an accredited institution of higher learning in the event of remarriage, all operate to determine the period under which compensation will be payable and, thus, the first requirement of the commutation under section 85.45(1) is not met.

Even if a determinable period for receipt of compensation could be definitely ascertained, the second requirement to be met before a commutation is granted is a showing that the commutation of weekly benefits is in the claimant's best interest.

Claimant's age, education, and history as a money manager are relevant factors in determining if the commutation is in her best interest. Claimant has had the responsiblity of managing a good sum of money for some time prior to the hearing. She has commendably taken steps to insure the protection of the principal and has used professional financial advice for her commutation request. However, she has not shown responsibility in maximizing the rate of return of the fund she has held to date. She has invested over $90,000 in a fund that pays interest of only 5.25 percent. The other investments, again over $90,000, earn an unknown amount of interest which claimant thought originally earned nine percent but now apparently earns less. Claimant was unsure at the hearing of the amount of interest a substantial portion of her assets was earning, and was also unaware of the rate of home mortgage interest she was paying. Thus, her financial management record to date has been only adequate at best.

Claimant's financial condition and the reasonableness of her plan for the commuted funds are factors to be considered. She desires the commuted funds to establish a trust for her children's college education, make home repairs, provide for medical expenses, and set up a retirement system for herself.

The record also shows that if a commutation was granted, a great deal of the amount would go toward the payment of attorney fees. The amount remaining would leave only nine years of

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payments for claimant who was 44 years at the time of the hearing and who had no pension plan or other provisions for retirement.

Claimant has not shown that she would profit from the commutation of benefits considering the present discount rate. Of the three investment options presented by Mr. Kelley, one produces no greater rate of return and two produce only a slightly higher return. In addition, one of those two requires payment of a commission and the other has a penalty for early withdrawal. They are not recommended by him as investment vehicles because of the need of availability of the funds for educational purposes. Claimant would not derive a significant benefit in terms of greater financial return from a commutation.

In addition, the record shows that claimant's proposed use of the funds would result in a greater tax burden to her. Her present receipt of weekly benefits is not taxable. If the benefits were commuted and invested as claimant proposes, the interest earned thereon would be taxable to her.

Claimant already has considerable assets to provide for the needs she recites. Her income exceeds her expenses by over $30,000 per year. Her children's college education may be provided tuition-free if any of many participating colleges are chosen. Although the list of colleges may involve schools some distance from claimant's home, there are other colleges among the participants within the state of Iowa and nearby, including Briar Cliff College itself. This is not to say that claimant's children must attend one of these colleges, but their eligibility to do so tuition-free is an asset and a relevant factor and indicates that a college education will be available to them even if a commutation is not granted. If the tuition-free colleges are unacceptable, other funds exist to provide for college tuition, such as the subtantial savings or the continued weekly workers' compensation benefits. Thus claimant is not in need of the commuted funds to provide a college education for her children.

Similarly, claimant's income and assets would provide a source for her home repairs without endangering claimant's ability to provide the necessitites of life. Her stated intent to use the commuted funds for retirement is unpersuasive in light of the fact she already has available to her a pension plan at her place of employment with the advantage of contribution by her employer, yet she has not taken advantage of this opportunity. Although she lists unforeseen medical expenses of her daughter as an additional reason for her request, only $2,500 of expenses appear in the record. There is no indication that greater expenses are likely to occur other than periodical transportation costs to Houston, Texas for monitoring of her medical progress.

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Finally, claimant's family situation and her responsibility to dependents are relevant factors. The statute contemplates the receipt of weekly benefits. Weekly compensation benefits represent a safeguard against the hazards of mismanagement, and guarantee an income to the family unit to meet the basic needs and necessitites of life in the event other sources of income fail.

In summary, then, a commutation of benefits is appropriate only when a balancing test shows that the benefits of claimant's intended use of the commuted funds outweigh the detriments to claimant. The contingent interest of dependent children in this case make the period during which compensation is payable not capable of being definitely determined. In addition, a commutation is not in claimant's best interest. Commutation of weekly benefits at this time is inappropriate.

FINDINGS OF FACT

1. Claimant is the unremarried surviving spouse of Charles Campolo and was awarded workers' compensation benefits as a result of her husband's work-related death on March 26, 1981.

2. Claimant had three dependent children, ages 17, 15, and 14 at the time of hearing.

3. Claimant seeks a commutation to pay her attorney fees balance, to pay costs of home improvements, to pay extraordinary costs of her daughter's illness, to provide for her retirement, and to pay for her children's parochial and post high school education.

4. Claimant's children have a contingent right to benefits should she remarry before the youngest child reaches age 18 or finishes his schooling to age 25.

5. Claimant has approximately $99,000 invested in money market certificates yielding a probable return of less than nine percent.

6. Claimant has approximately $95,000 invested in passbook savings accounts yielding a return of 5.25 percent.

7. Claimant could earn higher returns with like security for her principal and with other investments.

8. Claimant has made only minimal provision for her retirement.

9. Claimant has a Masters Degree.

10. Claimant's current assets and income are sufficient to pay the home improvement, medical and educational costs.

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11. The proposed commutation trust would not yield a return significantly greater than that generated when a compound discount factor is applied to claimant's workers' compensation payment expectation and would be subject to federal and state income taxes which could offset any return above the amount claimant receives in periodic workers' compensation payments.

CONCLUSIONS OF LAW

The period for which compensation is payable cannot be definitely determined.

A full commutation is not in claimant's best interest.

WHEREFORE, the decision of the deputy is affirmed.

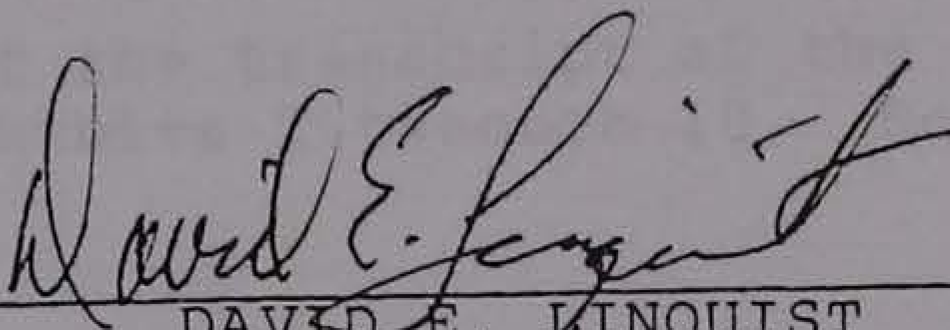
ORDER

THEREFORE, it is ordered:

That claimant's request for commutation of benefits is denied.

That claimant pay costs on appeal including the transcription of the hearing proceeding.

Signed and filed this 26th day of February, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KEITH N. CANNON, Claimant,	:	
vs.	:	File No. 795331
KEOKUK STEEL CASTING, Employer,	:	A P P E A L
and	:	D E C I S I O N
ROYAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	

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JAN 27 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding five weeks of permanent partial disability.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 10. Both parties filed briefs on appeal.

ISSUES

Claimant states that the issue on appeal is the extent of claimant's permanent partial disability.

REVIEW OF THE EVIDENCE

Review of the record indicates the summary of evidence in the arbitration decision is adequate and will not be repeated herein.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and the evidence. In addition, the following authorities are also applicable:

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).

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

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

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).

Iowa Code section 85B.4(1) states as follows:

> "Occupational hearing loss" means a permanent sensorineural loss of hearing in one or both ears in excess of twenty-five decibels if measured from international standards organization or American national standards institute zero reference level, which arises out of and in the course of employment caused by prolonged exposure to excessive noise levels.
>
> In the evaluation of occupational hearing loss, only the hearing levels at the frequencies of five hundred, one thousand, two thousand, and three thousand Hertz shall be considered.

Iowa Code section 85.34(2)(r) and (u) states:

> r. For the loss of hearing, other than occupational hearing loss as defined in section 85B.4, subsection 1, weekly compensation during fifty weeks, and for the loss of hearing in both ears, weekly compensation during one hundred seventy-five weeks. For occupational hearing loss, weekly compensation as provided in the Iowa occupational hearing loss Act [chapter 85B].
>
> ....

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> u. In all cases of permanent partial disability other than those hereinabove described or referred to in paragraphs "a" through "t" hereof, the compensation shall be paid during the number of weeks in relation to five hundred weeks as the disability bears to the body of the injured employee as a whole.
>
> 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.

Iowa Code section 17A.14(5) states: "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence."

There can be no recovery of benefits for industrial disability unless it is shown that a part of the body other than the scheduled member is impaired. Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986).

The benefits under section 85.34, The Code, contemplate compensation for any effect on the claimant's earning capacity caused by psychological problems stemming from an injury to a scheduled member. Pilcher v. Penick & Ford, File number 618597 (Appeal Decision, October 1987).

ANALYSIS

Claimant appeals the deputy's award of one percent industrial disability. Claimant alleges a hearing loss, tinnitus and resultant psychological stress due to an explosion of an oxidizing device he was operating on May 30, 1984.

Claimant's medical experts did establish that claimant suffers from a hearing loss in both ears, with tinnitus, or a ringing in the ears, as a symptom. Claimant did not miss any time from work as a result of this injury. Claimant experienced a ringing sensation for a short time after the injury, with a reoccurrence six months later. He indicated that the ringing has been constant since then and that it causes him sleeplessness, an inability to be around loud noises, irritability with his wife and grandchildren and social handicaps such as an inability to understand conversations in a noisy setting.

Guenter H. Gehrich, M.D., confirmed that claimant had noise-induced damage to both inner ears and that the condition was permanent. There is no treatment available. Claimant's

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condition was, in his opinion, common for persons exposed to noise on a repeated basis and could be aggravated by a loud noise. He found claimant to have a 20 dBA hearing loss in the right ear, and 25 dBA in the left ear. However, under the BAHL method and the 1979 AMA Guides, he would rate that loss as insignificant or 0%. He did not offer testimony on any psychological effect on claimant.

Craig Blaine Rypma, Ph.D., testified that claimant would likely suffer permanent psychological difficulty in adjusting to his hearing loss. He stated that this would exclude him from certain types of employment in the future, such as telephone work or working with the public. Dr. Rypma declined to offer a rating or degree of impairment. Dr. Rypma made no use of the AMA guides.

In his appeal brief, claimant requests the Commissioner to take into consideration the more recent AMA Guides to the Evaluation of Permanent Impairment, 2nd Edition, chapter 12 and table 1 therein, dealing with mental and behavioral disorders, as these "should be looked to for guidance even though the two doctors seem to be not familiar with such guidelines." He urges that when these standards are applied, claimant's impairment is actually 50-55%. Claimant has attached a copy of chapter 12 of the AMA Guides to his appeal brief.

Claimant's request that the Commissioner, on appeal, consider evidence, not made part of the record at the hearing, is denied. Evidence that was available to claimant at the time of the hearing cannot be considered on appeal unless the same was properly offered and accepted into the record at the hearing with an opportunity for defendants to object to its admission and cross-examine as to its contents. This was not done and said evidence will not be considered on appeal.

Claimant brought his petition under chapter 85 of the Code, and not under chapter 85B, dealing with occupational hearing loss. The record shows that claimant's hearing loss does not exceed 25 decibels, as required by section 85B.4(1), The Code. In addition, the record shows that claimant's hearing condition was caused by trauma in the form of an explosion, as opposed to the prolonged exposure to excessive noise levels contemplated by section 85B.4. Thus, claimant's injury, if it is compensable, would be governed by chapter 85, The Code.

Claimant's hearing loss was rated at 0% by the only expert medical testimony received. He also suffers tinnitus, or ringing in the ears.

In March of 1985 claimant reported "light headedness." However, B. J. Williamson, M.D., noted the same month that claimant had "no loss of balance." At the hearing on June 17,

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1986, pursuant to numerous questions, both claimant and his wife failed to mention light headedness, dizziness, or a loss of balance, motion tolerance or equilibrium as part of claimant's symptoms.

If claimant's tinnitus is a scheduled loss, he is to be compensated pursuant to section 85.34(2)(r), The Code. If claimant's tinnitus is an injury to the body as a whole, he is to be compensated according to the degree of his industrial disability under section 85.34(2)(u), The Code.

Section 85.34(2)(r) refers to the loss of hearing, other than occupational loss of hearing. The question then becomes, is tinnitus "loss of hearing"? The few Iowa cases dealing with tinnitus do not provide a ready answer. In Arguello v. Aluminum Company of America, II Iowa Industrial Commissioner Report 11 (1981), although tinnitus was present, the award was based on claimant's hearing loss and motion intolerance. In Besch v. Fort Dodge Laboratories, Thirty-fourth Biennial Report of the Industrial Commissioner 37 (1979), again tinnitus was part of the record, but the award given was based on hearing loss. In Haney v. University of Iowa--Oakdale Branch, I Iowa Industrial Commissioner Report 129 (1980), although claimant alleged he suffered tinnitus, insufficient evidence was put into the record on the extent of disability or its connections to the injury. In addition, claimant in that case also suffered dizziness.

There is, therefore, no clear authority on the proper treatment of tinnitus under the Iowa Workers' Compensation law. The present case is unique in that claimant suffers no dizziness, loss of balance or equilibrium that might be considered as extending his condition from the scheduled member (hearing) to the body as a whole.

Claimant's tinnitus affects his ability to hear or distinguish words and does not affect any other part of his body. Under this set of facts, claimant's tinnitus is a loss of hearing, and as such is compensable under section 85.34(2)(r).

Any psychological effects of his hearing loss or tinnitus are contemplated in "loss of hearing" under section 85.34(2)(r), and thus would not constitute an extension of the impairment to the body as a whole.

Under section 85.34(2)(r), functional impairment, rather than industrial disability, determines the extent of claimant's compensation. Although Dr. Gehrich does not assign a percentage to claimant's hearing loss, he has sustained an actual hearing loss. Dr. Gehrich described claimant's hearing loss as having lost "not so much the ability to hear but the ability to understand in noisy surroundings." (Deposition of Dr. Gehrich, p. 7, ll. 8-9) Dr. Gehrich described claimant's speech discrimination

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as "excellent." Claimant testified that "if I'm in a noisy environment and there is several people, it's virtually impossible for me to distinguish what people are saying." (Transcript, p. 29, ll. 7-9) Claimant's wife confirmed claimant's inability to distinguish speech in social situations. It is therefore determined that claimant's hearing loss due to tinnitus results in a three percent functional loss of hearing as a result of his injury.

FINDINGS OF FACT

1. On May 30, 1984 claimant suffered an injury to his hearing as the result of an explosion at work.

2. Claimant lost no time from work as a result of his injury.

3. Claimant suffers tinnitus as a result of the May 30, 1984 injury.

4. Claimant has difficulty understanding conversation in a noisy environment as a result of the injury on May 30, 1984.

5. Claimant has a total three percent hearing loss for both ears due to his tinnitus.

6. Claimant's rate of compensation is $232.27.

CONCLUSIONS OF LAW

Claimant has proven by a preponderance of the evidence that on May 30, 1984 he suffered an injury arising out of and in the course of his employment.

Claimant has proven by a preponderance of the evidence that he has suffered a permanent hearing loss to both ears of three percent.

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

ORDER

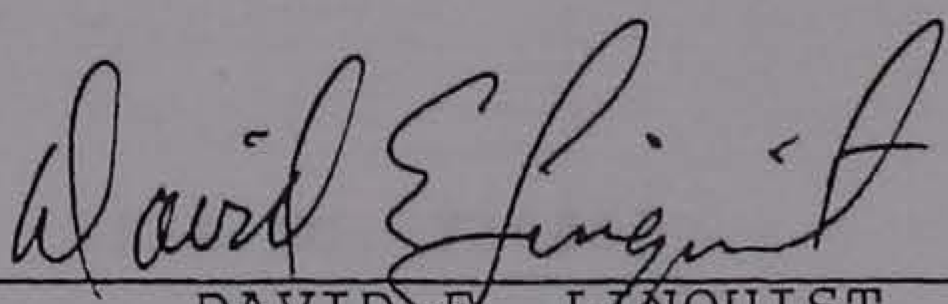
THEREFORE, it is ordered:

That defendants pay unto claimant five point twenty-five (5.25) weeks of permanent partial disability at the rate of two hundred thirty-two and 27/100 dollars ($232.27) per week commencing May 31, 1984. All benefits shall be paid in a lump sum together with statutory interest thereon.

That the costs of this action are taxed to the defendants.

That defendants shall file claim activity reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 27th day of January, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN A. CARLSEN, Claimant,	:	
vs.	:	File No. 736867
DEPARTMENT OF TRANSPORTATION, Employer,	:	A P P E A L D E C I S I O N
and	:	
STATE OF IOWA, Insurance Carrier, Defendants.	:	FILED MAY 20 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding permanent partial disability benefits.

The record on appeal consists of the transcript of the proceeding; claimant's exhibits 1 through 43; and defendants' exhibits A through C. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

I. The facts in this case are substantially similar to those in Dietrich [sic] v. Tri-City Railway Co., 258 NW 889 [sic], and thus the result should have been similar.

II. In the alternative, the industrial disability of claimant is in excess of 40%.

III. Under the circumstances in this case, the action taken in reducing the 40% being voluntarily paid, if affirmed, will "chill" future claimants from exercising their rights in this social legislation.

REVIEW OF THE EVIDENCE

Briefly stated, claimant was employed by defendant Iowa

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Department of Transportation as an equipment operator from October 1966 until April 30, 1984. Claimant's work involved driving vehicles such as snow plows, and some heavy manual labor consisting of bending, stooping, twisting and heavy lifting as well as prolonged standing and sitting. Claimant's entire work history consisted of these duties and farm work. Claimant's education is limited to the eighth grade.

On June 16, 1983, claimant suffered an injury to his low back when he hit a "washout" while mowing roadside grass. Claimant felt the immediate onset of pain in his back and legs. Claimant was treated by E. M. Mumford, M.D., who diagnosed a broken fusion mass at the L4-5 vertebral interspace. Claimant was 61 years old at the time of his accident.

This interspace had been previously fused in a 1969 surgery and again fused in 1971 following work injuries. The 1971 surgery was the result of a work injury in 1970 that was seen as pulling loose the earlier fusion. Claimant was given a lifting restriction of 50 pounds, but nevertheless was returned to full duty work. Claimant also had Paget's disease of the spine.

Dr. Mumford opined that claimant's injury of June 16, 1983 again pulled loose the fusion of claimant's L4-5 interspace, based upon claimant's symptomatology following that injury. Prior to June 16, 1983, claimant had not required medical attention for his back since 1980 and had little pain. Claimant's Paget's disease was treated and Dr. Mumford opined that this disease was asymptomatic and unrelated to his back injury. Dr. Mumford re-fused claimant's L4-5 interspace on January 31, 1984. Pursuant to his physician's recommendations, claimant voluntarily retired from his work on April 30, 1984.

Dr. Mumford indicated that claimant reached maximum medical recovery from this surgery on June 14, 1985. At his last examination in January of 1986, claimant was told not to stoop by Dr. Mumford and was given a lifting restriction of 15 pounds. Claimant has not found other work, and testified that he would like to work but feels he cannot do any physical work. Claimant has not applied for any jobs or sought rehabilitation counseling because he felt his restrictions would make a job search futile. Claimant makes craft items at home on a non-profit basis.

On June 14, 1985, Dr. Mumford opined that, "[f]rom the most recent injury, the disability would be 40% minus what he had previously been rated as having. Exhibit 2." The record contains no ratings of impairment or finding of industrial disability prior to June 16, 1983.

Claimant and his wife testified that prior to June 16, 1983 claimant was able to perform the duties of his job, but that after June 16, 1983 claimant has chronic pain in his hip and

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back radiating into his legs, cannot sit longer than one hour at a time, and cannot perform household chores.

The parties stipulated that claimant received an injury on June 16, 1983 which arose out of and in the course of his employment with defendant; that claimant is entitled to and has been paid temporary total disability or healing period benefits from June 16, 1983 through June 14, 1985; that if claimant has a permanent disability, it is an industrial disability; that the commencement date for any permanent disability is June 14, 1985; and that claimant's rate is $187.90.

APPLICABLE LAW

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W.2d 899 (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. * * * *

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

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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).

The approach of later years when it can be anticipated that under normal circumstances a worker would be retiring is, without some clear indication to the contrary, a factor which can be considered in determining the loss of earning capacity or industrial disability which is causally related to the injury. Becke v. Turner-Busch, Inc., 34th Biennial Report of the Industrial Commissioner 34 (Appeal Decision 1979).

Apportionment is limited to those situations where a prior injury or illness independently produces some ascertainable portion of the ultimate industrial disability which exists following the employment related aggravation. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984).

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ANALYSIS

Claimant urges that under the principles enumerated in Diederich v. Tri-City Railway Co., 219 Iowa 587, 258 N.W. 899 (1935), claimant is entitled to a finding of permanent total disability. Specifically, claimant argues that since he was 61 years old at the time of his disability, received a partial rating of impairment, and could not return to the work he had done all of his life, that he was therefore totally and permanently disabled. The claimant in Diederich was 59 years old at the time of his accident, had a partial rating of impairment, and could not return to work.

It should be noted that Diederich was decided in 1935. Subsequent cases have set forth the various factors that determine industrial disability. Claimant's age at the time of his injury is a relevant factor in a determination of industrial disability. The approach of normal retirement age, without an indication to the contrary, is a factor properly considered in evaluating the effect of the claimant's age on his loss of earning capacity.

Claimant's motivation to find work is also a relevant factor. Claimant has not actively sought alternative work. Claimant's receipt of social security disability benefits has provided some income and decreased claimant's incentive to look for work. Claimant has lost income. However, loss of earnings is not synonymous with loss of earning capacity.

Dr. Mumford assigned claimant 40 percent "disability." It is unclear from the record whether Dr. Mumford was assigning a rating of physical impairment, or industrial disability. Medical testimony is properly limited to opinions on the extent of physical impairment. The degree of industrial disability is beyond the expertise of Dr. Mumford.

However, a medical rating of physical impairment is but one factor to be considered in determining industrial disability. Claimant is no longer able to perform the duties of his job. Claimant is unable to realistically compete for other jobs involving heavy physical labor, or prolonged sitting or standing. Claimant's training and work experience are limited to jobs that do require heavy physical labor and prolonged sitting and standing. Claimant's education is limited to the eighth grade, and he found school difficult. Claimant is not a good candidate for retraining. Claimant's age also mitigates against retraining or further education. Claimant's back condition has resulted in restrictions on lifting, bending and stooping. Claimant is under medical advice not to return to his work. Claimant is close to retirement age. Subsequent to June 16, 1983, claimant was given a lifting restriction of 15 pounds.

Based on these and all other appropriate factors for determining industrial disability, claimant is determined to have an industrial disability of 55 percent.

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Since claimant had a prior disability, an apportionment must be considered. There is no rating of impairment for claimant's prior injuries or surgeries in the record, nor is there a finding of industrial disability based on these injuries and resulting surgeries. Claimant had undergone two prior back surgeries, but was able to perform the duties of his job after the last surgery for over 12 years until the present injury. Claimant had not sought medical attention for his back for approximately three years prior to June 16, 1983. Claimant had a lifting restriction of 50 pounds prior to June 16, 1983.

Based on the factors known to exist prior to the injury, it is determined that claimant had prior industrial disability of 25 percent.

Claimant argues that lowering the benefit amount claimant was already receiving pursuant to voluntary payments by the employer would deter other claimants from pursuing a claim for benefits in an arbitration proceeding. However, the amount of benefits voluntarily paid prior to the institution of arbitration proceedings can have no binding effect on this agency as it is the duty of the agency under the Code of Iowa to make a determination of claimant's entitlement to benefits based on the law and the facts of the case. It is irrelevant to that determination whether a voluntary arrangement between the parties resulted in differing benefits or speculation as to the effect of the decision on other claimants.

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FINDINGS OF FACT

1. Claimant was employed by defendant Iowa Department of Transportation from October 1966 until April 30, 1984.

2. Claimant received an injury to his back that arose out of and in the course of his employment on June 16, 1983.

3. Claimant had a prior fusion surgery of the L4-5 interspace in 1969, and an injury to his back in 1970 and second fusion surgery of the L4-5 interspace in 1971.

4. Claimant had a lifting restriction of 50 pounds prior to June 16, 1983.

5. As a result of the injury on June 16, 1983, claimant underwent a third fusion surgery at the L4-5 interspace on January 31, 1984.

6. Claimant voluntarily retired from work on April 30, 1984, pursuant to medical advice.

7. Claimant was 61 years old at the time of his injury on June 16, 1983.

8. Claimant reached maximum medical recovery on June 14, 1985.

9. Claimant has a lifting restriction of 15 pounds subsequent to his injury of June 15, 1983 and cannot bend, stoop, stand or sit for prolonged periods of time.

10. Claimant's work involved physical labor and the operation of heavy equipment, and required claimant to lift, bend, stoop, stand or sit for prolonged periods of time.

11. Claimant can no longer perform the duties of his job.

12. Claimant's education is limited to the eighth grade.

13. Claimant had an industrial disability of 25 percent prior to June 16, 1983.

14. Claimant's industrial disability at the time of hearing was 55 percent.

15. As a result of his injury of June 16, 1983, claimant has an industrial disability of 30 percent.

16. Claimant's rate is $187.90.

CONCLUSIONS OF LAW

Claimant suffered an injury to his back that arose out of and in the course of his employment on June 16, 1983.

Claimant has an industrial disability of 55 percent subsequent to his injury of June 16, 1983.

Claimant had an industrial disability of 25 percent prior to June 16, 1983.

Claimant met his burden in proving an industrial disaility of 30 percent as a result of his June 16, 1983 injury.

WHEREFORE, the decision of the deputy is modified.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at a rate of one hundred eighty-seven and 90/100 dollars ($187.90) per week from June 14, 1985.

That defendants are entitled to credit for benefits previously paid.

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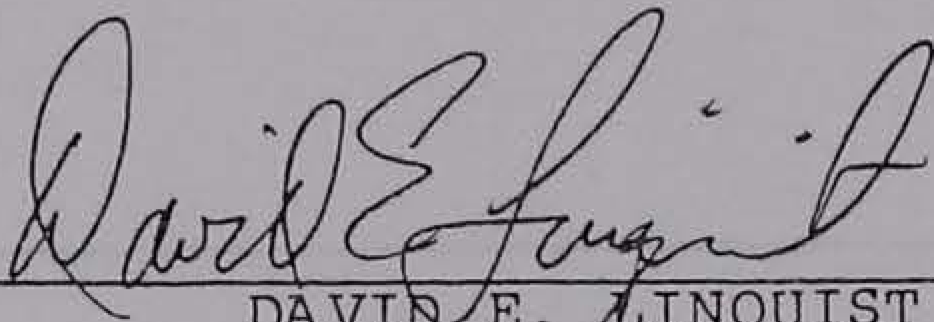
That defendants shall pay accrued weekly benefits in a lump sum.

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

That defendants are to pay the costs of this action.

That defendants shall file claim activity reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 20th day of May, 1988.



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1402.30
Filed April 18, 1988
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD L. CHRISTIANSEN,	:	
Claimant,	:	File No. 816101
vs.	:	A R B I T R A T I O N
IBP, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

1402.30

Claimant failed to appear at hearing and the failure was found to be without reasonable cause or excuse. Defense counsel, nevertheless, offered exhibits showing that the hearing loss of which claimant complained was not a work-related ailment. The claim was dismissed with prejudice on the merits and also as a result of the claimant's failure to appear at hearing and introduce evidence. By failing to appear and introduce evidence, claimant failed to carry the burden of proof on his claim.

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IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD L. CHRISTIANSEN,	:	
Claimant,	:	File No. 816101
vs.	:	ARBITRATION
IBP, INC.,	:	DECISION
Employer, Self-Insured, Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Richard L. Christiansen against IBP, Inc., his self-insured employer. Claimant alleges that he sustained an occupational hearing loss and seeks compensation for permanent partial disability and a hearing aid. The case was heard and fully submitted at Sioux City, Iowa on April 13, 1988. The record in this proceeding consists of defendant's exhibits 1, 2 and 3.

ISSUES

The issues presented for determination are whether claimant is entitled to any compensation for permanent partial disability or for a hearing aid under the provisions of Chapter 85B of The Iowa Code. Neither claimant nor his attorney appeared at the time of hearing. A telephone call to the office of claimant's attorney, made 20 minutes after the time the hearing was scheduled to commence, provided information that claimant's counsel was out of the office at lunch and was not enroute to Sioux City, Iowa for the hearing. Defense counsel moved for dismissal of the case on the ground that the claimant had failed to introduce evidence sufficient to carry the burden of proof as a result of claimant's failure to appear for the hearing. Defense counsel, in the alternative, also offered exhibits 1, 2 and 3 and requested dismissal based on the merits of the case.

SUMMARY OF EVIDENCE

The only evidence introduced comes from defendant's exhibits 1, 2 and 3. Exhibit 1 is a report from W. H. Wilder, M.D., which states that claimant has a bilateral hearing loss that is unmistakably due to a disease of the middle ear bones called otosclerosis and that claimant's hearing loss was not due to the trauma of working in a noisy environment and was not caused by

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claimant's work at IBP, Inc. Exhibit 2 is the curriculum vitae of Dr. Wilder. Exhibit 3 is a description of hearing protective devices purportedly used at IBP, Inc.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an occupational hearing loss on March 7, 1986 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

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

The only evidence in the record of this case is that claimant's hearing loss is "unmistakably" due to a familial disease and that it is not due to noise trauma. Based upon the record, the only determination which can be reached is that the claimant has failed to prove he sustained an occupational hearing loss which arose out of and in the course of his employment.

Further, the claimant failed to appear for the hearing. The agency file shows that a pre-hearing conference was conducted on or about November 3, 1987 with both parties appearing. It further appears that, at the pre-hearing conference, the hearing was scheduled to be held on April 13, 1988 at 1:00 p.m. at the county courthouse in Sioux City, Iowa. The agency file further indicates that a copy of the hearing assignment order was mailed to counsel of record on November 11, 1987. The file contains no

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undelivered envelopes. Accordingly, it would appear that claimant's counsel had notice of the time and place of hearing through the pre-hearing conference itself and also from the hearing assignment order. Nevertheless, no one appeared on behalf of the claimant at the hearing. The claimant is therefore in default. The record presents no reasonable cause or excuse for claimant's failure to appear at the hearing. Accordingly, dismissal of his claim is warranted.

FINDINGS OF FACT

1. Claimant failed to introduce evidence showing it to be probable that his hearing loss arose out of and in the course of his employment with IBP, Inc. To the contrary, it is established by a preponderance of the evidence that the claimant's hearing loss is a familial disease which is totally unrelated to his employment.

2. Claimant failed, without reasonable cause or excuse, to appear at the hearing.

CONCLUSIONS OF LAW

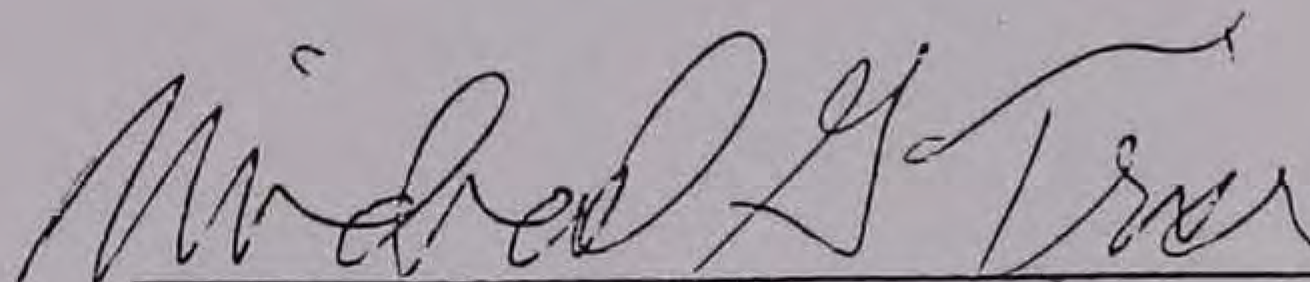
1. The defendant is entitled to a dismissal of this claim, with prejudice, both on the merits of the case and also procedurally in view of the claimant's failure to appear at the hearing. Either ground is independently sufficient to warrant the dismissal of the claim with prejudice.

ORDER

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

IT IS FURTHER ORDERED that the costs of this proceeding are assessed against the claimant pursuant to Division of Industrial Services Rule 343-4.33 including one hundred thirty-one and 00/100 dollars ($131.00) for the cost of a written report from Dr. Wilder and also for the fees of the court reporter who appeared at the hearing pursuant to Iowa Code section 86.19.

Signed and filed this 18th day of April, 1988.



MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RANDY A. CLARK, Claimant,	:	File No. 764542
vs.	:	A P P E A L
WILSON FOODS CORPORATION, Employer, Insurance Carrier, Defendant.	:	D E C I S I O N

FILED
FEB 22 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals from an arbitration decision awarding permanent partial disability benefits based upon a 20 percent industrial disability.

The record on appeal consists of the transcript of the arbitration hearing, claimant's exhibits 1 through 3, and defendant's exhibits A through C. Only defendant has filed a brief on appeal.

ISSUES

Defendant states the following issues on appeal:

1. Claimant has failed to prove by a preponderance of evidence from competent medical testimony that his back problem "arose out of" a work "injury".

2. The Arbitration Decision, without explanation or basis, erroneously favors the medical report of the evaluating physician over the opinions of the treating physician.

3. The Arbitration Decision erroneously finds the Claimant's injury to extend beyond the right lower extremity.

REVIEW OF THE EVIDENCE

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

On May 1, 1984, while carrying a roll of film weighing

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90-100 pounds, claimant slipped and twisted his body injuring his right knee. Claimant stated that he went to the company nurse who sent him immediately to the hospital. Claimant indicated that he was examined at the hospital and was placed in a splint and sent home the same night.

Claimant was then treated by L.C. Strathman, M.D., on May 9, 1984. Dr. Strathman states in his examination report:

> EXAMINATION: Reveals mild puffiness about the knee, no discreet effusion. He states it was more swollen than this earlier. The collaterals and cruciates seem stable. He lacks a few degrees of extension and a few degrees of flexion compared to the other side. Tenderness is primarily medially. McMurray's test reveals no click.
>
> X-ray shows this very large knee. The joint is well preserved. I don't see any evidence of fracture or dislocation. Patellar view shows wide lateral facet but there does not seem to be impingement.
>
> His findings are more consistent with acute strain. The possiblity of internal derangement has to be considered but I don't find enough change today to warrant further studies and particularly invasive studies.
>
> We'll have him start quad exercises, range of motion, gradually wean off the immobilizer and we should check him in a couple weeks.

(Defendant's Exhibit A, unnumbered page 4)

Dr. Strathman released claimant on May 10, 1984 for limited work wearing the knee immobilizer. See defendant's exhibit A, page 4. Claimant returned to Dr. Strathman on May 23, 1984, and Dr. Strathman noted that claimant was experiencing continued soreness but that claimant retained full range of motion. See defendant's exhibit A, page 5. Dr. Strathman examined claimant on June 25, 1984, and he opined:

> 6-25-84: This lad's right knee feels better but he is aware of a click in the knee. Today on acute flexion a palpable click is noted at the joint line medially. This is not particularly painful and there is no effusion.
>
> I feel this gèntleman has a torn medial meniscus and when symptoms are bothering him sufficiently that he wishes to be rid of it we should proceed

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> with arthroscopy and probably removal of this medial meniscus.

(Def. Ex. A, p. 5)

After his August 16, 1984 examination, Dr. Strathman scheduled claimant for arthroscopic surgery. In a December 9, 1985 letter, Dr. Strathman opines:

> This gentleman was seen and treated by the writer from 5-9-84 through 7-10-85. His initial history was of slipping while at work and injuring his right knee.
>
> He subsequently showed evidence of a click. Arthroscopic exam was carried out and he had a torn medial meniscus which was subsequently removed. He went on to satisfactory healing. During this time that we saw him there were no complaints other than in respect to this right knee. He was rated as an estimated permanent partial disability of 10% of the affected right lower extremity.

(Def. Ex. A, p. 3)

Claimant stated that the injury to his right leg has caused him to favor his left leg. Claimant opined that his left leg is getting bigger. Claimant also stated that he has been having problems with his lower mid back. Claimant opined that these back problems are related to his right knee injury.

Claimant was examined by John R. Walker, M.D., with regard to claimant's back problem on October 16, 1985. Dr. Walker opines:

> OPINION: This patient has definite permanent impairment of the right lower extremity. It appears to be affecting his low back as well and I think that he may well have a little impairment of this as well. As far as the right, lower extremity is concerned, I believe that his permanent, partial impairment is 14% of the right, lower extremity and this is based on all of the findings, plus the cruciate laxity. This translates in to 6% of the whole man. I believe that he has suffered another 2% permanent, partial disability because of the low back lesion. It does seem reasonable that these complaints are logical and valid. I have queried him at great extent and he tells me that he has never had any back ache or back problems before this and has never been to a chiropractor or osteopath and he has never been to a doctor except

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> for a Wilson Foods examination by the company doctor. All-in-all this should then total up to 8% impairment of the whole man.

(Cl. Ex. 2)

Claimant was examined by Dr. Strathman on July 18, 1986 with regard to claimant's back problems. Dr. Strathman states his impression:

> IMPRESSION: Acute and chronic low back strain.
>
> This gentleman should be working with a flexion exercise program, should be wearing a garment for awhile, at least for symptomatic relief. I think he's going to have to get some weight off and get on a conditioning program to keep this from becoming more of a chronic problem. There's no sign of radicular pain at this time and myelography or scanning does not seem indicated. I'll check him in a month.

(Def. Ex. A, p. 2)

With regard to whether the back problems are related to claimant's knee injury, Dr. Strathman opines: "I do not feel that the injury to his knee was contributory to his back complaints." (Def. Ex. A, p. 2)

Claimant saw Dr. Walker again on August 18, 1986. Dr. Walker opines after that examination:

> OPINION: This patient still has the same problems that he had, plus a coccydynia which is painful. I cannot account for the coccyx pain as far as his original injury is concerned. It is difficult to see why he is having it other than this may have just come on in the course of events over these many months. As far as his permanent impairment is concerned, I would make no change. I believe that he has a permanent, partial impairment of the right knee amounting to 14% of the right, lower extremity and as far as the low back is concerned, he has a sprain of L-4, L-5 with some instability which is a chronic situation which I still believe amounts to a 2% permanent, partial impairment of the whole man. At the present time I really have no further suggestions for treatment except to do quadriceps exercises which I have indicated to him and to use heat on the low back on a PRN basis and to turn himself in to the nursing station at work if this back ache gets worse. I

> think that the back support is a good idea and he should wear it on a PRN basis. Probably he should be put on a back exercise program which I will leave to Dr. Strathman, however, today we did show him the quadriceps exercises because apparently he has not been doing them and I think they might benefit his right knee. I would be very happy to see this man back again if it is indicated.

(Cl. Ex. 1)

Claimant testified that his knee still bothers him but he opined that it is improving. Claimant stated that lifting bothers his knee and back. Claimant related that he lifts between 23,000 and 25,000 pounds per night in his current job. Claimant opined that his back pain affects his ability to work overtime.

Claimant testified that he is 27 years old and that he dropped out of high school in the eleventh grade. Claimant has been employed by defendant since he was 19 years old.

At the hearing the parties stipulated that claimant was off work from May 2, 1984 through May 9, 1984 and from August 16, 1984 through October 20, 1984.

APPLICABLE LAW

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

ANALYSIS

Defendant argues that claimant's injury does not extend to the body as a whole. The deputy analyzed this issue as follows:

> If a claimant contends he or she has sustained industrial disability (loss of earning capacity), he or she has the burden of proving that his or her injury resulted in an ailment that extends beyond the scheduled loss. Kellogg v. Shute and Lewis Coal Co., 256 Iowa 1257, 130 N.W.2d 667 (1964). Claimant herein has met his burden in this regard. Claimant's testimony combined with Dr. Walker's persuasive medical testimony establishes by a preponderance of the evidence a causal link between claimant's back impairment and the injury of May 1, 1984. In this regard, it is noted that a treating physician's testimony need not be given greater weight as a matter of law than that of a physician who later examines a workers' compensation claimant in anticipation of litigations. Rockwell Graphic

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> Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Also, the record in this case establishes that claimant did not have any back problems prior to his injury of May 1, 1984. In sum, I am persuaded that claimant's back problem resulted from the trauma to his right knee and claimant "compensating" for this right knee injury. The fact that there is not substantial impairment to the back (i.e., greater than 2% of the whole body) does mean that this is a scheduled member case.

(Arb Dec., p. 7)

Claimant was examined and treated by Dr. Strathman on at least thirteen occasions before he reported to anyone that he was having back problems. He finally reported that he was experiencing back problem to Dr. Walker on October 16, 1985. At that time, Dr. Walker opines that the impairment of claimant's right lower extremity "appears to be affecting his back as well" and Dr. Walker assigns a two percent body as a whole rating based on impairment of the back, but Dr. Walker does not suggest any treatment for the back impairment nor does he place any restrictions on claimant. Claimant's next medical examination was on July 18, 1986 by Dr. Strathman. Dr. Strathman treated claimant's back problem with exercise program and with a back brace, but Dr. Strathman opines that claimant's back problems are not related to his right knee injury. Claimant returned to Dr. Walker on August 18, 1986. At that time, Dr. Walker states that claimant had the same problems plus a painful coccydynia which Dr. Walker opines he cannot account for as far as the original injury is concerned. See claimant's exhibit 1. Dr. Walker does not change his impairment ratings and he only suggests that claimant use heat on his back along with the treatment prescribed by Dr. Strathman.

The following testimony by claimant concerning the onset of his back problems is interesting.

> Q. Randy, when did your back first start bothering you?
>
> A. Well, when I went to see Dr. Walker the first time, I told him about it.
>
> Q. Well, when did you first feel it though? Not when you first sought treatment,
>
> A. Well, it was a little ways after I had surgery on my knee. And I have been back to work for a while working on it and after a while it started bothering me, but it's been increasing more and more this last year.

(Tr. p. 54)

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The greater weight of evidence does not support the deputy's finding that claimant's back problems are related to his work injury. The undersigned gives more weight to the opinion of Dr. Strathman who was claimant's treating physician and saw claimant over a greater length of time. Claimant's failure to report any back complaints until October 16, 1985 also supports such a conclusion.

Claimant is entitled to benefits only to the extent of the impairment of his right lower extremity. Dr. Strathman opines that claimant suffers a 10 percent impairment of the right lower extremity. Dr. Walker opines that claimant suffers a 14 percent impairment of the right lower extremity. Dr. Strathman has observed claimant's knee injury over a substantial period of time. The greater weight of evidence establishes that claimant suffers a 10 percent permanent partial impairment of the right lower extremity.

FINDINGS OF FACT

1. On May 1, 1984, claimant injured his right knee while working for defendant.

2. Claimant's back problems are not causally connected to his injury of May 1, 1984.

3. As a result of the May 1, 1984 work injury, claimant suffers a 10 percent permanent partial impairment of the right lower extremity.

4. Claimant returned to work on October 21, 1984.

5. Claimant's rate of weekly compensation is stipulated to be $206.09.

CONCLUSIONS OF LAW

Claimant has established that he sustained an injury arising out of and in the course of employment on May 1, 1984.

Claimant is entitled to permanent partial disability benefits based on a 10 percent impairment of the right lower extremity.

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

ORDER

THEREFORE, it is ordered:

That defendant pay claimant twenty-two (22) weeks of permanent partial disability benefits at the rate of two hundred six and

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09/100 dollars ($206.09) per week commencing on October 21, 1984.

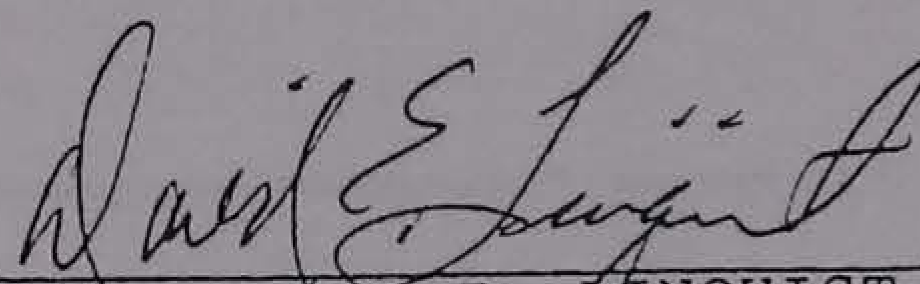
That defendant pay accrued amounts in a lump sum together with interest pursuant to Iowa Code section 85.30.

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

That defendant pay the costs of this proceeding 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 22nd day of February, 1988.



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Filed June 30, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SCOTT CLINE, Claimant, vs. C. DUFFY GUSTAFSON, d/b/a DUFFY'S AUTO CLEAN, Employer, Defendant.	: : : : : : : : : : :	FILE NO. 856884 A R B I T R A T I O N D E C I S I O N

Although entitlement to benefits was found, no award can be made due to discharge of the claim in bankruptcy proceedings during the pendency of proceedings before this agency.

I. Whether an employer-employee relationship existed between claimant and the alleged defendant employer at the time of the alleged injury;

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

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

IV. The extent of weekly disability benefits to which claimant is entitled; and,

V. 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. As will be the case in any attempted summarization, conclusions about what the evidence offered may show are inevitable. Such conclusions, if any, in the following summary should be considered as preliminary findings of fact.

Claimant and his witness, Niccum, testified that on July 27, 1988, while claimant was in the employee of defendant as a working manager, claimant injured his left long or middle finger. According to claimant, while shampooing the interior of an automobile, a needle became imbedded in his finger which he could not remove. After leaving work a few hours later, claimant called defendant's wife and was referred to the Iowa Methodist Medical Center on Merle Hay Road in Des Moines, Iowa for treatment. The doctors at this center could not remove the needle and claimant was referred to an orthopedic surgeon, Arnis Grunberg, M.D. After his examination of claimant, Dr. Grunberg performed surgery on the finger to remove the needle.

Claimant testified that he was able to return to work approximately three days after the surgery. However, defendant's business closed on the day of the injury and has not reopened. Claimant eventually returned to work on August 1, 1988 when he began his own business. Claimant stated that he could have returned to work immediately on limited duty had defendant's business continued operation.

Defendant testified that he was unaware of any injury to claimant on the alleged date of injury but admitted that his wife had received a telephone call from claimant at that time.

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Defendant admitted that he was "in and out" that last day of his business operation. Defendant stated that claimant was a good employee.

Claimant testified at hearing that he has had no problems with his finger since his recovery from surgery and that he does not seek disability benefits from defendants. Claimant indicated that he only seeks reimbursement for his medical expenses which total $1,432.66 as set forth in the prehearing report.

During the latter part of the hearing it was discovered that defendant and his wife had filed bankruptcy on Feburary 19, 1988 during the pendancy of these proceedings which began in January, 1988. After further inquiry of the U.S. Bankruptcy Clerk in Des Moines, Iowa, the undersigned has learned that claimant's claim for disability benefits and medical bills against defendant in this proceeding was discharged by order of the Bankruptcy Court on May 12, 1988.

APPLICABLE LAW AND ANALYSIS

Under federal law, discharge of this claim in bankruptcy prohibits this agency from making any order of payment against defendant. However, there is no stay of proceedings after a discharge is granted and findings of fact can be made for whatever use claimant may make of them.

By his credible testimony, claimant has shown a work injury and a causal connection of the treatment provided to him to remove the needle from his finger.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. Claimant was in the employ of C. Duffy Gustafson d/b/a Duffy's Auto Clean on July 27, 1987.

3. On July 27, 1987 claimant suffered an injury to the left long finger which arose out of and in the course of employment with Duffy's Auto Clean when a needle became imbedded in the finger while cleaning a car.

4. The following medical expenses were incurred by claimant for treatment of his work injury of July 27, 1987:

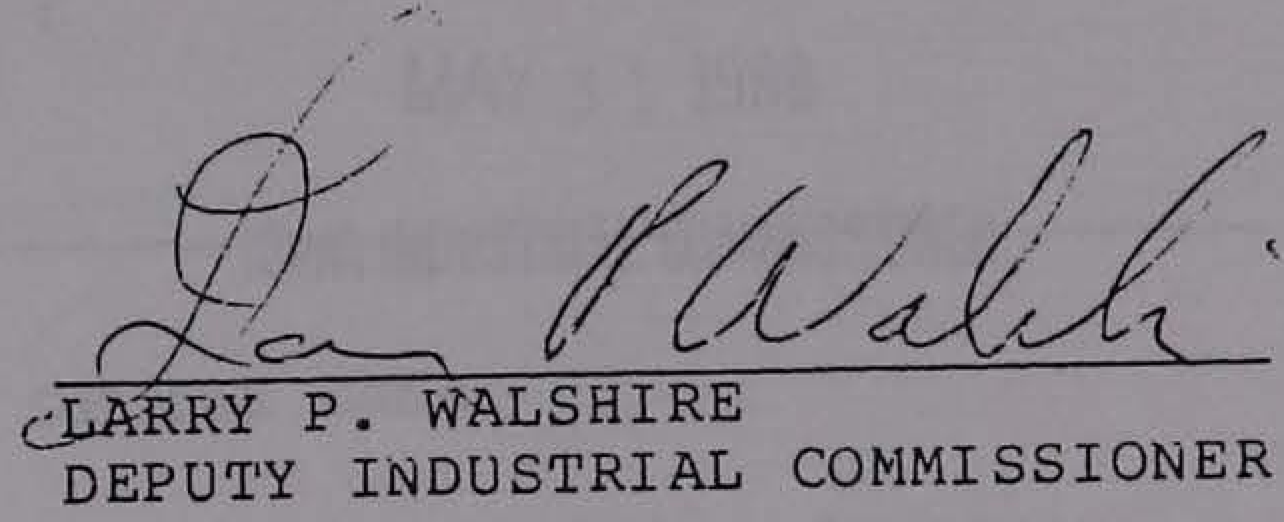
Iowa Methodist Medical Center	7-27-87	$ 95.00
Methodist Plaza Pharmacy	7-28-87 & 7-30-87	61.19
Iowa Methodist Medical Center	7-30-87	521.47
Associated Anesthesiologists, P.C.	7-30-87	240.00
Des Moines Orthopaedic Surgeons, P.C.	7/87 & 8/87	515.00
Total		$1,432.66

5. Claimant's gross weekly earnings on the day of injury was $275.00.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to temporary total disability benefits for five days at the rate of $170.64 per week and medical benefits. However, no award or orders can issue against defendant due to a discharge of this claim in Chapter 11, bankruptcy proceedings.

Signed and filed this 30 day of June, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RODNEY COKER, Claimant, vs. OSCAR MAYER & COMPANY, Employer, Self-Insured, Defendant.	:	File No. 745328 A P P E A L D E C I S I O N

FILED
MAY 31 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying benefits.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 12; and defendants' exhibit A. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

A. Whether there is a causal connection between claimant's injury and the subsequent disability upon which the claim is based.

B. The nature and extent of claimant's disability.

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

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

ANALYSIS

The analysis of the evidence in conjunction with the law is

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adopted. Dr. Wilson opined that claimant's disability was causally related to his injury of November 6, 1981. Dr. Bishop opined that claimant's disability was caused by degeneration of his preexisting cervical disc herniation and recited findings of cervical degenerative arthritic changes prior to claimant's fall on November 6, 1981. Dr. Wilson examined claimant only once. Dr. Wilson did not treat claimant. Dr. Bishop examined and treated claimant on several occasions over a period time. Dr. Bishop also noted that claimant did not seek further medical attention for his neck pain for six months after his fall. The testimony of Dr. Bishop will be given the greater weight. Claimant has failed to meet his burden to show that his disability is causally related to his injury of November 6, 1981.

FINDINGS OF FACT

1. On November 6, 1981, claimant injured his neck at work.

2. The injury at work may have slightly aggravated a preexisting osteoarthritic condition.

3. Claimant's subsequent disability and medical expenses were not caused by the injury of November 6, 1981.

CONCLUSIONS OF LAW

Claimant has failed to prove by a preponderance of the evidence that there is a causal relationship between his injury and the disability upon which this claim is based.

WHEREFORE, the decision of the deputy is affirmed.

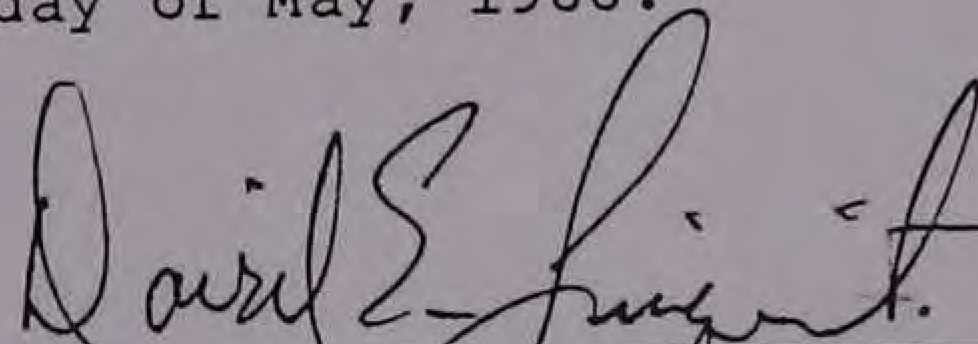
ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That each party shall pay the costs they incurred in the original proceeding. Defendant shall pay the cost for the attendance of the court reporter. Claimant is to pay the costs of the appeal.

Signed and filed this 31st day of May, 1988.



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1801
Filed January 26, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLEO COLLINSON, Claimant, vs. DES MOINES REGISTER, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	FILE NO. 787601 A R B I T R A T I O N D E C I S I O N

1801

Claimant was denied additional disability benefits and medical benefits as a result of a failure to establish causal connection of his continued back problems to an injury which appeared to only temporarily aggravate a longstanding preexisting arthritis.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLEO COLLINSON,	:	
Claimant,	:	
vs.	:	FILE NO. 787601
DES MOINES REGISTER,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
LIBERTY MUTUAL INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

FILED
JAN 26 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Cleo Collinson, claimant, against the Des Moines Register, employer (hereinafter referred to as The Register), and Liberty Mutual Insurance Company, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on February 5, 1985. On September 30, 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 the following witnesses: Julia Collinson, Bill Williams and Bill Brown. 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 relevant to this decision:

1. On February 5, 1985, claimant received an injury which arose out of and in the course of his employment with The Register.

2. Claimant is seeking temporary total disability or healing period benefits from November 5, 1985 through December 2, 1985 and defendants agree that he was not working at this time. Defendants stipulated that claimant was entitled to temporary total disability or healing period benefits from February 5, 1985 through March 4, 1985.

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type that opens in the middle and each half of the door moves simultaneously up and down. The two sections of the door that move are counter balanced with a weight to reduce the amount of force needed to open and close the door. The extent of force required was in dispute at the hearing.

Claimant stated at hearing that he retired from The Register in May, 1986, because he could no longer tolerate the back pain which occurred while working. The person responsible for personnel management at The Register at the time of claimant's retirement testified in a deposition that claimant did not discuss or give as a reason for his retirement any complaints of back pain or inability to perform his work as a result of back pain. Claimant admitted in his testimony that he did not request a job modification before he resigned from The Register. The agency file indicates that claimant filed his petition for benefits before his retirement in January, 1986.

Claimant's past work history includes jobs as a gas station attendant, farmhand, lumbermill helper and dump truck driver for a sand and gravel company. However, the most significant work history is that claimant was an over-the-road semi truck driver for approximately 30 years. Claimant retired from over-the-road trucking in 1981. Claimant testified that he left truck driving at that time because his employer went out of business. He did not state what efforts, if any, he made to look for other driving work before his retirement. Claimant currently receives a pension as a result of his past truck driving work. Claimant stated that he must limit his work as a truck driver while he is receiving his pension benefits, otherwise such work may jeopardize his pension rights.

The facts surrounding the work injury in February, 1985, are not in dispute. Claimant testified that while pulling down a freight elevator door at The Register he "apparently turned wrong" and experienced the onset of severe pain and back spasm. Claimant stated that he finished work that day but the next day he "couldn't straighten up." Claimant then reported to the company nurse who referred claimant to the Mercy Hospital Clinic and to a James Eelkema, M.D.. Dr. Eelkema's office notes indicate that claimant reported to the doctor that he had "injured his back Tuesday" and "stated pain began Tuesday night & has gotten worse since then." His complaints consisted of low back pain with aching of the hips and tingling of the right leg. Dr. Eelkema referred claimant to John R. Bakody, a neurosurgeon, who previously operated on claimant's back. Although no records of this prior surgery was offered into the evidence, claimant testified that this surgery did not involve a disc in the vertebra but only involved the removal of calcium deposits on his spine. In November, 1985, Dr. Bakody found tenderness and tightness of the lumbar muscles but claimant's neurological findings were normal. X-rays at that time revealed narrowing of the lumbosacral

interspace but Dr. Bakody noted, "we all develop some narrowing with the aging process and can be a source of discomfort but many of us have this same narrowing and it does not bother us at all." Claimant was seen by Dr. Bakody again in February, 1986, and at that time claimant stated he was "pretty good with bedrest." Dr. Bakody suggested at that time a regular exercise program but no return appointment was made.

Claimant and his wife testified that he never recovered and continued to ache in the hip and low back with tingling in the right leg after last seeing Dr. Bakody but the aching was tolerable and did not require medical treatment. Claimant said that he continued in this state until November 5, 1985 when he injured himself again when he had difficulty straightening up after lifting a 10 pound box at work. Claimant also said that he "believes that he strained his back again while lifting the elevator door after lifting the box." Claimant's supervisor testified that claimant told him that he awoke in the morning of November 5, 1985, with back and hip pain. According to a report of injury prepared by claimant for The Register in November, 1985, claimant stated that he did not know what he was doing at the time of the injury or how the injury occurred. Claimant explained at the hearing that he had forgotten about the box incident when he prepared the work injury report.

Claimant again returned to Dr. Alkema in November, 1985, who reports in his notes that claimant's back and hip pain started "this a.m." and that claimant "denies." Claimant also again reported back to Dr. Bakody with complaints of severe back pain and an inability to return to work. Claimant was placed on muscle relaxant medication and a physical therapy program at that time including moist heat, light massage, ultrasound and bedrest. Claimant was treated until December 2, 1987 at which time claimant was released to return to work and only to be seen in the future "as needed." At that time claimant told the doctor that he felt the back pain was due to heavy lifting at work. Dr. Bakody stated as follows in response, "work aggravation certainly sounds reasonable to me so that it is my opinion that there is a cause and fact relationship between the heavy lifting at work in early November and his back discomfort which he consulted me in November."

In March, 1986, claimant's back difficulties were evaluated by William R. Boulden, M.D., an orthopedic surgeon. Dr. Boulden found significant degenerative changes in claimant's spine from his review of claimant's x-rays and opined that claimant suffered an aggravation of a preexisting condition. In August, 1985, claimant returned to Dr. Boulden after experiencing sharp lower back pain while taking a shower at home. Dr. Boulden reported that the use of a TENS unit and exercises eleviated a lot of his pain. Dr. Boulden opined that this shower incident "in no way was effected by his work." In his deposition, Dr. Boulden

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opined that the aggravation injuries were only temporary in nature and that claimant's continuous problems were due to a longstanding degenerative disc disease and arthritis. Dr. Boulden believes that the prior surgery was a removal of the arthritic "spurs" which would reenforce his view of an extensive prior existing arthritic condition. Dr. Boulden further opines that claimant has a five percent permanent partial impairment due to the degenerative changes but that none of this permanent impairment was work related. Dr. Boulden imposed no work restrictions other than that claimant would have to use proper body mechanics in performing lifting and bending activities. Critical to Dr. Boulden's views is that Dr. Boulden believed that claimant fully recovered from the two incidents of back pain in February and November of 1985. Dr. Boulden states that this is what was told to him by claimant when he examined claimant in March, 1986. Finally, Dr. Boulden had stated that it was possible that heavy work at The Register could have excellerated or worsened the degenerative changes in claimant's back.

In January, 1987, claimant was evaluated by a general surgeon, Walter B. Eidbo, M.D. Dr. Eidbo received a history from claimant that both the February and November, 1985 incidents occurred after lifting a box and an inablity to straighten up. Claimant also indicated to him that he opened and closed the elevator door approximately 400 times per day. Dr. Eidbo believes that from his personal experience with the metal doors such as used by claimant that such work would be heavy work. However, Dr. Eidbo never observed or monitored the operation of the elevator used by claimant. Dr. Eidbo opined that claimant has an eight to 10 percent permanent partial impairment to the body as a whole, but he felt that half of this impairment is due to claimant's preexisting arthritis condition. However, Dr. Eidbo opines that the two work incidents in February and November, 1985, were significant contributing factors to the remaining permanent partial impairment. Futhermore, Dr. Eidbo reports that in February, 1987, claimant returned to him following an onset of severe back pain after carrying cement blocks in his yard at home. Dr. Eidbo did not believe this incident to be significant so as to change his causal connection opinions. The doctor believed that the blocks were only cement bricks, however, he admitted in his deposition that the term "block" was contained in his records. Dr. Eidbo stated that claimant is permanently restricted from lifting over 15 to 20 pounds and he must be careful in the bending, lifting, pushing, pulling, or any other strenuous use of his back.

In September, 1986, claimant underwent a repair of a recurrent hernia. No medical records were offered from any treating physician for this hernia repair. Dr. Boulden did not render any opinion as to the causal connection of this condition to claimant's work. Dr. Eidbo opined that the hernia was work related due to claimant's heavy lifting at work.

Claimant testified that he had prior back problems but that between his 1963 surgery and the 1985 work incident he had no difficulties requiring medical treatment and no pain similar to that which he experience in February, 1985. However, after some refreshing of his recollection with past medical records, claimant testified that he received treatment in December, 1975, from Dr. Bakody for back pain and was admitted to the hospital for back pain in August, 1967.

Claimant's appearance while testifying failed to demonstrate a credible demeanor.

APPLICABLE LAW AND ANALYSIS

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

Claimant's evidence suggests a request that a new work injury in November, 1985, be found in this proceeding despite any pleading of such an injury in his petition. Although a finding of this alleged second injury in November, 1985, is not made in this decision, the inability to make such a finding is not due to the lack of proper pleading practice. This is an administrative agency and the technical rules of pleading do not apply. Certainly there was no surprise in the factual basis for this second injury to the defendants. However, the evidence fails to demonstrate a specific or cumulative "gradual trauma" leading to injury in November, 1985. Claimant and his wife are only speculating as to the source of claimant's problems at that time. Claimant reported no trauma to his superiors or to his physicians. Although Dr. Bakody opines that heavy work at The Register was a cause of his problems, claimant has not demonstrated in the opinion of this deputy commissioner that his elevator work or the lifting of a 10 pound box constitutes heavy work. The testimony that claimant opened the elevator door 400 times a day or 50 times an hour is not believeable and is certainly inconsistence with credible testimony to the contrary by his superiors. The issue of the causal connection of claimant's pain in November, 1985, to the February, 1985 injury will be discussed below.

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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 causal connection of the February, 1985 incident to anything other than temporary disability cannot be found. Claimant is not credible on the issue of his continuing problems after the February incident as it is inconsistent with what he told his physicians at the time and there was no attempt on his part to continue treatment after the initial appointment with Dr. Bakody. If claimant felt that these continuing problems were not significant enough to warrant treatment, one can reasonably conclude that such problems were not unusual for him. Medical opinions on this causal connection issue is certainly

split. However, the views of Dr. Boulden are the most convincing. First, he is an orthopedic surgeon and most familiar with orthopedic problems such as the one claimant complains of. Secondly, Dr. Boulden has actually treated claimant unlike Dr. Eidbo. Finally, the views of Dr. Eidbo are unclear. First, he first basis his opinion on heavy work at The Register. Whether or not occasionally opening of elevator doors or lifting of 10 pound boxes constitutes heavy work in the opinion of Dr. Bakody is unknown. Also, he states that there may have been an aggravation of a preexisting condition but he does not state whether or not he believes the aggravation has any permanent effects. Furthermore, claimant suffered incidents of pain subsequent to his retirement from The Register in August, 1985, in the shower and while carrying cement blocks in January, 1987. These incidents do not appear to be any less traumatic then the incidents complained of in this proceeding in February and November of 1985. On the whole record, therefore, claimant has failed to demonstrate by preponderance of the credible evidence that he has suffered any worsening of his prior existing degenerative arthritis spinal condition from the work incident in February, 1985, or that the subsequent episodes of back pain are in any way causally connected to the February, 1985, incident.

As the additional healing period benefits requested by claimant are for an absence from work caused by the November, 1985, onset of pain and it could not be found that a work injury occurred at that time or that such pain was causally connected to the February, 1985 work injury, claimant has not shown entitlement to additional weekly benefits.

Certainly, Dr. Eidbo's causal connection opinions as to claimant's hernia are uncontroverted. However, the reports from this hernia condition were not introduced into the evidence and there is no explanation from claimant as to why this was not included in the evidence. Also, Dr. Eidbo places great weight on his opinion that claimant performed heavy work at The Register. The preponderance of the evidence fails to show that claimant actually performed heavy work at The Register. Again, Dr. Eidbo bases his opinions upon the fact that claimant may have opened the elevator door 400 times a day, however, as indicated above, such a claim is not credible. Therefore, despite the views of Dr. Eidbo, no finding of causal connection between claimant's hernia and his work at The Register could be found from the evidence presented.

None of the medical expenses requested in the prehearing report appear to be related to anything that happened in February or March of 1985 which is the only condition found work related in this proceeding.

As claimant was not found to be credible, costs will be taxed against him.

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FINDINGS OF FACT

1. Claimant was in the employ of The Register at all times material herein.

2. The work injury occurring on or about February 5, 1985 was a cause of a period of temporary total disability from work as a result of a temporary aggravation of a preexisting degenerative condition of claimant's spine. Claimant had prior surgery for this degenerative condition in 1963 and some treatment after that time. Claimant fully recovered from the temporary aggravation in February and March of 1985 and sought no further treatment following his return to work until November, 1985, when pain reoccurred after claimant awoke in the morning.

It could not be found that claimant was credible due to inconsistencies between his testimony and other credible evidence and due to his demeanor.

It could not be found from the evidence presented that the November 5, 1985 onset of pain was work related either as a new injury or as precipitated by the February, 1985 work injury. It could further not be found that the medical expenses listed in the prehearing report were related to the February, 1985 work injury.

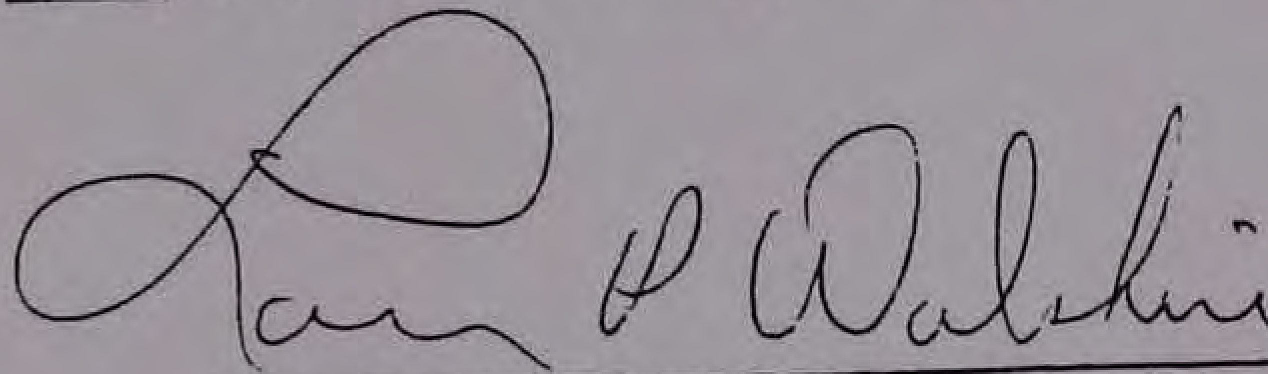
CONCLUSIONS OF LAW

Claimant has not established entitlement to additional workers' compensation benefits.

ORDER

Claimant shall take nothing from this proceeding and shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 26 day of January, 1988.



LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

000275

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1800
Filed May 20, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES CONRAD, Claimant, vs. MARQUETTE SCHOOL, INC., Employer, and U.S.F.& G Insurance Co., Insurance Carrier, Defendants.	:	FILE NO. 696189 R E V I E W - R E O P E N I N G D E C I S I O N

1800

Claimant denied additional permanent partial disability benefits for a failure to show a change in condition. The case was not found to be argueable and claimant was assessed the costs.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES CONRAD, Claimant, vs. MARQUETTE SCHOOL, INC., Employer, and U.S.F.& G Insurance Co., Insurance Carrier, Defendants.	:	FILE NO. 696189 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 20 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by James Conrad, claimant, against Marquette School, Inc., employer, and U.S.F. & G. Insurance Company, insurance carrier, for the recovery of further workers' compensation benefits as a result of an injury on January 11, 1982. A prior review-reopening decision for this injury was filed on April 30, 1984, following a hearing on February 28, 1984. This decision became a final agency decision. On March 3, 1988, a hearing was held on claimant's petition filed herein 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. No oral testimony was received during the hearing in this case. Claimant failed to appear, but his attorney was present. The exhibits received into the evidence at hearing are listed in the prehearing report.

In the last review-reopening proceeding, claimant was found to have a 10 percent permanent partial impairment to the body as a whole as a result of the injury to his low back on January 11, 1982. According to the decision in that proceeding, the injury resulted in a 25 percent industrial disability and weekly benefits were awarded accordingly. It was also found in that decision that claimant had other permanent partial impairments due to non-work related causes and degenerative arthritis. Claimant was only employed sporadically at the time of the last

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hearing. It was found in the last proceeding that claimant had a varied work background rendering it likely that he would be able to find entry level positions utilizing his past experience but that he was physically capable of only light to moderate work on an intermittent basis. Official notice was taken of the prior medical records as requested by the parties.

ISSUES

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

I. Whether claimant suffered a change of condition causally related to the original work injury since the last review-reopening proceeding; and,

II. The extent of claimant's entitlement to additional permanent disability benefits as a result of the alleged change of condition.

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. As will be the case in any attempted summarization, conclusions about what the evidence offered may show are inevitable. Such conclusions, if any, in the following summary should be considered as preliminary findings of fact.

The exact nature of the claimed change of condition in this proceeding is somewhat in question due to claimant's failure to testify at the hearing. The written evidence submitted shows that since the last proceeding, claimant has received medical treatment from William H. Whitley, D.O., for bilateral shoulder pain after playing volleyball in June, 1985. An x-ray report at that time revealed degenerative arthritis of the acromioclavicular (A/C) joints bilaterally.

In June, 1987, claimant was treated for two weeks by Nile Kennedy, D.C., for pain and subluxations in the lower cervical/thoracic level of his spine. According to Dr. Kennedy, x-rays of the low back at that time revealed some arthritic spurring at various levels of the low back but Dr. Kennedy in his deposition stated that this spurring was not a source of claimant's pain complaints to him.

Also, offered into the record was evidence that claimant was rejected from a job titled "water superintendent" by the City of Westpoint, Iowa due to his back problems. According to the city

administrator at the time, this job required occasional heavy lifting.

Finally, William Boulden, M.D., an orthopedic surgeon, opined from a review of most of the records in this case that claimant's current arthritis spurring in the low back is not work related.

APPLICABLE LAW AND ANALYSIS

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

Claimant has not demonstrated even an argueable case for additional benefits. His only recent complaints of difficulties involve the upper back and shoulders, not the low back.

All costs requested by defendants are assessed against claimant except that defendants may not receive more than $150.00 for the cost of any written report. It is the position of this agency that a doctor should not receive more fees for a written report than he would receive from oral testimony. The parties stipulated in the prehearing report that the request for costs have been paid.

FINDINGS OF FACT

1. Claimant has had upper back and shoulder problems since the last review-reopening proceeding in 1984.

2. Claimant has degenerative arthritic spurring in the low back vertebras.

3. Since the last review-reopening proceeding, claimant has been rejected from a job due to an inability to perform heavy lifting.

It could not be found from the evidence presented that the shoulder and arthritic conditions were related to the original injury.

CONCLUSIONS OF LAW

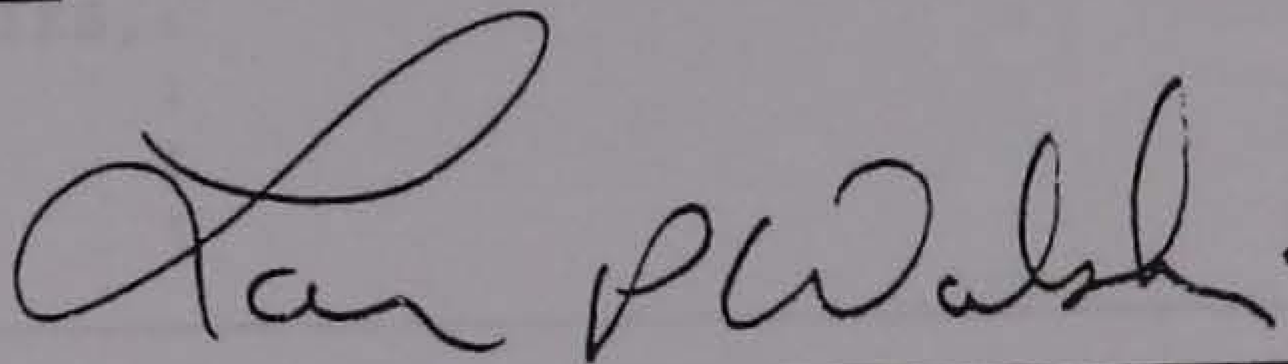
Claimant has not established by a preponderance of the evidence entitlement to additional workers' compensation benefits.

ORDER

1. Claimant shall take nothing from this proceeding.

2. Claimant shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and specifically taxed as costs are the items listed in claimant's request filed April 8, 1988, except that defendants shall not receive more than one hundred fifty and no/100 dollars ($150.00) for any written medical report.

Signed and filed this 20th day of May, 1988.



LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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1100; 1402.30; 1803
4000.2
Filed 3-28-88
Deborah A. Dubik

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA CONRAD, Claimant, vs. MATT PARROTT & SONS, Employer, and BITUMINOUS INSURANCE COMPANIES, Insurance Carrier, Defendants.	:	File No. 827150 A R B I T R A T I O N D E C I S I O N

1100; 1402.30

In May 1985, claimant complained of elbow pain and sought treatment. After her release to return to work, claimant continued to experience pain and sought additional treatment one year later. Held claimant sustained an injury arising out of and in the course of her employment in May 1985 which was the cause of her further treatment in June 1986. Claimant did not sustain a new injury in June 1986.

1803

Medical evidence established claimant had no limitation of motion and minimal functional disability and the only medical expert to testify would not rate claimant as impaired. Claimant has been able to return to her regular job and perform that job without the necessity of any further medical treatment. Held claimant failed to establish the work injury was the cause of any permanent impairment and no permanent partial disability benefits awarded.

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Claimant awarded 35% penalty benefits for unreasonable delay in commencement of benefits. Insurance company had denied

liability although it failed to conduct any semblance of a thorough investigation and there was no question of causation. Only one medical expert treated claimant and offered any opinion on the cause of her problem.

IOWA STATE LAW LIBRARY

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA CONRAD, :
Claimant, :
vs. :
MATT PARROTT & SONS, :
Employer, :
and :
BITUMINOUS INSURANCE COMPANIES, :
Insurance Carrier, :
Defendants. :

File No. 827150

A R B I T R A T I O N

D E C I S I O N

FILED
MAR 28 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration concerning Patricia A. Conrad, claimant, Matt Parrott & Sons, employer, and Bituminous Casualty, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained May 23, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner February 29, 1988. The record was considered fully submitted at the close of hearing. The record in this case consists of the testimony of claimant, Hamer Conrad, her husband, Brenda Hardee, and Russell Hemmingson; claimant's exhibits A through M, inclusive; defendant employer's exhibit 1; and defendant insurance carrier's exhibits 2 and 3.

ISSUES

Pursuant to the prehearing report and order submitted and approved February 29, 1988, the following issues are presented for resolution:

1. Whether claimant sustained an injury arising out of and in the course of her employment on May 23, 1985;

2. Whether claimant sustained a new injury arising out of and in the course of her employment June 24, 1986;

3. Whether the alleged injury is the cause of any permanent disability;

4. The extent of claimant's entitlement to temporary total

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disability/healing period benefits;

5. The extent of claimant's entitlement, if any, to permanent partial disability benefits stipulated to be a scheduled member;

6. Claimant's entitlement to certain medical benefits purusant to Iowa Code section 85.27; and,

7. Whether claimant is entitled to Iowa Code section 86.13 penalty benefits.

FACTS PRESENTED

Claimant works in the bindery department of defendant employer's plant wrapping packaging of all shapes, sizes, weights and thicknesses with a shrink wrap machine. Originally, this machine was operated manually requiring claimant to push down on a bar to seal a package and then to push the package through onto a conveyor belt. However, since approximately January 1985, an automated machine has been in place which uses a simple push button. Claimant explained the shrink wrap machine is situated behind her and requires her to turn around each time she places a package in it.

Claimant testified she had been experiencing pain in her right elbow for approximately six to seven months before she sought any type of medical treatment. Claimant saw Dale G. Phelps, M.D., on May 23, 1985, who placed a splint on her arm and prescribed physical therapy. Claimant was released to return to work and did return approximately May 28, 1985, working until a long arm cast was put in place on June 11. Although claimant was able to perform left arm duty, none was available with defendant employer and she therefore was off work until July 16, 1985. Claimant testified that by this time her pain had not dissipated and she received an injection of cortisone. Claimant returned to work with instructions to wear a tennis elbow splint which she did wear for approximately one year.

Claimant testified her pain diminished after the cortisone injection but returned to its previous intensity approximately two months later. Claimant did not return to see her physician at that time, however, explaining that she had been told surgery may be necessary and she feared undergoing an operation. Claimant testified she continued to experience pain and eventually did return to see Dr. Phelps in June 1986, when she felt she could no longer continue working with her elbow in such a painful state. Claimant had surgery to her right elbow June 26, 1986 and returned to work in her regular job September 2, 1986. Claimant acknowledged the condition of her elbow has improved since surgery and that she is able to perform all the responsibilities of her job but that she continues to experience pain and numbness in her elbow approximately three or four days per

week. Claimant testified she no longer wears the tennis elbow splint, has had no further medical care since her surgery, that she had no problems with her elbow prior to 1985 and no other subsequent injuries to it.

Hamer Conrad testified he is employed with defendant employer and that claimant complained continuously about her elbow from the onset of the pain and continues to so complain as of the time of the hearing.

Brenda Hardee testified she has been employed with defendant employer for approximately eight years, has worked with the claimant, and has listened to claimant's complaints of elbow pain for approximately two and one-half to three years. She opined that after the long arm cast was removed, claimant did better but there was never a time claimant was pain free, that the longer claimant was at her job the worse she became and at times, depending on how busy the work flow is, claimant is not able to keep up with her job.

Dale G. Phelps, M.D., orthopedic surgeon, testified he first saw claimant May 23, 1985 with right elbow pain which he felt was caused by repeated lifting of boxes resulting in tendonitis or medial epicondylitis which is related to use. Claimant was initially treated by iontophoresis, then a long arm cast, and then an injection of cortisone. Claimant was released to return to work July 9, 1985 but, because of pain, did not return to work with the doctor's agreement until July 16, 1985. Claimant was advised at the time of her medical appointment with Dr. Phelps on July 2 to return to see him if she had further difficulty.

Dr. Phelps' notes reveal claimant returned to see him on June 9, 1986, stating that in spite of all her treatment and wearing the tennis elbow splint, she still continued to have pain in the medial side of her elbow especially when using it at work. Claimant was scheduled for an excision of the medial epicondyle and release of her flexors performed June 25, 1986. Dr. Phelps testified:

> Q. You have no reason to believe that Mrs. Conrad's pain went away after you last saw her during 1985, do you?
>
> A. No.
>
> Q. And isn't it true that more often than not a cortisone shot is basically for relief of symptoms rather than for cure of the underlying condition?
>
> A. Sometimes the relief is permanent with it.
>
> Q. In this case it was not?

A. In this case it was not.

Q. Have you ever indicated to anyone that Mrs. Conrad sustained a new injury during 1986?

A. No.

Q. Has it ever been your opinion that she sustained a new injury during 1986?

A. No.

(Claimant's Exhibit A, pp. 20-21)

When he last examined claimant, Dr. Phelps found claimant had no limitation of motion in her elbow and minimal functional disability but, at the time of his deposition, stated:

Q. Dr. Phelps, at the time you last saw Patricia Conrad I believe you mentioned she continued to have some complaints concerning pain and some numbness?

A. Yes.

Q. If those complaints continue to the present time, would you consider those to be permanent?

A. If she still had them at one year after that I would consider it to have some permanent problem, yes.

Q. Although the range of motion may be normal, would that be a basis for you to give her some physical impairment if those complaints did persist to the present time?

A. I am an orthopedic surgeon and primarily a treating surgeon and not a Work Comp evaluating surgeon. I try and use the guidelines in the books that are given us, and those books do not allow anything for a minimal amount of pain over a long period of time. So in utilizing the guidelines which I have, I would not give her any permanent disability, although she certainly would have some functional disability as far as doing any heavy lifting or repeated use of that arm.

(Cl. Ex. A, pp. 24-25)

Russell Hemmingson testified he is employed by defendant insurance carrier, Bituminous Casualty, as a claim manager and

is responsible for overseeing workers' compensation claim adjusting. Defendant employer had a policy for workers' compensation coverage with Bituminous from June 15, 1984 through June 15, 1985. Hemmingson explained Bob Engstrom, an investigator/adjuster, was assigned to claimant's file July 18, 1986, that he (Engstrom) contacted claimant July 23, 1986 and denied the claim July 24, 1986 on the basis that claimant sustained a new injury in June 1986 although he had not received any medical information on the claim at the time of the denial. Hemmingson stated he would have wanted to look at the medical data before a denial was issued and that it is not a policy of Bituminous to deny a claim before the medical reports are received. Hemmingson acknowledged the possibility of an Iowa Code section 85.21 agreement was discussed between himself and Engstrom but rejected since the other insurance carriers, who may have been involved, would not go along with it. Bituminous accepted responsibility for payment for claimant's absence in 1985 and paid claimant in October 1986 four and four-sevenths weeks of benefits for the period from May 23 through May 27 and June 12 through July 8.

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 she received an injury on May 23, 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 words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

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

When a worker sustains an injury, later sustains another injury, and subsequently seeks to reopen an award predicated on the first injury, he or she must prove one of two things: (a) that the disability for which he or she seeks additional compensation was proximately caused by the first injury, or (b) that the second injury (and ensuing disability) was proximately caused by the first injury. DeShaw v. Energy Manufacturing Company, 192 N.W.2d 777, 780 (Iowa 1971).

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 23, 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). 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.

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).

Iowa Code section 85.33(1) provides:

> 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.

Iowa Code section 85.27 provides, in part:

> The employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonably necessary transportation expenses incurred for such services.

Iowa Code section 86.13 provides, in part:

> If a delay in commencement or termination of benefits occurs without reasonable or probable cause of excuse, the industrial commissioner shall award benefits in addition to those benefits payable under this chapter, or chapter 85, 85A, or 85B, up to fifty percent of the amount of benefits that were unreasonably delayed or denied.

ANALYSIS

There can be no dispute claimant sustained an injury May 23, 1985. Claimant, who had no previous problems with her right elbow, sought treatment therefor with Dr. Phelps who rendered a diagnosis of medical epicondylitis caused by repeated lifting and use. Dr. Phelps related this condition to claimant's employment. There is no evidence in the record to support a conclusion that claimant's condition was caused by anything outside of her employment. Claimant was off work as a result of this injury from May 23 through May 27 and again from June 12 through July 15, 1985. Therefore, it is concluded claimant sustained an injury May 23, 1985 which arose out of and in the course of her employment and which was the cause of temporary disability for which claimant is entitled to five and four-sevenths weeks of temporary total disability benefits.

Likewise, there is no evidence in the record to support a conclusion that claimant's problems in 1986 were anything but a result of the 1985 injury. Claimant's uncontroverted testimony establishes that from the outset of her symptoms she was never symptom free. Although she had some relief through reduced (not eliminated) pain from the cortisone injection, her elbow continued to be troublesome, painful and interfered with her ability to do the job as she had done before the pain began. There is no evidence in the record to show claimant was "cured" when she returned to work in July 1985 and then began later to experience new symptoms. The only physician to have seen or treated claimant was Dr. Phelps, who continually expressed his opinion that claimant's problems in 1986 were related to the 1985 injury. Indeed, at the time claimant was released to return to work in 1985, the possibility of surgery had already been discussed. Simply because the actuality of surgery did not occur until some eleven months later does not give rise to the conclusion that a new injury occurred in the interim period. It is not difficult to believe claimant did not want to face the possibility of surgery and therefore delayed returning for medical care until the condition was such that she could delay no longer. The fact that claimant delayed does not negate the fact that she continued to experience the same type of symptoms that initially led her to seek treatment. Accordingly, it is concluded claimant did not sustain a new injury in June 1986, but that rather claimant's injury on May 23, 1985 was the proximate cause of the surgery on June 25, 1986. Claimant is

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therefore entitled to payment for all disputed medical expenses and is further entitled to temporary total disability benefits for the period she was off work as a result of the surgery.

As claimant has sustained an injury to a scheduled member, the functional method of evaluating disablity must be employed. Dr. Phelps testified claimant has no limitation of motion in her elbow and minimal functional disability and that, based on the American Medical Association Guidelines, he would not give claimant any permanent physical impairment. Dr. Phelps does admit claimant would have some functional disability as far as doing any "heavy" lifting or repeated use of that arm. Dr. Phelps does not define his meaning of the term "heavy." Claimant testified she wrapped packages of all sizes, shapes, weights, and thickness and, outside of one reference to 25 pound boxes, did not specify the weight she is or may be required to lift. Further, the record establishes that claimant went from using a manual shrink wrap machine to an automated one. Claimant, therefore, went from pulling down a bar to pressing a button. Following her surgery, claimant was released to return to work without restriction and, although it is not subject to doubt that claimant continues to experience some discomfort, she has been able to perform all of the responsibilities of her job, has missed no further work as a result of her injury, and has sought no further medical care. Therefore, it is concluded claimant has failed to establish she sustained any permament impairment as a result of her work injury.

The final issue for resolution is whether claimant is entitled to Iowa Code section 86.13 penalty benefits. Generally speaking, penalties are not imposed where there are legitimate disputes on causation or extent of impairment. See, for example, Just v. Hygrade Food Products Corp. and National Union Fire Insurance Company, IV Iowa Industrial Commissioner Reports 190 (Appeal Decision January 30, 1984). There can be no dispute Bituminous was responsible for payment on the 1985 period of claimant's absence from work. However, payment was not made until October 1986. Evidence in the record suggests the carrier was not aware of claimant's absence from work until October 1986 and, when it was made aware, rendered immediate payment. The record is void of evidence as to why the insurance carrier would not have been aware of claimant's absence from work. However, medical evidence establishes claimant was off work an additional week as a result of the injury over and above that which was compensated. The company was aware of that additional week at the time payment was made. Yet, there is no evidence to show why that final week was never compensated.

Iowa Code section 86.13 allows for penalty benefits where delay in the commencement of benefits occurs without reasonable or probable cause or excuse. To determine whether or nor defendants' actions in withholding payments are reasonable,

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inquiry may first be made into whether the claim was properly investigated. Evidence establishes that, at best, a minimal investigation was done by the insurance carrier before the claim was denied. A discussion was had with the claimant but no medical evidence had been received although it was requested. What was the point of requesting the records if those records were not to be utilized? Russell Hemmingson acknowledged he would have wanted to look at the medical records before a response to the claim would be issued and further that it is not a policy of the company to deny a claim before receiving the medical. Further, at the time Bituminous denied claimant's claim, it had not not yet even paid what was owing for 1985 for which it was clearly liable. Defendants argue that the claim was questionable in light of the court's ruling in McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). McKeever is not convincing here because the record clearly establishes claimant first missed work in May 1985 for the condition which resulted in surgery in June 1986 when Bituminous was clearly the employer's insurance carrier.

Inquiry is next made into whether or not there is a legitimate dispute over causation. A legitimate dispute over causation would appear to exist to the undersigned when there are differing opinions as to causation. There is only one medical expert in this case and it has been his opinion throughout claimant's entire treatment expressed as early as September 24, 1986 that claimant's problems in 1986 were related to her injury of May 1985. As stated above, the issue of causation is essentially within the domain of expert testimony. Defendants' actions herein have caused claimant to go without income and to resort to having to retain counsel to secure what she rightfully was due. Penalty benefits are clearly in order.

FINDINGS OF FACT

Wherefore, based on the evidence presented, the following facts are found.

1. Claimant began working for defendant employer in May 1974 in the bindery operating a shrink wrap machine which required repeated use of her arm as well as lifting.

2. Claimant sought medical treatment May 23, 1985 for right elbow pain which she had been experiencing for some six to seven months.

3. Claimant was diagnosed as having tendonitis or medial epicondylitis and was treated with physical therapy, long arm cast, cortisone injection, and told to wear a tennis elbow splint which claimant did wear for approximately one year.

4. Claimant's condition was caused by her employment.

5. Claimant was unable to work as a result of her injury from May 23 through May 27, 1985, inclusive, and again from June 12, 1985 through July 15, 1985, inclusive.

6. Claimant continued to experience pain despite the treatment she had received.

7. Claimant returned to see her physician in June 1986, and on June 25, 1986 an excision of the medial epicondyle and release of her flexors was done.

8. Claimant's surgery June 25, 1986 was as a result of the May 23, 1985 injury.

9. Claimant was unable to work as a result of her injury from June 25, 1986 through September 1, 1986.

10. Claimant has no permanent impairment as a result of her injury.

11. Defendants delayed commencement of benefits without reasonable or probable cause or excuse.

CONCLUSIONS OF LAW

Wherefore, based on the principles of law previously stated, the following conclusions are made:

1. Claimant sustained an injury which arose out of and in the course of her employment May 23, 1985, which resulted in surgery occurring June 25, 1986.

2. Claimant has not established her entitlement to any permanent partial disability benefits.

3. Claimant has established entitlement to temporary total disability benefits for periods from May 23 through May 27, 1985, June 12 through July 15, 1985, and June 25 through September 1, 1986, inclusive.

4. Claimant has established entitlement to Iowa Code section 86.13 penalty benefits.

5. Claimant has established entitlement to medical benefits pursuant to Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

Defendants are to pay to claimant five point five seven one (5.571) weeks of temporary disability benefits for the period

from May 23 through May 27, and June 12 through July 15, 1985, inclusive, at the stipulated rate of one hundred thirty-seven and 88/100 dollars ($137.88) per week.

Defendants are to pay to claimant nine point eight five seven (9.857) weeks of temporary disability benefits for the period from June 25, 1986 through September 1, 1986, inclusive, at the stipulated rate of one hundred thirty-eight and 85/100 dollars ($138.85).

Defendants are to pay to claimant the additional sum of five hundred twenty-seven and 62/100 dollars ($527.62) or thirty-five percent (35%) of those benefits which were unreasonably denied claimant specifically for the week of July 9 through July 15, 1985 and the period from June 25, 1986 through September 1, 1986.

Defendants shall pay all disputed medical expenses as follows:

Dr. Dale H. Phelps	$750.00
Allen Memorial Hospital 5/24, 26, 29, 31/85	72.00
Allen Memorial Hospital 6/3, 4, 6, 8	90.00
Radiological Associates, 6/23/86	17.50
Waterloo Internal Medicine Associates, P.C., 6/25/86	12.00
John Glascock, M.D., P.C., 6/25/86	240.00
Allen Memorial Hospital, 6/25/86	589.64
Dr. James D. Collins, Jr.	25.00
Evansdale Pharmacy (Prescriptions)	4.88

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

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

A claim activity report shall be filed upon payment of this award.

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

Signed and filed this 28th day of March, 1988.

Deborah A. Dubik

DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

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1402.40; 1803; 3202;
3203; 1806; 4200;
2207; 2209
Filed May 19, 1988
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN A COOPER,	:	
Claimant,	:	
VS	:	File No. 832043
IOWA MEAT PROCESSING,	:	
Employer,	:	
and	:	
CHUBB GROUP OF INSURANCE COMPANIES,	:	
Insurance Carrier,	:	
and JOHN MORRELL & COMPANY,	:	
Employer,	:	File No. 832042
and	:	
NATIONAL UNION FIRE INSURANCE COMPANY	:	
Insurance Carrier,	:	
and	:	A R B I T R A T I O N
SECOND INJURY FUND OF IOWA,	:	
Defendants.	:	D E C I S I O N

1402.40

The parties stipulated that claimant received carpal tunnel injuries on two separate dates. Claimant did not sustain the burden of proof by a preponderance of the evidence that the first stipulated injury was the cause of permanent impairment or

disability.

1803

Claimant did sustain the burden of proof by a preponderance of the evidence that the second stipulated injury was the cause of bilateral carpal tunnel which occurred simultaneously and was the cause of permanent impairment and disability under Iowa Code section 84.34(2)(s). The award was the same as the prehearing benefits paid, so claimant took nothing.

3202; 3203

The Second Injury Fund of Iowa was not liable for benefits because claimant did not prove that the first injury produced any permanent disability.

1803; 4200

Apportionment or contribution was not allowed to the second employer and insurer from the first insurer and carrier because all of the permanent disability and impairment was arrtibutable to the second injury.

2207; 2209

No finding on cumulative injury was made because the parties had stipulated to the two separate injury dates on the prehearing report.

FILED
MAY 1 9 1988
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN A COOPER,	:	
Claimant,	:	
VS	:	File No. 832043
IOWA MEAT PROCESSING,	:	
Employer,	:	
and	:	
CHUBB GROUP OF INSURANCE COMPANIES,	:	
Insurance Carrier,	:	
and JOHN MORRELL & COMPANY,	:	
Employer,	:	File No. 832042
and	:	
NATIONAL UNION FIRE INSURANCE COMPANY	:	
Insurance Carrier,	:	
and	:	A R B I T R A T I O N
SECOND INJURY FUND OF IOWA,	:	
Defendants.	:	D E C I S I O N

INTRODUCTION

This is a proceeding in arbitration brought by Steven A. Cooper, claimant, against (1) Iowa Meat Processing Company, employer, and Chubb Group of Insurance Companies, insurance carrier, for benefits as a result of an injury which occurred on October 4, 1985 (file no. 832043); (2) also against John Morrell and Company, employer, and National Union Fire Insurance Company, insurance carrier, for benefits as a result of an injury that occurred on August 3, 1986 (file no. 832042) and (3) also against the Second Injury Fund of Iowa. A hearing was held in Sioux City, Iowa on January 27, 1988 and the case was fully

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submitted at the close of the hearing. The record consists of the testimony of Steven A. Cooper and Joint Exhibits A through E. All four attorneys submitted excellent briefs.

PRELIMINARY INFORMATION

Claimant performed the same job at the same location at all times in this case. At the time of the injury on October 4, 1985 (file no. 832043), claimant was employed by Iowa Meat Processing (Iowa Meat) and this employer was insured by Chubb Group of Insurance Companies (Chubb Group). On February 1, 1986, the insurance coverage changed to National Union Fire Insurance Company from Chubb Group of Insurance Companies. On March 1, 1986, the employer changed to John Morrell and Company (John Morrell) from Iowa Meat Processing. Therefore, at the time of the injury on August 3, 1986 (file no. 832042), claimant was employed by John Morrell and Company who was then insured by National Union Fire Insurance Company.

STIPULATIONS I

All of the parties stipulated to the following matters:

That an employer-employee relationship existed between claimant and employer at the time of each of these respective injuries; and

That the rate of compensation, in the event of an award, is $244.22 for the injury of October 4, 1985 and $243.28 for the injury of August 3, 1986.

STIPULATIONS II

Claimant, Iowa Meat, Chubb Group, John Morrell and National Union Fire stipulated to the following matters:

That claimant sustained injuries on October 4, 1985 and on August 3, 1986 which arose out of and in the course of his employment with the respective employers;

That claimant missed three days of work due to the injury of October 4, 1985 and that claimant was not entitled to any disability benefits for this period of time;

That claimant missed seven days of work due to the injury of August 3, 1986 and was paid 4/7 weeks of workers' compensation benefits for this period of time;

That claimant's entitlement to temporary disability benefits is not an issue in dispute in this case at this time with respect to either injury;

That the type of permanent disability due to the injury of October 4, 1985, if the injury is found to be a cause of permanent disability, is scheduled member disability to the right hand;

That the injury of August 3, 1986 was the cause of some permanent disability;

That the type of permanent disability due to the injury of August 3, 1986 is scheduled member disability to the right and left hands;

That with respect to both injury dates, claimant's entitlement to medical benefits has been paid and medical benefits are no longer in dispute;

That neither employer nor insurance carrier claim a credit under Iowa Code section 85.38(2) for benefits paid prior to hearing under an employee nonoccupational group health plan;

That defendants, Iowa Meat and Chubb Group, make no claim for credit for workers' compensation benefits paid prior to hearing;

That defendants, John Morrell and National Union Fire, have paid 4/7 weeks of temporary disability benefits and 25 weeks of permanent partial disability benefits at the rate of $243.28 per week prior to hearing and are entitled to a credit for the amount of permanent partial disability benefits which have already been paid; and

That there are no bifurcated claims.

ISSUES

The parties submitted the following issues for determination at the time of the hearing:

Whether the injury of October 4, 1985 was the cause of any permanent disability;

Whether claimant is entitled to any permanent disability benefits as the result of the injury of October 4, 1985;

Determination of claimant's entitlement to permanent disability benefits as the result of the injury of August 3, 1986 ;

Whether claimant is entitled to recover any benefits from the Second Injury Fund of Iowa. In order to find liability against Second Injury Fund of Iowa it would require a determination that claimant sustained an injury on October 4, 1985 and August 3, 1986 and that each of these injuries was the cause of permanent disability, because the Second Injury Fund did not join in these

stipulations as the other defendants have done;

Whether defendants John Morrell and Company and National Union Fire Insurance Company have over paid claimant for the injury of August 3, 1986; and

Whether defendants John Morrell and Company and National Union Fire Insurance company are entitled to a contribution from Iowa Beef Processing and Chubb Group of Insurance Companies.

SUMMARY OF THE EVIDENCE

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

Claimant was born on January 9, 1955 and is a life-long resident of Sioux City, Iowa. He was 33 years old at the time of the hearing, divorced and the father of three dependant children that he supports. Claimant graduated from high school in 1973 as a D student. He studied auto mechanics and welding in the eleventh grade but never used these skills. He has not acquired any additional education or training after high school.

Claimant started to work at this meat packing plant when it was Iowa Meat Processing on September 1, 1981. He had worked there continuously until the strike, which occurred on March 9, 1987, against the current employer, John Morrell and Company. After the strike, claimant worked one day dumping garbage into a truck for a waste products company in the middle of the summer (1987) at $3.35 per hour but was unable to continue to do this job longer than one day because it hurt his hands. He has also worked part-time since August of 1987, when work has been available, for a tire company, ten to 25 hours per week at $5.00 per hour unloading and stacking tractor and truck tires.

Claimant's past employments were manual labor jobs such as washing dishes, picking bricks out of an oven, stacking lumber and janitor work. After graduation from high school in 1973, claimant performed general labor jobs assigned to him through the labor union hall until he started to work in the packing house in 1981. Typical general labor jobs performed included digging ditches, puddling concrete, pouring concrete, sweeping floors, operating a jack hammer or ground pounder and other general labor work.

After claimant began employment for employer, Iowa Meat, on September 1, 1981, he worked two weeks feeding the fire, working in offal and working in the cooler. After that he worked five years seperating the black gut from the small gut. This job is also described as the chitterling job. This job requires repetitive use of his hands. His right hand is his dominant hand. He wore cotton and nylon gloves furnished by employer.

This is a standing up job. The guts come down the line in a tray. They weigh about five pounds. They are difficult to handle because they are wet and mixed with blood and manure. His job was to pick up the black gut, which is the large gut, with the right hand and the small gut in the left hand; break the cord that binds them together by a pulling action with his right hand; pull them apart; and then send the parts in different directions. The large gut or black gut is thrown into a shute approximately two feet away. The small gut is placed back into the tray and sent down the conveyor line. Claimant testified that it requires a hard pulling action to seperate the guts and it usually required at least two pulls to pull them apart completely.

On October 4, 1985, claimant felt a tingling and burning sensation in his right hand, aching in his right wrist and the ends of his fingers were numb. He testified that it had been gradually coming on for some time but that this was the first time that he went to the nurse. Claimant denied that he had any symptoms or problems with his left hand on October 4, 1985. He stated that he had pain in his right hand when he worked during the day. At night his right hand would burn, swell up and ache.

Claimant was sent to see Daniel M. Rhodes, M.D., at Morningside Clinic. Claimant was given medications, a wrist splint and told to soak his hand in ice at night. The doctor prescribed light duty. Claimant testified that there are no light duty jobs in the packing house. Claimant stated that he always returned to doing his regular job when the doctor prescribed light duty. Claimant maintained that if he complained, he might get off for a few hours or so. Sometimes he would call in sick if he could not stand another day of suffering. He received no more medical treatment for the right hand after March of 1986 because the plant nurse said he did not need it. Claimant alleged however, that the right hand did not clear up but to the contrary, it only continued to get worse. Claimant emphasized that the pain in his right hand has never lessened since it began. He stressed several times that it has only become progressively worse. Claimant stated that the metal wrist splint cut into his hand and so he did not use it very much.

In the spring of 1986, claimant said that he began to use his left hand to do the jobs that he usually did with his right hand in order to reduce the pain in his right hand. Claimant said that approximately six months after his last visit to the Morningside Clinic for his right hand, which was in March of 1986, he then began to experience problems with his left hand. He had the same problems in the left hand that he had in the right hand of burning, tingling, numbness and the wrist ached. This time claimant was sent to see Milton D. Grossman, M.D., and William M. Krigsten, M.D. Claimant stated that he had pain in both his right hand and his left hand in August of 1986.

Claimant testified that in December of 1986, he finally had sufficient seniority to bid a different job and get it. The new job was pulling lace fat or gall fat from the stomach. Claimant testified that pulling lace fat is much easier than the chitterling job of seperating guts. Lace lard does not require a hard grip. Instead you can work the fat off easily. Claimant added that it was necessary to take a ten cent per hour cut in pay in order to do the lace fat job. He said that it can be done with either hand. He performed this job until a strike occurred on March 9, 1987. Claimant testified that he nevertheless, still had pain in his right hand.

Claimant said that pain in his right hand makes if difficult to paint, rake the yard or grip the wheel of a car. The left hand still hurts some, but it is not as bad as the right hand. Claimant testified that the right hand is worse now than it was at the end of 1985. Claimant testified that he can feel his loss of grip when putting torque on a wrench. Sometimes a coffee cup will slip out of his right hand, fall and break. Claimant said that he probably could do some of his old laboring jobs, such as digging ditches and puddling concrete, but that it would cause him a lot of discomfort. Claimant stated that he was taking no medication now and he is not under a doctor's care now. Claimant testified that he plans to return to the job of pulling lace fat when the strike is over.

Claimant reiterated that he had no problems with his left hand until the fall of 1986. He also reaffirmed more than once that his right hand has never shown any improvement, but in his opinion it has only become worse since the very beginning of his problem with his right hand in October of 1985. Claimant disagreed with several notes made by a number of doctors to the effect that his right hand was "improved" or "better". Claimant countered that the doctors write down what they want to write. Claimant stated that he always said that his right hand was becoming worse. He denied that he ever told the doctors that it was the same or better. Claimant further testified that his right or left hand might be better or worse on any given day, depending on usage of that hand, but overall his right hand has always gotten worse. The problems with his left hand are minor by comparison to the right hand.

Claimant agreed that he did continue to do the job of seperating guts or lace fat after both injury dates. Claimant acknowledged that he had not received any surgery for the carpal tunnel condition of either his right hand or his left hand.

On October 4, 1985, the plant nurse noted that claimant complained of right arm pain and that his arm falls asleep (Ex. A, p. 8).

The medical records of Morningside Clinic show that claimant

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was treated there by Daniel M. Rhodes, M.D., John N. Redwine, D.O. and Michael A. Jennings, M.D., for the injury that was stipulated to have occurred on October 4, 1985.

On October 10, 1985, Dr. Rhodes' initial diagnosis was myotenositis of the right arm and wrist (Ex. A, pp. 48 & 49). On October 15, 1985, Dr. Rhodes also added that the left arm was mildly tender but stated that his diagnosis was clinical carpal tunnel syndrome, right (Ex. A, pp. 46& 47). On October 21, 1985, Dr. Redwine repeated that exact same diagnosis (Ex. A, pp. 44 & 45). On October 24, 1985, Dr. Jennings diagnosed mild tendonitis of the extensor tendon of the right hand, carpal tunnel syndrome-mild right (Ex. A, pp. 42 & 43). On October 31, 1985, Dr. Jennings noted slight improvement (Ex. A, pp. 40 & 41). On November 7, 1985, Dr. Jennings stated that patient says that he feels much better (Ex. A, pp. 38 & 39). On November 14, 1985, the doctor recorded that patient feels somewhat better and was working full time at his usual job (Exs. 36 & 37). On February 27, 1986, Dr. Jennings stated that claimant's pain had been coming back gradually since his last visit and that it was greater on the right than the left (Ex. A, pp. 30 & 31). On March 4, 1986, Dr. Jennings reported that claimant had used a pitchfork and shovel and that his pain was worse (Ex. A, pp. 28 & 29). On March 10, 1986, Dr. Jennings said that patient feels somewhat better (Ex. A, pp, 26 & 27). On March 17, 1986, Dr. Jennings recorded carpal tunnel syndrome better (Exs. 25 & 26).

At the time of all of these examinations the written recorded diagnosis was right carpal tunnel syndrome (Ex. A, pp. 24-48). The left upper extremity is only mentioned slightly on two occasions in passing (Ex. A, pp. 46 & 30).

Dr. Jennings wrote a letter to the insurance carrier (Chubb Group) on May 1, 1986 which reads as follows:

> I last saw Steve Cooper on March 17, 1986. He just received conservative management for carpal tunnel syndrome. I do not believe we got a nerve conduction study on him as he improved without the need for surgery or injections. The last time I saw him he was better.

(Ex. A, p. 20)

Next, the medical records show that claimant saw Milton D. Grossman, M.D., on September 26, 1986 for the injury that was stipulated to have occurred on August 3, 1986 to both the right hand and the left hand at the same time (Ex. A, pp. 6 & 11). Dr. Grossman said claimant described right hand pain and numbness and that his left hand bothered him also. Dr. Grossman's recorded diagnosis was tendonitis - right hand and fingers (Ex. A, p. 19).

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Claimant was seen in the same office by William M. Krigsten, M.D., on October 8, 1986 for a recheck of his hands and Dr. Krigsten diagnosed possible carpal tunnel syndrome (Ex. A, p. 18). Dr. Krigsten ordered an EMG and nerve conduction test on October 13, 1986 from Dennis Nitz, M.D., (Exs. 14 & 17). On October 16, 1986, Dr. Krigsten diagnosed carpal tunnel syndrome, mild, bilateral. He recommended a week off work and concurrently a week of physical therapy at the Marion Health Center (Exs. 15 & 16). On October 23, 1986, Dr. Krigsten's diagnosis was the same. He recommended that claimant be allowed to perform the lace lard job for three weeks (Ex. A, pp. 11-13). On November 4, 1986, Dr. Krigsten wrote to Chubb Group that he had proposed carpal tunnel surgery to claimant (Ex. A, p. 4). On November 13, 1986, Dr. Krigsten continued to record bilateral hand pain and continued to recommend the lace fat job (Ex. A, pp. 2 & 3).

In his letter to Chubb Group, dated November 4, 1986 (Ex. A, p. 4), and in a final letter to the attorney for National Union Fire dated January 9, 1987 (Ex. A, p. 1) Dr. Krigsten stated that claimant had been seen at Morningside Clinic about a year prior to this time and that he had not seen any doctor for six months. Dr. Krigsten then briefly summarized his office notes and concluded as follows: "This man had gradual onset of discomfort in both hands gradually at same time; has 5% permanent impairment right hand and 3% of left hand." (Ex. A, p. 1).

APPLICABLE LAW AND ANALYSYS

The claimant has the burden of proving by a preponderance of the evidence that the injuries of October 4, 1985 and August 3, 1986 are causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Claimant did not sustain the burden of proof by a preponderance of the evidence that the injury stipulated to have occurred on October 4, 1985, was the cause of permanent disability. It was further stipulated that claimant only lost three days of work due to this injury. Claimant was treated for this injury eleven times between October 10, 1985 and March 17, 1986. Claimant testified that he always returned to work to the difficult chitterling job of seperating the large black gut from the small gut. Claimant was frequently returned to light duty work, however; claimant testified that there is no such thing as light duty work in the packing house. Claimant testified that either you do your regular job or you don't work at all. Claimant testified that he was able to do the job even though it was very difficult from the aching and the pain in his right wrist. Claimant's credibility on the subject of pain is not questioned However, pain that is not substantiated by clinical findings is not a substitute for impairment. Waller v. Chamberlain Mfg., II Iowa Industrial Commissioner Report 419, 425 (1981).

The clinical findings in this case are that claimant was treated several times from October 10, 1985 to March 17, 1986. On March 17, 1986, Dr. Jennings said claimant was performing his regular job and that he was better.

None of the three physicians at the Morningside Clinic who treated claimant for this condition--Dr. Redwine, Dr. Rhodes or Dr. Jennings--imposed any temporary or permanent restrictions or limitations on claimant's work activity. None of these three doctors gave an impairment rating or said anything to indicate that an impairment rating was warranted or indicated. Claimant did not receive an EMG. Dr. Jennings said no injections were administered. No surgery was recommended or performed for this condition. According to the medical records and nurses notes, claimant was able to function in his job until approximately August 3, 1986. Claimant testified that his right hand became progressively worse at all times. This is controverted by the medical records which show gradual improvement until claimant was described as better on March 1, 1986. Therefore, there is a conflict of evidence between claimant's testimony and the medical records as to whether claimant's right hand got worse or better. It is a fact however, that claimant did do the job without medical treatment from March 17, 1986 to August 3, 1986. Claimant then, has not sustained the burden of proof by a preponderance of the evidence that the injury which is stipulated to have occurred on October 4, 1985, was the cause of any permanent disability. Consequently, claimant is not entitled to any permanent disability benefits as a result of the injury of October 4, 1985.

Accordingly, claimant is not entitled to benefits from the Second Injury Fund of Iowa. Iowa Code section 85.64 requires (1) the loss or loss of use of one hand, one arm, one foot, one

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leg or one eye; (2) the loss of loss of use of another such member or organ and (3) some degree of permanent disability resulting from both the first and second injury. Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978). Counsel for the Second Injury Fund in her brief accurately and succinctly summarized why claimant is not entitled to Second Injury Fund benefits in this case.

> Claimant sought Fund benefits on the basis of a first loss to his right hand on October 4, 1985. Claimant did now show a loss of use with resulting permanent disability to his right hand, however. What the evidence demonstrates is that Claimant's initial complaints regarding his right hand was of a temporary nature only. He missed 3 days of work and on November 14, 1985, his treating physician imposed no limitations or restrictions. Joint Ex. A, p. 36. Furthermore, no expert medical evidence was offered that Claimant suffered from any permanent impairment to his right hand due to any October 4, 1985, injury. Claimant's position that his first claimed injury to his right hand was sufficient to invoke § 85.64 must be rejected as his first injury was not permanent and did not act as any hindrance to his ability to obtain or retain effective employment. § 85.64; Anderson v. Second Injury Fund, 262 N.W.2d 278, 791 (Iowa 1978).

No Second Injury Fund benefits were awarded to a claimant who failed to show a permanent disability existed as a result of the first injury and prior to the second injury. Ross v. Service Master-Story Co., Inc., Thirty-fourth Bienniel Report of the Industrial Commissioner 273 (1979).

None of Dr. Krigsten's impairment rating can be attributed to the first injury because (1) Dr. Krigsten did not examine claimant until after the second injury and (2) all Dr. Krigsten knew about the first injury was that claimant had been seen at the Morningside Clinic about one year prior but had not seen a doctor for approximately six months. Therefore, Dr. Krigsten was not in a position in point of time to evaluate the first injury and he did not have sufficient information to make such an evaluation. Nor is there any information in either of Dr. Krigsten's letters that even slighly suggests that he intended to rate the first injury of October 4, 1985 to the right hand (Ex. A, pp. 1 & 4). Consequently, claimant is not entitled to Second Injury Fund benefits because he did not sustain the burden of proof by a preponderance of the evidence that the first injury resulted in any permanent disability.

Claimant is entitled to permanent disability benefits as a result of the injury which the parties stipulated occurred on

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August 3, 1986. Dr. Krigsten made it clear in his office notes (Ex. A, pp. 3, 12, 13, 16 & 18) and his two written reports (Ex. A, pp. 1 & 4) that this man had gradual onset of discomfort in both hands gradually at the same time with respect to the injury of August 3, 1986 which he treated. For this bilateral carpal tunnel syndrome he awarded a five percent permanent functional impairment of the right hand and a three percent functional impairment to the left hand (Ex. A, p. 1).

The Iowa Supreme Court case of Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983) held that permanent partial disability of two members caused by a single incident is a scheduled injury and that the degree of impairment for a partial loss must be computed on the basis of a functional, rather than industrial, disability pursuant to Iowa Code section 85.34(2)(s). Dr. Krigsten is the only medical practitioner to evaluate and rate the injury of August 3, 1986. He said that claimant sustained bilateral carpal tunnel which developed in both hands at the same time. There is no medical evidence to the contrary to even consider in this case. This is a simultaneuos injury to the right and left hands which occurred at the time of the injury which is stipulated to have occurred on August 3, 1986. Simbro applies.

Iowa Code section 85.34(2)(s) provides as follows:

> The loss of both arms, or both hands, or both feet, or both eyes, or any two thereof, caused by a single accident, shall equal five hundred weeks and shall be compensated as such, however, if said employee is permanently and totally disabled he may be entitled to benefits under subsection 3.

Using the Guides to the Evaluation of Permanent Impairment second edition, published by the American Medical Association, table 9 on page 10 then five percent of the right hand converts to five percent of the right upper extremity and three percent of the left hand converts to three percent of the left upper extremity. Turning to table 20 on page 23, five percent of the right upper extremity converts to three percent of the body as a whole and three percent of the left upper extremity converts to two percent of the body as a whole. Turning to the Combined Values Chart, on page 240, the combined value of three percent and two percent equals five percent of the body as a whole. Five percent of 500 weeks is equal to 25 weeks of permanent partial disability benefits. Therefore, it is determined that the injury of August 3, 1986 was the cause of permanent disability and that claimant is entitled to 25 weeks of permanent partial disability benefits. Coincidentally, or not so coincidentally, 25 weeks of permanent partial disability benefits is the exact number of weeks of permanent partial disability that defendants, John Morrell and Company and National Union Fire Insurance

Company, have paid claimant prior to hearing. Therefore, it is determined that defendants, John Morrell and Company and National Union Fire Insurance Company, have not over paid claimant for the injury of August 3, 1986.

Iowa Code section 85.21(1) provides as follows:

> The industrial commissioner may order any number or combination of alleged workers' compensation insurance carriers and alleged employers, which are parties to a contested case or to a dispute which could culminate in a contested case, to pay all or part of the benefits due to an employee or an employee's dependent or legal representative if any of the carriers or employers agree, or the commissioner determines after an evidentiary hearing, that one or more of the carriers or employers is liable to the employee or to the employee's dependent or legal representative for benefits under this chapter or under chapter 85A or 85B, but the carriers or employers cannot agree, or the commissioner has not determined which carriers or employers are liable.

As previously indicated, there is simply no medical evidence that claimant sustained a permanent impairment or disabilty as a result of the injury on October 4, 1985. Therefore, no permanent partial disability benefits are due to claimant from this injury. Likewise, no contribution is due from Iowa Meat Processing and Chubb Group of Insurance Companies to John Morrell and Company and National Union Fire Insurance Company.

FINDINGS OF FACT

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

That there was no medical evidence that the injury of October 4, 1985 was the cause of any permanent functional impairment;

That Dr. Krigsten, the only medical practitioner to testifiy on the topic of impairment, stated that claimant sustained a simultanous bilateral carpal tunnel syndrome as a result of the injury which occurred on August 3, 1986. His assessment is accepted as being correct;

That Dr. Krigsten awarded a five percent permanent functional impairment rating of the right hand and a three percent permanent functional impairment of the left hand for the injury that occurred on August 3, 1986. His ratings are accepted as being correct;

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That these ratings convert and combine to a five percent impairment to the body as a whole; and

That claimant is entitled to 25 weeks of permanent partial disability benefits as a result of the injury which occurred on August 3, 1986, and was paid 25 weeks of permanent partial disability benefits by John Morrell & Company and National Union Fire Insurance Company prior to the hearing.

CONCLUSIONS OF LAW

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

That claimant did not sustain the burden of proof by a preponderance of the evidence that the injury of October 4, 1985 was the cause of any permanent functional impairment or disability;

That claimant did sustain the burden of proof by a preponderance of the evidence that the injury of August 3, 1986 was the cause of bilateral permanent impairment which occurred simultaneously;

That claimant is entitled to 25 weeks of permanent partial disability benefits pursuant to Iowa Code section 85.34(2)(s);

That the Second Injury Fund of Iowa is not liable for the payment of any benefits pursuant to Iowa Code section 85.64; and

That claimant has not been over paid by John Morrell and Company and National Union Fire Insurance Company and that this employer and this insurance carrier are not entitled to a contribution from Iowa Meat Processing and Chubb Group of Insurance Companies pursuant to Iowa Code section 85.21.

ORDER

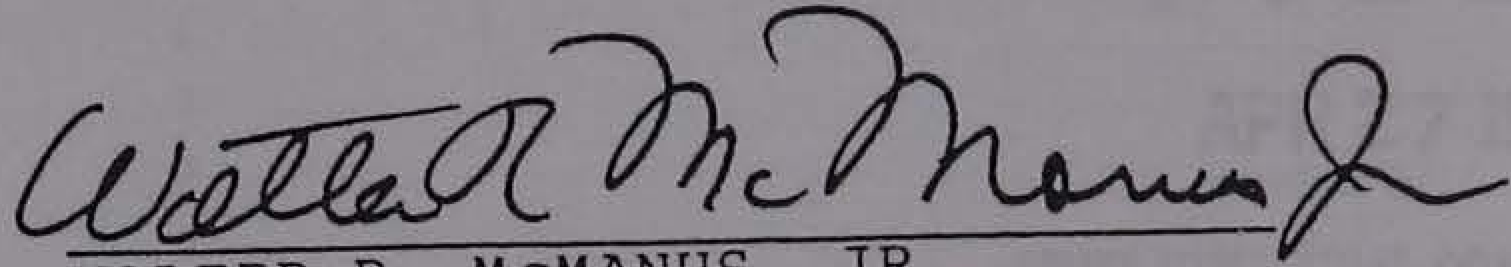
THEREFORE, IT IS ORDERED:

That claimant take nothing from this proceeding;

That claimant pay the costs of all parties to this action pursuant to Division of Industrial Services Rule 343-4.33; and

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 May, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
APR 27 1988
IOWA INDUSTRIAL COMMISSIONER

ROBERT CORMAN,
Claimant,
vs.
VAN BUREN COUNTY ALCOHOL PLANT,
Employer,
and
HARTFORD INSURANCE COMPANY,
Insurance Carrier,
Defendants.

File No. 725770

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 Robert Corman, claimant, against Van Buren County Alcohol Plant, employer, and Hartford Insurance Company, insurance carrier, defendants, for benefits as a result of an injury that occurred on January 14, 1983. A hearing was held on August 6, 1987 at Burlington, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Linda Corman (claimant's wife), Robert Corman (claimant), claimant's exhibits one through 85 and defendants' exhibits A through D. Claimant's attorney submitted an excellent brief. Defendants' attorney did not submit a brief.

STIPULATIONS

The parties stipulated to the following matters.

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

That claimant sustained an injury on January 14, 1983 which arose out of and in the course of employment with employer.

That the alleged injury was the cause of temporary disability due to the injury to claimant's neck, right shoulder and back.

That claimant is entitled to temporary disability benefits for the injury to his neck, right shoulder and back from January 14, 1983 to August 17, 1984 and that such benefits have already been paid.

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That all of claimant's medical expenses for the treatment of claimant's neck, right shoulder and back have been or will be paid by defendants.

That during the course of his medical treatment for his neck, right shoulder and back, claimant developed herpes zoster and that the only issue in this case is whether the herpes zoster condition was caused by the injury of January 14, 1983.

That if it is determined that claimant's herpes zoster condition was caused by the injury of January 14, 1983, then the parties have agreed that claimant is entitled to a running award of temporary disability benefits from August 17, 1984 indefinitely into the future and that claimant will then be entitled to payment of his medical expenses for the treatment of the herpes zoster condition.

That claimant's entitlement to permanent partial disability benefits for his neck, right shoulder and back cannot be determined until the herpes zoster condition is healed or stabilized.

That whether claimant is or is not an odd-lot employee is not an issue in this case at this time and it cannot be determined whether he is or is not an odd-lot employee until the herpes zoster issue is resolved.

That the rate of compensation, in the event of an award, for the herpes zoster condition is $261.97 per week.

That defendants make no claim for credit for benefits paid under an employee nonoccupational group health plan.

That defendants make no claim for any workers' compensation benefits paid for the herpes zoster condition prior to hearing.

That there are no bifurcated claims.

ISSUES

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

Whether the injury of January 14, 1983 was the cause of the herpes zoster condition of claimant.

Whether claimant is entitled to temporary disability benefits for the herpes zoster condition.

Whether claimant is entitled to payment of medical expenses for the herpes zoster condition.

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SUMMARY OF THE EVIDENCE

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

Claimant was injured on January 14, 1983 by lifting heavy burners from a combuster (1st report of injury). Claimant did not feel the immediate onset of pain while doing the task. Rather, his shoulder became sore a short time later. Claimant saw his family physician, Richard D. Breckenridge, D.O., several times at the emergency room of the hospital from January 16, 1983 to February 15, 1983 for right shoulder pain which Dr. Breckenridge diagnosed as acute intracostal neuralgia. He treated claimant with medications and physical therapy.

Linda Corman, claimant's wife, testified that she is a registered nurse. She is employed as the director of nursing services at a nursing home. Prior to this injury claimant was healthy and worked many hours everyday. She went with her husband to the doctors and hospitals. She testified and claimant testified that Dr. Breckenridge gave claimant an injection of cortisone at the site of the injury. Dr. Breckenridge confirmed that he did give claimant a cortisone injection on January 18, 1983 and again on January 20, 1983 (Exhibit 32; Ex. 19, page 76). Dr. Breckenridge reported several times at exhibits 27, 28, 29 and 30.

Dr. Breckenridge referred claimant to Donald D. Berg, M.D., an orthopedic surgeon in Ottumwa, on January 22, 1983. On February 15, 1983, Dr. Berg said that claimant had a cervical nerve root impingement with radiating pain into the right arm probably secondary to a cervical disc (Ex. 31). Claimant's wife testified that claimant was hospitalized at St. Joseph's Hospital in Ottumwa by Dr. Berg from January 22, 1983 to February 2, 1983. She further testified that claimant was given cortisone daily. Claimant also testified that he received cortisone from the nurse during this hospitalization. Dr. Berg reported claimant received Indocin but he did not say that claimant received cortisone or any steroid (Ex. 19, pp. 73 & 74; Ex. B). The St. Joseph's Hospital records also state that claimant received Indocin. Cortisone or steroid are not mentioned. Hyperlipidemia was also diagnosed (Ex. 19, pp. 68 & 81). Dr. Berg also stated that he prescribed Percodan on April 29, 1983 but no mention is made of cortisone or a steroid (Ex. 19, pp. 67, 68, 75, 82, 83, 88, 89). In a narrative report dated April 18, 1983 Dr. Berg said claimant was unable to work on April 7, 1983. Dr. Berg added that he was referring claimant to an orthopedic surgeon for removal of a cervical disc (Ex. B).

Claimant was then hospitalized at Iowa City from July 7, 1983 to July 21, 1983 for tests and treatment. Gerald W. Howe, M.D., an orthopedic surgeon, examined claimant at Mercy Hospital, in Iowa City, at the request of Dr. Berg. Cervical surgery was initially contemplated but Dr. Howe eventually decided it was

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not needed (Ex. 19, pp. 70 & 72). Dr. Howe then referred claimant to James Worrell, M.D., a neurologist in Iowa City. Claimant's wife stated that Dr. Howe gave claimant two large cortisone injections on two occasions. Claimant also stated that Dr. Howe gave him cortisone injections on two occasions. These injections cannot be verified from Dr. Howe's records or the hospital records as having been given or not been given (Ex. 19, pp. 70 & 72).

Claimant was initially hospitalized at Iowa City for a cervical myelogram for a probable C-5 right radiculopathy after conservative treatment had failed (Ex. 35, pp. 117 & 118). The myelogram of July 7, 1983 showed a normal flow pattern. There was no evidence of obstruction or blockage (Ex. 36). Dr. Worrell then performed an EMG on July 9, 1983 which revealed denervation of the serratus anterior muscle (Ex. 39). Chest x-ray, bone scan and CT scan were normal (Ex. 1, pp. 38, 39, 41 & 43; Exs. 47 & 48). Claimant complained of severe pain in the right shouler blade, neck and arm but it was determined that there was no surgically correctable lesion. The only physical finding that could be made was some weakness of the serratus anterior muscle which brought about what was described as winging of the scapula on the right (Ex. 47).

Claimant's wife testified that Dr. Worrell gave claimant Prednisone daily from July 7, 1983 to July 21, 1983 during this period of hospitalization. Claimant also testified that he took a cortisone pill prescribed by Dr. Worrell and got a reaction from it. He said that his face got big, he gained 20 pounds, he could not breathe and he broke out in sores on his arms and back. He added that Dr. Worrell is still treating him for this condition.

Claimant returned to the emergency room on July 30, 1987 with swollen ankles, hands and face; a 20 to 25 pound weight gain; increased abdominal girth; shortness of breath and weakness. This was diagnosed as herpes zoster and claimant was readmitted to the hospital (Ex. 44). Dr. Worrell said that claimant developed a marked steroid effect with edema, weight gain and the like. Claimant then developed a clearly herpetic eruption involving the left C-5 and C-6 distribution which he noted was the opposite side from claimant's cervical radiculopathy symptoms. The herpes zoster extended down claimant's left arm to the palm, hand and thumb. There were no changes in the right arm (Ex. 49). Claimant was hospitalized for this condition until he was discharged on August 12, 1983 (Ex. 50).

The hospital records from July 7, 1983 to July 21, 1983 do not show precisely what prescriptions that claimant did or did not take during this period of hospitalization (Ex. 47, pp. 140 & 141). However on August 2, 1983 while claimant was hospitalized for this steroid reaction Dr. Worrell noted:

> We had tried him on extensive medication programs and physical theray [sic] with minimal improvement. He was discharged on Amitriptyline, 50 mg during the day and 100 mg at night, and a transcutaneous stimulation unit. He was also given Motrin and a tapering course of Decadron. At the time of discharge, he was only on 0.75 mg of Decadron three times a day. Unfortunately, he has then developed rather marked steroid effect with edema, weight gain, and the like. He then developed clearly a herpetic eruption involving the left C5 and C6 distribution.

(Ex. 49)

Claimant's physical examination showed a clear case of steroid effect and marked herpes zoster (Ex. 49).

Dr. Worrell gave this report to the insurance carrier on August 15, 1983.

> Mr. Corman did sustain an injury to his back in January and I do feel his subsequent problems are entirely related to that. Please refer to the records being sent along with this letter. His present condition is work related. The last admission which was about a week ago now was necessitated because he developed a bout of herpes zoster involving the cervical dermatomes on the left arm at exactly the same distribution as the problem was on the right side. This was probably brought on by the Decadron that I had given him to try to treat his previous condition.

(Ex. 1, p. 29; Ex. 52)

Dr. Worrell reported to Dr. Breckenridge that arm symptoms as well as generalized herpes zoster continued to persist on August 30, 1983 and September 26, 1983 (Exs. 54 & 58). He reported to the insurance carrier on November 3, 1983 that claimant's neck and shoulder problems and herpes zoster problems continue and added that claimant was still totally disabled (Ex. 60). On November 7, 1983 the herpes zoster affected claimant's right thorax, left shoulder and his genitals (Ex. 61).

Dr. Worrell sent claimant to the University of Iowa Hospitals and Clinics, Division of Infectious Diseases for an evaluation. Claimant was seen on November 16, 1983. Ian M. Smith, M.D., recited that accident history and then added:

> He was treated with shots and oral Prednisone over 2 1/2 weeks (unknown dose). He had fluid

> retention and moon facies and developed herpes zoster on the left upper arm and back with residual pain. This didn't clear completely and he had a lesion on the right upper arm and then disseminated. Oral, eyes, hands, palms, and legs still have lesions.

(Ex. 17).

The herpes zoster condition was graphically described by Dr. Smith in these words:

> Physical examination revealed right wing scapula discoloration and scarring of both shoulder with erythematous maculopapular lesions. There were vesiculopustular areas on the back, chest, and upper arms. A penile lesion was raised, scarred, and non-tender, but was painful.

(Ex. 17)

Dr. Smith concluded as follows:

> The patient's herpes zoster is resolving. Since the outbreak occurred on Corticosteroids, we do not feel these are warranted at this time. We find no evidence of underlying disease, so this should be self-limited. If he is still symptomatic in three months, he should return to our clinic for further evaluation.

(Ex. 17)

Also, a laboratory report showed that the sample which they examined showed that claimant was grossly lipemic (Ex. 18, pp. 65 & 66).

Dr. Worrell reported that claimant continued to suffer with herpes zoster on November 30, 1983 (Ex. 64), December 20, 1983 (Ex. 65) and on January 27, 1984 (Ex. 69). On the last date he reported that claimant was still unable to work. He summarized claimant's status on February 1, 1984 as follows:

> Mr. Corman came over today and has had a flareup [sic] again with severe pain in the left shoulder and upper arm. A few more vesicles have popped out on the shoulder and neck and on the lip. He has no systemic symptoms. Examination today is really about the same with some weakness around the left shoulder girdle but no increase in his atrophy and no other new neurological findings. He continues to have severe herpes zoster related radiculopathy

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> and pain but overall the past few months he has had some good weeks also and hopefully we are on an improving part of this. This is a most difficult and baffling case to deal with. Mr. Corman is again depressed but I will hold off any antidepressants again for awhile and see if he will bounce back on his own.

(Ex. 70)

On February 21, 1984 claimant had an unrelated appendectomy (Ex. 72). After a two and one-half month remission, the herpes zoster recurred on April 18, 1984 (Ex. 75) and June 4, 1984 (Ex. 76).

At the request of defendants, claimant was seen and examined and evaluated extensively by several specialists at the Industrial Injury Clinic from July 8, 1984 to July 11, 1984 (Ex. D). However, the shingles or the herpes zoster condition was not specifically addressed other than to be mentioned in passing (Ex. D, pp. 1, 7 & 10). The staff recommendation and conclusions of the Industrial Injury Clinic were as follows:

> STAFF RECOMMENDATIONS AND CONCLUSIONS
>
> 1. In the opinion of the staff, based on review of past medical data and current evaluation, there is no clear mechanism of injury relative to the patient's symptomatic complaints. This is especially true of the apparent serratus anterior palsy from which he has now essentially recovered. In any event, from an industrial standpoint at this time, there is no substantial evidence of any significant residual impairment or permanent disability.
>
> 2. We would recommend from an industrial standpoint that this individual upgrade his level of exercising and physical conditioning. It is our opinion that if he proceeds responsibly in this regard, that he should be able to return to work on or by 6 August 1984 within the work capacity classification attached to this report.
>
> 3. At this time we do not see the need for continued formal biomedical, orthomedical or paramedical treatment relative to the industrial incident in question.

(Ex. D, p. 11)

A considerable amount of personality testing and development

revealed that claimant had little or no motivation to return to work due to family dynamics with his wife and mother and the fact that his former employer was no longer in business. This does bear indirectly on claimant's disposition to return to work but it is not directly related to whether the injury was the cause of the herpes zoster condition which is physical, objective and medical in nature (Ex. D, p. 63).

Dr. Worrell was angered by the examination at the Industrial Injury Clinic at Neenah, Wisconsin and the termination of claimant's benefits. He expressed his feelings in a letter to the insurance carrier dated August 9, 1984 (Ex. 78).

On October 24, 1984 Dr. Worrell gave a deposition (Ex. 80). His testimony generally parallels his reports which have already been summarized. He did state that claimant's pain and disability had been aggravated and prolonged quite markedly by the chronic herpes zoster. He felt that the injury caused claimant's cervical and shoulder complaints and that eventually claimant would have a permanent impairment but it was too early to render an opinion (Ex. 80, pp. 7 & 8). Dr. Worrell explained why an injury to the serratus anterior muscle would cause winging of the shoulder blade.

> The winging is actually identified when you are looking at the person from behind and they bring their arms up in front of them. In the normal person the shoulder blade will stay close to the chest wall, whereas if it's winged or there's weakness of these muscles, the shoulder blade will actually fan out or look like a, basically like a chicken wing as it's coming out. And for that reason that's why it's called that.

(Ex. 80, p. 12)

The condition is caused by a lack of nerves to the muscle (Ex. 80, p. 13). Dr. Worrell granted that claimant's initial nerve injury occurred to claimant's right arm, but that the herpes zoster condition initially caused pain in the left arm (Ex. 80, pp. 16 & 17). He said that he sent claimant to the university to try to determine if there was some underlying disease, because herpes zoster is usually self-limiting, that is it crops up and will disappear without any specific treatment, but claimant's condition had become chronic (Ex. 80, p. 18). Defendants counsel asked Dr. Worrell to explain why the traumatic injury to the cervical nerves were aggravated or complicated by the herpes zoster. Dr. Worrell responded as follows:

> Q. What is the reference to "aggravated by" or "complicated by the herpes"? How has that affected the original injury, a stretch type injury to the

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cervical nerves?

A. In my judgment what -- And looking through the literature on herpes zoster we know that this virus is all -- once we've had the chicken pox, this virus is in all of us in our nervous system in one place or the other along the sensory nerves, near the spinal cord. And it is noted with an injury to the nerve that in some people this will free the virus for some reason or another and then produce the shingles reaction, which I think this is what has happened here with Mr. Corman. You'll get this sometimes even after a lumbar disk operation or something. The patient after surgery a week or so will develop shingles down the leg along the same exact course of that nerve. So we assume the injury to the nerve will then produce, for reasons that are totally obscure, will allow the herpes zoster inflammation to occur along the same course.

Q. So there is an association between the two, so you have the cervical injury or the stretching of the nerve and then ultimately the herpes show up so you deduct from that there is a relationship?

A. Yes.

(Ex. 80, pp. 19 & 20)

Dr. Worrell admitted that you would expect the herpes zoster condition to show up earlier than seven or eight months after the original injury. Also, he conceded that it was unusual that the herpes zoster followed the left C5 dermatome branch when the original injury was to the right side of the body since each side has it's own separate dermatome coming off the spinal cord (Ex. 80, pp. 20 & 21). Dr. Worrell acknowledged that he did not do a nerve conduction study when he performed the EMG (Ex. 80, p. 23). He admitted that he had wondered if claimant had a functional overlay when claimant had pain without impingment objective findings but he discounted this after the herpes zoster appeared because they are very painful (Ex. 80, pp. 29-31). Dr. Worrell said that in his opinion the herpes zoster was at least aggravated by what he considered the injury to the cervical nerve groups (Ex. 80, p. 36). But the doctor conceded that the question of whether a nerve injury could cause herpes zoster was not a matter currently under investigation in the medical community and that any literature on it would be uncommon (Ex. 80, pp. 36 & 37). The following colloquy transpired between defendants counsel and Dr. Worrell:

Q. What are the other identifiable or suspected causes of onset or initiation of herpes zoster?

A. There may be no identifiable cause in the majority of cases.

Q. What do you mean?

A. The virus may activate spontaneously. There can be some underlying diseases on the person's part that may interfere with his defense against virus infections such as he may have a cancer or has diabetes or is taking certain drugs or other types of injuries to the body such as burns or anything that stresses the body, or there may be no identifiable cause at all.

Q. So I take it this herpes zoster could literally flare up without anything specific happening to set it in motion?

A. It can, yes.

Q. And that's reported in the literature?

A. Oh, yes.

Q. Is that the more common or more frequent manner in which herpes zoster shows up; that is, in the absence of trauma?

A. Yes.

Q. Let me ask then a difficult question, and this is my last one: How is it or what factors do you look at then in linking Mr. Corman's left C5 dermatome herpes pattern with the insult to the nerve on the opposite side of this body as opposed to saying, "Well, this is just one of those freak occurrences where the herpes activity was coincidental or in a temporal relationship to when we had him in the hospital"?

A. I have no way of proving that one way or the other.

Q. Okay.

A. It just was a strange coincidence that it would occur in the exact same dermatome on the opposite side.

Q. Okay. Thank you very much, Doctor.

(Ex. 80, pp. 37 & 38)

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In conclusion, Dr. Worrell said that if claimant had trauma on the right side of his body it could have been severe enough to cause changes on the left side of the body. The fact that the herpes erupted at the same C5 dermatome may have been more than coincidental (Ex. 80, p. 43).

Claimant continued to have flare-ups of herpes zoster on March 25, 1985 (Ex. 5); episodes of shingles on April 18, 1985 (Ex. 2); and several episodes of recurrent herpes zoster and radiating pains on July 31, 1985 (Ex. 6). Dr. Worrell said that he was still totally disabled on March 25, 1985 (Ex. 47). On February 13, 1986 Dr. Worrell said that claimant was still disabled and would be for the forseeable future (Ex. 7).

Claimant was extensively examined again for multiple complaints, primarily abdominal, but also including herpes zoster at the University of Iowa Hospitals and Clinics on January 15, 1986 through January 22, 1986 (Exs. 8-16). Claimant was examined in the lipid clinic by Bruce Leishl, M.D., who among other things, noted cholesterol of 423 and triglycerides of 3,115 (Ex. A).

A Dr. Schrott (full name unknown) recommended a lowfat diet for the hypertryglyceride condition. He added that claimant's skin lesions have an unusual distribution for herpes zoster because they were bilateral and did not follow a dermatomal pattern. He proposed that dermatitis herpetiformis is another vesicular dermatitis which is related to steatorrhea (fatty feces). He proposed a low gluten diet. He also asked claimant to return during an acute flare-up of lesions for an evaluation by the dermatology department (Ex. A).

Claimant testified that he tried these diets for six months but they did not clear up his condition and they had no effect on his sores.

Gay R. Anderson, M.D., testified by telephonic deposition on May 7, 1987 (Ex. C). His very impressive curriculem vitae appears with the deposition. He is a board certified orthopedic surgeon and also a board certified pyschiatrist. Dr. Anderson granted that he was not a board certified neurologist and is not more qualified in neurology than a board certified neurologist but he does practice a certain amount of neurology. He has specialized in industrial medicine and is one of the founders of the Industrial Injury Clinic (IIC) and Neenah, Wisconsin in 1975 which operates in conjunction with Theda Clark Regional Medical Center. In 1983, he was recognized as physician of the year by President Ronald Reagan for his work for rehabilitation of the handicapped. Claimant was evaluated from July 8, 1984 through July 11, 1984 at the clinic. The clinic follows a multiple discipline approach. In addition to Dr. Anderson, claimant was also examined by and evaluated by a board certified pyschiatrist and neurologist, a pyschologist and a certified rehabilitation

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counselor. Numerous physical and personality tests were administered (Ex. C, pp. 8-19).

Dr. Anderson only found slight winging of the right scapula, and mild serratus anterior muscle palsy (Ex. C, pp. 20, 23 and 28). This was established by EMG. All of the objective tests of the claimant were normal (Ex. C, pp. 25-28). Dr. Anderson controverted Dr. Worrell's testimony that claimant sustained either a brachial plexus or a C5 stretch injury (Ex. C, pp. 28-31). He added that damage to the C5 nerve root on the right would not produce signs or symptoms on the left nerve root (Ex. C, pp. 31 & 32). Dr. Anderson described herpes zoster as follows:

> A. Herpes zoster is a vesicular eruption caused by the chickenpox [sic] virus that will usually follow a specific nerve root, sometimes one or two nerve roots or a specific division of a cranial nerve.
>
> Q. When you say vesicular eruption, what does that mean?
>
> A. That means on the skin one will see little vesicles that look a lot like little cold sores that form a little eruption, kind of a pimply eruption, vesicles as we call them that are filled with fluid and these will follow the distribution of a sensory nerve that it is involving. The specific chickenpox [sic] virus that causes herpes zoster is sometimes known as shingles.
>
> Q. Is herpes zoster, if it is found along a nerve root distribution or dermatome distribution known to be a painful condition?
>
> A. Yes, occurring in the acute phase since it is inflammatory and it is a viral infection and since it affects primarily the sensory nerves, it will cause a neuritis or inflammation of a nerve and generally pain along the distribution of that particular sensory nerve.
>
> Q. When you say it is viral, are you saying that herpes is believed to be caused by a virus?
>
> A. Yes. As I mentioned, it is specifically caused by the chickenpox [sic] virus. It is sometimes called adult chickenpox [sic].
>
> Q. From the causation standpoint, are there well known or accepted causes or explanations for flare-ups of herpes zoster in an adult?

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> A. Usually the initial occurrence of herpes zoster or shingles is simply caused by an infection from the chickenpox [sic] virus. The exact mechanism of this infection and whether it can be a primary infection or whether it is a remanifestation of a virus is not clearly defined. There are many theories, but the virus has been isolated and once the initial flare-up or neuritis has developed, in some people there will be a periodic recurrence.
>
> Now, the cause of those recurrences is unknown. They just empirically have been observed to occur. The theory is very similar to the cold sore virus in that the virus does exist in the latent form in the nerve tissue and periodically reactivates.
>
> Q. Dr. James Worrell, the neurologist who has previously testified in this case, offered the opinion that at least half of the known flare-ups of herpes zoster are idiopathic or from an unknown cause. Would you agree with that opinion?
>
> A. Probably more than half. The only other cause that comes to mind is sometimes shingle flare-ups, the shingles has been associated with steroid therapy. Also in some cases it seems to flare up at the time of immune depression, sometimes with cancer, but other than that, I would say that in the otherwise healthy individual who isn't on significant steroid therapy, probably all of the occurrences, flare-ups would have to be labeled idiopathic.

(Ex. C, pp. 32-35).

Dr. Anderson reiterated that an injury to the right shoulder would not cause herpes in the left C5 dermatome. He gratuitously added that he knew of no documentation or data that would indicate that trauma flares up or causes the onset of herpes zoster in any event (Ex. C, pp. 35 & 36). Dr. Anderson said that herpes zoster usually follows one or two dermatomes and it is very unusual for it to be generalized as in the case of claimant (Ex. C, pp. 37 & 38). Returning to the subject of whether steroids can cause herpes zoster the following dialogue transpired between Dr. Anderson and claimant's counsel:

> Q. Doctor, previously you mentioned that the herpes zoster or shingles as you also related to it is something that tends to flare-up when on a steroid therapy, is that correct?
>
> A. I have seen it and heard it reported that

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steroids could bring it on and it is logical that that might happen because steroids tend to suppress the immune system. I haven't seen this on numerous occasions, but I do know certainly with other viruses that steroids can enhance the viral infection and that sort of thing.

Q. Doctor, in this particular case I believe Dr. Worrell has stated that Mr. Corman was given cortisone treatment for his injury and it is our understanding that that cortisone treatment then activated the herpes zoster by lowering the immune system.

A. As I just said, that is possible depending on how much and how long he was given the steroids. If this was just simply one injection, I doubt that that would happen; but if he was on steroids for any length of time or multiple injections, especially of depo-steroids, that's possible.

Q. You would not have any difficulty with that then?

A. No, depending on the details of the steroid treatment.

Q. As I understand it, without something like I might have just described, just merely having an injury like Mr. Corman relates to his arm and shoulder, that in itself normally would itself not cause a flare-up of the herpes zoster and would not be connected to just that injury as such and that is your opinion, isn't that true?

A. Yes, that's right.

(Ex. C, pp. 57-59)

Dr. Anderson was asked whether claimant could have dermatitis herpetiformis as suggested by Dr. Schrott at the University of Iowa. Dr. Anderson replied as follows:

Q. Could you tell the judge what, I will not pronounce it again, what this dermatitis herpetiformis involves in terms of vesicular formation?

A. Well, as the name suggests, it is herpetic like in nature, that is what herpetiformis means. This is referred to as a skin inflammation that is herpetiform in nature, in other words, there will be a vesicular eruption and you can see this type

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> of herpetic reaction with a number of viruses, with the various herpes viruses a well as the chickenpox [sic] virus.
>
> Q. Dr. Schrott writes in his clinical notes that Mr. Corman's skin lesions, and I will quote, "Have distribution unusual for herpes zoster bilateral and not in dermatome pattern." Is that consistant with a flare-up or an outbreak of dermatitis herpetiformis?
>
> A. That would be more consistent as I think I mentioned earlier when it was brought up by either you or Mr. Hoffman that Mr. Corman seems to have multiple areas of involvement. I have remarked that that was just atypical and in my own mind I was beginning to wonder what the details were.
>
> Now that you have explained it, it sounds rather unlikely that this is, in fact, herpes zoster and if he has got multiple areas that don't follow anatomic dermatomes, then it is more likely to be one of the other viruses that we are familiar with, the herpetiform dermatitis.

(Ex. C, pp. 71 & 72).

Defendants' counsel suggested that claimant might be suffering from a condition called herpetic neuropathy and Dr. Anderson replied as follows:

> Q. I have only one other question then. You mentioned to Mr. Hoffman that you had seen patients in the past who have had a herpetic type reaction where they initially were thought to have a neurological damage or some type of neurological syndrome. Are you familiar with the term herpetical neurology?
>
> A. You mean herpetic neuropathy?
>
> Q. Yes, I am sorry.
>
> A. Yes.
>
> Q. In Mr. Corman's case if he complained bitterly of arm pain, pain radiating into the arm, but by myelography or by CT scan and by x-ray there was no sign of nerve root impingement, no sign of there being a disc, and subsequently he developed a true herpetic type condition, would there at least be a distinct possibility in terms of medical probability that the initial arm complaints or the perception

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of pain in the arm of a radiating nature would be an early manifestations of a viral condition?

A. Absolutely. As I mentioned and cited examples of earlier, I see that not infrequently and I cited this as one of the reasons why I see a number of herpes zoster cases because before the eruption they are sent here with the thought that they have some type of radiculopathy, mechanical type disc and in this particular case, the pain may be a red herring, may be herpetic in nature especially if this individual is continuing to have recurrent eruptions with a peculiar nature or a particular nature as you are deriving here in the 1986 evaluation.

Q. Would the fact that Mr. Corman has had regular ongoing eruptions of a herpetic nature tend to suggest that there may be a cause far beyond just the injections of some steroid medication for a month or so?

A. Yes, if he is still having trouble now and he was given one month of intermittent steroid treatment three or four years ago, I think anybody would be hard-pressed to relate such treatment to result in a herpetic reaction. There is something else going on if he is still having herpetic problems now.

(Ex. C, pp. 73 &74)

Claimant testified that he did not know if he had chicken pox or not as a child; however he did have the usual childhood diseases.

Claimant, claimant's wife and Dr. Worrell all state that claimant is unable to work. Claimant testified that he has no energy. His arms get weak doing dishes or picking up the house. He has no grip with his right arm and drops things. The herpes spots feel like hot grease splattering him. It is activity or motion which causes his skin to break out. Claimant testified that Dr. Worrell told him the condition should heal itself in time.

Mrs. Corman testified that claimant can not abduct, adduct or flex his arms. Repetitive motions or vibration cause the lesions to erupt. These motions also make his arms tremble and shake. He drops things. He cannot raise his arm to comb his own hair or pull a shirt over his head. Whatever muscle he uses gets the sores and becomes sensitive and sometimes will break out with pimples.

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APPLICABLE LAW AND ANALYSIS

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

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

Fairly early in Iowa workers' compensation law the Supreme Court decides that where an accident occurs to an employee in the usual course of his employment, the employer is liable for all consequences that naturally and proximately flow from the accident. Oldham v. Scofield & Welch, 222 Iowa 764, 767-68, 266 N.W. 480, 269 N.W. 925 (1936); Lindeken v. Lowden, 229 Iowa 645, 295 N.W. 112 (1940).

It has long been established that whenever the treatment employed for an injury aggravates or increases the disability initially caused by the injury the employer and it's insurance carrier remain responsible for all of the resulting disability. Injury resulting from treatment is considered as having been proximately caused by the original injury. Heumphreus v. State, 334 N.W.2d 757 (Iowa 1983); Bradshaw, 251 Iowa 375, 101 N.W.2d 167 and Cross v. Hermanson Bros., 235 Iowa 739, 16 N.W.2d 616 (1944). Claimant and his wife testified that he received cortisone either by injection or by mouth from Dr. Breckenridge, Dr. Berg, Dr. Howe and Dr. Worrell. It was confirmed by Dr. Breckenridge that he gave claimant two cortisone injections. It could not be confirmed that Dr. Berg gave any cortisone or other steroids. It is not shown among the medications that Dr. Berg

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mentioned. It cannot be confirmed whether Dr. Howe gave any cortisone or steroids from his report. We do not have the hospital records showing claimant's medication regimen for the period July 8, 1983 through July 21, 1983. However, Dr. Worrell admits to prescribing a steroid and says that he was receiving 0.75 mg of Decadron three times a day and claimant was sent home with a tapering course of Decadron (Ex. 49). The source of Dr. Smith's information is not known but he states claimant was treated with shots and Prednisone over two and one-half weeks (unknown dose) (Ex. 17). Defendants' counsel impugned the testimony of claimant's wife in that she really could not be absolutely sure of what medications claimant received because she did not administer them or have the records before her. Other than that, claimant's testimony and his wife's testimony that he received steroids is uncontroverted, uncontradicted and not refuted.

Particularly pertinent is the fact that claimant had steroids during the period of hospitalization from July 8, 1983 to July 21, 1983 and he was sent home with a tapering dose which he was presumably taking at the time the steroid reaction occurred (Exs. 17 & 49). The emergency room doctor on July 30, 1983 clearly diagnosed a steroid reaction and herpes zoster and claimant was immediately hospitalized (Ex. 44). The sequence in which these events occurred stongly suggests a cause and effect relationship.

Claimant's treating physician, Dr. Worrell, who administered the medications flatly stated to the insurance company on August 15, 1983 that claimant's condition was work related and further stated with regard to the herpes zoster "This was probably brought on by the Decadron that I had given him to try to treat his previous condition." (Ex. 1, p. 29: Ex. 52). Dr. Smith thought there was enough of a causal connection that he said that since the outbreak occurred on corticosteroids that no more of them should be given to him (Ex. 17).

Dr. Anderson, defendants' evaluating physician, corroborated Dr. Worrell and Dr. Smith on the point of whether steroids did or could cause a viral condition of a herpetic nature. Dr. Anderson agreed that generally the etiology of approximately one-half of the cases of herpes zoster is unknown and it is an ideopathic condition. But, Dr. Anderson gratuitously added that the only cause that comes to mind is steroid therapy, which is the exact point that claimant is contending is the cause of the herpes zoster in this case. Dr. Anderson further explained that this is because steroids depress the immune system (Ex. C, pp. 34, 57 & 58).

Defendants have raised the possibility that claimant may have dermatitis herpetiformis or herpetic neuropathy rather than herpes zoster. The precise herpetic medical diagnosis appears to be immaterial. Claimant, claimant's wife and many doctors

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have described his herpetic condition in vivid detail. Claimant, his wife and Dr. Worrell contend that claimant is currently totally disabled. They supplied numerous facts and descriptions of claimant's objective physical medical condition to establish that he is currently unable to work. Dr. Worrell, however, stated that the condition is temporary because it is self-limiting. Dr. Smith also called it self-limited. Dr. Worrell expects the condition to clear according to the medical evidence in the record as soon as it has run it's course. He believed it was simply a matter of time. He was not yet willing to characterize it as a permanent condition. Therefore, it is found that the injury of January 14, 1983 was the cause of claimant's herpetic condition which makes claimant unable to work at the present time because of the steroid reaction claimant suffered as a result of the medications administered to him in July of 1983. Claimant is entitled to a running award of temporary disability benefits. Claimant is also entitled to recover his medical expenses for the treatment of the herpetic condition.

Claimant's right shoulder injury was described variously as serratus anterior muscle injury or palsy, winged scapula injury, C5 dermatome injury, brachial plexus injury, C5 nerve stretch and brachial plexus nerve stretch. Dr. Worrell's contention that trauma alone could cause the herpetic condition was effectively controverted by the testimony of Dr. Anderson. Dr. Worrell himself admitted that there was nothing in the medical literature on this point.

The fact that no medical explanation has been given for why the condition still persists, four or five years after the onset from an approximate 30 day course of steroid treatment, in no way diminishes claimant's entitlement to recovery. The fact is that it does exist. There was no proof by a preponderance of the evidence that this unexplained fact would affect claimant's recovery.

FINDINGS OF FACT

THEREFORE, based upon the evidence presented the following findings of fact are made.

That the steroid treatment administered during the hospitalization from July 8, 1983 to July 21, 1983 and shortly thereafter, was the cause of the steroid reaction that occurred on July 30, 1983 and caused claimant's viral herpetical condition.

That claimant is not able to work due to the affects of this steroid reaction.

That claimant has incurred certain medical expenses for the treatment of this steroid reaction.

CONCLUSIONS OF LAW

WHEREFORE, based upon the evidence presented and the foregoing principles of law the following conclusions of law are made.

That the injury of January 14, 1983 was the cause of claimant's present herpetic condition.

That claimant is entitled to a running award of temporary disability benefits indefinitely into the future.

That claimant is entitled to the payment of his medical expenses for treatment of this herpetic condition.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant a running award of temporary total disability benefits in the amount of two hundred sixty-one and 97/100 dollars ($261.97) per week beginning on August 7, 1984 which is the date that previous temporary disabililty benefits were terminated.

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

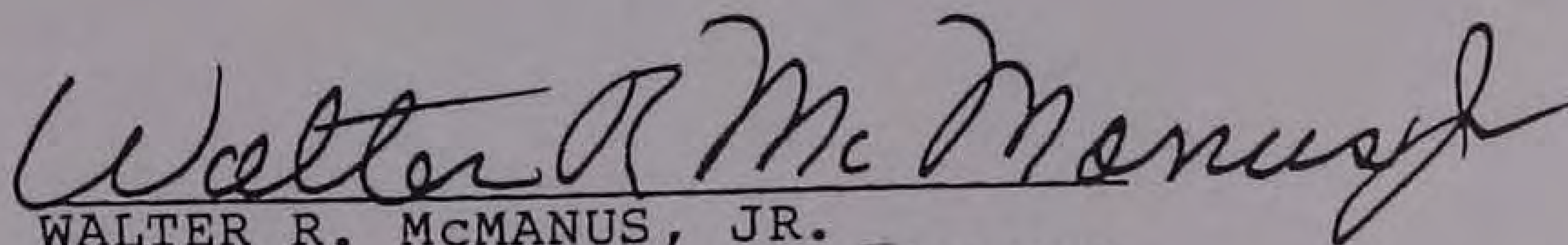
That interest will accrue pursuant to Iowa Code section 85.30.

That defendants pay claimant's medical expenses for the treatment of his viral herpetic condition which has been described most often as herpes zoster.

That the costs of this action are assessed against defendants 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 27th day of April, 1988.



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1803
Filed May 12, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LYLE R. CORNWELL, Claimant, vs. GRIFFIN WHEEL COMPANY, Employer, Self-Insured, Defendant.	:	FILE NO. 841129 A R B I T R A T I O N D E C I S I O N

1803

Claimant failed to establish entitlement to permanent partial disability benefits. Claimant failed to demonstrate that he suffered additional permanent partial impairment from an injury which appeared to temporarily aggravate a preexisting condition.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LYLE R. CORNWELL,	:	
Claimant,	:	FILE NO. 841129
vs.	:	A R B I T R A T I O N
GRIFFIN WHEEL COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

FILED
MAY 12 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Lyle R. Cornwell, claimant, against Griffin Wheel Company, employer (hereafter referred to as Griffin), for workers' compensation benefits as a result of an alleged injury on December 12, 1986. On March 2, 1988, 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 William Benson. 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 December 12, 1986, claimant received an injury which arose out of and in the course of employment with Griffin.

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

3. If the injury is found to have caused permanent disability, the type of disability is a scheduled member disability to the left leg.

ISSUE

The only issue submitted by the parties in 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. As will be the case in any attempted summarization, conclusions about what the evidence offered may show are inevitable. Such conclusions, if any, in the following summary should be considered as preliminary findings of fact.

The fighting issue in this case is whether claimant suffered additional permanent impairment as a result of the injury in December, 1986. Claimant testified that on December 12, 1986, while lifting a heavy grinding stone at Griffin, his left knee "snapped" and "went out" and immediately pain began requiring medical treatment. Claimant was treated by Don K. Gilchrist, M.D., an orthopedic surgeon. Dr. Gilchrist eventually surgically repaired the knee after a diagnosis of a torn cartilage or medial meniscus. The surgery consisted of removal of the torn portions of the meniscus.

Claimant admitted that he had prior problems with his left knee. In 1986, while working for another employer, claimant twisted his knee causing it to again "go out" or "pop". Medical treatment at that time consisted also of surgery to remove a portion of a torn cartilage or medial meniscus. This surgery was performed also by Dr. Gilchrist. Claimant was last seen by Dr. Gilchrist following this first surgery in May, 1977. Claimant had told Dr. Gilchrist when he was first seen that he had first injured his left knee while playing high school football 10 years earlier.

Claimant testified that he fully recovered from the first knee surgery in 1977 and returned to full duty at work. Claimant also assisted in farming operations and his father testified that he observed no loss of use of the left knee after his recovery in 1977.

Claimant testified that he now has problems with his left knee which he did not have before. Claimant complains that his knee is weaker and still goes out "backwards." He states that unlike before his knee is very sore and stiff at the end of the day. Claimant states that he is careful lifting because he cannot trust his knee. Claimant complains that he cannot kneel or climb as before. He also states that prolonged walking now causes difficulties. He states that he currently uses his right leg much more in his job at Griffin then he did before. Claimant's current supervisor at Griffin testified that claimant is fully able to handle all of the work that is assigned to him as a plumber. The supervisor stated that only recently has he complained of weakness in the knee although he admitted that claimant is not generally a complainer.

With reference to the question of whether claimant's condition has changed medically by the injury Dr. Gilchrist states as follows:

> Please be informed that it is my opinion that this patient suffered a ten per cent permanent partial impairment to his left leg as the result of a "bucket handle" type of tear to the medial meniscus in May of 1977. That was successfully treated with appropriate excision of the torn "bucket handle" portion of the meniscus. Further surgery was preformed in May of 1987 as a result of a re-injury. It was found that the small remaining rim of meniscus had been subsequently torn and it was removed resulting in essentially a total medial meniscectomy of his left knee. He has now since recovered from this second surgery and he was released from treatment on April 13, 1987. It is my opinion that the ten per cent permanent partial impairment rating of his left leg remains unchanged.

APPLICABLE LAW AND ANALYSIS

Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. 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, claimant has failed to demonstrate that his condition has changed since the 1977 surgery. Admittedly, claimant believes that his knee worsened at least from a subjective standpoint. However, claimant's treating physician does not agree and his medical opinions are uncontroverted in the record. The question of permanent partial impairment is largely a medical question and this deputy commissioner is in no position to second guess the opinions of a qualified orthopedic surgeon.

Despite his lack of success in establishing his claim in this proceeding, claimant's case was at least argueable and claimant appeared sincere in his testimony. Therefore, claimant will be awarded the costs of this action.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. On December 12, 1986, claimant suffered an injury to his left leg which arose out of and in the course of employment at Griffin consisting of a torn cartilage or medial meniscus in the left knee.

3. The work injury of December 12, 1986, was a cause of a temporary period of total disability from work.

4. As a result of a prior work injury in 1976 consisting of a torn medial meniscus, claimant suffered a 10 percent permanent partial impairment to the left leg.

5. Claimant has failed to demonstrate that the work injury of December 12, 1986, caused additional permanent partial impairment.

CONCLUSIONS OF LAW

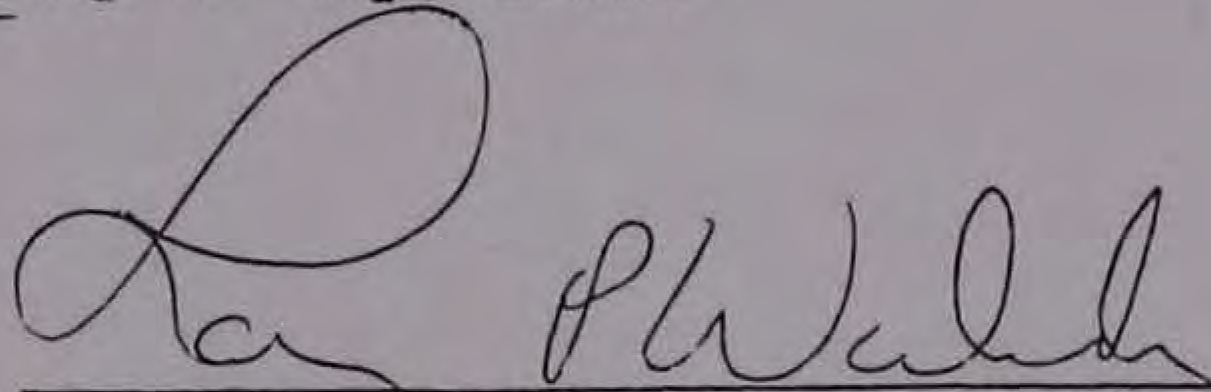
Claimant has failed to establish by a preponderance of the evidence entitlement to additional permanent partial disability benefits.

ORDER

1. Claimant shall take no additional permanent disability benefits from this proceeding.

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

Signed and filed this 12 day of May, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THEODORE L. COURCHAINE, Claimant, vs. OVERLAND DRIVER SERVICE, Employer, and FARMERS INSURANCE GROUP, Insurance Carrier, Defendants.	File No. 723925 A P P E A L D E C I S I O N	FILED JAN 29 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding claimant permanent total disability benefits.

The record on appeal consists of the transcript of the review-reopening hearing, claimant's exhibits 1 through 18 and defendants' exhibits A through I. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

Did the deputy industrial commissioner err in determining claimant's weekly compensation rate based upon a pay period from February 28 to June 5 and upon a pay rate of 16¢ per mile?

Did the deputy industrial commissioner err in allowing claimant to recover expenses for medical problems not causally related to the injuries he sustained in the accident of June 5, 1981?

Did the deputy industrial commissioner err in rejecting the agreement between claimant and defendants and in allowing claimant to recover for medical expenses incurred in violation of the agreement?

REVIEW OF THE EVIDENCE

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

Claimant was employed as a truck driver for defendant on June 5, 1981. Claimant was injured when the truck he was driving was struck head on by an oncoming car. The collision caused the truck to roll over a guardrail and down an embankment.

Claimant struck his head on the roof of the truck and was hospitalized until noon the next day after the accident. Claimant was treated at the hospital by A. M. Romano, M.D. Dr. Romano states the following diagnosis in a letter dated October 5, 1981:

> The diagnosis on this man is as follows:
>
> 1. Concussion
> 2. Laceration of eyebrow
> 3. Contusion of knee
>
> Prognosis is good. It is anticipated that his concussion will give him problems for quite a while, but eventual 100% recovery is expected.

(Claimant's Exhibit 9)

Claimant testified that he does not have clear memory of the events of the summer of 1981 following the accident. Exhibit 10 contains copies of claimant's log book entries. The first page is dated August 18, 1981 and indicates that claimant drove about ten hours that day. The last page of this exhibit is dated September 6, 1981 and indicates that claimant drove about nine hours that day. Defendants exhibit I contains copies of medical release for work forms. Page 2 of this exhibit is signed by Dr. Romano and releases claimant for return to work on August 16, 1981. Page 1 of this exhibit is signed by Behrouz Rassekh, M.D., and indicates that claimant was under Dr. Rassekh's care from September 15, 1981 to September 24, 1981 and was released for return to work on September 28, 1981.

Claimant stated that he went to see Jan J. Golnick, M.D. Dr. Golnick hospitalized claimant on October 26, 1981 and he reports the course of treatment followed in a letter dated December 3, 1981:

> Patient was admitted to Midlands Community Hospital on October 26, 1981 for neurological work-up as well as myelogram. During the hospitalization, he underwent extensive testing and the

myelogram revealed mild asymmetry of the L5-S1 with slight blunting of the nerve root on the right side. He was seen on orthopedic consultation by Dr. Murphy who recommended that the patient would have to wear lumbosacral corset and have active rehabilitation exercise program consisting of Williams' flexion exercises in addition to cervical muscles training as well as caudal block for lumbar pain to be done by anesthesiologist, Dr. Rosenberg.

(Cl. Ex. 9)

Claimant gave the following testimony concerning the nerve blocks performed by Dr. Rosenberg:

Q. Do you remember a Dr. Rosenberg doing some nerve blocks?

A. Yes.

Q. You do remember that?

A. Yes.

Q. Why do you remember that?

A. It was really painful.

Q. What did he do?

A. They take a needle about ten inches long and stick it under your arm for about a foot and a half and leave it there and inject fluid in you.

Q. What does it do?

A. It knocks the hell out of you.

Q. Did it cause numbness or something?

A. It gives you a severe pain; and the next day, you're supposed to be relieved of pain.

Q. Were you relieved of pain?

A. I suppose for a period of time.

(Transcript, pages 71-72)

Claimant continued to experience pain and was eventually referred to Dr. Blume in October 1982. Claimant testified concerning Dr. Blume's treatment:

Q. When you went up to see Dr. Blume in October of 1982, did they do some injection into your spinal area to try and determine what was the problem?

A. Yes, they did. Got a pen? I'll show you. They take a needle about that size and put it right here (Indicating).

Q. In your throat?

A. Right to the neck bone, and then they put another one right above it. Then they take a needle about that long, and they put it in there; and they induce pain in it.

Q. Did they induce pain?

A. You got that right. They sure did.

Q. And what happened?

A. I blew my guts up.

Q. What do you mean?

A. That's what I did. My guts blew up.

Q. Well, that is very descriptive, but it doesn't help describe what you mean by that.

A. They call it an ulcer.

Q. When did this ulcer come to being, that you had any knowledge that you had any problem?

A. Shortly after that injection.

(Tr., pp. 81-82)

Claimant stated that he was taken to the hospital for treatment of ulcer by his sister-in-law as he was unconscious. At the hospital claimant was treated by William A. Albano, M.D. Dr. Albano opines in a letter to claimant's counsel:

> Mr. Courchaine was seen by Dr. Keig and myself on an emergency basis due to a perforated duodenal ulcer with a subphrenic fluid collection. Prior to the time of the development of his acute abdomen, I had not known the patient. However, duodenal ulcer disease, especially that associated with acute perforation, has certainly been linked to stress, as well as anti-inflammatory and analgesics that

> are used for the type of injuries that Mr. Courchaine had prescribed following his automobile accident. The duodenal ulcer, per se, was not directly related to the automobile accident, though without question, the etiology for such an ulcer disease is directly connected to the stress and medicines that the patient was under.

(Cl. Ex. 9)

Apparently claimant was also seen by Lawrence M. Fitzgerald, M.D., at the hospital:

> I first saw Mr. Chourchaine [sic] on the evening of November 10, 1982 at which time he was suffering from a one day history of profuse abdominal pain and confussion. Subsequently he was found to have a perforated ulcer of the duodenum and underwent emergency surgery that evening. At the time of surgery he was also found to have a right subphrenic abscess.
>
> Mr. Courchaine was being treated with Fiorinal and Atavan as well as an arthritis medication for pain in the cervical and lumbosacral spine area as the result of an auto accident in June of 1981. Within the week prior to his admission he had been to Sioux City, Iowa where he underwent discography. Accourding [sic] to the patient, that procedure did cause severe pain and anxiety which lasted for several days.
>
> I believe that the undue stress that Mr. Courchaine experienced as a result of the procedure did play a small part in the development of his ulcer. However I think that the major inciting factor of the ulcer was most likely his medications, which are known to have this complication.

(Cl. Ex. 9)

Claimant stated that his gallbladder was removed in June 1984. Claimant opined that the gallbladder was gangrenous. Claimant also indicated that he went to James A. Conroy, M.D., a specialist in internal medicine, because he had had diarrhea and bowel problems since the ulcer surgery.

Dr. Conroy opined that claimant has chronic pancreatitis. Dr. Conroy gave the following testimony concerning the cause of claimant's pancreatitis at his deposition taken on June 18, 1985:

> Q. Is that relative insofar as your diagnosis and

any prognosis that you've made as regards to this patient?

A. It was not at the time relevant. Perhaps I should restate that. It could have had some relevance.

Q. Why?

A. One of my final impressions as can be seen on page 4--

Q. Yes.

A. --was chronic pancreatitis and as I indicated, my first consideration for the etiology or the cause of that chronic pancreatitis was related to trauma and so I based that suspicion or impression on the historical fact that he indicated that he began having loose stools the same summer as his automobile injury.

(Conroy Deposition, p. 12, lines 11-24)

Q. Can you tell me this: Is pancreatitis caused by other diseases such as gallstones?

A. It's related to a number of other medical diseases, yes. Gallstones is included in that list.

Q. What else would there be?

Conroy - Direct

A. Perforated peptic ulcer.

Q. What else?

A. Hyperlipidemia, a condition of excessively high cholesterol, high calcium, certain tumors that can elevate the calcium content. There's a long list.

Q. So pancreatitis, the causations of that are numerous, also?

A. Yes.

(Conroy Dep., pp. 20-21, lines 21-25, 1-8)

Q. Well, I guess I want to ask you, based on the fact that he had that gallbladder surgery, do you think that the gallstones were in any way related

to what you've now determined as pancreatitis?

A. There is some possible connection.

Q. Likely connection?

A. As I stated earlier, I tried to weigh all the factors and the temporal relationship with his automobile injury seems to stick out as the predominent factor, although I grant that this certainly could also have been contributory.

(Conroy Dep., pp. 23-24, lines 18-25, 1-3)

Q. You gave an opinion to Mr. Laubenthal that at least 50--you have at least a 50 per cent medical certainty in your mind that the ulcer was probably related to the accident.

A. Indirectly, yes, I feel at least 50 per cent confident that the ulcer was precipitated by the stress and/or medications he was given that resulted from the accident.

Q. And when you say "and/or medication," are you saying that it could be one or the other or a combination of the two?

A. Probably both.

Q. All right. Is it significant to you that he had no history of ulcers before that accident?

A. Yes. That's part why I attribute at least 50 per cent, because it would have been likely, as I stated earlier today, if the man had a chronic history of peptic ulcer disease, then I wouldn't say that it was--it was likely caused by the wreck, but when he had no prior history, and this was a de novo problem, so to speak, then one has to relate it to the likely causes at the time and that was the stress and the medication.

Q. What's your opinion as to whether his present pancreas problems are likewise related to the collision of June of 1981?

A. I would say with the same degree of certainty as the peptic ulcer that--probably 50 per cent, but I could not say at the 90 per cent confidence level.

Q. Okay. Is that because of the fact that he

has--had a history, at least, of gallbladder problems?

A. That's correct.

(Conroy Dep., pp. 53-54, lines 19-25, 1-24)

Claimant was examined by James G. Patterson, Ph.D., a psychologist, on March 30, 1983. In his psychological report Dr. Patterson opines:

> In brief, Mr. Courchaine is functioning in the Dull Normal range of intelligence at present. There does appear to be a significant degree of deterioration in his mental capacity in comparison with pre-morbid functioning. The deficit is most apparent in short term memory and in higher visual integration, and could be the result of depression and anxiety or brain damage, but most likely a comination [sic] of the two factors. His depression is likely to be a reaction to physical impairment and chronic pain, especially since he has no previous psychiatric history, and is accompanied by paranoid suspiciousness and mistrust, especially toward the medical profession. Some further testing and evaluation is needed in reference to his visual integration problems as well as memory. For this purpose, the Wechsler Memory Scale, and the Benton Visual Memory test will be given within the next two weeks. Possibly, some type of anti-depressive medication would be helpful also.

(Cl. Ex. 9)

Dr. Patterson reports these results on the follow-up testing:

> On the Wechsler Memory Scale, he obtained a Memory Quotient of 94, which falls in the lower part of the Average range. Since these scores are directly comparable to WAIS - R IQ scores (mean of 100, standard deviation of 15), his MQ of 94 represents a considerable degree of improvement over his WAIS - R Full Scale IQ score of 84, obtained on 3/30/82. This should not be interpreted as an overall improvement in cognitive function however, since his memory for digits on both tests remained the same. His higher score on the WMS resulted mainly from better preformance on tasks involving immediate recall of verbal material, paired-associates learning, and recall of current information. Hence, the results of this test contraindicate a significant memory deficit.

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> On the Benton Visual Retention Test, he obtained a total error score of four, which is precisely equal to the expected score for normal adults for his age group with low average IQs. These results, as in the WMS suggest that he has no significant impairment of visual memory. His lower score on the WAIS - R was probably due substantially to emotional factors prevailing at that time which adversely affected his concentration.

(Cl. Ex. 9)

Claimant has also been examined by Thomas G. Grandy, Ph.D., a clinical psychologist on February 2, 1984. Dr. Grandy opines:

> Diagnostic impressions, in accordance with the inventory results, suggest consideration of obsessive-compulsive neurosis, depressive reaction, anxiety reaction.
>
> Treatment considerations include a psychiatirc [sic] examination to determine the nature of both anxiety and depressive reactions as well as to carefully evaluate the suicide potential. Anti-depressant medication and tranquilizers can be considered to reduce the severtiy [sic] of depression and panic reactions. Drug dependency does not appear to be an issue in treatment. Psychotherapy is probably not advised unless the patient desires it, as defensiveness is very high. However, should psychotherapy be considered, it may be useful to focus upon avoidance of aggression, expression of anger and sensitivity to his own emotions.

(Cl. Ex. 9)

Claimant was evaluated by Michael Newman, a certified vocational evaluator on February 15, 1984. Mr. Newman relates his impressions and recommendations concerning claimant's physical ability to do work in his report:

> Physically, this gentleman presents himself as one who is severely disabled and unemployable. Mr. Courchaine's level of physical activity was observed closely and the findings are reported in the preceding paragraphs. In addition to numerous physical complaints stated by Mr. Courchaine, the client also strongly believes that he has suffered significant brain damage as a result of his trucking accident. A review of psychological testing administered by Dr. James G. Patterson indicates that Mr. Courchaine is functioning intellectually

> somewhere between the dull-normal to low-average range of intelligence. Dr. Patterson further stated the possibility of the client's test scores being lowered through factors of depression and anxiety or brain damage. Based on Dr. Patterson's psychological report, it is not clearly stated whether or not Mr. Courchaine indeed suffers from organic brain damage.
>
> In keeping with the aforementioned clinical observations and current vocational testing results it appears that Mr. Courchaine would be a poor risk for successful case management until the client's current medical dilemma is resolved to his satisfaction. Currently this gentleman exhibits a tremdous [sic] amount of anger and suspiciousness towards the medical profession in general as he stated "I have been, expletive, over by them so much, I don't know who to believe."

(Cl. Ex. 9)

Claimant has continued to see Dr. Golnick, and in a February 27, 1985 letter to the State of Iowa Disability Determination Services Dr. Golnick opines:

> His medical history is very lengthy and very complex. In brief, this patient had sustained injury to the brain, the entire spine, and currently there is some evidence that he developed postraumatic injury to the pancreas and spleen which has resulted in pancreatic insufficiency.
>
> Medical diagnosis:
>
> 1. Status post brain contusion and contusion of the entire spine and spinal cord.
> 2. Severe cervical thoracic and lumbosacral radiculopathy with significant discopathy and postraumatic degenerative changes of the spine.
> 3. Mild to moderate organic mental syndrome with significant memory loss secondary to head trauma.
> 4. Postraumatic cephalgia.
> 5. Possible postruamtic [sic] pancreatic insufficiency.
>
> It is my medical opinion that this patient is totally disabled for any type of work indefinitely.
>
> As far as the prognosis is concerned, there is

practically no chance that this type patient will ever recover to the point where he will be able to assume any type of job or to be as well as he was prior to the accident.

(Cl. Ex. 9)

Claimant testified that he has tried to sell cars and to do carpenter work but he was unable to because he has to go to the toilet frequently. Claimant states that he is 52 years old.

Testimony was also presented at the hearing concerning how much claimant was paid. Claimant testified that he was paid $.16 per mile, $25 for each pickup (loading and unloading) except for the first pickup for which he received nothing, and $40 for layovers. Claimant also stated that he was given a cash advance before he left on a trip to pay for trip expenses. Claimant had to produce receipts for expenditures made from this advance, and any money left over from the advance was withheld from his pay as it was money claimant already had. Claimant identified claimant's exhibits 1 and and 2 as his log books for the months of April, May and June 1981. Claimant also identified the driver settlement sheets which are attached to claimant's exhibits 1, 2 and 5. Claimant's exhibit 5 is typical of these dirver settlement sheets:

DRIVERS SETTLEMENT

Driver Ted Courchaine — Unit No. 2066 — Trip No. 5312

4,132 Miles @ .13 =		$ 537.16
1 day layover		40.00
6 pick up Miles @ 25.00 =		$ 150.00
Total Gross		$ 727.16
F.I.C.A.	$ 48.35	
Fed. W/H	144.60	
State W/H	17.19	
Insurance		
SUB-TOTAL	$180.14	$ -180.14
Net Pay		$ 547.02
Cash Advance	50.00	
Cash Spent	77.98	
Adjust to Pay	27.98	$ +27.98
Total Due		$ 575.00
4,132 miles	03	123.96
		698.96

Paid by Check No.____ Date__________

TRIP EXPENSES

Truck Maint.	$	
Trailer Maint.		
Tires		
Fuel		
Oil		
Permits		
SUB-TOTAL		$ -------
Loading		
Communications	6.63	
Motel & Meals	17.47	
Tolls & Scales	4.75	
	.83 - logs	
Miscellaneous	48.30 - permits	
SUB-TOTAL		$ 77.98
TOTAL EXPENSES		$ 77.98

Claimant testified that the additional $.03 which is added after withholding was a safety bonus.

Page 3 of claimant's exhibit 18 is a Nebraska first report of injury prepared by Ron Chitcott, general manager of Overland Driver Service. In box 17 of this exhibit it is indicated that claimant's wage rate at the time of injury was $.16 per mile. Claimant's exhibit 4 is a letter to claimant's attorney from James B. Hagaret who, according to testimony at the hearing (Tr., pp. 37-38, lines 1 & 2), is the owner of Overland Driver Service. Hogarth states:

> With reference to your letter of April 17, 1985 regarding the rate of pay of Mr. Courchaine, Mr. Chilcott was in error in stating the gross pay was 16¢ a mile.

> Mr. Courchaine was paid 13¢ a mile as wages and an additional 3¢ a mile for road expense, which is probably where the misunderstanding occurred.

(Cl. Ex. 4)

Rich DeGroff, vice president of Overland Driver Service, testified at the hearing. DeGroff stated on direct examination that Overland Driver Service went into business on April 1, 1981. DeGroff opined that the additional $.03 per mile which claimant was paid are for expenses such as motels or meals. (Tr., p. 155) DeGroff identified defendants' exhibit G as a photocopy of the books of Overland. On cross-examination, DeGroff revealed that Overland Driver Service actually went into business on March 1, 1981. (Tr., p. 16) DeGroff indicated that he does not know why the March 13 $727.16 payment which is listed on claimant's exhibit 3 does not appear on defendants' exhibit G. DeGroff disclosed that he was not employed by Overland at the time claimant was injured. DeGroff revealed that he is the son-in-law of Hogarth. DeGroff stated that Hogarth formerly owned American Driver Service in partnership with Jim Roberts. On redirect, DeGroff stated that the $726.16 was paid by American Driver Service. DeGroff also identified defendants' exhibit H as showing that claimant was on the continuous employment at American Driver Service or Overland Driver Service. On further cross-examination, DeGroff identified Ron Chilcott as the former general manager of Overland.

APPLICABLE LAW

The citations of law in the review-reopening decision are appropriate to the issues and evidence.

Iowa Code section 85.36 (1981) states in part:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had 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, computed or determined as follows and <u>then rounded to the nearest dollar</u>:
>
> ....
>
> 6. In the case of an employee who is paid on a daily, or hourly basis, or by the output of the employee, the weekly earnings shall be computed by dividing by thirteen the earnings, not including

> overtime or premium pay, of said employee earned in the employ of the employer in the last completed period of thirteen consecutive calendar weeks immediately preceding the injury.

(Emphasis added.)

ANALYSIS

The greater weight of evidence establishes that claimant was paid $.16 per mile. DeGroff's and Hogarth's contention that the $.03 was for motel and meal expenses is contrary to the driver settlement sheets which show motel and meal expenses as deductions from the cash advance. DeGroff admits that he was not an employee of Overland or American Driver Service at the time claimant was injured and that Ron Chilcott was general manager at the time of claimant's injury.

Claimant's exhibit 3 discloses the gross pay that claimant received for the months of March, April, May and June 1981. The information contained in claimant's exhibit 3 is also contained in claimant's exhibits 1, 2 and 5. Defendants' contention that the March 13, 1981 $727.16 payment is for work done outside the 13 week period preceding claimant's injury (March 6 through June 5, 1981) is rejected as it is based on pure speculation. The payments reflected on claimant's exhibit 3 do not contain the additional $.03 per mile which claimant received. The appropriate rate will be calculated by adding the additional $.03 per mile to the total set out in claimant's exhibit 3:

March 1981	Gross Pay @ $.13 plus Pickups & Layovers		Additional $.03		
March 13	$727.16	+	$123.96	=	$ 851.12
March 20	421.72	+	97.32	=	519.04
April 1981					
April 10	375.57	+	86.67	=	462.24
April 17	626.98	+	127.98	=	754.96
April 17	226.59	+	52.29	=	278.88
May 1981					
May 1	220.87	+	50.97	=	271.84
May 8	566.10	+	119.10	=	685.20
May 8	210.99	+	48.69	=	259.68
May 22	591.89	+	136.59	=	728.48

June 1981

June 5	548.03	+	114.93	=	662.96
			TOTAL		$5,474.40

The total is then divided by 13 to arrive at a gross wage of $421 per week. Claimant testified that he is married with two children who were ages 24 and 18 at the time of the injury. Using the workers' compensation benefit schedule for July 1, 1980 the rate of weekly compensation is $253.61.

The greater weight of evidence establishes that claimant was married with two dependent children at the time he was injured.

The greater weight of evidence causally connects the medical treatment claimant received for the ulcer, gall bladder and chronic pancreatitis with claimant's work injury. Doctors Fitzgerald, Albano, and Conroy opine that claimant's ulcer condition was the result of the stress and medication involved in the treatment of claimant's work injury. Doctors Conroy and Golnick causally connect claimant's gall bladder and chronic pancreatitis conditions to the work injury.

As a result of claimant's third party settlement in this matter, defendants are entitled to credit against the medical expenses awarded in this section. Defendants' credit is calculated as follows:

Third party settlement	$100,000.00
Claimant paid to insurance carrier See claimant's exhibits 6 and 7	-58,837.79
Attorney's fees-claimant's exhibit 7 See section 85.22(1) Iowa Code and Higgins v. Peterson II Iowa Iowa Industrial Commissioner Report 199 (1982).	-12,348.66
	$ 28,813.55
Medical expenses paid by defendants since 10-9-83 See claimant's exhibit 14	+ 2,365.00
Defendants' credit	$ 31,178.55

Finally, defendants argue that claimant is not entitled to recover medical expenses incurred in violation of the memorandum of settlement and consent to settlement entered into by claimant and states that: "Any expenditures greater than $1,000.00 on account of medical or other services shall not be incurred by Theodore L. Courchaine without approval of Overland Driver Service and Farmers Insurance Group in keeping with the rights of the employer under Section 85.27." Claimant's exhibit 6, pp. 3-4. The agreement was filed with this agency on October 13, 1983.

This provision limiting medical expenditures by claimant fails for at least two reasons. First, it is apparent that this agreement was more than a consent to settlement under Iowa Code section 85.22(b)(4). This agreement appears also to be a full commutation terminating claimant's rights to future medical benefits. Nevertheless, whatever this agreement may be, it was never approved by this agency and is not enforceable by the industrial commissioner. Second, claimant needed no authorization from defendants for emergency medical treatment and the gall bladder surgery was performed on an emergency basis.

Defendants present no argument on appeal concerning the extent of claimant's disability. Claimant is 52 years old with a GED and is functioning in the dull normal range of intelligence. Claimant currently experiences bowel problems due to his pancreatitis and severe back and leg pain. Claimant has experienced memory lapses due to the injury. Claimant has attempted to sell cars and do carpentry work but was unsuccessful because he had to go to the toilet too frequently. The injury resulted in multiple injuries to claimant's back, neck and brain. Claimant's treating physician, Dr. Golnick, opines that there is practically no chance that claimant will ever return to truck driving. The greater weight of evidence establishes that claimant is permanently and totally disabled.

FINDINGS OF FACT

1. Claimant sustained injuries to his back and neck on June 5, 1981 when the truck he was driving for defendant-employer Overland Driver Service collided with an oncoming car and rolled down an embankment.

2. As a result of the stress and medication used to treat claimant's injury, claimant developed an ulcer which required surgical treatment.

3. As a result of the injury, claimant developed gall bladder problems which required emergency surgery to remove the gall bladder.

4. As a result of the injury, claimant developed chronic pancreatitis.

5. Claimant is 52 years old, has a GED, and is functioning in the dull normal range of intelligence.

6. Claimant has attempted to sell cars and do carpentry work but was unsuccessful because he has to go to the toilet too frequently.

7. Claimant has problems sleeping and is only able to sleep between 10 to 12 minutes at a time.

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8. Claimant currently experiences severe back and leg pain.

9. Claimant has had memory lapse problems as a result of the injury.

10. Claimant is permanently and totally disabled.

11. At the time of the injury claimant was married with two dependent children.

12. Claimant was paid $.16 per mile, $25 per pickup except for the first pickup and $40 per day for layovers.

13. Claimant's rate of weekly compensation is $253.61.

14. Claimant entered into a third-party settlement as a result of the June 5, 1981 work injury under which claimant received $100,000.00

15. On October 11, 1983 claimant entered into a consent to settlement agreement with defendants under which he paid $58,837.79 to defendants for compensation and medical expenses paid as a result of his June 5, 1981 injury.

16. Claimant incurred $12,348.66 in attorneys' fees as a result of the third-party settlement.

17. Defendants have paid $2,365.00 toward claimant's medical expenses since the consent to settlement.

18. Defendants have $31,178.55 in credit against any award made in this decision.

CONCLUSIONS OF LAW

Claimant has established a causal connection between his June 5, 1981 work injury and the medical treatment for the ulcer, gall bladder and chronic pancreatitis conditions.

Claimant has established a causal connection between his June 5, 1981 work injury and his present disability.

Claimant has established that he is permanently and totally disabled as a result of his injury on June 5, 1981.

Claimant is entitled to $12,348.66 in attorneys' fees for his third-party settlement.

Defendants are entitled to a credit of $28,813.55 as a result of claimant's third-party settlement; and defendants are entitled to a credit of $2,365.00 for medical expenses paid since the consent to settlement.

Claimant's weekly rate of compensation is $253.61.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant's medical expenses associated with the treatment of his ulcer, gall bladder, and chronic pancreatitis conditions.

That defendants pay claimant permanent total disability benefits at the weekly rate of two hundred fifty-three and 61/100 dollars ($253.61) commencing June 5, 1981 for the period of claimant's disability.

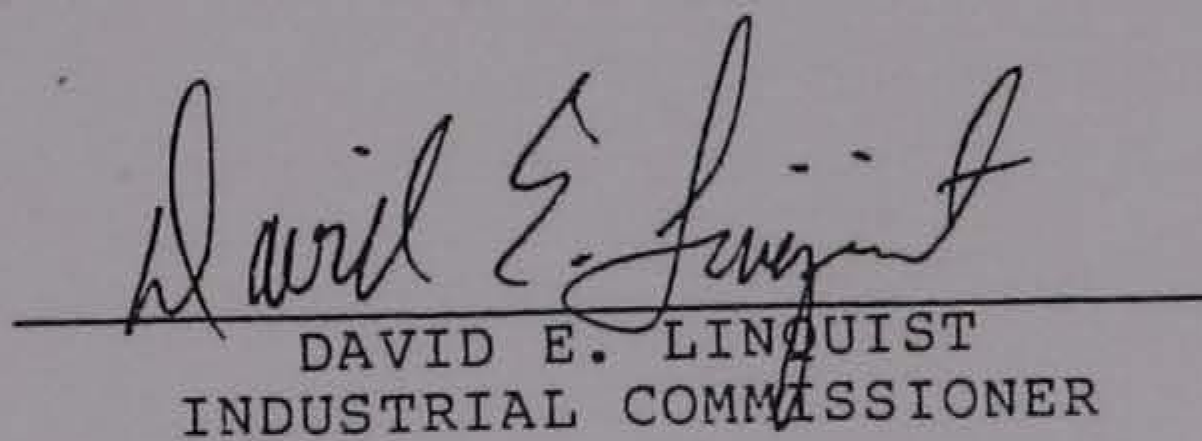
That defendants be given thirty-one thousand one hundred seventy-eight and 55/100 dollars ($31,178.55) credit for medical expenses already paid and for claimant's third-party settlement.

That defendants pay accrued amounts in a lump sum together with interest pursuant to section 85.30 of the Iowa Code.

That defendants pay the costs of this proceeding including the costs on appeal pursuant to Division of Industrial Services Rule 343-4.33.

That defendants file claim activity reports pursuant to Division of Industrial Services Rule 343-3.1(2) as requested by the agency.

Signed and filed this 29th day of January, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DARREL L. CRAIN, Claimant, vs. NEVADA RURAL FIRE PROTECTION ASSOCIATION, Employer, and AID INSURANCE SERVICE, Insurance Carrier, Defendants.	:	File No. 719428 A P P E A L D E C I S I O N

FILED
FEB 26 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding claimant healing period benefits, medical expenses and permanent partial disability benefits as a result of an injury on September 29, 1982.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 9; claimant's exhibits 1 through 6; and defendants' exhibits A through D. Both parties filed briefs on appeal.

ISSUES

1. Whether claimant's disability is causally related to his injury of September 29, 1982;

2. The extent of claimant's disability; and

3. Whether defendants are responsible for payment of certain medical bills for claimant.

REVIEW OF THE EVIDENCE

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

Briefly stated, claimant was employed by E & D Auto Parts of

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Nevada, Iowa. His work involved bending, stooping, lifting up to 50 pounds at a time, and driving approximately 300 miles per week. Claimant also served as a volunteer fireman for defendant Nevada Rural Fire Protection Association.

In 1976, claimant was responding to a fire alarm and ran into a parked car. He did not lose any time from work as a result of this injury, but did experience pain in his back. In February of 1980, he visited John A. Grant, M.D., who discovered a ruptured disc at the L4-5 level on the left. A laminectomy was performed by Dr. Grant and the disc was excised. Claimant was off work for three months, then resumed his work. Claimant testified he had no further problems until August 1981, when he reported to Dr. Grant back and leg pain, especially after driving.

In March 1982, claimant experienced a slip on the ice while getting ready to make a delivery for B & D Auto Parts. He again experienced pain and complained of difficulty in riding in a car. Claimant told Dr. Grant his back problem had "never settled" since September 1981. Dr. Grant performed a myelogram, which showed "some deformity of the nerve root at the L4-5 level." Claimant was treated with epidural block and released back to work.

On September 29, 1982, claimant was assisting at a rural fire when he slipped on grass made wet by a portable water tank he was operating. Claimant experienced immediate pain and had to lie down. Claimant's fellow firefighters, Steven Herr and Harold Mitchell, both observed claimant in pain immediately after the fall. Although he drove home, his wife testified he could not undress himself. Claimant returned to his job the next day, but three days later he could not dress himself for work.

Steven Herr opined that claimant had a reputation for truthfulness. Harold Mitchell testified that claimant made parts deliveries to his business, and that prior to September 29, 1982, claimant had no visible difficulty with lifting while carrying out those deliveries.

Claimant stated that after the fall, he experienced increased back and leg pain, as well as left testicle pain. Claimant was hospitalized by Dr. Grant for two weeks and treated with traction, heat, medication and injections. Claimant testified that after his March 1982 slip, injections relieved his pain, but after his September 1982 fall, injections did not help.

On November 22, 1982, claimant underwent a second myelogram, which Dr. Grant stated showed an irregularity of the L4-5 nerve root, but "the degree of irregularity is much less than it was on the examination of 3/18/82." He stated that "this appearance

may be due to postoperative change. It is also possible that there is a fragment of nucleus pulposus which is extended laterally and is less evident than it was previously." On December 9, 1982, claimant underwent a CT scan, which, according to George H. Holmes, M.D., had "no recurrent disc protrusion identified." Another CT scan was conducted on December 28, 1982 and Dr. Grant stated that a bulge at the L4-5 level and scar tissue was noted. In December 1982, Dr. Grant stated that claimant "was going to try to return to work, although he was still having trouble." However, by January 14, 1983, Dr. Grant felt "he should not return to work until able to resume most of his regular employment."

On January 24, 1983, Dr. Grant stated: "It appears to me that the cause of his current difficulties are directly related to the September, 1982 injury but what percentage of the current symptoms are directly due to the fall and what percentage might be due to aggravation of pre-existing problems is impossible to state."

Claimant stated that he continued to experience both pain and a "catch" in his back. Claimant indicated that since no relief for his discomfort had been obtained, he asked Dr. Grant for a referral to Mayo Clinic for a second opinion. An electromyography was conducted at Mayo Clinic on February 17, 1983. A psychiatric examination of claimant at Mayo Clinic on February 21, 1983 concluded: "He does not appear to...be exaggerating or dramatizing his symptomatology."

On February 28, 1983, Dr. Grant stated:

> I had a great deal of difficulty trying to sort out what percentage of his current symptoms are due to the fall and what percentage might be due to aggravation of a pre-existing problem. On that basis I will quote verbatim from the "Manual for Orthopedic Surgeons In Evaluating Permanent Physical Impairment" and perhaps try and establish from this what percentage of his current difficulties are due to the situation before the fall and what are due to the condition after the September, 1982 fall. In this booklet which I use quite frequently the "surgical excision of disc, no fusion, good results, no persistent sciatic pain" there is awarded a 10% whole body permanent physical impairment and loss of physical function of the whole body. The next step in this sequence states that "surgical excision of a disc, no fusion, moderate persistent pain and stiffness aggravated by heavy lifting with necessary modification of activities" leads to a percent whole body permanent physical impairment and loss of physical function of the whole body of

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> 20%. It would be my feeling that based on these considerations he had a 10% impairment as a result of his original surgery leading up to the time of the subsequent fall. I would then estimate that the fall has produced the rather persistent pain and stiffness and placed him in a category of 20% partial permanent physical impairment. As you must realize this is an estimate based on my judgement [sic] but it is the closest I can come to trying to break down the differences.

(Jt. Ex. J4, P. 19)

On April 18, 1983, Dr. Grant opined:

> Based on the way this man appears to me, I feel he has a 20 percent partial permanent physical impairment and loss of physical function of the body as a whole. This is an impairment rating, not a disability rating.
>
> ...I certainly think that it would be advisable for him to look into some type of further training for a more sedentary occupation requiring less lifting, less repeated bending, and less highway travel....Personally, I would think it unlikely that he will ever return to the type of work he was doing before and that the most advantageous approach to this man would be attempted training at a more sedentary type activity.

(Jt. Ex. J4, p. 20)

On June 21, 1983, the Mayo Clinic, through Dr. White, released claimant to work at sedentary jobs. The claimant testified that at that point, he did not feel capable of returning to work, had no relief from his pain, could not stand physical activity, and travel was hard on him. He stated he could no longer do household chores such as mowing or gardening. His wife testified that claimant wanted to return to his work at B & D, but was not capable of doing so. Claimant was engaged in walking and swimming therapy throughout the summer of 1983. Dr. Grant advised claimant in August 1983 that he did not recommend surgery, and that there would be no significant improvement.

On October 5, 1983, claimant was examined by Dr. Peter Wirtz for purposes of determining his continuing eligibility for disability insurance benefits. Dr. Wirtz reported:

> This patient has chronic symptoms in his back secondary to his laminectomy and congenital anomalies. In light of his congenital anomalies and the back

> surgery, he has a restriction of activity from heavy lifting, twisting and bending. Weight limitation would be 25 to 30 pounds, as well as the same for pushing and pulling.
>
> This patient's back does not limit standing, walking or sitting activities. Jarring activities such as car or truck activities would be limited only as far as intermittent resting for walking and bending.
>
> Orthopaedic impairment is based upon surgery and he has had an L4-5 laminectomy which would be a 5% impairment of the body. This is directly related to his 1980 surgery. The patient, likewise, has congenital anomalies which pre-existed this problem and would be another 5% impairment of the body as a whole because they continue to restrict his functional ability.
>
> Injuries since his accident, on a periodic basis, are an aggravation of a pre-existing problem. Each episode of [sic] has healed itself without any increase in his impairment.

(Jt. Ex. J6, p. 2)

Claimant continued to complain of a "catch" in his back and testicular pain, and stated that he had not experienced either of these symptoms prior to his fall of September 29, 1982.

On October 20, 1983, Kenneth Heithoff, M.D., stated:

> INTERPRETATION: C.T. scan of the lumbar spine shows evidence of previous surgery at the L5-S1 level on the left. There is a small to moderate size disc herniation at the L5-S1 level on the left which extends caudally to underlie the left S1 nerve root. The left S1 nerve root is compressed against the ligamentum flavum and lamina of S1.
>
> The L3-4 and 4-5 levels are normal.
>
> <u>CONCLUSIONS:</u> Small recurrent free fragment disc herniation L5-S1 on the left with 1 mm. of caudal migration.

(Jt. Ex. J9, p. 1)

It was noted in the record that claimant suffered a congenital anomaly that could result in the labeling of the L4-5 disc as L5-S1.

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Dr. Grant referred claimant to the Low Back Institute and Alexander Lifson, M.D., at claimant's request. Dr. Lifson reviewed claimant's CT scan and concluded:

> This study showed a soft tissue density at the level between the last lumbar and the first sacral segment. It is very difficult for me to differentiate the possibility of a recurrent disc herniation from postoperative fibrosis.
>
> If Darrel has a recurrent disc at this level, I believe it could be responsible for irritation of the S2 nerve root and resulting testicular pain. To clarify this diagnosis, we would like to obtain a metrizamide enhanced CT scan of the lumbar spine which can be done on an outpatient basis.

(Jt. Ex. J9, p. 6)

Dr. Lifson also stated in his deposition that claimant's fall of September 29, 1982 aggravated or exacerbated his pre-existing condition.

An enhanced CT scan, however, could not be conducted due to a toxic reaction by claimant. Consequently, claimant received a percutaneous radiofacet nerve block, which claimant indicated relieved the symptoms to a degree.

On December 7, 1983, claimant began to seek employment again. At a seminar to obtain job seeking skills, he found he could not sit comfortably through the seminar. Claimant was given a lengthy list of possible job placements compiled by North Central Rehabilitation Services of Des Moines, and claimant investigated these.

Dr. Grant reiterated his diagnosis on July 15, 1984, stating "[F]rom my standpoint his percentage of partial permanent physical impairment and loss of physical function to the whole body remains as described on February 28, 1983. I feel this is an impairment rating that will not change despite the fact that he may obtain some degree of relief with the treatment that was given."

On March 2, 1984, Dr. Lifson performed surgery on claimant's back. He found evidence of a "very extensive" amount of epidural fibrosis, and removed a herniated disc fragment that was compressing the nerve root against the layer of scar tissue. Dr. Lifson stated in his deposition that the nerve impingement claimant suffered could be caused by either the epidural fibrosis from his 1980 surgery or by disc herniation. He stated that the disc herniation could have been caused by a number of factors, including injury, disease, or even slight activity such as

coughing or sneezing.

Dr. Grant reviewed the results of the above procedures, and stated on March 24, 1984:

> [I]t appeared to me that the cause of his current difficulties directly relate to the September, 1982 injury. I have also reviewed the consultation report from Doctor Lifson that had been sent to you on March 8, 1984. Based on his statements I really do not feel my opinion is going to change much. The findings at surgery suggest that following the initial operative procedure he had adhesions which may have been present but asymptomatic. It is then very possible that the fall he sustained both in March of 1982 and September of 1982 have aggravated existing adhesions producing the intractable pain he described. We still are faced with the uncertainty of what percentage of his current symptoms relate to each separate incident. I still feel that his current difficulties are directly related to the September, 1982 injury as the major source of symptoms because his March, 1982 injury responded to symptomatic treatment so well and was not associated with much difficulty until the reinjury of September 30, 1982.

(Jt. Ex. J4, p. 25)

Dr. Grant Also expressed the opinion that claimant was not a malingerer.

In April or May 1984, claimant stepped into an elevator and again felt the sudden onset of pain in his groin, back and leg. Claimant described the pain as being the same as that experienced after the September 29, 1982 fall although he did not re-experience the catch in his back.

Another CT scan was performed on May 30, 1984, and Dr. Heitoff stated:

> [T]here is epidural and perineural fibrosis extending into the central spinal canal lateral to the fat graft. There is evidence of a prior discectomy with removal of a portion of the plate of L5. There is a strong suggestion of a recurrent free fragment L5-S1 disc herniation underlying the left S1 nerve root and the fat graft. Since this may also represent perineural fibrosis, a metrizamide enhanced CT scan is necessary to distinguish between the two possibilities since the disc visualized at the site of the previous discectomy

is low in attenuation values; and an isodense disc herniation cannot be excluded.

(Jt. Ex. J9, p. 27)

On June 18, 1984, Dr. Lifson again performed surgery and found no disc herniation but a significant amount of prior epidural fibrosis. Following this surgery, claimant indicated his symptoms improved but not to the same extent as following his March 1984 surgery.

Both Dr. Grant and Dr. Lifson stated in their depositions that it is difficult to distinguish between epidural fibrosis, or scarring, and recurrent disc herniation.

On October 25, 1984, the Institute For Low Back Care assessed claimant's limitations as follows:

The patient states he is able to sit for forty-five minutes before feeling an increased discomfort in his low back. With breaks he states he could sit for up to four hours. The patient reports discomfort in his low back after walking approximately thirty-five minutes. He states with breaks he could walk for up to six hours. The patient states he is able to drive a car. He states he is able to drive a manual shift. He denies any difficulty operating the pedals with either foot. He denies any upper extremity gross motor coordination difficulties.

FLEXIBILITY: Active range of motion of the lumbar spine is as follows:

Flexion	0 to 60 degrees
Right side bending	0 5o 15 degrees
Left side bending	0 to 15 degrees
Right rotation	0 to 20 degrees
Left rotation	0 to 20 degrees
Extension	0 to 15 degrees

....

SUMMARY: Today the patient reports intermittent left lower extremity discomfort. He says this is exacerbated by activities which include forward flexion and heavy lifting. He has participated well in caring for his low back in that he has lost considerable weight since his first time seen. He now expresses an interest in returning to work in whatever capacity is available for him. Strength testing showed a grade of normal throughout. He was able to lift 30 pounds and carry 40 pounds with

> slight report of discomfort. His overall endurance is decreased, and he is in need of a reconditioning program. With care given to limit the amount of repetitive forward flexion and heavy lifting the patient should do well.

(Jt. Ex. J9, pp. 40, 41)

On October 30, 1984, Dr. Lifson opined:

> Darrel Crain was first seen at The Institute for Low Back Care on 10/20/83. In consideration of the past history, the initial and follow-up physical examinations, and patient's response to treatment, and the condition in which we found him at the time of the last examination on 7/31/84, he has a 25 percent permanent partial disability to the spine.

(Jt. Ex. J9, p. 42)

Claimant received employment assistance from Kathryn Bennett of North Central Rehabilitaton Services. Claimant contacted numerous potential employers, found employment with an auto dealer and is currently earning approximately $12,400 annually as a service advisor. His employer is satisified with his work and eventually claimant could earn up to $20,000 in his present position. Kathryn Bennett further stated that claimant was cooperative and motivated toward finding work. His present work does not require bending, lifting, or stooping. She described him as a difficult job placement in light of his strict limitations and three surgeries.

Claimant also stated that he attempted to drive a truck to Montana in October 1984, but found that shifting the gears of the truck produced back pain. He testified that since his September 1982 fall, he cannot lift more than 20 pounds, cannot stand longer than one to two hours without a break, sit comfortably, or drive more than 100 miles without stopping. He also indicates he now has testicular pain, and has developed a fear of falling as a result of his three back surgeries.

Claimant's exhibit 1, a ruling on a social security disability claim, was not considered on appeal in that a determination of eligibility for social security disability benefits is based on criteria not appropriate to this case. The parties stipulated that claimant's rate of compensation is $379.61.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 29, 1982 is causally related to the disability on which he now bases his claim.

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Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

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

The Iowa Supreme Court cites, apparently with approval, the C.J.S. statement that the aggravation should be material if it is to be compensable. Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); 100 C.J.S. Workmen's Compensation §555(17)a.

Our supreme court has stated many times that a claimant may recover for a work connected aggravation of a preexisting condition. Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934). See also Auxier v. Woodward State Hosp. Sch., 266 N.W.2d 139 (Iowa 1978); Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager, 253 Iowa 369, 112 N.W.2d 299; Ziegler, 252 Iowa 613, 106 N.W.2d 591.

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

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

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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).

Defendants cannot deny liability in a workers' compensation case and also guide the course of treatment or select the medical care the injured worker receives. Barnhart v. MAQ Incorporated, I Iowa Industrial Commissioner Reports 16 (Appeal Decision 1981).

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 (Iowa 1980).

Apportionment is appropriate where a prior injury or illness independently produces some ascertainable portion of the ultimate industrial disability which exists following the current injury. Varied Enterprises, Inc. v. Sumner, 353 N.W.2d 407 (Iowa 1984).

ANALYSIS

On September 29, 1982, claimant slipped and fell while working as a volunteer fireman. Two other firemen witnessed the incident and confirmed claimant's statement that he immediately experienced severe back pain and had to lie down. Claimant stated that he also experienced leg pain and left testicular pain, and a "catch" in his back subsequent to the accident, and that these symptoms had not been present prior to his fall. Subsequent to his fall, he can no longer perform the lifting or bending duties of his job. Claimant's co-firemen indicated claimant was a truthful person, and the Mayo Clinic psychiatric report indicated claimant was not exaggerating his symptoms. Although claimant had two back injuries and one back surgery prior to September 29, 1982, these incidents did not result in any inability to perform his duties for B & D Auto Parts other than discomfort while driving. All of the above nonexpert testimony tends to confirm a causal relationship between claimant's present impairment and his injury of September 29, 1982.

Dr. Grant expressed the medical opinion on January 24, 1983 that claimant's impairment was caused by his fall on September 29, 1982. He reiterated that opinion on March 24, 1984, after reviewing the results of Dr. Lifson's surgery. Both Dr. Grant and Dr. Lifson opined that claimant's fall of September 29, 1982 aggravated or exacerbated his preexisting condition.

There is medical testimony in the record that claimant's

back condition could be caused by a disc herniation compressing the nerve root or by epidural fibrosis, or scarring, from his surgery in March 1982, or a combination of these causes. Defendants argue that claimant's impairment is the result of scarring from the 1980 surgery and not the September 1982 fall. Both Dr. Grant and Dr. Lifson indicated that epidural fibrosis and disc herniation are very difficult to distinguish on a CT scan without enhancement. Enhancement was not possible here due to a toxic reaction.

Dr. Lifson indicated that if claimant's condition was caused by a recurrent disc herniation, that herniation could be caused by more than one factor. He listed injury, as well as slight activities such as coughing, sneezing, or bending to tie shoes as possible causes. Claimant testified he had had no incident of excessive coughing. The surgery conducted in March 1984 did confirm the presence of disc herniation as well as extensive scarring.

Dr. Grant expressed an inability to assign a percentage of causation to either contributing factor. He reaffirmed his opinion that claimant's current impairment was caused by the September 29, 1982 fall based on his observations that claimant's condition improved considerably after the March 1982 surgery but has not improved subsequent to the September 29, 1982 fall. He concluded the present condition was not a result of the scarring from the prior surgery but was the result of the September 29, 1982 fall.

Dr. Wirtz opined that although claimant's injuries aggravated his preexisting condition, no further impairment resulted. The opinions of Dr. Grant were based on examinations of claimant on numerous occasions, as well as the surgery he performed on claimant. His opinion remained unchanged even with the benefit of updated information from Dr. Lifson. Dr. Wirtz examined claimant only once. The opinions of Dr. Grant will be given the greater weight. Claimant's injury of September 29, 1982 was a substantial cause of his present impairment.

Dr. Grant determined that there would be no improvement in claimant's condition, and thus his disability is permanent. Subsequent to his fall of September 29, 1982, he can no longer bend or lift as he could before. Dr. Wirtz stated that claimant should not lift more than 20-30 pounds. Claimant himself testified he could not lift more than 20 pounds. Both claimant's testimony and that of Kathryn Bennett of North Central Rehabilitation Services show that claimant's prior employment with B & D Auto Parts did involve lifting weights up to 50 pounds. Claimant was able to perform those duties prior to the injury of September 29, 1982, as shown by his testimony and that of Harold Mitchell. Claimant has therefore suffered a loss of lifting ability as a result of his injury.

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Claimant also testified that since his injury of September 29, 1982, he cannot sit for longer than two hours at a time. His former employment with B & D Auto Parts required him to stand for longer periods than two hours.

Since his injury, claimant cannot drive over 100 miles without a rest. His employment at B & D required him to drive approximately 300 miles per week. However, there is evidence in the record to indicate that claimant suffered an inability to drive or ride long distances in a vehicle prior to his fall in September 1982, and therefore this restriction is not attributable to his September 1982 injury.

Dr. Lifson rated claimant's condition as a 25 percent impairment of the spine. Dr. Grant opined claimant's prior surgery and its effects would have given claimant a 10 percent permanent partial impairment, and that after his fall of September 29, 1982, claimant now has a permanent partial impairment of 20 percent of the body as a whole. He first gave this opinion on February 28, 1983, reconfirmed it on April 18, 1983, and again reconfirmed it on January 15, 1984.

It must be realized that functional impairment is only one of the factors used in determining a person's industrial disability.

Claimant was 40 years old at the time of the hearing, with one and one-half years of college education.

The record also shows claimant attempted to return to work after his fall, but found he could not perform his job duties. Both he and his wife testified he wanted to return to work. Dr. Grant also opined that claimant was not a malingerer. Kathryn Bennett, of North Central Rehabilitation Services, testified that claimant's motivation to find work was good. Both his former employer and his present employer were pleased with claimant's performance. The Mayo Clinic psychiatric report described claimant's attitude as positive. Although defendants urge that claimant was a malingerer in order to maximize his receipt of various public benefits, and did not seek employment until his eligibility for those benefits had expired, the greater weight of the evidence shows that claimant's motivation to return to work was good.

Claimant was unable to return to his prior employment because of an aggravation or exacerbation of his preexisting condition. His income from that position for a nine month period of time up to his injury was $16,877. By extrapolation, his annual income was approximately $22,500. His new employment is at $12,400 annually. The record shows a potential future income of $20,000. Claimant has suffered and will continue to suffer a loss of earning capacity as a result of his fall of September 29, 1982.

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Taking these factors and all other factors used in determining a person's earning capacity into account, claimant presently has a permanent partial industrial disability of 40 percent.

Because defendants are only responsible for the extent the September 29, 1982 injury aggravated claimant's preexisting condition, a determination of claimant's preexisting disability is necessary so that an apportionment can be made.

Dr. Grant stated that claimant has a 10 percent functional impairment of the body from his 1980 surgery. Dr. Wirtz opined that claimant had a preexisting 5 percent impairment from the 1980 surgery, and an additional 5 percent impairment from a congenital disc defect. Under either view, claimant had a 10 percent impairment of the body as a whole as a result of his 1980 surgery. Claimant also had a second back injury in March 1982.

The 10 percent functional impairment rating is only one of the factors to be considered. The record shows that claimant was able to return to his work at his job at B & D Auto Parts subsequent to his 1980 surgery, but that he experienced some discomfort in driving. Driving up to 300 miles per week was one of his job duties. Considering these factors and all other factors used in determining a person's earning capacity, claimant's industrial disability prior to September 29, 1982 is determined to have been 10 percent of the body as a whole.

In that claimant's medical bills at the Low Back Institute were the result of a referral by Dr. Grant, they were related to his injury of September 29, 1982. This conclusion is not affected by the fact that claimant requested the referral. Dr. Grant made the referral in keeping with his medical judgment. As the bills are causally related to claimant's injury of September 29, 1982, defendants are responsible for them under Iowa Code section 85.27. In addition, as defendants denied liability, they cannot refuse payment because the bills were not authorized.

FINDINGS OF FACT

1. Claimant was 40 years old at the time of the hearing.

2. Claimant completed high school and one and one-half years of college.

3. Claimant worked as a saleman for B & D Auto Parts.

4. Claimant's B & D Sales job required him to lift up to 50 pounds and to travel approximately 300 miles per week.

5. Claimant injured his back in 1976 when responding to a

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fire call as a volunteer firefighter.

6. Claimant underwent a laminectomy in February 1980, resulting in a ten percent permanent partial impairment to the body as a whole.

7. Claimant injured his back in March 1982 when he slipped on some ice.

8. Claimant injured his back on September 29, 1982 while working as a volunteer firefighter for the Nevada Rural Fire Protection Association.

9. Claimant's fall on September 29, 1982 materially aggravated claimant's preexisting back condition.

10. Subsequent to the fall on September 29, 1982, claimant had a permanent partial impairment to the body as a whole of 20 percent.

11. Subsequent to September 29, 1982, claimant has back pain and is physically unable to drive extensive distances, to lift over 30 pounds, or bend on a regular basis.

12. Claimant can now only perform sedentary or light duty jobs and currently works as a service advisor for an auto dealer at an annual salary of $12,400.

13. Claimant earned more than $12,400 annually prior to his injury on September 29, 1982.

14. Claimant is not a malingerer.

15. Claimant's physical condition is not likely to improve significantly in the future.

16. Claimant reached maximum healing on June 21, 1983.

17. Claimant's stipulated weekly rate of compensation is $379.61.

18. Claimant's medical bills relating to the Low Back Institute are causally related to his injury and treatment.

19. Prior to September 29, 1982, claimant had a permanent partial disability of 10 percent of the body as a whole.

20. As of the date of hearing, claimant had a permanent partial disability of 40 percent of the body as a whole.

21. As a result of his injury of September 29, 1982, claimant has a permanent partial impairment of 30 percent of the body as a whole.

CONCLUSIONS OF LAW

Claimant established by a preponderance of the evidence he sustained an injury on September 29, 1982 that arose out of and in the course of his employment with the Nevada Rural Fire Protection Association.

Claimant established by a preponderance of the evidence there is a causal connection between his injury of September 29, 1982 and his claimed disability.

Prior to September 29, 1982, claimant had a permanent partial disability of 10 percent of the body as a whole.

As of the date of hearing, claimant had a permanent partial disability of 40 percent of the body as a whole.

As a result of his injury of September 29, 1982, claimant has a permanent partial impairment of 30 percent of the body as a whole.

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

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred fifty (150) weeks of permanent partial disability benefits at a rate of three hundred seventy-nine and 61/100 dollars ($379.61) per week from June 21, 1983.

That defendants are to pay unto claimant healing period benefits at a rate of three hundred seventy-nine and 61/100 dollars ($379.61) per week from September 29, 1982 through June 20, 1983, less any days claimant actually worked during that period.

That defendants shall pay claimant's medical bills incurred with the Low Back Institute.

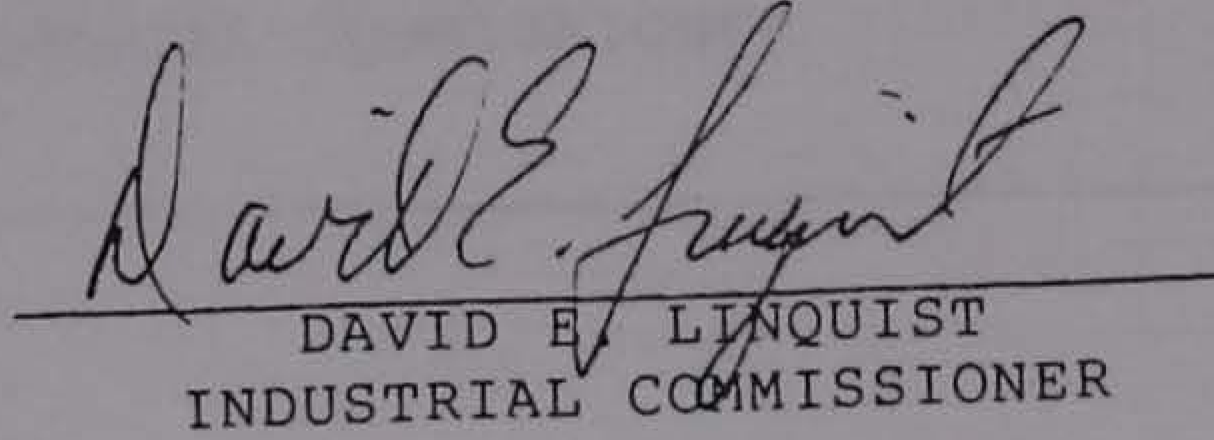
That defendants shall pay accrued benefits in a lump sum, and pay interest pursuant to section 85.30, The Code.

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

That defendants are to pay the costs of this action.

That defendants shall file claim activity reports, pursuant to Division of Industrial Services Rule 343-3.1(2), as requested by the agency.

Signed and filed this 26th day of February, 1988.



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1802, 1803, 3001, 3002
3003, 4100
Filed February 9, 1988
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA CRAWFORD, Claimant, vs. WESTMARK PROPERTY MANAGEMENT COMPANY, Employer, and STATE FARM INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 759165 A R B I T R A T I O N D E C I S I O N

1802, 1803, 3001, 3002, 3003, 4100

Fifty-five-year-old claimant injured her back while working as an apartment manager. The employer offered continued employment with accommodations, but she resigned after working approximately eight months. The resignation was not medically directed and her condition had not changed and no further healing period was awarded. She has severe limitations and limited work experience. Claimant was awarded 60% permanent partial disability. Claimant had not looked for work or retrained and odd-lot held unavailable to her. Claimant received a salary and an apartment with utilities for her services as manager. The value of the apartment with utilities was held to be part of her gross weekly earnings and also of her weekly spendable earnings since it was not subject to payroll taxes. The rate was determined by applying the salary to the benefit schedule and then adding 80% of the value of the apartment and utilities. The employer was granted partial credit for the apartment and utilities for so long as the apartment was provided to claimant during the healing period, but it was not allowed as a credit against permanent partial disability since it was part of the earnings she received for the work she was then performing.

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FILED

FEB 9 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PATRICIA CRAWFORD,

Claimant,

vs.

WESTMARK PROPERTY MANAGEMENT COMPANY,

Employer,

and

STATE FARM INSURANCE COMPANY,

Insurance Carrier,
Defendants.

File No. 759165

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 Patricia Crawford against Westmark Property Management Company, her former employer, and State Farm Insurance Company, the employer's insurance carrier. The case was heard in Des Moines, Iowa on July 7, 1987 and was fully submitted upon conclusion of the hearing.

The record in the proceeding consists of testimony from Patricia Crawford, Pamela Kelly and Brenda Goeden. Also received into evidence were claimant's exhibits 1 through 9 and defendants' exhibits A, B, C, D, E, G, H, I, K, L, M and N.

ISSUES AND STIPULATIONS

It was stipulated that claimant sustained an injury on February 3, 1984 which arose out of and in the course of employment.

The issues identified by the parties for detemination are: Whether there is a causal relationship between the alleged injury and the disability; whether claimant is entitled to temporary total disability or healing period benefits or permanent partial or permanent total disability benefits; whether claimant falls within the odd-lot doctrine; and, claimant's rate of compensation in the event of an award. The employer also seeks credit, in the event of an award, for the benefits previously paid to claimant.

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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. Defendants' proposed summary of evidence is essentially accurate and is incorporated herein with some modification.

Patricia Crawford is a 55-year-old woman who had been employed by Westmark Property Management Company as an apartment manager for six months prior to her injury on February 3, 1984. She is single. Claimant's formal education is limited to the eighth grade. Prior to becoming an apartment manager in 1969, she had worked as a waitress.

Claimant testified that, on February 3, 1984, while moving a washer and dryer at the Riverview Oaks apartment complex at 8450 Hickman, in Des Moines, Iowa, to clean behind them, she heard her back "pop." She went home to lie down. There were no witnesses. She saw a chiropractor on February 6, 1984 without obtaining relief. On February 7, 9, 15, and 27, 1984, she received osteopathic manipulative treatments from the Dietz Family Practice Clinic. She was given another prescription of Parafon Forte. After the treatment on February 7, 1984, claimant felt fine, but then went bowling, threw her back out and her symptoms returned (defendants' exhibit A, pages 3-5).

Claimant sought treatment at the Mercy Hospital Medical Center on February 11, 1984. She was diagnosed by Sinesio Misol, M.D., as having a possible herniated disc. She was treated conservatively with medication, rest and a TENS unit. Claimant returned to see Marvin Dubansky, M.D., on March 1, 1984 and was admitted to Mercy Hospital. A myelogram was performed on March 2, 1984 which revealed evidence of partial sacrilization of L-5. There was noted a large defect at the level of L-4, L-5 on the right side. There was no evidence of any other pathological change (defendants' exhibit B, page 23).

Dr. Dubansky performed chemonucleolysis at L-4/L-5 on March 5, 1984 and discharged claimant on March 12, 1984 (defendants' exhibit B, pages 14-16). Because of complaints of pain, she was readmitted on April 4, 1984 to Mercy Hospital and was discharged on April 20, 1984. She received outpatient therapy and medication. Claimant was still having pain in the right leg and was admitted to Mercy Hospital on May 24, 1984. A lumbar laminectomy was performed on May 25, 1984 by Dr. Dubansky. According to the operative report, the findings on surgery were as follows:

> The dissector was used and there really was not too much bulging, and it was very difficult to try to identify the disc space itself. A needle was placed in what I thought probably was this space, although it was extremely narrow. Xray was taken and confirmed this was the L4-5 interspace where I wanted to be. A knife was used to try and cut into this area, but there was some thickening of tissues on the back of the vertebra and beneath the dura, but not really extruded disc. It didn't look like disc material. I used the narrowest pituitary rongeur to try and remove some of the material between the vertebra, but it was really scarred and fibrous. Using the dissector up under the nerve root, however, there was a hard, flat piece of material, about .5 cm x .5 cm. x 2-3 mm. It was lying beneath the nerve root and when this was removed, down to the vertebral body, and seemed to decompress the nerve root. The nerve root was a little bit inflammed [sic]. (Defendants' exhibit B, page 20).

Claimant was released from Mercy Hospital on June 1, 1984, with an improved amount of right leg pain. Subsequently, she received physical therapy from June 14, 1984 through July 26, 1984. Claimant was discharged from therapy as she had plateaued in treatment on July 26, 1984 (defendants' exhibit B, pages 24 and 25).

On July 31, 1984, Dr. Dubansky released claimant to do office work (defendants' exhibit B, page 6). On September 25, 1984, claimant started working at an apartment complex owned by employer in Phoenix, Arizona. Her "care" was transferred to Ronald B. H. Sandler, M.D., in Phoeniz. She complained to Dr. Sandler of persistent pain involving the right buttock and lateral right thigh and burning pain in the right calf. Claimant complained that she would have it in the morning when she first awoke and at other times she would be on her feet for 1-2 hours before it begins (defendants' exhibit B, pages 26 and 27). Claimant received an epidural steroid injection on October 31, 1984, November 1, 1984, and again on November 8, 1984. When she again saw Dr. Sandler on November 16, 1984, claimant was feeling better with aching discomfort in the calf. Dr. Sandler indicated that she could continue working (defendants' exhibit B, pages 28-30).

Claimant was next examined by Dr. Sandler on January 18, 1985 with complaints of persistent recurring discomfort in the right calf. Dr. Sandler felt that claimant could probably control her symptoms by watching her activity level and positions (defendants' exhibit B, page 31). On March 13, 1985, Dr. Sandler felt she was stable and gave claimant a 20% impairment rating

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(defendants' exhibit B, page 32).

Claimant quit her job in April, 1985. She stated that she was physically incapable of continuing to perform the job due to her pain. Claimant received her last check in May, 1985 (defendants' exhibit E). At the time of the injury on February 3, 1984, claimant was making $800.00 per month and was receiving an apartment with a fair rental value of $295.00 with utilities valued at $20.00 per week (defendants' exhibit M). Claimant received the apartment and utilities until June 11, 1985.

According to Evalene J. Hannah, claimant quit her job with the employer because she was getting married to Charles Buxton. Claimant testified that her pain and restricted activities caused the marriage to end.

Claimant's job in Phoenix, Arizona included the leasing of apartments, paper work, collection of rents, serving of notices and court actions. Claimant hired an assistant or maintenance person to do the maintenance, repairs, grounds, pools and cleaning. Claimant was responsible for supervising and training this person. In late April of 1985, the employer received a written complaint concerning claimant regarding her availability to tenants. The employer also suggested a way for her to remain at her job in spite of her physical complaints (defendants' exhibit E, pages 10 and 11).

Claimant saw Dr. Dubansky on December 9, 1985. At that time, claimant had an EMG and CT scan. The EMG study of L.S. paraspinal and left lower extremity was normal. The CT scan revealed no evidence of nerve root compression. Dr. Dubansky gave her a 20% impairment rating (defendants' exhibit B, pages 8 and 9).

On October 13, 1986, claimant saw Andrew G. Shetter, M.D., a neurosurgeon, in Phoenix, Arizona. Claimant told Dr. Shetter that her pain symptoms had decreased over the past two years. Dr. Shetter observed no evidence of lower extremity muscle atrophy. Dr. Shetter stated that the patient's symptoms were indicative of a residual right L5 radiculopathy. He recommended no further surgery and felt that her present treatment should be continued (defendants' exhibit B, pages 44-46).

On December 29, 1986, Dr. Dubansky again examined claimant. The doctor stated that there were no objective neurological changes and that claimant showed no evidence of weakness or atrophy. He recommended no change in her course of treatment (defendants' exhibit B, page 10).

Claimant has not sought employment since quitting her job with the employer in April, 1985. The employer introduced evidence through Brenda Goeden of jobs presently available in

the Phoenix area that were within claimant's experience and physical restrictions as indicated by Dr. Shetter. Also available in the Phoenix area was employment as a leasing hostess, or a job similar to that which she held with this employer. Claimant is presently restricted to 20 pounds lifting and should avoid excessive stooping or bending (deposition of Dr. Shetter, page 12).

Claimant's prior medical history reveals that she has had polio which affected her right leg in her twenties and a work injury of "approximately three months duration" in 1962, according to interrogatory answer number 3 (defendants' exhibit I, page 5). However, on cross-examination, it was admitted by claimant that her work injury occurred on March 14, 1963 and, as late as April 1, 1964, she still had not returned to work and had no knowledge as to when she would be returning to work. She saw Thomas B. Summers, M.D., on December 12, 1963. It was his opinion that her objective findings were minimal in degree. Claimant indicated that because of the pain she did not feel she could carry on with her usual occupation. Her work injury involved the lower cervical spine (defendants' exhibit A, page 31). Claimant received a settlement in June, 1964 from the employer and returned to work as a waitress thereafter (defendants' exhibit C, page 2).

Claimant denied having any disability in her right leg from polio. However, on cross-examination, it was revealed that, whenever she gets tired, she limps on her right leg. Robert B. Stickler, M.D., her family doctor, stated that, in July, 1966, claimant had severe back pain (defendants' exhibit A, page 29). Dr. Shetter also rendered his opinion that gait changes from polio could aggravate or exacerbate arthritic changes in claimant's spine (deposition of Dr. Shetter, page 20).

Claimant spends her time presently caring for her daughter's two seven-year-olds. Claimant belongs to a health club and occasionally socializes at a neighborhood bar. While she worked for the employer, claimant flew back to Des Moines in December, 1984 to attend a staff Christmas party.

Claimant's major physical complaint relates to pain. Dr. Dubansky stated, in his deposition at page 32, that his rating of 20% included 15% for her subjective complaints of pain. Furthermore, Dr. Summers stated in a report dated April 13, 1978, that he believed there was a sizeable functional element which contributed to the symptomatology, in whole or in part. Dr. Summers was seeing claimant at that time for dizziness or lightheadedness (defendants' exhibit A, pages 33 and 34).

Dr. Dubansky stated, in a clinical note dated August 23, 1984, that it is "Real hard to determine just how much of this is nerve root compression and how much is residual back that is causing some leg pain and how much of it is a psychological

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overlay." (Defendants' exhibit B, page 7; deposition of Dr. Dubansky, page 26).

According to Dr. Shetter, claimant does not have any loss of motor function in the legs or sensory loss that would be functionally incapacitating (deposition of Dr. Shetter, page 15). He testified that all pains can be and are influenced by behavioral and emotional factors and that the location of claimant's pain is anatomically appropriate (deposition of Dr. Shetter, page 22).

The defendants have paid claimant workers' compensation benefits from February 4, 1984 through September 29, 1984, a period of 34 weeks, at the rate of $127.90. Benefits were resumed on March 13, 1985 through June 16, 1987, a period of 118 weeks, at the rate of $127.90. The defendants paid benefits from June 17, 1987 to the date of hearing, a period of two weeks, at the rate of $177.01. A check was given to claimant's attorney on July 2, 1987 for $2,441.45 for what was believed to have been an underpayment of workers' compensation benefits based on the weekly rate paid of $127.90. The foregoing payments are established by a stipulation of the parties contained in the prehearing report. The total paid is $22,345.88.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that the injury of February 3, 1984 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965); Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 1607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The causal connection is made by Dr. Dubansky in his deposition.

Claimant alleges she is entitled to the benefit of the odd-lot doctrine. Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). However, she has failed to make a prima facie showing of permanent total disability under the odd-lot doctrine because she has made no effort to secure employment. She also presently cares for her daughter's seven-year-old twins. Emshoff v. Petroleum Transportation Services, Industrial Commissioner Appeal Decision, March 31, 1987. Therefore, this doctrine has no application in this case.

It remains to be determined the percentage of disability to which claimant is entitled as a result of the work injury. Both Dr. Sandler and Dr. Dubansky gave claimant a 20% functional impairment rating. Dr. Dubansky admitted that 15% of the rating was for subjective complaints of pain.

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

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

The 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 which can be considered in determining the loss of earning capacity or industrial disability which is causally related to the injury. Christopher B. Becke v. Turner-Busch, Inc. and American Mutual Liability Insurance Company, Thirty-fourth Biennial Report 34, 36.

Claimant is 55 years old and has completed eighth grade. She has worked as a waitress and an apartment manager most of her adult life. Claimant's physicians gave her a 20% functional impairment rating and she is restricted to lifting no more than 20 pounds and to avoid excessive stooping and bending.

Claimant has not attempted retraining or employment. At hearing, it was apparent from claimant's demeanor that she is not motivated to attempt to find gainful employment. Motivation is a factor which weighs on industrial disability. Claimant is of an age when normally her work life would soon end. Thus, her potential loss of earning capacity on account of her disability is less than that of a younger individual. When claimant's physical impairment, education, work experience, age, motivation and all the other factors are considered, she is found to have sustained a permanent partial disability of 60%.

The appropriate conversion date from healing period to permanency benefits remains to be determined. Claimant was released by Dr. Dubansky to return to office-type work as of July 31, 1984 and returned to work on September 30, 1984. She received her first check for the prior two weeks of work on October 15, 1984 (defendants' exhibit E, page 4). See Iowa Code section 85.34(1). All payments made after October 1, 1984 should be credited to permanency benefits. Claimant left her

job in April, 1985. She was getting married. Despite her testimony, no physician had recommended that she quit. She did not seek medical attention or treatment from March, 1985 until September, 1985. Her condition has been essentially stable since she returned to work on September 30, 1984. No further healing period compensation is due. The healing period therefore runs from February 4, 1984 until her return to work on September 30, 1984, a period of 34 weeks.

Claimant's rate must be established. Claimant received $800 per month in salary, plus an apartment valued at $295 per month and utilities valued at $20 per week. In calculating the rate, multiply $295 times twelve to get the yearly allowance for the apartment. This totals $3,540.00. Utilities of $20 per week multiplied by 52 weeks per year total $1,040.00. Utilities and the apartment added together total $4,580.00 which, when divided by 52 weeks brings an additional weekly value to claimant of $88.08 in earnings. Hoth v. Eilors, I Iowa Industrial Commissioner Report, 156 (1980).

The additional value of $88.08 in earnings, when added to the weekly wage of $184.62 ($800 per month x 12 divided by 52 weeks), equals a gross weekly wage of $272.70. The benefit schedule would provide a rate of compensation of $168.22, if the rate is computed in this manner.

The benefits of housing and utilities continued from February 3, 1984 through June 11, 1985. Therefore, a credit should be given as this was considered a portion of the payment of earnings that was continued. Division of Industrial Services Rule 343-8.4. The credit for the value of the apartment with utilities is applicable only to the healing period. The apartment and utilities were part of claimant's earnings for the work she performed. If the credit was applied against permanent partial disability benefits, it would be the same as crediting wages earned after the end of the healing period toward a permanent partial disability award. Wages earned during a period of entitlement to permanent partial disability benefits are not a credit against the employer's liability to pay permanent partial disability benefits [§85.34(2)].

The statutes do not provide directives as to how the deduction should be handled. The two apparent alternatives are to deduct the value of the apartment and utilities directly from the rate of compensation or to recompute the rate based only upon the $800 monthly salary.

Section 85.37 makes the rate equal to "eighty percent of the employee's weekly spendable earnings." Section 85.61(11) defines spendable earnings as the amount remaining after payroll taxes are deducted from gross weekly earnings. The values of the apartment and utilities are not included in claimant's

taxable earnings and are not subject to payroll taxes (see defendants' exhibit H). Simply adding the $88.08 to the weekly salary and then applying that sum to the benefit schedule results in an understatement of the correct rate since the schedule treats the entire sum as if it was subject to payroll taxes. The correct way to compute the rate in a case where part of the earnings are not subject to payroll taxes is to apply the taxable salary to the benefit schedule to determine a preliminary rate based only upon the taxable salary. Then, 80% of the non-taxable earnings should be added to the preliminary rate to arrive at the final rate. Any other method of computing the rate would violate the statute. In this case, the weekly salary provides a preliminary rate of $119.11. Eighty percent of $88.08 equals $70.46. The final rate is therefore $189.57. For so long as the employer continued to provide the apartment and utilities, the employer's liability is to pay $119.11 per week. After September 30, 1984, the rate is $189.57 per week.

The permanent partial disability award of sixty percent (60%) entitles claimant to 300 weeks of benefits commencing September 30, 1984, payable at the rate of $189.57 per week. The amount payable for permanent partial disability is $56,871.00.

The net compensation payable during the healing period is $119.11 for 34 weeks for a total of $4,049.74.

At the time of hearing, July 7, 1987, all healing period ($4,049.74) and 144 2/7 weeks of permanent partial disability compensation equaling $27,352.30 were due. The total due was $31,402.04. The sum of $22,345.88 had been paid by the date of hearing resulting in an underpayment of $9,056.16.

FINDINGS OF FACT

1. On February 3, 1984 claimant was a resident of Iowa employed by Westmark Property Management Company in the state of Iowa.

2. On February 3, 1984 claimant sustained an injury to her back in the course of her employment.

3. Following the injury, claimant was medically incapable of performing work in employment substantially similar to that she performed at the time of the injury from February 4, 1984 to September 29, 1984, when claimant became medically capable of returning to employment substantially similar to that in which she was engaged at the time of the injury.

4. As a result of the injury, claimant has a permanent 60% loss of her earning capacity.

5. Claimant's credibility concerning the severity of her

allegations of pain and disability is not well established.

6. Claimant presently babysits full-time for her daughter's twin seven-year-olds.

7. Claimant had worked for most of her adult life as a waitress and an apartment manager.

8. Claimant has not sought employment since quitting her job in April, 1985.

9. Claimant has not sought vocational rehabilitation.

10. The physical restrictions outlined by Dr. Shetter at pages 11 and 12 in exhibit 6 are correct for the claimant in this case.

11. The assessment made by Brenda Goeden that people with claimant's restrictions can usually obtain gainful employment if they want to work is correct.

12. Claimant has not established that she is disabled from working as an apartment manager.

13. Claimant has sustained a large loss of access to the job market.

CONCLUSIONS OF LAW

1. Claimant has established that she received an injury on February 3, 1984 which arose out of and in the course of her employment.

2. Claimant has established a causal relationship between the injury and her disability.

3. Claimant is entitled to healing period benefits from February 4, 1984 until September 29, 1984, a period of 34 weeks.

4. Claimant is entitled to weekly benefits at the rate of $189.57. However, from February 4, 1984 to September 30, 1984, the amount to be paid is $119.11 as part of claimant's earnings were continued in the form of an apartment plus utilities valued at $88.08 per week for which a credit against healing period is granted.

5. The odd-lot doctrine is not applicable as claimant has not made a <u>prima facie</u> showing of permanent total disability through unsuccessful bona fide efforts to find employment or otherwise.

6. Where part of an employee's earnings are non-taxable,

that part should not be applied through the benefit schedule. In lieu thereof, 80% of the value of the non-taxable earnings should be added to the rate determined when the earnings subject to payroll taxes are applied to the benefit schedule.

7. The value of the apartment and utilities is a credit against healing period compensation, but is not a credit against permanent partial disability compensation since it was then a part of claimant's current earnings.

8. Where the non-taxable part of an employee's earnings are continued by the employer, the weekly compensation paid to the employee should be based only upon that part of the earnings which are not continued.

9. Claimant has a 60% permanent partial disability when it is evaluated industrially which entitles her to 300 weeks of compensation under section 85.34(2)(u).

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant thirty-four (34) weeks of compensation for healing period at the rate of one hundred nineteen and 11/100 dollars ($119.11) per week commencing February 4, 1984.

IT IS FURTHER ORDERED that defendants pay claimant three hundred (300) weeks of compensation for permanent partial disability commencing September 30, 1984 at the rate of one hundred eighty-nine and 57/100 dollars ($189.57) per week.

IT IS FURTHER ORDERED that credit is given for the twenty-two thousand three hundred forty-five and 88/100 dollars ($22,345.88) paid prior to hearing. Defendants are also entitled to credit for any payments made subsequent to the hearing.

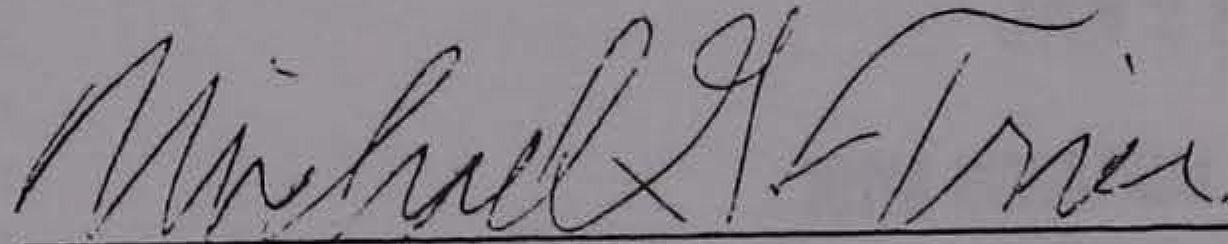
IT IS FURTHER ORDERED that all unpaid amounts which are accrued shall be paid in a lump sum together with interest pursuant to section 85.30.

IT IS FURTHER ORDERED that defendants shall pay the costs of this action as itemized in Claimant's Bill of Costs filed on July 6, 1987 with the cost of five and 00/100 dollars ($5.00) for medical records disallowed and with the expert witness fees for Drs. Dubansky and Shetter limited to one hundred fifty and 00/100 dollars ($150.00) each pursuant to Division of Industrial Services Rule 343-4.33. The net amount equals one thousand one hundred sixty-eight and 09/100 dollars ($1,168.09).

IT IS FURTHER ORDERED that defendants shall file Claim Activity Reports on the payment of this award as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

IT IS FURTHER ORDERED that this case be assigned for pre-hearing conference on claimant's claim for additional benefits under the fourth unnumbered paragraph of section 86.13.

Signed and filed this 9th day of February, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DEAN CREASY,	:	
Claimant,	:	
vs.	:	File No. 725325
PETERSON BUSINESS ACCOUNTING,	:	APPEAL
Employer,	:	DECISION
and	:	
AMERICAN MUTUAL INS. CO.,	:	
Insurance Carrier, Defendants.	:	

FILED
JAN 28 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision (erroneously captioned a review-reopening decision) awarding permanent partial disability for an additional 15% (75 weeks).

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 17; and defendants' exhibits A through K. Both parties filed briefs on appeal.

ISSUES

Claimant states the issues on appeal are whether the deputy erred in finding that claimant was not an odd-lot employee and whether the deputy erred in apportioning claimant's loss of earning capacity between his 1982 injury and his pre-1982 disability.

REVIEW OF EVIDENCE

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

Claimant injured his back in 1981 while employed in Colorado as a truck driver. On March 1, 1982 Cloyd L. Arford, M.D., performed a laminectomy at L4-L5, L5-S1 on the right side. On September 7, 1982 Dr. Arford opined that claimant had a permanent disability of five percent "as a working unit" and should avoid

bending and heavy lifting permanently.

Claimant moved to Iowa and began work for defendant employer, Peterson Business Accounting, on about August 1, 1982. On December 7, 1982 he slipped and fell on the ice outside his employer's home while picking up business records. He was hospitalized and returned to work driving a truck. On January 23, 1983, while working, he reported numbness in his legs and he was rehospitalized on January 31, 1983. A myelogram showed an extradural defect at L4,5. Mark Broderson, M.D., performed a laminectomy at that level. On September 30, 1983 Dr. Broderson opined that claimant had a permanent partial impairment of 20% of the body as a whole as regards his lower back problem. The doctor further opined that claimant could do occasional lifting, but not on a repetitive basis and that he should not do repetitive bending or twisting. He also stated that claimant was employable within his restrictions.

In summer 1983, the defendant insurer referred claimant to Crawford Rehabilitation Services (Crawford) for vocational rehabilitation assistance. On August 17, 1983 claimant was administered the career assessment inventory and general aptitude test battery (G.A.T.B.). Claimant's scores were interpreted as ranging in the average area with below average abilities noted in finger and manual dexterity portions of the test. Claimant's best scores were in verbal aptitude, numerical aptitude and general learning category. Several occupational areas suggested by the G.A.T.B. results included security services, quality control, materials control, production technology, general sales, hospitality services, and child and adult care. In the career assessment inventory, claimant's highest interest area was in the realistic realm indicating general areas of high interest as manual/skilled trades, agriculture, animal service, and high interest areas with mechanical/fixing, electronic, carpentry, and nature/outdoors. Crawford referred claimant to the Department of Public Instruction, Vocational Rehabilitation, where he was first seen November 8, 1983. A microcomputer evaluation and screening assessment (M.E.S.A.) was administered claimant. Claimant scored on the seventh grade level in respect to vocabulary and at a fourth grade level in respect to mathematics, spelling and reading ability. The evaluator felt claimant appeared below the necessary academic requirements to successfully complete a one- or two-year vocational training course. He indicated that claimant demonstrated below average visual memory ability as well as (below average) reasoning ability. The reporter noted that claimant demonstrated an interest in horticulture/agriculture, sports, maintenance and repairs, law enforcement, personal service or manufacturing occupations. Claimant also demonstrated a strong familiarity with the world of work in respect to getting and keeping a job as well as other work-related requirements and was noted to have excellent tool usage skills as well as work speed.

Crawford referred claimant to a number of potential job openings. A number of the jobs considered were in the Des Moines area or further from claimant's home and he testified that travel that far was not feasible for a part-time or minimum wage position. A vocational consultant with Crawford related that a variety of positions considered for claimant were otherwise filled before claimant was available for them. Records from Crawford and State Vocational Rehabilitation in evidence do suggest, however, that claimant was not always wholly motivated to work steadfastly towards his vocational rehabilitation. Claimant reported that while he could now work at certain minimum wage jobs, such as service station attendant, he would be required to pay child support if he did so and that, with transportation and living costs, he then would have no personal income. He admitted that there were jobs he could do.

APPLICABLE LAW

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

ANALYSIS

Defendants argue in their reply brief on appeal that the odd-lot doctrine was not raised at the hearing and, therefore, may not be argued as an issue now. The result of this decision renders this issue moot.

It appears that claimant cannot return to over-the-road trucking or heavy manual labor. He is also restricted from twisting and bending maneuvers. Claimant has been self-employed as a race car builder, a trucker and a service station owner-operator. He admitted that there were jobs he could do. There were positions available that he chose not to pursue. It is impossible for a defendant to force a claimant to work. A claimant's motivation and cooperation are of prime importance. That claimant has problems unrelated to his injury which effect the choices claimant makes, does not mean that defendants are responsible for greater liability. It appears that claimant is employable. Claimant has not presented evidence sufficient to shift the burden of proof, with respect to employability, to the employer. Claimant, therefore, cannot be considered an odd-lot employee. When all factors, including claimant's limited motivation, are considered, claimant has a permanent partial disability of 45% overall.

It is necessary to consider what portion, if any, of the overall disability resulted from his pre-injury condition. Although claimant argues otherwise, there is evidence on which to base such a decision. The record discloses claimant's age before his injury as well as his education. The record discloses the type of work he had been performing and any working restric-

tions. The record shows clearly that the deputy was not basing a decision on speculation, but on facts received into evidence. Dr. Arford opined claimant had a permanent partial impairment of five percent of the body as a whole from his Colorado injury, but claimant worked in Iowa at his earlier vocation of truck driving. His Iowa injury now precludes him from doing certain activities, such as driving a truck. The deputy correctly concluded "that 10 percent of claimant's current industrial disability results from his preexisting disability and not from his December 1982 work injury." The deputy further correctly concluded:

> Defendants, therefore, are liable for permanent partial disability benefits of 35 percent. Defendants have paid claimant permanent partial disability benefits of 20 percent for which they receive credit. Defendants, therefore, are liable for an additional 15 percent permanent partial disability benefits.

FINDINGS OF FACT

1. Claimant sustained an injury which arose out of and in the course of his employment on December 7, 1982 when he fell on ice outside his employer's home.

2. Claimant subsequently underwent back surgery in which extensive scarring was lysed from the nerve root, but in which no significant disc abnormality was found.

3. Claimant had sustained an injury in early 1982 after which he underwent two back surgeries. Disc bulging and disc herniation were found at the L4-L5 and L5-S1 levels.

4. Claimant had a permanent partial impairment of five percent of the body as a whole in September 1982.

5. Claimant had a permanent partial impairment of 20% of the body as a whole in September 1983.

6. Claimant returned to trucking after his 1982 surgeries and was able to continue working until his December 1982 injury and subsequent surgery.

7. Claimant is 47 years old and a high school graduate.

8. Claimant's academic abilities largely are at the fourth grade level.

9. Claimant has difficulty thinking abstractly. His ability to complete extensive vocational retraining is questionable.

10. Claimant is restricted from heavy lifting and bending. Claimant cannot return to trucking. Claimant has past experience as a self-employed small businessman.

11. Claimant is employable and is not an odd-lot employee.

12. Claimant is not well motivated to work.

13. Defendants have made extensive efforts to vocationally rehabilitate claimant.

14. Claimant's current efforts at vocational rehabilitation are ambiguous.

15. Claimant's overall loss of earning capacity may be proportioned between his December 1982 work injury and his previous back condition.

16. Claimant's overall loss of earning capacity is 45% of which 10% may be attributed to his pre-December 7, 1982 disability.

CONCLUSIONS OF LAW

Claimant has established that his injury of December 7, 1982 is the cause of the disability on which he now bases his claim.

Claimant is entitled to permanent partial disability resulting from his December 7, 1982 injury of 35%.

Defendants are entitled to credit for permanent partial disability of 20% already paid claimant.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant permanent partial disability for an additional seventy-five (75) weeks at a rate of one hundred ninety and 90/100 dollars ($190.90).

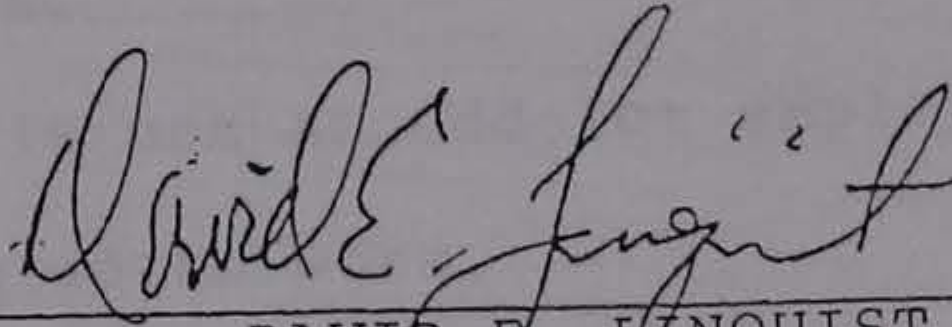
That defendants pay accrued amounts in a lump sum.

That defendants pay interest pursuant to section 85.30.

That defendants pay the costs of the arbitration proceeding and claimant pay the costs on appeal including the transcription of the hearing proceeding.

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 January, 1988.



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10. Claimant is restricted from heavy lifting and bending. Claimant cannot return to trucking. Claimant has past experience as a self-employed small businessman.

11. Claimant is employable and is not an odd-lot employee.

12. Claimant is not well motivated to work.

13. Defendants have made extensive efforts to vocationally rehabilitate claimant.

14. Claimant's current efforts at vocational rehabilitation are ambiguous.

15. Claimant's overall loss of earning capacity may be proportioned between his December 1982 work injury and his previous back condition.

16. Claimant's overall loss of earning capacity is 45% of which 10% may be attributed to his pre-December 7, 1982 disability.

CONCLUSIONS OF LAW

Claimant has established that his injury of December 7, 1982 is the cause of the disability on which he now bases his claim.

Claimant is entitled to permanent partial disability resulting from his December 7, 1982 injury of 35%.

Defendants are entitled to credit for permanent partial disability of 20% already paid claimant.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant permanent partial disability for an additional seventy-five (75) weeks at a rate of one hundred ninety and 90/100 dollars ($190.90).

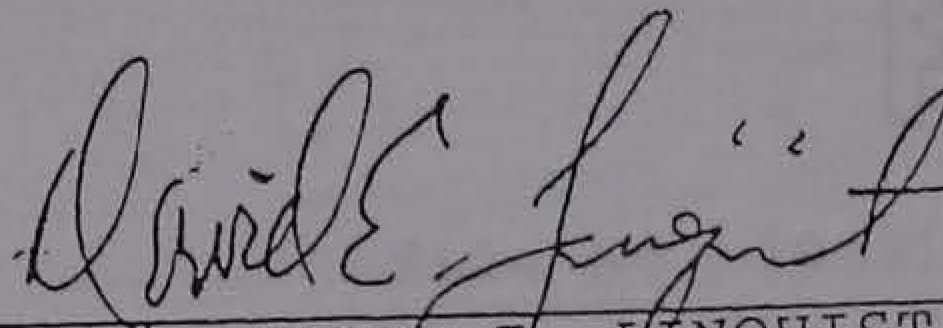
That defendants pay accrued amounts in a lump sum.

That defendants pay interest pursuant to section 85.30.

That defendants pay the costs of the arbitration proceeding and claimant pay the costs on appeal including the transcription of the hearing proceeding.

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 January, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILTON CROFT,	:	FILED
Claimant,	:	File No. 792717 JAN 27 1988
vs.	:	A P P E A L IOWA INDUSTRIAL COMMISSIONER
JOHN MORRELL & COMPANY,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision barring his claim because he failed to give his employer notice of his occupational disease.

The record on appeal consists of the transcript of the arbitration decision; claimant's exhibits 1 through 8; and defendant's exhibit A. Both parties filed briefs on appeal.

ISSUE

The issue raised on appeal is whether claimant's claim is barred because he failed to give his employer timely notice of his occupational disease.

REVIEW OF THE EVIDENCE

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

Claimant worked at defendant's plant where he was regularly exposed to steam from plant cleaning operations or condensation as warm hog carcasses hit the cool air on the kill floor. He testified that there was an oil mist in the plant as well as ammonia and hog odor in the winter. He reported that there had been several ammonia leaks in the plant after which workers were evacuated, but agreed that no medical treatment was ever sought following those leaks.

Claimant had seen R. P. Bose, M.D., for treatment of hypertension and heart trouble. Claimant, on his own volition, began seeing physicians at Fairmont Medical Clinic. Medical records

from Fairmont indicate that claimant was treated for anginal-like symptoms, heaviness of chest and shortness of breath on April 6, 1982. He was seen for similar breathing problems on April 19, 1982, May 3, 1982, and May 28, 1982. The office notes by Robert Lohr, M.D., made regarding the April 6, 1982 visit stated: "HE [sic] notes some heaviness in the chest and shortness of breath with a dry wheezy cough. It usually is relieved by rest and is exacerbated when he is at work where he works at Morell's [sic] in Estherville." Claimant was also seen by Dr. Lohr on October 1, 1982 and the doctor noted that his breathing had been quite good and that he uses an inhaler only occasionally. On December 7, 1982 the doctor again noted that his breathing had been good. On January 17, 1983 the doctor noted that he had had no shortness of breath. On July 15, 1983 a pre-employment physical screening was done because claimant had been laid off for 13 months and the doctor noted that his breathing had been good. Claimant noticed when he returned to work that the cough kept getting worse. In October of 1983 Dr. Lohr noticed that claimant's coughing seemed to be related to something he was exposed to at the plant. Medical records of November 14, 1983, November 12, 1984 and March 25, 1985 further indicate a connection between claimant's conditions and his employment.

The following is taken from the deposition of claimant (defendant's exhibit A) in response to questioning by defendant's lawyer:

> Q. Bill, what's-- If you're claiming that something at work has caused some of these problems, what's the reason you didn't file this action until May of 85 after you'd retired?
>
> A. Well, I'll tell you. When I went to see Ernie I'd put in for a job in Minnesota and if I-- And the things on that application-- There wasn't no job that paid any amount of money or anything. And the things that are on there-- It just asked you if you had any lungs and this and that and at that time I don't know, I'm not saying I was transferred, but I was even thinking about transferring, but that cough just had me wore out when the plant closed.
>
> Q. Well, I guess I still don't quite understand why you didn't. If you're alleging these problems started to occur two or three years ago why have you waited until this particular time to file your action?
>
> A. Well, can't give you exactly pinpoint of what you-- I mean why I didn't do it until--

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Q. At least why you-- why didn't you take a medical-- written medical excuse or explanation to John Morrell of some kind?

A. Well, they knew about it cause the nurses many a times wanted me to sit down for a minute or two until I get my breath. In fact she had to run up and get my proventilator for me at the drugstore for me.

Q. Okay. I understand that you had had some problems breathing, but is there any written medical report that indicates that the problems you've had breathing had anything to do with your working at John Morrell?

A. Well, I don't know how you'd really answer that.

The personnel and labor relations director for defendant testified that claimant never did give defendant a light-duty slip indicating he was unable to perform certain jobs. On September 21, 1983 claimant saw the defendant's plant nurse because of difficulty in breathing and she sent him to Fairmont Medical Center.

APPLICABLE LAW

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

ANALYSIS

Claimant argues on appeal that defendant was given notice of claimant's injury because the Fairmont Medical Clinic physicians are representatives of the defendant and that any knowledge of those physicians is attributable to the defendant. If an employer does not have actual knowledge of an employee's disability or death because of an occupational disease within 90 days the employee is required to give written notice to the employer within 90 days after the first distinct manifestation of the disease. See section 85A.18.

Claimant knew or should have known the seriousness of his breathing difficulties and probable compensable character of his disease on April 6, 1982. Breathing difficulties were treated three more times within seven weeks of that date. Shortly thereafter claimant was laid off for 13 months and his breathing problems subsided during that time. He returned to work in July 1983 and his difficulties resumed and continued to get worse. Other than the petition which initiated this action (filed May 2, 1985), claimant never gave the defendant written notice. The claimant initially began seeing the physicians at Fairmont when

he was dissatisfied with the treatment he received from Dr. Bose. The physicians at Fairmont were not representatives of the defendant. The knowledge of those physicians does not constitute actual knowledge of the defendant. Claimant failed to prove that Fairmont Medical Clinic had such a relationship with defendant as to make the knowledge of the clinic that of defendant. The earliest possible event that would demonstrate that defendant may have had actual knowledge of claimant's condition is when he visited the defendant's nurse on September 21, 1983. But, it is not even totally clear that at that time defendant knew claimant's problems were related to his work. Claimant's own testimony reveals that he knew he did not give defendant notice of his injury. Claimant's failure to inform his employer of his condition within 90 days of April 6, 1982 bars his claim.

FINDINGS OF FACT

1. Claimant's work environment contained hog odor, ammonia, temperature variations and steam in amounts greater than found in other occupations or in nonemployment life.

2. Claimant underwent pulmonary function studies of April 24, 1985 and May 15, 1984.

3. Studies of May 15, 1985 were significantly improved over those of April 24, 1985.

4. Claimant was working at the Morrell plant on April 24, 1985, but had ceased working as of May 15, 1985.

5. Claimant saw Fairmont Clinic physicians for breathing complaints on April 6, 1982.

6. Claimant related exasperation of his complaints to his work at Morrell at that time.

7. Claimant's symptoms remitted when he left work for layoffs and vacations.

8. Claimant has a history of pneumonia on several occasions over the last 20 years and was hospitalized for pneumonia in the late 1970's or early 1980's.

9. Claimant has had asthma attacks in the past.

10. Claimant has chronic obstructive pulmonary disease consisting of asthmatic bronchitis and central to smaller airway disorder with a history of temporary aggravation as a result of conditions in his work environment.

11. Claimant did not transfer, in part, because he felt he could no longer work in the packing plant environment on account

of his physical condition.

12. Claimant became actually incapacitated from performing his work on April 26, 1985.

13. Claimant filed his petition in arbitration on May 2, 1985.

14. Claimant's disease process first distinctively manifested itself on April 6, 1982.

15. Defendant did not have actual knowledge of claimant's condition within ninety days of that date nor reason to know of the condition within ninety days of that date.

16. A reasonable person of claimant's education and intelligence should have recognized the nature, seriousness and probable compensable character of his condition when he related to his Fairmont physicians on April 6, 1982 that work exasperated his problem.

CONCLUSIONS OF LAW

Claimant's claim is not barred by the applicable statute of limitations.

Claimant's claim is barred because claimant failed to give his employer notice of his occupational disease as required under section 85A.18.

WHEREFORE, the decision of the deputy is affirmed.

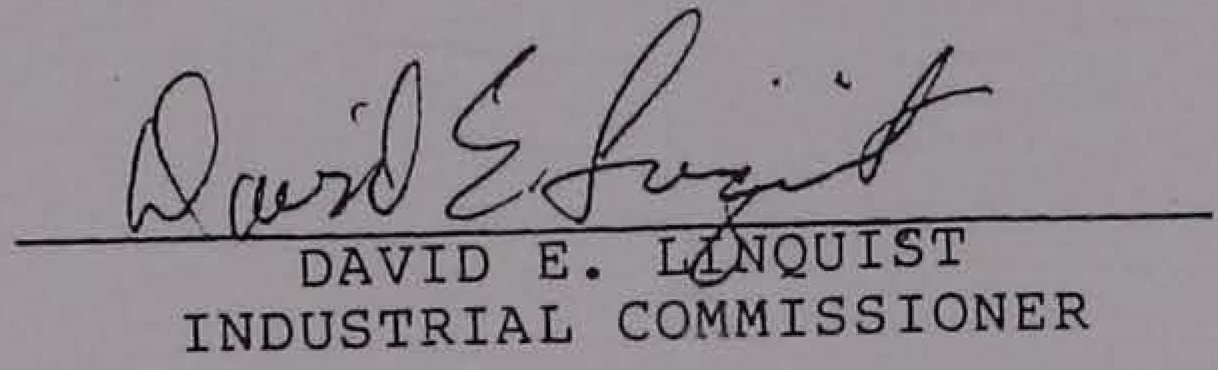
ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That claimant pay the costs of the arbitration proceeding as well as the costs on appeal including the transcription of the hearing proceeding.

Signed and filed this 27th day of January, 1988.



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3001
Filed January 26, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH L. CROUSE,	:	
Claimant,	:	
vs.	:	FILE NO. 844402
S & H TRANSPORTATION,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
CNA INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

3001

Applied agency precedent in calculating gross weekly earnings for an owner/operator truck driver which did not consider employee paid expenses.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KENNETH L. CROUSE,	:	
Claimant,	:	
vs.	:	FILE NO. 844402
S & H TRANSPORTATION,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
CNA INSURANCE CO.,	:	
Insurance Carrier, Defendants.	:	

FILED
JAN 26 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Kenneth L. Crouse, claimant, against S & H Transportation, employer (hereinafter referred to as S & H), and CNA Insurance Company, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on July 8, 1986. On December 11, 1987, a hearing was held on claimant's petition and the matter 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. According to the prehearing report, the parties have stipulated to the following matters:

1. On July 8, 1986, claimant received an injury which arose out of and in the course of his employment with S & H. (The independent contractor defense was waived at the time of hearing.)

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

3. Claimant is entitled to 22 weeks of permanent partial disability benefits for a 10 percent loss of use of a leg as a result of the work injury.

4. Claimant's entitlement to medical benefits is no longer in dispute.

5. At the time of the work injury claimant was married and entitled to two exemptions for purposes of determining rate of compensation.

6. No benefits have been paid.

ISSUES

The only factual issue presented by the parties for determination in this proceeding was the amount of claimant's gross weekly rate of compensation at the time of the work injury.

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. As will be the case in any attempted summarization, conclusions about what the evidence offered may show are inevitable. Such conclusions, if any, in the following summary should be considered as preliminary findings of fact.

Claimant is a truck driver and the owner and operator of a trucking entity called Kenneth Crouse Trucking. At the time of the work injury claimant owned two trucks. Claimant drove one of these trucks and employed his son to drive the other. In his trucking operation claimant leased his trucks to S & H under a written lease agreement, Exhibit 10. Under this agreement claimant was to use the leased trucks to haul, transport, unload and deliver freight at the direction of S & H. In consideration for such activity, claimant received a percentage of the gross monies received by S & H from customers for the loads handled by claimant and his drivers. Under the agreement claimant was required to pay his own expenses such as compensation to drivers, fuel and other expenses to maintain his trucks.

Each year of operation claimant treated his trucking operation for tax purposes as a sole proprietorship and filed a schedule C in his income tax returns to report his net profit and/or loss. In 1985, claimant's tax return revealed that claimant had gross receipts from his trucking operation of $250,690, expenses of $217,222 with a net profit of $33,468. In 1986, claimant's tax return indicates a gross of $179,652, expenses of $136,995 and a net income of $42,657.

Claimant testified that he pays his son a regular weekly amount and pays himself from $300 to $400 a week. Claimant testified that his draw amounts to roughly 30 percent of the

gross which represents approximately the amount left over after cash expenses. The amount of claimant's draw from the operation varied from week to week. The exhibits offered into the evidence indicate that over the 13 week period prior to the work injury claimant received under the lease contract with S & H a total sum of $24,519 or an average of $1,886.08 per week.

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

APPLICABLE LAW AND ANALYSIS

Defendants argue claimant's expenses to operate his trucking operation should be taken into account for purposes of calculating his rate of compensation for workers' compensation benefit purposes. Shortly before the hearing in this case, the industrial commissioner issued a decision which stated as follows in a case involving an injured owner/operator truck driver:

> The appropriate rate in this case is computed by utilizing claimant's gross average earnings of $995 per week for the 13 weeks prior to his injury. This figure is used despite the fact that claimant paid for maintenance and other expenses out of this weekly amount. The statutory scheme of rate calculation is specific and it was designed to ease the process of calculation. It would be an impossible task to determine rate if employee paid expenses were taken into account. Taking into account such expenses would lead to absurd results. For example, in this case, claimant would not be entitled to any rate of compensation despite the fact he was gainfully employed at the time of his injury as he had a net operating loss for tax year 1983. Sperry v. D & C Express, Inc., Appeal Decision, filed December 10, 1987.

This language is determinative of the issue in this case. It will be found that claimant's gross weekly earnings were $1,886.08. The amount of exemptions and marital status are not important as claimant has surpassed the gross amount to show entitlement to the maximum rate of compensation allowable for the injury under chapter 85. According to the commissioner's rate book schedule for an injury on July 8, 1986 published by this agency, the maximum rate of compensation for permanent partial disability benefits is $564.00 per week.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. On July 8, 1986, claimant was an owner/operator truck driver under a lease agreement with S & H wherein he received a percentage of the gross receipts received by S & H for loads delivered by claimant and his drivers. Under this arrangement, claimant was to assume the costs of the drivers, truck fuel, truck maintenance and other operating expenses.

3. In the 13 week period prior to July 8, 1986, claimant received from S & H the total sum of $24,519 or an average of $1,886.08 per week for the loads delivered by him and his drivers at the direction of S & H.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to weekly rate of compensation in the amount of $564.00.

ORDER

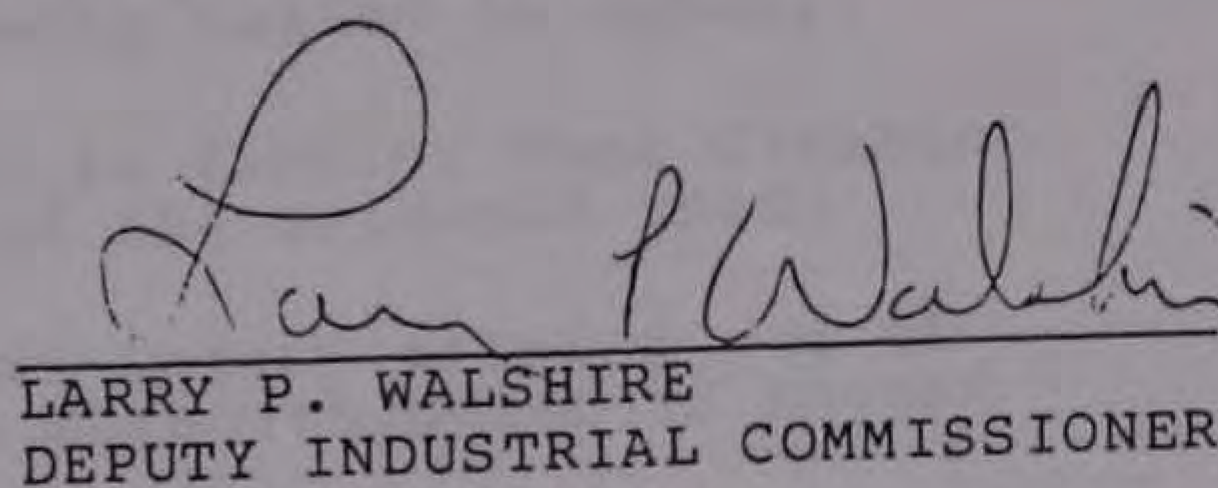
1. Defendants shall pay to claimant twenty-two (22) weeks of permanent partial disability benefits at the rate of five hundred sixty-four and no/100 dollars ($564.00) per week from July 8, 1986.

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

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

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

Signed and filed this 26th day of January, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES E. CROWLEY, Claimant,	:	File No. 760351
vs.	:	
MEREDITH/BURDA CORPORATION, Employer,	:	A P P E A L D E C I S I O N
and	:	
TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	

FILED
JUN 22 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an aribtration decision awarding permanent partial disability benefits based on a 60 percent impairment to the left foot.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 15 and defendants' exhibits A through S. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

Whether the Deputy erred in finding that Claimant proved by a preponderance of the evidence that:

1. Claimant sustained an injury arising out of his employment with Meredith/Burda in August in 1983; and,

2. Claimant sustained an injury in the course of his employment with Meredith/Burda in August of 1983.

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

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

ANALYSIS

Claimant's treating physicians, Doctors Fellows and Cunningham, agree that claimant's left foot impairment is related to his work injuries. Although Dr. Hertko opined that claimant's foot impairment was not the result of his work for defendant employer, his opinion is not consistent with the record as a whole. The mere fact that claimant has not controlled his diabetes adequately does not preclude his recovery. The greater weight of evidence establishes that claimant sustained a material aggravation of his preexisting condition.

FINDINGS OF FACT

1. Claimant has known that he was a diabetic since 1969.

2. Claimant has not maintained adequate control of his diabetes.

3. Claimant was wearing safety shoes at work on July 28-30, 1983.

4. On July 30, 1983, claimant developed blisters on his feet and on July 31, 1983 the blisters broke.

5. The blisters on the right foot healed, but the left foot required numerous surgeries.

6. Claimant's left foot condition was diagnosed as chronic draining osteomyelitis and neurotrophic ulcer.

7. Claimant sustained a stress fracture to the left foot while he was climbing at work as a result of the weakened condition of his foot.

8. Claimant suffers a 60 percent permanent impairment to the left foot as a result of the injuries he sustained at work on July 30, 1983.

9. Claimant's healing period ended on January 14, 1985.

10. Claimant's weekly rate of compensation is $342.14.

CONCLUSIONS OF LAW

Claimant established by a preponderance of the evidence that he sustained an injury that arose out of and in the course of

his employment with Meredith.

Claimant established by a preponderance of the evidence that there is a causal connection-between claimant's work-related injury and his asserted disability.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay healing period benefits from August 4, 1983 through September 7, 1983; from October 7, 1983 through June 6, 1984; and from July 23, 1984 through January 14, 1985, all at a weekly rate of three hundred forty-two and 14/100 dollars ($342.14).

That claimant is entitled to ninety (90) weeks of permanent partial disability benefits commencing on January 15, 1985, at a weekly rate of three hundred forty-two and 14/100 dollars ($342.14).

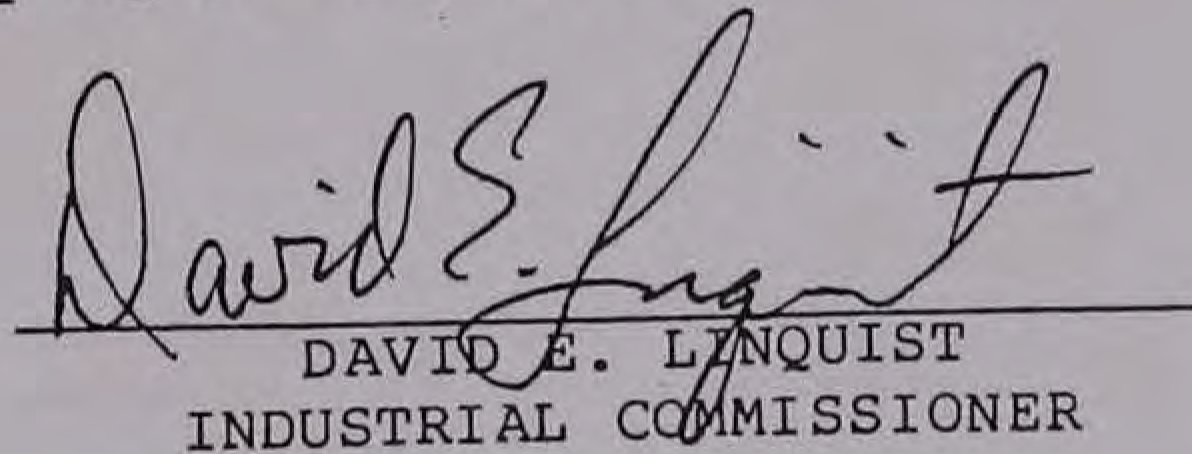
That defendants pay accrued benefits in a lump sum and pay interest pursuant to section 85.30, The Code.

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

That defendants pay the costs of this action including the cost of the transcription of the arbitration hearing pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 22nd day of June, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARY S. CUROE, RICHARD P. CUROE, Deceased,	:	
Claimant,	:	File No. 802807
vs.	:	
CLIFFORD PFAB,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	FILED
IMT INSURANCE COMPANY,	:	MAR 1 5 1988
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying death benefits. The record on appeal consists of the transcript of the arbitration proceeding, and joint exhibits 1 and 2. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issue on appeal: "The deputy commissioner erred in denying benefits in this case."

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on May 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 injury must both arise out of and be in the course of the employment. Crowe v. DeSoto Consol. Sch. Dist., 246, Iowa 402, 405-406, 68 N.W.2d 63 (1955). 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

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

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure, 188 N.W.2d 283, Musselman, 261 Iowa 352, 154 N.W.2d 128. It was stated in McClure, 188 N.W.2d 283 that, "'in the course of' the employment refers to time, place and circumstances of the injury....An injury occurs in the course of employment when it is within the period of employment at a place where the employee reasonably may be performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto."

Whenever an employee leaves the line of duty, compensation coverage ceases. Walker v. Speeder Mach. Corp., 213 Iowa 1134, 240 N.W. 725 (1932). However, to disqualify the employee from compensation coverage, the departure from the usual place of employment must amount to an abandonment of the employment or be an act wholly foreign to the usual work. Crowe, 246 Iowa 402, 68 N.W.2d 63. The mere fact that an employee happens to be a short distance removed from the actual situation of his work does not prevent recovery in a compensation proceeding. Bushing v. Iowa R. & L. Co., 208 Iowa 1010, 226 N.W. 719 (1929). If an employee deviates sufficiently from the line of duty so that his actions are foreign to the employer's line of work, injuries which occur to the employee may be outside the course of employment. Sheerin v. Holin Company, 380 N.W.2d 415 (Iowa 1986). In determining whether an employee was acting in the course of his employer's business, the question of whether the activity was to the benefit of the employer is a relevant factor. Briarcliff College v. Campolo, 360 N.W.2d 91 (Iowa 1984).

A worker whose duty includes painting a house, not the property of his employer, who is injured while attempting to extinguish a fire that threatens the house voluntarily assumes a risk not contemplated by his employment, and the injury would not arise out of and be in the course of his employment. Robert's Case, 284 Mass. 316, 187 N.E. 556 (1933).

ANALYSIS

To be compensable, Richard Curoe's heart attack must arise out of and in the course of his employment. If either requirement is not met, claimant cannot recover benefits.

Richard Curoe was working as a farm laborer at the time of his heart attack and death. His duties involved driving a

tractor across a field at the Gerald Brown farm. He was engaged in this activity when he observed a fire in an old shed. Curoe left the tractor and informed Mrs. Brown of the fire, then took steps to contain the fire. The record is undisputed that the fire posed no danger to Mrs. Brown or her children. It is also clear that, although a truck belonging to Curoe's employer was in the farmyard, it was not in danger from the fire. Thus, Curoe was not acting to save any person from the fire, or to save his employer's property from the fire.

Curoe's actions, although commendable from a humanitarian standpoint, were a deviation from his employment. Although certain emergency situations have been held to be an extension of the employee's employment, such as an emergency posing danger to a person or to the employer's property, no such extension exists for an emergency endangering a third party's property. 99 C.J.S. Worker's Compensation Sec. 257(2), pp. 889-890; 1A Larson, Workmen's Compensation Law §§ 28.00, 28.24 (1985).

The record does not show that Curoe was excited when he informed Mrs. Brown of the fire, nor did it show that he exhibited any signs that he had run from the tractor to the farmhouse. At that point in time, Curoe would have known that neither persons in the house, or the truck belonging to his employer, were in any danger from the fire. The testimony of Mrs. Brown that she and the deceased joked about the fire indicates that Curoe was aware of the lack of immediate danger. When Curoe left his tractor to warn Mrs. Brown of the fire, and then elected to undertake containment actions after it became clear only the property of the third party was threatened by the fire, he deviated from his employment with defendant employer. His heart attack was not an injury in the course of his employment.

Although this determination that Curoe's heart attack was not in the course of his employment is dispositive of the claim, the question of whether his heart attack and death arose out of his employment will also be addressed. To arise out of the employment, there must be a causal connection between the injury and the employment. Here, it must be shown that Curoe's heart attack was causally connected to the employment.

Even if it is assumed that Curoe was acting in the course of his employment at the time he warned Mrs. Brown of the fire and took steps to keep the fire from spreading to the house, there is no showing in the record that his heart attack was caused by that activity. There is no expert testimony by way of a physician's opinion on any connection between the heart attack and the events surrounding it. There are no medical reports, other than the death certificate, listing the heart attack as the cause of death. The only testimony in this regard is that of the decedent's wife, a registered nurse, opining that the fire and the excitement

caused by it could have caused her husband's heart attack. Initially, it is noted that this opinion is that of the claimant herself, and must be viewed as self serving. Secondly, it is the opinion of a registered nurse, not that of a physician, and as such is not competent as medical evidence on causation. Finally, Mrs. Brown, a registered nurse trained in recognizing and treating heart attack patients in emergency situations and who witnessed decedant's attack, stated that Curoe did not show any visible signs of being excited or under stress, such as being out of breath, sweating, etc. prior to his attack. Taken as a whole, the record is devoid of any competent evidence establishing a causal connection between Curoe's heart attack and his employment. Claimant has failed to show that Richard Curoe's subsequent death arose out of his employment.

FINDINGS OF FACT

1. Richard Curoe was employed by Clifford Pfab as a farm worker on May 8, 1985.

2. Richard Curoe left the site of his work in a farm field to aid in the containment of a fire on the farm of Gerald Brown on May 8, 1985.

3. Richard Curoe died as a result of a heart attack on May 8, 1985.

4. Richard Curoe was not an employee of Gerald Brown.

5. The fire on the Gerald Brown farm on May 8, 1985 did not pose a threat to human life.

6. The fire on the Gerald Brown farm on May 8, 1985 did not pose a threat to any property of Richard Curoe's employer.

7. Richard Curoe was not performing any of his job duties when he had his heart attack on May 8, 1985.

8. Richard Curoe was not on the location of his job at the time of his heart attack on May 8, 1985.

9. Richard Curoe was not acting in the course of his employment at the time of his heart attack and death on May 8, 1985.

10. Richard Curoe's heart attack on May 8, 1985 and his death therefrom did not arise out of his employment.

CONCLUSIONS OF LAW

Claimant has failed to prove by a preponderance of the

evidence that Richard Curoe suffered an injury that arose out of and was in the course of his employment when he suffered a heart attack and died on May 8, 1985.

WHEREFORE, the decision of the deputy is modified.

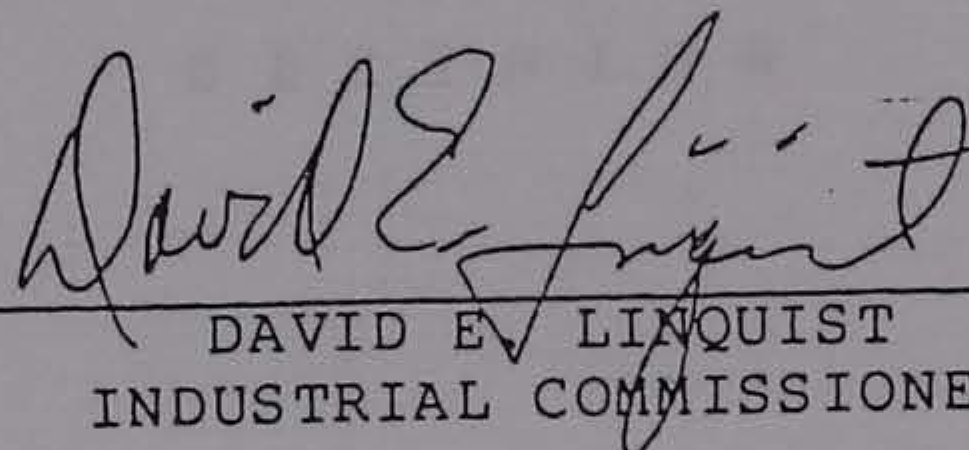
ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from these proceedings.

That claimant is to pay the costs of this action.

Signed and filed this 15th day of March, 1988.



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2203; 1803
Filed June 17, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRED CURRY, Claimant, vs. IOWA ASBESTOS COMPANY, Employer, and EMPLOYERS MUTUAL COMPANIES, AND IOWA CONTRACTORS WORKERS' COMPENSATION GROUP, Insurance Carriers, Defendants.	:	FILE NO. 728713 A R B I T R A T I O N D E C I S I O N

2203; 1803

Claimant was found to have shown that he suffers from asbestosis as a result of his occupational exposure to asbestos over the last 30 years. However, claimant failed to demonstrate that the asbestosis condition has progressed to the point of disablement. However, claimant was awarded annual physical examinations at a major medical center to monitor the disease process. It was noted as a matter of specialization agency expertise that asbestosis can be a progressive disease.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRED CURRY, Claimant, vs. IOWA ASBESTOS COMPANY, Employer, and EMPLOYERS MUTUAL COMPANIES, AND IOWA CONTRACTORS WORKERS' COMPENSATION GROUP, Insurance Carriers, Defendants.	:	FILE NO. 728713 A R B I T R A T I O N D E C I S I O N FILED JUN 17 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Fred Curry, claimant, against Iowa Asbestos Company, employer (herein after referred to as Iowa Asbestos), and Iowa Contractors Workers' Compensation Group and Employers Mutual Companies, insurance carriers, for workers' compensation benefits as a result of an alleged occupational disease of asbestosis. On March 28, 1988, 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 witness: Dana Kever and Jack Copic. The exhibits received into the evidence at the hearing are listed in the prehearing report.

Taken under advisement at hearing was a request by claimant to take official notice of the Appendix I, parts II and III of the Iowa Occupational Safety and Health Standards for the construction industry (29CFR 1926 as adopted by Iowa Administrative Rule 530-10 (88) of the Iowa Administrative Code). Defendants object on the basis of the proposition that OSHA rules are not to affect employer liabilities. Iowa Code sections 88.20, Lunde v. Winnebago Industries, Inc., 299 N.W.2d 473 (Iowa 1973). Defendants cite OSHA rules that Appendix I is for informational

purposes only. The claimant did not state the exact purpose for offering this appendix into the evidence. No expert issuing a report in this case refers to such an appendix. Official notice will not be taken of Appendix I.

ISSUES

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

I. Whether claimant suffers an occupational disease as defined in Chapter 85A.8 of the Iowa Code;

II. Whether there is a causal relationship between the disease and the claimed disablement;

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

IV. The extent of claimant's entitlement to medical benefits under Iowa Code sections 85A.5 and 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. As will be the case in any attempted summarization, conclusions about what the evidence offered may show are inevitable. Such conclusions, if any, in the following summary should be considered as preliminary findings of fact.

The claimant, Fred R. Curry, testified at the hearing that he is a 58 year old man with an eighth grade education. He has been working in the insulation industry since approximately 1953 and began working with asbestos at that time. The claimant testified that beginning in the 1950's his main job was to block boilers which involved taking large sheets of asbestos insulation and molding them to fit the boiler. This work was done by pounding the asbestos sheets to conform them to the shape of the boiler. Claimant also testified that he would grind asbestos with a grinder to make a powder form of asbestos which was used in asbestos mud or joint compound. In these early years he was also sometimes involved in removal of asbestos and in application of asbestos insulation to pipes which involved cutting and molding asbestos insulation to fit to the pipes and pounding wires into the insulation to hold it onto the pipes. At no time during his work in the insulation industry, did he wear any form of respiratory protective apparatus although after 1982, he occasionally wore a paper face mask. Testimony and exhibits

entered at the hearing indicated that the claimant was employed at a number of different insulation companies, including some out-of-town work in the early part of his career. The claimant was a member of Local 74, the insulation workers' union. Although the claimant testified that Iowa Asbestos Company was his major employer from 1972 through 1982, testimony and exhibits indicate that the claimant also worked intermittently during that time for ICM Insulation Limited, and L & L Insulation.

The claimant testified that the last job he worked on for Iowa Asbestos Company was a remodel of the Banker's Life building in downtown Des Moines. The claimant testified that the job started in November or December of 1981, and he worked on it off and on until June, 1982, when he was laid off by Iowa Asbestos following completion of that job. The claimant testified that during this period of employment at Iowa Asbestos Company, he was not involved in removal or encapsulation crews handling asbestos insulation. He said that he reinsulated existing pipes and duct work by tying in new fiberglass insulation to existing asbestos insulation. The claimant testified that in tie-ins on old asbestos he would bring new fiberglass insulation on new pipes up to points in old pipes which were covered by asbestos insulation and tie-in and wrap the fiberglass insulation so that it met and was sealed onto existing asbestos insulation. The claimant testified that this tie-in work did not involve cutting, pounding, grinding, or otherwise disturbing the existing asbestos insulation.

Claimant further testified that he also performed patching work on the Banker's Life job which involved patching the holes, cut into air ducts and vacuuming out the ducts. These ducts were insulated with asbestos. Finally, claimant stated that all of his work was performed in areas where asbestos existed and that asbestos was airborn in these areas. Claimant said that a fibrous white dust was visible in these areas and from his years of experience, he identified the dust as asbestos. Claimant said that although he was temporarily assigned to other projects, he worked at least 60 days on the Bankers Life Project during his last period of employment with Iowa Asbestos.

The claimant also testified that prior to the Banker's Life job, he worked on the Meredith remodeling job for Iowa Asbestos on and off over one and a half years, but such work totalled at least 60 days. Claimant stated that he was similarly exposed to asbestos in the Meredith job from his reinsulation work and the breathing of asbestos dust in the air at the job site.

The claimant testified that on December 5, 1982, he traveled to Omaha with a group of other union Local 74 members for a medical examination arranged by the union. This examination was apparently done under the direction of Dr. Irving J. Selikoff, M.D., of the Environmental Sciences Laboratory, The Mount Sinai

Medical Center, and included chest x-rays and pulmonary function tests. In a letter report dated July 29, 1983, Dr. Selikoff reviewed the results of Mr. Curry's December 5, 1982 exam in Omaha and noted that "...[W]hile your chest x-ray did show scarring of the sort we commonly find following asbestos insulation, consistent with the diagnosis of asbestosis....[T]his was not accompanied by any of the very serious problems that we occasionally encounter, that would give us immediate concern." Dr. Selikoff also noted that the results of Mr. Curry's pulmonary function tests were all well within normal limits and that all other tests performed were normal.

Claimant's personal physician, Dr. Walter B. Eidbo, M.D., a general practitioner, in a letter report dated January 15, 1985, stated that based on chest x-ray findings he diagnosed asbestosis with associated emphysema. Dr. Eidbo opined that the claimant is functionally impaired in that he has weakness and shortness of breath. Dr. Eidbo also indicated that the claimant has a 10 percent to 20 percent disability associated with his asbestos and associated emphysema. The doctor's notes also indicate that the claimant has generalized arthritis and pain and discomfort in his joints associated with arthritis and a history of insomnia dating back to the 1970's.

The claimant was also seen by Dr. Greg Hicklin, a pulmonary specialist on March 11, 1986, who confirmed a diagnosis of asbestos. In a letter report on that date, Dr. Hicklin noted that pulmonary function tests performed on the claimant were normal and that chest changes seen on x-rays were physiologically insignificant at the current time. Dr. Hicklin stated that based on the claimant's current pulmonary function tests, he would expect the claimant to be able to pursue any occupation or activity although Dr. Hicklin would recommend that the claimant avoid further exposure to asbestos by wearing protective equipment and clothing should he be further exposed to asbestos.

Claimant testified that since June, 1982, he has not returned to work in asbestos areas upon the advice of his family physician, Dr. Eidbo. He has only worked on new construction, not involving asbestos since June, 1982. Claimant has been laid off for a number of years from his insulation work. Claimant admitted that the insulation business is in an economic slump.

Defense witnesses, Dana Kever and Jack Copic, testified that the number of full time employees at Iowa Asbestos has declined since claimant's lay off. However, as demonstrated by claimant in cross-examination, much of the business is now performed by non-union insulating companies, one of which is a subsidary of the parent corporation which also owns Iowa Asbestos.

Claimant testified that he cannot return to any insulating work due to fatigue, a feeling of weakness and shortness of

breath due to his asbestosis. He stated that he "supposed" the reasons for his not being called back to Iowa Asbestos is his physical limitations. In either 1984 or 1985, claimant began working for a greenhouse performing work such as picking up supplies, making deliveries and moving flowers and pots around at the rate of $5.50 to $6.00 per hour as opposed to his $16.00 to $17.00 per hour wages as an asbestos worker. Claimant is currently laid off from his greenhouse work and that "he heard" that he was replaced by two minimum wage workers. Claimant is unemployed at present. Claimant said that he desires treatment for his asbestosis.

Medical records indicate that claimant has a history of arthritis, insomina, and nervousness or anxiety. Claimant takes medication for his insomina and nerves. Claimant said that he feels his arthritis is due to the asbestos exposure.

Kever, the controller of Iowa Asbestos testified that Iowa Contractors Workers' Compensation Group was the insurer for Iowa Asbestos from January 1, 1980 through December 31, 1984 and Liberty Mutual Insurance Company has been the insurer since January 1, 1985. Kever also testified that claimant last worked for Iowa Asbestos on August 24, 1982.

From his demeanor, claimant appeared to be testifying truthfully.

APPLICABLE LAW AND ANALYSIS

Iowa workers' compensation law distinguishes workers' injuries from occupational diseases. Iowa Code section 85A.8 states as follows:

> Occupational diseases shall be only those diseases which arise out of and in the course of the employee's employment. Such diseases shall have a direct causal connection with the employment and must have followed as a natural incident thereto from injurious exposure occasioned by the nature of the employment. Such disease must be incidental to the character of the business, occupation or process in which the employee was employed and not independent of the employment. Such disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have resulted from that source as an incident and rational consequence. A disease which follows from a hazard to which an employee has or would have been equally exposed outside of said occupation is not compensable as an occupational disease.

In further explanation of the distinction between work injuries and occupational diseases, the Iowa Supreme Court in McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980 at page 190) states as follows:

> ...[To] prove causation of an occupational disease, the claimant need only meet the two basic requirements imposed by the statutory definition of occupational disease, given in section 85A.8. First, the disease must be causally related to the exposure to harmful conditions of the field of employment.... Secondly, those harmful conditions must be more prevalent in the employment concerned than in everyday life or in other occupations....

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

In the case sub judice, claimant has clearly shown that his employment as an asbestos worker since December, 1953, subjected him to exposure to asbestos dust which is more prevalent in his job than elsewhere. All of the physicians in this case have diagnosed that claimant has a condition of asbestos from such exposure. The evidence is clear that he worked with asbestos, five out of the last ten years of his employment as an asbestos worker. Therefore, the negative presumption of 85A.13 is not applicable.

Also, the limited presumption that his exposure at Iowa Asbestos was a cause of this condition contained in Iowa Code section 85A.10 can be invoked in this case. The Iowa Supreme Court states as follows in applying this code section:

> To overcome this problem of proving causation in the occupational disease context, chapter 85A identifies the employer who shall be held accountable. Section 85A.10 imposes liability upon the last employer in whose employment the claimant was injuriously exposed to the hazardous condition of employment. It does not require that the claimant prove that his disease was actually caused by that exposure. Rather, we believe it is sufficient that he show that the hazardous employment condition which at some time caused his disease existed to the extent necessary to possibly cause the disease at his last employer's place of employment. McSpadden at 188.

The McSpadden court, however, noted an additional burden to invoke this presumption of causal connection upon the last specific employer. Claimant must show that he was exposed to asbestos for at least 60 days during his employment with the last employer he wishes to excess with liability for his occupational disease. Claimant argues for application of the amended version of Iowa Code section 85A.10 which removes the 60 day requirement. However, defendants are correct in their brief arguement that the amendment is not applicable to this case as claimant filed his petition prior to July 1, 1986, the effective date of the amendment. However, in this case, the preponderance of the evidence consisting primarily of claimant's uncontroverted and credible testimony established that he was last exposed to visable asbestos dust for a period of at least 60 days at Iowa Asbestos. After 30 years of experience in working with asbestos, claimant should be in a position to distinguish asbestos from other substances that might appear at a construction site. Defendants do not contend that asbestos was not present in the areas in which claimant worked. Claimant's physicians do not limit their causation views to any particular period of exposure and certainly, visible dust is sufficient exposure in any event.

Defendants contend that claimant must show exposure for a period of 60 consecutive days. Such a rule would be too onerous of a burden to place upon an injured worker especially in the construction field. Given the nature of claimant's insulation jobs, moving from one project to another is routine. Applying a 60 consecutive day rule would be difficult and could result in absurd results. This question is a matter of first impression with this agency. The Supreme Court has repeatedly held that the workers' compensation statute is to be liberally construed in favor of the worker due to its humanitarian purposes.

Beier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983).

Claimant, on the other hand, has not shown that his occupational disease has resulted in disablement. Disablement is defined under Iowa Code section 85A.4 as follows:

> Disablement as that term is used in this chapter is the event or condition where an employee becomes actually incapacitated from performing the employee's 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.

The medical evidence is conflicting as to whether claimant has functional impairment as a result of his asbestos condition. Pulmonary specialists, Dr. Selikoff in 1982 and Dr. Hicklin in 1986, found normal pulmonary function and no significant physical or mental impairment. Only Dr. Eidbo, claimant's family physician, whose past experience and training in the area of pulmonary medicine is unknown, opines that claimant has a loss of physical impairment and shortness of breath from his asbestosis. Claimant simply has failed to show by a preponderance of the evidence a permanent physical or mental impairment. Although claimant's testimony appeared credible, claimant's personal opinions as to what he may think are the cause of his problems and the single report from Dr. Eidbo does not outweigh the clear opinions of the pulmonary specialists.

According to the McSpadden court, a failure to show functional impairment does not prohibit a finding of loss of earning capacity. Claimant has shown that he cannot return to work where asbestos dust is present upon the orders of Dr. Eidbo. A similar recommendation against exposure to asbestos was given by Dr. Hicklin. However, the use of asbestos for new construction has been prohibited according to the evidence in this case. Claimant admits to working as an insulator on new construction projects after June, 1982, but was laid off for economic reasons, not due to his asbestos condition. According to defendants' evidence the amount of allowable asbestos dust in a work environment without use of protective equipment has been severely lowered under current OSHA standards. Claimant has failed to demonstrate whether Dr. Eidbo or Dr. Hicklin would allow asbestos work under these lowered standards or with use of protective equipment. Therefore, claimant has failed to show any economic loss or loss of any employment opportunity as a result of his occupational disease.

Despite a failure of claimant to show entitlement to weekly benefits for disablement caused by his occupational disease, claimant is entitled to life time medical benefits for this

condition under Iowa Code section 85A.5. This section states, in part, as follows:

> If, however, an employee incurs an occupational disease for which the employee would be entitled to receive compensation if the employee were disabled as provided herein, but is able to continue in employment and requires medical treatment for said disease, then the employee shall receive reasonable medical services therefor.

There may be some question as to what, if any, treatment is needed. Certainly Dr. Eidbo and claimant feel that there is some need. It is the specialized experience of this agency that asbestosis may be a progressive disease. Therefore, claimant will be directed to provide at claimant's request yearly evaluations beginning this year by a pulmonary care department of a major medical center such as the University of Iowa Hospitals and Clinics. Defendants shall provide such care as deemed necessary from such evaluations.

The claim for penalty benefits is denied as claimant has failed to show entitlement to any weekly disability benefits. Penalty benefits are not applicable to a failure to pay medical benefits. Klein v. Furnas Elec. Co., 384 N.W.2d 370, 375 (Iowa 1986).

FINDINGS OF FACT

1. Claimant was a credible witness.

2. Between December, 1952 and June 1982, claimant suffered an occupational disease known as asbestosis from exposure to asbestos dust for at least five out of the last ten years before June, 1982. Claimant's last 60 day exposure to asbestos dust visible to the naked eye was while working for Iowa Asbestos.

3. It could not be found that claimant's ongoing asbestosis condition is a cause of a permanent functional impairment or an inability to receive equal wages in comparable insulation construction work.

4. The condition of asbestosis may be progressive and reasonable treatment of this condition requires periodic physical examinations in the future to monitor the disease process.

CONCLUSIONS OF LAW

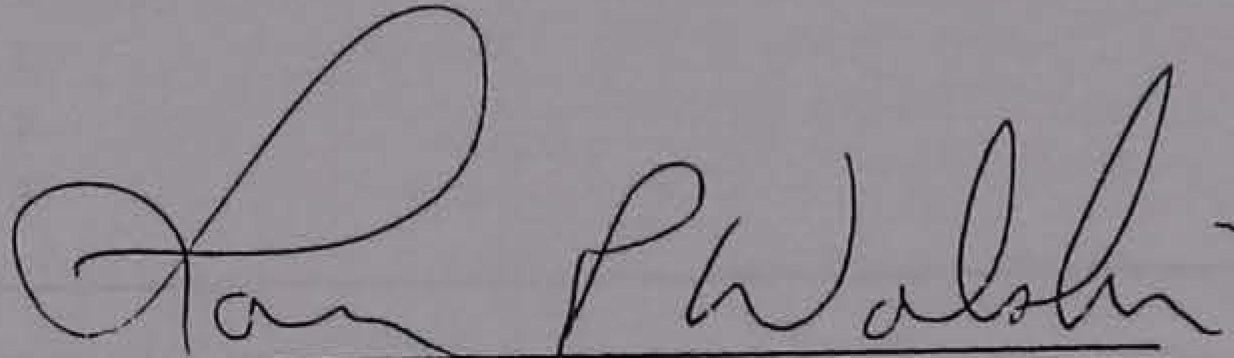
Claimant has established by a preponderance of the evidence entitlement to the medical benefits awarded below.

ORDER

1. Defendants shall provide, without cost to claimant, medical evaluations annually or more or less frequently as may be medically determined of his asbestosis condition at a major medical center such as the University of Iowa Hospitals and Clinics Pulmonary Care Department or comparable institution and shall provide such care and treatment at defendants' expense as recommended by the evaluating center. The first examination evaluation shall take place within ninety (90) days upon claimant's request for such an evaluation subsequent to this award.

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

Signed and filed this 17 day of June, 1988.



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FILED
MAR 9 1988
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOYCE D'OSTILIO, Claimant, vs. FEDERAL RESERVE BANK, Employer, and THE HARTFORD INSURANCE GROUP, Insurance Carrier, Defendants.	File No. 753117 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 brought by Joyce D'Ostilio against Federal Reserve Bank, employer, and The Hartford Insurance Group, its insurance carrier. Claimant seeks further benefits as a result of the injury that she sustained on January 29, 1982 which arose out of and in the course of her employment.

The case was heard and fully submitted at Des Moines, Iowa on August 6, 1987.

The record in this proceeding consists of testimony from Joyce D'Ostilio, Kim Rhoads and Bil Cooper. Joint exhibits 1 through 20 were received into evidence.

ISSUES

The issues presented by the parties for determination are whether the injury of January 29, 1982, which the employer admitted, was a proximate cause of the permanent disability with which claimant is afflicted; the extent of claimant's entitlement to compensation for healing period; determination of claimant's entitlement to compensation for permanent disability; and, assessment of costs. In particular, claimant urges that she is permanently and totally disabled and relies upon the odd-lot doctrine. Defendants, at the time of hearing, sought credit for the amount of claimant's salary that had been paid in addition to workers' compensation benefits, but in their posthearing brief, defendants acknowledged that they were not entitled to

any credit for the excess. (Division of Industrial Services Rule 343-8.4). Claimant had sought additional compensation under the fourth unnumbered paragraph of Iowa Code section 86.13, but that claim was waived at the time of hearing.

The parties stipulated that claimant's rate of compensation is $169.68 per week, that benefits had been paid as set forth in exhibit 19, which was received into evidence, and that the days claimant was absent from work were as set forth in an attachment to the pre-hearing report.

SUMMARY OF EVIDENCE

The following is a summary of evidence presented in this case. Only the evidence most pertinent to this decision is discussed, but all of the evidence received at the hearing was considered in arriving at this decision. Conclusions about what the evidence offered may show are inevitable with any summarization. The conclusions in the following summary should be considered to be preliminary findings of fact. In the post-hearing filings made by the parties, each party included a summary of the evidence. Those summaries were both quite accurate and fairly summarize the pertinent evidence in the case. The summarization by claimant is used as a basis for the following statements, with some modifications as were deemed appropriate by the undersigned.

Claimant testified that she was 49 years old at the time of hearing. She resides at 902 SE Diehl, Des Moines, Iowa. Claimant has been married for over 30 years to Patrick W. D'Ostilio, a city of Des Moines police officer. Their two children are now grown and no longer reside in the family home. Mr. D'Ostilio will be eligible for retirement in about three years. Claimant stated she and her husband then plan to move their residence to a "place where it is warm."

Claimant graduated from Roosevelt High School in 1955. She has had no further education or vocational training. Following high school, claimant worked for the phone company for approximately two years; Central National Bank for five years; and, Valley National Bank for one year. All of these employment positions were clerical in nature. From 1966 until 1972 she remained at home with her children as a housewife. Claimant returned to employment in 1972. Initially, she worked in a restaurant as a waitress and cashier. Later in 1972, she gained a position with the defendant, Federal Reserve Bank. Initially, her duties were limited to clerical typing and filing, but as she gradually gained experience, her employment positions entailed more responsibility and bookkeeping work. At the time of her injury in January, 1982, she worked in "check adjustment" receiving "blocks" of tapes from commercial banks, reviewing and researching the tapes, and trying to solve whatever bookkeeping problem the

banks had. Claimant testified that, while employed by the Federal Reserve Bank, she worked 40 hours per week and, at the time of injury, was receiving an annual salary of $13,771.00. Her job title at the time of injury was that of a "senior difference clerk." Claimant's duties included preparation of routine correspondence, carrying blocks of checks, reviewing lists of figures for errors, movement of small file trays and computer tapes, and other various clerical duties which included both working at a desk as well as a lesser amount of walking and climbing. Claimant testified that she enjoyed her job duties with the Federal Reserve Bank and received above average performance ratings throughout the course of her employment. This testimony is confirmed by exhibits 12 and 14, both of which refer to above average performance ratings and an essentially perfect attendance record prior to the January 29, 1982 work incident.

Claimant testified that, on January 29, 1982, (a Friday), while walking to her car in a parking lot maintained by the Federal Reserve Bank, she slipped on an icy surface with her feet going out from under her. She fell to the parking lot surface on her buttocks and hands. Claimant, not believing herself to be seriously injured, went home, but, over the course of the weekend, noticed that she began to feel poorly. The following Monday, February 1, 1982, claimant reported the fall to her employer, but continued working (exhibit 13). Claimant's condition did not improve whereupon she was referred to the company physician, Mangil G. Seo, M.D. Claimant first saw Dr. Seo on February 8, 1982 (exhibit 1). Dr. Seo treated claimant in a conservative fashion prescribing medication, heat, ultrasound and massage. He instructed claimant to stay off work. One week later, she again saw Dr. Seo who changed her medication and kept her off work. Dr. Seo saw claimant on February 22, 1982, at which time claimant indicated that she was feeling better, but that she was still experiencing pain at the center of her neck. Dr. Seo was of the opinion that she had suffered a myofascial strain of the neck. Claimant was authorized to return to her preinjury employment duties on February 23, 1982 (exhibit 1).

Claimant returned to and continued to perform her occupational duties for approximately two months. On April 28, 1982, she was examined by Dr. Seo who noted that her pain was persisting both in her neck and right arm along with tingling and numbness of the right fourth and fifth fingers. The aspirin she was taking for pain was giving her stomach problems. On May 7, Dr. Seo examined claimant noting pain intensification. He admitted her to Mercy Hospital Medical Center in Des Moines, Iowa for purposes of administering physical therapy.

On May 8, 1982, a consultation with John T. Bakody, M.D., a board-certified neurosurgeon, was arranged by Dr. Seo. Dr. Bakody was initially of the impression that claimant was suffering from traumatic spinal syndrome and suggested intensive physical

therapy and the administration of medication [exhibit 2(b)]. The physical therapy was performed without lasting benefit [exhibit 2(i)]. On May 18, 1982, a cervical myelogram was carried out which showed an anterior indentation of the dye column at the C5-6 interspace [exhibit 2(i)]. On May 21, 1982, Dr. Bakody carried out an anterior cervical interbody fusion at the C5-6 interspace [exhibit 2(f), 2(i)]. Postoperatively, claimant improved with regard to her discomfort, her wounds healed well and, upon x-ray, the cervical spine showed good position and alignment of the fusion mass [exhibit 2(i)]. Claimant was allowed to return home on May 27, 1982 with a prescription of Tylenol #3 for pain as needed [exhibit 2(i)].

Claimant continued to follow up with Dr. Bakody as a patient through the months of June and July. Cervical x-rays again showed excellent positioning of the fusion body although claimant was experiencing discomfort with activity and also was suffering from reduced range of motion of the head and neck [exhibit 2(a)]. Dr. Bakody recommended return to half-time duties beginning August 23, 1982 [exhibit 2(a), 2(k)].

Claimant testified that she felt she was ready to return to work and did so on a half-time basis beginning August 23, 1982, working approximately four hours per day. On September 10, 1982, she again saw Dr. Bakody. Claimant reported that she was continuing to suffer a lot of pain. Her prescription for Tylenol #3 was renewed and Dolobid and Elavil were also prescribed [exhibit 2(a)]. On October 12, 1982, claimant was examined by Dr. Bakody and related that "she was feeling a lot better" (exhibit 18(d), page 9). After discussion with Dr. Bakody, it was agreed that she could try full-time work, which she did on October 15, 1982 (exhibit 13). Dr. Bakody related, in reference to claimant's return to full-time duties in October, 1982:

> I think you could consider recovery, work return, at that time, at least, representing a maximum recovery but not knowing, again, what the future will bring. (Exhibit 18(d), page 12).

Claimant testified that she did in fact return to her preinjury employment duties on or about the October 15, 1982 date and continued with these duties until approximately December 13, 1983. In the interim, she testified to having experienced a lot of pain in her neck, arms and head. Exhibit 15 sets forth in part the prescription medications that she was taking during this interim. In addition to the Dolobid, Tylenol #3 and Elavil, claimant testified to taking lots of aspirin during this time frame. Claimant testified that the pulling of drawers and the hanging of her head over her work area were two particular factors that seemed to aggravate the discomfort in her neck, arms and head.

Dr. Bakody's office notes [exhibit 2(a)] also set out both the quantity of pain medication that was being prescribed and her reports of discomfort. At the time of claimant's July 13, 1983 examination, the doctor resumed claimant's Dolobid and Elavil, which apparently had been either reduced or discontinued during January of 1983.

Claimant testified that, on or about December 13, 1983, the pain became so intense that it was to the point of becoming disabling. She testified that she could not function. She missed work on December 13, 14, 15, 16, 23 and 30. On December 19, claimant consulted with Dr. Bakody reporting her distress. Upon examination, Dr. Bakody found limitation in rotational movements of claimant's head and neck, but neurological findings were normal. He advised continuing her medications and ordered her to report for physical therapy (exhibit 18(d), page 15). He also ordered electromyography and nerve conduction studies, both of which were reported as normal [exhibit 2(q)]. Dr. Bakody reported that the symptoms claimant was suffering at this time appeared to be a continuum of her problems relating to the fall in the parking lot in 1982 [exhibit 2(t)]. Claimant testified that she got no relief from the physical therapy and again sought Dr. Bakody for further examination on January 24, 1984. She had not worked since December 29, 1983 (exhibit 2(t), page 18). Dr. Bakody obtained a progress x-ray and found, "the fusion position from an x-ray standpoint, it was excellent."

Claimant continued to see Dr. Bakody approximately every two weeks during the months of January and February, 1984. Dr. Bakody continued the Tylenol #3, Elavil and Motrin, prescribed a "wall-pil-o" and recommended the practice of biofeedback muscle relaxation techniques [exhibit 2(a)]. On February 7, 1984, Dr. Bakody recommended treatment at the Mercy Hospital Pain Clinic under the care of James Blessman, M.D. [exhibits 2(a); 2(v)].

Dr. Blessman was of the initial impression that claimant was suffering from chronic myofascial cervical strain [exhibit 5(a)]. From mid-February to March 16, 1984, claimant was hospitalized at the Mercy Hospital Medical Center Pain Clinic. Claimant was seen in consultation with staff psychologist, Dr. Todd Hines. It was reported that Dr. Hines found claimant to be significantly depressed and noted a number of secondary gain factors that were operating in this case [exhibit 5(b)]. However, Dr. Blessman stressed that there were absolutely no signs of malingering [exhibit 5(b)]. He felt the patient's pain to be on an anatomical basis and did feel it was related to the traumatic injury of 1982 [exhibit 5(b)]. While a patient at the Pain Clinic, claimant's medication was modified, she was treated with several different types of physical therapy. A TENS unit was recommended and utilized with some success [exhibit 5(b)]. Claimant participated in aquatic exercises, stretching and flexing exercises and various aerobic exercises, specifically including walking on a

treadmill [exhibit 5(b)]. Dr. Blessman was of the impression that claimant was very well motivated [exhibit 5(b)]. Claimant was instructed in weight reduction, restriction in the consumption of caffeine and refined sugars and Dr. Blessman recommended that she work on her efforts to discontinue smoking [exhibit 5(b)]. Dr. Blessman was of the opinion that claimant had gained considerable improvement from the pain management program and recommended that she continue an active rehabilitation program through the use of an exercise bicycle and swimming at the YMCA [exhibit 5(b)]. Her return to work eight weeks following discharge from the Pain Center was projected [exhibit 5(b)].

Claimant testified that she returned to her home and continued to practice the techniques learned at the Pain Clinic. She also continued to consult with Dr. Bakody. Dr. Bakody's office notes of April 24, 1984 report that claimant was feeling a lot better and that she was of the impression she had learned a lot at the Pain Clinic [exhibit 2(a)]. At that time, it was Dr. Bakody's plan that claimant return to employment duties during early June, 1984 [exhibits 2(a); 2(z)]. Claimant returned to the bank and worked the days of June 5 and June 6, 1984 (exhibit 13). On June 5, 1984, she phoned Dr. Bakody with so many complaints that he referred her to Theodore Rooney, D.O., who is head of the rheumatology clinic at Mercy Hospital (exhibit 18(d), page 23). Dr. Bakody has not seen claimant since then.

In Dr. Bakody's opinion, claimant has sustained in the area of a 15% to 20% permanent physical impairment to the body as a whole "as a result of the change of the structure of her neck, along with the surgery, and the fact that there are continuing complaints" (exhibit 18(d), pages 13 and 34).

Claimant first saw Dr. Rooney on or about June 19, 1984 [exhibit 3(a)]. The following are excerpts from exhibits 3(a) and 3(x). Claimant reported to Dr. Rooney that she had been taking between six and eight Tylenol #3 daily for the past three weeks, but was barely able to deal with the pain. She described symptoms of achiness and discomfort of the posterior cervical area and the cervicothoracic area that was worse on the right as opposed to the left. She reported intermittent pain radiating down into her hands. She reported swelling in her arms and fingers which came and went, but was not associated with any definite joint stiffness or swelling or was usually not limited to the joints. She reported that she generally felt best in the morning depending upon how she felt before going to bed and that the symptoms became worse as the day went on. She reported significant disrupted sleep. Examination revealed restricted range of motion in the cervical spine; evidence of multi-tender trigger points along the posterior musculature of the upper neck and thoracic spine; and, some tenderness in the lateral elbows. She had no findings in the lower extremity and her neurological exam was unrevealing (exhibit 18(c), pages 6 and 7). Dr. Rooney

was under the initial impression that claimant suffered from chronic pain syndrome secondary to chronic cervical strain and significant fibromyalgia (exhibit 18(c), page 8). He was also of the opinion that a portion of her problems were tied to underlying depression and frustration which would exacerbate the underlying condition. Other aggravating factors included her disrupted sleep pattern. Testing was carried out in order to rule out systemic rheumatologic manifestations. Dr. Rooney prescribed Nalfon, Elavil and water exercises at Mercy Hospital. His plan for treatment was directed to controlling her symptomatology through anti-inflammatory and anti-depression medication (exhibit 18(c), page 11).

Upon re-examination of claimant on July 28, 1984, Dr. Rooney noted that she had less discomfort, was sleeping better and there was no tenderness in her lower back area [exhibit 3(e)]. Dr. Rooney reported that the Feldene he had prescribed in place of the Nalfon was causing some stomach upset. He also reported that claimant tended to have symptoms of reflux without any other medications on board. Dr. Rooney recommended the continuation of the Feldene, the use of liquid antacids and a trial basis of return to half-time work approximately six weeks into the future.

On September 24, 1984, claimant returned to part-time employment duties with the Federal Reserve Bank. The half-time duties were described as the same duties that she performed both before her January 29, 1982 accident and the interims thereafter. Claimant performed her half-time duties continuously until January 4, 1985 with the exception of December 14, 1984 and a vacation taken from November 13 through December 7, 1984 (exhibit 13). When claimant was next seen on November 25, 1984, Dr. Rooney found her significantly improved and almost pain-free (exhibit 18(c), page 17). Apparently, claimant's medication had been changed from Feldene to Naprosyn. Claimant reported having occasional GI upset, but on an irregular basis. She was continuing to take Elavil at night time. Dr. Rooney reported his assessment as moderate to severe fibromyalgia that was improved over the episodes that had been previously reported. He recommended continuation of her present medications, a reduction in the ingestation of Naprosyn, instruction in the use of stress and relaxation techniques, continuation of a regular exercise program and an increase in her working day to a total of six hours with a goal of an eventual increase to full-time duties (exhibit 13). Claimant testified that, throughout this particular return to work episode, she continued to suffer from pain and additional frustration.

Claimant testified that, on or about January 4, 1985, she suffered from an exacerbation of the underlying condition. She reported that her pain and depression was much worse than during the previous year, that she ached and that she had difficulty in concentrating and thinking. She was continuing with the Naprosyn.

She spoke with Dr. Rooney over the phone [exhibit 3(x)]. Claimant had apparently been taking Darvocet N100 for pain, but the medication had caused her to be ill so she stopped using this medication. The doctor recommended she continue to use the Naprosyn, Elavil, TENS unit, pool and warm heat [exhibit 3(x)]. Claimant returned to Dr. Rooney on January 27, 1985, describing increased pain in her neck and shoulders radiating down into both arms (exhibit 18(c), page 17). Dr. Rooney described his findings at the January 27, 1985 exam as indicating a "flare-up" of symptoms which can be precipitated by a variety of emotional or physical events (exhibit 18(c), page 20). He was of the impression that most of the manifestations were secondary to rather significant muscle spasms [exhibit 3(x)].

Dr. Rooney did not examine claimant again until September, 1985 (exhibit 18(c), page 23). However, he received a phone call from claimant in May, 1985, wherein she related feeling better, but "she was freely admitting to some significant depression at that time" (exhibit 18(c), page 24).

In his report of April 14, 1985, Dr. Rooney indicated that the natural history of conditions such as fibromyalgia, as well as many different types of arthritis, is one of remissions and exacerbations that do not necessarily have any predictable nature to them [exhibit 3(h)]. He indicated that claimant's condition had been precipitated by the original injury and that the injury had probably predisposed her to some secondary osteoarthritis which may have contributed to the difficulties she was suffering [exhibit 3(h)]. Over the next four months, Dr. Rooney attempted to adjust claimant's medication in order to accomplish maximum relief which included the prescription of Tolectin, Darvocet N100 and Elavil. During May, 1985, Dr. Rooney referred claimant to Dr. Hines for consultation [exhibit 3(x)].

Claimant began to consult with Dr. Hines on a weekly basis beginning May 14, 1985 [exhibit 4(a)]. Dr. Hines reported that claimant had experienced a reactive depression in response to the pain and disability which had become of such magnitude as to be disabling in and of itself [exhbit 4(a)]. The diagnostic impression was that of Dysthymic Disorder (DSMIII/300.40). Dr. Hines was of the opinion that claimant expressed a strong emotional investment in her work and derived much of her sense of self worth from her productivity [exhibit 4(a)]. Claimant's experience of pain had been so strong and so pervasive that she had been unable to perform domestic tasks, to participate in typical activity patterns and to be emotionally available to her family as well as being unable to return to employment outside the home [exhibit 4(a)]. She reported fears of rejection and abandonment by everyone including family and employer as a result of her decreased productivity and the fear of both tended to drive her efforts toward recovery and to fuel her depression as she found herself unable to perform [exhibit 4(a)].

During approximately April, 1985, Bil Cooper (rehabilitation counselor with North Central Rehabilitation) was employed by the defendants to assist claimant in a possible return to employment duties. The effort to return claimant to employment was coordinated with Drs. Hines and Rooney, claimant and the employer. Exhibit 9(c) is a job analysis form that was prepared by Cooper specifically describing the nature of the employment duties to which claimant would return. The duties can be best described as extremely light and primarily sedentary. Approximately five percent of claimant's time would be spent lifting weights between 3-12 pounds. Approximately 75 percent of her time would be spent sitting. Cooper testified at hearing that the job description was about as light as was possible with the Federal Reserve Bank.

Dr. Hines was in agreement that a third attempt to return to work was needed [exhibit 4(a)]. The plan was for Dr. Hines, Dr. Rooney, claimant, Bil Cooper and the employer to arrange for claimant's return to work on a limited basis.

On September 7, 1985, claimant returned to Dr. Rooney for reevaluation. The doctor noted improvement in pain and discomfort although claimant appeared to be rather depressed. She exhibited decreased motion in the neck and there was noted again tender muscles in the cervical and thoracic area (exhibit 18(c), page 25). She also reported episodes of severe epigastric pain that awakened her at night. The medications of Nalfon, Elavil and Tylenol #3 were continued.

Claimant attempted a return to these employment duties beginning September 9, 1985 and through October 22, 1985 with the exception of September 18, 19, 20, 25, 26, 30, October 1, 2, 9, and 10, 1985, when claimant missed entire work days. Beginning October 23, 1985 and continuing to the hearing date, claimant had not resumed employment duties. (From November 4, 1985 through December 13, 1985, claimant was absent from work for a non-work related condition.)

On December 15, 1985, claimant was again evaluated by Dr. Rooney. She was continuing to complain of the same pain including pain and stiffness in the muscles of the cervical-thoracic region. Claimant, for the first time, related to Dr. Rooney that she had developed discomfort in the outer hip and low back (exhibit 18(c), pages 25, 48 and 49). She was using Elavil and Nalfon. She was also complaining of migraine headaches with visual symptoms. She reported headaches of a migraine variety as a young lady, but they had not reoccurred until only recently. Dr. Rooney recommended a prescription for a Jackson cervical pillow, whirlpool and ultrasound treatments, water exercises, neurologic consultation and a follow-up in 3-4 months.

The neurologic consultation was carried out with Steven R. Adelman, D.O. Dr. Adelman was of the impression that claimant was

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suffering from classic migraine headaches (exhibit 7). Dr. Adelman was of the opinion that stress and muscle tension can precipitate the onset of migraine headaches, but that the same could be controlled through the use of medication and lifestyle modification [exhibits 7(c) and 7(d)]. Dr. Adelman was of the opinion that there was a "loose" association at best between the migraine headaches and the cervical fusion [exhibit 7(b)].

During the course of both the return to work and the subsequent discontinuing of her employment duties, claimant continued to consult with Dr. Hines. In his report of January 31, 1986 [exhibit 4(b)] he reported that, due to the intensity of the pain experience, it was necessary for claimant to terminate her recent efforts to return to work on a part-time basis. Dr. Hines continued in his opinion that claimant was strongly motivated to return to work, but was realistic about the needs of the employer to have someone on the job who is consistently productive [exhibit 4(b)]. Dr. Hines indicated that the job had become a source of continuing frustration to her and suggested that it might well be therapeutic for the job and related legal issues to be brought to a close [exhibit 4(b)].

Claimant was examined by Dr. Rooney on June 22, 1986 [exhibit 3(x)]. A complete neurological examination was unrevealing. By this time, claimant was able to discontinue smoking. Her pain was described as again in the cervical-thoracic area with some intermittant numbness in the shoulder and trapezius. The pain seemed to be aggravated by most kinds of activity. Claimant reported suicidal ideations which had improved recently. Dr. Rooney was of the opinion that she was continuing to suffer from chronic cervical muscular pain with some secondary osteoarthritis and also depression. He felt that she should see a psychiatrist for a change in her antidepressant medication with the prescription of either Orudis or Flexoril for clinical relief once the depression medication had been regulated (exhibit 18(c), pages 26 and 27).

When seen on September 4, 1986, Dr. Rooney noted significant improvement (exhibit 18(c), pages 27 and 28).

Claimant was referred to Hector W. Cavallin, M.D., with Dr. Cavallin first seeing claimant on June 30, 1986 [exhibit 8(b)]. Dr. Cavallin began claimant on Tofranil PM with the amount of medication being increased through the month of July. Dr. Cavallin did not feel claimant was able to return to work in the near future [exhibit 8(b)]. Dr. Cavallin indicated that it was difficult to know how well she would respond to the change in medication and whether her depression would improve sufficiently to allow her to return to work [exhibit 8(b)].

On or about July 15, 1986, Jo Ann Bennett, manager of operations of the Federal Reserve Bank, wrote to claimant

informing claimant that, effective February 20, 1986, all benefits under the Workers' Compensation Act had ended (exhibit 4(c), page 2). Bennett informed claimant that, from February 20 until July 7, 1986, claimant had received payments for accrued sick leave. After July 7, 1986, claimant's status was changed to "ill without pay." Bennett asked for a commitment as to what date claimant intended to return to work and required a response by Friday, July 18, 1986, or claimant would be removed from the company's records as of said date. Dr. Hines [exhibit 4(d)], Dr. Rooney [exhibit 3(u)], and Dr. Cavallin [exhibit 8(b)] were all in agreement that, at that time, claimant was incapable of returning to her previous employment duties with the Federal Reserve Bank.

Claimant testified that, at the present, she suffers from limitations of neck movement and limitations in her ability to use her hands above her head such as to wash her hair. She is in constant pain which interferes with her ability to concentrate. She reports that the motion of her head and neck is severely limited, both in her ability to rotate her head as well as to flex and extend same. She testified that a typical day would involve her arising at approximately 6:00 a.m., having coffee and breakfast with her husband, perhaps walking with a friend at her own pace for approximately 45 minutes, listening to relaxation tapes, performing light housework such as dusting and depositing clothing in a washing machine. All of the activities were described as activities that she conducted at her own pace. She reported lying on a heating pad on a daily basis. Pads were placed both on her recliner and davenport. Claimant ate lunch which she would prepare and then, in the afternoon, she would rest and perhaps watch television or read while lying in the recliner. Claimant usually prepared the evening meal for herself and for her husband, limited her standing to less than 30 minutes and was up and down as her tolerance for pain dictated. After the evening meal, claimant generally deposited her dishes in a dishwasher, watched some television, was up and down as her pain would tolerate, spent time lying on a heating pad and, on occasion, took an evening shower.

Claimant testified to having had various hobbies, including toll painting, ceramics and sewing. She participates in no hobbies now. She is able to operate a motor vehicle, although she does have difficulty turning her head to observe traffic.

Claimant reported that she feels herself to be a failure and she has been unable to successfully return to work. She reported that work was something that she enjoyed in that she enjoyed the sense of well-being and the sense of camaraderie that was shared with her fellow employees. She would like to return to work, but she really does not know what she can do. She cannot envision any easier work than what was offered by her employer. She feels frustrated and disappointed. She never thought she

would end up as she is now. She is concerned about the future of her relationship with her husband. She feels she is not living up to her end of her marital commitments. She feels her goals of working until retirement after her children are gone, of traveling, of having security in the future and of developing and maintaining friendships have all been affected by this injury.

Dr. Rooney is the medical director of the Arthritis Center and Rehabilitation Organization at Mercy Hospital Medical Center. He is board certified and specializes in rheumatology, arthritis and related disorders. Dr. Rooney testified that, in his opinion, there was a relationship between the January 29, 1982 incident and the initial diagnosis of chronic pain syndrome secondary to chronic cervical strain and significant secondary fibromyalgia (exhibit 18(c), page 9). Dr. Rooney explained that Nalfon was one of the medications prescribed which acts as an anti-inflammatory medication similar to aspirin, Motrin and Feldene. All of these drugs are similar in that they are helpful in reducing pain and/or inflammation depending upon the dosage that is used. He described Elavil as a tricyclic medication used in very high doses to treat endogenous depression and other associated disorders. Dr. Rooney was of the opinion that claimant's depression was related to her chronic pain syndrome (exhibit 18(c), page 12). He described fibromyalgia as a form of nonarticular rheumatism meaning a discomfort in the muscles and other soft tissues that surround the joints (exhbit 18(c), page 13). As a part of its manifestation, fibromyalgia often disrupts sleep, causes chronic pain with radiation into the arms or legs and causes trigger points on palpation upon direct examination at certain characteristic areas (exhibit 18(c), page 13). At the time of his initial assessment of claimant on June 19, 1984, he did not feel she was capable of returning to her employment duties with the Federal Reserve Bank and that such inability continued up until the time of her eventual part-time return during September, 1984 (exhibit 18(c), page 16). At the time of Dr. Rooney's examination of claimant during January, 1985, he noted that she suffered a "flare" which can be precipitated by over activity, stressful events or other emotional or physical trauma (exhibit 18(c), page 20). Dr. Rooney thought it would be probable that the factors of returning to work, the underlying depression and the presumed increased physical activity would all contribute to the flare noted during January, 1985 (exhibit 18(c), page 21).

In a report dated October 20, 1986 [exhibit 3(w)], Dr. Rooney indicated that he reviewed all of claimant's cervical spine films from 1982 up to and including x-rays taken in May, 1986, for purposes of seeing whether there had been any interval change over that period of time. The first x-rays taken in May, 1982, revealed mild changes of osteophyte formation (evidence of osteoarthritis) at C5 and C6. Repeat post-surgery films revealed

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a stabilized cervical fusion without deterioration. The fusion remained stable over the four-year period. The only change noted was a little bit of osteophyte formation at C6 and C7 which had not been present in 1982 (see also, exhibit 18(c), pages 29 and 30). Dr. Rooney stated that claimant's initial film suggested that she had osteoarthritis and that the change noted is indicative of the natural history of the process of osteoarthritis. It was impossible for Dr. Rooney to state the cause of the changes over the four-year period because osteoarthritis is a slowly progressive disorder (exhibit 18(c), page 31). Nor could he state the effect of these changes upon her symptoms (exhibit 18(c), page 33). Since the disease is a gradual process, it was impossible for him to tell how long the condition had existed prior to the initial May, 1982 x-rays (exhibit 18(c), pages 46 and 47).

Dr. Rooney has assigned a nine percent permanent partial functional impairment rating to claimant's body as a whole (exhibit 18(c), page 33). In his opinion, claimant's prognosis is fair. Although he believes it is likely she will continue to have exacerbations in the future, he thinks she would be able to return to work and yet be able to control at least a comfortable level of pain that was not disabling (exhibit 18(c), page 36). Despite optimal, maximal measures, claimant has not progressed as well as Dr. Rooney expected (exhibit 18(c), pages 36-38). Dr. Rooney did indicate that the opinions expressed in his deposition as well as reports were restricted to musculoskeletal manifestations and did not encompass the fields of psychiatry or psychology (exhibit 18(c), page 60).

Dr. Bakody is a board-certified neurosurgeon practicing in Des Moines, Iowa. Dr. Bakody was of the opinion that there was a cause and effect relationship between falling at work and the ensuing surgery of May, 1982 (exhbit 18(d), page 7). Further, the doctor was of the opinion that there was a permanent physical impairment, both as a result of the change of the structure of the neck along with the surgery and the fact that there are continuing complaints (exhibit 18(d), page 13). The doctor referred to the Manual of Orthopedic Surgeons in Evaluating Permanent Physical Impairment and offered the opinion that claimant suffers from a 20% impairment of the body as a whole from a functional standpoint. Dr. Bakody indicated that he felt there was a relationship between the exacerbation of December, 1983 and the original injury and that he felt the manifestations of December, 1983 were a continuum of the earlier problem (exhibit 18(d), page 20). At the time of Dr. Bakody's January 9, 1984 evaluation of claimant, he related that claimant had not been working since December 29, 1983 and that, based upon the history as reported as well as his examination, he did not feel claimant was able to return to her employment during that time. Subsequent to the January 9, 1984 evaluation and continuing up to his final evaluation of claimant, Dr. Bakody reported a

gradual improvement in her overall condition (exhibit 18(d), pages 22 and 23). He was of the opinion that her discomfort could be expected to continue for an indefinite amount of time into the future (exhibit 18(d), page 23).

Dr. Cavallin is a psychiatrist licensed to practice medicine in the state of Iowa. Dr. Cavallin testified that claimant was suffering from a major depressive disorder and that she had been suffering from this disorder for a significant amount of time before he had first seen her (exhibit 18(e), page 4). The doctor indicated that the use of pain killing medication following claimant's surgery both affects the intellectual functioning of people who take the medication and also creates depression (exhibit 18(e), page 5). Dr. Cavallin described the function of the medication Tofranil in that it helps sleep, reduces depression and increases the tolerance for pain (exhbit 18(e), page 7). He described the effect of chronic pain and/or depression as creating chronic fatigue in that the patient loses energy and suffers from a loss of motivation and a loss of strength. It tends to limit the amount of physical activity and contributes to social withdrawal because a patient experiences relief from being quiet and from spending a rather sizeable amount of time resting, more than the usual person would (exhbit 18(e), page 7).

Dr. Cavallin was of the opinion that the major depressive disorder appeared to have been triggered by the chronic pain syndrome which had been treated at the Mercy Pain Clinic during 1984 (exhibit 18(e), page 4). He indicated that claimant would be required to use Tofranil indefinitely. Dr. Cavallin was of the opinion that claimant was at the present unable to return to gainful occupational duties because the degree of her depression was so severe as to incapacitate her from any kind of gainful employment (exhibit 18(e), page 11). The doctor was also of the opinion that, in view of the course of the illness up to the present, her disability due to the depression is permanent and that he does not anticipate any significant change in the foreseeable future. As a consequence of no anticipated improvement in her depression, the doctor was of the opinion that she would not be able to perform gainful occupational duties in the future. He indicated that his involvement would be necessary into the indefinite future, but that it would be primarily limited to monitoring claimant's medication. Dr. Cavallin was of the opinion that claimant's condition, from a psychiatric standpoint, essentially stabilized since August 4, 1986 (exhibit 18(e), pages 16 and 17).

Dr. Hines is a clinical psychologist licensed to practice psychology in the state of Iowa. He testified that claimant suffers from a diagnosis called dysthymic disorder, which basically means chronic depression. Based upon the history given and his examination of claimant, it was his clinical opinion that there was a relationship between her diagnosis and

the pain that she suffered as a consequence of her work injury of January, 1982 (exhibit 18(f), page 6). He testified:

> It's my opinion that the depression arises wholly out of the injury and the pain experience. I have seen Joyce on some 75 occasions, which is a rather extensive, at least in terms of my practice, course of psychotherapy and have come to know her, I think, and the conditions of her life relatively well. As best I can discern, she was not depressed before her injury. There were no conditions or symptoms or expressions of significant depressions that I am aware of, and I know of no other factors in her life over the time that I have been acquainted with her or information that I have about other times that would indicate anything else as the cause other than her injury and her pain. (Exhibit 18(f), page 6).

At the time claimant was first evaluated by Dr. Hines, Dr. Hines was of the opinion that she was incapable of performing or returning to her full range of employment duties with the Federal Reserve Bank (exhibit 18(f), page 6).

Dr. Hines described depression as something that does not occur overnight, but rather is a result of a gradual building process (exhbit 18(f), page 8). Dr. Hines expressed the opinion that a particular episode is not necessary to cause depression, but rather, in light of his knowledge of claimant, there would either not be a particular event or else it would be difficult to determine one particular event simply because claimant would have a tendency to deny and suppress and try to work over or work through any particular kind of event that would contribute to the depression (exhibit 18(f), pages 9-10).

Dr. Hines testified that he felt an attempt to return to work would be therapeutic and thus he cooperated in the attempt to return Joyce to employment duties during 1985 (exhibit 18(f), pages 12-13). Dr. Hines reported that claimant's motivation continued at a very high level, but that her pain experience was simply not going to allow her to do the work she wanted to do (exhibit 18(f), page 14). Following her efforts to return to her employment duties during 1985, the doctor described that, when she would come to his office, she would be dysfunctional (exhibit 18(f), page 14).

> She was a mess, which is to say she was in so much pain that it was hard for her to get here. It was hard for her to get up out of a chair in the waiting room. Once we got her down in here, it was hard for her to get up and down. She could not sit still. The pain experience was very strong. She

> was in tears all the time, just could not stop crying. She would literally cry from the moment she hit the door until the moment she left. She was then 60 minutes in tears. (exhibit 18(f), page 14).

Dr. Hines opined that emotional turmoil interferes with concentration, memory, attention span, and can be so specific as to disorient a person (exhibit 18(f), page 15). Dr. Hines indicated that the July 15, 1986 letter from the Federal Reserve Bank directed to claimant informing her that she would be dropped from the work roles had a very significant effect upon her (exhibit 18(f), pages 17 and 18). Dr. Hines explained that claimant has carried a deep-seated fear of abandonment, that she was strongly connected to her work and to the particular job and that the letter emotionally carried her back into her fear of abandonment (exhibit 18(f), page 18). In Dr. Hines' opinion, following the final attempt to return to occupational duties in 1985, claimant reached her psychological plateau at or about the time of Dr. Hines' referral to Dr. Cavallin (exhibit 18(f), page 19). Claimant's prognosis from a psychological standpoint is that her condition will flare on occasion and, when it does, she will need more therapeutic intervention (exhibit 18(f), page 21). Dr. Hines is of the opinion that it is highly improbable that she could carry on the necessary duties of employment (exhibit 18(f), page 23).

Dr. Hines confirmed the opinions expressed in his report of January 20, 1987 [exhibit 4(e)] that claimant is totally and permanently vocationally disabled and he does not anticipate that this condition will improve in the foreseeable future. Dr. Hines indicated that psychotherapy will probably be necessary at least one time per month for life (exhibit 18(f), page 21). The purpose of the continued therapeutic treatment is to keep claimant from getting any worse as far as the depression is concerned, particularly to ward off any need for mental health unit hospitalization, and also to guard against any suicidal impulses that might arise (exhibit 18(f), page 20).

Scott B. Neff, D.O., is a board-certified orthopedic surgeon. He examined claimant on one occasion during September, 1986. Dr. Neff was of the opinion that claimant suffers from a loss of motion and chronic achiness that occurs in the neck and muscles of the neck as a consequence of her cervical fusion. Dr. Neff initially expressed the opinion that claimant suffered a 10% functional impairment of the body as a whole because of the neck injury, cervical fusion, resulting loss of motion and the persistence of neck soreness and neck pain (exhibit 18(a), page 29). Dr. Neff recommended that claimant not be asked to do heavy manual labor and not be in a work place function whereby she has to do repetitive side-to-side or flexion/extension activity of the neck (exhibit 18(a), page 33).

Dr. Neff felt claimant has one legitimate medical problem. She has had a cervical fusion resulting in loss of motion and chronic pain in the neck (exhibit 18(a), page 25). He does not know of any way anatomically that such a condition would result in pain radiating down the legs and into the feet or cause headaches in the front part of her head (exhibit 18(a), page 25). He further stated that he has examined numerous patients who suffer from chronic pain syndrome and reactive depression and he has never found any such individual to be permanently disabled from gainful employment (exhibit 18(a), pages 27-28). It is Dr. Neff's opinion that claimant has a 10% impairment to the body as a whole based on persistence of neck pain (exhibit 18(a), page 29), although he would have no difficulty in agreeing with Mr. Bower's 15% rating (exhibit 18(a), page 34). There is no question in Dr. Neff's mind that claimant is physically capable of gainful employment in an office-type environment (exhibit 18(a), page 33). Dr. Neff did confirm that there was more than simply a musculoskeletal component to the injury which was in part confirmed by the symptom magnification profile that was completed (exhibit 18(a), page 40). Dr. Neff conceded that claimant has undergone significant deconditioning over the past 3 1/2 years since she last worked, that claimant does not fit within the average parameters of strength for a person of her size and age and that she could not be expected to do manual labor at any point in the future (exhibit 18(a), page 42). Dr. Neff confirmed that the opinions he has expressed as far as claimant's ability to perform office type sedentary work would be from a musculoskeletal standpoint only (exhbit 18(a), page 34).

Thomas W. Bower is a licensed physical therapist. He conducted a functional capacity evaluation of claimant in an attempt to describe her overall abilities to function (exhibit 18(b), page 7). Mr. Bower reported that her functional capacity placed her within the light/medium category which means that she could infrequently lift 35 pounds and frequently would be able to lift 25 pounds or less (exhibit 18(b), page 16). He expressed the opinion that claimant was a borderline symptom magnifier which means that the individual's behavior is out of proportion to the organic findings (exhibit 18(b), page 19). Mr. Bower was of the opinion that claimant should be able to perform the occupational duties that were attempted during the fall of 1985 (exhibit 18(b), pages 25-26). However, Mr. Bower did confirm that the opinions he expressed with regard to the job description for the position created in the fall of 1985 would be from a musculoskeletal standpoint only (exhbit 18(b), page 29). He confirmed that once deconditioning takes place, it makes it extremely difficult to rehabilitate the person and get them back to a functioning level. He indicated that a 3 1/2 year period of time where an individual has been off work, such as claimant, would make a work hardening process much more improbable (exhibit 18(b), page 30). Mr. Bower confirmed that, from a musculoskeletal standpoint, claimant suffers a 15% functional impairment of the

body as a whole (exhibit 18(b), page 32). Mr. Bower was not aware that claimant had been diagnosed as suffering from chronic depression (exhibit 18(b), pages 36 and 37) and that chronic depression could have an impact upon the findings he noted (exhibit 18(b), page 37). Mr. Bower confirmed that, if claimant had attempted to return to the duties as described in exhibit 9(c), and was unable to perform those duties, a question would be posed as to why claimant could not function in a job placed within those restrictions (exhibit 18(b), page 40). It may mean that there would be other concerns such as psychological or psychiatric concerns that would be beyond the area of Mr. Bower's admitted expertise which may in some fashion affect claimant's ability to perform the occupational duties described in exhibit 9(c), (exhibit 18(b), page 40).

Exhibit 15 sets out claimant's prescription medication usage and costs since February 8, 1982. It shows that claimant has advanced $178.00 from her own funds which has not been reimbursed by the defendants.

Exhibit 17 sets out claimant's mileage expenses.

Exhibit 19 sets out the total amount of temporary partial disability, temporary total disability/healing period, and permanent partial disability benefits paid and the respective dates thereof.

Exhibit 20 reflects that the employer continued to pay claimant's salary while absent from work until approximately the second month of 1986 and that the total amount of salary paid over and above workers' compensation benefits was $6,871.14.

Kim Rhoads, testifying on behalf of the Bank, stated that she is presently employed at the Bank as supervisor of the night force, although most of her work experience with the Bank has been in its human resources department. She has been a Bank employee since February, 1982. Ms. Rhoads described the specific duties of the "check processor" position to which claimant returned in September, 1985. The position entailed receiving and comparing bookkeeping machine tapes for accuracy. The duties were performed while seated at a desk. No machinery was required other than an adding machine. Other than carrying a "block" of tapes from a cart to her desk, no lifting was required. (Claimant testified these "blocks" weighed approximately one pound.) Claimant was free to stand, walk or rest as she needed.

Ms. Rhoads further testified that she researched and prepared exhibit 20 which evidences the amount of salary paid to claimant by the Bank over and above her weekly workers' compensation benefits. The Bank's policy is to pay employees on workers' compensation full salary, less compensation benefits.

Ms. Rhoads stated that the Bank is willing to return claimant to employment. Although the "check processor" position is presently filled, she testified that there is a high rate of turnover in the position, especially in the night force, and that as soon as the position opened, claimant could return to work.

Bil Cooper testified that he is owner of Cooper Consultants, a vocational rehabilitation firm, and has been employed as a rehabilitation consultant with his firm for one year. Previously he was a vocational rehabilitation counselor with North Central Rehabilitation Services for three years. While with North Central, he was retained by the Bank's insurance carrier on April 16, 1985 to evaluate claimant for vocational rehabilitation purposes. Thereafter, Cooper contacted claimant, her physicians and Bank personnel and, in consultation with these individuals, developed a "work hardening program" with a view towards returning claimant to employment with the bank. Cooper received from Dr. Rooney a capacity evaluation concerning restrictions upon claimant's physical activity [exhibit 9(d)]. He then developed an employment position with the Bank which would meet or be less taxing than the criteria set by Dr. Rooney. The position developed was that of "check processor." Cooper then set forth a description of the check processor's duties to both Dr. Rooney and Dr. Hines for their approval on a "job analysis" form [exhibit 9(c)]. Both Dr. Rooney and Dr. Hines approved claimant's return to work as a check processor (exhibit 18(f), page 30; exhibit 18(c), page 44). The plan under the work hardening program was to return claimant to work at the new position on a part-time basis and gradually thereafter to full-time.

Claimant returned to work at the new position on September 9, 1985. Cooper accompanied her to work and maintained close contact with claimant as to her progress. Cooper testified that he could not think of a more sedentary job than that which claimant performed as a check processor. He did not recall claimant complaining of any physical problems with the job. The Bank was very cooperative and allowed claimant to rest or take breaks at will. During the first 30 work days of the program, claimant failed to report to work on 20 occasions (exhibit 13). She absented herself from work on November 4, 1985 for gall bladder surgery and has not returned to work since. Cooper was not satisfied with claimant's efforts toward the work hardening program and did not feel claimant cooperated in the effort.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of January 29, 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).

Defendants do not dispute that claimant sustained some permanent impairment and permanent disability in the cervical area of her spine as the result of the January 29, 1982 injury. The real issue in the case is the relationship between the January 29, 1982 injury and claimant's claimed inability to be gainfully employed due to a major depressive disorder.

The facts of this case as it began to unfold were relatively unremarkable. Claimant fell and then sought medical treatment when her condition did not resolve promptly. A trial of conservative treatment was employed, but without success. Surgery was eventually performed. Following the surgery, claimant returned to her work, which was sedentary in nature. From the evidence presented, it appears that, as of October 16, 1982, when claimant resumed full-time duties, the expectation was that she would make a relatively full recovery and continue with her employment. She, in fact, continued to work and perform the duties of her employment in an apparently satisfactory manner, as shown by her employee evaluations (exhibit 12). However, in December, 1983, she began missing work and again sought medical care. Although there have been two subsequent efforts for claimant to resume her employment, both have met with failure. Drs. Cavallin and Hines have both expressed the opinion that claimant suffers from a major depressive disorder that was induced by the pain which she experienced from the condition that resulted from her January 29, 1982 fall. There is some evidence in the record that claimant may have had some problems in her relationship with her husband, but that evidence appears to be quite remote and relatively less significant to claimant's depressive disorder than is the pain resulting from the January 29, 1982 injury.

From the evidence, it appears that the pain feeds the depression and that the depression feeds the pain. The symptom

magnification exhibited to Mr. Bower is as likely a symptom of the depression as it is any indication of exaggeration of complaints. The evidence does not contain a single opinion from a medical professional which disputes the diagnosis of depression that has been made. It is therefore found that claimant is afflicted with a major depressive disorder which was proximately caused by the injuries she sustained in the fall that occurred on January 29, 1982.

Dr. Neff indicated that some degree of depression is not uncommon following a relatively serious injury or sugery. A depression of the magnitude that has been diagnosed by Drs. Cavallin and Hines is not, however, what normally occurs. For claimant to have developed the major depressive disorder, it would seem likely that she was in some way predisposed or susceptible to developing the disorder.

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

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

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).

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). A disability of the magnitude claimant experiences does not normally occur following an injury of the type which she experienced. The injury is, nevertheless, a proximate cause of the disability with which she is now afflicted.

Claimant's injury was initially to her cervical spine and she now has a major depressive disorder. Neither condition is a

scheduled member and the parties correctly stipulated that her disability should be evaluated industrially.

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

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

Claimant seeks to rely on the odd-lot doctrine. Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). The Federal Reserve Bank has treated claimant quite fairly throughout the entire course of events that are the subject of this proceeding. Claimant has been given fine medical treatment. The employer made good faith efforts to enable claimant to resume employment. Unfortunately, the efforts were not successful. Drs. Cavallin and Hines have indicated that, in their opinions, claimant is not capable of being gainfully employed due primarily to her depressive disorder. The physicians who have dealt with her physical state, namely, Drs. Neff and Bakody, have found no reason why claimant should not be able to be gainfully employed. A cervical fusion does not normally make an individual unable to perform sedentary employment. If this case was typical, claimant would have remained at work up to the present time and indefinitely into the future following her return on October 16, 1982. That is not, however, what occurred. There is no expert medical evidence in the record which indicates that claimant's emotional disorder is not disabling. There is no expert medical evidence in the record which indicates that the emotional disorder is not permanent. To the contrary, the unrebutted evidence from Drs. Cavallin and Hines shows claimant's emotional disorder to be totally disabling and to be of indefinite and indeterminable duration, if not permanent. The only evidence in the record which detracts from the opinions expressed by Drs. Cavallin and Hines is: (1) that a major depressive disorder does not normally occur following an injury of the type claimant sustained; (2) the fact that secondary gain may be a factor; and (3) the physical impairment resulting from the cervical fusion would not normally prevent a person from performing sedentary employment. It is found that those factors are not sufficiently strong to overcome the clear, unrebutted opinions of Drs. Cavallin and Hines. Claimant is

therefore found and determined to be permanently and totally disabled within the meaning of Iowa Code section 85.34(3).

The date that claimant's healing period ended is not of any particular importance in view of the finding of permanent total disability. It is clear that claimant was not permanently and totally disabled when she resumed full-time work on October 16, 1982. She did, however, have some degree of permanent partial disability at that time and was entitled to receive compensation for permanent partial disability. It is determined that her permanent partial disability, on October 16, 1982, based upon the information that was available on that date, would have presented a disability of approximately 15% permanent partial disability. Such would have provided an entitlement of 75 weeks of benefits. Claimant worked on a full-time basis for 60 5/7 weeks and then began missing work again commencing December 13, 1983. When she began missing work, her entitlement to compensation for healing period resumed. That entitlement continued until the point that it became medically indicated that further significant improvement from the injury was not anticipated under the provisions of Iowa Code section 85.34(1). Teel v. McCord, 394 N.W.2d 405 (Iowa 1986); Thomas v. William Knudson & Son, Inc., 349 N.W.2d 124, 126 (Iowa App. 1984); Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60 (Iowa App. 1981). It is therefore determined that claimant's healing period ended on October 23, 1985, the last day of her last attempt to return to work.

An injured worker is not entitled to receive both healing period and compensation for permanent disability from the same injury on any given day. It must be one or the other. In this case, claimant was paid her full salary to supplement workers' compensation benefits. She was either receiving healing period, permanent partial disability, temporary partial disability, her regular salary or some combination. Up to the date of October 23, 1985, claimant had clearly been paid all that was due to her under the workers' compensation system through the combination of workers' compensation benefits and the employer's salary continuation policy. While the excess of the salary continuation over and above the workers' compensation benefits does not constitute a credit towards future workers' compensation liability, the amounts paid as salary do satisfy the workers' compensation liability for the weeks for which the salary was paid. (Division of Industrial Services Rule 343-8.4).

For purposes of the record, however, the healing period should be specified. Claimant's healing period, determined in accordance with section 85.34(1), is as follows:

February 9, 1982 through February 22, 1982 (2 1/7 weeks)
May 6, 1982 through August 22, 1982 (15 4/7 weeks)
December 13, 1983 through December 16, 1983 (4/7 week)
December 23, 1983 (1/7 week)

December 30, 1983 through September 23, 1984 (38 2/7 weeks)
November 13, 1984 through December 9, 1984 (3 6/7 weeks)
January 4, 1985 through September 8, 1985 (35 3/7 weeks)
Total -- 96 weeks

Claimant is also entitled to receive temporary partial disability in accordance with Iowa Code section 85.33(2) for the following periods:

August 23, 1982 through October 15, 1982 (7 5/7 weeks)
September 24, 1984 through November 12, 1984 (7 1/7 weeks)
December 10, 1984 through January 3, 1985 (3 4/7 weeks)
September 9, 1985 through October 22, 1985 (6 2/7 weeks)
Total -- 24 5/7 weeks

Claimant also seeks to recover costs. Division of Industrial Services Rule 343-4.33 controls costs in proceedings before this agency. The costs claimed are found in exhibit 13. All of the depositions for which claimant seeks to recover costs were received into evidence and reporting and transcription fees incurred in obtaining depositions are recoverable under Iowa Rule of Civil Procedure 157(a). Woody v. Machin, 380 N.W.2d 727 (Iowa 1986). Expert witness fees are limited, however, to $150.00 as provided by Iowa Code section 622.72. The costs recoverable by claimant are therefore as follows:

Rooney report	$ 100.00
Hines report	90.00
Bakody expert witness fee	150.00
Cavallin expert witness fee	150.00
Rooney expert witness fee	150.00
Hines expert witness fee	150.00
Bakody deposition reporter fees	143.50
Hines deposition reporter fees	157.00
Cavallin deposition reporter fees	83.25
Rooney deposition reporter fees	242.00
Total	$1,415.75

FINDINGS OF FACT

1. On January 29, 1982, Joyce D'Ostilio was a resident of the state of Iowa employed by Federal Reserve Bank in Des Moines, Iowa.

2. Joyce D'Ostilio was injured when she fell in the parking lot of the employer's place of business on January 29, 1982.

3. Following the injury, claimant continued to work through February 8, 1982, but then sought medical treatment which took her off work from February 9, 1982 through February 22, 1982. Claimant was again absent from work from May 6, 1982 through August 22, 1982 for purposes of medical treatment. She returned to work part-time on August 23, 1982 and resumed full-time

duties on October 16, 1982. Thereafter she continued to work full-time until December 13, 1983. Commencing on December 13, 1983, claimant began missing work and has not since made a sustained, long-term return to work, although she has attempted to return to work on a part-time basis on three separate occasions.

4. During all of the times claimant was absent from work, she was medically incapable of performing work in employment substantially similar to that she performed at the time of injury.

5. Claimant reached the point it was medically indicated that further significant improvement from the injury was not anticipated on October 23, 1985. In all, claimant accumulated a total of 96 weeks when she was in a healing period status and 24 5/7 weeks when she was temporarily partially disabled and working part-time. She has been paid all weekly benefits due prior to October 23, 1985.

6. Claimant is a credible witness.

7. Claimant's injury was the herniation of cervical disc for which cervical fusion surgery was performed.

8. Claimant initially made a relatively normal recovery, but then developed a chronic pain syndrome which, in turn, developed into a major depressive disorder which is currently her primary medical problem.

9. The fall which claimant sustained on January 29, 1982 was a substantial factor in producing the depressive disorder with which claimant is currently afflicted.

10. Drs. Cavallin and Hines are correct in their assessment that claimant is presently totally disabled from performing gainful employment and that she is likely to remain so disabled for an indefinite period of time.

CONCLUSIONS OF LAW

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

2. Claimant's fall in the employer's parking lot on January 29, 1985 is a proximate cause of the physical impairment in her cervical spine, the pain she experiences in the cervical spine, the chronic pain syndrome which she has developed and the major depressive disorder with which she is currently afflicted.

3. Claimant's depressive disorder is an injury which arose out of and in the course of her employment with the Federal Reserve Bank.

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4. Claimant is permanently and totally disabled within the meaning of Iowa Code section 85.34(3).

5. Claimant is entitled to receive 96 weeks of compensation for healing period, all of which has previously been paid by the employer and its insurance carrier.

6. Claimant is entitled to receive 24 5/7 weeks of temporary partial disability compensation, all of which has previously been paid by the employer and its insurance carrier.

7. Claimant is entitled to receive 60 5/7 weeks of compensation for permanent total disability payable commencing October 16, 1982, all of which has previously been paid by the employer and its insurance carrier.

8. Claimant is entitled to receive compensation for permanent total disability for so long as she remains permanently and totally disabled commencing October 23, 1985.

9. Claimant is entitled to recover costs from the defendants in accordance with Division of Industrial Services Rule 343-4.33 in the amount of $1,415.75.

ORDER

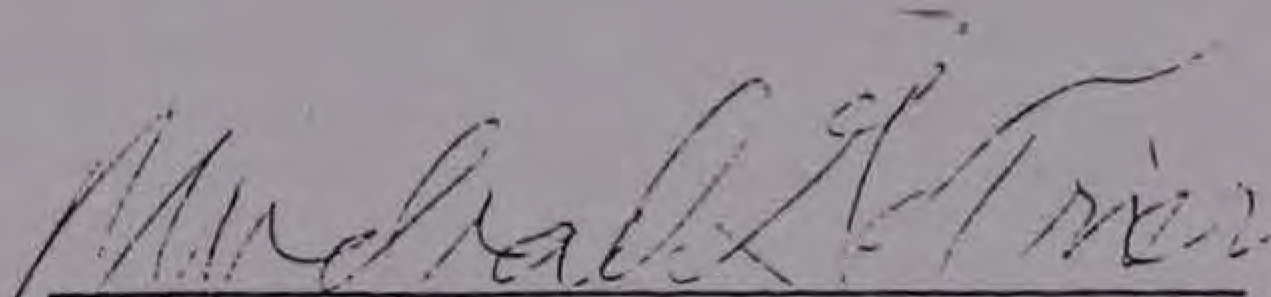
IT IS THEREFORE ORDERED that defendants pay claimant compensation for permanent total disability commencing October 23, 1985 at the rate of one hundred sixty-nine and 68/100 dollars ($169.68) per week and continuing for so long as claimant remains totally disabled from gainful employment.

IT IS FURTHER ORDERED that defendants receive credit for all amounts previously paid and, in the event any amounts are past due and owing, such amounts shall be paid in a lump sum together with interest pursuant to section 85.30 of The Code of Iowa.

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 one thousand four hundred fifteen and 75/100 dollars ($1,415.75).

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 9th day of March, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY E. DAVIS,	:	
Claimant,	:	File No. 747153
vs.	:	
J. M. STEEL ERECTORS, INC.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
WAUSAU INSURANCE COMPANIES	:	
Insurance Carrier, Defendants.	:	

FILED
MAY 31 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying any benefits.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 31. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether claimant received an injury which arose out of and in the course of his employment.

REVIEW OF THE EVIDENCE

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

Claimant worked for defendant employer (herein employer) helping to erect grain storage bins. The job sites were in various states. A job in Oblong, Illinois was finished on September 3, 1983 (a Saturday). The following job site was at Clemons, Iowa, which is near Marshalltown. Claimant and other workers were to be on the Clemons job site on Monday morning, September 5, 1983, to go to work. Some of the workers went directly from Oblong to Clemons. Claimant and a coworker (John Rupp) were given an option of going to Shenandoah where they shared an apartment prior to traveling to Clemons.

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On Monday, claimant went to a festival in Essex, Iowa. It was claimant's idea to go to the festival. After attending the festival, Rupp drove the employer's truck, with claimant in the front seat and another coworker in the truck, from Essex towards Shenandoah in order to pick up a fourth coworker. Rupp had an accident with the truck at approximately 6:00 p.m. prior to arriving in Shenandoah. Claimant was allegedly injured in the accident. Claimant performed no work duties while in Essex and he did not load any equipment in the truck.

Claimant testified that he expected to get paid for the drive between Essex and Shenandoah. He also testified that he just got paid travel time for what it would take to travel from one job site to the next. Claimant stated that Rupp told him he would pick him up about 8:00 p.m. on Monday.

Jerry A. Miller was president of J.M. Steel, the employer, on September 5, 1983. This corporation is no longer in existence. Miller testified that he paid workers for travel time from the last job they were on to the next job. He also testified that the workers were to get paid for travel from Oblong, Illinois to Clemons, Iowa. He stated that the workers were not paid for travel time to return home and then go to the next site. He further stated that claimant and other workers were supposed to be on the job Monday morning.

APPLICABLE LAW

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

ANALYSIS

Claimant has failed to prove his injury arose out of and in the course of his employment. The greater weight of evidence indicates that claimant was not to be paid for the time he actually traveled from Shenandoah to Clemons. The travel time he would have been paid was for travel from Oblong, Illinois to Clemons, Iowa. Furthermore, claimant was not to be paid for traveling from Shenandoah to Essex and then back to Shenandoah.

Claimant was supposed to be at the Clemons job site on Monday morning. Instead of doing so, he attended a festival at Essex on that day and made arrangements to have Rupp pick him up there. After claimant attended the festival, Rupp and claimant were returning to Shenandoah to pick up a coworker to travel to the Clemons job site. Claimant had been given permission to return to Shenandoah and then travel to the job site at Clemons. He was not authorized by his employer to attend a festival instead of reporting for work and then return home and then go to the next job site. Claimant's activities, which were undertaken on his own volition and which were in direct conflict with

his employer's instructions, placed him in a situation where he was injured. Claimant's employment did not place him in the situation in which he was injured. Claimant performed no work for his employer in Essex. He was not furthering the employer's business by traveling from Essex to Shenandoah and there was no benefit to the employer for claimant to do so.

FINDINGS OF FACT

1. On September 3, 1983, claimant was employed by J.M. Steel.

2. On September 3, 1983, a J.M. Steel project in Oblong, Illinois, was completed.

3. On September 4, 1983, a new J.M. Steel project was to be started in Clemons, Iowa, near Marshalltown, Iowa.

4. Claimant was supposed to appear at the Clemons project on the morning of September 5, 1983.

5. Claimant's home is in Shenandoah, Iowa.

6. On September 5, 1983, claimant and a coworker, John Rupp, went to a festival in Essex, Iowa. It was claimant's idea to attend this festival.

7. Essex is located near Shenandoah and a trip from Essex to Clemons is a shorter trip than a trip from Shenandoah to Clemons.

8. J.M. Steel gave claimant and John Rupp the option of returning home prior to going to the Clemons job site; in other words, claimant and John Rupp were not required to go directly from the Oblong job site to the Clemons job site.

9. J.M. Steel employees were paid on an hourly basis for travel time to a job site.

10. On a new project the hourly rate was computed by determining the amount of time it would take to get from Hamburg, Iowa (the home of Jerry Miller, the president of J.M. Steel) to the new job site.

11. John Rupp and claimant were in Essex on September 5, 1983 from about 9:00 a.m. to about 6:00 p.m.

12. John Rupp started to drive a company truck, with claimant in the front seat, from Essex to Shenandoah commencing at about 6:00 p.m.

13. Prior to arriving in Shenandoah, where John Rupp was going to pick up another coworker, John Rupp had an accident

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with the company vehicle.

14. The accident described above occurred at about 6:30 p.m. on September 5, 1983.

15. Claimant injured his back in the truck accident on September 5, 1983.

16. There is a Clemons, Iowa located in Marshall County, near the city of Marshaltown.

17. Clermont, Iowa is located in Fayette County near the county seat of West Union, Iowa.

18. J.M. Steel only paid a worker his hourly rate for travel time if the worker arrived on the job site.

19. Claimant's injury on September 5, 1983 did not arise out of his employment with J.M. Steel.

20. Claimant's injury on September 5, 1983 did not occur during the course of his employment with J.M. Steel.

CONCLUSIONS OF LAW

Claimant failed to establish by a preponderance of the evidence that he sustained an injury that arose out of and in the course of his employment on September 5, 1983.

WHEREFORE, the decision of the deputy is affirmed.

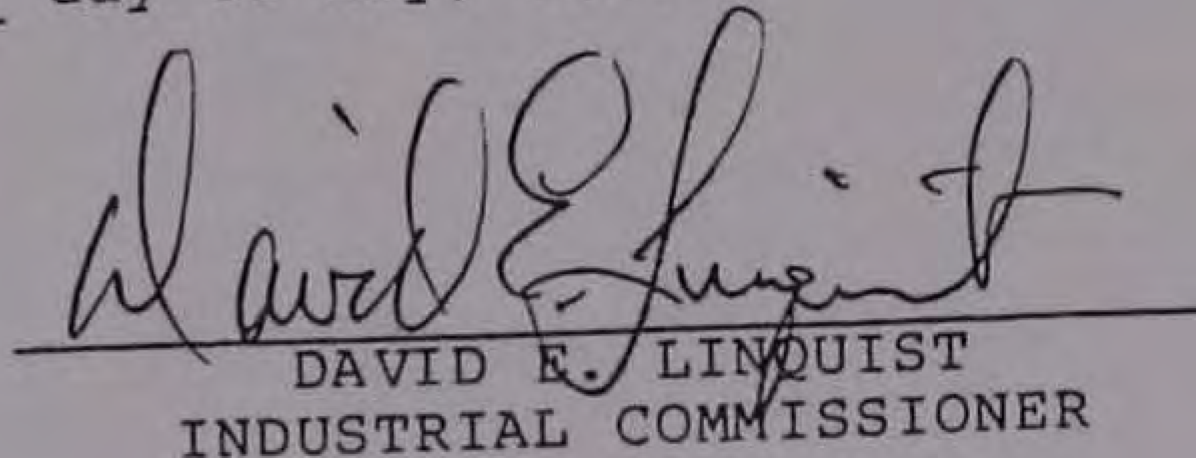
ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

That claimant pay the costs of this action including the costs of the appeal and transcription of the arbitration hearing.

Signed and filed this 31st day of May, 1988.



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1108, 1803
Filed April 22, 1988
HELEN JEAN WALLESER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARLA DAVIS, Claimant, vs. K MART DISCOUNT STORE, Employer, Self-Insured, Defendant.	:	File No. 804730 ARBITRATION DECISION

1108, 1803

Claimant did not establish causal connection between work incident and claimed permanent partial disability where claimant did not seek further care after post-injury work return for seven months and only after the employer terminated her for noninjury-related reasons.

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FILED

APR 22 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARLA DAVIS,

Claimant,

vs.

K MART DISCOUNT STORE,

Employer,
Self-Insured,
Defendant.

File No. 804730

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, Marla Davis, against her self-insured employer, K-Mart Discount Store, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained September 10, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner at Burlington, Iowa on December 23, 1987. A first report of injury was filed September 23, 1985. Claimant has been paid two weeks and five days of temporary total disability or healing period benefits.

The record in this case consists of the testimony of claimant, of Murray Brooks, Jr., and of Linda Watson as well as of joint exhibits 1 through 39.

ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant's rate of weekly compensation is $68.78; that medical costs are fair and reasonable; that claimant did receive an injury which arose out of and in the course of her employment on the injury date; and, that the injury is causally related to temporary total disability. The issues remaining for resolution are:

Whether claimant's injury is a cause of permanent partial disability;

Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement, including whether claimant is entitled to any additional temporary total or healing period compensation;

Whether claimant is entitled to payment of certain medical

costs as reasonable and necessary medical care causally related to her work injury and authorized by the defendant; and,

Whether claimant is entitled to additional benefits for unreasonable delay or denial of payment pursuant to Iowa Code section 86.13.

REVIEW OF THE EVIDENCE

Claimant is 28 years old, separated and has one child. Claimant had been employed at K-Mart Discount Store for approximately one and one-half years on September 10, 1985. She had worked at the cash registers and on the floor in housewares. Claimant testified that she was working in the stock room when a Sani-Flush display fell down and hit her on the head. Claimant reported she was bleeding, lost consciousness and was transported to the hospital by ambulance. Claimant stated she initially had sharp pain at the injury site on the top of her head as well as dizziness, double vision and pain and numbness in the neck. Claimant was released for home care. Charles F. Eddingfield, M.D., treated claimant in the emergency room as well as on the following day. Claimant subsequently underwent physical therapy with James P. Smith, L.P.T., on September 24, 25 and 26, 1985. Claimant testified that, on September 25, 1985, she saw Robert R. Kemp, M.D., the company physician, per K-Mart's instructions and that she was instructed that she was no longer to see Dr. Eddingfield, but was to see either Dr. Kemp or a Dr. Schulte. Dr. Kemp released claimant for a work return after September 26, 1985. Claimant testified that, following her work return, she received less work hours and was placed on a cash register more often than on floor duty. Claimant was terminated on April 11, 1986.

Claimant apparently saw no physician from her work return until her termination. Subsequent to her termination, she saw Dr. Eddingfield again. Claimant testified that she called Linda Watson, K-Mart personnel director at the Keokuk store, and asked for medical care. She reported Ms. Watson told her that, since she was no longer employed, K-Mart was not responsible for her medical care. Claimant then saw Dr. Eddingfield on her own. Claimant testified that Dr. Eddingfield advised her to see Walid Hafez, M.D., a neurologist, hospitalized her for a CT scan and prescribed one and one-half months of physical therapy. She reported that he subsequently referred her to William Vance, D.C., who treated her complaints. Claimant testified that she continues to have numbness and pain in her head, neck and shoulders which was not present prior to her injury. She identified medical statements in evidence as involving treatment incurred for her condition as described. At hearing, the parties stipulated that K-Mart would send claimant to see Dr. Kemp. They further stipulated that, if necessary and recommended by Dr. Kemp, a neurologist or orthopaedic surgeon of Dr. Kemp's choice would examine claimant and issue further treatment, if necessary.

Claimant received unemployment benefits after contesting her initial denial of those benefits subsequent to her employment at K-Mart. Claimant agreed that, at the time of her October, 1986 deposition, she was still receiving unemployment benefits. She did not contest that she had said in her deposition she was not sure she wanted to work as she wished to stay home and take care of her daughter. Claimant is now employed at the Ten Pin Bowl, earning $3.75 per hour. She works approximately 12 hours per week and receives tips. Claimant received $3.80 per hour at K-Mart and worked 25-30 hours per week. Claimant agreed that her actual take-home net at the Ten Pin Bowl, with tips, is approximately the same as it was at K-Mart. Claimant is a high school graduate. Prior to her K-Mart employment, claimant had held a number of waitressing and bartending jobs, each paying between $3-$4 per hour. Claimant agreed that, after her work return in September, 1985, she did not miss work at K-Mart on account of neck or shoulder pain. Claimant stated that such was reoccurring, but that she did not "bring it up."

Claimant agreed that outstanding bills with a doctor and with the Four Seasons on her credit report were not related to her K-Mart incident.

Murray Brooks, Jr., general store manager of K-Mart at Keokuk, reported that, to the best of his knowledge, claimant's medical bills to her work return in September, 1985, were paid. He indicated that, upon her work return, claimant did not inform him of any physical limitations. He denied that claimant was demoted, but was unable to state whether claimant received less hours. He reported that different employees are given more or less hours, but that claimant was not subjectively given less hours than other employees. Mr. Brooks denied that claimant had ever told him of problems with her neck, shoulder or back. He stated that, had she done so, he would have advised her to see a physician. He reported that claimant exhibited no signs of impairment in work performance from her work return until her termination. Mr. Brooks characterized claimant's termination as resulting from cash register shortages and tardiness. He reported that the shortages arose from not properly supervising to prevent shortages. Brooks reported that claimant did not ask for medical treatment until after she was denied unemployment benefits at the first level. Brooks reported that claimant was not returned to the company doctor after her termination because she was no longer covered by company insurance at that point.

Linda Watson, personnel director at K-Mart in Keokuk, reported that she observed no limitations on claimant's ability to perform her duties from her work return until April 11, 1986. Watson reported that claimant called her following her termination and that Watson initially told claimant she could see either Dr. Kemp or Dr. Schulte, but that, after a conversation with Mr. Brooks, Watson told claimant she would not be able to see either physician

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since she was no longer employed by K-Mart. Watson recalled a Spring, 1986 phone conversation with Dr. Kemp's office in which she advised the office that claimant's medical treatment would not be covered since claimant had been released from work and terminated. Watson reported she has never received communication from a medical practitioner that claimant continues to have problems related to her 1985 injury. Watson reported that claimant exhibited no symptoms on her work return and never requested to again see Dr. Eddingfield until April, 1986.

A Keokuk area hospital outpatient record of September 10, 1985 reports that claimant has a superficial laceration to the right side of the head of approximately one inch. The report indicates that claimant had no loss of consciousness, but had kept wanting to go to sleep. An x-ray was reported as negative. Tylenol #3 was prescribed. The diagnosis was of an abrasion on the scalp and concussion. Claimant was released to return home, apparently in good condition and ambulatory. On September 11, 1985, Charles Eddingfield, M.D., reported that claimant had had vertigo while sitting in the waiting room and had lain down. She was advised to not go to work and to rest. On September 16, 1985, claimant was, by Dr. Eddingfield's report, able to be up and about for an hour and then would develop more pain. She continued to have some dizziness, but was considerably improved and stated she felt much better. She did not feel nauseated, had not been vomiting and had had no vision changes.

On September 24, 1985, James P. Smith, L.P.T., reported that claimant had normal range of motion thoughout the cervical area, but slight associated soft tissue tightness of the bilateral cervical spine. On September 26, 1985, Mr. Smith noted that claimant had shown good progress with a reduction in soft tissue tightness about the posterior cervical area. Increased cervical motion was noted and claimant stated she had less acute pain about the involved area, although some residual soreness remained.

A note, apparently of Dr. Kemp, of September 25, 1985, reports that claimant is ready to return to work as of September 26, 1985. A further note of Dr. Kemp indicates that claimant missed a follow-up appointment on October 2, 1985. A note, also apparently of Dr. Kemp, of May 2, 1986 states that Linda Watson from K-Mart had phoned and stated that patient had returned to work and was later terminated. The note indicates that claimant, at that time, stated she had head, neck and back pain which she believed related back to her September 10, 1985 injury. Ms. Watson apparently reported that K-Mart would refuse charges for further office calls.

On May 30, 1986, Walid Hafez, M.D., a neurologist, reported that claimant's neurological examination was entirely within normal limits for mental state, cranial nerves, motor system, sensory system, coordination, reflexes, station and gait, and

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Romberg test. Percussion of the calvarium did elicit very minimal tenderness over the right posterior parietal area. Manipulation of the neck revealed excellent range of motion without muscle spasm and without pain. The doctor related that claimant gave a history of post-traumatic headaches and possibly mild depressive symptomology which could relate to her unfortunate dealings with her employer. Claimant's prognosis was good and the doctor did not expect her to have chronic headaches, migraines or neck pain. Claimant's examination was characterized as extremely satisfactory and the doctor saw no need to proceed with more testing, more specifically, any need for a CT brain scan. Claimant was advised to continue with Motrin. The doctor prescribed 25 mg of Amitriptyline for claimant at bedtime to improve her sleep and to possibly alleviate some of her mild depressive symptoms.

On July 29, 1986, claimant described her complaints on a patient admission form from Vance Chiropractic Clinic as "grating sound on movement" of the neck, frontal head pain and aching shoulders. She also reported pain at the base of the neck, headache, inability to sleep, some vertigo and some tingling, apparently of the hand. Handwritten notes, apparently of the Vance Chiropractic Clinic, indicate headache improved as of August 18, 1986; one headache during the week of August 22, 1986; apparently a bad head [ache], neck and back [pain] on Wednesday of the week of September 5, 1986; headache during the week of September 18, 1986; nerves and headache during the week of October 17, 1986; and, headache during the week of November 25, 1986.

Charges with the Vance Chiropractic Clinic in evidence include a $35.00 fee for full spine x-ray of July 29, 1986; $35.00 fee for a lateral full spine x-ray of July 29, 1986; $195.00 charge for office calls of July 31, August 11, August 13, August 18, August 22, August 29, September 5, September 12, September 30, October 17, November 4, and November 25, 1986 and February 6, 1987. Claimant is reported as having already paid prescription costs for Tylenol with codeine at $6.20; for Talwin at $10.55; and for Tylenol with codeine at $6.20, prescribed from September 10, 1985 through September 20, 1985. Claimant has $140.00 of outstanding charges with James Smith for services rendered on May 19, 1986, May 20, 1986, May 21, 1986, May 22, 1986, May 27, 1986, May 28, 1986 and May 29, 1986.

Claimant has $60.00 of charges for office visits for herself with Dr. Eddingfield on July 23, 1986, October 11, 1986 and January 28, 1987. A balance forward with Dr. Eddingfield of $180.00 also remains. It cannot be discerned whether such relates to treatment for claimant, for her daughter or for her then spouse. K-Mart Corporation paid Dr. Eddingfield a balance of $140.00 by check dated February 14, 1986.

Claimant has a $75.00 balance due for treatment with Dr. Hafez.

A Keokuk Area Hospital statement of September 13, 1985 reports $227.50 in charges for treatment rendered on September 10, [1985]. A notation of November 12, 1985 reports a payment of $227.50 from K-Mart.

A statement identified on the exhibit list as from the Credit Bureau of Keokuk indicates a balance due of $1,177.15 with $192.50 due to a Dr. Fortson, $140.00 due to Jim Smith, $92.76 due to a Dr. Strope, $717.05 due to the Keokuk Area Hospital and $34.76 due to the Four Seasons.

In his deposition taken December 7, 1987, Robert R. Kemp, M.D., identified himself as a family practitioner. He reported that, when he released claimant to return to work on September 26, 1985, he recorded no limitations of bending, stooping or lifting. He reported that his impression was that claimant then should have been able to satisfactorily do any type of work that would ordinarily be done at a K-Mart store. In response to a hypothetical question generally outlining claimant's medical course subsequent to September 10, 1985, he opined that the course would substantiate that she was not "disabled." The doctor stated, however, that claimant may have had subjective complaints, even if those were not limiting the type of work that she would have. He reported that, if claimant continued to have symptoms, then further evaluation would be appropriate. The doctor stated that mild concussions ordinarily might produce symptoms such as dizziness for from one to three days. He reported that a blow to the head may indirectly injure the neck, but that the length of time such would bother was moderate, depending upon the severity of the injury. The doctor reported that, for her symptomatology to continue in the neck area for a year and a half, would be a rather long time. He reported that, while patients may complain and have symptoms, those symptoms do not necessarily mean permanent injury. The doctor reported that symptomatology and complaints in the neck area should resolve within six months to a year or less.

APPLICABLE LAW AND ANALYSIS

Initially, we note that claimant, in her brief, conceded that she has no further entitlement to additional temporary total disability. We agree with claimant as it is apparent from the evidence presented that claimant could have continued working, but for her termination on April 11, 1986 for noninjury-related reasons. We consider then the issue of whether claimant has established a causal relationship between her work injury and claimed permanent partial disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 10, 1985 is causally

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

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

Claimant has presented no direct medical evidence supporting her contention of a causal connection between her work injury consisting of a scalp laceration and possible concussion and claimed permanency. Claimant returned to work in late September, 1985 and worked until her termination on April 11, 1986. Claimant saw no physician from her work return until subsequent to her termination. Claimant did not request medical treatment or make complaints to her employer during the period from her work return until subsequent to her termination. Physicians whom claimant saw subsequent to her termination, while relating claimant's subjective history as to the origin of her complaints, have not rendered opinions causally connecting those complaints to the earlier work injury. Dr. Hafez has stated that claimant's prognosis was good and that he did not expect her to have chronic headaches, migraines or neck pain. He found her neurological examination to be entirely within normal limits. He did not feel that CT scan or other further testing was appropriate for claimant. He agreed that claimant had mild depressive symptoms which could relate to her unfortunate dealings with her employer, but did not connect those with the work injury per se. Given claimant's variety of problems with K-Mart, that statement even coupled with lay evidence would not be sufficient to connect claimant's depressive symptomatology to her work injury. Likewise, Dr. Hafez's statement that claimant would not be expected to have chronic headaches, migraines or neck pain would mitigate any claim as to permanency on account of those conditions.

Further, the doctor did not relate them to the work injury, but for claimant's subjective history. Additionally, Dr. Kemp, who, with Dr Eddingfield, treated claimant subsequent to her

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injury in September, 1985, reported that, when released to work, she had no limitations on bending, stooping or lifting. He stated his impression that mild concussions would ordinarily produce symptoms such as dizziness for from one to three days and that any blow to the head which indirectly injured the neck would probably cause symptomatology and complaints in the neck area which would resolve within six months to a year or less. Such would suggest that any continuing difficulties claimant now has were too distant in time when initially made manifest after her April, 1986 termination and are currently too distant in time to be rationally related to her September, 1985 work incident. Further, while claimant has treated with the Vance Chiropractic Clinic since at least July, 1986, notes of the clinic in evidence suggest that claimant's principal complaint is of headaches. Nothing in the notes suggests that the headaches relate to the September, 1985 work incident. Clinic notes in their entirety suggest that claimant's personal circumstances and personal activities could have also contributed to her headaches and other complaints. Claimant's claim of a causal relationship between her work incident and permanent disability fails.

As claimant has not shown a causal relationship between her work incident and claimed permanent disability, we need not make a determination as to the nature and extent of any claimed permanent partial disability. We note in passing, however, that, had such been established, any permanency award would have been <u>de minimous</u>. Claimant was not precluded from returning to work <u>at K-Mart</u> following her work incident. Indeed, she worked for her employer for at least seven months subsequent to the incident. Claimant, at least in part, voluntarily removed herself from the labor market subsequent to her K-Mart termination. When she did ultimately seek employment, such employment was well within the skills she had possessed prior to and subsequent to her injury and paid approximately the same as her K-Mart salary. Claimant has had no physician-imposed limitations. All of the above would suggest that any permanency award would have been minimal, at best.

As regards the section 85.27 issue, the parties stipulated at hearing that claimant would be permitted to schedule an examination by Dr. Kemp and that, if Dr. Kemp thought such was warranted, she would be referred to a neurologist or orthopaedic surgeon of Dr. Kemp's choice. Therefore, such is not an issue.

Claimant seeks payment of medical costs with physicians seen after her April, 1986 termination. Section 85.27 requires the defendant to pay claimant for reasonable and necessary medical care, both authorized and related to a compensable injury. For reasons further elaborated above in the discussion of the permanency causal connection issue, claimant has not shown that care sought after her April 11, 1986 termination related to her

September, 1985 work injury. As noted, such care was remote in time from claimant's original injury. Claimant had not made complaints nor sought care for an extended period from her post-injury work return to following her termination. No physician has causally connected such care with conditions related to claimant's work injury. Hence, on the record as submitted, claimant has not established the requisite causal connection between such care and her work injury. Payment for such is not required of the defendant.

As the defendant has no requirement to pay claimant for any care sought and as claimant has not shown any entitlement to permanent partial disability benefits, the issue of whether a penalty is appropriate for unreasonable delay or denial of benefits is moot.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant received an injury arising out of and in the course of her employment on September 10, 1985 when she was hit on her head by items from a Sani-Flush display while working at K-Mart.

Claimant had a superficial laceration to the right side of her head of approximately one inch. Claimant had no loss of consciousness, but had kept wanting to go to sleep.

Claimant's diagnosis was of an abrasion on the scalp and concussion.

Claimant had dizziness when seen by Dr. Eddingfield on September 11, 1985 and on September 16, 1985.

On September 16, 1985, claimant felt that her dizziness was considerably improved and she did not feel nauseated, had not been vomiting and had had no vision changes.

On September 25, 1985, claimant was released to work after September 26, 1985 without restrictions.

Claimant worked from after September 26, 1985 until her termination at K-Mart on April 11, 1985 for cash register shortages and tardiness.

From her work return until her termination, claimant did not complain of symptoms related to her work injury and was able to work.

Subsequent to her termination, claimant requested further medical care.

Subsequent to her termination, claimant sought further medical care on her own accord when K-Mart refused to authorize such care.

Further care received after claimant's termination was not causally related to claimant's work incident.

Conditions complained of subsequent to claimant's termination were not causally related to claimant's work incident.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established that her injury of September 10, 1985 is causally related to any additional temporary total disability or causally related to any permanent partial disability.

Claimant has not established she is entitled to payment of medical costs for treatment sought after her April 11, 1985 termination by K-Mart.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing further from this proceeding.

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

Signed and filed this 22nd day of April, 1988.

Helen Jean Walleser
HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ESLIE DE HEER,	:	
Claimant,	:	
s.	:	FILE NO. 804325
LARKLIFT OF DES MOINES,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
ind	:	FILED
IGNA COMPANIES,	:	JAN 15 1988
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Leslie De Heer, claimant, against Clarklift of Des Moines, employer (hereinafter referred to as Clarklift), and Cigna Companies, insurance carrier, defendants, for workers' compensation benefits as a result of an alleged injury on September 9, 1985. On November 24, 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: Richard Rattray, Nona De Heer, Donald Bryant, Mary Kathleen Schauwecker (f/k/a Kathy Ward). The exhibits received into the evidence at the hearing are listed in the prehearing report. Subsequent to the hearing, the parties have indicated that exhibit L was to be withdrawn at the time of hearing but was erroneously listed as an exhibit in the exhibit list attached to the prehearing report. Therefore, exhibit L was not submitted and was not considered in arriving at this decision. According to the prehearing report, the parties have stipulated to the following matters:

1. If defendants are held liable for the alleged injury, claimant is entitled to at least temporary total disability or healing period benefits from September 24, 1985 through June 15, 1986 and that claimant has not been employed since September 24, 1985 to defendants' knowledge.

2. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

3. Claimant's rate of compensation shall be $273.86 per week.

Defendants objected at hearing to any use by claimant of a gradual injury or cumulative trauma theory or the use of any other injury date in the application of such a theory in this case for compensability as such a theory was not previously plead. This objection is not well taken and shall be overruled. Legal theories need not be plead, only the relevant facts. There was no showing that defendants were surprised in any fashion as to any facts or opinions under which such a theory in this case was applied. In fact, the underlying facts and expert opinions giving rise to such a theory of recovery was first elicited from physicians in this case in their depositions taken on October 13, 1987 and on November 18, 1987, well before the hearing. It is well established that the technical rules of pleadings do not apply to cases before this agency. As a policy matter, it would not be consistent with the humanitarian principles of the workers' compensation acts or administratively efficient to require claimant to plead each and every possible injury date (thereby creating a large number of agency files) under a complicated legal theory such as the cumulative trauma or gradual injury theories. This agency by its rules takes meticulous care to avoid surprises of facts at the hearing in requiring a list of exhibits and witnesses 15 days prior to hearing. This is in most cases sufficient notice of any facts relied upon in the application of any particular legal theory.

ISSUES

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

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

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

III. The extent of weekly disability benefits to which claimant is entitled.

SUMMARY OF THE EVIDENCE

The following is a summary of evidence presented in this case. For the sake of brevity, only the evidence most pertinent

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to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision. Furthermore, any attempted summarization of evidence will inevitably contain conclusions as to what the evidence may show. Such conclusions in this summary should be viewed as preliminary findings of fact.

Claimant testified that he worked for Clarklift from September, 1972 until September, 1985, as a forklift mechanic. He stated that his duties consisted of repairing transmissions and differentials on forklift trucks but his work also involved overhauling motors and hydraulic lifts. All of his work involved heavy lifting over 20 pounds and repetitive bending, stooping, lifting, twisting and prolonged standing. Claimant earned $11.15 per hour and approximately $35,000 a year annually in his job at the time of the alleged work injury. Claimant's employment records indicate that claimant was considered a good to fair employee by his supervisor. There is no indication prior to September, 1985, that claimant had any difficulty performing his work as a result of any physical limitations. Claimant stated at the hearing that he left his employment at Clarklift following the alleged work injury. Claimant has not worked since leaving Clarklift. Claimant's absentee record shows that he was rarely absence from work due to illness before the alleged work injury.

Claimant testified that his home life or activities outside of his employment at Clarklift was generally very sedentary and limited to light yard or household work. There is some evidence to indicate that at one point in time he did cut and sell firewood but this was for a brief period of time well before the alleged work injury.

The facts surrounding the work injury are in dispute. Claimant testified at hearing that on September 9, 1985, he was working on a hydraulic cylinder located on his workbench. While lifting a "saddle" weighing approximately 25 to 30 pounds, he felt a pop in his back while attempting to carry this saddle to the parts washing area he experienced pain after taking only a few steps. This pain began in his low back and radiated down into his left leg. Claimant said that this pain compelled him to fall to the floor. Claimant said that he then made it back to his feet and continued to the washing area to complete the washing of the saddle and the other parts he was carrying at the time. He then returned to the work bench at his work station but he said that the pain gradually became worse and he told his foreman eventually that he could no longer work. Claimant then left work for the day. Claimant admitted that he did not specifically tell his foreman at that time what exactly had happened before leaving work but did so a few days later.

In his deposition, claimant testified that the pain did not develop until after he began to carry the saddle weighing

approximately 20 pounds or less and only after taking a few steps. In the history provided to his initial treating physicians, claimant stated that the pain began while he was in the act of lifting and that the saddle weighed approximately 30 pounds. This account was similar to the account of the incident given by claimant to an insurance representative in a telephone call soon after the incident.

Donald Bryant, claimant's supervisor, testified that the saddle actually weighs 14 pounds from his measurement using a scale prior to the hearing. He stated that claimant told him that the incident happened while carrying the saddle to the washing area and that his "back gave out." Bryant stated that he recalls claimant stating that he was going to a chiropractor to "pop joints" prior to the time of his work injury but generally he was not around claimant to hear any back complaints. Bryant further stated that he was first aware of claimant's back problems in 1982.

Claimant immediately sought treatment after the incident on September 9, from the Mater Clinic from Bernard C. Hillyer, M.D., who immediately admitted claimant to the hospital for traction, medication, physical therapy and bedrest. Dr. Hillyer eventually diagnosed claimant as suffering from an aggravation of a prior existing spondylolithesis (hereinafter referred to as spondy) condition and referred claimant to Jerome Bashara, M.D., a board certified orthopedic surgeon. Claimant's treatment over the next several weeks remained conservative until November, 1985, when claimant was readmitted to the hospital for additional testing and possible surgery. After this testing confirmed the need for surgery, Dr. Bashara performed a gill laminectomy and fusion at the L5-S1 level of claimant's spine. Claimant then underwent a slow but steady recovery over the next several months until July 3, 1986, when Dr. Bashara stated that claimant's recovery had "reached a plateau" and that claimant was ready for work. However, Dr. Bashara's release for work was only to light duty activities with no lifting over 20 pounds or excessive bending, stooping or twisting of the lumbosacral spine. These restrictions have not been changed by Dr. Bashara since that time and the doctor considers them as permanent.

At the hearing claimant admitted that he had back problems before September, 1985, but indicated that these problems were in the upper back and shoulders. Claimant also stated that he received chiropractic treatment for these problems. The records of Jeffrey Meyer, D.O., indicates that claimant had treatment not only for upper back problems but also for lower back difficulties since 1982, but primarily for the upper back. The eariest low back complaints that can be deciphered from the records of Dr. Meyer submitted into evidence was in June of 1983 following an incident brought on by coughing. In histories given to physicians in this case, claimant stated that he had back problems all of his

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life and that over the past few years these problems had become worse. Claimant stated in his deposition that he only had backaches before September, 1985, and certainly not the type of pain and difficulties that he experienced in the alleged work injury.

Claimant testified that at the present time his low back continues to hurt and in addition to the restrictions imposed by Dr. Bashara, he has difficulty with prolonged sitting and standing. He stated that he does enjoy walking and does so for extended periods of time. Dr. Bashara rates claimant's impairment as consisting of a 25 percent permanent partial impairment to the body as a whole but that five percent of this is due to a prior existing low back difficulty. Dr. Bashara attributes the remaining 20 percent impairment to the work injury in September, 1985. In his deposition Dr. Bashara opined that the work incident described by claimant induced the spondy condition and the resultant impairment and also opined that it was likely that claimant's heavy work at Clarklift over 13 years was also a likely cause of the spondy condition. Dr. Bashara stated that even if he were to assume that the spondy condition preexisted the alleged work injury or claimant's work at Clarklift, such an assumption would not change his opinion that the surgery and impairment were work related.

At the request of defendants, claimant was evaluated by William R. Boulden, M.D., another board certified orthopedic surgeon, in May, 1986. Initially, Dr. Boulden relied upon the history that claimant felt pain while lifting the saddle and opined that claimant traumatically aggravated the preexisting spondy condition. He then rated the claimant as suffering from a 25 percent permanent partial impairment to the body as a whole, 15 percent of which constituted the preexisting spondy condition. In his deposition, Dr. Boulden changed his causal connection opinion after reading the testimony given by claimant in his deposition that the pain did not begin until after he began to carry the saddle. Such an act of carrying the saddle did not in the opinion of Dr. Boulden consist of a traumatic event sufficient to cause the onset of pain and the resultant surgery. Dr. Boulden felt that the onset in such case would be the natural course of events in any spondy condition. Dr. Bashara stated in his deposition that it was not unusual for the onset of symptoms to occur several minutes after the injury and the fact that claimant had been carrying the saddle rather than lifting the saddle at the time of the onset of pain did not change his causal connection opinions.

Finally, Dr. Hillyer, the general practitioner physician at the Mater Clinic who initially treated claimant, opines that claimant's low back difficulties were work related either due to the heavy work at Clarklift over the years or due to the September, 1985 incident. Dr. Hillyer, in his deposition, stated that he

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was in a residency program at a hospital in the State of Kansas and had treated over a 1,000 orthopedic patients in the past but that he does not considered himself a specialist in orthopedic surgery. However, Dr. Hillyer does perform some limited orthopedic surgeries in the area of the hip and minor surgery such as for carpal tunnel syndrome. Dr. Hillyer testified it is not unusual for orthopedic patients to blur the events and be unable to precisely indicate or describe an orthopedic injury or when pain begins. Therefore, he did not think it particularly important whether the pain began while lifting or soon thereafter.

After his release by Dr. Bashara, claimant returned to Clarklift to inquire as to returning to work and was told that there was no job available within his physical restrictions imposed by Dr. Bashara. Claimant has made two applications for employment in the Knoxville area and states that he monitors ads for available jobs in local newspapers. Claimant has not as yet found suitable replacement employment. Claimant began to receive vocational rehabilitation counseling from Intercorp, a rehabilitation service retained by defendants in the summer of 1986. A part of this counseling consisted of an evaluation of claimant's abilities by the State of Iowa rehabilitation facilities located in Des Moines. To date, claimant has not located suitable employment from any vocational rehabilitation activity.

The state vocational rehabilitation personnel extensively evaluated claimant's job skills and rehabilitation potential. Claimant drove to Des Moines daily for these evalutions which lasted several days. Despite the fact that claimant only has an eighth grade education, he was able to demonstrate in the state tests a vocabulary equivalency to the 12.7 GE level, reading comprehension at the 9.9 grade level, general reading performance at the 11.4 grade level and math skills at the 10 grade level. Claimant demonstrated an ability to keep accurate bookkeeping records but had difficulty with understanding the concepts of double entry bookkeeping. At the state rehabilitation facility claimant expressed a desire for training in gunsmithing and small engine repair. Claimant testified that he has had a long interest and hobby in handling guns and has done minor repairs on guns in the past such as making firing pins. The state evaluation found that claimant had sufficient knowledge and transferable skills to pursue vocational training in gunsmithing and small engine repair but the counselors question the viability of these goals due to claimant's physical limitations. Claimant also did not believe that small engine repair was viable in that he could not crank an engine during the repair work. However, the state rehabilitation personnel did approve an attempt to pursue the gunsmithing training but this has not been accomplished to date due to claimant's lack of funds. The state rehabilitation testing also indicated some aptitude for low grade clerical, bookkeeping or office type of employment but this was not pursued with any vigor as claimant did not express an interest in such employment.

Richard Rattray, a State Vocational Rehabilitation counselor, estified at the hearing that it is unlikely that claimant will e able to obtain light industrial employment due to his physical ntolerance for activity and an inability to work eight hours a ay. He stated that the evaluators at the state rehabilitation acility did observe claimant's inability to tolerate prolonged tanding and sitting and the need to frequently change positions. attray further testified that he felt that claimant was not a ood candidate for retraining due to the constant back pain which would affect his thought processes. Finally, Rattray did ot believe that gunsmithing was a viable vocational goal as the hances of employment were unlikely in gunsmithing within this area.

Mary Kathleen Schauwecker testified for Intercorp on behalf of the defendants. Schauwecker testified that claimant can be employed as he possesses considerable transferable skills in the area of mechanics and that he possesses a good work record. She believes that suitable employment can be found with proper vocational counseling including a program to improve job seeking skills, assistance in contacting employers and a proper identification of job goals. She explains that further work by Intercorp is awaiting the report from the state rehabilitation evaluation testing. She identified various light duty positions which fall into claimant's work abilities such as gunsmithing, retail and sporting goods, inspection, shipping and receiving, small engine repair and supervision of auto and truck mechanics. She testified that several jobs similar to these were available last year in the Polk County area and in surrounding counties. Schauwecker admitted that a study of job availability specifically for claimant was not performed by her. Many of the openings could have exceeded claimant's physical limitations. Finally, she stated that there are many jobs available which allow a person to change position frequently.

Claimant testified that his past employment primarily consisted of carpentry with his father for two years after he left high school, work as a glass cutter and assembler at Rolscreen, a self-employed farmer and a truck driver/mechanic at Knoxsville Ready Mix. Claimant said his work as a farmer was unsuccessful and he went bankrupt after two years.

Claimant stated at hearing that he is 50 years of age with a formal eighth grade education. Claimant has completed his requirements to obtain a GED. Claimant and his wife testified that his wife recently quit her job with the State of Iowa and opened a restaurant business in the Knoxville area. Both state that today this business has not generated any income for the family. Claimant denies any participation in the business except for running a few errands for his wife. Claimant currently

is the treasurer and bookkeeper of the Eagles Club in Knoxville and these duties require him to keep track of daily receipts and expenditures and keeping books of account. This work is however on a volunteer basis for which he receives no compensation despite the fact that it consumes several hours each day.

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

APPLICABLE LAW AND ANALYSIS

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

It is not necessary that claimant prove that his disability results from a sudden unexpected traumatic event. It is sufficient to show that the disability developed gradually and 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 the pain prevents the employee from continuing to work. In McKeever, the injury date coincided with the time claimant was finally compelled to give up his job.

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

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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, whether you use a specific injury theory or cumulative trauma theory, claimant has shown a work injury on September 9, 1985. Under the cumulative injury theory this would coincide with the time claimant was finally compelled to give up his job due to his pain. Although the views of Dr. Boulden were considered and are certainly important, they cannot overshadow the views of the two primary treating physicians, Dr. Bashara and Dr. Hillyer. Dr. Bashara is also board certified and Dr. Hillyer is certainly not unfamiliar with orthopedic problems. With reference to claimant's differing accounts as to when the pain began, the comments of Dr. Hillyer that pain tends to blur events were most appropriate. Furthermore, if one must decide what exactly happened on the date in order to make a finding of a work injury, claimant's account given soon after the incident to his physicians and to the insurance investigator would probably be more correct than one given in a deposition two years later. Under the first scenario of events given by claimant, Dr. Boulden had no problem with a causal connection opinion. Therefore, the greater weight of the opinion evidence offered in this case supports the finding that claimant suffered a work injury on September 9, 1985. This work injury consisted of either the spondy condition or an aggravation of this spondy condition.

Aside from the causal connection issue, the orthopedic surgeons in this case all agree that claimant currently has a 25 percent permanent partial impairment to the body as a whole. Dr.

Bashara opines that five percent of this is due to the preexisting spondy condition and Dr. Boulden opined initially that 10 percent of this is due to the prior existing condition. The greater weight of these opinions establish that claimant has suffered a 15 to 20 percent permanent partial impairment to the body as a whole as a result of the September 9, 1985 work injury.

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 certainly not excellent and he suffered from a few low back difficulties in the years before the work injury. Also, under the theory of gradual injury, such a history is consistent with a gradual increase in symptomatology. Physicians have opined that claimant had a five to ten percent previously existing permanent partial impairment. Although claimant may have had this prior impairment, any impairment prior to the work injury is not important as the record does not indicate that such impairment resulted in any work disability. Claimant was fully able to perform all of his duties at Clarklift including heavy lifting; repetitive lifting, bending; twisting and stooping; and, prolonged standing and sitting. No physician ever imposed

ny permanent restrictions on claimant's activity prior to
September 9, 1985. Claimant was very infrequently absent from
work due to illness. Apportionment of disability between a
preexisting condition and an injury is proper only when there is
some ascertainable disability which existed independently before
the injury occurred. Varied Enterprises v. Sumner, 353 N.W.2d
407 (Iowa 1984). Therefore, apportionment of industrial disability
is not appropriate in this case as none existed before September
9, 1985.

As a result of the September 9, 1985 injury, claimant's
whole body has been affected and claimant was compelled to
undergo surgery which took several months to heal. Claimant now
has permanent restrictions upon his work activities which
prevent him from returning to his employment at Clarklift and
any other employment to which he is best suited given his heavy
labor background.

Apart from his lost earnings during his healing period which
will be compensated by healing period benefits, claimant has
suffered a significant permanent loss in actual earnings as a
result of his disability and inability to return to work.

Claimant is middle age and should be in the most productive
employment years of his life. His loss of future earnings from
employment due to his disability is much more severe than would
be the case for a younger or an older individual. Becke v.
Turner-Busch, Inc., Thirty-Fourth Biennial Report of the Iowa
Industrial Commissioner 34 (1979); also Walton v. B & H Tank
Corp., II Iowa Industrial Commissioner Report 426 (1981).

Although it was shown that claimant is capable of certain
types of light duty work, claimant requests an award of permanent
total disability due to the application of the so-called "odd-lot"
doctrine. This doctrine is a procedure device designed to shift
the burden of proof with respect to employability to the employer
in certain factual settings. Klein v. Furnas Elec. Co., 384 N.W.2d
370, 375 (Iowa 1986). A worker becomes an "odd-lot" employee
when an injury makes the worker incapable of obtaining employment
in any well known branch of the labor market. Guyton v. Irving
Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985). 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 the Supreme Court held that
under the odd-lot doctrine, there is no presumption that merely
because the worker is physically able to do certain work, that
such work is available. When a worker makes a prima facie case
of total disability by producing substantial evidence that the
work is not employable in the competitive labor market, the
burden to produce evidence shifts to the employer. If the
employer fails to produce such evidence and if the trier of fact
finds that the worker does fall into the odd-lot category, the

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worker is entitled to a finding of total disability. Id. at 106. The Supreme Court in Guyton indicated that such a prima facie case can be established by a showing of a reasonable but unsuccessful effort to secure employment in the area of claimant's residence.

In the case sub judice, claimant failed to make out such a prima facie case for application of the odd-lot doctrine. Admittedly, the vocational rehabilitation evidence offered by defendants was extremely lacking as there was no real attempt to actually assess the marketability of claimant's limited skills in the area of his residence. However, claimant did not make a sufficient effort in the opinion of this deputy commissioner to find suitable replacement work. He has been released for light duty activity since July, 1986, and has only applied at a very limited number of employers by his own testimony. Limiting a job search to monitoring newspaper ads is not the type of effort needed to invoke the procedural aspects of odd-lot doctrine.

Although claimant cooperated with what vocational counseling was offered to him, the vocational efforts appeared to be limited solely to the ascertaining of his disability for purposes of presenting evidence before various tribunals rather than securing suitable employment. The capabilities assessment made by State Vocational personnel was extremely limited. The inquiry was limited to only examining the suitability of gunsmithing and small engine repair, despite surprisingly high scores given claimant's eighth grade education in the area of his vocabulary, reading and math skills. The assessment of suitability for office, clerical or several other sedentary work was not fully examined because claimant did not express an interest in pursuing such job goals. If claimant is capable of working daily on the Eagles Club's books of account, why is he unable to do so in an employment setting, full or part-time or make an all out effort to find such work.

The views of the state rehabilitation counselor, Rattray, that claimant was not employable in an industrial setting was based upon his assessment that claimant cannot work for eight hours a day. The record is absent of any medical opinions or other evidence including claimant's own testimony which would indicate that claimant is incapable of working eight hours a day in suitable employment.

However, despite the failure of claimant to make out a prima facie case for permanent total disability under the odd-lot doctrine, claimant has demonstrated a very severe disability. Although claimant now has achieved his GED, he still only possesses an eighth grade education. Claimant only has average intelligence and any retraining certainly will not be easy for a 50 year old person. Admittedly, claimant's physical limitations and intellectual skills does not limit his entry into some sort

of sedentary work such as office, sales, food service, clerical or light bench work. However, claimant's earning capacities in such occupations would be extremely low compared to his $11.00 an hour job at Clarklift at the time of the work injury. Given the testimony of the Intercorp counselor, claimant could earn only from $3.35 to $5.00 per hour in most of the light duty jobs she has examined.

After consideration of all the factors, it is found as a matter of fact that claimant has suffered a 70 percent loss in earning capacity from his work injury. Based upon such a finding, claimant is entitled as a matter of law to 350 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 70 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 benefits, claimant is entitled to weekly benefits for healing period under Iowa Code section 85.34 from the date of injury until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work he was performing at the time of the injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first.

The evidence is virtually uncontroverted that claimant reached a plateau in his healing process on July 3, 1986 in the opinion of his primary treating orthopedic surgeon, Dr. Bashara. The views of the treating physician and surgeon in this case should be given greater weight over those of Dr. Boulden in such determinations.

The cost request by claimant in an application submitted subsequent to the hearing will be granted except that the expert witness fees are limited in the same manner as in the District Court to the sum of $150.00 per day.

FINDINGS OF FACT

1. Claimant was a credible witness.

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

3. On September 9, 1985, claimant suffered an injury to the low back which arose out of and in the course of employment with Clarklift. Claimant was injured while lifting and carrying an object at work while performing his heavy work at Clarklift over the last 13 years which either aggravated or caused a spondylolithesis condition and eventually lead to fusion surgery at the L5-S1 level of his spine.

4. The work injury of September 9, 1985 was a cause of a period of total disability from work during recovery from the injury and surgery beginning on September 24, 1985 and ending on July 3, 1986, at which time claimant reached maximum healing.

5. The work injury of Septemer 9, 1985, was a cause of a 15 to 20 percent permanent partial impairment to the body as a whole and permanent restrictions upon claimant's physical activity consisting of no lifting over 20 pounds; repetitive lifting, bending, stooping, or twisting; and, prolonged sitting or standing. Claimant had no permanent restrictions before September 9, 1985.

6. The work injury of September 9, 1985 and the resulting permanent partial impairment was a cause of a 70 percent loss of earning capacity.

Despite his prior back problems and a prior existing functional impairment rated by physicians as consisting of five to 15 percent to the body as a whole, this prior impairment was not significant from an industrial disability standpoint.

He was able to fully perform his heavy work at Clarklift with varied and frequent absences from work from illness or due to back problems. Claimant's employer never complained of any inability on the part of claimant to physically perform his duties before September 9, 1985. Claimant had no restrictions on his physical activity prior to September 9, 1985. Claimant lost no earnings as a result of any back problems prior to September 9, 1985.

Due to the work injury on September 9, 1985, claimant cannot return to his mechanic work at Clarklift or to any other work that he has held in the past or to which he is best suited due to his history of employment only in heavy labor occupations. Claimant is 50 years old with only a formal eighth grade education. Claimant has earned his GED. Claimant performs academically in the mid high school range in such areas as vocabulary, reading comprehension and math. Claimant is able to attend vocational retraining so long as he has an upgrading of his math skills for such occupations as gunsmithing or other light duty machinist type work so long as the training does not exceed his physical limitations. Claimant can only drive an automobile or truck for one hour or less without stopping to change positions and rest. Claimant is able to perform accurate bookkeeping and filing type of work but has difficulty understanding concepts such as double entry bookkeeping. Claimant has numerous transferable skills in the area of auto and tractor mechanics but his disability prevents the use of most of these skills in an industrial setting. Claimant is capable of light bench work such as small engine repair if an accommodation can be made for a lack of an ability to crank the engine at various times. Claimant is able

.o perform office, clerical, or other sedentary type of work so ong as he is permitted to change positions. Claimant has ıverage potential for vocational rehabilitation in jobs which :arn considerably less than his income at Clarklift at the time ıf the work injury.

It could not be found that claimant can only perform services :hat are so limited in quality, dependability or quantity that a :easonably stable market for them does not exist.

CONCLUSIONS OF LAW

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

ORDER

1. Defendants shall pay to claimant three hundred fifty (350) weeks of permanent partial disability benefits at the rate of two hundred seventy-three and 86/100 dollars ($273.86) per week from July 4, 1986.

2. Defendants shall pay to claimant healing period benefits from September 24, 1985 through July 3, 1986 at the rate of two hundred seventy-three and 86/100 dollars ($273.86) per week.

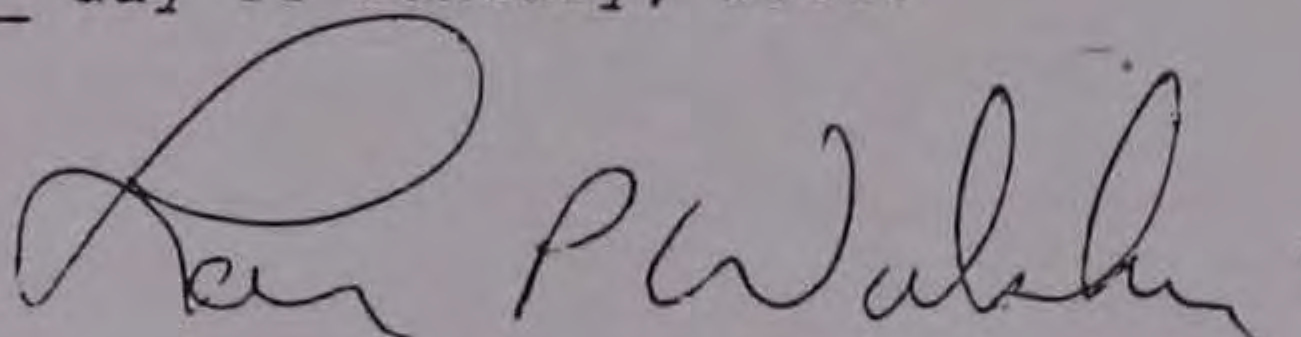
3. Defendants shall pay accrued weekly benefits in a lump sum and shall receive a credit against this award for all benefits previously paid.

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

5. Defendants shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and shall be specifically taxed the sum of two hundred seventy-four and 59/100 dollars ($274.59) for reporting costs in the depositions of Dr. Hillyer and Dr. Bashara and the sum of one hundred fifty and no/100 dollars ($150.00) each for witness fees of Dr. Hillyer and Dr. Bashara.

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 15th day of January, 1988.



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1107; 1110; 1402.20;
1402.30; 1402.60; 1403.30;
1601; 1602; 1802; 1803;
2501
Filed March 4, 1988
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARRIET DEN HARTOG, Executor of the Estate of LARRY DEN HARTOG, Deceased, Claimant, VS FARMERS COOP OIL ASSOC., Employer, and FARMLAND MUTUAL, Insurance Carrier, Defendants.	File No. 777409 A R B I T R A T I O N D E C I S I O N

1107; 1110; 1402.20; 1402.30; 1402.40; 1402.60; 1403.30

Employee, a chronic alcoholic, checked in at training school. Then he disappeared and his whereabouts were unknown for 24 hours until he was involved in a terrible one car automobile accident when his car left the interstate and hit the bridge pillars. Accident occurred on the route toward home and his car was headed toward home and he was 100 miles away from training site. Employer agreed to pay his average hourly wages while at school, all expenses of school, and travel and transportation expense to and from the school. Employee was found to be returning home and did sustain an injury arising out of and in the course of employment.

1601

There was absolutely no evidence of the use of alcohol or other drug substance based on patrol and emergency room evidence. There was a history of fainting, blackouts and one gran mal seizure in the past followed by periods of confusion for up to 72 hours. There was evidence from claimant, his wife and

daughter that he was ill the day before and the day of the disappearance.

1602

There was no evidence of suicidal inclinations until claimant actually hung himself over a year after the accident. The only evidence on suicide was that he was not suicidal.

1802; 1803; 2501

Claimant was allowed healing period and permanent partial disability until the date of his nonrelated death and $79,405.02 in medical expenses.

Proper party in interest and section 85.31(4)

Claimant brought the action but died before liability was determined. Held his estate was the proper party to continue the action. It was held that damages did not have to be liquidated prior to death in order to be recoverable by his estate in construing section 85.31(4).

FILED
MAR 04 1988
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HARRIET DEN HARTOG, Executor of the Estate of LARRY DEN HARTOG, Deceased,

Claimant,

vs

FARMERS COOP OIL ASSOC.,

Employer,

and

FARMLAND MUTUAL,

Insurance Carrier, Defendants.

File No. 777409

A R B I T R A T I O N

D E C I S I O N

INTRODUCTION

This is a hearing in arbitration brought by Harriet Den Hartog, executor of the estate of Larry Den Hartog, claimant, against Farmers Coop Oil Company, employer, and Farmland Mutual Insurance Company, insurance carrier, defendants, for benefits as a result of an alleged injury that occured on May 16, 1984. A hearing was held on May 20, 1987 at Des Moines, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Harriet Den Hartog (claimant), William J. Muilenburg (coop manager), claimant's exhibits A through Z, AA through ZZ, AAA through ZZZ, AAAA, BBBB, and CCCC and defendants' exhibits 1 through 13. Both counsel submitted outstanding briefs.

STIPULATIONS

The parties stipulated to the following matters.

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

That if it is determinied that claimant sustained an injury arising out of and in the course of his employment with employer, then it is stipulated that the injury was the cause of temporary disability and that claimant is entitled to temporary disability benefits from May 16, 1984 through October 31, 1984.

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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, in the event such benefits are awarded, is November 1, 1984.

That the rate of compensation, in the event of an award, is $172.35 per week.

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

That the providers of medical services would testify that the treatment was reasonable and necessary for the alleged injury and defendants are not offering contrary evidence.

That the medical expenses are causally related to the injury but the causal connection to a work injury remains an issue to be decided in this case.

That no credits are claimed by defendants under Iowa Code Section 85.38(2) for the previous payment of benefits under an employee nonoccupational group plan or for workers' compensation benefits paid prior to the hearing.

That the claim for Iowa Code Section 86.13 penalty benefits has been bifurcated from these proceedings.

ISSUES

The parties presented the following issues for determination at the time of the hearing.

Whether claimant sustained an injury on May 16, 1984 which arose out of and in the course of employment with employer.

Whether the alleged injury is the cause of permanent disability.

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

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

Whether claimant's injury was caused by his own willful intent to injure himself.

Whether claimant's injury was caused by his intoxication

which did not arise out of and in the course of his employment, but was due to the effects of alcohol or another narcotic, depressant, stimulent, hallucinogenic, or hypnotic drug not prescribed by an authorized medical practitioner which was a substantial factor in causing the injury.

That in the event it is determined that claimant sustained an injury arising out of and in the course of employment, and in the event it is determined that the claim is not barred by willful intent to injure or his intoxication, then whether the claim of Harriet Den Hartog, as executor of the estate of Larry Den Hartog, is barred by Iowa Code Section 85.31(4) because Larry Den Hartog died on September 8, 1985 from unrelated causes while this claim was yet unliquidated.

The issue of penalty benefits under Iowa Code Section 86.13 is bifurcated.

SUMMARY OF THE EVIDENCE

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

Counsel for the defendants made a very compehensive, yet succinct summary of much of the pertinent evidence in this case in his post-hearing brief. Therefore, a large portion of his summary will be used as an overview of the facts of this case. His summary will then be supplemented by additional evidence and other evidence which is also pertinent to the determination of this case.

> Larry Den Hartog began working for Farmers Coop Oil Association on January 4, 1984. Mr. Den Hartog had a history of alcohol abuse and during the previous six months had twice been a patient at alcohol treatment centers. When Mr. Den Hartog was hired, William J. Muilenburg, the manager of Farmers Coop Oil Association, informed Mr. Den Hartog that any evidence of drinking on the job would be grounds for immediate termination.
>
> In late April or early May, Mr. Muilenburg was informed by a citizen that Larry Den Hartog had been seen purchasing alcohol at a local establishment. When confronted by Mr. Muilenburg with this allegation, Larry Den Hartog denied that he had returned to drinking.
>
> In March or April, Farmland Industries announced a seminar in Kansas City dealing with LP gas safety. After a discussion with Mr. Muilenburg, Larry Den Hartog agreed to go to the school in Kansas City.

Larry Den Hartog understood the schedule was for three days of classes beginning Tuesday morning May 15 and continuing through Thursday afternoon, May 17. Mr. Den Hartog agreed to drive his own vehicle from Orange City to Kansas City on Monday, May 14 and return from Kansas City either late Thursday, May 17 or early Friday, May 18.

In Kansas City, Farmland Industries has a self-contained schooling facility with dormitory rooms, dining facilities and auditoriums and meeting rooms where seminars are conducted. Larry Den Hartog's food and lodging had been prepaid with the registration for the seminar.

Farmers Coop Oil Association's business practice is to reimburse an employee's actual out-of-pocket expenses for gas and meals en route to and from work seminars.

At approximately 6:00 a.m. on May 14, Larry Den Hartog went to the offices of Farmers Coop Oil Association and told Bill Muilenburg's secretary that Mr. Muilenburg had authorized an advance of $100.00 for travel expenses to Kansas City. The secretary complied with the request. Mr. Den Hartog then promptly left for Kansas City.

When Mr. Muilenburg learned of the request, he was angry because, 1) employees normally got no advance monies and simply received reimbursement for amounts actually sent; 2) Larry Den Hartog lied when he said the advance had been authorized by Mr. Muilenburg; and 3) $100.00 was more than twice the amount which was generally needed for gas and food on the road during the round trip to and from Kansas City.

Larry Den Hartog arrived in Kansas City late in the afternoon of Monday, May 14. Mr. Den Hartog was assigned to a double room which he shared with another seminar participant. The following morning Larry Den Hartog's roommate left for breakfast and attendance of the seminar meetings before Larry Den Hartog was out of bed.

Larry Den Hartog did not attend any of the seminar sessions which began early Tuesday morning May 15. When a representative of the school went looking for Larry Den Hartog on Tuesday morning May 15, Mr. Den Hartog was not in the room and he had taken his belongings with him.

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Larry Den Hartog never attended any of the seminar sessions on May 15, 16 or 17.

There is no evidence of the whereabouts of Larry Den Hartog from 7:00 a.m. May 15 through 9:00 a.m. May 16.

There is no evidence in this record that Mr. Den Hartog was engaged in any activity in furtherance of his employer's business from 7:00 a.m. Tuesday, May 15 through 9:00 a.m. Wednesday, May 16. When Larry Den Hartog was specifically asked if he had been doing anything within the scope of his employment, he failed to answer (Def.'s Ex. 2, p. 23, Interrogatory No. 29).

At approximately 8:50 a.m. on Wednesday, May 16 Larry Den Hartog was involved in a single-vehicle accident at a location approximately 100 miles north of Kansas City when Mr. Den Hartog's vehicle abruptly left the road and ran into a concrete bridge pillar.

At the time of the accident, his employer and his wife both expected that Mr. Den Hartog would have been attending classes in Kansas City.

Mr. Muilenburg testified that if Larry Den Hartog had appeared at the offices of Farmers Coop Oil Association on Wednesday, May 16 with no explanation of where he had been or why he was not attending the seminar, Mr. Den Hartog would have been terminated from his employment.

Farmers Coop Oil Association never paid Larry Den Hartog any wages for May 15 and 16, 1984 since there was no evidence Mr. Den Hartog was acting on behalf of his employer on those dates.

As a result of injuries sustained in the motor vehicle accident, Larry Den Hartog was hospitalized for extensive treatment in Omaha, Sioux City, and Orange City. Following his release from the hospital and his release to return to work, Mr. Den Hartog never contacted Bill Muilenburg seeking re-employment at Farmers Coop Oil Association. Rather, Larry Den Hartog took a job with the Sioux County Sheriff's Department for wages which exceeded the wages he had previously been paid at Farmers Oil Association. Larry Den Hartog began work November 1, 1984 and worked until June 23, 1985, when he was terminated for drinking on the job. In

July or August 1984 Mr. Den Hartog was treated for alcoholism at the Calvary Rehabiltiation Center in Phoenix, Arizona. On or about September 7 or September 8, 1985, Mr. Den Hartog died in Phoenix, Arizona from causes not related to the injury on May 6, 1984.

This excellent summary is now supplemented by the following additional and other evidence.

Harriet Den Hartog, testified that the decedent, Larry Den Hartog, hung himself while on work release from the rehabiltation center in Phoenix, Arizona at 6:00 a.m. on Sunday, September 8, 1985. She stated that she had talked to him a week before, and that claimant saw her brother in Mesa, Arizona the week before his death, and claimant sounded good, he liked his job and seemed to be doing well (Exhibit 1, pages 5-8).

Claimant, while he was living, summarized his own institutional treatment for alcoholism at interrogatory number 12.

a. Alcoholism
b. Unknown
c. State Hospital Cherokee, IA — d. 30 days - May, 1966

Keystone Treament [sic] Center Canton, SD — 30 days - Oct. 1972

State Hospital Cherokee — 10 days - Jan. 1973

Keystone Treament [sic] Center Canton, SD — 30 days - July - 1983

Calvary Rehab. Center Phoenix, Ariz. — 42 days - Oct. 1983

Calvary Rehab. Center Phoenix, Ariz. — June 18, 1985 -

(Ex. 2, p. 8)

An examination of claimant's treatment records do not indicate he was suicidal. On the contrary, the only time suicide was specifically mentioned, Dr. Robert A. Komer, D.O., at Cherokee stated on January 5, 1973 "There is no evident suicidal rumination." (Ex. 6, p. 14). On another occasion when claimant was admitted on August 4, 1966, his wife indicated on the Commitment Notes that claimant was not suicidal (Ex. 5, p. 11). Other than these two recorded references which indicate that claimant was not suicidal, there is no evidence in the record on

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the subject of suicide until claimant did in fact hang himself on September 8, 1985.

The hospital treatment records do record a fainting episode (Ex. 5, pp. 5 & 15). This had never happened before and claimant was real confused afterwards (Ex. 5, p. 23). This happened while claimant was hospitalized at Cherokee on August 4, 1966.

When claimant was hospitalized at Keystone on July 21, 1983, he indicated on a Medical History that he had had blackouts years ago (Ex. 7, p. 5). Claimant suffered another episode of loss of consciousness at this institution which was described briefly as follows.

> On his fifth day of treatment, the patient again admitted to drinking beer which , he stated, "another patient bought for me". When confronted and threatened with dismissal, the patient suffered a Gran Mall seizure in the counselor's office. A staff doctor was in attendence at the time. The patient suffered some temporary loss loss of memory, but appeared improved within 72 hours. He was allowed to remain at Keystone. The patient frequently spoke of "leaving treatment early".

(Ex. 7, p. 14)

Claimant stated a number of times at the treatment facilities that his drinking began to be a serious problem after his first daughter, Kelly, was born a paraplegic on December 13, 1962 (Ex. 5, p. 3; Ex. 7. p. 12).

Claimant's wife testified that he did not have any money to take to school at Kansas City and she had none to give him, so he got $100.00 from his employer before he left. When she met him at the hospital in Omaha after the accident he still had $86.00 and some odd change left, which in her opinion was just about what he needed for gas for his car (Ex. 1, pp. 11-16; Ex. 13, p. 37). She testified that Muilenburg told her to keep the $86.00 (Ex. 1, p. 38).

Claimant's wife testified that she tried to talk to her husband and find out how the accident happened. He did not remember anything after the accident. He did not remember whether he attended classes or when he left his room (Ex. 1, pp. 17-21). She testified that claimant took a lie detector test to prove that he was telling the truth when he said he did not remember what happended (Ex. 1, p. 23).

In response to interrogatory number 29, claimant gave this account of his memory while he was still living.

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Left Orange City and drove to Kansas City and checked in at Seminar site and was given a room.

b. In route from Orange City to Kansas City and at the seminar site.

c. Left Orange City early in the morning of May 14th and drove throughout the day and reached the seminar site late in the afternoon. Went to bed about Suppertime. Woke up during the night sometime on the night of May 14th and the morning of May 15th and went to the bathroom. Sometime early in the morning of May 1 th, a roommate invited me to go to breakfast but I felt too sick to get up at that time. Was involved in a one car accident on the 16th of May but have no recollection of same.

(Ex. 2, p. 23)

Claimant's wife testified that their daughter told her that claimant had a bad headache the morning he left town on Monday, May 14, 1984. She further testified that claimant was sick and did not feel good on Sunday night before he left town (Ex. 1, pp. 18 & 19). Claimant's wife denied that her husband had returned to drinking before leaving for Kansas City (Ex. 1, pp. 50 & 51). She said that she had no idea where her husband was during the approximate 24 hour period prior to the accident (Ex. 1, p. 23). She further testified that she visited that accident scene approximately one and one-half weeks later. It appeared to her that his car had left the road gradually (Ex. 1, pp. 21 & 22).

Claimant's wife was asked if her husband had been drinking at the time of the accident and she responded as follows.

Q. And what did you learn from the highway patrolman?

A. He said that -- The first thing I asked, I said, "Was there drinking involved?" He said, "I've been a patrolman for 25 years." And he said, "I had to get right down next to Larry's mouth in order to even understand what he was saying." And he said, "No, there was no alcohol involved." He said, "There's nothing been found in the car, there's been no smell on his breath." And he says, "I know what they smell like," he says, "no matter what they've had." And he told that to me, and he also told it to one of my friends that had taken us down there.

(Ex. 1, pp. 25-28)

The patrol report did not show any drinking, arrest or improper conduct by the driver. The patrolman did say that the car left the road abruptly on the right side and struck two concrete bridge pillars. Otherwise, the patrolman gave no indication how or why the accident happened (Ex. 4; Ex. AAAA).

Claimant was transferred from the accident scene to Fairfax, Missouri Community Hospital and then to Clarkson Hospital in Omaha. Later he was tranferred to Marion Health Center in Sioux City and eventually Orange City Municipal Hospital. Claimant suffered multiple serious injuries. Probably the most complete but yet succinct listing of his injury situation is found at the final impressions made by the Marion Health Center on June 2, 1984.

FINAL IMPRESSION:

1. Status post thoracic trauma with multiple fractured ribs bilaterally, history of flail chest, prolonged mechanical ventilation from 5-16 to 5-30, bilateral pneumothroax, and status post chest tube placement.
2. Status post pulmonary contusion.
3. Status post lacerated liver, exploratory laparotomy times two.
4. Status post multiple lacerations with disconnected ear that has been re-attached.
5. Fracture of lumbar vertebra.
6. Right displaced femur fracture.
7. Elevated white count with history of Enterobacter cloacae and 12 days of Gentamycin.
8. Urinary tract infection with resistant pseudomonas, now reolved.
9. Status post hypoxemia, now non-hypoxemic.
10. Confusion, resolved.
11. History of alcohol abuse in the past.
12. Tobacco abuse.

(Ex. VV)

The emergency room physician in Missouri, E. L. Niedermeyer, M.D., stated that he did not take a blood alcohol test but he added that he did not have any indication or reason for drawing an alcohol blood level, and he did not necessarily suspect alcohol was involved in this situation at that time (Ex. F). None of the hospital records at Clarkson Hospital in Omaha, mention or give any indication or suspicion that alcohol was involved in this accident or that claimant was intoxicated at the time of the injury (Exs., Y, Z, AA-RR).

Claimant answered interrogatory number 22 as follows while he was living.

<u>Interrogatory No. 22</u>: State with specificity

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the basis for your contention that the injury arose out of and in the course of your employment with this employer.

Answer:
As part of my job, I was sent to Kansas City at Employer expense to attend a seminar. I was told to provide my own transportation, for which I would be reimbursed and I was paid my full salary for the trip to Kansas City attending at the seminar and return. I was returning to my home from Kansas City at the time of the automobile accident.

(Ex. 2, p. 16)

Claimant's wife testified that he did not return to work at the Coop because after the accident he could not handle the physical aspects of the job like handling the large tanks (Ex. 1, p. 36).

William J. Muilenburg, employer's manager, testified that he hired claimant as a driver salesman delivering LP gas on a bulk truck which was a job that required exertion and physical effort (Ex. 13, pp. 5-15). He testified that claimant agreed to go to school in Kansas City. Claimant was to be paid on the basis of the average hours he would have worked if he had not gone to school. His tuition, lodging and food for the school were all paid by employer. The employee was to drive his own vehicle and be reimbursed his automobile expenses when he returned (Ex. 13, pp. 15-24). Muilenburg said that claimant was not physically able to perform this job after the accident (Ex. 13, pp. 35 & 36). Muilenburg testified that claimant was paid for May 14, 1984 but he was not paid for May 15 and May 16, 1984. Claimant was allowed to keep the $100.00 that he got as expense money from the bookkeeper (Ex. 13, p. 36). Muilenburg verified that the original agreement was that claimant was to be paid while attending this school, all of his expenses for attending the school were to be paid, and claimant was to be reimbursed for his transporation expenses to and from the school (Ex. 13, p. 39).

The following colloquy transpired between claimant's counsel and Muilenburg.

Q. In other words, you didn't expect him to go down to Kansas City and be stranded down there?

A. No.

Q. And he would be just as much on the trip coming home as he would going down, would he not?

A. Pardon me? I don't understand.

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Q. It's as much an essential part of the trip that he come home as that he go down?

A. Yes.

Q. And you would certainly expect that the trip down would be followed up by a trip home?

A. Yes.

Q. The place where this accident happened, was it on a highway for travel that is customarily used to travel between Kansas City and Orange City?

A. Yes.

Q. Do you know whether or not this accident happened on the portion of the highway for travel that was headed toward Orange City or away from Orange City?

A. Well, not having been at the scene of the accident, I would -- my answer would be on the way towards Orange City.

Q. In other words, it would be northbound, northbound portion?

A. Yes.

(Ex. 13, pp. 39 & 40)

Muilenburg testified that he did not know of any facts that would support a claim that the accident was a willful attempt by claimant to injure himself. Likewise, he testified that he had no knowledge of any facts that alcohol or any other drug substance was a substantial factor in decedent's automobile accident (Ex. 13, pp. 40-48).

In a response to a request for admissions, Muilenburg answered questions five and six as follows.

5. Admit that the accident occurred on the most acceptable and appropriate automobile route between Orange City, Iowa and Kansas City.

Admit.

6. Admit that the claimant's vehicle was travelling said route in a direction away from Kansas City and toward Orange City, Iowa.

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Admit.

(Ex. CCCC)

Alan Pechacek, M.D., an orthopedic surgeon, who treated claimant for his fractured hip and spinal injury, stated that claimant suffered multiple injuries and was fortunate to have survived the accident. He began to treat claimant in Sioux City on June 2, 1984. He declared that claimant was temporarily totally disabled from the date of the accident May 16, 1984 to November 1, 1984 when he was able to perform the light sedentary office job for the sheriff as a dispatcher. He stated that claimant could not perform moderate or heavy physical labor again, as he had done in the past. Dr. Pechacek described claimant's limitations as follows.

> At the time that he did return to work in November, 1984, his recovery was such that he was really only suited to a sedentary or light job activity. He was certainly not fit for work activities that would include lifting, carrying, bending, turning, or twisting, and prolonged standing and/or walking, climbing up and/or down stairs, ladders, or on equipment on a continuous or repetitive basis throughout a work day. I feel that he could have performed job activities involving a mixture of standing, walking, and sitting. He could probably handle light materials (less than 15 lbs.) so far as lifting or carrying are concerned, but only on an occasional or intermittent basis. He was probably not suited for prolonged periods of riding or driving vehicles or heavy equipment.

(Ex. ZZZ)

Dr. Pechacek applied the Guides to the Evaluation of Permanent Impairment, second edition, published by the American Medical Association and awarded a five percent permanent impairment of the body as a whole for decendent's spinal injury. He awarded a seven percent permanent impairment of the right hip and converted this to three percent of the body as a whole. He combined these two ratings to eight percent of the body as a whole. He added that he felt that claimant's disability would be greater than ten percent because of functional limitations that reduced his ability to perform work (Ex. ZZZ).

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).

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Claimant has the burden of proving by a preponderance of the evidence that he received an injury on May 16, 1984 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The words "out of" refer to the cause or source of the injury. Crowe, 246 Iowa 402, 68 N.W.2d 63

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

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure, 188 N.W.2d 283, Musselman, 261 Iowa 352, 154 N.W.2d 128 (1967).

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 16, 1984 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

If claimant has an impairment to the body as a whole, an

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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 did sustain the burden of proof by a preponderance of the evidence that he sustained an injury which arose out of and in the course of employment with employer. The testimony of Muilenburg established that there was an agreement that claimant was to be paid for attending the school and that all of his expenses were to be paid by employer as well as his transportation expenses to and from the school for the use of his personal vehicle. Muilenburg's decision to only pay claimant through May 14, 1984 was an after the fact unilateral decision that was not part of the original agreement. In effect, Muilenburg granted that he had paid claimant for May 15 and May 16 by permitting the Den Hartogs to keep the $86.00 in expense money that was not used during decedents absence.

Iowa Code Section 85.61(6) provides:

> The words "personal injury arising out of and in the course of the employment" shall include injuries to employees whose services are being performed on, in, or about the premises which are occupied, used, or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

Employer, in this case, agreed to pay the employee his average hourly wages during the period that he traveled to the school and also during the period that he traveled from the school to home again. Employer agreed to pay the employee his travel and transportation expenses to the school and to return home again. Claimant testified by interrogatory number 22 "I was returning home from Kansas City at the time of the automobile accident." (Ex. 2, p. 16). Claimant was 100 miles north of Kansas City on the most direct and immediate route to return home at the time of the accident. He was driving in the direction

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of home. His suitcase was in the car. Therefore, it is determined that the accident occurred while claimant was returning home from the school.

Defendants argue that claimant deviated from his employment from the morning of May 15, 1984 until the time of the accident on May 16, 1984 because claimant was supposed to be in the classrooms at the school. Actually, defendants are correct when they state in their brief "There is no evidence of the where abouts of Larry Den Hartog from 7:00 a.m. May 15 through 9:00 a.m. May 16."

If there is absolutely no evidence of where claimant was or what he did during this period, it is difficult to state with certainty whether he did in fact or did not in fact deviate. It would appear likely that a deviation occurred because claimant was expected to be in the classroom but did not attend any of the classes. Assuming that the claimant did deviate, he had terminated the deviation when he started home. In Farmers Elevator Co., Kingsley, v. Manning, 286 N.W.2d 174 (Iowa 1979), the employee was held to be in the course of employment when returning home from a company sponsored dinner when he fell asleep at the wheel and was involved in an accident.

Bulman v. Sanitary Farm Dairies, 247 Iowa 488, 494, 73 N.W.2nd 27, 30 (1955) held as follows.

> If the employer assumes the burden of the workman's coming and going expense, that is held to imply that the time of coming and going is a part of the time of employment. Or when the employer sends him on a special mission apart from his usual employment, the coming and going time of such mission is implied to be within the course of employment.

Likewise, the claimant in Crees v. Sheldahl Telephone Co., 258 Iowa 292, 139 N.W.2d 190 (1965) was also found to be in the course of employment when involved in an automobile accident while returning to his place of employment after an evening meal out of town and the employer was in the practice of paying for claimant's travel and transportation expenses.

In addition, the court held in the Crees case "If, after deviating from the employment or a temporary abandonment, the employee returns to the employment, in this case starts the return trip home, and is injured, the injury is compensable."

In Pohler v. T. W. Snow Constr. Co., 239 Iowa 1018, 33 N.W.2d 416 (1948) an employee returning to his bunk car from a special errand for his employer was held to be in the course of employment. The court said in Pohler that even if it is assumed

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that the employee deviated from his employment, nevertheless, when he reached the place where he had turned aside from his employment, then the deviation had ended and he had resumed his employment.

The return trip is as much a part of the employment as the outbound trip. Heisler v. Strange Bros. Hide Co., 212 Iowa 848, 850, 237 N.W.343 (1931).

In Lamb v. Standard Oil Co., 250 Iowa 911, 916 96 N.W.2d 730 (1959), the return trip was held to be in the course of employment. It was also held that claimant's temporary abandonment (deviation) ended when he started the return trip home. See also 1 Larson, Workmens' Compensation Law, §19.29.

Defendants' argument that these cases can be distinguished by the fact that the employee completed the business that he was sent to do and that Den Hartog did not because he did not attend the classes is without merit. Claimant's employment had not been terminated at the time of the accident, even though grounds for termination probably existed. Therefore, it is determined that under the facts of this case, that even if it is assumed that a deviation occurred, that once claimant started home, the deviation ended and he resumed his employment. In conclusion, it is determined that claimant did receive an injury which arose out of and in the course of employment with employer when he was involved in an automobile accident on his return trip from Kansas City to home on May 16, 1984.

The parties have agreed by stipulation that the injury was the cause of temporary disability and that claimant is entitled to temporary disability benefits from March 16, 1984 to November 1, 1984.

It is now determined that the injury was the cause of permanent disability. Dr. Pechacek established that there is permanent impairment and that it was caused by this injury. There is no evidence to suggest otherwise.

Dr. Pechacek awarded an eight percent permanent functional impairment of the body as a whole. Worse however, are claimant's working limitations as described by Dr. Pechacek. Moderate to heavy physical labor which claimant had done in the past was foreclosed in the future. Claimant was limited to light, sedentary office type of work in which he could stand, walk and sit alternately. He cannot lift or carry over 15 pounds. Claimant should not lift, carry, bend, turn or twist or do any prolonged standing, walking, or climbing. Claimant is entitled to a 40 percent industrial disability to the body as a whole. However, due to his death, he is only entitled to receive benefits from November 1, 1984 to the date of his death on Sunday, September 8, 1985. Iowa Code Section 85.31(4). Claimant

is entitled to medical expenses in the amount of $79,485.02 as shown in claimant's exhibits CCC through XXX. The report fee of Dr. Pechacek in the amount of $75.00 for a medical report is not a medical expense but rather a trial preperation expense, however, it may be treated as a cost of this action under Division of Industrial Services Rule 343-4.33. None of these medical expenses were disputed by defendants. On the contrary, it was stipulated that they were fair and reasonable charges, that the services were reasonable and necessary and were causally connected to this injury.

Iowa Code section 85.16 provides as follows.

> No compensation under this chapter shall be allowed for an injury caused:
>
> 1. By the employee's willful intent to injure himself or to willfully injure another.
> 2. By the employee's intoxication, which did not arise out of and in the course of employment but which was due to the effects of alcohol or another narcotic, depressant, stimulent, hallucinogenic, or hypnotic drug not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury.
> 3. By the willful act of a third party directed against the employee for reasons personal to such employee.

Defendants have the burden of proving the affirmative defense of willful intent to injure himself. Reddick v. Grand Union Tea Co., 230 Iowa 108, 296 N.W. 800 (1941). There is absolutely no evidence to indicate that claimant willfully intended to injure himself at the time of the automobile accident and injury on March 16, 1984 or at any other time. On the contrary, there only two times that suicide is specifically mentioned in the record and the evidence supports the proposition that claimant was not suicidal. When claimant's wife committed him to Cherokee, on August 4, 1966, she made a recorded statement that he was not suicidal (Ex. 5, p. 11). Dr. Komer, on January 5, 1973, stated that there was no evidence of suicidal rumination (Ex. 6, p. 14). The only evidence in the record that claimant was suicidal is the incident when claimant actually took his own life on Sunday, September 8, 1985, which was more than a year after the automobile accident on May 16, 1984.

Defendants have the burden of proving the affirmative defense that alcohol or some other drug substance was a substantial factor in causing the injury. Reddick, 230 Iowa 108, 296 N.W. 800. There is absolutely no evidence of any substance other than alcohol in the entire record. It is true, that claimant was severely afflicted with the disease of alcoholism and received a great deal of treatment for it. Ironically, however, there is

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absolutely no evidence that claimant had been drinking alcohol at or immediately before the time of this accident or during his absence from the school. On the contrary, the patrol report shows no evidence of alcohol. No arrests were made and no charges were filed against claimant as a result of the accident for any reason. Claimant's wife testified that the patrolman told her that he had been a patrolman for 25 years and that he put his face next to claimant's mouth and did not detect any alcohol substance (Ex. 1, pp. 25-28). The emergency room doctor in Fairfax, Missouri, Dr. Niedermeyer, reported in writing that he did not have any reason to take a blood alcohol test and that he did not suspect that alcohol was involved in this situation (Ex. F).

Furthermore, if claimant left home with $100.00 in cash and still had $86.00 after the accident, there is some inference, at least, that claimant did not spend alot of money on alcohol or anything else, especially considering that claimant probably would have purchased some food and some gasoline sometime during the period after he left home on Monday, May 14, 1984 at 6:00 a.m. until the time of the accident on Wednesday, May 16 at 9:00 a.m.

Even though there is no evidence of alcohol at or before the time of the automobile accident, there is evidence that claimant was sick. Claimant's wife testified that he was sick the night before he left home. She also testified that her daughter reported that claimant had a headache on the morning that he left home (Ex. 1, pp. 18 & 19). Claimant himself testified at interrogatory number 29 that he felt too sick to get up and eat breakfast on the morning of May 15, 1984 (Ex. 2, p. 23). It should also be noted that claimant had a history of blacking out, fainting episodes and at least one gran mal seizure. He fainted at Cherokee in 1966 and was real confused after that (Ex. 5, pp. 5, 15 & 23). When he entered Keystone in 1983 he reported that he had had blackouts some years ago (Ex. 7, p. 5). He suffered a gran mal seizure at Keystone in 1983 with a temporary loss of memory, but appeared improved within 72 hours (Ex. 7, p. 14).

From the foregoing evidence it is determined that defendant did not sustain the burden of proof by a preponderance of the evidence that claimant's injury was due in any respect to a willful intent to injure himself, or that alcohol or any other drug was a substantial factor in causing the injury. On the contrary, there is evidence of fainting spells, blackouts and a gran mal seizure. These were typically followed by confusion or lack of ability to function for up to 72 hours. Hence, there is evidence that claimant was sick immediately prior to his period of absence. This sickness combined with previous periods of lack of consiousness, raises an inference that illness or blackouts may be the explanation for his absence from the school and the accident itself. Due to this evidence, it is difficult

to say with absolute certainty that claimant did in fact deviate from his employment, if in fact he became sick, blacked out or encountered a period on confusion.

Defendants contend that Harriet Den Hartog, executor of the estate of Larry Den Hartog, cannot recover because all potential liability of the employer and insurance carrier was extinguished pursuant to Iowa Code section 85.31(4) when Larry Den Hartog died from unrelated causes while his claim was yet unliquidated. Defendants cite Vanni v. Ringland-Johnson-Crowley Co., Vol. 1 Iowa Industrial Commissioner Report 353 (Appeal Decision 1980).

Iowa Code section 85.31(4) provides "Where an employee is entitled to compensation under this chapter for an injury received, and death ensues from any cause not resulting from the injury for which he was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate." Compensation for permanent partial disability becomes due at the end of the healing period. Iowa Code section 85.34(2). Teel v. McCord, 394 N.W.2d 405 (Iowa 1986). The deputy, writing an appeal decision on behalf of the commissioner, decided as follows.

> Claimant's argument, in essence, is the Mrs. Vanni should be able to collect disability benefits for the period of time between the last payment of said disability to claimant and the time of his death. Obviously, such benefits are accrued. However, claimant fails to point out that said benefits are unliquidated. That is, where the injured worker dies for reasons not associated with the injury, the workman's compensation law has no provision in it for the surviving spouse or estate to bring an action for an unliquidated number of weeks or weekly benefits payments.

The Vanni decision is incorrect for several reasons. First, nothing in Iowa Code section 85.31(4) requires the benefits to be liquidated. Second, the deputy does not explain why he did not follow the decision of the industrial commissioner himself made just a few months prior to the Vanni decision. Vanni is dated October 27, 1980. The commissioner, himself, decided on June 4, 1980 in the case of Lundeen v. Quad City Construction, Thirty-fourth Biennial Report of the Industrial Commissoner 193 (Appeal decision 1980) that the proper construction of Iowa Code section 85.31(4) was as follows.

> In light of the purpose and principles served by the Iowa Workers' Compensation Act, it cannot be said that an employer is released from all liability incurred and owing prior to a claimant's untimely death. A fair interpretation of Iowa Code section

> 85.31(4) indicates that any portion of an award which has not accrued as of the date of a claimant's non-related death will abate along with any further liability on the part of the employer. However, any award which was due prior to a claimant's demise that is still owing upon the date of claimant's death does not abate.

A surviving spouse was awarded benefits on the basis of Lundeen in the case of Valerie Handel, surviving spouse of Ted Handel, claimant v. Determann Industries, Inc., Vol III Iowa Industrial Commissioner Report 120 (September 15, 1982). The deputy was reversed by the commissioner on appeal for the reason that the surviving spouse in her own right was not a party to bring the action. However, the commissioner cited Lundeen again as good law and a proper interpretation of Iowa Code section 85.31(4). It was apparent from the decision that the estate would have been a proper party in interest. Valerie Handel, surviving spouse of Ted Handel, v. Dettermann Industries Inc., file number 670157, decided January 28, 1983. In this case the action is not brought by the surviving spouse, but rather by the decedent's estate. The commissioner indicated in Handel that the injured employee's legal representative would be a proper party in interest under Iowa Code section 85.26(4). In this case, Harriett Den Hartog is the executor of the estate of Larry Den Hartog and is a proper party to bring this action.

The issue of whether Iowa Code section 85.31(4) extinguishes the right of the estate to bring an action was the subject of a ruling on a motion to dismiss in the case of Lou Ann Risinger, executrix of the estate of Harry W. Risinger, deceased v. Allied Structural Steel, file number 745320 filed July 6, 1984. The deputy in that ruling agreed with the deputy in Handel that Professor Larson shows a wide variance of how the various states handle the situation when an employee dies from unrelated causes. 2 Larson Workmen's Compensation Law section 58.44 (1981).

The instant case is specifically a situation where claimant brought the action himself before he died but died before liability was established. The Iowa Supreme Court has not addressed this specific situation. In a case where liability had been established prior to death by a memorandum of agreement, the Supreme Court held as follows, quoting from the Risinger ruling.

> In the case Tibbs v. Denmark Light and Telephone Corp., 230 Iowa 1173, 300 N.W. 328 (1941), the court ruled that unpaid installments of weekly compensation which had not become payable become barred at the time of death but that any unpaid installments which had become due were an asset of the estate, the same as any other debt. In Tibbs there was a

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> memorandum of agreement for payment of 400 weeks of compensation which had been entered into before the worker's unrelated death. This ruling was recently followed in Lundeen v. Quad City Construction Co., 23 Biennial Report, Iowa Industrial Commissioner 193 (Appeal Decision 1980).

The balance of the Risinger ruling is pertinent to this case and is quoted below.

> This action was commenced by the worker during his lifetime and is now being prosecuted by the executor of his estate, the proper party to pursue such an action. Handel v. Determann Industries, Inc., Appeal Decision, File No. 670156, (January 28, 1983).
>
> The purpose of workers' compensation is to replace lost earnings. Prompt payment of justly due benefits is to be encouraged. Wilson Food Corporation v. Cherry, 315 N.W.2d 756 (Iowa 1982).
>
> As shown previously, no recovery can be had for any amounts which become payable subsequent to the death of Harry W. Risinger. If some amount were justly due to Harry W. Risinger and had been timely paid he would have received those payments prior to his death. His estate would presumably be larger as a result of the timely payment of compensation.
>
> The first alternative is to sustain the motion which would reward defendants for a failure to make timely payments of justly due compensation and deny decedent's heirs what they would have received if timely payment of justly due benefits had been made.
>
> The second alternative is to overrule the motion which should result in defendants paying the same amount they would have paid if timely payment had been commenced and which would give decedent's heirs the same amount they would have received if timely payment had been paid.

Permitting the estate to maintain this action is clearly consistant with Iowa Code section 611.20 which provides as follows "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same".

It is also consistant with Iowa Code section 611.22.

> Any action contemplated in sections 611.20 and

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> 611.21 may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the time it would have accrued to the deceased if the deceased had survived. If such is continued against the legal representative of the defendant, a notice shall be served on the legal respresentative as in case of original notices.

The Supreme Court has not ruled on this exact situation, because in Tibbs liability had already been established by a memorandum of agreement, nevertheless, this decision is consistant with a steady stream of Supreme Court decisions over the years that have held that the workers' compensation laws are for the benefit of the injured worker and are to be construed liberally to that end. Rish v. Iowa Portland Cement Co., 186 Iowa 443, 451, 170 N.W. 532, 535 (1919); Barton v. Nevada Poultry Co., 253 Iowa 285, 289, 110 N.W.2d 660, 662 (1961); Irish v. McCreary Saw Mill, 175 N.W.2d 364, 368 (Iowa 1970); John Deere Dubuque Works v. Meyers, 410 N.W.2d 255, 157 (Iowa 1987).

FINDINGS OF FACT

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

That employer had sent claimant to the school in Kansas City and had agreed to pay claimant his average hourly wage while attending the school, pay the expenses of the school, and pay claimant's transportation and travel expenses to and from the school.

That claimant was returning home from the school at the time of his accident on May 16, 1984.

That claimant sustained an injury on May 16, 1984 which arose out of and in the course of his employment at the time of the automobile accident while returning home from the school.

That claimant was unable to work due to the injury from May 16, 1984 to November 1, 1984.

That Dr. Pechacek determined that claimant sustained a permanent functional impairment of eight percent to the body as a whole.

That claimant was no longer to perform employment which requires moderate to heavy physical labor as he had done in the past and that claimant was limited to light, sedentary office

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type of work with a lot of freedom of movement after the injury.

That claimant sustained an industrial disability in the amount of 40 percent of the body as a whole.

That claimant died from causes unrelated to this injury on September 8, 1985.

That claimant incurred $79,485.02 in medical expenses.

That claimant commenced this action in person while still living.

That the estate was substituted as the party claimant after his death.

That employer's liability had not been established by settlement, award or otherwise at the time of claimant's death on September 8, 1985.

That defendants had paid no benefits to claimant or to his estate up to the time of his death.

That claimant's death was not due to this injury but was a result of causes unrelated to this injury.

That there was no evidence to indicate that claimant's injury was a result of his own willful intent to injure himself.

That there is no evidence that alcohol or any other drug substance was a substantial factor in causing the injury.

That there was evidence that in the past claimant had suffered blackouts, fainting episodes and at least one gran mal seizure.

That claimant did not feel well the night before he left home, that claimant's daughter reported that he had a headache the morning that he left home, and that claimant testified that he was sick on the morning of May 16, 1984 and did not go to breakfast at that time.

CONCLUSIONS OF LAW

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

That claimant did sustain an injury on May 16, 1984 which arose out of and in the course of employment with employer.

That the injury was the cause of temporary disability from

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May 16, 1984 to November 1, 1984.

That claimant in entitled to healing period benefits for the period of temporary disability shown above.

That the injury was the cause of permanent disability.

That claimant is entitled to permanent partial disability benefits from November 1, 1984 until the date of his death on September 8, 1985.

That claimant is entitled to medical expenses for this injury.

That claimant did not willfully intend to injure himself.

That alcohol or other drug substances were not a substantial factor in causing claimant's injury.

That the estate was a proper party to this action after claimant's death and is entitled to recover both medical expenses and workers' compensation benefits from the date of injury until the date of death.

That Iowa Code section 85.31(4) did not extinguish claimant's rights to recovery but that this cause of action survived pursuant to Iowa Code section 611.20 and 611.22.

ORDER

WHEREFORE, IT IS ORDERED:

That defendants pay to claimant twenty-four point two eight six (24.286) weeks of healing period benefits at the rate of one hundred seventy-two and 35/100 dollars ($172.35) per week for the period from May 16, 1984 to November 1, 1984 in the total amount of four thousand one hundred eighty-five and 69/100 dollars ($4,185.69).

That defendants pay to claimant forty-four point five seven one (44.571) weeks of permanent partial disabilty at the rate of one hundred seventy-two 35/100 dollars ($172.35) per week for the period from November 1, 1984 to September 8, 1985 in the total amount of seven thousand six hundred eighty-one and 81/100 dollars ($7,681.81).

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

That interest will accrue pursuant to Iowa Code section 85.30.

That defendants pay to claimant seventy-nine thousand four

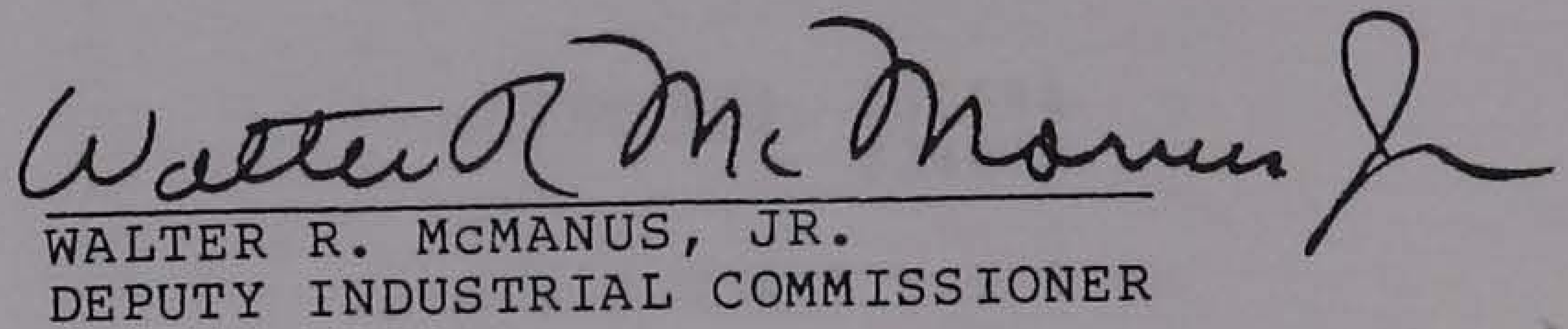
hundred eighty-five and 02/100 dollars ($79,485.02) in medical expenses.

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.

That this case is to be returned to the prehearing calandar for assignment on the issue of penalty benefits pursuant to Iowa Code section 86.13.

Signed and filed this 4th day of February, 1988.



WALTER R. McMANUS, JR.
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1106, 1108.50, 1402.20, 1402.30
1402.60, 1403.30, 1802, 2206
2207, 2209, 2501, 4200
Filed March 16, 1988
WALTER R. MCMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RAYMOND DENNING, Claimant, vs. HYMAN FREIGHTWAYS, INC., Employer, and EXCALIBUR INSURANCE COMPANY by IOWA INSURANCE GUARANTY ASSOCIATION, Insurance Carrier, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 751584 834032 A R B I T R A T I O N D E C I S I O N

1106, 1108.50, 1402.20, 1402.30, 1402.40, 1402.60, 1403.30, 1802
2206, 2207, 2209, 2501, 4200

Back strain was held to be a continuation, extension, worsening and deterioration of a former injury and surgery rather than a new injury under the cumulative injury threory, or otherwise, based on claimant's testimony and doctors' statements. Claimant allowed additional healing period compensation and medical benefits from the insurance carrier for the earlier injury. Insurance carrier for the second alleged injury was not liable for any payments.

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FILED
MAR 1 6 1988
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RAYMOND DENNING, Claimant, vs. HYMAN FREIGHTWAYS, INC., Employer, and EXCALIBUR INSURANCE COMPANY by IOWA INSURANCE GUARANTY ASSOCIATION, Insurance Carrier, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	File Nos. 751584 834032 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 Raymond Denning, claimant, against Hyman Freightways, Inc., employer, Excalibur Insurance Company by Iowa Insurance Guaranty Association, insurance carrier, and Liberty Mutual Insurance Company, insurance carrier, defendants, for benefits as the result of an injury that occurred on November 28, 1983 and an alleged injury which allegedly occurred on August 18, 1986. A hearing was held in Des Moines, Iowa on August 24, 1987 and the case was fully submitted at the close of the hearing. The record consists of the testimony of David Sterr (claim adjuster), Renae Herr (legal assistant) and Raymond Denning (claimant). The record also consists of joint exhibits 1 through 6 and defendants' exhibit A. All three attorneys submitted excellent briefs.

STIPULATIONS AND ISSUES -- INJURY OF NOVEMBER 28, 1983

Claimant, employer, and Iowa Insurance Guaranty Association agreed to the following stipulations and issues concerning the injury of November 28, 1983.

STIPULATIONS -- INJURY OF NOVEMBER 28, 1983

The parties agreed to the following stipulations:

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

That claimant sustained an injury on November 28, 1983 which arose out of and in the course of employment with the employer;

That the rate of compensation in the event of an award is $408.93 per week;

That the fees charged for medical services or supplies are fair and reasonable, that the expenses incurred were for reasonable and necessary medical treatment and that the expenses were caused by the condition on which claimant is now basing his claim;

That claimant had received the workers' compensation benefits shown on the form 2A attached to the pre-hearing report through August 15, 1986;

That permanent disability is not an issue in this case at this time; and,

That the issue of penalty benefits under Iowa Code section 86.13 is bifurcated.

ISSUES -- INJURY OF NOVEMBER 28, 1983

At the time of the hearing, the parties submitted the following issues for determination:

Whether the injury of November 28, 1983 is the cause of additional temporary disability during a period of recovery;

Whether claimant is entitled to additional temporary disability benefits;

Whether claimant is entitled to certain medical expenses.

STIPULATIONS AND ISSUES -- ALLEGED INJURY OF AUGUST 18, 1986

Claimant, employer and Liberty Mutual Insurance Company, agreed to the following stipulations and issues concerning the alleged injury of August 18, 1986.

STIPULATIONS -- ALLEGED INJURY OF AUGUST 18, 1986

The parties stipulated to the following matters:

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

That the rate of compensation is $370.02 per week;

That the fees charged for medical services or supplies are fair and reasonable, that the medical expenses were incurred for reasonable and necessary medical treatment and that the expenses were caused by the condition on which claimant is now basing his claim;

That defendants make no claim for credit for benefits paid prior to hearing;

That permanent disability is not an issue in this case at this time; and,

That the issue of penalty benefits under Iowa Code section 86.13 is bifurcated.

ISSUES -- ALLEGED INJURY OF AUGUST 18, 1986

At the time of hearing, the parties submitted the following issues for determination:

Whether claimant sustained an injury on August 18, 1986 which arose out of and in the course of employment with the employer;

Whether the alleged injury of August 18, 1986 was the cause of temporary disability during the period of recovery;

Whether claimant is entitled to temporary disability benefits as a result of the alleged injury on August 18, 1986; and,

Whether claimant is entitled to certain medical expenses as a result of the alleged injury on August 18, 1986.

STATEMENT OF THE CASE

The attorney for the employer and Liberty Mutual Insurance Company made a correct statement of the case in the following words:

> This is a proceeding in arbitration brought by Raymond Denning against his Employer, Hyman Freightways, to obtain weekly benefits for a period of alleged temporary total disability commencing in August 1986. The Claimant has filed two separate actions against his Employer which have been consolidated for the purpose of this hearing. In File No. 751584, the Claimant has filed a claim against Hyman

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> Freightways and the Iowa Guaranty Association alleging an injury to his back on November 28, 1983. At that time, Hyman Freightways was insured by Excalibur Insurance. The claims against Excalibur Insurance are presently being handled by the Iowa Guaranty Association. In File No. 834032, the Claimant has filed a claim against Hyman Freightways and Liberty Mutual for an injury to his back which allegedly occurred on August 18, 1986, as a result of "bouncing in truck and other work activities". Liberty Mutual Insurance Company provided workers' compenstion insurance coverage for Hyman Freightways on August 18, 1986.

More specifically, claimant seeks temporary disability benefits for an absence from work from August 27, 1986 to October 1, 1986 and payment of medical expenses in the total amount of $1,335.28 for treatment to his back at that time (exhibit 2). Each insurance carrier contends that they are not liable for claimant's temporary disability and medical expenses. Each insurance carrier contends that the other carrier is liable for claimant's temporary disability and medical expenses.

SUMMARY OF THE EVIDENCE

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

The statement of facts prepared by the attorney for the employer and Liberty Mutual Insurance Company (Liberty Mutual) is both comprehensive and succinct. It is also accurate and fair. Therefore it is quoted below as a brief overview of the facts of this case, but it will be supplemented by additional and other evidence.

> The Claimant, Raymond Denning, is a truck driver/dockman with Hyman Freightways. After sustaining an injury to his back while unloading a trailer for Hyman Freightways on November 28, 1983, the Claimant was off work from November 28, 1983, through May 13, 1985. The Claimant was treated by William Boulden, M.D., for his back condition, which was diagnosed as an extruded disc fragment at L4-5 on the left, degenerative facet foraminal stenosis at L4-5 bilaterally and at L5-S1 (Ex. 1, p. 42). A bilateral discectomy and two level decompression was performed on February 24, 1984. (Ex. 1, pp. 7 and 23). After a healing period, Dr. Boulden released the Claimant to return to work effective May 13, 1985, for city truck driving only. (Ex. 1, p. 24). The Claimant did return to work as a city truck driver/dockman and continued to work in that

position until taken off work by Dr. Boulden on August 28, 1986. (Ex. 5).

On August 29, 1986, a representaive of Hyman Freightways prepared a report entitled "Supplementary Report of Injuries and Illnesses" concerning the Claimant. In that report, it is stated that as a result of an accident in 1983, the Claimant's left leg and back started to hurt and slowly got worse. (Ex. 5). A copy of that report was sent to the Iowa Guaranty Association and to Liberty Mutual. Upon receipt of that report, Dave Sterr, a claim adjuster for Liberty Mutual, contacted the Claimant on September 4, 1986, in order to take his statement as part of an investigation of the claim. (Ex. 3). In his statement, Mr. Denning stated that his back and left leg started hurting about six months ago in February or March of 1986. (Ex 3, p. 2). The Claimant stated that he first noticed a slight pain in his left leg which slowly got worse with time until it was there every day. (Ex. 3, p. 2). When giving the statement, Mr. Denning could not relate the onset of pain to any specific incident or activity. (Ex. 3, p. 2). Mr. Denning was unable to say whether he first noticed the pain at home or at work. (Ex. 3, p. 2). The Claimant reported that after his return to work in May of 1985, he did not have any trouble other than occasional soreness until the most recent episode of pain which started in February or March of 1986. (Ex. 3, p. 6). Commencing with his return to work in May of 1985 through approximately August 15, 1986, Mr. Denning received weekly benefits for permanent partial disability from Excalibur Insurance/The Iowa Guaranty Association. Effective July 1, 1985, Liberty Mutual began providing workers' compensation insurance to Hyman Freightways.

Mr. Denning reported to Dr. Boulden on August 18, 1986, that within the last couple of weeks he began to develop left thigh pain down to the knee. The neurological examination of the Claimant on that date was normal. (Ex. 1, p. 40). Dr. Boulden prescribed a CT scan which was scheduled at Lutheran Hospital for August 21, 1986, at 4:30 p.m. (Ex. 1, p. 22). Dr. Boulden reported in his notes dated 8-26-86 that the CT scan showed a possible small fragment of the L5-S1 disc pressing on the S1 nerve, but that Mr. Denning's symptoms did not correspond with this finding. (Ex. 1, p. 40). Dr. Boulden further reported that the Claimant had foraminal stenosis at L4-5 that had been previously corrected,

but had now been reformed with continued deterioration of his spine. (Ex. 1, p. 40). The Claimant received an epidural steroid injection which markedly improved his pain. (Ex. 1, p. 40). Dr. Boulden released the Claimant to return to work effective October 1, 1986. The Claimant returned to the same job, performing the same duties as he had performed prior to being off work. The Claimant continues in the same job today.

In a letter dated October 21, 1986, addressed to the Iowa Insurance Guaranty Association, Dr. Boulden stated:

> It is my feeling that the patient's problem at the time we saw him in August was further deterioration of his spine from the previous surgeries. He was having some more foraminal stenosis type pain, which was relieved with the epidural steroid injection. Therefore, it is my feeling that it was only a temporary aggravation of a pre-existing condition and was related on his first surgery. In no way do I feel that he has had any increased permanency.

(Ex. 1, p. 16).

In a later letter to the Iowa Insurance Guaranty Association dated November 5, 1986, Dr. Boulden stated:

> As you have pointed out in your letter, continued truck driving could further accelerate the degenerative process in Mr. Denning's back. Therefore, this may be one of the reasons this has continued to get worse. This also could be just a natural developing degeneration from the previous surgeries.
>
> Therefore, it is hard for me to state which one has more than the other, but I would say that it was a definite contributing factor.

(Ex. 1, p. 15).

Claimant testified at the hearing that he has worked for this employer for 15 years. Claimant confirmed the seriousness of his injury on November 28, 1983; that he was off work approximately

but had now been reformed with continued deterioration of his spine. (Ex. 1, p. 40). The Claimant received an epidural steroid injection which markedly improved his pain. (Ex. 1, p. 40). Dr. Boulden released the Claimant to return to work effective October 1, 1986. The Claimant returned to the same job, performing the same duties as he had performed prior to being off work. The Claimant continues in the same job today.

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(Ex. 1, p. 15).

Claimant testified at the hearing that he has worked for this employer for 15 years. Claimant confirmed the seriousness of his injury on November 28, 1983; that he was off work approximately

one and one-half years as a result of that accident; and that he had been back to work for approximately one and one-half years before the occurrence of the alleged injury on August 18, 1986. Claimant related that, after a return to work in May, 1985, he had some problems with his leg and back that would come and go. He related these left leg and back problems to the injury of November 28, 1983 and the surgery on February 24, 1984. Claimant added that, when he again tried to drive a truck in his job in approximately March of 1986, the pain was more severe, but he did not seek any medical treatment for it because Dr. Boulden told him that he could expect to always have some pain in his left leg and that certain things would aggravate it. Claimant testified that his left leg and back pain became worse between March and August of 1986 when his wife told him he had better go to the doctor. Claimant granted that driving the truck at work or driving his personal vehicle or sitting in one position too long caused the symptoms to be worse. Dock work, in itself, did not seem to bother him. In his statement to the Liberty Mutual adjuster on September 4, 1986, claimant did not allege that truck driving caused his pain. On the contrary, he could not pinpoint any specific cause for his increase in symptoms. He did say that every once in a while extended driving would hurt his back, but when he got out and moved around a little bit, he felt pretty good again (exhibit 3).

Defendant employer and Iowa Insurance Guaranty Association (IIGA) contend that the reason claimant returned to the doctor was because he was told his August, 1986 check for permanent partial disability benefits was to be his last check from the injury of November 28, 1983.

Claimant contended that he was off work from the day he saw Dr. Boulden on August 18, 1986 until Dr. Boulden released him to return to work on October 1, 1986. However, it was proven that claimant was paid regular wages through Tuesday, August 26, 1986 (exhibit A). Claimant testified at the hearing that his back and left leg pain in August of 1986 felt like it was related to the November 28, 1983 injury. Claimant testified that, in his opinion, it was an extension of the November 28, 1983 injury because he had the same symptoms and the same pain. Claimant testified that the doctor told him the pain was from the injury of November 28, 1983.

Claimant said that, even though he returned to work on October 1, 1986, he still had pain which felt like the pain he had after the November 28, 1983 injury and February 24, 1984 surgery.

Claimant also reported that he had a third injury to his back in May of 1987. At this time, he was trying to upright an engine block which had tipped over. This injury is not an issue in this case. Claimant added that he suffered muscle strain at

the time of this injury and that Liberty Mutual has paid for his medical bills and for his time off work from this injury.

David Sterr, adjuster for Liberty Mutual, testified that he received a report of injury on September 4, 1986. He took a statement from claimant and reviewed claimant's medical records with Dr. Boulden. He determined that claimant's injury was a continuation of the injury of November 28, 1983. He notified claimant of his decision on September 11, 1986 and denied the claim by letter on September 11, 1986 (exhibit 4). The basis for his denial was that claimant did not report an incident. Claimant indicated in his statement that his problems were due to his day-to-day activities. Claimant did not assert any particular employment activity was causing his condition. Sterr testified that the facts which he acquired did not present a new work injury in his opinion. Sterr said that Dr. Boulden's medical reports of August 18, 1986 and August 26, 1986 (exhibit 1, pages 21 and 23), said that claimant's problems were a continuation of the deterioration of his spine coming from the earlier foraminal stenosis. In addition, Sterr said that claimant told him his complaints were a continuation of his earlier problems that occurred on November 28, 1983.

Renae Herr testified that she assists in the administration of the IIGA funds. She stated that she functions like an insurance adjuster. She testified that claimant called her office in mid-August of 1986. She did not take a statement from claimant about the alleged injury. She did write to and talk to Dr. Boulden and relied upon his evidence. She denied telling claimant to see Liberty Mutual about this injury. She said that, when she received Dr. Boulden's report of October 21, 1986 (exhibit 1, page 16), she could not determine if claimant's condition was due to his old injury or to a new injury. Therefore, she wrote to Dr. Boulden on October 27, 1986. Dr. Boulden responded on November 5, 1986 (exhibit 1, page 15). Herr stated that when Dr. Boulden said the injury could be from truck driving, she denied claimant's claim (exhibit 6). She stated that she interpreted Dr. Boulden's letter as saying that claimant had an aggravation of a preexisting condition. Therefore, she thought that Liberty Mutual should pay the claim.

A review and summary of Dr. Boulden's office notes and letters now follows.

On August 18, 1986, the day that claimant saw Dr. Boulden for the alleged injury of August 18, 1986, his notes report the following:

> Follow up of bilateral discectomy and L4-5, 5-S1, with two level decompression. The patient has done fairly well until the last couple of weeks, when he started to develop left thigh pain down to the knee.

> We examined him today and found him to have negative straight leg raising and neurologically intact. However, because of the previous two level decompression disc surgery, I recommended to repeat the CAT scan to see if there may be some abnormalities going on. Therefore this will be set up and I'll check him back in one week. (Exhibit 1, pages 23 and 40).

A CT scan was performed on August 21, 1986 (exhibit 1, page 40).

On August 26, 1986, Dr. Boulden noted and reported this information:

> Follow up of left leg recurrent pain. The CAT scan showed a possible small fragment of L5-S1 disc pressing on the S1 nerve. However his symptoms are anterior thigh, which would not correspond with this finding.
>
> He has foraminal stenosis at L4-5 that had been previously corrected, but has now been reformed with continued deterioration of his spine. Therefore, I think his symptoms are coming from the foraminal stenosis, and I have recommended an epidural steroid injection, as well as getting off work for two weeks, and see what his symptoms do. We will follow him up after that. (Exhibit 1, pages 21 and 40).

On September 23, 1986, Dr. Boulden, based upon claimant's statements to him, injected the idea that truck driving might be a factor in the cause of claimant's pain.

> Follow up of foraminal stenosis of L4-5. The patient continues to do quite well. He is having minimal symptoms. He states that as soon as he starts driving he starts having a lot of pain, so it would be my recommendation that the pain is usually associated with driving, that he refrain from driving again in the future. He feels however, that he could handle dock work, and since he says that he has done that for many years, he knows how to do it properly, then I would be more in favor of returning him back to dock work.
>
> Therefore, our final conclusion will be that he stop the truck driving and return to dock work to see if he could not handle that, and be productive. (Exhibit 1, pages 18 and 39).

Dr. Boulden's notes reflect that claimant called his office

on September 29, 1986 requesting a release to return to work. Dr. Boulden agreed to a release to return to work, providing claimant do "mostly dock work but some driving" (exhibit 1, page 39).

On October 21, 1986, Dr. Boulden's unfortunate use of the term "temporary aggravation of a preexisting condition" in the following report created a problem.

> It is my feeling that the patient's problem at the time we saw him in August was further deterioration of his spine from the previous surgeries. He was having some more foraminal stenosis type pain, which was relieved with the epidural steroid injection. Therefore, it is my feeling that it was only a temporary aggravation of a pre-existing condition and was related on his first surgery. In no way do I feel that he has had any increased permanency. (Exhibit 1, page 16).

Dr. Boulden then had a conference with Herr and responded to her letter as follows on November 5, 1986.

> As you have pointed out in your letter, continued truck driving could further accelerate the degenerative process in Mr. Denning's back. Therefore, this may be one of the reasons this has continued to get worse. This also could be just a natural developing degeneration from the previous surgeries.
>
> Therefore, it is hard for me to state which one has more than the other, but I would say that it was a definite contributing factor. If I can be of any further help, please feel free to contact me. (Exhibit 1, page 5).

Claimant presented these medical expenses for payment:

BILLS
(See Attached Statements)

Iowa Lutheran Hospital (CAT Scan - 8/21/86)	$520.00
Des Moines Anesthesiologist	200.00
William Boulden, M.D. (Central Iowa Orthopaedics)	310.00
Surgery Center of Des Moines	270.00
TOTAL MEDICAL BILLS OWED	$1,300.00

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MILEAGE

William Boulden, M.D. 28 miles rdtrp. x 4 = 112 x .21 =	23.52
Iowa Lutheran Hospital (8/21/86) 28 miles rdtrp. x 1 x .21 =	5.88
Surgery Center of Des Moines (8/28/86) 28 miles rdtrp. x 1 x .21 =	5.88
TOTAL MILEAGE DUE =	$35.28

(Exhibit 2)

The parties stipulated that these bills were fair and reasonable; were reasonable and necessary medical treatment; and, were for the condition on which claimant is now basing his claim.

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 November 28, 1983 and on August 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).

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

The claimant has the burden of proving by a preponderance of the evidence that the injuries of November 28, 1983 and August 18, 1986 are causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all

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

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 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).

Defendant IIGA contends that claimant sustained a temporary aggravation of his underlying permanent impairment which occurred during the period of coverage insured by Liberty Mutual. IIGA adds that the cumulative trauma of driving a truck in the performance of claimant's job resulted in a new injury on the day claimant was unable to continue to work.

Defendant Liberty Mutual contends that claimant did not sustain a new injury, but rather only a continuation, extension, worsening or deterioration of the condition that occurred on November 28, 1983 during the period of coverage by IIGA.

Claimant testified that he continued to have pain that would come and go in his left leg and back after the injury of November 28, 1983 and the surgery of February 24, 1984. He described his left leg and back pain in 1986 and on August 18, 1986 as related to, and an extension of, the pain he sustained in the injury of November 28, 1983. Therefore, claimant's testimony supports the proposition that his pain was a continuation, extension or deterioration of the condition caused by the injury of November 28, 1983.

When claimant gave the statement to the adjuster on September 4, 1986, he did not state that his pain was caused by truck driving. He said it became worse with extended truck driving, but as soon as he got out and moved around, it felt better (exhibit 3, page 7). In his statement, claimant said that the pain had no specific onset. He indicated that he felt it at home as well as at work. There was no specific incident, activity or trauma that caused it. He just did the same things he always did around home and at work. There was a slight pain in the left leg and it got worse until it was there all the time (exhibit 3, page 2). Claimant testified that Dr. Boulden told him this was a continuation and extended deterioration rather than a new type of injury (exhibit 3, page 7).

At the hearing, claimant testified that the pain was worse when he drove the truck, but that driving his personal automobile also made it worse sometimes and that simply sitting in one position for a prolonged period of time also made it worse. Therefore, it is not possible to identify the 1986 complaints as caused by driving a truck at work based on claimant's own testimony, either in his deposition or at the hearing.

Defendant IIGA did not take a statement or deposition from claimant or develop any other evidence to establish that claimant's complaints were the result of a cumulative type of injury.

There is evidence of pain. There is evidence of truck driving. There is no evidence in between to prove numerous minor cumulative traumas. On the contrary, there is evidence that just sitting in one position or driving a private passenger automobile or truck provoked the pain. Therefore, it is determined that there is insufficient evidence to make a determination that claimant sustained a cumulative injury. In fact, as claimant's counsel pointed out in his brief, "There is no testimony by claimant of any specific additional trauma" (claimant's brief, page 3).

A review of the notes and reports of Dr. Boulden supports the view that claimant did not sustain a new injury and that claimant did not sustain an aggravation of his underlying preexisting condition, but rather that claimant suffered from a continuation and extension of the condition incurred at the time of the injury on November 28, 1983.

When claimant first saw Dr. Boulden on August 18, 1986, the doctor said it was a follow-up of the earlier bilateral discectomy and two level decompression. Dr. Boulden did not mention any new injury or trauma, but said that, due to the previous surgery, he wanted a repeat CT scan (exhibit 1, pages 23 and 40).

On August 26, 1986, Dr. Boulden called it recurrent pain. He said the foraminal stenosis that had been corrected had

become reformed with continued deterioration of the spine. Dr. Boulden plainly stated, "I think his symptoms are coming from his foraminal stenosis." He also stated on August 26, 1986 that he was taking claimant off work for two weeks. Claimant was last paid for Tuesday, August 26, 1986 (exhibit A). Therefore, his temporary disability should begin on Wednesday, August 27, 1986. Claimant was released to return to work on October 1, 1986 (exhibit 1, pages 20 and 39).

On September 23, 1986, Dr. Boulden still described the office visit as a follow-up to the foraminal stenosis. He noted that since the pain is worse when driving, claimant should return to dock work as much as possible (exhibit 1, pages 18 and 39).

On October 21, 1986, Dr. Boulden flatly stated, "It is my feeling that the patient's problem at the time we saw him in August was further deterioration of his spine from the previous surgeries." Dr. Boulden's statement, "that it was only a temporary aggravation of a pre-existing condition and was related on his first surgeries" is further evidence that this condition is related to the injury of November 28, 1983 rather than the alleged injury of August 18, 1986. It is not believed that Dr. Boulden used the term "temporary aggravation of a pre-existing condition" as words with a technical, legal meaning, but only in a descriptive manner. Furthermore, Dr. Boulden linked the aggravation to the first surgery and not to any occurrence or activity which occurred on or about August 18, 1986 (exhibit 1, page 16).

On November 5, 1986, Dr. Boulden acknowledged that it was possible the truck driving could accelerate the degenerative process. He did not say it was probable or likely. Furthermore, it would appear that the idea that truck driving could accelerate the degenerative process originated with a question from Herr, rather than a spontaneous and voluntary statement from Dr. Boulden (exhibit 1, page 15).

Therefore, it is found that the injury of November 28, 1983 is the cause of claimant's left leg and back pain in 1986 and, more specifically, on August 18, 1986. Claimant then is entitled to additional healing period compensation from August 27, 1986 to October 1, 1986. Claimant is also entitled to $1,335.28 in medical bills and medical mileage (exhibit 2). These amounts are due from employer and the IIGA.

Under the evidence presented, it is determined that claimant did not sustain an injury or an aggravation of a preexisting condition under the cumulative injury theory or otherwise on August 18, 1986 which arose out of and in the course of employment with employer. Therefore, no amounts are due from employer and Liberty Mutual for the alleged injury on August 18, 1986.

law ?

The contention of the IIGA that healing period disability benefits cannot be awarded after the prior payment of healing period and permanent partial disability benefits because it does not fall within the framework of the workers' compensation law is without merit.

FINDINGS OF FACT

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

That claimant sustained a recurrence, extension, continuation and further deterioration of his foraminal stenosis which was caused by the injury of November 28, 1983.

That the recurrence, extension, continuation and further deterioration is the cause of additional healing period compensation and time off work from August 27, 1986 to October 1, 1986.

That claimant incurred $1,335.28 in medical expenses and medical mileage to treat this recurrence and further deterioration.

CONCLUSIONS OF LAW

THEREFORE, based upon the evidence presented and the foregoing findings of fact, the following conclusions of law are made:

That the injury of November 28, 1983 was the cause of additional healing period compensation.

That claimant is entitled to healing period compensation from August 27, 1986 to October 1, 1986.

That claimant is entitled to the payment of medical expenses in the amount of $1,335.28.

That claimant did not sustain a new injury on August 18, 1986 which arose out of and in the course of his employment with employer.

That claimant is not entitled to compensation or medical benefits from Liberty Mutual.

ORDER

THEREFORE, IT IS ORDERED:

That defendant employer and IIGA pay to claimant five point one four three (5.143) weeks of healing period compensation at the rate of four hundred eight and 93/100 dollars ($408.93) per week for the period from August 27, 1986 to October 1, 1986 in the total amount of two thousand one hundred three and 13/100

dollars ($2,103.13).

That defendant employer and IIGA pay this amount in a lump sum together with interest pursuant to Iowa Code section 85.30.

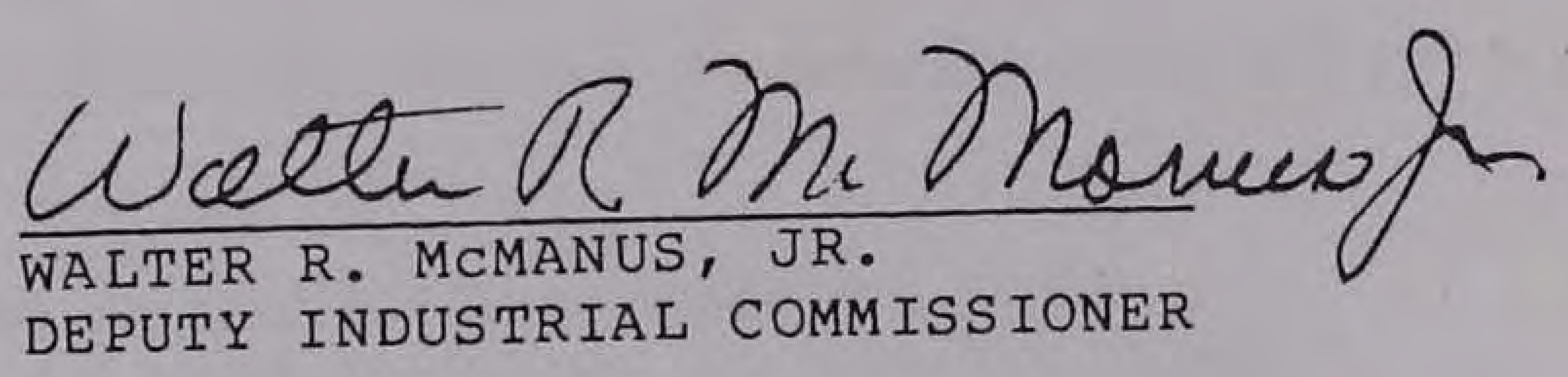
That defendant employer and IIGA pay claimant's Iowa Code section 85.27 medical benefits in the amount of one thousand three hundred thirty-five and 28/100 dollars ($1,335.28).

That defendant employer and IIGA pay the costs of this proceeding pursuant to Division of Industrial Services Rule 343-4.33.

That all defendants file Claim Activity Reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

That this case be returned to the pre-hearing calendar for assignment of the issue of penalty benefits pursuant to Iowa Code section 86.13 on claim file number 751584.

Signed and filed this 16th day of March, 1988.



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1100, 1104, 1107, 1108
Filed January 20, 1988
HELEN JEAN WALLESER

MARK E. DORPINGHAUS, Claimant, vs. UNIVERSITY OF IOWA HOSPITALS AND CLINICS, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	File No. 771007 A R B I T R A T I O N D E C I S I O N

1100, 1104, 1107, 1108

Claimant, who slipped on wet ground while walking from employer assigned parking lot to side entrance of his building, had established an injury arising out of and in the course of his employment where the main entrance was not available to claimant at the hour at which he needed to arrive to work and where the employer apparently acquiesced in the use of the side entrance and the route claimant used from the lot to the side entrance. Claimant did not establish that the work incident was causally related to the claimed disability where claimant had had prior shoulder injury with recurrent dislocations and surgeries and where claimant's post work incident surgery consisted of repair of remarked degenerative changes in the glenohumeral joint and removal of a staple present in the joint as a result of prior surgery.

FILED 00331

JAN 20 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARK E. DORPINGHAUS, Claimant, vs. UNIVERSITY OF IOWA HOSPITALS AND CLINICS, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 771007 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, Mark E. Dorpinghaus, against his employer, University of Iowa Hospitals and Clinics, and its insurance carrier, the State of Iowa, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained on May 24, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner at Cedar Rapids, Iowa, on June 16, 1987. A first report of injury was filed August 23, 1984. No benefit payments have been made. The record in this case consists of the testimony of claimant as well as of joint exhibit 1 and claimant's exhibits 2 and 3.

The parties specified relative to claimant's exhibit 2 that, of the 21 pages of medical costs submitted, only $202.29 had not been paid by the health insurer. Also, a statement in the amount of $150.00 from Medical Practitioners Neiman and Worrell was not received into evidence pursuant to defendants' objection that it was not timely served.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant's rate of weekly compensation is $120.84. They further stipulated that claimant's time off work and period of benefits for healing period entitlement, if such is found, would be from May 25, 1984 through September 3, 1984. They stipulated that claimant's medical costs are fair and reasonable for the

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services provided and that defendants would be entitled to credit under 85.38(2) as outlined in the prehearing report attachment which is incorporated into this decision by this reference.

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 the alleged injury and the claimed disability; (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 certain medical costs pursuant to section 85.27.

REVIEW OF THE EVIDENCE

Claimant described himself as a 29-year-old high school graduate who has completed two years of a business education course at the University of Iowa and one year of a nursing program at Kirkwood Community College. He hopes to reenroll and complete the nursing program. Claimant has been employed at the University of Iowa for approximately ten years in clerical and nursing assistant positions. Claimant also has prior employment experience as a long-distance telecommunicator with American College Testing Services. Claimant is now employed as a nursing assistant I at the Department of Pediatrics, Division of Developmental Disabilities. He described his duties as lifting clients who range in age from infancy to approximately 30-35 years and in weight from approximately 13 to 150 pounds. He reported that he must do so without assistance and that he must also brace, walk and restrain mentally disabled clients. Claimant agreed that his general office skills from ACT as well as his understanding of medical terminology, his ability to document medical information and his ability to physically and psychologically restrain and work with clients are skills which are likely quite marketable in the medical community. He also agreed that he has received contract negotiated raises since his alleged injury.

Claimant reported that on his injury date, which is variously described as May 24 or May 25, 1984, he was to work from 6:30 a.m. to 3:30 p.m. He reported that, on that morning, he parked his car in his assigned parking lot, which was owned by the University of Iowa, and walked downhill to the hospital school building in which he was employed. Claimant stated it had rained throughout the night and the surface was muddy as it was seeded for grass, but the grass had not yet begun to grow. He reported that construction was also underway in the area. Claimant fell approximately 50 yards from the hospital school building and approximately 100 yards from the entrance of the building which claimant generally used upon arriving at work. Claimant reported that the main entrance of the building did not open until 8:00 a.m. Claimant described his fall as occurring at a "dip in the hill" which claimant believed had been created for wheelchair access.

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Claimant testified that he physically fell backwards and caught himself with the palms of his hands extended outward. He indicated that he began work and informed the head nurse of his injury. He reported having a dull right shoulder pain with a red and blotchy area about the shoulder. He sought care at the Employee's Medical Clinic. X-rays were taken and claimant reported he was told there was no injury. Claimant described his arm as immobile, swollen and painful with numbness in the arm, palm and 4th and 5th fingers.

Claimant subsequently took his x-rays to Mercy Hospital where he saw Edward A. Dykstra, M.D., an orthopaedic surgeon. Claimant's follow-up care, which will be described below, included Bristow Repair and shoulder reconstruction surgery. Claimant returned to work on September 4, 1984. Claimant reported he had a 50-pound lifting restriction upon his work return and was advised to use extreme caution in using his arm and in movements away from his torso. He agreed that such is no longer in effect. Claimant reported that shoulder pain occurs now at least twice weekly and that he has limited range of motion as well as limited ability to put his arm behind his back or his head without pain. He reported that he is unable to swim or play racquetball. He agreed that he can now lift 50 pounds, but stated that his ability to perform his job has not changed in the past three years. He reported that co-employees help him out on the job and that he often takes sick leave for reasons other than for his shoulder. Claimant opined that, if he would pursue a nurse's training course, such may require lifting and stated his belief that he had not received a job for which he had applied in the intensive care unit because of his 50-pound lifting restriction. Claimant testified that he has applied for a position as a nursing unit clerk and as a clerk II in the hopes that taking such jobs would alleviate problems he has in doing physical work.

Claimant agreed that he has had prior right shoulder surgery with Bruce L. Sprague, M.D., in 1981. He reported that such was for shoulder dislocation and staple repair. Claimant alleged that, after a six- to eight-week recovery period, he had no subsequent problems with the shoulder in his work or life activities. On cross-examination, he did not deny that he had limited shoulder range of motion prior to his May, 1984 injury.

A May 27, 1981 note of B. L. Sprague, M.D., reports that he had seen claimant in his office that day and that claimant reported that, approximately two years earlier, he had fallen down some stairs injuring his shoulder. Claimant stated he had pain in the shoulder, particularly with abduction and external rotation which could be relieved "by forcing the shoulder down to A D duction [sic] and internal rotation." Claimant had radiation of pain down the medial aspect of the arm with numbness and tingling involving his hand and fingers. Some crepitus was

noted on taking the shoulder from extension, external rotation to abduction, internal rotation. X-rays showed an old fracture off the anterior lip of the glenoid. Dr. Sprague's impression was that claimant had recurrent subluxations of the shoulder and would probably benefit from a shoulder capsular reattachment.

A July 8, 1981 Mercy Hospital report of Ben Welch, M.D., reported that claimant had limitation of abduction of the right shoulder and was unable to get much over 85 degrees. He reportedly was otherwise able to internally rotate and externally rotate fully and extend fully, although there was some crepitus with abduction and extension in the shoulder joint. Neuro-sensory and motor functions in the arm were normal and intact.

On July 9, 1981, claimant had a Du Toit stapling, right glenohumeral joint for recurrent anterior subluxation, right humeral joint.

On July 29, 1981, Dr. Sprague reported that claimant had full flexion, 130 degrees of abduction, 40 degrees of internal rotation and external rotation to neutral. He characterized claimant as doing extremely well and gaining his full range of motion.

On September 4, 1981, Dr. Sprague reported that claimant had much less motion in his right shoulder than a month earlier. Flexion was limited to 130 degrees, abduction to 90 degrees and internal rotation with external rotation of 20 degrees. Claimant reportedly stated that he had had a heavy door close against his hand and that this resulted in decreased shoulder motion.

On September 16, 1981, claimant was reported as having less pain in the right shoulder, but not as good as two months earlier. Abduction was 130 degrees; flexion was 130 degrees; good external rotation; and, very limited internal rotation. Dr. Sprague suggested the exploràtion of the glenohumeral joint with removal of staples.

On October 1, 1981, Dr. Sprague removed the superior staple from the right glenoid.

On October 12, 1981, Dr. Sprague reported that claimant had 110 degrees of flexion, 90 degrees of abduction, 40 degrees of internal rotation and 20 degrees of external rotation.

On October 26, 1981, claimant had 150 degrees of flexion, 150 degrees of abduction, 40 degrees of internal rotation and 20 degrees of external rotation. He had some pain on lifting with his arm and mild crepitus around the rotator cuff which Dr. Sprague characterized as perfectly normal at that time.

An x-ray report of May 25, 1984 for the right shoulder

reports that claimant is status post stapling of the right shoulder as a "Hill-Sachs deformity" but no fracture or dislocation at that time.

Notes of E. A. Dykstra, M.D., of May 24, 1984 indicate that claimant was examined in the emergency room and had mild tenderness over his shoulder with limitation on range of motion and was placed in a shoulder immobilizer. The note further reports that x-rays including a stress axillary view show no evidence of dislocation, but that claimant has a strange shaped glenoid with a staple extremely close to the anterior aspect of the joint.

Michael M. Durkee, M.D., on June 5, 1984, noted that x-rays revealed the staple appeared to be essentially in the anterior aspect of the joint. The doctor noted that, upon examination, claimant had a great deal of grinding and catching in the shoulder and that the edge of the staple may be causing this.

On June 22, 1984, Dr. Durkee reported that claimant had had a right shoulder arthroscopy and was felt to have recurring dislocation and marked degenerative changes in the joint. Claimant was reported as having lost a great deal of motion.

On June 29, 1984, Dr. Durkee reported that he felt the staple may be giving claimant a little bit of trouble and would be removed. Bristow Repair of the shoulder, as well as removal of the staple, was performed July 15, 1984.

On August 24, 1984, Dr. Durkee reported that claimant had abduction to about 70-80 degrees; forward flexion to 110 degrees; internal rotation to 90 degrees; and, almost no external rotation.

On September 25, 1984, Dr. Durkee reported claimant had abduction to 90 degrees; forward flexion to 120 degrees; internal rotation to 85-90 degrees; and, external rotation of 10-15 degrees. He reported that claimant was able to get his hand behind his head with some difficulty, but was not quite able to get his hand behind the small of his back. Claimant was weight lifting at 25 pounds.

On November 13, 1984, Dr. Durkee stated that claimant "was doing very well," had some limitation of motion and was unable to get his hand completely behind the small of his back. Abduction was reported as only to 90 degrees. Claimant was able to get his hand behind his head and had minimal amounts of pain and discomfort. Claimant was reported as stating the shoulder was "100% better than before surgery."

On October 1, 1984, Dr. Durkee reported that, under the orthopaedic surgeon's guide, claimant's permanent physical impairment equals five percent of the arm.

On May 8, 1986, James B. Worrell, M.D., pediatric and adult neurologist, reported that muscle strength over the shoulder girdle, including the rhomboids, spinatus and pectoral muscles was quite strong. Deltoid gave way a bit, but had no atrophy. Biceps, triceps, wrist extensors and extensors of the fingers were all reported as fairly strong with finger abduction a bit weaker on the right side, but not much. No atrophy was noted. Thumb flexion was strong, autonomic function seemed equal over the hands and reflexes were symmetrical. Claimant had "some decrease in sensory [sic] over the top of the right shoulder," mainly in the C5 distribution, but perhaps onto the C4. He was reported as having diminished sensation over the under aspect of the arm into the 4th and 5th fingers of the right hand which would be mainly T1 and C8, but other sensory areas seem fairly well spared. Dr. Worrell stated that, neurologically, claimant may have had injury to the brachial plexus with all these recurrent injuries. The doctor doubted that this would be a progressive problem. On June 12, 1986, Dr. Worrell reported that electromyographic studies revealed no nerve conduction abnormalities. He indicated there were some modest changes in the C5 muscle and C8 muscle, indicating some old injury perhaps to those nerve roots, but nothing acute. He suspected a previous stretch injury, perhaps to the plexus, now stable.

Medical expenses, as could be gleaned from the submissions made, were as follows:

Walgreens	prescriptions	$ 12.29
Steindler Ortho Clinic	5/24/84-8/24/84	2,066.00
Mercy Hospital IA CITY	5/25/84	72.50
Mercy Hospital IA CITY	6/13/84	1,225.60
Mercy Hospital IA CITY	7/18/84-7/20/84	2,297.34
M A Menezes M.D.	8/3/84	345.00
M A Menezes M.D.	7/2/84	299.00
University Hospitals	6/7/84	42.00
Towncrest X-ray Dept.	6/6/84	24.00
Bruce L. Sprague M.D.	5/27/84-10/26/84	1,274.00

APPLICABLE LAW AND ANALYSIS

Of first concern is whether claimant received an injury which arose out of and in the course of his employment.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on May 24, 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

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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).

As a general rule, absent special circumstances, employees are not entitled to compensation for injuries occurring off the employer's premises on the way to or from work. However, an injury arising out of and in the course of employment may be found where: (1) the site of injury was so closely related in time, location and employee usage to the work premises as to bring the claimant within the zone of protection of the workers' compensation law, or (2) the employer had exercised its control over the abutting area as to make it an extension of the business premises. Frost v. S. S. Kresge Co., 299 N.W.2d 646, 648 (Iowa 1980).

In the instant case, claimant fell approximately 50 yards from the hospital school building and approximately 100 yards from the entrance to the building which claimant normally used to enter his work premises. While the record is silent as to whether any other entrances were available to claimant, the record discloses that the building's main entrance was not open until 8:00 a.m. Claimant was expected to arrive at work at or before 6:30 a.m. Thus, it could be expected that claimant would be in the vicinity of this or another ancillary entrance while traveling to work. The record is also silent as to whether claimant might have chosen a less-hazardous route into the building. Claimant appears to have been taking the most direct route from his assigned parking lot to his work premises, however. Hence, it appears that the employer acquiesced in

claimant's use of such route to enter the building from one of, if not the only, entrance available at the time his work shift began.

The record is silent as to ownership of the area where claimant fell. Claimant was traveling from an assigned employer-owned parking lot to the employer's premises at the time of his fall, however. As noted, the main entrance to the employer's premises was not available to claimant when his fall occurred. As further noted, the employer apparently acquiesced in the use of the route from the parking lot to the employer's premises on which the injury occurred. Such would suggest that the employer had some degree of control over the area, if not through ownership, then through an informal and consented-to arrangement permitting its employees entrance by that route. Given the foregoing, it can be said that the site of claimant's fall was so closely related in time, location and employee usage to the work premises as to bring claimant within the zone of protection of the workers' compensation law and that the employer had exercised such control over the route on which the fall occurred as to make the route an extension of the employer's business premises. Thus, claimant has established a work incident arising out of and in the course of his employment on May 24 or 25, 1984. It remains for claimant to establish that his work incident resulted in a work injury which is causally related to his claimed disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 24, 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

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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.

Initially, we note that no medical personnel has causally related claimant's condition to his work incident of May 24, 1984. Likewise, no physician has indicated that the work incident aggravated claimant's prior shoulder problems. Claimant was not thought to have evidence of a dislocation when examined on May 24, 1984. A staple extremely close to the anterior aspect of the (glenohumeral) joint was disclosed on x-rays of that date, however. As of June 22, 1984, Dr. Durkee opined that claimant had recurring dislocation of the right shoulder with marked degenerative changes in the joint. He felt, as of June 29, 1984, that the staple (remaining from claimant's July 9, 1981 Du Toit stapling of the right glenohumeral joint) "may be giving" claimant "a little bit of trouble" and advised its removal. Bristow Repair of the shoulder was also advised. At no point does either Dr. Durkee or Dr. Dykstra, or any other medical practitioner, indicate that the repair and staple removal were required on account of claimant's May 24, 1984 fall or that either the marked degenerative changes found in the joint, the recurring dislocation, or the problems with the staple were conditions aggravated by that fall.

Likewise, Dr. Sprague noted, on May 27, 1981, that claimant had radiation of pain down the medial aspects of his arm and numbness and tingling involving his hands and fingers. Claimant attributed those problems to his May 24, 1984 fall. Their existence from three years prior to that incident undercuts claimant's credibility as a reporter of his own pre- and post-incident physical condition and symptomatology. Dr. Worrell confirmed claimant's numbness and tingling upon physical examination of May 8, 1986. Nevertheless, Dr. Worrell only stated that claimant may have had injury to the brachial plexus from all his recurrent injuries. He did not expressly attribute the problems to the May 24, 1984 incident. The presence of the symptoms prior to the 1984 incident, as noted, further indicates that they should not be so attributed. Furthermore, Dr. Worrell reported, on June 12, 1986, that electromyographic studies revealed no nerve conduction abnormalities. All of the above

demonstrate that claimant has not established the requisite causal connection between his May 24, 1984 incident and any subsequent problems. That such a connection is not possible is not disputed. The law, however, requires a probability and such is not shown in this record.

As claimant has not prevailed on the causal connection issue, we need not address the remaining issues of benefit and medical payment entitlement. We note, however, that any permanency due claimant would likely have been small. Claimant's assigned impairment is five percent of the arm. Under the AMA guides to impairment, such would translate to three percent of the whole person. (We note that the impairment of five percent of the arm was obtained under the orthopaedic guides and not under the AMA guides. Further, no distinction was made as to what percentage, if any, of that impairment related to claimant's pre-May 24, 1984 condition.) Claimant is not now under a lifting restriction. Dr. Durkee's November 13, 1984 medical report belies claimant's contention that he is unable to get his hand behind his head. The doctor does state that claimant is not able to get his hand completely behind the small of his back, however, indicating that claimant may not have altogether exaggerated that complaint. However, that restriction does not appear to unduly impair claimant in performing other work duties. Likewise, as claimant attested to, he has a considerable number of marketable clerical and medical skills. He is also a bright individual who has completed a number of years of college and associate college work. He is a younger worker who could well proceed with his plans to obtain a nursing degree. For those reasons, it is doubtful that claimant could have shown any industrial disability resulting from the May 24, 1984 incident.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant was employed by the University of Iowa Hospitals and Clinics as a nursing assistant I, Department of Pediatrics, Division of Developmental Disabilities on May 24, 1984.

Claimant's work shift began at 6:30 a.m. and ended at 3:30 p.m.

Claimant was assigned a parking space in the University-owned parking lot.

The main entrance of the Department of Pediatrics hospital school building was not open until 8:00 a.m.

Claimant used a side entrance to the Department of Pediatrics hospital school building to enter to begin his work shift.

The route from the assigned parking lot to the ancillary entrance which claimant normally used required a walk downhill through a grass-seeded area where construction was taking place.

It had rained throughout the night into the morning of May 24, 1984.

Claimant fell enroute to the hospital school building on the morning of May 24, 1984 approximately 50 yards from the hospital school building and approximately 100 yards from the entrance claimant customarily used.

Claimant had had numbness and tingling involving his hands and fingers as of May 27, 1981.

Claimant had fallen down stairs injuring his shoulders in approximately 1979.

On July 9, 1981, claimant had a Du Toit stapling of the right glenohumeral joint for recurrent anterior subluxation of the right humeral joint.

On October 1, 1981, claimant had a superior staple removed from the right glenoid.

Claimant had had limitation of right shoulder motion prior to May 24, 1984.

As of May 24, 1984, claimant had mild tenderness of the shoulder with limitation of motion.

X-rays of May 24, 1984 showed no evidence of dislocation, but did reveal a staple extremely close to the anterior aspect of claimant's glenohumeral joint.

Right shoulder arthroscopy of June 22, 1984 revealed recurring dislocation and marked degenerative changes in the (glenohumeral) joint.

Bristow Repair of the shoulder and removal of the staple in the glenohumeral joint was performed on July 15, 1984.

Electromyographic studies of June 12, 1986 revealed no nerve conduction abnormalities.

Claimant's permanent partial impairment is five percent of the arm or approximately three percent of the body as a whole.

Claimant is a younger worker.

Claimant has marketable skills in the medical field as well as in the clerical field. Claimant has completed three years of

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coursework at either the university or the associate college level.

Claimant no longer has medically-imposed lifting limitations. Claimant's continuing inability to put his arm behind his back does not appear to affect his ability to perform work.

Claimant would be a good candidate to complete a degree in nursing, as he desires.

Any industrial disability arising from claimant's injury, had such been found, would have been minimal.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established a work incident of May 24, 1984, which incident did arise out of and in the course of his employment.

Claimant has not established that that incident resulted in an injury which was causally related to claimed disability.

Claimant has not established any entitlement to healing period, temporary total disability or permanent partial disability benefits as a result of the incident of May 24, 1984.

Claimant has not established medical costs which are compensable under section 85.27 as related to a compensable injury.

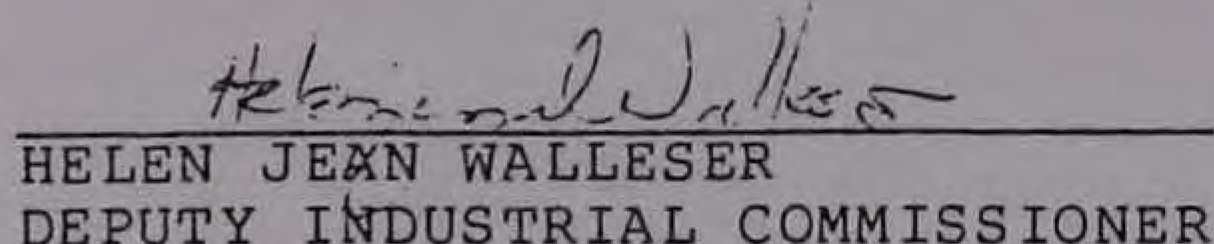
ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceeding.

Claimant pay costs of this proceeding.

Signed and filed this 30th day of June, 1988.



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1402.60; 1802; 1803
Filed 5-5-88
Thomas J. McSweeney

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN R. DENNIS,	
Claimant,	File No. 810512
vs.	
CONSOLIDATED FREIGHTWAYS, INC.,	A R B I T R A T I O N
Employer,	D E C I S I O N
and	
OLD REPUBLIC INSURANCE CO.,	
Insurance Carrier, Defendants.	

1402.60; 1802; 1803

Held in arbitration that claimant established entitlement to medical benefits, healing period benefits, and permanent partial disability benefits.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOHN R. DENNIS,	:	
Claimant,	:	File No. 810512
vs.	:	
CONSOLIDATED FREIGHTWAYS, INC.,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	FILED
OLD REPUBLIC INSURANCE CO.,	:	MAY 5 1988
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by John R. Dennis, claimant, against Consolidated Freightways, employer, and Old Republic Insurance Co., insurance carrier, for benefits as a result of an alleged injury on November 13, 1985. A hearing was held in Burlington, Iowa on March 9, 1988 and the case was submitted on that date.

The record consists of the testimony of claimant, Cheryl Dennis, Robert B. Witte, Bill Hawkins, Donald Fobar, and Bernard C. DeWeerth; claimant's exhibits 1 through 48; and defendants' exhibits A through G. Neither party filed a brief.

The parties stipulated that claimant's weekly rate of compensation is $368.67; that claimant was paid for all time off work up until August 20, 1986; that claimant received no benefits from August 20, 1986 through August 23, 1987; and that the contested medical bills are reasonable in amount.

ISSUES

The contested issues are:

1) Whether claimant received an injury on November 13, 1985 which arose out of and in the course of his employment at Consolidated Freightways;

2) Whether there is a causal relationship between the

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alleged injury of November 13, 1985 and claimant's asserted disability;

3) Nature and extent of disability; in this regard, defendants assert that any permanency benefits awarded would commence on February 3, 1986 (date of full release) whereas claimant asserts that any permanency benefits awarded would commence on August 24, 1987 (the date claimant started back to work);

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

5) Whether claimant is entitled to penalty benefits pursuant to Iowa Code section 86.13.

SUMMARY OF THE EVIDENCE

Cheryl Dennis testified she has been married to claimant for 11 years. Prior to November 13, 1985, claimant was active, but after November 13, 1985 he changed. Claimant has gone through a pain clinic and went back to work on August 24, 1987, but still has problems. Claimant currently has no patience.

Robert B. Witte testified that he owns a gutter company and that claimant has no proprietary interest in this firm. Witte remodeled claimant's house in 1987.

Claimant testified that on November 13, 1985, he worked for Consolidated Freightways and that he injured his back on that date unloading heavy bags. Claimant acknowledged doing "little errands" when his home was being remodeled. Claimant testified that the surveillance done by defendants was done on the wrong residence.

Claimant testified that prior to November 13, 1985, he could do anything he really wanted to do. Claimant described his medical treatment after November 13, 1985.

Claimant testified that he is currently paid $14.71 per hour; he was paid $13.21 per hour in November 1985.

Bernard C. DeWeerth testified that he is the terminal manager for Consolidated Freightways and hired claimant in 1977. Claimant has not complained to DeWeerth about his back since August 24, 1987 when he returned to work. Claimant works as a local driver and is able to do his job.

Exhibit 41, page 152, contains a whole body rating of 8 to 10 percent.

APPLICABLE LAW AND ANALYSIS

I. Defense counsel made numerous objections at hearing and most, if not all, of the objections were overruled. The basis for the evidentiary rulings are found in Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890, 894-95 (Iowa App. 1983) (the court held that Iowa Code section 86.18 provides that the industrial commissioner is not bound by statutory or common law rules of evidence); Heidemann v. Sweitzer, 375 N.W.2d 665, 669 (Iowa 1985) (Iowa Rules of Evidence do not govern administrative hearings; section 17A.14 governs such proceedings).

II. Claimant has the burden of proving by a preponderance of the evidence that he received an injury on November 13, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967). It is concluded that claimant established by a preponderance of the evidence that he sustained a new injury on November 13, 1985 or sustained a material aggravation of a preexisting condition on that date. Claimant is found to be a credible witness.

III. The claimant has the burden of proving by a preponderance of the evidence that the injury of November 13, 1985 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). It is further concluded that claimant established a causal connection between his work-related injury and his asserted disability.

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

Claimant's current employment is a consideration in assessing his industrial disability; his current employment lessons his industrial disability and defendants' resulting liability. However, claimant has sustained some loss of earning capacity. See Michael v. Harrison County, 34 Biennial Rpts. 218, 220 (1979). It is concluded that permanency benefits should commence on August 24, 1987 when claimant returned to work. It is further concluded that claimant is entitled to permanent partial disability benefits based on an industrial disablity of 15 percent (75

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weeks of permanent partial disability benefits).

V. Defendants owe the medical benefits in question. Defendants' authorization arguments are rejected as they did not admit compensability. Defendants' causal connection arguments were rejected above.

VI. Penalty benefits are not appropriate in this case as reasonable persons could disagree about the resolution of the contested issues in this case.

FINDINGS OF FACT

1. Claimant injured his back on November 13, 1985 while working for Consolidated Freightways.

2. Claimant sustained whole body impairment as a result of his work-related injury of November 13, 1985.

3. Claimant returned to work full time on August 24, 1987.

4. Claimant's industrial disability is 15 percent.

5. Claimant's stipulated rate is $368.67.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence that he sustained a work-related injury on November 13, 1985.

Claimant has established by a preponderance of the evidence that there is a causal connection between claimant's work-related injury and his whole body impairment.

Claimant is entitled to healing period benefits from November 13, 1985 through August 23, 1987 but only for the weeks that he was not paid for.

Claimant has established entitlement to 75 weeks of permanent partial disability benefits based on industrial disability of 15 percent.

Defendants owe the contested medical bills.

Claimant is not entitled to penalty benefits.

ORDER

IT IS THEREFORE ORDERED:

That defendants pay healing period benefits for the period described above at a weekly rate of three hundred sixty-eight

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and 67/100 dollars ($368.67).

That defendants pay claimant seventy-five (75) weeks of permanent partial disability benefits commencing on August 24, 1987 at a weekly rate of three hundred sixty-eight and 67/100 dollars ($368.67).

That defendants pay the contested medical bills.

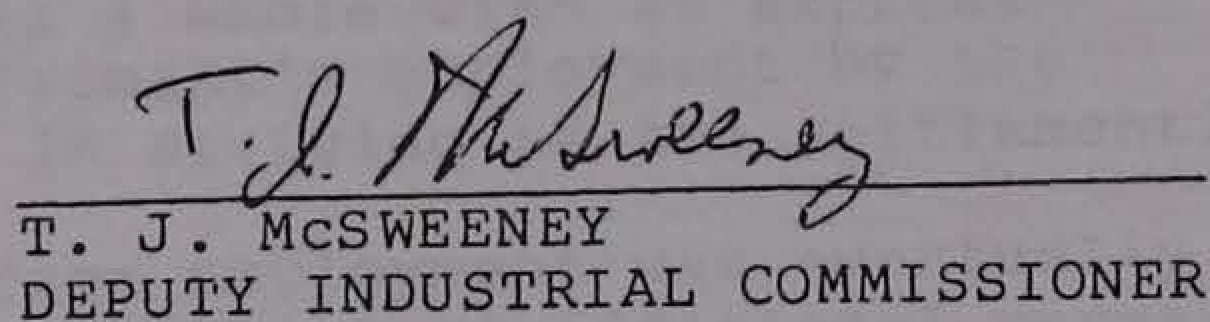
That defendants pay accrued benefits in a lump sum and pay interest pursuant to section 85.30, The Code.

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

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

That defendants shall file claim activity reports pursuant to Division of Industrial Services Rule 343-3.1(2), as requested by the agency.

Signed and filed this 5th day of May, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT L. EDLER, Claimant, vs. EMCO SPECIALTIES, INC., Employer, and HARTFORD INSURANCE GROUP, Insurance Carrier, Defendants.	File No. 675182 R E M A N D D E C I S I O N

FILED
FEB 26 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding on remand that comes as a result of the following history. An agreement for settlement was approved in which claimant was given compensation for 20 percent permanent partial disability of the body as a whole with an express provision that termination of claimant's employment by the employer had not been evaluated in arriving at the settlement.

The claimant's termination from employment was eventually upheld. Claimant sought further benefits of additional permanent partial disability in a review-reopening proceeding. A review-reopening decision dated July 3, 1984 concluded that claimant's loss of employment was a result of the injury he had sustained and that claimant was entitled to 25 additional weeks of compensation based upon a 25 percent permanent total disability. Claimant appealed that decision to the commissioner, and in an appeal decision dated January 8, 1985 a deputy appointed by the commissioner concluded that claimant's termination of employment was not related to his injury and that no additional benefits should be awarded. Claimant appealed the appeal decision to the district court in Polk County.

In a ruling filed May 30, 1986 the district court held that the issue of causal connection between the termination and the industrial disability was not properly before the commissioner. The district court further held that even if the issue were properly before the commissioner the resolution of the issue was erroneous. The district court reversed the appeal decision and remanded the case to the commissioner for review to determine

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whether the award of an additional five percent permanent partial disability in the review-reopening decision is correct. The commissioner retained jurisdiction of the matter at the appeal level.

The record on appeal consists of the transcript of the review-reopening hearing; claimant's exhibit 1 through 7; and defendants' exhibits A through E. Both parties originally filed briefs on appeal.

ISSUES

The issue on remand is the extent of claimant's industrial disability.

REVIEW OF THE EVIDENCE

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

At the time of the hearing held on May 1, 1984, claimant was 33 years of age. He completed high school although he did not get a regular high school diploma. While in high school he attended special classes in math and reading. He testified that he does not read well but he can read and understand. He testified that he can write but has trouble spelling. While he was in the service for a year and a half he was an antiaircraft gunner. His work history consists of construction and manual labor jobs.

While working for defendant employer as a videx machine operator he injured his back when he pushed a crane with a spool of metal on it. At the time of his injury he was earning approximately $8.65 per hour based on a 40 hour work week. He also received medical and life insurance coverage while employed with the employer. He testified that he has not had any steady employment since 1981 but that he does earn approximately $5.00 per hour for the work he does for his church and, that since 1981 has worked about six weeks for the church. Robert R. Tucker, plant manager for the employer, testified that if claimant were working for the employer at the time of the hearing he would have been earning approximately $9.35 per hour and that the value of the medical benefits would have been approximately $105 per month.

Robert C. Jones, M.D., testified in a deposition taken July 26, 1982 that he would give claimant a 15 percent impairment to the body as a whole rating. In a deposition taken February 8, 1984, Thomas B. Summers, M.D., opined that claimant had developed a herniated intervertebral disc in the lower lumbar region as a result of the work injury. In a report submitted with the

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depositon Dr. Summers rated functional impairment or physical disability of at least 10 percent of the body as a whole. Thomas Carlstrom, M.D., testified in a deposition taken February 9, 1984 that under AMA Guides claimant had a five percent permanent partial disability.

APPLICABLE LAW

The citations of law in the review-reopening decision are appropriate to the issues and evidence.

ANALYSIS

The sole issue to be resolved is whether the deputy correctly determined that claimant's industrial disability as a result of an injury on June 17, 1981 was 25 percent and therefore was entitled to an additional 25 weeks of permanent partial disability. The deputy stated in the review-reopening decision:

> The opinions regarding claimant's functional impairment range from five percent by Dr. Carlstrom to 15 percent of the body as a whole by Dr. Jones. All three medical opinions fall within the range of what would normally be expected following such a surgery and none can be deemed unreasonable. The only objective basis for questioning any one of the three opinions is that Dr. Jones' evaluation was made so long ago that he did not have the benefit of observing how good the result of his surgery actually was in this case. The greater weight of the evidence indicates that claimant's functional impairment is in the range of 10 percent of the body as a whole and such finding is adopted.
>
> Claimant's educational background is minimal and he has not demonstrated or [sic] exhibited an apptitude [sic] for further formal education. His demeanor at hearing gave no indication that he had suffered from a learning disability. Most of claimant's prior work experience has involved moderate to heavy physical labor. He would still have the present residual ability to perform janitor work as has been exhibited. At hearing he expressed an interest in working with his hands and at small engine repair. There are also many other fields of employment for which claimant would remain suited. His actual physical impairment is small.
>
> Claimant has sought reemployment but has not found any. Although his physical impairment may play some part in that inability to find work, the

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current state of the economy is, in all likelihood, the primary reason for his failure to become reemployed. His motivation and attempts to return to gainful employment fall within normal limits.

Claimant argues that the rating of industrial disability by the deputy is too low and defendants respond that the deputy is correct. The deputy correctly identified that claimant's educational background is minimal and that claimant has not demonstrated aptitudes for either further education or work which requires reading, writing or mathematical calculation. Claimant had not had any steady employment between his injury in June 1981 and the hearing held in May 1984. The employment he had had was at a rate approximately $4.00 per hour lower than his job with defendant employer. When all factors are considered, it is determined that claimant's work injury resulted in 30 percent industrial disability.

FINDINGS OF FACT

1. Claimant is a 33 year old married male with two dependent children.

2. On June 17, 1981 claimant sustained an injury to his lower back while pushing a coil onto a spindle at his employment with Emco Industries, Inc.

3. The injury claimant sustained was in the nature of a herniated disc in his lower back at the L5-S1 level.

4. Claimant underwent a laminectomy which ultimately had a very good result with little residual functional impairment.

5. Claimant did complete high school by attending special classes and has no formal education beyond the high school level.

6. Claimant does not have an aptitude for work which requires substantial reading, writing or mathematical calculation.

7. Claimant's work experience has been in the area of moderate to heavy physical labor.

8. Claimant remains physically capable of light to moderate physical labor.

9. At the time of his injury claimant was earning approximately $8.65 per hour and if still employed would be earning approximately $9.35 per hour.

10. At the time of the agreement for settlement, claimant's grievance for termination of his employment was pending and the result of that grievance could not reasonably have been determined.

11. Since claimant lost his job with Emco the most he has been able to earn is $5.00 per hour.

12. Claimant has no demonstrated work skills which would enable him to return to employment at or near the rate of earnings which he enjoyed with Emco Industries.

13. Claimant's employment was terminated because he was absent from work without having obtained a leave of absence from his employer.

14. The only reason claimant was absent from work was the necessary recuperation from the injury and its corrective surgery.

15. Claimant was medically disabled from performing the normal duties of his occupation at the time his employment was terminated.

16. Claimant has previously received compensation for a 20 percent permanent partial disability of the body as a whole as a result of an agreement for settlement which was approved October 15, 1982.

CONCLUSIONS OF LAW

The adverse abritration decision concerning claimant's grievance constitutes an impairment of his earning capacity which has occurred subsequent to the agreement for settlement and constitutes a change of condition sufficient to warrant reopening.

The loss of claimant's employment was a proximate result of the injury he sustained on June 17, 1981.

Claimant has proved by the greater weight of evidence that he has an industrial disability of 30 percent as a result of his injury on June 17, 1981.

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

ORDER

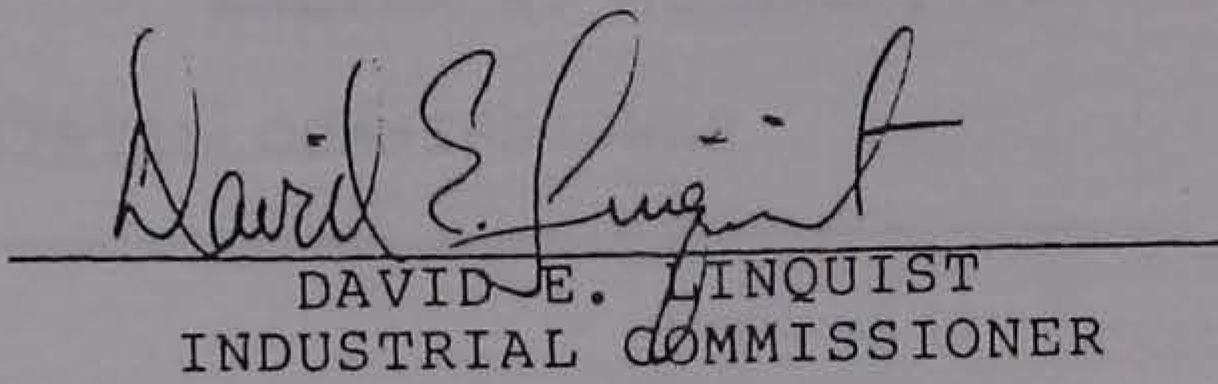
THEREFORE, it is ordered:

That defendants pay claimant an additional fifty (50) weeks of compensation for permanent partial disability at the rate of two hundred five and 54/100 dollars ($205.54).

That defendants pay the costs of the remand proceeding.

That defendants file a claim activity report pursuant to Division of Industrial Services Rule 343-3.1(2).

Signed and filed this 26th day of February, 1988.



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1106; 1108.30; 1402.20;
1402.30; 1402.40; 2203;
2205; 2206; 1801; 1803;
1701; 1703; 2501
Filed February 11, 1988
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES ENGLAND, Claimant, VS IOWA POWER AND LIGHT COMPANY, Employer, Self-Insured, Defendant.	:	File No. 763543 A R B I T R A T I O N D E C I S I O N

1106; 1108.30; 1402.20; 1402.30; 1402.40; 2203; 2205; 2206;

Claimant did not prove asbestosis or that his minimal pleural thickening was caused by his employment. He did prove that fly ash and coal dust at work aggravated his preexisting and intrinsically determined allergic conditions.

1801; 1803

Claimant allowed temporary total disability for time claimant was ordered not to work in a dusty environment by his doctor. Claimant not awarded any permanent partial disability because he did not prove any permanent functional impairment or any permanent physical impairment caused by the dusty environment in which he worked.

1701; 1703

Employer given credit for payment of sick leave pursuant to Division of Industrial Services Rule 343-8.4.

2501

Employer ordered to pay for claimant's medical bills incurred in the diagnosis and treatment of the temporary aggravation of his preexisting condition.

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the latter part of April 1987 and less than 15 days prior to hearing. The letter is dated April 24, 1987. In his brief, defendant's counsel stated that the document was served on April 30, 1987. Claimant's counsel responded that Dr. Hopp is an earlier authorized physician in this case and that any information that he supplied has at all times been available to defendant. Claimant's counsel also stated that he sent this report by express mail to defendant's counsel as soon as he received it. Defendant's counsel replied that Dr. Hopp had not been involved in the case since the latter part of 1984. Defendant's counsel maintained that this medical report was a suprise. Defendant's counsel maintained that he had no opportunity to talk to Dr. Hopp, to depose Dr. Hopp, or to show the report to any other physician or to obtain an independant medical evaluation. Defendant's motion to exclude was deferred at the time of hearing. At this time it is now determined that defendant's motion to exclude exhibit one is granted. Exhibit one was not timely served pursuant to paragraph six of the hearing assignment order. In fact, exhibit one was not even drafted until April 24, 1987 which is less than fifteen days prior to the date of the hearing assignment order. Therefore, exhibit one is not admitted into evidence and will not be considered in the decision of this case. The document itself will remain a part of the record as an offer of proof in the event of an appeal.

STIPULATIONS

The parties stipulated to the following matters.

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

That the time off work for which claimant now seeks either temporary total disability or healing period benefits is stipulated to be from July 26, 1984 through December 3, 1984.

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

That the rate of compensation is $373.21 per week, in the event of an award, which is the weekly rate of compensation based upon a gross weekly wage of $647.16 per week for a married person with two exemptions on November 28, 1983.

That defendant is entitled to a credit under Iowa Code section 85.38(2) for sick pay or disability income benefits paid to an employee under an employee nonoccupational group plan for the period July 26, 1984 through December 3, 1984. The parties further stipulated that Division of Industrial Services Rule 343-8.4 is applicable and that the excess payment by employer, in lieu of compensation which exceeds the applicable weekly

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compensation rate, shall not be construed as an advance payment of workers' compensation benefits.

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

That there are no bifurcated claims

ISSUES

The parties presented the following issues for determination.

Whether claimant sustained an injury on November 28, 1983 which arose out of and in the course of employment with employer.

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

Whether claimant is entitled to weekly compensation for temporary total disability or healing period during a period of recovery.

Whether claimant is entitled to weekly compensation for permanent disability benefits, and if so, the commencement date of such benefits.

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

SUMMARY OF THE EVIDENCE

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

Claimant was born September 1, 1928 and was 58 years old at the time of the hearing. He was 55 years old at the time of the injury and married. As a child, he had no pulmonary, respiratory or allergy problems. He quit smoking in 1959 due to publicity that it was bad for your health. He was in the military service for a year and one-half. He farmed for a year or so.

Claimant started to work for employer on August 21, 1951. His first position at the Council Bluffs plant was station control room operator. He performed this job from April 27, 1959 to March 13, 1974. His second position was defined as electrician control mechanic - working foreman (Exhibit 35). He performed this job from May 1, 1974 to December 3, 1984. Claimant described himself as a working foreman and basically he repaired and maintained electrical equipment. All of claimant's jobs for employer are shown by job title and dates of assignment in joint exhibit two, deposition exhibit one.

Claimant testified that the plant changed from gas to coal energy in the 1960's (Ex. 2, page 15). Claimant testified that he developed some breathing problems in approximately 1977 which were the result of an injury to his nose from playing contact sports earlier in life. James Whicker, M.D., an Omaha physician, straightened his nose (Ex. 27). Also, when pollen was high, claimant began sneezing. Dr. Whicker scraped polyps out of his nose and it did not bother him after that (Ex. 2 pp. 10, 15-18). The record indicates that James Whicker, M.D., performed surgery on an upper airway obstruction secondary to nasal septal deformity on December 1, 1976 and also removed one polyp at that time (Ex. 27). Claimant testified that he did not have any breathing or allergy problems prior to this at the plant (Ex. 2, p. 18). He also testified that he did not see a doctor before this for any sinus or breathing problems (Ex. 2, pp. 20 & 21).

Claimant testified that in approximately 1980 or 1981 he developed sinus problems (Ex. 2, pp. 10 & 18). He is allergic to most kinds of dust (Ex. 2, pp. 13 & 20). He began having drainage in his throat and coughed up phlegm. Other times it would plug up and would not drain. Claimant testified that he still has drainage and coughs up phlegm everyday but not as bad since he has left the plant (Ex. 2, p. 24). Claimant attributed the problems to exposure to dust at work (Ex. 2, pp. 9 & 13). He also testified that he was particularly allergic to house dust and had installed special filters in his furnace ducts at home and changes the bedding at least twice a week pursuant to a doctor's recommendation (Ex. 2, p. 13).

Claimant testified that Dr. Hopp told him that the environment at the plant was also contributing to his problem and that he should get out of that environment (Ex. 2, pp. 13 & 23).

In addition to sinus problems due to dust exposure, claimant testified that a company physical examination disclosed that his lungs had been exposed to asbestos (Ex. 2, pp. 9, 22 & 23).

Claimant testified that a substance which he called fly ash bothered him the most. Fly ash is the dust that usually comes out of smoke stacks. Precipitators at the plant collected this dust. Claimant stated that he had to go into the precipitators and make repairs quite often and this is when it bothered him the most. He added that sometimes there is fly ash outside of the precipitators when they have had problems and dumped it on the floor (Ex. 2, p. 14). Claimant related that he entered the precipitators about two times a month in 1982 or approximately 25 times in all that year. He said that he complained to two of his supervisors several times about his breathing (Ex. 2, pp. 18 & 19). Dr. Hopp said claimant was allergic to most dust but did not identify fly ash specifically. Claimant added that he was also exposed to coal dust daily at the plant (Ex. 2, p. 20).

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Claimant further testified that in 1983 soda ash was added to the coal to help it burn better. Claimant related that his condition got ten times worse in 1983. He said that sometimes he was in the precipitator for four to five hours per day for two or three days in a row. At other times it might only be an hour. In 1983 his phlegm drainage and stopped up head got worse. He said that employer provided a mask to wear. He wore it in the precipitators and in the coal dust, but it was inadequate. He averred that fly ash was everywhere, even in his teeth. He said that he could take a shower and still not get rid of it.

Claimant testified that after the company physical examination disclosed possible asbestos exposure in 1983 he went to see John W. Marshall, M.D. Claimant maintained that Dr. Marshall told him to get out of the dusty area. Claimant further testified that other doctors advised him to get out of the dust. Claimant said that the only doctor that employer agreed to pay for was Dr. Marshall.

As for asbestos exposure, claimant said that he has not had trouble with his lungs unless he exerted himself like trying to climb hills. If he bumps his ribs, then it hurts in the lung area (Ex. 2, p. 22). However, he admitted that no doctor told him that this difficulty is related to asbestos exposure. It is simply his own conclusion (Ex. 2, p. 30).

As a result of Dr. Marshall's recommendation to remove himself from the dust, claimant took sick leave from July 26 through December 3 of 1984. During that period he was examined by Dr. Fieselmann and as a result of his examination, employer directed claimant to return to work, but to wear a mask when he was exposed to dust. When he returned to work claimant elected to perform a meter reader job (Ex. 2, p. 6). He said that this was his own decision for his own safety so that he would not get too fouled up where he could not work at all. He said that he took a cut in pay from $16.00 per hour to $12.00 or $13.00 per hour. Claimant testified that he could have continued in this job as far as his health was concerned, but elected to take a voluntary early retirement because it was a good opportunity to retire (Ex. 2, pp. 25 & 26). Claimant said that he felt that he could perform either the meter reader job or go back to the control room; however, sometimes the control room operators are asked to work maintenance and he would not be able to do this because he would be exposed to dust again. He granted that he could work in the control room itself for about a dollar an hour less than his job as electrician foreman (Ex. 2, pp. 27 & 28). Claimant testified that he now receives retirement pay of $1,200.00 per month.

Claimant testified that he is not currently taking medication except to breath from an inhaler once or twice a week if he plugs up (Ex. 2, pp. 28 & 29). In addition to avoiding dust as

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the doctor advised, claimant imposed his own restrictions of no climbing because a couple of times when he had bad drainage he got dizzy and fell (Ex. 2, p. 31).

Norman Jack Thompson, a 31 year employee of employer, testified that he has worked the electrician foreman position since it was vacated in December of 1984 by claimant. He verified that employer added soda ash to the coal in late 1983 and that fly ash exists at employer's plant. These substances usually penetrate the mask and get into your eyes. He stated that after exposure to fly ash he would cough and spit up fly ash for two days. He testified that it is effecting him now, but he has not sought medical attention for any pulmonary problems even though he has been employed at the plant since 1957. This witness testified that he noticed claimant having difficulty breathing and shortness of breath and that claimant spit up mucus in the latter part of 1983 after working around the precipitator dust.

Thomas L. Sieburg, testified that he is a 17 year employee of employer. He has been a journeyman electrician for ten years. He has worked in the precipitators. He verified that when 100 railroad cars dump coal into the hoppers that it creates a lot of dust. He said soda ash is added to the coal to make it burn better. The fly ash is like being in a dust storm. It gets into your mouth and clothes. It makes it difficult to breath. It causes you to sneeze and cough a lot. He could see that claimant had breathing and mucus problems around October of 1983. The witness said that he did not have to go into the precipitators very often, possibly only once every two months. Most of his work was in other parts of the plant away from the coal handling area. The witness stated that he has breathing problems too, but he has not seen a doctor but he thinks he will see a doctor soon.

Mary Nelson testified that she is the manager of compensation services and also handles voluntary early retirement. She paid claimant's first doctor bill as a workers' compensation claim, because the company physical examination by Health Evaluations Programs, Inc. (HEP) told claimant to see a doctor because of his asbestos exposure. She testified that she denied all subsequent medical bills from claimant and other employees because they did not pertain to work-related injuries.

The HEP report dated November 7, 1980, for an examination that took place on October 27, 1980, disclosed claimant was allergic to pollen and dust as well as insect bites or stings. His chest x-ray was normal with no pneumoconiosis but prior x-rays had shown some pleural thickening of both lungs. No mention is made of fly ash or coal dust (Ex. 26).

A HEP report dated November 16, 1983, for an evaluation that

took place on November 3, 1983, again showed allergy to pollen or dust but advised claimant to seek a clinical x-ray evaluation of his own because of the pleural thickening of the left lateral chest wall consistant with asbestosis (Ex. 24, pp. 1 & 5). This report also recorded a phlegm productive cough everyday, sensitivity to chemicals and sinusitis. It also confirmed that claimant worked with solvent and insect or plant sprays and coal dust (Ex. 24, pp. 1-3 & 7).

As a result of the HEP examination of November 3, 1983 claimant went to see John W. Marshall, M.D., on November 28, 1983 as his own choice of personal physician, because he was very concerned about asbestosis. Dr. Marshall ordered x-rays and comparative studies were made with older x-rays by Raymond G. McDonald, M.D., a radiologist at Jennie Edmundson Hospital in Council Bluffs. Dr. Marshall concluded that it was unlikely that the minimal pleural thickening was asbestosis because of the chronicity of the condition and the lack of change in x-rays over the years. A needle biopsy would establish or deny asbestosis, but based on Dr. Marshall's opinion claimant declined to have a pleural biopsy performed (Ex. 22 &23). Dr. Marshall referred claimant to Vito A. Angelillo, M.D., for a second opinion about claimant's abnormal chest x-ray. Dr. Angelillo is a professor in the Division of Pulmonary Medicine and Allergy and Immunology at the Creighton University School of Medicine in Omaha. Claimant saw Dr. Angelillo on May 2, 1984. In addition to the abnormal chest x-ray, claimant complained of working in dust and a cough productive of clear white phlegm for approximately one and one-half years.

Dr. Angelillo reported on May 17, 1984 that claimant denied any respiratory symptoms, anorexia or weight loss. The doctor stated that claimant's examination was unremarkable. From his examination of the x-rays, he determined that they did not give rise to classical asbestosis x-ray findings, but only that they were consistant with asbestosis. Dr. Angelillo reported that claimant told him he had had considerable asbestos exposure. Dr. Angelillo concluded by simply recommending yearly x-rays and pulmonary function tests in order to detect any change that might occur. He returned claimant to work the following day on May 3, 1983 without any restrictions [Ex. 17, 18, 18(2) and 19].

Dr. Marshall, claimant's chosen physician, gave an excellant summary of claimant's condition on June 18, 1984. He continued to rule out presently active asbestosis. He stated that claimant's coughing up of white phlegm was a form of chronic bronchitis precipitated by dust exposure. He recommended that claimant avoid exposure to dust and further asbestos. Furthermore, if he is around dust, he should continue to wear a mask at all times [Ex. 16 & 16(2)].

On July 23, 1984, Dr. Marshall issued a slip which stated

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that claimant "should not work in a dusty area due to health problems" (Ex. 15). Claimant then took sick leave under the employee's nonoccupational group plan from July 26, 1984 to December 3, 1984.

Claimant next saw John Fieselmann, M.D., a pulmonary disease specialist, in Des Moines at the request of employer on September 6, 1984. Claimant complained of a cough that was productive of small amounts of clear sputum. He also complained of a postnasal drainage which sometimes became dry causing congestion and light-headedness that has resulted in several falls. Due to the falls, claimant has not worked for the last month. The sinus congestion also gives him headaches, occasional sore throats and earaches. Claimant also reported to Dr. Fieselmann that he had intermittent exposure to asbestos since 1951. Claimant also related his exposure to fly ash and coal dust. Claimant felt fly ash exacerbated his symptoms to the greatest degree. Dr. Fieselmann concluded as follows.

> IMPRESSION: Based on the pleural calcification and thickening along the left lateral chest wall and the pertinent history for asbestos exposure, I feel strongly that the X-ray changes are probably secondary to asbestos exposure. However, this is a marker of exposure rather than a marker of disease or impairment. Based on the patient's pulmonary function and physical exam, there is no evidence of asbestosis. The patient's symptoms and his pulmonary function suggests an irritable airway syndrome as a cough variant of asthma. I suspect the patient has an asthmatic bronchitis based on the irritation of the dust that he is exposed to in his environment. In addition, he appears to have an allergic rhinitis and sinusitis with postnasal drip. I suspect that these difficulties exacerbate a middle ear problem and that this may account for his dizziness and lightheadedness [sic]. It is also possible that his lightheadedness [sic] and falling episodes are related to something totally different.

(Ex. 13, pp. 2 & 3)

Dr. Fieselmann prescribed medication and suggested claimant wear a mask to filter out offending dust. The doctor did not take him off work at this time. On the contrary, the employer ordered claimant back to work as a result of his visit to Dr. Fieselmann (Ex. 34).

Claimant was next examined by Russell J. Hopp, D.O., an allergist, in Council Bluffs on October 19, 1984 because Dr. Fieselmann had recommended that claimant see an allergist. Claimant complained to Dr. Hopp of nasal congestion, upper

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respiratory track congestion, nasal drainage, soreness of the throat and throat clearing for approximately three years, which claimant felt were triggered by exposure to fly ash at work. Dr. Hopp diagnosed hyper-reactive airway disease and cough variant asthma due to long time exposure to dust (Ex. 10). However, on November 9, 1984 Dr. Hopp clarified that claimant had preexisting allergic disease aggravated by his exposure to fly dust at work. Dr. Hopp said that claimant had intrinsically determined hyper-reactive airway disease that is probably aggravated by exposure to dust at work (Ex. 9). On November 16, 1984 Dr. Hopp again stated that claimant had preexisting allergy and that exposure to fly ash made his symptoms more clinically evident. Dr. Hopp said that even if claimant were removed from fly ash he would continue to have hyper-reactive airway disease that would manifest itself by shortness of breath. His symptomatology would improve if he was not continually exposed to fly ash (Ex. 8). On December 7, 1984 Dr. Hopp thought that the meter reader job should be within claimant's physical capabilities provided that walking in the cold weather would not aggravate his chest congestion (Ex. 7). Claimant was able to perform this job from December 3, 1984 until his voluntary early retirement on September 1, 1985.

On December 30, 1985 claimant was examined again in Des Moines by another pulmonary disease specialist, John Glazier, M.D. Dr. Glazier stated that claimant was free of pulmonary symptoms at that time (Ex. 4) and that his pulmonary function tests were normal (Ex. 4 & 6). As to possible asbestosis, Dr. Glazier said:

> My impression is that Mr. England has asbestos exposure by history as well as an x-ray which shows a benign abnormality compatible with asbestos exposure, i.e. pleural thickening. However, at this point in time, I find no evidence of serious consequences of his asbestos exposure. That is, I find no evidence of bronchogenic carcinoma, mesothelioma or interstitial lung disease.

(Ex. 4)

Dr. Angelillo examined claimant again on July 22, 1986. He stated that his examination in May of 1984 showed bilateral pleural thickening consistant with asbestos exposure but it did not appear that claimant was incapacitated in anyway. Dr. Angelillo's pulmonary function tests performed both in May of 1984 and again on July 22, 1986 were completely within normal limits. He stated that claimant was only mildly symptomatic and experienced dyspnea only after heavy exertion. He added that claimant could walk as much as possible without any difficulty. Dr. Angelillo concluded as follows:

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> In response to your questions concerning disability related to asbestos exposure, it does not appear to me that any clinical disability exists for Mr. England. His only evidence of asbestos exposure is the bilateral pleural thickening. He, however, is not incapacitated with shortness of breath and his pulmonary function test is completely WNL. I, therefore, cannot make any percentage rating since I do not feel that he is disabled or impaired as a result of this asbestos exposure.

(Ex. 3)

Claimant requested payment of four medical bills.

DATE	MEDICAL PROVIDER	AMOUNT
7-23-84	Bluffs Medical Assoc., P.C. John W. Marshall, M.D. Office Call	$ 25.00
4-26-84	Jennie Edmundson Hospital Chest X-ray	39.00
5-02-84	Creighton Health Prof. Center Vito A. Angelillo, M.D.	106.80
4-26-84	Bluffs Medical Assoc., P.C. John W. Marshall, M.D. Office Call	25.00
	TOTAL	$195.80

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 November 28, 1983 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

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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.

Our supreme court has stated many times that a claimant may recover for a work connected aggravation of a preexisting condition. Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934). See also Auxier v. Woodward State Hosp. Sch., 266 N.W.2d 139 (Iowa 1978); Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler, 252 Iowa 613, 106 N.W.2d 591.

The claimant has the burden of proving by a preponderance of the evidence that the injury of November 28, 1983 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

Claimant did not prove that he has asbestosis. Nor did he prove that his pleural thickening was caused by his work for employer. In the medical records, it appears that claimant told doctors he was exposed to asbestos. There is no other evidence of this fact. There is no evidence of how long he was exposed or how much he was exposed. None of the doctors actually diagnosed asbestosis, but rather only found that the x-rays were consistant with asbestosis. Dr. Marshall concluded that the minimal pleural thickening probably was not asbestosis based upon the x-ray studies over a number of years done by Dr. McDonald, the radiologist, and due to the fact that the condition

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has persisted for many years without any evidence of change over the years. Apparently, claimant was satisfied with the conclusion of Dr. Marshall and Dr. McDonald because he declined the opportunity to have a needle biopsy of his pleura to confirm or deny asbestosis (Ex. 22 & 23). Dr. Angelillo, a pulmonologist and professor of pulmonary medicine, said that claimant's x-rays were not classical asbestosis x-rays, but rather that they were only consistant with asbestosis [Ex. 17, 18 & 18(2)]. Dr. Fieselmann, another pulmonologist, concluded that claimant's x-rays were probably secondary to asbestos exposure, but was careful to clarify that this was a marker of exposure rather than a marker of disease or impairment. He flatly stated there is no evidence of asbestosis [Ex. 13(2), 13(3)].

Dr. Glazier, another pulmonologist, found that claimant demonstrated asbestos exposure by history and x-ray, by way of pleural thickening, but he found no serious consequences from his asbestos exposure and ruled out by name the diseases which he felt would result from it (Ex. 4). It was also pointed out by Dr. McDonald, the radiologist, on December 23, 1983 (Ex. 23) and again on April 26, 1984 (Ex. 21), that claimant's pleural thickening could also have been caused by a previous inflammatory process or a possible chest wall trauma.

In conclusion, claimant did not prove that he suffered from asbestosis. He did not prove that the pleural thickening was caused by his employment. Claimant did not prove any disease, impairment or disability as a result of his pleural thickening. Therefore, as to asbestosis, claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained an occupational disease or an injury which arose out of and in the course of his employment with employer.

Claimant did prove by a preponderance of the evidence that he received an injury which arose out of and in the course of his employment with employer in so far as he sustained a temporary aggravation of a preexisting health condition. Dr. Marshall declared on June 18, 1984 that claimant's persistant production of white phlegm was a form of chronic bronchitis precipitated by dust exposure. He felt claimant should avoid further exposure to dust and asbestos [Ex. 16 & 16(2)]. On July 23, 1984 he wrote on his prescription pad that claimant should not work in a dusty area due to health problems. As a result, claimant took, and apparently was granted, sick leave from his employment because claimant was off work on sick leave from July 26, 1984 through December 3, 1984 and he received his full weekly wage of $647.16 per week during that entire period.

Dr. Marshall is supported by Dr. Fieselmann who said claimant had an irritable airway syndrome which was a cough variant of asthma. He further defined it as asthmatic bronchitis based on the irritation of the dust to which he is exposed in his environment.

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In addition, Dr. Fieselmann said that claimant suffered from allergic rhinitis and sinusitis with postnasal drip [Ex. 13(2), 13(3)].

Dr. Hopp, the allergist, unequivocally stated that claimant's nasal congestion and drainage and upper respiratory tract congestion were triggered by exposure to fly ash at work (Ex. 10). Nevertheless, he was careful to clarify that claimant suffered from preexistent and intrinsically determined allergic disease which was aggravated by his exposure to fly ash dust at work (Ex. 9). Dr. Hopp added that if claimant were removed from the work place that he would continue to have difficulty but that his sypmtomatology would improve if he were not continually exposed to fly ash (Ex. 8). The testimony of claimant, claimant's wife, Thompson and Sieberg definitely established that claimant worked in a dusty environment. This is further confirmed by the hospital admission form when claimant was hospitalized on November 20, 1980, when he fell through the ceiling at work. The admission form recorded that there is evidence of coal dust in the mouth and inside of the nares too. The report commented that his mouth hygiene and hydration were good except for the coal dust [Ex. 21(8) & 38(21)].

Claimant returned to work on December 4, 1984 and performed the job of meter reader until his voluntary early retirement on September 1, 1985.

Dr. Angelillo, Dr. Fieselmann and Dr. Glazier all performed pulmonary function tests and all of them reported that claimant's pulmonary function was within normal limits. Dr. Angelillo actually performed these tests twice, once in May of 1984 and again in July of 1986 (Ex. 3).

From the foregoing evidence, it is determined that claimant sustained a temporary aggravation of a preexisting condition. The preexisting condition was diagnosed by Dr. Marshall as chronic bronchitis [Ex. 16 & 16(2)]. It was diagnosed by Dr. Fieselmann as irritable airway syndrome which was a cough variant of asthma, more particulary, asthmatic bronchitis [Ex. 13(2), & 13[(3)]). It was defined by Dr. Hopp as hyper-reactive airway disease and cough variant asthma (Ex. 10). All three doctors indicated claimant's condition was aggravated by exposure to dust or fly ash in claimant's environment [Ex. 16, 16(2), 13, 13(2), & 10].

Consequently, it is determined that claimant is entitled to temporary total disability benefits pursuant to Iowa Code section 85.33(1) from July 26, 1984 through December 3, 1984. However, since claimant has already been paid benefits from the employee nonoccupational group plan as sick leave benefits in excess of the workers' compensation benefit rate for this same period of time, then it would appear that claimant has already

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been fully paid for this entitlement. Actually, claimant received his full weekly salary rather than the workers' compensation rate.

Claimant did not sustain the burden of proof by a preponderance of the evidence that he sustained any permanent impairment or permanent disability caused by his employment or as a result of the temporary aggravation of his preexisting allergy conditions. None of the doctors found claimant to be impaired or disabled and none of the doctors assessed an impairment rating. None of the doctors said that claimant could not continue to work in his job as electrician foreman even though he was cautioned to wear a mask when there was exposure to dust in his job. Dr. Marshall cautioned claimant to wear a mask when exposed to dust but never removed him from this job permanently [Ex. 16(2)]. Dr. Fieselmann also cautioned claimant that he should wear a mask when exposed to dust but did not remove him from this job permanently [Ex. 13(3)]. Claimant did not suffer from asbestosis. His pulmonary function was always medically established as normal on several occasions.

There is some evidence claimant could have disability bumped into his former job as control room operator at approximately the same pay as the electrician foreman job rather than to bump into the meter reader job. There was no evidence that the allergies from which claimant suffered were actually caused or permanently aggravated by his employment. On the contrary, Dr. Hopp stated that they were preexistant and intrinsically determined. Consequently, it is determined that claimant did not sustain the burden of proof that his employment was the cause of any permanent impairment or permanent disability. Therefore, claimant has not proven entitlement to any permanent disability benefits.

The medical bills submitted by claimant were for diagnosis or treatment of the temporary aggravation of his preexisting condition. Defendant offered no evidence to the contrary. Therefore, claimant is entitled to payment of the four medical bills which were attached to the prehearing order itemized above which total $195.80.

FINDINGS OF FACT

THEREFORE, based on the evidence presented the following findings of fact are made.

That claimant was employed by employer on November 28, 1983.

That claimant established that he did work in a dusty environment.

That claimant did not prove that he suffered from the disease of asbestosis.

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That claimant did demonstrate some minimal pleural thickening in his lungs but did not prove that it was caused by his employment.

That claimant suffered from preexisting intrinsically determined allergies which were not proven to be caused by his employment.

That claimant's employment exposure to fly ash and coal dust did temporarily aggravate his preexisting allergic conditions.

That Dr. Marshall directed claimant not to work in dust on July 23, 1984.

That claimant took sick leave, an employer paid sick leave, from July 26, 1984 to December 3, 1984.

That claimant returned to work on December 4, 1984 by virtue of a disability bump into a meter reader job.

That claimant did not prove he suffered any permanent impairment or any permanent disability based on the medical evidence admitted into evidence.

That claimant incurred $195.80 in medical expenses for the diagnosis and treatment of his work-related temporary aggravation of his preexisting allergic conditions.

CONCLUSIONS OF LAW

Based upon the evidence presented and the foregoing principles of law, the following conclusions of law are made.

That claimant sustained an injury on November 23, 1983 that arose out of and in the course of his employment with employer in that he sustained an aggravation of a preexisting allergic condition.

That the aggravation was the cause of claimant's absence from work from July 26, 1984 through December 3, 1984.

That claimant is entitled to temporary total disability benefits from July 26, 1984 through December 3, 1984.

That defendants are entitled to a credit under Iowa Code section 85.38(2) for the payment of sick leave benefits in the amount of $647.16 per week from July 26, 1984 through December 3, 1984, as stipulated by the parties.

That claimant did not sustain the burden of proof by a preponderance of the evidence that his work was the cause of any permanent functional impairment or permanent disability.

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That claimant is not entitled to any permanent disability benefits.

That claimant is entitled to payment of $195.80 in medical expenses as claimed.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant eighteen point seven one four (18.714) weeks of temporary total disability benefits at the rate of three hundred seventy-three and 21/100 dollars ($373.21) per week for the period from July 26, 1984 through December 3, 1984 in the total amount of six thousand nine hundred eighty-four and 25/100 dollars ($6,984.25) commencing on July 26, 1984.

That defendants are entitled to a credit under Iowa Code section 85.38(2) for sick leave benefits paid to claimant at the rate of six hundred forty-seven and 16/100 dollars ($647.16) per week for the same period of time as stipulated by the parties. Therefore, claimant has been fully paid for all of his entitlement.

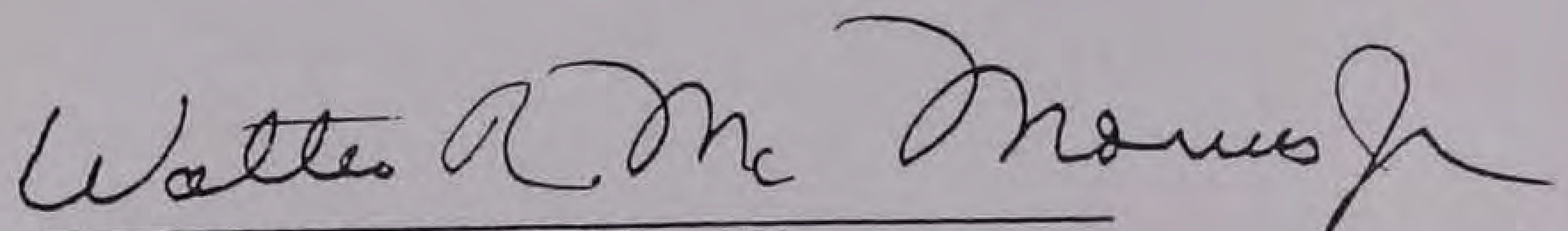
That since claimant is fully paid for his entitlement then no interest is due under Iowa Code section 85.30.

That defendant pay claimant one hundered ninty-five and 80/100 dollars ($195.80) in medical expenses.

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

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

Signed and filed this 11th day of February, 1988.



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000573

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BONNIE FARREN,	:	
Claimant,	:	File No. 796069
vs.	:	
GEIFMAN FOOD STORES, INC.,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	
LIBERTY MUTUAL INSURANCE COMPANY,	:	
Insurance Carrier, Defendants.	:	

FILED
JAN 26 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying benefits.

The record on appeal consists of the hearing transcript; and joint exhibits A-J. Both parties filed briefs on appeal.

ISSUE

Claimant states the following issue on appeal:

Whether the deputy industrial commissioner erred in ruling that insufficient credible evidence was presented upon which to base a finding that claimant suffered an injury which arose out of and in the course of her employment.

REVIEW OF THE EVIDENCE

Review of the evidence indicates the summary of evidence in the arbitration decision is adequate, and it will not be totally reiterated herein.

Briefly stated, claimant began work for defendant Geifman, a grocery store, in 1961. Her work consisted of both bookwork and cashier work. Claimant testified that on May 11, 1985 while lifting an eight-pack carton of pop from a grocery cart, she felt severe low back pain. She reported the incident to her manager. Claimant's husband testified he observed claimant in

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pain when she came home from work, and two days later he took her to see Dr. Birdsell, a chiropractor. Claimant was off work until August 1985, when she returned to her same position. Although claimant indicated she returned to lighter duties that did not involve heavy lifting, both Richard Geifman and John Wittowski, her supervisors, testified they were unaware of any change in her duties.

At a deposition, claimant stated that prior to the May 11, 1985 incident she had not had any problems with her back, had not injured her back, and had not received treatment from a chiropractor because of back problems. (Exhibit J, page 5, lines 21-25; page 6, lines 1-10) She asserted that prior to May 11, 1985, she had not been involved in any accidents or slip and falls that required medical or chiropractic attention. (Ex. J, p. 8, lines 5-10).

Claimant also testified that prior to May 11, 1985, she had not been off work as a result of a back injury (Ex. J, p. 6, lines 3-5) or as a result of any type of injury (Ex. J, p. 8, lines 11-14).

Claimant acknowledged seeing Dr. Birdsell as a patient prior to May 11, 1985, but described these visits as occurring "very seldom," with the last visit prior to May 11, 1985 occurring "probably several months" (before), although claimant was not certain. She indicated the prior visits with Dr. Birdsell were for "regular adjustment(s)." (Ex. J, pp. 7-8).

However, Dr. Birdsell testified that he had treated claimant for a nonwork-related fall in 1974 which injured claimant's tailbone. He treated her again in 1978 for a nonwork-related fall injuring her "behind." Dr. Birdsell also stated that claimant had been a regular patient of his since 1978 with appointments occurring on an approximate monthly basis. Claimant's last visit with Dr. Birdsell was one month prior to the alleged injury. Dr. Birdsell opined that claimant's condition was related to the May 11, 1985 incident. Claimant was also examined by John E. Sinning, M.D., and Jan Koehler, M.D.

When confronted with the discrepancies in her testimony, claimant stated she made those responses because she did not consider the prior injuries to be permanent and that she felt a different area of the back was involved. As to her failure to acknowledge her prior time off from work, she stated she recalled the time off now but did not recall it at her deposition. She admitted that she had been off work from falling incidents two times prior to May 11, 1985, with one period of absence from work lasting four weeks. (Tran., p. 64, lines 18; p. 65, line 16) When asked if she had slipped and fallen on stairs at home prior to May 11, 1985, she acknowledged she "probably" had. (Tran., p. 50, lines 22-25).

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APPLICABLE LAW

Claimant has the burden of proving by a preponderance of the evidence that she received an injury on May 11, 1985 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 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.

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 11, 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).

An expert's opinion is not necessarily binding on the industrial commissioner or his deputy, but is to be weighed together with facts and circumstances of the claim with the ultimate conclusion to be made by the finder of fact. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (Iowa 1965).

ANALYSIS

Claimant has the burden to show by a preponderance of the evidence that she has suffered an injury which arose out of and in the course of her employment. Claimant's testimony is the only evidence in the record on the actual occurrence of the injury. Claimant's credibility was successfully impeached by defendants. At her deposition, claimant was told to ask for clarification if any questions propounded to her were unclear. She did not ask for any such clarification. The questions on prior back problems, treatment, and absences from work were clearly worded and unequivocal.

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Those questions went directly to the issue of whether her present disability stems from an injury which arose out of and in the course of her employment or from a nonwork injury. The testimony of Dr. Birdsell directly contradicted claimant's testimony on her prior injuries, treatment and work absences. Her answers at her deposition were given under oath.

Thus, little weight can be given to claimant's testimony that her present disability stems from an alleged injury at her place of employment on May 11, 1985.

In searching the record for evidence, independent of claimant's testimony, that claimant's present disability stems from an injury arising out of and in the course of her employment, only the testimony of claimant's husband that claimant came home on May 11, 1985 with back pain is available.

In his decision, the deputy stated:

> At the hearing claimant explained that she did not feel at the time of her deposition that any of the prior injuries were significant enough to mention or consider as an injury and that she could not remember the injury or loss of work in 1978. Such an explanation cannot be believed. In this agency's experience, it is certainly not unusual for claimant to "down play" past injuries. However, claimant's deposition testimony cannot be explained as honest exaggeration and her lack of credibility is fatal to her case. After rejection of her testimony, we are left with her husband's testimony that he observed her pain on the alleged date of injury. This may establish that she was in pain, but it does not verify the events leading up to the onset of this pain. Admittedly, claimant held a responsible position with Geifman for many years and Ronald Geifman, the owner and manager, testified that claimant was an honest person from his experience. Unfortunately, such testimony only establishes her honesty in the performance of her job, not in the pursuit of this workers' compensation claim.

Claimant's evidence does not satisfy her burden in proving that she suffered an injury arising out of and in the course of her employment.

FINDINGS OF FACT

1. Claimant was an employee of defendant Geifman Food Store on May 11, 1985.

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2. Prior to May 11, 1985, claimant had suffered two back injuries.

3. Prior to May 11, 1985, claimant had received chiropractic treatment for back problems.

4. Prior to May 11, 1985, claimant had missed time from work due to back problems.

5. Claimant gave deposition answers under oath which denied having back injuries, receiving chiropractic treatment or missing work due to back problems prior to May 11, 1985.

6. There were no witnesses to claimant's alleged injury.

7. Claimant is not a credible witness.

CONCLUSION OF LAW

Claimant has failed to meet her burden to show by a preponderance of the evidence that her alleged injury arose out of and in the course of her employment.

WHEREFORE, the decision of the deputy is affirmed.

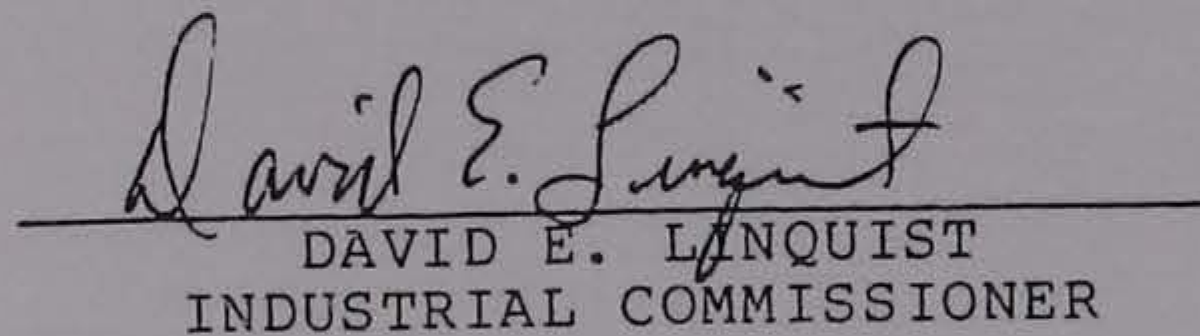
ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from these proceedings.

That claimant shall pay the costs of this action.

Signed and filed this 26th day of January, 1988.



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Filed April 27, 1988
HELEN JEAN WALLESER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VICKI L. FERDIG, Claimant, vs. JOHN MORRELL & COMPANY, Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 833234 A R B I T R A T I O N D E C I S I O N

1108

Claimant, who gave discrepant stories regarding the onset of her symptoms, failed to establish causal relationship between alleged headache and neck pain and work injury.

FILED

APR 27 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

VICKI L. FERDIG, Claimant, vs. JOHN MORRELL & COMPANY, Employer, and NATIONAL UNION FIRE INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 833234 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, Vicki L. Ferdig (Witkowski), against her employer, John Morrell & 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 on August 8, 1986. This matter came on for hearing before the undersigned deputy industrial commissioner at Sioux City, Iowa on February 1, 1988. A first report of injury was filed on October 28, 1986.

The record in this proceeding consists of the testimony of claimant, of Rexanne Smith, R.N., and of claimant's exhibits 1 through 5 and 9 through 12 as well as of joint exhibits 1 through 12.

ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant's rate of weekly compensation is $231.41; that claimant did receive an injury arising out of and in the course of her employment on the injury date; and, that the provider of medical services would testify that the charges were reasonable charges and were for reasonable and necessary services.

The issues remaining for resolution are:

Whether a causal relationship exists between claimant's injury and her claimed disability;

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Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement, including the commencement date for any permanent partial disability and time off work for which temporary total disability should be paid; and,

Whether claimant is entitled to payment of certain medical costs as causally connected to the work injury and authorized by the defendants.

REVIEW OF THE EVIDENCE

Claimant, Vicki L. Ferdig Witkowsky, testified that she is currently married and has three children. She reported that she is a high school graduate who attained a "C" average during her high school course work. Claimant reported that she had been employed in the Sioux City Parks and Recreation Department during her last two years in high school and that, while there, she was a playground helper who worked with children doing crafts as well as arranging equipment for different activities. Claimant's initial post-high school employment was at Iowa Beef where she initially ran a tipper machine packaging 10-pound sirloins. She reported that she worked eight hours per day, six days per week and went from a salary of $3.50 per hour initially to $8.45 per hour when she left. Also, at Iowa Beef, claimant worked as a trimmer of top sirloin using an eight-inch blade trimming knife. She characterized the knife as weighing a couple of pounds. Claimant left that employment voluntarily and took a job as a bank teller earning approximately $100 per week. At the bank, she worked with customers, handled cash and checks and filed checks as they were returned.

Claimant began work at Iowa Meat Processors, which is now John Morrell, in 1981. She reported that she worked on the boning line for approximately six months using a wizard knife and then went to the kill floor where she trimmed hog snouts. She also used a wizard knife for this job. She was trimming cheeks when injured. Claimant reported that she had work-related trigger finger and tendonitis of the left wrist in 1984. She required two surgeries for the left wrist condition and had received workers' compensation benefits for both conditions, but denied having continuing problems. Claimant denied that she had ongoing headache or neck or shoulder pain prior to August 8, 1986. Claimant reported that, on that date, at approximately 5:45 a.m., she injured herself when her feet went out from under her as she was descending stairs to her locker. Claimant reported that she landed on her elbow and right side and went down approximately eight steps. Claimant stated that she went to the nurse's office where she was bandaged for an abrasion of her right elbow and then returned to work and finished her work day. Claimant stated that, on the following day, a Saturday, her neck was stiff and she had a slight headache. On Monday morning she saw Milton D. Grossman, M.D., the company doctor. She continued

working, but received heat treatments for four days. Claimant reported she had daily headaches at the base of her skull for which she took approximately 9-12 Advil per day. She indicated that she saw her family doctor, Cecil G. Cunningham, D.O. She reported that Dr. Cunningham took her off work and connected headache complaints to her fall at work. Dr. Cunningham apparently prescribed manipulative treatment, Flexeril and Halcion. Claimant returned to work on November 24, 1986. She worked until the plant's strike on March 9, 1987, but reported she did so with daily headache and neck stiffness. She reported that she continued to have intermittant sleeping problems, that is, approximately two or three times per week. After the strike, claimant initially worked as a bartender for approximately five months and has subsequently worked at Pack Fabricators since September 2, 1987. She trims hams for 60 hours per week, albeit while still having headaches. Claimant reported that her headaches do not decrease in frequency when she does not work. Claimant reported that she is now treating with Brian McCloy, D.C., approximately once per week and still takes 9-12 aspirin per day. Claimant self-reported that she cannot get her head back as far as she once could and that she has strain when she tries to look to the left or right or tilt her head upward.

On cross-examination, claimant denied that her counsel had referred her to Dr. Cunningham and opined that she did not believe her headaches had improved, even if Dr. Cunningham's notes would so reflect.

Claimant reported that she had seen Dr. McCloy a total of six times and stated that, while she had seen him weekly until last month, she could no longer do so since her employer does not let her off to see a medical practitioner.

Claimant is now earning $5.75 per hour.

Claimant denied that she had been thinking of leaving the meat packing industry subsequent to her 1983 left arm surgery. She could not recall either having a 10-pound lifting restriction following that injury or having been told that she had deQuavain's disease at that time. She reported that she did discuss vocational rehabilitation with state counselors, but decided she could not quit her job to learn something else. Claimant did agree that she had taken and passed a typing course, however.

Claimant reported that she is a John Morrell union member and indicated that, if the work stoppage at the plant is resolved, she plans to return to work at John Morrell. Claimant agreed that she had never asked anyone at John Morrell if she could see Dr. Cunningham, stating that she went to see Dr. Cunningham because of her headaches and not because she had fallen down stairs.

Claimant agreed that she landed on her right side, approximately three inches from the waist, with her elbow on the steps. She did not hit her head in the fall. Claimant agreed that she had never discussed seeing a specialist for headache with anyone at John Morrell. Claimant denied that she had had headaches with ear infections, although she said she was off work one time for an ear infection.

Rexanne Smith, R.N., reported that she is employed at John Morrell and was working for the company in August, 1986. Ms. Smith reported that nursing notes relative to claimant do not reflect that claimant requested to see Dr. Cunningham. Ms. Smith stated that, had claimant so requested, claimant would have been told she could see only the authorized company doctor.

Cecil G. Cunningham, M.D., testified by way of his deposition taken January 26, 1988. Dr. Cunningham is a certified general surgeon who has practiced in the Sioux City area since 1965 having graduated from osteopathic college in 1957. The doctor reported that, after determining that claimant had a whiplash type injury through x-ray evaluation, he started a program of osteopathic manipulative treatment with soft tissue massage to achieve more neck range of motion. He reported he also tried intermittant cervical traction, spinalator and diathermy. He reported that claimant's symptoms persisted, notwithstanding treatment rendered. The doctor reported his diagnosis as cervical whiplash suboccipital, neuralgia and cephalalgia, all caused by the fall down stairs and resulting in the 12% permanent partial impairment or disability previously stated.

In a report of Dr. McCloy, Dr. Cunningham characterized statements that claimant may have no permanent impairment as being contradictory. Dr. Cunningham explained that future treatment referred to would indicate some permanent impairment. Dr. Cunningham agreed that he had referred claimant to Dr. McCloy for manipulative therapy only, but that he himself remained claimant's primary treating physician for her condition.

Dr. Cunningham reported claimant had stated (on an initial visit of September 23, 1984) that she had headaches for two weeks off and on following a fall approximately a month earlier. He reported he had not questioned her as to whether she had had headache immediately after the fall. The doctor reported that he supposed he had checked claimant's active and passive neck range of motion, but he had not recorded it. [The doctor did record severe muscle spasm thoughout the cervical spine on the September 23, 1986 examination of claimant.] The doctor reported that headaches have many common causes and can occur from accidents, allergies, ordinary tension, work posture, stresses and strains of ordinary life, from shoveling snow, from environmental factors such as hot and cold, from toothache, and from eye problems. The doctor reported he had not considered as necessary

a myelogram or CT scan or other diagnostic procedures as the "accident quite evidently caused the thing." He indicated he had found nothing, other than the accident, by visually looking at the patient, that caused "it."

Dr. Cunningham reported that, on February 12, (1987), he gave claimant an antibiotic and decongestant for cold and for throat inflammation and that, on October 13, 1987, he treated her for bilateral earache with antibiotic and cough syrup. The doctor reported he has not made subsequent x-rays and agreed that the only way to tell absolutely that a patient has reversal of the cervical curve would be with further x-rays and by comparing them with the original x-rays. The doctor reported that his impairment rating was based upon his personal experience with large numbers of patients over time and was not based on either the AMA guides or orthopaedic guide. The doctor reported that he distinguished between impairment and disability in that an impairment would probably be impairment of function and disability would be what you could not do because of this impairment and this his rating would probably be a "disability rating."

In an earlier report of June 29, 1987, Dr. Cunningham stated that injuries such as claimant's take considerable time, often as much as two or three years, to resolve. In notes of November 28, 1986 and December 8, 1986, he reported claimant's headache as having gone.

Dr. Cunningham identified claimant's exhibit 5 as a statement of account for his services and stated that it included charges for three manipulations performed by Dr. McCloy for which he had already paid Dr. McCloy. Exhibit 5 reports medical service not related to the work-related injury of $31.00 and otherwise includes charges of $758.00, generally for manipulation and other services, but also for x-rays.

On August 11, 1986, Milton D. Grossman, M.D., reported that claimant had fallen down stairs with complaints in her right arm, neck and leg. He reported that claimant had pain in the right shoulder and elbow on motion, but complete range of motion of shoulder and elbow, an abrasion on the right elbow and a muscle bruise on the right thigh. Diagnosis was of a right contusion of the right shoulder and elbow. On September 24, 1986, Dr. Grossman reported that claimant complained of neck pain since falling down stairs and that she had had occipital headache since September 20, 1986. Claimant had full range of motion of the neck. Dr. Grossman opined that claimant could return to work September 26, 1986 without restrictions.

On September 24, 1986, G. Shay, M.D., a radiologist, interpreted films apparently of Drs. Krigsten and Grossman taken on September 24, 1986 of claimant's cervical spine in flexion and extension

as demonstrating no evidence of fracture, dislocation or subluxation. He reported there was no evidence of subluxation or slippage in either flexion or extension with alignment perfect and interspaces normal and lipping negligible.

John J. Dougherty, M.D., of Orthopaedic Associates of Sioux City, P.C., evaluated claimant on October 26, 1987. The doctor characterized as "a little unusual" that claimant would fall down, land on her "rump," bruise her elbow and then her shoulder bothered her with her neck apparently not bothering her for some time. He stated that claimant apparently did not have any headache at that time. The doctor did not believe that claimant had a reversal of her cervical curve. He reported that her disc spaces worked okay with the possible exception of minimal narrowing at C6-7. The doctor then stated:

> With regard to your question as to whether the complaints she has now are related to her fall, I guess one would be hardput to say they're not. However, I certainly would question to say they are taking into account the mechanism of injury.

The doctor stated he did not think complaints with reference to her neck are really associated with the fall.

On December 11, 1984, William M. Krigsten, M.D., reported that claimant could walk or stand for five to eight hours per day; that claimant could lift up to 10 pounds frequently; that claimant could use her hand for repetitive movements, including simple grasping and fine manipulation, but not for pushing or pulling; and, that claimant could use repetitive movement of her feet, as in operating foot controls. He reported that claimant was able to bend, climb and kneel frequently and carry occasionally and that claimant could reach above shoulder level and could work an eight-hour day plus overtime. The doctor was then unsure of the expected duration of modified duty restrictions.

APPLICABLE LAW AND ANALYSIS

Our first concern is the causal relationship issue.

The claimant has the burden of proving by a preponderance of the evidence that the injury of August 8, 1986 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

An expert's opinion based upon an incomplete history is not necessarily binding on the commissioner, but must be weighed with other facts and circumstances. Musselman v. Central Telephone Company, supra.

Dr. Cunningham, who has treated claimant for her headaches and neck pain, has causally related those to her fall in August, 1986. Dr. Dougherty, who examined claimant on October 26, 1987, has characterized as "a little unusual" that claimant would fall, land on her "rump," bruise her elbow and then her shoulder bothered her with her neck apparently not bothering her for some time. Dr. Dougherty did not believe claimant had a reversal of her cervical curve as Dr. Cunningham believed. Dr. Dougherty reported that claimant disc spaces were working okay, meaning apparently that they were normal with the possible exception of minimal narrowing at C6-7. Dr. Dougherty questioned whether claimant's complaints were related to her fall, given the mechanism of injury. Dr. Dougherty is an orthopaedic physician. Dr. Cunningham is a general surgeon. Dr. Grossman, the company physician, rendered no opinion as to causation. Claimant

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testified at hearing that she had a stiff neck and a slight headache on the Saturday following her Friday work incident. While claimant reported neck complaints when she saw Dr. Grossman on August 11, 1986, she did not mention having headache at that time. Dr. Grossman then reported no objective findings regarding the neck. He did find complete range of motion of the shoulder and elbow and made a diagnosis of right contusion of the right shoulder and elbow. On September 24, 1986, Dr. Grossman reported that claimant had a continued complaint of neck pain and had had occipital headaches since September 20, 1986. Dr. Grossman found that claimant then had full range of motion of the neck. On September 23, 1986, Dr. Cunningham had not recorded claimant's neck range of motion, but reported that she had had severe spasm throughout the cervical area. The findings of Drs. Grossman and Cunningham, not more than a day apart, appear somewhat inconsistent. Likewise, Dr. Cunningham made his diagnosis, in part, on x-ray findings he interpreted as showing a reversal of the cervical curve. Dr. Shay, a radiologist, interpreted x-rays approximately contemporaneous with Dr. Cunningham's as showing no evidence of fracture, dislocation, subluxation or slippage in either flexion or extension, with alignment perfect, interspaces normal and lipping negligible. We find it curious that Dr. Shay, a radiologist, does not interpret x-rays taken in near proximity to Dr. Cunningham's in a similar manner as Dr. Cunningham. Dr. Dougherty's interpretation of the x-rays is more consistent with Dr. Shay than with Dr. Cunningham.

Also, it appears curious that claimant, had she had continuing neck pain and headache from her injury onward, would not have sought additional medical care through John Morrell from August 11, 1986 until seeking care from Dr. Cunningham on September 23, 1986. Having sought care from Dr. Grossman per instructions of the company, she certainly was aware that such care was available for her, were she having continuing complaints. We find that the fact that claimant failed to do so diminishes the weight that can be given to her testimony as regards headaches from the injury onward. It is also inconsistent with her statement to Dr. Cunningham, upon initial examination on September 23, 1986, that she had had headaches for two weeks off and on. We note that, even if claimant had headaches for two weeks off and on prior to seeing Dr. Cunningham, such headaches would then have had their onset approximately one month following her work incident. Such remoteness in time would generally make the causal relationship between the headache and the work incident more tenuous. Dr. Cunningham, himself, indicated that headaches have many common causes and can occur from, among other things, accidents, allergies, ordinary tension, work posture and stresses and strains of ordinary life as well as from numerous other factors. He reported that he had not done other diagnostic studies to look for causes beyond claimant's work incident as claimant's work incident had "quite evidently caused the thing."

We believe that the remoteness in time from the injury to

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claimant's first report of headache complaints; claimant's failure to report such complaints to the John Morrell medical department on a timely basis; the inconsistencies in her reports as to the onset of the headaches, vis-a-vis her testimony at hearing, her report to Dr. Grossman on September 24, 1986 and a report to Dr. Cunningham on September 23, 1986; and, the lack of objective physical findings relative to her neck condition make it less certain that claimant's work incident caused her subjective complaints of headache and neck pain. We note that Dr. Dougherty has greater expertise in the area of orthopaedic injury and its sequilla than does Dr. Cunningham. That fact, as well as the numerous inconsistencies outlined above, incline us to accept Dr. Dougherty's opinion that, given her mechanism of injury, it is questionable that claimant's complaints, as of October 26, 1987, related to her fall. We accept this opinion over Dr. Cunningham's account as to causation. While Dr. Dougherty did not expressly so state, we find it also unlikely that claimant's complaints at time of initial treatment with Dr. Cunningham on September 23, 1986 related to her work incident for the reasons stated above. The evidence presented as regards that question, at best, raises an issue as to causal connection between claimant's then-current complaints and claimant's work injury of almost six weeks earlier. The evidence does not show such connection by a preponderance. Claimant is required to prove her case by a preponderance of the evidence; her burden is not satisfied by the creation of an equipoise. Volk v. International Harvester, 252 Iowa 298, 106 N.W.2d 649 (1960).

As claimant has not shown the requisite causal connection between her work incident and her claimed disability, she has not shown an entitlement to healing period, permanent partial disability or temporary total disability benefits. Hence, the question of whether claimant is entitled to temporary total or healing period benefits for time off work from September 23, 1986 to November 24, 1986, as prescribed by Dr. Cunningham, is moot. Likewise, claimant has not shown an entitlement to payment of medical costs with Dr. Cunningham. We note in passing that claimant was certainly aware, having had a previous workers' compensation injury, that such was not authorized. We find it most curious that she sought treatment with Dr. Cunningham prior to attempting any type of additional examination or treatment through her John Morrell physicians.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant had an incident at work on August 8, 1986 when she fell down stairs while descending to her locker.

Claimant went down approximately eight steps and landed on her right side, approximately three inches from the waist with

her elbow on the steps. Claimant did not hit her head in the fall.

Claimant complained of right arm, neck and leg pain on August 11, 1986. On August 11, 1986, claimant had complete range of motion of the shoulder and elbow with abrasion of the right elbow and muscle bruise of the right thigh.

On September 23, 1986, claimant reported to Dr. Cunningham that she had had headaches for approximately two weeks after having fallen at work approximately one month earlier.

On September 24, 1986, claimant reported to Dr. Grossman that she had had occipital headaches from September 20, 1986 onward.

At hearing, claimant testified that she had had a slight headache from the Saturday following her Friday work incident.

Claimant's accounts of the onset of her headache condition are inconsistent.

Claimant did not report headaches to John Morrell officials or seek medical care from John Morrell officials from August 11, 1986 until September 24, 1986.

Claimant independently sought medical care from Dr. Cunningham on September 23, 1986.

Interpretations by Dr. Cunningham and Dr. Shay of chronologically proximate x-rays are dissimilar.

Dr. Dougherty's x-ray interpretations are more consistent with Dr. Shay's x-ray interpretations.

Claimant has had a prior workers' compensation injury.

Claimant was aware of the procedure for reporting medical conditions and seeking medical attention on account of her work-related injury.

Dr. Cunningham is an osteopathic physician and general surgeon.

Dr. Dougherty is an orthopaedic specialist.

Dr. Shay is a radiologist.

Headaches can be produced by a variety of conditions.

Dr. Cunningham did not do further diagnostic studies or look for other causes of claimant's headaches besides claimant's

report of her work incident.

Claimant was reported to have severe muscle spasm in the cervical area on September 23, 1986, but was reported to have full range of motion of the neck on September 24, 1986.

On September 24, 1986, Dr. Grossman released claimant for work as of September 26, 1986.

Dr. Cunningham took claimant off work on September 23, 1986 to November 24, 1986.

Claimant's continuing complaints are inconsistent with the mechanism of injury.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established a causal relationship between her injury of August 8, 1986 and her claimed disability.

Claimant is not entitled to temporary total disability benefits, healing period benefits or permanent partial disability benefits.

Claimant is not entitled to payment of costs with Dr. Cunningham.

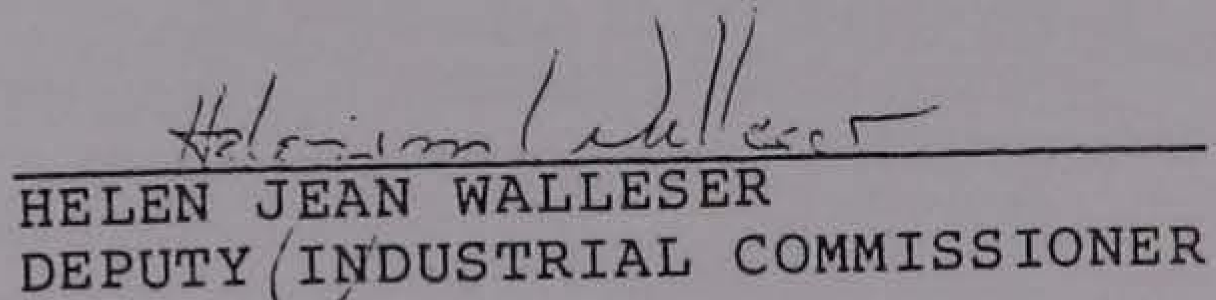
ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceeding.

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

Signed and filed this 27th day of April, 1988.



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1108.50; 2905
Filed May 24, 1988
David E. Linquist

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUDY A. FISHER, Claimant, vs. QUAKER OATS COMPANY, Employer, and IDEAL MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 504237 A P P E A L D E C I S I O N

1108.50

Claimant who experienced a pain in her back while bending over cleaning a bathtub at home failed to show a causal connection between her disability and her original injury.

2905

Claimant who failed to establish a causal connection between her present disability and her original injury did not establish a change of conditions on review-reopening.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JUDY A. FISHER,	:	
Claimant,	:	File No. 504237
vs.	:	
QUAKER OATS COMPANY,	:	A P P E A L
Employer,	:	D E C I S I O N
and	:	FILED
IDEAL MUTUAL INSURANCE COMPANY,	:	MAY 24 1988
Insurance Carrier, Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision denying further benefits.

The record on appeal consists of the transcript of the review-reopening proceeding; joint exhibits 1, 2, 2A and 7; and claimant's exhibits 3 through 6. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

1. Whether the deputy erred in failing to find the 1978 injury was a proximate cause of temporary total disability in 1984, 1985, and resulting medical expenses and costs.

2. Whether the deputy erred in failing to find temporary total disability constitutes a "change of condition."

REVIEW OF THE EVIDENCE

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

APPLICABLE LAW

When a worker sustains an injury, later sustains another

000594

injury, and subsequently seeks to reopen an award predicated on the first injury, he or she must prove one of two things: (a) that the disability for which he or she seeks additional compensation was proximately caused by the first injury, or (b) that the second injury (and ensuing disability) was proximately caused by the first injury. DeShaw v. Energy Manufacturing Company, 192 N.W.2d 777, 780 (Iowa 1971).

Upon review-reopening, claimant has the burden to show that she has suffered a change in her condition since the original award was made. Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 21 (1959). A mere difference of opinion of experts as to the percentage of disability arising from an original injury would not be sufficient to justify a different determination on a petition for review-reopening. Rather, such a finding must be based on a worsening or deterioration of the claimant's condition not contemplated at the time of the first award. Bousfield v. Sisters of Mercy, 249 Iowa 64, 86 N.W.2d 109 (1957). A failure of a condition to improve to the extent originally anticipated may also constitute a change of condition. Meyers v. Holiday Inn of Cedar Falls, 279 N.W.2d 24 (Iowa 1978).

ANALYSIS

The analysis of the evidence in conjunction with the law is adopted. Claimant has failed to show a change of condition since the original award of benefits. In addition, claimant has failed to carry her burden to show a causal connection between her present disability and her injury of April 1978.

FINDINGS OF FACT

1. Claimant sustained an injury to her low back which arose out of and in the course of her employment on April 10, 1978 which injury resulted in the award of 10 percent permanent partial disability.

2. Claimant experienced low back pain on January 29, 1984 performing a bending maneuver while cleaning in her home.

3. Claimant never experienced a specific episode of low back pain at work in the time on or about January 29, 1984 for which she seeks temporary total disability compensation.

4. Claimant experienced a second episode of low back pain at home when she bent to pick up an item off the floor in March 1986.

5. Dr. Lehmann does not report claimant's at home episode.

6. Dr. Lehmann's opinion as to the cause of claimant's current complaints was based on an incomplete history.

7. Claimant's condition is not significantly different from her condition as of July 1981.

CONCLUSIONS OF LAW

Claimant has not established a change of condition such that she is entitled to an additional award.

Claimant has not established that her April 10, 1978 injury was a proximate cause of her claimed current disability or was a proximate cause of her at home incident on January 29, 1984 and any ensuing disability.

WHEREFORE, the decision of the deputy is affirmed.

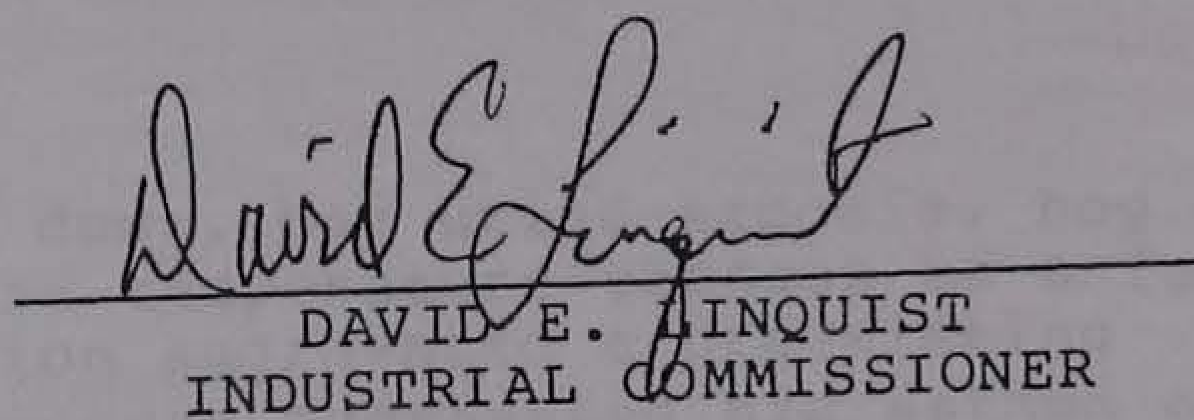
ORDER

THEREFORE, it is ordered:

That claimant take nothing further from this proceeding.

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

Signed and filed this 24th day of May, 1988.



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1108.40; 1801; 1803
2203; 2206
Filed 4-15-88
David E. Linquist

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS GETTLER, Claimant, vs. ROBERT TICKNOR, Employer, and EMPLOYERS MUTUAL COMPANIES, Insurance Carrier, Defendants.	:	File No. 737927 A P P E A L D E C I S I O N

1108.40; 2203; 2206

Claimant's exposure to dirt, dust, hog urine ammonia, hog dander, stale air, grain dust, and temperature changes as a farm worker in hog confinement operation aggravated a preexisting bronchial asthma. Claimant's exposure aggravated his asthma and resulting condition resolved itself when claimant was no longer exposed to the irritants. No occupational disease was caused by exposure to the irritants. Even if claimant had suffered an occupational disease this employer would not have been liable for benefits because claimant's last injurious exposure to the irritants was when he was self-employed as a construction worker and hog raiser.

1801

Claimant lost no income on this job because of the aggravation of his preexisting bronchial asthma. He had not proved that exposure to the irritants was the cause of any temporary disability.

1803

Claimant's bronchial asthma was not caused by exposure to irritants while employed by defendant employer. When claimant was suffering from his asthma condition, he had an impairment. That impairment was not permanent and was relieved by avoidance of the irritants or medication.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DENNIS GETTLER,
Claimant,
vs.
ROBERT TICKNOR,
Employer,
and
EMPLOYERS MUTUAL COMPANIES,
Insurance Carrier,
Defendants.

File No. 737927

A P P E A L

D E C I S I O N

FILED
APR 15 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability and medical benefits.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 24. Both parties filed briefs on appeal.

ISSUES

The issues on appeal are whether claimant has an occupational disease which arose out of and in the course of employment; if claimant does have an occupational disease, whether his last injurious exposure was while employed by defendant employer; and whether there is a causal relationship between claimant's exposure to irritants at work for defendant employer and his bronchial asthma.

REVIEW OF THE EVIDENCE

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

Briefly stated, the claimant and his wife testified that he had no serious illnesses or lung problems before beginning work on the defendant employer's farm under a written employment contract beginning the third week in February 1983. Prior to this contract he had worked for his father and another employer

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and had been self-employed and in construction work. Claimant's duties for the employer were to do chores and take care of the 240 head sow, farrow-to-finish hog operation. He worked inside buildings approximately fifty percent of the time and outdoors approximately fifty percent of the time. In the hog confinement buildings the air was stale and there was feed dust, hog hair dust, manure odor, and pit gases. The work outside consisted of moving hogs, cleaning buildings, repairing items, and moving corn from bin to bin. Claimant had brief involvement with the 2500 acres of row crops of employer.

Claimant reported that in moving corn he was around moldy corn in a 500 bushel grain bin in March 1983. He testified that after working in the corn he felt pain in his right side. He reported that by the end of his one year employment contract he could not stay in the hog operating building because he was having so many breathing problems. He was not able to continue work for employer after the year long contract was completed.

Claimant testified that he was paid $400 per week, and that he was paid under the terms of the agreement. Defendant employer stopped paying claimant in February 1984. Claimant reported that after a two week vacation in February 1984, he was supposed to work two more weeks but was unable to and Dr. Hicklin hospitalized him. He further testified that in the time between February and June 1984, he did some field work for defendant employer, and that he was looking for construction jobs during that time. The medical records indicate that claimant was treated at Iowa Methodist Medical Center from April 3, 1984 through April 6, 1984. The diagnosis at the time of admission was right middle and lower lobe nonperfusion, high probability for pulmonary embolism.

In June 1984, claimant attempted to return to doing home remodeling jobs but the dust, dirt, asbestos insulation, and construction site fumes caused coughing like he had experienced when working for employer. He stated he can no longer do the physical work he previously did in construction because he still has coughing and breathing problems. In November 1984, claimant began to raise hogs on his own acreage under an arrangement with another individual who furnished the hogs and the feed and claimant furnished the buildings and care of the hogs. Claimant received $.06 a head per day and an extra half cent if the death loss was less than three percent and another half cent if the death loss was less than one percent. Claimant initially raised 240 hogs and increased to 450 hogs. He reported that his wife helped in the operation and that he would spend between ten and fifteen minutes per day in the buildings but for cleaning, which required about two hours of time. He stated that cleaning the buildings bothered him and that he began to have coughing problems after the operation increased to about 360 hogs.

Gregory Hicklin, M.D., first saw claimant on June 8, 1983 with an evaluation of right mid-lung infiltrate. Claimant was hospitalized from June 8, 1983 through June 11, 1983 and had no activity restrictions when discharged. The diagnosis on admission was probable pulmonary embolism, right lung with infarct. Dr. Hicklin saw claimant on December 22, 1983 with persistent, recurrent, right-sided chest pain with some dyspnea on exertion. The diganosis was of bronchial asthma. In a report of November 23, 1984, the doctor stated that the bronchial asthma was definitely worsened by exposure to hog confinement buildings and breathing cold air while doing chores around the farm, but stated that exposure to the buildings and cold air did not cause the asthma per se. He noted that the asthma limits what claimant can do and that further exposure to nonspecific irritants would be expected to cause claimant's asthma to flare up. He recommended that claimant avoid nonspecific irritants and not continue work in hog confinement buildings or vigorous manual labor in cold air. The doctor described asthma as an intermittent or variable disease and stated that on days when claimant's asthma is bad, claimant has a Class 2 impairment under the AMA Guidelines of 10 to 25 percent of the body as a whole. He reported that on a good day claimant is normal and has no impairment.

Dr. Hicklin testified that he would not characterize claimant's impairment as either a temporary or permanent disability. He also testified that claimant's continuing problem relates to the preexisting asthma condition.

Dr. Hicklin defined asthma as a reversible airway obstruction associated with bronchial hyperactivity. He described it as a lung and bronchial tube related difficulty, a disease. The doctor reported that he did not believe that claimant's occupation caused his asthma but stated that he felt claimant had a propensity towards asthma and the exposures in the occupation to cold air, grain dust, and hog confinement buildings irritated his condition to bring it to his attention.

The doctor opined claimant's subsequent exposure to hogs and hog confinement operations was an injurious exposure to the same hazards and the same disease process as claimant had experienced on the Ticknor operation. The doctor opined that on November 15, 1984, when claimant entered his own hog business, he was susceptible to further aggravation of his asthmatic condition and that the subsequent exposure aggravated the underlying asthmatic condition with the same symptoms provoked by the same atmosphere and relieved by avoidance or medication (as at the Ticknor farm).

Dr. Hicklin stated that he disagreed with Dr. Aronow's diagnosis in that bronchial asthma is a disease with many causes and that claimant's was not caused by hog house exposure. Dr. Hicklin explained that any kind of irritant fumes may exacerbate bronchial

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asthma and that hog house fumes are an exacerbating, but not a causative factor (in the condition). Dr. Hicklin reported that he saw no physical impairment as a result of claimant's pulmonary function test and that nothing led him to believe claimant's employment exposure caused claimant's need to avoid certain irritants. He described the employment exposure as a re-exacerbation of the asthma with each new contact or new exposure a new aggravation of a problem preexisting employment with the employer. He also reported that claimant had a pulmonary embolism of undetermined source.

Paul From, M.D., saw claimant for evaluation on February 19, 1985. He reported claimant had evidence of obstructive lung disease and a cough compatible with tracheobronchitis as well as residual pleuritic change in his chest following pulmonary embolus and infarction. The doctor stated claimant's course was nearly classical for chemical irritation of the tracheobronchial tree secondary to exposure to atmosphere in a hog confinement system.

Martin R. Aronow, D.O., saw claimant on April 23, 1985. The doctor stated that test results suggested that claimant had an obstructive ventilatory defect and that in spite of claimant's history of cigarette smoking, he believed claimant's respiratory impairment was mainly the result of his occupational exposure. The doctor opined that claimant has a typical chronic or typical obstructive ventilatory defect as one would see in a hog confinement worker.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence but will be supplemented as necessary for disposition of the matter.

Claimant has the burden of proving by a preponderance of the evidence that he received an injury in February 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 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 oc-

> cupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury.... The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.
>
> ....
>
> A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

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

Our supreme court has stated many times that a claimant may recover for a work connected aggravation of a preexisting condition. Almquist, 218 Iowa 724, 254 N.W. 35. See also Auxier v. Woodward State Hosp. Sch., 266 N.W.2d 139 (Iowa 1978); Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960).

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

An employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson, 255 Iowa 1112, 125 N.W.2d 251; Yeager, 253 Iowa 369, 112 N.W.2d 299; Ziegler, 252 Iowa 613, 106 N.W.2d 591. See also 257 Iowa 508, 133 N.W.2d 704; Almquist, 218 Iowa 724, 254 N.W. 35.

The claimant has the burden of proving by a preponderance of the evidence that the injury of exposure to irritants during his employment 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.

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.

ANALYSIS

Defendants argue on appeal that claimant's condition is not an occupational disease because his condition is a preexisting asthma condition that was aggravated by the exposure to irritants. While claimant's bronchial asthma was aggravated by work environment exposure, the bronchial asthma was not caused by the exposure of the work environment of defendant employer. Dr. Hicklin indicated that the condition was worsened by the work exposure but that the exposure did not cause the asthma. He was a treating physician and his opinion should be and is given more

weight than Dr. From and Dr. Aronow, each of whom examined claimant once nearly two years after claimant's asthma flared up. In addition, the evidence clearly indicates that claimant's condition is relieved by avoiding the nonspecific irritants which cause the asthma to flare up. Claimant suffered a temporary aggravation of a preexisting condition but he has not suffered an occupational disease within the meaning of Iowa Code chapter 85A. Claimant has failed to establish that his condition was caused by irritants found in his work environment. Claimant does not have a disease which arose out of and in the course of his employment. The deputy erred in finding otherwise.

Even if claimant had an occupational disease, he would not be able to recover benefits from defendant employer. Iowa Code section 85A.10 provides that the employer in whose employment the employee was last injuriously exposed to the hazards of the disease is liable for compensation. Claimant was exposed to the same irritants while raising hogs on his own acreage after he terminated employment with defendant employer as he was when he was employed by defendant employer. It should be noted that claimant also had breathing difficulties when he was exposed to irritants while doing construction work. The last exposure that claimant had with the irritants was when his employment was raising hogs on his own acreage. Exposure to the irritants while in the employment of defendant employer was not the last injurious exposure and therefore defendant employer would not be liable for compensation.

While the defendant employer is not liable to claimant for an occupational disease, the defendant employer would be liable for the injury of the temporary aggravation of the preexisting asthma condition causing disability. Dr. Hicklin, whose opinion is given more weight, did not think that the employment exposure caused the permanent bronchial asthma condition. Dr. Hicklin thought that when claimant was suffering from his asthma condition, claimant had an impairment. That impairment was not permanent and was relieved by avoidance of irritants or medication. Claimant is not entitled to permanent disability benefits nor healing period benefits.

Claimant would be compensated for temporary disability benefits if the aggravation of the preexisting asthma condition resulted in his being temporarily disabled. The record is devoid of any evidence that claimant was temporarily disabled because of the aggravation of his asthma condition. He was hospitalized from June 8, 1983 through June 11, 1983, but was discharged with no activity restrictions. Also, that hospitalization was due at least in part to the pulmonary embolism, the cause of which is undetermined. Claimant was paid for the full term of the agreement with defendant employer. After he was unable to continue working for defendant employer after the expiration of the one year agreement period, claimant looked for other work

and did other work. Claimant was hospitalized April 3, 1984 through April 6, 1984. That hospitalization appeared to be because of the pulmonary embolism and it was more than a month after claimant's employment contract had ended. The flare-up of claimant's asthma condition was alleviated by avoidance of the irritants, therefore, it cannot be said that this hospitalization was caused by exposure to the irritants that would have occurred at least one month prior to the hospitalization. There is no evidence in the record that demonstrates claimant was temporarily disabled because of the aggravation of his asthma condition caused by exposure to irritants at defendant employer. Claimant has not proved by the greater weight of evidence that he had a disability that was caused by exposure to irritants while working for defendant employer.

FINDINGS OF FACT

1. Claimant has preexisting bronchial asthma.

2. Claimant was able to work in construction prior to beginning work with this employer.

3. Claimant was exposed to grain dust, dirt, hog dander, hog ammonia, temperature changes, and stale air while working for defendant employer.

4. Claimant was treated for and hospitalized for his respiratory condition while working for defendant employer from June 8, 1983 through June 11, 1983.

5. Claimant lost no income as a result of this hospitalization but was paid the full amount pursuant to his contract.

6. Claimant's condition is now aggravated by nonspecific irritants such that he is unable to work in hog confinement operations, or in construction, or in other locales where he would be exposed to nonspecific irritants.

7. Claimant's work for defendant employer temporarily aggravated his preexisting bronchial asthma.

8. Claimant worked under a year long contract from February 1983 to February 1984.

9. Claimant was hospitalized on account of a pulmonary embolism from June 8, 1983 through June 11, 1983 and from April 3, 1984 through April 6, 1984.

10. The cause of the pulmonary embolism is undetermined.

11. Claimant did not continue work for the employer at the contract's expiration.

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12. Claimant attempted to raise hogs on his own land in November 1984 in a joint venture or partnership arrangement.

13. Claimant was exposed to the same irritants in the joint venture or partnership arrangement as he was while in the employment of defendant employer.

14. Claimant did not continue the joint venture or partnership on account of his condition.

15. Claimant's last injurious employment exposure to the irritants that aggravate his bronchial asthma did not occur in the employment of defendant employer.

CONCLUSIONS OF LAW

Claimant has not established by the greater weight of evidence that he sustained an occupational disease which arose out of and in the course of his employment with defendant employer.

Claimant has not proven by the greater weight of evidence that the aggravation of his preexisting asthma condition by exposure to irritants while employed by defendant employer was the cause of any temporary or permanent disability.

WHEREFORE, the decision of the deputy is reversed.

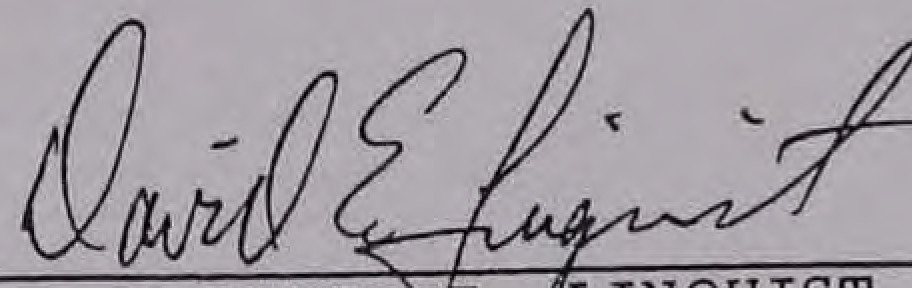
ORDER

THEREFORE, it is ordered

That claimant take nothing from this proceeding.

That defendants pay costs, including the costs of this appeal and transcription of the hearing, pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 15th day of April, 1988.



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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JANET L. GLADDEN,
Claimant,
vs.
KAHL HOME FOR THE AGED,
Employer,
and
BITUMINOUS INSURANCE COMPANIES,
Insurance Carrier,
Defendants.

File No. 773664

A P P E A L
D E C I S I O N

FILED
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IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits based on a 35 percent industrial disability.

The record on appeal consists of the transcript of the arbitration hearing, claimant's exhibits 1 through 4, and defendants' exhibits A through Z and AA through PP. No briefs were filed on appeal.

ISSUE

As no appeal brief has been filed by appellants, this appeal will be considered generally without specified errors to determine its compliance with the law.

REVIEW OF THE EVIDENCE

Claimant sustained an injury on September 2, 1984 when she slipped on something on the floor at defendant employer. She stated that this slip caused her "to do the splits." (Transcript, page 8) At the time of the injury claimant was six months pregnant. Claimant first noticed pain in her low back and sought treatment from D.D. Stierwalt, D.C. Dr. Stierwalt treated her with spinal adjustments for approximately one year after the injury.

Claimant stated that she noticed nodules in her groin area approximately two months after her injury and denied having

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these nodules before the injury. She reported that her delivery was normal.

Claimant indicated that she was sent to William R. Irey, M.D., in January 1985. Dr. Irey treated her from December 28, 1984 through March 20, 1985. See defendants' exhibits F-L.

In his initial examination report, Dr. Irey states:

> 12-28-84 This patient is a 32 year old LPN at the Kahl Home referred at the request of her insurance carrier for evaluation of back pain. She states she fell while at work at the Kahl Home on 9-2-84. She states she had no prior problems with her back. She said she was walking down a hall and slipped on egg which was spilled on the floor and sustained a twisting injury. She had immediate pain in the back and immediate groin pain on the right. She was seen by her chiropractor that day and has seen him on several occasions since that time. She was pregnant at the time and had been followed by the obstetrics group. She delivered her child in November and states that since that time she has had some decrease in her back pain. She continues to complain of pain in the lower back and occasional radiation to the left leg or leg hip area and lateral aspect of the thigh. She complains of pain in the right groin which radiates from her back around the side of her body and to the groin area. She says at times she has difficulty standing straight. She finds that she cannot bend forward without pain. There is no cough or sneeze effect.
>
> She has had no prior back surgery and is currently taking only Tylenol on a prn basis for medication. She does not wear any lumbar support and is currently under no exercise program.
>
> Physical Exam: The patient is obese (206 lbs) sitting on a chair in no obvious distress. She is able to stand without difficulty and walks without a limp or gait disturbance. She forward flexes to about 60°, extension is moderately difficult for her and performed only 50% of normal. Lateral bending is within normal limits, rotation is normal. Neurologic exam of both lower extremities including muscle strength testing and deep tendon reflex testing is normal. She straight leg raises to 90° in the seated position but only about 50° in the supine position bilaterally.

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She is also tender directly over the symphysis pubis and mildly tender in the left groin. She has full flexion and internal and external rotation of both hips performed with minimal discomfort.

X-rays AP lateral and obliques of the lumbar spine and AP of the pelvis show no specific abnormalities.

IMPRESSION: Probable mild to moderate lumbosacral strain and possible inflammation of the pubic symphysis.

PLAN: I think her back strain is probably related to her history of falling. I think the discomfort she feels in the groin and the pubic area is more likely related to her pregnancy. It may also be aggravated by her fall.

For the present time I think she should undergo a course of treatment in a physical therapy department along with a program of back exercises. I also gave her a prescription for Disalcid 1500 mg. po b.i.d. which is anti-inflammatory medication.

Plan to check her back in about 3 weeks for follow up examination. She should continue off work for the present time.

(Defendants' Exhibit F)

Dr. Irey recommended a lumbosacral corset and physical therapy on claimant's subsequent visits. See defendants' exhibit F. Claimant last saw Dr. Irey on March 20, 1985. See defendants' exhibit L.

Dr. Irey referred claimant to R. L. Kreiter, M.D. Dr. Kreiter states his impression in his initial examination report: "IMPRESSION: Chronic lower back pain neurologically intact, probable chronic strain 2) obesity." (Def. Ex. O) The record reveals that Dr. Kreiter examined and treated claimant from April 24, 1985 through May 23, 1986. See defendants' exhibits O through Z. In a July 9, 1985 letter, Dr. Kreiter opines that "maximum healing had already taken place." See defendants' exhibit U. In a July 31, 1985 letter, Dr. Kreiter states his opinion as to the extent of claimant's impairment and as to claimant's lifting restriction:

I am writing in regard to the most recent letter you wrote on Janet Gladden. At the present time I would anticipate that Janet might complain of discomfort in her back if she would be required to

> help lift a 200 lb. patient. It seems to me that in her mind she has the idea that she will not return to work as a nurses aid [sic]. It has been my experience that when people feel that way, then anything that might come up which would require the possiblity [sic] of injuring their back, they usually start to complain of pain. My lifting maximum I think was around 35-40 lbs. and I think it should stay that way. I really can give you no date in regard to her maximum date of healing since I did not see her initially. In regard to a functional impairment I certainly would not give her anymore then [sic] a 5% whole body physical impairment loss of physical function to the whole body and I would hope that that would improve with time.

(Def. Ex. W)

Again, in a December 12, 1985 letter, Dr. Kreiter reiterates his opinion as to the extent of claimant's physical impairment:

> In regard to a permanent impairment rating I would state that she has a neurogenic low back discomfort with possible disc injury with periodic episodes of acute back pain and body list with intermittent sciatic nerve tests, which are positive. This would give her a 5% whole body permanent physical impairment loss of physical function to the whole body as a result of her injury.

(Def. Ex. X)

Claimant was also examined by F. Dale Wilson, M.D., on July 15, 1986. In his report, Dr. Wilson recommends the following restrictions be placed on claimant:

> Restrictions to be imposed are self imposed and are reasonable; She must very carefully sit down on a not too hard surface for maximum of an hour. Weight lifting is restricted to 35 pounds. She must turn and bend carefully. The prospect of continuing as a nurse's aide or LPN seems unlikely. Because of her back problems she seems an unsatisfactory applicant for such a position.

(Claimant's Exhibit 1)

With regard to the extent of claimant's impairment, Dr. Wilson opines:

Impairment Evaluation:

A.	Motion loss: Back extension	2%
B.	Pain: Right leg	2
	Sitting	2
	Back pain	3
C.	Power for weight lifting, walking	5
D.	Nerve involvement: Loss of sensation and pain in the left leg	2
		16%

(Cl. Ex. 1)

Dr. Stierwalt also opines concerning the extent of claimant's impairment:

> Summary
> Although patient has responded somewhat favorably to the various treatments rendered, I believe some permanent impairment has been done to the motor unit of the L5 S1 juncture as well as instability created at the symphis pubic junction. It is my opinion that a 10% permanent impairment is realistic.

(Cl. Ex. 4)

Claimant testified that the first time she went back to defendant employer with a light duty work restriction she was told that no light duty work was available. Claimant stated that she attempted to return to work with defendant employer on light duty on two subsequent occasions but that defendant employer refused to take her with any kind of restrictions. See transcript, page 18.

Claimant's exhibit 2 is a response to claimant's request for admissions. Request for admisson number 7 states:

> 7. Employer refused to allow Claimant to return to her former duties or any other job at its place of business under medical restricted conditions.
>
> RESPONSE: Deny.

(Cl. Ex. 2)

Claimant testified that her work for defendant employer involved passing out medication, making assignments of nurses' aides, and lifting and moving patients. Claimant stated that some patients weighed as much as 180 pounds, but she revealed that when lifting patients of that weight she usually had at least one person to assist her.

Claimant indicated that in January 1985, she enrolled in Mary Crest College in the substance abuse counseling program. Claimant stated that this program leads to a Bachelor of Arts degree. Claimant testified that she is presently employed by the seventh judicial district as a corrections advisor but claimant stated she is on probationary status until the first of the year. Claimant stated that her duties as a corrections advisor involves checking on the whereabouts of residents of the work release center in Davenport.

Claimant related that after leaving employment with defendant employer, she applied for work at hospitals, social service agencies, at a place called The Development of the Mentally Disabled, and at a place called Skills Incorporated. Claimant indicated that Skills Incorporated would not hire her because of her work restrictions.

Claimant stated that in the summer of 1985, she worked two months for the Mercy Alcoholism Recovery Center as an alcoholism counselor at $10 per hour. Claimant also indicated that she turned down employment with the Center of Alcohol and Drug Services to accept the position with Mercy Alcoholism Recovery Center.

Claimant related that she was contacted by a rehabilitation specialist named Kathleen Negaard. Claimant indicated that she would not allow Negaard into her home for an interview until Negaard spoke to claimant's attorney.

Claimant testified that she currently has pain in her low back and has difficulty sitting for extended periods of time and stated that she has difficulty doing any activities with her children.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 2, 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 (1956). 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

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be couched in definite, positive or unequivocal language." Sondag v. Ferris Hardware, 220 N.W.2d 903, 907 (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, 360, 154 N.W.2d 128 (1967).

In Rockwell Graphics Systems v. Prince, 366 N.W.2d 187 (Iowa 1985), the supreme court stated:

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

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

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is proportionally related to a degree of impairment of bodily function.

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

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy or commissioner to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985); Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985).

ANALYSIS

No evidence is presented in the record that claimant had back pain prior to her work injury of September 2, 1984. Doctors Kreiter, Irey, Wilson and Stierwalt all agree that claimant's back strain is related to her work injury. The greater weight of evidence supports a finding that claimant's back strain is causally related to her work injury of September 2, 1984.

The next issue for consideration is the extent of claimant's industrial disability. The factors for evaluating industrial disability are set out in the preceding citations. Claimant's condition at the time of the injury was that of a normal 34 year old female who was six months pregnant and overweight. As a result of the injury, claimant sustained a mild lumbosacral strain and was off work for five months. Claimant related that her pregnancy resulted in a normal delivery. Claimant's prior

work experience involved working as a licensed practical nurse. Since the injury, claimant is working 40 hours per week as a corrections advisor though on probationary status and has worked at least two months as an alcoholism counselor. She is also attending college to obtain a bachelor degree in substance abuse counselor. Claimant is restricted by Doctors Kreiter and Wilson in lifting to a maximum of 35 pounds, in sitting to a maximum of four to eight hours at one time, in standing/walking to a maximum of zero to two hours at one time and in bending, kneeling, and climbing. See defendants' exhibit V. Dr. Kreiter opines that claimant suffers a five percent impairment to the body as a whole. Dr. Kreiter also opines that claimant's impairment may improve with time. Dr. Wilson opines that claimant suffers a 16 percent impairment to the body as a whole. Dr. Stierwalt opines that claimant suffers a 10 percent impairment to the body as a whole. Dr. Kreiter also opines that claimant's impairment may improve with time. More weight is given the testimony of Dr. Kreiter who specializes in fractures and diseases of the bones and joints. Claimant maintains that as a result of her injury, she can no longer return to her work as a licensed practical nurse. Claimant further asserts that defendant employer refused to return her to work with restrictions. Defendant employer denies that claimant was not allowed to return to work with restrictions. Claimant failed to disclose her present earnings. Claimant's reduction of earning capacity has not been greatly effected by her injury. Taking all these factors into account, it is determined that claimant's industrial disability is eight percent.

The deputy adequately and accurately analyzed the extent of claimant's entitlement to the payment of Dr. Stierwalt's chiropractic charges and that analysis is adopted herein.

FINDINGS OF FACT

1. On September 2, 1984, claimant sustained an injury to her back when she slipped and fell at work.

2. Claimant's back injury was diagnosed as a back strain.

3. As a result of the back injury, claimant was off work from September 4, 1984 through February 21, 1985.

4. As a result of the back injury, claimant is restricted in lifting to a maximum of 35 pounds occasionally; in sitting four to eight hours at one time; in standing/walking to a maximum of zero to two hours at one time; and in bending, squatting, kneeling, and climbing.

5. As a result of the back injury, claimant suffers permanent impairment to the body as a whole.

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6. Claimant is currently employed within her work restrictions as a corrections advisor.

7. Claimant has above average intelligence and is currently attending college to obtain a bachelor's degree in substance abuse counseling.

8. Claimant currently suffers an industrial disability of eight percent.

9. Claimant's treatments with Dr. Stierwalt after December 28, 1984 were not authorized by defendants.

CONCLUSIONS OF LAW

Claimant has established entitlement to healing period benefits for the period commencing September 4, 1984 through February 21, 1985.

Claimant has established entitlement to 40 weeks of permanent partial disability benefits based on eight percent industrial disability.

Claimant is entitled to reimbursement for 23 chiropractic treatments she received prior to December 28, 1984.

WHEREFORE, the decision of the deputy is modified.

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant healing period benefits commencing September 4, 1984 through February 21, 1985 at the rate of one hundred forty-nine and 35/100 dollars ($149.35) per week.

That defendants shall pay to claimant forty (40) weeks of permanent partial disability benefits at the rate of one hundred forty-nine and 35/100 dollars ($149.35) per week commencing February 22, 1985.

That defendants shall pay claimant the sum of three hundred forty-five dollars ($345) as reimbursement for medical expenses she incurred for chiropractic treatment prior to December 28, 1984.

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

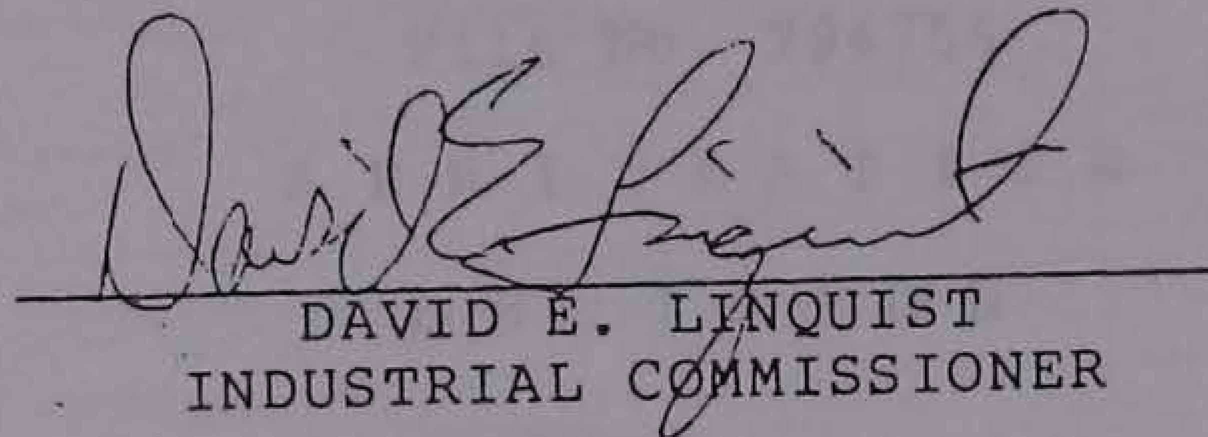
That defendants shall pay interest on benefits awarded

herein as set forth in Iowa Code section 85.30.

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

That 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 29th day of April, 1988.



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1108
Filed April 14, 1988
HELEN JEAN WALLESER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SANDY GORSETT, Claimant, vs. WILSON FOODS CORPORATION, Employer, Self-Insured, Defendant.	:	File No. 794756 A R B I T R A T I O N D E C I S I O N

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Claimant did not establish causal relationship between any additional disability and her work-related condition.

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IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SANDY GORSETT,	:	
Claimant,	:	File No. 794756
vs.	:	A R B I T R A T I O N
WILSON FOODS CORPORATION,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Sandy Gorsett, against her self-insured employer, Wilson Foods Corporation, to recover benefits under the Iowa Workers' Compensation Act as the result of an injury sustained on December 5, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner at Storm Lake, Iowa on November 10, 1987. A first report of injury was filed on May 21, 1985. Claimant has been paid 33 2/7 weeks of healing period benefits and 28.5 weeks of permanent partial disability benefits. The record in this case consists of the testimony of claimant and of claimant's exhibits 1 through 21 and defendant's exhibits A through J as well as of the stipulated statement regarding testimony of Mary Wuebben.

ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant did receive an injury arising out of and in the course of her employment on the stated injury date and that claimant's rate of compensation is $197.51. The issues remaining for resolution are whether a causal relationship exists between claimant's injury and her current disability and whether claimant is entitled to additional temporary total or healing period benefits as well as additional permanent partial disability benefits above the 15% of the hand disability benefits which the insurer has already paid.

REVIEW OF THE EVIDENCE

Claimant is 28 years old, single and a high school graduate. She began working for Wilson Foods, Inc. in 1979. Her only other work experience was as a care center cook and as a road construction flagger. Claimant began working on the boning line

after approxiately one year with Wilson Foods. She skinned hams. Ham skinning involved grabbing a 20-25 pound ham from the ham vat with the right hand. The ham was then placed on the skinning machine with both hands. Claimant estimated that she skinned approxiately 200 hams per hour by this method. Claimant is right handed.

Claimant testified that she noticed a lump on her left wrist which was increasing in size. She reported that, on approximately December 15, 1984, she saw the plant nurse who subsequently sent her to Keith Garner, M.D., the company doctor. He prescribed Naflon and took x-rays. She next saw him on April 26, 1985 at which time she was sent to Dean E. Meylor, D.C. Dr. Meylor wrapped and manipulated the wrist. Claimant described her left arm pain as between the knot on her wrist and two or three inches up her arm.

On May 30, 1985, claimant saw William Follows, M.D. Dr. Follows placed her on limited duty. Claimant worked until her seniority was not sufficient to allow her to continue on light duty. On July 25, 1985, Dr. Follows gave claimant a Cortisone injection and took her off work for one week. Claimant saw Thomas P. Ferlic, M.D., a hand specialist, on August 12, 1985. She reported that Dr. Ferlic placed her arm in a cast and removed her from work for 30 days. He subsequently removed her from work for another month and injected Cortisone below the wrist knob on September 19, 1985. On November 4, 1985, Michael T. O'Neill, M.D., examined claimant per referral of Dr. Ferlic. On December 19, 1985, claimant had surgery by way of a Bower's resection. Claimant returned to work on limited duty on March 11, 1986. Claimant reported that, on some days, she did work limited duty, but, on other days, did regular duty. She reported she still had much pain and swelling following her work day. Claimant testified that she would report to the company that she would not be in because of her pain and swelling, but would be told to come in for medical treatment consisting of wrist wraps and Advil.

Claimant saw Dr. Garner on March 24, 1986. Physical therapy was prescribed on a tri-weekly basis to April 4, 1986. Claimant stated therapy increased her wrist motion.

On April 7, 1986, claimant saw Patricia Jean Harrison, M.D., her family doctor, who removed her from work for one week, reportedly because of redness and swelling. Claimant could not recall whether she received workers' compensation benefits or company sick pay for the time she was off from April 7, 1986 to April 14, 1986. On April 16, 1986, claimant saw Dr. Garner. She testified that he refused her request to again see Dr. Ferlic, but told her to return in three weeks. On April 28, 1986, claimant had an incident at home with her wrist. Claimant denied that that pain differed from her work pain. An undated note of Dr. Harrison states, "bumped wrist at site of operation...

swelling." Claimant disagreed with characterization in a medical note that she had slammed her wrist in the desk drawer. Claimant stated she had bumped and not slammed the wrist. At hearing, the parties stipulated that, if Mary Wuebben, a registered nurse employed by Wilson Foods, were called to testify, she would testify that she was employed by Wilson Foods on April 28, 1986 and was on duty at 11:12 a.m. when claimant reported that she had a sore wrist and stated, "she slammed it in the desk drawer."

On April 29, 1986, claimant saw Dr. Harrison who then removed her from work until May 5, 1986. Apparently, on that date, Dr. Harrison removed claimant from work until Dr. Ferlic reexamined her on May 14, 1986. Claimant reported that she again saw Dr. Garner in May, 1986 and requested a split shift. She reported that the doctor and Larry Flood denied that request. Claimant reported that she returned to work on May 20, 1986 and left work early on May 23, 1986 and that, on May 27, 1986, Dr. Harrison removed her from regular work. Claimant has not worked since that date. She testified that she had been released for light duty work, but that Mr. Flood had reported that no light duty work was available.

Claimant testified that she continues to have left wrist problems and that the wrist swells if she uses it frequently. She reported that she has difficulty with dropping things. Claimant agreed that she has worked as a fill-in at Box Office Video since May, 1986. Claimant testified that she has had right side as well as left side discomfort.

Claimant reported that she saw A. J. Wolbrink, M.D., for a disability examination and that the doctor performed both grip and mobility testing. Claimant could not recall whether she had told Dr. Ferlic of the home incident. She was aware that she had not told Dr. Wolbrink of that incident.

A. J. Wolbrink, M.D., examined claimant on January 29, 1987. He reported that she had undergone a partial resection of the distal ulna of the left wrist on December 19, 1986. He reported that, as of January 29, 1987, she would have pain in the arm with excessive use with pain being predominently above the distal ulna, but also with pain above the shoulder as well. Claimant reported some loss of sensation about the incision, but no other significant parathesis. Claimant did not relate any previous problems or past history with the wrist.

On examination, claimant had no tenderness in the cervical spine muscles. Left shoulder did have some crepitation with motion. Claimant was able to touch her chin on her chest and had normal extension, side bending and rotation of the cervical spine. Claimant had full 170 degrees of forward flexion of the left shoulder as well as full 60 degrees of internal rotation and 60 degrees of external rotation and seemed to have normal strength throughout the shoulder. She had mild discomfort with

forward flexion, abduction motion. She had normal range of motion of the elbow. Rotation of the left forearm was limited to 80 degrees at supination comparable with the right arm and 30 degrees of pronation in the left arm compared to 80 degrees in the right arm. Claimant had 30 degrees of dorsiflexion, 45 degrees of palmar flexion and normal ulnar and radial deviation. Claimant had grip strength of 18/16/20 Kg. in the left hand compared 38/32/31 in the right hand. Claimant had no significant circulatory or neurosensory deficit.

The doctor's impression was that claimant had suffered an injury to the distal radial joint of the left wrist which had resulted in some restricted motion, weakness and residual pain in the wrist. He opined that claimant had a 21% permanent impairment of the upper left extremity due to residual loss of range of motion and strength. The doctor opined that claimant could not tolerate many pulling, pushing and twisting motions with the left wrist.

On May 30, 1985, William Fellows, M.D., an orthopaedic surgeon, reported that claimant had increasing pain in the left wrist right around the ulnar styloid. The styloid was reported as perhaps a little dorsally prominent, but not excessively so. Claimant had full pronation and supination, flexion and extension of the wrist. Tenderness was on the ulnar side of the distal ulnar head. X-rays were normal other than that the ulnar may be a little posterior. The doctor's opinion was that claimant's problem was tendonitis.

On May 27, 1986, P. J. Harrison, M.D., reported that claimant had reinjured her wrist and had limited range of motion. The doctor reported she needs to not overwork her wrist and, if she cannot reduce her work, or do simple flexion-extension, she should not work.

Dean E. Meylor, D.C., initially treated claimant on April 26, 1985, diagnosing an acute, severe carpal tunnel syndrome, complicated by laxity of the wrist. On May 8, 1985, he reported that radial and ulnar deviation continued to create some discomfort and that, with the laxity of the support structures in the wrist, he felt that the radial and ulnar lateral deviation would continue to be a problem for some time with no guarantee of complete resolution.

Thomas P. Ferlic, M.D., an orthopaedic surgeon, diagnosed claimant's condition as degenerative joint disease, distal radial ulnar joint on the left. On December 19, 1985, he performed a Bower's resection of the distal ulna. On March 4, 1986, Dr. Ferlic opined that claimant should be able to return to her former occupation and rated her as having a permanent "disability" of 15% of the hand under the manual for orthopaedic surgeons in evaluating permanent physical impairment. On May 14, 1986, Dr. Ferlic noted that claimant's was "a fairly standared

[sic] amount of disability and is rateable to the hand even though even though [sic] it is her wrist." On physical examination of that date, claimant had no erythema or induration over her distal ulna. She had no gross swelling, but had mild tenderness over the area of the scar. She had no gross subluxation of the distal ulna and had virtually full supination. Her pronation was to within 25 degrees of normal, although the last ten degrees were obviously tender for her. She had full flexion and extension and no radial head tenderness or problems. Neurovascular status was intact to the hand. The doctor opined that, as of that date, claimant was capable of packing house work in a job which did not require excessive pronation. He reported that she could do any job requiring full flexion and extension of the wrist with the wrist in neutral or in some supination.

On April 25, 1986, Dr. Garner saw claimant in a conference with Larry Flood, Mary Ketterman, R.N., and John Ketelson, a union representative. The representative apparently stated that claimant's wrist was still stiff and she was unable to do her job on a skinning machine, which she worked right-handed. Dr. Garner stated it was questionable how much work claimant had to do with her left hand. Dr. Garner indicated that claimant was to obtain a job description, return to Dr. Ferlic, have him examine her and go over the job description and write a letter concerning the work status. Claimant was to continue working in the meantime. That arrangement was agreed upon by all parties concerned. On April 23, 1986, Dr. Garner reported that claimant continued to have difficulty with getting full pronation. She was working on strengthening in supination and pronation. On May 1, 1986, the doctor reported that claimant was gradually gaining more pronation. Her wrist was reported as sore that week and she was off work. On June 18, 1986, B. Goettsch, L.P.T., reported that claimant was making slow improvement, but still did not have normal pronation and apparently was to continue physical therapy weekly. As of July 2, 1986, it was reported that claimant received whirlpool and gentle passive range of motion and encouraged pronation, also strengthening of pronators on the right hand.

APPLICABLE LAW AND ANALYSIS

Our first concern is the causal connection issue.

The claimant has the burden of proving by a preponderance of the evidence that the injury of December 5, 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 much ado has been made over the issue of whether claimant "bumped" or "slammed" her wrist at home on April 28, 1986, the precise action involved appears to have little bearing on the actual resolution of this issue. Claimant apparently had been able to work, at least on an intermittent basis, prior to the incident at home. Following the home incident, claimant was off work from April 29, 1986 until she returned to work on May 20, 1986. Claimant apparently worked May 20, 1986 as well as May 21, 22 and part of the day on May 23, 1986. On May 27, 1986, Dr. Harrison removed her from regular work. Claimant has not worked since that date. While claimant had continued to receive treatment prior to her home incident, she apparently had been working after March 11, 1986, except for the period April 7, 1986 through April 14, 1986. Nothing in the record suggests that claimant would not have continued to work, but for the April 28, 1986 home incident. Likewise, nothing suggests that claimant would not have continued work after May 20, 1986, but for the intervention of the April 28, 1986 incident. Indeed, by agreement of all parties on April 25, 1986, claimant was to continue working until further evaluation and the report of Dr. Ferlic was obtained. Likewise, no physician has indicated that claimant's current condition relates only to her work injury and not to the intervening incident. Neither Dr. Ferlic nor Dr. Wolbrink mentioned the work incident in reports of examination subsequent to that incident. Claimant acknowledges that she did not tell Dr. Wolbrink of that incident in her January 29, 1987 examination by that doctor. Dr. Harrison's light-duty restriction of May 27, 1986 does not relate that restriction to claimant's work-related condition and not to her home incident. [While, in the absence of opinion testimony as to causation the absence of a complete medical history may be irrelevant to this issue, it has import concerning the question of whether the doctor's 21% permanent partial impairment of the left upper extremity assigned to claimant can be properly attributed wholly to her work incident. See Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128, 133 (1967).]

We consider the benefit entitlement questions. Initially, we consider claimant's contention that she is entitled to additional temporary total disability for the time off from

April 25, 1986 to May 16, 1986 and from May 23, 1986 to June 21, 1986.

Section 85.33(1) provides that the employer shall pay an employee for injury producing temporary total disability weekly compensation benefits 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 the injury, whichever occurs first. As discussed above, claimant has not established that her time off work from her April 28, 1986 home incident onward related to her initial work injury and not to the home incident. For that reason, claimant has shown no entitlement to temporary total disability benefits for that period.

We consider the permanent partial disability entitlement questions.

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 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).

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).

An injury to the wrist is generally considered to result in disability to the hand rather than to the upper extremity, that

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is, the arm. Elam v. Midland Manufacturing, II Iowa Industrial Commissioner Report, 141 (App. Decn. 1981).

On March 4, 1986, Dr. Ferlic, who performed claimant's surgery, opined that she had a 15% permanent partial impairment of the hand. On May 14, 1986, Dr. Ferlic noted that claimant had a fairly standard amount of "disability." He reported that that was ratable to the hand, even though it was in her wrist. The doctor's May 14 examination was subsequent to claimant's home incident. He reported that, as of that date, claimant had no gross subluxation of the distal ulna and had virtually full supination. Pronation was within 25 degrees of normal and she had full flexion and extension and no radial head tenderness or problems. Dr. Wolbrink, an examining physician, saw claimant on January 29, 1987 and then opined that she had a 21% impairment to the left upper extremity. He noted that rotation of the left forearm was comparable to the right and that claimant had 30 degrees of pronation on the left, 30 degrees of dorsiflexion and 45 degrees of palmar flexion. Dr. Wolbrink related claimant's impairment to an injury to the distal radial joint of the wrist, reporting that claimant had restriction of motion, weakness and residual pain in the wrist. He was unaware of claimant's home incident and did not relate her wrist injury to either her work or to the home incident. Dr. Ferlic also did not mention the home incident when he examined claimant on May 14, 1986. However, as of that date, the doctor saw no reason to evaluate claimant differently than he had evaluated her prior to the home incident. Dr. Ferlic's long-term treatment of claimant should have placed him in a better position than Dr. Wolbrink as far as assessing any additional damage to claimant on account of the home incident. He apparently did not observe any change in claimant's permanency when he examined her on May 14, 1986. Hence, even had claimant had a change of condition on account of the home incident, it apparently was not evident upon examination on May 14, 1986. For that reason, we accept Dr. Ferlic's evaluation of permanency of 15% percent of the hand. In accepting the doctor's position, we note that, following Elam, claimant's impairment remains in the hand. Nothing in the record as made suggests that the impairment extends beyond the wrist joint into the arm.

Section 85.34(2)(l) provides that weekly compensation is due for the loss of a hand for 190 weeks. Dr. Ferlic's rating is of a 15% permanent partial impairment to the hand. Claimant, therefore, is entitled to 28.5 weeks of permanent partial disability benefits on account of that loss. The parties have agreed that the defendant has already paid that amount of permanency. Claimant is therefore entitled to no additional permanent partial disability benefits.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant injured her left wrist while performing repetitive motions in her job as a ham boner at Wilson Foods.

On December 19, 1985, Dr. Ferlic performed a Bower's resection of claimant's left distal ulna.

The Bower's resection was intended to treat claimant's condition which was diagnosed as degenerative joint disease, distal radial ulnar joint on the left.

Claimant returned to limited duty work on March 11, 1986.

On some days, claimant worked limited duty, but on other days, she worked regular duty.

Claimant received wrist wraps and Advil from the Wilson first aid station during this period.

On March 24, 1986, Dr. Garner prescribed physical therapy for claimant to April 4, 1986.

Therapy increased claimant's wrist motion.

On April 7, 1986, Dr. Harrison removed claimant from work for one week.

Claimant worked from April 14, 1986 through April 25, 1986.

On April 25, 1986, claimant, union and company representatives agreed claimant was to continue working until further evaluation and report of Dr. Ferlic.

On or about April 28, 1986, claimant had an incident with her wrist at home.

On April 29, 1986, Dr. Harrison removed claimant from work.

Claimant returned to work on May 20, 1986 and worked until she left work early on May 23, 1986.

On May 27, 1986, Dr. Harrison removed claimant from regular work.

Claimant has not worked for Wilson Foods since May 27, 1986.

On March 4, 1986, Dr. Ferlic opined claimant had permanent partial impairment of 15% of the hand.

On May 14, 1986, Dr Ferlic did not indicate that claimant's

rating differed from the rating given on March 4, 1986.

Dr. Wolbrink examined claimant on January 29, 1987.

Dr. Wolbrink assigned claimant a 21% impairment of the left upper extremity.

Dr. Wolbrink reported that such was due to an injury of the distal radial joint, but did not relate the injury to either claimant's work or to her home incident.

Claimant did not tell Dr. Wolbrink of her home incident.

Claimant did not tell Dr. Ferlic of her home incident.

Claimant's injury does not extend beyond her wrist joint into the arm.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established a causal relationship between the work injury of December 5, 1984 and either additional temporary total disability or additional permanent partial disability.

Claimant is not entitled to temporary total disability benefits from April 25, 1986 to May 16, 1986 or from May 23, 1986 to June 21, 1986.

Claimant is not entitled to additional permanent partial disability benefits on account of her December 5, 1984 injury.

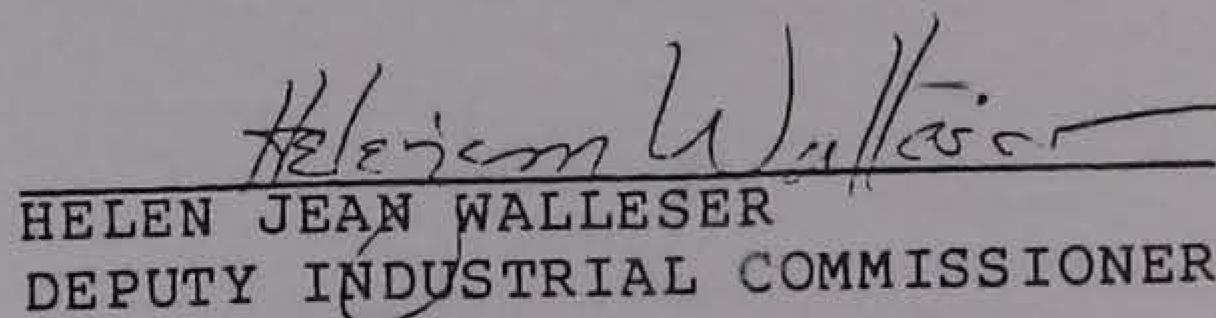
ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing further from this proceeding.

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

Signed and filed this 14th day of April, 1988.



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1803.1
Filed May 17, 1988
Deborah A. Dubik

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LESTER D. GOULD,
Claimant,

vs.

CONTRACT SERVICES, LTD.,
Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,
Insurance Carrier,
Defendants.

File No. 806729

A R B I T R A T I O N

D E C I S I O N

1803.1

Claimant's injury to his shoulder extended beyond the upper extremity and therefore found to be to the body as a whole. Claimant awarded 15% permanent partial disability benefits.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LESTER D. GOULD, Claimant, vs. CONTRACT SERVICES, LTD., Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 806729 A R B I T R A T I O N D E C I S I O N FILED MAY 17 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Lester D. Gould, claimant, against Contract Services, Ltd., employer, and Liberty Mutual Insurance Company, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained August 13, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner March 17, 1988. The record was considered fully submitted at the close of the hearing. The record in this case consists of the testimony of claimant and Linda Gould, his wife; claimant's exhibits A, B and C, and defendants' exhibits 1 and 4. Defendants' objection to claimant's exhibit B is overruled and the document is admitted for its probative value.

ISSUE

The sole issue presented for determination is the nature and extent, if any, of claimant's permanent partial disability.

FACTS PRESENTED

Claimant began working for defendant employer in July 1982. He explained he first went to Omaha from Texas for approximately two weeks, then, when a position in Knoxville, Iowa, became available, he transferred there and began working as a supervisor overseeing the cleanup and maintenance of the Hormel plant and grounds. Claimant described his position as a working supervisor of six people which involved, in addition to actually helping

with the maintenance work, a "great deal" of administrative work including bookkeeping, the keeping of time records, reports and doing personnel functions. Claimant sustained an injury which arose out of and in the course of his employment August 13, 1985 when he heard a "pop" in his right shoulder as he was putting a squeegee assembly on a floor scrubber. Claimant testified that he felt immediate pain but continued working that evening and the next morning, when he was still feeling pain, went to see his family doctor, B. C. Hillyer, M.D., of the Mater Clinic. Claimant continued his regular job for the next two months or so explaining that although his shoulder bothered him off and on during this period of time, he was continuing to take the pain medication prescribed by his physician and that he "lived with" the shoulder trouble.

Claimant was eventually referred to Jerome Bashara, M.D., who, in October 1985, repaired a tear in claimant's rotator cuff. Claimant testified that his shoulder was not really better after the surgery and that he was not capable, because of the pain, of returning to his regular employment. Claimant did eventually lose his employment with defendant employer when the company lost its cleaning contract with the Hormel plant in March 1986. Claimant acknowledged his separation from employment was attributable to the fact there was no longer a job rather than because of his injury, absence from work, or dissatisfaction with his work performance. Claimant testified he was under Dr. Bashara's care until approximately February 1987 but maintained that his shoulder did not truly improve as it continues to bother him when he lies down, it interrupts or prohibits sleep, and it causes pain in his back when he lies on his side. Claimant described a constant aching in the shoulder area, not going beyond the shoulder blade in his back with some stiffness in the neck and numbness to the elbow in the right arm. (It should be noted that claimant had surgery on both hands for carpal tunnel syndrome approximately two weeks before the hearing. Claimant does not make any claim that this is related to his injury of August 13, 1985.) Claimant testified that he "favors" his right shoulder, moves it around to keep it rotating and that driving causes numbness in his arms both inside and out.

Linda Gould testified that she has been married to claimant since 1962 and described claimant's injury as a "big physical breakdown" causing a loss of weight, a "broken spirit," a "lost ability to reason," and depression. She explained that when claimant attempted to do heavy physical work he felt pain into his neck and back. Mrs. Gould acknowledged claimant's carpal tunnel pain began when claimant was employed by another company in January through April 1987.

Robert Breedlove, M.D., orthopedic surgeon, testified he first saw claimant April 8, 1986 with primary complaints of pain with use of the right upper extremity and pain at night. Dr. Breedlove

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found claimant to have a near normal range of motion and, believing it was too soon after surgery to render an opinion on permanent impairment, recommended two to three months of physical therapy and suggested an anti-inflammatory medication. When claimant was next seen September 11, 1986, claimant continued to complain of right shoulder pain and a lot of popping in his shoulder with use. Dr. Breedlove found:

> On physical examination he has abdunction of 130 degrees, forward flexion of 165 degrees, internal rotation of 40 degrees, external rotation of 80 degrees, and backward elevation of 30 degrees. He is also tender over the AC joint.
>
> ....
>
> Permanent disability at this point is 9% to the right shoulder. This is based on 2% for decreased abduction, 2% for decrease forward flexion, 2% for internal rotation, 2% for external rotation, and 1% for backward elevation. I feel that the patient may benefit from a distal clavicular resection if his pain continues.

(Defendants' Exhibit 1; Deposition Exhibit 2, page 6)

Dr. Breedlove again examined claimant December 4, 1987 and of that examination testified:

> A. I examined the patient's musculature and he appeared to have normal muscle tone and thickness concerning the posterior muscles of the right shoulder as compared to the left shoulder. Range of motion examination was performed. Abduction was 160 degrees, forward flexion 140 degrees, external rotation 80 degrees, internal rotation 30 degrees and extension was 20 degrees.
>
> Q. Doctor, would it be a fair statement that his condition, based upon the examination of December 4th, 1987, had improved from that of September 11th, 1986, insofar as range of motion was concerned?
>
> A. Yes, his range of motion was improved somewhat.
>
> Q. Did you note any other problems that the claimant had which would have been attributable to the August 8th, 1985 incident other than what you've described for me here, based upon range of motion or a similar loss which would be covered under the AMA guidelines?

(Dep. Ex. 2, p. 9)

Dr. Breedlove concluded that claimant had a seven percent permanent partial impairment of the right dominant upper extremity which, by use of the AMA Guidelines converted to a four percent permanent partial impairment to the body as a whole.

On June 20, 1986, Dr. Bashara opined:

> This patient was last seen on May 29, 1986. He has now reached maximum improvement.
>
> His final diagnosis is a rotator cuff tear, right shoulder, treated by surgery on October 30, 1985.
>
> This patient is being given a 20% permanent partial physical impairment of his right upper extremity which converts to a 12% permanent partial physical impairment to his body as a whole related to his rotator cuff injury. The rating was given for a mild to moderate restriction of motion and mild loss of strength and pain.

The medical records of B. C. Hillyer, M.D., revealed claimant began treating for right shoulder problems in 1983 diagnosed as subacromial bursitis for which he received injections and medications. Claimant was admitted to the Knoxville Area Community Hospital with hemarthrosis and separation of the acromioclavicular joint on the right side secondary to an injury at work.

Claimant's exhibit B is the industrial disability appraisal of G. Brian Paprocki, M.S., V.E., who stated:

> Based on the information noted above, it is my belief that the claimant has sustained an industrial disability of approximately 30%. This rating is principally based on the following factore [sic]: the claimant's inability to return to his former employment as an industrial cleaning crew supervisor; the total loss of income while seeking reemployment; and the differential between the earning potential of his last job and the alternative work he is likely to secure.

(Def. Ex. B, p. 1)

(This document was admitted for its probative value. It is determined, however, that it has little probative value. Mr. Paprocki has not been shown to have the qualifications to render an evaluation of industrial disability. The document fails to

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indicate that Mr. Paprocki has any legal training and his report clearly indicates that he is not familiar with the concepts of industrial disability within the state of Iowa. Mr. Paprocki has based his industrial disability rating of approximately 30 percent on claimant's inability to return to work as an industrial cleaning supervisor, a loss of income while seeking reemployment, and the differential between earning potential of his last job and the alternate work claimant is likely to secure. A review of this criteria establishes that none of the criteria has anything to do necessarily with claimant's injury but all have to do with the fact that claimant lost his employment. It must be remembered that claimant lost his employment with defendant employer as a result of the employer's loss of the service contract and not as a result of claimant's injury, his absence, or any dissatisfaction with his employment. Defendant employer simply no longer had any work available to claimant. Further, a loss of earnings is only one of the many factors of industrial disability under Iowa law. The report fails to establish Mr. Paprocki conducted any studies into the actual availability of jobs to the claimant or his ability to perform any of available jobs. The usefulness of this report is limited to providing a summary of claimant's medical and employment history.)

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 Co., 256 Iowa 1257, 130 N.W.2d 667 (1964). A shoulder injury, not scheduled being, is an injury to the body as a whole. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949).

ANALYSIS

Although the parties have not stipulated claimant's work injury is the cause of permanent disability, the medical experts who testified or presented evidence agree that claimant's injury of August 13, 1985 has resulted in a permanent impairment. The essential issue for determination is the nature and extent of

claimant's permanent disability. Initially, it is determined that based upon the situs of the injury as well as claimant's own testimony of subjective symptoms beyond the upper extremity, claimant has 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 & Company, II Iowa Industrial Commissioner Reports 281 (Appeal Decision 1982), and Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986).

There are two impairment ratings in the record. Dr. Breedlove, who evaluated and was the last physician to see claimant for his work-related injury, opined claimant sustained a seven percent permanent partial impairment of the upper right extremity or four percent impairment to the body as a whole based upon the range of motion. Dr. Bashara, who surgically treated claimant for his injury, found claimant to have a 20 percent permanent partial impairment of the upper right extremity or 12 percent impairment to the body as a whole based on a "mild to moderate restriction of motion and mild loss of strength and pain." Dr. Bashara, however, fails to present any specific data on what constitutes "mild to moderate" or "mild loss" and fails to indicate exactly on what he is basing his opinion. None of Dr. Bashara's other medical records have been submitted into evidence and consequently, it is difficult, at best, to determine the accuracy of his opinion. Therefore, the opinion of Dr. Bashara is given less weight than the opinion of Dr. Breedlove who expressly states the basis for his rating.

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

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

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

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and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. These are matters which the finder of fact considers collectively in arriving at the determination of the degree of industrial disability.

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total, motivation - five percent; work experience - thirty percent, etc. Neither does a rating of functional impairment directly correlate to a degree of industrial disability to the body as a whole. In other words, there are no formulae which can be applied and then added up to determine the degree of industrial disability. It therefore becomes necessary for the deputy to draw upon prior experience, general and specialized knowledge to make the finding with regard to degree of industrial disability. See Christensen v. Hagen, Inc., (Appeal Decision, March 26, 1985); Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Claimant was 51 years old at the time of hearing and is a high school graduate with one year of junior college training in business administration. Claimant has work experience as a cook, baker, and working with dairy products. For approximately 19 1/2 years claimant worked in the sanitation department of Rodeo Meats in Arkansas City, Kansas, cleaning the packinghouse and equipment. Claimant was earning $450 per week with defendant employer at the time of his injury, and at the time of hearing was employed as a janitor working 39 1/2 hours per week at $4.00 per hour. It must be noted, however, that claimant's loss of his employment with defendant employer cannot be directly attributed to his injury since it was the employer's loss of its service contract with the Hormel plant that led to claimant's unemployed status. In addition to his laborer/janitorial duties with defendant employer, claimant performed supervisory and administrative duties including bookkeeping, personnel functions, and the keeping of time records and reports. However, it is acknowledged that the majority of claimant's work experience was not in supervision or management but rather was as a laborer doing the day-to-day work of a janitor. Claimant's medical records show that prior to his injury of August 13, 1985, he was diagnosed as having bursitis in his right shoulder which was severe enough to have sought medical attention and to have received pain medication. However, it does not appear from the records that this condition interfered with his ability to perform his job. Neither Dr. Bashara nor Dr. Breedlove, however,

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appear to place any restrictions on claimant's employability. Claimant exhibited marked sincerity during his testimony concerning his desire to be exact over events of the past and his need as well as his desire to be employed. Claimant's capacity to learn has clearly been hampered as a result of his injury. Considering then all of the elements of industrial disability, it is found that claimant has sustained a permanent partial disability of 15 percent for industrial purposes as a result of his injury on August 13, 1985.

FINDINGS OF FACT

Wherefore, based on all of the evidence presented, the following findings of fact are made:

1. Claimant, at the time of hearing, was 51 years old and a high school graduate with one year training in business administration at junior college.

2. Claimant has work experience as a cook, baker, working with dairy products, and a janitor, doing manual labor, supervising, and a combination of both.

3. Claimant sustained an injury which arose out of and in the course of his employment on August 13, 1985 to his right shoulder resulting in surgery to repair a torn rotator cuff.

4. Claimant sustained a permanent partial impairment as a result of the work injury.

5. Claimant has a permanent partial disability to the body as a whole as a result of the work injury of August 13, 1985.

6. Claimant, who was earning $450 per week at the time of the injury, lost its employment with defendant employer when the employer lost his service contract with the Hormel plant where claimant was employed as a working supervisor of six people cleaning and maintaining the plant and grounds.

7. Claimant is currently employed as a janitor earning $4.00 per hour.

8. Claimant's decrease in earnings cannot all be directly attributable to his injury although claimant's capacity to earn has been hampered as a result of his work injury.

9. Claimant continues to perceive a constant aching in his shoulder extending to his arm, back and neck.

10. Claimant has a 15 percent industrial disability as a result of his work injury of August 13, 1985.

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 establishing an injury to the body as a whole.

2. Claimant has established an industrial disability of 15 percent as a result of his work injury of August 13, 1985.

ORDER

THEREFORE, IT IS ORDERED:

That defendants are to pay to claimant seventy-five (75) weeks of permanent partial disability benefits at the stipulated rate of two hundred seventy-nine and 40/100 dollars ($279.40) per week commencing April 22, 1987.

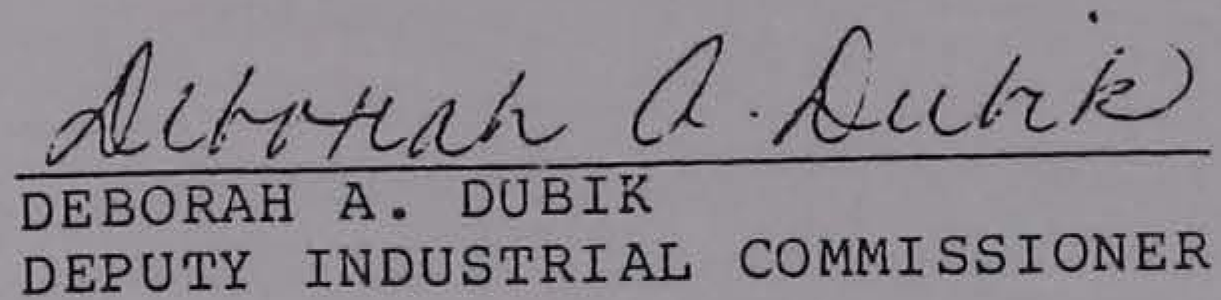
That defendants shall receive full credit for all permanent partial disability benefits previously paid.

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

That a claim activity report shall be filed upon payment of this award.

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 May, 1988.



DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

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1803, 2501, 2700, 4100
Filed April 20, 1988
HELEN JEAN WALLESER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY W. GRIFFIN,	:	
Claimant,	:	File No. 603461
vs.	:	R E V I E W -
EATON CORPORATION,	:	R E O P E N I N G
Employer, Self-Insured, Defendant.	:	D E C I S I O N

1803, 4100

An additional 25% permanent partial disability was awarded a 30-year-old male claimant with 10% to 20% permanent partial impairment, no post high school training and work experience as a manual laborer only. Defendant had not recalled claimant following his work injury. Claimant was not an odd-lot worker.

2501, 2700

Alternate medical care was allowed where the defendant had denied further liability to claimant on account of the work injury.

FILED
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APR 20 1988
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY W. GRIFFIN,	:	
Claimant,	:	File No. 603461
vs.	:	R E V I E W -
EATON CORPORATION,	:	R E O P E N I N G
Employer, Self-Insured, Defendant.	:	D E C I S I O N

INTRODUCTION

This is a proceeding in review-reopening brought by the claimant, Terry W. Griffin, against his self-insured employer, Eaton Corporation, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained on February 19, 1979. This matter came on for hearing before the undersigned deputy industrial commissioner at Storm Lake, Iowa on November 10, 1987. A first report of injury was received on July 17, 1979 as was a memorandum of agreement. At hearing, the parties stipulated that claimant has been paid 100 weeks of permanent partial disability. The parties stipulated that claimant has received all temporary total or healing period disability benefits to which claimant is entitled.

The record in this proceeding consists of the testimony of claimant, of Brenda Rae Griffin, of Ron Sanow and of Linda Maurer, R.N., as well as of claimant's exhibits A through Y and defendant's exhibits 1, 2 and 3. All objections to exhibits are overruled.

ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant's rate of weekly compensation is $134.38; that claimant's medical expenses reflect fair and reasonable charges for reasonable and necessary medical treatment; and, that a causal relationship exists between claimant's injury and a permanent partially disabling condition. The issues remaining for resolution are:

Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement, including the related question of whether claimant is an odd-lot worker under the Guyton doctrine and the question of the commencement date of any

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permanent partial disability due claimant; and,

Whether claimant is entitled to payment of medical costs under section 85.27. As regards the latter issue, claimant requests that the employer be ordered to pay for myelogram under the direction of Thomas A. Carlstrom, M.D.

REVIEW OF THE EVIDENCE

Claimant is 30 years old and a high school graduate. He has no other formal training and has had no military service. Claimant worked as a tire changer and mechanic and in constructing steel storage sheds prior to beginning work at Eaton Corporation in August, 1978. Eaton is a manufacturer of hydraulic transmissions. Claimant initially worked as an LD transmission tester. He ran transmissions through a testing machine. Claimant lifted individual transmissions weighing from 25 to 35 pounds each onto the testing machine, approximately 100 per night. Claimant's starting pay at Eaton was approximately $5.60-$5.70 per hour. Claimant was earning $8.50 per hour in 1982 at Eaton. Claimant now earns $5.80 per hour working as a concrete and masonry assistant for his mother's cousin. Subsequent to his Eaton injury, claimant also worked for approximately four months as a temporary route truck driver for United Parcel Service. He earned $9.40 per hour in that position. Claimant reported that the United Parcel delivery job required lifting of not over 60 pounds with much lifting of under 10 pounds. He indicated that he was able to get along, but that the lifting he did do bothered him. Also, subsequent to his injury, claimant worked part-time driving livestock in a sale barn. His left leg easily tired in that work. Claimant worked briefly as a bottle sorter for a soft drink distributing company. Lifting empty cases bothered him some, but not a lot; he earned $3.60 per hour. Claimant has also been a part-time school bus driver, driving one hour to an hour and a half per day. Claimant could handle that position. Claimant has plowed, disced and cultivated on his parents' farm operation since his injury.

Claimant works approximately 47-55 hours per week on his masonry construction job. Claimant stated that he is looking for work which is lighter than the masonry construction job, but has been unable to find such. Claimant draws unemployment compensation during the winter. He denied that he has made most of his job applications during that season, however.

Claimant was injured on February 19, 1979 while moving parts with a forklift. He jumped off the forklift into an oil spill, caught himself, but injured his back. He was initially seen by A. C. Rice, M.D., who treated the condition as a muscle strain. Claimant reported a light-duty work return on the deburring bench until July 3, 1979 when William Follows, M.D., an orthopaedic surgeon, took him off work. On July 9, 1979, claimant saw

Albert D. Blenderman, M.D., for a second opinion. Surgery was subsequently performed on August 27, 1979. Claimant returned to light-duty work on the deburring bench on November 15, 1979 and apparently worked there until a layoff in March or April, 1980. Claimant testified that Dr. Follows assigned him a 10% permanent partial impairment rating which Eaton paid as 10% permanent partial disability. Claimant was called back to Eaton in either August or October, 1980. He reported that, per Dr. Follows, he was unable to bend and could lift only from 35-45 pounds. He worked running an Allan drill on the day shift. Claimant testified that he had a resurgence of symptoms in fall, 1980 with leg numbness and quivering as well as numbness in the groin area. He reported that he bid for his injury date job of smoothing transmissions outside and inside. He received the job in late 1981 or early 1982. He could handle that job without increased difficulty. Claimant subsequently worked as a heavy duty end cover deburrer in 1982 prior to a second layoff. Claimant testified that this job bothered his back as it involved increased bending and heavier lifting. He reported severe low back pain and what felt like a pulled muscle in the right leg. Claimant continued in either the honing job or the deburring job until a July, 1982 Eaton layoff. Claimant has not worked for Eaton since that layoff.

Claimant reported that, per Dr. Follows' direction, he saw Keith McLarnan, M.D., on August 2, 1982 and underwent a CT scan on August 9, 1982. Subsequent to interpretation of the CT scan, chymopapain injection was suggested. The Eaton Corporation did not allow the procedure. Claimant indicated that Dr. Follows then increased his permanent partial impairment rating "to 10 percent." Eaton subsequently paid claimant an additional ten percent permanent partial disability. Defendant's objections to hearsay testimony concerning conversations with the personnel manager are sustained.

Claimant testified that, in 1983, Eaton was recalling people. Claimant reported that his number [as to seniority] was passed. Claimant reported that, after persons with lower [seniority] numbers were rehired, he contacted Eaton, but continued to be passed over. Claimant attributed the passover to a decision made by the previous personnel manager. Claimant denied that he had ever given up recall privileges at Eaton.

Claimant stated that his present employer was aware of his "20 percent disability" and his inability to do heavy lifting when they hired him. Claimant reported that he has had increasing problems with numbness in the groin area in the past year. He reported sharp pain in the back of his right leg. Claimant reported that sweeping, lawn mowing, auto mechanic work and moving concrete produce problems for him. Claimant asserted that sitting produces groin area numbness and testicle pain. Claimant reported that, as a masonry assistant, he wheels and

levels cement and must bend over at times. He must be on his hands and knees. He reported that the bending as well as being on his hands and knees creates right leg and groin numbness. Claimant indicated that he lifts by pushing himself up with one hand while lifting with the other. Claimant reported that he can move a 35-pound cement block from a table or can lift up to 50 pounds from table height throughout the day without problems. He opined that he could lift approximately 10 pounds from a bent-over position. Claimant testified that he has had increasing quivering in his legs, particularly the right leg, in the last several years. Claimant can drive approximately 100-150 miles before needing to stop and walk about. Claimant reported difficulty bending over the bathtub to wash his five-year-old child's hair. Claimant apparently has a 20-pound lifting restriction from Dr. Follows as well as restrictions on repetitive bending and stooping. Claimant agreed that he has lifted greater than 20 pounds in order to continue working. Claimant agreed that exhibits 2 and 3 are photos of claimant working at the Eaton plant in July, 1985 removing concrete. He agreed that, in exhibit 2, he is rolling a piece of concrete to a bobcat. Claimant opined that the weight of the concrete would be approximately 45-50 pounds and stated that exhibit 3 was a photo of some of the heaviest work he has done for his present employer.

Claimant denied that he had twisted his back when he stepped in a hole in September, 1983 asserting he had twisted his ankle, but not his back at that time. Claimant agreed, however, that he has twisted his back a number of times since his employment with Eaton and stated he assumed he had gone to the chiropractor following such. Claimant reported that he had seen a Dr. Pringle, a chiropractor, the last two or three months for his upper back, but claimant denied that Dr. Pringle had treated his lower back reporting that Dr. Pringle has refused to touch his low back since his surgery.

Claimant agreed that he last saw Dr. Follows in 1982 and that he initially saw J. R. Peterson, D.O., in February, 1985. Claimant reported that he had seen L. F. Frink, M.D., in between treatment with Dr. Follows and Dr. Peterson. Claimant reported that he saw Thomas Carlstrom, M.D., on referral of Dr. Peterson. Dr. Carlstrom apparently suggested a CT scan and myelogram. Claimant had no health insurance and was unable to pay for such. Claimant could not recall whether Dr. Carlstrom had recommended an epidural steroid injection, but reported that he was willing to undergo any testing or surgical procedure that his doctors felt was appropriate.

Brenda Rae Griffin, claimant's wife since 1976, substantiated claimant's testimony regarding his life activity restrictions and identified medical costs with Dr. Peterson in evidence as related to claimant's work injury.

Ron Sanow, floor supervisor for Eaton Corporation, reported that he had observed claimant working outside the plant in July, 1985. Mr. Sanow reported that claimant was then carrying and rolling cement blocks weighing from 35 to 40 pounds. He reported that claimant performed the job for several days.

Linda Maurer, occupational health nurse at Eaton Corporation since November, 1981, reported that, in November, 1982, per Dr. Follows, claimant was restricted to 20 pounds lifting with no repetitive bending or stooping. She testified that, in 1985, claimant's man number was reached for recall, but that no positions were then available within claimant's restrictions. She testified that this was the sole reason claimant was not returned to work. Ms. Maurer reported that, on July 25, 1985, the Eaton Corporation referred claimant to Robert R. Giebink, M.D., who assigned claimant a 20% body as a whole "disability" which she stated that Eaton had already paid in 1983. Maurer reported that she had observed claimant tearing up cement outside the plant on July 22, 1985. She reported that claimant was then lifting "way beyond" Dr. Follows' restrictions and was not using proper body mechanics. She reported that she has observed claimant working at home doing construction, lifting, bending, stooping and picking up chunks of cement which she believed exceeded Dr. Follows' restrictions. She reported having further observed claimant working on an eye clinic job, also lifting beyond 20 pounds.

On December 8, 1986, Jeffrey R. Peterson, D.O., noted that, subjectively, claimant continued to have low back discomfort, constant in nature, but sometimes much worse. He stated that, with activity, claimant noticed progressive weakness, numbness and tingling in the right lower extremity, especially that fall after attempting to hunt pheasant. Claimant continued to be unable to lift any weight of more than 40 pounds on a repetitive basis. Such lifting caused low back pain which felt like claimant had been beaten with a hammer. He had a sensation of swelling and pain in the right lower extremity with some intermittent left leg discomfort. Claimant continued to have numbness and tingling sensation about the groin and inner thighs, but denied any weakness sensation in the left lower extremity. Claimant was using Motrin on a PRN basis for the pain in the low back and the right lower extremity. When questioned regarding the condition of his back and leg at that point as compared to a year earlier, claimant stated that overall there had been no improvement and, in fact, his activity may have been more limited than before. Claimant stated that he could not get on his hands and knees and trowel cement and that he noticed discomfort when sitting during breaks at work. At those times, he would get severe back pain associated with numbness, tingling and pain in the right lower extremity. Claimant was having occasional electric-like pains down the right lower extremity as well. On physical examination, claimant had increased lordosis in the lumbar region with moderate lumbar paravertebral muscle

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spasms, right more than left. There was some obvious atrophy of the right hamstrings. Claimant was able to walk equally well on both toes. Claimant was markedly weak on the right heal with early fatigue. Claimant had only minimal restriction of flexion and full extension on range of motion testing of the lumbar spine with right and left lateral flexion limited by five to ten degrees in each direction. Rotational movements in the lumbar spine were limited by approximately 10 degrees both to the right and to the left. The right Achilles reflex was diminished at plus one-fourth dash four with the left plus one negative two slash four. There was no ankle clonus; plantar reflexes were normal. Straight leg raising was positive at 70 degrees on the right; negative to 80 degrees on the left. The diagnoses were of persistent right lower extremity and back discomfort following an L5-S1 laminectomy and probable recurrent herniated disc at L5-S1 on the right as well as persistent neurologic changes in the right lower extremity including sensory changes and motor weakness, especially the right hamstrings.

On April 30, 1985, Dr. Peterson had opined that claimant then had a greater limitation of function and activity as well as fewer opportunities for gainful employment than he had had in 1982 when last evaluated for disability. The doctor cited numerous examples of a worsening of claimant's condition, including additional left-sided pain at all times. The doctor stated that claimant reported that his right side still bothered him as before, but he continued to have more problems in the left back. The doctor reported that, two years earlier [1983], claimant was able to bale hay and scoop manure for extended periods of time, but currently [1985] was unable to scoop manure, except for very short periods. Claimant was unable to sit for more than a few minutes as he had increased low back pain with prolonged sitting and he was no longer able to lift up to 40 pounds for more than a very short time without increased low back pain. Dr. Peterson then opined that, if claimant had had a 20% permanent partial "disability" in 1985, he should be reevaluated as, in the doctor's estimation, he had a 10-20 percent greater impairment in 1985 than he had had previously.

In his deposition taken December 9, 1986, Dr. Peterson stated that he had not seen any records of left-sided pain or discomfort prior to his examination of claimant in February, 1985. The doctor again opined that claimant's subjective symptoms regarding back pain, left leg pain and right leg pain were getting worse in 1985 as compared to two or three years earlier, that is, at the time of Dr. Giebink's examination in 1983. The doctor related claimant's continuing subjective complaints and findings to his 1979 injury. He felt that claimant had developed new or additional symptoms which were an aggravation of his underlying problem. Dr. Peterson opined that he had referred claimant to Dr. Carlstrom as he felt claimant deserved further work-up and neurosurgical opinion for his low

back problems. The doctor stated that claimant had had a CT scan which suggested recurrent ruptured disc and was having a difficult time finding satisfactory employment as well as continuing to have problems. He stated that, if something further could be done to better his situation, it should be pursued. Dr. Peterson characterized Dr. Carlstrom's letter as reporting that claimant needed a CT scan and a myelogram to define further definitive treatment.

Dr. Peterson reported that there were some very minor differences between his findings on examination on December 8, 1986 and the findings of Dr. Giebink in September, 1983. He reported that claimant's range of motion testing was a little better when examined in 1986 than when examined by Dr. Giebink. Rotational movements were a little worse "at this time" than in June, 1985. The doctor did not recall any significant differences of opinion in sensory testing. Dr. Peterson opined that, if claimant did have a recurrent ruptured disc on the right at L5-S1, definite benefit would likely result from laminectomy or discectomy.

On July 18, 1986, Dr. Follows opined that claimant had a permanent "disability" of 10%. He then opined that claimant should avoid heavy lifting as well as repeated lifting, bending or stooping. On November 29, 1982, Dr. Follows restricted claimant from lifting more than 20 pounds and from repetitive bending or stooping. On July 19, 1982, Dr. McLarnan recommended a CT scan at the L5 to S3 nerve root distribution and reported that there was some evidence at that time of an S2 and S3 sensory component. He was unable to explain why claimant's entire leg felt swollen or distended. On sensory exam, sharp sensation was diminished on the S2 distribution of the right posterior thigh. The S3 distribution on the buttocks was not diminished which was in the same dermatone as the penis. Earlier, Dr. McLarnan had noted that, originally in association with the swollen leg feeling, claimant had a sensation of numbness and tingling in the penis. At the time of examination, the leg or penile discomfort could be independent of each other. Claimant was having no difficulty with starting and stopping of the urinary stream and was having no problems with erections or ejaculations. On August 17, 1982, Dr. McLarnan opined that a CT scan performed August 11, 1982 suggested some residual disc material on the right side at L5-S1. He reported that views of the foraminal outlets taken because of claimant's S2 complaint revealed no encroachment in those regions. On August 30, 1982, Kenneth B. Heithoff, M.D., a board-certified radiologist, interpreted the August 11, 1982 CT scan as showing no evidence of significant epidural fibrosis following previous laminectomy at L5-S1 on the right side, but as having evidence of a mass effect anterior to the S1 nerve root on the right. He reported swelling of the S1 nerve root below this mass effect. Dr. Heithoff opined that the most likely diagnosis was of recurrent

herniated disc at L5-S1 on the right. He suggested a Metrizamide enhanced CT scan which would identify the position of the S1 nerve root with certainty.

On November 18, 1981, Dr. Follows had reported that, two or three times over the last year, claimant had gotten numbness into the left leg and groin, including his penis area, usually when sitting in a peculiar position like on a toilet stool or sitting cross-legged.

On September 9, 1983, Dr. Follows opined that claimant had a "20 percent permanent disability" on the basis of his back problem. He reported that such represented a reaggravation and a continuation of his previous injury and not a new, entirely different injury.

Dr. Giebink, an orthopaedic surgeon, examined claimant on June 25, 1985. He reported present complaints of pain in the lower back, cramping pain in the legs, and intermittent numbness involving both legs on the posterial lateral aspect of the calf with muscles seeming to quiver a lot. Claimant reported that it did not seem to make much difference whether he sat, stood, walked or worked. Walking and driving produced the most trouble; coughing and sneezing sometimes aggravated the condition. Claimant reported that his back felt pretty stiff in the morning, but limbered up as he got going. He reported getting through the day okay, but aching a lot in the evening. Claimant slept on a waterbed and reported that he slept "pretty good." On physical examination, motion of the lower back was mildly restricted with claimant able to reach about three inches from the floor with his knees extended. Claimant could forward flex to about 75 to 80 degrees; extension and side bending were restricted about five degrees with pain on bending to the right side. Rotation was also mildly restricted. The right thigh, five inches above the patella, measured one-half inch smaller in circumference than the left thigh. Right and left calf each measured about 17 inches in circumference. Patellar reflexes were brisk and equal. The right Achilles reflex was reported as present, but reduced. The right Achilles reflex being about one plus with the left Achilles reflex about two plus. Testing for strength on the left foot was normal with the right foot showing slight but definite weakness of the dorsiflexor muscles of the right foot, particularly the peronial muscle group. Claimant had diminished sensation to pin prick over the lateral side of his right heel and foot, posterial lateral aspect of his right calf and the lateral aspect of his right thigh. Similar, but not nearly as marked findings were present on the left side. Straight leg raising was free on the left side, but limited to about 80 degrees with pain and pulling on the back on the right side. Lumbar lordosis was present.

Dr. Giebink reported that claimant would not be able to

return to heavy work and would always be restricted in lifting, stooping, shoveling and like activities. He reported the usual lifting limitation as about 25-30 pounds with occasional lifting of 50-60 pounds if using the back straight and if using the knees. The doctor opined that claimant could not return to the work he was doing at the time of his injury as that involved considerable heavy work. He reported he could return to work in a lighter capacity. He felt that claimant had a 20% impairment of function of his whole body as the result of the injury and subsequent disc surgery.

On October 8, 1987, Dr. Carlstrom reported that he had seen claimant in his office on October 1, 1987. He reported that claimant had radicular symptoms on the right, relating principally to the S-1 nerve root and that it was conceivable that he may have a lesion in the low back which could be fixed with laminectomy. He felt claimant needed a myelogram for decent definition of the lesion. Dr. Carlstrom did not believe that a CT scan would be helpful. Dr. Carlstrom reported claimant's alternative to surgical intervention was simply "to live with it." He reported claimant had been doing fairly well for the last year or two and probably could do so into the future. Dr. Carlstrom opined that claimant's symptoms would be considerably reduced with activity restriction, particularly restrictions on heavy exertion and heavy lifting. The doctor thought that surgery was a reasonable approach and that claimant's symptoms may improve, but that more information was needed before pursuing that further. Dr. Carlstrom reported that he had "mentioned" epidural steroid injection to claimant.

On January 22, 1986, Dr. Carlstrom felt that, while claimant could have recurrent radiculopathy and perhaps might benefit from a reoperation, he mostly likely had myofascial symptoms which should be treated conservatively.

At various times, Dr. Peterson, Dr. McLarnan and Dr. Carlstrom recommended that claimant lose weight as a means of potentially improving his physical condition.

Claimant's exhibit X is an unsigned agreement bearing a space for claimant's signature as well as that of S. E. Shepard and Linda Maurer stating that claimant agrees to give up recall privileges at Eaton Corporation's Spencer, Iowa plant effective on the date of the signed agreement. The agreement initially stated that, upon payment of 10% permanent partial disability settlement, claimant would release Eaton Corporation from all future liability regarding injuries sustained while employed at Eaton from August 21, 1978 through November 29, 1982. Claimant's exhibit Q is a typed listing of job applications made since 1983. Forty-one entries from 1983 through September, 1987 are listed. A number of entries represent reapplications with the same potential employer. Claimant's exhibit S is a series of charges

with R. K. Peterson, D.O. It was agreed at hearing that a charge of $17.00 for an office call of February 27, 1987 was not related to claimant's injury. An office call of April 16, 1987 with a charge of $17.00 relates a first diagnosis of baker's cyst, right knee and a second diagnosis of right lumbar radiculopathy. Four charges for blood pressure and weight check at $5.00 each are also listed as are two telephone consultations for $3.00 each for pain medication prescriptions. Office calls of August 21, 1986, September 8, 1986 and September 21, 1987 relate to right sciatica, or probable recurrent ruptured disc at L5-S1 on the right. Each such office call carries a charge of $17.00. Claimant's exhibit T is a statement of Dr. Carlstrom for a neurological exam of January 16, 1986 for $65.00 and was apparently paid on March 10, 1986. An office call of October 1, 1987 with a charge of $40.00 remains outstanding.

APPLICABLE LAW AND ANALYSIS

A memorandum of agreement settles the question of employment relationship and the question of whether the injury arose out of and in the course of the employment. Claimant is not required to prove a change of condition after the filing of the memorandum of agreement, but is required to prove that increased disability for which no compensation has been paid was proximately caused by the injury. Caterpillar Tractor Company v. Mejorado, 410 N.W.2d 675 (Iowa 1987).

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 19, 1979 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).

No competent physician has opined that claimant's current

condition does not relate back to his original injury. Indeed, Dr. Giebink and Dr. Peterson both have related claimant's more recent condition to the original injury. Claimant has testified that he has twisted his back on occasion since his original injury. No evidence of new back incident was present, however. One, therefore, assumes that whatever "twisting" incidents occurred were simply symptomatic aggravations of claimant's underlying condition and were not new injuries. The medical evidence establishes that increased disability claimed is proximately caused by the original injury. We therefore consider the benefit entitlement question.

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

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

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

There are no weighting guidelines that indicate how each of the factors are to be considered. There are no guidelines which give, for example, age a weighted value of ten percent of the total value, education a value of fifteen percent of total,

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

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

Similarly, a claimant's inability to find other suitable work after making bona fide efforts to find such work may indicate that relief would be granted. McSpadden v. Big Ben Coal Co., supra.

Claimant is a high school graduate. He has no other training. Claimant is 30 years old and his latest impairment rating suggests a 20% permanent partial impairment. Various doctors have issued various restrictions. Generally, however, claimant is restricted to lifting no more than 20 to 30 pounds and has restrictions on repetitive bending, stooping, lifting, shoveling and like activities. Claimant's prior work experience has all been in manual labor. He testified to a variety of jobs which he has held since his injury, some of which were apparently beyond his limitations. Claimant's employer has not recalled him. The employer stated they did not recall claimant because they did not have work within claimant's restrictions. Dr. Giebink has indicated claimant could not go back to his job at the time of injury, but could do lighter work. Claimant testified that, subsequent to his injury, he had been able to handle the transmission smoothing job he had been doing at the time of his original injury. The record does not suggest that the defendant has made a good faith effort to return claimant to work. Claimant is currently working for a relative who tolerates claimant's problems. All parties are in agreement that claimant, on occasion, has to work beyond his restrictions in that job. The defendant has made much ado concerning such. We do not believe, however, that Iowa's workers' compensation law requires an employee, after an injury, to take only those positions within medically imposed restrictions if his alternative to going outside of the restrictions is to secure no livelihood for himself and for his dependents. Claimant has sought work other than that in which he is now employed. The record does not establish that those efforts are not genuine and diligent. Claimant was earning $8.50 per hour at Eaton in 1982 and is now

earning $5.80 per hour. While an actual reduction in earnings is not, per se, an indication of industrial disability, it is a factor to be considered with other factors in assessing industrial disability. Claimant appears well motivated and appears to have made serious efforts to mitigate the economic effects of his work related injury. Claimant, unfortunately, has only limited experience and training. He currently, as regards such, is best suited for the heavy manual labor which he should no longer perform. Claimant is a younger worker, however. He appeared to be of at least average intelligence and was well spoken. We suspect he would be a good candidate for vocational rehabilitation into lighter duty work, were that opportunity available to him. We note also that the employer made no attempt to assist claimant with vocational rehabilitation. All factors suggest that claimant has a loss of earning capacity of 45%. The defendant, pursuant to section 85.34(4), is entitled to credit for the 20% permanent partial disability already paid claimant.

While claimant has raised the question of whether he is an odd-lot worker under the Guyton doctrine, the record does not show claimant is an odd-lot worker. As noted above, claimant is currently working, albeit outside of his restrictions. Claimant's restrictions are not so profound as to preclude him from obtaining employment in any well-known branch of the labor market. Nor can it reasonably be said that claimant is so totally disabled that the only services claimant can perform are so limited in quality, dependability or quantity as to be lacking a reasonably stable market. Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985).

As regards the commencement date issue, the claim activity report of October 7, 1983 indicates that claimant's last payment of permanent partial disability was on October 5, 1983. Such apparently related to additional permanent partial disability payments voluntarily made following Dr. Follows' reassessment of permanent partial "disability" and his assignation of an additional 10% impairment. The record does not suggest that determination of industrial disability could not have been made at that time. Hence, additional permanent partial disability benefit payments should commence on October 6, 1983.

We consider the medical care and medical expense payment issues.

Section 85.27 requires the employer to furnish reasonable surgical, medical, osteopathic, chiropractic and other forms of medical care and supplies for injuries compensable under the Iowa Workers' Compensation Act. The employer has the right to choose the care. Treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. The employee may petition the commissioner for alternate care where, after communicating dissatisfaction with

the care to the employer in writing, the employee and the employer cannot agree on alternate care reasonably suited to treat the injury.

The evidence establishes that claimant's treatments with Dr. Peterson, at least in part, related to treatment of his original injury. Costs in evidence with Dr. Peterson are contained on Exhibit S. A number of charges on Exhibit S do not appear to be causally related to the injury, however. Charges for blood pressure and weight check are not sufficiently related to claimant's work situation. Office calls of August 21, 1986, September 8, 1986 and September 21, 1987 relating to right sciatica do relate to the work injury. The defendant is liable for a charge of $17.00 as regards each such call. An office call of April 16, 1987 with a charge of $17.00 carries both a diagnosis regarding a cyst on claimant's right knee and a diagnosis of right lumbar radiculopathy. The defendant is ordered to pay half of such cost, or a charge of $8.50. Dr. Peterson referred claimant to Dr. Carlstrom for an evaluation regarding his work-related back condition. Hence, charges with Dr. Carlstrom are also considered compensable. The defendant is ordered to reimburse claimant for the costs of a neurological exam of January 16, 1986 in the amount of $65.00 and to pay claimant costs of an office call of October 1, 1987 with a charge of $40.00 outstanding. We note that the employer did not apparently direct claimant to see Dr. Peterson or Dr. Carlstrom nor did the employer acquiesce in claimant seeking treatment from those physicians. The employer has consistently denied any further liability to claimant on account of his injury, however. Having taken the position that the employer has no further liability to claimant as well as the position that claimant's current conditions are not compensable as related to his 1979 work injury, the defendant has forfeited the right to choose claimant's medical care under section 85.27. See Barnhart v. MAQ, Incorporated, I Iowa Industrial Commissioner Report, 16 (1981).

Claimant seeks alternate care by way of administration of myelographic studies by or under the direction of Dr. Carlstrom. On October 8, 1987, Dr. Carlstrom opined that a myelogram would give "more decent definition of the lesion" that he felt claimant conceivably had in the low back, which lesion potentially could be "fixed with laminectomy." The doctor indicated that more information was needed before further pursuing a surgical approach to claimant's problem. The defendant apparently last had claimant examined by a physician of their choice, namely, Dr. Giebink, in June, 1985. The defendant had taken no further steps to assist claimant in amelioration of his condition. Claimant has seen Dr. Carlstrom at the direction of Dr. Peterson, who has been claimant's treating physician in the interim. Dr. Carlstrom's October 8, 1987 report suggests that myelographic studies are needful in order to better evaluate claimant's continuing symptomology and arrive at appropriate diagnosis and

treatment. Claimant has a satisfactory and established relationship with Dr. Carlstrom. Alternate care by way of myelographic examination by or under the direction of Dr. Carlstrom is warranted and granted. Further care as Dr. Carlstrom directs should also be construed as reasonable and necessary care compensable under the Workers' Compensation Act.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant sustained an injury in the course of his employment and arising out of his employment on February 19, 1979 when he jumped off a fork lift into an oil spill, caught himself and injured his back.

Claimant has proximally a 20% permanent partial impairment as a result of his 1979 injury.

Claimant has restrictions of 20 to 30 pounds on lifting as well as restrictions on repetitive bending, stooping, lifting, shoveling and like activities.

Claimant is a high school graduate.

Claimant has had no military experience and has no post high school training.

Claimant's work experience is limited to heavy manual labor.

Claimant is 30 years old.

Claimant's employer did not recall claimant to work after a layoff in July, 1982.

Claimant has sought a variety of jobs, but has been unable to find one within his restrictions.

Claimant is currently working as a concrete and masonry assistant for his mother's cousin.

Claimant's current employer is aware of and tolerates claimant's restrictions, but on occasion, claimant must perform activity beyond the restrictions imposed upon him.

Claimant is well motivated.

Claimant appears to be of average intelligence and would likely be a good candidate for vocational rehabilitation, if such were available.

Claimant's employer has not attempted to assist claimant in

vocational rehabilitation.

Claimant is not incapable of obtaining employment in any well-known branch of the labor market.

Services which claimant can perform for potential employers are not so limited in quality, dependability or quantity that a reasonably stable market for them does not exist.

Claimant is not an odd-lot worker under Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985).

The defendant last paid claimant permanent partial disability payments on October 5, 1983.

A finding as to claimant's extent of industrial disability could have been made at that time.

Dr. Peterson referred claimant to Dr. Carlstrom.

The defendant has denied liability for claimant's current medical condition and has not provided either medical care or medical examination since June, 1985.

Costs with Dr. Carlstrom in the amount of $40.00 and in the amount of $65.00 relate to claimant's work injury.

Costs of office visits with Dr. Peterson of August 21, 1986, September 8, 1986 and September 21, 1987 as well as part of April 16, 1987 relate to claimant's work injury condition.

Myelographic studies are appropriate to assess claimant's low back condition and determine whether and what other treatment is appropriate.

Claimant is comfortable with treatment with Dr. Carlstrom.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant is entitled to additional permanent partial disability on account of his February 19, 1979 injury of 25%.

Claimant is entitled to payment of medical costs with Dr. Peterson and with Dr. Carlstrom as set forth in the above applicable law and analysis.

Claimant is entitled to alternate care by way of myelographic study by or under the direction of Dr. Carlstrom as well as other care as Dr. Carlstrom directs.

ORDER

THEREFORE, IT IS ORDERED:

Defendant pay claimant an additional one hundred twenty-five (125) weeks of permanent partial disability benefits at the rate of one hundred thirty-four and 38/100 dollars ($134.38) with those benefits to commence on October 6, 1983.

Defendant provide claimant with alternate care by way of myelographic study by Dr. Carlstrom or under the direction of Dr. Carlstrom as well as other care as Dr. Carlstrom directs.

Defendant pay claimant medical costs with Dr. Peterson related to claimant's compensable injury as outlined in the above applicable law and analysis. Defendant pay claimant medical costs with Dr Carlstrom related to claimant's compensable injury as related in the above applicable law and analysis.

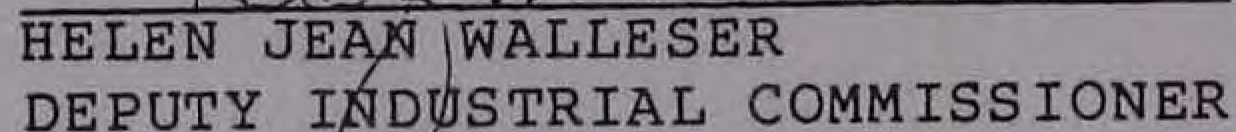
Defendant pay accrued amounts in a lump sum.

Defendant pay interest pursuant to Iowa Code section 85.30.

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

Defendant file Claim Activity Reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 20th day of April, 1988.



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1108
Filed June 30, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GERALD GWINN, Claimant, vs. CRST, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	FILE NO. 839795 A R B I T R A T I O N D E C I S I O N

1108

Claimant failed to show a causal link between his urinary tract infections and gallbladder problems with his duties at work as a truck driver. All benefits were denied.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GERALD GWINN, Claimant, vs. CRST, Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	FILE NO. 839795 A R B I T R A T I O N D E C I S I O N

FILED
JUN 30 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Gerald Gwinn, claimant, against CRST, Inc., employer (hereinafter referred to as CRST), and Liberty Mutual Insurance Company, insurance carrier, for workers' compensation benefits as a result of an alleged injury in September, 1985. On April 20, 1988, 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: Sheryl Gwinn and Leonard Weaver, III. Exhibits received into the evidence at the hearing are listed in the prehearing report. According to the prehearing report, the parties stipulated to the following matters:

1. In September, 1985, an employer-employee relationship existed between CRST and claimant.

2. Claimant is seeking temporary total disability or healing period benefits from November 2, 1985 through March 17, 1986 and the defendants agree that claimant was not working during this period of time.

ISSUES

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

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

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

III. The extent of weekly disability benefits to which claimant is entitled; 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. As will be the case in any attempted summarization, conclusions about what the evidence offered may show are inevitable. Such conclusions, if any, in the following summary should be considered as preliminary findings of fact.

Claimant testified that he started working for CRST as a truck driver in September, 1985. He stated that although he lives in Chariton, Iowa, he was dispatched from Cedar Rapids, Iowa. He stated that his duties consisted of over-the-road interstate truck driving of a semi tractor trailer truck. After recovery from the alleged work injury in this case, claimant purchased his own truck and now is self employed under an owner/operator lease arrangement. Claimant testified that while working for CRST he was "greedy" and "run harder than most" due to the fact that he was paid by the mile and not by the hour. Claimant stated that he probably worked harder than he should. In one month during his CRST employment, claimant said that he logged over 14,000 miles.

Claimant claims that he suffered a work injury in September, 1985, in the form of a kidney infection. He also claims that this infection led to gallbladder problems which eventually resulted in removal of his gallbladder and disability from work for several months in late 1985 and early 1986. Claimant attributes these problems to a change by CRST in September, 1985, from a smooth to a rough riding truck. While on a long run in this rough riding truck, claimant said that he told his dispatcher that he developed a kidney infection but could not be relieved. Claimant said that he began to pass blood on the return trip. Claimant said that he sought treatment upon his return from Loren C. Hermann, D.O., whose records indicate that

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he treated claimant for acute cystitis and pyelitis. Claimant was off work for a week and then returned to his normal truck driving duties after being "talked into returning" by his superiors at CRST. Claimant said that after one week the infection returned and he began to develope pain under the right rib cage. On November 2, 1985, this pain became so severe while on a road trip that claimant was compelled to terminated his driving. Claimant then called his wife, who is an LPN. Claimant testified that his wife told him that he might have a gallbladder problem. Claimant's wife then drove to Indiana to transport claimant back to his residence in Chariton, Iowa. Claimant returned to Dr. Hermann at that time who again treated claimant for complaints "similar" to the complaints he had in September, 1985. According to Dr. Hermann these problems resolved but his upper right quadrian pain persisted along with intolerance to greasy food. Claimant was then referred by Dr. Hermann to James Gould, M.D., a gastroenterologist, whose testing indicated an abnormal functioning of the gallbladder. After further conservative care failed to alleviate the problem, claimant's gallbladder was removed by William Wellington, M.D., in December, 1985. After recovery, claimant was released to return to work on March 16, 1986, but did not return to CRST. As stated above, he then began his owner/operator business.

Four physicians have rendered causal connection opinions in this case. Dr. Hermann stated in a report dated January 23, 1986 as follows:

> It is my opinion that his initial condition of acute cystitis and pyelitis was due to his employment driving duties. I feel that this condition may have resulted in a systemic infection which in turn contributed to his gall bladder condition. His history is negative for any prior treatment for any of these conditions. He continues to be totally disabled at this time.

Dr. Gould states in his consultation report of December, 1985 as follows: "I have no evidence that the patient's work had anything to do with his problem."

A specialist in urology and urological surgery (at least according to his letterhead) Hugh C. Dick, M.D., stated in his May 26, 1987, report as follows:

> It is my opinion that his occupation did not cause these illnesses. Patients in all walks of life occasionally develop urinary infections. This problem is a bacterial one and is not mechanically induced. I must also note that occasionally patient's who already have prostatic or urinary infection will have their symptoms aggravated by

mechanical factors such as he experienced in his job.

In Summary:

1) The occupation did not cause the bacterial infection.
2) There is no relationship between the gallbladder disease and the urinary infection.
3) After adequately clearing the infection with appropriate antibiotics, this fellow should have been able to return to work. I would expect that it should not have taken longer than 1-2 weeks of therapy.

Finally, Donald W. Blair, M.D., (specialty, if any, unknown) made the following statement in a report dated April 8, 1987:

> It would not appear to this reviewer that the complaints of cystitis, pyelitis as well as his gall bladder symptoms would be related to his truck driving activities. These would appear to be more of his own personal medical problems and I would feel that any medical compensation should be covered by his private medical insurance. There is no report from a urologist which has been submitted which would attribute the bladder or kidney situation to his truck driving activites.

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

APPLICABLE LAW AND ANALYSIS

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

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in

whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

In the case sub judice, claimant has not shown by a preponderance of the evidence a work injury. The case cited by claimant, Lanford v. Kellar Excavating and Grading Company, 191 N.W.2d 667 (Iowa 1971) is not applicable to the facts of this case. Unlike Lanford, the medical expert opinions in this case concerning the causal connection between claimant's kidney infection/gallbladder problems and his duties of driving a rough riding truck at CRST are conflicting. The two specialists, Dr. Gould and Dr. Dick do not agree with Dr. Hermann whose specialty, if any, is unknown. Although Dr. Dick opines that the kidney infection could be aggravated by claimant's truck driving, he denies any causal link between the gallbladder problems and urinary tract infection. It was the gallbladder problem in this case, not the urinary tract infection, which precipitated the absence from work for the periods of time requested by claimant in the prehearing report. Although claimant and his wife appeared credible in their testimony in questions of causal connection, this agency must rely heavily upon the medical experts. The greater weight of the evidence presented simply does not support claimant's position.

As claimant has failed to demonstrate a work related injury, the remaining issues of entitlement to disability and medical benefits are moot. Claimant and his wife, however, appeared sincere in their claim and will be awarded the costs of this action.

FINDINGS OF FACT

1. Claimant and his wife were credible witnesses.

2. Claimant was in the employ of CRST from September through November, 1985.

3. In September, 1985, claimant suffered a urinary tract infection while performing his truck driving duties for CRST which required medical treatment and absence from work for a period of one week.

4. In November, 1985, claimant suffered a severe recurrence of urinary tract infection and gall bladder problems involving treatment and absence from work during the latter part of 1985 and the early part of 1986.

5. No causal link could be found between claimant's urinary tract infection or gallbladder problems and his work at CRST.

CONCLUSIONS OF LAW

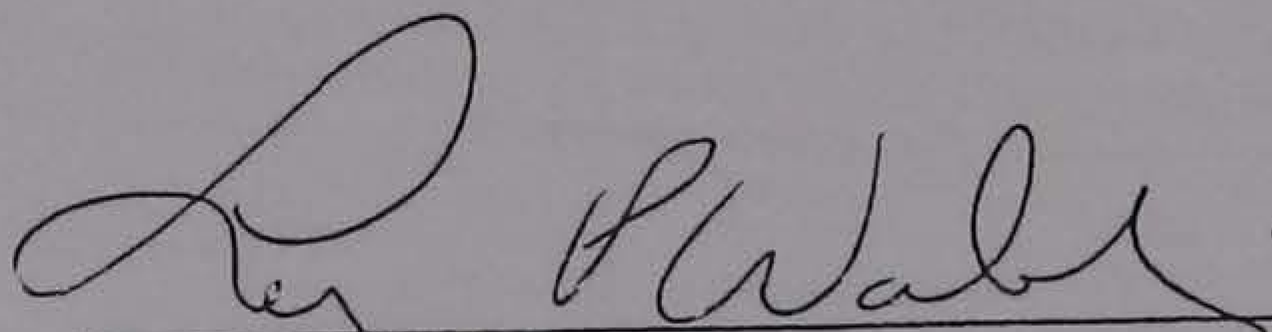
Claimant has failed to establish entitlement to disability or medical benefits.

ORDER

1. Claimant's petition for benefits is denied.

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

Signed and filed this 30 day of June, 1988.



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