Iowa Industrial Commissioner

Decisions

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IOWA INDUSTRIAL COMMISSIONER
1988

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STUART G. HALL, Claimant, vs. BACKMAN SHEET METAL, Employer, and IOWA CONTRACTORS' WORKERS COMPENSATION GROUP, Insurance Carrier, Defendants.	:	FILE NO. 688256 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 25 1988 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

Stuart G. Hall, the claimant, filed a review-reopening petition on May 28, 1986. Defendants are Backman Sheet Metal, employer, and Iowa Contractors' Workers Compensation Group, insurance carrier. The petition seeks additional benefits under the Iowa Workers' Compensation Act as a result of an injury on November 5, 1981. The case was heard and submitted at Des Moines, Iowa on February 15, 1988, before the undersigned.

Claimant, in a previous review-reopening hearing on November 20, 1984, resulting in the decision filed February 25, 1985, was awarded benefits based on a 32 percent permanent partial disability to his right hand and the entitlement to certain future medical benefits. The record in this February 15, 1988 hearing consists of the testimony of claimant and exhibits numbered 1 through 12 with the first four being introduced by claimant and the remaining eight being introduced by defendants. Official notice is taken of prior proceedings in this case.

ISSUES

The issues to be considered are:

1. Whether or not claimant has proved a changed condition to support review-reopening.

2. Whether or not claimant is entitled to healing period benefits from February 15, 1985 to July 15, 1985.

FACTS PRESENTED

A deputy commissioner concluded from the hearing on November 20, 1984, that:

> Claimant has established that his disability is causally connected to his November 5, 1981 injury and is an occupational disease under chapter 85A.
>
> Claimant is entitled to permanent partial disability benefits equal to thirty-two percent (32%) of the right hand....
>
> Claimant is entitled to further medical treatment including surgical excision and resuture of his carpal tunnel decompression scar under the direction of Dr. Anthony Ivan Pakiam.
>
> . . .
>
> The deputy, based upon the above conclusions of law, ordered:
>
> . . .
>
> Defendants provide claimant care under the direction and control of Dr. Pakiam to the extent necessary to secure the recommended surgical excision and resuture of his carpal tunnel decompression scar and prescribed follow-up procedures. [Emphasis supplied]
>
> Defendants pay accrued amounts in a lump sum.
> . . .

Claimant's hand was treated pursuant to the deputy commissioner's order. Claimant's treatment was described by A. Ivan Pakiam, M.D., as conservative treatment and that for a time a TENS unit was applied. Claimant testified that the TENS unit was applied to his right arm and wrist and the TENS unit restricted the use of his right arm so that claimant was unable to carry out ordinary functions when the arm was involved. Dr. Pakiam, a reconstructive and plastic surgeon, performed a second surgery on the claimant's right hand on July 16, 1985.

The claimant never returned to his regular employment as a sheet metal worker, nor did he work at all between February 25, 1985 and July 15, 1985. The claimant was paid healing period benefits after the surgery but was not compensated from February 25, 1985 to July 15, 1985. Dr. Pakiam indicated that claimant "should be off work" from February 25, 1985 to July 15, 1985 and the parties stipulated the healing period to be as Dr. Pakiam advised.

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Claimant introduced evidence that impairment had been reduced in his right hand since the second surgical operation.

APPLICABLE LAW

The governing statute in review-reopening proceedings is Iowa Code section 86.14(2) which reads:

> In a proceeding to reopen an award for payments or agreement for settlement as provided by section 86.13, inquiry shall be into whether or not the condition of the employee warrants an end to, diminishment of, or increase of compensation so awarded or agreed upon.

The operative burden on the petitioning party in a review-reopening proceeding is to show there has been a change in condition in the employee's condition subsequent to the time of the former award setting adjudication. Henderson v. Iles, 250 Iowa 787, 96 N.W.2d 321 (1959). Stice v. Consolidated Ind. Coal Co., 228 Iowa 1031, 291 N.W. 452 (1940); Lawyer & Higgs, Iowa Workers' Compensation - Law and Practice, section 20-2.

The Supreme Court of Iowa has held that in review-reopening cases if a claimant is fully aware of compensable injuries at the time of a prior settlement or award and fails to assert these injuries, he cannot for the first time on a review-reopening proceeding claim additional benefits. But, "...if a claimant does not know of other employment connected injuries or disability at time of any prior agreement or adjudication, he is not ordinarily barred from later asserting it as a basis for additional benefits." Gosek v. Garmer & Stiles Company, 158 N.W.2d 731, 733 (Iowa 1968).

Healing period is provided for and defined in Iowa Code section 85.34(1)(1981):

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37 [compensation schedule], beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

A healing period may terminate and later begin again. Riesselman v. Carroll Health Center, III Iowa Industrial Commis-

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sioner Report 209, 210 (1982); Teel v. McCord, 394 N.W.2d 405, 406 (Iowa 1986).

In the situation where there is an overpayment of benefits, credit is allowed for the overpayment. Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982).

ANALYSIS

Exhibit 12 is a letter written by Dr. Pakiam indicating the claimant's present disability to his right hand had decreased. Claimant objected to the introduction of defendants' exhibit 12 during the hearing on the basis that credit had been not raised before as an issue. The objection was taken under advisement during the hearing and is now overruled. Exhibit 12 is admitted as being relevant to the case as showing a change of condition. Defendants next moved to amend their answer to raise the question of credit, which was also then taken under advisement. The motion to amend is overruled since credit is taken into consideration under the present issues. Wilson, at 757 and 758.

A change of condition must be shown to maintain a review-reopening proceeding. If the action for review-reopening is appropriate, then an additional award for healing period benefits and credit for overpayment may be considered.

Claimant has proven by a preponderance of the evidence that there is a change in his condition. Claimant has shown Dr. Pakiam's request that he be "off-work" from "...February 25th, 1985, and up to the surgery on July 15th, 1985,..." (Claimant's Exhibit 1). Further, evidence was introduced by claimant showing surgery on his hand and that there has been a decrease in claimant's functional impairment since the prior determination that claimant had functional disability in his right hand of 32 percent.

Claimant testified he can now clench his right fist and that his right hand is better to the extent that he can grip objects and manipulate his right hand in performing work although there are limitations on the functioning of the hand.

Defendants introduced, as exhibit 12, a letter of Dr. Pakiam written after he had performed surgery on claimant's hand on July 16, 1985. The letter, dated September 25, 1987, stated:

> I have worked out the partial permanent disability to Mr. Hall's hand to be 20% according to the Guides to the Evaluation of Permanent Impairment published by the A.M.A., 2nd Edition.

Although Dr. Pakiam opined claimant had permanent disability to the hand of 20 percent, it is clear that he was using the AMA Guides and was speaking of permanent impairment. The permanent partial disability of claimant's hand is also 20 percent.

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As stated earlier claimant had the burden of proving a change in condition before he is entitled to a review-reopening. Once claimant has established a change in condition has occurred, he has the burden of proving his present disability. The report of Dr. Pakiam (Ex. 12) is the only evidence which was presented which establishes claimant's present impairment or disability.

Claimant has met his burden in proving entitlement to healing period benefits for the period between February 15, 1985 and July 15, 1985. Claimant's evidence stands undisputed that Dr. Pakiam released him from work for this period. However, it is also undisputed that defendants have overpaid claimant's permanent partial disability benefits in that claimant's permanent partial disability is less than was anticipated by the prior decision.

Claimant's argument that the issue of credit for overpayment was not raised prior to the hearing is without merit. Claimant's petition for review-reopening automatically raised the issue of claimant's present disability and, therefore, the issue that an overpayment may have occurred.

FINDINGS OF FACT

Finding 1. Claimant met his burden of proof for a review-reopening proceeding by showing changed condition.

Finding 2. A prior decision directed that claimant should have further medical treatment and that permanent partial disability was then 32 percent for his right hand.

Finding 3. Claimant received medical treatment for his right hand including a second surgical operation from his treating doctor.

Finding 4. Claimant's treating doctor prescribed that he not work after February 25, 1985, until surgery was performed on July 15, 1985.

Finding 5. Claimant did not work from February 25, 1985 to July 15, 1985.

Finding 6. Claimant's present permanent partial disability to his right hand is 20 percent.

Finding 7. Defendants have overpaid claimant 22.8 weeks of permanent partial disability benefits.

Finding 8. Healing period benefits should be allowed from February 25, 1985 to July 15, 1985 which is 21.143 weeks.

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Finding 9. The stipulated rate of compensation is $334.47 per week.

CONCLUSIONS OF LAW

A. Claimant has met his burden of proving he is entitled to healing period benefits from February 25, 1985 to July 15, 1985, or a total of 21.143 weeks at $334.47 per week.

B. Defendants are entitled to a credit for overpayment of claimant's permanent partial disability of 22.8 weeks.

C. Defendants' credit exceeds claimant's entitlement to healing period by 1.657 weeks.

ORDER

THEREFORE, IT IS ORDERED:

1. Claimant shall take nothing from these proceedings.

2. Each party shall pay their own costs. Defendants shall pay the costs of the court reporter.

Signed and filed this 25th day of May, 1988.

G. Woodward

G. WOODWARD
DEPUTY INDUSTRIAL COMMISSIONER

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1108.50; 1402.40; 1402.60;
1803; 2501
Filed March 14, 1988
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL HARMON, Claimant, vs CONTROL SERVICES, INC., Employer, and BITUMINOUS INSURANCE CO. Insurance Carrier, Defendants.	File No. 818287 A R B I T R A T I O N D E C I S I O N

1108.50; 1402.40; 1402.60; 1803; 2501

Claimant had a serious congenital back defect and one prior work related injury. Claimant was awarded an additional five percent of industrial disability due to surgery from this injury. Claimant had already been paid five point four percent by defendants. Claimant did prove, but only by the thinnest margin, that the surgery was caused by the injury rather than his congenital back condition.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL HARMON, Claimant, vs CONTROL SERVICES, INC., Employer, and BITUMINOUS INSURANCE CO. Insurance Carrier, Defendants.	File No. 818287 A R B I T R A T I O N D E C I S I O N FILED MAR 14 1988 IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Michael Harmon, claimant, against Control Services, Inc., employer, and Bituminous Insurance Co., insurance carrier, defendants, for benefits as a result of an injury that occurred on February 25, 1986. A hearing was held in Council Bluffs, Iowa on July 13, 1987 and the case was fully submitted at the close of the hearing. The record consists of joint exhibits one through 27, the testimony of Michael Harmon (claimant) and John Earl Jones (employer's manager). Defendants provided a copy of the transcript for the industrial commissioner's file. 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 injury.

That claimant sustained an injury on February 25, 1986 which arose out of and in the course of employment with employer.

That the injury is the cause of temporary disability during a period of recovery and claimant is entitled to temporary disability benefits from February 26, 1986 to July 11, 1986.

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

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disability to the body as a whole.

That the commencement date for permanent partial disability benefits, in the event such benefits are awarded, is July 11, 1986.

That the rate of compensation, in the event of an award of weekly benefits, is $350.62 per week.

That the fees charged for medical services or supplies are fair and reasonable and defendants are not offering contrary evidence.

That the medical services and supplies were necessary and reasonable medical treatment and defendants are not offering contrary evidence.

That defendants claim no credit under Iowa Code Section 85.38(2) for previous payment of benefits under an employee nonoccupational group plan.

That defendants are entitled to a credit for workers' compensation permanent partial disability benefits paid to claimant prior to hearing for 26 and 1/7 weeks at the rate of $350.62 per week.

That there are no bifurcated claims.

That the amount of claimant's costs for Dr. Margules' depostion and testimony is $200.00 and that the court reporter fee of Rex Blair and Associates to report and transcribe his testimony is $129.00.

ISSUES

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

Whether the injury was the cause of any permanent disability.

Whether claimant is entitled to permanent partial disability benefits as industrial disability.

Whether claimant is entitled to medical benefits under Iowa Code section 85.27, more specifically, whether claimant's surgery was caused by the work injury or whether it was caused by his preexisting congenital back condition.

SUMMARY OF THE EVIDENCE

Claimant was 36 years old at the time of the injury and 37 years old at the time of the hearing. He is single and has no

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dependents. He graduated from high school, attended junior college approximately one year and took college correspondance courses after that for several months. He took general subjects and received C and D grades. He was in the army for three years where he completed basic training, advanced individual training and military police training. After that he cut trees, clerked in 7-11 stores and installed drywall. He has also lugged beef for a packing house and performed outdoor constuction work as a laborer and has laid concrete blocks. Claimant entered the sheet metal trade and attended evening classes for four years as an apprentice before he became fully qualified as a sheet metal worker. Sheet metal work requires heavy lifting and due to back problems, claimant learned to be an air balancer, balancing the flow of heating and air conditioning. Air balancing is not heavy work. Claimant said 50 percent of it is paperwork (Transcript page 22). Air balancing does require climbing ladders and being able to bend and twist and stoop and to work in very awkward bodily positions in high places in the upper portions of a room. Balancing is a separate specialty within the sheet metal trade. At the same time, since sheet metal work is seasonal, claimant also purchased a truck and drove as an over the road trucker. This business eventually failed. Claimant also studied a year and received a certificate in advanced heating and air conditioning (Exhibit 27, pages 1-25).

Prior to this injury, claimant was previously injured on September 26, 1978 while doing heavy sheet metal work for another employer. At that time, he was installing fabricated metal and insulated panels at the power plant in Council Bluffs. His back simply gave out due to the position he was working in on that job. Claimant was treated by Cemal M. Adli, M.D., and Maurice P. Margules, M.D. As a result of that injury claimant was off work about two weeks and received 75 weeks of permanent partial disability benefits pursuant to a compromise settlement. Claimant was treated conservatively for this injury and received no surgery. Claimant testified that Dr. Margules returned him to work and simply told him to use his own discretion about the type of activities that he engaged in. Claimant admitted that he had a preexisting congential back condition prior to that injury (Ex. 27, pp. 32-37). Claimant also said that following that injury he had a little tightness and discomfort in his lower back and a little bit of numbness in his leg (Ex. 27, p. 40).

Dr. Adli reported that he saw claimant at the emergency room at Jennie Edmundson Hospital on September 27, 1978 for pain in his low back and down into his left foot. He reported that claimant told him that approximately five days before this his back went out while bending over and pulling panels up into position. His back became worse and he could not work. X-rays disclosed a spondylolisthesis at L-5 (1st degree). Claimant was treated conservatively and returned to work a week later. Dr. Adli reported again on December 6, 1978 that claimant continued to

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have problems off and on when he lifts or bends. The doctor added that this was the first time claimant had reported symptoms from his congential defect but he predicted claimant would continue to have problems with his back. Dr. Adli noted that claimant was a sheet metal worker and advised him that he should probably change his occupation (Ex. 17).

Claimant then saw Dr. Margules on March 28, 1979. Dr. Margules said the injury x-rays on September 26, 1978 disclosed spondylolysis of L-5 and very minimal spondylolisthesis of L-5 over S-1. A myelogram was performed on April 2, 1979. It disclosed spondylolysis of L-5 and very minimal spondylolisthesis of L-5 over S-1. Dr. Margules stated that these were preexisting congenital conditions of the lumbar spine aggravated by the injury of September 26, 1978. Dr. Margules wrote a letter on March 12, 1979 and another letter on March 21, 1979 in which he recommended that claimant discontinue his present occupation, seek employment of a sedentary nature and that he should seek retraining through the vocational rehabilitation facilities of the state of Iowa. On July 27, 1979, Dr. Margules wrote "It is our opinion that as a result of the injuries sustained on September 26, 1978 Mr. Harmon has a partial permanent physical disability which is rated at 10-15% of the body as a whole." (Ex. 15).

Claimant related that he had some back problems in 1983 and again in 1984 when he was driving as an over the road trucker. He collected workers' compensation benefits on one of these incidents but not on the other one.

Claimant admitted that he had some continuing back problems on August 16, 1984 when he saw R. Schuyler Gooding, M.D., because he hurt his back working on his truck. His back was "snapping" and his legs were giving way. Dr. Gooding reported that claimant had recurring old back pain with numbness of the left leg, and occasional numbness of the right leg. Dr. Gooding said "X-rays of the lumbar spine revealed a first degree L5 and S1 spondylolisthesis secondary to spondyloysis, a condition of the lower back, that is usually congenital in nature, and which can become symptomatic in physically active people." (Ex. 14).

Dr. Gooding recommended no specific treatment other than to avoid overstressing his lower back.

The injury under consideration in this case occurred on February 25, 1986 when claimant fell approximately eight feet from a ladder and landed on his back on the concrete floor while working for this employer at the dog track in Council Bluffs. Claimant was balancing air at the time of the injury. Claimant said that he never returned to heavy sheet metal work after his first injury at the power plant on September 26, 1978 (Tran. pp. 27 & 28). Claimant further testified that the instant injury was

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worse than anything else that had ever happened before. It caused excruciating pain in his lower back, down into his legs and up into his neck. He reported this injury to employer. Employer indicated that he could see the doctor he had seen before so claimant recontacted Dr. Margules. The pain became worse. Claimant testified that he can take pain but that he could not take this pain. Claimant was admitted to Jennie Edmundson Hospital again and Dr. Margules performed surgery on March 17, 1986 (Tran. pp. 30-33).

The surgery relieved the excruciating pain but claimant said that he still has discomfort from the surgery and developed new complaints in the right side of his back (Tran. p. 37). Claimant returned to work and did office work, computer work and blueprint work for five weeks and was then laidoff. Claimant testified that he was laidoff because he had retained an attorney and presented a workers' compensation claim (Tran. pp. 38-41). John Earl Jones, employer's manager, testified that claimant was laidoff because the work was completed (Tran. p. 78). Jones also verified that claimant was never called back to work as a balancer (Tran. p. 81). He said that it was tacitly agreed between he and claimant that if claimant returned to work as a balancer it might hurt his back. Jones also testified that claimant did not reapply for the job of balancer (Tran. p. 79).

The medical evidence reveals that claimant was admitted to Jennie Edmundson Hospital on February 26, 1986 for pain in the lumbar spine and into the left lower extremity after an eight foot fall to the concrete floor (Exs. 11, 12, & 13). Dr. Margules verified that claimant had not returned to heavy sheet metal work after the 1978 injury but had been working as a balancer instead which entails less heavy lifting. Dr. Margules reported that claimant's back was severely bruised in two places. A myelogram produced no evidence of any new abnormality (Ex. 10). X-rays also showed that claimant's back condition remained unchanged [Ex. 9(1)]. Electromyogram and nerve conduction studies were normal [Ex. 9(2)]. On March 2, 1986 claimant was discharged with the following diagnosis.

FINAL DIAGNOSIS: Sprain contusion of the lumbar spine due to trauma sustained in an accidental fall February 25, 1986.
Pre-existing spondylolisthesis of L5 over S1, possibly aggravated by trauma sustained as in #1.

[Ex. 9(2)]

Claimant was readmitted on March 16, 1986 (Ex. 8). Dr. Margules performed an excision of the posterior arch of L5 and disarticulation at the false joints on March 17, 1986 (Ex. 6).

Claimant was discharged on March 24, 1986 (Ex. 5). Dr. Margules reported on June 16, 1986, it was his opinion that at that time claimant could return to any schooling activities in order to obtain a sedentary type of employment (Ex. 3). Dr. Margules finally wrote on June 19, 1986:

> It was our opinion, at this time, that as the result of the injury sustained in the accidental fall of February 25, 1986 which aggravated a pre-existing condition at the L5 level, the patient has a partial permanent physical disability which is rated at 10 to 15% of the body as a whole.

(Ex. 2)

Dr. Margules, a neurosurgeon, testified by depostion that claimant suffered two things from the fall of February 25, 1986 (1) a contusion of his musculature (2) possible change in his bony structure at the level of the spondylolisthesis (Ex. 26, p. 16). When claimant reported to Dr. Margules that his pain was intolerable, Dr. Margules then performed the surgery (Ex. 26, pp. 17 & 18).

There is an issue in this case as to whether the surgery was caused by the fall of February 25, 1986 or whether it was caused by claimant's preexisting congenital back condition. Dr. Margules testified at one point in his deposition that he felt there was a possible change in claimant's bony structures (Ex. 26, p. 16) and at another point that claimant had physical anatomical change (Ex. 26, p. 19). Yet, in response to defense counsel's question as to what objective changes he observed, Dr. Margules replied that the x-rays showed no change in the bony structures. He added that he proceeded clinically because of the persistant complaint of severe pain in the lumbar region and the paresthesia in the lower extremities, which is more subjective. He repeated that he decided to do the surgery because the patient indicated he had a pain which he did not feel he could tolerate (Ex. 26, pp. 24 & 25). Dr. Margules added that he also performed the surgery to avoid dysfunction of the cauda equina due to mechanical trauma. If severe pressure is applied to the cauda equina it can cause drastic complications such as bladder, rectal and sexual dysfunction (Ex. 26, pp. 26 & 27).

Even though it appears that Dr. Margules' testimony was inconsistant about whether there were or were not objective changes in the bony structures, nevertheless, Dr. Margules testified that the fall on February 25, 1986 was a material and substantial factor in causing the aggravation of claimant's spondylolisthesis and resulting in his surgery on March 17, 1986 for resection of the posterior arch at the level of L-5 (Ex. 26, pp. 18 & 19).

Claimant had residual pain after the surgery shown by the

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office notes of July 11, 1986 and September 22, 1986 which Dr. Margules said would come and go and probably continue indefinitely. Again, Dr. Margules recommended sedentary work (Ex. 26, pp. 20-22). The doctor clarified that the ten to 15 percent impairment rating that he made on June 19, 1986 was not in addition to the earlier rating on July 27, 1979, but rather it was part of the same disability (Ex. 26, p. 23).

There is evidence that the economy had an impact on the sheet metal trade. Claimant testified that union membership declined from 600 to 300 people (Ex. 27, p. 22). Jones testified that employer employed two balancers, instead of three balancers at one time after claimant fell and that they did not work full time. Employer employed five balancers at the time of the hearing (Tran. pp. 79 & 80).

Claimant admitted that after he was laidoff by employer, he did not go out and try to find a job (Ex. 27, p. 6 & 7). Instead, he drew unemployment compensation from July of 1986 until the time of his deposition on December 2, 1986 (Ex. 27, p. 8: Tran. pp. 61 & 62). Either this is not true or claimant then drew unemployment compensation at the same time he was earning weekly wages from his UPS job because the record shows that he was paid on November 15, 1986, which would mean he started to work on November 8, 1986 because he was paid weekly [Ex. 25(2)]. Claimant was actually working at the time of the deposition. Claimant testified that he was earning $10.00 per hour or more at the time of the hearing (Tran. p. 44). His current employer reported however, that he earns $12.62 per hour [Ex. 25(2)]. Defense counsel pointed out a number of other material inconsistancies between claimant's testimony at the hearing and the time of his earlier deposition which reflect on claimant's credibility (Tran. pp. 49-65). Claimant testified that he was earning close to $18.00 per hour from employer at the time of his injury but on the paycheck it shows $16.11 per hour.

At the hearing, claimant testified that he started to work for UPS just before Christmas (Tran. p. 42). The UPS record, however, indicates that claimant started to work on approximately November 8, 1986 [Ex. 25(2)]. After Christmas, he was off but, claimant was rehired by UPS and has continued to work there as a feeder driver, but he does not do any loading or unloading. He hooks and unhooks the trailer from the tractor by mechanical means (Tran. p. 43). Driving does present a problem with his neck and the right side of his back from sitting and bouncing in the truck. He said that his job is only probationary to see if he can handle it with his back (Tran. p. 45). Also, he could get bumped by an employee with more seniority (Tran. pp. 46 & 47).

Claimant presented a medical bill from Medical Anesthesia Associates in the amount of $525.00 (Ex. 23). There are two

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bills from Dr. Margules. One of them shows that claimant owes $3,170.00 [Ex. 24(1)]. The other one shows that claimant owes $20.00 [24(3)].

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 25, 1986 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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 v. Shenandoah Nurseries, 213 Iowa 724, 254 N.W. 35 (1934). See also Auxier v. Woodward State Hosp. Sch., 266 N.W.2d 139 (Iowa 1978); Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960).

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 prove that the fall of February 25, 1986 was the cause of permanent disability. The letter of Dr. Margules dated July 19, 1986 stated that the accidental fall of February 25, 1986 aggravated a preexisting condition at the L-5 level and that claimant had a permanent partial physical disabililty which he rated at ten to 15 percent of the body as a whole (Ex. 2). In his depostition Dr. Margules said that the injury was a material and substantial contributing factor to the surgery which he performed on March 17, 1986 (Ex. 26, pp. 18 & 19).

Claimant did prove a slight increase in his industrial disability due to the injury of February 25, 1986. It is true that the permanent functional impairment ratings after both injuries, September 26, 1978 and February 25, 1986, were the same, ten to 15 percent, and that these ratings were made my the same doctor. It is also true that after both injuries it was recommended that claimant perform sedentary work. Therefore, defendants argue that there is no change after the second injury that was not already present after the first injury. There are some distinctions or differences that increase claimant's industrial disability as distinguished from his permanent functional impairment.

In the first injury, there was only a strain. In the second injury, there was severe trauma from an eight foot fall that caused two large contusions to claimant's back. The first injury, a strain, was treated only with conservative measures and claimant recovered. The second injury, a traumatic accident, required major back surgery.

On one hand, it could be argued that claimant may be better off after the surgery than before the surgery because his lifelong congenital defects which were a threat to his earning capacity are corrected. On the other hand, claimant returned to the competitive labor market with not only a history of back

injury but also a major back surgical procedure. Workers in this catagory, including claimant, find that physical and manual labor type of jobs are foreclosed to them. Michael v. Harrison County, thirty-fourth Biennial Report of the Industrial Commissioner 218, 220 (Appeal Decision 1979). Although claimant had previously adandoned heavy sheet metal work, he was still able to perform the job of air balancer, which was not heavy work but, nevertheless, required a fair amount of agility. Jones testified that both he and claimant agreed that claimant might get hurt if he tried to perform the balancing job again. Therefore, the balancing job seems to be foreclosed to claimant since the fall of February 25, 1986 and the resulting surgery.

Also, agency expertise includes the knowledge that many employers prefer to hire job applicants without a previous history of back surgery for any kind of work, even light work, if it might predispose a back injury.

Claimant could possibly be a balancer again, but it is not likely that he would be hired with this surgical history and it probably would not be wise for him to endeavor to try it. Claimant testified that although balancing is not heavy work, it is done at ceiling heights on ladders with much twisting, bending and getting into awkward positions. Dr. Margules testified that if claimant were to bend, lift or crawl it would be a recipe for a catastrophe and further recurrence of his problems (Ex. 26, p. 22).

Depsite Dr. Margules' admonition to do sedentary work after the injury of September 25, 1978, claimant did demonstrate that he could perform the job of balancing air. However, whether his fall on February 25, 1986 was due to his congenital back condition or was simply a slip and fall for some other reason is not known. Claimant did not know for sure how he happened to fall. In any event, it seems clear that claimant is now foreclosed from the job of air balancing since the injury of February 25, 1986 and his resulting surgery.

Claimant sought no employment at all from July of 1986 until approximately November 8, 1986. During that period he received unemployment compensation benefits. Therefore, it does not appear that claimant was highly motivated to work at least during that four month period of time.

The job of driving a truck over the road, even though it involved sitting, is not generally considered to be sedentary employment, in workers' compensation jargon, because of the extreme amount of jarring to the body while driving trucks for long periods of time as well as certain duties normally required of the drivers, such as crawling in and out of the vehicles.

Therefore, claimant can do work that is not strictly sedentary.

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He also drove trucks over the road in between these two injuries, in 1983 and 1984, when he was admonished to do only sedentary work. He testified that he had back complaints in 1983 and 1984 but there was no evidence that he was forced to quit driving due to his back condition. He testified that his current job of driving a truck over the road does cause discomfort and pain but he has been able to perform the job.

The difference in the hourly rate between a sheet metal worker and the over the road truck driving job for UPS is not a true indication of claimant's loss of earning capacity. Claimant testified that sheet metal work is seasonal and also subject to economic fluctuations. The driving job for UPS is a 40 hour a week job plus anywhere from two to seven hours overtime per week [Ex. 25(3)]. It is entirely possible that claimant could earn more income on an annual basis in his present job as a driver than as a sheet metal worker or air balancer. Therefore, primarily based upon the element of major back surgery following a traumatic fall, it is determined that certain employments are foreclosed to claimant resulting in an additional industrial disability of five percent over and above the 15 percent that claimant was already paid for the prior injury of September 26, 1978. Claimant is young enough that he can develop new job skills. He has demonstrated from his past employments and educational efforts that he is bright and can learn to do very technical types of work. Claimant has already been paid five point four percent industrial disability by employer prior to the hearing. Therefore, claimant's award of increased industrial disability of five percent does not result in any additional payments by employer.

Claimant was entitled to see Dr. Margules. Both claimant and employer testified that he was told that he could see Dr. Margules.

Whether claimant is entitled to recover for the expenses of the surgery depends upon whether the surgey was caused by the fall at work or whether is was caused by claimant's congenital back condition. An examination of claimant's myelogram, x-rays, EMG and nerve conduction studies did not show any abnormal findings or any change after the injury of February 25, 1986 that were different from the findings after the earlier injury on September 26, 1978 [Exs. 5, 7, 8, 9(1), 9(2), 10 and 11(1)].

Dr. Margules' testimony was equivocal. He said there were possible changes in the bony structures (Ex. 26, p. 16). He said there was physical anatomical change (Ex. 26, p. 19). When confronted by defendants' counsel on cross examination and asked for objective evidence of changes, he admitted that the x-rays showed no change in the bony structures, but he performed the surgery primarily because of claimant's persistant complaints of intolerable pain, which was a subjective standard (Ex. 26, pp. 24

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& 25).

The turning point on this decision however, is that Dr. Margules did answer the question of whether the fall caused the surgery in the affirmative (Ex. 26, pp. 18 & 19). It is clear that Dr. Margules intends to say there was a causal connection even though his factual basis for it is either equivocal or certainly not clearly explained. Dr. Margules' testimony was not controverted, contradicted or rebutted by any other professional medical practitioner. Therefore, even though his opinion is not very satisfying, it stands as the only evidence of causal connection and he says that the fall caused the surgery (Ex. 26, pp. 18 & 19).

Therefore, it is determined that claimant has sustained the burden of proof by a preponderance of the evidence that the surgery was due to the fall of February 25, 1986. Claimant's treating physician, the only physician in this case, said that it was a substantial factor. A cause need only be a substantial cause, it need not be the only cause. Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128 132 (1967). Claimant, therefore, is entitled to recover the medical expenses for the surgery.

FINDING OF FACT

WHEREFORE, based upon the evidence presented the following finding of fact is made.

That based upon the traumatic accidental nature of the injury, the claimant's fall on February 26, 1986 was the cause of five percent additional industrial disability, of the surgery performed by Dr. Margules and of the residual effects of the major back surgery.

CONCLUSIONS OF LAW

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

That the injury of February 25, 1986 was a proximate cause of permanent disability and surgery.

That claimant is entitled to an additional five percent of permanent partial disability as industrial disability.

That claimant is entitled to recover the medical expenses of Medical Anesthesia Associates and Dr. Margules for the back surgery.

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ORDER

THEREFORE, IT IS ORDERED:

That claimant is entitled to an additional five percent of permanent partial disability as industrial disability but that claimant has already received more than five percent of industrial disability from employer and therefore no further amounts are due to claimant.

That defendants pay to claimant or the provider of services five hundred twenty-five dollars ($525.00) for anesthesia and three thousand one hundred seventy dollars ($3,170.00) for physicians care.

That since it was necessary to make a finding in favor of claimant for the payment of his medical expenses, claimant is the prevailing party in this action. Therefore, defendants are to pay the costs of this proceeding pursuant to Division of Industrial Services Rule 343-4.33 to include one hundred fifty dollars ($150.00) for the deposition of Dr. Margules and one hundred twenty-nine dollars ($129.00) for court reporter costs to Blair and Associates (Tran. p. 7).

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

Signed and filed this 14th day of March, 1988.

Walter R. McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOSEPH ALLEN HARPER, Claimant, vs. CARRIER CORPORATION, Employer, and LIBERTY MUTUAL, Insurance Carrier, Defendants.	:	File No. 685546 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 brought by Joseph Allen Harper, claimant, against Carrier Corporation, employer, and Liberty Mutual Insurance Company, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained October 15, 1981. This matter came on for hearing before the undersigned deputy industrial commissioner January 12, 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, and joint exhibits 1 through 12, inclusive.

ISSUES

Pursuant to the prehearing report and order submitted and approved January 12, 1988, the following issues are presented for determination:

1. Whether claimant's work injury of October 15, 1981 is causally connected to the disability on which claimant now bases his claim;

2. The extent of claimant's entitlement, if any, to temporary total disability/healing period benefits;

3. The extent of claimant's entitlement, if any, to permanent partial disability benefits stipulated to be an industrial disability; and

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4. The appropriateness of certain medical expenses pursuant to Iowa Code section 85.27.

It should be noted at the outset that at the time claimant filed his original notice and petition, he alleged an injury date of October 1, 1981 and certain records refer to that date. However, the parties have stipulated that claimant sustained his injury on or about October 15, 1981.

FACTS PRESENTED

Claimant began working for defendant employer in 1979 and, prior to sustaining the injury under review, sustained two other injuries which affected his back. In June 1979, claimant fell after catching his leg between a loading dock and a truck bumper twisting his back and right knee. Claimant brought an action for benefits (industrial commissioner file number 602160) which was settled pursuant to Iowa Code section 85.35. On May 5, 1981, claimant felt a sharp pain in his back while reaching inside a compressor to remove a screw. Claimant again brought an action (industrial commissioner file number 672305) which, according to testimony, was dismissed.

Claimant sustained an injury arising out of and in the course of his employment on October 15, 1981 while installing a compressor. Claimant explained that while hoisting the compressor, he felt his back tighten "severely" with pain going down his left leg which was a sensation claimant did not feel he had experienced in any of his previous injuries. Claimant, who was being treated as a result of the previous injuries, returned to see the doctor and was off work until February 1, 1982. Claimant explained he was still experiencing back pain but returned to his regular job because he had been told by his physician that nothing more could be done for his back. Claimant continued to work until his discharge for unsatisfactory job performance on August 23, 1982. Claimant testified he was thereafter assigned to a series of jobs out of the union hall which usually ended in what might be considered a "reduction in force discharge" because of his inability to keep up with the work.

Claimant testified his leg pain was getting worse as time progressed and when he asked his family doctor for some medication for it, was referred to Scott B. Neff, D.O. After examination by Dr. Neff, testing and consultation with other physicians, claimant underwent surgical procedures performed by Dr. Neff and explained he could not work from February 1985 until his release to return to work April 7, 1987 with the permanent restrictions of no lifting, pushing or pulling. Claimant explained he began working in June 1987 for a former supervisor who agreed to work around his medical restrictions and physical limitations by providing claimant with an assistant who would do the heavy work. Claimant currently earns approximately $19.00 per hour but

asserted the tenuous nature of the employment since the company is currently in Chapter 11 bankruptcy.

Claimant testified he has learned to "live with" his back pain although he admitted the pain is not as severe as before the surgeries. Claimant explained he has pain and stiffness in his hip where bone fragment was removed in one of the surgical procedures. Claimant is able to drive, feels he cannot walk "too far" because of tightening in his hip and must remember to stand and sit "properly." Claimant opined he is not employable within his regular trade as a steamfitter/pipefitter because he cannot do the heavy work required and must depend on a helper which the employer is not, in the claimant's opinion, generally willing to provide.

Sinesio Misol, M.D., testifying in July of 1982 after claimant commenced the action due to the June 1979 injury, stated he first examined claimant on October 24, 1980 when Dr. Robinow, who had been treating claimant, was no longer available. Dr. Misol saw claimant immediately after his injury on May 5, 1981 and, when asked where claimant's pain was coming from at that time, stated:

> And that I had answered already when we said a few seconds ago that he had no radiation of pain, that the pain was in the back and in the lumbosacral area, so the back, the lumbosacral area, is the lower part of the back, so that's where the pain was coming from.

(Joint Exhibit 9, pp. 13-14)

Dr. Misol, aware of all three incidents (June of 1979, May of 1981, and October of 1981) at the time he made the determination claimant had a permanent and physical impairment of 10 percent, testified:

> Q. And would I be correct in understanding you that to some extent that permanent impairment that you described for him would be attributed to the incidents of May 6th of 1981 and October 29th of 1981?
>
> A. I don't think I said that anywhere. Correct me if I'm wrong. I, myself, I find myself unable to ascribe a percentage of a physical impairment to specific incidents of history. All the best that I can do is to talk to a patient, listen to how much pain he or she has, examine the spine and the nerves, realize that it is not normal when compared to normal, and try to give it a figure, but I cannot tell you or anybody whether that ten percent

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comes from February of 1980 or July of '81 or from before or after that because I cannot do it.

(Jt. Ex. 9, pp. 28-29)

Medical records of Scott B. Neff, D.O., show claimant was seen February 4, 1985 with complaints of pain in the low back at the left posterior superior iliac spine radiating down the left leg. A CT scan was ordered which revealed a large herniated disc to the left side at L5-S1 and a bulging disc at the L4-L5 level. Dr. Neff concluded that based on claimant's history, the ruptured disc was related to the previous trauma to claimant's back although he did not specify at that time the trauma to which he was referring. On May 28, 1985, claimant underwent extensive discectomy with neurosoraminotomy after which claimant did well for about six weeks until his symptoms in the left leg began to recur. Claimant was referred to William Boulden, M.D., for a second opinion who found claimant to have a "tremendous amount of epidural fibrosis" with "significant foraminal stenosis," either or both of which could cause claimant's symptoms. Dr. Boulden recommended trigger point injections suggesting claimant may have to have further decompression, fusion, and discograms at 3-4 and 4-5 to make sure there are no other abnormalities with the discs. Claimant thereafter returned to Dr. Neff's care and discograms were done October 11, 1985 which were totally normal at L3-L4 level and reproduced severe back pain at L4-L5 level. Dr. Neff, before recommending anterior interbody fusion and posterior stabilization, referred claimant to Kent Patrick, M.D., for another opinion. Dr. Patrick concurred with Dr. Neff's opinion and claimant subsequently underwent lumbar fusion from L4 through the sacrum because of persistent pain.

On November 7, 1985, Dr. Neff wrote: "It is my opinion that the recommended fusion in his lumbar spine is directly related to his work injury of October 1, 1981, and is not a new injury, but the continuum from that incident." (Jt. Ex. 1, p. 7)

Dr. Neff's final opinion was rendered April 8, 1987 and stated:

> Certainly this is a difficult historical situation, and it is my opinion that the fusion which was required for his lumbar spine was directly related to his work injury of 1981, and this did not result from a totally new injury, but it continued a worsening process which occurred since that injury of 1981. Certainly there is no way to know the exact date that the disc above the bottom disc began to break down, but obviously both of these discs were subject to the trauma at the time of injury. When it continued to degenerate or break down further, then one was probably ruptured on the

very date of the injury.

....

It is my opinion that this patient has a 25% impairment to the body as a whole as a result of this injury and the resultant surgery.

....

At this time I believe we should end his healing period because the last x-rays that were taken showed the bone fusion to be substantially complete.

...Certainly he will never be totally without symptoms, and that is the reason for unimpairment [sic] rating.

(Jt. Ex. 1, pp. 1-2)

APPLICABLE LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 1, 1981 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be couched in definite, positive or unequivocal language. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). 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).

Iowa Code section 85.34(1) provides that if an employee has suffered a personal injury causing permanent partial disability, the employer shall pay compensation for a healing period from the day of the injury until (1) the employee returns to work; or (2) it is medically indicated that significant improvement from the injury is not anticipated; or (3) until the employee is medically capable of returning to substantially similar employment.

Iowa Code section 85.34(2) provides that compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code section 85.34(2)(u) provides that compensation for a nonscheduled or body as a whole injury shall be paid in relation to 500 weeks that the disability bears to the body as a whole.

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 essential question for determination is whether claimant's injury of October 15, 1981 is causally connected to the disability on which claimant now bases his claim. Certainly, claimant presents a difficult historical situation. There is no dispute claimant suffered from degenerative disc disease and that he injured his back originally in 1979 after which he never was completely symptom-free. Claimant asserts, however, that the injury of October 15, 1981 caused additional permanent impairment to that which existed prior. To justify an award of benefits, claimant must establish that the injury of October 1981 and not the previous injuries, was the proximate of the surgery and subsequent additional disability. As stated above, the question of causal connection is essentially within the domain of expert testimony.

Two medical experts have presented opinions in this case.

Dr. Misol testified after claimant sustained all three injuries but before the discovery of the problems which eventually led to the surgery. Dr. Misol stated essentially that he is unable to determine which injury caused the rating of a 10 percent permanent partial impairment. Dr. Misol began treating claimant in approximately December of 1980, after Dr. Robinow was no longer available. Medical records of Dr. Robinow have not been submitted into evidence and Dr. Misol's records do not reflect claimant had a CT scan which was what assisted Dr. Neff in arriving at his ultimate diagnosis of herniated nucleus pulposus or ruptured disc at the L5-S1 level with a bulging disc at the L4-5 level, manifestation of internal disc disruption. Dr. Neff relates claimant's surgeries to the October 1981 injury although he acknowledged there is no way to know the exact date the disc began to break down. It must be obvious, however, that even if both discs were damaged before the incident of October 1981, they were also subject to the trauma of that date. There is no evidence to suggest claimant suffered any further trauma to his back after this October 1981 injury and, whereas prior to this injury claimant had been capable of returning to work in his regular job and capable of performing that job, the same is not true after the October 1981 injury. Claimant's testimony is uncontroverted in that when he returned to work in February 1982, he simply was not performing the job in the same manner as he had done before. Claimant distinguished the previous injuries from that which occurred in October 1981 by the amount and intensity of pain he had in his back which radiated down his left leg. Indeed, it was this radiating pain which precipitated the referral to Dr. Neff. It is concluded the opinion of Dr. Neff, as the treating physician and as the last physician to see claimant when all of the facets of claimant's injury may have been made more evident, who appeared to do more testing and who had the advantage of hindsight, is entitled to greater weight. Therefore, this opinion, coupled with claimant's testimony concerning the nature of the October 1981 injury and the course of his physical condition after that injury, allows claimant to meet his burden that the injury of October 1981 is causally connected to the disability on which he now bases his claim.

Dr. Misol, in July 1982, rated claimant 10 percent permanently partially impaired without distinguishing specifically what injury gave rise to this impairment rating. It cannot, however, be the subject of dispute that prior to the injury of October 1981 claimant had already suffered some permanent impairment. Dr. Neff opines claimant has a 25 percent impairment to the body as a whole as a result of the October 1981 injury and the resultant surgery.

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

and inability to engage in employment for which he is fitted. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963). Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

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

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

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

Claimant is 41 years old with a high school education and appears to be of above average intelligence with a good motivation to work. He not only has training as a plumber/steamfitter but has also been trained to work with centrifugal and absorption machines, a field claimant decided to enter because of the limited number of qualified persons who worked in the field.

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Claimant, although he may no longer be able to perform the heavy type of labor associated with his trade, clearly has not lost the knowledge garnered from his years of experience and training in these fields. Indeed, claimant's present employer hired claimant for that very reason. Claimant is currently employed at a rate of pay commensurate to what he was receiving at the time of his injury. Although claimant's stresses the tenuous nature of this employment because of the financial situation of the company, it is claimant's present status which must be evaluated. To consider what may happen to claimant in the future is pure speculation and not a proper area of inquiry in this proceeding. See Umphress v. Armstrong Rubber Company, Appeal Decision filed August 27, 1987. ("It appears...that the deputy based his decision in part on what may occur to claimant in the future as opposed to his present condition. This is mere speculation.") It is not, however, an individual's earnings which are necessarily of major importance in the evaluation of industrial disability but rather the loss or reduction of an individual's earning capacity which must be reviewed. It is evident from claimant's testimony, as well as the permanent medical restrictions imposed on him, that claimant's capacity to earn has been hampered as a result of his injury. Considering then all the elements of industrial disability, it is determined claimant has a permanent partial disability of 25 percent for industrial purposes. However, the employer asserts, with which the claimant does not take issue, claimant had an industrial disability of eight percent at the time of his settlement on the injury of June 1979. No disablity attributable to the May 1981 injury has been shown. Therefore, it is determined eight percent of claimant's 25 percent disability is attributable to his previous injury and defendants are liable in this case for permanent partial disability benefits based upon a 17 percent industrial disability.

While defendants dispute that the care given by claimant's family doctor and Dr. Neff was not authorized, the record clearly establishes defendants denied the compensability of claimant's claim. Claimant's original notice and petition for benefits was filed March 6, 1985. In the answer filed March 12, 1985, defendants denied the injury date, how the injury occurred, the time disabled, and that claimant sustained any permanent partial disability as a result of the injury. It is a well established principle of workers' compensation law in Iowa that an employer or insurance carrier cannot deny the compensability of the claim and at the same time control the medical care. Further, defendants cannot take advantage of the benefits of surgery while disputing its authorization particularly where unauthorized treatment improved the employee's condition and ultimately may mitigate the employer's liability. Claimant has established the medical care received was reasonable and necessary for the treatment of the October 1981 injury. Claimant is, therefore, entitled to the medical expenses incurred and for

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healing period benefits for the stipulated period from February 4, 1985 through April 7, 1987.

FINDINGS OF FACT

Wherefore, based on the all of the evidence presented, the following facts are found:

1. Claimant sustained an injury to his back in June 1979.

2. As a result of the June 1979 injury, claimant had an industrial disability of eight percent.

3. Claimant sustained an injury in May 1981, to which no disability has been attributed.

4. Claimant sustained an injury to his back which arose out of and in the course of his employment October 15, 1981.

5. Claimant was off work as a result of his injury from October 15 until February 1, 1982.

6. When claimant returned to work, he was unable to perform his job with the same degree of efficiency as before the injury.

7. Claimant was discharged from his employment with defendant employer in August 1982 for unsatisfactory job performance.

8. From August 1982 until February 1985, claimant held a series of short term jobs secured through the union hall all of which resulted in a "reduction in force discharge."

9. In early 1985, claimant was referred to Scott D. Neff, D.O., by his family doctor for treatment of leg pain radiating from the back.

10. Dr. Neff diagnosed claimant as having a herniated nucleus pulposus or ruptured disc at the L5-S1 level with a bulging disc at the L4-5 level manifestation of internal disc disruption.

11. Claimant underwent discectomy and neuroforaminotomy and then a lumbar fusion from L4 through the sacrum because of persistent pain.

12. Claimant's surgery was causally connected to his work injury of October 15, 1981.

13. Claimant has a permanent partial impairment as a result of the work injury of October 15, 1981.

14. Claimant was unable to work from February 4, 1985

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through April 7, 1987 as a result of the reasonable and necessary treatment he received for the October 15, 1981 work injury.

15. Claimant has an industrial disability of 25 percent, eight percent of which is attributable to a previous injury.

CONCLUSIONS OF LAW

Wherefore, based on the principles of law previously stated, the following conclusions of law are made:

1. Claimant has established that a portion of the disability on which he bases his claim is causally connected to his work injury of October 15, 1981.

2. Claimant has established his entitlement to healing period benefits for the period from February 4, 1985 through April 7, 1985.

3. Claimant has established he has an industrial disability of 25 percent, eight percent of which is attributable to a previous injury.

4. Claimant has established his entitlement to medical expenses under Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

That defendants are to pay unto claimant eighty-five (85) weeks of permanent partial disability at the stipulated rate of three hundred sixty-four and 15/100 dollars ($364.15) per week commencing April 8, 1987.

That defendants are to pay unto claimant one hundred thirteen point two eight six (113.286) weeks of healing period benefits at the stipulated rate of three hundred sixty-four and 15/100 dollars ($364.15) for the period from February 4, 1985 through April 7, 1987.

That defendants are to pay all disputed medical expenses.

That defendants shall receive full credit for all disablity benefits previously paid.

That payments which 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.

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

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

Deborah A. Dubik
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1402.40; 1803; 1806
Filed March 28, 1988
Deborah A. Dubik

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JOSEPH ALLEN HARPER, Claimant, vs. CARRIER CORPORATION, Employer, and LIBERTY MUTUAL, Insurance Carrier, Defendants.	:	File No. 685546 A R B I T R A T I O N D E C I S I O N

1402.40

Prior to sustaining the injury under review, claimant sustained two other injuries (not under review) which affected his back. Two medical experts testified in the matter: one could not specify which of the three injuries gave rise to the 10% permanent partial impairment rating; one opined the injury under review gave rise to the surgery and 25% permanent partial impairment. Based on this last medical opinion, taken in conjunction with claimant's testimony that after the other injuries he was also able to return to work and after this injury he could never perform his job as a plumber/steamfitter the same, held claimant met his burden that the injury under review was the cause of the disability on which he now based his claim.

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Claimant, 41, high school graduate, of above average intelligence, with good motivation, who has experience as a plumber/steamfitter, and in the area of centrifugal and absorption machines, who may no longer be able to perform the heavy labor involved in those areas, still had the experience and training from his years of work. Claimant currently employed in the field at a rate of pay commensurate with that which he was making at the time of his injury. Claimant's request to consider

the tenuous nature of the employment (current employer in bankruptcy proceedings) rejected based on Umphress. Claimant found to have a 25% industrial disability.

1806

There was no dispute claimant already suffered some permanent disability as a result of previous work injuries. Held 8% of the 25% industrial disability from the previous injuries making this defendant liable for an industrial disability of 17%.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
MAR 04 1988
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

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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.

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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

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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 — d. 30 days - May, 1966
Cherokee, IA

Keystone Treament [sic] Center — 30 days - Oct. 1972
Canton, SD

State Hospital — 10 days - Jan. 1973
Cherokee

Keystone Treament [sic] Center — 30 days - July - 1983
Canton, SD

Calvary Rehab. Center — 42 days - Oct. 1983
Phoenix, Ariz.

Calvary Rehab. Center — June 18, 1985 -
Phoenix, Ariz.

(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)

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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.

Interrogatory No. 22: 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.

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

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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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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

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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 tc 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

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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.
WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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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

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1402.40, 1803
Filed February 24, 1988
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALBERT HERRERA, Claimant, vs. LEHIGH PORTLAND CEMENT COMPANY, Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 805997 A R B I T R A T I O N D E C I S I O N

1402.40, 1803

Claimant failed to establish the credibility of the severity of his complaints. Claimant awarded 20% permanent partial disability based upon an aggravation of a preexisting degenerative condition. Claimant had left his employment after working more than 30 years for the same employer, had taken his pension and had not sought any other employment.

FILED
FEB 24 1988
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ALBERT HERRERA, Claimant, vs. LEHIGH PORTLAND CEMENT COMPANY, Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 805997 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 Albert Herrera, claimant, against Lehigh Portland Cement Company, employer, and Travelers Insurance Company, the employer's insurance carrier. The case was heard at Mason City, Iowa on August 20, 1987 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Albert Herrera, Roger Marquardt, Louis Frasing, Bret Amick and Burr Heitland. The record also contains claimant's exhibits 1, 2 and 3 and defendants' exhibits A, B and D.

Defendants' exhibit C is a video cassette which purports to depict some of claimant's activities as observed by Bret Amick. It was offered by defendants as surrebuttal evidence following rebuttal testimony that had been presented by claimant wherein claimant countered testimony given by Amick with regard to washing a car and carrying boxes. Claimant objected to the video cassette being received into evidence. The basis for the objection was that it had not been listed on the exhibit list as required by the hearing assignment order, that it had not been produced in response to a request for production and that it is not actually surrebuttal evidence. Counsel for defendants countered that the video cassette is not covered by the request for production, that it was never intended to be used in the defendants' case in chief and that it is surrebuttal concerning claimant washing a car and the manner in which he did so. Defense counsel contends that, since it is surrebuttal evidence, it need not have been disclosed in advance of hearing.

Determination of what constitutes rebuttal, or surrebuttal evidence, and whether it should be received is largely discretionary. Karr v. Samuelson, Inc., 176 N.W.2d 204 (Iowa 1970). The fact that testimony might have been useful and usable in the case in chief does not necessarily preclude its use in rebuttal. In Re Estate of Shama, 245 Iowa 1039, 65 N.W.2d 360 (1954); Blakely v. Bates, 394 N.W.2d 320 (Iowa 1986). Calling a witness for the purpose of rebuttal should not, however, be used as a device to avoid the provisions of a pretrial order which requires the disclosure of witnesses. Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986). Rebutting evidence is that which explains, repeals, controverts, disproves, or tends to impeach or otherwise rebut evidence of the opponent. State v. Hephner, 161 N.W.2d 714, 718 (Iowa 1968). The video cassette tape, defendants' exhibit C, is cumulative of the testimony given by Amick. Amick's testimony was presented by defendants as part of their case in chief. Its importance in the case was not substantially changed as a result of claimant giving rebuttal testimony. When testifying as part of his case in chief, claimant testified that he can wash a car at his own speed, the same as he testified on rebuttal. The evidence that claimant submitted on rebuttal is found to not be significantly different from the evidence he submitted in his case in chief. Claimant's rebuttal testimony did not actually introduce any new material which would warrant surrebuttal. The evidence contained in exhibit C is cumulative with the testimony provided by Amick. In summary, it appears that exhibit C was offered as surrebuttal evidence solely because it had not been listed on an exhibit list as required by the hearing assignment order. The hearing assignment order required a list of all proposed exhibits to be served on the opposing party no later than 15 days prior to the date of hearing. The hearing assignment order does not contain any specific sanction to be imposed upon the failure to list an exhibit if the exhibit is something other than written evidence, but it clearly states that written evidence shall not be admitted at the hearing unless it has been timely served on the opposing party. The hearing assignment order also indicates that testimony of witnesses who were not listed on the witness list will not be permitted unless the testimony is clearly rebuttal or surrebuttal. Apparently Amick was listed as a witness. Even though a specific sanction does not appear in the hearing assignment order for an exhibit such as defendants' exhibit C, the same rules should be applied in order to be consistent with the intent and spirit of discovery and the hearing assignment order, namely, that surprise be avoided. Exhibit C is not "clearly rebuttal or surrebuttal." It was not listed on an exhibit list. Claimant's objection is therefore sustained, and exhibit C is not received into evidence. The request for production would not have required disclosure of exhibit C.

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ISSUES

The parties indicated that the only issue to be determined is claimant's entitlement to compensation for permanent partial disability. His healing period was stipulated to run from September 23, 1985 to June 24, 1986. It was stipulated that claimant had been paid 41 weeks of compensation for permanent partial disability and that any additional permanent partial disability compensation awarded should become payable commencing April 8, 1987. It was further stipulated that the rate of compensation in this case is $328.78 per week. It was stipulated that claimant sustained an injury on September 23, 1985 which arose out of and in the course of his employment and that the injury was a cause of both temporary disability and permanent disability.

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.

Albert Herrera is a 53-year-old married man who injured his back on September 23, 1985 while helping a fellow worker move an elevator door at the employer's place of business. Claimant reported the injury and was seen by the employer-designated physician John R. Yankey, M.D.

Dr. Yankey was of the impression that claimant had sustained an acute back strain as his examination had failed to disclose any definite neurological abnormalities. Conservative treatment in the nature of rest, heat, Tylenol #3 medication and avoidance of physical activity was recommended. When claimant showed no improvement at the follow-up examination two days later, Dr. Yankey referred him to R. L. Emerson, M.D., an orthopaedic surgeon (defendants' exhibit A, pages 1 and 2).

Dr. Emerson examined claimant and formed the impression that claimant probably had a herniated disc of the lower lumbar spine and that he also exhibited evidence, by x-rays, of degenerative disc disease. Further conservative treatment in the nature of bed rest and medication was recommended (defendants' exhibit A, page 8). When claimant showed no improvement under conservative care, a CT scan and myelogram were performed. The CT scan showed degenerative changes, but was otherwise unremarkable (defendants' exhibit A, page 11). The myelogram showed mild bulging at the L4-5 and L5-S1 levels without signs of nerve root impingement (defendants' exhibit A, page 13). Dr. Emerson concluded that claimant had degenerative disc disease without disc herniation. He had no further treatment options to offer claimant and suggested that claimant be seen at the Sister Kenny Institute in Minneapolis, Minnesota (defendants' exhibit A, page 14).

In January of 1986, claimant fractured his right ankle in an accident that occurred while claimant was in Missouri. Open reduction and internal fixation of the fracture was accomplished by N. B. Chase, M.D. The history of the incident indicates that, at approximately 1600 hours on the date of admission, claimant was kicked by a horse and sustained an injury to his right ankle (defendants' exhibit A, pages 23-26). Claimant testified that the ankle injury occurred by stepping in a rut or hole in a roadway upon which he was walking rather than from being kicked by a horse. Claimant denied riding any horses subsequent to his 1985 injury (defendants' exhibit A, pages 63 and 64).

On June 9 and 20, 1986, claimant was evaluated by A. P. Manahan, M.D. Following the first visit, Dr. Manahan was of the impression that claimant had chronic low back pain secondary to a lumbosacral strain and degenerative arthritis of the spine. He found claimant to have a good range of motion and normal neurological findings. Dr. Manahan suggested that claimant enter a conditioning program consisting of physical therapy at the Mercy Hospital in Mason City, Iowa, anti-inflammatory medication and use of a TENS unit. At the time of the June 20 return visit, claimant appeared to have improved somewhat following the therapy, but still complained of pain. The report indicates that claimant expressed a fear of returning to work and of inability to do the same job he had previously performed. It also indicates that claimant ceased taking the prescription medication because it caused headaches and a sleepy feeling. Claimant's pain is characterized as a dull ache which is localized in the low back area and radiates into both legs. Dr. Manahan indicated that claimant could go back to to a light job with a 50-pound limit on lifting and then gradually work back to his former job over a period of 4-6 weeks. Dr. Manahan indicated claimant's neurological findings were normal. Claimant was assigned a five percent permanent partial impairment rating on the basis of the American Medical Association's Guides to the Evaluation of Permanent Impairment (defendants' exhibit A, pages 18 and 19).

Claimant was again seen by Dr. Emerson on July 18, 1986. He continued to exhibit a dull aching pain over the low back and indicated that his symptoms were related to activities such as walking, prolonged sitting, prolonged standing or lifting. A physical examination was normal neurologically. Dr. Emerson indicated that claimant had low back pain of unknown etiology, but suspected that it was due to degenerative disc disease and posterior facet arthrosis. He rated claimant as having a 10% permanent partial impairment of the whole man. Dr. Emerson attributed his 10% impairment rating to the injury that occurred in September, 1985 (defendants' exhibit A, page 39). He indicated that the only explainable cause for claimant's back pain is his degenerative disc disease (defendants' exhibit A, page 15). He again recommended that claimant be seen at the Sister Kenny Institute (defendants' exhibit A, page 20).

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On October 20, 1986, claimant was seen at the Sister Kenny Institute. A physical examination revealed evidence of mechanical low back pain with no sciatic radiculitis. A CT scan showed narrowing of the L5-S1 disc space with evidence of degenerative changes, but no disc bulging. Aggressive treatment in the nature of nerve injections and blocks was undertaken. It provided brief temporary relief, but did not improve claimant's condition and, in fact, may have worsened it somewhat. It was recommended that claimant continue with exercise and accomplish weight reduction. A surgical stabilization procedure was indicated to be a possible option (defendants' exhibit A, pages 28-30 and 35). Claimant testified that Alexander Lifson, M.D., the primary physician he dealt with at the Institute, had not actually recommended surgery, but had indicated to claimant that it was up to claimant as to whether or not he wanted to try surgery (defendants' exhibit A, pages 67 and 68).

On December 11, 1986, Dr. Yankey issued a comprehensive, and substantially accurate, report regarding claimant's injury, treatment, recovery and future prognosis (defendants' exhibit A, pages 33 and 34). The report indicates that claimant exhibited no signs of muscle weakness, atrophy or other neurological or circulatory deficits. Range of motion of the lumbar spine was restricted, but strength, sensation and reflexes were intact. Dr. Yankey indicated that claimant has many functional limitations and should avoid prolonged sitting, standing, bending, driving and lifting. Dr. Yankey indicated that claimant was not currently capable of working at his normal job or at any other type of job due to his back pain which accompanies just about any movement of his back. Dr. Yankey indicated that claimant's problem was not expected to significantly improve or deteriorate in the future.

Claimant is presently involved in a controversy wherein he is suspected of altering or tampering with a motor vehicle odometer. Claiment denied the allegation, but had no explanation for the apparent decrease of miles on the odometer of the vehicle between the time he purchased it and its subsequent sale (defendants' exhibit A, pages 112-123).

Claimant was placed under surveillance by Bret Amick on July 30 and 31, 1987. Amick testified that claimant's gait appeared normal throughout the period of surveillance. Amick testified that, on July 30, he observed claimant bend over, carry and place boxes, which appeared to contain vegetables, in the trunk of a car without apparent difficulty. Amick testified that, on July 31, he observed claimant washing and drying a car at a relatively fast pace without any apparent difficulty. Claimant testified that the boxes he carried contained clothing and were not heavy. He stated that he was able to wash a car, but that he did so at his own pace.

Claimant was evaluated by Roger F. Marquardt, a qualified vocational consultant. Marquardt's report appears in exhibit A at pages 109-111. Marquardt expressed the opinion that claimant has no functional capacity to permit him to return to any of his past employments, but that he does have certain acquired employment skills which are transferrable to light or sedentary work, particularly in the area of maintenance of electrical machines and circuits. Marquardt indicated that placement assistance would be highly advisable if claimant was to seek employment. Marquardt stated that placement attempts should center on semi-skilled work in the building maintenance or electrical maintenance field where median pay is in the range of $7.00 per hour and could possibly run as high as $8-$10 per hour. Marquardt opined that claimant could earn up to $9.00 per hour in semi-skilled work. Marquardt also indicated that wage scales in the Joplin, Missouri area would be consistent with those in Iowa.

Claimant testified that most of his employment career has been spent in the employ of Lehigh Porland Cement, but that he also has limited experience in building maintenance, military telephone installation and repair and as a gas station attendant. He has completed trade courses in air conditioning, electricity, mechanical drawing, plumbing and general construction maintenance. While at Lehigh, he held a number of different positions.

Claimant owns a small farm near Joplin, Missouri and frequently travels between the part-time home in Missouri and his home in Mason City, Iowa, a distance estimated at approximately 430 miles each way. Claimant testified that he sometimes makes the drive by himself and that it takes approximately 10 hours.

Claimant testified that his condition is aggravated by almost any activity in which he engages. He presently receives a pension from the employer in the amount of $653.08 per month. He stated that he was earning $548.00 per week at the time of injury and that, in 1984, he earned in the range of $28,000-$30,000. Claimant stated that, prior to the time of his injury, he planned to work until age 65. He now has a claim pending for Social Security disability benefits. He has not looked for work since the injury. Claimant had a full range of fringe benefits at his employment, but was uncertain as to what fringes, if any, have continued during his retirement.

APPLICABLE LAW AND ANALYSIS

The only issue presented by the parties for determination is the extent of claimant's industrial disability that resulted from the injury sustained on September 23, 1985.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 23, 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).

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 only medical diagnosis that has been made in this case is degenerative disc disease in claimant's spine. Agency expertise is relied upon to realize that degenerative disc disease is a long-standing problem and that claimant's degenerative condition did not have its origin in the September 23, 1985 incident. Degenerative condition is, however, a condition which is particularly susceptible to injurious aggravations.

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

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

Claimant had a prior incident involving his back which required approximately three months to resolve. It is easily conceivable that any aggravation of his degenerative condition could be quite troublesome. Claimant was given a five percent impairment rating from Dr. Manahan and a 10% rating from Dr. Emerson. Dr. Emerson specifically related the impairment to the September 23, 1985 incident.

Claimant has substantial limitations as summarized by Dr. Yankey in his December 11, 1986 report.

The only basis for claimant's complaints that has been suggested by any of the physicians is the degenerative condition. The severity of the complaints is quite subjective. Claimant's appearance and demeanor was observed as he testified. There are indications in the record that claimant is quite upset with the employer, blames the employer for his condition and has no desire whatsoever to return to employment with the employer. There is nothing in the record, beyond claimant's subjective complaints, which indicates that the aggravation of claimant's preexisting condition that occurred on September 23, 1985 was an incident of major long-term consequence. He has not exhibited any neurological or other physical changes which can be objectively determined. Claimant's motivation and desire to be gainfully employed are determined to be suspect as is his credibility regarding the severity of his complaints. Claimant seems to live the life of a quite active retired person. Nevertheless, he has been given impairment ratings and Dr. Emerson has attributed the impairment to the injury. The causal connection made by Dr. Emerson and his impairment rating are accepted as correct. When all the applicable factors of industrial disability are considered, it is determined that claimant has sustained a 20% permanent partial disability as a result of the injury that occurred on September 23, 1985. Claimant's failure to establish the credibility of his complaints renders the medically-imposed restrictions on his activities lacking in foundation. The restrictions indicated by Dr. Yankey appear to be based solely upon claimant's subjective complaints. The assessment made by Dr. Manahan is determined to by the most accurate assessment of claimant's actual physical capabilities.

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FINDINGS OF FACT

1. On September 23, 1985, Albert Herrera was a resident of Mason City, Iowa employed by Lehigh Portland Cement.

2. Albert Herrera injured his back on September 23, 1985 when assisting a co-worker in moving an elevator door.

3. The injury to claimant's back was in the nature of a strain which aggravated a preexisting degenerative condition.

4. Claimant has a 10% permanent physical impairment of the body as a whole due to the injury sustained in that incident.

5. Claimant did not establish the credibility of his complaints of pain.

6. Claimant is not motivated to return to work with this employer, or elsewhere.

7. At the time of hearing, claimant was 53 years of age and married, but without any other dependents.

8. The physical limitations which were indicated by Dr. Manahan are accepted as being correct rather than the more restrictive estimates of claimant's functional capabilities which have been provided by other medical practitioners who based their recommendations on claimant's complaints of pain and discomfort, which complaints have been found to be unreliable.

9. Claimant is a high school graduate and has worked for the employer for more than 30 years in various positions. Claimant has also taken various trade courses in air conditioning, electricity, mechanical drawing, general construction maintenance and plumbing.

10. Claimant appeared to be of at least average intelligence and to be emotionally stable.

11. Claimant has a 20% loss of earning capacity due to the September 23, 1985 injury.

CONCLUSIONS OF LAW

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

2. The injury of September 23, 1985 is a proximate cause of impairment of claimant's lumbar spine.

3. When claimant's permanent disability is evaluated industrially, pursuant to section 85.34(2)(u), it is found to be a 20% permanent partial disability.

ORDER

IT IS THEREFORE ORDERED, that defendants pay claimant one hundred (100) weeks of compensation for permanent partial disability at the stipulated rate of three hundred twenty-eight and 78/100 dollars ($328.78) per week. Pursuant to the stipulation of the parties, forty-one (41) weeks have already been paid which leaves a remainder of fifty-nine (59) weeks to be paid commencing April 8, 1987 consistent with the stipulation made by the parties.

IT IS FURTHER ORDERED that all past due accrued amounts be paid in a lump sum together with interest pursuant to section 85.30.

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

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

Signed and filed this 24th day of February, 1988.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LOIS HERRING,	:	
Claimant,	:	File No. 733671
vs.	:	A P P E A L
ARMOUR DIAL, INC.,	:	D E C I S I O N
Employer, Self-Insured, Defendant.	:	FILED

MAR 28 1988

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision awarding benefits based on a 25 percent impairment of claimant's left upper extremity. The deputy denied benefits for industrial disability holding that claimant did not establish that she sustained a disability to the body as a whole.

The record on appeal consists of the transcript of the review-reopening hearing and joint exhibits 1 through 11. The deputy took official notice of the exhibits received into evidence at the arbitration hearing in this matter on August 27, 1984. Only claimant-appellant has filed a brief on appeal.

ISSUES

Claimant states the following issue on appeal: "The deputy's finding that the claimant's impairment and disability are limited to the arm and the scheduled portion of the Code as opposed to the body as a whole and unscheduled part of the Code is error."

REVIEW OF THE EVIDENCE

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

The deputy made the following findings of fact in the arbitration decision filed in this matter:

> Claimant sustained an injury arising out of and in the course of her employment when she strained herself while separating two cartons of canned meat which were glued together.

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Claimant's injury resulted in a reflex sympathetic dystrophy with an underlying carpal tunnel syndrome.

Claimant had a carpal tunnel release performed June 3, 1983. The release did not relieve claimant's symptoms.

Claimant had a series of ganglion blocks in February 1984. These resulted in some improvement in her symptoms.

Claimant will require at least a second series of ganglion blocks to return to her preinjury status.

Claimant has not recovered to the extent that she can return to work substantially similar to that in which she was engaged when injured.

Claimant has not yet returned to work for defendant.

Claimant has incurred medical expenses related to her April 28, 1983 injury. These include medical mileage of the 1270 miles in 1983 and of 840 miles in 1984, and costs for a series of ganglion.

(Arbitration Decision, page 13)

Claimant's injury occurred on April 28, 1983. Since the arbitration hearing, claimant underwent a second series of ganglion blocks on December 5, 1984. The ganglion blocks were of little benefit to claimant. See joint exhibit 5. D. K. Nelson, M.D., claimant's treating physician, states his impression of claimant's condition in his January 8, 1985 notes: "Impression: She has clinical evidence of ulnar neuropathy or C8 radiculopathy also improved condition of reflex sympathetic dystrophy." (Joint Exhibit 5)

Dr. Nelson referred claimant to a Dr. Blair for a second opinion. Dr. Blair examined and treated claimant on three occasions from March 12, 1985 through April 23, 1985. In his March 12, 1985 clinical notes, Dr. Blair states:

> EXAM: Exam reveals the left upper extremity appears the same in size, color and texture to the right upper extremity. The forearm measured 18 cm proximal to the radial styloid, is 1 cm less in diameter than the right. The left upper extremity. is slightly cooler than the left throughout. Color is the same. The skin on the left hand is slightly

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dryer than the right. She has full ROM of the shoulder, elbow, wrist and fingers. No swelling, no particular tenderness to touch except the posterior arm. Neck has full ROM without reproduction of symptoms.

IMP: The patient was seen and examined with Dr. Blair. We feel she is in a late stage of an almost completely recovered reflex sympathetic dystrophy now with persistent dysesthesias, cold intolerance.

(Jt. Ex. 7)

In his April 23, 1985 clinical notes, Dr. Blair states:

PHYSICAL EXAM: Exam shows the skin to be apparently dryer than on the other side and slightly shiny. Strength in her deltoid, triceps, wrist flexion and extension on the left is all 4+/5 compared with the right and strength in her biceps is 5- compared with 5 on the right.

IMP: The patient was seen with Dr. Blair and it was felt that she has received some relief from the TENS unit and that the headaches that she described could be due to improper placement of the pads. She was therefore sent down to PT for review of the proper use of the TENS unit and will return in 2 months for f/u. When she does return AP and lateral flexion extension views of her spine will be obtained to rule out any pathology here causing her symptoms.

(Jt. Ex. 8)

On May 13, 1985, Dr. Nelson performed surgery on claimant for left ulnar neuropathy. See joint exhibit 7, page 10. On subsequent visits, Dr. Nelson's notes reflect that claimant was experiencing shoulder and neck pain, but claimant retained full range of motion in her shoulders. See joint exhibits 8-10.

On May 7, 1986, Dr. Nelson examined claimant for the purpose of evaluating claimant's impairment:

I saw Mrs. Herring on May 7, 1986. At that time I felt that her healing had plateaued and at that time I ended her healing period. I estimated her permanent physical impairment to be 25% of the upper extremity, this equates to a 15% whole man extremity. Her symptoms and disability are the result of her injury at work on May 1, 1983. I feel that her condition is permanent and have no

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other recommendations for treatment.

(Jt. Ex. 11)

In the arbitration decision, the deputy states the following concerning claimant's prior medical history:

> Claimant recited that repetitive raising of her left arm remains a problem. Claimant reported that she had injured a tendon in her upper left arm at work in 1979 and that she had missed "quite a bit" of work when hospitalized for stomach problems prior to the April 28, 1983 incident.
>
> On cross examination, claimant elaborated concerning her 1979 injury. She stated she ruptured a tendon while lifting cases of chili from a pallet. She testified that the muscle in her upper left arm "caved in." Claimant was off work because of this injury from January 10, 1979 through April 1, 1980. She reported a Dr. Browning treating her condition and performed surgery about 1.5 inches above her wrist on her forearm. She stated the doctor described such as "clearing out a tunnel" but "didn't call it a carpal tunnel." Claimant stated returning to her regular job following her injury was "quite an adjustment." She reported that she experienced a dull ache in her wrist following this injury. Claimant disclosed that she was hospitalized in 1982 for severe headaches. She recited that tests at that time revealed a pinched nerve. Claimant admitted she had experienced pain at the base of her skull before 1983 and that such radiated into both shoulders. Claimant relayed that in May 1983 she displaced a rib while loading meat into her home freezer.

(Arb Dec. p. 3)

APPLICABLE LAW

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

ANALYSIS

Contrary to claimant's argument, the greater weight of evidence supports the deputy's finding that claimant's disability is limited to the left upper extremity.

Claimant states that she experiences pain in her left shoulder, but Dr. Nelson's clinical notes reveal that claimant

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retains full range of motion in the left shoulder. The arbitration decision discloses that claimant experienced pain problems in the neck and both shoulders before the injury of April 28, 1983. This fact weakens the causal connection between claimant's neck and shoulder complaints and her April 28, 1983 work injury. The evidence claimant presented just failed to meet her burden.

FINDINGS OF FACT

1. Claimant reached maximum medical improvement on May 7, 1986.

2. As a result of claimant's April 28, 1983 work injury, claimant suffers a 25 percent impairment of the left upper extremity.

CONCLUSIONS OF LAW

Claimant is entitled to healing period benefits from April 28, 1983 through May 7, 1986.

Claimant is entitled to permanent partial disability benefits based upon a 25 percent impairment of the left upper extremity.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant pay claimant healing period benefits for the period from April 28, 1983 through May 7, 1986 at the rate of two hundred sixty-eight and 08/100 dollars ($268.08) per week.

That defendant pay claimant sixty-two point five (62.5) weeks of permanent partial disability benfits at the rate of two hundred sixty-eight and 08/100 dollars ($268.08) per week commencing May 8, 1986.

That defendant shall pay accrued amounts in a lump sum together with interest pursuant to Iowa Code section 85.30.

That defendant shall receive credit for all benefits already paid.

That claimant shall pay the costs of this appeal in accordance with Division of Industrial Services Rule 343-3.1.

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

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

000740

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000741

1402.40; 1402.60
1801; 1802; 1803
2203; 3202; 4000.1
Filed 4-15-88
David E. Linquist

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BIRDEEN HIMSCHOOT, Claimant, vs. MONTEZUMA MANUFACTURING, Employer, and FIREMAN'S FUND INSURANCE, Insurance Carrier, and SECOND INJURY FUND OF IOWA, Defendants.	File Nos. 672778 738235 A P P E A L D E C I S I O N

1402.40; 1801

Claimant was not allowed temporary disability benefits for a work-related recurrence of a ganglion cyst. Claimant has not proved that she was unable to work for any period of time because of the recurrence of the ganglion cyst.

1402.60

Doctors had indicated that the ganglion cyst and its recurrence were work related. Therefore, claimant was allowed medical benefits for the recurrence.

1802

Claimant's condition was the same before and after surgery for the ganglion cyst. The medical exhibits did not demonstrate the cyst was the cause of any permanent partial disability.

Claimant was not entitled to healing period benefits for the cyst.

1803

Claimant had suffered bilateral carpel tunnel syndrome because of the work injury. The bilateral carpal tunnel was one injury when symptoms for both hands occurred at the same time, even though treatment and surgery for each arm occurred on different dates about a year apart. Claimant had a functional disability of the body as a whole because she had impairment of both hands, right greater than the left.

2203

Under the facts of this case claimant's bilateral carpal tunnel syndrome was the result of an injury and is not an occupational disease.

3202

Since bilateral carpal tunnel was found to be one injury there was no second injury fund liability even though claimant filed two petitions, two claim files were processed, and the surgeries occurred about a year apart.

4000.1

Claimant was allowed an additional 30 days of benefits for healing period benefits because the employer failed to send a section 86.13/Auxier notice.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BIRDEEN HIMSCHOOT,	:	
	:	
Claimant,	:	
	:	File Nos. 672778
vs.	:	738235
	:	
MONTEZUMA MANUFACTURING,	:	
	:	A P P E A L
Employer,	:	
	:	D E C I S I O N
and	:	
	:	
FIREMAN'S FUND INSURANCE,	:	
	:	
Insurance Carrier,	:	
	:	
and	:	
	:	
SECOND INJURY FUND OF IOWA,	:	
	:	
Defendants.	:	

FILED

APR 15 1988

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision awarding permanent partial disability, healing period benefits, mileage, and medical expenses.

The record on appeal consists of the transcript of the review-reopening hearing; one joint medical exhibit; claimant's exhibits 1 through 3; defendant Second Injury Fund's exhibits 4 through 6; and defendant employer and insurance carrier's exhibits 7 and 8. All parties filed briefs on appeal.

ISSUES

The issues on appeal are:

1. Whether claimant is entitled to benefits from the second injury fund;

2. Whether claimant is entitled to temporary total disability benefits, additional healing period benefits, or medical expenses; and

3. Whether claimant's condition is an occupational disease.

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REVIEW OF THE EVIDENCE

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

Claimant started working for defendant employer on September 23, 1980 as a production worker. Her job required many repetitious hand movements with both hands. Shortly after she began working she experienced a numb and tingling feeling as if her fingers had fallen asleep. She saw her personal physician, Nyle Kauffman, M.D. She reported to him on October 22, 1980 that she had numbness in her arms. Dr. Kauffman referred her to Lynn Kramer, M.D., a neurologist. Dr. Kramer saw claimant on April 27, 1981 and wrote to Dr. Kauffman the next day that claimant had bilateral carpal tunnel syndrome, right greater than left, and a ganglion cyst on the median nerve on the right.

On June 4, 1981, Bruce Sprague, M.D., performed surgery which was a release of right transverse carpal ligament and excision of ganglion of volar surface right wrist. The diagnosis on that day was bilateral carpal syndrome and ganglion, volar surface, right wrist. On September 9, 1981, Dr. Sprague released claimant to return to work without any restriction.

Claimant returned to work on September 10, 1981 and began to have more problems with the left hand. There was a layoff from October 20, 1981 to January 8, 1982. After claimant returned to work following the layoff, she continued to have problems with the left hand and the employer sent her to Robert Carney, M.D. On February 12, 1982, Dr. Carney saw her and on February 19, 1982 took her off work because of pain in the left wrist.

On March 22, 1982, Albert L. Clemens, M.D., saw claimant for pain in the left wrist and a stiff right index finger. He diagnosed her as having left carpal tunnel syndrome and recommended a release operation which was performed in surgery on April 9, 1982. On July 6, 1982, Dr. Clemens released her for light work for one month.

Claimant testified that there was no light duty work at the employer. Mary Van Gorp, office manager, and Jack Ramsey, foreman for the employer, also testified that the employer did not accept a light duty release. Claimant did report for work in August 1982 without a full release from a doctor. She indicated that she felt she could not do the work and she resigned.

Van Gorp testified that she had a conversation with claimant in July 1982 and it was agreed that claimant would not work for one more month and that claimant would get a full release and return to work. Claimant testified that she had no recollection

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of the conversation but would believe Van Gorp if Van Gorp testified that the conversation took place.

Claimant testified that in July of 1982, she indicated to Ramsey that her right hand still was not right and the employer made an appointment for claimant to see Dr. Carney. He saw her on August 10, 1982 and indicated she had recurrence of the ganglion just above the previous ganglionectomy area.

Dr. Clemens performed surgery on the ganglion on December 10, 1984 and removed it. Claimant testified that this surgery did not affect the function to her right hand or arm. She also testified at the time of the hearing that she had numbness and tingling in her hands and that she would not have the grip nor the dexterity to do production work for the employer.

In a letter dated January 15, 1985, Dr. Carney stated, "In regards to the ganglion recurring, this too is not unusual, in my opinion. When a person returns to a repetative [sic] type of work causing strain to the previous problem area this could indeed occur." Dr. Clemens, in a letter dated June 1, 1983, stated:

> It was my opinion that her bilateral carpal tunnel syndromes, for which she underwent surgery, as well as her original ganglion of her wrist, were related to her employment. The recurrence of the ganglion in the same place, is not an unusual circumstance. It is usually related to the same type of repetitive work and I felt this was the case in this lady's problems.

(Joint Medical Exhibit, page 54)

In a letter dated May 25, 1984, Paul From, M.D., stated that the original ganglion was related to her employment but did not express an opinion whether the recurrence was or was not related to employment. In a letter dated January 17, 1984, Dr. Sprague stated:

> Her ganglion has reoccurred, which is something that happens 10% of the time following excision of ganglions, which we feel is probably due to some mucoid cells that are left in the area that will again produce the ganglionous process.
>
> I do not feel the ganglion is a work-aggrevated [sic] condition; the carpal tunnel syndromes are a work-aggrevated [sic] condition.

(Jt. Med. Ex., p. 44)

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In a letter dated March 13, 1985, Dr. Clemens stated, "I have seen her once since the surgery, namely January 10, 1985, and to my knowledge, as of that date, she had recovered completely from the surgery and I have no knowledge of her current status." (Jt. Med. Ex., p. 51)

Since claimant's resignation in August of 1982 she has spent some of the time in school and worked at various jobs. Some of the time is not accounted for in the record. She attended community college from September 1982 until May 1983. She has not returned to work for the employer. She still has numbness, no grip strength, pain in her right arm, and minor problems with her left arm. These problems have made doing the various jobs she has tried difficult. Dr. Carney, in September 1982, wrote a letter stating that claimant terminated her job as a result of carpal tunnel syndrome.

Claimant did not receive workers' compensation checks after August 1982. Defendant employer and insurance carrier did not give claimant written notice of termination of compensation benefits.

APPLICABLE LAW

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

ANALYSIS

Claimant argues on appeal that she has sustained two separate injuries and as a consequence is entitled to benefits from the second injury fund. Claimant's arguments are not persuasive. The record clearly indicates that the original diagnosis following claimant's first complaints was that claimant had bilateral carpal tunnel syndrome, the right greater than the left. That diagnosis was made by Dr. Kramer on April 27, 1981 and by Dr. Sprague on June 4, 1981. These diagnoses were made before February 12, 1982, the date claimant asserts is the date of the second injury. It should be noted that the date February 12, 1982 which claimant asserts is the date of the second injury is merely the date claimant sought medical treatment for the carpal tunnel syndrome in her left hand.

Claimant argues that the separate memoranda of agreement for injuries of April 27, 1981 and February 12, 1982 establish as a matter of law that there are two separate injuries. This argument is also not persuasive. A memorandum of agreement establishes an employer-employee relationship and that the injury arose out of and in the course of employment. It does not indicate what the injuries were or if any permanent impairment resulted. It does not establish any fact relating to liability of the second injury fund. In this case, the second

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In a letter dated March 13, 1985, Dr. Clemens stated, "I have seen her once since the surgery, namely January 10, 1985, and to my knowledge, as of that date, she had recovered completely from the surgery and I have no knowledge of her current status." (Jt. Med. Ex., p. 51)

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Claimant did not receive workers' compensation checks after August 1982. Defendant employer and insurance carrier did not give claimant written notice of termination of compensation benefits.

APPLICABLE LAW

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

ANALYSIS

Claimant argues on appeal that she has sustained two separate injuries and as a consequence is entitled to benefits from the second injury fund. Claimant's arguments are not persuasive. The record clearly indicates that the original diagnosis following claimant's first complaints was that claimant had bilateral carpal tunnel syndrome, the right greater than the left. That diagnosis was made by Dr. Kramer on April 27, 1981 and by Dr. Sprague on June 4, 1981. These diagnoses were made before February 12, 1982, the date claimant asserts is the date of the second injury. It should be noted that the date February 12, 1982 which claimant asserts is the date of the second injury is merely the date claimant sought medical treatment for the carpal tunnel syndrome in her left hand.

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injury fund specifically did not stipulate that there were two injuries that arose out of and in the course of employment. Claimant has not proved by the greater weight of evidence that she received two separate injuries and is not entitled to benefits from the second injury fund.

Claimant also argues on appeal that she is entitled to additional healing period benefits and medical benefits for the injury on April 27, 1981. The injury discussed in the appeal brief is the ganglion cyst and claimant asserts she is entitled to healing period benefits from the date the recurrence of the cyst was diagnosed (August 10, 1982) to a reasonable time for recuperation from the surgery which was performed on December 10, 1984. In order for claimant to receive the healing period benefits, the claimant must prove that the injury resulted in permanent partial disability.

Claimant's own testimony indicated that her condition was the same before and after each of the surgeries for the ganglion cyst. The medical exhibits do not demonstrate the ganglion cyst was the cause of any permanent partial disability. Dr. Clemens states that it was not the cause of any permanent partial disability. Claimant had returned to work in September 1981 after the first surgery which was performed on June 4, 1981. She did work several jobs after she quit at the employer in August 1982. Claimant is not entitled to healing period benefits as she has not proved that the ganglion cyst was the cause of any permanent disability.

Even if claimant is not entitled to healing period benefits, she may be entitled to temporary disability benefits if she proves that she was unable to work due to the injury (the ganglion cyst). Claimant has not met her burden of proof. There is no evidence that claimant's inability to return to work in August 1982 was due to the ganglion cyst. Just as there is no evidence that claimant's inability to return to work in August 1982 was due to the ganglion cyst, there is also insufficient evidence to conclude that claimant was unable to work after the surgery in December 1984. Claimant has the burden of proving the period of temporary disability, if any. Claimant has not provided sufficient evidence to determine the period of temporary disability. While Dr. Clemens' letter of March 13, 1985 states that claimant had recovered completely from the surgery by January 10, 1985, it is not sufficient to determine a period of disability. Also, claimant's own testimony as discussed previously indicated that her condition was the same before and after each of the surgeries for the ganglion cyst. Claimant is not entitled to temporary disability benefits because of the ganglion cyst.

Dr. Carney, Dr. Clemens, and Dr. From expressed the general opinion that the ganglion cyst and its recurrence are work related. The defendants should pay the medical expenses for the

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excision on December 10, 1984.

Claimant also argues she is entitled to additional healing period benefits for the injury of February 12, 1982 because she was not given notice of termination of benefits as required by Iowa Code section 86.13. Dr. Clemens released claimant to do light duty work for one month on July 6, 1982. The employer did not have light duty work. Claimant reported to the employer on August 7, 1982 without obtaining a full release but quit because she thought she could not do the work. The complaints she had about her condition were the same at the time she quit and at the time of the hearing. She was paid benefits through August 8, 1982 but was not given written notice of the termination of those benefits. Claimant had discussed with her employer and it was the employer's understanding that claimant was to receive benefits until August 8, the date she was to return to work. Claimant had previously received compensation for surgery in 1981 and returned to work at which time the benefits would have ended. Under these circumstances, she had constructive notice that compensation would be terminated and she should have known that they would terminate on August 8, 1982. Claimant is entitled to thirty days of temporary disability benefits from the time she had constructive notice of the termination of benefits. She is entitled to benefits from August 9, 1982 through September 8, 1982.

The final argument on appeal by claimant is that as an alternative to second injury fund benefits, she has suffered an occupational disease and should be awarded permanent partial disability. Under the facts presented in this case, claimant's carpal tunnel syndrome is the result of an injury and is not an occupational disease.

FINDINGS OF FACT

1. Claimant became an employee of the employer on September 23, 1980.

2. Claimant's job required numerous repetitive hand, wrist and arm movements with both upper extremities.

3. Shortly after the claimant started to work she experienced numbness in both hands and pain that went up into her arms, the right arm worse than the left; a funny feeling in her right index finger; loss of grip strength; and a ganglion cyst on her right wrist.

4. Claimant's employment was the cause of bilateral carpal tunnel syndrome.

5. All of claimant's symptoms occurred at the same time and were first recorded when she saw her personal physician, Dr. Kauffman,

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on October 22, 1980.

6. Dr. Carney, Dr. Kramer, Dr. Sprague, Dr. Clemens, Dr. Solomon, Dr. Blair, Dr. Paulsen, and Dr. From all confirmed that claimant suffered from bilateral carpal tunnel syndrome even though the surgery on the right hand and the left hand were performed at different times.

7. The ganglion cyst on her right wrist which appeared at approximately the same time as the bilateral carpal tunnel, and the recurrence of it, were caused by her employment.

8. The ganglion cyst and the recurrence of it did not cause her to miss any time from work.

9. The employer did not send an Auxier notice to the claimant when they terminated her temporary benefits in August of 1982.

10. On August 8, 1982, claimant had constructive notice that her benefits would be terminated.

11. Claimant has suffered a 10 percent permanent physical impairment of the right hand and a five percent permanent physical impairment of the left hand.

12. Claimant incurred the medical expenses as shown on claimant's exhibit 2 for excision of the recurrence of the ganglion cyst.

13. Claimant incurred mileage expenses for her treatment as shown on claimant's exhibit 1 for her work-related injuries.

CONCLUSIONS OF LAW

The work related injury of bilateral carpal tunnel was the cause of permanent disability and also certain medical expenses.

The claimant is entitled to an additional 30 days or 4.286 weeks of healing period benefits from August 9, 1982 through Septemer 8, 1982 due to the failure of the insurance carrier to send an Auxier notice.

The claimant is entitled to 10 percent permanent partial disability for functional impairment of the right hand and five percent permanent partial disability for functional impairment to the left hand.

Ten percent of the right hand converts to nine percent of the upper extremity and five percent of the left hand converts to five percent of the upper extremity.

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Nine percent of the right upper extremity converts to five percent of the body as a whole and five percent of the left upper extremity converts to three percent of the body as a whole for a combined value of eight percent of the body as a whole.

Because the claimant has received only one injury, and not separate injuries, claimant is not entitled to benefits from the second injury fund.

There is a causal connection between the work injury and the ganglion cyst.

The ganglion cyst was not the cause of either temporary or permanent disability.

The claimant is entitled to payment of medical expenses for a section 85.39 examination and the excision of the recurrence of the ganglion cyst as shown on claimant's exhibit 2 in the amount of $1,253.00.

The claimant is entitled to payment of mileage expenses in the amount of $272.16 as shown in claimant's exhibit 1.

The claimant is not entitled to any additional healing period benefits or temporary disability benefits due to the recurrence of the ganglion cyst.

Claimant's bilateral carpal tunnel and ganglion cyst are injuries and are not occupational diseases.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendants pay claimant forty (40) weeks (.08 x 500) of permanent partial disability benefits at the rate of one hundred twenty-eight and 48/100 dollars ($128.48) for a total amount of five thousand one hundred thirty-nine and 20/100 dollars ($5,139.20). Said payments to be due from September 9, 1982.

That defendants pay claimant's mileage expense in the amount of two hundred seventy-two and 16/100 dollars ($272.16) as shown on claimant's exhibit 1.

That defendants pay claimant's medical expenses in the amount of one thousand two hundred fifty-three and no/100 dollars ($1,253.00) as shown on claimant's exhibit 2.

That defendants pay all these benefits to claimant in a lump sum.

That interest will accrue on the healing period benefits and permanent partial disability benfits under Iowa Code section 85.30.

That defendants pay the costs of the review-reopening proceeding and claimant pay the costs on appeal including the cost of the transcription of the hearing proceeding.

That defendants are to file a final report when this award is paid.

Signed and filed this 15th day of April, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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000753

2209
Filed January 29, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRUCE T. HOENING,	
Claimant,	
	FILE NO. 767993
vs.	
	A R B I T R A T I O N
OSCAR MAYER & CO.,	
	D E C I S I O N
Employer,	
Self-Insured,	
Defendant.	

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Compensable gradual injury was found for bilateral carpal tunnel syndrome. As claimant did not leave his work permanently as a result of pain, it was found that claimant suffered two compensable injuries before he permanently left work as a result of being terminated for leaving his work station without notice. The first injury date resulted in a period of temporary total disability and temporary total disability benefits were awarded. A second injury date was found which resulted in permanent disability. The date utilized was the date when claimant's physician first realized that the condition would be permanent and claimant would not be able to return to his usual work. Despite subject complaints of shoulder and back pain, it was found that the injuries were confined to the upper extremities.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRUCE T. HOENING,	:	
	:	
Claimant,	:	
	:	FILE NO. 767993
vs.	:	
	:	A R B I T R A T I O N
OSCAR MAYER & CO.,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	JAN 29 1988
Defendant.	:	

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Bruce T. Hoening, claimant, against Oscar Mayer Food Corporation, employer (hereinafter referred to as Oscar Mayer), for workers' compensation benefits as a result of an alleged injury on May 14, 1984. On December 4, 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: Rebecca Hoening, Phil Schumacher, John Feather. The exhibits received into the evidence at the hearing are listed in the prehearing report. All according to the prehearing report, the parties have stipulated to the following matters:

1. On May 14, 1984, claimant received an injury to the right arm which arose out of and in the course of employment with Oscar Mayer; the alleged work injury to the left arm remains in dispute.

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $165.31 per week.

3. Claimant was paid 25.21445 weeks of compensation at the rate of $165.31 per week prior to the hearing.

ISSUES

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

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I. Whether claimant received any other injuries arising out of and in the course of his employment at Oscar Mayer;

II. Whether there is a causal relationship between any of the alleged work injuries and the claimed disabilities; and,

III. The extent of weekly disability benefits to which claimant is entitled.

SUMMARY OF THE EVIDENCE

The following is a summary of the evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision. As will be the case in any attempted summarization, conclusions about what the evidence offered may show are evitable. Such conclusions, if any, in the following summary should be considered as preliminary findings of fact.

Claimant testified that he worked for Oscar Mayer from November 14, 1983 until his termination on January 3, 1985. Most of his work involved ham boning in which he was required to trim 20 pound hams on a continuous repetitive basis in assembly line fashion. Claimant said that after each ham arrived at his work station he would use a six inch straight knife held in his right hand to trim the ham. He steadied the ham using his left hand. After trimming, which only took a few seconds, claimant said that he would then throw the ham over his shoulder to a bin located behind him. Claimant testified that eventually he was assigned to a "pace line" which processed from 700 to over 1,000 hams during his shift. Phil Schumacher, the personnel manager at Oscar Mayer, testified that claimant was performing the job incorrectly by throwing the hams over his shoulder and that the hams were only 16 to 17 pounds in weight. Schumacher also disagreed with claimant's description of the extent of the amount of wrist and hand motions required to perform the job.

Claimant's employment prior to working at Oscar Mayer consisted of labor work for a Ford car dealer, care of patients at Woodward State Hospital, work in a bakery shop, work in a car rental business and employment as a cashier at a Hardee's fast-food restaurant.

Claimant testified that after only six weeks on the job at Oscar Mayer his hands began to hurt and he felt numbness and tingling in his fingers and hands. He said that at times on his way home from work the fingers of his right hand would lock around the steering wheel of his car. He stated that he also began to experience difficulty sleeping because of the pain and numbness in his arms. Claimant testified that he also began to

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drop things due to a loss of strength in his hand. Claimant said that he never had these types of problems before working at Oscar Mayer. The company medical records indicated that claimant first reported right wrist pain to the medical department on February 2, 1984.

In April, 1984, claimant saw Robert Deranleau, M.D., for left arm and shoulder pain. In May, 1984, claimant saw Dr. Deranleau for right wrist and left shoulder pain. Claimant, at that time, was referred by Dr. Deranleau to an orthopedic surgeon, A. B. Grundberg, M.D., who first saw claimant on June 1, 1984 for a complaint that his right hand was falling asleep with pain and numbness in the carpal tunnel and metacarpal areas of claimant's right hand radiating into the elbow which had "come on gradually over the last several months." Dr. Grundberg's impression was that claimant was suffering from right carpal tunnel syndrome and cross over tendinitis of the right wrist. A few days later, Dr. Grundberg stated to claimant that he had an option of either quitting his employment at Oscar Mayer and finding easier work or undergoing surgery which is not successful 20 percent of the time. Claimant expressed a desire to remain working at Oscar Mayer and chose surgery. On June 20, 1984, claimant left work and underwent decompression surgery of the right carpal tunnel syndrome and the cross over tendinitis condition by Dr. Grundberg. This surgery was performed despite a negative EMG test for carpal tunnel syndrome although Dr. Grundberg noted several clinical tests which were positive for such a syndrome.

Claimant was released for light duty work by Dr. Grundberg on August 13, 1984, at which time claimant returned to work. Claimant was then placed back onto the ham boning line but at a reduced pace. Despite the reduced pace, claimant again began to experience difficulties with both of his arms which extended into his shoulder and acrossed his back. Claimant returned to Dr. Grundberg who placed him on cleanup duty for a month. Claimant then worked on the cleanup crew at that time which also involved cleaning a dehairing machine. This type of work involved use of claimant's hands in order to pry the hair from the tongs in the machine. Claimant remained on this job for the next several weeks. In October, 1984, Dr. Grundberg noted that claimant was taking too many pain pills and he tapered off from the quantity he prescribed. At that time Dr. Grundberg noted that the left arm was bothering claimant most of the time. His impression at that time was right carpal tunnel syndrome, postop; bilateral cubicle tunnel syndrome; and, left carpal tunnel syndrome. Dr. Grundberg recommended that claimant remain on cleanup duty indefinitely or bid on an easier job. If claimant could not find easier work at Oscar Mayer, Dr. Grundberg recommended that he look for employment elsewhere.

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Claimant then continued to work until January 3, 1985, at which time he was terminated by Oscar Mayer for leaving his job at Oscar Mayer without permission. The circumstances leading up to this termination were in dispute at the hearing. Claimant testified that John Feather, Schumacher's assistant, told him that he would have to find a permanent job other than the temporary cleanup job. Therefore, claimant said that he completed a transfer request "bid" form. Claimant testified that he did not apply for any particular type of work. Feather and Schumacher disagreed with claimant's testimony. He testified that claimant was under no complusion to change jobs and that claimant voluntarily completed a transfer request to find lighter work on the cut floor. The transfer request form indicates that claimant requested a transfer to the cut floor.

Claimant said that when he started the new job on the cut floor, he could not physically tolerate the work as it exceeded Dr. Grundberg's restrictions against lifting over 20 pounds. Claimant said that he complained to his foreman who stated that he was unaware of any such restrictions. Claimant said that he then became angry and told his foreman that he would go home to get the written restriction note from Dr. Grundberg. Claimant stated that the foreman told him that he should do so. The foreman in the company records indicates that claimant never told him that he was leaving. Claimant said at the hearing that he left the plant at lunchtime and upon leaving he discussed the matter with union officials. Claimant then arrived at home and discussed the matter with his mother and then returned to the plant but well after the usual lunch break time. Apparently, he did not return with any note from Dr. Grundberg. Claimant learned upon arriving at Oscar Mayer that he was terminated. Claimant then filed a grievance which was ultimately denied by the company but that company officials agreed at the final step of the grievance process not to contest claimant's claim for unemployment compensation benefits. In his deposition, claimant's story as to the circumstances leading up to the termination was somewhat different then his testimony at hearing. In his deposition, claimant said that he only told union officials that he was leaving work, not his foreman.

Dr. Grundberg's records indicate that on November 20, 1984, the doctor gave claimant a note that claimant should remain on cleanup duty for three months. As indicated above, Dr. Grundberg in October, 1984, had indicated to claimant that he should bid on an easier job. Dr. Grundberg did not impose written permanent work restrictions against pushing, pulling, or lifting over 20 pounds until after an office visit on January 11, 1985, subsequent to claimant's termination. Feather and Schumacher testified that under the transfer rules, claimant could have terminated the transfer and returned to the cleanup crew if he was dissatisfied for any reason with the kill floor job. They further testified that claimant was terminated only for the reason of leaving his job without permission which they contend is a very serious

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violation of company rules and in an assembly line type of packing plant where each job must be manned for the line to remain operative.

In May, 1985, claimant returned to Dr. Grundberg with new complaints of a stiff neck and Dr. Grundberg diagnosed a possible cervical radiculitis and ordered a myelogram test. Dr. Grundberg stated that claimant had such cervical problems extending into his upper extremities for years. The myelogram was performed at Iowa Methodist in September, 1985, and the test results were normal. However, shortly after the myelogram test claimant suffered what was called at the time "grand mal seizure" and temporarily lost consciousness. Claimant has not had such a seizure or a loss of consciousness since that time but claimant now contends that his neck and back have hurt since that time. Dr. Grundberg diagnosed claimant's back difficulties as chronic strain of the cervical spine. All EMG tests performed upon claimant since that time have remained normal. Claimant last saw Dr. Grundberg in May, 1986, and the doctor noted a continuation of claimant's neck and shoulder pain.

Claimant testified that he developed a drug dependency problem from using the medication prescribed by Dr. Grundberg and after Dr. Grundberg stopped prescribing this medication, he obtained the same pain medication illegally from "the streets." Eventually, claimant was diagnosed as a drug abuser for reliance upon the medication prescribed by Dr. Grundberg. This diagnosis was made by Erle W. Fitz, D.O., who claimant said at the hearing is a psychiatrist. Dr. Fitz's background is not a part of the record of this case. There is also no indication on the medical report submitted by Dr. Fitz what, if any, specialty in medicine Dr. Fitz may have or whether his specialty is board certified. According to claimant he underwent drug abuse therapy for approximately 30 days in March of 1987. Claimant is currently sueing Dr. Grundberg for malpractice because of his alleged drug problem. Claimant admitted at hearing that he lied in his deposition by stating that he was off drugs at the time of his deposition for approximately four months. However, claimant testified at hearing that he has been off drugs for approximately a year. It should be noted that claimant requested and received a prescription for pain medication from Peter Wirtz, M.D., only a few weeks before the hearing in this case.

After leaving Oscar Mayer claimant was unemployed for a considerable length of time and drew unemployment compensation benefits. Claimant then worked for a brief period of time as a car wash attendant and on a construction crew erecting grain bins. Claimant states that he was compelled to quit both of these jobs due to his hand and arm problems. At the hearing, claimant described a continuation of pain and loss of strength in both of his arms, shoulders and back. He complains of popping in his shoulders and wrist areas along with having a

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stiff neck on the right side. Claimant testified that symptoms appear after activity such as raking leaves or while quickly turning his neck. At the time of the hearing, claimant was working full time for his father in the family newspaper business as an ad salesman and printer. Claimant denies performing any heavy work in such employment.

In February, 1985, Dr. Grundberg opined that claimant suffers from a seven percent permanent partial impairment to the right upper extremity and an eight percent permanent partial impairment to the left upper extremity. Dr. Grundberg did not give a specific opinion dealing with the causal connection of claimant's symptoms to his work. David B. McClain, D.O., another orthopedic surgeon, opined that claimant suffers from bilateral carpal tunnel syndrome and rates the permanent partial impairment as 15 percent to each upper extremity with an overall body as a whole impairment of nine percent. Dr. McClain did not opine as to the causal connection of this impairment to claimant's work.

Peter D. Wirtz, M.D., a board certified orthopedic surgeon, examined claimant in September, 1985, and again in November, 1987. At the time of his first exam, Dr. Wirtz reports that claimant also complained to him of low back pain along with his arm, shoulder and neck difficulties. In his deposition, Dr. Wirtz believes that claimant's arm symptoms are work related but disagrees with the carpal tunnel syndrome diagnosis of Dr. Grundberg and likewise disagrees with the need for carpal tunnel release surgery performed by Dr. Grundberg. Dr. Wirtz does not believe that a carpal tunnel diagnosis or a determination concerning carpal tunnel release surgery is appropriate without a positive EMG test and he notes that all of claimant's past EMG tests were negative. He admits, however, that he did not attempt to rate claimant's pain, loss of strength or sensation under the most recent AMA Guidelines. Dr. Wirtz also does not believe that claimant has suffered permanent partial impairment due to the negative EMG test. Given a history of prior cervical problems and no cervical problems until after claimant left his employment at Oscar Mayer, Dr. Wirtz further does not believe that any of claimant's cervical or low back pain was work related.

Claimant's appearance and demeanor at the hearing failed to indicate 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

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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 or progressively from work activity over a period of time. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). In McKeever cour also held that the date of injury in gradual injury cases is the time when pain prevents the employee from continuing to work. In McKeever, the injury date coincided with the time claimant was finally compelled to give up his job. This date was then utilized in determining rate and the timeliness of claimant's claim under Iowa Code section 85.26.

Defendant argues that any application of the McKeever gradual injury doctrine is not appropriate in this case because claimant did not plead such a theory. First, this deputy commissioner is unaware of any rule of law which requires litigants to plead legal theories before a hearing and in any event the technical rules of pleading do not apply to administrative proceedings. The facts giving rise to a gradual injury in this case were well know to defendant long before the hearing given Dr. Grundberg's first report of a gradual onset of symptoms. Secondly, the application of the McKeever doctrine to an overuse syndrome case certainly cannot be a surprise legal theory as the McKeever case itself involved an overuse syndrome type of case.

Therefore, the McKeever gradual injury theory is applicable to this case insofar as the fact that claimant has shown a gradual injury which arose out of and in the course of his employment. Although Dr. Grundberg did not give a specific causal connection opinion, it is clear from his treatment and restrictions he placed on claimant's activities that he believed that claimant's hand and arm difficulties are work related. Although Dr. Boulden disagrees with Dr. Grundberg's diagnosis and form of treatment, he did admit that the symptomatology of claimant's hands and arms were work related. Therefore, the greater weight of the evidence establishes a gradual or cumulative trauma type of injury process to both of claimant's hands and arms which arose out of and in the course of employment.

On the other hand, claimant has not shown that the upper or lower back problems were work related either by medical opinion or the facts. It is not clear, however, what Dr. Grundberg believes as to the cause of claimant's upper back problems in light of the statement that claimant had such problems for many years in his report. Claimant had no back problems while

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working for Oscar Mayer. Claimant claims that the back problems began after the seizure following the myelogram. This theory is not pausible as the reason that the myelogram was first performed was due to claimant's back pain complaints.

A problem arises as to the injury date when you apply the gradual or cumulative injury theory onto the facts of this case. Claimant plead an injury date of May 4, 1984 and this was stipulated to by defendant. However, this date really does not coincide or relate to any period of disability. Claimant did not leave work until June 20 for the surgery. Although claimant permanently left his employment in January, 1985, such a date could not be utilized for an injury date under the McKeever doctrine because claimant left because he was angry with his supervisor which led to his termination, not because of his pain. Claimant is simply not found credible on his circumstances of his termination. Unfortunately, the McKeever court did not give instructions as to how to arrive at an injury date when claimant did not permanently leave his employment due to pain. However, it must be realized that under the gradual injury process, there is a continuous injury each and every day claimant works in the injurious environment. Consequently, there may be several injury dates leading to several different types of disability over the entire gradual or cumulative injury process. Therefore, each type of disability may have a different injury date although it is a part of the same injury process. The precise injury dates in this case for the claimed disabilities will be dealt with below.

Claimant has not shown by the preponderance of the evidence that he suffered an injury as the result of his claim of drug abuse. This deputy commissioner must know more about Dr. Fitz to accept an opinion by him as to the causal connection of claimant's alleged drug addition problems especially when claimant admitted to obtaining drugs "from the streets." Also, no lasting effects from the seizure following the myelogram has been shown to constitute an injury to claimant's spine or the brain.

Finally, claimant has not shown that he has an injury to either of his shoulders or an injury into the body as a whole. Subjective pain complaints alone are not sufficient to establish an injury. Claimant, in his testimony, complained about pain radiating from his arms into his shoulders and acrossed his back. In this agency's experience, this could be the result of many causes unrelated to an injury to the tissues of the shoulder. The only treatment claimant has received relates to the arms and a diagnostic test for his upper back. The upper back problems, however, have not been found to be work related. Finally, there is absolutely no medical evidence supporting any theory of an injury to the shoulder; nor has there been any diagnosis or specific treatment for a shoulder injury.

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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, claimant has shown only a work injury to his arms as a result of the gradual injury process. First, the views of the primary treating physician, Dr. Grundberg, are given greater weight over the other physicians rendering opinions in this case due to his familiarity with claimant's condition on a clinical basis. From the reports of Dr. Grundberg, claimant established that he was off work for treatment of his work related right hand and arm condition from June 20, 1984 through August 12, 1984. Claimant was not absent again until

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his termination on January 3, 1985. It was first reported by Dr. Grundberg on October 23, 1985 to defendants that claimant will have permanent effects from bilateral carpal tunnel syndrome and bilateral cubicle tunnel syndrome and that claimant will not be able to return to his normal job at Oscar Mayer. Dr. Grundberg recommended at that time that claimant either remain on cleanup duty indefinitely or find easier work. Dr. Grundberg ultimately rated claimant's permanent impairment after claimant left work in January, 1985, but there does not appear to be any evidence that claimant's condition changed between October of 1984 and January of 1985.

Such facts as set forth above under a gradual type injury process give rise to two injury dates for purposes of awarding disability benefits. The first injury date is June 19, 1984 for an injury to the right arm resulting in temporary total disability extending from June 20, 1984 through August 12, 1984. The benefits are labeled temporary total disability rather than as healing period because Dr. Grundberg expected claimant to return to full duty following the surgery as the purpose of the surgery was to return claimant to work.

A second injury date arises from the fact that claimant returned to work in August, 1984 and was working at the time Dr. Grundberg finally realized that claimant's bilateral conditions were permanent on October 23, 1984. This injury was a simultaneous injury on October 23, 1984 to both arms due to Dr. Grundberg's simultaneous multiple diagnoses at that time of bilateral carpal tunnel syndrome and bilateral cubicle tunnel syndrome. The October 23, 1984 date also should be the injury date for awarding permanent disability benefits. It would be unfair to require defendant to pay permanent disability benefits prior to the time the authorized physician realized that claimant's condition was permanent. Interest on benefits should also be paid from that date as defendant should have realized from the statement of Dr. Grundberg on October 23, 1984, that claimant would have some extent of permanent disability to both extremities although he was not actually rated until January, 1985. Claimant also is not entitled to healing period benefits after January 3, 1985 because it was apparent to Dr. Grundberg on October 23, 1984 that claimant's condition was not expected to improve. Again, the only injuries found to be work related in this case was limited to the arms.

III. Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly Oil Co., 252 Iowa 128, 133, 106 N.W.2d 95, 98 (1960); Graves v. Eagle Iron Works, 331 N.W.2d 116 (Iowa 1983);

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Simbro v. DeLong's Sportswear, 332 N.W.2d 886, 997 (Iowa 1983). When the result of an injury is loss to a scheduled member, the compensation payable is limited to that set forth in the appropriate subdivision of Code section 85.34(2). Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). "Loss of use" of a member is equivalent to "loss" of the member. Moses v. National Union C.M. Co., 194 Iowa 819, 184 N.W. 746 (1922). Pursuant to Code section 85.34(2)(u) the industrial commissioner may equitably prorate compensation payable in those cases wherein the loss is something less than that provided for in the schedule. Blizek v. Eagle Signal Company, 164 N.W.2d 84 (Iowa 1969).

From the evidence submitted, it is found as a matter of fact that the work injury of October 23, 1984 is a cause of both a seven percent loss in use of the right upper extremity and an eight percent loss of use of the left upper extremity resulting occurring at the same time. Based on such a finding, claimant is entitled as a matter of law to a total of 45 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(s) which is nine percent of the 500 weeks, the maximum allowable number of weeks two simultaneous injuries resulting in the same accident. The nine percent figure was arrived at by utilizing the AMA Guidelines referred to in the evidence by taking the rating of Dr. Grundberg under these guidelines and arriving at a total whole man percentage of nine percent. See Simbro v. Delong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

Claimant is also entitled to temporary total disability benefits from June 20, 1984 through August 12, 1984 as a result of the June 19, 1984 injury under Iowa Code section 85.33(1). There is little question that claimant left work for surgery at that time and was not released by Dr. Grundberg until August 12, 1984.

FINDINGS OF FACT

1. Claimant was in the employ of Oscar Mayer at all times material herein as a ham boner in a meat cutting plant operated by Oscar Mayer. Claimant's job at Oscar Mayer required the extensive and repetitive use of both of his hands, wrists and arms in a cold environment.

2. On June 19, 1984, claimant suffered an injury to the right arm as a result of an overall gradual injury process medically referred to as right carpal tunnel syndrome and cross over tendinitis of the right wrist which arose out of and in the course of his employment at OM.

3. The work injury of June 19, 1984, was a cause of a period of temporary total disability during treatment and recovery from the work injury from June 20, 1984 through August 12, 1984. Claimant underwent decompression surgery on June 20,

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1984 and was not released to return to work by Dr. Grundberg until August 13, 1984.

4. On October 23, 1984, claimant suffered a permanent injury to both of his arms at the same time as a part of an overall gradual injury process medically termed as bilateral carpal tunnel syndrome and bilateral cubicle tunnel syndrome which arose out of and in the course of his employment at Oscar Mayer. At this time, claimant's primary treating physician first released that claimant would not return to full duty at Oscar Mayer and that he would have to remain on light duty or seek work elsewhere.

5. The work injury of October 23, 1984, was a cause of a seven percent permanent partial impairment of the right upper extremity and an eight percent permanent partial impairment to the left upper extremity or a total whole man permanent impairment of nine percent. Claimant is now permanently restricted from pushing, pulling and lifting over 20 pounds as a result of the permanent condition of his arms. Claimant continues at the present time to suffer from pain, loss of sensation and loss of strength in both of his upper extremities as a result of the October 23, 1984 work injury.

CONCLUSIONS OF LAW

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

ORDER

1. Defendant shall pay to claimant forty-five (45) weeks of permanent partial disability benefits at the rate of one hundred sixty-five and 31/100 dollar ($165.31) per week from October 23, 1984.

2. Defendant shall pay to claimant temporary total disability benefits from June 20, 1984 through August 12, 1984, at the rate of one hundred sixty-five and 31/100 dollars ($165.31) per week.

3. Defendant shall pay accrued benefits in a lump sum and shall receive credit against this award for the twenty-five point two-one-four-four-five (25.21445) weeks of weekly benefits previously paid pursuant to the stipulation of the parties in the prehearing report.

4. Defendant shall pay interest on benefits awarded herein in a manner consistent with this opinion.

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

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6. 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 January, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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1301, 1302, 1402.30, 1703
1804
Filed February 18, 1988
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WAYNE V. HOLLIDAY, Claimant, vs. SPENCER COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 711863 A R B I T R A T I O N D E C I S I O N

1301, 1302, 1402.30, 1703, 1804

Claimant presented himself with symptoms affecting primarily his right arm, but which also involved his neck and shoulder region. Although he had been thoroughly evaluated, the consensus of the medical practitioners was that he did have bona fide complaints and abnormalities, but that they were unable to identify the etiology of those complaints and abnormalities. The record clearly showed that the onset of the complaints was immediate following the trauma of which claimant complained. It was found that, in view of the medically documented physical abnormalities, the unknown etiology and the onset upon the occurrence of the trauma, that the trauma was a proximate cause of claimant's difficulties. Where the difficulties involved primarily the right upper extremity, but also involved the cervical spine, the disability was held to be to the body as a whole. Where the evidence failed to suggest, based upon claimant's education, experience and physical condition, that there was any type of employment for which he was reasonably suited, he was found to be permanently and totally disabled. Claimant was a construction worker who usually did not work during the winter months, but the occupation in which he engaged sometimes did provide winter work in the Midwest area or work in warmer states. The occupation was held to be not exclusively seasonal and his rate of compensation was based upon his previous 13 weeks' earnings.

FILED
FEB 18 1988
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WAYNE V. HOLLIDAY, Claimant, vs. SPENCER COMPANY, Employer, and LIBERTY MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 711863 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 Wayne V. Holliday, claimant, against Spencer Company, his former employer and Liberty Mutual Insurance Company, the employer's insurance carrier. The case was heard at Waterloo, Iowa on July 30, 1987 and was fully submitted upon conclusion of the hearing. The record in this proceeding consists of testimony from Wayne V. Holliday, William F. Bower and Patricia Holliday. The record also contains jointly offered exhibits 1 through 13.

ISSUES

The issues presented by the parties are determination of whether a causal connection exists between the injury that claimant sustained on July 26, 1982 and any permanent disability with which he is afflicted. Also at issue is the nature and extent of permanent disability. Claimant urges that he is permanently and totally disabled and that the odd-lot doctrine should be applied. Claimant urges that his healing period runs from August 3, 1982 through February 14, 1984. The rate of compensation is at issue with the employer contending that claimant was a seasonal employee whose compensation should be determined under section 85.36(9) while claimant urges that the rate of compensation should be determined under section 85.36(6). Assessment of costs is also at issue with defendants seeking to recover $185.15 for reporting fees for the deposition of Dr. VanGilder and $150.00 for an expert witness fee for Dr. VanGilder, totaling $335.15. It was stipulated that claimant sustained an injury which arose out of and in the course of his employment. It was stipulated that defendants had paid claimant 180.286 weeks of compensation at the rate of $262.58 prior to the date of hearing.

SUMMARY OF EVIDENCE

The following is only a brief summary of pertinent evidence. All evidence received at the hearing was considered when deciding the case even though it may not necessarily be referred to in this decision. The proposed findings and conclusions filed by the parties were reviewed and are to some extent incorporated herein with modifications deemed appropriate by the undersigned.

Wayne V. Holliday is the claimant in this case. Patricia Holliday is his spouse. William Bower is a former tuck pointer who lives in the Vinton, Iowa, area. The summary of evidence regarding the general nature of the business of tuck pointing as is hereinafter made is based upon the testimony presented by Wayne Holliday and William Bower. The statements regarding claimant's abilities, complaints and restrictions are based upon the testimony from claimant and his wife.

Wayne V. Holliday is a 45-year-old male whose birth date is February 18, 1942. He quit high school during the twelfth grade. He was in the Army reserve being on active duty in 1960 and was recalled to service in 1962. He received an honorable discharge. He had no further formal vocational, technical or academic training. His only training was on-the-job.

Claimant worked approximately seven months for U. S. Steel Corporation, starting as a welder's helper and, by the time he left employment with U. S. Steel, he was a welder.

Claimant began tuck pointing in 1962 and worked basically as a tuck pointer from 1962 until 1982 when he was injured. The occupation of being a tuck pointer was completely explained at the time of the hearing with pictures of the equipment used and a description of the activities, skills and exertion of being a tuck pointer (exhibit 7).

Tuck pointers primarily repair the mortared joints between bricks of a brick building that have deteriorated due to weather. A tuck pointer often works from scaffolding which is attached to the roof of the building. This is done in one of two ways: If the building has a ledge overhang, hooks are attached to the roof of the building and ropes are dropped from the hooks and attached to the scaffolding; if the building does not have a ledge on which to fasten the hooks, then the job becomes much more difficult. It is necessary then to use 12- to 20-foot 4 x 6 pieces of lumber, referred to as lookouts, which are placed on the roof and extended slightly over the roof. On the end of the timber, away from the edge of the building, sandbags are placed to counter balance the weight of the scaffolding.

In order to get the equipment to the roof of the building, it is necessary to carry it to the roof of the building. This

would be done from within the building, if possible. If not, equipment would have to be moved up on the outside of the building. Ropes would be attached to the equipment so the individuals on the roof could pull the equipment up to the roof. The rope could weight in excess of 100 pounds. The lookouts could weigh over 100 pounds. The individual on the roof must pull the equipment to the roof manually.

The job of tuck pointing begins with grinding out the deteriorated mortar joint with an electric or air powered grinder which could weigh approximately 30 pounds. Pictures of the grinders were entered into evidence and an air and electric grinder were displayed (exhibit 12-4 and 12-5). The tuck pointer is required to put pressure on the grinder to clean the joints. It is necessary to hold the grinder to ensure that it does not fall out of the hands of the worker. Both claimant and the witness, William Bower, testified to the stress upon the body from this type of work. A tuck pointer is often required to grind for an eight- or ten-hour day.

After the grinding has been completed, it is sometimes necessary to sand blast the building. A compressor is used to create high pressure that blows silica sand against the building to clean the bricks. A detailed description of this procedure was given. Pictures of the equipment used in the procedure, together with actual lengths of sand blast hose and a nozzle and hood were displayed (exhibits 12-1, 12-7, and 12-8). Tuck pointers may sand blast for entire days, resulting in fatigue as described by the witnesses.

After the building is sand blasted the actual tuck pointing begins. Mortar is mixed on the ground and sent up to the tuck pointer on the scaffolding. The tuck pointer puts from six to eight pounds of new mortar on his hock at a time and, using a tuck pointing tool, which was displayed (exhibits 12-6, 12-10, and 12-11), presses the mortar into the joints between the bricks. While this is not as heavy work as sand blasting and grinding, it requires constant bending, twisting and turning as described by the witnesses.

Following the tuck pointing, the building is acid washed which was described by the witnesses as easy work and may then be waterproofed.

Other than for a period in the 1970's when claimant worked as a structural steel welder in Sidney, Nebraska, claimant worked as a tuck pointer constantly from 1962 to 1982.

Before working as a tuck pointer, the only illness or injury experienced by claimant that appeared serious was when he was 12 years old and was hit by a truck which produced a broken leg and pelvis and brain concussion. Claimant recovered completely from

this injury and residuals of the injury apparently did not cause him any problems.

While working as a tuck pointer in 1977 for Spencer Company, claimant suffered a very serious accident. On October 21, 1977, he and the owner of Spencer Company had delivered a crane to their next job site on a Friday evening. While returning from this task, claimant was involved in an accident with his pickup truck which resulted in a fracture of two vertebrae in his neck. He was cared for by John C. VanGilder, M.D.

Dr. VanGilder performed a triple fusion on claimant. He remained under Dr. VanGilder's care until May 1, 1977 when he returned to work as a tuck pointer with no restrictions.

Claimant did not put in a claim for workers' compensation nor did he attempt to excuse himself from any type of duty because of restrictions or disabilities.

Claimant admitted that he is an alcoholic and testified that, up until August of 1979, he was drinking rather heavily. He entered into the Powell Treatment Center at a hospital in Des Moines. Claimant testified that he had not consumed alcohol since the date of entering the treatment at Powell. Claimant recently quit smoking.

Claimant continued working at Spencer Company without incident until April 1, 1982. At that time, while working in southern Iowa, claimant was unhooking a compressor from the rear of a truck. A picture of the compressor was entered into evidence (exhibits 12-2 and 12-3). This compressor is mounted on a trailer that fastens behind a truck. It was used to compress air for the sand blasting operation.

Claimant had unfastened the compressor from the truck. He had his back to the compressor and was lifting on the tongue pushing the compressor backwards away from the truck. Claimant stepped into a small hole, lost his balance and fell. The tongue of the trailer fell across his chest causing pain in his upper back. He attempted to complete work, but because of his injury, returned to Oelwein where he was treated by Darwin B. Jack, M.D. He was off work for approximately 11 days. Claimant returned to work without restriction of his activities.

Claimant stated that the residuals of that injury continued to bother him during that summer and to progressively worsen, but he continued to do his job until July 26, 1982.

On that day, he was working in Estherville, Iowa on a hospital. Claimant had gone there with two other individuals who are no longer in Iowa and are unavailable for testimony. When claimant arrived at the scene, he found that the majority

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of the building did have an overhang and could be done with hooks, but one wing of the hospital did not have an overhang so he had to find lookouts in the area. He was able to rent lookouts from a local lumber yard.

One of the individuals remained on the ground while claimant carried the rope to the roof from an inside stairway with the other individual. Claimant was pulling up one of the lookouts with the rope, hand over hand. He got the lookout about halfway up and felt a severe pain in the cevical area of his spine which caused what he described as an electrical shock to go down both of his upper extremities. He immediately let go of the rope, dropping the lookout. For the balance of the day, he was unable to work and only supervised the work of the other employees. On the next day, he went home because of the pain in his back and right arm.

Claimant was treated by Dr. Jack, was seen by David F. Poe, M.D., and was sent to Dr. VanGilder. Claimant was treated by Dr. VanGilder, and was examined by Arnold E. Delbridge, M.D., and by Winthrop S. Risk, M.D. Claimant was evaluated at the Medical Occupational Evaluation Center at Mercy Hospital in Des Moines.

Claimant was found to be totally disabled in accordance with the provisions of the Social Security Act and is receiving total disability benefits under the provisions of that Act. Claimant stated that his weight has gone from approximately 155 pounds down to approximately 120 pounds. He cannot mow the lawn or vacuum the house without his back hurting. He does help with some household work such as washing dishes, etc., but can do no stressful work of any type. He is severely limited in the periods of time that he can stand and sit and has difficulty riding in cars. Claimant has difficulty sleeping at night.

Claimant's day-to-day medical care has been provided by Dr. Jack who monitors claimant's condition with monthly evaluations (exhibits 1-2 and 1-8). Dr. Jack has consistently indicated that he considers claimant to be totally disabled (exhibits 1-1 and 1-16). His notes from 1982 are found in exhibit 1 at pages 129-132.

The neurosurgeon who treated claimant for the 1977 accident and for his current problems is Dr. VanGilder. Dr. VanGilder has diagnosed claimant's condition as a chronic polyneuropathy (exhibit 10, pages 21, 24, 31 and 45). A battery of diagnostic tests has failed to identify the etiology of claimant's problems. The only definite abnormality consistently found is abnormal EMG's of the right arm. Reflex changes and some of claimant's symptoms have been transitory (exhibit 10, pages 10-13, 16, 17, 20-25, 27, 29 and 31). Claimant has consistently exhibited diffuse loss of sensation of the right arm, but has not exhibited atrophy of the arm (exhibit 10, pages 10, 11, 24 and 30). The

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undersigned was unable to observe any apparent atrophy in claimant's arm at hearing.

Dr. VanGilder rated claimant's right arm as being totally disabled and equated it to a 20% disability of the body as a whole (exhibit 10, page 28). He felt that the 1977 accident had not produced any permanent impairment (exhibit 10, page 43).

Dr. VanGilder has consistently stated that the cause of claimant's problems is unclear (exhibit 10, pages 20, 21, 23, 31 and 32). He has ruled out the possibilities of the problems relating to the 1977 injury, a herniated disc, tumor or other mechanical factors (exhibit 10, pages 10-13, 35 and 44). An alcoholic neuropathy was indicated to be a possibility (exhibit 10, pages 19, 20, 27, 33, 34 and 37). Dr. VanGilder stated that claimant exhibited indications of a systemic disease which affects more than one nerve (exhibit 10, pages 18 and 20) and that he would expect that type of problem to be diffuse, but that claimant's problem seems limited to the right arm (exhibit 10, page 37).

Dr. VanGilder testified extensively with regard to the effect of the 1982 accident. On page 36, the doctor, following a question from claimant's counsel assuming facts in the record, responded as follows:

> A. I think I would rather answer the question by saying that with his history of trauma and the onset of his symptoms, that I felt the symptoms were secondary to the trauma.

On pages 40 and 41 of his deposition, Dr. VanGilder stated the following:

> Q. So if I understand your etiology here, you indicate that he received these traumatic injuries and whatever has happened to him, that started the process in motion.
>
> A. Yes.
>
> Q. And whether or not it would have happened to him in the future or not, it is very difficult if not impossible for you to tell.
>
> A. I can't say.
>
> Q. But be that as it may, what started this whole process in motion was those traumatic injuries.
>
> A. That's when he became symptomatic and I presume so.

At pages 32 through 34, Dr. VanGilder stated:

Q. Okay. Early on I had touched on the possibility of whether his current condition was caused by an injury that he had described to you back in '82 or whatever. What's your feeling about that?

A. Well, it started with the injury, but I don't think the injury was of the magnitude that persisted for the period of time that it has. Plus, we know that he had progression of his symptomatology somewhere in the middle of this, his change in reflexes. And this would have been two years after an injury. So I don't -- I don't think that's the primary cause of it, no.

Q. Okay.

A. It may have started the symptoms off.

Q. What would it be about an injury that would get it to start those symptoms?

A. Well, I think it would stretch the nerves and cause initial irritation in them. By stretching, what I'm saying is, he said something struck him on the shoulder at the time. And he probably had some trauma to a nerve. But I don't think that would cause a progressive sort of phenomenon to occur.

Q. Okay.

A. Several months or years after the injury.

Q. Is this the type of thing that you would expect to see in Mr. Holliday today absent that injury?

A. Is what now, I missed the question?

Q. Absent the injury, is this the type of thing that Mr. Holliday would have expected to incur during his lifetime anyway?

A. I don't know.

Q. Okay.

A. Possibly.

Q. Well, I was trying to figure out from those possible or likely causes that you had, if he was likely to wind up in the same position anyway?

A. I think it's very probable he would, but I can't answer that. I don't know.

Dr. VanGilder clearly indicated that claimant's leg complaints were not related to the 1982 traumas (exhibit 10, page 27).

Claimant was examined by Winthrop S. Risk, M.D., a neurologist in Cedar Rapids, Iowa. His reports are located in exhibit 1, pages 49-52 and 64-67. In his report of October 31, 1983, Dr. Risk indicates that claimant's problem resulted from the traumatic injuries described in this discussion. In that report he stated the following:

> In addition to the neck pain which is associated with the severe limitation of movement of the neck in all directions and in addition to the upper thoracic and arm pain, he experiences pain in his right hip and entire right lower limb.
>
> He assessed claimant's condition as follows:
>
> Wayne Holliday presents with right sided sensory motor impairment, neck pain, back pain, right upper limb and thoracic, and right lower limb pains; all fitting a pattern of chronic post-traumatic pain, with sensory motor impairment. As indicated in the examination above, there is no sign of dis-use atrophy of the right limbs. Tendon reflexes are generally symmetric. Fluency of movement improved with distraction and repetition. Most probably the patient suffers from post-traumatic syndrome, with somatization. The present degree of impairment, in terms of his complaints of pain and limitation of movement, appear out of proportion to the actual physical findings on examination. An associated depressive reaction is present.
>
> He further stated in that report:
>
> Given the duration of the patient's present problems, prognosis for recovery to a level that would permit the patient to return to work is guarded.

(Exhibit 1-52).

On July 9, 1984, Dr. Risk again examined claimant and reported:

> Assessment - Wayne Holliday presents with sensorimotor impairment of the right arm and leg and symmetrical weakness in both lower limbs. In addition, he has immobility of the neck. At the present time it is

not possible to demonstrate any objective finding that would relate these impairments to the accident on April 1, 1982.

On the other hand, the patient exhibits numerous findings on his examination that would fit some of the categories described in the AMA Guides to the Evaluation of Permanent Impairment, copyright 1971 in Chapter 13 under mental illnesses. These findings would fit with a diagnosis of posttraumatic syndrome. They would be rated class III (impairment of the whole man 50 to 95 percent), and would fit Category 3F, conversion or hysterical reaction. Given the fact that the patient has been off work for two years as a result of his reported symptoms, impairment rating would be in the higher range of impairment, 80 percent or greater.

It is not possible to assign permanent impairment rating in this circumstance, because by the AMA criteria, the term "impairment" refers to a condition which results in a substantial loss of function despite treatment, and no efforts have been made to treat the patient's psychological component of his illness. Furthermore, a disability rating cannot be established since the AMA guide does not provide in the case of such psychiatric illness a conversion from impairment to disability.

Finally, with regard to any actual organic injury from the patient's accident, as previously stated the major symptom has been pain. It is impossible to witness pain or measure it. It is certainly conceivable that had the injury occurred as the patient described, he may indeed continue to experience pain. In this regard, I would defer to Dr. VanGuilder's opinion that the patient has an AMA disability based on considerations of the upper right limb of 20 percent. In addition, the patient's neck is nearly completely immobilized, which would carry a disability rating of 20 percent, for a combined rating of 36 percent. However, it should be emphasized again there are no objective criteria supporting these conclusions other than the patient's persistent complaint of pain and his chronic impairment that has prevented him from returning to work for two years.

Psychiatric evaluation by a psychiatrist well experienced in posttraumatic syndrome would be appropriate in an effort to get a more quantitative measure of disability related to the patient's

psychological component of his illness.

(Exhibit 1-67).

Claimant was also examined by Arnold Delbridge, M.D., on two occasions. The first examination was done in 1983 for Social Security purposes. The report following that workup is exhibit 3. The second examination was done in 1986. The doctor's deposition is exhibit 9.

Dr. Delbridge found little overall change between the two examinations (exhibit 9, pages 11-15). He found claimant to have markedly limited range of motion in his neck, back and right shoulder. He characterized claimant's right hand as virtually useless. He found the intrinsic muscles of the right hand to be atrophied (exhibit 9, pages 7-10). He estimated permanent impairment on pages 19-22 of his deposition. He indicated, based upon AMA guides, that there was a seven percent whole man impairment resulting from the accident of 1977. Dr. Delbridge agreed with Dr. Risk that claimant had suffered a 20% impairment due to the limitations of his cervical spine. He then estimated a 70% impairment of his right upper extremity which converted to 42% of the body as a whole. He then combined 13% from his neck (20% minus seven percent preexisting) and 42% for his right upper extremity giving a combined total of 50% impairment of his body as a whole secondary to his accidents of 1982.

Dr. Delbridge did not feel that claimant's back problems were due to the 1982 accident (exhibit 9, pages 21, 28 and 29). He discounted alcohol as a factor in claimant's problems (exhibit 9, pages 26, 34 and 35).

Regarding claimant's ability to be employed, Dr. Delbridge stated:

> As far as this patient's capacity of work, it is at this time virtually nill [sic]. He cannot lift anything at all because he cannot bend over to do it and when he squats to lift he is very weak and he can barely support his body weight back up to a standing position. Repetitively lifting is completely out of the question. Standing would give him difficulty very soon after beginning the activity. Sitting is possible for short periods of time but once again he is very limited because of his limited motion as far as turning or adjusting himself to do tasks is concerned.
>
> In brief, what we have here is a gentleman who is emaciated, has lost thirty pounds over the past few months, is very weak, cannot use his right upper extremity for any meaningful activity and has a

very very limited range of motion of both his neck and his lower back.

(Exhibit 3).

At page 16 of his deposition, which is exhibit 9, Dr. Delbridge stated the following:

Q. And what conclusions did you come to, to that, regarding the social security claim?

A. The conclusion that I came to in his social security claim was that in my opinion at this time this patient is not suitable for any type of work whatsoever.

The doctor indicated that claimant's activities were considerably limited due to the 1982 injury (exhibit 9, pages 24-26).

Identifying the situs and cause of claimant's injury was thoroughly discussed at pages 30-34 of exhibit 9:

Q. And you are talking about that this is involving the shoulder, as getting into the body side as well as the arm?

A. Yes. This is upper extremity, and I suspect that some of this is rotator cuff, and there you might be getting into the body as a whole. I converted it to body as a whole to give an illustration of how compromised he was on a total body basis.

...

A. I didn't find any tears necessarily of the rotator cuff, so while I did convert it, really this is an upper extremity type of difficulty with the exception of the sensation, which might be attributable to the neurological function, of course coming from the cervical spine area. But there really wasn't any -- but that was really the only thing that I felt it could be attributed to, other than the extremity itself.

...

Q. Do you agree or disagree with Dr. Van Gilder that the problems that Mr. Holliday is having with his upper right extremity are of unknown etiology?

A. Well, there is no real ready and pat answers regarding his upper extremity, because Dr. Risk

speculates on post injury trauma -- post trauma syndrome and proposes a quite high impairment. Dr. Van Gilder talks about an obscure neuropathy and talks about a lesser impairment. The people at Des Moines, one of the people that saw him there didn't feel that this was alcohol related. His EMG was pretty normal except for his ulnar nerve.

So I didn't really believe that he was an alcoholic neuropathy. And I don't really think Dr. Van Gilder did either. The way I see Mr. Holliday is that Mr. Holliday is somewhat like a reflex sympathetic dystrophy of the upper extremity. He had an injury. He had immobility. He had pain. He had more immobility. He had more pain. He went into a spiral and essentially ended up with a useless extremity. I see Mr. Holliday as more of a pain syndrome, disuse syndrome, than a neuropathy or an alcoholic neuropathy.

Q. So that are you saying maybe because it hurts he's not used it, and his hand has deteriorated?

A. Yes. Indeed his whole body has. I mean, he's lost -- when I saw him he had lost 30 pounds off a hundred and fifty pound frame.

Claimant was evaluated at the Mercy Hospital Medical Occupational Evaluation Center. He was seen by Robert C. Jones, M.D., a neurosurgeon. Dr. Jones diagnosed claimant's condition as a strain of neck muscles, right tardy ulnar nerve palsy and possibly a stretched brachial plexus. Dr. Jones did not feel that claimant's problem was due to alcohol or to the 1977 accident (exhibit 1-168, 1-169 and 1-171).

Claimant was also evaluated by Todd Hines, Ph.D., a psychologist. Hines indicated that claimant exhibited a modicum of reactive depression of a magnitude that was not sufficient to warrant treatment (exhibit 1-170, 1-172 and 1-173).

In concluding the evaluation, it was determined that claimant had a five percent permanent impairment of the body as a whole due a stretch injury to the brachial plexus, that his problems had no relation to alcohol abuse and that they did relate to the injuries he sustained in 1982 (exhibit 1-186, 1-187, 1-191 and 1-192). It was indicated that there were definite limits on claimant's ability to return to work (exhibit 1-191 and 1-192).

Exhibit 1-40 indicates that, at the time of claimant's 1977 accident, prior to treatment, he exhibited a decrease in sensation and strength in his right upper extremity.

On September 15, 1982, claimant was examined by David F. Poe, M.D. Dr. Poe's report was issued prior to the time most of the diagnostic tests which are now available in this case had been administered. It is not particularly definitive of the nature or cause of claimant's problems.

Claimant was seen and evaluated by two vocational rehabilitation consultants, namely, G. Brian Paprocki and Clark H. Williams. The report from Mr. Williams, exhibit 5, is incomplete because it does not deal with claimant's physical capabilities and restrictions. Paprocki indicated that claimant would seem to have the intellectual ability to complete vocational retraining and the report indicates that claimant complained of pain which restricted his activities. Paprocki concluded that claimant's level of daily activities does not approximate even the least physically demanding category of employment, namely, sedentary employment. He felt that claimant had no transferable skills that were within the limits of his residual functional capacity. Paprocki indicated that retraining would be hampered due to the loss of fine motor control in claimant's right hand. He felt that the chances of claimant ever holding competitive employment of any type were nil (exhibit 4).

The evidence in the record regarding the seasons during which tuck pointing is performed was provided by claimant and William Bower. They stated that most tuck pointing in the Midwest is done during the summer months, but that, even during the winter, there is tuck pointing work that is done on interior walls. They indicated that it is not uncommon for a tuck pointing contractor to arrange work in the southern part of the country in order to operate through the entire year.

Exhibit 11 shows that claimant earned $4,966.50 during the 13 weeks preceding the week which included July 26, 1982. This computes to a gross average weekly wage of $382.04. According to claimant he was married, but had no dependent children at the time of injury.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 26, 1982 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all

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

Dr. Delbridge and the physicians at the Mercy Medical Occupational Evaluation Center found claimant's complaints to be related to the 1982 trauma. Drs. Risk and VanGilder were reluctant to make such a cause and effect relationship. They did not, however, indicate that they were of the definite opinion that a causal relationship was absent. A close examination of the evidence from Drs. Risk and VanGilder shows that they have found no definite, objective basis for concluding that the trauma and claimant's current problems are related.

An expert may testify to the possibility of causal connection, but a possibility, standing alone, is insufficient. A probability is necessary to generate a question of fact and sustain an award. Burt v. John Deere Waterloo Tractor Works, Supra. The Iowa Supreme Court, in Becker v. D & E Distributing Co., 247 N.W.2d 727 (Iowa 1976) discussed the law on this problem with great clarity. Briefly summarized, the Court indicated that an expert witness may testify to the possibility, probability or actuality of the causal connection between a claimant's employment and his injury. If the expert testimony shows probability or actuality of causal connection, this will suffice to raise the question of fact for the trier of fact and, if accepted, will support an award. If the opinion shows a possibility of causal connection, it must be buttressed with other evidence such as lay testimony that the described condition of which complaint is made did not exist before the occurrence of those facts which are alleged to be the cause.

This case presents a lack of consensus from the medical practitioners regarding the cause of claimant's complaints, other than an apparent consensus that the precise physiological cause is unknown. A number of causes have been suggested. Some have been discounted. It is, of course, possible that more than one causitive factor is involved in this case. One thing that is absolutely clear, however, is that Wayne Holliday was able to work as a tuck pointer without any complaint or physical restriction prior to April of 1982. While he may have had some restrictions and complaints between April and July of 1982, he was still able to work in that quite strenuous occupation. After the incident of July 26, 1982, he was unable to function as a tuck pointer or

to engage in hardly any other activity. The abrupt change in claimant's physical condition which followed the July 26, 1982 injury is found to be sufficient to buttress the medical opinions and to carry the burden of proving that the injury of July 26, 1982 is a substantial factor in producing his present disabilities, as the same relate to his right arm and neck. The injury of July 26, 1982 is a proximate cause of the disability with which he is currently afflicted regarding his right arm and neck. The fact that medical science cannot identify the source of a problem does not prove that a problem does not exist. The appearance and demeanor of claimant and his spouse were observed as they testified and their testimony is accepted as being credible and accurate.

There is some question regarding whether claimant's permanent disability should be evaluated industrially or as a disability to his arm, a scheduled member. It is obvious that the bulk of his physical limitations deal with his right hand and arm. The record also, however, contains reference to injury to his brachial plexus, a part of the body which is not located in the arm. Claimant also has been rated as having disability, which resulted from the 1982 injury, in his cervical spine. Claimant's testimony regarding the incident of July 26, 1982, and also the earlier incident of April, 1982, clearly establishes that the trauma of those incidents was not restricted to his right arm. His symptoms are not inconsistent with some type of nerve impingement in the brachial plexus or cervical spine. The evidence from the Mercy Hospital evaluation and from Dr. Delbridge is accepted as correct even though it conflicts with evidence from Dr. VanGilder. Claimant's disability is determined to be a disability to the body as a whole. It is not limited to claimant's right arm. In assessing claimant's industrial disability, the problems with his legs are considered to be unrelated to the 1982 traumas, as indicated by Dr. Delbridge and others.

As indicated by Dr. Risk and Mr. Hines, it is found that there is a psychological component to claimant's condition as well as the physical component.

Drs. Jack and Delbridge have indicated that claimant is totally unable to be employed. G. Brian Paprocki has reached the same conclusion. The physical restrictions that have been indicated by Dr. VanGilder are not condusive to readily finding gainful employment.

The record of this case does not suggest a single viable occupation or place of employment for Wayne Holliday. He has not looked for work. In his present condition, it would be pointless for him to seek work since there is no reasonable likelihood that he could be employed in the competitive labor market. Total disability under compensation law is not to be interpreted literally as utter and abject helplessness. The

ability to earn some wages creates a presumption that the person has earning capacity commensurate with the wages that have been earned, but the presumption may be rebutted by evidence which shows that the post-injury earnings are an unreliable indicator of actual earning capacity. 2 Larson Workmen's Compensation Law, section 52.21(d). The loss of earning capacity is the reduction in value of the general earning capacity of the individual rather than the precise loss of wages or earnings in any specific occupation. Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa App. 1977) 100 A.L.R.3d 143. The test of permanent total disability in workers' compensation law 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 he can earn a living for himself, 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); Diedrich v. Tri-City Railway, 219 Iowa 587, 594, 258 N.W. 899, 902 (1935). Permanent disability means a disability that is lasting for an indefinite and indeterminable period. It does not require absolute perpetuity. Wallace v. Brotherhood, 230 Iowa 1127, 1130 (1941). There are few individuals in our society whose earning capacity is absolutely zero. Even the most severely impaired can, if they choose, produce some level of earnings. The test, however, is that the earnings be of a sufficient level to make the person self-supporting. It is found that Wayne Holliday does not have sufficient residual earning capacity to be self-supporting and that he is therefore totally disabled. It is further found that the condition of total disability, and its underlying physical problems which induced it, are long-lasting and indefinite. They are therefore considered to be permanent in nature. There has been no progress or noted improvement in his condition over the years since the injury. The fact, if it be a fact, that some part of his overall problem is a depressive reaction or some other psychological condition which has arisen from the physical injuries does not make his overall condition any less disabling or any less permanent. The employer has the choice of medical care under the provisions of Code section 85.27. If there has been a failure to diagnose and treat any emotional condition that may exist, the impact of such failure rests as heavily on the employer, who has the statutory duty to provide reasonable care, as it does on the employee. It is therefore found and concluded that Wayne Holliday is permanently and totally disabled within the meaning of section 85.34(3) of The Code.

The rate of compensation is in dispute. From the testimony of claimant and of William Bower, it is clear that, in the Midwest, the occupation of tuck pointing is largely seasonal, but that there is some tuck pointing work available in the Midwest even during the winter months and that some tuck pointing companies move their operation to the southern states during the

winter months. To compute compensation under section 85.36(9), the occupation must be "exclusively seasonal." From the evidence presented in this case, it is found that the occupation of tuck pointing is primarily seasonal in the Midwest, but that it is not exclusively so. Accordingly, claimant's rate of compensation should be computed under section 85.36(6). It appears that the rate previously paid was based upon an average weekly wage of $420.00. Exhibit 11 shows that the average weekly wage during the 13 preceding weeks was actually $382.04. Since claimant was married with two exemptions, this provides a rate of compensation of $235.70 per week. Defendants are, of course, entitled to a credit for the erroneous overpayment. Wilson Food Corp. v. Cherry, 315 N.W.2d 756 (Iowa 1982); Wolfe v. Weigel & Stapf Construction Co., 33rd Biennial Report, 221 (1977); White v. City of Fort Dodge, 33rd Biennial Report, 222 (1977).

Claimant seeks to recover the cost of his treatment with Dr. Jack as contained in exhibit 8. The total shown is $150.00. The treatment provided, according to the evidence from Dr. Jack, is in essence a monitoring of claimant's condition. The treatment is not unusual or unreasonable. The charges on exhibit 8 appear reasonable for a routine office visit. While exhibit 1 shows that some services, unrelated to the 1982 injuries were provided to claimant, exhibit 8 does not seem to indicate any additional charge submitted in this case for those services over and above the charge for the routine office visit. Defendants are therefore responsible under section 85.27 for the fees of Dr. Jack in the amount of $150.00 as shown on exhibit 8.

FINDINGS OF FACT

1. Wayne Holliday was an employee of Spencer Company on April 1, 1982 and on July 26, 1982 when he sustained injuries which arose out of and in the course of his employment. The injury on April 1, 1982 occurred when a compressor unit fell upon him across his chest. The injury of July 26, 1982 occurred while he was using a rope to pull a lookout to the top of a building.

2. At the time of injury, claimant was working as a tuck pointer.

3. Following the injury of April 1, 1982, claimant was off work for a period of time which has not been precisely determined from the record made, but which appears to have been approximately 11 days.

4. Following the injury of April 1, 1982, claimant was able to resume the duties of employment, but he experienced some difficulties in doing so.

5. Following the injury of July 26, 1982, claimant has not

returned to any gainful employment of any type.

6. The precise physiological damage or injury which claimant sustained in either of the two incidents that occurred in 1982 has not been determined. Claimant experiences pain and numbness in his right arm. He has suffered a severe loss of the ability to use his right hand. Claimant also has pain in his right shoulder region and a sensory impairment on the right upper portion of the trunk of his body.

7. It is found to be probable that there is some undiagnosed physiological condition in the anatomical region of claimant's cervical spine, brachial plexus and right shoulder which is responsible for the symptoms that he experiences in his right arm.

8. It is further found that the injuries claimant sustained on April 1, 1982 and/or July 26, 1982 were substantial factors in producing that physiological injury.

9. It is likely that there is some emotional component to claimant's current physical condition.

10. The injuries sustained in either of the incidents in 1982 are not a probable source of the problems of which claimant complains regarding his lower extremities except to the extent that the problems may be psychologically induced.

11. Since the injury of July 26, 1982, Wayne Holliday has not returned to gainful employment and has not been medically capable of returning to gainful employment substantially similar to that in which he was engaged at the time of injury.

12. Claimant is found to have reached the point that it was medically indicated that further significant improvement from the injury was not anticipated on August 10, 1983, the date he completed his evaluation at the Mercy Hospital Medical Occupational Evaluation Center. Subsequent to that date, he has not been under any active recuperative treatment.

13. Claimant does not have sufficient residual capacity to be self-supporting.

14. Claimant does not have sufficient physical capacity to enable him to be employed in any well-known branch of the labor market in the geographic region of his residence, or elsewhere.

15. Wayne Holliday is a 45-year-old married man.

16. During the 13 weeks prior to July 26, 1982, claimant earned $4,966.50.

17. The medical care claimant has received from Dr. Jack is reasonable treatment for the injuries he sustained on July 26, 1982 and the charges made are fair and reasonable.

18. Wayne Holliday has a restricted range of motion in his cervical spine and severely limited use of his right upper extremity which have resulted from the injuries sustained on July 26, 1982. He is in constant pain which is of a level that is mentally distracting.

19. Claimant dropped out of high school during the twelfth grade and has no further formal education.

20. Claimant's entire work experience has involved moderate or heavy physical labor and proficient use of both upper extremities.

21. Claimant is reasonably intelligent and a highly-motivated individual who would prefer to be gainfully employed rather than afflicted with his present state of disability. Claimant is emotionally stable, but there may be some psychological component to his present condition which has arisen from the physical injuries that he sustained.

22. Wayne Holliday, Patricia Holliday and William Bower are fully credible witnesses.

23. As between the incidents of April 1, 1982 and July 26, 1982, the latter is found to be the primary source of the disability with which claimant is currently afflicted.

24. The occupation of tuck pointer is not exclusively seasonal.

CONCLUSIONS OF LAW

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

2. The injuries claimant sustained on April 1, 1982 and July 26, 1982 arose out of and in the course of his employment with Spencer Company.

3. Wayne Holliday is permanently and totally disabled within the meaning of section 85.34(3) of The Code.

4. The injuries claimant sustained on April 1, 1982 and July 26, 1982 are a proximate cause of his current permanent and total disability.

5. Claimant's rate of compensation is determined under section 85.36(6) and is found to be $235.70 per week.

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant weekly compensation for permanent total disability at the rate of two hundred thirty-five and 70/100 dollars ($235.70) per week commencing July 26, 1982 and continuing thereafter, for so long as claimant remains totally disabled.

IT IS FURTHER ORDERED that defendants pay claimant's expenses with Darwin B. Jack, M.D., in the amount of one hundred fifty and 00/100 dollars ($150.00).

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

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

Signed and filed this 18th day of February, 1988.

Michael G. Trier
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DEPUTY INDUSTRIAL COMMISSIONER

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Filed May 13, 1988
HELEN JEAN WALLESER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD HOSCH, Claimant, vs. BORK TRANSPORT, INC., Employer, and GREAT WEST CASUALTY COMPANY, Insurance Carrier, Defendants.	:	File No. 804991 A R B I T R A T I O N D E C I S I O N

1108, 1601

Claimant failed to show causal connection between a work incident in which he fell less than three feet and aggravation of a preexisting back condition where claimant bowled immediately before the work incident and against doctor's instructions following the work incident.

Defendants failed to show that claimant was intoxicated when he fell or that, if intoxicated, the intoxication was a substantial factor in his work injury.

FILED 900789
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IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD HOSCH,	:	
Claimant,	:	
vs.	:	
BORK TRANSPORT, INC.,	:	File No. 804991
Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
GREAT WEST CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Richard Hosch, against his employer, Bork Transport, Inc., and its insurance carrier, Great West Casualty Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury allegedly sustained on September 15, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner at Davenport, Iowa on May 19, 1987. A first report of injury was filed on September 30, 1985. The parties stipulated that claimant has been paid 21 weeks of temporary total or healing period benefits at the rate of $277.93.

The record in this case consists of the testimony of claimant, of Patrick Doherty, of Teresa Hosch, of Colleen R. Torgerson, of Brenda Smith, of Robert Lynn Smith, of Dennis M. Torgerson, of Robert D. Gillespie and of Ed Barnett as well as of claimant's exhibits 1 through 13, joint exhibits 14 through 36, and defendant's exhibits A through L.

ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant's rate of weekly compensation is $271.26 and that medical costs were fair and reasonable for the conditions treated. Issues remaining to be decided are:

Whether an employee-employer relationship existed between claimant and defendant;

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

Whether claimant's claim is barred on account of intoxication as provided in Iowa Code section 85.16(2);

Whether claimant's claim is barred as a result of misrepresentations to the employer on the job application and elsewhere;

Whether a causal relationship exists between claimant's alleged injury and the claimed disability;

Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement, including the question of whether claimant is an odd-lot worker under the Guyton doctrine; and,

Whether claimant is entitled to payment of certain medical costs as causally related to the work injury.

REVIEW OF THE EVIDENCE

Claimant testified that he was born on February 19, 1947 and completed the ninth grade in school. He left school in 1964 and subsequently drove an egg truck for his mother's produce business until 1972. He then worked as an over-the-road semi driver for Cupler Building Corporation. Claimant earned $350 per week in that job. Claimant denied receiving reprimands for lateness while driving for Cupler. He reported that he was laid off from trucking and then worked as a manual laborer in the Cupler factory earning $3.50 per hour until he was fired for inability to handle factory work. Claimant then worked for CRST as a long-haul semi driver and testified that he earned $450 per week. That job required him to unload boxed meat weighing from 70-120 pounds. From 1977 until 1981, claimant worked at Dawley Transport and reported earnings of approximately $30,000 per year. Claimant was terminated from that job for sleeping while enroute. He agreed he had received reprimands for lateness in that position. Claimant then worked for Rowley Interstate as a long-haul driver of meat shipments. He reported that he earned $450 per week, but was terminated after seven months for refusal to take a load. Claimant worked for Apple Lines from March through November, 1982. He initially reported that he left that position, in which he was earning $250 per week, on account of a conflict over hours. He subsequently denied that he had been terminated, but agreed he was not called back after being off for two weeks. Claimant agreed he had been reprimanded for being tardy in the pick-up and delivery of loads. Claimant agreed that the work history he gave in his deposition was inconsistent with his testimony at hearing. He reported that, but for the work history, the deposition was accurate.

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Claimant testified that he began working at Bork Transport, a company which specializes in hauling hazardous materials in bulk, in January, 1983. Claimant testified he worked for the company until November 15, 1985 without quitting. He agreed he had been discharged for two weeks in August, 1985 after falling asleep on the job. He reported that Bob Gillespie had intervened and had helped him to be rehired at that time. Claimant stated his employer believed he had been drinking during that episode.

Claimant denied he had been treated for back problems prior to September 15, 1985, but for a three- or four-month period in 1974 and 1975 when he treated with H. A. Gearhart, D.O., an osteopathic physician, and D. W. Kaiser, D.C. He reported he had also seen C. S. Gonstead, D.C., in 1974 and 1975, but denied he had lost six months of work for back problems in the mid-1970's. Claimant denied he had told doctors he had intermittent trouble with his back from the mid-1970's onward. He agreed he might have told his physicians that symptoms in the 1970's included right leg pain. Claimant stated he had not had back problems in January, 1983 and denied he had misrepresented himself on his job application when he reported he had no physical impairments. Claimant asserted he had always passed his biennial DOT driver's physical.

Claimant reported that, on September 13, 1985, he loaded his truck in Cedar Rapids, drove it to Maquoketa, Iowa, where he resides, and parked it at a truck stop. He reported that Bob Gillespie, Bork dispatcher, had advised claimant it was permissible to park the truck at the Maquoketa truck stop. Claimant stated that Todd Bro, Bork owner, had dispatched him out on a load into Chicago and then to Wisconsin with a Wisconsin arrival time of 8:00 a.m.

Claimant bowled on the evening of September 15, 1985. He called Bob Gillespie from the bowling alley to discuss a letter he had received which indicated his wage percentage would be cut. Claimant denied that, during the course of that conversation, he quit, was fired or indicated that he would not take out the scheduled load. Claimant further denied that he was drunk when he talked to Gillespie or that he had been drinking on September 15, 1985. Claimant reported that he bowled three games consisting of ten frames or twenty balls per game. He indicated that he left the bowling alley at approximately 9:30 p.m. With Mrs. Hosch driving, they drove back to the east edge of town where his house is located and then drove to the truck stop on the west edge of town. There are three stop lights on the route. Claimant indicated his wife drove within the 20 mile-per-hour speed limit. Claimant stated that, at the truck stop, he got into his truck and started the engine. He stated he then got out, put in his suitcase and said goodbye to his wife. He reported that he fell approximately four or five feet while getting back into the truck. Claimant did not dispute that he

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had told the insurance adjustor that he fell after the luggage was put into the rack and that, in his deposition, he reported he fell before the luggage was put into the rack. Claimant stated that, in the course of the fall, he twisted to the left with pain in his right leg and low back as well as foot numbness. Claimant testified that his wife then shut off the truck and took him to the hospital emergency room where a Dr. Beivy examined him.

On cross-examination, claimant reported that he had arrived at the truck at approximately 9:15 p.m. and arrived at the emergency room at about 10:00 p.m. Claimant could not recall having told the emergency room personnel that he had been injured approximately one half hour earlier. Claimant denied that he had not gone to the truck that evening. Claimant agreed that the Chicago to Wisconsin run would take approximately five to six hours. He reported he left five hours early in order to sleep and plan for any contingencies. Claimant stated he was not tired as he had slept during the day of September 15, 1985. He asserted it would have been harder to sleep until midnight and then leave, but stated he needed to leave by midnight if he were to reach Chicago before rush hour traffic. Claimant agreed he had earlier received reprimands for late hauling.

Claimant reported that he saw Clifford L. Rask, M.D., on September 18, 1985 and that Dr. Rask advised rest. Claimant reported that he gave Dick Sayre that report. Claimant testified that, in October, 1985, Bork's bookkeeper asked him if he wished to continue his Blue Cross/Blue Shield and that claimant advised he would be unable to do so without an income. Claimant stated that he never received a termination or quit letter. He reported that he applied for unemployment following his work release by Eugene Collins, M.D., in September, 1986 and received such from Bork without contest.

Claimant stated that, following the September, 1986 work release, he talked to Mr. Gillespie regarding his willingness to return to work within restrictions imposed. He reported that Gillespie never got back with him regarding such.

Claimant agreed that he had bowled on September 29, 1985, although Richard L. Kreiter, M.D., had advised him to remain at bedrest. Claimant denied that the bowling aggravated his condition. Claimant then bowled three games of ten frames each with two balls to each frame. Claimant reported that Dr. Kreiter, to whom Dr. Rask had referred claimant, subsequently hospitalized claimant for CT scan and myelographic studies. Dr. Kreiter then referred claimant to Dr. Collins who initially injected claimant's back and then performed back surgery.

Claimant reported that defendants asked him to be evaluated at the University of Iowa, but then denied permission for a CT

scan and myelographic studies which the university requested. Claimant identified exhibits 14 through 26 as unpaid medical costs related to the September 15, 1985 incident. He identified exhibit 27 as unreimbursed mileage expenses related to the incident.

Claimant testified that he can sit for two or three hours and can walk one to two miles. He indicated he can drive for a couple of hours and can lift approximately 15 pounds. He is to alternate standing and sitting. Claimant reported that he had worked for two weeks prior to hearing hauling fertilizer in a pickup. He reported the job was to last five days, but that he quit after three days as he could not sit in a truck for ten hours per day. Claimant stated that exhibit 13 lists jobs for which he has applied. Claimant testified that he had not been considered for several open gas station jobs once the potential employer became aware of his restrictions. Claimant stated he had difficulty completing job applications because his reading skills are limited. He was willing to undergo vocational rehabilitation, if provided. Claimant testified that Bork has drivers who specialize in hauling liquid and, therefore, do nothing heavier than pulling hoses in and out.

Teresa Hosch, claimant's wife of 21 years, testified that claimant's back was in excellent condition when he started work with Bork. She reported that he then had no trouble with lifting, twisting or bending and that he water-skied, hunted and fished. She reported that he can no longer water-ski or hunt and that he no longer goes to church as he cannot kneel. She reported that claimant cannot mow the law or rearrange furniture and has difficulty vacuuming. Mrs. Hosch reported that the couple arrived at the bowling alley at approximately 7:15 p.m. on September 15, 1985. She believed claimant was drinking Pepsi at the alley. She denied that claimant had any falls or other untoward events at the alley and reported that claimant was fine and not in pain when they left the alley. She generally corroborated claimant's testimony regarding his fall from the truck.

Mrs. Hosch called Bob Gillespie from the emergency room. She testified that Gillespie initially hung up on her and she subsequently called him and they conversed. Mrs. Hosch reported that she told Gillespie that claimant likely would be unable to take the load out. She reported Gillespie then said he would have to dispatch someone else. She denied that Gillespie said he had already done so. Mrs. Hosch characterized Gillespie's speech as slurred and stated that he had eiher been sleeping or drinking. Mrs. Hosch reported that, after bowling on September 29, 1985, claimant's back was in the same condition as it had been prior to his bowling that evening. She stated she has helped claimant fill out job applications subsequent to his work injury.

Robert D. Gillespie identified himself as the Des Moines terminal manager for Bork Transport. He reported that he had known claimant for approximately four to four and one-half years at the time of hearing. Gillespie was claimant's dispatcher and indicated he talked to claimant on the phone several times every day. Gillespie reported that, at times, he had had beers with claimant after work. Gillespie reported receiving a phone call from claimant on September 15, 1985 at between 8:00 and 9:00 p.m. He reported that claimant was in an argumentative mood and wanted to voice his feelings about the percentage decrease in his wage which Dick Sayre had ordered. Gilliespie reported that claimant was very forceful and direct in that conversation, but generally is not so. Gillespie heard sounds of a bowling alley in the background. Gillespie reported claimant as saying that claimant had made up his mind he was calling it quits instead of patching things up with Sayre. Gillespie stated he assumed claimant had been drinking as a result of his past experience with claimant and claimant's forcefulness. He characterized claimant as generally more forceful after he had been drinking. Gillespie stated he had had other problems with getting claimant to work on Sunday night and had had prior phone conversations with claimant or with his wife about claimant going on the road on Sunday evening. Gillespie stated that, once he was off the line with claimant, he called a driver in Gary, Indiana and got an answering machine response. He reported that that driver took claimant's assigned haul on the next day. Gillespie agreed that claimant had never expressly said he quit, but had said he could not work for the wage he would be earning. Gillespie agreed he could not recall claimant expressly saying he would not take the load out. Gillespie did not believe he had written in claimant's personnel file that claimant had quit as the quitting procedure requires. He was unaware of claimant receiving a follow-up letter as per procedure is sent to an individual who quits employment with Bork. Gillespie agreed that Dick Sayre makes final determinations regarding job quits. Gillespie believed he had reached the Gary, Indiana driver at approximately 8:00 a.m. Gillespie reported that the haul was to Wauwatosa, Wisconsin and that such was approximately three hours from Gary, Indiana. Gillespie did not recall that he himself had been drinking on September 15, 1985. He did recall having received a phone call from claimant's wife at approximately 10:00 p.m. during which she told him claimant had slipped and fallen while getting into his truck.

Gillespie stated that the run from Maquoketa, Iowa to Wauwatosa, Wisconsin would be approximately six hours. He reported that, normally, a driver would leave at approximately 2:00 a.m. He opined that, from past experience with claimant, he would have expected claimant to make a 12:00 noon [September 16, 1985] delivery to Wauwatosa after sleeping eight hours and starting out on the trip at approximately 5:00 a.m. Gillespie agreed that claimant had been late a number of times while

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employed at Bork and, in August, 1985, received a letter advising claimant that, if claimant was late again, he would be fired. Gillespie opined it was likely that, had claimant again been late, he would have lost his Bork job.

Gillespie testified that a Bork driver must make a pre-trip inspection which takes approximately 15 minutes. He must know the federal code regarding transportation of hazardous materials, log his duty hours, determine his route, determine whether he is at a legal weight, determine if the storage facility has room for gasoline, drive safely, fill out his log book and have customers sign such and lift a hose. He reported that determining whether the facility has room involves doing a math conversion from inches to gallons. He reported that claimant was one of the few Bork drivers qualified for handling corrosive materials. Gillespie reported the hose weighs approximately 45-50 pounds, but that an individual would never have to lift the entire hose at one time. Gillespie could not recall having ever had complaints regarding claimant's paper work during claimant's employment at Bork.

Gillespie testified that a back problem would be a substantial factor in Bork's decision to hire or to not hire a driver. He reported that a Bork driver would be in and out of his truck several times per day and would need to climb the ladder several times per day, but could be in his truck for up to four hours at a time. Gillespie reported he had received a phone call from claimant regarding claimant's medical release. He reported he told claimant that Gillespie would need a copy of the release. Gillespie reported he has not tried to rehire claimant, although the company has a desire to put individuals back to work. Gillespie stated that he was unaware of how claimant had been hired, but stated that the procedure which claimant described was not Bork's standard hiring procedure.

Gillespie did not know why Dick Sayre had requested medical information regarding claimant per a letter of Dr. Rask of September 20, 1985. He agreed that would not be done if the employee had quit.

Ed Barnett, who resides in Gary, Indiana, reported that he had worked for Bork Transport for two and one-half years and had known claimant as a Bork driver. He reported he was aware of the September 15, 1985 load as Mr. Gillespie had called him at home during daylight hours. He was uncertain as to whether he had talked to Gillespie directly or had responded to an answering machine message from Gillespie, but stated that Gillespie had told him claimant was in a tavern drinking and had quit his Bork job. Barnett indicated Gillespie advised him he would have to take the load.

Colleen R. Torgerson testified that she is a co-owner of The

Bowling Center in Maquoketa. She identified herself as a secretary of the mixed doubles league in 1985-86. She could not recall whether claimant had been drinking on September 15, 1985, but reported it was very possible claimant had been drinking.

Dennis M. Torgerson identified himself as Colleen's husband and co-owner of The Bowling Center. He was a professional bowler for approximately three years and demonstrated a bowling technique, indicating that bowling can involve stooping and twisting. Torgerson stated that the Sunday Mixed League's starting time was 7:30 p.m., but, because of paperwork on the first evening of the leagues, such as September 15, it might take a little longer for leagues to start. He reported they likely started 10-15 minutes late and finished that much later than usual. Mixed doubles were reported as usually taking from two to two and one-half hours with the ending time being approximately 9:45-10:15. Torgerson doubted that the league had finished after 10:00 p.m. as he and his wife had left the alley by 11:00 p.m. He reported they likely finished at right around 10:00 p.m. Torgerson could not remember claimant drinking on September 15, 1985 or his serving claimant drinks that evening. He reported it was possible that his wife or someone else may have served claimant drinks that evening. He characterized claimant as not "roaring drunk" that evening.

Brenda Smith indicated she first met claimant and his wife on September 15, 1985 at the bowling center when she and her husband were paired with the Hosches for the mixed doubles league. Mrs. Smith recalled claimant having a beer on September 15, 1985. She reported that her husband purchased beer for claimant and that claimant purchased beer for her husband throughout a two to two and one-half hour time frame.

Robert Lynn Smith, Brenda's husband, reported that he had initially met claimant on September 15, 1985 and that claimant stated on that evening he had to leave for Chicago at approximately midnight. He reported he may have purchased beer for claimant that evening and that they may have been drinking that evening as it was a common practice to buy beers back and forth. Mr. Smith stated he had seen claimant drinking in taverns in the Maquoketa area. He reported that he could not positively recall whether claimant did or did not drink on September 15, 1985. Smith was uncertain as to whether claimant was severely intoxicated when claimant left the alley that evening, but did not believe claimant was intoxicated when claimant arrived at the alley. Mr. Smith testified that claimant had been intoxicated one of the three times he had bowled with claimant in the 1985-86 league, but that he was uncertain that it was the evening of September 15, 1985.

Patrick Doherty identified himself as a vocational rehabilitation counselor with the Work Fitness Center of the Franciscan Medical

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Center. Mr. Doherty received a Masters Degree in 1978. He assists in placing workers who have been disabled with back injuries. Doherty reported he saw claimant per claimant's counsel's request and performed testing with claimant. He reported claimant as having an I.Q. of 108 which places him in the high average range. He reported that claimant had good math skills, but read only at the fifth grade level and spelled only at the third grade level. He indicated claimant is restricted to lifting only from 15-20 pounds with no prolonged sitting, standing or bending.

Doherty opined that, prior to his injury, claimant had access to 42% of jobs in the labor market and that, following his injury, claimant had access to only 33% of jobs or had sustained 24% loss of job access. Doherty reported that claimant is now limited to light-duty, sedentary work for which he is not academically suited. He characterized as highly improbable that claimant could find a job by himself. He reported that claimant's ability to conduct job interviews and fill out job applications as well as his personal grooming and time off work would interfere with his job placement. Doherty did not believe that claimant could now maintain a job. He recommended that claimant spend approxiately a year doing coursework to obtain his GED and that claimant then do a career assessment inventory to determine his interests. Doherty opined that, with a year for work on the GED and a year for retraining, claimant could earn approximately $5.00 per hour in telephone repair or $14,000-$15,000 per year in bill collecting. He also suggested claimant might work as a drivers' license examiner. He reported that claimant had earned from $27,000-$28,000 per year in the trucking industry. Doherty was unaware of claimant's prior job terminations. He stated that he was not stating claimant could not do factory work, but that such should be preassessed as he was concerned that claimant would have difficulty doing any factory job involving forward flexion of the spine. Doherty agreed that he had had no indication claimant could not perform the record keeping required of him in his trucking jobs.

Eugene Collins, M.D., is a board-certified neurosurgeon who testified by way of his September 5, 1986 deposition. Dr. Collins saw claimant at the request of Richard Kreiter, M.D., on October 8, 1985. Claimant gave a history of having had pain in his low back ten years earlier which had gotten better after six months of chiropractic care. He reported that claimant had been doing reasonably well with no definite complaints until three weeks prior to consultation when, while getting into a truck, his foot slipped and the patient landed on his right leg and soon noted pain in the back of the right leg, accompanied by numbness, as well as some pain in his right hip and low back. Symptoms were increased by bowel movement and coughing. Dr. Collins reported that a myelogram was performed during claimant's October 8, 1985 hospitalization which showed a herniated disc at L4-5 on the

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left, L5-S1 on the right. The left leg was asymptomatic. There was pain in the right leg, back of the leg, consistent with "this disease" at L5-S1. Chemonucleolysis was performed.

Dr. Collins stated he had no history of claimant bowling, but that on the basis of the history given him, he felt that if claimant had no problems while bowling and then got on the truck, slipped and had symptoms, the symptoms were caused by the fall from the truck and not from bowling. Dr. Collins reported that if claimant had bowled about three games on September 29, 1982, such would not have caused the disc to rupture, if he had symptoms prior to that bowling. Dr. Collins indicated that claimant was seen intermittently through April 14, 1986 when he called and complained of left leg pain and numbness worse over the past two weeks. Claimant was then admitted to St Lukes Hospital and a myelogram performed confirmed a herniated disc at L4-5 on the left. A laminectomy at L4-5 on the left was performed on May 1, 1986. Dr. Collins opined that, if claimant's history was correct, he believed claimant's fall from the truck on September 15, 1985 was the cause of claimant's May 1, 1986 laminectomy. Subsequently, the following dialogue took place:

> Q. Initially, I believe you indicated that he was asymptomatic on the left side. Why do you feel that the laminectomy was caused by the fall on September 15, 1985, when initially he was not having that many problems on the left side?
>
> A. There were two ruptured disks. Usually one predominates. The pain pathway predominates on one side. It was the right one that was the predominant one. After the pressure was taken off the right nerve root, the left one started to act up. This is not unusual, the way it presented. With more than one ruptured disk, usually the initial one is the major culprit and bothers the patient. When that one is taken care of, it's not unusual for the other one to act up. It's not unusual.

Dr. Collins opined that claimant would have reached maximum improvement about four months after the second surgery and therefore, within the past couple weeks of the deposition or as of the time of the deposition. He opined that claimant was not able to return to his previous work and reported that he had informed claimant that any activities involving prolonged bending, lifting, driving, pushing, pulling, or standing would tend to cause him problems and that he should avoid such. He reported he had told claimant to seek sedentary type employment. The doctor opined that a reasonable lifting limit for claimant would be 15 or 20 pounds. He reported that claimant should not stand more than a couple hours a day and that he should not climb stairs excessively. Dr. Collins reported that claimant

did not indicate he had sought services of chiropractors from 1974 up to within a year of his slip on the semi. Dr. Collins indicated that bowling three days after complete bedrest had been prescribed was not consistent with conservative therapy and bedrest therapy after a person presented with clinical signs of a herniated disc. The doctor did not think bowling helped claimant's condition and stated it may or may not have worsened his condition. Dr. Collins stated that claimant had not reported the September 29, 1985 bowling to him and that he had not written down that claimant had bowled on September 15, 1985. Dr. Collins reported that vibrations and long rides involved in truck driving were items claimant could not handle. He reported that shortened rides would still give claimant trouble with back stiffness. He also stated that the more claimant had to get up and down from the truck, the more likely he was to have problems.

Richard Kreither, M.D., testified by way of his deposition taken March 28, 1987. Dr. Kreiter is a board-certified orthopaedic surgeon. The doctor reported a history from claimant which was generally that which Dr. Collins reported, but for the fact that Dr. Kreiter reported claimant stated he had some intermittent trouble with his back following the episode ten years prior to 1985. Dr. Kreiter stated he had noted that claimant had had sciatica previously and stated that such was similar to the pain he was having when seen in September, 1985. On physical examination, claimant had spasm and positive straight leg raising. Knee reflexes were normal and right ankle jerk was absent as compared to left ankle jerk. Claimant had good strength in his lower extremities. X-rays taken were interpreted as showing a narrowed disc between L5 and S1 and early narrowing between the L4 and L5. Dr. Kreiter reported he suggested complete bedrest for claimant in order to give his back a chance to heal. Dr. Kreiter reported claimant had had a significant problem in 1975 and that his back condition was progressive. He reported that, once injured, the back is more prone to reinjury. Dr. Kreiter reported that he did not advise claimant to go bowling and explained that bowling involves a forward flex position likely to stress the L4/L5 and L5/S1 discs in the same manner as do vacuuming and bedmaking, both of which he characterized as creating significant complaints in persons with back problems. The doctor opined that an aggravation of a preexisting back condition would be more likely from bowling over a two and one-half hour period than from slipping three feet down a ladder and catching oneself with the arm and landing on the feet. He stated, however, that either activity could cause back problems. Dr. Kreiter reported that the absent right knee jerk could be an old finding related to claimant's problems from 1975 onward. He reported that claimant might have had numbness prior to September 15, 1985, but pursuant to the history given, claimant did not have numbness to the degree that it was a bother to him and that the same would be true as regards both his muscle spasm and his positive straight leg raising. Dr. Kreiter stated that, when he saw claimant on

September 26, 1985, claimant had a disc which had had previous problems as evidenced by the narrowing as seen on x-ray. He further stated that claimant had evidence of further irritation, at least to the sciatic nerve giving the symptoms and findings discussed as found on that date. The doctor stated that, if claimant's bowling had caused his symptoms, he would have expected that claimant might have had an aching back or a stiff back, while perhaps not an excruciating problem (upon leaving the bowling alley). He further opined, however, that it is possible for a person to engage in an activity and not appreciate that they are "having problems" until several hours later or the next day. The doctor reported that claimant's bowling the week after he saw claimant on September 26, 1985 would indicate claimant was getting over the situation rather rapidly.

James N. Weinstein, D.O., testified by way of his deposition taken April 17, 1987. Dr. Weinstein is assistant professor of orthopedic surgery and director of the spinal center at University Hospitals. He is a board-certified orthopaedic surgeon. Dr. Weinstein saw claimant on February 26, 1987 after reviewing various medical records concerning his low back condition. Claimant apparently gave Dr. Weinstein a history substantially as given to Dr. Collins. The doctor opined that, if claimant had had a low back history dating over a ten-year period with an initial problem that responded to chiropractic treatment, but which resulted in his being off work for six months with low back pain radiating to the right leg, intermittent problems and chiropractic treatment over the subsequent ten years, that history certainly could have been a substantial contributing factor to claimant's condition from September 15, (1985) (onward). The doctor reported that forces generated in bowling for two-plus hours with a 14-15 pound ball and the twisting involved would probably be more stresstul than falling two or three feet and landing on his feet as claimant described. The doctor later stated that the bowling "would be contributory" reporting that he did not think it could be said that the bowling or falling off the truck or the problem ten years ago was the event, but that there was a continuum of events and somewhere in there it "got bad." Dr. Weinstein stated that bowling after being ordered to bedrest could have "hypothetically" substantially contributed to the need for surgical intervention two or three weeks later. Dr. Weinstein stated it is possible to have a disc at a higher level that can cause symptoms at a lower level, but is unlikely that a disc at a lower level will cause symptoms at a higher level. Dr. Weinstein opined that the usual healing period for an individual following a chymopapain injection for herniated disc is for leg symptoms to immediately resolve and for back pain to continue for up to two years or longer. He reported that back pain is never resolved by chymopapain injection.

On cross-examination, Dr. Weinstein stated the following:

A. Based on the history Mr. Hosch gave me that all of this started as of the date of this accident, one would think that there was a cause-and-effect relationship, but based on the patholphysiology of disk disease and the way in which a disk herniation occurs, one would think that maybe other things were involved in his past. That a fall from five to six feet landing on his feet could have been an insult that could have caused the problem, but I would guess that there had been some predisposing reason for it, some unusual, very unusual, unreported cause of disk herniation.

Dr. Weinstein stated that, when he had reported that claimant's condition was "definitely work related" he had meant that "the patient told me that this happened on the job."

Dr. Weinstein stated that both the bowling and the fall of the truck could have been a cause of claimant's back condition, but it was difficult to determine whether they were substantial or unsubstantial, "positive" or "negative."

Dr. Weinstein apparently evaluated claimant on February 26, 1987 and noted an impression that it was difficult to determine the cause of claimant's pain, although he did have instability and symptoms consistent with an L4-S1 disc. He stated "[h]is injury is most definitely work related and should be covered by workers' compensation." Impairment rating was estimated to be 12-15%.

L. E. Johnson, M.D., interpreted a myelogram of April 17, 1986 as showing abnormality of the L4-5 level with a small bone spur of calcified disc material arising from the inferior aspect of L4 and displacing the thecal sac along the left side. He interpreted the L5-S1 interspace as normal, except for slight narrowing.

A. E. Berkow, M.D., interpreted a lumbar spine CT scan of October 7, 1985 as showing an extradural compression of the L4-5 level on the left side compatable with a herniated disc. He reported there was no evidence of central canal stenosis or foraminal stenosis. He later reported that a CT scan also showed evidence of some compression of the right sided nerve root at L5-S1 by osteophytes and some protrusion of the disc on the right side at L5-S1.

An October 7, (1985) nursing history reports the following history:

> Works at Bork Transport on 9/15/85 I was getting out of my truck. The rails were wet and I slipped and twisted myself and had a sudden pain back which

went down my right leg...

Eugene Collins, M.D., reported that CT scan and myelogram of October, 1985, showed probable disc disease at L4-5 on the left and L5-S1 on the right laterally with the L5-S1 obviously the symptomatic level on the right side. Chemonucleolysis injection was done on October 10, 1985 at the L5-S1 level without complications. As of October 12, 1985, claimant was doing well with pain down the right leg improved and minimal back spasm. Strength was satisfactory in the dorsi and plantar flexors of the feet.

A report of Richard Kreiter, M.D., of October 3, 1985, states that "Richard is about the same. He has had symptoms now for about 2 1/2 weeks. He stayed down." Straight leg raising is noted to be painful on the right at 45 degrees. Right ankle jerk is decreased.

Dr. Kreiter examined claimant on September 26, 1985 noting an impression of lumbar disc disease with a right sciatica and absent right ankle jerk. He noted that claimant was tender in the lumbosacral area and in the right sciatic notch; had mild spasm and painful straight leg raising on the right at 60 degrees, negative on the left. Knee jerks were intact; left ankle jerk was intact; strength was good.

On August 11, 1986, Dr. Collins opined that, in view of claimant's disc disease at two levels, it would be difficult for claimant to work at a job involving bending, twisting, lifting over 20 pounds, standing, climbing or prolonged sitting and so forth. He reported it would be difficult for claimant to drive a truck for long periods with commitant twisting and other activities. He opined that claimant may be able to return to a sedentary job not involving the above activities.

On February 24, 1986, Dr. Collins opined that claimant's problem, which necessitated his being seen in the emergency room (on September 15, 1985) as well as subsequent treatment, was not caused by prior back problems, but was a new incident of injury caused by claimant slipping from the truck.

An accident report of J. Bybee, M.D., of October 2, 1985, states that claimant fell from a semi, but did not fall to the ground. It reports he twisted his back and was hanging by the hands. A note of Dr. Bybee of January 24, 1986 states he had examined claimant on September 15, 1985 for a back injury and that claimant did not appear to be, and he found no evidence to suggest that claimant was under the influence of alcohol. A January 30, 1986 Maquoketa Family Clinic note signed by Dr. Bybee indicates that Dr. Bybee had given claimant a statement indicating he had found no evidence of findings to suggest alcohol use or intoxication.

A December 10, 1986 note of the Leon Chiropractic Center of Douglas G. Leon, D.C., reports that claimant was seen on September 24, 1983 as well as on apparently a subsequent occasion in September, 1983.

A record of the Gonstead Clinic of Chiropractic of January 28, 1975 reports symptoms of apparently low back pain radiating into the right leg to foot for three months.

H. A. Gearhart, D.O., reported that he had seen claimant for low back pain on November 15, November 23, and November 25, 1974. Claimant was treated with physical therapy and was improved when discharged and has not been seen since 1974.

Exhibit 1 of exhibit B is a photograph which shows an individual standing beside a semi tractor holding a yard stick. The yard stick is approximately parallel to the base of the tractor ledge and slightly above the second step of the ladder into the tractor-trailer side door. The second step is approximately two inches lower than the base of the ledge. Exhibit 2 is bowling cards indicating that Dick or Richard Hosch bowled on September 15, 1985 and September 29, 1985. Exhibit 3 is a January 3, 1987 Clinton Herald newspaper article indicating that job service figures record a 5.4% unemployment rate for December (1986) for Jackson County. Exhibit B, exhibit 10 is claimant's Bork Transport personnel file. A January 11, 1984 letter of Michael Bedolli of Moreco Energy, Inc. to Tod Bro of Bork Transport reports an incident involving a Bork driver upon whom Moreco personnel could smell alcohol and who was reported to have "acted peculiar during the entire time he was at our plant." On April 18, 1983, claimant received a written warning for being eight hours late to load at ADM in Peoria. An August 13, 1985 letter reports that, per a discussion of the letter writer, Dick Sayre, with claimant, claimant was advised that he had been late for a delivery, that he did not call his dispatcher with a mechanical problem and that he had taken his truck home without authorization. Claimant was informed that "[b]ecause of these and other problems" the options of termination or hauling gas out of Bettendorf were given to claimant. An August 20, 1985 letter advised claimant per Sayre that he was on 90-days' probation and had a 1% drop in commission. It noted "This is the final warning, any infraction of company policy and your position is terminated."

On June 9, 1983, claimant received two warning notices, one for failure to mail in paperwork daily and another for having placards on the trailer wrong and for failure to be within 25 feet of the unloading trailer at ADM, Cedar Rapids. On May 4, 1985, Dick Sayre wrote claimant indicating that, on account of problems with daily mailing of paperwork, with arriving at destination on time, with communicating with dispatch and with unloading, Bork would be evaluating claimant's employment

situation. A hand-written note of May 7, 1985 reports that claimant called and the letter was reviewed with claimant agreeing to try mailing (paperwork) every three days and that another Tulsa situation, apparently in reference to unloading problems, would not occur.

Exhibit B, 12 is a Rowley Interstate file for claimant. The file contains a number of notations regarding late delivery relative to claimant. A Job Service decision dated July 9, 1982 determined claimant had not voluntarily left his employment with Rowley Interstate Transportation Company as claimant had refused to take a dispatch due to personal business and important personal problems.

Exhibit B, 13 is claimant's personnel records from Lear Siegler, Inc. The exhibit demonstrates that claimant was ultimately terminated by that company for failure to timely report late work arrivals and work absences.

Exhibit B, 14 are records relative to claimant's prior workers' compensation claim resulting from an injury of September 17, 1969 wherein claimant twisted an ankle.

Exhibit B, 15 is a report of Patrick D. Doherty, MSR/CRC. Mr. Doherty reported that he had performed an LMA computer analysis relative to the 1985 national male labor force. He indicated the analysis resulted in a 43% access of jobs that were available to claimant prior to his injury with post-injury access of 33%. Such was reported as representing a personal loss of access to the labor force of 24%. Factors affecting employment were listed as: (1) Lack of transferrable educational skills, (2) Lack of transferrable work skills, and (3) Poor job availability in local labor market with unemployment reported as remaining about 10-11% in "this area of Iowa."

Exhibit B, 16 is personnel records from Apple Lines. Records reflect that claimant was employed at the lines from March 1, 1982 through November 18, 1982. Claimant was ultimately discharged for failure to leave on a road trip on a timely basis. Reportedly, claimant went to a local tavern instead.

Exhbit B, 17 is personnel files from Dahlen Lines. The records reveal that claimant received a number of written and verbal warnings as well as work suspensions for infractions generally involving tardiness or leaving work for unexcused reasons.

Claimant's exhibits 3 through 6 are correspondence from the employer, the insurer and between the attorneys regarding claimant's alleged work injury and denial of benefits for such.

Claimant's exhibit 11 is a September 24, 1986 letter of

claimant to the employer advising that his doctor has released him to return to work with certain restrictions and stating that a copy of the deposition of Dr. Collins, which outlines such restrictions, is enclosed.

Claimant's exhibit 12 is an AT & T Communications detailed listing of itemized calls. The following calls were made at the indicated times on September 15, [1985]:

Date	No.	Time	Place	Area-Number	Min
Sep 15	6.	723PM	TO Des Moines IA	515 274-5990	
			FR Maquoketa IA	319 652-9009	1.0
Sep 15	7.	727PM	TO Adel IA	515 993-3640	
			FR Maquoketa IA	319 652-9009	2.0
Sep 15	8.	730PM	TO Des Moines IA	515 244-1734	
			FR Maquoketa IA	319 652-9009	1.0
Sep 15	9.	1042PM	TO Adel IA	515 993-3640	
			FR Maquoketa IA	319 652-9061	1.0
Sep 15	10.	1043PM	TO Adel IA	515 993-3640	
			FR Maquoketa IA	319 652-9061	1.0

Claimant's exhibit 13 is a hand-written account of jobs into which claimant apparently inquired. The account consists of approximately three full wide-lined pages generally indicating that the company listed is "not hiring" and occasionally indicating that claimant is not qualified for a position with the company.

Exhibit L is the deposition of Colleen R. Torgerson taken September 22, 1986. Ms. Torgerson is co-owner with her husband of the bowling center in Maquoketa. She agreed that the Hosches were on a mixed doubles bowling league which had its first night on September 15, 1985 and that the league was scheduled to start at 7:30. She very much doubted that the league started at exactly 7:30 on that night because there was always a fair amount of paperwork on the first night and therefore it took longer to get underway. Ms. Torgerson felt it was possible claimant had drunk on the night of September 15, 1985, but stated she did not remember specifically that he had had anything to drink.

Exhibit K is a written transcript of a recorded conversation between Ms. Torgerson and Bob Wren taken November 26, 1985. Ms. Torgerson could not remember bowling against claimant that night, reporting it "was a kind of a busy night for me, the first night always is for the secretary." Ms. Torgerson answered the following as regards claimant's drinking on the evening of September 15, 1985:

> A. As I recall I think he was drinking that night more than the other team members but I would hate to have to swear to that because I can't, my memory is a little foggy about that night. I know that

I've heard other people mention you know that he drinks too much but that's not firsthand information for me so.

Joint exhibit D is a deposition of Robert Gillespie taken September 29, 1986. Mr. Gillespie was dispatcher for Bork Transport Company on September 15, 1985. Mr. Gillespie stated that claimant called him at his home between 7:00 and 9:00 p.m. on September 15, 1985. Mr. Gillespie reported that, from the background noise, he assumed claimant was in a bowling alley and that he felt claimant had been drinking. Gillespie reported that claimant indicated he could not work for a load percentage which he was to be paid. Gillespie stated that claimant did not expressly state he was quitting his employment, however. Gillespie reported that he made arrangements for another driver to haul the load for which claimant had been dispatched because Gillespie was unsure as to whether claimant would deliver the load. Gillespie reported that he received a call from claimant's wife at approximately 10:30 or 11:00 p.m. on the evening of September 15, 1985 in which she reported claimant had slipped getting into his truck and was in the hospital. Gillespie reported that, at approximately 9:30 or 10:00 p.m. on the night of September 15, 1985, he had contacted Ed Barnett in Gary, Indiana and arranged for him to pick up and take the load originally assigned to claimant.

Gillespie denied that he had received a letter from claimant requesting that claimant return to work. He reported that the company's history is to find jobs for workers who have suffered injuries when those workers are released to go back to work with certain lifting restrictions, however.

Gillespie stated he felt claimant had been drinking or was intoxicated since he slurred his words and was somewhat argumentative which he characterized as atypical for claimant.

Gillespie stated that neither claimant's time of leaving nor his being at the truck at the time of the injury would be abnormal under ordinary circumstances. He reported, however, that normally a person would probably leave around 2:00 a.m. to make a delivery in Milwaukee in the morning. He reported that a lot of drivers would leave early so that they could sleep for a period at their load point and then deliver their load refreshed and ready to take another load.

Joint exhibit C is a deposition of Todd Bro taken September 29, 1986. Bro was aware that claimant had requested to be allowed to come back to work and reported that Howard Shives, the safety director, would make decisions concerning that request. Bro reported that, on the morning of September 15, 1985, he talked with claimant and gave him dispatch instructions regarding a Monday a.m. load.

Exhibits A, 13 and 14 list the following medical costs:

St. Lukes Hospital		05/01/86	$ 25.00
St. Lukes Hospital		04/17/86	281.00
St. Lukes Hospital		04/17/86	350.00
St. Lukes Hospital		05/01/86	25.00
Dr. Gonzales		05/01/86	700.00
Dr. Milas		05/01/86	550.00
Dr. Collins	through	05/29/86	4,565.00
Dr. Rosario		10/10/85	424.00
Dubuque Radiological Assn.		03/19/86	24.00
Dr. Kreiter	through	03/19/86	176.00
Maquoketa Family Clinic		09/15/85	45.00
Gonstead Clinic		01/31/75	85.00
Maquoketa Family Clinic		09/18/85	20.00
Jackson County Hospital		09/27/85	99.00
Jackson County Hospital		10/07/85	56.00
St. Lukes Hospital		05/06/86	30.00
Mercy Hospital Davenport		10/17/85	3,776.35
St. Lukes Hospital		04/27/86	5.00
Jackson County Hospital		05/14/86	82.00
St. Lukes Hospital Pathology		04/23/86	17.50
St. Lukes Hospital Pathology		05/08/86	151.50

Claimant's exhibits 14 through 26 relate to medical costs claimed by claimant:

Jackson County Hospital	X-ray	$ 72.00
Jackson County Hospital	Emergency Rm	27.00
Jackson County Hospital	Phys Therapy	56.00
Dubuque Radiological Assoc		24.00
Dr. Rosario	Anesthesia	424.00
St. Lukes Hospital		5.00
St. Lukes Hospital		30.00
Dr. Gonzales	Anesthesia	700.00
Radiology Group, Davenport	X-rays	25.00
Radiology Group, Davenport	Myelograms	350.00
Mercy Hospital, Davenport	Msc.	3,776.35
Jackson County Hospital		141.00
St. Lukes Hospital Pathology	CFS Micro Total Protein	17.50
St. Lukes Hospital Pathology	Blood Testing	151.50

Claimant's exhibit 27 is a written itemization of medical mileage as follows:

Destination	Date	Miles
Dr. Bybee & Rask	09/18/85	10
Dr. Kreiter	09/26/85	70
Dr. Kreiter	10/03/85	70
Dr. Collins	11/01/85	70
Dr. Collins	11/22/85	70

Dr. Collins	01/07/86	70
Dr. Collins	02/24/86	70
Dr. Collins	04/14/86	70
Dr. Collins	05/29/86	70
Jackson County Hospital	09/24/85	10
Jackson County Hospital	09/25/85	10
Mercy Hospital	10/07/85-10/12/85	70
St. Lukes Hospital	04/17/86-04/18/86	70
St. Lukes Hospital	04/30/86-05/06/86	70
University of Iowa	02/26/87	180
Total Miles		910

APPLICABLE LAW AND ANALYSIS

Our first concern is whether an employee-employer relationship existed between the claimant and defendant.

Iowa Code sections 85.61(1) provides in part:

> 2. "Worker" or "employee" means a person who has entered into employment of, or works under contract of service, express or implied, or apprenticeship, for an employer....

The Iowa Supreme Court stated in Nelson v. Cities Service Oil Co., 259 Iowa 1209, 1213, 146 N.W.2d 261 (1967):

> This court has consistently held it is a claimant's duty to prove by a preponderance of the evidence he or his decedent was a workman or employee within the meaning of the law....
>
> And, if a compensation claimant establishes a prima facie case the burden is then upon defendant to go forward with the evidence and overcome or rebut the case made by claimant. He must also establish by a preponderance of the evidence any pleaded affirmative defense or bar to compensation. (Citations omitted.)

Given the above, the court set forth its latest standard for determining an employer-employee relationship in Caterpillar Tractor Co. v. Shook, 313 N.W.2d 503 (Iowa 1981). The court stated in part:

> I. The employer-employee relationship. As defined in section 85.61(2), The Code, an "employee" is a "person who has entered into the employment of, or works under contract of service...for an employer." Factors to be considered in determining whether this relationship exists are: (1) the right of selection, or to employ at will, (2) responsibility

for payment of wages by the employer, (3) the right to discharge or terminate the relationship, (4) the right to control the work, and (5) identity of the employer as the authority in charge of the work or for whose benefit it is performed. The overriding issue is the intention of the parties. McClure v. Union, et al., Counties, 188 N.W.2d 285 (Iowa 1971). (Emphasis added).

The above issue essentially involves a fact question as to whether claimant had voluntarily terminated his employment relationship with Bork Transport on the evening of September 15, 1985. Both parties to the telephone conversation between Mr. Gillespie and claimant testified. Both parties agreed that, while claimant made statements as to being unable to work for the percentage to which his wage had been cut, claimant had not stated expressly that he had quit his employment or that he would not take out the load which had been dispatched to him on the morning of September 15, 1985. We note also that claimant's letter notification of his percentage wage cut was apparently dated August 20, 1985. We suppose, given that date, that claimant had actually received that notification substantially earlier than September 15, 1985. Given that circumstance, we believe it would have been most unusual for claimant to have waited until September 15, 1985, while bowling, to inform his employer that he did not intend to continue working at that wage. For that reason also, we find that the evidence does not establish an intention on claimant's part to voluntarily terminate his employment with Bork on September 15, 1985. Claimant prevails on this issue.

Our next 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 September 15, 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).

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

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

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d

63 (1955).

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

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971), Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Again, the question of whether claimant was involved in a work incident on the evening of September 15, 1985 is largely a fact issue. Claimant and claimant's wife testified as to the incident. Claimant's wife reported the incident to Mr. Gillespie substantially as testified to at hearing. Mr. Gillespie testified that he did receive a call from Teresa Hosch who reported claimant had fallen from the truck on the evening of September 15, 1985. Medical histories, including that of Dr. Bybee, of October 2, 1985 are consistent with a fall from a semi, without a fall to the ground. Defendants' evidence disputing the work incident largely concerns whether claimant had intended to take out a load that evening and whether claimant could have arrived at the truck and fallen, given that claimant had bowled approximately two to two and one-half hours that evening. Defendants also attempted to impeach claimant's credibility. While we do not deny the evidence suggests that, on past occasions, claimant has engaged in less than responsible conduct and has been less than forthright with his employers, we believe the greater weight of evidence indicates that claimant was actually at his truck on the evening of September 15, 1985 in the vicinity of 10:00 p.m. and that an actual incident in which he fell from the truck occurred at that time. Whether that work incident and the aftereffects of the fall rise to the level of an injury as defined in our workers' compensation act is largely a matter of causal connection and will be discussed further below.

Our next concern is whether claimant's claim is barred on account of intoxication as provided in Iowa Code section 85.16(2). The section provides that no compensation is allowed for an injury caused by an employee's intoxication, which did not arise out of and in the course of the employment, but which was due to the effects of alcohol not prescribed by an authorized medical practitioner, if the intoxication was a substantial factor in causing the injury.

Much evidence was presented relative to the issue of whether claimant was in fact intoxicated on the evening of September 15, 1985. Despite the myriad lay evidence submitted, the evidence

does not show that claimant was, in the words of one witness who actually observed claimant that evening, "roaring drunk." Claimant's behavior that evening may have been unusual; he may have had a reputation for drinking; and, he may have been more forceful than normal in speaking to Mr. Gillespie. Those items, however, without more, do not establish that claimant was intoxicated that evening. Furthermore, one would suspect that, if claimant had had observable signs of intoxication, they would have been evident during his emergency room visit and Dr. Bybee would have reported them. Dr. Bybee did not note any such signs in his report of October 2, 1985 and expressly denied evidence of intoxication in two subsequent reports of January, 1986. Hence, we do not find factually that defendants have shown claimant to be intoxicated on the evening of September 15, 1985. Furthermore, the legal standard under Iowa Code section 85.16 requires that the intoxication be a substantial factor in causing the injury before the intoxication bars recovery. A factor is substantial when the injury can be directly traceable to it. See Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974). Defendants presented no evidence suggesting that claimant's work incident, that is, the fall from the truck, was directly traceable to intoxication. The slip and fall which claimant described is not so beyond ordinary events of life that one can per se state that an individual's intoxication would be a substantial factor in its occurrence. The event could well have occurred in the absence of any intoxicated state. Defendants have not preponderated on this issue.

Defendants also assert that claimant's claim is barred as a result of misrepresentations to the employer on the job application and elsewhere. Iowa has not adopted the legal principle that misrepresentation per se bars recovery. Even if that standard were generally applicable, it would not bar recovery in this case, however. 1C Larson Workmen's Compensation Law, section 47.53 states:

> The following factors must be present before a false statement in an employment application will bar benefits: (1) The employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation the the injury.

The defendants have not shown that claimant knowingly and wilfully made a false representation as to his physical condition. Claimant testified that he had passed all of his DOT physicals. The evidence shows that claimant had had significant back problems in 1974 and 1975. Claimant had treated chiropractically for those and testified that they had resolved. The only evidence that claimant sought subsequent treatment for his back

were two notations of chiropractic care obtained in 1983. Claimant had not had surgery or other nonconservative management for back problems. Such would suggest that claimant could well have believed that he had no significant back problems at the time of his Bork application. As a heavy manual laborer, claimant could have expected occasional backaches and pains and not have seen them as so significant a physical defect as would need to be reported on an employment application. Given those facts, it cannot be said that claimant knowingly and wilfully made a false representation as to his physical condition. Likewise, while Mr. Gillespie testified that a back problem would be a substantial factor in Bork's decision to hire or to not hire a driver, the evidence does not show that the degree of back difficulties claimant was having at the time Bork hired him was such that those problems, if any, would have been a substantial factor in Bork's decision to hire or to not hire claimant. As defendants have failed to show claimant willingly and knowingly made a false representation, whether a causal connection existed between claimant's preexisting problems and his injury is moot as to the issue of whether any false statement barred benefits.

We consider the question of whether a causal relationship exists between claimant's alleged injury and his claimed disability.

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury....The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.
>
> ....
>
> A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee.

[Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 15, 1985 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

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

The work incident or activity need not be the sole proximate cause of the injury if the injury is directly traceable to the incident. Holmes v. Bruce Motor Freight, Inc., 215 N.W.2d 296, 297 (Iowa 1974).

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 on an incomplete history is not necessarily binding on the commissioner, but must be weighed with other facts and circumstances. Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128, 133 (1967).

Dr. Collins, a board-certified neurosurgeon and claimant's primary treating physician as regards his chemonucleosis of October, 1985 and his laminectomy of May 1, 1986, reported that he received no history of claimant bowling prior to his fall. Dr. Collins opined that, if claimant had no symptoms while bowling, but had symptoms subsequent to the fall, it was the fall and not the bowling which produced the symptoms. He further stated, however, that claimant's bowling on September 29, 1985 did not help claimant's condition and may or may not have worsened that condition. Dr. Kreiter, a board-certified orthopaedic surgeon who treated claimant early on after September 15 and subsequently referred him to Dr. Collins, reported that bowling results in a forward flexion likely to stress the L5-S1 and L4-L5 interspaces. He opined that bowling over a two and one-half hour period was more likely than slipping three feet from a ladder and landing on one's feet to aggravate a preexisting back condition, although either could cause back problems. The doctor further stated that, if bowling had produced claimant's condition, one would expect aching or a stiff back on leaving the bowling alley. He further testified that symptoms may not appear until a time after one has engaged in the aggravating activity, however. Dr. Weinstein, a board-certified orthopaedic surgeon who is also assistant professor of orthopaedic surgery at the University of Iowa and director of the University's spinal center, examined claimant, but did not treat him. Dr. Weinstein opined that a ten-year history of back problems with radiation into the right leg and intermittent symptoms and treatment could have been a substantial contributing factor to claimant's condition after September 15, 1985. He reported that the forces generated by bowling for two or more hours are probably more

stressful [to the back] than falling two to three feet and landing on one's feet, although both "could have been" causes of back problems. The doctor reported that there is apparently a continuum of events over a ten-year period, including the bowling and the fall, with claimant's back "getting bad" somewhere. He reported that bowling, after having been ordered to complete bedrest, could hypothetically substantially contribute to a subsequent need for back surgery within two or three weeks. The doctor characterized as "unlikely" that a disc at the lower level would cause symptoms at a higher level, given the anatonomical makeup of the spinal system. In his deposition, he explained that an earlier characterization, by way of a report, of claimant's condition as definitely work-related meant that claimant had told Dr. Weinstein that his incident had happened on the job.

The parties apparently concede that claimant had some sort of back condition prior to September 15, 1985. Even had the condition consisted of radial symptoms down the right leg in 1974 and intermittently subsequent to 1975, those apparently had not "acted up" on such a regular basis that claimant sought treatment on a consistent basis from 1975 to 1983 and from 1983 until September 15, 1985. At any rate, medical records so indicating were not presented at hearing. Hence, the fighting issue between the parties is whether claimant's preexisting back condition was aggravated by his bowling on September 15, 1985 and September 29, 1985, by his fall from a truck on September 15, 1985 or by both events. As regards such, we note that claimant's fall and the bowling occurred in extremely close proximity to each other. For that reason, Dr. Collins' statement that claimant should have had symptoms while bowling and Dr. Kreiter's statement that claimant should likely have had an aching or stiff back on leaving the bowling alley are not of any great value in assessing the evidence. While claimant did not complain of back symptoms on leaving the alley and his wife indicated that, on observation, he did not appear to have back problems on leaving the alley, Dr. Kreiter has also testified that one may not realize activity has aggravated an underlying condition until time has passed. Hence, it is possible that claimant experienced symptoms which actually related back to the bowling and not to the fall. It is also possible, as Dr. Weinstein opined, that both the bowling and the fall could have been causally related to back problems. The causation with which we are concerned is proximate causation. Proximate causation need not be the sole causation, but must be directly traceable causation. We believe that claimant's claim fails in that he has not shown by a preponderance of the evidence that his back condition is directly traceable to the fall of two or three feet on September 15, 1985. Preponderance of the evidence means greater weight of the evidence; that is, the evidence of superior influence or efficacy. Bauer v. Reavell, 219 Iowa 1212, 260 N.W. 39 (1935). Claimant does not discharge his burden of showing, by a preponderance of the evidence, the causal relationship by creating an equipose. Volk v. International Harvester Co., 252

Iowa 298, 106 N.W.2d 649 (1960). Both Drs. Kreiter and Weinstein opined that claimant's bowling was more likely than his fall to have contributed to his back condition. Only Dr. Collins discounted the possibility of claimant's bowling having produced claimant's post-September 15, 1985 back condition. Dr. Collins' opinion was based on the absence of reported symptoms while bowling. As Dr. Kreiter noted, it is possible that symptoms can relate to an activity, but only be observable or noticed at a time subsequent to the activity. As noted above, the bowling and the fall were in such close proximity that symptoms thought to have been produced by the later activity could well have been produced by the earlier activity. We do not find that claimant's back problems can be directly traceable to his fall, which the greater weight of evidence indicates was of less than three feet. Further, Dr. Kreiter testified that, had claimant bowled on September 29, 1985 without problems, it would suggest that any problems from September 15, 1985 were resolving rapidly. Both claimant and his wife testified claimant bowled on September 29, 1985. Hence, it would appear any problems from the earlier incident were resolving as of that date. For that reason also, we cannot say that any subsequent back condition and medical treatment for such was directly traceable to claimant's September 15, 1985 fall. For that reason also, claimant's claim fails.

Because claimant has not shown the requisite causal relationship between his work incident and his injury and any ensuing disability, we need not reach the remaining questions of benefit entitlement or entitlement to payment of medical costs.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

On the morning of September 15, 1985, the Bork dispatcher instructed claimant to take a semi load for Bork Transport from Maquoketa, Iowa to Wauwatosa, Wisconsin for 8 a.m. September 16, 1985 delivery.

Claimant and his spouse bowled the first night of mixed doubles league on the night of September 15, 1985.

Claimant and his spouse arrived at the bowling alley at about 7:15 p.m.

Bowling commenced by approximately 7:45 and lasted at least two hours, but not more than two and one-half hours.

Claimant bowled three games of ten frames consisting of two balls each.

Claimant called Bob Gillespie from the bowling alley early in the evening of September 15, 1985.

Claimant discussed a letter dated August 20, 1985 he had received from Bork notifying him of a percentage wage cut.

Claimant stated he could not work for that percentage; he did not expressly quit or refuse to take the assigned load.

Claimant's demeanor, as perceived over the telephone, was more forceful than that to which Gillespie was accustomed at times when claimant was not drinking.

Claimant has a reputation for excessive drinking, both in his work and his nonwork community.

Other persons in the bowling alley on the evening of September 15, 1985 variously reported claimant as either drinking alcohol or not drinking alcohol on that evening.

No one perceived claimant as "roaring drunk" that evening.

Claimant and his spouse left the bowling alley by at least 10:00 p.m.

Claimant could have departed on the run as late as 2:00 a.m., but chose to leave directly after bowling.

Claimant had received numerous reprimands for tardiness on startups and deliveries.

Claimant had received a written reprimand for tardiness in August, 1985, stating that any further tardiness would result in his termination.

Claimant and his spouse returned home driving east through Maquoketa, picked up claimant's suitcase and drove back west through Maquoketa to the truck stop where claimant's semi was parked.

Claimant's spouse was driving. She observed the 20 mile-per-hour speed limit and observed any of three potential red traffic lights.

After leaving the truck, after starting and inspecting it, to say goodbye to his wife, claimant fell a distance of not more than three feet while attempting to reenter the truck.

Claimant and his wife went to the hospital emergency room.

Claimant reported a fall from his truck to emergency room personnel.

Claimant's wife called Bob Gillespie and advised Gillespie that claimant had fallen from his truck and would be unable to take the dispatched load.

Bob Gillespie had advised a second driver to take the load as claimant would not be taking the load since claimant was in a tavern drinking.

Claimant advised his treating and examining physicians of his fall from the truck.

Dr. Kreiter directed claimant to complete bedrest on September 26, 1985. Claimant bowled three games of ten frames, two balls each on September 29, 1985.

Claimant had herniated disc at L4-5 and L5-S1. He had chemonucleosis injection in October, 1985 for the L5-S1 disc and a laminectomy for the L4-5 disc in May, 1986.

Claimant had had back pain with radiation into his right leg in 1974 and 1975. He sought chiropractic care for such.

Claimant had intermittent back symptoms to 1985.

Claimant sought chiropractic back care in 1983 on two occasions.

Claimant had no nonconservative care from 1975 until after September 15, 1985.

Claimant had passed required DOT physicals from 1975 to 1985.

Bowling is more likely to aggravate a preexisting back condition than a three-foot or less fall.

Bowling on September 29, 1985 would indicate that any condition from September 15, 1985 was resolving quickly.

An activity can aggravate a back condition without immediate onset of pain and stiffness or other symptoms.

Claimant's bowling of September 15, 1985 and his fall from his truck were in very close chronological proximity.

Claimant's injury and claimed disability are not directly traceable to his September 15, 1985 fall.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established an employee-employer relationship between claimant and defendant.

Claimant has established an incident on September 15, 1985, which incident arose out of and in the course of his employment.

Claimant's claim is not barred on account of his intoxication as provided for in Iowa Code section 85.16(2).

Claimant's claim is not barred as a result of misrepresentations to the employer on the job application and elsewhere.

Claimant has not established an injury which arose out of and in the course of his employment on September 15, 1985 and has not established a causal relationship between any work-related injury and his claimed disability.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from these proceedings.

Claimant and defendants share equally the costs of these proceedings pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 13th day of May, 1988.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY M. JOHNSON,	:	
Claimant,	:	File Nos. 782796
vs.	:	792733
GEORGE A. HORMEL & COMPANY,	:	N U N C
Employer,	:	P R O
and	:	T U N C
LIBERTY MUTUAL INSURANCE CO.,	:	O R D E R
Insurance Carrier,	:	
and	:	
SECOND INJURY FUND OF IOWA,	:	
Defendants.	:	

The appeal decision filed June 21, 1988 ordered defendants to pay claimant weekly permanent partial disability benefits. Iowa Code section 85.30 provides for interest for weekly compensation payments not paid when due.

THEREFORE, it is ordered:

That defendants shall pay interest on weekly benefits awarded in the appeal decision as set forth in Iowa Code section 85.30.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY M. JOHNSON,	:	
	:	
Claimant,	:	
	:	File Nos. 782796
vs.	:	792733
	:	
GEORGE A. HORMEL & COMPANY,	:	
	:	A P P E A L
Employer,	:	
	:	D E C I S I O N
and	:	
	:	
LIBERTY MUTUAL INSURANCE CO.,	:	
	:	
Insurance Carrier,	:	F I L E D
	:	
and	:	JUN 21 1988
	:	
SECOND INJURY FUND OF IOWA,	:	IOWA INDUSTRIAL COMMISSIONER
	:	
Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits. Claimant cross-appeals.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 4. Defendants, claimant and the Second Injury Fund of Iowa filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

I. Whether the Deputy erred in finding that Claimant had sustained a "gradual injury."

II. Whether the Deputy erred in finding Claimant had sustained an injury to the body as a whole.

III. Whether the Deputy erred in awarding Claimant an Industrial Disability Award where he found three or more scheduled member injuries.

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IV. Whether the Deputy erred in finding Claimant condition permanent.

Claimant states the following issues on cross-appeal:

1. Whether claimant sustained an injury to two scheduled members such as would qualify him for benefits under section 85.34(2)(s), The Code.

2. If claimant did not sustain an injury to two scheduled members under section 85.34(2)(s), The Code, the extent of disability for the two scheduled injuries and the extent of liability of the second injury fund.

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, 39 years old at the time of the hearing and with a high school education, was employed by defendant George A. Hormel & Company (hereinafter Hormel) from March 1971 until August 26, 1985 to strip out rejected sausages and to cut long "Rosa" sausages into smaller pieces. Claimant was required to handle approximately 2000 pounds of meat per hour, involving twisting, grasping, pinching, bending and lifting both below and above shoulder level.

Prior to November 1984, claimant had experienced a shoulder injury which caused him to miss work in 1976, but claimant did not miss work or require medical attention as a result of this injury between 1976 and November 1984. Claimant did report a sore right hand to a doctor in December 1979.

On November 27, 1984, claimant experienced severe pain on November 27, 1984, in his right wrist while lifting a rack of sausages. Claimant was seen by Dan Miner, a physician's assistant, who indicated claimant also complained of chronic pain in both wrists and hands. Claimant was returned to light duty work. Claimant again experienced pain, and was seen by Mr. Miner. Mr. Miner's notes indicate that claimant told him he had had pain in his right wrist and hand for years.

Claimant was then seen by Kenton K. Moss, M.D., who diagnosed tendonitis of the right wrist with possible mild carpal tunnel, which he concluded was work related and stemming from "overuse syndrome." Dr. Moss prescribed wrist splints for both wrists. Claimant was off work for 10 days. Claimant returned to his regular work, but again experienced pain and was placed on light duty work.

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Claimant underwent electrical studies of his wrists by Sant M.S. Hayreh, M.D., a neurologist, in January of 1985. The EMG conducted at that time showed moderate carpal tunnel syndrome on the right and mild carpal tunnel syndrome on the left. Dr. Hayreh also found ulnar nerve compression at the right elbow, and at the Guyon's canal in the right hand.

Claimant was also seen by an orthopedic surgeon, Raymond L. Emerson, M.D. Dr. Emerson diagnosed claimant as having bilateral carpal tunnel syndrome in both hands, constriction of the ulnar nerve at the right Guyon canal of the right hand, and possibly thoracic outlet syndrome. Dr. Emerson testified that claimant had suffered an aggravation of his predisposition for carpal tunnel syndrome, but that no permanency had resulted. Dr. Emerson indicated that claimant was unable to work because of his symptoms, and that it was common to observe development of carpal tunnel syndrome first in one extremity and then the other.

Claimant missed several weeks of work and noticed improvement in his symptoms. Claimant returned to work, but testified that he favored his right arm. Shortly after returning to work on March 12, 1985, claimant experienced an incident of severe pain in his left wrist. Hormel placed claimant on light duty again, and claimant did not return to full duty work thereafter.

Claimant acknowledged that he had experienced pain in his hands prior to both the November 27, 1984 incident and the March 12, 1985 incident but had attributed this to normal aches and pains from his work. Claimant also acknowledged wearing wrist splints on both wrists even prior to the March 12, 1985 injury, which he indicated he wore to prevent further injury. Claimant's plant manager testified that claimant had complained of pain in the wrists prior to the November 27, 1984 injury and when claimant returned from seeing the doctor after the November 27, 1984 injury.

In April 1985, Dr. Emerson noted that claimant's symptoms had improved in his right upper extremity but that those symptoms would likely reoccur if claimant returned to his old duties and might eventually require surgical decompression of the wrist nerves. Dr. Emerson opined that claimant's condition was caused by overuse of his arms and hands at work and recommended that claimant find less repetitive employment.

Dr. Emerson also testified that thoracic outlet syndrome could not be diagnosed with certainty, and that the presence of thoracic outlet syndrome in claimant was less certain than the presence of carpal tunnel syndrome. Dr. Emerson also stated:

> Q. And Doctor, then, that is not to be confused with carpal tunnel inasmuch as the thoracic outlet syndrome basically is in the shoulder; is that fair?

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A. That's correct. The -- Unfortunately, they will sometimes give the same symptoms. That's why it can be confusing for us to make a diagnosis.

(Joint Exhibit 3, page 25)

Dr. Emerson conducted tests of claimant's shoulder and found no impairment.

Between May 31, 1985 and August 1985, claimant was seen by Charles B. Carignan, Jr., M.D. Dr. Carignan agreed with the diagnosis of bilateral carpal tunnel syndrome by Dr. Emerson and Dr. Moss, noting that claimant's conditions "occurred sequentially and probably occurred at different times and as a result of separate-disparate injuries rather than as a result of a single incident or injury." Claimant indicated to Dr. Carignan that he was suffering pain in both wrists, but especially the left wrist, as well as pain in his arms to the elbows, and pain in both shoulders, particularly the left shoulder.

At the hearing, Dr. Carignan testified concerning his initial examination of claimant on May 31, 1985 as follows:

Q. And what did you find in this patient as far as functional impairment first as to the right limb, upper limb, and secondly as to the left upper limb?

A. Well, his symptoms which combined loss of sensation, loss of motor function and strength involving apparently a carpal tunnel syndrome on the right, I felt at that time amounted to about a 20 percent impairment of the extremity as a whole in the right upper extremity which was equivalent to about a 9 -- a 12 percent impairment of the whole body at that time, a whole percent impairment functional. And based on my similar findings in the left hand only more severe in the left I felt that he was suffering about a 30 percent impairment of the left upper extremity equivalent to about an 18 percent impairment of the body as a whole. And the combined impairment of both extremities I felt at that time was equivalent to about 21 percent impairment of the person as a whole.

(Tr., pp. 44-45)

Dr. Carignan also opined that claimant's left wrist problems were the result of his right wrist problems:

Q....it's my understanding from your testimony that the functional impairment ratings that you have given to Mr. Johnson it's your opinion that that

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functional impairment was caused by Mr. Johnson's repetitive movements at work; is that correct?

A. The right, yes. I think to some extent the involvement on the left was caused by the fact that he was babying the right and then threw an undue load on the left subsequently.

Q. Now, isn't it also correct that you have agreed that the bilateral carpal tunnel that has been diagnosed is something that creeps up gradually?

A. Correct. It's what they call an overuse syndrome.

Q. So you would agree that the problems that have been related to you by Mr. Johnson would constitute an overuse syndrome?

A. In his case, yes. I think particularly with the right wrist.

....

Q. And would you agree that because of this overuse syndrome there may be a point in time where I believe you indicated that the patient may just have enough and seek medical care?

A. When it becomes sufficiently disabling that he has to seek help.

Q. At that point, I suppose, would vary from individual to individual?

A. That's correct.

Q. And in this case you testified that Mr. Johnson had related to you that before he had enough and sought medical care that he had symptoms or problems in both the wrists or both arms, both hands and both shoulders?

A. Correct.

(Tr., pp. 85-87)

Dr. Carignan indicated that carpal tunnel syndrome would not be caused by a single traumatic event:

Q. Doctor, in your experience do the problems of carpal tunnel syndrome creep up gradually on the

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individual workman?

A. In my experience they do. Carpal tunnel more often is a gradually developing situation.

(Tr., pp. 47-48)

Dr. Carignan also expressed the opinion that claimant's condition was permanent:

Q. And would you explain or elaborate to the Court as to why you feel this type of medical problem is permanent with the patient?

....

A....his condition has been quite static with very little change. And I believe it's fairly stabilized at the present state because of what I've seen.

....

Q. And so far as additional improvement is concerned does the length of period that this patient has sustained this problem have any affect [sic] on your judgment as to whether or not this is a permanent injury?

A. Well, that's what does make me think this. Generally with these types of things about 18 months is the period in which we would normally expect progressive improvement in the situation or total resolution of it. Based on what we know that his problems started possibly several months before the time in November when he sought help from his employer about it, one would think certainly -- it's been probably two years since onset. There would certainly be change by now if there were going to be further improvement.

(Tr., pp. 48-49, 56)

On August 23, 1985, claimant reported pain in the left shoulder and wrist to Dr. Moss, which claimant indicated had been persistent since March 1985. Dr. Moss took claimant off work and again referred him to Dr. Hayreh. Dr. Hayreh found that claimant had "very mild carpal tunnel syndrome in both sides along with some involvement of the ulnar nerve at the elbow." Dr. Hayreh prescribed medication and placed a restriction on claimant's use of his hands and elbows, but also noted that claimant's complaints were out of proportion to the physical findings and recommended claimant undergo psychological tests.

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Claimant was off work for various periods of time in 1985, with claimant's last day of work occurring on August 26, 1985. Claimant was earning approximately $10 per hour when he left work. Claimant could have bid into another job but did not.

Between his last day of work on August 26, 1985 and January 1986, claimant continued to have complaints of pain and numbness in both wrists, both arms, both elbows and both shoulders, along with clumsiness when using his hands and arms above shoulder level. Dr. Moss also recommended psychological testing, which claimant declined.

In February 1986, claimant was evaluated by W.P. Cooney, M.D., at the Mayo clinic orthopedic department. Dr. Cooney stated: "Obviously there was some work stress overuse involved and the carpal tunnel syndrome was the most prominent condition producing symptoms." (Jt. Ex. 1, p. 13) Dr. Cooney also opined that claimant had not suffered any permanency from his carpal tunnel syndrome. Claimant was found to have normal range of motion in his shoulders.

At the hearing, Dr. Carignan expressed disagreement with the findings of Dr. Cooney and Dr. Hayreh in regards to a lack of permanency. Dr. Carignan, who has psychiatric training, also disagreed with opinions that claimant's symptoms were affected by significant functional overlay:

A....As far as overlay, sometimes we do see people who develop a hysterical component to their symptoms in that they will develop bizarre numb patterns or bizarre types of paralysis which have no possible explanation or organic basis or anatomical or physiological basis. And sometimes these types of components do occur in association with organic conditions. I found no evidence, however, that any of the symptoms that Mr. Johnson was exhibiting were in any way of a hysterical nature. They did conform exactly to known anatomical patterns and to known functional situations which were easily explained by the types of lesions he'd had inflicted on him.

(Tr., pp. 54-55)

Claimant has not found other employment since he left work, although he has applied at only three employers. He presently operates a farm, but testified that he requires assistance from family members for many tasks. Claimant's stipulated rate was $277.64. The parties also stipulated that claimant's last day of work was August 26, 1985, and that claimant was not entitled to any further temporary total disability or healing period benefits prior to August 27, 1985.

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APPLICABLE LAW

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).

A petition for arbitration may state a claim in general terms, and technical or formal rules of procedure need not be observed. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949).

The manifestation of one injury on two occasions does not necessarily qualify a worker for second injury fund benefits under section 85.64, Code of Iowa. McMurrin v. Quaker Oats Company, 1 Iowa Industrial Commissioner Report 222 (Appeal Decision, April 28, 1981).

Workers' compensation benefits for permanent partial disability of two members caused by a single accident is a scheduled benefit under Iowa Code section 85.34(2)(s), and the degree of disability must be computed on a functional basis. Simbro v. DeLong's Sportswear, 332 N.W.2d 886 (Iowa 1983).

Bilateral carpal tunnel syndrome resulting from one gradual injury process constitutes the loss of two members from one accident and is evaluated on the functional basis under section 85.34(2)(s), Code of Iowa. Himschoot v. Montezuma Manufacturing, Appeal Decision, April 15, 1988.

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 remainer the compensable value of the previously lost member or organ.

Iowa Code 85.34(2) provides, in part:

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

....

(s) The loss of both arms, or both hands, or both feet, or both legs, 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 the employee may be entitled to benefits under subsection 3.

....

(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.

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

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

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, 233 Iowa 758, 10 N.W.2d 569.

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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).

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 Iowa Code section 85.34(2). Barton, 253 Iowa 285, 110 N.W.2d 660.

"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 (1921).

The claimant has the burden of proving by a preponderance of the evidence that the injuries of November 27, 1984 and March 12, 1985 are related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

ANALYSIS

Defendants urge that the deputy erred in determining that claimant had suffered a cumulative or gradual injury. Claimant did not allege a cumulative injury. Rather, claimant maintained that he suffered separate injuries on November 27, 1984 and March 12, 1985.

However, the record clearly shows that claimant did not suffer any traumatic injuries on those dates. Dr. Carignan testified that claimant suffered from bilateral carpal tunnel syndrome, and that bilateral carpal tunnel syndrome is acquired gradually. The other doctors whose opinions appear in the record all agree that claimant suffers from bilateral carpal tunnel syndrome, referring to the condition as "overuse syndrome." Claimant told both the physician's assistant and his foreman that he had problems in both wrists even prior to the first alleged injury date of November 27, 1984. Claimant wore wrist splints on both wrists prior to March 12, 1985. In addition, claimant's own testimony establishes that he experienced aches and pains in his hands and wrists prior to November 27, 1984 and March 12, 1985. Between the two alleged injury dates, in January 1985 Dr. Hayreh diagnosed carpal tunnel syndrome in both of claimant's wrists.

Defendants on appeal offer no argument that claimant's injury is not gradual. Rather, defendants' argument is that

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claimant should not be found to have suffered a gradual injury if claimant did not rely on a gradual injury theory at the hearing. This approach would allow two parties to make a mutual agreement to the detriment of a third party (in this case, the second injury fund). Here, although claimant strongly urged a finding of two separate traumatic injuries, and claimant's attorney went so far as to request Dr. Carignan to base his ratings on two separate injuries, the medical evidence at the hearing clearly shows a gradual or cumulative injury process. Claimant's work caused pain and discomfort in both of his wrists prior to both the November 27, 1984 and March 12, 1985 injury dates, and those dates represent the points in time where claimant's pain caused him to miss work. They do not constitute traumatic injuries.

The record is undisputed that claimant suffers from bilateral carpal tunnel syndrome. The record also clearly shows that claimant's carpal tunnel syndrome is caused by his work. It is determined that claimant has suffered a gradual injury.

Some of the medical testimony noted thoracic outlet syndrome as a possible part of claimant's condition. However, no definite diagnosis of thoracic outlet syndrome was made. For purposes of establishing that a disability is caused by claimant's injury, a probability is necessary. A possibility is insufficient. In addition, Dr. Emerson testified that the symptoms that suggested the possible presence of thoracic outlet syndrome could also be caused by claimant's carpal tunnel syndrome. Claimant has not established by the preponderance of the evidence that he suffers from thoracic outlet syndrome.

Claimant indicated to various physicians that he suffers from shoulder pain. Claimant had a prior shoulder condition. There is no medical testimony in the record establishing that claimant's shoulder condition has been aggravated by his work. Dr. Emerson tested claimant's shoulders and found no impairment. Claimant has not established by a preponderance of the evidence disability involving his shoulders.

Claimant's present impairment is therefore limited to his bilateral carpal tunnel syndrome, ulnar nerve compression, and Guyon's canal compression. As claimant's condition causes disability only to his hands, wrists and arms, claimant's impairment does not extend to the body as a whole.

Section 85.34(2)(s) deals with the loss of two scheduled members from one accident. It has been determined that claimant developed bilateral carpal tunnel syndrome gradually over a period of time. Since claimant's bilateral carpal tunnel syndrome is the loss of two scheduled members as the result of a single gradual injury process, his disability is to be compensated under section 85.34(2)(s).

It is next alleged that the record does not show claimant's condition to be permanent. Dr. Carignan testified that in his opinion claimant's condition was permanent. Dr. Emerson and Dr. Cooney stated that claimant's condition was not permanent. The basis for the conclusions of Dr. Emerson and Dr. Cooney do not appear in their reports. Dr. Carignan testified that he felt claimant's condition was permanent because it had failed to improve in the time he would expect to see improvement if the condition were temporary. Claimant is unable to perform farm tasks because of his disability, and testified that he continues to suffer pain and disability in his arms. The opinion of Dr. Carignan as to permanency will be given the greater weight. Claimant's condition is determined to be permanent.

Claimant has sought payment from the second injury fund, alleging that the incident of pain he experienced on November 27, 1984 constituted a prior injury under section 85.64, Code of Iowa, and the incident of pain on March 12, 1985 constituted a second injury under that section. Under section 85.64, claimant is required to show that he had previously lost, or lost the use of, one member and subsequently became permanently disabled by a compensable injury that resulted in the loss of or loss of use of another member. Claimant did not suffer two injuries, but one gradual injury that manifested itself in two episodes of severe pain. As indicated earlier, claimant had experienced pain and loss of function in both wrists prior to November 27, 1984 and had worn splints on both wrists prior to March 12, 1985. Claimant made statements that he had problems with his wrists for some time prior to either alleged injury date. Claimant was diagnosed as having carpal tunnel syndrome in both wrists prior to March 12, 1985. Claimant did not suffer a prior loss of a scheduled member under section 85.64, Code of Iowa.

Claimant's disability is to be determined by the functional method under section 85.34(2)(s). The medical evidence indicates claimant's impairment is 21% of the body as a whole. Claimant is entitled to 21 percent of 500 weeks of benefits under section 85.34(2)(s), Code of Iowa, or 105 weeks.

FINDINGS OF FACT

1. Claimant worked for defendant George A. Hormel & Company from 1971 until August 26, 1985.

2. Claimant's duties involved the repetitive handling of meat, and required claimant to use his hands, wrists, and arms.

3. Claimant experienced an injury to his shoulders in 1976.

4. Claimant experienced aches and pain in his wrists prior to March 12, 1985.

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5. Claimant wore wrist splints on both wrists prior to March 12, 1985.

6. Claimant experienced an episode of acute pain in his right wrist on November 27, 1984 while at work.

7. Claimant experienced an episode of acute pain in his left wrist on November 12, 1985 while at work.

8. Claimant returned to work following the incident of November 27, 1984 and favored his right wrist by using his left wrist to a greater extent.

9. Claimant suffers from bilateral carpal tunnel syndrome.

10. Claimant's bilateral carpal tunnel syndrome is caused by his work.

11. Claimant does not presently suffer any disability of his shoulders.

12. Claimant has not been definitely diagnosed as having thoracic outlet syndrome.

13. Claimant's impairment is confined to bilateral carpal tunnel syndrome, ulnar nerve compression, and Guyon's canal compression.

14. Claimant's impairment is confined to his hands, wrist and arms, and does not extend to the body as a whole.

15. Claimant's impairment is permanent.

16. Claimant's bilateral carpal tunnel syndrome is the result of a gradual injury.

17. Claimant's rating of functional impairment is 21 percent of the body as a whole.

18. Claimant's rate of compensation is $277.64 per week.

19. Claimant's last day of work was August 26, 1985.

CONCLUSIONS OF LAW

Claimant has shown by a preponderance of the evidence that he has suffered a gradual injury.

Claimant has bilateral carpal tunnel syndrome caused by his work.

Claimant's functional impairment is confined to his hands,

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wrists and arms and does not extend into the body as a whole.

Claimant's impairment consists of the loss of use of his hands and arms caused by a gradual injury.

Claimant's disability is to be determined on a functional basis.

Claimant's functional impairment is 21 percent of the body as a whole.

Claimant is entitled to 105 weeks of permanent partial disability benefits at the rate of $277.64 per week.

Claimant is not entitled to benefits from the second injury fund.

WHEREFORE, the decision of the deputy is modified.

ORDER

THEREFORE, it is ordered:

That defendants are to pay unto claimant one hundred five (105) weeks of permanent partial disability benefits at a rate of two hundred seventy-seven and 64/100 dollars ($277.64) per week from August 27, 1985.

That claimant shall take nothing from the second injury fund in this proceeding.

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

That defendants are to be given credit for benefits previously paid.

That defendants Hormel and Liberty Mutual Insurance Company 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 21st day of June, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEE RICHARD JOHNSON, Claimant, vs. SCHWANS SALES ENTERPRISES, INC., Employer, and LIBERTY MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 643948 A P P E A L D E C I S I O N FILED MAY 25 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding temporary total disability and medical benefits, and claimant cross-appeals.

The record on appeal consists of the transcript of the review-reopening proceeding; and joint exhibits 1 through 49. Both parties filed briefs on appeal, and defendants filed a rebuttal brief.

ISSUES

Defendants state the following issue on appeal:

Whether the deputy had sufficient facts in the record to make a decision granting claimant additional temporary total disability benefits and medical expenses related to his back problem in 1984 after the settlement agreement.

Claimant states the following issues on cross-appeal:

1. Did the deputy correctly rule that claimant had established causal connection between the admitted compensable low back injury of June 17, 1980 and the pain claimant experienced in his low back on May 21, 1984?

2. Should claimant be awarded additional temporary total disability benefits beyond the May 21 to August 19, 1984 time

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period?

3. Did claimant establish a change of condition sufficient to justify an award of additional permanent partial disability benefits?

REVIEW OF THE EVIDENCE

Briefly stated, claimant was employed by defendants as a route delivery driver. Claimant drove over a bump on June 17, 1980 and struck his head, and later began to suffer back pain and pain in his right thigh.

Previously, claimant suffered an injury while driving a tractor in 1972 which resulted in pain in claimant's left hip, extending down into the left leg. Claimant was off work for three months and received healing period or temporary total disability benefits for the 1972 injury.

A settlement agreement concerning the June 17, 1980 injury providing for healing period benefits and 75 weeks of permanent partial disability benefits was submitted by the parties. After the filing of medical reports from David F. Poe, M.D., and John R. Walker, M.D., giving claimant a rating of impairment of 10 percent of the body as a whole, the settlement was approved by this agency on August 31, 1982. Claimant testified that at the time of the settlement, he thought he would be able to continue working.

Claimant worked for Bishop Farms at the time of the settlement planting crops, plowing, harvesting, hauling grain, clearing land and other manual labor. Claimant testified that he was initially led to believe this was a managerial job that did not require physical labor. Claimant worked at this seasonal job from April 1982 until December 1982. Claimant acknowledged that he felt this job was beyond his physical capabilities, but that he continued with the job out of financial need.

After leaving Bishop Farms, claimant was unemployed until June 1983. Claimant stated he sent out 100 job applications without finding employment. Beginning in June 1983, claimant engaged in selling insurance.

On May 24, 1984, claimant attended an athletic event in Des Moines and when he returned, he experienced pain in his back which he attributed to riding in the car. Claimant testified he developed a lump at the same area as the pain from the June 1980 injury. Claimant sought medical treatment and was later hospitalized.

Claimant indicated that since the May 1984 incident, his right leg is now frequently numb whereas at the time of the

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settlement in August 1982, he had no numbness. Claimant stated that any physical activity, including riding in a car, brings on the numbness. Claimant testified that as a result of his physical problems, he is unable to drive any distances and has lost insurance business in communities outside of his immediate area. However, claimant also attributed the failure of his insurance business to a deteriorating economy in the Waterloo area.

Claimant stated he currently cannot lift 20 to 40 pounds without resulting pain, cannot drive more than 50 to 70 miles per day, and has problems with bending, stooping, and sleeping that he did not have in August 1982. Claimant stated that his back problem was "minimal" from 1982 until 1984, and is now stable but worse than it was in August 1982. Claimant indicated that in 1982 he had some days without pain, but he now has pain daily. Claimant described the pain from the 1984 incident as occurring on the right side and two to three inches higher than the 1980 pain.

Claimant discontinued his insurance business in March 1986. Claimant then went into motel management until October 1, 1986. Claimant managed a motel in Wyoming for 18 days, then returned to Iowa. Claimant later managed a motel in Kansas, but again returned to Iowa. Claimant acknowledged that in both instances, he quit the positions because he and his wife desired to return to Iowa and to be nearer their children.

In his deposition, Dr. Poe testified in regards to his assignment of a 10 percent rating of impairment for claimant in 1981 as follows:

Q. What were your future expectations for him at that time as far as his prognosis?

A. I believe that his lumbar spine problems would be characterized by intermittent flare-ups of backaches. Also periods where he would be completely pain free.

Q. By intermittent flare-ups, what do you mean, once a year, twice a year?

A. It would be impossible to scientifically predict how often he would flare-up. It might be once a year, it might be once in ten years.

Q. So when you made the rating you felt there would be periods of time when he had no symptoms and other times that he would be down with pain, is that correct?

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A. Yes, sir.

Joint Exhibit 14, pages 17-18)

Dr. Poe stated that he saw claimant in June 1984, and released claimant to light duty work in October 1984. Claimant was hospitalized with another flare-up of pain on December 12, 1984 and released to light duty work again by Dr. Poe on January 15, 1985.

Dr. Poe stated on August 14, 1985:

I believe his permanent disability would be in the range of ten percent (10%) permanent whole body.

At the present time I would limit Richard's amount of bending, twisting, lifting and walking if this is possible. Certainly I would avoid any prolonged abuse and perhaps even given him a weight restriction of 25 lbs.

It is my impression that Richard's problem with obesity would aggravate any lumbar disc disease problems.

My final diagnosis is lumbar disc disease at L4 with myofascial pain syndrome.

With regard to prognosis I believe this would have to be guarded for Rich. It is my impression that it may be anticipated with his degenerative disc disease to go on to repetitive episodes of flareups with pain that may respond to various conservative measures.

It is my impression that Rich has lumbar disc disease aggravated by repetitive episodes of abuse. It would be impossible to assign 100% of all his present problems to that single accident in 1980 and more likely his present problems present a lifetime of smaller abuses.

(Joint Exhibit 12)

On September 18, 1985, Dr. Poe stated:

It would be impossible to attribute this disc failure to any single episode but more likely is related to a life time of abuse.

Specifically I would be unable to causedly [sic] relate the relation of all of Mr. Johnson's spine problems to one single automobile accident on June 17, 1980. I appreciate that there may be some

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causal relationship but there would be no scientific basis to attribute all his lumbar disc degenerative problems to his single episode. With regard to repetitive episodes of abuse causing longstanding disc deterioration, I am certain that any normal life time activity can cause increased wear of lumbar disc and this would be any activity that involves bending, lifting, stooping and twisting.

(Jt. Ex. 13)

In his deposition, Dr. Poe testified as to claimant's condition as of December 13, 1985:

Q. ...What limitations did you feel would be appropriate for him on December 13, 1985?

A. I think he would be fit for light duty only to avoid repetitive bending, lifting and stooping and to avoid heavy lifting.

Q. Can you be more specific as to what you mean by heavy lifting, 10 pounds, 20 pounds?

A. I don't know if it's possible to be that scientific and be that precise. There would be times where he could lift 50 pounds without pain and there would be other times where he couldn't lift a feather.

Q. But you are not putting any specific limitation on him, is that correct?

A. No, sir.

....

Q. You do not feel he is a surgical candidate or anything of that nature at this time?

A. That's correct.

Q. It's the same as 1980 and '82?

A. Yes, sir.

....

Q. At the time you saw him in December of 19, December 13, 1985, was he complaining of any numbness or anything in his legs or weakness in his lower extremities?

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A. He complained of midline pain. I saw no reference of any extremity discomfort or numbness.

(Jt. Ex. 14, pp. 28-29, 31)

Claimant weighs approximately 285 pounds, and weighed over 300 pounds approximately five months before the hearing. Claimant at one time weighed 350 pounds. Claimant acknowledged that his doctors have told him his weight aggravates his back problem. Claimant stated he had a thyroid operation previously that affected his metabolism. Claimant testified that in approximately 1963, he lifted weights, and could bench press 360 pounds and "dead lift" 480 pounds. Claimant also served as an emergency medical technician on an ambulance crew at the time of the hearing, but stated that he avoided lifting patients, and also served on a volunteer fire department. The parties stipulated that claimant's rate was $211.30, and that claimant's medical bills were reasonable in amount but defendants disputed their relationship to the injury of June 1980.

APPLICABLE LAW

Upon review-reopening, claimant has the burden to show that he has suffered a change in his 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).

The Iowa Workers' Compensation Act compensates individuals for loss of earning capacity because of work-related injuries, not for the loss of earning capacity because of career choices. McCarty v. DeKalb Ptizer Genetics, Inc., Appeal Decision filed September 12, 1986.

ANALYSIS

On review-reopening, claimant has the burden to show a change of condition not contemplated at the time of the original award of benefits. There was no arbitration decision in this case, as the parties entered into an agreement of settlement which was approved by this agency on August 31, 1982. Claimant has the burden to show he has suffered a change of condition not contemplated by that agreement.

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The settlement agreement in this case merely recites that laimant will be paid an additional 15 weeks of healing period enefits and 75 weeks of permanent partial disability benefits epresenting 15 percent industrial disability. In addition, edical reports were later filed showing that claimant was given atings of impairment of 10 percent of the body as whole by two hysicians prior to the settlement. These reports constitute art of the settlement agreement.

However, the settlement agreement does not indicate the ontemplation of the parties at the time of the settlement as to on-physical factors affecting claimant's disability. Claimant as the burden upon review-reopening to show a change of con- ition not contemplated by the original award. The settlement s silent on the contemplation of the parties as to non-physical onditions. It is impossible to determine if there has been a on-physical change of condition since the settlement that was ot contemplated by the parties.

Even if a determination as to non-physical change of con- itions could be made, the record shows that claimant has not uffered a non-physical change of condition caused by his injury.

Claimant has suffered a loss of earnings. There is no howing that claimant has suffered a loss of earning capacity. laimant's work at the time of the settlement was seasonal. laimant's insurance work failed at least in part due to economic onditions. Claimant quit two motel management jobs for personal easons unrelated to his injury. Thus, claimant's present loss f income is of his own making.

The record shows that claimant was given two ratings of mpairment of 10 percent of the body as a whole by two physicians rior to the settlement. The medical evidence on review-reopening hows that Dr. Poe still rates claimant's impairment at 10 ercent of the body as a whole. In addition, Dr. Poe testified hat at the time he gave the initial rating of impairment in 981, it was contemplated that claimant would continue to suffer lareups of back pain and discomfort. Claimant's 1984 pain ncident was not the result of trauma, but resulted from a ride n a car. This type of flareup and claimant's discomfort when iding in a car appears to have been contemplated at the time of he agreement of settlement. Dr. Poe released claimant for ight duty prior to the 1982 settlement. In the review-reopening earing, Dr. Poe stated that claimant is still eligible for ight duty work. There was no indication in the record that laimant's condition was expected to improve at the time of the ettlement. There is an indication that claimant's condition is n part affected by his failure to lose weight. Thus, there is o physical change in claimant's condition.

Claimant has also sought additional temporary total disability

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benefits and medical benefits. Claimant bears the burden of showing that the time he was hospitalized or otherwise unable to work and the medical benefits he received were causally related to the injury of June 17, 1980.

The record contains the testimony of Dr. Poe, stating that he could not causally connect claimant's present back problems following the May 24, 1984 incident to the original June 17, 1980 injury the settlement agreement was based on. On the contrary, Dr. Poe described both the 1984 and 1980 incidents as part of a lifelong ongoing process. There is therefore no medical evidence that claimant's hospitalization, convalescence, and medical expenses following the 1984 pain incident were causally related to the original injury in June 1980.

In addition, the evidence suggests other possible causes for claimant's 1984 back pain. Claimant continued to work at a job in violation of his medical restrictions even after the settlement in 1982. Claimant's weight has been identified as a source of aggravation of his back problems. Claimant at one time engaged in weightlifting of up to 480 pounds. Claimant had a prior back injury while driving a tractor in 1972. Based on the record, any of these events constitute as likely a source of claimant's ongoing back pain as the June 1980 incident. Claimant has failed to show that his medical expenses, hospitalization and convalescence from the May 24, 1984 incident are causally related to the injury of June 1980.

FINDINGS OF FACT

1. Claimant and defendants entered into an agreement of settlement that was approved by this agency on August 31, 1982.

2. Said agreement of settlement provided for 15 weeks of additional healing period benefits and 75 weeks of permanent partial disability benefits as the result of an injury on June 17, 1980.

3. The agreement of settlement was based on a rating of impairment of 10 percent of the body as a whole.

4. At the time of the settlement, claimant was working at a job that required physical labor contrary to his medical restrictions.

5. On May 24, 1984, claimant experienced additional pain in his lower back after riding in a car.

6. Claimant was engaged in selling insurance on May 24, 1984, but later terminated his insurance business due to back pain after driving and economic conditions.

7. Claimant attempted two motel management jobs outside the

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state of Iowa, but terminated both positions due to a desire to return to the state of Iowa.

8. Claimant's back condition is the result of ongoing lumbar disc disease.

9. The settlement agreement of August 31, 1982 contemplated an impairment rating of 10 percent of the body as a whole.

10. Claimant's present rating of impairment is 10 percent of the body as a whole.

11. Claimant is presently capable of doing light duty work.

12. At the time of the agreement of settlement, claimant was considered capable of performing light duty work.

13. Claimant's continuing back pain was contemplated by the agreement of settlement of August 31, 1982.

CONCLUSIONS OF LAW

Claimant has failed to show a change of condition since the agreement of settlement of August 31, 1982.

Claimant is not entitled to further permanent partial disability benefits.

Claimant has failed to show a causal connection between his medical expenses, hospitalization and convalescence following the incident of May 24, 1984 and his injury of June 17, 1980.

Claimant is not entitled to any temporary total disability benefits as a result of this action.

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

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from these proceedings.

Claimant is to pay the costs of this action.

Signed and filed this 25th day of May, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

THOMAS C. JOHNSON,	:	
	:	
Claimant,	:	
	:	File No. 684104
vs.	:	
	:	
YOUNKERS DEPARTMENT STORE,	:	A P P E A L
	:	
Employer,	:	D E C I S I O N
	:	
and	:	FILED
	:	
AETNA LIFE & CASUALTY,	:	MAY 20 1988
	:	
Insurance Carrier,	:	
Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision awarding permanent partial disability and medical benefits, and defendants cross-appeal.

The record on appeal consists of the transcript of the review-reopening proceeding of March 26, 1986; claimant's exhibits 1 through 13; and defendants' exhibits A through E. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

Whether the deputy industrial commissioner failed to consider testimony in the record regarding the change in claimant's condition from the prior review-reopening hearing held on November 1, 1982.

Whether Guyton v. Irving Jensen Company, 373 N.W.2d 101 (Iowa 1985) allows a finding of a change in condition.

Whether the deputy industrial commissioner has utilized the proper standard in determining a change in condition.

Whether the deputy industrial commissioner erred in not awarding payment under section 85.27, Code of Iowa, of the billing from Iowa Methodist Medical Center in the amount of $1,406.35, and a billing from Blue Cross/Blue Shield in the

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amount of $83.00 representing charges not allowed by Blue Cross/Blue Shield on Dr. Bunten's bill for the surgery charge allowed and payable to Central Iowa Medical for services rendered on July 11, 1979.

Whether costs incurred by the claimant for the expenses of Roger Marquardt are taxable to the defendants.

Whether the deputy erred in denying claimant's motion to close the record.

Whether claimant is permanently and totally disabled under the meaning of section 85.34(3), Code of Iowa.

Defendants state the following issue on cross-appeal:

Whether defendants are responsible for the expenses of Dr. Summers.

SUMMARY OF THE EVIDENCE

Claimant was 61 years old at the time of the hearing, with a sixth grade education. Claimant had worked at various unskilled manual labor jobs for minimal wages prior to beginning work for Younkers in 1975 as a custodial worker.

The prior review-reopening decision reveals that claimant injured his back while lifting a table on June 27, 1979. He experienced back and leg pain, and underwent a decompressive laminectomy in February 1980. Thomas B. Summers, M.D., examined claimant on February 23, 1981, and diagnosed a radicular syndrome, lower lumbar chronic. Claimant was given a rating of 20 percent permanent partial impairment of the body by Ronald K. Bunten, M.D., on October 23, 1981, with 10 percent of that amount based on disc degeneration and 10 percent based on surgery. On December 14, 1981, claimant was given an impairment rating of 15 percent of the body and a lifting restriction of 15 pounds by Thomas A. Carlstrom, M.D.

When claimant was released to return to work, defendant Younkers did not rehire him, but did provide vocational rehabilitation services through Richard McCluhan. McCluhan contacted over 100 employers for claimant and obtained a job for claimant delivering newspapers. Claimant used his car to go to the newspaper route site. Claimant's income from this job was $22 per week. Claimant quit this job. McCluhan also obtained work for claimant involving telephone sales of light bulbs, but claimant was discharged for not selling enough bulbs. McCluhan testified that claimant was also capable of performing work as a custodian or security guard.

A memorandum of agreement was filed on October 21, 1982. A review-reopening hearing was held on November 1, 1982. In a decision dated November 10, 1982, claimant was awarded permanent

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partial disability benefits for 33 1/3 percent of the body as a whole. That award was affirmed upon appeal by a decision of the industrial commissioner on July 29, 1983, and affirmed upon appeal to the district court on June 12, 1984.

Dr. Summers again examined claimant on August 23, 1984. Dr. Summers found that claimant's diagnosis remained unchanged, but also expressed the opinion that claimant had a significant difference or worsening in his symptoms since he first examined claimant in 1981. Dr. Summers later acknowledged that his findings during the second examination were similar to the initial examination, with the exception that straight leg raising was positive on the left at 60 degrees in February 1981, while in August 1984 straight leg raising was positive on the left at 45 degrees. Forward flexion bending in February 1981 was 45 degrees, while in August 1984 forward flexion bending was 60 degrees.

Claimant filed a second petition in review-reopening and a hearing was held on March 26, 1986. Claimant testified that he experienced more back pain and left leg pain than before and on a more frequent basis, and that he could not lift, bend, twist or walk up and down stairs as well as he could at the time of the November 1981 hearing. Claimant stated he worked for two weeks as a bartender since the last hearing, but could not lift kegs. Claimant was still unemployed at the time of hearing. Claimant stated he has lost his back brace.

Claimant indicated he had never been fired from a job because of his back, and that he has never been told he had been denied a job because of his back. Claimant admitted that his pain was now confined to his left leg, as opposed to both legs at the time of the first hearing. Claimant testified he felt he could perform such jobs as fry cook, janitor, shelf stocker, night watchman, school crossing guard, and possibly laundry worker. Claimant also stated that he felt that if the employers who had denied him employment would have had openings, he would have been hired. Claimant testified he spends his days in two bars in Des Moines in an attempt to obtain employment as a bartender, and that he does not utilize an employment office or consult newspaper want ads to find employment.

Claimant's friend, Euric Fountain, testified that claimant goes fishing with him, and claimant is able to climb up and down a 15 foot bank in order to do so.

Richard McCluhan testified that he had reopened his file on claimant in preparation for the second hearing. McCluhan indicated that he had located two job possibilities for claimant as a security guard and as a custodian, but that no definite job offers had been made. McCluhan opined that claimant could work as a school crossing guard with a pay rate of $6.00 per hour, which was in excess of the minimum wages claimant had earned

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prior to his injury. McCluhan also testified that claimant had missed three of five job opportunity training classes. Claimant maintains he had appeared at all five sessions but three were cancelled due to low attendance.

McCluhan declined to offer an opinion on whether claimant's condition was such that the services or work he could perform given his medical condition were so limited in quality, dependability, and quantity that a reasonably stable market for his services did not exist. McCluhan also declined to state that claimant was so handicapped by virtue of the combination of his physical injury, age, education, and training that it was more likely than not that he will not be employed regularly in any well known branch of the labor market at full-time adult wages. Finally, McCluhan declined to state that claimant had no reasonable prospect of steady, adult full-time employment. McCluhan instead stated that claimant could function as a school crossing guard, janitor, security guard, and possibly as a parking lot attendant, laundry worker, cook or dishwasher if prolonged standing could be avoided. McCluhan described the market for these jobs as stable, regularly and continuously available, and paying approximately minimum wage or above.

McCluhan also testified that according to his observations, claimant's ability to walk, bend, and stoop was about the same at the time of the second hearing as he observed it to be in 1981 and 1982.

The record shows that a medical bill in the amount of $1,406.35 from Iowa Methodist Hospital was paid by Blue Cross/Blue Shield. The parties stipulated that claimant's rate was $102.07.

The deputy commissioner's decision dated June 19, 1986 determined that claimant had failed to show a change of condition, and no further benefits were awarded. Claimant filed a request for a rehearing. The deputy commissioner's decision on rehearing dated October 3, 1986 found that claimant had shown a non-physical change of condition, and awarded 75 percent permanent partial disability benefits. Claimant has appealed that decision, and defendants have cross-appealed.

APPLICABLE LAW

Upon review-reopening, claimant has the burden to show that he has suffered a change in his 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.

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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).

A worker is totally disabled if the only services a worker can perform are so limited in quality, dependability or quantity that a reasonable stable market for them does not exist. Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985).

In determining industrial disability, the fact that employment opportunities are temporarily restricted due to a local economic situation is not a proper factor, in that such conditions affect all workers in the area equally, regardless of claimant's injury. Webb v. Lovejoy Construction Company, II Iowa Industrial Commissioner Report 430 (Appeal Decision 1984).

"Claimant is not entitled to reimbursement for medical bills unless he shows that he paid them from his own funds." See Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890 (Iowa App. 1983).

Iowa Industrial Commissioner Rule 343-4.33 states:

> Costs taxed by the industrial commissioner or a deputy commissioner shall be....(4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports....Costs are to be assessed at the discretion of the deputy commissioner or industrial commissioner hearing the case unless otherwise required by the rules of civil procedure governing discovery.

Section 622.72 (Code, 1987) states:

> Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed one hundred fifty dollars per day while so employed.

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ANALYSIS

Claimant alleges a change of condition since the original review-reopening decision of November 10, 1982. The record contains the testimony of Dr. Summers, which indicates claimant's medical condition at his examination in 1984 was basically unchanged from the time of the prior hearing. Claimant had suffered some further loss of straight leg raising, but had gained some ability in forward flexion. Other aspects of claimant's ability to lift, bend or stoop were unchanged. It should be noted that Dr. Summers was comparing his examination of February 23, 1981, a point in time prior to the first review-reopening decision, and his examination of August 23, 1984. There is a gap of one year and nine months between Dr. Summers' first examination and the point in time that the initial determination of 33 1/3 percent disability was made. There is no evidence to show to what extent claimant's condition may have worsened between Dr. Summers' February 23, 1981 examination and the hearing on November 1, 1982.

Claimant admitted that his pain is now confined to one leg instead of both legs. McCluhan testified that he observed no worsening of claimant's ability to walk, bend or stoop. Dr. Summers offered no rating of impairment in either the original review-reopening proceeding or in this proceeding. Neither Dr. Bunten or Dr. Carlstrom, the physicians who did assign claimant ratings of impairment, were utilized in the second hearing. There is no evidence to indicate that their ratings of impairment have changed. It is thus concluded that the record fails to show that claimant has suffered a physical change in his condition since the hearing on November 1, 1982.

An increase in industrial disability may occur without a change in physical condition. The record shows claimant has been unable to obtain meaningful employment since the November 1, 1982 hearing. A reduction in earning capacity can constitute a change of condition.

At the time of the original award of benefits, the vocational counselor stated that he had difficulty finding a job for claimant. Claimant was seen as capable of performing work as a custodian, parking attendant, or security guard. At the second hearing, the vocational counselor felt claimant could work as a custodian, security guard, crossing guard, and possibly as a parking attendant, laundry worker, cook, or dishwasher.

At the time of the November 1, 1982 hearing, the vocational counselor listed telephone solicitation as a possible job for claimant. However, claimant had been dismissed from a telephone solicitation job just prior to that hearing. At the time of the second hearing, the vocational counselor no longer listed telephone solicitation for claimant as a possible employment. Other than this, the vocational counselor enumerated the same job possibilities for claimant at the second hearing as were

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listed at the first hearing, and additional job possibilities were listed at the second hearing as well. There is no evidence to indicate that claimant has attempted any of the jobs listed at the time of the first hearing and discovered he was unable to perform them. The only employment claimant has attempted since the hearing of November 1, 1982 has been a job as a bartender, which was not among the occupations recommended by the vocational counselor at the November 1, 1982 hearing. Claimant's employment opportunities have not changed since the November 1, 1982 hearing.

Claimant has failed to prove a nonphysical change of condition since the November 1, 1982 hearing.

Thus, all the factors that affect claimant's industrial disability at the present time were present and contemplated at the time of the November 1, 1982 hearing and award of benefits and have not changed. If the economic climate in which claimant seeks employment has worsened since the first hearing, it has worsened for all job applicants as well, and does not constitute a change of condition. The finding of 33 1/3 percent industrial disability at the first hearing shows that difficulty in finding employment for claimant was contemplated in that decision. The mere fact that claimant has indeed been unable to find employment since the first hearing is not a non-physical change of a condition.

Claimant alleges he is an odd-lot employee. Since claimant has failed to show a change of condition, the question of whether claimant is an odd-lot employee is not a proper issue in this case. The extent of claimant's disability was determined in the November 1, 1982 review-reopening decision and it cannot be redetermined in this proceeding unless a change of condition is shown.

Even if claimant had shown a change of condition, the record shows substantial work for claimant does exist in the job market. The vocational counselor listed several jobs available to claimant, and indicated claimant is employable and that a market exists for his services. Claimant himself stated he felt he was capable of performing several jobs. Claimant is not an odd-lot employee.

Claimant also seeks payment of certain medical bills connected with his injury and surgery. However, the record shows that the bill from Iowa Methodist Hospital was paid by Blue Cross/Blue Shield. Claimant cannot seek payment from defendants for his stated reason of avoiding a windfall to defendants. Claimant cannot be awarded medical expenses unless he has paid them himself. Defendants are responsible for any expenses of Central Iowa Medical and Dr. Bunten not covered by Blue Cross/Blue Shield and paid by claimant.

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Claimant seeks payment by defendants for the services of Roger Marquardt, a vocational expert claimant consulted but did not use at the hearing. Claimant argues that defendants' alleged delaying tactics necessitated these costs. Defendants argued that the fee is in excess of section 622.72, The Code. Division of Industrial Services Rule 4.33 allows the assessment of costs of witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, to be assessed at the discretion of the commissioner. Section 622.72 limits said compensation to $150 per day. Claimant seeks payment of $420.90 in payment for Marquardt. Claimant indicates that Marquardt was hired just prior to the hearing because defendants' vocational witness, McCluhan, was not utilized by defendants until late in the proceedings. Marquardt was not used by claimant as a witness due to a scheduling conflict. Claimant could have moved for time to depose McCluhan to ascertain the need to employ Marquardt as a rebuttal witness. The undersigned has not seen any authority for imposing a witness fee for someone who in fact is not used as a witness. Defendants are not responsible for the fees of Roger Marquardt.

Defendants, on cross-appeal, object to being required to pay the fees of Dr. Summers as he was not the treating physician and his services were not authorized by defendants. In addition, part of Dr. Summers' fees involved consultation with claimant's attorney in preparation for hearing, and the amounts involved exceed the limits contained in section 622.72, The Code. Claimant has not addressed this issue in a reply brief. As the services of Dr. Sumners do not appear to have been authorized, defendants are not responsible for the fees of Dr. Summers.

Claimant further seeks a reversal of the deputy's ruling not to close the record to defendants because of alleged misconduct. The record shows that defendants did arrange for the presence of witness Liz Stelzer for her deposition. Although claimant alleges that the scheduling of the deposition did not provide adequate time for claimant to prepare, that defendants did not cooperate in making this witness available, and that the witness did not bring proper records with her to the deposition, no requests for a continuance pursuant to Division of Industrial Services Rule 4.23 was made by claimant for the stated reason that the hearing had already been continued before and claimant wished to avoid further delay. Defendants did provide the witness for a deposition. Rule of Civil Procedure 147(a), relied upon by claimant, does not provide for the sanction of closing the record to one of the parties. The deputy's refusal to close the record was proper.

FINDINGS OF FACT

1. Claimant was awarded workers' compensation benefits based on 33 1/3 percent industrial disability as the result of a

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hearing on November 1, 1982.

2. Claimant's physical condition has not significantly changed since November 1, 1982.

3. Claimant has not received a revised rating of impairment subsequent to November 1, 1982.

4. Claimant has not experienced a nonphysical change of condition since November 10, 1982.

5. The number and type of jobs claimant can perform has not changed since November 1, 1982.

6. A market for services claimant can perform does exist, and claimant is capable of performing jobs that exist in the job market.

7. Claimant is not an odd-lot employee.

8. Claimant's medical bills from Iowa Methodist Hospital have been paid by Blue Cross/Blue Shield

CONCLUSIONS OF LAW

Claimant has failed to establish a change of condition not contemplated by the original award of benefits and is not entitled to additional weekly disability benefits.

Defendants are not required to pay to claimant medical bills which he has not paid.

Defendants are not required to pay to claimant the fees and expenses of Roger Marquardt.

Defendants are not required to pay to claimant the fees and expenses of Dr. Summers.

The deputy industrial commissioner did not err in refusing to close the record to defendants' evidence.

WHEREFORE, the decision of the deputy is reversed in part and modified in part.

ORDER

THEREFORE, it is ordered:

That claimant shall take no weekly disability benefits from this proceeding.

That claimant shall pay the costs of this action.

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

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEWIS E. JONES, Claimant, vs. R. M. BOGGS COMPANY, INC., Employer, and NORTHWESTERN NATIONAL INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 655193 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

Defendants appeal and claimant cross-appeals from a review-reopening decision in which claimant was awarded permanent total disability benefits. The record on appeal consists of the stipulations in the prehearing report; the transcript of the review-reopening proceeding; and exhibits 1, 2, 3 (except pages numbered 180-182), 4E, 4G, 5, 7, A through W, Y, Z and AA through DD, GG, MM, NN, and OO. Both parties filed briefs on appeal. The deputy properly excluded exhibits 3 (pages number 180-182), 4(A), 4(B), 4(C), 4(D), 4(F), X, KK, and LL and they are not considered upon appeal.

ISSUES

Defendants state the following issues on appeal:

1. The deputy erred in finding a causal connection between claimant's injury and his current condition.

2. Claimant's industrial disability rating of 100 percent is unsupported by the record evidence.

3. The deputy's rate calculation was in error.

4. The deputy erred in not allowing credit for past payment.

Claimant states the following issues on cross-appeal:

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1. The deputy erred in excluding claimant's exhibit 3 regarding rate.

2. The deputy's rate calculation was in error.

3. The deputy failed to award mileage.

REVIEW OF THE EVIDENCE

The review-reopening decision adequately and accurately reflects the pertinent evidence and it will not be fully set forth herein.

On November 13, 1980, while installing an air conditioning coil in a furnace, claimant suddenly became dizzy and disoriented and heard a loud roaring noise in his left ear. Claimant sought medical attention from the Department of Otolaryngology at the University of Iowa Hospital and Clinics. In December 1980, he underwent surgery to correct a perilymph fistula in the left ear. After a few weeks of recovery he returned to work. He continued to have periodic mild episodes of vertigo between 1981 and 1983. After experiencing severe spinning, dysequilibrium, dizziness, profuse sweating and vomiting in June 1983, he returned to University Hospitals in July 1983. A second surgery on a fistual in the left ear followed. He failed to improve and further surgery for the destruction of the portion of the left inner ear which controls balance was performed in December 1983. The vertigo spells subsided after the last surgery. He has no hearing in his left ear and residual dysequilibrium and poor balance which do not enable him to move around very much without tending to fall to the left side. He becomes disoriented with a startle reaction. Roger A. Simpson, M.D., Bruce Haughey, M.D., and Paul D. Nosal, M.D., have opined that the residual dysequilibrium and hearing loss are probably related to the events of November 13, 1980. Dr. Nosal rates claimant's whole person impairment at 56 percent of the body as a whole. A vocational rehabilitation specialist found claimant to be 90 to 100 percent vocationally impaired.

Claimant worked forty or more hours for nine weeks out of a forty-five week period prior to the work injury. He worked thirty-seven or more hours for thirteen weeks in the time period May 28, 1980 through October 29, 1980. The hourly rate for this period of time was $14.25. He was not paid for time off taken due to illness, holidays, or vacations. Employees of defendant would usually work 40 hours per week.

At time of the hearing claimant was 53 years of age and had a ninth grade education but had recently received his GED. In the 1960's he successfully completed a correspondent course in heating and air conditioning, and refrigeration repair and maintenance. He is also a licensed journeyman electrician and plumber. Prior

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to his heating and air conditioning work, he held various unskilled and semi-skilled jobs such as a garage mechanic, truck driver, door-to-door salesman, house mover, farm helper, and military policeman. Most of the jobs he held prior to the work injury in this case required heavy lifting and extensive standing or walking.

APPLICABLE LAW

The citations of law in the review-reopening decision are appropriate to the issues and evidence except as they relate to the issue of rate in this matter.

Briefs by the parties indicate agreement that rate is to be calculated pursuant to Iowa Code subsection 85.36(6). That subsection provides a method to calculate the basis of compensation for employees who are paid on an hourly basis and have been employed for more than thirteen weeks at the time of the injury.

Iowa Code section 85.27 provides in part, that "the employer, for all injuries compensable under this chapter or chapter 85A, shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatrial, physical rehabilitation, nursing, ambulance and hospital services and supplies therefor and shall allow reasonable necessary transportation expenses incurred for such services."

ANALYSIS

The filing of a memorandum of agreement conclusively establishes the occurrence of an injury arising out of and in the course of employment. While some language in the review-reopening decision might appear to indicate that the memorandum of agreement also establishes a causal connection between the injury and claimant's disability, the memorandum of agreement does not establish the causal connection. Claimant must prove by a preponderance of the evidence a causal connection between the work injury and his disability. The physicians are unanimous in their opinion that there is a direct link between claimant's disability and the November 1980 injury. Claimant has clearly established by a preponderance of the evidence that he suffered a permanent impairment to his body as a whole from the injury.

Claimant's primary treating physican at University of Iowa Hospitals has given claimant an impairment rating of 56 percent and has described a condition that prevents claimant from doing anything other than sedentary work in an isolated environment. He has no significant training for such work and successful vocational rehabilitation is unlikely. Permanent disability benefits should begin as of June 28, 1983, the day after his last day he worked for defendant or anyone else. Because it is determined that claimant has suffered a 100 percent loss in

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earning capacity without the necessity of of changing the burden of proof, it is unnecessary in this case to determine if he is an odd-lot employee.

The rate for hourly employees such as claimant is computed under Iowa Code subsection 85.36(6) using representative weeks. Overtime work is included but only at the normal hourly rate. Representative weeks are weeks in which there was no use of sick leave or vacation time. Representative weeks in this case must mean weeks where there was no substantial use of sick leave or vacation time. There were only approximately nine weeks out of a forty-five weeks period prior to the work injury in which claimant did not use some sick leave or vacation time. Therefore, those thirteen weeks which claimant worked thirty-seven or more hours would be the proper representative weeks.

One other matter should be noted. In the review-reopening decision it was ordered that defendants pay for both a report from and expert witness fee for Marion Jacobs. Cost may be taxed either for either the report or the expert witness fee but not both because to tax both as costs would be taxing for cumulative evidence. In this case the cost to be taxed will be $150 for the expert witness fee.

FINDINGS OF FACT

1. Claimant is a credible witness.

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

3. Claimant's job on November 13, 1980 consisted of the installation, maintenance, and repair of heating and air conditioning equipment along with necessary plumbing and electrican work.

4. On November 13, 1980, while performing his work for defendant, claimant injured his left ear which resulted in immediate hearing loss, tinnitus, and vertigo.

5. As a result of the work injury, claimant underwent a surgical operation in December 1980 to plug the fistula hole with fat material.

6. Subsequent to the December 1980 surgery, claimant returned to work in January 1981 and except for his hearing loss his vertigo symptoms diminished.

7. Between January 1981 and June 1983, claimant had recurrent episodes of mild dizziness which lasted several minutes.

8. Beginning in June 1983, claimant began to develop severe

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episodes of vertigo and nausea from a recurrence of the November 1980 fistula.

9. In July 1983, another surgery was performed on claimant's left ear to patch the recurrent fistula with more fat material but claimant's symptoms did not subside after this procedure.

10. As a result of the recurrent fistula in September 1983, claimant underwent a surgical procedure termed a destructive labyrinthectomy which permanently destroyed parts of the left inner ear and resulted in a total hearing loss in that ear.

11. The September 1983 surgery ended the spontaneous episodes of vertigo but claimant still has permanent residual dysequilibrium as a result of the 1980 work injury.

12. As a result of the November 1980 work injury and residual dysequilibrium, claimant is unable to walk or stand without grasping a firm object and becomes disoriented upon movement of objects around him and after being startled with sudden noises.

13. Claimant had no episodes of vertigo, dizziness, hearing loss, or disorientation caused by sudden noises before the work injury of November 13, 1980.

14. Prior to November 1980, claimant had numerous physical problems including high blood pressure, obesity, and back pain.

15. After the work injury, claimant was diagnosed as diabetic and suffering from a peripheral neuropathy unrelated to the work injury herein.

16. Prior to the work injury, claimant had no physical impairments or ascertainable disabilities.

17. Prior to the work injury, claimant was able to fully perform his work at defendant.

18. As a result of the work injury, claimant is unable to perform strenuous work, extensive climbing, or heavy lifting.

19. As a result of the work injury herein, claimant is unable to return to heating and air condition work or any other work for which claimant is best suited given his past experience and training.

20. As a result of the work injury herein, claimant is unable to move about freely and is confined to a wheelchair.

21. Claimant is able to drive an automobile at the present time but such driving is unsafe given his tendency to have

episodes of vertigo from movement of vehicles around him.

22. Claimant's work history consists of regular gainful employment in the type of work he can no longer perform.

23. Claimant has suffered a loss in actual earnings from employment due to his work injury.

24. Claimant is motivated to find suitable alternative employment but it is unlikely that claimant will ever find such employment.

25. Claimant was born August 28, 1932 and was 53 years of age at the time of the review-reopening hearing. Claimant has a GED.

26. Claimant has above average intelligence.

27. Claimant has very low potential for successful vocational rehabilitation.

28. As a result of the work injury, claimant has suffered a total loss of earning capacity.

29. Claimant has not been employed in any capacity since June 27, 1983 due to his work injury herein.

30. According to the parties' stipulation, at the time of the work injury herein, claimant was married and entitled to five exemptions.

31. Claimant worked the following representative weeks and his gross earnings corresponding to those weeks are:

Payroll Period Ending (1980)	Number of Hours	Amount of Earnings
10-29	38.5	$ 548.63
10-22	37.5	534.38
10-08	39.5	562.88
09-24	41.0	584.25
09-17	41.0	584.25
09-10	40.0	570.00
08-13	37.0	527.25
08-06	41.0	584.25
07-30	40.0	570.00
07-16	37.0	527.25
07-02	41.5	591.38
06-11	40.5	577.13
06-04	43.0	612.74

32. Claimant was earning $14.25 per hour during this period of time.

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33. Claimant's gross weekly earnings at the time of the work injury were $567.26 per week.

34. Claimant's rate of weekly compensation is $325.30.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence that the injury of November 13, 1980 is a cause of permanent disability.

Claimant has established by a preponderance of the evidence entitlement to permanent total disability benefits from June 28, 1983 at the rate of three hundred twenty-five and 30/100 dollars ($325.30) per week.

Claimant is entitled to mileage expenses.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay to claimant permanent partial disability benefits during the period of his disability at the rate of three hundred twenty-five and 30/100 dollars ($325.30) per week from June 28, 1983.

That defendants shall pay accrued weekly benefits in a lump sum and shall receive credit against this award for all weekly benefits paid after the date of June 28, 1983 and benefits previously paid for permanent partial disability.

That defendants shall pay mileage expenses of one hundred eight dollars ($108).

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

That defendants shall pay the costs of this action including the costs of the transcription of the review-reopening hearing pursuant to Division of Industrial Services Rule 343-4.33. Specifically, the following costs are taxed against defendants.

Reporter and transcript for the deposition of R.M. Boggs	$ 55.00
Paul Nosal, M.D., report	150.00
Expert witness fee for Marion Jacobs	150.00

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

That the matter shall be set back into assignment for a prehearing and hearing on claimant's application for penalty benefits under Iowa Code section 86.13.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RUSSELL J. KEENEY,	:	File Nos. 789227/679931
	:	789226
Claimant,	:	
	:	A R B I T R A T I O N
vs.	:	
	:	A N D
WILSON FOODS CORPORATION,	:	
	:	R E V I E W -
Employer,	:	R E O P E N I N G
Self-Insured,	:	
Defendant.	:	D E C I S I O N

FILED
JAN 29 1988
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding for the recovery of further benefits as a result of injuries claimant received while working for defendant on August 26, 1981, March 16, 1982 and February 7, 1984. The cases came on for hearing on January 30, 1987. Other than allowing the parties to file briefs the matter was considered fully submitted upon completion of the hearing.

Although this case was heard by the undersigned while still a deputy, the undersigned is now the Industrial Commissioner and the agency will treat this decision as a final agency decision.

The record consists of the testimony of claimant, LuRie Fairlie, Fred Nekola, Mary "Pat" Usher and Hugh MacMenamin, M.D.; claimant's exhibits 1 through 10 and defendant's exhibits A, B, E, F, J, K, L and portions of D, G, H, and I which were not objected to.

ISSUE

The issue presented by the parties is the extent of permanent partial disability related to claimant's injuries on August 26, 1981, March 16, 1982, and February 7, 1984.

FACTS PRESENTED

Claimant started working for defendant in May of 1975. On August 26, 1981 claimant received an injury arising out of and in the course of his employment with defendant when, while cutting cords, he strained his back. Claimant went to see the company nurse and company doctor. Claimant testified that he had no prior problems with his back. Claimant indicated that the pain he experienced was in his back right buttock and right leg. Claimant missed some work but then was released back to

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work on September 3. Claimant testified that his back pain, right buttock pain and right leg pain has continued and basically not changed since that date.

On March 16, 1982 claimant had another injury when he fell backwards off a stand onto a metal grate. Claimant disclosed that he was off a couple of days but then returned to work. Claimant stated his back, right buttock pain and right leg pain continued as before the March 16, 1982 injury.

On February 7, 1984 claimant was again injured when he fell down icy steps at work. Claimant stated he bounced down the steps on his buttock and back. Claimant returned to work the following day. Claimant revealed that his back pain, right buttock pain and right leg pain continued as before the injury.

On March 21, 1985 claimant alleges he had another injury while working for Farmstead Foods when while bending down and lifting up four gambrels he felt a sharp pain like an electrical shock in his back.

In a report to William R. Finn, M.D., dated December 19, 1978, W. J. Robb, M.D., stated:

> Russell J. Keeney was examined on December 15, 1978, in regard to persisting pain in his dorsal spine or thoracic spine as a result of injury incurred in September, 1978, in an automobile accident near Oelwein, Iowa. He was riding as a passenger in a van, the van was hit from behind and rolled over several times, and he sustained injury to his back. He was transferred from Oelwein to St. Luke's Hospital in Cedar Rapids and attended here.
>
> Subsequent to the accident, he developed some back pain, primarily mid or upper back area. He does not recall having had any problem with his neck. He had to remain off work on several occasions because of the pain in the back and in spite of improving some, he still has soreness in this area. He is working at this time, however.
>
> On examination he shows a full range of motion of flexion, extension, and lateral bending. He is moderately tender over the erector spinae muscle mass on the right from T4 to T12. This is a generalized tenderness, and I don't detect any trigger points. Full flexion of the spine did not seem to produce any symptoms.
>
> X-ray examination of the dorsal spine does not reveal any evidence of fracture-dislocation or

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abnormality of the bone or joint.

Diagnosis: STRAIN, ERECTOR SPINAE MUSCLE MASS, DORSAL SPINE

Treatment: The patient's work is probably heavy enough that it is straining the muscles some and constitutes some aggravation but on the other hand I see no reason why he should not continue working. I think the symptoms of which he complains are temporary in nature and will gradually subside. I did order some Nalfon, 300 mg. One q.i.d. to try for a period of two to three weeks and could be renewed if beneficial. I shall plan to check him once more in two months.

Earl Y. Bickel, M.D., in a report dated October 3, 1985, stated:

I saw Russell J. Keeney on March 17, 1982. I saw him on only one visit. Laboratory tests were obtained. A letter was sent to Wilson's on March 23, 1982, and at this time I felt that he had myositis or spondylosis. I was not able to explain the exact nature of his problem.

He was placed on some Tolectin, and I felt that his problems would subside. At that time I did not anticipate any permanent disability.

In his report dated September 22, 1986, John R. Huey, M.D., stated:

I saw Russell Keeney in my office March 23, 1984 with a three week history of pain in his back. He stated he had had no prior treatment for back problems. He was working on a job at Wilson and Company which involved bending over and pulling. Most of his pain was in the mid lumbar area of the back and over the sciatic nerve. He was not having any complaint of numbness in the legs. He had seen the company doctor and also Dr. Bickel who placed him on Tolectin and obtained an arthritis profile which was negative. He continued to work with only occasional absenses.

On examination straight leg raising tests caused pain on the right at about 180° and were negative on the left. No muscle weakness, spasm or rigidity was present. Reflexes were physiological and he could bend well in all directions. No sensory changes were noted. X-rays of his pelvis were

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negative for the hip area. Other than a spina bifida of the first sacral segment, the films were essentially negative of his lumbosacral spine. I felt he had a mildly congenital weak lumbar spine and advised William's exercises. He was told to try to live with and around his problem and to elevate his work.

In summary, his findings were basically negative. The straight leg raising tests at 180° were mainly on a muscular basis only. I could find no evidence of neurological deficit and I feel he has no permanency from this episode.

In a report to claimant's attorney dated December 16, 1985, Hugh P. MacMenamin, M.D., stated:

> In reply to your request for information on the above patient, in having examined the documents you sent, I would state the following.
>
> My working diagnosis on Russell Keeney is chronic low back pain-chronic myofascial strain. His second diagnosis is degenerative disc disease with a very minimally bulging L-5 S-1 disc and spina bifida occulta of S-1.
>
> Specifically in answer to your question #1 whether the incident of August 21, 1981, pulling hogs, was a causal, contributing, or aggravating factor in producing his back complaints, I have no specific way of telling. From Mr. Keeney's history it sounds as though this was the case. However I do not have any medical records from this period of time.
>
> The incident of March, 1985 picking up gambrels and trolleys off the floor appeared to exacerbate his pain also.
>
> As to your question #3, in examining the records and in examining the modalities for issuing a permanent partial impairment rating, namely the American Medical Association Guide and the Manual for Orthopaedic Surgeons in evaluating permanent physical impairment, I do not find any evidence of a permanent partial impairment.
>
> As to your question #6 regarding Mr. Keeney's prognosis, he will probably continue with symptoms as he has in the past, that is, intermittent low back pain associated with exertion or activities as

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outlined in his history. I would not put any limitations on his future employment. I would encourage him to continue to work as he has been doing over the years.

Dr. MacMenamin saw claimant on October 8, 1986. A report which appears to be dated October 16, 1986 states:

> 10/09/86: This patient is a 32-year-old white male who is seen for evaluation at the request of Wilson Foods. He is seen for evaluation of back pain and right buttock and thigh pain. He states he had the onset of his symptoms in August of 1980. His job at Wilson's Food at that time was cutting cords on hogs. This required him to be in a bent over position, with the knife in one hand and pulling with the other. He states at that time that production speeded up. Following this, he noted pain in his back in the right "hip" and the right buttock. He worked through the next several weeks and noted that he had to take a bath and relax every night in order to try to gain enough strength for work the next day. He states that he has very little sleep at night because of the pain. He has had a history of back pain prior to this, but it was mostly in the upper back and not in the lower back.
>
> He was seen at this office 6/1/79 by Dr. Strathman for back pain related to a motor vehicle accident. This was in the upper back. He was seen 3/23/84 by Dr. Huey at this office for trouble with his back related to work. He had pain in the right hip at that time. As stated, it had been bothering him for several months. In August, 1980, the patient states he saw the nurse at Farmstead Foods and subsequently saw Dr. Sloan and Dr. Solmonson. He was treated with medications with only minimal improvement. He continued having a lot of pain at night and difficulty working. He relates one time in 1980 he was reaching and felt sudden pain in the right thigh and hip. He has seen Dr. Bickel in and around 1983. I do not have a copy of the record of this. He had lower and upper back pain at that time. He states that he saw Dr. Bickel after he went to Union Hall and asked where he could receive help. He states that Dr. Bickel did tests for arthritis which were apparently negative. He went to physical therapy for two weeks. He states that he was diagnosed as having spina bifida which he says now has been disproven.

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He has had persistent low back pain and right buttock pain through the years. He has been absent on several occasions from work. He is presently working and does five different jobs. He states that he cannot stay in the same job more than several days, otherwise his back will bother him.

EXAMINATION: He is a health-appearing white male. His forward flexion beyond 50° produces discomfort. Lateral bending is 20° bilaterally. His straight leg raising signs, on the right, he appears to resist any attempt at straight leg raising beyond 50°. On the left, it is negative. He states that he gets back pain on the right side with attempts at straight leg raising. Ankle jerk and knee jerk are 2+ and symmetrical, bilaterally. Ankle dorsiflexion and toe dorsiflexion is normal. He notes sensation is decreased on the lateral aspect of the right foot. Patrick's test and pelvic rock tests are negative.

From reviewing the notes, his CT scan done 5/11/85 at Mercy Hospital does appear to have a small bulging disk to the left side at the L5-S1 level. Lumbosacral spine films done at Mercy Hospital showed slightly narrowed L5-S1. There are no other distinct abnormalities.

IMPRESSION: 1. Degenerative disk disease, L5-S1, with protrusion to the left.

DISCUSSION: This is the opposite side from the patient's symptoms. I still do not have any distinct pathological cause for the patient's right-sided hip pain. Perhaps a follow up CT scan or even a myelogram would help to resolve this.

The findings on testing, i.e., the left-sided disk protrusion, does not appear to match the patient's symptoms. We do know that he has degenerative disk disease at the L5-S1 level. At most, I would confer that this will give the patient a 5% impairment and loss of physical function to the whole body.

On December 23, 1986 Dr. MacMenamin stated that after reviewing claimant's chart he still opined claimant's impairment to be five percent.

On March 21, 1986 Jerome G. Bashara examined claimant on behalf of claimant and gave the following report.

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EVALUATION
3-21-86

This is an evaluation being seen for the Attorney Phillip Vonderhaar. The patient is accompanied today by a cover letter from Mr. Vonderhaar; a signed patient's waiver; employee records (health records) from the Wilson Food Corporation/Farmstead Food Corporation of Cedar Rapids, Iowa; medical records from the Mercy Hospital Trauma Center in Cedar Rapids, Iowa; medical records from the Lynn County Orthopedists, P.C.; medical records from Dr. Huey; medical records from Dr. MacMenamin; medical records from the Frank T. Hazelton Physical Therapists; a deposition taken on Russell J. Keeney; medical records from Dr. Robb and Dr. Bickel; medical records from Dr. Finn's office in Cedar Rapids, Iowa; x-rays from the Cedar Rapids Radiologists P.C.; x-rays from the Orthopaedic Surgeons, P.C. in Cedar Rapids; and x-rays from the Cedar Rapids Mercy Hospital.

H.P.I.:

This is a 31 year old white male who has sustained multiple injuries to his lower back while at work for the Wilson Foods Corporation, now the Farmstead Food Corporation of Cedar Rapids, Iowa.

The following history was obtained both from the patient and corroborated with the above medical records which were researched. He had some intermittent back discomfort, primarily in his neck and thoracic region in the late 1970's. Sometime in mid July of 1981, he developed low back pain with pain radiating down his right lower extremity. Sometime between July and August 26 of 1981, he began seeing the company nurse on a regular basis for complaints of persistent back pain with radiation down his right lower extremity which he felt was brought on and aggravated by his job in reaching and pulling hogs while at work. He has been treated nonoperatively throughout the past 5 year period with physical therapy, medication and restricted acitivity [sic]. He has had several other specific injuries to his back since August and July of 1981. On March 16, 1982 while at work he fell approximately 2 feet off of a stand and landed on a metal grate. He was seen at that time at the Mercy Hospital Trauma Center by Dr. Sawyers. He was treated for abrasions to his left hand and both elbows. No x-rays of his lumbar spine were

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taken at that time, although the patient states that he fell because of pain in his lower back. He was seen by Dr. Earl Bickel in Cedar Rapids on March 17, 1982. Dr. Bickel's primary notes refer to his problem from that accident being related to the cervical spine and thoracic spine regions. Over the last 5 year period the patient has experienced intermittent pain down through his lower back, right S1 Joint, with intermittent pain radiating down his right lower extremity.

On 2-7-84, while he was attempting to go down some ice covered metal steps, he fell and bounced down approximately 14 metal grated steps. He complained of pain in his left elbow, left scapular region and in his back. X-rays were taken at the Mercy Hospital Trauma Center in Cedar Rapids, Iowa. He was released and instructed with ice and aspirin. The patient was seen by Dr. John Huey in Cedar Rapids on 3-23-84, Orhtopeadic [sic] Surgeons, P.C. for complaints of low back pain. X-rays were taken at that time and he was started on a William's back exercise program.

On 3-21-85 he was bending over to pick up some gambriels [sic], weighing approximately 3 lbs. each - 2 in each hand, when he developed some severe low back pain and this time the pain radiated down his left lower extremity. The patient was seen by Dr. MacMenamin. X-rays were reviewed from Mercy Hospital. A CT Scan was ordered. A diagnosis at that time was made of a herniated disc at the L5-S1 level, primarily left sided herniation.

The patient continues to have back and primarily right lower extremity pain aggravated by lifting, twisting or bending and somewhat relieved by rest.

P.M.H.:

OPERATIONS: None

MEDICATIONS: None

DRUG ALLERGIES: None

F. & S.H.:

He is married and employed at Farmstead as a production worker.

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P.X.:

Height: 5'10"
Weight: 182 lbs.

He has mild lumbar paraspinous muscle spasm, particularly on the right. Mild tenderness at the L5-S1 interspace posteriorly. His straight leg raising produces back and buttock pain on the right at 60 degrees and is negative on the left at 80 degrees. He has tight hamstrings bilaterally. A neurological exam of the lower extremities is normal.

X-RAYS:

X-rays were reviewed from the Cedar Rapids Radiologists, P.C. dated 3-9-82, thoracic spine normal. X-rays of the cervical spine dated 3-9-82, reveal flattening of the normal cervical lordosis, otherwise they appear normal.

X-rays were reviewed fom the Orthopaedic Surgeons, P.C. in Cedar Rapids dated 3-23-84 of the lumbosacral spine show some mild narrowing of the L5-S1 disc space and a spina bifida occulta of S1.

X-rays were reviewed from the Cedar Rapids Mercy Hospital, a CT Scan dated 5-10-85, there appears to be a herniated disc at the L5-S1 level, centrally and to the left.

DIAGNOSIS:

1. Herniated lumbar disc L4-S1.

I would give the patient a 10% permanent partial physical impairment of his body as a whole related to the above diagnosis.

It is impossible to determine how much of the permanency rating is attributed to each of the incidents which occurred at work, but feel that the 10% permanency rating is related to some increased symptoms which started in July or August of 1981 and progressively got worse until the present time.

APPLICABLE LAW

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

The claimant has the burden of proving by a preponderance of

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the evidence that the injuries of August 26, 1981; March 16, 1982; and February 7, 1984 are causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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 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).

ANALYSIS

Claimant has failed to meet his burden in proving his injuries of March 16, 1982 and February 7, 1984 resulted in any permanent impairment or disability. Claimant's own testimony indicates that claimant's back, right buttock and right leg pain was not changed as a result of either of these injuries. Furthermore, the greater weight of medical evidence supports such a conclusion.

The real question then is, does claimant have any permanent impairment or disability as a result of his injury on August 26, 1981? From the claimant's own statements and the medical evidence that has been presented claimant's back complaints did predate his August 26, 1981 injury. Not only was claimant involved in a motor vehicle accident, claimant had pain in the right side of his back (Defendant's Exhibit F, page 150) and the nurses notes indicate that claimant was having low back complaints

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as early as June of 1981. By claimant's own testimony he was having problems sleeping prior to his August 26, 1981 injury. There are also incidents subsequent to his August 26, 1981 injury about which not much has been said. It would appear that claimant injured his back shoveling snow (Def. Ex. F, p. 152). Furthermore, the greater weight of medical evidence indicates that claimant had no permanent impairment as a result of the August 26, 1981 injury. Dr. Bickel opined claimant had no permanent disability on March 17, 1983. In a letter dated December 16, 1982 Dr. MacMenamin, a treating physician, indicated he could find no evidence of permanent partial impairment. More weight is given to claimant's treating physicians than Dr. Bashara who merely examined claimant. Therefore, claimant only met his burden in proving he had a temporary aggravation of a preexisting condition. Although there is evidence that might support a decision in favor of claimant as a result of his injury of March 21, 1985 that matter is not before the undersigned.

It should be pointed out that even if claimant had shown a permanent impairment as a result of his injury on August 26, 1981 he would still not have prevailed. Permanent impairment is only one of the considerations in determining industrial disability. Claimant returned to work and continued to do that work at least up to March 21, 1985 in the same position he held prior to his August 26, 1981 injury. Weighing all the factors that one considers in determining industrial disability, claimant failed to prove any disability resulted from the August 26, 1981 injury or that he had a reduction in his earning capacity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

WHEREFORE, based on the evidence presented and the principles of law previously stated, the following findings of fact and conclusions of law are made:

FINDING 1. On August 26, 1981 claimant received an injury while working for defendant.

FINDING 2. Prior to his injury on August 26, 1981 claimant had problems with his back.

FINDING 3. As a result of his August 26, 1981 injury claimant missed work for which he has been compensated.

FINDING 4. Claimant has no permanent impairment as a result of his August 26, 1981 injury.

CONCLUSION A. Claimant failed to prove that his August 26, 1981 injury resulted in any permanent disability.

CONCLUSION B. Claimant did meet his burden in proving a temporary aggravation of his preexisting condition.

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FINDING 5. On March 16, 1982 claimant was injured while working for defendant.

FINDING 6. As a result of his March 16, 1982 injury, claimant missed work for which he has been compensated.

FINDING 7. Claimant has no permanent impairment as a result of his March 16, 1982 injury.

CONCLUSION C. Claimant failed to prove that his March 16, 1982 injury resulted in any permanent disability.

FINDING 8. On February 7, 1984 claimant was injured while working for defendant.

FINDING 9. Claimant's medical bills were paid.

FINDING 10. Claimant's injury of February 7, 1984 did not result in claimant qualifying for temporary total disability benefits because he did not lose the required time.

FINDING 11. Claimant's injury of February 7, 1984 resulted in no permanent impairment.

CONCLUSION D. Claimant failed to prove his February 7, 1984 injury resulted in any permanent disability.

ORDER

THEREFORE, claimant is to take nothing as a result of these proceedings.

Costs are taxed to defendant pursuant to Division of Industrial Services Rule 343-4.33.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ANDREW M. KENNEBECK,

Claimant,

vs.

IOWA BEEF PROCESSORS, INC.,

Employer,
Self-Insured,
Defendant.

File No. 762999

A P P E A L

D E C I S I O N

FILED

JUN 24 1988

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

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

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 9. Both parties filed briefs on appeal.

ISSUE

Defendant states the following issue on appeal: Whether the deputy erred in awarding claimant 10 percent industrial disability.

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, 24-year-old claimant with a high school education worked for defendant as a "gutter," which required him to use a large knife on hog carcasses. Claimant would "gut" approximately 800 hogs per hour.

On April 25, 1984, claimant accidently stuck a gutter knife into his own abdomen. He was taken to the Buena Vista County Hospital by ambulance and had surgery as a result of his injury. He was released to return to work on June 4, 1984 without medically-imposed restrictions. Claimant then bid into other jobs at Iowa Beef Processors:

Q. And how long did you work as a gutter again?

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A. I stayed up there for two or three months. And then I bid off to a different job.

Q. What job did you bid off to?

A. I bid off to the stunner job.

Q. What is a stunner?

A. Well, a stunner while the hog is still alive is stunned by the stunner, and that's all he does is stuns the hogs.

....

Q. Okay. Why was there a change in your position? Why did you go from a gutter to a stunner?

A. I just didn't want to do that gutter job any more. It was getting to be too much.

Q. Could you explain what you mean by that?

A. Well, it was too much work, you know, to be doing it all day. Be too wore out at the end of the day.

Q. After you returned to this gutter position did you experience any physical problems?

A. It was more of an overall weakness than one, you know, when I did use certain muscles it felt like a real sharp pulling in my stomach, you know, like it was ripping muscle apart or something.

Q. Did you have these problems before the accident?

A. No.

....

Q. And you were earning approximately 6.50 an hour as a gutter?

A. Yes.

Q. Now you're back down to a Grade 1, which is the stun; is that correct?

A. Yes.

Q. And that pays 6.25 an hour?

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A. Yes.

Q. So in essence you were losing 25 cents an hour by going from a gutter to a stun?

A. Yes.

....

Q. And where did you move on to after that?

A. From there I moved on to a shave job which is also a Grade 1.

Q. What is a shave job?

A. A shave job is use the shave knife. It's a rather large knife and what you do is you shave the remaining hair off the side of the hogs.

Q. How would you compare that job with the job as a gutter as far as physical demands of the job?

A. It was much easier because you only have--you only use a knife in one hand and that's all you have to do. I mean, you just have to use your one hand and your one arm. As a gutter you have to use your knife in one hand plus lift and pull the gut, which they're heavy. They weigh around 50 pounds or more. Lot of them do.

Q. So in essence being a stun is less strenuous than being a gutter?

A. Yes. And shaving is less than a stun.

....

Q. Have you held any other positions at IBP other than a stun or a shaver since you returned to work after the injury?

....

A. I bid onto the split saw.

Q. What is a split saw?

A. Split saw, you split the back of the hog after -. the hog's already been gutted. That was a Grade 3 job.

Q. So that would pay more?

A. It paid a quarter more than the gutter job.

....

Q. What happened? Why aren't you presently a splitter?

A. It was just way too much work for this guy.

Q. How did it bother you being a splitter physically?

A. It was you had to use a lot of effort, and I couldn't do it. I bid off it right away.

Q. Well, you say you couldn't do it. What type of problems, Mr. Kennebeck, physically were you experiencing, if any, during the time that you were a splitter?

A. The split saw, it's a big saw, and it's hanging from a cable. But you still have to lift it. You lift it up and you put it up into the hog's back and then you got to force it down through the hog.

....

Q. Okay. But what, if you can, you know, it may be hard, but if you detail as to the particular type of physical problems that you were feeling which made you feel that you couldn't continue as a splitter?

A. Well, first we had to lift it up and then as you force it down through you're doing a lot of bending over, and I couldn't take it.

Q. Did you have any of these problems prior to April 24, 1984--or April 25, 1984?

A. No.

Q. What part--specific part of your body would you feel strain or aches or whatever in while you were doing tyis type of work as a splitter?

A. Well, on that splitter job it was more in my shoulders and arms than in my stomach area.

Q. Did you have any problem with your stomach area at that time?

A. Not specifically on that job, no.

(Transcript, pages 16-22)

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

Claimant testified that he now has problems with his lower back area. On July 11, 1986, claimant saw Paul From, M.D., and complained of weakness in his abdomen and a "problem in the lower left side."

Claimant testified that he currently feels weak and out of shape. He did not have this feeling prior to April 25, 1984. He has returned to some sporting activities but he is not able to play basketball as he used to be able to do. Claimant stated he has not missed work since his return to Iowa Beef Processors in June 1984.

On April 16, 1985, K. M. Johannsen, M.D., stated:

> The Buena Vista Clinic office records indicate that Mr. Kennebeck returned on 10/25/84 to see Dr. Arthur Ames requesting a general examination in reference to his previous abdominal injury. His complaints were those of intermittent backaches and some discomfort in his chest associated with hard work. Dr. Ames' examination was essentially negative but Mr. Kennebeck did complain of lower back discomfort with flexion, extension and lateral bending. A blood count and urinalysis were normal. I do not associate the above mentioned complaints with his abdominal injury.
>
> In summary then, based on my last examination of 6/1/84, Mr. Kennebeck has made an uneventful recovery from his injuries and without evidence of any permanent disability. I have reviewed the AMA Guides to the Evaluation of Permanent Impairment pages 113-115, and find nothing to substantiate or suggest a permanent disability for this type of injury.

(Joint Exhibit 2)

On July 15, 1986, Paul From, M.D., opined:

> Mr. Kennebeck did sustain a significant laceration of his intra-abdominal organs during a work injury on April 25, 1984. This did occasion an appendectomy as well as a laparotomy to repair the laceration.

He has done well and has been able to return to work since the surgery, although he still has significant abdominal complaints. It would appear that he has either an irritable bowel syndrome, gastritis and/or duodenitis or duodenal ulcer, or is developing adhesions from the extensive inflammatory reaction that would have been present at the time his gastric contents spilled into the peritoneal cavity. He will need occasional and periodic evaluations to make sure that no obstruction develops or that any definite peptic ulcer disease is present. I would estimate his permanent partial impairment at this time of 5 to 10%.

(Jt. Ex. 7)

On December 8, 1986, David T. Sidney, M.D., stated:

His complaints now, at this time, are that he continues to have a "weakness in his abdomen."...

...He does complain of some back problems on the left side, that at least, temporally, relate to his accident at Iowa Beef Packing.

On examination, this is a healthy, well-built, well-nourished young man in no acute distress....

Mr. Kennebeck had an upper G.I. series today down at Radiology, P.C. I have enclosed a copy for your information. This x-ray of his stomach was entirely normal.

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

(Jt. Ex. 5)

APPLICABLE LAW

Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is

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

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

The opinion of the supreme court in Olson 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 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

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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).

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 Report 218, 220 (Appeal Decision, 1979)

ANALYSIS

The question on appeal is the extent of claimant's disability. The nonmedical evidence consists of claimant's assertion that subsequent to his injury of April 25, 1984, he is unable to perform the duties of his job as a "gutter." Claimant is still employed by defendant in a different capacity, but at a lower hourly rate of compensation than the gutter's job he was performing prior to his injury.

Claimant was unable to perform a more strenuous job which paid more money. However, claimant indicated that he was unable to perform the splitter's job because of resulting pain in his arms and shoulders. Claimant did not relate his inability to perform the splitter's job to his stomach injury, and indicated he quit this job because it was too much work.

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The medical evidence presented is contradictory. Dr. Sidney states that claimant does not suffer any "permanent disability." Dr. Johannsen makes reference to the AMA Guides to the Evaluation of Permanent Impairment and then concludes that claimant does not suffer a "permanent disability."

Dr. From attributed claimant's condition to irritable bowel syndrome, gastritis or duodenitis resulting from the spillage of stomach contents into the peritoneal cavity. Dr. From has assigned claimant a permanent partial impairment rating of 5 to 10 percent.

Dr. Johannsen is claimant's treating physician. Dr. Johannsen observed claimant on more occasions than did Dr. From, and Dr. Johannsen observed claimant over a longer period of time. Dr. Johannsen observed claimant closer in time to his injury than did Dr. From and Dr. Johannsen performed the surgery to repair claimant's stomach injury. Dr. Johannsen consulted the AMA Guides to the Evaluation of Permanent Impairment in forming his opinion. Dr. Sydney's opinion, which was in part based on an x-ray of claimant's stomach, corroborates the opinion of Dr. Johannsen. Thus, the opinions of Dr. Sydney and Dr. Johannsen will be given the greater weight. Claimant has failed to prove he suffered any permanent impairment as a result of his injury of April 25, 1984.

FINDINGS OF FACT

1. Claimant is 24 years old.

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

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

4. On April 25, 1984, claimant cut himself with a knife blade while working for Iowa Beef Processors.

5. Claimant is currently employed at Iowa Beef Processors.

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

7. Claimant was off work from April 25, 1984 until June 4, 1984 as a result of his injury of April 25, 1984.

8. Claimant has not suffered any permanent physical impairment as a result of his injury of April 25, 1984.

9. Claimant's inability to perform the job duties of a splitter are not related to his stomach injury of April 25, 1984.

10. Claimant's back problems are not related to his stomach injury of April 25, 1984.

CONCLUSION OF LAW

Claimant has not suffered any permanent physical impairment as a result of his injury of April 25, 1984.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That defendant is to pay unto claimant temporary total disability benefits from April 25, 1984 until June 4, 1984 at the rate of one hundred fifty-three and 94/100 dollars ($153.94) per week.

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

That defendant is to pay the costs of this action including the cost of the transcription of the hearing proceeding.

Signed and filed this 24th day of June, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

Copies To:

Mr. Robert E. McKinney
Attorney at Law
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P.O. Box 209
Waukee, Iowa 50263-0209

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1803.1; 1402.40; 1804
Filed June 2, 1988
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FRED KISCHER,
Claimant,

vs.

WILSON FOODS,

Employer,
Self-Insured
Defendant.

File No. 765484

A R B I T R A T I O N

D E C I S I O N

1803.1

All of the evidence indicated the injury was to the body as a whole and no evidence indicated it was limited to the scheduled member other than the impairment rating were expressed in terms of the upper extremity.

1402.40; 1804

Claimant awarded 15 percent permanent partial disability for left shoulder injury. Impairment ratings were six percent, nine percent, and three percent. Various doctors recommended claimant find new work, do no heavy lifting, do no repetitive work and not work above shoulder level.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
JUN 2 1988
IOWA INDUSTRIAL COMMISSIONER

FRED KISCHER,	:	
	:	
Claimant,	:	
	:	File No. 765484
vs.	:	
	:	A R B I T R A T I O N
WILSON FOODS,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Fred Kischer, claimant, against Wilson Foods Corporation, employer, and self-insured defendant for benefits as a result of an injury that occurred on May 17, 1984. A hearing was held in Storm Lake, Iowa on March 30, 1988 and the case was fully submitted at the close of the hearing. The record consists of the testimony of Fred Kischer (claimant), claimant's exhibits 1 through 13 and defendant's exhibits A & B. Defendant's attorney submitted an excellent brief. Claimant's attorney did not submit a brief.

STIPULATIONS

The parties stipulated to the following matters:

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

That claimant sustained an injury on May 17, 1984 which arose out of and in the course of employment with employer;

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

That the injury is the cause of some permanent disability;

That the commencement date for permanent partial disability benefits, in the event of an award of permanent partial disability benefits, is February 26, 1985;

That the rate of compensation, in the event of an award, is $233.10 per week;

That all requested medical benefits have been or will be

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paid by defendant;

That defendant makes no claim for credit for benefits paid under an employee nonoccupational group health plan prior to hearing;

That defendant is entitled to a credit for 15 weeks of permanent partial disability benefits paid at the rate of $230.00 per week prior to hearing beginning on November 21, 1985; and

That there are no bifurcated claims.

ISSUES

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

Whether claimant is entitled to permanent partial disability benefits, and if so, the nature and extent of benefits to which he is entitled, including whether claimant is entitled to scheduled member benefits or industrial disability benefits for an injury to the body as a whole; and

The issue of whether claimant is an odd-lot employee as shown on the hearing assignment order was withdrawn by claimant on the record at the time of the hearing.

SUMMARY OF THE EVIDENCE

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

Claimant testified that he was born on July 15, 1953. He was 30 years old at the time of the injury and 34 years old at the time of the hearing. He graduated from high school in 1971 with average to below average grades in the lower part of his class. He did poor in science but did well in mathematics. He mixed mink feed on a fur farm for five years from 1971 to 1975. He started to work for employer in February of 1975 at Cherokee and has been there ever since except for the period of time from approximately May of 1985 to May of 1986. He has worked on both beef kill and hog kill. He has performed most of the jobs on the kill floor. Only five other employees have more seniority than claimant. Claimant testified that he has suffered a few episodes of tendonitis and several cuts but none of these injuries has resulted in a severe disabling injury.

On May 17, 1984 claimant was working with regular trimmings. Regular trimmings are pieces of fat with a small amount of meat in them. He was instructed to make up 80 pound boxes of regular trimmings. He prepared three and one-half pallets of boxes of

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regular trimmings with 30 boxes per pallet. The next day he was told that employer wanted 75 pound boxes instead of 80 pound boxes. The meat had frozen in the meantime. So, claimant drove a long rod or bar down into the corner of the boxes and chipped out and removed five pounds per box. Then, he reweighed the boxes to ensure that they weighed 75 pounds. Claimant testified that he is left handed and that he did this chipping of the frozen regular trimmings with his dominant left arm. He experienced pain that same night while at work in his left shoulder. It was worse the following day and grew progressively worse for the next few days (Exhibit 1).

Claimant reported this injury to Mary Kitterman, plant nurse, on May 21, 1984. Kitterman sent claimant to see Mark Peterson, a physician's assistant at the Cherokee Clinic on May 21, 1984 (Ex. 2). Claimant testified and the form 2a verifies that claimant lost about ten days work from May 18, 1984 to May 28, 1984 (Ex. 1, page 2).

On July 17, 1984, claimant complained again of a strained muscle in his left shoulder and was sent to see the company physician, Keith O. Garner, M.D. (Ex. 5). Claimant testified that he saw Dr. Garner many times in May, June and July of 1984. He said that he was treated with Motrin, Icy Hot and physical therapy. Icy Hot was the only thing that helped by temporarily soothing the pain in his left shoulder.

Claimant demonstrated at the hearing by gestures that the pain is in the top of his shoulder where it joins the neck. From there it shoots down into his chest, down into his back and up into his head.

Dr. Garner referred claimant to D. G. Paulsrud, M.D., an orthopedic surgeon in Sioux City, who first saw claimant on September 20, 1984 for pain in the periscapular area up into the trapezius area and out into the subdeltoid region. Dr. Paulsrud said that claimant had a full range of motion but also described some crepitation in the subdeltoid area. X-rays were normal. Dr. Paulsrud diagnosed rotator cuff tendonitis (Ex. 7, p. 2).

On June 25, 1985, Dr. Paulsrud saw claimant again for the same continuing complaints, diagnosed rotator cuff tendonitis again and concluded that claimant is unsuited for heavy, repetitive work using that arm (Ex. 7, p. 1). On November 26, 1985, Dr. Paulsrud noted catching and aching in the shoulder with motion. He recommended claimant get retrained for some activity that does not require heavy, repetitive use of this shoulder (Ex. 7, p. 3). On December 12, 1985, Dr. Paulsrud reported that on November 26, 1985 claimant had a full range of motion, some crepitation in his rotator cuff, reflexes were equal and active, no significant muscle atrophy, x-rays were normal and the doctor diagnosed chronic rotator cuff tendonitis. He stated that

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Claimant had a ten percent permanent partial impairment in his left upper extremity (Ex. 7, p. 4). He charged $35.00 for this report (Ex. 7, p. 5). Dr. Paulsrud reported one more time on April 29, 1987 at which time he stated:

> As you are aware, Frederick Kischer was seen in the office again on February 3, 1987. He returned again for problems with recurring pain in his left shoulder. He reported that he had been hired and fired by Wilson Foods two times since he was here last, due mainly to problems involved with his shoulder. The man does have chronic rotator cuff tendonitis. I believe he is in the wrong kind of work. It is occupational in origin. His permanent partial impairment remains the same.

(Ex. 7, p. 6)

Claimant testified that Dr. Garner also sent him to see Oscar M. Jardon, M.D., at the University of Nebraska Medical Center, Department of Orthopedic Surgery in Omaha. Dr. Jardon made reports on January 5, 1985 and January 30, 1985. Dr. Jardon suspected shoulder impingement syndrome (Ex. 6, p. 1). An arthrogram was normal, but Dr. Jardon added that he was unable to get die into the subachromial bursa. An injection of the bursa gave relief for two days. He diagnosed chronic bursitis of the subachromial and recommended conservative, concentrated physical therapy and nonsteroid anti-inflammatory medications. He said that claimant could try to work but he recommended against a lot of activity overhead and heavy lifting. Dr. Jardon did not award an impairment rating (Ex. 6, p. 2).

Claimant said that he saw Tim K. Daniels, M.D., on June 16, 1986 on his own to see if there was anything else that he could do about his shoulder. He said that he got this name from Dr. Garner. Dr. Daniels recommended to claimant that he rest the left shoulder to reduce the pain and inflammation (Ex. 11).

Claimant's attorney sent him to see A. J. Wolbrink, M.D., at the Park Clinic in Mason City on June 25, 1986. He described claimant's symptoms as pain in the shoulder, supraclavicular area, pectoral region, deltoid region, trapezius and neck. He added that symptoms increased with work activities. He reported no paresthesias or neurologic deficit. X-rays of the cervical spine and left shoulder were normal. Claimant had a nearly normal range of motion. Dr. Wolbrink concluded as follows:

> It is my opinion that Mr. Kischer has tendinitis [sic] of the rotator cuff of the left shoulder and possible tear of the meniscus of the AC joint with some degeneration of that joint. He has some symptoms to the neck, but do not see evidence of

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significant injury or arthrosis of the cervical spine.

It would be my opinion that the rotator cuff problems and the tear of the meniscus in the AC joint probably are related to his work situation. This may well have started from the incident which he describes and has been a bit progressive with time, continued use, as well as some degeneration since then.

It is my opinion that, at the present time, Mr. Kischer has a permanent impairment of 15% of the left upper extremity due to his problems with this shoulder. I should note that Mr. Kischer is left handed.

(Ex. 8, p. 3)

In a final paragraph Dr. Wolbrink added: "Mr. Kischer will always have some difficulty with this shoulder. He should avoid work above shoulder level. Also, repetitive pulling or pushing activities with the left arm will cause increased symptoms." (Ex. 8. p.4).

Dr. Wolbrink charged $93.00 for this examination (Ex. 8, p. 1).

Dr. Wolbrink gave a deposition on September 11, 1986. He said that claimant reported that he lost a lot of work due to the shoulder injury and that he was also off work for one year due to a labor dispute, but he was working at the time of his examination (Ex. 10, pp. 2-4). He gave claimant a copy of the shoulder owner's manual (Clmt. ex. 10, deposition ex. 1).

Dr. Wolbrink stated that claimant sustained a 15 percent permanent functional impairment of the left upper extremity which he said converts to nine percent of the whole man according to the Guides to the Evaluation of Permanent Impairment published by the American Medical Association (Ex. 10, p. 13). Dr. Wolbrink said that he relied only on the history that he took from claimant. He did not have any other history or records to review (Ex. 10, p.p. 18 & 19). He felt claimant should avoid work above shoulder level and repetitive pulling and pushing with the left arm (Ex. 10, p. 24). Other than those restrictions claimant is fully capable of working (Ex. 10, p. 26).

Claimant was next referred to Scott B. Neff, D.O., by Dr. Garner. Claimant saw both Dr. Neff and Thomas W. Bower, a physical therapy consultant, on November 6, 1986. Bower reported to Neff that he noted a popping on movement of the left shoulder and definite subluxation of the clavicle (Ex. 9. pp. 1 & 2). Dr. Neff found that claimant had a full range of motion of both

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shoulders. He found no evidence of left shoulder instability or subachromial impingement (Ex. 9, p. 4). He said that the other doctors had missed the proper diagnosis. Dr. Neff stated that he believed that claimant had a sternoclavicular joint disease next to the breastbone and that is where the clicking and popping occurs (Ex. 9, pp. 4 & 5). Dr. Neff recommended against surgery (Ex. 9, pp. 5 & 7). A bone scan and x-rays were essentially normal (Ex. 9, p. 3). Dr. Neff assessed that claimant had sustained a five percent permanent functional impairment based on muscle soreness and decreased motion (Ex. 9, p. 7). Bower took body measurements for claimant's permanent functional impairment rating that was awarded by Dr. Neff. Bower verified to claimant's counsel that Dr. Neff was not present at the time these tests were performed (Ex. 9, pp. 7 & 8).

Claimant admitted that he did not take all of the physical therapy that was offered to him. He explained that it went on for quite a long time and that it really did not help him a lot. Sometimes he was sick when his appointments were scheduled. Many appointments were scheduled in the mornings and he was not able to attend after working all night. Claimant also stated that he did not have an Iowa driver's license and that it was not always possible to find someone to drive him for the therapy treatments. Claimant admitted that he did not ask the employer for transportation to the physical therapy treatments.

Claimant denied that he told Dr. Garner that he had a part-time job on February 25, 1985 as reflected in Dr. Garner's notes (Ex. 2, p. 4). Claimant testified that the year he was off work, from approximately May of 1985 to May of 1986, was not due to his shoulder. He added that he did no work of any kind during that year until approximately two or three weeks before he returned to work for employer on May 5, 1986. At that time, he tried to see if he could be a bartender serving drinks. Then, he got his old job back with employer at the plant and he returned to work there. Claimant said that he was fired for missing work due to his shoulder from July of 1986 until October of 1986. Defendant's exhibit B shows that claimant's termination on July 8, 1986 was a result of four unexcused absences within a twelve month period.

Claimant explained that approximately 80 percent of the absences for sickness on his employee work record (Ex. A) were for his shoulder but he may not have explained that as the reason because he got fired once for missing work due to his shoulder. He added that sometimes he was just sick (Def. ex. A, pp. 1-3). Another employee record, the nonwork-related medical service record, shows that claimant received first aid for his left shoulder approximately 11 times between May 21, 1986 and October 28, 1987 (Ex. 13).

Claimant testified that he was now performing the floor boy

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job. This job requires him to keep the floor clear of fat, skin and other debris. He cleans up the floor and dumps the debris down the hatcher hole. This job involves pushing a two wheel cart that weighs approximately 300 to 350 pounds when empty. It weighs approximately 900 to 1100 pounds when full. It causes him pain to operate the cart but he can shift some of the work to his right arm and shoulder. It does not take much effort to get it rolling and if it is balanced okay it doesn't take much effort to make it go. Sometimes it spills and he has to refill it. Sometimes if it starts to spill, he can stop it if he catches it soon enough. Other times if it starts to spill, there is nothing he can do to stop it. Sometimes he cannot stop it because of the weakness in his left shoulder.

Claimant testified that the floor boy job is one of the best jobs that he could have now for his current shoulder condition. Even if it is heavy, it is not repetitive. However he has been on the line a few times since May of 1984. The last time, was in the spring of 1987 as a pace boner (Ex. A, p. 5).

Claimant said that he is more uncomfortable doing knife work now than in the past. He said that he saw Dennis Nitz, M.D., a neurologist, who diagnosed mild early carpal tunnel of the right hand as a result of a median nerve conduction study done on April 1, 1987 (Ex. 12). He stated that this is another reason why he is trying to avoid repetitive movements. Dr. Garner referred claimant to Dr. Nitz for these right arm complaints.

Claimant explained that certain jobs pay bracket amounts in addition to the base pay scale. A bracket is worth five cents per hour more. An eight bracket job would then pay 40 cents per hour more. Pace boning was an eight bracket job. Claimant testified that the floor boy job paid brackets also, however, they are not shown on the plant employee service record (Ex. A, p. 5). Claimant conceded that most of his work for employer was zero bracket work. This is verified by defendant's exhibit A, page 5.

Claimant said that he could work on the line but he does not want to, partly because of his left shoulder, partly because of his mild early right hand carpal tunnel syndrome, and partly because he doesn't feel like he needs to work that hard with all of his seniority. He repeated that the floor boy job is the best job for him now on account of his shoulder. It is easier work and it is easier on the body.

Claimant testified that he has not pursued any formal education or training since high school.

Claimant admitted that he did not accept the injection that was offered to him by Dr. Wolbrink because Dr. Wolbrink was only to evaluate him. Claimant denied that Dr. Neff offered to

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inject his shoulder. Dr. Neff only recommended a shot at some time in the future. Furthermore, Dr. Neff also was an evaluating physician. Claimant recalled that he did receive an injection from Dr. Jardon.

Claimant acknowledged that only five other employees were senior to him in the plant. This meant that there are many jobs that he could bid into, including utility man. He granted that he might own a job on pace boning but he was not aware of it. He agreed that most of the line jobs can now be done right in front of you. He did not believe that he could do the shanking job now due to his left shoulder. Claimant concluded by saying that he works in pain now just about all of the time.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 17, 1984 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

Permanent partial disabilities are classified as either scheduled or unscheduled. A specific scheduled disability is evaluated by the functional method; the industrial method is used to evaluate an unscheduled disability. Martin v. Skelly

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)il 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."

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

Claimant has sustained an injury to the body as a whole. Therefore, he is entitled to industrial disability benefits. Claimant described that his pain is in the trapezius area where his left shoulder meets his neck. From there, it radiates down the front of his body to the pectoral area, runs down his back in the trapezius area and it migrates up into his head. All of these areas are in the body as a whole. The first report of injury describes a left shoulder injury.

Mark Peterson, the physician's assistant, treated claimant's left shoulder (Ex. 2, p. 1). Dr. Garner treated claimant's left shoulder (Ex. 2, pp. 2-7). Dr. Paulsrud said that claimant's problem was in the periscapular, trapezius and subdeltoid areas. He diagnosed rotator cuff tendonitis (Ex. 7, pp. 1-6). Dr. Pardon diagnosed shoulder impingment synarome and chronic subachromial bursitis (Ex. 6, pp. 1& 2). Dr. Wolbrink described the condition as affecting the shoulder, suprascapular, pectoral, deltoid, trapezius and neck. He diagnosed left rotator cuff tendonitis and a possible tear of the acromioclavicular joint (Ex. 8, pp. 1-3). Mr. Bower referred to popping on movement of the left shoulder and subluxation of the clavicle. Dr. Neff disagreed with the other doctors and diagnosed sternoclavicular joint disease next to the breastbone (Ex. 9 pp. 1-5). All of the above described body parts are areas of the torso considered to be parts of the body as a whole. Lauhoff Grain v. McIntosh

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395 N.W.2d 834 (Iowa 1986); Alm v. Morris Barrick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); Nazarenus v. Oscar Mayer Co., II Iowa Industrial Commissioner Report 281 (1982); Godwin v. Hicklin GM Power, II Iowa Industrial Commissioner Report 170 (1981). None of the doctors mentioned the arm except to measure the amount of permanent functional impairment in the shoulder, chest, back and neck. Therefore, it is determined that claimant has sustained an injury to the body as a whole.

Claimant was 30 years old at the time of the injury and 34 years old at the time of the hearing. Claimant is young enough to be retrained and learn new skills. The feasibility of retraining is one consideration in a determination of industrial disability. Conrad v. Marquette School, Inc., IV Iowa Industrial Commissioner Report 74, 78 (1984). At age 30-34, claimant is relatively young. His loss of future earnings from employment due to his disability is not as severe as it would be in the case of an older individual. Walton v. B & H Tank Corporation, II Iowa Industrial Commissioner Report 426 (1981).

Claimant has the advantage of a high school education. He has learned various jobs over the years while working for employer (Ex. A, pp. 4 & 5). Claimant is senior to all but five other employees in the plant. Therefore, under the bidding system, claimant has a wide range of choice of jobs at the plant. The large number of different jobs that claimant has been able to perform at the plant is evidence of his adapability, but most of these skills are not transferable outside of the meat packing industry. Claimant testified that he was in the ideal job for him now as a floor boy.

Since the injury, claimant has been able to perform the ham boning job that paid eight brackets or 40 cents per hour more than the base pay. He has chosen not to do repetitive work because of advancing tendonitis and because with his seniority he can earn good money with the least amount of abuse to his body. Although claimant has not had permanent weight restrictions or limitations mandatorily imposed on him, he has nevertheless, been advised by physicians that he will continue to have trouble if he does repetitive or heavy work. Claimant has suffered tendonitis a number of times. He now has crepitus, catching and popping in his left shoulder. Dr. Paulsrud recommended that claimant be retrained for some activity that does not require heavy use of the shoulder (Ex. 7, p. 3). Dr. Paulsrud said that he believes claimant is in the wrong kind of work (Ex. 7, p. 6). Dr. Jardon recommended against activity overhead and heavy lifting (Ex. 6, p. 2). Both of these doctors were selected by employer.

Dr. Wolbrink said claimant will always have some difficulty with his shoulder. He should avoid work above shoulder level. He stated that repetitive pulling and pushing with the left arm

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will cause increased symptoms (Ex. 8, p. 4). Physical therapist Bower found popping on movement of the left shoulder and subluxation of the clavicle (Ex. 9, pp. 1 & 2). Dr. Neff found claimant had sternoclavicular joint disease next to the breastbone (Ex. 9, pp. 7 & 8).

As for permanent functional impairment ratings, Dr. Paulsrud found ten percent of the left upper extremity. This converts to six percent of the body as a whole. Dr. Jardon did not assess a rating. Dr. Garner did not assess a rating. Dr. Wolbrink found that claimant's permanent functional impairment rating was 15 percent of the left upper extremity which he stated converts to nine percent of the body as a whole. Dr. Neff made an evaluation of a five percent permanent functional impairment rating of the left upper extremity based upon measurements performed by Mr. Bower. Dr. Neff's rating converts to three percent of the body as a whole.

Industrial disability, or loss of earning capacity, in a workers' compensation case is quite similar to impairment of earning capacity, which is 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 actual loss of wages or earnings in a specific occupation. Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa appeals 1977) 100 A.L.R. 3rd 143; 2 Larson, sections 57.21 and 57.31.

Although claimant did pace boning a short time ago at eight brackets, he has opted to be floor boy to save wear and tear on his already debilitated body. Claimant testified that he did not think he could do it again now. By making the choice to avoid repetitive work claimant has partially followed the recommendation of the doctors to find a different kind of work. To completely follow the recommendation of the doctors would probably require claimant to undergo some retraining or on-the-job training in a new line of work which is not heavy, does not require repetitive use of the arms, and no overhead work. Possibly he can find such work with employer but the probability of finding such work is limited.

In one case it was determined that when claimant returned to his former employment without loss of earnings that there was no industrial disability. Mason v. Armour-Dial, Inc., I Iowa Industrial Commissioner Report 227, 229 (1981). At the same time, there is no 100 percent assurance or guarantee that this employer will be able to provide remunerative employment for claimant until such time as he is eligible for retirement. Rohrberg v. Griffin Pipe Products Co., I Iowa Industrial Commisioner Report 282 (Appeal Decision 1981).

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Therefore, based upon the foregoing factors and all of the factors that go into determining loss of earning capacity and industrial disability [Ver Steegh v. Rolscreen, IV Iowa Industrial Commissioner Report, 377, 381 (1984)], it is determined that claimant has sustained a 15 percent industrial disability to the body as a whole.

Claimant submitted an itemized list of costs with the prehearing report. The following costs from that list are allowed.

Court reporter charge for deposition of Dr. A.J. Wolbrink	$ 92.91
Professional charge of Dr. A.J. Wolbrink for deposition	150.00
Medical report from Dr. A.J. Wolbrink	27.00
Medical report of Dr. D. G. Paulsrud	35.00
TOTAL	$304.91

Only two medical reports can be allowed pursuant to Division of Industrial Services Rule 343-4.33(6). Therefore, the medical report of Dr. Paulsrud in the amount of $15.00 cannot be allowed because two other medical reports for higher amounts are included in the itemization above.

FINDINGS OF FACT

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

That claimant's injury is to his shoulder, neck, chest and back;

That claimant is age 34, has a high school education and no additional formal education or training;

That claimant is adaptable but has few, in any, transferable skills;

That claimant is young enough to be retrained and to learn other kinds of work;

That two company physicians recommended that claimant undergo retraining to learn to do work that is not heavy or repetitive;

That the various medical specialists awarded claimant permanent functional impairment ratings of six percent, nine

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percent and three percent of the body as a whole;

That claimant did not receive any surgery for this injury and that no surgery in contemplated at this time; and

That claimant has sustained an industrial disability of 15 percent of the body as a whole.

CONCLUSIONS OF LAW

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

That claimant has sustained an industrial disability to the body as a whole; and

That claimant has sustained a 15 percent industrial disability.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of two hundred thirty-three and 10/100 dollars ($233.10) per week in the total amount of seventeen thousand four hundred eight-two and 50/100 dollars ($17,482.50) commencing on February 26, 1985;

That defendant is entitled to a credit of fifteen (15) weeks of permanent partial disability benefits paid prior to hearing at the rate of two hundred thirty dollars ($230.00) per week commencing on November 21, 1985 in the total amount of three thousand four hundred fifty dollars ($3,450.00);

That all benefits are to be paid in a lump sum;

That interest will accrue pursuant to Iowa Code section 85.30;

That costs are assessed against defendant pursuant to Division of Industrial Services Rule 343-4.33 and in particular, those costs previously set out above in the total amount of three hundred four and 91/100 dollars ($304.91); and

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

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Signed and filed this 2nd day of June, 1988.

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

Copies To:

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Cherokee, Iowa 51012

2904
Filed March 28, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JACK KLASS, SR.,

Claimant,

vs.

COMMERCIAL SERVICES,

Employer,

and

EXCALIBUR INSURANCE COMPANY, BY AND THROUGH IOWA INSURANCE GUARANTY ASSOCIATION,

Insurance Carrier,
Defendants.

FILE NO. 674610

R E V I E W -

R E O P E N I N G

D E C I S I O N

2904

This was a proceeding in review-reopening. Additional benefits were denied for failure to show a change of condition either physically or industrially since the last proceeding.

000904

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JACK KLASS, SR.,	:	
Claimant,	:	FILE NO. 674610
vs.	:	
COMMERCIAL SERVICES,	:	REVIEW-
Employer,	:	REOPENING
and	:	DECISION
EXCALIBUR INSURANCE COMPANY, BY AND THROUGH IOWA INSURANCE GUARANTY ASSOCIATION,	:	FILED
Insurance Carrier, Defendants.	:	MAR 28 1988
	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Jack Klass, Sr., claimant, against Commercial Services, employer, and Excalibur Insurance Company, by and through Iowa Insurance Guaranty Association, insurance carrier, for workers' compensation benefits as a result of an injury on June 25, 1980. A prior review-reopening decision from this agency awarding permanent partial disability benefits for a 15 percent industrial disability to the body as a whole was filed on November 3, 1983. This award was increased to 25 percent on appeal in a decision by the industrial commissioner filed on June 29, 1984. On January 22, 1988, a hearing was held on claimant's most recent review-reopening petition requesting additional disability benefits for a change of condition as a result of the original work injury.

The parties have submitted a prehearing report of contested issues and stipulations which was approved and accepted as a part of the record of this case at the time of hearing. Oral testimony was received during the hearing from claimant and the following witnesses: John TenPas, Lawrence Pursell and Shirley Klass. The exhibits received into the evidence at the hearing are listed in the prehearing report. According to the prehearing report, the parties have stipulated that in the event of an award of weekly benefits from this proceeding, claimant's rate of compensation shall be $194.33 per week.

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ISSUES

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

I. Whether claimant suffered a change of condition causally connected to the work injury since the last arbitration award.

II. The extent of claimant's entitlement to weekly benefits for permanent disability should a change of condition be established.

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.

In a medical report dated December 18, 1981, submitted at hearing during the prior review-reopening proceedings in 1982, John R. Walker, M.D., related the following history:

The above captioned 51 year old male, comes to me for diagnosis, evaluation and treatment. He tells me that on June 25, 1980 he was the driver of a semi-trailer truck, employed by Commercial Services of Storm Lake, Iowa, traveling around Algona, Iowa when his truck was hit head on by a Pontiac that had crossed the center line and traveling at an estimated speed of 75 miles per hour. The patient states that he was going about 40 miles per hour when they hit and did have some opportunity apparently to slow down before the actual impact. His truck was thrown over on it's right side. He says that he hung on to the steering very assiduously and more or less for dear life and following the accident was taken to Algona for x-rays. The x-rays did determine that he had a crushed, right ankle. He was then sent on to Fort Dodge where surgery was performed immediately by Dr. Stitt of Fort Dodge, Iowa. The patient was discharged after five days, wearing a cast and he wore this cast for at least six or seven weeks and then was on crutches for several months. After his hospitalization he complained more and more about his low back pain and says that he had some in the hospital but it got worse after he got out. He says that his leg was hurting so bad in the hospital that he didn't

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pay any attention to it because he knew he had a fracture, however, he also began to have pain down the leg and note numbness if he sat for too long in one spot, also particularly if he elevated the foot up on the couch or davenport. After some months of complaining to Dr. Stitt, x-rays were ordered of his low back and elbow. These were read, at least according to the patient, as being negative, or nothing wrong, but he is not sure. At least no treatment was ordered. In August of 1981, he was referred to the Mayo Clinic by concerned parties for a second opinion. X-rays were taken of his elbow, back, right ankle and right knee and he was told that he would probably have to have an ankle fusion, that he had arthritis. He was given a support to wear on his shoe. The patient has not been able to return to work because of these problems. He still has his job and apparently could go back to it. He states that his back has been gradually giving him more and more trouble and limits his activities.

He denies any previous back pain or problem, but does state that about ten years ago he sprained his right elbow, but it had not been a problem as far as pain and discomfort was concerned since that time. He says that since the accident he has not been able to straighten his elbow out quite as much, but that there might have been some loss in complete extension prior to this, but we cannot be sure. He has never had any problems with his right knee before, but did have two broken toes on his right foot some thirty years ago. He has never had any chiropractic or osteopathic treatments.

On May 5, 1982, the doctor described the following complaints made to him by claimant at that time:

1.) He gets headaches in the occiput region rather than all over his head and this indicates some improvement.

2.) The patient has an aching neck most of the time but not all the time.

3.) The patient has a constant low back ache in the lumbar region.

4.) He has some discomfort in the elbow if he does any pro or supination or twisting or turning. He states that he cannot run a screwdriver.

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5.) His right ankle aches 24 hours a day and if he is on it it aches worse.

6.) The right knee still gives out on him when he walks.

Based upon these complaints, his review of past records in his examination of claimant, Dr. Walker rated claimant as suffering from a 22 percent permanent partial impairment to the whole man.

However, in the review-reopening and appeal decisions of this agency in 1982, not all of the permanent partial impairment described by Dr. Walker was found to be work related. In their brief, defendants point out the following portion of the review-reopening decision on page 6:

> Claimant has a multitude of other complaints, including neck discomfort, right knee and right elbow pain. Certainly the right knee complaints may logically flow from the ankle injury and change in gait. The record does not establish a relationship between the neck discomfort, the elbow problem and this injury.
>
> * * *
>
> In another sense, he says claimant has a 22 percent impairment that appears to consider certain maladies, i.e., elbow and neck, which have never been established to be causally related to the incident.

This portion of the review-reopening decision was sustained on appeal by the industrial commissioner.

At the hearing in this case, claimant and his wife testified that claimant's condition is growing worse over the years. Claimant testified that he continues to have trouble with his knee, both shoulders and elbows. He stated that he has difficulty with his sex life and cannot be as active physically as he was before the work injury. Claimant said that his neck is now more stiff then at the time of the prior hearing.

Dr. Walker reexamined claimant on July 30, 1984. As he did in 1982, Dr. Walker listed the following complaints made to him:

1.) He has a constant dull ache starting at the base of the cervical spine and radiating up in to the occiput region and ending at that region.

2.) He has a dull ache across the trapezius area bilaterally which is intensified after he is up and around for any period of time.

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3.) He has a constant, dull ache in the midline in the lumbar region which becomes worse with any activity. At times he has shooting pains down the entire right leg to the ankle and he points basically to the L-4, L-5 and h-5, S-1 region.

4.) He has aching in both knees when he walks or the weather changes. He says this is a dull ache around the patellae or kneecaps as he puts it.

5.) Both elbows have intermittent dull aches, especially with damp or cold weather.

6.) The right ankle gives him a constant, aching pain.

However, Dr. Walker goes on to state as follows:

OPINION: This patient seems to have a lot more pain and discomfort based pretty much on his examination which includes the loss of neck motion and his subective [sic] complaints. It is my opinion that the patient has some increase in his permanent, partial impairment. His permanent, partial impairment at this time in my opinion is evaluated at 33% of the whole man.

Two vocational rehabilitation counselors and evaluators employed by the state, John TenPas and Lawrence Pursell, testified that despite claimant's high motivation, he is unemployable. However, TenPas testified at the previous review-reopening proceedings in 1982 and issued the same opinion. TenPas admitted at hearing in this case that he formed his opinions in March, 1982, before the review-reopening hearing and his opinions have remained unchanged since that time. Pursell testified that his opinions were based upon TenPas' findings and evaluations performed in March, 1982. The testimony of TenPas was excluded from the consideration in the last review-reopening proceedings due to failure to list him on a witness list served upon defendants prior to hearing.

Claimant testified that he is 55 years of age. Claimant is unable to read and write. Claimant has not been employed since the work injury. Claimant believes that he is 100 percent totally disabled. Claimant said that he sought vocational rehabilitation after the work injury but the counselors indicated to him that he was unemployable.

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APPLICABLE LAW AND ANALYSIS

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

With reference to the alleged physical change in this case, claimant's subjective complaints are little different than the complaints he had at the hearing in 1982. At the hearing in this case, claimant only described additional neck stiffness. This additional stiffness was verified in the 1984 report of Dr. Walker. However, it was found in 1982 that claimant's neck problems are not work related and this deputy industrial commissioner is helpless to reverse a prior final agency decision on the matter. Claimant's attorney points to age as a factor to award more benefits in this case. It is well settled that a change of condition must include factors which were not anticipated at the time of the prior award. Meyers at 24. It can safely be assumed that it was anticipated in the prior proceedings that claimant would grow older.

With reference to any change in claimant's industrial disability, it seems rather clear that claimant is unemployable. However, claimant has been unemployable since the date of injury. Whether or not the prior award was sufficient or not is not an issue before the undersigned deputy. Also, the exclusion of the vocational rehabilitation information at the prior hearing in May, 1982, cannot form the basis of a second review-reopening proceeding.

On the whole record, the undersigned deputy commissioner certainly empathizes with claimant's current problems. However, the undersigned must follow the law and no significant change of condition could be found.

FINDINGS OF FACT

1. Claimant continues to have problems regarding his right ankle, both knees, both shoulders, both elbows, low back and neck or cervical spine.

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2. Claimant is 57 years of age. His level of education, his ability to read and write, his work experience and occupational skills have remained unchanged since the injury. Claimant was unemployable in May, 1982, and remains unemployable at the present time.

3. It could not be found that claimant's physical condition or the degree of his industrial disability has changed since May, 1982.

CONCLUSIONS OF LAW

Claimant has not established entitlement to additional permanent partial disability benefits.

ORDER

1. Claimant's petition in this matter shall be dismissed.

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

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

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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1803
Filed March 29, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY KNIGHT, Claimant, vs. PRINCE MANUFACTURING COMPANY, Employer, and NORTHWESTERN NATIONAL INSURANCE Insurance Carrier, Defendants.	:	FILE NO. 733994 A R B I T R A T I O N D E C I S I O N

1803

Claimant found to be entitled to only 25 percent permanent partial disability benefits as a result of his inability to return to heavy work. He is currently employed in a light duty job.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY KNIGHT, Claimant, vs. PRINCE MANUFACTURING COMPANY, Employer, and NORTHWESTERN NATIONAL INSURANCE Insurance Carrier, Defendants.	:	FILE NO. 733994 A R B I T R A T I O N D E C I S I O N

FILED
MAR 29 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Larry Knight, claimant, against Prince Manufacturing Company, employer (hereinafter referred to as Prince), and Northwestern National Insurance, insurance carrier, for workers compensation benefits as a result of an alleged injury on May 23, 1983. On February 9, 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 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 May 23, 1983, claimant received an injury which arose out of and in the course of his employment at Prince.

2. Claimant's rate of compensation in the event of an award of weekly benefits from this proceeding shall be $225.50 per week.

3. Claimant is only seeking temporary total disability or healing period benefits from May 24, 1983 through July 25, 1983 and from June 9, 1987 through June 26, 1987. Defendants agree that claimant was not working during these times. Claimant has been paid a total of nine weeks of weekly benefits at the stipulated rate before the hearing.

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4. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

5. If permanent disability benefits are awarded, they shall begin as of July 25, 1983.

6. With reference to the requested medical expenses, it was agreed that the provider of the services would testify that the charges were reasonable and defendants were not offering contrary evidence.

ISSUES

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

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

II. The extent of weekly disability benefits to which claimant is entitled; and,

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

SUMMARY OF THE EVIDENCE

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

Claimant testified that he has worked for Prince since 1973 and continues to work for Prince at the present time. Between 1973 and 1983, claimant worked in material transfer as a forklift operator moving materials both inside and outside of the plant. Claimant currently works in this job. During his deposition, claimant said that the work is "pretty light duty." Claimant also stated that on occasion he is required to physically handle some materials to accomplish his job. Claimant currently earns $9.12 per hour over a 40 hour work week and receives incentive pay. The evidence does not show that claimant is earning less on a weekly basis than he would have had the injury not occurred.

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After a 10 month layoff period in 1983, claimant was returned to work by Prince to a job different than the forklift operation. Claimant testified this new job involved assembly work in which he was located at a work station and worked in assembly line fashion on "piston rods" utilized to manufacture hydraulic cylinders. This work involved repetitive lifting and bending while reaching and placing rods weighing from 10 to 50 pounds in position so they may be worked upon with an air powered impact wrench. It was while performing this job that claimant suffered his alleged work injury herein.

Claimant testified that after two weeks on his assembly job, he began to gradually experience low back pain radiating into his right leg. Claimant initially felt that he was just not in good physical shape and that the pain would eventually subside. However, the pain steadily grew worse until on May 23, 1983, while working at the wash tank performing the same type of repetitive heavy lifting, claimant could no longer tolerate the pain and was sent by his supervisors to the company doctor, R. L. Morgan, M.D. Dr. Morgan diagnosed acute myofascial strain of the lumbosacral spine and prescribed rest and muscle relaxant medication. Claimant was sent home but upon awakening the next morning he could not get out of bed. With the help of his family he went to a hospital emergency room. Claimant was then hospitalized by Dr. Morgan and treated with bedrest, traction, physical therapy and whirlpool baths. While in the hospital, Dr. Morgan consulted with an orthopedic surgeon, M. E. Wheeler, M.D. Claimant was discharged after five days in an improved condition but claimant said that his back still hurt. He continued to receive treatment from Dr. Morgan for a short period of time and then he was exclusively treated by Dr. Wheeler until he was returned to work by Dr. Wheeler on July 25, 1983.

At hearing and in his deposition, claimant denied any prior chronic back problems and any prior low back or leg difficulties. Claimant said that three or four years after he was first hired at Prince, he hurt his neck while pulling on "bar stock." Claimant said that he was hospitalized for five days at that time and was placed under the care of Drs. Paulsrud and Ashmore, first names unknown. No reports or records from these doctors were offered into the evidence in this case.

The evidence does not reflect any restrictions imposed by Dr. Wheeler on claimant when he returned to work in July, 1983. However, claimant testified that he experienced difficulty when he returned to the same assembly job that he had in May, 1983. He stated that fellow employees helped him perform the heavier work. Despite this assistance from fellow employees, claimant testified that he continued to experience chronic back and leg pain. Claimant was then returned by Prince to his former forklift operator job, a job he continues to perform at the present time.

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Claimant did not seek further treatment from Dr. Wheeler until August 7, 1985, when he returned complaining of increased pain. He told Dr. Wheeler that he had never been pain free since July, 1983, and that his current forklift work is now causing him problems at the end of the day. Claimant returned again to Dr. Wheeler in October, 1985, with continued complaints of back difficulty. At that time Dr. Wheeler attempted to use a TENS unit, an electrical nerve stimulation device to relieve claimant's pain. Claimant testified that Dr. Wheeler offered no further solutions to his pain and he then sought out treatment from D. F. Sievert, D.C., in the form of chiropractic adjustments beginning in March, 1986. Claimant said that he only received temporary relief from Dr. Sievert's treatment.

In July, 1986, claimant was examined by John Walker, M.D., another orthopedic surgeon. Claimant at that time complained of pain and stiffness in his low back but not in the right leg. He also complained of pain in the neck and down his left arm. This pain he stated at that time occurred two or three times a week and lasted one to two days. After his examination and tests, including a CT scan and a myelogram of the upper and lower back, Dr. Walker opined that claimant was suffering from irritation of the rami dorsalis of the posterior nerve roots of the intervertebral joints on the right side at L4/5 and L5/S1 levels of the spine. Dr. Walker states that this condition is related to the work activity leading up to the episode of May 23, 1983. In June, 1987, Dr. Walker stated as follows with reference to the permanency of claimant's low back problems: "[I]t is my opinion within reasonable medical probability that the patient has a permanent partial impairment to the body as a whole of approximately 8% as a result of the work related incident June 22, 1983, while working at Prince Manufacturing."

With reference to claimant's neck problems, Dr. Walker stated that claimant has cervical ruptured discs at C5/6 and C6/7 of the upper spine with encroachment of the cervical nerve root canals at these levels with degenerative disc disease and cervical spondylosis and spondylarthrosis. He stated as follows with reference to causation and extent of claimant's neck impairment:

> ...There is no doubt that this kind of condition can develop over a period of many years while he was working as a fork lift [sic] operator, but I cannot relate this to any particular one time accident. But, from all of our experience within reasonable medical probability, some of these abnormal findings in the cervical spine can also be related to his work activity which he had been involved in over an eleven or twelve year period. It is difficult to put any percentage on this, but it has to be taken into consideration.

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On June 9, 1987 and again on June 16, 1987, claimant returned to Dr. Wheeler who, at that time, performed epidural flood procedures in his low back as a result of a flare-up of low back pain radiating into both legs at that time. Claimant was subsequently discharged by Dr. Wheeler in an improved condition after the epidural floods but claimant testified that only the leg pain tended to improve with this procedure. Claimant was off work from June 8 through June 26, 1987, as a result of this flare-up and treatment. Claimant has not missed work or sought further treatment since that time.

After May, 1983, claimant has reported several incidences of back injuries at work to Prince Management between August 24, 1984 through September 10, 1985 and again in May, 1987. These episodes all occurred while performing his forklift operator work at Prince. The September, 1985, injury occurred as a result of a contusion to his back when a handle of a car "let go" while claimant was pulling on it throwing claimant into a steel rack. At that time claimant sought treatment again from Dr. Wheeler but Dr. Wheeler reports that the problems subsided after two days. Claimant denies telling Dr. Wheeler that the incident "almost knocked him out" as reported by the doctor in his office notes.

Claimant testified that he at some time (it is unclear in the record) was placed by Dr. Wheeler on a 25 pound lifting restriction. The precise nature of any such restriction was not contained in any of the records from Dr. Wheeler offered into the evidence. However, claimant's testimony in this regard is uncontroverted. Claimant testified that he is still bothered by low back pain from the bouncing and jarring while operating his lift truck. Claimant said that only laying flat upon the floor is of any help in relieving his low back pain. Claimant said that should he lose his job, he could not returned to any of the other type of employment he has held in the past both at Prince or in his employment before Prince. Claimant stated that his back problems developed primarily after activity. Although he is able to perform a limited amount of sporting activity such as tennis and golf, too much of this activity bothers him a great deal.

Claimant testified that he is 46 years of age and only has a ninth grade education. Claimant attempted to complete his requirements for a GED but was not able to do so. Claimant's work experience before his employment at Prince was mainly in laboring occupations. Claimant worked as a meat cutter performing heavy work for several years and as a grounds keeper for a short period of time for a parks department of a municipality. Claimant has no significant military training. Claimant testified that he is very high on the Prince plant senority list. The future, however, of Prince as a viable business entity was not dealt with at the hearing.

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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 his disability results from a sudden unexpected traumatic event. It is sufficient to show that the disability developed gradually or progressively from work activity over a period of time. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). The McKeever court also held that the date of injury in such cases is a time when pain prevents the employee from continuing to work. In McKeever the injury date coincided with the time claimant was finally compelled to give up his job. This date was then utilized in determining rate and the timeliness of claimant's claim.

Although there was a stipulation that claimant had suffered a work injury on May 23, 1983, the stipulation did not deal with the nature of the injury. Given the credible testimony of claimant and the medical reports which demonstrate a gradual onset of low back difficulties and a continuation of this injury process at Prince, it will be found that claimant suffered a gradual or cumulative trauma injury to the low back at Prince. On May 23, 1983, claimant was compelled by his pain to leave his regular work at Prince that he was performing at the time of the injury and has never really fully returned to such work.

The evidence indicates that there could be a second injury date on June 9, 1987 relating to the absences from work for the epidural floods. Such an injury date was not pled nor was the petition amended to include a request for disability benefits for absences from work in 1987. However, the claim for healing period benefits for these absences was contained in the prehearing report and there was no objection from defendants as to lack of notice or surprise to this claim. Also, the technical rules of pleading do not apply in an administrative pleading. Yeager v. Firestone Rubber Company, 253 Iowa 369, 373, 112 N.W.2d 299 (1961). However, no such injury date can be found. Claimant's

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evidence is lacking as to what actually preciptated this flare-up of back pain and whether this resulted in any way from work activity. Such a void in the evidence prohibits a second finding as to the injury date, not the failure to plead such an injury date.

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

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

In the case sub judice, claimant contends that he suffered permanent disability as a result of the work injury due to permanent impairment to the body as a whole. With reference to

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claimant's low back problems, the causal connection opinions and the opinion as to permanency by Dr. Walker are uncontroverted. Also, claimant credibly testified that he continues to have low back problems. Dr. Wheeler did not render an opinion on this topic. Claimant testified that he has a 25 pound lifting restriction imposed by Dr. Wheeler and this testimony is uncontroverted. Therefore, claimant has established by the greater weight of the credible evidence that the work injury was a cause of an eight percent permanent partial impairment to the body as a whole.

The neck problems, however, could not be found to be work related. Claimant's only neck injury at work occurred many years ago. Claimant did not mention chronic neck or arm problems until 1986 well after the onset of his low back problems in 1983. Given claimant's testimony, a finding of causal connection of the neck problems could not be based upon the vague opinion of Dr. Walker contained in the medical reports.

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 have 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).

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Claimant's medical condition before the work injury was excellent and he had no functional impairments or ascertainable disabilities. Claimant was able to fully perform physical tasks involving repetitive heavy lifting. Claimant is not able to do so now and is unable to return to the type of work he was performing at the time of the work injury or most other physical labor type of work he had in the past. Claimant's treating physician, Dr. Wheeler, has imposed lifting restrictions upon claimant's activity and claimant's credible testimony demonstrates physical activity restrictions which prohibit his return to heavy physical labor. However, claimant's usual work over the years at Prince was operating a forklift in the job he is currently able to perform at the present time, albeit with some continuing problems. Given claimant's history of recurrent problems, it is likely he will continue to experience difficulties in the future.

Apart from his lost earnings during his healing period which will be compensated by healing period benefits, claimant has not suffered a significant permanent loss in actual earnings as a result of his disability. However, a showing that claimant had no loss of actual earnings does not preclude a finding of industrial disability. See Michael v. Harrison County, Thirty-Fourth Biennial Reports of the Iowa Industrial Commissioner 218, 220 (1979).

Claimant is 46 years of age and in the middle of his working career. His loss of future earnings from employment due to his disability is more severe than would be the case for a younger or older individual. See Becke v. Turner-Busch, Inc., Thirty-Fourth Biennial Reports of the Iowa Industrial Commissioner 34 (1979) and Walton v. B & H Tank Corp., II Iowa Industrial Commissioner Reports 426 (1981).

Claimant has shown motivation to remain employed despite physical pain on a regular basis. He should not be penalized for this remarkable effort by denying him adequate disability benefits.

Given claimant's education and past experience, he is not a likely candidate for successful vocational rehabilitation.

Claimant's current employment is suitable at the present time, the future stability of which is unknown and is probably no different then the future of any other manufacturing organization in this state.

After examination of all the factors, it is found as a matter of fact that claimant has suffered a 25 percent loss of his earning capacity as a result of his work injury to his low back. Based upon such a finding, claimant is entitled as a matter of law to 125 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 25 percent

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of 500 weeks, the maximum allowable for an injury to the body as a whole in that subsection. According to the stipulation, such benefits shall be awarded from July 25, 1983.

As claimant has established entitlement to permanent partial disability benefits, claimant may be entitled to weekly benefits for healing period under Iowa Code section 85.34 from the date of injury until he returns to work; until he is medically capable of returning to work; or, until he reaches maximum healing, whichever occurs first. Claimant has shown entitlement to healing period benefits from May 24, 1983 until June 25, 1983. Claimant's entitlement to healing period benefits for an injury on May 23, 1983 ended when he returned to work on July 25, 1983. Consequently, claimant is not entitled to additional benefits for healing period for the 1987 absences from work. Had the 1987 absences had been shown to be the result of additional work injuries at Prince he would have been entitled to additional temporary total disability benefits.

IV. Pursuant to Iowa Code section 85.27, claimant is entitled to reimbursement for reasonable medical expenses incurred in treating a work injury. Claimant's request for medical expenses is listed in the prehearing report. All of these expenses relate to the 1987 absences from work as a result of the epidural floods. The greater weight of the evidence shows that the epidural floods were a result of a flare-up of his back condition which developed as a result of the 1983 injury and therefore he is entitled to those benefits.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. Claimant was in the employ of Prince in May, 1983 and remains in the employ of Prince at the present time as a forklift operator.

3. On May 23, 1983, claimant suffered a gradual or cumulative injury to the low back which arose out of and in the course of his employment at Prince. Over a two week period while performing a new assembly job requiring repetitive lifting and bending of heavy objects, claimant developed chronic low back and leg pain precipitated by nerve root irritations in the joints of the low back. On May 23, 1983, claimant was compelled by his low back pain to leave work and seek medical treatment. Claimant has not returned to that job since that time.

4. The work injury of May 23, 1983, was a cause of a period of temporary disability from work beginning on May 23, 1983 and ending on July 25, 1983. Claimant returned to work on July 27, 1983 and reached maximum healing at that time. Claimant's treatment after July 25, 1983 appears to be only maintenance in nature to take care of occasional flare-ups.

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5. The work injury of May 23, 1983 was a cause of an eight percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's activity consisting of no lifting over 25 pounds and no repetitive lifting of heavy objects. This impairment and the restrictions are the result of claimant's low back difficulties. Claimant has current neck problems but claimant had an injury to his neck many years ago two or three years after he first started at Prince. The extent of claimant's physical restrictions and impairment due to his neck problems could not be determined from the record in this case.

6. The work injury of May 23, 1983, and the resulting permanent partial impairment is a cause of a 25 percent loss of earning capacity. Claimant is 46 years of age and only has a ninth grade education. Claimant is unable to return to heavy repetitive physical labor work as a result of the work injury. Claimant's only significant past work history has been heavy physical labor in a packing plant. Claimant's primary work activity over the years at Prince has been as a forklift operator and claimant continues to work at this job which appears to be suitable at the present time despite continuing complaints. The stability of Prince Manufacturing is unknown. Claimant has demonstrated a low potential for successful vocational rehabilitation. Claimant continues to experience pain in his job and will likely continue to suffer pain in the future. Claimant has not suffered a loss of income as a result of the work injury.

7. The medical expenses listed in the prehearing report totalling $591.10 are causally connected to the work injury of May 23, 1983 and were incurred by claimant for reasonable and necessary treatment of a work injury. The epidural flood treatments in 1987 appear to be treatments of aggravations of a preexisting condition.

CONCLUSIONS OF LAW

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

ORDER

1. Defendants shall pay to claimant seventy-five (125) weeks of permanent partial disability benefits at the rate of two hundred twenty-five and 50/100 dollars ($225.50) per week from July 25, 1983.

2. Defendants shall pay to claimant healing period benefits from May 23, 1983 through July 25, 1983, at the rate of two hundred twenty-five and 50/100 dollars $225.50) per week.

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3. Defendants shall pay claimant the sum of five hundred ninety-one and 10/100 dollars ($591.10) as reimbursement for medical expenses.

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

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

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

7. 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 29 day of March, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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FILED
000924

1110, 1402.30, 3400
Filed April 1, 1988
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARVIN KNUDSEN,	:	
	:	
Claimant,	:	
	:	File No. 825121
vs.	:	
	:	A R B I T R A T I O N
MADDEN TRUCKING,	:	
	:	D E C I S I O N
Employer,	:	
Defendant.	:	

1110, 1402.30, 3400

Claimant, a truck driver, was struck by a vehicle while making preparations to unload a load. It was found that his injuries arose out of and in the course of employment, even though his log book did not show him to be on duty at the time.

Claimant's injuries were found to include a fractured fibula, which was not diagnosed until approximately five days after the incident, where claimant's legs were not x-rayed at his initial emergency room visit and he testified that the pain in his leg had been present ever since he was released from the hospital emergency room immediately following the accident.

The employer's subrogation rights with regard to a third party claim in the state of Minnesota were held to not be a sufficient reason or excuse for non-payment of benefits. It was held that the potential or fact of a third party settlement does not absolve an employer from paying benefits which are justly due under Chapter 85. Section 85.22 provides a right of subrogation, not an excuse for non-payment.

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FILED

APR 1 1988

BEFORE THE IOWA INDUSTRIAL COMMISSIONER IOWA INDUSTRIAL COMMISSIONER

MARVIN KNUDSEN,	:	
	:	
Claimant,	:	
	:	File No. 825121
vs.	:	
	:	A R B I T R A T I O N
MADDEN TRUCKING,	:	
	:	D E C I S I O N
Employer,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Marvin Knudsen against Madden Trucking, his uninsured employer. The case was heard and fully submitted on March 30, 1988. The record in this proceeding consists of testimony from Marvin Knudsen, claimant's exhibits 1 through 4 and defendant's exhibit A.

ISSUES

The issues presented by the parties at the time of hearing are whether claimant sustained an injury which arose out of and in the course of his employment; whether the alleged injury is a cause of a period of temporary total disability; and, whether the alleged injury is a cause of the medical treatment expenses incurred by the claimant. It was stipulated that an employer-employee relationship existed at the time of injury, that the period for which the claimant was off work ran from September 10, 1985 through October 29, 1985 and that the rate of compensation, in the event of an award, is $152.94 per week. The employer did not dispute that claimant was injured in the vehicle-pedestrian accident upon which the claim is based, but the employer contends that the injury did not arise out of and in the course of employment. The employer also contends that there is no causal connection between the alleged injury and some of the medical treatment for which claimant seeks payment.

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.

Marvin Knudsen testified that, on the Saturday before the accident, he had picked up a load of angle iron in Detroit and had then driven with it to Minneapolis, Minnesota, where he arrived at approximately 4:30 p.m. on Sunday afternoon. Claimant testified that he slept in the truck behind the White Castle Restaurant that evening, got up the following morning, had breakfast at the restaurant and then drove the distance of approximately three or four blocks to the customer's location where he was to unload. Claimant testified that the customer had a large unloading area and that claimant wanted to know the specific dock at which he was to unload before pulling into the customer's lot.

Claimant testified that he parked the truck next to the curb on the street, leaving the motor running, walked across the street, inquired about where he was to unload and then started walking back toward the truck. Claimant testified that, while crossing the street back to the truck, he was struck by a car, knocked unconscious and taken to Methodist Hospital.

Claimant testified that, while at the hospital, he was x-rayed, had stitches and was then released with instructions to return to his own physician at home in a few days to have the stitches removed.

Claimant testified that he took a cab back to the scene of the accident where another individual drove the truck to the dock, got it unloaded and then drove the truck for him back to the interstate. Claimant testified that his leg had been hurting ever since he left the hospital and that he then drove back to Boone, Iowa, on the interstate highway without stopping while enroute.

Claimant testified that he arrived at the terminal in Boone at approximately 5:00 and that Mr. Madden, his employer, drove him to his home.

Claimant testified that, the next morning, he got out some crutches to use that were in his home from a time when his son was sick. He testified that, on Friday of that week, he went to his family physician, John M. Wall, M.D., to have the stitches removed. While there, claimant complained of his leg and was sent for x-rays which showed a cracked fibula.

Claimant confirmed that exhibit 2 contains the bills that were incurred in obtaining treatment for the accident.

Claimant testified that he had not started the daily log at the time when the accident occurred and that he did not think to put in the log that he was on duty, but not driving, at the time of the accident.

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Claimant testified that, following the accident, his chest hurt for a week or two and that it then went away. He stated that the pain in his leg persisted longer than the chest pain.

It was indicated by claimant and his counsel that a settlement has been made in the state of Minnesota against the driver of the vehicle which struck claimant. Claimant testified that he has not received any proceeds from the settlement. Claimant stated that he did not know the amount of the settlement and that it was being handled by his Minnesota attorney.

Claimant's exhibit 3 contains an ambulance report which indicates that claimant had a large laceration on his forehead and seemed confused. No other injuries were noted. The emergency department record, part of exhibit 3, indicates that claimant had not lost consciousness, but seemed confused. The report further indicates that claimant had a laceration on his forehead and nasal bridge, but that he denied pain in other parts of his body. The follow-up instructions from the emergency department indicated that claimant should see his own doctor in five days for suture removal and that he should also contact a doctor if any problems developed or if any changes in his condition occurred. The only x-ray reports in the record are of claimant's chest and skull. There is no indication that his legs were x-rayed.

Exhibit 4 is a report from John M. Wall, M.D., dated April 17, 1986. The report begins "This is to certify that I saw and attended Marvin Knudsen starting Sept. 13, 1985 for an injury sustained in a car pedestrian accident..." Dr. Wall then goes on to describe injuries in the form of lacerations on the face and nose, stitches, swelling in claimant's left foot and tenderness in the mid portion of claimant's left leg. The report indicates that an x-ray showed a fine, hairline transverse fracture of the left fibula. The report shows that a return appointment was scheduled for October 1, 1985, at which time tenderness was still present in the left leg and ankle. The report indicates that claimant was told to remain at modified rest and to return for a recheck in one month. The recheck appointment occured on October 29, 1985, at which time the doctor indicated that claimant's face, nose and leg were all essentially well healed. The second page of exhibit 4 indicates that Dr. Wall stated claimant was released for work as of October 29, 1985.

Claimant's exhibit 2 is a collection of medical bills which total $797.00 as itemized in the pre-hearing report.

APPLICABLE LAW AND ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that he received an injury on September 9, 1985 which arose out of and in the course of his employment. McDowell v.

Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

The words "out of" refer to the cause or source of the injury. Crowe 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).

A traveling employee is within the course of his employment while he pursues many of the activities of daily life for the entire time he is on the road. Crees v. Sheldahl Telephone Co., 258 Iowa 292, 139 N.W.2d 190 (1965); Volk v. International Harvester Co., 252 Iowa 298, 106 N.W.2d 649 (1960). Such employees are in the course of their employment from the time they leave home until the time they return home. Heissler v. Strange Bros. Hide Co., 212 Iowa 848, 237 N.W. 343 (1931). According to claimant's testimony, which is controverted only by his log book entry for the date in question, he was in the process of arranging to make a delivery at a customer's place of business for his employer. Knudsen's explanation of the manner in which he completed the log book for that date is accepted as correct. Knudsen was clearly acting in the course of his employment when he was struck while crossing the street. For an injury to arise out of the employment, the injury must be a natural incident of the work. It must be a rational consequence of a hazard connected with the employment. Cedar Rapids Community Sch. v. Cady, 278 N.W.2d 298 (Iowa 1979). Knudsen's injuries when struck by the vehicle while crossing the street clearly arose out of his employment.

The claimant has the burden of proving by a preponderance of the evidence that the injury of September 9, 1985 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

The agency's experience, technical competence and specialized knowledge may be utilized in evaluating evidence. Iowa Code section 17A.14(5). Claimant placed the onset of pain in his leg at the time he left the hospital. He complained of it to Dr. Wall and an x-ray revealed a hairline fracture. A reading of Dr. Wall's report indicates that he apparently considered the leg injury to have occurred when claimant was struck by the vehicle. There is nothing about the accident which would make the chance of a leg injury in any way remote. If claimant was, in fact, walking south, as is indicated in claimant's exhibit 1, his left side would be the first part that would be struck by a westbound vehicle. It is not difficult to believe that claimant's left leg could have been injured in such an incident. It is therefore found that the injuries claimant sustained when struck by the vehicle on September 9, 1985 included lacerations and contusions to his face and head and a hairline fracture of the fibula in his left leg.

Claimant's testimony and a review of exhibits 3 and 4 clearly show that the medical expenses contained in exhibit 2 were incurred in obtaining treatment for the injuries claimant sustained on September 9, 1985 and are therefore the responsibility of the employer.

Since it was stipulated that claimant sustained no permanent disability in the injury, he is entitled to receive temporary total disability from the time of the injury until he either returns to work or is medically capable of returning to employment substantially similar to that in which he was engaged at the time of the injury, whichever occurs first. Iowa Code section 85.33(1). From the records both at the Methodist Hospital Emergency Room and from Dr. Wall, it is clear that claimant was directed to rest from the date of injury up until Dr. Wall released him to return to work on October 29, 1985. According to the dates stipulated by the parties, this is a span of seven and one-seventh weeks for which claimant is entitled to receive temporary total disability compensation.

Iowa Code section 85.22 gives the employer a right of

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subrogation and provides a method for the employer to obtain a lien upon any recovery that the claimant may obtain from a third party. The fact that claimant may obtain such a recovery, or that a settlement has been made with the proceeds being held by claimant's attorney in the state of Minnesota, does not justify the failure to pay benefits due under Chapter 85 of The Iowa Code in a timely manner. In fact, the first unnumbered paragraph of section 85.22 envisions a system where workers' compensation benefits are paid and the employer then looks to the third party for reimbursement. If the employer in this case pays benefits to the claimant in accordance with this decision, it would then have a lawful right of subrogation against any recovery from any third party which claimant may obtain due to the accident which is the subject of this litigation.

FINDINGS OF FACT

1. On September 9, 1985, Marvin Knudsen was a resident of the state of Iowa, employed by Madden Trucking, an employer who maintained a place of business at Boone, Iowa.

2. Knudsen was injured on September 9, 1985 when struck by a vehicle while crossing a street in the process of preparing to make a delivery of freight which he was hauling as part of the duties of his employment with Madden Trucking.

3. Following the injury, claimant was medically incapable of performing work in employment substantially similar to that he performed at the time of injury from September 10, 1985 until October 29, 1985 when claimant became medically capable of returning to employment substantially similar to that in which he was engaged at the time of injury.

4. Claimant's appearance and demeanor were observed as he testified and he is found to be a fully credible witness.

5. Medical expenses incurred by claimant in the total amount of $797.00 as itemized in the pre-hearing report were reasonable expenses that were incurred in obtaining reasonable treatment for the injuries he sustained on September 9, 1985.

CONCLUSIONS OF LAW

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

2. Claimant sustained injury to his head and left leg on September 9, 1985 which arose out of and in the course of his employment with Madden Trucking.

3. Claimant is entitled to receive seven and one-seventh weeks of compensation for temporary total disability under the

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provisions of Iowa Code section 85.33.

4. Claimant is entitled to recover $797.00 in medical expenses under the provisions of Iowa Code section 85.27.

5. The fact that a third party settlement may be recovered does not constitute any lawful justification or excuse for the failure to pay benefits which are owed to an employee under the provisions of Chapter 85 of The Code of Iowa.

ORDER

IT IS THEREFORE ORDERED that defendant pay claimant seven and one-seventh (7 1/7) weeks of compensation for temporary total disability at the stipulated rate of one hundred fifty-two and 94/100 dollars ($152.94) per week payable commencing September 10, 1985.

IT IS FURTHER ORDERED that defendant pay the entire amount in a lump sum together with interest from the date each payment came due until the date of payment at the rate of ten percent (10%) per annum pursuant to Iowa Code section 85.30.

IT IS FURTHER ORDERED that defendant pay claimant seven hundred ninety-seven and 00/100 dollars ($797.00) as and for reimbursement for medical expenses he incurred.

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

IT IS FURTHER ORDERED that defendant file Claim Activity Reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 1st day of April, 1988.

Michael G. Trier
MICHAEL G. TRIER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DAVID KOETTERS, Claimant, vs. STATE III ELECTRIC, Employer, and HERITAGE MUTUAL INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 800074 A R B I T R A T I O N D E C I S I O N

FILED
FEB 25 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by David Koetters, claimant, against State III Electric, employer, and Heritage Mutual Insurance Co., insurance carrier, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained July 24, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner December 3, 1987. The record was considered fully submitted upon the receipt of joint exhibit 26 (the deposition of John J. Dougherty, M.D.) December 14, 1987. The record in this case consists of the testimony of the claimant, Elliot Rush, and Lynda Boyd; and joint exhibits 1 through 29, inclusive.

ISSUES

Pursuant to the prehearing report and order submitted and approved December 3, 1987, the issues presented for determination are:

1. Whether claimant's work injury is the cause of any permanent disability and, if so, the nature and extent thereof; and

2. The extent of claimant's entitlement to weekly compensation for temporary total disability/healing period benefits.

FACTS PRESENTED

Claimant, an electrician by trade, sustained an injury

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arising out of and in the course of his employment July 24, 1985, when he fell into a hole while following a line of conduit. Claimant was hospitalized where his left shoulder was reset by Dr. H. N. Hirsch and his arm placed in a restraining device so he could not move it. Claimant stated he was referred to John J. Dougherty, M.D., who treated him with medications, physical therapy and a TNS unit which he still uses for pain control. Claimant last saw Dr. Dougherty at the end of December 1986, when he was treated for a broken hand sustained in a home accident. Claimant acknowledged that since his treatment for that home accident, he has neither continued with nor sought the care of any medical provider.

Claimant testified he was never told by Dr. Dougherty he was released to return to work. However, in December 1986, when his workers' compensation payments ceased, claimant contacted his local union business office and requested to have his name placed on the employment referral list. Claimant was sent to two jobs in 1987, both of which he was able to perform satisfactorily. He maintained, however, that the other workers on the job "took care of" him by doing all the lifting, carrying and pulling and that neither job required any overhead work. He also acknowledged that since his injury he has worked on a remodeling project, has done some painting, has been a consultant on the installation of a computer system and was attempting to install an overhead fan at home when he fell in December 1986. Claimant stated that since his work injury he has not conducted any active job search outside of placing his name on the union referral list and has not taken any action toward a change in vocations.

Claimant identified his current symptoms as constant pain in his left shoulder, arm and neck which he described as a dull ache, at times severe. He testified he cannot work overhead with any degree of efficiency because the extended use of his arm overhead or any heavy repetitive lifting or pulling causes his pain to intensify.

Elliot Rush testified he is the business manager for the Sioux City local electrical union and as such is responsible for referring union members to work. He explained that after receiving an order for workers from an employer, he begins his referrals from the top of the list discussing with each worker whether or not the job is within his capabilities. He stated when claimant was called in 1987 about work on the Powerhouse, claimant indicated he was willing to at least try the work and that he received no complaints on the quality or quantity of work claimant performed while on the job.

Lynda Boyd, M.S., C.R.C., C.I.R.S., testified that she reviewed the vocational rehabilitation report of Gail Leonhardt (joint exhibit 22) and that she strongly disagreed with its

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content and conclusions particularly with regard to the assertion claimant has lost 99.04 percent access to the original employment market to which he had access before he became injured. Ms. Boyd maintained 99.04 percent is very high and would indicate significant restrictions had been imposed which she did not believe, based on a review of the medical records, had been imposed on claimant.

John J. Dougherty, M.D., orthopedic surgeon, testified he began treating claimant September 30, 1985 on referral from Dr. Hirsch who had performed a closed reduction on the shoulder dislocation (dislocation of the left humerus, fracture of the greater tuberosity left humerus, fracture of the left clavicle (joint exhibit 3)). An arthrogram performed in October 1985 showed no evidence of a rotator cuff tear and an EMG study showed some evidence of denervation in the deltoid and brachial radialis. Dr. Dougherty's office notes indicate claimant was not making much progress toward healing until February 10, 1986 when he noted claimant was beginning to show some improvement. One month later, however, claimant was referred to Dennis Nitz, M.D., for evaluation who opined after examination on April 1, 1986 claimant's "status post left shoulder dislocation with small humeral head avulsion fracture and fractured left clavicle" was "clinically stable" and that there was "no evidence of cervical radiculopathy, brachial plexopahty, entrapment neuropathy." (Jt. Ex. 2)

Claimant thereafter returned to Dr. Dougherty's care who noted on June 6, 1986 that when claimant was seen May 13, 1986, the possibility of claimant's returning to work was discussed but rejected by claimant. Dr. Dougherty wrote:

> It appears that Mr. Koetters has pretty well reached a plateau....Basically, I have no other significant treatment for him....
>
> As far as disability, I think we should wait three months and give him a disability....As far as restrictions, I would say he's probably going to have some difficulty as far as abducting and working above his head, but I would not be adverse to letting him do whatever he feels he can do with limitation by pain and possibly by some weakness. I would feel at this point in time that he will probably have a disability of about 10% of his left upper extremity, but I think it would be best to wait at least another three months and then determine his disability.

An arthrogram and EMG were done again in November 1986 at which time Dr. Dougherty notes claimant had no evidence of denervation and the EMG was normal. At that time, Dr. Dougherty expressed his belief that claimant's range of motion was good and his

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power was back. Dr. Dougherty wrote on December 30, 1986:

> Attempting to arrive at a disability rating on this patient, it would be my opinion he's probably entitled to about 5% of his left upper extremity. As I mentioned before, his EMG looks normal now around the shoulder....I am just at a loss to explain why he can't do more than he says he reportedly is able to do.

Claimant was seen for evaluation July 9, 1986 by Horst G. Blume, M.D., who concluded:

> It is my opinion, within reasonable medical probability, that the patient has a permanent partial disability to the left arm of 36%, which includes a partial injury to the auxillary nerve due to loss of strength and pain of 20%, and 16% due to loss of range of motion, and the injury sustained are a direct result of the work-related accident when the patient fell on July 24, 1985.

APPLICABLE LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 24, 1985 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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, however, is not scheduled, being an injury to the body as a whole. Alm v. Morris Barrick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949).

Iowa Code section 85.34(1) provides that if an employee has suffered a personal injury causing permanent partial disability, the employer shall pay compensation for a healing period from the day of the injury until (1) the employee returns to work; or (2) it is medically indicated that significant improvement from the injury is not anticipated; or (3) until the employee is medically capable of returning to substantially similar employment.

> By the very meaning of the phrase, a person with a "permanent disability" can never return to the same physical condition he or she had prior to the injury.....See, 2 A. Larson, The Law of Workmen's Compensation § 57.12 (1981). The healing period may be characterized as that period during which there is reasonable expectation of improvement of the disabling condition," and ends when maximum medical improvement is reached. Boyd v. Hudson Pulp & Paper Corp., 177 So.2d 331, 330 (Fla.1965). That is, it is the period "from the time of the injury until the employee is as far restored as the permanent character of his injury will permit." Winn Drilling Company v. Industrial Commissioner, 32 Ill.2d 144, 145-6, 203 N.E.2d 904, 905-6 (1965). See also W. Schneider, Schneider's Workmen's Compensation, § 2308 (1957). Thus, the healing period generally terminates "at the time the attending physician determines that the employee has recovered as far as possible from the effects of the injury. Winn, 203 N.E. at 906.
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> Armstrong Tire & Rubber Co. v. Kubli, 312 N.W.2d 60, 65 (Iowa 1981).

Iowa Code section 85.34(2) provides that compensation for permanent partial disability shall begin at the termination of the healing period. Iowa Code section 85.34(2)(u) provides that compensation for a nonscheduled or body as a whole injury shall be paid in relation tc 500 weeks that the disability bears to the body as a whole.

ANALYSIS

Generally, a claim of permanent disability invokes an

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initial determination of whether the work injury is the cause of permanent physical impairment or permanent limitation in work activity. Considering the claimant's testimony with regard to his current physical complaints and capabilities in conjunction with the medical records and opinions, it is accepted claimant will never return to the same condition he was in prior to the work injury of July 24, 1985 and that it is, therefore, the cause of a permanent impairment. Further, based upon the situs of the injury (dislocation of the left humerus, fracture of the greater tuberosity, fracture of the left clavicle) as well as claimant's testimony of subjective symptoms beyond the upper extremity, it is accepted claimant sustained an injury to his shoulder which constitutes under Alm, supra, an injury to the body as a whole. See also Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Reports 281 (Appeal Decision 1982). In Alm, claimant had a rating of 25-30 percent impairment to the arm and the court, noting the anatomical location of the injury extended from the arm into the shoulder, ruled that the injury was not restricted to a schedule; thus, an injury to the shoulder which produces permanent impairment entitles the claimant to an industrial disability. See also Lauhoff Grain Co. v. McIntosh, 395 N.W.2d 834 (Iowa 1986).

The mere fact that the rating pertains to a scheduled member does not mean the disability is restricted to a schedule. Pullen v. Brown & Lambrecht Earthmoving, Incorporated, II Iowa Industrial Commissioner Reports 308 (Appeal Decision 1982). There are two impairment ratings in the record. Dr. Dougherty, claimant's treating physician, rated claimant as having a 10 percent permanent partial impairment to the upper left extremity in June 1986 and reduced that to 5 percent in December 1986. Dr. Blume, who saw claimant for evaluation in July 1986, rated claimant as having a permanent partial disability to the left arm of 36 percent. Neither Dr. Hirsch, who performed the closed reduction, nor Dr. Nitz, who saw claimant for evaluation, provide any permanent partial impairment rating.

Dr. Dougherty's opinion is given greater weight than Dr. Blume's. Based on Dr. Blume's report, there is no indication that he availed himself of any of the x-rays or EMG tests previously performed, that he performed any diagnostic tests himself and it would appear he relied in large measure on the subjective complaints of claimant. Further, Dr. Blume bases 20 percent of his rating on neurological injury while tests, done subsequent to the rating, reveal the absence of any neurological injury.

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

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Barton v. Nevada Poultry, 253 Iowa 285, 110 N.W.2d 660 (1961).

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

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

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

Claimant is 47 years old (45 at the time of injury) who, as will be discussed, has had a lengthy healing period as a result of the injury. He is a high school graduate with previous work experience as a truck driver, warehouseman, equipment operator and assembler and who has, since 1962, worked as an electrician in residential, commercial and industrial settings. He described his health before his injury as "generally good" although he also now admits to problems with restricted breathing due to

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asthma and high blood pressure compounded by obesity and alcohol intake. For an extensive period in 1987, claimant returned to his previous employment and, after three weeks on the job, was named foreman earning approximately $18.50 per hour, about $3.00 more per hour than a journeyman electrician. Neither Dr. Dougherty nor Dr. Blume impose any particular restriction on claimant outside of pain tolerance, essentially leaving it to claimant's discretion as to what he may or may not be able to do. Claimant argues, however, his work as an electrician is heavy work requiring he be able to sustain working overhead which he does not feel he can do with any degree of efficiency. As support, claimant points to the vocational rehabilitation evaluation report of Gail Leonhardt. (Jt. Ex. 22) That report is, however, given little weight in this analysis because of its questionable probative value. The undersigned's observation of claimant at the time of hearing and the actions of the claimant himself in returning to work and showing his ability to perform his job satisfactorily establish claimant clearly has not been precluded from 99.04 percent of the labor market to which he had access prior to his injury. Claimant argues that the only reason he was able to do these jobs was his union coworkers "took care of" him by doing the heavy work. Elliot Rush attested to this as being the prevailing attitude, in his opinion, throughout the union membership. Accepting this testimony, a question arises as to whether or not there is any reason to believe this would not continue in the future, thus, allowing claimant not only the opportunity to return to work but also to work in his chosen trade. It is accepted, however, that claimant's work injury has affected his capacity to earn since claimant, prior to his injury, had no need to depend on the assistance of others. Considering, then, all of the elements of industrial disability, it is concluded claimant has established he has a permanent partial disability of 10 percent for industrial purposes.

The final question for resolution is claimant's appropriate healing period. Claimant prays for a healing period from July 24, 1985 through February 2, 1987--the period from injury to return to work. Defendants assert claimant's healing period should cease July 9, 1986, the time of Dr. Blume's rating since it is reasonable to conclude it was then medically indicated that significant improvement from the injury was not anticipated and that claimant was then capable of returning to employment substantially similar to his preinjury employment. Dr. Dougherty in July 1986 rated claimant 10 percent permanently partially impaired. However, in December 1986 the rating is reduced. Clearly, claimant must have improved over this six month period. Both Dr. Nitz and Dr. Blume recommend additional treatment. When considering all the possible dates the medical experts suggest as when claimant reached maximum medical recovery, it is found claimant's healing period ended November 28, 1986 when the results of the EMG showed no evidence of denervation and the arthrogram was essentially negative. Pursuant to Iowa Code

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section 85.34(2), permanent partial disability benefits shall commence November 29, 1986.

FINDINGS OF FACT

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

1. Claimant sustained an injury arising out of and in the course of his employment July 24, 1985, when he fell in a hole while tracing a line of conduit.

2. Claimant is currently 47 years old, a high school graduate, and has worked as an electrician since 1962.

3. Claimant's work as an electrician requires pulling, lifting and carrying materials of various weights as well as an ability to work with the arms overhead.

4. Claimant suffered a dislocation of the left humerus, fracture of the greater tuberosity, left humerus and fracture of the left clavicle in the work accident July 24, 1985.

5. Claimant's injury is to the shoulder, extending beyond the upper extremity as claimant perceives persistent pain in his shoulder, neck and arm.

6. Claimant's injury is the cause of a permanent impairment.

7. Claimant cannot work overhead with the same degree of efficiency as before his injury.

8. Claimant has been able to return to work as an electrician but must depend on the assistance of others to do the heavier work which causes his pain to intensify.

9. Claimant's capacity to earn has been hampered as a result of the injury.

10. Claimant has a 10 percent industrial disability as a result of the injury.

11. Claimant reached maximum medical recovery November 28, 1986 when the last EMG revealed no denervation and the arthrogram was essentially normal.

CONCLUSIONS OF LAW

Wherefore, based on the principles of law previously stated, the following conclusions of law are made:

1. Claimant has established his injury is the cause of the

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disability on which he now bases his claim.

2. Claimant has established he sustained an injury to the body as a whole.

3. Claimant has met his burden of proving an industrial disability of 10 percent as a result of the July 24, 1985 injury.

4. Claimant has established entitlement to healing period benefits for the period from July 24, 1985 through November 28, 1986, inclusive.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant seventy point four twenty-nine (70.429) weeks of healing period benefits at the stipulated rate of three hundred forty-eight and 20/100 dollars ($348.20) per week.

Defendants shall pay to claimant fifty (50) weeks of permanent partial disability benefits at the stipulated rate of three hundred forty-eight and 20/100 dollars ($348.20) per week commencing November 29, 1986.

Defendants shall receive full credit for the fifty-three (53) weeks ($18,447.18) of temporary total/healing period benefits and the twenty-one (21) weeks ($7,309.26) of permanent partial disability benefits previously paid.

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

A claim activity report shall be filed upon payment of this award.

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

Signed and filed this 25th day of February, 1988.

Deborah A. Dubik

DEBORAH A. DUBIK
DEPUTY INDUSTRIAL COMMISSIONER

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1108.50, 1803.1, 2209
Filed June 27, 1988
HELENJEAN WALLESER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY L. KOLLN, Claimant, vs. FARMLAND FOODS, INC., Employer, and AETNA CASUALTY & SURETY COMPANY, Insurance Carrier, Defendants.	:	File Nos. 782163 816127 816128 A R B I T R A T I O N D E C I S I O N

1108.50, 1803.1, 2209

Claimant did not show cervical complaints were related to two alleged work incidents or to cumulative trauma at work. Claimant had had prior work experience which could have produced degenerative disc disease as well as a motorcycle accident which he had failed to report to medical practitioners. Physicians opined that the condition preexisted employment. Claimant did not show entitlement to greater permanent partial disability benefits that defendants had already paid for bilateral carpal tunnel syndrome.

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FILED

JUN 27 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TERRY L. KOLLN,	:	
Claimant,	:	
vs.	:	File Nos. 782163
FARMLAND FOODS, INC.,	:	816127
	:	816128
Employer,	:	
	:	A R B I T R A T I O N
and	:	
	:	D E C I S I O N
AETNA CASUALTY & SURETY COMPANY,	:	
	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

These are proceedings in arbitration brought by the claimant, Terry L. Kolln, against his employer, Farmland Foods, Inc., and its insurance carrier, Aetna Casualty & Surety Company, to recover benefits under the Iowa Workers' Compensation Act as a result of injuries allegedly sustained on July 13, 1984, November 14, 1984 and January 20, 1986. This matter came on for hearing before the undersigned deputy industrial commissioner at Sioux City, Iowa on February 2, 1988. First reports of injury were filed on January 4, 1988 as regards the alleged July 13, 1984 injury; on December 13, 1984 as regards the alleged November 14, 1984 injury; and, on January 4, 1988 as regards the alleged January 20, 1986 injury. As regards the alleged November 14, 1984 injury, the parties have stipulated that claimant's rate of compensation is $275.42 and that claimant has been paid healing period benefits of $2,373.10 and permanent partial disability benefits of $8,337.15.

The record in this case consists of the testimony of claimant and of Mary Tigges, R.N., as well as of joint exhibits 1 through 35.

ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant's rate of weekly compensation as regards the alleged 1984 injuries is $275.42 and as regards the alleged 1986 injury is $245.86. They further stipulated that the provider of

medical services would testify the fee for such services was reasonable and that defendants are not offering contrary evidence. The issues remaining to be decided are:

1. Whether claimant has received injuries which arose out of and in the course of his employment on the alleged injury dates;

2. Whether a causal relationship exists between claimant's alleged injuries and 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, in whole or in part, of Dr. Blume's charges for an independent medical examination under Iowa Code section 85.39.

REVIEW OF THE EVIDENCE

Claimant's date of birth is June 27, 1951. He is a high school graduate who also completed an 18-month course in aviation mechanics. He has been federally certified in aviation mechanics, although his certification is not now in effect. Claimant has never worked as an aviation mechanic. Claimant has worked as a farmer with his father; as an upholsterer and upholsterer's helper; as a laborer in a hide plant; and, as a laborer at Farmstead Foods. Claimant has also owned and continues to operate his own upholstery business.

Claimant reported that, on July 13, 1984, he was working as a forker on the 25-pound HRI line. He described the forker as having an approximately 18-inch long prong with which to scoop up 5-pound sections of bacon. He reported that the laborer then turned and twisted from the waist while sliding the bacon into a box. Glands were also picked out of approximately 50% of the slices. The individual must raise his arms above shoulder height and then slide down to turn the bacon into the box. The full box then slides down the line. The left arm is used on the opposite side of the table where substantially the same procedure is followed.

Claimant reported that, on July 13, 1984, he had neck pain such that he reported to the nurse's station and received aspirin. He indicated that his foreman threatened to fire him if he were off the line for any length of time, even though a cooler was also blowing on his neck. A nursing note which Mary Tigges, R.N., occupational health nurse for Farmland Foods, identified as her own for July 13, 1984 indicates that claimant complained of a sore neck and claimed he needed to work twice as hard since he was training a new scooper. Claimant took two acetametaphine tablets and was given two to take later. According

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to the report, claimant refused referral to a doctor if the doctor was only to describe muscle relaxants. Claimant subsequently saw R. M. Mason, M.D., on his own. Dr. Mason took claimant off work for two days with a work return of July 19, 1984. Claimant reported that he then took no aspirins or other medication for his neck, although he did receive medication for his hands.

Claimant reported that, on November 14, 1984, he was either working as a scooper, a handler, a bacon grader or packing off. Claimant described each process and each involved repetitive hand movements over the course of an eight-hour day. Claimant indicated that his fingers began to swell and that he lost dexterity. He saw Donald Soll, M.D., who prescribed acetametaphine and a splint. Claimant returned to work and reported a gradual worsening of his hand symptoms. He subsequently saw Dr. Mason who referred him to John Green, M.D. Dr. Green performed electromylographic studies and, subsequently, bilateral carpal tunnel releases; right release on February 7, 1985 and left release on March 7, 1985. Claimant returned to work approximately eight weeks following his releases and was comfortable until three or four months subsequent to his work return, at which time he experienced bilateral swelling of his hands. Claimant reported that he then saw Dr. Green in January, 1986. Anti-inflammatories were prescribed. Claimant ceased to use them as they upset his stomach. In February, 1986, Chester Thompson, M.D., evaluated claimant. Dr. Thompson recommended claimant work in a warmer environment in a job requiring less speed and repetition. Dr. Thompson felt that claimant's index finger [injury] had resulted in permanent injury, but that claimant's hand and wrist swelling as well as his numbness would markedly improve with a change in claimant's environment. Dr. Thompson indicated that, as of March 17, 1986, claimant had a 20% permanent partial impairment of the right hand and a 15% permanent partial impairment of the left hand.

On January 20, 1986, claimant reported that he experienced problems with his left hip and left arm and shoulder numbness while either working in scooping or packing off. Claimant stated that he used BenGay and aspirin for those conditions as advised by the plant nurse. He also saw Robert Soll, M.D., who reportedly attempted manipulation and flexiral. On February 8, 1986, Dr. Soll reported that radiographic x-rays obtained showed claimant had a narrowed C5-6 disc space. Dr. Soll apparently referred claimant to Alan Frion, M.D., a neurologist. Dr. Frion reported that claimant's neurological examination with respect to his upper extremities was within normal limits and that claimant had a relatively free range of motion of the cervical spine when examined. Dr. Frion opined that claimant's pain was related to his spur formations seen on radiographs, but that examination did not show hard evidence of radiculopathy or decrease in cervical mobility. The doctor stated that he felt chances that claimant's arthritic process was self-limiting were

fairly good and that there was no current evidence of a need for surgical intervention. The doctor advised claimant to take aspirin on a regular basis for a week or two to determine whether such would reduce his general level of neck discomfort.

The insurer subsequently referred claimant to John J. Dougherty, M.D. Dr. Dougherty, of Orthopaedic Associates of Sioux City, P.C., saw claimant on October 2, 1986 and reported on October 31, 1986 that claimant presented a markedly degenerative disc at C5-6 with marked spur formation. He indicated that, upon examination, claimant's range of motion was really fairly good with only minimal discomfort with rotation to the right. The doctor reported that claimant did not appear to have neurological problems, but indicated that claimant might develop such in the future because of marked spurring of the foramina. He reported claimant as having scoliosis and increased kyphosis. The doctor indicated that claimant had good strength in his hand, although he may have a bit of thenar atrophy on the right. The doctor opined that claimant probably developed carpal tunnel syndrome from the repetitive work he was doing and that the carpal tunnel releases appeared to have been successful. He opined that claimant was entitled to two- to three-percent permanent partial impairment to his upper extremities as a result of his carpal tunnel releases. He indicated claimant's hands did not look swollen, that his joints looked okay and that his range of motion was good. The doctor opined that claimant's neck condition did not appear to be related to claimant's work, but was the result of an old, long-standing injury which claimant may or may not remember. The doctor indicated that claimant's upholstery work was not harder than his work at Farmland and may have been the precipitating cause [of claimant's neck condition] before claimant ever worked for Farmland.

In March, 1987, claimant's counsel referred claimant to Horst Blume, M.D., a neurosurgeon. Dr. Blume agreed that claimant's permanent partial impairment should be 20% of the right hand and 15% of the left hand per Dr. Thompson. The doctor opined, based upon information in the claimant's history and medical reports as well as his own examination, that claimant's bony spur formation as well as his degenerative disc disease developed during claimant's work at Farmland Foods and that irritation of the rami dorsalis of the posterior nerve roots of the intervertebral joints of the mid lower cervical spine on the right, with suspicion of intermittent lower cervical nerve root irritation, was an aggravation of a preexisting condition. He reported that claimant had shoulder and arm pain as well as previously reported neck pain. He opined that claimant's permanent partial impairment was 10% of the body as a whole as a result of his cervical spine condition. Dr. Blume advised that claimant have a myelogram and CT scan before "proper treatment" was initiated. Dr. Blume's charges were as follows:

Comprehensive office visit of March 16, 1987	$150.00
EMG of March 17, [sic] 1987	190.00
Office visit of April 1, 1987	50.00

On March 16, 1987, claimant was self-employed in his upholstery shop and was not working elsewhere.

Claimant reported that, at times, he limped at work as a result of a dull, aching pain in his left hip. He reported that he took up to six aspirins per day for that condition. Claimant last treated for neck pain in February, 1986 with Dr. Soll.

Claimant initially testified that he was terminated on June 9, 1986 after he had had too many doctor visits scheduled. He later stated that the plant supervisor indicated his termination resulted from claimant's failure to seek other jobs in the factory after Dr. Thompson had recommended claimant not continue working in his present job. Claimant reported that he lacked the seniority for other jobs and that the union bidding system in effect prevented the employer from assigning him to jobs within Dr. Thompson's restrictions.

Claimant reported that he has not found other employment since his June 9, 1986 termination. He has continued in his upholstery business which he characterized as part-time. Claimant agreed that, from November, 1987 through Christmas, he had an increase in that business. He characterized January and February as slow months in the upholstery business. Claimant agreed that he is under grand jury indictment for selling drugs.

Claimant testified that he continues to have loss of finger and hand dexterity with a decrease in strength in his arms and wrists. He reported that his neck is stiff with limited range of motion in cold weather.

Claimant agreed he had had a motorcycle accident in July, 1983. He was bounced off his motorcycle and thrown over the hood of a car. Claimant stated the injury was primarily to his right lower calf with some right hip pain. Claimant is not claiming a hip injury. Claimant could not recall having had upper back and shoulder blade tenderness as reported in an outpatient record of July 14, 1983. Claimant denied having been involved in auto accidents when questioned as to such by Dr. Mason on July 19, 1984 and by Dr. Dougherty on October 28, 1986. Claimant stated it was possible he had had finger swelling and splinting per Dr. Soll in March, 1984. He indicated it was also possible that his right wrist complaints of October, 1984 were similar to the problems of March, 1984.

On July 19, 1984, Dr. Mason reported that claimant was seen as a result of a sprained neck which occurred while working on July 13, 1984. On October 8, 1984, Dr. Soll placed claimant on

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anti-inflammatories for one week for strain of his right forearm tendons. On November 14, 1984, Dr. Mason diagnosed bilateral carpal tunnel syndrome. On January 11, 1985, Dr. Green reported claimant's account of his accident as repetitive flexion and extension of the wrist causing bilateral carpal tunnel syndrome.

On August 25, 1987, Edward M. Schima, M.D., a board-certified neurologist, reported that, on examination of August 4, 1987, claimant did not have objective weakness or reflex change. His complaints were entirely subjective. He suspected that claimant's carpal tunnel syndrome was related to repetitive work at Farmland Foods, but that claimant's neck problem was a preexisting condition. The doctor estimated claimant's permanent "disability" as two to three percent of the hands and his cervical [apparently permanent disability] at five percent. The doctor reported that claimant may require further study including a CT scan of the cervical spine to help delineate the extent of neck problems.

In his deposition of January 11, 1988, Dr. Schima opined that claimant's upholstery work may have contributed to his carpal tunnel, but [had not likely contributed] to claimant's other conditions. The doctor reported that getting older is one cause of spur formation in the cervical area, but stated that trauma can also cause or accelerate the condition. He opined that there could be multiple causes for claimant's neck pain and that it was possible his job caused the pain.

Claimant testified that the upholstery business involves keeping books, doing orders and operating a heavy-duty sewing machine, a buttonholer and a foam shredder. Claimant advertises his upholstery business in the telephone directory serving Charter Oak, Denison and Dow City, Iowa.

APPLICABLE LAW AND ANALYSIS

Our first concern is whether or not claimant received an injury which arose out of and in the course of his employment. In his petition, claimant alleges an injury date of November 14, 1984 with injury resulting from repetitious use of both hands. The Iowa Supreme Court upheld the theory of cumulative trauma as appropriate in factually appropriate workers' compensation claims in McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). As claimant alleges a cumulative injury, the subissue of causal connection becomes intertwined with the broader issue of whether claimant received an injury which arose out of and in the course of his employment.

Claimant has the burden of proving by a preponderance of the evidence that he received injuries on July 13, 1984, November 14, 1984 and January 20, 1986 which arose out of and in the course of employment. McDowell v. Town of Clarksville, 241 N.W. 2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa

352, 154 N.W.2d 128 (1967).

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

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

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

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

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971), Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury....The result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.
>
> ....

> A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

The claimant has the burden of proving by a preponderance of the evidence that the injuries cited above 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).

At hearing, claimant testified that work processes in which he was involved on or about November 14, 1984 consisted of repetitive hand movements during an eight-hour day and that, during this time, he experienced a swelling in his hands and loss of finger dexterity. Dr. Soll apparently prescribed acetametaphine and hand splints. Dr. Green conducted EMG studies and, on January 11, 1985, noted an impression that claimant had bilateral carpal tunnel syndrome. Carpal tunnel releases were subsequently performed on the right on February 7, 1985 and on the left on March 7, 1985. Dr. Thompson, who examined claimant in early 1986, advised claimant to work in a warmer environment in a job requiring less speed and repetition. That advice suggests that Dr. Thompson believed there was a

relationship between claimant's job and his hand condition. Dr. Dougherty expressly opined that claimant's carpal tunnel syndrome was a function of his repetitive work at Farmstead Foods. On January 11, 1985, Dr. Green indicated that, per claimant's self-report, repetitive flexion and extension of his wrists had produced carpal tunnel syndrome. Dr. Schima suspected that claimant's carpal tunnel syndrome related to his repetitive work for Farmstead, although claimant's upholstry work may have contributed. All of the above demonstrates that claimant's carpal tunnel syndrome was an injury which arose out of and in the course of his employment with Farmstead Foods and that such injury and subsequent surgery has produced claimant's claimed disability to his hands. The parties have stipulated that claimant had been paid healing period benefits of $2,373.10. There apparently is no claim for further healing period benefits. The parties further stipulated that claimant has already received permanent partial disability benefits at the appropriate rate and in the amount of $8,337.15. At the appropriate rate of $275.42, such would equal 30.270 weeks of permanent partial disability benefits.

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).

An injury to the wrist is generally considered to result in disability to the hand rather than to the upper extremity, that is, the arm. Elam v. Midland Manufacturing, II Iowa Industrial Commissioner Report, 141 (App. Decn. 1981).

Section 85.34(2) compensates for various enumerated injuries as follows:

l. For the loss of a hand, weekly compensation during one hundred ninety weeks.

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

....

s. The loss of both arms, or both hands, or both feet, or both legs, 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.

Webster's Ninth New Collegiate Dictionary, defines an accident as an unforeseen and unplanned event and as an unexpected happening causing loss or injury which is not due to any fault or misconduct on the part of the person injured, but for which legal relief may be sought.

In cases of doubt as to workers' compensation cases, the court must construe statutes liberally with a view to extending aid to every employee who can be fairly brought within them. Usgaard v. Silver Crest Golf Club, 127 N.W.2d 636 (Iowa 1964).

Initially we are concerned with the situs of claimant's scheduled injury. The greater weight of medical references are to the hand and to impairments in the fingers, wrist or hand and not to the upper extremity or arm. That finding suggests that claimant's injury is properly located in the wrist or hand region. We next must consider whether claimant's injury is properly compensable under section 85.34(2)(1) or section 85.34(2)(s). As noted above, on January 11, 1985, Dr. Green's impression was of bilateral carpal tunnel syndrome. Claimant's surgeries were performed within four weeks of each other. Past experience with carpal tunnel injuries has led the undersigned to believe that it is common to schedule bilateral releases sequentially, although within a short time frame, in order to avoid total disablement of both hands simultaneously on the part of the injured party. The overall sequence of claimant's complaints suggests that his conditions in both hands developed simultaneously and not sequentially. The fact that surgeries were scheduled within four weeks of each other also suggests such. We believe that the sequential scheduling of surgeries in such close proximity is not sufficient to remove claimant's claim from the additional benefits possible under section 85.34(2)(s) where the medical evidence as a whole suggests that claimant's condition was a bilateral injury resulting from repetitive, work-related trauma. (As set forth above, an accident need not be one happening. It is the unforeseeableness and the absence of fault or misconduct on the part of the injured person which is commonly understood to produce an accidental happening.)

We finally consider claimant's actual disability entitlement on account of his bilateral carpal tunnel syndrome. In February, 1986, Dr. Thompson rated claimant's permanent partial impairment

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as 15% of the right hand and 20% of the left hand. Dr. Thompson then noted it was likely that claimant would have a marked improvement in his hand condition with a change in his environment and a decrease in repetitive movements. Dr. Blume, who evaluated claimant during and after March, 1987, agreed with Dr. Thompson. Dr. Dougherty saw claimant in October, 1986 and then reported that claimant had a two- to three-percent impairment of his upper extremities. He indicated that claimant's hands did not look swollen, that his joints were okay and that claimant had good range of motion. Dr. Schima evaluated claimant on August 25, 1987. He then stated that claimant's impairment was two to three percent of the hands. Claimant was terminated on June 9, 1986. Hence, the Blume, Dougherty and Schima evaluations were all subsequent to claimant's termination and at a time when claimant had had a change from his environment during which he was evaluated by Dr. Thompson. Dr. Dougherty is an orthopaedist; Dr. Schima is a neurologist; and, Dr. Blume is a neurosurgeon. Drs. Dougherty and Schima arrived at independent impairment ratings after independent evaluations. As defendants noted in their brief, neither summarily adopted the other's evaluation. We note that that fact also lends credibility to their evaluations. We note that it is of little significance whether we adopt Dr. Dougherty's or Dr. Schima's impairment ratings, even though Dr. Dougherty references impairment to the upper extremity and Dr. Schima references impairment to the hand. Two percent of the hand, under the AMA guides, is equal to two percent of the upper extremity. Three percent of the hand, under the AMA guides, is equal to three percent of the upper extremity. We have already decided that, under Iowa law and the facts of this situation, claimant's impairment is to the hand, but must be evaluated under secton 85.34(2)(s). When the impairments are construed in the light most favorable to claimant, it is found that claimant, at best, has an impairment of three percent of each hand. As noted, three percent of a hand equals three percent of the upper extremity and, under the AMA guides, three percent of the upper extremity equals two percent of the body as a whole. Under the AMA guides' combined values charts, two percent of the body as a whole, when combined with another two percent of the body as a whole, equals a four percent body as a whole permanent partial impairment. A four percent body as a whole impairment equals 20 weeks of benefits under section 85.34(2)(s). Claimant has already received substantially greater than that amount of benefits on account of his November, 1984 injury. For that reason, claimant is not entitled to further benefits in this proceeding.

We next consider the questions raised by claimant's alleged injuries of July 13, 1984 and January 20, 1986.

Initially, we note that the law as to the issues of arising out of and in the course of and as to causal relationship between any claimed injury and any alleged disability are as set

forth above in regard to claimant's carpal tunnel syndrome with the exception of the following:

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 expert's opinion based on an incomplete history is not necessarily binding on the commissioner, but must be weighed with other facts and circumstances. Musselman v. Central Telephone Co., 261 Iowa 352, 360, 154 N.W.2d 128, 133 (1967).

Claimant alleges a work incident on July 13, 1984 when he experienced neck stiffness and pain and had cold air blowing on his neck. Claimant apparently left work that day. It is unclear whether claimant left voluntarily or left as a result of a suspension for throwing meat. Nurse's notes do reflect the neck stiffness of that date and that claimant refused to see a doctor as of that date. Claimant voluntarily saw Dr. Mason, apparently his own physician, on July 19, 1984. Dr. Mason reported a neck sprain of July 13, 1984 while at work. The above suggests that claimant did experience neck pain at work on July 13, 1984. The question remains as to whether such related to work or as to whether such resulted in an injury as contemplated under our workers' compensation act, however. Claimant further testified that, on January 20, 1986, he experienced left arm and shoulder numbness while working in either scooping or packing off. Claimant was apparently off work again at that time, but as defendants point out in their brief, it is unclear as to whether he was off for flu or for neck symptoms. Hence, again, while claimant may well have experienced numbness as of that date, the question remains as to whether his experience at work was an injury within our act. To ascertain such, we must look at the medical causation questions. Dr. Blume, who examined claimant in March, 1987, relates claimant's degenerative disc disease and spur formation to claimant's work at Farmstead and reports that there is an irritation of the nerve roots which is an aggravation of a preexisting condition. We find Dr. Blume's opinion testimony confusing at best. Dr. Schima, who examined claimant in August, 1987, opined that his neck problems were a preexisting condition and indicated that there could be multiple causes for neck pain, including aging and trauma. He did state that claimant's job was a possible cause of neck pain. Dr. Frion, who examined claimant early on, found that claimant's neurological examination, with respect to his upper extremities, was within normal limits and that claimant had relatively free range of

motion of the cervical spine. The doctor related claimant's pain to spur formations seen on radiographs. He described claimant's condition as an arthritic process which was likely self-limiting with no current evidence of a need for surgical intervention. Dr. Frion's remarks suggest a long-standing condition such as Dr. Schima opined. Dr. Dougherty, who examined claimant in October, 1986, opined that claimant's neck condition did not appear to be work-related. He reported that the condition likely resulted from an old injury which claimant may or may not remember. Dr. Dougherty further opined that claimant's extensive work as an upholsterer may have been a precipitating cause of the neck condition before claimant began work at Farmstead. We note that claimant did have a motorcycle accident in July, 1983 in which he was thrown from his motorcycle and over the hood of a car. Claimant denied having had any motor vehicle accidents to both Drs. Dougherty and Mason. We find claimant's express denial of any motor vehicle accidents troubling. Coupled with claimant's overall demeanor at hearing, it leaves us to believe that claimant was not an altogether credible witness. We adopt the opinions of Drs. Dougherty and Schima that claimant's condition was preexisting as such would be consistent with claimant's previous motor vehicle accident, the degenerative nature of his disease and the work in which claimant was engaged prior to his Farmstead employment. We find that, while claimant may well have had neck pain on July 13, 1984 and arm and shoulder numbness on January 20, 1986, both at work, neither condition was so related to work as to suggest that the conditions were a work injury which arose out of and in the course of claimant's employment.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant was involved in work on or about November 14, 1984 which involved repetitive hand movements during an eight-hour work day.

Claimant experienced swelling in his hands and a loss of dexterity.

Claimant was treated medically with acetametaphine and hand splints.

Electromyelographic studies indicated claimant had bilateral carpal tunnel syndrome.

That condition was diagnosed on January 11, 1985.

Carpal tunnel releases were performed on the right and the left on February 7, 1985 and March 7, 1985, respectively.

Claimant had past experience, both full-time and part-time in his own upholstery business.

Upholstery work also involves hand motion.

Repetitive work at Farmstead Foods was a substantial factor in the development of claimant's bilateral carpal tunnel syndrome.

Claimant's medical symptoms and impairment were confined to the hand and wrist.

Claimant's carpal tunnel syndrome was a single, unforeseen occurrence or event.

Claimant's hand condition, as of February, 1986, was likely to markedly improve with a change in claimant's environment.

Claimant was terminated from Farmstead Foods on June 9, 1986.

Dr. Dougherty examined claimant in October, 1986; Dr. Blume examined claimant in March, 1987; and, Dr. Schima examined claimant in August, 1987.

Upon examination by Dr. Dougherty, claimant's hands were not swollen and he had good range of motion.

Dr. Schima's examination was most recent and most reflective of claimant's current condition.

Claimant's impairment is approximately three percent of each hand.

Three percent of each hand equals three percent of the upper extremity and equals two percent impairment of the body as a whole.

Two percent impairment of the body as a whole combined with two percent impairment of the body as a whole equals four percent impairment of the body as a whole under the AMA Guides to the Evaluation of Permanent Impairment.

Claimant experienced neck stiffness on July 13, 1984 while at work while cold air was blowing across his neck.

Claimant experienced left arm and shoulder numbness while working on January 20, 1986.

Claimant had degenerative disc disease with bony spurring in the cervical area.

Claimant had worked for over a decade, either part-time or full-time, as either an upholsterer's helper or in his upholstery

business.

Claimant had had a motorcycle accident in July, 1983 in which claimant was thrown from his motorcycle and over the hood of a car.

Claimant did not relate the accident to medical examiners and expressly denied having had any motor vehicle accidents to Drs. Dougherty and Mason.

Claimant lacked credibility.

Claimant's neck problems and any cervical condition were preexisting conditions, not related to work at Farmstead.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has shown an injury which arose out of and in the course of his employment on November 14, 1984.

Claimant has shown a causal relationship to that injury and his claimed disability as a result of his bilateral carpal tunnel syndrome.

Claimant is entitled to compensation for his bilateral carpal tunnel syndrome under section 85.34(2)(s).

Claimant is entitled to permanent partial disability on account of his bilateral carpal tunnel syndrome equal to four percent of the body as a whole or 20 weeks of permanent partial disability benefits.

Defendants are entitled to credit for benefits previously paid.

Claimant has not established an injury which arose out of and in the course of his employment on July 13, 1984.

Claimant has not established an injury which arose out of and in the course of his employment on January 20, 1986.

Claimant has not established a causal connection between the claimed work incidents of July 13, 1984 and January 20, 1986 and any claimed disability.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits

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for twenty (20) weeks at the rate of two hundred seventy-four and 42/100 dollars ($274.42) on account of his November 14, 1984 injury. Defendants take credit for benefits previously paid, which credited benefits are in excess of the twenty (20) weeks to which claimant is entitled.

Claimant take nothing from these proceedings relative to his claimed injuries of July 13, 1984 and January 20, 1986.

Claimant pay costs of these proceedings pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 27th day of June, 1988.

Helenjean Walleser

HELENJEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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Filed May 18, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELLEN S. KRIEGER, Claimant vs. MENTAL HEALTH INSTITUTE, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	:	FILE NO. 635312 R E V I E W - R E O P E N I N G D E C I S I O N

1800 - Change of Condition

Claimant in a review-reopening proceeding from a prior award failed to demonstrate a change of physical or non-physical change of condition and additional disability benefits were denied.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ELLEN S. KRIEGER,	:	
	:	
Claimant,	:	
	:	FILE NO. 635312
vs.	:	
	:	R E V I E W -
MENTAL HEALTH INSTITUTE,	:	
	:	R E O P E N I N G
Employer,	:	
	:	D E C I S I O N
and	:	
	:	FILED
STATE OF IOWA,	:	
	:	MAY 18 1988
Insurance Carrier,	:	
Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in review-reopening brought by Ellen S. Krieger, claimant, against the Iowa Mental Health Institute, an agency of the State of Iowa, employer, for the recovery of additional workers' compensation benefits as a result of an injury on June 6, 1979. A prior review-reopening decision for this injury was filed on July 15, 1983. On March 4, 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. Oral testimony was received during the hearing from claimant and her husband, Jerry. The exhibits received into the evidence at the hearing are listed in the prehearing report.

In the last review-reopening proceeding for weekly permanent disability benefits, a deputy industrial commissioner found claimant to have suffered a 25 percent industrial disability as a result of the work injury and weekly benefits were awarded accordingly. This decision was not appealed and became the final agency decision.

ISSUE

The only issue submitted by the parties is the extent of claimant's entitlement to additional weekly compensation benefits for an alleged change of condition.

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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 testified that at the time of the last hearing on June 23, 1983, her back had improved and remained constant in this improved state until May or June of 1984. At that time she claims in this proceeding that her back worsened without any precipitating injury. When this back condition worsened she returned to Alfred Savage, D.O., the original treating orthopedic surgeon. According to claimant, Dr. Savage injected her with cortizone on three occasions and eventually referred her to another orthopedic surgeon, Koert Smith, M.D. Dr. Smith hospitalized claimant for approximately a week. According to Dr. Smith, the hospitalization was for the purpose of helping claimant cope with her pain and for bed rest and further tests. Dr. Smith also injected claimant with steroid injections during this hospitalization which improved claimant's condition according to his office notes. Claimant testified that she did get some relief from Dr. Smith's treatment in the hospital but that she had lost the feeling in her right foot for almost a year after this episode. She states that the feeling has now returned.

Claimant testified that she must limit the amount of household work she can perform and that her husband vacuums the house for her. She states that she cannot perform gardening or canning activities as she once did. She states that she is "somewhat worse" than she was at the time of the last hearing in June of 1983. For example she stated that on the Sunday before the hearing in this case she could not place a 16 pound ham into her oven. She said that she could have done this in June of 1983. She said that she spends 10 days every month in her bed due to back and leg pain. She explained that she has not returned to Dr. Smith recently because all of the doctors in this case continually prescribe the same treatment; bed rest and use of Tylenol. She feels that she simply continues to do this each time she has episodes of pain. Finally, claimant complained that she was unable to live the lifestyle that she once had due to her low back pain.

Claimant's husband testified that he thought she was doing better but that after the last hearing she had a set back and

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then she has not recovered from the set back. He said that there were many things she could no longer do such as riding in a boat and tieing shoes for their boys. He said that she is down more days in a month than she was in 1983 and that he does not know how she could hold a job.

With reference to claimant's employment status since the last hearing, claimant remains unemployed. Claimant said that she has applied for jobs but has not been hired except for a job in 1986. This job consisted of affixing labels on items at home. Claimant was paid a piece work rate for this work. She said that she could not perform this job because she could not lift the boxes although she could perform the labeling work. She currently is doing volunteer work at a local school as a teacher's aid. She spends one and a half to two and a half hours per day over three days a week. She stated that she hopes that this activity will eventually lead to employment at the school.

In cross-examination, claimant admitted that she was unable to find work at the time of the last hearing. She also admitted to difficulties in every day activity such as riding in a boat and performing housework at the last hearing. She admitted that she was advised by Dr. Savage before the last hearing not to work outside the home and that she felt in 1983 that she could not work five days a week.

In August, 1985, Dr. Smith rated claimant's current permanent partial impairment as constituting a 20 percent permanent partial impairment to the body as a whole under the guidelines contained in the manual for orthopedic surgeons published by the American Association of Orthopedic Surgeons. Dr. Smith states as follows in his January, 1985 report:

> It is my opinion that Ellen Krieger's present symptoms are related to her previous work injury. The reason that people have laminectomies and persistent radicular symptoms are given a 25% impairment is because intermittently they will have acute episodes such as Mrs. Krieger just experienced. She has had no new injury and her present symptoms are very typical of post laminectomy recurrent sciatica. It is my opinion that she has not increased her permanent impairment rating, I would think a 25% permanent impairment rating would be appropriate and consistent with her present and past history and symptoms. She was last seen on 12-7-84 and at that time was up nearly all day; although she would usually rest a couple hours in the afternoon. She is able to do light housework except any vacuuming and other heavy activity. She is still wearing her corset full time but basically was improving.

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CONCLUSIONS OF LAW

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

In the case sub judice, claimant has not shown a change of condition either physical or non-physical. Her testimony and that of her husband that she is worse is simply not substantiated by the medical evidence and such a question is largely a matter of medical opinion. Neither claimant nor her husband are medical experts. The difference between the rating of permanent partial impairment in the last review-reopening proceeding and Dr. Smith's rating in this case appears to be simply a difference of opinion as to the rating of claimant's condition which has not changed since 1983. Smith agreed that her condition has not changed in his January, 1985, letter report. The fact that she has experienced an episode of significant back pain in 1985 is simply consistent with the views of Dr. Savage at the last hearing in 1983 that claimant will continue to experience episodes of back difficulty for the rest of her life. Also, her work restrictions are unchanged. She still should avoid heavy lifting and repetitive bending.

Claimant's employment situation also has not changed. She remains unemployed. Although deputy commissioners can differ as to the extent of claimant's industrial disability in 1983, she was not able to return to work in 1983 and this remains true today. This judge cannot simply overturn a prior final agency decision without a showing of a significant change in condition.

Although claimant did not prevail in this proceeding her claim was argueable and her testimony and that of her husband appeared to be sincere. Therefore, she will be awarded the costs of this action.

FINDINGS OF FACT

1. Claimant was a credible witness.

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2. In the spring and summer of 1985, claimant experienced a significant recurrence of low back pain and leg pain requiring hospitalization and medical treatment consisting of bed rest and other pain relief modalities. The recurrence of pain was caused by the original work injury of June 6, 1979.

Claimant has not established by the evidence that her current condition has changed since the last hearing of June, 1983. She continues to experience recurrent episodes of low back pain requiring bed rest and medication. Claimant continues to experience difficulties with housework and with everyday life activities. She continues to have difficulty with heavy lifting repetitive lifting and prolonged walking. She continues to be unemployed since the last hearing.

CONCLUSIONS OF LAW

Claimant has not established by a preponderance of the evidence entitlement to additional permanent partial disability benefits.

ORDER

1. Claimant shall take nothing from these proceedings.

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

Signed and filed this 18 day of May, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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000967

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DARRELL L. LEAMING, Claimant, vs. TOM BORNHOLTZ d/b/a SIOUX SALES COMPANY, Employer, and CITIZENS SECURITY MUTUAL INSURANCE, Insurance Carrier, Defendants.	:	FILE NO. 818155 A R B I T R A T I O N D E C I S I O N FILED APR 20 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Darrell L. Leaming, claimant, against Tom Bornholtz d/b/a Sioux Sales Company, employer (hereinafter referred to as Sioux Sales), and Citizens Security Mutual Insurance, insurance carrier, for workers' compensation benefits as a result of an alleged injury on February 27, 1986. On January 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: Judith Leaming and Harry Bornholtz. The exhibits received into the evidence at the hearing are listed in the prehearing report except as otherwise stated below. According to the prehearing report, the parties have stipulated to the following matters:

1. On February 4, 1986, claimant received an injury which arose out of and in the course of his employment with Sioux Sales. (February 27, 1988 was first date of disability).

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $264.58.

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3. Claimant is only seeking temporary total disability or healing period benefits from March 1, 1986 through August 12, 1986; August 22, 1986 through March 1, 1987; and, March 3, 1987 through May 11, 1987. Defendants agree that claimant was not working during these periods of time.

4. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

5. The medical bills submitted by claimant at hearing were fair and reasonable and causally connected to the medical condition upon which the claim herein is based but that the issue of their causal connection to any work injury remains an issue to be decided herein.

Taken under advisement at hearing were objections to exhibits 7A and defense exhibit A. Defendants object to the opinion letter of Richard Adams, M.D., exhibit 7A, on the grounds of lack of foundation, competency, relevancy and, under Chapter 17A, Code of Iowa, as not being the type of evidence a reasonably prudent person would rely upon in the conduct of his/her important affairs. This objection is overruled. The heresay nature of the evidence was overcome by claimant's compliance with agency rules regarding service of such evidence upon defendants before the hearing. Defendants had ample opportunity to cross-exam Dr. Adams prior to hearing. With reference to competency and foundation, it must be noted that the evidence of Dr. Adams' background and qualifications to render a pathology report was lacking but that it is also noted that Dr. Adams is a pathologist at the Iowa Methodist Medical Center in Des Moines, Iowa. Dr. Carlstrom, whose qualifications as a neurosurgeon were not questioned by defendants, is a staff doctor at the Iowa Methodist Medical Center in Des Moines, Iowa. In Dr. Carlstrom's deposition testimony he found no problem with Dr. Adams' qualifications in giving weight to his opinions. Furthermore, written reports from staff pathologists certainly are the type of evidence that physicians rely upon in the course of their treatment of patients at the Iowa Methodist Medical Center and certainly the type of evidence permissible under Iowa Code section 17A.14. Therefore, exhibit 7A is received into the evidence.

Claimant objects to defense exhibit A on the same grounds raised by defendants in their objections to exhibit 7A. However, this objection is sustained and exhibit A will be excluded from the evidence. The exhibit appears to be nothing other than a summarization or paraphrasing of some of the medical evidence in this case. As it is not complete as to all of the medical evidence, it frankly is not reliable and should be excluded for the reasons stated by claimant in his objections. Therefore, exhibit A is excluded from the evidence. However, despite being excluded from the formal evidence, the content of the exhibit

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was reviewed and considered in the same manner as would be "argument" in the same fashion as defendants' post-hearing brief and summarization of evidence was considered in arriving at this decision.

ISSUES

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

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

II. The extent of weekly disability benefits to which claimant is entitled; and,

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

SUMMARY OF THE EVIDENCE

The following is a summary of 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 has worked for Sioux Sales since 1984 as a traveling salesman of law enforcement equipment and goods. Claimant continues in this work activity at the present time. Claimant resides in Des Moines and each week he drives his automobile to all areas of the state and adjacent areas of bordering states in the course of his sales work. Claimant testified that he is successful in this work and to date he earns approximately the same amount of money he earned at the time of the work injury in this case. Claimant's supervisor, the owner of Sioux Sales, testified that claimant has been a good salesman for his company and remains to be so at the present time.

The facts surrounding the work injury are not in real dispute. Claimant testified that on February 4, 1986, he was on the road in the course of his sales activity. Claimant testified that on the evening of February 4, 1986, while walking from his motel room to the motel office to cash a check prior to going out for evening supper, he slipped and fell on ice on the motel sidewalk striking the upper left side of his forehead, cutting his scalp just above the left eyebrow. Claimant said that he

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to these normal x-rays Dr. Disbro opines that the compression fractures in claimant's spine occurred sometime between August 23, 1986 and claimant's hospitalization in March, 1987. Claimant did not report any seizure falls during this period of time to his physicians or at hearing. Claimant denies any back problems prior to the Waterloo incident.

The fighting issue in this case was the alleged causal connection between claimant's fall on February 4, 1986 and claimant's brain hemorrhage and corrective surgery. The neuro-surgeon who performed the corrective brain surgery, Dr. Winston, has opined that he does not believe that the fall was related to the events leading up to the surgery. However, upon closer scrutiny in his deposition testimony, Dr. Winston's views were very unclear. He stated that he believes that the condition was caused by trauma from some recent falls but the only history given to him by claimant prior to the surgery was the February 4, 1986 fall. Dr. Winston states as follows in his deposition:

> A. It was my opinion, based upon the surgical findings, that the fall of 2/4/86 had nothing to do with my surgical findings of the day I operated on the patient, had nothing whatever to do with any of that other information, had strictly to do with what I was looking at.

When asked if it were his opinion that there was no causal connection between the fall and the brain hemorrhage, Dr. Winston states as follows:

> A. Well, I think that's stretching it a point. Because we're talking about several things here, so I'm not sure I can answer your question. It was given -- I was given the impression and made the speculation in my letter of May 12th, 1986 to Doctor Hostetter and sent a copy to Doctor Shreck that if there was in some hematologic mechanism, which I am not an expert in, some kind of traumatic incident that occurred three or four weeks before, and that this set off an abnormality, that then there might have been some credence to having what occurred then three to four weeks later to Mr. Leaming -- that that, in fact, might have been the case.
>
> The letter that I reviewed at the request of counsel seemed to indicate that this indeed was the case, and therefore my letter agreeing with that opinion is based on my agreement with someone who has expertise in the area of hematology, which I do not have.

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Robert R. Schreck, M.D., a hemologist, to which Dr. Winston refers to in the above passages, had examined claimant when he first arrived at Mercy prior to the brain surgery. Blood tests at that time indicated to Dr. Schreck that claimant had a borderline level of factor IX in his blood, a clotting agent. Claimant also had a prior diagnosis of Christmas disease, a form of mild hemophilia from a factor IX deficiency. Dr. Schreck opined initially that the February 4, 1986 fall combined with claimant's blood disorder precipitated the hemorrhage and surgery. Dr. Winston defers to Dr. Schreck as to the effect of claimant's blood disorder on the hemorrhage later in the month of February. However, what was confusing to Dr. Winston was that Dr. Schreck has most recently opined that claimant does not have such a blood disorder. However, despite his change of opinion as to the condition of claimant's blood, Dr. Schreck still maintains that there is a causal relationship between the fall early in February and the events later in February leading up to the brain surgery. He explains in his deposition that there is simply no other possible cause given his medical school training but that he definitely would defer to neurosurgeons on the matter.

Claimant's treating neurologist, Dr. Adelman, D.O., clearly opines that the February 4, 1986 fall caused the hemorrhaging in claimant's brain which necessitated the emergency surgery in March, 1986. He also opines that claimant's loss of consciousness in May and August of 1986 were "break through" seizures caused by the original fall and the necessary corrective surgery.

Thomas A. Carlstrom, M.D., another board certified neurosurgeon, also issued a causal connection opinion in this case. Dr. Carlstrom testified that he did not examine claimant but he did not feel it necessary to do so to render an opinion in this case. Dr. Carlstrom felt that Dr. Winston's reported surgical findings contained in his records are consistent with a fall several weeks prior to the surgery and that it was his opinion that the February 4, 1986 fall was a cause of the hemorrhaging and brain surgery later in the month.

Finally, in December, 1987, Richard Adams, M.D., a pathologist at the Iowa Methodist Medical Center, issued a report of his examination of tissue samples taken from claimant's brain during the March, 1986, surgery. According to Dr. Adams, he found not only evidence of fresh hemorrhage but also "reactive gliosis" which was a finding compatible with a trauma injury several weeks prior to the acute hemorrhaging episode.

Claimant testified that although he continued to perform very well in his current sales work at Sioux Sales, he states that he is slower mentally then before and must spend more time on each sales call. Claimant's wife testified that claimant has lost emotional response and that "he does not care about things as much as he did before." The only physician to opine as to

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any permanent defects from the brain injury was Dr. deGravelles who opined from psychological testing that claimant has a 20 to 25 percent permanent partial impairment to the body as a whole under AMA Guidelines as a result of his deficits in affect, behavior, thinking and his potential for restoration. Dr. Adelman states that claimant will likely be on anti-seizure medication all of his life and that it is likely that he will have another seizure in the future. Dr. Adelman explains that if he does have another seizure, he will again be prohibited from driving for a six month period.

Claimant continues to complain of back problems and of an inability to lift over 25 pounds. However, he admits that heavy lifting is not a major part of his sales work.

Claimant testified that his past employment primarily consisted of sales work over the last 25 years. Before that, claimant was engaged in many jobs primarily of a physical nature such as construction but that he worked for a short period of time as a bartender.

Claimant stated at hearing that he is 50 years of age. Claimant did not graduate from high school but received his GED in the navy.

The owner of Sioux Sales testified that he is satisfied with claimant's current performance as a salesman and that he has not noticed any change in claimant's ability to do his work since his work injury.

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

APPLICABLE LAW AND ANALYSIS

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

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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, with reference to claimant's brain hemorrhage difficulties, the evidence clearly establishes that he has suffered a permanent impairment to the body as a whole from the hemorrhage and brain surgery in the latter part of February and the first part of March, 1986. The views of Dr. deGravelles were uncontroverted. Defendants take issue with the doctor's use of the AMA Guides but this deputy commissioner is not about to question the doctor's use of the Guides without a contrary medical opinion.

Also with reference to claimant's brain hemorrhage, the greater weight of evidence shows the requisite causal connection between the fall of February 4, 1986 and the permanent partial impairment found by Dr. deGravelles. The opinions of Dr. Winston were certainly important as he was indeed the surgeon. However, his opinions were not consistent with the facts. He believes that claimant's problems were due to the fall but no other history of a fall was given other than the fall on February 4, 1986. Claimant appeared to be credible when he indicated he had no other falls. Also, the doctor was very unclear in his deposition when he tried to explain his views. Likewise, Dr. Schreck's views were somewhat suspect due to his change in opinion as to the claimant's blood disorders. However, the views of Dr. Carlstrom and Dr. Adams were very convincing and consistent with claimant's credible testimony. Of critical importance was the pathology report from Dr. Adams which was

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entirely consistent with a fall several weeks prior to the hemorrhage. Dr. Winston's views were apparently made without the benefit of this pathology report.

With reference to claimant's back problems, the requisite causal connection could not be found. The only medical opinion offered to support the causal connection theory was that of Dr. Disbro and he opined that the compression factors occurred during a period of time in which there were no seizure falls. It is within the specialized experience of this deputy commissioner in deciding hundreds of workers' compensation cases over the last several years, that compression fractures need not be caused by trauma and can be the result of simply belated muscle spasms from a prior work injury. However, without supportive medical opinion in this case basing a causal connection finding simply on such speculation by this deputy commissioner would be wholly improper.

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

Claimant's medical condition before the work injury was excellent and he had no functional impairments or assertainable

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disabilities. Claimant was fully able to intellectually handle his job. Claimant's pace is now slowed and he does not function as well as before. Also, his wife is believed and this deputy commissioner accepts her view that claimant is now somewhat emotionally impaired. However, as pointed out by the defendants pain and suffering and the loss of emotional response is not compensable under workers' compensation law if it does not result in a loss of earning capacity. Only those injuries which affect directly a person's ability to be employed can be compensated. Claimant, in this case, has shown considerably resiliency and is functioning quite well as a result of his serious injuries. Claimant is not restricted at the present time from driving or other physical tasks.

Apart from his lost earnings during his healing period which will be compensated by healing period benefits, claimant has not suffered a significant permanent loss in actual earnings as a result of his disability. However, a showing that claimant had no loss of actual earnings does not preclude a finding of industrial disability. See Michael v. Harrison County, Thirty-Fourth Biennial Report of the Iowa Industrial Commissioner 218, 220 (1979).

Given the above, however, claimant is still in a precarious situation. He remains significantly functionally impaired. Dr. Adelman has opined that it is likely that claimant will experience another seizure in the future. The probability that claimant will suffer such seizures in the future severely effects his employability. Claimant remains functionally impaired to a considered amount according to his rehabilitation physicians. Therefore, despite his currently suitable and stable employment, claimant remains significantly industrially disabled. After examination of all the factors of industrial disability, it is found as a matter of fact that claimant has suffered a 20 percent loss of his earning capacity from his work injury. Based upon such a finding, claimant is entitled as a matter of law to 100 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 20 percent of 500 weeks, the maximum allowable number of weeks 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 he returns to work, until he is medically capable of returning to substantially similar work to the work he was performing at the time of injury, or until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first.

Although claimant did return to work briefly before his last seizure in August, 1986, it was apparent that he had not reached

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maximum healing because of this seizure. Claimant could not reach maximum healing and return to his work at Sioux Sales until he had been seizure free for at least six months. This did not occur until his return to work on May 17, 1986. Consequently, permanent partial disability benefits will begin at that time. Claimant will be entitled to healing period benefits prior to that time.

III. Pursuant to Iowa Code section 85.27, claimant is entitled to an order directing the defendants to pay reasonable medical expenses for treatment of the work injury. Claimant is entitled to an order of reimbursement only for those expenses which he has previously paid. Krohn v. State, ___ N.W.2d ___, (Iowa 1988) Supreme Court decision filed March 16, 1988.

As the back condition was not found work related, the following charges were excluded from the list attached to the prehearing report.

Mercy Hospital	3-9-87	$3,754.09
Dr. Adelman	3/9/87 - 3/18/87	635.00
Tylenol III Drugs	3-7-87	7.87
Total		$4,396.96

Defendants will be directed to pay the balance of the bills listed in the prehearing report either directly to the physicians or medical providers if the bill is unpaid or to claimant or his group insurance carrier if the bill has been paid.

The suit costs requested in the prehearing report by claimant will be awarded to claimant except that it is the policy of this agency that report fees should not exceed an amount that a physician would be paid if he were to testify orally in a deposition or at hearing. Therefore, there is a maximum limit of $150.00 per report.

FINDINGS OF FACT

1. Claimant was a credible witness.

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

3. On February 4, 1986, claimant suffered an injury to the head which arose out of and in the course of his employment with Sioux Sales. While on a road sales trip, claimant slipped and fell injurying his head and other parts of his body requiring medical attention in the form of stitches to close a head wound. The injury set up a mechanism which eventually led to extensive brain hemorrhaging on the left and right frontal areas of claimant's head leading to seizures, loss of balance, gait and loss of mental functions. This condition required emergency brain surgery to remove excess blood and damaged brain tissue.

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3. The work injury of February 4, 1986, was a cause of a period of disability from work beginning on March 1, 1986 through August 12, 1986; from August 22, 1986 through May 11, 1987, at which time claimant returned to work and reached maximum healing. Although claimant was hospitalized and unable to work due also to nonwork related back problems in March, 1987, his brain injury remained to be a significant factor in causing his inability to return to work during all of these periods of time.

4. The work injury of February 4, 1986, was a cause of a 20 to 25 percent permanent partial impairment to the body as a whole as a result of claimant's brain deficits in affect, behavior, thinking and potential for restoration. It is likely that claimant will suffer brain seizures in the future.

5. The work injury of February 4, 1986 and resulting permanent partial impairment is a cause of a 20 percent loss of earning capacity. Claimant is not able to mentally perform the job as before. Claimant has not suffered a loss of earnings as he is making the same as before in suitable and stable employment. However, his sales work has been adversely affected by his inability to perform as fast as before and the risk of future seizures is significant must be taken into account to measure his loss of earning capacity. Claimant's loss of emotional response has no immediate impact on his loss of earning capacity. Claimant does have potential for rehabilitation in other sales and sedentary work which would not require driving.

6. The medical expenses listed in the prehearing report requested by claimant were incurred by claimant for reasonable and necessary treatment of his brain condition as a result of the work injury on February 4, 1986, except for the expenses relating to his back condition which total $4,396.36.

CONCLUSIONS OF LAW

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

ORDER

1. Defendants shall pay to claimant one hundred (100) weeks of permanent partial disability benefits at the rate of two hundred sixty-four and 58/100 dollars ($264.58) per week from May 12, 1987.

2. Defendants shall pay to claimant healing period benefits from March 1, 1986 through August 12, 1986, August 22, 1986 through March 1, 1987 and March 3, 1987 through May 11, 1987 at the rate of two hundred sixty-four and 58/100 dollars ($264.58) per week.

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3. Defendants shall pay the medical expenses listed in the prehearing report except for those identified in the Analysis section of this decision ($4,396.96) as relating to claimant's back problems. This payment shall be made either to claimant or his group insurance carrier if the bill has been paid or to the medical service provider directly if the bill is unpaid.

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

5. Defendants shall receive credit for previous payment of benefits under a nonoccupational group insurance plan, if applicable and appropriate under Iowa Code section 85.38(2).

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

7. Defendants shall pay the costs of this action pursuant to Division of Industrial Commissioner Rules 343-4.33 and specifically the costs delineated requested by claimant in the prehearing report except that the defendants shall only pay the sum of one hundred fifty and no/100 dollars ($150.00) for the charges of Dr. Schreck to prepare his report.

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

Signed and filed this 30 day of April, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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FILED

1108.50; 1402.40; 1803
Filed February 23, 1988
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES LEOPOLD,	:	
	:	
Claimant,	:	File No. 771493
	:	
VS	:	
	:	A R B I T R A T I O N
OSCAR MAYER FOODS CORPORATION,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

1108.50; 1402.10; 1803

Claimant proved causal connection between boning hams and permanent disability.

Treating physician awarded five percent of the hand. Claimant's evaluating physician awarded 27 percent of the right upper extremity. Defendant's evaluating physician awarded zero percent. Claimant's evaluator gave no satisfactory reason for rating the upper extremity. Defendant's evaluator was inconsistant with the basic facts upon which he based his decision. Defendant's counsel effectively proved that claimant's evaluator had incorrectly applied the AMA Guides in several particulars.

Claimant was awarded five percent of the right hand based on the treating physicians rating.

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FILED

FEB 23 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES LEOPOLD,	:	
	:	
Claimant,	:	File No. 771493
	:	
VS	:	
	:	A R B I T R A T I O N
OSCAR MAYER FOODS CORPORATION,	:	
	:	D E C I S I O N
Employer,	:	
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by James Leopold, claimant, against Oscar Mayer Foods Corporation, employer, and self-insured defendant for benefits as a result of an injury that occurred on June 14, 1984. A hearing was held in Des Moines, Iowa on July 8, 1987 and the case was fully submitted at the close of the hearing. The record consists of the testimony of David B. McClain, D.O. (claimant's evaluating physician), James Leopold (claimant) and joint exhibits A through F. Defendants provided a transcript of the hearing for the industrial commissioner's file. Both attorneys filed outstanding briefs.

PRELIMINARY MATTER

Defendant sought to introduce into evidence defendant's exhibit G, a report from Alfredo Socarras, M.D., which was delivered to defendant's counsel during the course of the hearing (Transcript page 71). Defendant's counsel stated that it was offered as rebuttal evidence. Nevertheless, it is still a medical report and the information it seeks to rebut was known well before the hearing. Claimant's counsel objected to the admission of defendant's exhibit G for several reasons. Claimant's motion to exclude defendant's exhibit G was granted for the reason that this document was not served in a timely manner as required by paragraph six of the hearing assignment order. Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986). Defendant's exhibit G will remain a part of the record as an offer of proof in the event of an appeal (tran., pp. 88-92).

STIPULATIONS

The parties stipulated to the following matters.

That an employer-employee relationship existed between

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claimant and employer at the time of the injury.

That claimant sustained an injury on June 14, 1984 which arose out of and in the course of his employment with employer.

That the injury was the cause of temporary disability during a period of recovery and that entitlement to temporary disability is not an issue in this case at this time.

That the commencement for permanent partial disability benefits, in the event such benefits are awarded is, September 24, 1984.

That the weekly rate of compensation in the event of an award is $161.54 per week.

That claimant's entitlement to medical benefits or medical evaluations are not an issue in dispute in this case at this time.

That defendant's claim no credit for benefits paid prior to hearing.

That claimant's claim for penalty benefits under Iowa Code section 86.13 has been bifurcated from these proceedings.

ISSUES

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

Whether the injury is the cause of any permanent disability.

Whether the permanent disability, if any, is to the right hand or to the right upper extremity.

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

SUMMARY OF THE EVIDENCE

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

The key physicians in this case are (1) Arnis B. Grundberg, M.D., treating physician, (2) David B. McClain, D.O., claimant's evaluating physician, and (3) Peter D. Wirtz, M.D., defendant's evaluating physician. The brief of claimant's counsel very carefully, clearly, succinctly and fairly summarizes most of the facts of this case in the following words.

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STATEMENT OF FACTS

Mr. Leopold worked on the line of Oscar Mayer prior to the date of his injury, June 14, 1984. He worked with a whizard knife doing ham boning. (Transcript p. 6). Use of the knife required a constant back and forth shaving motion. (Transcript p. 68).

Mr. Leopold developed pain and weakness in his right hand and wrist. His fingers would stiffen and lock in flexion, a condition relieved only by manipulating the fingers open with his left hand and working them back and forth. (Transcript pp. 69, 70, 71, 72; Exhibit A). He also experienced tingling and electronic shock sensations in his hand and wrist. (Transcript pp. 69, 72; Exhibit A). At that time Mr. Leopold experienced intermittent elbow pain. (Transcript p. 73; Exhibit A).

Oscar Mayer, Mr. Leopold's employer, sent him to Dr. Robert Deranleau for treatment. (Transcript p. 70). Dr. Deranleau saw Mr. Leopold for about 30 days and then referred him to Dr. Grundberg, an orthopedic surgeon in Des Moines, Iowa. (Transcript p. 7, 70, Exhibit A). Dr. Grundberg examined Mr. Leopold on July 13, 1984. (Transcript p. 70, 73, Exhibit A). Dr. Grundberg sent him for an EMG evaluation. (Transcript p. 73; Exhibit A). Dr. Grundberg's impression of Mr. Loepold's [sic] condition was right ulnar tunnel sydrome [sic] and trigger finger of the right long, ring and little fingers. (Exhibit A).

Dr. Grundberg saw Mr. Leopold again on July 24, 1984. In spite of the fact the EMG was normal, clinically Dr. Grundberg found mild right cubital tunnel syndrome, right ulnar tunnel syndrome, right carpal tunnel syndrome, and trigger finger of the right long ring and little fingers. (Exhibit A).

Mr. Leopold underwent outpatient surgery on August 1, 1984 for decompression of the right unlar [sic] and carpal tunnels and decompression of the right long, ring and little trigger fingers. Surgery was followed by office visits on August 10, 1984 and August 31, 1984. Mr. Leopold still complained of a shock-like sensation and weakness in his hand. (Exhibit A).

Dr. Grundberg released Mr. Leopold to light duty on September 24, 1984 and to full duty on Occotber [sic] 8, 1984. (Transcript p. 73; Exhibit A). Mr. Leopold returned to work and attempted full duty but he still experienced problems with his hand

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which prevented him from doing full duty. (Transcript p. 74). He saw Dr. Grundberg again on October 12, 1984 complaining of pain over the unlar [sic] area. (Transcipt p. 8; Exhibit A). Dr. Grundberg examined Mr. Leopold at this time and found his right grip was only 40 while his left grip was 95; right pinch was only 8 while left pinch was 11. Dr. Grundberg released Mr. Leopold to light duty for 3 weeks and then back to full duty. (Exhibit A). Mr. Leopold left Oscar Mayer at his time. (Transcript p. 74).

Mr. Leopold returned to Dr. Grundberg on January 7, 1986 complaining of local symptoms over the right carpal tunnel area where Dr. Grundberg operated and weakness in his right hand. He still experienced discomfort at the elbow and intermittent mild numbness and tingling up and down his hand. (Transcript pp. 74-75; Exhibit A). These symptoms bothered him at work in 1986 and continue to cause him problems at work. (Exhibit A, Transcript p. 76).

Dr. Grundberg's tests in January 1986, a year and a half after his injury, indicated his right grip was only 90 while his left grip was 135. His right pinch was only 9 while his left pinch was 12. (Exhibit A). Mr. Leopold is right-handed. (Transcript p. 77; Exhibit A). His injury caused him to be weak, he could not open jars. Dr. Grundberg rated Mr. Leopold's permanent partial impairment 5% of the right hand due to residuals of carpal tunnel syndrome. (Exhibit A).

The parties agreed at that time to get another independent medical evaluation. Mr. Leopold was referred to Dr. David B. McClain, an orthopaedic surgeon specializing in traumatic surgery and certified in disability evaluation. (Transcript pp. 17, 14, 16). Dr. McClain examined Mr. Leopold on March 17, 1986. Transcript p. 17, Exhibit C). At that time Dr. McClain found Mr. Leopold sufferred [sic] decreased range of motion and sensory impairment in his right hand. Dr. McClain rated Mr. Leopold's impairment 27% of the upper right extremity as a result of the trauma and surgical intervention. (Transcript pp. 35-36, Exhibit C).

Defendant Oscar Mayer thereafter referred Mr. Leopold to Dr. Wirtz. Dr. Wirtz examined Mr. Leopold and found decreased feeling over the right index, long, ring and 5th fingers. (Exhibit E). Dr. Wirtz sent Mr. Leopold to the Physical Therapy and Sports Center in Des Moines for tests. The cybex test of

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the wrist and forearm indicated deficits on the right side in all motions. The extention maneuver deficit was a significant level. (Exhibit D). Mr. Leopold's right grip strength was also diminished as well as his right pinch strength. The cybex test showed Mr. Leopold's average grip strength deficit on the right side was 8.9% and his average pinch strength deficit on the right side was 21.6%. (Exhibit D).

Dr. Wirtz in his letter to Defendant, concluded, in spite of the cybex test and decreased sensation; the surgery had not left Mr. Leopold with an anotomic or functional impairment based on range of motion, neurological (sensation) and strength. Exhibit E).

Mr. Leopold's present complaints are that his right hand is weaker than his left hand, he still experiences pain in his elbow and wrist, and he still has electronic sensations in his arm. (Transcript p. 77). In addition, the symptoms cause him problems in his work. (Transcript p. 76, 77). He still can't open jars or run a roto tiller. (Transcript pp. 77, 78). He continues to suffer loss of strength, sensation, and motion.

This concludes the summary of the evidence prepared by claimant's counsel. Claimant testified that he has been performing the job of carpenter for the past several months prior to the hearing. He indicated that he was able to perform the work but did have continuing complaints of weakness, tingling and locking of his fingers.

In summary, the impairment ratings of the physicians are as follows.

PHYSICIAN	DATE	RATING	BODY PART
Arnis B. Gundberg, M.D.	1-7-86	5%	Hand
David B. McClain, D.O.	5-7-86	27%	Right Upper Extremity
Peter D. Wirtz, M.D.	10-22-86	0%	--------

Dr. Wirtz in his report only discussed the fingers, hand and wrist.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 14, 1984 is causally related to the disability on which he now bases his claim.

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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).

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).

All of these physicians knew that they were examining claimant and evaluating him for the carpal tunnel and ulnar tunnel and locking finger condition which occurred on June 14, 1984 while working for employer. None of the physicians suggested any other cause for his finger, hand or wrist problems. The award of a rating implies that the disability is caused by the alleged injury at work for which claimant is being examined. Dr. McClain testified that there was a causal connection between claimant's work and the injury and between the injury and the disability (Tran., pp. 26-32). There is no evidence that any of the doctors believed there was any other cause for claimant's impairment. It is true that claimant has done carpenter work since the injury with employer, but none of the physicians suggested that carpenter work was causally connected with the impairment. Dr. Grundberg was aware of the carpenter work. Dr. McClain knew that claimant was engaged in construction work. Therefore, it is determined that claimant's work boning hams and operating a whizard knife for employer, from July of 1983 until June 14, 1984, was the cause of his carpal tunnel, ulnar tunnel and trigger finger condition which resulted in surgery on August 1, 1984 and subsequent disability.

Practically all the evidence in all of the medical reports

and in the testimony of Dr. McClain and the testimony of the claimant which mentions body parts specifically talks about the fingers, hand and wrist. Only rare, casual, fleeting, passing mention is made of intermittent elbow pain (Tran., p. 73; Exhibit A) or discomfort at the elbow (Tran., p. 75). The physical effect of the intermittent elbow pain and elbow discomfort appeared to be insignificant. The following colloquy transpired between claimant and his counsel.

Q. You had a little elbow pain intermittently but it wasn't much of a problem?

A. Yes.

Q. And your neck and shoulder didn't bother you?

A. No, they don't.

(Tran. p. 73)

A second question and answer were as follows

Q. You also stated that you have a little bit of discomfort at times at the elbow and intermittent mild numbness and tingling in the ulnar nerve distribution. Do you have tingling up and down your hand?

A. Yes, sir.

(Tran. p. 75)

Why Dr. McClain rated the right upper extremity and felt that claimant's impairment extended into his arm (Tran., p. 44) is not immediately clear from either his testimony or his written report (Ex. C). His discussion of claimant's impairment centered on the thumb and index finger and dorsiflexion and palmar-flexion of the wrist (Tran., pp. 33-37). Practically 100 percent of the evidence in this case, which mentions a body part, is about the fingers, hand and wrist. The wrist has been determined to be a part of the hand. Elam v. Midland Mfg, II Iowa Industrial Commissioner Reports 141 (Appeal Decision 1981). Consequently, it is determined that claimant's injury, impairment and disability are all to the right hand.

As to the degree of impairment, the testimony of Dr. McClain is not pursuasive. Simply as a matter of reason, it is not likely claimant could satisfactorily perform the job of a carpenter, using hammers and the other tools which he described in his testominy, if he had lost one-fourth or more of the use of his right arm. Although claimant had some complaints, there was no indication that he could not satisfactorily perform his

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job for his carpentry employers after he left this employer.

Furthermore, defendant's counsel clearly demonstrated on cross examination that Dr. McClain had not properly followed the instructions in the American Medical Association Guides to the Evaluation of Permanent Impairment, second edition (Tran., pp. 37-59). Defendant's counsel demonstrated several particulars in which Dr. McClain did not follow the rating evaluation method prescribed in the publication. The AMA guides may be used and relied upon in determining permanent partial disability under Iowa Code section 85.32(2). Caylor v. Employers Mut. Cas. Co., 337 N.W.2d 890, 895 (Iowa App. 1983). Dr. McClain eventually conceded that "My opinion is that the examination was not done with the criterion using this guideline. It's done on the basis of the guideline book being a guide, not an absolute word-for-word guide that we go by." (Tran., p. 62).

Even though it was demonstrated that Dr. McClain had not applied the instructions and formula in the guide properly, his impairment rating is, nevertheless, admissible under Division of Industrial Services Rule 343-2.4 which provides "Nothing in this rule shall be construed to prevent the presentations of other medical opinion or guides for the purpose of establishing that the degree of permanent impairment to which the claimant would be entitled would be more or less than the entitlement indicated in the AMA guide."

Dr. McClain's statement that the impairment is to the right upper extremity is not supported by his testimony which specifically speaks to and rates the fingers and the wrist. Furthermore, his percentage of impairment is not reasonable in light of claimant's testimony that he can perform the job of a carpenter and the ratings of the other two orthopedic surgeons.

The rating of Dr. Wirtz is not persuasive either. It is not consistant with the physical findings mentioned in his letter and it is not consistant with the cybex test results which are mentioned in his letter. It is difficult to beleive that claimant has absolutely no anatomic impairment or functional impairment when (1) the cybex test show deficits on the right side in all motions; (2) that the extension manuever deficit was significant as compared to the opposite side; (3) that his average grip strength deficit was 8.9%; and (4) that his pinch strength deficit on the right side was 21.6% (Ex. D).

Dr. Grundberg has the most reasonable, persuasive, acceptable permanent impairment rating consistant with the other evidence in the record. He is also the treating physician and surgeon in this case. Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985). Therefore, it is determined that claimant has sustained a 5% permanent functional impairment of the right hand based upon the evaluation of Dr. Grundberg the treating

physician.

FINDINGS OF FACT

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

That claimant's work of boning hams and operating a whizard knife for employer was the cause of his carpal tunnel, ulnar tunnel and locking finger injury on June 14, 1984 which resulted in surgery on August 1, 1984.

That the injury was the cause of permanent disability to claimant's right hand.

That the claimant has sustained a permanent partial impairment of 5% of the right hand.

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 June 14, 1984 was the cause of permanent disability.

That the permanent disability is to the right hand.

That claimant is entitled to 9.5 weeks permanent partial disability benefits.

ORDER

THEREFORE, IT IS ORDERED:

That defendant pay to claimant nine point five (9.5) weeks of permanent partial disability at the rate of one hundred sixty-one and 54/100 dollars ($161.54) per week in the total amount of one thousand five hundred thirty-four and 63/100 dollars ($1,534.63) commencing on September 24, 1984 as stipulated to by the parties.

That all accrued benefits be paid in a lump sum.

That interest will accrue pursuant to Iowa Code section 85.30.

That the costs of this action are assessed against defendant 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

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That this case is returned to the prehearing calendar for assignment on the issue of whether claimant is entitled to penalty benefits under Iowa Code Section 86.13.

Signed and filed this 23rd day of February, 1988.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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1108, 1402.20, 2206
Filed January 25, 1988
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL LINDSAY, Claimant, vs. CYCLE COUNTRY, Employer, and UNITED FIRE & CASUALTY COMPANY, Insurance Carrier, Defendants.	File No. 797014 A R B I T R A T I O N D E C I S I O N

1108, 1402.20, 2206

The evidence clearly showed claimant to have a preexisting condition. He lost no time from work due to the alleged injury. There was strong evidence of subsequent, intervening trauma. Claimant was found to be unreliable. Held for defense due to claimant's failure to prove injury arising out of and in the course of employment.

FILED 993
JAN 25 1988
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MICHAEL LINDSAY,	:	
Claimant,	:	
vs.	:	File No. 797014
CYCLE COUNTRY,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
UNITED FIRE & CASUALTY COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Michael Lindsay, claimant, against Cycle Country, employer, and United Fire & Casualty Company, insurance carrier, for benefits as a result of an alleged injury when claimant picked up a Yamaha motor fork head on or about November 1, 1984. The case was heard before the undersigned deputy industrial commissioner at Storm Lake, Iowa, on June 24, 1987, and was fully submitted at the close of the hearing.

The record in the proceeding consists of testimony from Michael Lindsay, Jerry Lindsay, Charles B. Carignan, Jr., M.D., Janice Danbom, Pat Feuerhelm, Michael James Fritz and Dick Gibson; depositions from Michael Lindsay, John J. Dougherty, M.D., Harry W. Hargett, D.C., Daniel G. MacRandall, M.D., and Darwin W. Hoover, D.C.; claimant's exhibits 1 through 68; and, defendants' exhibits A through N.

ISSUES AND STIPULATIONS

The parties stipulated to the following matters:

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

That the type of permanent disability, in the event of a finding of permanent disability for the alleged picking up of a piece of equipment on or about November 1, 1984, is partial

disability to the body as a whole; and,

That claimant's rate of compensation, in the event of an award, is $104.00.

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

Whether claimant sustained an injury on or about November 1, 1984;

Whether the alleged injury of November 1, 1984 is the cause of any temporary or permanent disability;

Whether claimant is entitled to temporary disability benefits during a period of recovery for the alleged injury of November 1, 1984;

Whether claimant is entitled to any permanent disability benefits for the alleged injury of November 1, 1984; and,

Whether claimant is entitled to payment for medical charges and bills as set forth in Iowa Code section 85.27.

SUMMARY OF EVIDENCE

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

The summarization of evidence submitted by defendants is substantially correct and is incorporated herein with a few modifications.

Michael Lindsay is 28 years of age and currently resides in Worthington, Minnesota. He was raised in Spirit Lake and went to school in Arnolds Park. His first job was as an employee for the City of Arnolds Park in the street department where he did heavy labor. Claimant has worked for his brother, Jerry E. Lindsay, as a dock builder. He went to work for Morton Buildings in 1968 and worked for Morton Buildings for about three years. While there, he was hit in the head by a steel beam and suffered serious, permanent injury.

Claimant went to work for Cycle Country in January of 1984. He worked a short period of time, was laid off and then was recalled. On November 1, 1984, while lifting a box, claimant reported he twisted and his back went out. At that time, he went to Harry W. Hargett, D.C., a chiropractor. Eventually claimant was referred to the Orthopedic Clinic in Sioux Falls, South Dakota, where he saw Daniel G. MacRandall, M.D. He did

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not miss any work at Cycle Country because of the incident of November 1, 1984. He worked up until the time he was laid off, because of the seasonal business of Cycle Country, on February 1, 1985. He was operated on in September of 1985 when a disc and some scar tissue were removed. As a result of the operation, claimant's lifting was restricted to 45 pounds.

Since then, although doctors say he can work, claimant has been unable to hold down any type of employment. He currently is receiving rehabilitation and general assistance from the state of Minnesota. Claimant has completed his GED. He has seen Paul D. Anderson, D.O., a psychiatrist, in Spencer.

Claimant filed his petition in July of 1985. He admitted at the hearing that he had problems with his back prior to his work at Cycle Country. In his deposition and to Dr. MacRandall, he had denied prior back problems. On cross examination, claimant did admit that he had seen Darwin W. Hoover, D.C., for a long time. He had in fact seen him over 50 times for a series of problems and had numerous visits within four months of the time the alleged incident took place as evidenced by Dr. Hoover's records, exhibit A. Claimant further admitted he was hurt while working for Lindsay Dock Service and did file workers' compensation claims against his brother. Claimant admitted he told Dr. MacRandall he had no previous problems with his back, which was not true.

Charles B. Carignan, Jr., M.D., testified that he is a certified family practitioner. The first time he saw claimant in regard to this injury was in July of 1985, at Attorney Wilcke's request. As a result of the examination on July 20, 1985, Dr. Carignan wrote a report (claimant's exhibit F). At the time of this examination, Dr. Carignan stated on the last page:

> In addition, the small areas of numbness to pinwheel prick and light touch sensation found on the posterior right thigh does not correspond to Mr. Lindsay's complaints which he described in a rather vague and ill-described way. As a result I feel that most, if not all, of Mr. Lindsay's problems are of a psychosomatic nature which, while they cause impairment, are difficult to evaluate and to treat.

At this time Dr. Carignan gave claimant a rating of 10% permanent impairment to the body as a whole which was the same functional impairment which he had received as a result of his settlement with Morton Buildings (defendants' exhibit H). Dr. Carignan said he does a significant amount of workers' compensation work for Mr. Wilcke. He further admitted he is not an orthopaedic surgeon. As a result of the operation, Dr. Carignan increased his disability rating to 20% of the whole man. Dr. Carignan did admit that a portion of this disability rating is the result of

his previous injury sustained at Morton Buildings.

Dr. Carignan said claimant was able to work after the November 1, 1984 incident up until the time he was laid off in February of 1985. He further admitted there was a CT scan and an EMG performed by Dr. MacRandall almost seven months after the incident, both of which were normal. Dr. Carignan testified that claimant did work as a dishwasher in the summer of 1985 and mowed yards. He did admit that something could have happened that summer which could have caused him to have this operation. Dr. Carignan stated that claimant's current weight restriction would be 45 pounds.

Jerry Lindsay, who is claimant's brother, testified that claimant had worked for him intermittently. Jerry Lindsay stated that claimant had filed several workers' compensation claims against him and that he had been injured while working for him. He stated that his brother had a serious head injury while working for Morton Buildings which left claimant with headaches, memory and psychological problems. He stated that he hired him when he was unemployed and that claimant performed heavy labor.

Jan Danbom testified that she was the personnel manager for Cycle Country. She stated that claimant was not a particularly good worker and that he missed a number of hours of work. He did not, however, miss any more hours after the accident than he did before. He never brought any statement from a doctor indicating he should have light-duty work. He was let go in February because of a general layoff by the company due to the cyclical nature of the products they make, which had nothing to do with the November, 1984 incident. The only times claimant worked for Cycle Country were January 6, 1984 through January 27, 1984 and August 17, 1984 through February 1, 1985. The box which he was lifting at the time was not 70 pounds, as he testified, but rather weighed 39 pounds. Ms. Danbom stated claimant did not appear unusual at the time of the alleged injury or afterwards.

Pat Feuerhelm, Vice President of Cycle Country, testified that the box that was being lifted at the time was only 39 pounds, not 70 pounds. Mr. Feuerhelm stated that nothing appeared to be different about the work habits of claimant after as opposed to before the incident. The witness stated claimant went back to regular work and never did light-duty work. Mr. Feuerhelm testified that claimant was not the best employee.

Dr. MacRandall testified by deposition, exhibit N. He is an orthopaedic surgeon in Sioux Falls, South Dakota. He first saw claimant on February 1, 1985. His physical exam was fairly normal at that time. Claimant had a good range of motion in his back, good strength in his legs and good sensation. It was felt

that claimant had a lumbosacral strain (deposition, page 5, lines 8-12). Claimant gave the doctor a history on February 1, 1985, that he had never had any difficulty with his back prior to his present ailment (deposition page 6, lines 14-25). The doctor diagnosed the problem as lumbosacral strain based upon the history given to him by the patient of no prior problems and the fact that his physical exam did not show anything to suggest any main problem (deposition page 8, lines 7-12). The patient was seen February 15, 1985 and was feeling better at that time (deposition page 8, lines 20-23). He was next seen on March 22, 1985 and was continuing to feel better. At that time claimant was discharged by Dr. MacRandall and was free to go back to work (deposition pages 10 and 11).

Claimant returned on April 11, 1985. He stated he had been shoveling snow when he felt a stabbing sensation in his leg and came in because of the sticking type pain in his left anterior groin. That type of pain means either a new injury or an aggravation of an old injury (deposition page 11, lines 15-25). The diagnosis as a result of the snow scooping incident again was musculoskeletal strain (deposition pages 12 and 13).

Claimant returned May 9, 1985, reported that he was feeling better and was discharged at that time (deposition pages 13 and 14). He was seen a month later on June 7, 1985. He exhibited, for the first time, numbness over the outer area of his left leg and other signs of a L5/S1 radiculopathy (deposition pages 14 and 15). Because of his continual complaints a CT scan and EMG were performed. Both were interpreted as normal (deposition page 15, lines 1-11). Claimant exhibited no evidence of a herniated disc and was released on June 20, 1985 to go back to work (deposition pages 17 and 18).

Claimant returned on July 12, 1985 and stated he had been working with his mower when he noted a pull in his back (deposition page 19, lines 2-18). He exhibited sciatic notch tenderness for the first time. Claimant then was informed that he could go back to work with a lifting restriction of no more than 20 to 30 pounds (deposition page 21, lines 4-8).

Claimant returned August 23, 1985 and again on September 16, 1985 with increased complaints. He was hospitalized and the myelogram and CT scan performed at that time showed a large central disc, both to the right and to the left (deposition page 25, lines 1-5). It was decided to operate (deposition page 26, lines 18-22). Claimant had an L5/S1 hemilaminectomy and a disc excision of his S1 nerve root (deposition page 27).

Claimant had a normal recovery until November 21, 1985 when he came to the hospital with abdominal pain. He was hospitalized and consulted a psychiatrist for his anxiety. Dr. Hoverstein was concerned about kidney stones (deposition page 33, lines

7-21). Dr. MacRandall gave claimant a permanent partial disability rating of 10% (deposition page 35, lines 12-25). The doctor gave claimant a lifting restriction of no more than 40 pounds (deposition page 38, lines 1-8).

Dr. MacRandall felt, based upon the history he had obtained from claimant of no previous injuries to the back, that the incident in November of 1984 was probably the instigating incident. The doctor went on to say that, if there had been prior incidents of minor back problems and treatments by chiropractors or other medical facilities, this would probably change his opinion. Dr. MacRandall clearly qualified that his opinion was based on the history he obtained from claimant on February 1, 1985, that he had no prior history of back problems (deposition page 44, lines 22-25; page 45, lines 1-2). Dr. MacRandall stated that claimant had had a lot of injuries and it would be difficult to say exactly which one caused the disc to finally rupture (deposition page 28, lines 17-25).

Dr. MacRandall, based upon claimant's current condition, gave him a 40-pound weight restriction (deposition page 48, lines 9-10). Dr. MacRandall testified that claimant reached maximum physical recovery on April 4, 1986 (deposition page 53, lines 20-21). Dr. MacRandall stated that the abdominal pain claimant had was the result of constipation or bowel obstruction (deposition page 55, lines 11-16).

Dr. MacRandall concluded his deposition by again reiterating that his opinion was based upon the history obtained that there were no prior back problems or history associated with claimant. The doctor stated that, if he had a history of prior problems, he would have doubt as to when the precipitating incident occurred (deposition page 59, lines 16-19).

Harry W. Hargett, D.C., testified by deposition, exhibit L. When claimant came to him, he contended that he had had no prior back problems. Dr. Hargett treated him for muscle spasms. Dr. Hargett is a chiropractor who treated the individual with manipulations. It is interesting to note on the questionnaire of Dr. Hargett filled out by claimant that he indicated he had never had low back problems, pain between the shoulders, neck problems or arm problems.

As shown on exhibit A, claimant had been treating with Dr. Hoover since 1975. Since that date, he had seen him on over 50 occasions. The most recent occasion began June 15, 1984, approximately four months before the alleged incident in November of 1984 at Cycle Country. At that time, Dr. Hoover stated in his notes that claimant had stepped into a hole which severely injured his lower back. It was diagnosed as a severe sprain of the lumbosacral area and resulted in claimant having 12 chiropractic treatments.

Darwin W. Hoover, D.C., testified via deposition, exhibit M. Claimant was first seen in May, 1975, when he had an accident while installing dock planks when he slipped and fell (deposition page 4, lines 6-12). Claimant was next seen in January of 1977 for minor problems. He was seen on May 17, 1978 for mid-thoracic strain (deposition page 7, lines 18-20). Claimant was seen May 7-18, 1979 for a lumbar strain and sprain and misaligned vertebrae from an injury sustained while working for Morton Buildings. Claimant was seen again in September of 1979 when he was injured while wheeling a cart onto a trailer bed which was slick with dew. The cart slipped and injured claimant between the shoulder blades. He was treated 10 times in September and once in October for that injury (deposition page 11, lines 1-6). Claimant was seen on March 3, 6 and 11 in 1980 for an injury sustained when he was lifting gutter onto a trailer, twisted and injured the sacral area (depostion page 12, lines 1-9). Claimant was next seen on October 23 and 27 of 1980 for a catch in the middle of the back which occurred while working for Morton Buildings (deposition page 12, lines 23-25; page 13, lines 1-4). He was seen again December 15, 1980 for a misaligned 5th thoracic vertebrae. This again was a workers' compensation matter (deposition page 13, lines 18-21). It was the result of a rafter table injury.

After this injury, Dr. Hoover discussed proper ways to lift straight forward and so forth with claimant (deposition page 15, lines 3-8). Claimant was next seen in April of 1981 when it was reported there was a lumbar involvement or stiffness in the back (deposition page 16, lines 16-25). Workers' compensation paid for the treatment, which was a lower back problem. Dr. Hoover saw claimant on June 15, 1984. Claimant was carrying a long plank when he turned. The plank hit a tree which threw him off balance and he stepped into a hole which severely injured his lower back. Claimant had a severe sprain of the lumbosacral area (deposition page 1, lines 1-12). This was paid for by the workers' compensation carrier.

Dr. Hoover stated he saw claimant more frequently than other patients. Dr. Hoover's notes indicated that, in 1975, there was right leg pain for one week which radiated down the back to the knees. Dr. Hoover was not consulted and did not treat claimant in regard to the time he was struck by a steel beam in 1980.

John J. Dougherty, M.D., testified via deposition, exhibit K. Dr. Dougherty is an orthopaedic surgeon in Sioux City, Iowa. He first examined claimant on October 17, 1985. He did not come to any conclusion from that examination as it was only three weeks post hemilaminectomy and claimant could not be doing any work.

Dr. Dougherty subsequently reexamined claimant on September 19, 1986. The doctor had the benefit of reviewing Dr. MacRandall's records as well as Dr. Hoover's records showing a multiple

history of treatments from 1975 through June of 1984. Dr. Dougherty felt that claimant had a permanent functional impairment as existed at the time of his last examination. The doctor felt he would be limited to lifting 30 to 40 pounds and would give him a functional disability rating of 10% of the body as a whole (deposition page 17, lines 11-15).

Dr. Dougherty did not think you could relate one single incident on one single day in November of 1984 to the problem. Dr. Dougherty felt claimant had had multiple problems with his back and, after the incident in November of 1984, he was able to return to work and was able to continue to work (deposition page 18, lines 1-8). Claimant terminated his employment and did not do so because of his back problems. Claimant was getting along fine and apparently had a little flare up in June. Dr. MacRandall did a CT scan and EMG, both of which were interpreted as normal (deposition page 18, lines 18-24). The record shows that he worked as a dishwasher and also mowed yards and had some problems with a mower. Dr. Dougherty felt it was impossible to single out one incident as the cause of claimant's problems (deposition page 19, lines 17-18).

Dr. Dougherty felt number one, the patient did not have much trauma at the time of the incident and, "Number two, he said his back went out. That's a standard statement of the lay population, my back went out. I don't know what that means." (Deposition page 44, lines 16-22). Dr. Dougherty felt that the snow shoveling incident in April of 1985 could be significant (deposition page 50, lines 8-14). The doctor felt that it was significant that claimant allegedly was injured November 1, 1984 and continued to work for the company until February of 1985 without missing any work because of the alleged injury. If, in fact, he had an injury or back problem, he would have been unable to work (deposition page 50, lines 20-25; page 51, lines 1-5). It was further significant that the CT scan and EMG in June of 1985 were normal, but that, in September, they were positive. Something in the interval -- July, August, September -- must have caused further damage to this individual's back (deposition page 52 and 53).

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 [Iowa Code section 85.3(1)].

Claimant has the burden of proving, by a preponderance of the evidence, that he received an injury on November 1, 1984 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

Claimant has the burden of proving, by a preponderance of the evidence, that the injuries of November 1, 1984 are causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965); Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 275, 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's injury record shows numerous injuries to his back. The history of the treating physician, Dr. MacRandall, was always premised on the fact that the patient did not have a back problem as was reported to Dr. MacRandall during the entire history of his consultations with claimant. The actual history obviously is much different.

Claimant's deposition was taken December 3, 1985. He did not tell the truth concerning his medical history when his deposition was taken. When his deposition was taken he claimed the only thing he could do was walk (deposition page 20, lines 15-18). When asked if he had any prior back problems, he stated at page 25, lines 18-22, "I think maybe once before when I worked out at Morton's I had to go, was up here in the top in between my shoulders. I think I did something once. I went to the doctor once and that was about it." And again at page 26, lines 1-6, "But that was years ago. I couldn't tell you it's been so long. I can't remember the doctor's name. As far as back problems before, no I haven't had back problems."

On page 27, lines 1-6, when asked whether he had gone to Dr. Hoover before, claimant stated, "I think I might have when I worked for Morton Building that time then. Q: You don't remember any other times? A: No, just that. That was years ago." That was from an individual who as recently as the summer of 1984 had seen Dr. Hoover 12 times for what Dr. Hoover stated was a serious back injury.

Although he filed claims against his brother and had a back injury in the summer of 1984 while working for his brother, when asked during his deposition, "Did you ever have back pains when you worked for your brother?", his answer was, "To my recollection, no." (Deposition page 27, lines 7-10).

Claimant further denied that he told Dr. MacRandall he was out shoveling snow when he felt a stabbing pain against his left leg (deposition page 24, lines 1-8).

This is an individual who has had numerous insults to his back over a long period of time. This is an individual who has had psychosomatic problems and may have suffered brain damage in the Morton Building accident with the steel beam.

The record is clear that claimant had a long-established problem and, therefore, there is no evidence to show within the realm of reasonable medical certainty that the incident of November 1, 1984 was the precipitating cause of his back problems.

The next question which needs to be decided is whether the incident on November 1, 1984 aggravated a preexisting condition. Clearly the evidence shows that claimant did not miss any work as a result of the incident on November 1, 1984. He was able to complete all of his work and was terminated by Cycle Country only because of the seasonal nature of the business and because they no longer needed claimant as an employee.

As Dr. Dougherty testified, it is significant that the alleged incident in itself was minor in that claimant was allegedly picking up a piece of equipment which weighed 39 pounds, that he missed no work and that he continued to work for a four-month period without missing any work.

It is also significant that Dr. MacRandall discharged him on March 22, 1985 as being OK. He reappeared at Dr. MacRandall's office because of a snow shoveling incident on April 11, 1985. He again was dismissed on May 9, 1985, but reappeared on June 7, 1985 complaining of some additional pain. At that point, a CT scan and EMG were done, both of which were normal. Claimant reappeared on July 12, 1985 as a result of a mower incident. He then was seen several times until September when a myelogram and CT scan were done which showed a bulging disc.

Clearly, the evidence indicates that claimant was able to continue to work without apparent difficulty. If he, in fact, did have an aggravation which was caused by the incident while working for Cycle Country, it was minor. Subsequent problems, which either resulted from scooping snow, mowing yards, working as a dishwasher, or some other incident claimant will not disclose, most likely caused claimant's unstable back to go out.

001003

Claimant has not met his burden, medical or otherwise, to show that an injury, or aggravation of a prior injury, arose out of and in the course of his employment.

What we have in this case is an individual whose testimony is unreliable. Perhaps claimant's shortcomings as an historian are due to the head injury at Morton, perhaps they are not. Whatever the reason, the inconsistencies are of such a magnitude as to render claimant's testimony too unreliable. The evidence clearly shows that the incident at Cycle Country was insignificant when compared to the numerous other problems claimant has had, so insignificant that he continued to work and perform his job for four months, which he was unable to do after all the other previous incidents noted on his record.

The only doctor with all of the evidence, Dr. Dougherty, stated that one cannot assess or determine that the minor incident at Cycle Country was the cause of claimant's problem. Dr. MacRandall's opinions cannot be considered due to the fact he continually prefaced all of his opinions based upon the fact that claimant had not had prior back problems which, in fact, was a complete falsehood. The change between the CT scans and other diagnostic tests of June and September, 1985, is strong evidence that some incident occurred which caused the further bulging of the disc which was long after claimant had left his employment at Cycle Country. Clearly, claimant has not met his burden to show that there was any injury or aggravation of a preexisting condition which resulted in a temporary or permanent disability nor is there any permanent condition which resulted from the incident of November 1, 1984. Dr. Dougherty's assessment of this case is accepted as correct.

FINDINGS OF FACT

1. Claimant had a significant low back problem which began as early as 1975.

2. Claimant saw Dr. Hoover over 50 times for back problems prior to the incident in question.

3. Claimant worked from November 1, 1984 through February of 1985 without missing any time at work as a result of the alleged injury on November 1, 1984. If he sustained any injury on November 1, 1984, it was a temporary aggravation of a preexisting condition that was so minor as to not produce any disability whatsoever.

4. Claimant was relieved of his job, not because of his injury or the fact he was unable to complete his work, but because of a general layoff due to lack of business of the employer.

5. Claimant was discharged from treatment by Dr. MacRandall on March 22, 1985.

6. Claimant had a snow shoveling incident on April 11, 1985 which resulted in further problems to his back.

7. Claimant was discharged from treatment by Dr. MacRandall on May 9, 1985.

8. A CT scan was performed on June 7, 1985 as well as an EMG, both of which were interpreted as normal.

9. Claimant had a mower incident on July 12, 1985, which resulted in further treatment.

10. A CT scan and myelogram performed in September, 1985 showed a herniated disc and surgery was then performed.

11. There were many and numerous insults to claimant's back over the period of his life. It is impossible to pick out any one specific incident to state that it was a substantial factor in producing the bulging disc and subsequent operation which was performed in September of 1985.

12. Claimant did not substantially aggravate a preexisting condition so as to result in temporary or permanent disability while working for Cycle Country as he at all times was able to perform his job.

13. Claimant lost no time from work due to the alleged injury to his back on November 1, 1984.

14. Claimant was not taken off work by a physician as a result of the alleged injury to his back on November 1, 1984.

15. Claimant's testimony is unreliable. He has psychological problems, however, and it cannot be determined whether the unreliability is due to honest mistake as opposed to intentional deceit.

CONCLUSIONS OF LAW

1. Claimant did not sustain the burden of proof, by a preponderance of the evidence, that he sustained an injury or aggravation to his back on November 1, 1984.

2. Claimant did not prove, by a preponderance of the evidence, that any injury or aggravation which occurred on November 1, 1984 was a proximate cause of any pain, disability or medical treatment regarding his back, subsequent to February 1, 1985.

001005

3. Claimant did not prove any entitlement to temporary or permanent disability benefits for his alleged back injury.

ORDER

IT IS THEREFORE ORDERED that claimant take nothing from these proceedings.

IT IS FURTHER ORDERED that costs are assessed against claimant pursuant to Division of Industrial Services Rule 343-4.33.

Signed and filed this 25th day of January, 1988.

MICHAEL G. TRIER
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001006

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

PAULINE LINN,

Claimant,

vs.

WEBSTER CITY PRODUCTS,

Employer,
Self-Insured,
Defendant.

File No. 686205

A P P E A L

D E C I S I O N

FILED
JUN 20 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision denying all compensation because claimant failed to establish either a change in her physical condition or in her earning capacity not considered and contemplated in the prior appeal decision.

The record on appeal consists of the transcript of the review-reopening hearing and claimant's exhibits 1 through 4. Both parties filed briefs on appeal.

ISSUE

The issue on appeal can be stated as whether claimant has established a change of condition causally related to her injury affecting her earning capacity.

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 issue and evidence.

In Johnson v. Schwans Sales Enterprises, Appeal Decision filed May 25, 1988, the industrial commissioner denied further benefits where claimant failed to establish a change of condition. The commissioner noted that it was impossible to determine whether claimant had sustained a change of condition since the prior settlement agreement did not specify the contemplation of the

parties as to claimant's future earning capacity.

ANALYSIS

The deputy's analysis of the evidence in conjunction with the law is adopted. Claimant has failed to show a change of condition since the prior hearings. It is difficult to determine whether claimant has established a change of condition where no evidence was introduced at the prior hearings as to claimant's future earning potential. Introducing evidence for the first time at this hearing only shows what claimant's present condition is--it does not demonstrate that claimant's condition has changed.

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

FINDINGS OF FACT

1. Claimant and her husband testified that the intensity and length of her migraine headaches has increased after the earlier proceeding.

2. Those allegations were not corroborated by any medical evidence and by themselves are not shown to be a reliable indication of a change in claimant's physical condition.

3. Claimant saw Job Service and took a GATB test concerning her employability after the earlier proceedings. The opportunity for this test was available to claimant at the time of the earlier proceedings.

4. Claimant's jewelry party business failed after the earlier hearings and decisions.

5. One factor in the failure of the jewelry party business was the economy in Fort Dodge.

6. One reason for fewer jobs in Fort Dodge and lesser paying jobs was the economy.

7. Claimant made no attempt to find employment prior to the earlier hearings and decisions and has not attempted to seek employment since the earlier proceedings.

CONCLUSIONS OF LAW

Claimant has failed to show a causal connection between the injury and any increased disability.

Claimant has failed to prove by a preponderance of the evidence that she has encountered either a change in her physical condition or in her earning capacity not considered and con-

001008

templated at the earlier hearings and at the time of the appeal decision by the industrial commissioner.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant is to pay the costs of this proceeding including the cost of transcription of the hearing proceeding under Division of Industrial Services Rule 343-4.33.

That defendant file any reports required by Division of Industrial Services Rule 343-3.1.

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

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

TIM LITTON,	:	
	:	
Claimant,	:	
	:	FILE NO. 825590
vs.	:	
	:	A R B I T R A T I O N
ECONOMY FIRE & CASUALTY CO.,	:	
	:	D E C I S I O N
Employer,	:	
	:	FILED
and	:	
	:	APR 18 1988
AMERICAN MOTORISTS INS. CO.,	:	
	:	IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier,	:	
Defendants.	:	

INTRODUCTION

Timothy Litton, the claimant, filed an arbitration petition against Economy Fire & Casualty Company, employer, and American Motorists Insurance Company, its insurance carrier, on January 2, 1987, for benefits under the Iowa Workers' Compensation Act as a result of an alleged injury on February 28, 1986 (originally alleged to be February 25, 1986). At Council Bluffs, Iowa on February 9, 1988, before the undersigned the case was heard and submitted.

The record consists of the testimony of Timothy Litton, David John Dickey and Harriett L. Weaver; joint documentary exhibits 1-52 and deposition exhibits 53-60.

In the approved prehearing report certain stipulations were made. The parties stipulated claimant received an injury arising out of and in the course of his employment. Only the issues which remain for decision follow.

ISSUES

1. Whether there is a causal connection between the claimant's fall on February 28, 1986 and his claimed disability.

2. The nature and extent of disability is questioned.

3. The awarding of healing period payments to claimant for the period commencing June 9, 1986 and ending August 28, 1987.

001010

4. Whether claimant should receive medical expense benefits under Iowa Code section 85.27.

FACTS PRESENTED

Claimant was injured on a ladder at Cedar Rapids, Iowa on February 28, 1986 when a rung broke on the ladder. He was working as an insurance adjuster for the defendant employer and was descending from a residential roof after inspecting for a claim. When the rung broke his right knee struck a lower rung of the ladder. Claimant avoided a fall to the ground by grasping the ladder. This incident was observed by John J. Arp, claimant's supervisor.

At the time of injury claimant's weight was about 260 pounds. His knee immediately became painful and swollen and claimant testified that he treated it with compresses and sought relief for aches to his back and other parts of his body by using a whirlpool at the motel where he was staying. Claimant testified he continued self-treatment to his knee which was his main concern, but he had continuing pain in his back and hips.

On June 6, 1986, during the inspection of a roof for the defendant employer claimant's right knee locked. Claimant went down on the roof and after he worked out the locked condition of his knee and descended from the roof he called his supervisor. Claimant told the supervisor he could not work any longer. He never returned to work for defendant employer.

After conservative medical treatment failed, knee surgery was performed by R. Michael Gross, M.D., in July of 1986. As claimant became more mobile he stated his back became worse and he discussed his back problem with Dr. Gross at the end of August or September. He was then treated by Dr. Gross and other physicians by therapy and cortisone shots.

On January 29, 1987, R. Schuyler Gooding, M.D., a neurosurgeon, performed back surgery on claimant after a CT scan revealed a herniated disc on the left at L5-S1. The L5-S1 discectomy by Dr. Gooding resulted in much improvement. On August 28, 1987, Dr. Gooding released claimant for work stating that claimant had reached the "maximum medical benefits" from his lumbar surgery.

Claimant opined that both the knee surgery and the back surgery were successful and that he felt good although he needed to be careful. Claimant reduced his weight by over 70 pounds from the time of the incident on February 28, 1986, which was part of therapy at the recommendation of his physicians.

APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 28, 1986 is causally

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

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

An injury to a scheduled member which, because of after-effects (or compensatory change), creates impairment to the body as a whole entitles claimant to industrial disability. Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961). Dailey v. Pooley Lumber Co., 233 Iowa 758, 10 N.W.2d 569 (1943).

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

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. * * * *

Iowa Code section 85.34(1) as amended provides as follows:

> If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2

001012

of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Iowa Code section 85.27, as amended, 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. The employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.

. . .

For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care.

In Barnhart v. MAQ Incorporated, I Iowa Industrial Commissioner Report 16, 17 (1981), the following statement of law pertaining to failure to obtain authorization from defendants for medical treatment appears:

As the second full issue on appeal, defendants claim they should not have to pay Dr. Wilson's bill. The evidence shows that defendants did not know claimant went to see Dr. Wilson and that claimant was sent to that doctor by his then-lawyer. Often, such an allegation would be valid; in the usual compensable case, defendants have the right to choose the care, as it is clearly stated by the code section. However, defendants in their answer denied that claimant's injuries arose out of and the course of the employment; further, the issue of arising out of and in the course of the employment was included in the pre-hearing order as an issue to be tried. It does not seem logical that defendants can deny liability on the one hand and guide the course of treatment on the other...(Emphasis added)

ANALYSIS

A causal connection must be shown in this case by claimant to exist between the injury of February 28, 1986 and the claimant's back problems.

It is undisputed that the ladder incident on February 28, 1986, took place and that at the time the claimant was acting in the course of his employment and that it arose out of his employment. Claimant had knee surgery on July 31, 1986 and back surgery occurred on January 29, 1987.

At the time of the incident on February 28, 1986, claimant testified that:

> ...I felt a jolting and a pop as I stopped going down.
>
> Q. Where was the pop in regard to the anatomy of your body, Mr. Litton?
>
> A. My knee, my right knee.
>
> Q. And where at that time did you feel pain, if any?
>
> A. Well, it hurt like hell. Pardon my language. My right knee. I got real stiff and real sore all over, but my right knee just, you know, hurt quite a bit. It swole up instantly. As a matter of fact, I commented to John, I said Jesus, look at this, because my pants got real tight in the knee.
>
> Q. And did you continue working that day or did you call it a day?
>
> A. No. I was real stiff. My back was real stiff. My knee hurt real bad and my shoulders were sore....

From February 28, 1986 until June 6, 1986, the claimant testified that he had daily swelling of his knee and he also had pain in his back and in both hips which he thought was because of the knee. His knee would lock periodically. However, claimant continued to work until about June 6, 1986, when his knee locked when he was walking down a roof. Claimant stopped working and sought medical treatment for his knee.

001014

Claimant stated that after his knee surgery in July of 1986, his back became worse as he became more mobile and that by the end of August or the first part of September he was discussing his back problem with Dr. Gross who had performed the knee surgery.

John J. Dougherty, M.D., an examining physician, reported that he was not sure as to whether the back injury was caused by the fall on February 28, 1986. Joel T. Cotton, M.D., another examining physician, expressed the opinion that it was not; while Dr. Gooding, a treating physician, expressed the opinion that it was. Dr. Cotton is a neurologist who does not perform surgery. Dr. Dougherty is an orthopedist specialist who reported but was not deposed. Dr. Gooding is a neurosurgeon who specialized in the type of operation that was performed on claimant. Dr. Gooding expressed the opinion that the back injury was caused by the ladder incident. He opined it was caused at the time the ladder rung broke, but with increased mobility claimant's back became worse as time progressed. Reports of Dr. Gross, who performed the knee surgery, support Dr. Gooding's view of how the back problem became worse at a later time.

Dr. Gooding's medical opinion is accepted as best describing claimant's medical condition in view of his: (1) specialization precisely in the medical problem involved; (2) the greater opportunity he had as a treating physician to observe claimant; and, (3) the manner in which his view best describes the development of the medical problem as it coincided with overt developments.

Defendants claim that claimant lacks credibility and that the causal connection is flawed by his lack of credibility both as to his own testimony and as to the testimony of doctors who relied upon the history given to them by the claimant.

Claimant's credibility is attacked on the basis of misrepresentation of fact in prior statements. Defendants produced the transcript of a tape interview of claimant by Michael Sigwalt, an employee of defendant Economy Fire & Casualty Company. In this taped interview dated June 16, 1986, claimant, at best, evaded answering the question as to whether he had had a prior knee injury other than when in high school and at worst claimant deliberately evaded answering that he had been injured on the job for a prior employer in 1985. When pressed for an answer to this question claimant answered "not really." However, it should be pointed out that claimant did state in his application and also in a health questionnaire to defendant employer that he had had prior surgery for his right knee. See exhibit 45. Michael Sigwalt did not appear to testify as to the authenticity and accuracy of the transcript of the tape for the defense nor did he give testimony by deposition.

Claimant concealed information to obtain a job with Republic Insurance. Claimant explained that he did so because he desperately needed work.

001015

Defendants next assert that claimant's 1985 knee problem never really went away and that the problem was perhaps aggravated by the "fall" on June 6, 1986. The exact words of claimant are: "...I was on top of a roof in a small town in western Iowa and as I was walking down the roof the knee locked and I went down and I couldn't work it out. I stayed up there about 35 minutes trying to work the knee out." What occurred when claimant's knee buckled on June 6, 1986 was not shown as a fall or as a fall causing injury.

Defendants claim that claimant did not tell John Arp or Joanie Ward, employees of defendant, that he had hurt his back. Claimant claims that he did. This is conflicting testimony, but it is not unusual for honest differences to exist between what is said and what is heard particularly concerning what appeared at the time to be something aside from the focus of attention, claimant's knee. At all times claimant emphasized the overriding concern was his knee until after his knee operation. This would also apply to when claimant went to doctors for help on his knee and he thought that his back problem was caused only by the knee condition. Claimant's mother, Harriett L. Weaver, testified to explain her son's belief concerning his back that she had been told by a doctor that an injury in a leg could cause back problems and that she had relayed this information to the claimant shortly after the ladder fall.

Defendants also complained that Frank W. Iwersen, M.D.'s report shows in October of 1986 that claimant "began having back trouble in September of 1986...." Trouble comes in different degrees and in any event this testimony is not inconsistent with the opinion of Dr. Gooding that the back injury was brought on by increased mobility which mobility increased after the knee surgery.

No other attacks on claimant s credibility by defendants have merit or relevancy to the case.

Under all the circumstances claimant's relevant testimony has not been impeached. His credibility is sound as to the injury and its results including the case histories related to physicians.

Claimant's account of events fit with known facts. He was not incapacitated nor had he indicated any back problems which relate in any way to any incident in evidence other than the injury of February 28, 1986. To assert the knee and back problems may have been caused by a prior knee injury in 1985 does not explain; (1) why there was no complaint of back injury before the February 28, 1986 incident; (2) why he became incapacitated for his back problem only after that incident; and,

001016

(3) the need for surgery on his knee on July 31, 1986 when he had already been successfully operated on in 1985 according to the treating physician, Thomas C. Bush, M.D.

Further, the testimony at the hearing by David J. Dickey, an unbiased observer who became acquainted with claimant in Little League, substantiates that early in April of 1986 claimant was having trouble with his back and not just his knee. Dickey observed that claimant's posture and movements indicated that he was having back pain at the time.

A casual connection to the injury of February 28, 1986 and the back problems has been demonstrated to exist by a preponderance of the evidence.

Claimant's back injury gives rise to the need for a determination of industrial disability with reference to the body as a whole. First, functional disability will be considered as it applies to claimant's body.

Dr. Dougherty, in reporting to defendants' attorney on October 5, 1987, gave claimant a 10 percent disability to his body (Exhibit 3). Dr. Cotton reported to defendants' attorney on July 15, 1987 and later testified in a deposition that the claimant had a functional disability to the whole man of five percent (Ex. 6). Dr. Gooding, who had performed the back surgery, in a deposition (Ex. 59, p. 19) confirmed his earlier report to claimant's attorney in which he rated functional disability of the whole person at 15 percent.

It is accepted that claimant will have extreme difficulty and probably will find it impossible to obtain employment as an insurance adjuster or as a manager of claims in the insurance industry. He has demonstrated this by his testimony pertaining to applying for work. However, claimant's earning capacity has not been reduced to the extent he pessimistically asserts.

Claimant appears in the long run to be highly motivated and his loss of weight will greatly enhance his chance of getting rewarding employment in areas other than insurance. Claimant's functional handicap should not hurt him much in view of his relative youth (age 39) and education. Indeed, claimant is so close to having enough hours to receive a bachelors' degree in the arts or science that he might exacerbate earning capacity by picking up needed college hours. Claimant had demonstrated an ability to supervise others and earn a good salary when he was with Republic Insurance.

Claimant is found to be 20 percent industrially disabled.

It follows from the authority cited and the prior analysis that healing period benefits should be awarded for the period of June 9, 1986 through August 28, 1987, inclusive.

001017

In view of the fact that defendants denied any obligation for the claimant's injury of February 28, 1986, there was no unauthorized medical treatment. Medical expenses should be awarded to claimant.

FINDINGS OF FACT

Finding 1. On February 28, 1986, claimant received an injury arising out of and in the course of his employment with defendant Economy Fire & Casualty Company.

Finding 2. As a result of his February 28, 1986 injury, claimant had medical problems with his right knee and back.

Finding 3. As a result of his injury claimant had surgery to his right knee and back.

Finding 4. Claimant began to miss work because of his injury on June 9, 1986.

Finding 5. Claimant reached maximum recovery on August 28, 1987.

Finding 6. As part of claimant's medical treatment claimant has lost about 70 pounds from the date of injury and now weighs about 185.

Finding 7. As a result of his injury claimant has a permanent functional impairment of 15 percent.

Finding 8. Claimant is now 34 years of age and has college credits nearly sufficient for a BA or BS degree and appears to be a motivated person.

Finding 9. Claimant has experience primarily as a law enforcement officer, insurance claims manager and claims adjuster, but has held a variety of full time and part-time jobs on a short term basis.

Finding 10. Claimant would have great difficulty obtaining employment in law enforcement or as an insurance claims manager or claims adjuster for an insurance company.

Finding 11. Claimant is found to be credible in so far as the relevant and material testimony given by him in this case.

Finding 12. Upon the principles of law and facts previously stated claimant is found to have a 20 percent industrial disability.

001018

CONCLUSIONS OF LAW

A. Claimant has met his burden in proving he has an industrial disability of 20 percent as a result of his injury on February 28, 1986.

B. Claimant is entitled to temporary disability benefits from June 9, 1986 to and including August 28, 1987.

C. Claimant is entitled to medical benefits under Iowa Code section 85.27.

ORDER

THEREFORE, IT IS ORDERED:

1. Defendants shall pay claimant one hundred (100) weeks of permanent partial disability benefits at the rate of two hundred seventy and 63/100 dollars ($270.63) per week and sixty-three point seven-one-four (63.714) weeks of healing period at the rate of two hundred seventy and 63/100 dollars ($270.63) per week together with interest as provided under Iowa Code section 85.30.

2. Defendants are to pay the medical bills pursuant to the itemized list filed in this proceeding.

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

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

5. This case is returned to pretrial status pending hearing on the bifurcated issue under Iowa Code section 86.13.

Signed and filed this 18th day of April, 1988.

G. Woodward

G. WOODWARD
DEPUTY INDUSTRIAL COMMISSIONER

001019

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001020

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BONNIE L. LOTERBAUER,

Claimant,

vs.

CON AGRA, INC./ARMOUR FOOD COMPANY,

Employer,

and

THE TRAVELERS,

Insurance Carrier,
Defendants.

File No. 780519

A P P E A L

D E C I S I O N

FILED

MAY 20 1988

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying all compensation because she did not establish a causal connection between her injury and her claimed permanent disability.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 37. Both parties filed briefs on appeal.

ISSUE

The issue on appeal can be stated as whether claimant has established a causal connection between her injury and her claimed 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 evidence.

ANALYSIS

The deputy's analysis is adequate and accurate and will not

001021

be expanded herein.

FINDINGS OF FACT

1. Claimant had preexisting problems with depression prior to October 27, 1984 and has had problems with depression since that date.

2. Claimant had treatment for back conditions in 1973 and 1975 and had recurrent back complaints prior to October 27, 1984 which she did not remember at deposition and of which she generally did not inform her physicians.

3. Claimant gave her physicians varying medical histories concerning her stated work injury.

4. It is uncertain whether claimant experienced a specific work incident with onset of pain or, if so, the exact nature of any specific work incident or how any such work incident or claimant's normal work conditions might have produced her back complaints.

5. Claimant has thoracic kyphosis and lumbar lordosis which preexisted October 27, 1984.

6. Claimant has osteoporosis and mild osteoarthritis.

7. Claimant's physicians have found little organic basis for her back complaints.

8. Claimant's back complaints relate to her lumbar lordosis, thoracic kyphosis, osteoporosis, and mild osteoarthritis.

9. Claimant's back complaints in part relate to her depressive disorder.

10. Claimant's depressive disorder is not related to her work injury.

11. Claimant was not a credible witness.

12. Claimant's work injury is not a cause of her stated back complaints.

CONCLUSIONS OF LAW

Claimant has not established that the injury she sustained on October 27, 1984 is the cause of her claimed permanent disability.

WHEREFORE, the decision of the deputy is affirmed.

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ORDER

THEREFORE, it is ordered:

That claimant take nothing further from this proceeding.

That claimant pay the costs of this proceeding pursuant to Industrial Services Rule 343-4.33.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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001023

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

DONALD LUEKEN,
Claimant,
vs.
JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY,
Employer,
Self-Insured,
Defendant.

File No. 810114

A P P E A L

D E C I S I O N

FILED
JAN 27 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals and claimant cross-appeals from an arbitration decision dismissing claimant's petition.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 19. Both parties filed briefs on appeal.

ISSUE

Defendant's issue on appeal is whether the deputy properly dismissed claimant's petition as prematurely filed. Claimant's issues on cross-appeal are whether defendant is estopped from asserting the statute of limitations, and whether the discovery rule applies to his claim.

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 began working for defendant in 1969. On May 1, 1972, he began duties in an engine test department, a position which exposed him to a noise level of 95 dBA. He was laid off February 21, 1982. He resumed work November 1, 1982, as a mechanic. On March 3, 1982, he began operating a "super sucker" vacuum, with a noise exposure of 76 dBA.

Joint exhibit 19 established that claimant has held numerous job classifications with defendant and has been transferred several times. Noise level exposures in these positions varied

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from 69 dBA to 99 dBA. Mervin McClenahan, M.D., stated that noise level exposure as low as 82 dBA could cause hearing loss.

Claimant brought his hearing loss to the attention of defendant's medical department in 1982. He was advised by Dr. McClenahan, on February 7, 1983, that he had a noise-induced, work-related hearing loss. In May of 1984, he was advised by defendant's safety director that the statute of limitations barred any claim for workers' compensation hearing loss benefits. In June of 1985, he re-inquired as to hearing loss benefits, based on his exposure to the vacuum noise, but was again told by the safety director that his claim was barred. His most recent work assignment has a noise exposure of 78 dBA. Claimant filed his original notice and petition on January 2, 1986.

APPLICABLE LAW

Iowa Code section 85B.8 states:

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

Iowa Code section 85.26(1) states:

> Limitation of actions.
> 1. An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

Under In Re Declaratory Ruling of John Deere Dubuque Works of Deere & Company, III Iowa Industrial Commissioner Report, 147

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(1983), if a worker who has been exposed to permanent sensorineural hearing loss is transferred from the area of exposure to a non-exposure area, the statute of limitations under Iowa Code section 85.26 begins to run from the date of such transfer; if a worker is not transferred from the area of exposure, the statute of limitations would not begin to run until retirement or termination of the employment relationship. The first of these events to occur will "trigger" the running of the statute of limitations.

Excessive noise level means sound capable of producing occupational hearing loss. Section 85B.4(2), The Code.

The noise levels set forth under section 85B.5, The Code, are presumptive only. They do not constitute minimum levels at which a noise level will be viewed as excessive. Muscatine County v. Morrison, 409 N.W.2d 685 (Iowa 1987).

Because the times and intensities under section 85B.5, The Code, are not minimum levels for excessive noise, a change in work assignment from an area where the noise level exceeds the times and intensities set forth in section 85B.5, The Code, to an area where said times and intensities are not exceeded would not necessarily constitute a transfer under section 85B.8, The Code. Daughetee v. John Deere Dubuque Works, File No. 779848, Appeal Decision June 30, 1987.

ANALYSIS

Claimant alleges he has suffered a hearing loss arising out of and in the course of his employment. Iowa Code section 85B.8 states that a claim of hearing loss may be filed six months after separation from the employment in which the employee was exposed to excessive noise levels. The date of the injury is the date of the earliest of three events -- retirement, termination of the employment relationship or transfer from the excessive noise level employment by the employer.

In the instant case, claimant is still employed by defendant and, thus, neither retirement nor termination of the employment relationship has occurred. Defendant alleges that claimant was transferred from excessive noise level employment by his employer when he was laid off on February 21, 1982. Defendant argues that when claimant returned to work, his noise level exposure was 76-78 dBA, less than the 82 dBA which Dr. McClenahan indicated as a minimum for the occurrence of hearing loss, and therefore a transfer occurred.

However, the record shows that claimant is subject to reassignment to varying levels of noise exposure. He has been so transferred numerous times in the history of his employment with defendant. His layoff on February 21, 1982 and recall on

November 1, 1982 to work with noise exposure, albeit less noise exposure, was not a transfer within the meaning of section 85B.8. Rather, such action was merely a reassignment within the same work force, and is subject to change.

Claimant works in an environment that continues to expose him to potentially excessive noise levels. He is subject to transfer to even greater noise exposure at any time. His action is thus premature and it follows that it is not barred by the statute of limitations under Iowa Code section 85.26. In light of this determination, all other issues on appeal are moot at this time and will not be addressed.

FINDINGS OF FACT

1. Claimant has been employed by the John Deere Dubuque Works of Deere and Company for 23 years.

2. Throughout his employment with defendant, claimant has held several positions and has been transferred numerous times.

3. Claimant's exposure to noise has varied according to the positions he has held.

4. Claimant is currently exposed to a noise level of 78 dBA.

5. Claimant is currently subject to transfer to other departments with excessive noise levels.

6. Claimant has not retired or terminated his employment.

7. Claimant has not been permanently transferred from excessive noise level employment by the employer.

CONCLUSION OF LAW

Claimant has failed to prove, by a preponderance of the evidence, that six months has passed after one of the three triggering events set forth in section 85B.8, The Code, and thus this matter is not ripe for adjudication under Chapter 85B, The Code.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That this matter be and the same is hereby dismissed without prejudice.

That the costs of the arbitration proceeding are taxed

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one-half to claimant and one-half to defendant and that the costs of the appeal, including the transcription of the hearing proceeding, are taxed to defendant.

Signed and filed this 27th day of January, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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001028

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

AMES LUMLEY,	:	FILE NO. 763158
Claimant,	:	A P P E A L
'S.	:	D E C I S I O N
CITY OF DES MOINES, IOWA,	:	FILED
Employer,	:	
Self-Insured,	:	MAY 20 1988
Defendant.	:	

IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appealed from an arbitration decision awarding healing period benefits beginning on April 16, 1984 and continuing in the future until the conditions of Iowa Code section 85.34(1) are satisfied. The arbitration decision also ordered defendant to provide and pay for reasonable medical treatment of claimant's obesity to the extent necessary to allow for the knee surgery contemplated by claimant's treating physician.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 6. Both parties have filed briefs on appeal.

ISSUES

The issues on appeal can be stated as whether claimant is entitled to a running award of healing period benefits and whether defendant must provide reasonable and necessary medical treatment to allow for the knee surgery contemplated by claimant's treating physician.

REVIEW OF THE EVIDENCE

On April 16, 1984, claimant sustained an injury to his right knee when a stack of chairs fell and hit his right knee. Claimant reported this injury to his foreman and went to see a doctor. Claimant stated that at the time of the injury he weighed about 225 pounds.

Claimant was referred to Kent M. Patrick, M.D., on May 9, 1984. In a letter on that date Dr. Patrick opines:

> Physical exam reveals an overweight gentlemen [sic] in no acute distress. He has an antalgic

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gait on the right. Examination of the right knee reveals a Grade 2 effusion. Range of motion is from 0 to 110 degrees. The leg is relatively straight with some tendency towards varus. He has pain along the medial joint line and pain with McMurray's testing. Ligamentous stability reveals some mild medial laxity.

Three views of the knee, including a standing AP and patellar views, reveal what appears to be significant medial compartment disease. He has no osteophytes to speak of but the joint space itself seems to be almost gone. He has some sclerosis on the tibial side of the joint implying a more long standing process. On the patellar view it appears he has some degeneration of the facet between the lateral femoral condyle and the patella.

The situation was discussed in detail with the patient. His symptoms may be on a degenerative joint basis which have been made more symptomatic by the type of work he does. On the other hand this may represent an isolated meniscal which is giving him his acute pain on top of an underlying degenerative joint. I think for now we need to get him settled down with some Indocin Sustained Release capsules. I would like to see him back in approximately ten days for follow-up. If he continues to have significant problems, we may need to consider an arthroscopic exam.

I spoke with him about the possibility of an upper tibial osteotomy at some point down the road. I am hopeful that we can get things comfortable for him on the Indocin Sustained Release and allow him to make some decision in the future as to whether his knee bothers him enough to require an osteotomy.

Diagnosis: Medial compartment gonarthrosis, right knee, with possible acute tear, right medial meniscus.

(Joint Exhibit 1, pages 19-20)

Dr. Patrick released claimant for return to work on May 29, 1984. Claimant returned to work on that date but he experienced pain and subsequently returned to Dr. Patrick:

> 5-30-84: Mr. Lumley returns today for follow-up of his right knee. He returned to work yesterday but while pushing some desks he had a giving way episode with a rather loud klunk. His knee has

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been sore since that time and indeed he has a Grade 2 effusion today. He is tender along the medial joint line as well.

With a problem so quickly after returning to work I suspect that Mr. Lumley does have some significant medial compartment disease, either in the form of degenerative changes with or without a meniscal tear. I think at this time he should have an arthroscopic evaluation and treatment as indicated through the scope. At some later date he might require the upper tibial osteotomy that we discussed on his initial visit but for now the arthroscopic surgery should be able to get him through. He would like to proceed with this as soon as possible so that he might get better and return to his normal lifestyle, including work. His general health is good. His only medication is the Indocin which I have given him and Codeine apparently bothers him, although I don't know that it is a specific allergy. Past surgeries include a gastric stapling, gall bladder surgery and hemorrhoid surgery. He apparently has not been in the hospital for any medical problems. He has had an upper respiratory infection recently but has had no fever with it. His exam in the office today is normal with the exception of some fluid behind the left ear drum. There is no erythema to go with it. He is scheduled for surgery on Tuesday the 5th of June. Time off work should be in the neighborhood of 2-4 weeks, depending on what is found at the time of surgery.

(Jt. Ex. 1, p. 21)

Dr. Patrick performed the arthroscopic surgery on June 5, 1984. After this surgery claimant continued to experience problems as Dr. Patrick's subsequent letters note. In an August 24, 1984 letter, Dr. Patrick states:

Mr. Lumley returns today and continues to have significant trouble. He is using a cane to get around, as well as taking medicine. He continues to show a significant effusion, and I am afraid we are fighting a losing battle.

I did get a standing AP and lateral of his knee today. This shows him to be in slight varus alignment with significant narrowing of the medial joint space. I think that an osteotomy to shift him over into valgus is going to be necessary if we are going to improve this man's status. This

would, of course, carry with it several months of rehabilitation, but ultimately I would hope that he could return to his job at the Botanical Center. He would like to think about this before proceeding with another surgical procedure. He is to notify me in the next week if and when he would like to proceed. If not, then some type of situation will need to be worked out for an impairment rating, although I think that this would be unfair. The only right thing is to improve the status of his leg.

Jt. Ex. 1, p. 11)

Dr. Patrick's subsequent letters indicate that claimant's steotomy surgery was postponed several times due to upper espiratory infections and diarrhea. See joint exhibit 1, pages -10. Claimant testified that the osteotomy was eventually cheduled for late November or early December, 1984, but claimant tated that there was a mix-up at the hospital when he arrived:

Q. Why don't you tell us if that surgery took place.

A. No, it didn't.

Q. Why not?

A. Well, there was a mix-up in the hospital and his office.

Q. As to what?

A. Well, we were -- I was told to be there at eight o'clock by his nurse. I had a card, and I don't know what I did with it, but I had it on the card.

And so we were getting ready to go, and the hospital called and said, "Well, you were supposed to be here at six o'clock," and I said, "No. I got it right here. It says, 'eight.'" She says, "Well, you better call you doctor's office."

So I did, and the nurse reassured me. She said, "No, it's at eight o'clock," and so then we get a call to just postpone it, you know, "Just don't come in."

Q. Did the surgery get rescheduled after that?

A. No. Doctor Patrick told me to go to the City

doctor -- back to the City doctor.

Q. This was in December of '84?

A. Yeah.

Q. Did you do that? Did you go back to the doctor?

A. Yes, I did.

Q. What did the City doctor do for you?

A. Well, me and Mike -- That's when you were there; right? He --

Q. Just you.

A. He told me that I couldn't have the surgery. I weighed too much.

(Transcript pp. 17-18)

Claimant opined that at that time he weighed approximately 350 pounds.

Michael Peterson, safety and training administrator for defendant, testified concerning the osteotomy surgery scheduled in November or December 1984:

Q. During your discussions with the City doctor, in his discussions with Doctor Patrick, why was the surgery scheduled that third time if everybody was so concerned about his weight?

A. I think Jim's case -- I can't speak for the doctors. I can make, I guess, an assumption here. Maybe that's not appropriate to do.

I believe there was some concerns all along about his weight, but there was also a weighing of what the potential was for benefit versus not doing it. I think it -- at one point it was considered to be the risk was better to go with the surgery even though the weight was there.

However, at one point the weight had just exceeded -- gotten to such a level that, I think, Doctor Patrick then -- I believe Doctor Patrick took the initiative on this -- suggested that it was not appropriate. The risk was [sic] now swung too far, and there really would not be that much benefit.

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....

Q. Did Doctor Patrick tell you that the weight needed to be taken care of before the surgery could be done?

A. I have never discussed Jim's case personally with Doctor Patrick.

Q. Okay. Did Doctor Schultheis tell you?

A. Yes.

Q. Did Doctor Schultheis tell you that the surgery on his knee needs to be done?

A. Yes. He agreed that the surgery would eventually help him if he could get the weight loss down.

(Tr., pp. 59-62)

Claimant was then sent to Dr. Patrick for an impairment rating:

Mr. Lumley returns today for an impairment rating. The City has requested this of me. We discussed the possible upper tibial osteotomy again, and I feel that it will improve his situation, but I am unsure as to whether we will let him return to his old job. In order to maximize the potential benefit of this procedure, Mr. Lumley needs to work diligently on weight loss. He needs to lose somewhere between 50 and 100 pounds. This whole thing with work has gotten him quite upset. He requested some Librium to help him relax, and I complied with this. I told him that this is not something we can do on an ongoing basis, but I could help him some during this particularly stressful time.

On exam he continues to show a significant effusion in the knee. He is tender along the medial aspect of the knee and has a restricted range of motion from -15 to 90 degrees. This gives him an active motion of 75 degrees. With this in mind and has continued discomfort, I feel he warrants a permanent partial impairment rating of 25% of the right lower extremity. Presumably with a good surgical result this would be less. Certainly his pain should be better, but as mentioned above, I don't know if he is going to be able to return to heavy work on that knee. His chances for a good

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result will be maximized by the weight loss. I would hope this is something Mr. Lumley can do but he has already failed at wight [sic] loss over the past years, including a surgical procedure for weight loss. So far he is tolerating his Nalfon. Ultimately this may give him enough discomfort that he can get along. I need not see Mr. Lumley back unless he or the City decides that we should indeed go ahead with the osteotomy. (Emphasis added)

(Jt. Ex. 1, p. 6)

Claimant was sent to Scott B. Neff, D.O., for evaluation on January 7, 1985: In his evaluation report Dr. Neff opines:

> Physical examination shows the right knee to have a 0-90 degree range of motion, +1 effusion. The left knee has a 0-100 degree range of motion. There is no crepitus.
>
> In my opinion, this patient has a 20% disability with reference to his right knee. Based on the fact that he has had an arthroscopic medial menis-cectomy, I would feel that his disability is 15% due to degenerative changes, and 5% due to the alleged meniscus injury. It is doubtful in my mind, based on the patient's history, as given by himself and his wife, that the blow, supposedly, from a table, caused the meniscus injury itself. I would feel relatively comfortably saying that the patient had significant meniscus disease, simply based on him walking around at this size, squatting, twisting, carrying meat, and doing the activities of normal living, before he was hit by this table which slipped off the cart.
>
> As originally described by Coventry, the upper tibial osteotomy is a very successful operation. Coventry's original criteria were that there were no arthritic changes in the lateral compartment, and the lateral meniscus be normal, and the patient have no ligamentous instability, and be of normal weight.
>
> I think upper tibial osteotomy in this patient is destined to fail, based on the patient's size, and the development of his lateral compartment arthritic disease.

(Jt. Ex. 1, p. 27)

Defendant sent a letter to claimant dated December 19, 1984,

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which states that defendant has retained Liz Barstad, vocational rehabilitation counselor, to assist claimant with his rehabilitation. See joint exhibit 4. Barstad closed claimant's case on March 15, 1985, stating: "As per request of the account the case is closed due to lack of client's interest in pursuing a weight loss program." (Jt. Ex. 2, p. 1)

Claimant testified that he spoke with Barstad on about ten occasions. Claimant stated that Barstad attempted to get him into some weight loss programs and attempted to get him to go to Vocational Rehabilitation. Claimant testified that he would like to lose weight, but his wife must drive him to his appointments because he has difficulty driving due to his weight. Claimant related that he has difficulty fitting behind the steering wheel and working the clutch and brake in his car. Claimant stated that the programs that Barstad suggested were too expensive for him. Claimant indicated that he did go to Vocational Rehabilitation for an intake interview as Barstad requested.

Claimant testified that he received two letters from defendant suggesting weight loss programs claimant could go to at defendant's expense but that he did not go to these programs because he lacked transportation. Claimant stated that he would participate in a weight loss program if he had transportation and that if he loses weight he would have the recommended knee surgery.

Claimant revealed that he has had weight problems in the past and that at one point he underwent a gastro bypass procedure ("stomach stapling") to lose weight. Claimant stated that at the time the procedure was performed he weighed 270 pounds. Claimant related that after he had healed from the gastro bypass surgery he went to work for defendant and that he weighed about 220 pounds. Claimant opined that he was able to keep his weight down as long as he was working. See (Tr., pp. 24-25) On cross-examination claimant testified that he first noticed that he was gaining weight when he was sitting at home and could not walk. See (Tr., p. 34).

APPLICABLE LAW

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

In Shilling v. Martin K. Eby Construction Co., Inc., II Industrial Commissioner Report 350 (Appeal Decision 1981), (no appeal taken), the industrial commissioner awarded temporary total disability benefits during the period claimant was receiving weight loss treatment necessary for proposed surgery on claimant's back and the industrial commissioner ordered defendants to provide and to pay the reasonable expenses related to

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claimant's weight reduction including any necessary surgical and hospital expenses. Id. at 355. In Moore v. Des Moines Metro Transit Authority, IV Industrial Commissioner Report 250 (Appeal Decision 1983), (District Court reversed and awarded running award of healing period benefits, Supreme Court remanded for full commutation), the deputy industrial commissioner writing the final agency decision awarded healing period benefits for the reasonable period necessary for claimant to lose weight so he could undergo back surgery.

In Adams v. Waterloo Community School District, Thirty-third Biennial Report of the Industrial Commissioner 80, 83 (Appeal Decision 1977). The industrial commissioner ordered defendants to pay the costs of "Weight Watchers" as it had been ordered by claimant's physician.

Iowa Code section 85.27 (1984) states:

> 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 employer shall also furnish reasonable and necessary crutches, artificial members and appliances but shall not be required to furnish more than one set of permanent prosthetic devices.
>
> ....
>
> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, he should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care. In an emergency, the employee may choose his care at the employer's expense, provided the employer or his agent cannot be reached immediately. (Emphasis added)

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ANALYSIS

The greater weight of evidence establishes that claimant's right knee injury of April 16, 1984, has resulted in permanent impairment to claimant's right lower extremity. Both Dr. Patrick and Dr. Neff agree that claimant suffers some permanent impairment.

The extent of this permanent impairment is undetermined at this time. Dr. Neff opines that claimant suffers a 20 percent permanent partial impairment to the right lower extremity. Dr. Patrick opines that it is 25 percent, but he also opines that with an osteotomy this rating would be less. Dr. Neff opines that the surgery "... is destined to fail based on the patient's size, and development of his lateral compartment arthritic disease."

Dr. Patrick's opinions as to the extent of claimant's impairment and need for surgery are adopted over those of Dr. Neff. Dr. Patrick has had numerous contacts with claimant over a longer period of time.

All of the physicians involved in this case agree that claimant must lose weight before any surgery should be attempted on claimant's knee. Defendant has made some attempts to assist claimant to lose weight but these attempts have failed because claimant lacks necessary transportation and money to attend weight loss programs. Iowa Code section 85.27 requires the employer to pay for reasonable medical and transportation expenses necessary to treat the injury. Therefore, defendant shall furnish all reasonable medical treatments necessary to help claimant lose weight and defendant shall pay for claimant's reasonable transportation expenses necessary in claimant's weight loss treatment.

The deputy awarded claimant healing period benefits until the conditions of Iowa Code section 85.34(1) are satisfied. Running awards for healing period have been made by this agency to facilitate weight loss necessary to achieve maximum medical improvement. See Shilling v. Martin Eby Construction Co., Inc., II Industrial Commissioner Report 350 (Appeal Decision 1981). See also Moore v. Des Moines Metro Transit Authority, IV Industrial Commissioner Report 250 (Appeal Decision 1983). The greater weight of evidence supports the deputy's running award of healing period benefits.

Claimant's motivation will likely play an important part in his recovery. Claimant must make a serious effort to achieve the weight loss necessary for his recovery. His failure to do so may stop the running of the award because at that time no further recovery will be anticipated.

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FINDINGS OF FACT

1. Claimant sustained an injury to his right knee on April 16, 1984 while he was stacking chairs for defendant.

2. At the time of the injury claimant weighed 225 pounds.

3. Claimant's right knee injury has been diagnosed as medial compartment gonarthrosis with possible acute tear, right medial meniscus.

4. Claimant needs surgery to correct his knee injury.

5. Claimant continues to experience knee pain which hampers claimant's ability to walk.

6. Claimant has been unable to perform acts of gainful employment due to knee pain since the April 16, 1984 injury.

7. As a result of claimant's inability to walk or work, claimant has gained in excess of 175 pounds.

8. Claimant must reduce his weight to alleviate his knee pain and to undergo surgery on his knee.

CONCLUSIONS OF LAW

Claimant sustained an injury to his right knee arising out of and in the course of his employment on April 16, 1984.

Claimant has established that his obesity is causally related to his April 16, 1984 right knee injury.

Claimant is entitled to reasonable and necessary medical treatment for his obesity.

Claimant is entitled to healing period benefits from April 16, 1984 and continuing until the conditions of Iowa Code section 85.34(1) are satisfied.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That defendant shall pay to claimant healing period benefits at the rate of two hundred eight and 30/100 dollars ($208.30) per week commencing April 16, 1984 and continuing until the conditions of Iowa Code section 85.34(1) are satisfied.

That defendant shall pay accrued amounts in lump sum together

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with interest pursuant to Iowa Code section 85.30.

That defendant shall receive credit for amounts already paid.

That defendants shall provide and pay for reasonable medical and transportation expenses necessary for claimant's weight reduction.

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

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

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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FILED

MAR 31 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CHARLES E. MCBIRNIE,	:	
	:	File Nos. 692457, 700671
Claimant,	:	756245, 756247
	:	
vs.	:	R E V I E W -
	:	
OSCAR MAYER & COMPANY,	:	R E O P E N I N G
	:	
Employer,	:	D E C I S I O N
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

These are proceedings in review-reopening brought by the claimant, Charles E. McBirnie, against his self-insured employer, Oscar Mayer & Company, to recover benefits under the Iowa Workers' Compensation Act as a result of injuries sustained or allegedly sustained on July 1, 1979, March 15, 1981, March, 1983, and August 1, 1983 through September 12, 1983, respectively. This matter came on for hearing before the undersigned deputy industrial commissioner at Des Moines, Iowa on June 11, 1987. A first report of injury was filed on January 25, 1982 regarding the July 1, 1979 injury; on April 23, 1982 regarding the March 15, 1981 injury; on April 25, 1985 regarding the March, 1983 alleged injury; and, on April 25, 1985 regarding the August-September, 1983 alleged injury, respectively. The parties stipulated that claimant has been paid 16.25 weeks of benefits as regards the July 1, 1979 injury and 12.5 weeks of benefits as regards the March 15, 1981 injury.

The record in this case consists of the testimony of claimant, of Julie Ann McBirnie, of Dan Severns, of Brenda Goeden, of Cecilia O'Brien and of Phil Schumacher as well as of exhibits 1 through 26, all offered jointly.

ISSUES

Pursuant to the pre-hearing report, the parties stipulated that claimant's rates of weekly compensation are: $256.58 as regards the July 1, 1979 and the March 15, 1981 injuries; $278.09 as regards the March, 1983 injury; and, $260.19 as regards the August-September, 1983 injury. The parties further stipulated that medical costs were fair and reasonable and that claimant did receive injuries which arose out of and in the course of his employment on July 1, 1979 and March 15, 1981. The parties further stipulated that a causal relationship exists between

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those injuries and temporary total disability or healing period previously paid as outlined above. The parties stipulated that claimant was entitled to five weeks of temporary total or healing period as regards the July 1, 1979 injury and 20 weeks of temporary total or healing period disability benefits as regards the March 15, 1981 injury. They further stipulated that defendant is to receive credit for benefits previously paid as set forth above. The parties stipulated that the commencement date for additional benefits, if any are due for permanent partial disability as regards the July 1, 1979 and March 15, 1981 injuries, is August 1, 1983. As regards the July 1, 1979 and March 15, 1981 injuries, the issue remaining to be decided is the nature and extent of benefit entitlement as to permanent partial disability with the dispute being as to whether claimant is entitled to scheduled member benefits under Chapter 85 or occupational disease benefits to be evaluated industrially under Chapter 85A.

As regards the March, 1983 and August-September, 1983 alleged injuries, the issues remaining to be decided are:

Whether the injuries arose out of and in the course of claimant's employment;

Whether a causal relationship exists between the alleged injuries and claim disability;

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

Whether claimant is entitled to payment of medical costs.

Apparently, a Chapter 85B issue remains to be decided in a bifurcated hearing.

As regards the July 1, 1979 and March 15, 1981 injuries, claimant contends that the injuries are occupational diseases and that claimant should be compensated for loss of earning capacity as a result of the injuries or, alternately, that claimant is entitled to additional permanent partial disability to scheduled members as a result of the injuries. Defendant asserts that the injuries are to a scheduled member only.

As regards the alleged injuries of March, 1983 and August-September, 1983, claimant contends either a specific injury on approximately March 2, 1983 to claimant's back which arose out of and in the course of claimant's employment or cumulative injuries to claimant's back which have caused claimant to be disabled since approximately September 12, 1983. Defendant denies that claimant has injuries or disability to his back and indicates that claimant's low back condition results from a cause or causes totally unconnected to work. Claimant contends and defendant

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denies that the odd-lot doctrine applies to claimant in this case. The pre-hearing assignment order does not designate the issue of whether claimant is an odd-lot employee under the Guyton doctrine as an issue that was to be tried in this case. Likewise, the pre-hearing conference notes do not designate the odd-lot doctrine as having been discussed at pre-hearing conference.

REVIEW OF THE EVIDENCE

Claimant was born in March, 1946. He left high school without graduating and obtained a GED in 1985. He has had some prior work experience driving a semi-truck after completing a truck driver training school as well as experience as a welder, greenhouse worker and factory laborer before beginning work at Oscar Mayer in July, 1969. Claimant initially worked at various Oscar Mayer jobs on the kill floor including bagging meat, as well as working at the viscera table, the shaving line and the bung room before beginning work in the boning department in approximately 1972. Claimant has been in the boning department since that time.

Claimant testified that he first developed problems with his right hand in approximately 1980 or 1981 for which he saw Robert F. Deranleau, M.D., the company doctor. He reported that Dr. Deranleau referred him to Arnis Grundberg, M.D., who subsequently performed right hand and elbow surgery in early 1982. Dr. Grundberg performed left arm surgery approximately six weeks later. Claimant reported that he was released for light-duty work with a subsequent full-duty work return. Claimant testified that co-workers had to help him meet his production quotas once he was released to full duty and that he subsequently had problems with numbness, tingling and aching of his palms and elbows on the right. He reported similar, but not as severe, left arm complaints. Claimant reported that, on April 25, 1983, an epicondylitis surgery was performed on the right and that he was off work until August, 1983. Claimant testified that he was running approximately "30 percent" on his work return, but that he has not worked at Oscar Mayer since September, 1983. Claimant indicated that he currently has problems with numbness and weakness in his hands as well as elbow aching. He indicated he cannot grasp pencils, door knobs, styrofoam cups or drinking glasses. He reported that he has difficulty picking up coins, sorting dollar bills and turning newspaper and magazine pages.

Claimant asserted that he had had upper back problems prior to March, 1983 consisting of pleurisy and muscle spasm between the shoulder blades. He attributed those problems to blading in front of a blower and to reaching across the boning table to grab meat. Claimant did not recall having had muscle spasm in his shoulder in June, 1980. He denied that a hospitalization in August, 1980 was related to low back muscle spasm. Claimant testified that he had slipped on fat in the locker room on

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approximately July 5, 1979 and had slipped on steps on his way to the Oscar Mayer lunch room in July, 1982, but could not recall having seen Wayne E. Rouse, M.D., for acute low back problems in 1968.

In March, 1983, claimant was boning Boston butts. The unprocessed product comes to the worker on a conveyor belt. Claimant variously described the procedure for acquiring product from the belt as involving turning and ducking under an upper level conveyor, reaching and grasping the meat and then pulling the meat onto the [boning] table. He described the maneuver of turning variously as involving a "twist at the waist" or turning the hips at an angle sideways in order to reach the meat. The product is boned and processed and commercial parts are placed in a plastic, dishpan-like tote which is pushed onto the conveyor. Bones and other debris are placed in a bucket. Claimant reported that more twisting and reaching was required at his work station than would have been required of a worker on the opposite side of the table. Claimant stated that the video of the picnic boning line in evidence shows the opposite side of the line where workers face the meat and, hence, was different from his own work situation. Claimant reported that he was generally third, fourth or fifth in line and that persons nearer to the top of the line, such as he, would generally have a greater quantity of product as well as a better quality of product to debone.

Claimant described the average weight of a butt as from 7-15 pounds, stating that seven was probably too low. He reported that sometimes the weights were greater than 20 pounds. Claimant indicated that, on Mondays, butts were stiffer, colder and drier as they had been in the cooler all weekend. Claimant testified that the boning department temperature was from "real cold" to approximately 50 degrees and that he was required to work on a brick floor which was wet and sloped towards the drains.

Claimant reported back ache and spasm on March 2, 1983. He reported to first aid and was given muscle relaxants. He subsequently saw Dr. Deranleau on March 7, 1983. The doctor apparently prescribed hot soaks, exercise and, as of March 14, 1983, physical therapy at the Dallas County Hospital. Claimant was taking muscle relaxers for his hands and arms at that time. He testified he really was not worried about his back as he was "scared" about his hands. Claimant was off work from his epicondylital surgery on April 25, 1983 until on August 1, 1983; he reported his back continued to ache during that period, but he did exercises and soaked in a tub for the back ache. Claimant said that, following his work return in August, 1983, his back would bother him by the end of the week. He reported that he was off following the weekend on Monday and Tuesday, September [12 and 13], 1983 as he had a sore throat, although, as far as his back was concerned, he could have returned to work on Monday.

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Claimant testified that, on Tuesday, while sitting on his couch at home, he developed severe back pain. He was subsequently hospitalized for 18 days with treatment by Dr. Rouse, his family physician for the past 23 years. Claimant reported that Dr. Rouse subsequently referred him to Dr. Gundberg and Robert Gitchell, M.D., as well as Stuart Winston, M.D. Claimant has also seen Peter Wirtz, M.D., and William R. Boulden, M.D., on account of his back. Claimant testified that he told "Kay" that he wanted to see Dr. Grundberg for his back.

Claimant testified that his back currently aches continually and that he has worsening muscle spasm. He testified that he was hospitalized for muscle spasm in December, 1986. Claimant reported a "constant weird feeling" in his right leg with complete numbness to the knee at times. Claimant testified that his spasm may become so severe that, if he does not deal with it immediately, he will be in bed for three of four days. Claimant reported he takes Motrin, Tylenol with codeine, an analgesic and two aspirins a day as well as Advil for his back pain. Claimant indicated that his back pain is now worse than it was when he was at the vocational rehabilitation center in Des Moines. Claimant reported that, at hearing, his weight was approximately 200 pounds and that he had weighed around 218 pounds in September, 1983.

Claimant reported a conversation with Phil Schumacher, personnel director for Oscar Mayer at Perry, following Dr. Wirtz's deposition of June, 1985. Claimant indicated that he subsequently contacted state vocational rehabilitation. He testified that they sent him home as "they couldn't do anything for me." Claimant agreed that they had suggested pain center treatment; claimant then reported that the vocational rehabilitation personnel told claimant he would not be accepted for pain center treatment after he had dealt with the pain on his own for six months as it was then "too hard to break existing patterns." Claimant agreed that vocational rehabilitation personnel had told him he may have been depressed. Claimant asserted that he had had a pretty mild depression and was "mad" and "real disappointed." Claimant testified that he is currently receiving Social Security disability benefits and that, at time of hearing, had recently been recertified as eligible. Claimant reported that Dr. Walker's examination had lasted approxiately 5.5 hours and had included both the taking of measurements and grip and strength testing.

Julie Ann McBirnie, claimant's wife of 23 years, substantiated claimant's testimony as regards his life activity restrictions and continuing problems with muscle spasm.

Phil Schumacher testified that claimant was terminated at Oscar Mayer under a clause in the union contract stating that any absence in excess of 18 months would result in termination of employment. Schumacher testified that Oscar Mayer has a

policy against rehiring previous employees. He reported that, for that reason, claimant would not be rehired at Oscar Mayer if he did apply for work, although the plant has hired persons with claimant's kinds of conditions. He indicated there are pork plants other than Oscar Mayer in Iowa.

Mr. Schumacher reported that exhibit 2 is a video tape of a long shot of the picnic boning conveyor line. He reported that, in the current operation, Boston butts are not asided into totes and therefore a video of the picnic line was made as it was identical to the layout of the butt line and was very similar to the 1983 butt boning procedure. Mr. Schumacher testified that picnic boning pieces are somewhat heavier than butt boning pieces. The video was viewed by the undersigned.

Schumacher indicated that the plant floor drops one-fourth inch in elevation per foot towards the drains as required by federal regulation.

Schumacher indicated that, on February 7, 1983, a notice of the Perry Oscar Mayer plant closing was posted. The plant has been able to stay open on two different occasions subsequent to that posting. Schumacher indicated that OSHA has not issued a citation relative to claimant's complaint regarding the plant's boning operation.

Mr. Schumacher assumed that Dr. Deranleau's services in March, 1983, as well as the services for physical therapy at Dallas County Hospital were paid as a workers' compensation claim.

Mr. Schumacher reported that the company doctor would make the determination as to whether prescription drugs should be given an employee; the employee would decide whether they needed their hands wrapped. Mr. Schumacher reported that there are currently a total of 10 inside-out ham boners at the Oscar Mayer plant. He indicated the job description provided defense counsel and Dr. Bolden accurately described their present duties and that, in addition, they would train individuals on new methods of boning, apparently piece boning, with less than 50% of their time spent on actual inside-outside ham boning. Schumacher reported that the patch skin and bone picnics job is still available at Oscar Mayer, but reported that the job does not exist as described in the April 18, 1972 job description in that the duties of taking off the patch skin and blood clots, bruises and hair roots is now performed by individuals other than the picnic boners. He reported that the service boning conveyors, or electric truck job, is not available as described in that, while the physical demands remain the same, a common service pool of workers for both picnics and hams is no longer used as the two operations are now performed on different floors. He reported that the job of service line boning no longer exists.

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Schumacher reported that piece ham boning has been performed at Oscar Mayer from approximately May or June, 1983.

Schumacher recalled a conversation with claimant of June, 1985 in which claimant told Schumacher claimant was going to come back to work as Dr. Wirtz had indicated in a deposition that claimant was capable of returning to work with no restrictions. Schumacher reported that he advised claimant that claimant was off work under the care of Dr. Rouse and that claimant could not return to work until he had a written release from Dr. Rouse.

Schumacher testified that temperatures in the area where hams are boned would be under 50 degrees, but would "bump up pretty close to that." He indicated that the floor in the area is wet from time to time throughout the day and that there are cooling units on the sides of the floor which can create drafts, although he was uncertain that there would be drafts in individual work stations. Schumacher opined that, of approximately 150 boners in the plant, approximately 20 have in excess of 15 years seniority.

Dan Severns is a supervisor in industrial engineering at the Oscar Mayer plant in Perry. He has had prior work experience as an industrial engineer and has attended ergonomics and other related seminars. Mr. Severns indicated he was familiar with the butt boning operation in 1983. Severns reported that 85% of rough butts were from light hogs weighing approximately 7 3/4 pounds and 15% were from heavy hogs weighing approximately 11 1/2 to 12 pounds with the heaviest weights being approximately 16 pounds. Severns reported that, in the boning operation, the bone, gristle and skin are discarded and the boneless butt, the blade meat and the plate fat are reserved in the tote. He indicated that the net weight in a tote would be approxiately 85% of the total weight from the table. The tote standard is boneless meat from seven butts or approximately 40 pounds. Once the tote is filled, the worker turns slightly to the left and pushes the tote up a 22 degree incline onto another conveyor. The work standard for light butts would be 42 units per hour with seven butts in a tote. Therefore, Severns testified that a worker would deal with slightly over six totes per hour with the totes per day totalling 6 plus multiplied by 7.67 hours. Severns reported that, when claimant was boning, the operation was a rough butt boning operation, whereas now the operation is a Boston butt boning operation. He explained that Boston butts are now not placed in the tote, but remain on the conveyor. Severns was unaware of the number of knife cuts required, but indicated it was possibly as high as 50, although he was uncertain as to whether it would have been between 50 and 75. Severns agreed that the greatest number of cuts would be required for the leanest of the three grades of butts boned. Severns reported that occasionally a worker would need to reach across the four foot wide conveyor to get a product as the product would be

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beyond the conveyor's center, even though the attempt was to have the product at the center. Severns indicated he was confused as to claimant's statement that turning [fully] in the work station was not possible. An 18-inch space exists between the cut board and the back of the next work station. He indicated a worker should be able to turn within that space and [time] should have been allowed for turning when boning job standards were established.

Severns reported that the jobs of boning hams inside out, of patch skin boning, of service boning conveyor and of operating electric truck now exist at Oscar Mayer although minor method changes have taken place since 1983. He reported that the physical demands from such jobs remain basically the same as in 1983, however. Severns reported that service loin boning is one of the more physical jobs in the plant and reported that there is no longer a loin boning operation at Oscar Mayer. Severns indicated that jobs at Oscar Mayer are coded by points to indicate the pay scale for such jobs with a lower point total indicating the job requires less force or physical demand. Ranges are from A for the lightest jobs to D for the heaviest jobs. Boning Boston butts is a code A job. Boning hams inside out is a code B job.

Brenda Goeden testified that she is a vocational rehabilitation specialist with a masters degree in personnel and counseling with an emphasis on job development and placement. She identified exhibit 22 as a VOCOMP output analysis. She described VOCOMP as a tool used to produce a listing of various jobs a worker can physically perform. The jobs supplied from VOCOMP are based upon the profile supplied, including the individual's work history, interests, aptitude, behavioral patterns from his work history, vocational training, education and physical capacities or restrictions. Ms. Goeden reported that a labor market survey would be done if a worker expressed an interest in a job title supplied through the VOCOMP analysis system. Ms. Goeden reported that the data supplied the VOCOMP computer for claimant included Dr. Grundberg's restrictions. She reported that average GATB scores were supplied the computer and that vocational training and education was limited to 12 months. Ms. Goeden reported that a total of 68 jobs were supplied through the VOCOMP analysis. It was not determined whether those jobs were available in the locale. Not all jobs required training that could be completed within 12 months. Ms. Goeden agreed that all jobs might include some reaching, handling, fingering or feeling. Ms. Goeden reported that was not considered significant as Dr. Grundberg had only moderately restricted claimant as regards those activities. She agreed that a labor market survey would be required to determine the feasibility of any given job for claimant.

Cecilia O'Brien, R.N., testified that she is a vocational rehabilitation specialist with Intracorp and has been such since

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July, 1986. Her prior work experience includes five and one-half years as a Swift Independent Packing Company plant nurse. Ms. O'Brien testified that in that job she had worked with meat packing workers as regards job modification and employee restrictions or job transfers on account of employee restrictions. Ms. O'Brien reported she had contacted Oscar Mayer and had visited the plant as well as having visited with Drs. Grundberg and Boulden. She reported she was aware of Dr. Grundberg's restrictions on claimant and reported that Dr. Boulden had placed no back or hand restrictions on claimant. Ms. O'Brien opined that claimant should not do a knife job given the symptoms that he has and his problems with dexterity, feeling and grasping. She reported that Dr. Grundberg's weight limit should also be considered and that claimant should work in a warm as opposed to a cold environment. Ms. O'Brien reported that packing plant jobs she might consider for claimant included stun and shackle hogs as that involved grasping large objects and not fine motor skills, driving hogs, cutting the feet off hogs and yard worker. She reported that he could possibly work as a day janitor or work pushing hogs into a cooler, although she would have to check with Dr. Grundberg to see whether any weight limits apply to pushing or pulling. She reported that, in driving hogs, some individuals use slappers, some use electric prods and others simply "holler" at the hog. She was unaware of whether Oscar Mayer allowed workers latitude as to the method in which the workers performed the job or whether they required the use of a particular tool. Ms. O'Brien agreed she had not viewed any of the jobs described as performed at Oscar Mayer or reviewed the Oscar Mayer job descriptions regarding any of the jobs. Ms. O'Brien testified that, while working at Swift, she had been aware of workers with both carpal tunnel and ulnar tunnel who had been hired by Swift. She reported that bilateral carpal, cubital and ulnar surgeries and epicondylitis surgery would not necessary preclude employment although, as plant nurse, she would have advised that the person would have trouble if placed in a knife job. Ms. O'Brien reported that, as plant nurse, if a job applicant had had back spasm or other indication of back problems, she would have sent them to the company doctor for x-rays. Ms. O'Brien opined that the ability to spell is not indicative of intelligence.

Kay Stokely, who has a Bachelor of Science degree in nursing from the University of Iowa, testified she has been employed by Oscar Mayer since 1969. Nursing notes relative to claimant were discussed. An entry for June 2, 1980 reflects that claimant called stating he would be under a doctor's care for one or two weeks on account of massive muscle spasms in the neck, arms, chest and back. The note states "not work connected." A note of October 28, 1981 reflects that claimant came to the first aid station on that date reporting a sore left arm and that an ACE bandage was applied to the arm. A note of March 4, 1983 reports that "lower back better, both shoulders sore. ... Analgesic was administered." An entry of March 28, 1983 indicates "right

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elbow, cannot fully extend. Will see Dr. Grundberg April 5 at 3:00. Back okay." After claimant's work return of August 1, 1983, the balance of the entries do not report back pain. She reported that entries of August 2, 1983, August 3, 1983, August 4, 1983, August 9, 1983, August 18, 1983, August 19, 1983, August 23, 1983 and September 9, 1983 related to claimant's arm which she characterized as including the wrist. Ms. Stokely indicated that her entry on claimant's employee attendance card for September 12, 1983 indicated that claimant had called and reported he would be under a doctor's care all week for sore throat and back. An entry of September 15, 1983 indicates that claimant had called and stated he would be in the hospital the rest of the week for back muscle spasm. Ms. Stokely indicated that in August, 1983, claimant was administered analgesic twice and Darvon once. She reported that she supposed that medication taken for arm or wrist pain would also affect back pain for a few hours. Ms. Stokely stated that no physician had advised her that claimant was off work for a work-related injury in September, 1983.

Patricia Massengill had had 20 years of experience working in the Dallas County Hospital and has worked at Oscar Mayer for 21 years. She apparently is not a licensed practical nurse, but has gained experience primarily from on-the-job training rather than from formal education. Ms. Massengill examined the first aid station nurse's notes for her entries relative to claimant. On September 28, 1981, claimant wanted his wrist wrapped. On March 2, 1983, claimant had a sore lower back with "twisting in the middle of the back" for which he was given analgesic. On March 14, 1983 claimant's back was no better; claimant saw Robert Deranleau, M.D., the company doctor. Ms. Massengill had not seen claimant after March 14, 1983. Upon examining a "white card", she reported that she had made a notation on August 15, 1983 of "Pulled muscles in back", however. She reported a similar notation for August 16, 1983. Neither notation referenced a work injury. On September 12, 1983, and September 13, 1983, claimant phoned and reported a sore throat.

Thomas W. Bower is a physical therapist. Bower reported claimant had full range of motion of the hands and wrists and that, under AMA guides, he would have no range of motion impairment. He reported that he understood two previous EMG's done postsurgically were normal and that, on that basis, he would assume the nerves were functioning normally and not contributing to any further impairment. Claimant's grip strength was recorded through use of a dynamometer which measures force or torque registered at five different positions. Generally, minimal grip strength is generated at the first and fifth positions with maximum torque generated at the mid position or the third position of the dynamometer. Such should produce a bell-shaped curve. Bower reported that claimant's dynamometer test was inconsistent in that it did not truly show a bell-shaped curve once grip strength

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values were plotted. Bower reported that claimant's pinch grasp test also yielded questionable values in that a wide variance of values existed. He reported that, in that test, the individual is asked to pinch another dynamometer between the index finger and thumb over three successive trials. Usually, there is a 5-10% difference between each successive trial. In claimant's case, there was a 40% variability on one side and a 30% variability on the other side. Bower testified that the dynamometer should give a valid result regardless of whether the individual had a strong grip or a weak grip. On cross-examination, Mr. Bower indicated he was unaware that claimant had cubital ulnar surgeries on both hands or that claimant had had epicondylitis surgery. Bower indicated he does perform physical impairment ratings of backs and that, if claimant had flexion of 30 degrees of the lumbar spine, that would represent a 6% (impairment) and extension of 15 degrees would represent a 1-2% (impairment). He reported that there was no impairment for lateral flexion right and left of 30 degrees. Mr. Bower related that Dr. Grundberg had performed claimant's left carpal, ulnar and cubital surgeries after an EMG of 1981 was interpreted as normal. He further agreed that, in evaluating disability from the nerves, sensory deficit, pain, discomfort and loss of strength are all taken into account even though several of those are not measurable objectively.

William R. Boulden, M.D., is a diplomat of the American Board of Orthopaedic Surgery and a fellow of the American Academy of Orthopaedic Surgeons. Dr. Boulden stated that, after examining claimant initially on September 15, 1986, he believed claimant had myofascial pain that his work may or may not have produced. The working diagnosis was of degenerative changes of the lumbar spine present since at least 1983. The doctor opined that most of [the changes] were soft tissue irritation with maybe some irritation of the degenerative changes in claimant's back. He reported that these should have been a temporary situation if properly treated and (if claimant were) properly advised and counseled in the proper use of his back in the future. Dr. Boulden indicated that claimant should be instructed on proper biomechanical use of his spine; instructed on proper low back exercise to keep his back more supple, lose and not prone to aggravation; and "making sure that his work site did not have jobs that were detrimental to performing proper biomechanical use of the spine." Dr. Boulden reported that he had reviewed a video tape of the deboning process at Oscar Mayer and had not seen anything that was physically demanding concerning the back other than that he would recommended claimant have a five-gallon bucket or plastic milk carton underneath his table in order that he could alternate from standing on both feet at once as to not aggravate his back. The doctor opined that if the floor had a quarter-inch drop per foot, that should not present a problem for claimant's back if he learns how to use his back properly through proper education. The doctor reviewed the job descriptions and physical demands of the jobs of bone hams inside-out, patch

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skin and bone picnics, service boning conveyors and electric truck and reported that there were no physical demands which claimant's back could not tolerate or working conditions which his back could not tolerate under those particular jobs. The doctor apparently had some reservation about the job of service loin boning as it involves very large weights (apparently lifting approximately 100 pounds). The doctor opined that claimant's back could tolerate both the physical demands and working conditions for the descriptions on exhibits 9 and 10, both designated bone loins.

Dr. Boulden opined that, per evaluation of Mr. Bower, claimant's grip strength tests varied too greatly from the standard deviation to show whether claimant had any objective grip strength weakness. The doctor reported that he and Mr. Bower were unable to make a permanent partial impairment rating on claimant based on his normal motion, normal EMG's, and inconsistent grip strength tests as according to AMA guidelines claimant did not qualify (for permanent impairment). Dr. Boulden reported that he would prophylactically restrict anyone who had had carpal tunnel surgery from repetitive bending of the wrists and from use of vibratory power equipment. Dr. Boulden opined that claimant should probably be able to cut meat using a non-vibratory electric wizard knife that is not as physically demanding on the wrist or hand. He reported that a job consisting of sorting different boxes and dumping them into larger tubs or containers did not require repetitive physical bending of the wrists. The doctor recommended the use of a soft-handled knife in order not to irritate any fibrous tissue about the scar area. The doctor opined that claimant would have no problem with his hands in doing any of the jobs outlined above other than, as regards boning hams inside-out, claimant's knife should have at least a cushion grip handle and that, if possible, claimant should use a wizard rather than a deboner knife. Claimant should wear a wrist splint for all jobs.

Dr. Boulden indicated that claimant did not relate he had sustained a back injury at work on March 2, 1983 for which the company physician had treated him. Dr. Boulden opined that something may have occurred around March 2, 1983 to claimant's back, but he stated that findings on physical examination referencing to pain in the lower back since March 2 were not out of the ordinary. The doctor opined that claimant's history of returning to work until approximately mid-April, 1983 and then being off for approximately 14 weeks on account of his arm surgery and then returning to work in August, 1983 with additional back problems after his return to work and eventual hospitalization did not necessarily indicate that something was occurring in his back that was more than a muscle strain in that, had claimant not had full rehabilitation prior to being off work for 14 weeks and if he did nothing during that period for rehabilitation of his back, then "[w]ith the underlying degenerative changes, that

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would fit along with what you described in his symptomatology." (Deposition page 26, lines 7-9). The doctor reported that he did not know what type of work claimant was performing in March, 1983. The following discussion then took place:

> Q. If he was boning butts, which he estimated weighed 10 to 25 pounds, and if the speed of the chain was approximately 50 per hour, and he would bone perhaps 430 to 450 during an eight-hour day, and if you would consider that the weight that he would be handling would be approximately three ton during that period of time, and he was standing on an uneven brick floor with a slope, and you have a temperature between 40 and 50 degrees, and the job required twisting for each bone, each butt that he boned, would that be the type of job that would aggravate this underlying degenerative condition?
>
> A. It's possible. First of all, I don't understand the job at all. It would be hard for me to conceive that he bones out 50 butts an hour. That would be almost a butt a minute. Maybe he is good, but that's almost impossible if we are talking about boning out a butt, we are talking about the large shank or ham side of the butt.
>
> Number two, requires him to twist, I'm not aware that there was any job there that was twisting. Obviously if he twisted without moving his feet, he could be taught properly how to move his legs and his back. I am saying if what you have told me is absolutely true, then, yes it could.

Dr. Boulden later opined that it is possible for degenerative disc disease to be accelerated with improper back usage.

Dr. Boulden reported that he did not really know what Dr. Winston was referring to when he indicated upon examining claimant in 1984 that claimant suffered a chronic, recurrent lumbosacral strain, obesity and chronic pain syndrome. Dr. Boulden reported that Dr. Gitchell's impression that claimant had degenerative disc disease with minimal nerve root irritation and weak abdominals as far as supporting his back was more consistent with what he found regarding claimant. Dr. Boulden did not recommend pain center treatment for claimant as claimant's pain source has not been identified yet and "[I]f it is something that is treatable, obviously the pain center has no benefit at all." Dr. Boulden also reported that claimant upon questioning did not seem to be that incapacitated with his pain. The doctor agreed that, with respect to the carpal tunnel, cubital tunnel and ulnar nerve problems for which claimant was treated, that without protection there was a higher instance of reoccurrence where an individual

has previously had surgery and then returns to the same type of work. Dr. Boulden indicated that bilateral (positive) Tinel's and positive Phalen's would not indicate clinical findings of carpal tunnel because they are subjective tests. He reported that he would not operate unless EMG changes (consistent with) carpal tunnel syndrome were found. Dr. Boulden opined that grip strength would be important.

John R. Walker, M.D., is a board-certified orthopaedic surgeon who has practiced in the Waterloo area for over 37 years. Dr. Walker opined that claimant's permanent impairment combined of the lumbosacral and sacroiliac would equal 18% if he could "properly get at least the sacroiliac in some kind of shape with treatment." Dr. Walker had rated the right arm at 32% of the arm and the left arm at 24% of the arm. The doctor felt that claimant had very little loss of abduction or adduction, but had no measurement in degrees as to those left wrist motions. Claimant had lost the last ten degrees of full extension of the right elbow. Pronation and supination of the right elbow were normal. Claimant had no shoulder problems. Claimant's abduction and adduction of the wrist joint on the right were normal throughout. Flexion and extension of the left elbow joint were normal. Rotation of the left elbow joint was normal and claimant's shoulders on both the right and the left were normal. Dr. Walker reported that claimant had about 60 degrees of forward flexion of the thoracolumbar spine. He reported that claimant did not have any loss of extension and felt that claimant could have forced himself to a fairly good range of motion. The doctor stated that he remembered, but had not recorded, that claimant had pain or a positive straight leg raising test at 30 degrees. Dr. Walker opined that claimant does not have a disc problem, but had chronic, painful sacroiliac sprain giving telalgic radiation into the thigh and groin on the right side. Dr. Walker opined that he had assigned claimant 32% (permanent partial impairment) of the right arm which, under the AMA guides, he translated into 19% of the body as a whole; had assigned claimant 24% [permanent impairment] of the left arm and translated that to 14% of the body as a whole; and had assigned claimant 18% of the body as a whole for the back. He reported that he then added the whole body percentages (of impairment) to achieve the figure 51% whole (person impairment). Dr. Walker agreed that, under the AMA guides, the figures would have been combined rather than added. He also agreed that the combination of impairment could very well be 42% (permanent partial impairment of the body as a whole).

Dr. Walker opined that an incident on March 2, 1983 when claimant was pulling meat off the line and twisted his back and felt immediate low back pain caused the pain he described as occurring in the sacroiliac joint. Dr. Walker recommended that he treat claimant to try to make claimant feel better, but stated that, when he had last seen claimant in March, 1986,

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claimant had reached maximum medical recuperation. The doctor opined that, without further treatment, he would not release claimant to return to gainful employment. Dr. Walker opined that further treatment for claimant's "upper extremity" would fail and that claimant could not return to his previous work he did before, given his present impairments of his arms. The doctor opined that repetitive use of the wrists and elbows had produced claimant's upper extremity conditions. He opined that the condition should be considered an injury rather than a disease.

A. B. Grundberg, M.D., is a member of the American Society for Surgery of the Hand and of the Academy of Orthopaedic Surgeons. The doctor first saw claimant on July 10, 1981 with complaints of pain in the right upper extremities and numbness and tingling. His final diagnosis regarding claimant was a compression of the median nerve at the wrist and compression of the ulnar nerve at the right elbow as well as probable thoracic outlet syndrome. On January 18, 1982, Dr. Grundberg did a decompression of the right carpal and ulnar tunnels and the ulnar nerve at the right elbow. He reported that claimant received only partial relief from that surgery and continued to have trouble until he had last seen claimant on January 28, 1986. On April 25, 1983, Dr. Grundberg performed a lateral epicondylitis of the right elbow as claimant was having discomfort in that area. The doctor determined that claimant had a compression of the median and ulnar nerves of the left wrist and the ulnar nerve at the left elbow and decompressed those on March 10, 1982. He reported that claimant was improved following that surgery, but did not recover altogether and was still having trouble when last seen on January 28, 1986. Dr. Grundberg opined that, under the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment, claimant had a 10% impairment of his right upper extremity and a 10% impairment of his left upper extremity. Dr. Grundberg opined that claimant's complaints about loss of strength in his hands would be consistent with the diagnosis he had made and with the surgery performed. The doctor indicated he would expect a person that does physical labor to have a normal grip strength of about 80-85 pounds, while claimant has a grip strength of approxiately 70 (pounds) in each hand. The doctor opined that claimant's grip strength could decrease with repetitive work activity and that such would be consistent with the type of problem he has. The doctor opined that he sees more of "these problems" in the meat packing industry than in some other industries because of the hard, repetitive nature of that work. The doctor stated that lateral epicondylitis usually does not leave any permanent impairment.

The doctor reported that claimant mentioned low back pain only on October 18, 1983 and May 11, 1984.

Peter D. Wirtz, M.D., is a member of the American Board of

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Orthopedic Surgery and the America Academy of Orthopedic Surgeons. The doctor first examined claimant on June 6, 1984. In a deposition of June 20, 1985, Dr. Wirtz reported that a Dr. Socarras performed an electromyographic study on October 8, 1984 and opined that no abnormality existed as far as conduction studies or electromyographic evaluation. Dr. Wirtz opined that, based upon loss of five degrees of right elbow motion, claimant had a three percent impairment of the right upper extremity, but did not have other permanent physical impairment. The doctor subsequently evaluated claimant on May 1, 1985. He opined that, other than his elbow impairment, claimant had no orthopedic findings that would indicate an impairment of his body. Dr. Wirtz opined that he would not recommend additional treatment orthopedically for claimant. He opined that, based on his examination of May 1, 1985, claimant has no activity restrictions. The doctor reported that he was familiar with the physical requirements of boning at Oscar Mayer and reported that claimant was physically fit to perform the duties of a boner as described by defense counsel. He further opined that the physical activity required for doing boning work would not aggravate and cause musculoskeletal strain in the back. Following an extended hypothetical question concerning claimant's symptoms and various evaluations, Dr. Wirtz opined that claimant's September 13, 1983 episode of back spasm at home would be a substantial factor in any disability or symptoms that he would have had after that date. The doctor further opined that, if claimant on October 15, 1983, while riding in a car, had a "flare-up" of his back, that flare-up would be a causative factor in any signs and symptoms of the back or legs after that date. Dr. Wirtz opined that claimant would benefit from treatment at the Mercy Hospital Pain Center. Dr. Wirtz opined that he would not have performed surgery based upon findings on electromyographic study in 1981. He stressed that nerve surgery [in the upper extremity] should be done on objective findings and, that if the electromyographic study did not indicate permanent damage, he did not feel surgery would benefit a patient any more than non-surgical treatment. Dr. Wirtz stated, regarding his rating of claimant's back, that he used the AMA guides as a guideline only and that, with claimant's straight leg raising in a sitting position normal, the loss of 10 degrees of full flexion while standing may be due to voluntary restriction of bending. On cross-examination, Dr. Wirtz stated a possibility exists that boning hams could possibly produce an acute lumbar strain.

The doctor stated that, upon neurological examination of August 6, 1984, claimant had decreased feeling over the index and fifth fingers of both hands, worse on the right, and that the claimant had a Tinel's sign on the ulnar nerve, right and left, to the fifth fingers. The doctor opined that claimant was capable of doing boning table work. The doctor stated that he did not advise claimant in May, 1985 that he should not go back to work at Oscar Mayer and that he did not recall advising

claimant in May, 1985 that he should pursue vocational rehabilitation, but reported that such would be appropriate advice. The doctor also stated he did not advise claimant in May, 1985 that he should obtain a TENS Unit and use it for possible relief of his back symptoms, but reported that such may benefit claimant.

In a deposition of June 19, 1986, Dr. Wirtz stated that he had seen claimant on February 13, 1986 and that claimant then had indicated he had been evaluated in the Ames area and was on Social Security because of multiple problems. Claimant's symptoms included lower backache off to the right side as well as right elbow stiffness and bilateral hand numbness. Examination of the lower back did not reveal muscle spasm. Claimant was able to flex his back 30 degrees while standing, extension of his back was 15 degrees and lateral flexion was 30 degrees right, 30 degrees left. Straight leg raising in the sitting position was 90 degrees on the right and 90 degrees on the left; supine position was 40 degrees on the left, 40 degrees on the right with backache. Knee jerks were 2 on the right and 2 on the left and ankle jerks were 0 on the left and 0 on the right. On examination of the big toe, extensor hallicus longus, revealed five over five and no sensory deficit was noted in the lower extremities. Flexion of the patient's knees and flexion of the hips gave pain in the back area.

Examination of the hand showed claimant had decreased feeling over the thumb, index, long and ring fingers of both hands, worse on the right than on the left. Claimant had Tinel sign on the forearm just proximal to the carpal tunnel release scar which radiates to the long finger and to the elbow. The left median nerve did not have a Tinel sign. The Tinel at the elbow was positive on the right with radiation to the shoulder and, on the left, was negative. Laterally, the right elbow had a well-healed scar. The range of motion of the right elbow was 15 degrees to 140 degrees whereas the left was 0 degrees to 140 degrees. Dr. Wirtz again stated that claimant's only physical impairment was an elbow loss of motion of 15 degrees equaling a three percent impairment of the right upper extremity under the AMA guides. Dr. Wirtz reported that Marvin M. Hurd, M.D., performed an electromyographic study on claimant to evaluate the upper extremity on October 8, 1984 and concluded that the study revealed no abnormalities in either upper extremity. Dr. Wirtz reported that Dr. Hurd's study indicated that claimant's neurological surgery left him with no permanent impairment. Dr. Wirtz reported that Dr. Hurd evaluated by way of conduction studies the right median, right ulnar at the wrist, the left median, the left ulnar at the wrist, the right ulnar and the left ulnar at the elbow and that the nerve conduction studies were normal.

Dr. Wirtz opined that the location of claimant's symptoms in the right lower back area in the muscular area around the pelvis would not be indicative of a sacroiliac strain. Likewise, the

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doctor indicated that x-rays of May 1, 1985 and August 6, 1985 were not indicative of a problem with sacroiliac strain. Dr. Wirtz indicated that claimant did not have symptoms in the inguinal area of the body and that he saw no possibility of a herniated disc in claimant's low back. Dr. Wirtz indicated he had reviewed Dr. Walker's letters and that they did not alter his opinions or conclusions. On cross-examination, Dr. Wirtz opined that, assuming 150 degrees is normal, claimant lacks 10 degrees of flexion and lacks 10 degrees of extension, which would be a 25 degree loss of motion equal to three percent based upon lack of extension and three percent based upon loss of 10 degrees of flexion. He agreed that, on the left extremity, assuming normal to be 150 degrees, claimant would have a three percent impairment of the extremity because of loss of flexion. Dr. Wirtz stated that only abnormal findings were mentioned in his report and clinical notes.

Dr. Wirtz reported that he evaluated claimant's back for disability in accordance with the AMA guides. The doctor reported that, on February 13, claimant's flexion was to 30 degrees forward with his legs straight while standing and that, if such correlated with other ranges of motions, claimant would have an impairment. The doctor stated that he would agree with the AMA guides and give a physical impairment of six percent for such flexion "[i]f the restriction of motion at thirty degrees was based on a back condition..." The doctor reported that, under the AMA guides, extension to 15 degrees would represent between a one and two percent impairment. The doctor agreed that claimant's lateral flexion on gross measurement was 30 over 30. He then stated he had used the AMA guides for evaluating claimant's physical impairment upon the measurement recordings only as "an overview as to the motions."

The doctor explained that he did not use the AMA guides portion pertaining to nerves in determining physical impairment of claimant's median and ulnar nerve because claimant's EMG was normal. The doctor reported with respect to claimant's positive Tinel sign that, on the right side, the median nerve was percussed in the forearm just on the elbow side of the wrist and just on the elbow side of the scar and that claimant had radiation to the elbow which is not correct. He stated that claimant also described a radiation to the long finger which is correct, but that radiation both ways is not common. The doctor stated that the left median nerve of the wrist did not have a Tinel sign and that the Tinel sign at the elbow on the right over the ulnar nerve radiated to the shoulder, which is not appropriate, whereas on the left there was no Tinel sign. The doctor described the Tinel sign as a physical examination technique that relies upon the patient on a subjective basis as to what is wrong with the patient. He reported that, in claimant's case, without a positive EMG, he felt it had little reliability. Dr. Wirtz reported that his assumption was that 140 degrees of flexion was

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normal for claimant and that 15 degrees of loss of extension was an abnormality. He agreed he had not given a rating for any loss of flexion.

Wayne E. Rouse, M.D., is a board-certified family practitioner. Dr. Rouse initially indicated that he had no medical records showing he had treated claimant for back difficulties prior to 1983, but later reported that he had seen claimant for acute lumbosacral muscle spasm on January 12, 1968. Dr. Rouse hospitalized claimant between September 13, and October 1, 1983 for recurrent spasm of the lumbosacral area requiring medication and physical therapy. Dr. Rouse indicated that, from October, 1983 through May, 1984, claimant had probable muscle spasm, limitation of back motion, and at times positive straight leg raising. Dr. Rouse opined that there was a causal relationship between the condition for which he saw claimant in September, 1983 and the incidents as related in exhibits 1 and 2 of Dr. Rouse's deposition. Exhibit 1 is an outpatient admission report of March 7, 1983 which states: "3/2/83 pulling meat off line twisted back." Exhibit 2 is hand-written notes. A note of March 7, 1983 states: "pain in lower back since 3/2." Dr. Rouse indicated he had not placed any specific weight lifting limitations on claimant. He later indicated that he advised claimant to not lift over 25 pounds. He reported that he had advised claimant to perform exercises for back stretching and strengthening and to walk to tolerance as a form of exercise. The doctor stated that he had advised claimant to not return to work at Oscar Mayer because he felt that claimant's job, as described to him, would aggravate claimant's condition. The doctor reported his understanding of the job as involving standing on an uneven surface, twisting of claimant's back and working in a cold, moist and damp environment. He opined that those conditions could be condusive to aggravating chronic, recurrent back strain and spasm. Dr. Rouse indicated that claimant is five feet eleven inches tall and that the ideal weight for a large framed individual of claimant's height and age would be between 175-185 pounds. He reported that, as of April 6, 1987 claimant weighed 205 pounds. Dr. Rouse felt that a sloped floor and moving meat could cause a back problem, but agreed it would be difficult to ascertain what slope would cause an injury. He reported that he had never been to Oscar Mayer's plant and that he had not seen any video tapes of the sort of work claimant had done. Dr. Rouse reported that, in responding to the earlier hypothetical question regarding claimant, he had felt that claimant had lost the symptoms in his low back while off work. Dr. Rouse indicated that claimant had informed him that claimant stood in position working on a line as a boner and that that gave him problems. The doctor reported he was not familiar with the sort of work a boner does. Dr. Rouse reported that, in his April 9, 1985 letter, he had assumed that the opinions of Dr. Gitchell and Dr. Winston, given November, 1983 and June, 1984, respectively, were still extant. He subsequently explained that he did not have correspondence concerning any

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follow-up visit with Dr. Gitchell and that, therefore, in the April, 1985 letter, he was referring to his own clinical notes regarding claimant and indicating that claimant was still having difficulty. He therefore felt claimant should not return to work. Dr. Rouse reported his clinical notes indicate that, on January 12, 1968 claimant was treated with acute lumbosacral muscle spasm, was rechecked on January 19, 1968 and returned to work on January 22, 1968. He reported that, in 1976, claimant complained of back pain, but the clinical condition found was pleurisy with muscle spasm. Dr. Rouse indicated he had not detected any muscle atrophy in claimant.

Deposition exhibit 1 is a copy of a Dallas County Hospital emergency outpatient record indicating an admission date of March 7, 1983 and reporting spine strain, indicating that on March 2, 1983 "pulling meat off line twisted back." Page two of exhibit 1, handwritten medical notes of September 27, 1982, March 7, 1983, and March 14, 1983 report back pain, initially pain on the right side of the back under the shoulder blade. The March 7 note reports pain in the lower back since March 2. It also reports that pain is across the back with sharp pain in the middle at the level of L5. The March 14, 1983 note reports that claimant is still tender as above.

Deposition exhibit 2 is physical therapy records indicating that initial treatment was on March 14, 1983 through Dr. Deranleau.

Illness and accident records for claimant reveal that claimant has had a past pattern of absenteeism for which he had received written warnings and that claimant had had two prior back pain complaint investigations while at Oscar Mayer, one occurring when he slipped on a stair and the other occurring when he slipped on loose shower in the men's locker room.

Joint exhibit 19 indicates that claimant received a service pin on July 28, 1974 and on July 28, 1979 as well as a notation of a 15-year service pin awarded to Charles McBirnie, undated. Oscar Mayer awarded all pins.

Joint exhibit 20 is a copy of a newspaper article entitled "Workers complain about hand numbness." The article contains an allegation by an unidentified Oscar Mayer worker that the condition (of carpal tunnel syndrome) started showing up after production requirements were raised at the (Oscar Mayer) plant. Page 3 of joint exhibit 20 is another article by the same reporter entitled "Oscar cited for health hazard." The article states that the Iowa Occupational Safety and Health Agency had issued a citation to the Oscar Mayer plant as well as imposed a $4,000 fine following an inspection wherein the agency found that ham boning employees had been exposed to "undue repetitive motion trauma. This trauma was caused due to repeated hand and wrist exertions causing, aggravating or precipitating the carpal

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tunnel syndrome, tendonitis, ganglion cysts, numbness and tingling of the hands, and sprains and strains of the hands, wrists, arms and shoulders."

Defendants' exhibit 1 is a computer printout of jobs prepared by Vocomp Output Analysis.

Defendants' exhibit 2 is an International Rehabilitation Associates Inc. Vocomp report concerning claimant. The reporter states that, in considering claimant's physical restrictions, considered jobs were light, defined as lifting or carrying 20 pounds and/or frequent walking and standing. The job title search was also limited to jobs which typically did not involve stooping, kneeling and crawling, reaching, using the hands and using the fingers. Jobs were selected which had at maximum a specific vocational preparation time of 12 months as well. Vocational possibilities listed included miller wet process, Wad compressor operator adjuster, bulk plant operator, steep tender, honey processor, chiller tender, second operator mill tender, quality control technician, concreting supervisor, and cabin equipment supervisor.

Defendants' exhibit 3 is an International Rehabilitation Associates report of specialist Cecilia O'Brien concerning the disability of carpal tunnel regarding claimant. Beyond the carpal tunnel and the notation of the 10% rating to the upper extremity on both left and right per Dr. Grundberg, the specialist also notes claimant's 1983 hospitalization for acute back spasms. The report states that claimant refused to answer questions pertaining to his finances, stating it was none of Oscar Mayer's business and that claimant was unwilling to delineate job ideas or interests indicating that "the state people said 'he was unemployable'." The report also contains the following "... attorney for claimant, then stated that this specialist was placig his client in an awkward position because he was on social security. He could not afford to support his family or [sic] less than that and this specialist could not guarantee him a wage equal to or greater than what he was now receiving,..."

Joint exhibit 24 is a stipulation of the parties that claimant's disability is caused by repetitive use of hands, wrists and elbows and that such use is more common in a meat packing plant than outside of claimant's occupation.

Joint exhibit 1 is medical reports relative to claimant. A November 11, 1986 report of William R. Boulden, M.D., reports that the doctor has reviewed claimant's 1983 films and that early degenerative changes were present at that time. The doctor further states that he would not rate claimant's back because claimant had preexisting degenerative changes. An October 2, 1986 report of Dr. Boulden reports that the CT Scan shows degenerative disc disease at L4-5, some at L5-S1 with some

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minor foraminal stenosis secondary to the degenerative process. There was no evidence of any herniated disc. On September 15, 1986, Dr. Boulden found claimant's hand very tender in the right epicondylar region over a well-healed incision. Claimant had full flexion, pronation and supination. He had pain extending to neutral degrees. He had bilateral Tinel's of both wrists and a positive Phalen's at both wrists. Allen's test was normal and there was no Thenar muscle wasting. The doctor reported that claimant had two "MGs" since carpal tunnel release and that both were normal. On examination of claimant's back, claimant had left and right lateral bending of 30 degrees in each plane with extension of 30 degrees. Claimant had a lot of low back pain with forward flexion and right posterior thigh pain. Straight leg raising on the right caused posterior right thigh pain to the knee, negative on the left. Great toe extensors were 4/5 on the right as compared to the left. Deep tendon reflexes were equal and symmetrical in the knees and ankles.

An October 18, 1985 Individual Written Rehabilitation Program Closure Addendum, signed by Tim Grasey as counselor, reports that claimant's file is being closed as a result of the evaluation. The reported states "The pain factor and loss of sensation of the hands, make it unlikely you can work competitively. Since our services would not improve chances of employment you are ineligible for services. If things improve you can reapply." An October 1, 1985 report of Gerald Bennett, counselor, states that from the beginning the counselor's impression was that claimant felt evaluation and vocational planning were quite futile. The reporter characterizes claimant as a rather typical, middle aged worker who has been disabled from doing the physical work that he has performed basically all of his life. He characterizes this as a rather overwhelming situation in that many of these workers enjoy their work and really do not plan to do anything other than what they have been doing, perhaps for decades. He states that claimant appears to be very much in that position. The reporter states that the staff overall felt claimant was not employable at that time and the counselor states that perhaps involvement in a pain clinic to help him adjust to the distress that he frequently knows might be a more profitable route for claimant. The reporter notes that the staff felt there might be a depression component in claimant's lack of ability to concentrate and discuss vocational planning. He notes that some staff members felt claimant could benefit from counseling regarding the way he feels about himself and his vocational future. He states it was suggested to claimant a number of times that, if he is able to make a better adjustment to his discomfort and stated pain, he might want to consider reevaluation at a later date.

A June 24, 1985 report of James A. Hardinger, D.O., reports an impression of low back pain secondary to unstable low back and paresthesias of both upper extremities secondary to old

carpal tunnel syndrome and ulnar nerve compression. He reports that reflexes in claimant's lower extremities were normal with circulation and neurofunction in both lower extremities appearing normal. Claimant had very poor lower back mobility. He had a straight leg raising test positive at 30 degrees on both the right and left side. Hip abduction and adduction caused dicomfort on both sides. Claimant was able to attain 90 degrees of flexion at both hip joints, but had very poor forward flexion, possibly less than 90 degrees at his waist, also with restricted rotation.

In a July 17, 1985 report, John R. Walker, M.D., stated that, at that time, "subsequent and because of and only following the injuries that he has suffered at the Oscar Mayer Company," claimant has the following persistent complaints:

1. Constant pain in the posterior lateral aspect of the right elbow which radiates down from the lateral epicondyle to the dorsum of the wrist into the forearm;

2. Cannot extend his arms completely with all ranges of motion painful, particularly if they are repetitive;

3. Grip in the right hand is weak and elbow aches and, when resting the elbow on the table, it is tender to touch;

4. An aching of the palm of the right hand with a tingling sensation especially involving the right thumb, the second, third and fourth fingers as well. Claimant has a loss of strength and grip and does not have good proprioception and cannot feel well and cannot pick up small items such as coins or stamps without actually looking at them. The doctor reports he has apparently lost some tactful sensation and also has difficulty in turning pages of a book or handling paper money;

5. In the left elbow, arm, hand and fingers, claimant has the same complaints as on the right, except not as severe. He notes that claimant does not have the lateral, epicondylar pain nor the anterior arm pain. He notes that claimant feels the range of elbow motion on the left is normal;

6. In the lumbosacral area, Dr. Walker reports claimant notes pain and aching in the midline which radiates expecially to the right sacroiliac area. He notes that the pain is made worse by sitting and standing for any length of time and that all twisting, bending or lifting makes the pain increase;

7. Severe right sciatic notch pain with sitting particularly and only in the right leg, thigh and buttock. Claimant has numbness on the right, anterior thigh, completely noted when sitting only. Claimant has some posterior thigh pain through the posterior aspect of the knee with the knee becoming stiff.

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Dr. Walker states that claimant has to help his hip flex by grabbing his pant leg and lifting his leg.

Dr. Walker reports that AP and lateral views of claimant's elbows are within normal limits as are AP and lateral views of the forearms and wrists. He reports that AP and lateral views and right, left, oblique views and spot views of the lumbar spine reveal a spina bifida occulta of S-1. Sacroiliac joints appear to be within normal limits. The doctor opines that he did not believe there was any particular narrowing of the fifth lumbar disc and that the disc spaces were within normal limits.

Dr. Walker opined that claimant had lost elbow motion and had certainly lost a great deal of tactile sensation as well as stereognosis involving the fingers and thumbs of both hands. He characterized this as residuals of his median and ulnar nerve problems and surgical decompressions and residuals following the decompressions. Dr. Walker opined that claimant had a permanent impairment of the right upper extremity of 32% and that claimant had a permanent impairment of the left upper extremity of 24%. He reported that claimant also had a mild lumbosacral sprain, but more particularly a chronic, very painful sacroiliac sprain, giving him a so-called telalgic radiation of pain into the anterior thigh and probably into the posterior aspect of the thigh as well. The doctor reported that this was brought on by claimant's original injuries at the plant as described in the first paragraphs of the doctor's report. The first paragraph of the doctor's report deals with the development of claimant's upper extremity problems. Dr. Walker felt that claimant could be rehabilitated fairly well with either a sacroiliac arthrodesis or multiple injections of the right sacroiliac joint with Cortisone and Xylocaine.

In a report of February 13, 1986, Peter D. Wirtz, M.D., indicated that, on examination of the low back, claimant had no muscle spasm, flexed to 30 degrees while standing, with extension to 15 degrees and lateral flexion of 30/30. Straight leg raising in the sitting position was 90/90 and in the supine position was 40/40 with backache. Knee jerks were 2/2 and ankle jerks were 0/0. Extensor hallicus longus was 5/5 with no sensory deficit in the lowers. Flexion of claimant's knee and hips gave pain in the back area. On examination of the hand, claimant had decreased feeling over the thumb, index, long and ring fingers of both hands, right worse than left. Tinel sign was present in the forearm proximal to the carpal tunnel release scar radiating to the long finger and the elbow. The left median nerve did not have a Tinel sign. Tinel sign was positive on the right to the shoulder and negative on the left. There were well-healed scars medially as well as a well-healed scar laterally on the right elbow. Range of motion of the right elbow was 15 degrees to 140 degrees and on the left 0 degrees to 140 degrees. Dr. Wirtz opined that claimant's loss of motion of

the right elbow resulted in a three percent impairment of the upper extremity. He further opined that, since claimant demonstrated no objective findings for neurological involvement of the lower back nor objective restriction, he had a musculoskeletal strain and not a permanent impairment.

In an August 6, 1984 report, Dr. Wirtz had diagnosed claimant's conditions as, (1) status postop bilateral carpal tunnel release; (2) status postop bilateral ulnar nerve tunnel release; (3) status postop bilateral elbow ulnar nerve compression; (4) status postop right lateral extensor tendon release; (5) neuropraxia, median nerve, bilaterally, and ulnar nerve, elbow, bilaterally; (6) right elbow stiffness; (7) musculoskeletal strain, lower back area.

On June 20, 1984, Stuart R. Winston, M.D., a neurosurgeon, reported that claimant was then overweight, being 215 pounds on examination and that claimant bends and extends abnormally with limited flexion. He reported that reproducing claimant's work situation with rotation about the waist caused an increase in his difficulty with lumbosacral pain. Dr. Winston described claimant's work situation as requiring lifting ten pounds, twisting to the left about 460 times per day and working on a floor which was slanted, requiring claimant to lift at an unusual angle. Dr. Winston reported claimant's gait as essentially normal though claimant favored the right lower extemity upon first arising until he "gets going some." He characterized claimant's strength as excellent with straight leg raising being negative. Reflexes were symmetric but reduced at the ankles bilaterally. The doctor's impression was one of chronic recurrent lumbosacral strain, obesity and a chronic pain syndrome. Electrodiagnostic study of the paraspinals and lower extremities were negative. Dr. Winston opined that a chronic pain center might be advantageous to claimant and stated he had "a great deal of difficulty in seeing how this man can return to his former occupation."

Marvin Hurd, M.D., interpreted nerve conduction studies, that is, an EMG study of the lower extremities as normal.

Robert Deranleau, M.D., reported in notes of September 27, 1982 that claimant had pain in the right side of the back under the shoulder blade; he reported on March 7, 1983 that claimant had had pain in the lower back since March 2, 1983 with the leg feeling tight. He also reported that the pain was across the back with a sharp pain in the middle level, apparently at L5. On March 14, 1983, the doctor reported that claimant was still tender, as above. Medical notes indicate that, on August 23, 1971, claimant twisted his back at work and it began to hurt the next day. The diagnosis was apparently of a strain of the right lower back. A note of July 5, 1979 indicates that claimant fell and landed on the back, bruising the lower back. A note of June

23, 1981 indicates that claimant has pain in the right elbow and wrist, his arm goes to sleep and his wrist aches. The note further states that the left wrist aches and that claimant drops things, especially with the right hand.

A discharge summary of Dr. Deranleau from the Dallas County Hospital dated August 29, 1980 for an admission of August 27, 1980 reports that claimant has had a history of muscle spasms in his shoulders and back and that claimant was at work and had a sudden onset of back pain which radiated to his chest. The Dallas County Hospital Emergency Outpatient record for an admission date of March 17, 1978 indicates that, on March 2, 1983, claimant was pulling meat of the line and twisted his back. The diagnosis is one of spine strain. Nabil Faltas, M.D., interpreted x-rays of the lumbar spine of March 8, 1983 as showing a questionable borderline narrowing of the L-5/S-1 intervertebral disc space. Also noted was an incomplete fusion of the spinous process of S-1. An outpatient emergency record with an admission date of apparently March 17, 1978 reports that claimant slipped and hit his right hand on a table and the hand was painful and swollen below the fourth and fifth digits.

On April 9, 1985, Wayne E. Rouse, M.D., reported that claimant's job involved standing on an uneven floor while doing considerable lifting. He opined that claimant's back complaints were directly related to the job performed and stated that claimant was precluded from similar employment due to his back condition. Dr. Rouse indicated that the point of maximum recuperation would be December, 1984 or January, 1985 in that the symptomatology seems to be leveling off with neither progression nor improvement. He reported that "at that time" he would not anticipate further improvement medically in claimant's condition. Dr. Rouse indicated that claimant's physical limitations resulted directly from his work at Oscar Mayer. He reported claimant's physical limitation as of April 8, 1985 as follows: Claimant awoke about three times a night with pain in his low back with radiation of pain into the right leg; riding in a car caused claimant's right leg to go to sleep with leg becoming completely numb after approximately one hour of riding; right leg sensation would return after five to ten minutes of activity. Prolonged sitting for more than one hour caused numbness and increasing pain in the low back with relief from pain achieved only from exercise or from relaxing in a hot tub. The doctor stated there are permanent physical limitations from the injury sustained while working at Oscar Mayer and that claimant would have "these limitations of duration of time, position, and physical capabilities within the time frames mentioned above."

A return to work slip of Dr. Rouse dated April 2, 1976 contains under remarks, the notation "[c]ontusion of the peronal nerve and bone on right lower leg."

Robert Gitchell, M.D., an orthopaedic surgeon, reported on December 19, 1983 that claimant stated his job involved handling approximately 25-pound bundles of meat about 450 times each day. Claimant also stated that the work floors were slanted and that this may bother claimant as well. On examination, straight leg raising was positive on the right at 80 degrees and negative on the left; knee jerks were 2/2; ankle jerks were 1/1; atrophy was not noted in either calf or thigh; sensation was grossly intact in the lowers; range of motion of the back was fair with pain at the extremes. Claimant was tender at the right SI joint although there was no tenderness in the sciatic notch. He was tender in the lumbosacral spine at about the L4-5 area. The doctor stated that he had programmed claimant on abdominal and back extensor exercises as he felt claimant needed to greatly improve the supporting structures of his back if he were to return to doing heavier type work as he had done in the past. The doctor thought that, in four to six weeks from the time of the report, claimant could consider going back to work. He reported that he would like to see claimant in approximately four weeks to check his progress.

A September 15, 1983 note of Dr. Rouse reports that claimant has severe back spasm and that claimant has a history of recurrent back spasm, apparently without complaints of trauma.

Arnis Grundberg, M.D., performed a lateral epicondylitis of claimant's right elbow on April 25, 1983. Dr. Grundberg has opined that claimant can perform light work involving lifting 20 pounds on an infrequent basis. He further reported that claimant should not work in extreme cold and that claimant was moderately restricted as to stooping, kneeling or crouching to pick up something light from the floor; as to crawling under a table to plug in a cord; as to reaching out with one or both arms and, as to grasping, holding, turning or handling an object with the fingers.

APPLICABLE LAW AND ANALYSIS

Our first concern is the nature and extent of claimant's disability as a result of his July 1, 1979 and March 15, 1981 conditions affecting his upper extremities. Claimant contends the extremity conditions are occupational diseases under Chapter 85A and should be evaluated industrially. Defendants contend claimant's conditions result in scheduled member disability pursuant to Iowa Code section 85.34(2)(m).

A treating physician's testimony is not entitled to greater weight as a matter of law than that of a physician who later examines claimant in anticipation of litigation. Weight to be given testimony of physician is a fact issue to be decided by the industrial commissioner in light of the record the parties develop. In this regard, both parties may develop facts as to

the physician's employment in connection with litigation, if so; the physician's examination at a later date and not when the injuries were fresh; the arrangement as to compensation; the extent and nature of the physician's examination; the physician's education, experience, training, and practice; and all other factors which bear upon the weight and value of the physician's testimony may be considered. Both parties may bring all this information to the attention of the factfinder as either supporting or weakening the physician's testimony and opinion. All factors go to the value of the physician's testimony as a matter of fact not as a matter of law. Rockwell Graphic Systems, Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

The 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 85A.8 provides:

> 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.

Iowa Code section 85.34(2)(m) provides:

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

Claimant's argument apparently is that claimant's carpal, cubital and ulnar conditions and his epicondylitis are forms of

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tenosynovitis and, therefore, are occupational diseases as tenosynovitis was among specific occupational diseases statutorily delineated prior to the 65th General Assembly's repeal of the specific disease table. As defendants point out in their brief, claimant has not presented expert evidence supporting claimant's position. Indeed, Dr. Walker opined that claimant's extremity conditions should be considered injuries and not disease processes. Likewise, claimant's conditions apparently result from cumulative trauma to his upper extremities arising from repetitive movements of the extremities in his job. While the question was not before the court in McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985), the facts presented in that case suggest that the Iowa Supreme Court would find that conditions resulting from repetitive traumatic processes are more properly evaluated as injuries under Chapter 85, rather than as diseases under Chapter 85A. We believe such is the better result as it provides a clearer distinction between the nature of the disease and injury process and, thus, prevents unnecessary confusion in the law. Furthermore, we believe defendants are correct in asserting that, even were claimant's conditions found to be occupational diseases, section 85A.17 provides that compensation payable would be as provided in the workers' compensation law. Under Chapter 85, claimant's extremity conditions must be evaluated under the schedule and not industrially.

We consider claimant's entitlement under the schedule. Drs. Wirtz, Walker and Grundberg evaluated claimant's hand. Dr. Wirtz alternately found a three percent impairment to the right upper extremity and no impairment to the left upper extremity and also a six percent impairment of the right upper extremity and a three percent impairment to the left upper extremity. Dr. Walker found a 32% impairment of the right upper extremity and a 24% impairment of the left upper extremity. Dr. Grundberg found a 10% impairment of both upper extremities. All three physicians are respected, board-certified orthopaedic surgeons well known professionally to this agency. Additionally, Dr. Grundberg is a member of the American Society for Surgery of the Hand, was claimant's treating physician for all his extremity problems and performed his right and left surgical releases and his epicondylitis surgery. Drs. Wirtz and Walker were examining physicians only and lack Dr. Grundberg's additional expertise in conditions affecting the hand. Dr. Grundberg has moderately restricted claimant as to reaching out with one or both arms and as to grasping, holding, turning or handling an object with the fingers. That restriction placed after long-time treatment of claimant appears the most objective evidence of claimant's upper extremity impairments. For the foregoing reasons, we accept Dr. Grundberg's opinion that claimant's condition has resulted in a 10% loss of use of each arm. Under section 85.34(2)(m), claimant is therefore entitled to 25 weeks of permanent partial disability benefits on account of each extremity loss with benefits to commence August 1, 1983. As the losses were incurred

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substantially prior to August 1, 1983 and as each loss represents a separate injury, the benefits for each loss should be paid concurrently.

We next consider whether claimant sustained either a specific back injury on March [2], 1983 or a cumulative back injury in August-September, 1983.

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

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

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

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

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

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971), Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury....The

result of changes in the human body incident to the general processes of nature do not amount to a personal injury. This must follow, even though such natural change may come about because the life has been devoted to labor and hard work. Such result of those natural changes does not constitute a personal injury even though the same brings about impairment of health or the total or partial incapacity of the functions of the human body.

....

A personal injury, contemplated by the Workmen's Compensation Law, obviously means an injury to the body, the impairment of health, or a disease, not excluded by the act, which comes about, not through the natural building up and tearing down of the human body, but because of a traumatic or other hurt or damage to the health or body of an employee. [Citations omitted.] The injury to the human body here contemplated must be something, whether an accident or not, that acts extraneously to the natural processes of nature, and thereby impairs the health, overcomes, injures, interrupts, or destroys some function of the body, or otherwise damages or injures a part or all of the body.

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

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 evidence reveals claimant sought treatment for back spasm as early as 1968. Claimant's description of his alleged March 2, 1983 work injury is confusing in that we are unable to determine whether claimant asserts he had a specific work incident on that day or whether claimant merely states he experienced pain on that date which claimant related to his job duties. In any event, claimant's description of his job duties appears somewhat exaggerated. For reasons which will be further developed below, we are unable to say the duties per se produced an injury to claimant's back. Dr. Walker has opined that claimant had an incident on March 2, 1983 when claimant was pulling meat off the line and twisted his back and felt immediate low back pain, which incident caused pain in the sacroiliac joint. Dr. Walker was an examining physician only, however, and examined claimant long after March 2, 1983. We are uncertain as to what Dr. Walker relied upon in reporting a March 2, 1983 incident as nursing notes for March 2, 1983 do not relate an incident. The only contemporaneous note of twisting is a March 7, 1983 admission note staing claimant twisted his back pulling meat off the line. We cannot determine whether such refers to a specific work motion, routine work motions or claimant's self description of the condition of claimant's back. Claimant's failure to testify as to specific activities of March 2, 1983 makes the point additionally confusing. As we have no specific testimony concerning a work incident on March 2, 1983, nor even a medical history precisely recording any such event, we are unable to find a specific incident of March 2, 1983 which produced injury to claimant's back. We, therefore, consider claimant's allegation of a cumulative injury.

Dr. Rouse, claimant's family practitioner, has stated a causal relation exists between the conditions related on a medical note and outpatient admission record of March 7, 1983 and the condition for which the doctor treated claimant in September, 1983. He acknowledged he was unfamiliar with the work a boner performs, but for claimant's description of claimant's work duties. The doctor opined claimant's work conditions, as the doctor understood those conditions, could be condusive to aggravating chronic, recurrent back strain and spasm. The doctor had understood that claimant's condition had improved while claimant was off work. Claimant reported at hearing that his back continued to ache while he was off work from April 24, 1983 to August 1, 1983 and that he did exercises and used hot

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soaks to relieve his condition during that period. Such is inconsistent with Dr. Rouse's understanding and appears inconsistent with the onset of claimant's severe back spasm on September 13, 1983. On that date, a Tuesday, claimant had not worked almost four full days on account of a sore throat before the onset of hs debilitating symptoms. Claimant, himself, testified that, on Monday, he was "backwise" ready to return to work. On Tuesday, while sitting on his sofa at home, he experienced severe back spasm for which he was hospitalized. Claimant's worse symptoms were far removed from any actual work activity. One would generally expect an individual's most severe symptoms which are aggravating a condition to be present while the individual is working or in close chronology to work activities. Claimant's actual history, therefore, discounts the weight to be given Dr. Rouse's opinion concerning a work related aggravation of claimant's underlying back condition.

Dr. Wirtz, on the other hand, has opined that claimant's back spasm at home on September 13, 1983 would be a substantial factor in claimant's symptoms and [physical] disability after that date. Dr. Wirtz does not relate the September 13, 1983 spasm to claimant's work. For reasons noted above, it appears inconsistent to relate that spasm episode to work which claimant had not performed for some four days.

Dr. Boulden initially stated claimant had myofascial pain which claimant's work may or may n t have produced. He later stated it was possible [emphasis added] claimant's job as described in claimant's counsel's hypothetical question could aggravate an underlying degenerative condition or accelerate degenerative disc disease. Dr. Boulden had earlier stated that the job viewed on video should not physically tax the back. We discount this statement somewhat as the video does not show the job claimant actually performed, but rather a job with both noted similarities and dissimilarities. The job recorded on the video does not involve a great deal of twisting of the lower back, however. Dr. Boulden reported that the one-fourth inch floor slope should not produce back problems with proper back use. Such appears reasonable. Mr. Schumacher testified that federal regulations require a one-eighth to one-fourth inch slope in packing plant construction. It appears highly unlikely such sloping would be required if the slope were a usual or recognized cause of back ailments in packing house employees. [We note in passing that we know of no other workers' compensation claim in which the slope of the packing house floor was implicated as a causative factor in claimant's back complaints. Again, if the slope can produce such problems and the slope is routinely required in packing plants, we find it unusual that we are unaware of other cases where such claim is made.] The hypothetical question to which Dr. Boulden responded referenced to claimant boning approximately 50 butts per hour, each weighing 10 to 25 pounds. Mr. Severns reported that butts to be boned would weigh

between 7 3/4 and 12 pounds and that an average worker would be expected to bone 42 butts per hour. Claimant stated the average weight of butts was 7 to 15 pounds. He further testified that, after his hand surgeries, he needed co-workers' help to meet his boning production quotas. He stated he was running at only approximately 30% on his August, 1983 work return. The above facts undermine the hypothetical question as placed and further make it doubtful that claimant's work conditions produced his spasmatic back condition. Further, as noted earlier, claimant had episodes of back spasm over an extended time and even predating his Oscar Mayer employment. Thus, while we do not doubt that claimant has seriously disabling back complaints and we sympathize with the distress these undoubtedly cause him and his family, we cannot say on this record that those complaints arose out of and in the course of his employment. For that reason, claimant's claim must fail.

As we have not found an injury which arose out of and in the course of claimant's employment, we need not address the remaining questions that claimant's claim presents.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant's conditions in his upper extremities are the result of cumulative traumatic injury and are not disease processes.

Claimant had a decompression of the right carpal and ulnar tunnels and of the ulnar nerve at the right elbow on January 18, 1982. Claimant had decompression of the median and ulnar nerves of the left wrist and of the ulnar nerve at the left elbow on March 10, 1982. Claimant had a lateral epiconylotis surgery on April 25, 1983.

Claimant performed repetitive movement of his upper extremities on his job; such repetitive movement culminated in his carpal, cubital and ulnar conditions.

Claimant's conditions in his upper extremities are evaluated under the schedule and not industrially.

Drs. Wirtz, Walker and Grundberg are all respected, board-certified orthopaedic surgeons.

Dr. Grundberg is a member of the American Society for Surgery of the Hand.

Dr. Grundberg was claimant's treating physician for claimant's extremity problems and performed claimant's right and left surgical releases and his epicondylitis surgery.

Drs. Wirtz and Walker examined claimant only and lack additional expertise in hand conditions.

Claimant is moderately restricted as to reaching out with one or both arms and as to grasping, holding, turning or handling an object with the fingers.

Claimant sought treatment for back spasm on various occasions from 1968 onward.

Claimant began work at Oscar Mayer in 1969.

It is unclear whether claimant had a specific work incident on March 2, 1983 or experienced pain while performing his regular work duties.

Claimant had physical therapy at Dallas County Hospital for a period beginning March 14, 1983 to relieve his back condition.

Claimant was off work from April 25, 1983 to August 1, 1983 following his epicondylitis surgery.

Claimant's back continued to ache while he was off work.

Claimant did exercises and used hot soaks to relieve his condition while he was off work.

Claimant returned to work on August 1, 1983.

Claimant worked on the Boston butt boning line.

Claimant boned butts with weights of from 7 3/4 pounds to 15 pounds.

Workers were expected to bone 42 butts per hour.

Co-workers assisted claimant in making his production quotas following his extremity surgeries. Claimant was boning approximately 30% of quota after claimant's August 1, 1983 work return.

The boning area floor has a one-fourth inch per foot slope to the drain.

Federal regulations require a one-eighth inch to one-fourth inch slope in meat packing facilities.

With proper back use, a one-fourth inch floor slope should not produce back problems.

Claimant last worked for Oscar Mayer on Friday, September 9, 1983.

Claimant was off work Monday and Tuesday, September 12 and 13, 1983 on account of a sore throat.

On Monday, September 12, 1983, claimant was ready to return to work as regards his back.

On Tuesday, September 13, 1983, in the afternoon while sitting on his sofa at home, claimant experienced severe back spasm for which he was subsequently hospitalized.

Claimant's back spasm at home on September 13, 1983 was remote in time from his work at Oscar Mayer.

Dr. Rouse was unfamiliar with claimant's work conditions as claimant described those conditions.

At hearing, claimant appeared to exaggerate the difficulties in his work conditions.

The hypothetical question placed to Dr. Boulden was inconsistent with claimant's actual job duties and claimant's actual job performance.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant is entitled to permanent partial disability resulting from his upper extremities conditions of 10% of the right arm and 10% of the left arm.

Claimant has not established a back condition which condition arose out of and in the course of his employment, either by way of a specific work injury of March, 1983 or by way of a cumulative injury during August-September, 1983.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for twenty-five (25) weeks on account of his right arm at the rate of two hundred fifty-six and 58/100 dollars ($256.58) per week with those benefits to commence August 1, 1983.

Defendants pay claimant permanent partial disability benefits for twenty-five (25) weeks on account of his left arm at the rate of two hundred fifty-six and 58/100 dollars ($256.58) per week with those benefits to commence on August 1, 1983.

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to Iowa Code section 85.30.

Defendants pay the costs for proceedings in file numbers 592457 and 700671 pursuant to Division of Industrial Services Rule 343-4.33.

Claimant take nothing from proceedings in file numbers 756245 and 756247.

Claimant pay the costs for proceedings in file numbers 756245 and 756247 pursuant to Division of Industrial Services Rule 343-4.33.

Defendants file Claim Activity Reports as requested by this agency pursuant to Division of Industrial Services Rule 343-3.1.

Signed and filed this 31st day of March, 1988.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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Filed May 26, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

GENNY E. McCLELLAN, Claimant, vs. MIDWEST BISCUIT COMPANY, Employer, and WAUSAU INSURANCE COMPANY, Insurance Carrier, Defendants.	FILE NO. 802020 A R B I T R A T I O N D E C I S I O N

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Claimant found to be an odd-lot employee. She has remained unemployed since her leaving of her employment and she is unable to return to her past employment because of her disability. Despite a reasonable effort to look for work she has failed to find suitable employment. Defendants' evidence that she was employable in the local labor market was not convincing.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ENNY E. McCLELLAN, Claimant, s. IDWEST BISCUIT COMPANY, Employer, and AUSAU INSURANCE COMPANY, Insurance Carrier, Defendants.	FILE NO. 802020 A R B I T R A T I O N D E C I S I O N FILED MAY 26 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Genny E. McClellan, claimant, against Midwest Biscuit Company, employer (hereinafter referred to as Midwest), and Wausau Insurance Company, insurance carrier, for workers' compensation benefits as a result of an alleged injury on August 8, 1985. On March 4, 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: Richard McClellan; Jeannette Mullahy; and, Clark Williams. The exhibits received into the evidence at the hearing are listed in the prehearing report. According to the prehearing report, the parties have stipulated to the following matters:

1. On August 8, 1985, claimant received an injury arising out of and in the course of her employment with Midwest;

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $127.83 per week;

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

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4. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole; and,

5. If permanent partial disability benefits are awarded herein, they shall begin as of February 28, 1985.

ISSUES

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

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

II. The extent of claimant's entitlement to weekly benefits for permanent disability.

SUMMARY 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 was born February 24, 1929 and is presently 59 years of age. Claimant weighs 185 pounds and is five foot two inches tall. Claimant has worked outside the home during much of the marriage. She held positions as a production worker, waitress, and clerk. Each of these jobs required standing, lifting, and bending and paid a minimum wage or slightly higher.

Claimant testified that she received no special job skills or training on any one of these jobs. Her formal education is limited to high school. She has no college, vocational training, or post high school academic training. Recent vocational testing done by G. Brian Paprocki, a vocational expert retained by claimant, indicated substantial deficiency in claimant's math skills.

Claimant said that she was first employed at Midwest Biscuit of Burlington, Iowa in 1979. She worked on the production line making and packaging cookies and crackers until late 1980 when she moved with her family to Colorado. While in Colorado claimant said that she worked at a production job. In March, 1981, claimant moved back to Burlington and resumed work at Midwest Biscuit in April. Her employment continued at Midwest Biscuit through August 8, 1985, the date of her injury.

On August 8, 1985, near the end of her regular eight hour shift, claimant testified that she was bending over to pick up a can of crackers. The can was located close to the floor and weighed between 10 and 20 pounds. She explained that as she lifted the can, she felt pain in her low back or she felt something give way. She said that she looked for the foreman to report the injury but could not locate him. Claimant stated that she did not pursue him at the time because she did not think then that the injury was likely to be serious. Claimant testified that when she awoke the following day, she was in terrible pain and could not get out of bed.

Claimant then reported her injury to her employer and was referred to Gordon Baustian, M.D. She saw Dr. Baustian the first Monday following her injury. Dr. Baustian later referred claimant to Koert Smith, M.D., an orthopedic surgeon. Dr. Smith has been claimant's primary treating physician since that time.

Dr. Baustian saw claimant on August 12, 1985. He concluded she suffered "acute back syndrome" due to the injury on August 8, 1985. Dr. Baustian prescribed Indocin, an anti-inflammatory drug, and Tylenol for pain. He also referred claimant to physical therapy at Burlington Medical Center. The physical therapy was discontinued because the therapist feared that he was making the back problem worse.

Dr. Baustian's examination on August 12 1985, showed straight leg raising to 30 degrees on the right, 45 degrees on the left. There was some decreased pin prick and vibratory sensation of the right lower extremity. There was noted tenderness in the low lumbosacral junction and along the S-1 joint on the right.

Further examination on August 26, 1985, by Dr. Baustian indicated that claimant complained of being worse physically. Dr. Baustian switched her medications and kept her off work until September 19, 1985.

Then, on September 4, 1985, Dr. Baustian reported that claimant was somewhat better and that the medication switch helped but her back symptoms remained unchanged. Claimant was unable to straight leg raise more than 45 degrees bilaterally.

On September 12, 1985, claimant saw the doctor and insisted she wanted to return to work. Although the doctor has some reservations, he released claimant to work. Claimant then returned to work on September 16, 1985.

Upon her return to work, claimant said that she could not handle the work and worked only a short time before her back pain forced her to seek medical help again. She left work the

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morning of the 17th due to increasing pain in her low back and into the right S-1 joint area. Claimant was then referred to Dr. Koert Smith, an orthopedic surgeon.

Dr. Koert Smith examined claimant on September 19, 1985. He found limited range of motion in the lumbar spine. He found tenderness at L-5 and S-1 and marked tenderness over the right sacroiliac joint and proximal gluteal area. Dr. Smith gave claimant an injection of Marcaine and Celestone and ordered her to remain off work.

Dr. Smith saw claimant again on September 25, 1985. At that time she reported continued pain in the back but not in the leg. She indicated she had been attempting to take short walks each day. Straight leg raising at 80 degrees on the right side caused pain behind the knee. The doctor observed a slight sensory deficit on the right side. Claimant was again advised to stay off work.

On October 7, 1985, Dr. Smith examined claimant and found considerable tenderness over the S-1 joint on the right side. Claimant reported continuing to take Tylenol No. 3 (pain medication) on an intermittent basis. Dr. Smith ordered Motrin as an anti-inflammatory.

Claimant was seen again on October 23, 1985, for pain in the right S-1 joint reaching down into the right leg. There was pain on the right side and straight leg raising at 90 degrees revealed tenderness on the right S-1 joint area. Dr. Smith elected to reinject the S-1 joint with 4cc of Marcaine and 2cc of Celestone. This was the second such injection.

Claimant was seen again on November 7, 1985 and reported slow improvement. She indicated she was having continued trouble with any type of heavy housework and was unable to vacuum. She stated that even bed making tended to bother her back. She expressed difficulty with sitting. Physical examination revealed tenderness in the right S-1 joint area. The doctor insisted she remain off work at that time.

On November 14, 1985, claimant called Dr. Smith and requested a return to work slip. The doctor authorized the same. Claimant returned to work on November 18, 1985 and worked until November 25, 1985. On November 25, claimant stated that she was only able to work an hour or so when she noted a significant recurrence of pain in her right leg. This pain had been progressing over the week and she was working to the point that she simply could not tolerate the pain and stopped working. Dr. Smith reported on December 5, 1985, upon examination, that claimant continued to have pain in the back, radiating down the leg. Intermittently, he reported that she had sharp pain in the right S-1 joint area as well as down into the hip. Claimant also reported numbness in the lateral aspect of the leg.

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Upon physical examination on December 5, 1985, Dr. Smith found absent ankle jerks. The doctor noted claimant showed more signs of S-1 and nerve root compression on the right side. At that time, Dr. Smith was considering epidural steroid injection at the L5/S-1 level based on absent ankle jerks.

Claimant was seen again December 12, 1985, and ankle jerks were again absent. Straight leg raising at about 50 to 60 degrees caused pain in the back. She informed the doctor she was only able to do very light housework without pain.

On December 23, 1985, claimant called the doctor to arrange the epidural steroid injection. The injection was completed on December 24, 1985, at Burlington Medical Center.

Dr. Smith next saw claimant on January 3, 1986, approximately 10 days after the steroid injection. Claimant informed the doctor that her leg pain was better for four or five hours after the injection but soon thereafter the symptoms returned and she felt her back was worse after the injection. She indicated difficulty with sleeping and stated she had given up playing bingo since she was not able to sit. She told the doctor she and her husband had moved because she could not go up and down stairs. She expressed concern that her condition prevented her from going to work. At this time, the doctor diagnosed her as suffering from neurogenic low back pain disc injury with periodic acute episodes with persistent body lists and sciatic pain.

In early February claimant had an acute episode of back pain brought on when she bent over to pick up an object and had sudden severe pain in her back. She stayed in bed over the weekend and called the doctor the following day. When she saw the doctor on February 14, 1986, she indicated she was beginning to slowly get better and was continuing to take her Motrin. She told the doctor she was treating her acute episodes with moist heat. She continued to complain of pain in her back, right leg, and calf. Physical examination on February 14, 1986, revealed range of motion limitations. The doctor advised claimant to continue with her treatment of staying down as much as possible, applying moist heat and continuing with Motrin and Tylenol No. 3.

Claimant returned for further follow up of her back and right leg pain on February 28, 1986. She stated she was feeling better and had been up a little more. She continued to complain of rather constant pain, sharp pain if she twisted wrong. She continued on Motrin and Tylenol. Physical examination revealed range of motion limitation. The doctor encouraged her to continue with Motrin and to continue to try to slowly be up as much as she could tolerate.

When claimant next returned to the doctor on March 20, 1986, she advised that she had experienced an increase in pain. She stated that she was able to stand only about ten minutes at a time doing activities such as washing dishes. She described the pain as being in her back and in the lateral aspect of the right calf. She denied any numbness.

Physical examination again revealed absent ankle jerks. Range of motion was limited. A second epidural steroid injection was discussed with claimant but was not prescribed by the doctor at that time.

On April 8, 1986, claimant had another acute episode. She was reaching across the table to pick up something and noted the sudden onset of pain in her mid back, a little bit to the right side. She stayed down at home, applied moist heat, took Motrin and Tylenol and on April 22, 1986, when she saw the doctor and reported this to him, she was just getting over that episode. Physical examination revealed once again absent ankle jerks. The doctor noted a subjective sensory deficit on the right calf. The doctor advised her to continue trying to slowly be up more, continue Motrin and Tylenol and return in six weeks.

Claimant returned again on June 3, 1986 and indicated she was about the same. She complained of increasing pain in her back due to the car ride made to Muscatine to see Dr. Kessler, the consulting physician for the workers' compensation insurance carrier. Ankle jerks were again absent. The doctor also noted sensory deficit on the right side.

On July 14, 1986, claimant again returned to the doctor. She complained of a worsening of her condition. She complained of pain continuously in her low back with acute intermittent episodes. She complained of an acute episode on June 25th and another on July 1st and explained those to the doctor. She also discussed with the doctor her restrictions at home including inability to do anything other than light housework, inability to vacuum, inability to do the laundry, inability to make the bed, inability to do grocery shopping, and inability to walk more than a block at a time. On July 14, 1986, the doctor found limited range of motion and also absent ankle jerks. At that time, the doctor opined that she suffered from right S-1 radiculopathy. He stated claimant could not tolerate working eight hours a day even with minimal lifting. He felt that she simply could not tolerate standing on her feet that long.

Dr. Smith also on July 14, 1984, estimated claimant's functional capacities over an eight hour period would permit her to sit for intervals as long as two hours as well as stand for two hours or walk for two hours at a time with some rest in between. She would be able to lift ten pounds occasionally, carry ten pounds occasionally, as well as squat and climb

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occasionally and she could frequently reach above shoulder level and would have no trouble in simple grasping, pushing, pulling or performing fine manipulations. She could also use her feet for repetitive movements as in operating foot controls with only mild restrictions in the operation of automotive equipment or being around moving machinery.

In Dr. Smith's letter of August 25, 1986, he stated:

> ...As indicated in the letter, I did last evaluate Mrs. McClellan on July 14, 1986. At that time, although she had intermittent good and bad days with intermittent acute episodes, her condition overall has remained stable since January of 1986. At that time, I indicated that I felt she had a 5% whole man impairment and I feel that rating continues to apply today. As indicated in your letter, she did have a CT scan that was normal, but continues to have some symptoms suggestive of a herniated disc. Occasionally a myelogram can detect a herniated disc that is not apparent on a CT scan, but because of her intermittent and at this time tolerable symptoms, no further studies are planned.
>
> ...At this point with the degree of her symptoms and her age, it is her choice to not work as opposed to proceed with additional testing and potential surgery and I certainly can not [sic] disagree with that decision.

The doctor then concluded that settlement of the case at this time would be the most appropriate course for all parties.

With respect to the duration of claimant's condition, Dr. Smith stated in his report of March 10, 1986:

> ...I would hope that gradually in the future, that her condition would improve and that she ultimately would be able to certainly return to four hours a day and hopefully back to her regular job....

He also indicated that the x-rays indicated minimal evidence of degenerative disease and degenerative arthritis.

The doctor also indicated in his deposition that claimant's obesity causes weakness and loss of tone of the muscles of her back and that extra weight is transmitted through the spine and certainly into the low back and puts additional stress or strain on the low back area. He also conceded that people that are obese are likely to have complaints similar to claimant's, even though sometimes seen in people who are not obese, and even in the absence of trauma.

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The doctor further concluded in the deposition:

A. In July of '86, she did report, between the time I evaluated her in June of '86 and July of '86, two episodes where she had had acute episodes. During those episodes, she indicated she wasn't doing anything particularly heavy; simply twisted wrong and had the onset of sudden, severe pain.

Claimant testified that she has not returned to Dr. Smith since July of 1986. Claimant states that her back condition is "about the same" since the date of injury and that she has pain all of the time but it becomes severe during periodic episodes and a list of these episodes was submitted into evidence. Despite these problems, she explained that she has not returned to Dr. Smith because she is doing simply what Dr. Smith tells her to do when pain episodes occur. On cross-examination claimant admitted that she became upset with Dr. Smith due to his assessment that she is obese.

Claimant denies any prior back problems and only admits to occasional backaches before the work injury in this case.

In May, 1986, claimant was evaluated by Patrick Kessler, M.D., another orthopedic surgeon retained by defendants. In his report of June 26, 1986, Dr. Kessler stated:

> I feel Ms. McClellan is suffering from a chronic, fairly severe low back strain with some chronic degenerative changes, but no evidence of significant radiculopathy or disc disease. She was somewhat difficult to evaluate because of her gross inconsistencies, somewhat in her history but primary in her exam.

He further concluded that he felt she would be able to perform the occupation in which she had been engaged and had reached maximum improvement with no more than a 5 percent permanent partial impairment from the chronic pain and decreased motion.

In Dr. Kessler's return to work evaluation, there was no restrictions with respect to either sitting or standing for a period of six to eight hours, except for alternating the two positions occasionally. There were no restrictions with respect to repetitive movement and the only weight restriction was over 20 pounds.

Claimant testified that she has not been employed since her last day at Midwest Biscuit. She states that she wants to work and does not want to "sit around." However, she does not believe that she can perform any meaningful job and Dr. Smith agrees with this attitude. Claimant states that she is registered

with Job Service of Iowa and periodically checks want ads. She has applied for a job at Walgreen's. None of her efforts to date have proven successful.

Evidence was submitted from two vocational rehabilitation consultants. Claimant retained G. Brian Paprocki. From a telephone interview and educational testing Paprocki opines that claimant is not employable. His assessment of claimant's industrial disability was excluded at hearing as not within his expertise as a vocational consultant. Paprocki points to claimant's age, lack of educational skills, especially in math and claimant's extensive disability as unsurmountable barriers to employment. He notes that Dr. Smith has indicated that claimant can only work less than four hours per day and then in only certain physical positions. He also felt that period absences from work during claimant's frequent flare-ups of back problems also restricts her employability.

Clark Williams was retained by defendants. Williams stated at hearing that suitable employment is available in the area of claimant's residence with restrictions imposed by physicians. He then lists various jobs in the Dictionary of Occupational Titles contained in Job Services' job listing in the Burlington area. He also described various ads in the local newspapers for certain types of jobs he felt claimant could perform. In arriving at this list, Williams states that he formulated a work capabilities analysis from the restrictive views of Dr. Smith and the more liberal views of Dr. Kessler. Williams did not contact any potential employer to determine claimant's physical ability to perform any of the positions nor did he refer any job leads to claimant. Williams states that placement was not his job. He perceived his job as only providing assistance to persons seeking employment.

Claimant's appearance and demeanor at the hearing and that of her husband indicated that they were testifying in a candid and truthful manner.

APPLICABLE LAW AND ANALYSIS

I. The claimant has the burden of proving by a preponderance of the evidence that the work injury is a cause of the claimed disability. A disability may be either temporary or permanent. In the case of a claim for temporary disability, the claimant must establish that the work injury was a cause of absence from work and lost earnings during a period of recovery from the injury. Generally, a claim of permanent disability invokes an initial determination of whether the work injury was a cause of permanent physical impairment or permanent limitation in work activity. However, in some instances, such as a job transfer caused by a work injury, permanent disability benefits can be awarded without a showing of a causal connection to a physical

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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, the evidence established that claimant has suffered a permanent impairment as a result of the work injury. Claimant's testimony that she had no chronic back problems before August 8, 1985, is uncontroverted and claimant is found to be credible. Both orthopedic surgeons rendering opinions in this case indicate that claimant has at least a five percent permanent partial impairment to the body as a whole. Dr. Smith's causal connection views are uncontroverted as Dr. Kessler did not specifically render a causal connection opinion. To the extent that Dr. Kessler's views are not favorable to claimant the views of Dr. Smith, the primary treating physician, are given greater weight in this proceeding due to his more extensive clinical involvement in claimant's case. Claimant's obesity probably aggravated her back problems, but an employer takes an employee as he is with his or her personal attributes and frailties.

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

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

Claimant's medical condition before the work injury was excellent and she had no functional impairments or ascertainable disabilities. Claimant's testimony and her extensive work history indicate that claimant was fully able to perform physical tasks involving such things as repetitive lifting, bending, twisting and stooping, and prolonged standing and sitting.

Claimant's treating physician, Dr. Smith, has given claimant a permanent impairment rating to the body as a whole. More importantly, however, in an industrial disability case is an assessment of claimant's physical capabilities. Again, Dr. Smith's views are found to be the most credible due to the longer clinical involvement in claimant's case and his views are most consistent with claimant's credible testimony. Dr. Kessler has only seen claimant once for a brief period of time. According to Dr. Smith, claimant cannot work eight hours a day and is able to only work, assuming an optomistic prognosis, four hours a day it there is no heavy lifting, repetitive lifting, bending, twisting and stooping; or, prolonged sitting or standing.

Claimant's medical condition and the physician imposed work restrictions prevents claimant from returning to her former work or any other work which requires claimant to violate those restrictions. Claimant's severe work restrictions appear to

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prohibit most types of work claimant has performed in the past and to any other work for which claimant is best suited given her age, education and work history. Claimant remains unemployed despite a reasonable effort to seek alternative employment with Job Service of Iowa. According to the Supreme Court, such a factual setting gives rise to an application of the so-called "odd-lot" doctrine. This doctrine is a procedure device designed to shift the burden of going forward with respect to employability to the employer when claimant demonstrates a reasonable but unsuccessful effort to look for work. Klein v. Furnas Elec. Co., 384 N.W.2d 370, 375 (Iowa 1986). A worker becomes an "odd-lot" employee when an injury makes a 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, such work is available. Where a worker makes a prima facie case of total disability by producing substantial evidence that the worker is not employable in the competitive labor market, the burden to produce evidence shifts to the employer. If the employer fails to produce such evidence and if the trier of fact finds that the worker does fall into the odd-lot category, the worker is entitled to a finding of total disability. Id. at 106.

In the case sub judice, claimant made a reasonable effort to find suitable work and produced expert evidence of her lack of employability in the competitive labor market. However, defendants did go forward with the evidence with the testimony of Clark Williams who opines that claimant does not fall into the odd-lot category. However, a review of all the factors of industrial disability clearly place claimant into the odd-lot category despite defendants' evidence.

Regardless of the evidence dealing with the reasons surrounding claimant's leaving Midwest's employment, such evidence is not particularly important because it is clear that, given Dr. Smith's views, claimant is not working at Midwest today because of her disability. Defendants attempted to escape odd-lot liability with the views of Dr. Kessler and Clark Williams, but such evidence was not convincing. Dr. Kessler again did not spend enough time with claimant to be convincing with reference to his views on the authenticity of claimant's objective complaints. The testimony of Williams is likewise shallow. First, his views must be rejected because they are based upon a physical capabilities assessment which he, not any particular physician, developed from a reading of both the reports of Dr. Smith and Dr. Kessler. This deputy feels that the views of Dr. Smith and Dr. Kessler are extremely divergent and do not lend themselves to any sort

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of blending. Second, the listing of available jobs is not convincing. There was no attempt to actually determine for the jobs listed if claimant is physically or mentally suitable for such jobs and whether such jobs would be regularly available to claimant. There was actually no contact by Williams with any of the potential employers. Williams appears to have a rather restricted view of his role in a workers' compensation proceeding and distinguishes between placing claimant into a job and assisting claimant in finding a job.

The claim by Williams that claimant was uncooperative in failing to fill out exhibit 10 consisting of over 30 pages of questions is equally not convincing. Any person, including the undersigned, would have difficulty in completing the form and more importantly understanding the nature of some of the questions imposed. Many of these questions are personal and could be perceived as harassment rather than an attempt at vocational rehabilitation. The undersigned believes that seeking such information was not harassment, but this does not change the fact that it could be perceived as such. Given claimant's lack of educational abilities which Williams himself found, it is understandable that she may have misconceived his purpose and refused to cooperate.

The undersigned was likewise not impressed with the report of Paprocki whose only testing involved math skills and who arrived at his conclusions after a telephone interview. It would appear that both Williams and Paprocki where hired for the purpose of litigation rather than for any true vocational rehabilitation. Consequently, their views are considered accordingly.

Regardless of the role of the vocational counselors in this case, the fact remains that claimant remains unemployed today and nothing defendants have done has changed this fact.

Claimant is 59 years of age and nearing the end of her working career. However, in Diederich v. Tri-City Railway Co., 219 Iowa 587, 258 N.W. 899 (1935), which also involved a 59 year old person, the court held that advanced age did not prohibit a finding of permanent total disability. In this case, claimant had no plans of retirement before the work injury. Working life does not end at age 59 or 60 years of age. It must be recognized that older persons are in the work force who are beyond the age of 59 years of age. Older persons regularly become employed even after retirement from their lifelong career jobs.

Claimant has shown motivation to remain employed and has attempted on more than one occasion to return to her job at Midwest but was unable to do so because of her disability.

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Although claimant has a high school education, she exhibited below average scholastic aptitudes from testing by vocational couselors. Most of the vocational rehabilitation consultants agree in this case that claimant is not a good prospect for vocational retraining due to her age and disability.

After examination of all the factors, it is found as a matter of fact that claimant falls into the "odd-lot" category and is 100 percent permanently and totally disabled in that there is no suitable or stable work available for claimant in the geographical area of her residence. Based upon such a finding, claimant is entitled as a matter of law to permanent total disability benefits under Iowa Code section 85.34(3) during the period of her disability which, in all likelihood, will be the rest of her life.

In light of the finding of permanent total disability, the question of credit for benefits paid is moot.

FINDINGS OF FACT

1. Claimant and her husband were credible witnesses.

2. The work injury of August 8, 1985, was a cause of a five percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of standing, sitting and walking but only with periods of rest and not over two hours at any one point in time. Also, claimant can do no lifting or carrying above 10 pounds. Claimant can only occasionally bend or crawl and at no time can she squat. She cannot work in areas of unprotected heights; work in marked temperature changes; work around machinery; or drive an automobile on a prolonged basis. In the future, claimant may be able to work up to four hours per day if she improves as anticipated.

3. The work injury of August 8, 1985, was a cause of a 100 percent loss of earning capacity. Claimant is 59 years of age but had no retirement plans before her work injury. Claimant has not returned to work and has made a reasonable but unsuccessful effort to find suitable work within the geographical area of her residence. Due to her lack of education and her disability, claimant is only able to perform services which are so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist. Claimant is not employable at any competitive labor market within the geographical area of her residence. Claimant is a high school graduate but due to her age and disability, vocational retraining is not a feasible alternative.

CONCLUSIONS OF LAW

Claimant has established by a preponderance of the evidence entitlement to permanent total disability benefits.

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ORDER

1. Defendants shall pay to claimant permanent total disability benefits for an indefinite period of time in the future during the period of her disability at the rate of one hundred twenty-seven and 83/100 dollars ($127.83) per week from August 8, 1985.

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

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

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

5. Defendants shall file activity reports 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 26 day of May, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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2209; 3201
Filed March 22, 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARTHA MCCOY, Claimant, vs. DONALDSON COMPANY, INC., Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, and SECOND INJURY FUND, Defendants.	FILE NOS. 805200 & 752670 A R B I T R A T I O N D E C I S I O N

2209; 3201

It was held that claimant suffered two cumulative traumas to the right and left extremities at different times as a result of carpal tunnel syndromes. The Second Injury Fund was then held liable for a difference between the combined effect of the two disabilities in the form of a 60 percent industrial disability and the small amount of permanent disability benefits to be paid by claimant's employer for the scheduled member injuries involved.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARTHA MCCOY, Claimant, vs. DONALDSON COMPANY, INC., Employer, and TRAVELERS INSURANCE COMPANY, Insurance Carrier, and SECOND INJURY FUND, Defendants.	FILE NOS. 805200 & 752670 A R B I T R A T I O N D E C I S I O N

FILED
MAR 22 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Martha McCoy, claimant, against Donaldson Company, Inc., employer (hereinafter referred to as Donaldson), Travelers Insurance Company, the insurance carrier for Donaldson, and the Second Injury Fund for workers compensation benefits as a result of alleged injuries on September 1, 1982 and June 25, 1984. On January 4, 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 Wayne Funk. The exhibits received into the evidence at the hearing are listed in the prehearing report. According to the prehearing report, the parties have stipulated to the following matters:

1. With reference to defendant Donaldson only, on September 1, 1982 and again on June 25, 1984, claimant received an injury which arose out of and in the course of her employment with Donaldson.

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2. With reference to defendant Donaldson only, claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $236.68 for the June, 1984, injury and $224.21 for the September, 1982, injury.

3. Claimant is not seeking additional temporary total disability or healing period benefits in this proceeding.

Taken under advisement at the hearing was an objection by defendant Second Injury Fund to a portion of the deposition testimony of Thomas B. Summers, M.D., Exhibit I, and specifically Dr. Summers' answer to the question "Can you give us some examples of jobs which would not be suitable for her based upon complaints of either or both hands?" Defendant Second Injury Fund argues that this is an improper question of a medical doctor as it calls for a question beyond his expertise and that the doctor was not shown to be a qualified rehabilitation specialist. This objection is overruled as the objection goes to the weight that the undersigned should give to Dr. Summers' opinions rather than to its admissibility in an administrative proceeding. In any event, the answers are not particularly probative as it identifies jobs involving "vibrating tools" in the course of industries which the doctor was familiar with. The doctor did not identify what types of industry he was familiar with.

Also, taken under advisement was an objection from the defendant Second Injury Fund to any application of a cumulative trauma theory to this case as first applied by the Iowa Supreme Court in the case entitled McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). Defendant Second Injury Fund argues that claimant has not plead such a theory before the hearing and no other injury dates were plead in this case. This objection is likewise overruled. First, legal theories need not be plead before they can be applied by a tribunal to the facts of a contested case. Second, the operative facts relied upon by claimant in this case and specifically the factual setting of a gradual onset or worsening of carpal tunnel syndromes over time were well known to all parties to this case long before the hearing. In fact, the McKeever case itself arose from a carpal tunnel type of work injury. Third, any requirement that a claimant is limited at hearing to only the injury dates pled in an overuse syndrome type of case would be unusually harsh and contrary to the humanitarian principles of the Iowa Workers' Compensation Acts. Cumulative trauma theory is extremely complicated and difficult to apply even by specialists in the workers' compensation law. The guideance of McKeever is not definitive for all factual settings and a tribunal may choose from several differing dates over a long period of time and differing injury dates may result depending upon the types of disability requested by the claimant. Given claimant's long history of medical treatment for overuse syndrome, the multiple reports of injury involved in this case and the depositions from

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physicians taken in this case describing a long process of gradual injury, defendant Second Injury Fund was not mislead nor did it lack reasonable notice that claimant had cumulative or gradual injury claim. Defendants, as well as claimant, are presumed to know the law before they arrive at a hearing.

ISSUES

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

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 disabilities;

III. The extent of weekly disability benefits to which claimant is entitled; and,

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

SUMMARY OF THE EVIDENCE

The following is a summary of evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision. As will be the case any attempted summarization, conclusions about what the evidence may show are inevitable. Such conclusions, if any, in the following summary should be considered as preliminary findings of fact.

Claimant testified that she worked for Donaldson from November 7, 1972 until November 9, 1984. She stated that she performed many jobs at Donaldson such as making boxes, common laborer work, assembly press, "saws", "heliarc" and work on the paint line. Claimant testified that she earned $9.37 per hour in her job at the time of the alleged work injuries in this case in 1984. Claimant stated that in addition she received approximately three hours of extra pay per week for a reward for meeting production quotas. Claimant testified that most of her work at Donaldson's involved repetitive hand work which was at times heavy.

The facts surrounding the alleged work injuries are in dispute. Claimant testified that she first began to experience difficulties with her right arm and wrist following work activity in 1980 while "making boxes" at a rapid pace. She said that her right hand would occasionally fall asleep after repetitive

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activity but she didn't "think much about it" at first. However, claimant said that her hand problems gradually grew worse with pain and tingling in the right hand following her work on her shift and during the night. She reported her problems at that time to her supervisors and she was referred to the company doctor. According to her medical records, claimant was subsequently referred to an orthopedic surgeon, Carl O. Lester, M.D., who treated claimant over the next several years for carpal tunnel problems in both the right and left hands and arms. After his treatment consisting of medication and wrist splints, Dr. Lester first imposed work restrictions on claimant's activities as a result of her right hand problems in March, 1980. However, Dr. Lester noted in April, 1980, that claimant also had left hand difficulties at that time. Claimant said that despite her left hand problems, the right hand symptoms were much worse and eventually in September, 1980, she received carpal tunnel release surgery to the right hand. After a few weeks following the surgery, claimant returned to work. In May, 1981, Dr. Lester stated that claimant should avoid, in the future, jobs involving pushing with the palm of the right hand or any repetitive act that applies pressure to the palm while pushing with the right hand. However, he opined that claimant suffered no permanent partial disability to her right arm as a result of the carpal tunnel problems. Dr. Lester also recommended that claimant continue wearing wrist splints.

Claimant testified that despite the restrictions imposed by Dr. Lester in 1981, her work at Donaldson after that time would occasionally violate these restrictions and she continued to experience bilateral arm and wrist pain. Dr. Lester continued to impose the same restrictions which eventually prohibited heavy lifting in excess of 25 pounds. According to Dr. Lester's medical records, claimant's right arm difficulties continued into 1982. In September, 1982, claimant testified that she began to experience greater difficulties with numbness, tingling and pain in her left wrist and arm. At that time Dr. Lester treated claimant with injections into the left arm. In November, 1982, Dr. Lester indicated that claimant's work limitations as a result of her left hand injury are the same as limitations imposed for right hand problems. Claimant continued to be treated periodically by Dr. Lester for both left and right hand problems but mostly for her left pain in 1983. Also, during 1983, Dr. Lester imposed gradually more restrictive limitations on her work activity consisting of no lifting over 25 pounds and a prohibition against several repetitive jobs at Donaldson which became more numerous as time went on. However, claimant testified that she was still occasionally assigned to these jobs when she was needed by Donaldson. Finally, in December, 1983, Dr. Lester performed a carpal tunnel release surgery on claimant's left hand.

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According to the records of Dr. Lester, claimant continued to experience both left and right hand and arm problems in 1984. Following the left hand surgery, Dr. Lester first indicated that his restrictions against several jobs at Donaldson and the prohibition against lifting over 25 pounds was permanent. Claimant was last seen by Dr. Lester on August 17, 1984, for left hand and arm pain. At that time, claimant apparently became dissatisfied with Dr. Lester's inability to solve her problems and she requested and obtained a second opinion from Scott Neff, D.O., another orthopedic surgeon. After his evaluation of claimant, Dr. Neff continued to see claimant a few times in 1984. Claimant was last seen by Dr. Neff in January, 1985.

According to Dr. Neff, claimant did not complain to him about left hand problems when she first saw him on August 31, 1984, 14 days after claimant was last treated for left arm and hand pain by Dr. Lester. Dr. Neff states that in his report and in his deposition that the focus of his attention was on the right hand pain and a possible reoccurrence of carpal tunnel problems and what appeared to be new ulnar nerve problems. After his conservative therapy failed to alleviate claimant's difficulties, Dr. Neff referred claimant to a specialist in hand surgery at the University of Iowa, Bruce Sprague, M.D. After his examination of claimant in October, 1984, Dr. Sprague concluded that claimant had a good result from surgery on the left. However, with reference to the right extremity, Dr. Sprague states in his report of August 15, 1984, that there was scarring around the mid-palmar or palmar cutaneous nerve and tendonitis in the extensor compartments of the right wrist along with irritation of the ulnar nerve. Dr. Sprague notes that nerve conduction studies, however, were normal. Dr. Sprague concluded that claimant would not be able to continue performing any repetitive type of work due to these problems. Dr. Sprague noted that claimant had not been able to work since September 10, 1984, because of these right hand problems.

In October, 1984, claimant returned to work at Donaldson in a special light duty status in which she worked as a janitor on a part-time basis and received partial workers' compensation benefits. Claimant testified that she was assigned to scrub floors, vacuum floors and perform other general cleaning janitorial duties. She also was assigned on occasion as needed back to the various assembly jobs at Donaldson that she performed before September 10, 1984. Unfortunately, this special arrangement for claimant did not last. In November, 1984, claimant was laid off in a general plant wide economic layoff. However, when she was recalled in December, 1984, she was informed at a meeting attended by the plant manager at Donaldson and the union president that work was no longer available to claimant under her work restrictions. Company officials indicated that they needed a person who would be available to perform occasionally regular work in the plant on an as needed basis. Claimant testified that she was unhappy with Donaldson's decision to terminate her

and that she felt that there were jobs she could do despite her disability. The union president testified that a person with less seniority than claimant was hired for a janitorial position after claimant was terminated by Donaldson.

In January, 1985, Dr. Neff opined that claimant suffered from a three percent permanent partial impairment to her right extremity as a result of her continuing problems. He later raised this rating in June, 1987, to five percent due to claimant's continuing problems. Dr. Neff felt that the claimant had no disability to the left arm because she did not complain to him of left hand problems. In his deposition, Dr. Neff attributed claimant's hand problems to claimant's work at Donaldson but noted in his records that claimant also suffered pain while washing walls and peeling potatoes at home. On one occasion in October, 1984, Dr. Neff complained that claimant's pain complaints were not consistent.

On December 6, 1986, claimant was evaluated by a neurologist, Thomas B. Summers, M.D. Dr. Summers arrived at similar conclusions as those of Dr. Neff concerning the extent of claimant's impairment to the right arm. Although he did not have Dr. Neff's medical reports or deposition, Dr. Summers was aware of Dr. Neff's opinion as to the extent of claimant's right and left hand impairments. Contrary to Dr. Neff's opinions, Dr. Summers concluded that claimant has at least "minimal" impairment to the left arm. He rates this impairment at two percent of the left arm. He felt that it was most likely that the overuse of the left arm was caused by the claimant's right hand difficulties in 1980, as claimant is right handed and transferred many of her hand work from the right to the left at that time. Finally, Dr. Summers pointed out under the new AMA Guidelines for measuring impairment, unlike before, subjective symptoms of pain and loss of sensation can be utilized to arrive at an impairment rating.

At the present time claimant is still taking Motrin for her pain four times a day and her right arm bothers her more than her left arm although she insists that she continues to experience left hand difficulties. Claimant is 44 years of age and has a high school education. Claimant testified that she was a "C" student in high school. Claimant said that she had no other formal training. Prior to working at Donaldson claimant worked as a waitress and as a clerk in a shoe store and a grocery store earning approximately $.75 per hour. Before working at Donaldson, claimant said that she has never earned more than $.75 per hour. Claimant and the president of the union at Donaldson testified that since claimant's termination, the union contract provided for a cut in wages to the extent of $1.76 per hour but the union president testified that he was planning an upcoming negotiation to reinstate this wage cut. Claimant was limited in testifying as to her efforts to look for suitable work after her termination at Donaldson due to rulings at hearing by the undersigned that

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she should not testify inconsistently with her answers to interrogatories which had not been supplemented as required by applicable procedural rules. However, in response to defendant Second Injury Fund's question, claimant testified that she was unsuccessful in seeking work since December of 1987. Her job seeking efforts have consisted of monitoring the local newspaper and making an application to a local electric utility company for the position of meter reader.

Since September, 1986, claimant has been working as a self-employed babysitter and is currently taking care of three small children. She denies the ability to hold the heavier children in this work. Claimant testified that since she now has three children, she has gross earnings of approximately $150 per week from her babysitting work.

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

APPLICABLE LAW AND ANALYSIS

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

It is not necessary that claimant prove her disability results from a sudden unexpected traumatic event. It is sufficient to show that the disability developed gradually or progressively from work activity over a period of time. McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). The McKeever court held that the date of injury in gradual injury cases is a time when pain prevents the employee from continuing to work. In McKeever the injury date coincided with the time claimant was finally compelled to give up his job. This date was then utilized in determining the rate and the timeliness of claimant's claim under time limitation provisions.

In the case sub judice, the greater weight of the evidence shows that claimant had a longstanding ongoing injury process to each of her extremities. Whether or not there were two separate injuries to the right arm is not important. What is important is the injury date for purposes of rate and awarding permanent disability for the right arm impairment. Obviously, claimant

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permanently left her employment at Donaldson when she was finally terminated in December, 1984. Under the McKeever doctrine this could be considered as the time of injury. However, she was in a part-time job at that time and her gross weekly earnings would not be reflective of the proper rate for her disability. The evidence indicates that she permanently left her normal work at Donaldson on September 10, 1984. After that time she was placed in a light duty janitor job on a part-time basis. The alleged date in the petition for the right arm injury certainly was one of the many injury dates and a part of the overall cumulative injury process but she returned to work after that time for a short period of time and continued to suffer additional cumulative injuries. Therefore, the correct date of injury under the McKeever doctrine for the cumulative injury process to claimant's right extremity is September 10, 1984.

The next question is the injury date for the left hand problems. Although claimant's left hand difficulties were less severe, it does appear from the record that claimant's work restrictions were, in part, at least attributable to claimant's left hand difficulties according to the records of Dr. Lester. However, it is apparent from the records of Dr. Neff that claimant did not leave for normal work at Donaldson on September 10, 1984 due to pain and difficulties from her left hand. Therefore, that injury date would not be appropriate for the left hand difficulties. There is actually a multitude of possible injury dates in the left hand cumulative injury process and a problem arises as to choosing one of those dates to be representative of the entire process. It appears to this deputy that the only logical way to approach the problem is to realize that each absence of work or period of disability during this process would have its own injury date. Consequently, each type of disability will have its own injury date. If there were periods of temporary disability during this process, the injury date for that temporary disability would have a different date than later periods of disability. If permanency is ultimately found, the logical injury date for any award of permanent disability benefits should be the time when it became reasonably apparent that claimant suffered permanent impairment. Defendants should not be expected to pay permanent disability benefits prior to that time. The matter of injury date for permanency will be discussed below.

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

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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).

Defendant Donaldson does not really dispute the fact that claimant suffered at least a five percent permanent partial impairment to the right arm. The record supports such a finding as all doctors except for Dr. Lester agree with this rating. Dr. Lester's views in 1981 that claimant had no impairment is not convincing as to a rating of claimant's current condition. Also, it is unusual in the experience of this agency for a physician to impose permanent work restrictions due to a work injury and then to conclude that the work injury failed to cause any permanent loss of use or impairment.

The extent of permanency for the left hand is highly contested by the parties. However, the greater weight of the credible evidence establishes that such an impairment, albeit a small amount, does exist. First, Dr. Lester rendered no opinion as to the extent of claimant's left hand impairment following the December, 1983, surgery. However, Dr. Lester imposed restrictions

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on claimant's work activity which continued throughout his treatment of claimant's left hand problems and this treatment continued until 14 days before claimant was examined by Dr. Neff. Dr. Neff failed to give claimant a rating for her left hand because she did not complain to him. However, there was a clear history of complaints for left hand pain. Claimant testified that she still had hand difficulties. In the face of this testimony and Dr. Summers' clear opinions, Dr. Neff's opinions are not convincing. Also, Dr. Summers is more convincing on the issue of permanent impairment ratings because only he recognized the change in the new AMA Guidelines which now recognizes that patients can have a rateable permanent impairment with only subjective pain and loss of sensation complaints in nerve type injuries. Therefore, claimant will be awarded permanent partial disability benefits for a five and two percent permanent partial impairment to the right and left arms respectively.

We now arrive at the issue of the proper injury date for purposes awarding permanent disability benefits for the left hand. As discussed previously, the most appropriate date would be the time when it became reasonably apparent that claimant's left hand difficulties were permanent. Employers should not be expected to pay permanent benefits prior to that time. The views and reports of Dr. Lester would be determinitive of this issue as he was the only treating physician for claimant's left hand problems. He issued no permanent impairment rating for claimant's left hand and probably was never asked to do so. However, the most appropriate time for an injury date given his records would be the time when Dr. Lester considered claimant's work restrictions as permanent restrictions. The available evidence in this case is admittedly unclear and confused by the fact that the November, 1982, restrictions imposed for the left hand were the same as those imposed for the right hand. However, there is one report of Dr. Lester that is dispositive of the matter. On April 30, 1984, Dr. Lester noted in his treatment report following the carpal tunnel surgery in December, 1983, to the left hand that the restrictions were now permanent. This was the first time that Dr. Lester used the words "permanent" in imposing work restrictions referring to the left hand problems. Therefore, April 30, 1984, shall be considered the injury date for the purposes of awarding permanent disability benefits for the left hand cumulative trauma.

Claimant also seeks additional disability benefits from the Second Injury Fund under Iowa Code section 85.63-85.69. This Fund was created to compensate an injured worker for a permanent industrial disability resulting from the combined effect of two separate injuries to a scheduled member. The purpose of such a scheme of compensation was to encourage employers to hire or retain handicapped workers. See Anderson v. Second Injury Fund, 262 N.W.2d 789 (Iowa 1978). There are three requirements under the statute to invoke Second Injury Fund liability. First,

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there must be a permanent loss or loss of use of one hand, arm, foot, leg or eye. Secondly, there must be a permanent loss of use of another such member or organ through a compensable subsequent injury. Third, there must be permanent industrial disability to the body as a whole arising from both the first and second injuries which is greater in terms of relative weeks of compensation than the sum of the scheduled allowances for those injuries.

According to the Supreme Court decision rendered in Second Injury Fund v. Mich. Coal Co., 274 N.W.2d 300, 304 (Iowa 1979), if this agency finds as to claimant's present condition an industrial disability to the body as a whole, the agency must also make a finding "as to the degree of disability to the body as a whole of the claimant caused by the second injury." Such language appears to make employers at the time of the second injury liable for disability benefits in excess of the prescribed scheduled amounts set forth in Iowa Code section 85.34(2)(a-s). However, Mich. Coal merely stands for the proposition that when the Second Injury Fund effects loss of use of a member and also extends into the body as a whole, a determination must be made as to the degree of industrial disability caused by the second injury. It does not mean that a scheduled loss is to be rated industrially. Fulton v. Jimmy Dean Meat Co., filed July 23, 1986, appeal decision, appeal to the District Court pending. Therefore, it is found that the degree of industrial disability due to the combined effects of the prior loss and the second injury loss is greater than the disability caused by the prior and secondary losses combined, whether the loss is measured functionally or industrially, then the fund will be charged with the difference. Id. at 5 & 6. Defendant Second Injury Fund argues that Fulton is incorrect. However, this agency precedent by the industrial commissioner is binding upon the undersigned deputy until the decision is reversed by the Supreme Court.

In the case sub judice, we have already determined that claimant suffered a compensable permanent disability on September 10, 1984, as a result of cumulative trauma to the right extremity. Also, it was found that claimant suffered a prior compensable permanent disability on April 30, 1984, as a result of cumulative trauma to the left extremity. The Iowa Supreme Court has directed that the laws of workers compensation should be construed liberally in favor of the claimant due to the humanitarian purposes of the act. Beier Glass Co. v. Brundige, 329 N.W.2d 280, 283 (Iowa 1983). Defendant Second Injury Fund argues that although the fund was created to hire the handicapped, it was not intended to be applied in this case to aid the retention of handicapped people in their employment. The undersigned can see no distinction between the encouragement of employment of handicapped people and the retention of handicapped people. When the statutory language is applicable to the operative facts, the courts or administrative agency should not adopt

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strained interpretations to artificially road block an injured worker's recovery of benefits. See Iowa Beef Processors v. Miller, 312 N.W.2d 530, 532 (Iowa 1981). Therefore, claimant is entitled to Second Injury Fund benefits provided her industrial disability exceeds the combined scheduled member disability benefits.

III. 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).

Before the combined effects of claimant's compensable injuries in this case, claimant was able to perform her work although she experienced chronic pain and difficulties in so doing. Following the permanent injuries in this case, claimant's physicians have imposed permanent restrictions of claimant's work activity by prohibiting tasks such as heavy lifting, repetitive lifting, and most repetitive tasks involving twisting or movement of the arms while at work. Claimant's medical condition prevents her from returning to her former work or any other work which requires claimant to violate these restrictions. Claimant's laborer and assembly work at Donaldson was the type of work for which she is best suited given her education and past working experience. Claimant's only past working experience has been in unskilled work prior to being employed by Donaldson.

Although it is unclear what efforts claimant has made to seek suitable work, it is clear that her babysitting work is not a suitable replacement for earning capacity or the loss of her job at Donaldson. Aside from the loss of weekly earnings she has lost important fringe benefits. Of importance to the decision as to the extent of claimant's disability, is evidence concerning claimant's actual employability outside of Donaldson and the extent and nature of available work in the geographical area of her residence. Claimant has not availed herself of the

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urden shifting aspects of the so-called "odd-lot doctrine" in he Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). lowever, there is one critical fact that is very probative as to he lack of available work to claimant. Despite the availability f a broader array of jobs at Donaldson, Donaldson saw fit to erminate her because there was no work available within her estrictions. Also, claimant appeared to be willing and ready o work at that time and at the time of the hearing in this case nd to date her only income is from babysitting. Despite some ather obvious evidentiary problems claimant had in this case, hese operative facts are clear evidence of a substantial ndustrial disability.

Claimant is 44 years of age and at the end of her working areer. Her loss of future earnings from employment due to her isability is more severe than would be the case for an older or younger individual. See Becke v. Turner-Busch, Inc., Thirty-ourth Biennial Report of the Iowa Industrial Commissioner 34 1979) and Walton v. B & H Tank Corp., II Iowa Industrial ommissioner Report 426 (1981).

Although claimant has a high school education and exhibited verage intelligence at the hearing, little is shown in the vidence as to claimant's potential for vocational rehabilitation.

After examination of all of the factors, it is found as a atter of fact as a result of the combined effects of the umulative injuries of April 30, 1984 and September 10, 1984, laimant has suffered a 60 percent loss in her earning capacity.

Therefore, Donaldson shall be ordered to pay 12.5 weeks of ermanent partial disability benefits from September 10, 1984 nd five weeks of permanent partial disability benefits from pril 30, 1984 (credit to be given for benefits already paid), nder Iowa Code section 85.34(2)(m) which is five percent and wo percent respectively of 250 weeks, the maximum allowable umber of weeks for an injury to the arm in that subsection.

Based upon the finding of industrial disability for the ombined effects of the two injuries, claimant is entitled as a atter of law to 300 weeks of permanent partial disability enefits from the Second Injury Fund under Iowa Code section 85.34(2)(u) hich is 60 percent of 500 weeks, the maximum allowable number f weeks for an injury to the body as a whole in that subsection. educted from this amount pursuant to statute it is 17.5 weeks f disability benefits to be paid by Donaldson. Therefore, the econd Injury Fund shall be ordered to pay to claimant 282.5 eeks of permanent partial disability benefits beginning 17.5 eeks after the second injury, September 10, 1984.

None of the stipulated rates of compensation could be tilized in this award. Claimant credibly testified that she

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earned $9.37 per hour over a normal 40 hour work week plus three additional hours of pay on average for meeting production quotas. The union president indicated a figure of $9.04 per hour but he was unsure as to this amount. Therefore, it is felt that claimant's testimony is probably more accurate and it will be found that claimant's gross weekly earnings are $402.91 per week during 1984. Claimant testified that she was married with one dependent child. The amount of gross weekly earnings combined with claimant's entitlement to three exemptions on her tax returns entitles claimant to a rate of compensation pursuant to the industrial commissioner's rate benefit schedule book to $253.73 per week for both cumulative injuries found in this case.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. Claimant was in the employ of Donaldson prior to December, 1984, as a general laborer and assembly operator. Such work involved repetitive and at times heavy repetitive work with claimant's hands.

3. On April 30, 1984, claimant suffered an injury to the left arm which arose out of and in the course of her employment at Donaldson. This injury consisted of a cumulative injury in the form of carpal tunnel syndrome over a number of years from repetitive heavy work at Donaldson. This injury resulted in a two percent permanent partial impairment to the left extremity and permanent work restrictions against repetitive work and work involving lifting over 25 pounds. April 30, 1984, was the first time it became reasonably apparent to claimant's treating physician and to Donaldson that claimant's left hand impairment and work restrictions were permanent.

4. On September 10, 1984, claimant suffered an injury to the right arm which arose out of and in the course of her employment at Donaldson. This injury consisted of cumulative injury in the form of a carpal tunnel syndrome and ulnar nerve irritation over a number of years from repetitive heavy work at Donaldson. This injury resulted in a two percent permanent partial impairment to the right extremity and permanent work restrictions against repetitive work and work involving lifting over 25 pounds. On September 10, 1984, claimant permanently left her usual work at Donaldson and she returned to work in October, 1984, in a part-time light duty janitor job. Claimant was then informed in December, 1984, that she was terminated by Donaldson because there was no longer work available to her given her restrictions.

5. The combined effect of cumulative trauma work injuries of April 30, 1984 and September 10, 1984 and the resulting permanent partial impairment caused by these cumulative traumas

was a cause of a 60 percent loss of earning capacity. Claimant is 44 years of age and has a high school education but no other formal training. Claimant's only work experience prior to being employed by Donaldson in 1972 was work as a waitress and as a store clerk for $.75 per hour. Claimant was earning $9.37 per hour over a 40 hour work week plus additional pay for three hours each week on average during the year 1984. Claimant was terminated in December, 1984, by Donaldson due to her work limitations caused by her cumulative traumas caused by her work at Donaldson. As a result of her cumulative injuries, claimant cannot return to her regular work or any other work to which she is best suited. Subject up to December, 1987, claimant made an unsuccessful effort to look for suitable work and remains willing to work at the present time. Since September, 1986, claimant's only work activity has been as a babysitter in which she currently earns approximately $150.00 per week.

6. Claimant's gross weekly earnings at Donaldson during the year 1984 was $402.91 per week.

CONCLUSIONS OF LAW

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

ORDER

1. Defendant Donaldson shall pay to claimant five (5) weeks of permanent partial disability benefits at the rate of two hundred fifty-three and 73/100 dollars ($253.73) per week from April 30, 1984 and twelve point five (12.5) weeks of permanent partial disability benefits at the rate of two hundred fifty-three and 73/100 dollars ($253.73) per week from September 10, 1984.

2. Defendant Second Injury Fund shall pay to claimant two hundred eighty-two point five (282.5) weeks of permanent partial disability benefits at the rate of two hundred fifty-three and 73/100 dollars ($253.73) per week beginning seventeen point five (17.5) weeks after September 10, 1984.

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

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

5. Defendants, Donaldson and Second Injury Fund, shall pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and the cost of providing the undersigned with a trial transcript in proportion to their liabilities for

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the awards made in this decision. As defendant Donaldson voluntarily paid twelve point five (12.5) weeks of permanent partial disability benefits before the hearing in this case, it shall pay only two percent (2%) of these costs and defendant Second Injury Fund shall pay the balance.

6. All 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 22nd day of March, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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001110

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

MARTHA MCCOY,	:	
Claimant,	:	FILE NOS. 805200 & 752670
vs.	:	N U N C
DONALDSON COMPANY, INC.,	:	P R O
Employer,	:	T U N C
and	:	O R D E R
TRAVELERS INSURANCE COMPANY,	:	
Insurance Carrier,	:	FILED
and	:	MAR 30 1988
SECOND INJURY FUND,	:	IOWA INDUSTRIAL COMMISSIONER
Defendants.	:	

To correct minor typographical errors, the arbitration decision filed in this matter on March 22, 1988 is amended as follows:

1. The third sentence of the first full unnumbered paragraph on page 8 should read:

However, it is apparent from her lack of complaints in the records of Dr. Neff that claimant did not leave ~~for~~ her normal work at Donaldson on September 10, 1984 due to pain and difficulties from her left hand.

2. The second from last sentence contained in finding number 5 on page 15 should read:

~~Subject up~~ Subsequent to December, 1987, claimant made an unsuccessful effort to look for suitable work and remains willing to work at the present time.

Signed and filed this 30th day of March, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

STEVEN McDONOUGH,	:	
	:	
Claimant,	:	
	:	File No. 762853
vs.	:	
	:	
DAHLEN TRANSPORTATION,	:	A P P E A L
	:	
Employer,	:	D E C I S I O N
	:	
and	:	
	:	FILED
IDEAL MUTUAL INSURANCE COMPANY,	:	
	:	JUN 21 1988
Insurance Carrier,	:	
Defendants.	:	IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendants appeal from an arbitration decision awarding permanent partial disability benefits for impairment to claimant's left arm and for hearing loss in claimant's left ear.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 34. Both parties have filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. The hearing officer erred in finding that Claimant developed a hearing loss in his left ear subsequent to his injury on March 21, 1984.

2. The hearing officer erred in finding that Claimant's permanent hearing loss in the left ear resulted from trauma to his head in his March 21, 1984 injury.

3. The hearing officer erred in finding the Claimant's costs with Dr. Zimmer relate to his compensable hearing loss.

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REVIEW OF THE EVIDENCE

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

Claimant sustained injuries on March 31, 1984 when the truck in which he was riding left the roadway, went through a guardrail, and came to rest in a bunch of trees. Claimant was part of a two-man driving team for defendant employer and at the time of the accident, claimant was sleeping in the sleeper area of the truck. Claimant stated that during the accident he struck the left side of his head and shoulder against a corner inside the truck. Claimant indicated that as a result of the accident he sustained a broken arm, but did not recall whether he sustained any bruises or abrasions to his head.

Claimant related that about one and one-half months after the injury he began experiencing a humming in his head which claimant described as "like somebody was blowing a horn in your ear, your left ear all the time." (Transcript, page 36) Claimant stated that he went to his family doctor to have the wax cleaned out of his ear and that shortly after the wax was removed he lost all hearing in the left ear. Claimant testified that he had had wax problems which affected his hearing before the injury, but that his hearing always returned to normal when the wax was removed.

Claimant testified that he went to Albert Zimmer, M.D., for treatment of his hearing loss. In a December 10, 1985 letter, Dr. Zimmer opined:

> I have seen Mr. Steven McDonough several times. He was first seen in November of 1984. At that time he was complaining of hearing loss in the left ear, of sudden onset, following trauma to his head. Audiograms taken using masking of 60 decibels, revealed a hearing level of 20 decibels in the right ear, and about 70 decibels in the left ear. Auditory evoked brainstem response was unremarkable. Middle ear tomograms revealed clouding of the left tympanic cavity, but no destruction of bone.
>
> He continues to complain of some tinnitus, and occasional vertigo. He has a sensorineural hearing loss in the left ear, most probably related to trauma to the head. He also has a conductive hearing loss related probably to trauma to the head, producing infection.
>
> While some of his hearing loss is probably related to noise exposure that anyone faces, the bulk of it is directly related to the head trauma. He will probably continue to have some problem for

the remainder of his life.

(Joint Exhibit 7)

In his February 18, 1986 deposition, page 12, Dr. Zimmer opines with a reasonable degree of medical certainty that claimant suffers a 100 percent impairment to the left ear as a result of the March 21, 1984 injury.

Joint exhibit 27 is a physical examination form completed by Dr. H. Rosen and dated January 16, 1980, and under the general comments it reveals some hearing loss left ear but perceives whisper and voice with good ear adequately. Claimant did not recall Dr. Rosen indicating anything about a hearing loss or performing an audiogram. Joint exhibits 24, 25 and 26 are physical examination forms for examinations performed on February 18, 1985, July 26, 1983, and September 16, 1981, respectively. These examinations reveal no hearing problems. However, claimant revealed that those examinations did not involve audiometric tests.

Claimant's wife, Cheryl McDonough, testified that she has known claimant since 1980 and that she did not notice that claimant was having difficulty hearing until about two months after the March 21, 1987 injury.

Carl Fanger testified that he team drove with claimant for about a year before the March 21, 1984 injury and that during that time he did not notice that claimant was having any difficulty hearing with his left ear.

John Orey testified that he is pastor of the church that claimant attends and that he is a personal friend of claimant. Orey stated that he knew claimant prior to March 21, 1984 and that he did not notice that claimant was having difficulty hearing until after the March 21, 1984 injury.

Claimant is 40 years old with a GED and no other formal training. His work experience consists of driving a truck for the last 22 years except for one year in which he worked as a dispatcher. Claimant currently works for defendant employer as a local truck driver because he does not like to work as a team driver which would require him to sleep while his partner drives. He stated that his current job does not require him to unload cartons or boxes. Claimant related that the local truck driving job pays less than the team driving job he had at the time he was injured.

Claimant suffers a 14 percent impairment to the left upper extremity but has no restrictions on the use of his left arm. He opined that he has some difficulty picking up a gas hose with his left arm. Claimant stated that he is right-handed.

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APPLICABLE LAW

Iowa Code section 85.34(2)(u) (1983) states:

> 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 of said scheduled maximum compensation.

When an injury results in impairment outside of a scheduled member, a claimant is entitled to have his disability rated industrially. 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

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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

Defendants argue that claimant's hearing loss in the left ear is not related to the March 21, 1984 injury. Defendants' argument relies upon the January 16, 1980 examination report which notes a left ear hearing problem. The deputy adequately and accruately analyzes this argument in the arbitration decision:

> We accept Dr. Zimmer's ultimate opinion that claimant's left ear hearing loss results primarily from trauma related to his vehicle accident. The only evidence substantially contradicting Dr. Zimmer's opinion is the exhibit 27 report of Dr. Rosen stating claimant had ear hearing loss on January 16, 1980 examination. While claimant refers to a 1980 audiogram in his brief, no such audiogram was offered into evidence. In any event, claimant had physical examination in 1981 and 1983 where left side hearing loss was not noted. Those facts suggest any hearing loss claimant had at those times was not so substantial as to require extensive personal concern or medical attention. Further, claimant himself testified he had had wax buildup in his ears with a return to normal hearing after its removal. He last had wax removed prior to his injury while living in Des Moines at a time contemporaneous with examination by Dr. Rosen. Hence, wax buildup could well account for claimant's 1980 examination results. Significant after claimant's injury are the facts that wax removal did not change the hearing loss and that the loss was

> apparent to other persons. Those facts as well as Dr. Zimmer's deposition testimony regarding claimant's auditory brain stem response results are significant factors supporting the conclusion that claimant's injury was a proximate cause of his hearing loss.

(Arbitration Decision, page 8)

The greater weight of evidence supports the deputy's finding that the March 21, 1984 injury was the cause of claimant's left ear hearing loss and claimant's medical treatment with Dr. Zimmer.

Defendants also contend that claimant's hearing loss should be apportioned between the work injury and preexisting hearing loss. Apportionment is only proper where "a prior injury or illness, unrelated to the employment, independently prouduces some ascertainable portion of the ultimate industrial disability...." Varied Enterprises v. Sumner, 353 N.W.2d 407, 411 (Iowa 1984).

The extent of claimant's prior hearing loss, if any, cannot be ascertained from the record; therefore, in this case apportionment would not be appropriate.

Although claimant failed to establish that the disability resulting from his arm injury extends to his body as a whole, he is still entitled to benefits for industrial disability under section 85.34(2)(u). Claimant sustained a loss of his hearing and of his left arm in a single accident. Loss of hearing and of the arm in a single accident is not described in paragraphs (a) through (t) of section 85.34(2). Therefore, claimant is entitled to industrial disability benefis under section 85.34(2)(u).

The factors for evaluating industrial disability are set out in the preceding citations of law. Claimant's education is limited to a GED. He is 40 years old. Claimant now suffers a hearing loss in the left ear and suffers a 14 percent impairment to the left upper extremity. Although claimant opines that he has difficulty picking up a gas hose with his left arm, no work restrictions have been placed on him by his doctors. Furthermore, claimant is right-handed. Claimant's prior work experience consists of truck driving for 22 years. He is currently a local truck driver because he dislikes team truck driving after the accident, but claimant presents no medical testimony that he is physically or psychologically precluded from team truck driving. Without that testimony claimant cannot establish that his reduced earnings on the local truck driving job are related to his work injury. The greater weight of evidence establishes that claimant suffers a 15 percent industrial disability.

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FINDINGS OF FACT

1. Claimant was injured on March 21, 1984 when his left side and head were thrown against the side of the sleeper compartment of the semi-tractor that his partner was driving when the semi-tractor was involved in a motor vehicular accident.

2. Claimant received a displaced transverse comminuted fracture of the middle third of the left humerus.

3. Claimant was treated with open reduction and internal fixation with compression plate on March 22, 1984.

4. Claimant's fracture did not heal and on July 3, 1985 an open reduction repeat internal fixation and bone grafting of the fracture was performed.

5. Claimant developed restriction of shoulder motion from an impingement syndrome and adhesive capulitis.

6. Claimant underwent extensive physical therapy for his condition.

7. An arthrogram of the left shoulder of November 1984 was negative.

8. Claimant has normal shoulder range of motion and can carry on activities of daily living without restriction.

9. Claimant's chiropractic care with Dr. Hill was not authorized.

10. Claimant developed hearing loss in his left ear subsequent to his injury.

11. Claimant had had hearing loss at other times but such loss resolved following removal of wax from claimant's ear.

12. Claimant's post-injury hearing loss did not resolve following wax removal.

13. Claimant's brain stem auditory evoked responses for November 1984 and August 1985 are abnormal on the left.

14. Claimant's permanent hearing loss in the left ear resulted from trauma to his head in his March 21, 1984 injury.

15. Claimant's costs with Dr. Zimmer relate to his compensable hearing loss.

16. Claimant is 40 years old and has a GED.

17. Claimant has worked (except for one year as a dispatcher) the last 22 years as a truck driver.

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18. Claimant currently works as a local truck driver for defendant employer.

19. Claimant suffers a 15 percent industrial disability.

CONCLUSIONS OF LAW

Claimant has established that his March 21, 1984 injury is the cause of permanent partial disability to his left ear and left arm.

Claimant is entitled to permanent partial disability benefits based on a 15 percent industrial disability.

Claimant is entitled to payment of costs with Dr. Zimmer.

Claimant is not entitled to payment of costs with Dr. Hill.

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

ORDER

THEREFORE, it is ordered:

That defendants pay claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of three hundred nine and 49/100 dollars ($309.49) per week.

That defendants pay claimant the costs of medical treatment with Dr. Zimmer in the amount of one hundred forty-four dollars ($144.00).

That defendants pay accrued amounts in a lump sum.

That defendants pay interest pursuant to Iowa Code section 85.30.

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

That defendants file claim activity reports as required by the agency.

Signed and filed this 21st day of June, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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FILED
FEB 22 1988
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JENNIFER MCGRUDER,	:	
Claimant,	:	
vs.	:	File No. 825195
MANAS BALAGNA d/b/a AUNT BEA'S,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
ROCKWOOD SERVICE CORPORATION,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration brought by the claimant, Jennifer McGruder, against her employer, Manas Balagna, d/b/a Aunt Bea's, and its insurance carrier, Rockwood Service Corporation, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained September 13, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner at Council Bluffs, Iowa, on November 30, 1987. A first report of injury was filed July 16, 1986. At hearing, the parties stipulated that claimant was paid 25 weeks of benefits at a rate of $103.77 and 15 weeks of benefits at a rate of $30.67.

The record in this case consists of the testimony of claimant as well as of joint exhibits 1 through 36 and A through O. Subsequent to hearing, claimant's counsel attempted to submit a Supplemental Witness and Exhibit List. As the record was considered fully submitted at close of hearing as evidenced by the post-hearing order, the proposed supplemental exhibits are not received.

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 September 13, 1985 and that there is a causal relationship between such injury and a period of temporary total or healing period disability. The issues remaining for resolution are: (1) Whether there is a causal

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relationship between the injury and claimed permanent partial disability; (2) Whether claimant is entitled to benefits and the nature and extent of any benefit entitlement, including the sub-issues of whether claimant is entitled to additional temporary total disability or healing period disability or running award and the issue of whether claimant is entitled to permanent partial disability benefits; (3) Claimant's rate of weekly compensation in the event of an award; and, (4) Whether claimant is entitled to benefits under section 85.27. As regards the last issue, the parties stipulated that the provider of medical services would testify that fees were reasonable and defendants are not offering contrary evidence; they also stipulated that the provider would testify that treatment was reasonable and necessary treatment and defendants are not offering contrary evidence. They further stipulated that expenses were causally connected to the work injury and that defendants authorized the expenses.

REVIEW OF THE EVIDENCE

Claimant is single, 30 years old, a high school graduate who took general business courses and the mother of two minor children. Claimant had worked in a variety of jobs involving secretarial, bookkeeping and receptionist duties prior to her work at Aunt Bea's. Claimant had worked for the National Park Service and had earned $20,000 in that position sometime prior to her work at Aunt Bea's. Claimant reported that she had resigned that position after she was rear-ended in an automobile accident in March, 1981. She apparently then worked doing bookkeeping and receptionist work in a friend's business. She had previously left a civil service position at approximately the same salary and government service grade when that position was relocated and she chose not to transfer. Claimant also apparently had had a motorcycle accident with several fractures of her right leg in 1979. Claimant had returned to college following her alleged injury. She reported she had experienced discomfort while sitting and subsequently had not always attended. She reported her grades as generally good, however.

Claimant testified that she began work at Aunt Bea's Restaurant in May, 1985 on a full-time basis working from 10 a.m. to 6 p.m., six days per week. Her duties apparently included vacumming, cleaning tables, stocking tables, waitressing and bartending. Claimant reported her starting wage as $4.50 per hour with an increase to $5 per hour in her second month at Aunt Bea's. Claimant reported that she was paid in cash with no withholdings made. She indicated that she had never filed an income tax return for her work at Aunt Bea's as the exact amount of her earnings could not be determined. Claimant reported that she received at least $200 in tips each week. Claimant stated that she was the only waitress employed in the afternoon. Claimant agreed that she had done bookkeeping services for the restaurant

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and had kept track of hours of other workers. She reported this consisted largely of multiplying the hours by the employee's pay rate and giving the calculation to the owner who then paid the employee. Claimant denied that she had ever worked part-time hours listed and reported that part-time work for her would have been impossible because she was the only employee in the establishment during the day. Claimant reported that she gave the cook approximately one-third of her tips and characterized the cook as also a full-time worker who worked from 30-40 hours per week and received pay at the rate of $5 per hour. Claimant had "no idea" if her employer had paid her $1,065 while she worked for the restaurant.

Claimant reported that, on September 13, 1985, she slipped and her feet went out from under her while working. She reported that she continued to work throughout the day, but by day's end felt sick, albeit without pain. She indicated that, by the following morning, her back was hunched over and she felt terrible. The next day was a Sunday. Claimant reported she could not get out of bed that day, but that a neighbor assisted her in seeking treatment at Jennie Edmundson Hospital. Claimant reported that she saw Bernard L. Kratochvil, M.D., who took her off work. Claimant subsequently was hospitalized in October, 1985 for myelographic studies. She also subsequently received chiropractic treatments from Deanne J. Rogge, D.C., whom claimant reported referred her to Daniel L. McKinney, M.D. Claimant also had prescribed physical therapy treatments, consisting largely of massage and self-help education. Claimant reported continuing pain in her low back, her buttocks and her right leg and reported that physical therapy had not alleviated her pain or problems. She reported that she continues to see Drs. Kratochvil and Rogge and well as Jay W. Burr, her physical therapist.

Claimant reports that she can at most walk three or four blocks and that her low back feels hot. She indicated she has difficulty sitting for extended periods, but that she spends a lot of time on her couch. She reported that she alternately spends her day walking, sitting or standing. Claimant reported that she had seen Michael J. Morrison, M.D., on two occasions consisting of 7 to 10 minute examinations each. She reported that his only advice was to give her a book containing exercises which she was unable to do because she had had a broken leg.

Claimant opined that she could not return to work as a secretary as she could not sit as required.

Claimant denied that she had cancelled 15 appointments with Mr. Burr from December, 1986 to March, 1987. She reported she could not remember Mr. Burr stating she could return to light-duty waitressing. She reported that she had seen L. Weber, M.D., a neurosurgeon upon referral of Dr. Kratochvil. She reported that she has seen Lilly M. Stroller, M.D., a psychiatrist, on one

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occasion, but not otherwise.

Claimant testified that her physicians have told her that if she did have surgery, she would likely need it on two or three occasions. She reported that Dr. Kratochvil would not let her drive car for a long time. She indicated she uses a heating pad constantly, but reported she takes medications only approximately once every three months. Claimant agreed that she can read and write the English language and has very good typing skills.

Sheri Grosvenor testified that she was hired as a cook at Aunt Bea's in June, 1985 and was paid $5.00 per hour for her services with compensation either by check or by cash. Withholding was not deducted from the witness' check. Ms. Grosvenor reported that, when she was able to observe claimant working, claimant did her work and did it well. She reported that, prior to September 13, 1985, she had not observed claimant walking with a limp or having physical impairments or complaining of back, knee or hip pain.

Jay Burr testified by way of his deposition taken March 17, 1987. Mr. Burr is a Nebraska-licensed physical therapist. Burr reported that he initially saw claimant on April 4, 1986 and that subsequently Dr. McKinney referred her for services. He described claimant as giving a history of having slipped on a concrete floor in the late afternoon of September 13, 1985, landing on her buttocks. He reported her symptoms as fairly diffuse consisting of low back, thoracic and cervical pain as well as mild headache and cold and profusely sweating hands and feet. Claimant had restriction in active lumbar range of motion and was not able to bend forward or backwards normally. The cervical spine was limited to approximately minus 10 degrees with rotation right and rotation left, but flexion-extension was essentially within normal limits. Claimant had had a partial fusion of her right knee on account of a fracture of the right leg, hence, active and passive range of motion of the right knee was abnormal. The right leg was approximately one inch shorter than the left. Claimant was tender to palpation in the lumbar, thoracic and cervical spine, but apparently without real muscle spasm. Burr reported that "[s]he was moving spontaneously and -- there appeared to be some minor mechanical involvement, which we have not been able to determine the etiology of the sacrum on ilium or the iliosacral complex."

Burr reported that claimant had a chronic strain of the lumbar spine extending into the sacrum. He reported that chronic strain generally involves consistent pain extending for greater than six months. He reported that a chronic problem generally results in change in soft tissue, shortening of musculature with the muscle losing its normal suppleness and with the effects of the strain extending elsewhere within the musculoskeletal system, that is, over time involving not only

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the muscle, but also the joint capsule, the ligamentous structure and the facial mechanisms.

Burr reported that claimant had been seen on a fairly regular basis, that is, two or three times per week, from April (1986) until approximately two months prior to the deposition. Claimant was started on a posture and exercise program and encouraged to increase her overall activity level. Hot packs, high voltage galvanic stimulation, ultrasound, therapeutic exercise, joint mobilization techniques and cranial-sacral technique were also used. Burr reported that claimant's ability to perform outside physical activity was limited to a degree because of the functional problems she had with her right knee and partial fusion of that knee. Treatment alleviated claimant's complaints of profuse sweating and cold feelings in both arms and legs or hands and feet. Burr reported that therapy provided "better balance" with claimant's sacroiliac mechanism and that her lumbosacral and thoracic complaints decreased, although those were chronic in nature and had required ongoing treatment. Burr did not believe claimant was a malingerer. He felt that her condition would result in some permanency. He opined that claimant's condition would probably preclude her from work involving a lot of lifting or where she would be either standing or sitting only. She would do better where she could maintain mobility and change her posture on a regular basis and she could probably, at that point, return to some very light waitressing.

Burr concurred that claimant's permanent partial impairment to the body as a whole is somewhere between five and ten percent. Burr opined that claimant had reached her maximum improvement in approximately December, [1986].

Burr reported that claimant's leg length discrepancy "reflects into the hip and into the sacrum, because of the short leg length, then the pelvic base or the hips are not even, which would make the right hip low. That compensates then into the lumbar spine." He felt that all of the foregoing creates a minor mechanical problem within the sacroiliac mechanism, consistent with "all of this." He reported that claimant does wear a shoe lift, which then "puts things more in balance," however.

Bernard Kratochvil, M.D., initially saw claimant and reported that examination of the back revealed tenderness to pressure in the lower lumbar area, especially over the right buttock. Straight leg raising did not seem to increase pain into the right lower extremity. Reflexes in the lower extremity were good as was strength and there was no sensory disturbance. The impression was of contusion of the lower back with contusion of the right sciatic nerve. Claimant was hospitalized on October 11, 1985 with considerable pain in the right lower extremity. The trochanteric area was injected with steroids, but without a

great deal of improvement. Physical therapy caused gradual improvement and claimant was discharged October 18, 1985.

Dr. Kratochvil reported, on December 3, 1985, that claimant had been readmitted to the hospital. An EMG study did not show any particular nerve root abnormality, but on account of persistent pain, a lumbar myelogram was performed. Claimant was reported as having a disc herniation at the last lumbar level and the sacrum characterized as the L6-S1 level. Behrouz Rassekh, M.D., saw claimant in consultation and felt that conservative care should be pursued as he did not feel the S1 radiculopathy corrolated with clinical findings.

On February 4, 1986, Dr. Kratochvil reported that claimant had been unable to work since September 13, 1985, was continuing to be treated conservatively and would be unable to return to work for an indefinite time.

On April 16, 1986, Dr. Kratochvil reported that claimant had taken medication to alleviate her symptoms which had resulted in constipation which was indirectly related to the work-related incident.

On August 11, 1986, Dr. Kratochvil indicated that he had seen claimant as of that date and that she still had symptoms relating to her back and right lower extremity and that further conservative care as well as continuation with Back School was appropriate. He estimated that claimant had a ten percent permanent partial impairment of her back as a result of her injuries. The doctor reiterated his permanency opinion on October 14, 1986.

On October 14, 1987, Dr. Kratochvil reported that, when last examined on August 13, 1987, claimant had continuing complaints with her back and had not reached maximum medical improvement.

Deanna J. Rogge, D.C., saw claimant for examination on January 6, 1986. She reported that claimant had reportedly incurred a fall at work on September 13, 1985, but that claimant's history to the accident was not significant as it related to her present injury. During consultation, claimant complained of low back pain with radiation into both buttocks, right posterior leg pain and numbness to the toes, right shoulder and neck pain, and thoracic pain rotating into the anterior chest. Claimant's gait was irregular with stiff and slow movements. On palpation of claimant's head, neck, shoulder girdle, thorax, lumbo-pelvic region, and extremities, marked muscle spasms were displayed of the bilateral gluteal, lumbar and thoracic paraspinal and trapezious muscles. Tenderness was elicited in the gluteal muscles bilaterally and paraspinal muscles from L5-L1. Orthopaedic examination revealed a positive Kemps bilaterally, Lewin, Braggard bilaterally, Laseques bilaterally, Ely and Nachlas

bilaterally, Foramina Compression to the right and Valsalva maneuver. Neurological examination revealed reduced patellar reflex bilaterally. Range of motion tests, as measured visually, demonstrated pain in all ranges of motion of the cervical and lumbar vertebrae. X-ray studies of the cervical area revealed a slight reversal cervical curve. Thoracic x-rays revealed an elevated right shoulder and mild scolosis curve and moderate degenerative changes. Lumbar x-rays revealed a decreased disc space at L5-S1 and moderated spurring of the anterior aspects of the lumbar vertebrae bodies. Slightly elevated left hip concave curve to the left of the lumbar spine was also noted. Claimant's injuries were interpreted as acute traumatic subluxation strain and sprain of the lumbar spine with resultant intervertebral disc syndrome with attendant extension neuralgia parasthesia. Chiropractic manipulation as well as heat and ultrasound were administered. A lumbosacral support belt was also used. Claimant was instructed to avoid sitting, lifting, and bending. Prognosis was rated as guarded and it was reported that post traumatic pathology was probable since the principal injury was one of ligamentous and muscular sprain and strain to the joints.

On March 5, 1986, Dr. Rogge reported that claimant had had a return of normal sensation in both legs and in her left arm and an increase in her patellar reflex for both right and left legs. She reported that claimant was still experiencing a great deal of pain, but stated that it was of less intensity and that claimant's ranges of motion had increased.

On May 7, 1986, Dr. Rogge reported that claimant would not be able to be employed for several years. She recommended that claimant refrain from sitting, lifting, bending or twisting.

Lilly M. Stoller, M.D., reported on January 23, 1986 that she had seen claimant for a one-time evaluation of her pain upon referral from Dr. Weber. She characterized claimant as a quite hysteroid young woman who sees herself as having a great deal of insight in a psychological sense when mainly there is a emotional reaction to the situation and a looking for an easy solution. Dr. Stoller reported that claimant truly does not believe she has psychophysiologic or conversion symptoms "and I see it as likely that may well be present." The doctor reported that claimant had a traumatic car accident in September, 1979 leaving her with her leg broken in four places. The doctor stated:

> My best guess psychodynamically is that this current accident is re-triggering the unresolved feelings from the previous accident of September 1979 which was of course very severe.
>
> The doctor further stated:
>
> ...I think this woman has difficulty resolving her

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feelings but is pretty unaware of this difficulty and would be difficult to do therapy with at the present time. I think if she could ever own what those problems are perhaps she could be helped more.

Daniel L. McKinney, M.D., reported that he had examined claimant on March 14, 1986 and found no reflex change, weakness or sensory loss and noted no muscle spasm in her back. He believed that claimant had suffered a chronic lumbar strain and recommended further chiropractic treatment or possibly a swimming or light exercise program as in her best interest.

On June 11, 1986, Dr. McKinney reported that he had not seen claimant since the initial examination of March 14, 1986 and that, at that time, he did not have any neurosurgical treatment to render her. He opined that, in view of the chronicity of her symptoms, he would anticipate a permanent partial "disability" of approximately five percent of the body as a whole.

Michael J. Morrison, M.D., examined claimant on May 6, 1986. He reported that claimant walked with a limp because of her right leg shortening, but that forward flexion of her cervical and lumbar spine was full with no gross muscle weaknesses in either her upper or lower extremities, biceps, triceps. Knee jerks and ankle jerks bilaterally were 1+/4+ and straight leg raising was negative bilaterally. The doctor reported that claimant's symptoms were all related to soft tissue strain and could easily be managed with abdominal flank muscle strengthening exercises supplemented with bicycle riding or swimming. He reported that when claimant was asked whether previous physicians would allow her to exercise, she stated emphatically that none would allow her to do so. He indicated that, upon review of her records, it was well outlined that Dr. Kratochvil had tried to reinforce this to her. Dr. Morrison opined that, after three of four weeks of performing appropriate exercises as well as bicycling or swimming, claimant could return to her prior job without restriction. He further stated that the injury should not result in permanent [impairment] and that, if after three of four weeks of exercising, claimant was unable to return to work, psychological testing should be obtained to rule out any possible functional overlay.

On May 1, 1987, Dr. Morrison reported that he had seen claimant on April 29, 1987. He reported that claimant's examination continued to reveal no objective evidence of any muscle weakness or atrophy, reflex changes or straight leg raising findings. He reported that he explained to claimant that she had reached maximum medical recovery, that no further medical treatment was indicated and that no permanency was anticipated from her injury. Dr. Morrison is associated with Orthopedic Clinic, P.C.

Dennis R. Green, D.C., reported that thermography of December

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15, 1986 showed findings consistent with right C5 nerve root irritation and left C6-7-8 nerve root irritation corrolating with claimant's symptomatology and clinical findings. Dr. Green reported that thermography of December 5, 1986 showed findings consistent with right L5-S1 nerve root irritation and corrolated with the patient's symptomatology in clinical findings. He reported that the abnormal vascular heat emission patterns in the right posterior thigh and right posterior calves were consistent with the L5-S1 nerve root irritation, but may be considered equivocal due to extensive injury to the right thigh in a prior injury in 1979 as evidenced by the cicatricial area in the right thigh. Dr. Green diagnosed claimant's conditions as chronic sprain of the lumbosacral spine with right sciatic neuropathy and chronic sprain of the cervical spine with brachial neuropathy.

Medical costs in evidence are as follows:

Dennis Green, D.C.	$ 829.99
Broadway Chiropractic Clinic	1,565.00
Medical Anesthesia Associates	475.00
The Physicians Clinic	2,125.00
Bernard Kratochvil, M.D.	210.00
Mercy Hospital	281.25
Daniel McKinney, M.D.	50.00
Jennie Edmundson Hospital	1,803.25
Cogley Medical Associates	202.00
Lilly M. Stoller, M.D.	60.00
Emergency Care Division	97.00
Walgreens	357.13
Bluffs Neurosurgical Associates	285.00
Omaha Neurological Clinic	90.00
Neurosurgical Assoc. of Council Bf.	75.00

APPLICABLE LAW AND ANALYSIS

We shall first consider the rate issue.

Defendants contend that claimant was a part-time employee. Claimant contends she was hired as a full-time employee at a rate of $5.00 per hour for a maximum of 40 hours per week. Claimant further contends that she worked as the only waitress in the establishment and earned a minimum of $200 per week in tips. Claimant is single with two children. Claimant testified that she was initially paid $4.50 per hour, but at a later point, earned $5.00 per hour. No records as to claimant's wages or tips were submitted into evidence. Defendants did not offer any testimony contradicting claimant's testimony, but for questioning claimant as to whether she had earned $1,065 while working for Aunt Bea's. Claimant testified that she worked full-time from 10:00 a.m. until 6:00 p.m., six days per week. While we do not find claimant an altogether credible witness, we

find that employer's total failure to participate in the arbitration, either by providing direct testimony or by providing documentary evidence of the employer's position compelling. Claimant's testimony is accepted. Claimant was apparently earning $5.00 per hour and working 48 hours per week when injured. Such would represent a gross wage of $240.00. Claimant's testimony that she earned $200 per week in tips is not unreasonable, given the nature of the business in which claimant worked and the extended hours during which she worked. Claimant testified that approximately one-third of her tips were given to the cook who was also on duty in the afternoon. Hence, claimant's estimated tip earnings are reduced by one-third to $133.00. Claimant's gross weekly wage then is $373.00. The basis for compensation is governed by section 85.36(6). (It is not altogether clear whether claimant had worked 13 calendar weeks prior to her injury. The result would remain the same, even if the basis of compensation was section 85.36(7), however.) Claimant is single and entitled to two exemptions. The applicable rate of weekly compensation is $229.06.

The parties have stipulated that claimant's injury was causally related to temporary total or healing period disability, but claimant contends she is entitled to a running award as she has not yet reached maximum medical improvement and defendants contend that claimant's condition had stabilized as of October 14, 1986.

As claimant's condition is found to have produced permanent disability as discussed below, our current concern is with healing period and not temporary total disability.

Section 85.34(1), Code of Iowa, provides that healing period benefits are payable to an injured worker who has suffered permanent partial disability until (1) he has returned to work; (2) is medically capable of returning to substantially similar employment; or, (3) has achieved maximum medical recovery. The industrial commissioner has recognized that healing period benefits can be interrupted or intermittent. Willis v. Lehigh Portland Cement Company, Vol. 2-1, State of Iowa Industrial Commissioner Decisions, 485 (1984).

Healing period ends upon the return to work or at the point of maximum medical recovery. Continuing to receive medical care, which is maintenance in nature, does not extend the healing period beyond the point where claimant actually stopped improving. Armstrong Tire & Rubber Co. v. Kubli, Iowa App. 312 N.W.2d 60 (Iowa 1981); Derochie v. City of Sioux City, II Industrial Commissioner Report, 112 (1982), District Court Appeal, remanded for settlement. On May 7, 1986, Dr. Rogge reported that claimant would be unable to be employed for several years. On May 6, 1986, Dr. Morrison reported that claimant would be able to return to a prior job without restriction after three or four

weeks of performing appropriate exercises as well as bicycling and swimming. On June 11, 1986, Dr. McKinney opined that claimant had a five percent body as a whole permanent partial "disability." On August 11, 1986, Dr. Kratochvil indicated that claimant a ten percent permanent partial impairment of her back and reported that she still had symptoms relating to her back and right lower extremity. He advised further conservative care as well as continuation with Back School. In his March 17, 1987 deposition, physical therapist Jay Burr opined that claimant had reached maximum medical healing as of approximately December, 1986 and reported that she had miss approximately 15 physical therapy sessions originally scheduled from January through March 17, 1987. On October 14, 1987, Dr. Kratochvil reported that claimant had continued to have complaints relative to her back when last examined on August 13, 1987 and that claimant had not reached maximum medical improvement.

The fighting issue here is the nature of claimant's care following assignation of permanency ratings in June and August, 1986. Claimant's symptoms and requirements for care following such dates were not noticeably different from her symptoms and requirements for care on or prior to such dates. While both Dr. Kratochvil and Dr. Rogge, and to a lesser extent Mr. Burr, indicate that claimant will need continuing care for her symptoms, they do not indicate the treatment will improve her underlying condition. Indeed, the record does not disclose that Dr. Kratochvil had seen claimant from his August 11, 1986 examination through his August 13, 1987 examination. Such an extended time without treatment by one's primary medical physician would suggest a stabilized medical condition. Likewise, treatment by Dr. Rogge also appears to have been primarily geared to reduction of symptomatology within the last year. Mr. Burr had seen claimant on a fairly regular basis from April, 1986 until approximately December, 1986. He had characterized her condition as chronic, however, and had indicated she would need ongoing treatment. All of the above suggests that, at least as of the date Dr. Kratochvil assigned claimant a permanency rating, that is, August 11, 1986, claimant's condition had stabilized to the point where she could be legally characterized as having reached maximum medical improvement. We accept that as the date upon which healing period benefits terminated. We reject the opinions of Dr. Kratochvil and Dr. Rogge regarding their views that claimant had not yet reached maximum medical improvement and claimant's non-employability. Each, when taken in the context of the practitioner's overall involvement with and discussion of claimant's condition, suggests that the practitioner was equating a continuing need for medical treatment with an absence of maximum medical improvement.

We consider the question of whether a causal relationship exists between claimant's injury and claimed permanent partial disability.

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The claimant has the burden of proving by a preponderance of the evidence that the injury of September 13, 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).

Dr. Kratochvil has indicated that claimant has a ten percent permanent partial impairment of her back as a result of her injuries. Dr. Morrison has reported that claimant has no permanency and has stated that she could return to her prior job without restriction after appropriate treatment. He characterized claimant as resisting offered treatment options of exercise and programmed exercises. Dr. Stoller, a psychiatrist, felt that psychophysiological conversion symptoms may well likely have been present in claimant's condition. She further surmised that claimant's work injury was retriggering unresolved feelings from her previous accident of 1979 in which claimant had broken her leg in four places. The doctor thought claimant had difficulty resolving her feelings, but was pretty unaware of this difficulty which would, in turn, create difficulties in conducting therapy with claimant as of the time of her examination. Mr. Burr had reported that claimant's leg length discrepancy "reflects into the hip and into the sacrum, because of the short leg length, then the pelvic base or the hips are not even, which would make the right hip low. That compensates then into the lumbar spine. " He believed that created a minor mechanical problem within the sacroiliac mechanism which he stated was consistent with "all of this." Burr had reported that claimant had a chronic strain of the lumbar spine extending into the sacrum. Other physicians and practitioners did not render opinions relevant to the causal relationship issue.

Dr. Kratochvil's opinion as claimant's primary treating medical practitioner is entitled to substantial weight. Dr. Kratochvil

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only relates claimant's permanent partial impairment to her back to her injuries. (We note that the term "injuries" as used in the doctor's opinion is somewhat ambiguous as it is not altogether clear that Dr. Kratochvil is speaking only of claimant's work injury and not of her previous automobile and motorcycle accidents. The doctor's medical reports overall reference only to the work injury, however. On that basis, we surmise that the doctor's opinion is as to causal connection to the work injury.) Claimant's back condition, as such is evidenced by the ten percent permanent partial impairment rating of Dr. Kratochvil and the five percent permanent partial rating of Dr. McKinney, is found to be causally related to her work injury. Claimant's multiple other symptoms and complaints are not found to be so related. Claimant's complaints are, in the experience of this deputy, atypical of those seen from the injury as described. Their multiplicity supports Dr. Stoller's conclusion that claimant is a hysteriod personality, sustaining a conversion reaction. They further suggest that claimant's physical problems, in part, may relate to her leg fracture previously, and not to her work injury.

We reach the question of entitlement to section 85.27 benefits.

We are perplexed as to the nature of this issue. Under the section, claimant is entitled to payment of all medical costs related to a compensable injury and authorized by the employer. Pursuant to the pre-hearing report, the parties stipulated as to both the issue of causal connection to the work injury and the issue of authorization indicating that medical services were both authorized and causally connected to the work injury. Given those stipulations and the lack of any evidence in this record directly contrary to those stipulations, defendants are ordered to pay medical costs in evidence.

We reach the question of permanent partial disability entitlement.

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

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

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

In Parr v. Nash Finch Co., (Appeal decision, October 31, 1980) the Industrial Commissioner, after analyzing the decisions of McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980) and Blacksmith v. All-American, Inc., 290 N.W.2d 348 (Iowa 1980), stated:

> Although the court stated that they were looking for the reduction in earning capacity it is undeniable that it was the "loss of earnings" caused by the job transfer for reasons related to the injury that the court was indicating justified a finding of "industrial disability." Therefore, if a worker is placed in a position by his employer after an injury to the body as a whole and because of the injury which results in an actual reduction in earning, it would appear this would justify an award of industrial disability. This would appear to be so even if the worker's "capacity" to earn has not been diminished.

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

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 has, at most, a ten percent permanent partial impairment rating. Mr. Burr has opined that she could possibly attempt a return to some light-duty waitressing. Claimant is a bright individual with a variety of previous skills. She has shown a capacity for additional education and appears to be a good candidate for vocational rehabilitation, should she so choose. She is a younger worker and that also would be a factor in her favor, should she choose further schooling or retraining. Without such, even though claimant appears to be restricted as to her ability to either stand or sit over a prolonged period, it does appear that there may well be employments in which claimant would have the physical mobility which she requires, but which would utilize her previous talents. Claimant has not sought other employment. That fact, as well as claimant's

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choice to discontinue the schooling that she had attempted following her injury, raise doubts as to claimant's motivation to improve her present condition. They also make it difficult to assess the reliability of claimant's own testimony regarding what she can and cannot do at this time. While defendants are required to compensate claimant for her loss of earning capacity, defendants are not to be penalized for claimant's own lack of motivation and initiative. When all factors set forth above are considered, claimant is found to have sustained a permanent partial disability of 20% of the body as a whole.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant is 30 years old, single, with two minor children.

Claimant is a high school graduate with prior work experience as a secretary, bookkeeper, receptionist and waitress.

Claimant worked as a waitress and bartender for Aunt Bea's Restaurant. She also had minor bookkeeping duties at the restaurant.

Claimant worked from 10:00 a.m. until 6:00 p.m. six days per week at the restaurant.

Claimant's salary, when first employed, was $4.50 per hour and her salary, when injured, was $5.00 per hour.

Claimant earned approximately $200 per week in tips and gave approximately one-third of that amount to the restaurant cook.

Claimant's gross wage was $373.00 per week.

Claimant received an injury arising out of and in the course of her employment on September 13, 1985 when she slipped and her feet went out from under her while working.

Claimant was treated conservatively following that injury.

Treatment claimant has received over at least the last year has been designed to reduce her symptomatology and not to alleviate her overall condition.

Dr. Kratochvil, claimant's primary treating physician, assigned claimant a permanent partial impairment rating on August 11, 1986.

Claimant reached maximum medical improvement on August 11, 1986.

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Claimant has multiple symptoms not generally characteristic of a low back injury.

Dr. Kratochvil has opined that claimant's permanent partial impairment rating to her back is on account of her injuries.

Claimant had had two prior vehicle accidents.

Claimant had broken her leg in four places in a motorcycle accident in 1979.

Claimant is likely a hysteriod individual with psychophysiological conversion symptoms.

Claimant has a leg length discrepancy which creates a minor mechanical problem within the sacroiliac mechanism consistent with her current problems.

Claimant's many other symptoms do not relate to her September 13, 1985 injury, but claimant's back condition generally relates to such injury.

Claimant has a permanent partial impairment of from five to ten percent of the body as a whole.

Claimant is a younger worker.

Claimant would require a position where she could alternate between sitting and standing.

Claimant has done well in previous college coursework.

Claimant is bright and shows a capacity for increased education and for vocational rehabilitation.

Claimant has not sought other work.

Claimant is not well-motivated.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant's rate of weekly compensation is $229.06.

Claimant has established that her injury of September 13, 1985 is a cause of the disability to her back upon which she now bases her claim.

Claimant has not established that her injury of September 13, 1985 is a cause of other disabilities upon which she now bases her claim.

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Claimant is entitled to healing period benefits from her injury date through August 11, 1986.

Claimant is entitled to permanent partial disability from her injury of September 13, 1985 in the amount of 20%.

Claimant is entitled to payment of all medical costs in evidence.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant permanent partial disability benefits for one hundred (100) weeks at the rate of two hundred twenty-nine and 06/100 dollars ($229.06) with those payments to commence on August 12, 1986.

Defendants pay claimant healing period benefits from claimant's injury date through August 11, 1986 at the rate of two hundred twenty-nine and 06/100 dollars ($229.06). Defendants compensate claimant for the proportionate difference between the rate of payment and the correct rate of weekly compensation for those weeks during which benefits were paid at the rate of one hundred three and 77/100 dollars ($103.77) and the rate of thirty and 67/100 dollars ($30.67).

Defendants pay accrued amounts in a lump sum.

Defendants pay claimant all medical costs in evidence as such costs are outlined in the above review of the evidence.

Defendants pay interest pursuant to Iowa Code section 85.30 as amended.

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

Defendants file Claim Activity Reports as required by this agency pursuant to Division of Industrial Services Rule 343-3.1.

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

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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2500, 2700
Filed February 19, 1988
HELEN JEAN WALLESER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RALPH K. MCGUIRE, Claimant, vs. PAGE COUNTY, IOWA, Employer, and FREMONT INDEMNITY COMPANY, Insurance Carrier, Defendants.	:	File No. 811944 A R B I T R A T I O N D E C I S I O N

2500, 2700

Claimant's treatment, upon advise of authorized physician that claimant see another doctor, found compensable.

Claimant permitted alternate care with psychiatrist of his choice for work injury related depressive disorder.

FILED
FEB 19 1988
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RALPH K. MCGUIRE,	:	
Claimant,	:	
vs.	:	File No. 811944
PAGE COUNTY, IOWA,	:	
Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
FREMONT INDEMNITY COMPANY,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

This is a proceeding in arbitration and for medical benefits brought by the claimant, Ralph K. McGuire, against his employer, Page County, and its insurance carrier, Fremont Indemnity Company, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained December 2, 1985. This matter came on for hearing before the undersigned deputy industrial commissioner at Council Bluffs, Iowa on December 2, 1987. A first report of injury was filed on December 18, 1985. The parties stipulated that claimant has received 28 6/7 weeks of temporary total disability benefits and 35 weeks of permanent partial disability benefits, all of which were paid at the rate of $176.73. The record in this case consists of the testimony of claimant, of Alfred J. Marchisio, Jr., and of Virginia Stumbo as well as of claimant's exhibits 1 through 4 and defendants' exhibits A, B, and C.

ISSUES

Pursuant to the prehearing report, the parties stipulated that claimant did receive an injury which arose out of and in the course of his employment on the alleged injury date. The issue to be decided is payment for alternate care. The parties were in disagreement as to whether that issue included only the issue of payment for past care provided or whether it included a subsequent issue and application for future alternate care.

REVIEW OF THE EVIDENCE

Claimant, Ralph K. McGuire, testified that he has gone through the tenth grade in school, but is unable to read. Claimant was employed as a custodian for Page County when injured on December 2, 1985. He subsequently received treatment from John L. Greene, M.D., and James Eaves, M.D. Claimant was released for work on July 28, 1986. He reported that he could then "lift a little bit." Claimant apparently worked from August 4, 1986 until he was terminated on September 17, 1986. Claimant characterized his termination as having been caused because he could not do the work and because he had taken too much time off.

Claimant contacted Virginia Stumbo, workers' compensation supervisor with Underwriters Adjusting Company, in December, 1986. She told him to continue treating with Dr. Eaves. Claimant reported that, as of that time, he could not sit, stand or walk comfortably. Claimant testified that Dr. Eaves told him he should receive another doctor's opinion. Claimant saw James Conroy, M.D., and Maurice P. Margules, M.D., in December, 1986. Apparently, claimant initially saw Dr. Conroy who then referred him to Dr. Margules. Claimant also retained counsel that month.

Claimant reported that Dr. Margules performed a series of tests and then advised claimant that he had a damaged disc for which he needed surgery. Claimant had surgery on January 2, 1987. Claimant agreed he had not notified anyone with Page County before that surgery, but stated that, to the best of his knowledge, he had notified his counsel before his hospitalization. Claimant agreed he had not personally notified defendants and stated he did not believe anyone had notified them of his election to have the second surgery. Claimant stated that his counsel was aware of claimant's appointment with Dr. Conroy. Claimant stated, however, that he himself did not even know he was going into the hospital until after he got there. Surgery was scheduled for three days following the appointment with Dr. Margules. Claimant notified his counsel of the surgery after the surgery had been completed.

Claimant characterized the surgery by Dr. Margules as having helped his condition and stated that he was 50% better than he had been prior to that surgery. He stated that he could now walk, bend and stoop to some degree. Claimant was visibly uncomfortable at hearing and stood and moved about on occasion while testifying. Claimant reported that he is now working four hours per day delivering parts for an auto supply house. He characterized that job as not requiring reading or writing and as requiring driving only within a 20-mile radius. Claimant opined that he could not work more than four hours per day.

Claimant reported that he has had tingling in his left leg

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and hand for approximately the last three or four months and has had tingling in his right hand for approximately three weeks. He reported that his back pain is at the belt line and radiates into the buttocks over the width of the whole back.

Alfred J. Marchisio, Jr., a vocational rehabilitation counselor and consultant, characterized claimant as having low literacy skills.

Virginia Stumbo testified that she had been a claims examiner for the insurance carrier's adjusting company when claimant's claim opened. She understood that Dr. Eaves had treated claimant initially and had referred claimant to Dr. Greene who had performed a microdiscectomy in March, 1986. She testified that the insurer had paid claimant's medical costs until termination of his employment for all medical costs submitted and had paid claimant for all time off work on account of the injury. She reported that the insurer had paid claimant 35 weeks of permanent partial disability benefits upon receipt of Dr. Greene's permanent partial impairment rating of seven percent. Ms. Stumbo reported that claimant's counsel contacted her on December 22, 1986 and that she then authorized an independent medical examination with Dr. Margules, but confirmed that Dr. Greene remained claimant's treating physician. She indicated that exhibit A, a letter of January 22, 1987 to claimant's counsel, was a confirmation of the earlier telephone conversation. She reported that exhibit B, a letter dated January 22, 1987 of claimant's counsel to the insurer, informed her of claimant's surgery with Dr. Margules of January 2, 1987. Ms. Stumbo reported that she subsequently conversed by phone with claimant's counsel and again told him that Dr. Greene was the treating physician and that care with Dr. Margules was unauthorized.

January 22, 1987 correspondence between Ms. Stumbo and claimant's counsel indicates that the letter is a confirmation of a phone conversation of December 22, (1986). The letter advises that claimant is entitled to an independent medical examination (with Dr. Margules), but that Dr. Greene is the recognized treating physician. Ms. Stumbo also requested a copy of any information received from Dr. Margules. A January 22, 1987 letter of claimant's counsel to Ms. Stumbo reports that Dr. Conroy had referred claimant to Dr. Margules who performed surgery in the form of a repeat laminectomy.

Ms. Stumbo agreed that she had not sent claimant for treatment with Dr. Greene after August 7, 1986. She could not recall counsel reporting that claimant could barely walk when she spoke with claimant's counsel in December, 1986. She indicated that they had not discussed surgery during that conversation.

Ms. Stumbo testified that, had the insurer received medical reports advising of the need for surgery, the insurer's medical

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consultant would have reviewed such. She indicated that the insurer had no reason to question the accuracy of any medical reports or any tests relative to claimant. Ms. Stumbo advised that the insurer would have had no problem with the second surgery, had Dr. Greene been able to review claimant's medical reports and had Dr. Greene subsequently agreed that another surgery was necessary.

Claimant has $11,115.40 in unpaid medical expenses including the following charges:

Jennie Edmundson Memorial Hospital December 28, 1986 through January 10, 1987	$4,743.10
James Conroy, M.D. December 26, 1986 through January 10, 1987	211.50
Medical Anesthesia Assoc. December 29, 1986 through January 2, 1987	550.00
Maurice Margules, M.D. December 28, 1986 through August 3, 1987	3,690.00
Clarinda Memorial Hospital March 12, 1987 through March 17, 1987	1,085.80
Clarinda Memorial Hospital March 25, 1987	16.00
Jennie Edmundson Memorial Hospital April 17, 1987	775.00
James E. Eaves, M.D. April 21, 1987 through April 22, 1987	44.00

The March 25, 1987 charge with Clarinda Memorial Hospital was designated as "PT"; the April 17, 1987 Jennie Edmundson Hospital charge was designated as "MRI." The evidence as a whole reveals that charges submitted related to claimant's treatment with Drs. Conroy and Margules.

On July 9, 1986, Dr. Eaves reported that claimant had not responded well following surgery and that he had discussed such with Dr. Greene and the head of the pain center at the University of Nebraska Medical School. He reported that, based upon the recommendations of apparently the pain center, Dr. Eaves would not recommend that claimant return to work. Dr. Eaves further recommended that claimant be evaluated at the pain center if the insurer so agreed and that he be retrained.

On July 25, 1986, Dr. Greene of Neurological Surgery, Inc., reported that he had seen claimant on July 21, 1986 with complaints of low back pain and left lower extremity pain. Dr. Greene reported that, upon examination, claimant walked with a limp, but had no muscle spasm and straight leg raising tests were negative. He reported that claimant had no neurological findings, but had good motor strength with deep tendon reflexes and good sensation. An EMG of the left lower extremity was normal and a CT scan of the lumbar spine was much better than pre-operatively

with x-rays of the lumbar spine showing no evidence of disc space. The doctor stated that he "would not expect the CAT scan findings to completely disappear. There is always going to be some bulging of the annulus. However, I don't think this is significant. I cannot explain (claimant's) symptoms on a discogenic basis."

On January 13, 1987, Dr. Conroy, who is board-certified in internal medicine, reported that examination of claimant showed loss of pin prick sensation over the lateral surface of his left leg in a typical dermatone distribution as well as diminished deep tendon reflexes indicative of nerve root injury on that side. The doctor reported that magnetic resonance image scan (MRI) was consistent with persistent bulging of disc material in the L5,S1 interspace and that claimant, therefore, was referred to Dr. Margules who did additional studies and who eventually performed a repeat laminectomy. The doctor further reported that claimant had some co-existent medical problems including features of a peptic ulcer and mild reactive depression secondary to the year-long distress and disability.

J. Huddle, M.D., interpreted a CT scan of December 29, 1986 as revealing minimal bulging posteriorally to the left at the L5-S1 disc with such causing a mild degree of foraminal stenosis and mild stenosis on that side, but with no significant defect seen against the spinal canal. Nerve roots appeared to be in normal position.

An operative report of Dr. Margules of January 4, 1987 indicated that the L5-S1 disc was found to be compressing the S1 root. The disc was incised and a large amount of disc tissue including two large necrotic fragments were removed. After the disc space had been cleaned of its disc material, no evidence of disc material was found in the epidural space. The root was exposed and free of compression.

In a discharge summary of January 10, 1987, Dr. Margules reported claimant's pain as strictly radicular in type and involving only the left lower extremity, described as the left gluteal region, posterior aspect of the left thigh, and left lower leg with paresthesia in the lateral aspect of the left lower leg. He reported that there was no involvement of the right lower extremity and no involvement of the upper extremities. The doctor further reported that EMG studies and nerve conduction studies of the left lower extremity were normal. Myeloradiculography did not show evidence of abnormal findings. The doctor reported that surgery was performed on the basis of claimant's history, clinical findings of S1 root involvement and CT scan studies.

On September 23, 1987, Dr. Margules opined that claimant had reached maximum medical improvement and that further treatment could not be recommended. He also assigned a permanent partial

"physical disability" rating.

On November 1, 1987, Dr. Conroy reported that claimant had returned to the office reporting perhaps 50% relief of left leg symptoms, although still having some element of back pain and painful paresthesia in the left leg. Claimant's complaints were then reported as including severe headaches, especially on the right side, and left arm numbness which claimant related chronologically back to the accident. MRI scan did not reveal cervical disc herniation or bony encroachment on nerve roots. The head study did not show tumor, blood clot, or other conditions which would account for claimant's complaints. Elements of chronic sinusitis were present, but the doctor did not relate them to claimant's headaches. The doctor reported that claimant was obviously depressed and needed supportive care, counseling, and vocational rehabilitation. Examination notes indicate that claimant's severe headaches had been ongoing for three or four months and were mostly in the right occipital region, although to some degree in the right temporal region. On physical examination, claimant's neck was stiff to rotation and he could tolerate only approximately one-half of normal rotation and range of motion. Neurological examination of the upper extremities was normal with normal hand grasp and deep tendon reflexes. Claimant had some stiffness to foward flexion involving his lower back. Babinski's were down going.

Dr. Margules testified by way of his deposition taken July 29, 1987. The doctor is a neurological surgeon. Dr. Margules reported that claimant's history was of a microdiscectomy performed followed by partial relief of pain for approximately 30 days and then return of pain unchanged with severe radicular pain in the left lower extremity present continuously. The doctor indicated that claimant displayed a lot of problems and was unable to really extend and flex his left lower leg. He reported that claimant undressed with great difficulty, walked with great difficulty and had great difficulty in keeping his left leg extended, stating that pressure on the lower extremity caused pain in his lumbar region and left leg.

Dr. Margules characterized claimant's as a difficult case in that paraclinical findings were normal as to the myelography, but abnormal as to MRI and CT scan, confirming that there was compression of the S1 root. The doctor stated that using those in conjunction with the history and clinical findings and claimant's obvious great difficulty, the doctor concluded that claimant had residual disc tissue and compression of his nerve root. He reported that two options were available: "One was to forget about it, do nothing and send him home, or surgically explore and try to decompress the root." The doctor stated that he saw no reason to think claimant would get better by himself in December, 1986 as claimant had had a course of progressive deterioration since March, 1986. Dr. Margules described claimant

as somewhat despondent about his condition, stating claimant "felt that he saw no areas for him, that he was hurting, that was his main obsession, that he was hurting and something had to be done for his pain. It was very difficult to have a logical discussion with him."

The doctor reported that he found a large amount of tissue left in the interspace compressing the root, including two large fragments. He characterized such as normal because claimant had had a microdiscectomy before with a small disc removed during that procedure.

Dr. Margules opined that claimant's July 23, 1986 CT scan probably reported essentially the same thing as his December 29, 1986 CT scan. The doctor characterized as correct the statement that Dr. Greene had gone in and was able to exercise 50% of claimant's bulge at the disc and that he, Dr. Margules, had removed as much as possible of the remaining 50%.

Dr. Margules, as of the time of deposition, had seen claimant on four occasions since his surgery. He reported that claimant had improved in that he did not have continuous, relentless pain in his left leg, but had some residual pain in his lumbar region, also felt to be definitely, markedly better. The doctor reported he still has some difficulties with claimant in discussing things on a very logical basis, but that that had something to do with his level of education, with his understanding of things. The doctor reported that claimant would likely improve, but that his course of recovery would be approxiately two years following the date of surgery.

The doctor characterized fees for his services as fair and reasonable in keeping with services of physicians in his medical specialty in the city of Council Bluffs. At hearing, the parties had stipulated that providers of medical services would so testify and that defendants would not offer contrary evidence.

Dr. Margules indicated that Dr. Eaves had admitted claimant to the Clarinda Hospital in March, 1987 when claimant "had a problem when he was using the bathroom and had an increase in his symptoms."

Dr. Margules subsequently stated that, from observation of claimant over the week that he was (hospitalized) he felt claimant was a man of moderate intellectual ability and low level of education, and therefore, that was the main part of his problem. He did not think claimant had any pathological psychiatric trait.

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APPLICABLE LAW AND ANALYSIS

Our first concern is whether claimant is entitled to payment for past care received from or at the direction of Drs. Eaves, Conroy, and Margules.

Section 85.27 provides that the employer, for all compensable injuries, shall furnish reasonable surgical, medical, physical rehabilitation, nursing, and hospital services and supplies. The employer has the right to choose the care. Treatment must be offered promptly and be reasonable suited to treat the injury without undue inconvenience to the employee. If the employee is dissatisfied with the care offered, the employee is to communicate the basis of that dissatisfaction to the employer. If the employer and employee cannot agree on alternate care, application is to be made to the commissioner. In an emergency, the employee may chose the employee's care provided the employer or the employer's agent cannot be reached immediately.

The employer has the duty to monitor the treatment being provided. Zimmerman v. L. L. Pelling Co., Inc., II Iowa Industrial Commissioner Report, 462 (App. Decn. 1982).

An authorized physician's referral to another physician is routinely found to be authorized. Limoges v. Meier Auto Salvage, I Iowa Industrial Commissioner Report, 207 (1981).

Where evidence in the record reveals claimant's condition improves as a result of care provided by a physician whom the employer did not authorize, that improvement not only helps claimant, but may also mitigate the employer's ultimate liability. That mitigation, when considered with other relevant factors, may result in a finding that the nonauthorized care was reasonable and necessary treatment as contemplated by section 85.27. Rittgers v. United Parcel Service, III Iowa Industrial Commissioner Report, 210, 213 (1983).

The California case of Zeeb v. Workmen's Compensation -- Appeals Board, 62 California Report 753, 432 P.2d 361 (1976) discusses the philosophy behind charging the employer with responsibility for providing medical care. The opinion states at 364:

> It will ordinarily be in the interest of both the employer and the employee to secure adequate medical treatment so the employee may recover from his injury and return to work as soon as possible. Permitting the employer to control the medical treatment permits the employer, who has the burden to provide the medical treatment, to minimize the danger of unnecessary extravagant treatment, and in light of the employer's interest in speedy recovery,

the employer's control should rarely result in a denial of necessary treatment.

Both claimant and Ms. Stumbo agree that, when Ms. Stumbo spoke with claimant in December, 1986, she directed him to return to Dr. Eaves for treatment. Dr. Eaves directed claimant to see another physician. It was at that point that claimant saw Dr. Conroy, who subsequently referred claimant to Dr. Margules. Claimant has low literacy skills and it was apparent at hearing that claimant has difficulty thinking abstractly. Under those circumstances, it was not unreasonable for claimant to assume that he could accept treatment from Drs. Conroy and Margules as Dr. Eaves, with whom he was authorized to treat, had advised him to see another doctor. Defendants do not appear to have appropriately monitored claimant's medical care beyond his work termination. Claimant's lack of sophistication is readily apparent, such that it is reasonable to surmise that it could have been gleaned even in the course of a telephone conversation. Under those circumstances, if defendants had not intended that claimant be permitted to seek other care if Dr. Eaves so advised, that should have been clearly stated to claimant in the December, 1986 telephone conversation. Nothing in this record suggests that that was so. While Ms. Stumbo testified that claimant did not discuss surgery in the December, 1986 conversation, claimant apparently did discuss medical care. Defendants had a duty to clearly advise claimant regarding such and clearly state at claimant's level of understanding the care that would or would not be considered authorized care. As claimant acted reasonably in seeing Dr. Conroy upon Dr. Eaves' direction and in seeing Dr. Margules upon Dr. Conroy's direction, care and services provided by those physicians or under their direction were authorized and will be compensated. The record reviewed as a whole supports claimant's contention that all services for which he seeks compensation, including physical therapy services and his March, 1987 and April, 1987 costs at Clarinda and Jennie Edmundson Memorial Hospital, were within the purview of services Drs. Conroy and Margules provided or directed. Costs with Dr. Eaves, of course, are compensable since defendants had advised claimant that he could treat with that physician.

We note that, on January 22, 1987, Ms. Stumbo advised claimant's counsel that care by Dr. Margules, beyond an independent medical exam, would not be authorized. That letter is reportedly a confirmation of Ms. Stumbo's December 22, 1986 telephone conversation with claimant's counsel in which she stated she advised counsel that independent medical examination alone by Dr. Margules was authorized. We find the letter noncompelling in that a full month lapsed between the testified-to phone conversation and the letter. Primary medical treatment, that being claimant's surgery, had been provided in the meantime. Had defendants wished to advise claimant to not seek treatment on a timely basis, such a lapse likely would not have occurred.

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Further, claimant has improved following Dr. Margules' surgery and Drs. Margules' and Conroy's subsequent treatment. Claimant describes himself as approximately 50% better in terms of back and leg pain and medical records support such. Dr. Margules indicated that claimant's condition had deteriorated and not improved following his microdiscectomy with Dr. Greene in April, 1986. Defendants will likely receive the benefit of claimant's improved condition by way of a decrease in their ultimate liability on account of claimant's injury. Hence, for that reason also, the unauthorized treatment is found to have been reasonable and necessary treatment as contemplated by section 85.27.

We consider the issue of whether further alternate care should be authorized.

Defendants argue that claimant's application for alternate care should not be addressed. The application was filed on November 5, 1987 and a supplemental application was filed on November 9, 1987. This matter was pre-heard on November 13, 1987. While notice as to the application for alternate care may have been less than under some circumstances, defendants cannot say they did not have notice of the application prior to hearing in this matter. At any rate, any such defense should have been raised at the time of the pre-hearing conference and not at time of hearing. The pre-hearing assignment order indicates that the issue is section 85.27 care and does not designate that such relates only to past care. For the above reasons, the application will be considered at this time. The law as stated above is applicable.

Claimant apparently seeks care for present complaints of continuing low back and left leg pain as well as complaints of headache and numbness and tingling in his left and right upper extremities and feelings of despondency and depression. Dr. Margules, on September 23, 1987, released claimant, indicating he had reached maximum medical improvement, and did not recommend further treatment. Dr. Conroy, on November 1, 1987, stated that claimant had headache and left arm numbness which claimant chronologically related to his injury. In his discharge summary of January 10, 1987, however, Dr. Margules had emphatically stated that claimant's symptoms were radicular symptoms related to the left lower extremity only and not involving either the right lower extremity or either upper extremity. Hence, Dr. Conroy's history in November, 1987 is inconsistent with that of Dr. Margules of January, 1987. Claimant himself, at hearing, testified that his left upper extremity problems had been present only for approximately three or four months and that his right upper extremity problems had been present only for approximately three or four weeks. Given the above, such problems cannot be related to claimant's work injury and treatment for such will not be authorized. As Dr. Margules has indicated that further treatment for claimant's back and left lower extremity condition is not

recommended, further treatment and alternate care for such is not authorized. Claimant, of course, remains free to seek care as needed for that condition from authorized physicians, understood to be Drs. Eaves and Greene.

Both Dr. Conroy and Dr. Margules have opined over extended time that claimant was despondent or depressed. Dr. Conroy related those conditions to claimant's work injury related disability. Depression is a recognized medical condition. As it has been related to claimant's compensable work injury, defendants are required to provide suitable care for such. In his application, claimant has expressed a preference for such treatment with Dr. David Winsor. Dr. Winsor is identified as a psychiatrist-internist. It is well recognized that the rapport between the patient and the physician is of particular import in producing efficacious treatment for mental disorders. Given claimant's expressed preference for treatment with Dr. Winsor, treatment with that practitioner would likely have a higher degree of success than would treatment with a physician of the employer's choice. As stated above, defendants will ultimately benefit from any amelioration of claimant's condition. For the above reasons, claimant is authorized to seek care for his depressive condition with Dr. Winsor.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant has completed tenth grade and has low literacy skills.

Claimant was employed as a custodian for Page County until he received an injury arising out of and in the course of his employment on December 2, 1985.

Claimant subsequently received treatment with John L. Greene, M.D., and James Eaves, M.D.

Claimant was released for work on July 28, 1986.

Claimant worked from August 4, 1986 until terminated on September 17, 1986.

The insurer's adjusting company paid claimant's medical costs to his September, 1986 termination.

A representative of the insurer's adjusting company advised claimant in December, 1986 that claimant was to continue treating with Dr. Eaves.

Claimant subsequently saw Dr. Eaves who told claimant that he should receive another doctor's opinion.

Claimant subsequently saw James Conroy, M.D., who referred him to Maurice Margules, M.D.

Dr. Margules subsequently performed a laminectomy on January 2, 1987.

Dr. Greene had performed a microdiscectomy in March or April, 1986.

Claimant is approximately 50% better in his low back and leg pain subsequent to the laminectomy performed by Dr. Margules.

The lamenictomy performed by Dr. Margules and related services of Dr. Margules and Dr. Conroy, as well as support practitioners, were reasonable and necessary care.

On September 13, 1987, claimant had reached maximum medical improvement as regards his low back and left lower extremity condition.

As of September 13, 1987, further treatment for the low back and left lower extremity condition was not recommended.

On November 1, 1987, claimant had complaints of left upper extremity numbness and headache.

As of hearing, claimant had complaints of right upper extremity numbness and tingling as well as left upper extremity numbness and tingling.

Claimant's left upper extremity numbness and tingling had had its onset within three or four months of hearing; his right upper extremity numbness and tingling had had its onset within three or four weeks of hearing.

Claimant's complaints of headache, numbness and tingling in his upper extremities do not relate to his work injury.

Treatment with Dr. Conroy or Dr. Margules for such conditions would not be reasonable and necessary treatment for claimant's work injury.

Claimant has had complaints of depression and despondency documented throughout medical reports of Drs. Conroy and Margules.

Claimant's complaints of depression and despondency relate back to his work injury and his subsequent disability.

Treatment for claimant's depression is reasonable and necessary treatment related to claimant's work injury.

Claimant wishes treatment with Dr. David Winsor, a psychiatrist-

internist.

Patient-physician rapport is an important factor in treatment of mental conditions.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant is entitled to payment of costs of medical treatment related to services provided by Drs. Margules and Conroy and for services provided by Dr. Eaves. Costs for which claimant is entitled to payment are as set forth in the above review of the evidence.

Claimant is not entitled to further treatment with Drs. Margules or Conroy for his left lower extremity, low back or upper extremity complaints or for his headache.

Claimant is entitled to treatment with Dr. David Winsor for his depressive condition.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant's medical costs as set forth in the above review of the evidence.

Defendants provide claimant with treatment with Dr. David Winsor as necessary for proper resolution of claimant's depressive disorder.

Defendants pay interest pursuant to Iowa Code section 85.30 as amended.

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

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

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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1402.40; 1802; 1803;
4100; 2907
Filed April 5, 1988
WALTER R. McMANUS, JR.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY McMILLEN,	:	
Claimant,	:	
VS	:	File No. 761229
ROYAL BUICK,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
UNIVERSAL UNDERWRITERS INS. CO.	:	
Insurance Carrier, Defendants.	:	

1402.40; 1802; 1803; 4100

Claimant strained his degenerative back resulting in a lumbar laminectomy. Physicians awarded ten to 15 percent permanent functional impairment. Two doctors and one vocational rehabilitation specialist said claimant could return to his old job of selling cars. Claimant refused to cooperate with work hardening at the pain center and refused to try to do any kind of work until he was entirely pain free. Claimant was receiving $200 to $350 more from workers' compensation and income disability benefits than he was earning when he was injured. Claimant's condition progressively deteriorated until he was barely functional at all. One and one-half years after the injury he asserted that the injury was the cause of bowel and bladder incontinence and also sexual dysfunction but there was absolutely no medical evidence to support his claim. Claimant awarded 35 percent industrial disability. Claimant was not permanent total or odd-lot permanent total.

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The hearing was scheduled to last two and one-half hours but lasted six hours due to the extensive and intensive interrogation and examination of the opposing vocational rehabilitation expert witnesses. Deputy ordered a transcript and ordered defendants' attorney to initially pay for it. Defendants' attorney refused

to pay. His refusal was found to be unreasonable and without legal justification in view of deputy's authority contained in Iowa Code section 86.19.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LARRY McMILLEN,	:	
Claimant,	:	
VS	:	File No. 761229
ROYAL BUICK,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
and	:	
UNIVERSAL UNDERWRITERS INS. CO.	:	
Insurance Carrier, Defendants.	:	

FILED
APR 5 1988
IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in arbitration brought by Larry McMillen, claimant, against Royal Buick, employer, and Universal Underwriters, insurance carrier, defendants, for benefits as a result of an injury which occurred on March 19, 1984. A hearing was held on July 14, 1987 at Council Bluffs, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Larry McMillen (claimant), Sharon McMillen (claimant's wife), James T. Rogers (claimant's vocational rehabilitation specialist), Ronald J. Eischen (defendants vocational rehabilitation specialist), joint exhibits one through 46, claimant's exhibit one and defendants' exhibit A.

STIPULATIONS

The parties stipulated to the following matter.

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

That the claimant sustained an injury on March 19, 1984 which arose out of and in the course of employment with employer.

That the injury was the cause of some temporary disability and also the cause of some permanent disability.

That the type of permanent disability is industrial disability to the body as a whole.

That the rate of compensation is $234.75 per week.

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

That defendants do not seek credit for any previous payment of benefits under an employee nonoccupational group health plan.

That defendants are entitled to a credit for all workers' compensation benefits paid prior to the decision in this case at the rate of $234.75 per week.

That there are no bifurcated proceedings.

ISSUES

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

What is claimant's entitlement to temporary disability benefits during a period of recovery.

What is claimant's entitlement to permanent disability benefits, and more specifically whether claimant is entitled to permanent total disability benefits either as an odd lot employee or otherwise.

SUMMARY OF THE EVIDENCE

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

Claimant testified that he was born on January 6, 1936. He was 48 years old at the time of the injury and 51 years old at the time of the hearing. Claimant called attention to the fact he was wearing a TENS unit, which he has worn since 1984 to mask his pain. Claimant is a high school graduate. He also has received some college credit for attending General Motors courses. Claimant began working packing groceries in high school. He then began working in automobile dealerships which continued on into full-time employment after high school. Past employments include maintenance repair mechanic, parts department counterman and manager and automobile dealership general service manager. As a hobby, claimant designs garages and has one of the most complete wood working shops in Council Bluffs. Formerly, he played golf, tennis and volleyball prior to this injury which occurred on March 19, 1984. Claimant testified that he has not been able to work in his woodworking shop due to this injury.

Claimant started to work for this employer in late 1982 or early 1983 as parts and service manager. Because of an internal dispute claimant stepped down from this job and became an automobile salesman. The sales job did not turn out to be as remunerative as he thought it was going to be. Claimant testified

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that employer wanted him to return to the service manager job just before this injury occurred. This injury has prevented him from taking the service manager job (Transcript pages 30-32).

At the time of the injury, on March 19, 1984, claimant was working as an automobile salesman. There was a lot of snow that day. They were moving cars inside but the cars kept getting stuck. While pushing a car claimant slipped, came down on his knee and jammed his back real bad causing severe pain in his lower back.

Claimant testified that Robert M. Cochran, M.D., had performed an earlier surgery on his back on October 29, 1982. Back then, claimant lost two and one-half to three months from work after the surgery and then returned to work without any pain or disability or any problems what so ever until the present injury.

After this injury claimant was able to work for about five days but then went to see his former surgeon, Dr. Cochran, because he felt so terrible. He stated that the pain was unbearable. Shots did not work and claimant was hospitalized for a myelogram, CT scan and a second surgery. After the second surgery claimant had severe pain in his left buttock and hip that ran down into his left leg. Since the last surgery his fourth and fifth toes on the left foot are always numb. The front of his right leg is numb from the top of his leg to his knee. Claimant testified that he also has bowel and bladder problems. At this point in his testimony claimant broke down emotionally. A short recess was held for claimant to recover. Claimant testified that he suffered real bad pain in his lower back down into his legs. He has shooting pains into his groin. When he tries to sleep at night, his throat closes off because of the tube that they put down his throat at the time of his second surgery for this injury. Claimant demonstated in the courtroom that he could only walk very slowly and very carefully. He stated that when he feels good he can walk about one and one-half blocks. Standing increases his pain. He can only sleep a couple of hours at a time. He can sit in his own chair at home for about one-half hour. He has to lay down four to five times a day. He does not lift at all. He is currently taking two pain killers which do not kill the pain but only reduce it.

Claimant testified that he could not work a steady job at all because his idea of work is "dedication", that is, working eighteen hours a day, six or seven days a week. Claimant admitted that he had never gone out and looked for any work since the date of this accident (Tran. p. 48). Claimant said that he did not believe that he could be a dependable employee due to his pain. Ron Eischen, defendants' vocational rehabilitation specialist, asked claimant to start back to work a few hours at a time. Claimant told Eischen that he could pick up the phone

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and get a job right now, but did not think that he could do the job, and then he would lose his reputation in automobile dealership circles.

Claimant testified that his physical condition has gotten worse rather than better since he last saw Eischen approximately one and one-half years ago --- much worse. Claimant added that he is getting worse all of the time. He testified that he has gone to pieces since then. The pain is more severe and goes down his leg farther. Claimant testified that he also talked to another vocational rehabilitation specialist retained by his own counsel by the name of Jim Rogers.

Claimant said that his wife drives the car 99 percent of the time. He has only driven a couple of times since the injury. Claimant said that he could not perform the job of security guard or self-service gas station attendant. Claimant testified that he has not been able to travel with his wife when she went to Germany and Florida to see his grandchildren. She went without him because he cannot travel.

Claimant admitted that he did not complete the pain clinic because he refused to enter the part about a mental acceptance of pain. Instead, he wanted to get rid of his pain which he knew they could do, but they were not doing it. Claimant was under the impression that there was a surgical solution to his pain and that he was not receiving it.

Claimant also conceded that before he left the pain clinic he could ascend and descend twelve flights of steps even though now he can only walk about a block. Claimant also tacitly admitted that the pain center terminated his treatment because he would not cooperate with them. He also admitted that he refused to try to work on a part-time basis because he did not think that he would dependable. He added that his reason for refusing to work was because he could not see a doctor who would get rid of his pain (Tran. p. 59).

Claimant testified that he had not seen Dr. Cochran for over a year. He stated that he uses a TENS unit, not because a doctor has prescribed it, but rather because it works and relieves his pain.

Claimant acknowledged that he was receiving about $1,300.00 to $1,350.00 per month in tax free benefits from a combination of workers' compensation benefits and income disability benefits from a private insurance policy. He further testified that before the injury his income was approximately $1,000.00 to $1,100.00 dollars per month (Tran. pp. 63, 68 & 69). Claimant admitted that he made one vacation trip to Florida with his wife since the injury but that his activities were quite limited after he arrived.

Claimant testified that he hoped to be able to work again someday, but he thought he was totally diabled at the time of the hearing.

Claimant was asked if he would work with doctors and vocational rehabilitation specialists toward returning to active and gainful employment again. Claimant indicated that he would not do so unless and until he got rid of his pain.

When claimant finished his testimony, his counsel requested permission for claimant to leave the court room and go home because claimant wasn't going to be able to last the day. Permission was granted.

Sharon McMillen, claimant's wife of 25 years, testified that she has been employed for 22 years and earns $30,000 per year. She described her husband as an active individual prior to this injury. Now, he can do very little. They used to walk two miles a day, but since he became worse, she now has to help him home if they try to go around the block. She testified that claimant's daily activities include back exercises, he walks up and down the driveway and puts the clothes into the washer and dryer. She corroborated that his pain keeps him from sleeping at night. She also confirmed that his first back surgery in 1982 did not interrupt his life-style. She affirmed that claimant's condition has deteriorated in the last year or so. She added that she has to do almost everything alone while claimant stays home by himself a majority of the time.

At the close of his wife's testimony, claimant's counsel again requested permission for claimant to leave the hearing to go home because he was in intractable, excrucitating pain. Permission was again granted.

James T. Rogers testified that he is the owner and operator of his own company as a professional rehabilitation counselor. He interviewed claimant and examined claimant's medical and employment history. He determined that claimant was motivated to return to work. Rogers testified that he did not believe claimant could return to work as a car salesman or perform what is defined as light work because he cannot do walking, standing or getting into and out of cars. He did not feel claimant can be a salesman and be around customers because he is incontinent. He did not think claimant was capable of performing full time, gainful employment, eight hours a day, five days a week, 50 weeks a year because of the severity of his pain and his functional restrictions.

Rogers testified that he did not know if claimant's bowel and bladder incontinence was related to this injury. Rogers admitted that he was incorrect by reporting that Dr. McKinney said that claimant was unemployable due to his pain, except in

the most trivial pursuits, because Dr. McKinney never made such a statement. Rogers agreed that a client who refused to engage in work hardening until he was 100 percent pain free would be a very difficult person to help. Rogers granted that he may have overlooked the report of the physical therapist who said that claimant refused to try to work until he was pain free, but he did not think that this was significant. Rogers acknowledged that claimant's complaints of severe pain were subjective and not supported by objective medical evidence or an anatomical explanation. Rogers agreed that no doctor told claimant that he could not work at all. Rogers also admitted that he did not give claimant any psychological tests to see if claimant's subjective complaints were due to secondary financial gain motives although such tests do exist and are available to use.

Ronald J. Eischen testified that he is a professional rehabilitation consultant and the proprietor of his own firm. He saw claimant several times and had examined basically the same medical and employment data that Rogers had examined. He participated in the pain clinic experience with claimant. He said that claimant cooperated with the program up to a certain point, that is the point when it was time to start back to work maybe as little as one hour at a time, which is described as work hardening. Rogers described that the program is designed to gradually restore an employee to full employment. He said that claimant refused to participate in the work hardening portion of the program because he was not completely free of pain. Eischen said that claimant's position was that as soon as he had no pain at all, he would go out and get his own job. The goal of the pain center is to teach claimant to function at the highest possible level while still dealing with active pain.

Eischen testified that claimant's ability to climb twelve flights of steps and to perform all of his physical exercises did not match up with claimant's complaints that he could barely walk up and down his driveway. Eischen testified that he was hired because a previous vocational rehabilitation specialist was not able to arrive at a good working relationship with claimant. After claimant refused to participate in the work hardening program, the treatment at the pain center ceased because there was nothing more to offer if claimant was not going to participate in the program. Eischen stated that his professional involvement in the case ended at that time too.

Eischen testified that claimant was rehabilitatable if claimant would have participated in the pain program at the University of Nebraska Medical Center. By dropping out of the program, claimant voluntarily extended the nature of his disability. The witness said that there are a number of sales jobs that claimant could perform within Dr. McKinney's restrictions. Eischen said that claimant could be a parts counter clerk or a service writer in a garage. Claimant's sales background is a

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transferable skill. Irrespective of whether claimant's bladder and bowel problems are work related or not, claimant can be trained to work with these problems without embarrassment. Such persons can be successfully placed in employment. Eischen added that he first learned of these bowel and bladder problems from claimant's attorney one and one-half years after the surgery in 1986. These problems were not documented in any of the medical evidence.

Eischen said that claimant could be returned to meaningful and gainful employment. He said that claimant could perform his old automobile sales job if he would cooperate. He said that claimant was not permanently and totally disabled because claimant was employable full time.

Eischen granted that work hardening was not successful for every person. He said that he believed claimant did have pain; he did not know how severe it was; but what claimant was saying and doing were incongruous. He granted that claimant now walks with a limp which he did not do previously. Eischen conceded that pain is a distraction and makes it difficult to concentrate while trying to work. Nevertheless, claimant was functioning in the pain program until he decided not to cooperate with it. This occurred at the point in time where claimant was asked to return to work within the limits of his ability.

Rogers testified in rebuttal, that in his opinion, claimant could not perform the job of auto parts counter clerk or service writer. Rogers based his opinion on the Dictionary of Occupational Titles (DOT). Eischen testified that he also followed the DOT but that he did not believe the DOT was the ultimate end and final authority on what a given person can or cannot do.

Eischen said that a vocational rehabilitation consultant did not determine disability. He added that he determines employability. Rogers said that as a vocational rehabilitation consultant he was able to make a determination of total disability because he made this decision several times when he was employed as a vocational rehabilitation consultant for the state of Iowa.

Rogers testified that he rejected Dr. Morrison's opinion that claimant could return to work because Dr. Morrison's opinion was not consistant with Rogers' own information and experience in this case. Rogers granted that no doctor told claimant that he could not or should not participate in the work hardening program. Rogers knew of nothing in the record that would make claimant's failure to participate in the work hardening program reasonable, other than claimant's own subjective complaint of pain.

The following is a brief summary of the medical evidence. Claimant saw Dr. Cochran, an orthopedic surgeon at Methodist

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Hospital in Omaha, on March 23, 1984. Claimant's admitting diagnosis was as follows.

Lumbar strain.
Possible ruptured lumbar disc.
History of emphysema x 9-10 years.
Congenital hemophilia requiring coagulants on any surgical procedures.
Status post laminectomy in October, 1982.

[Ex. 46(2)]

When claimant was discharged on April 30, 1984, Dr. Cochran's diagnosis was recurrent lumbar disc injury (Ex. 45).

The record shows that claimant returned to work from April 2, 1984 to June 20, 1984 [Exs. 38(2) & 43(1)].

Claimant was hospitalized again for recurrence of his lumbar low back pain on June 20, 1984 [Ex. 43(1)]. Claimant complained of numbness and tingling in the left leg into the left lateral two toes. A myelogram showed a disc fragment at L-5, S-1. Surgery was performed on June 26, 1984 and the extruded disc fragment was removed. Claimant was discharged on July 2, 1984 (Ex. 41).

Dr. Cochran said that the protruded intervertebral disc at L-5 was caused by pushing the car in March of 1984 (Ex. 40). Later in 1984, Dr. Cochran's notes show that claimant continued to have back pain, this time on the right after the surgery, and he also suffered from depression [Ex. 38(4)]. On March 19, 1985 claimant completed back school, wore a TENS unit and performed exercises twice a day (Ex. 37).

Claimant was readmitted to Methodist Hospital on April 23, 1985 for another myelogram (Exs. 35 & 36). Charles H. Waters, III, M.D., an orthopedic surgeon, was asked to give a second opinion. Dr. Waters said on April 25, 1985 that x-rays and the myelogram showed a left lateral defect of fairly small size at L-5, S-1 that this was probably post-surgical epideral scar changes which were secondary to contraction of the disc area. The right side looked clear. Dr. Waters explained to the patient, Dr. Cochran and Jack Lewis, M.D., claimant's personal physician that there was nothing that a third disc surgery would benefit. Dr. Waters added that the patient's absence of relief in a back brace made fusion surgery undesireable because it was unlikely to be successful (Exs. 32-34).

Dr. Cochran said that this hospitalization and myelogram showed no evidence of arachnoiditis, spinal stenosis or a new herniation. He did not know what was causing this severe disabling pain. Dr. Cochran sent claimant to see John C.

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Goldner, M.D., a neurologist.

Claimant saw Dr. Goldner on June 14, 1985. Dr. Goldner mentioned claimant's prior back problems in 1971 and 1982 on the left side and commented that claimant did return to work after these problems (Ex. 19 & 26-29). Dr. Goldner made these findings.

> It was my impression on June 14, 1985, that Mr. McMillen had musculoskeletal low back pain with probable residual right L3 or L4 radicular sensory symptoms. An EMG and nerve conduction study was done at the Nebraska Methodist Hospital on June 18, 1985. This was entirely normal. I discussed these results with Mr. McMillen and reported them to Dr. Cochran. I told them both that unfortunately I had no recommendations relative to further treatment. I believe he will have chronic musculoskeletal low back problems and that he has a 20% permanent partial impairment based on limitation of movement, pain, and the two previous lumbar laminectomies that have been done. His neurological findings now are different than they were in 1971 in that his current findings suggest a right radicular problem where as his 1971 findings suggested a left radicular problem. He will certainly be limited in the work that he can do from the standpoint of his chronic low back pain. He will be limited relative to lifting and to the amount of activity he can do in sitting or standing for any length of time. I would recommend that you contact Dr. Cochran relative to his opinion as to the details of what Mr. McMillen can and cannot do since Dr. Cochran is Mr. McMillen's orthopedic surgeon. We would be glad to discuss this further with you at any time.

(Ex. 19)

An independant medical examination was performed by Michael J. Morrison, M.D., on July 16, 1985 for employer. He reviewed that claimant had been seen by Dr. Cochran, Dr. Waters and Dr. Goldner. A CT scan, myelogram, EMG and nerve conduction study were all normal. Treatment had been medication, physical therapy and brace immobilization which aggravated claimant's symptoms. X-rays taken by Dr. Cochran were unremarkable except for claimant's previous back surgery. Dr. Morrison recommended certain excerises along with bicycle riding and swimming which should return claimant to work in four to six weeks as a car salesman (Ex. 24).

Dr. Morrison referred claimant to Ron Eischen and the pain management center at the University of Nebraska Medical Center in August of 1985 where claimant was treated by Giuseppe Siracusano,

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a registered physical therapist. Siracusano reported that claimant did well until it was suggested that he work. The registered physical therapist also reported that claimant was looking for a surgical solution to his pain problem. Siracusano reported as follows to Dr. Cochran on November 20, 1985.

> Mr. McMillen has made significant improvements in his overall flexibility and exercise endurance. He has progressed to walking three times per day and climbimg [sic] 12 flights of stairs twice daily. It was at this point that a progressive return to a work environment was suggested. This suggestion has raised many concerns which Mr. McMillen has openly expressed. As discussions of his progressive return to work became more specific, he has experienced increased difficulties following through with his endurance and flexibility exercises. There has also been an increase in the frequency of his pain behaviors and complaints.
>
> It was suggested by Mr. Eischen that there should be a conference between Mr. and Mrs. McMillen, Mr. Eischen, and myself so that the issues surrounding a progressive return to work be openly discussed. Mr. McMillen's return to work has been clouded by his feeling that there is something diagnostically or surgically that can be done to take away his back pain. Mr. McMillen has reported that he is unwilling to progress until these issues are resolved. Mr. Eischen said he wanted to discuss this case with you.

(Ex. 22)

F. M. Skultety, M.D., a neurogsurgeon at the University of Nebraksa Medical Center, said on October 7, 1985 that there was no indication for surgery.

> At the present moment this appears to be a musculoskeletal problem with chronic back pain. There is no indication for surgery. I think physical therapy is the only appropriate treatment and would authorize it for a reasonable period of time as long as the patient continues to improve. On the basis of the comments he made about not being able to return to work he may actually be better treated in the full pain unit program, but this was not discussed.

(Ex. 23).

On November 22, 1985, Raymond J. Breed, M.S., R.P.T., directer of physical and occupational therapy at the University

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of Nebraska, recommended that claimant try part-time if not full-time work activity. Breed said:

> The structural evaluation demonstrates that the patient has gained good flexibility in all areas and the patient feels that he has made good progress, but feels that he is still not 100%. Mr. McMillan [sic] still has complaints of discomfort in his low back, especially when he has to stand in one place for any length of time. Mr. McMillan [sic] also describes some unusual symptoms assiciated with some physical activities, which I cannot explain.
>
> It is my opinion that the client appears physically prepared to resume at least part-time, if not full-time work activity. I think it would also be appropriate that Mr. McMillan [sic] continue to participate with the Pain Management Unit, as well as obtained Pain Management counseling.

(Ex. 21)

The rehabilitation treatment at the university hospital terminated because they felt claimant was ready to return to work and claimant did not. Claimant refused to work until he received complete pain relief. Siracusano, of the Pain Management Center, wrote the following report to Dr. Skultety of the neurosurgery department on January 10, 1986.

> Mr. McMillen had been making slow and steady improvement until October. At this time it seemed as if he could return to work. The concept of a work-hardening program was introduced to Mr. McMillen by both the physical therapist and Mr. Eischen. After that time Mr. McMillen's progress in physical functioning slowed significantly. Additionally, there were exercises that he failed to do.
>
> Communications with Mr. Eischen and Mr. McMillen increased some understanding that Mr. McMillen did not feel ready to return to work. There was an increase in Mr. McMillens's desire to confer with more doctors in order to find the cause of his low back pain. During the time the Pain Management Center was closed for the Christmas Holidays, Mr. McMillen had enlisted the advice of an attorney and had seen several more doctors. Some of the doctors he had consulted prescribed medications to help him sleep at night.
>
> The last physical therapy visit was on January 10, 1986. At this time there was an increase in pain behavior and pain talk. Mr. McMillen was much

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more convinced that a return to work was not right for him until he had complete pain relief. It appears that a physical therapy program designed to help Mr. McMillen return to work will be fruitless at this time. Mr. McMillen was seen for a total of 16 physical therapy treatments. A similar report will be sent to Mr. Ron Eischen.

(Ex. 17)

On January 9, 1985 claimant was examined by Lynell W. Klassen, M.D., chief of the section of rheumatology and immunology of the Department of Internal Medicine at the University of Nebraska, for chronic low back pain exacerbated by physical activity. Dr. Klassen said that claimant gave a history of episodic back pain since age 20. Dr. Klassen brought to light for the first time in a medical report that claimant complained of bowel and bladder problems; however, Dr. Klassen did not associate these with the injury. Dr. Klassen reported

> Two complaints spontaneously given to me, but not otherwise noted in his past record, involves bowel and bladder incontinence. He reports that over the past six months he has had increasing difficulty with episodes of loss of sphincter tone and urinary incontinence. The bowel incontinence can occur any time, night or day. The bladder incontinence usually occurs after he goes from a sitting to standing position. He reports having an uncontrolled bowel movement several times a week.

(Ex. 18)

Dr. Klassen concluded as follows "My impression is that Mr. McMillen has a primary musculoskeletal/mechanical etiology for his low back pain. I can find no evidence of an inflammatory spondylitis or sacroilitis." (Ex. 18). Dr. Klassen added that he had nothing specific to add to the theraputic approaches that have been tried in the past (Ex. 18).

On January 22, 1986 Dr. Morrison concluded that claimant had reached maximum medical improvement and that no further diagnostic testing was in order. He said that claimant could do light work or salesman type of work that would allow him to sit or get up at his leisure (Ex. 15). On February 6, 1986 Dr. Morrison said claimant's permanent partial impairment would be from 10-15 percent of the whole body because of the necessity of having a lumbar laminectomy with some persistant residual pain (Ex. 14). Dr. Morrison said claimant could do light work, lifting a maximum of 20 pounds occasionally and frequently lifting or carrying 10 pounds (Ex. 16).

Even though Dr. Morrison recommended no further diagnostic testing he nevertheless, did order a magnetic resonance imaging scan (MRI) on March 18, 1986 which suggested a focal protrusion of disc material midline at the L-5, S-1 level. Robert H. McIntire, Jr., M.D., reported:

> These multiple images demonstrate the vertebral bodies to appear normal. Prominent degenerative disc disease is noted at the L5-S1 level. The remainder of the discs are thought to show reasonably normal signal intensity. There is thought to be a focal protrusion of the disc material midline at the L5-S1 level. This appears to extend slightly to the right and to the left. No evidence of focal protrusion or herniation is noted at any other level. No intradural defects are identified.

(Ex. 13)

This report prompted Dr. Cochran on April 18, 1986 to ask Dr. Morrison to refer claimant to one more evaluator (Ex. 12). On April 28, 1986 claimant was referred to Daniel L. McKinney, M.D., a neurosurgeon (Ex. 11).

Dr. McKinney saw claimant on May 21, 1986. Dr. McKinney reported that claimant was comfortable while reclining. He can only stand 15 minutes or sit 45 minutes without pain. He thought claimant could probably work as an automobile salesman because that would allow him to change positions frequently (Ex. 10). Claimant continued to have pain and Dr. McKinney hospitalized claimant for another myelogram on July 1, 1986 (Ex. 9). Dr. McKinney suspected a degeneratvie lumbar intervertebral disc (Ex. 8). The myelogram disclosed assymetry of the nerve roots and the caudal sac at L-5, S-1. He could not say with certainty that a degenerative disc was present, but it was a possibility (Ex. 7).

On August 14, 1986 Dr. McKinney wrote to claimant's counsel that the slight irregularity could be residual scarring secondary to the two previous surgeries at that level. He felt that the chance of surgery helping claimant at this time was too slim to recommend it. He believed claimant had a 15 percent permanent partial disability to the body as whole. He added that he did not think that claimant was employable because he had developed chronic pain syndrome and will need rehabilitation in this area before he is employable (Ex. 6).

On August 22, 1986 Dr. Cochran wrote to claimant's counsel that he last saw claimant on April 14, 1986. He had no explanation for claimant's continued pain. He did not believe claimant was a candidate for any further surgery (Ex. 5).

On September 8, 1986 Dr. McKinney wrote to defendants' counsel that claimant's limitations were no prolonged periods of standing, sitting or frequent bending or lifting. He said he had no anatomic or physiologic explanation for claimant's loss of bowel or bladder control or difficulty with sexual function. In fact, claimant had not previously mentioned sexual dysfunction (Ex. 4).

On September 16, 1986 Dr. McKinney made his last report.

> I would anticipate that Mr. Larry McMillen could probably perform the duties of a car salesman without causing damage to his lumbar spine. This type of duty, as I understand it, would allow him to change positions frequently and I believe he could probably do this provided he did not have to do any lifting of weights greater than 10 pounds or have to push automobiles on or off a showroom floor. His ability to work would of course be dependent upon Mr. McMillen's overall comfort and tolerance of his pain.

(Ex. 2)

On March 18, 1987 Dr. Cochran, who never rated claimant for this injury, nevertheless, told defendants' counsel that he believed that claimant would have a ten percent permanent impairment of the body as a whole as a result of the earlier L-5, S-1 surgery which occurred on October 29, 1982 (Ex. 1).

Rogers made a written report on September 9, 1986 to claimant's counsel that claimant had gotten much worse physically since he had last seen his doctors. Rogers believed that claimant was not employable due to his pain (Ex. 3).

In his pretrial desposition on March 13, 1986, claimant testified that he had applied for social security disability benefits (Ex. 1, p. 20). Also, he gave a detailed description of his pain complaints at that time to his back, buttocks, legs, toes, throat, groin, lack of bowel control, urinary incontinence and sexual dysfunction. Claimant attributed all of these problems to the injury of March 19, 1984 and the surgery of June 26, 1984 (Ex. 1, pp. 21-28).

Claimant also admitted that the combination of workers' compensation and income disability benefits was more than he was earning when he was working. He denied that he was financially better off because when he was working he had a car furnished and group insurance benefits and bonuses (Ex. 1, p. 42 & 43).

Claimant could not say that any of his many doctors have ever told him not to work (Ex. 1, pp. 43 & 44). He conceded

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that he never asked any of the doctors to go back to work (Ex. 1, p. 52). Claimant testified that he was not under a doctors care at the time of the deposition on March 13, 1986 (Ex. 1, p. 45).

Claimant testified in his deposition that he needs a TENS unit all of the time even though it has not been medically prescribed by a doctor. His whole day is in his house, where he can alternate standing, sitting and laying down. He is forced to lay down four or five times a day from five minutes to one-half hour until the pain goes away. His sleep habits at night are very irregular. He only sleeps two hours at any one time. Claimant testified that he could not sell cars because he has to lie down. Claimant could not think of any job that he is able to do (Ex. 1, pp. 52-58).

This hearing was scheduled to last two and one-half hours according to the estimate of each attorney given to the prehearing deputy at the time of the prehearing conference. Claimant's attorney estimated it would take two hours to present his case. Defendants' attorney estimated that it would take one-half hour to present his case. The hearing actually consumed six hours due to the extensive examination and re-examination of the two expert witnesses. The examination of these two experts included direct, cross, re-direct, re-cross, further re-direct, and further re-cross, rebuttal and sur-rebuttal. Due to the extensive and intensive examination of these two expert witnesses, the hearing deputy ordered a transcript of the record and ordered defendants to pay the initial transcript costs until the decision assessed the costs of the case.

The court reporter reported to the industrial comissioner that defendants' attorney refused to pay for the transcript because (1) the deputy did not have the authority to order a transcript and apportion the costs and (2) the court reporter's fee was excessive and exorbitant. Official notice is taken of the correspondence in the industrial commissioner's file from the court reporter to the industrial commissioner which includes copies of the correspondence of defendants counsel with the court reporter. Iowa Administrative Procedure Act 17A.14(4).

Defendants have paid claimant $19,962.85 in temporary disability benefits and $18,031.00 in permanent disability benefits and $21,497.33 in medical benefits prior to hearing. Permanent disability benefits were continuing to claimant at the time of the hearing (Defendants' Ex. A).

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 18, 1984 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

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Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

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

Claimant is entitled to healing period benefits from the date he was first forced to leave work and see Dr. Cochran on March 23, 1984 [Ex. 38(1)] until Dr. Cochran returned claimant to work on April 2, 1984 [Ex. 38(2)]. Claimant is entitled to healing period benefits again for the period of time from June 20, 1984, when he was hospitalized by Dr. Cochran for surgery [Ex. 43(1)], until Dr. Morrison stated that claimant had reached maximum medical improvement on January 22, 1986 (Ex. 15) [Iowa Code section 85.34(1)].

As for industrial disability claimant was 48 years old at the time of the injury. He should have been at the peak of his earning career but he had suffered two reverses prior to this injury. His long term employer of 20 years went out of business

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and he had to find a new job with this employer. In this new job, with this employer, an internal dispute arose and claimant was asked to step down from service manager and become an automobile salesman. Claimant testified that selling cars did not turn out to be as lucrative as he thought it was going to be.

Claimant's formal education is a high school education, but his many experiences and positions in automobile dealerships provided him with a very good practical, social and business education.

Claimant was awarded a permanent functional impairment rating of ten to 15 percent for this injury by Dr. Morrison because of the necessity of a lumbar laminectomy with some persistant residual pain (Ex. 14). Dr. McKinney assesed a 15 percent permanent functional impairment rating as a result of this injury in 1984 (Ex. 6). Dr. Goldner awarded a 20 percent permanent functional impairment rating which included both laminectomies [Ex. 19(2)]. Dr. Cochran estimated that the permanent functional impairment from the first laminectomy, which occurred in 1982, would be ten percent (Ex. 1). Subtracting Dr. Cochran's ten percent for the first surgery from Dr. Goldner's 20 percent for both surgeries leaves a theoretical ten percent permanent functional impairment rating for this injury. Dr. Cochran did not express a permanent functional impairment rating for this injury. A ten to 15 percent permanent functional impairment rating for a lumbar laminectomy is not an unusually high impairment rating.

The operative phrase in industrial disability is loss of earning capacity. Ver Steegh v. Rolscreen Co., IV Iowa Industrial Commissioner Report 377 (1984). Claimant contends that he cannot return to his old job of selling cars which was the job he was performing at the time of this injury. His testimony is corroborated by Rogers, his own vocational rehabilitation specialist. Claimant did not sustain the burden of proof by a preponderance of the evidence on this point. Dr. Morrison, Dr. McKinney and Eischen believed and stated that claimant could return to selling cars because there is no lifting and claimant can alternate standing and sitting. Eischen also stated that selling was a transferable skill and that claimant could also sell other products. In addition, Eischen mentioned certain minimum wage employments such as security guard and self-service gas station attendant that claimant could perform.

None of the many doctors who examined claimant testified that claimant was unable to work or that he could not perform his old job of automobile salesman. None of the many physicians who examined claimant testified that claimant was permanently and totally disabled or even suggested it.

The weight of the evidence is that claimant could return to

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his former employment of selling automobiles.

With respect to whether claimant is permanently and totally disabled, claimant testified that he could have a job simply by making one telephone call. Yet, he never did make that one telephone call nor, did he make any other effort to obtain employment of any kind.

Claimant's insistance on being pain free before attempting to work is not a privilege afforded to injured workers by the workers' compensation law. Claimant's insistance that he be able to work 18 hours per day, seven days a week is not a requirement of the workers' compensation law. Claimant's insistance that a surgical procedure existed that could make him pain free was not reasonable in light of the evidence presented at the hearing. Dr. Cochran, Dr. Waters and Dr. McKinney, all three competent surgeons, examined claimant, tested claimant, weighed and considered the possibility of additional surgery and each one of them recommended against it. Dr. Morrison, Dr. Goldner and Dr. Klassen all examined claimant and studied his history and stated that there was nothing further that they could offer in the way of treatment of any kind that would benefit claimant. Objective testing by way of x-rays, CT scans, myelograms and magnetic resonance imaging showed only some possible epideral scarring at L-5, S-1 which was probably due to his previous surgeries and did not justify any further or additional surgery. None of these doctors defined any explanation for claimant's continued symptoms of disabling pain other than this mild epideral scarring which was believed to be the result of his two prior surgeries at the level of L-5, S-1.

Back complaints were not new to claimant. Dr. Klassen reported that claimant has had episodic back pain since age 20 (Ex. 18). Claimant admitted in his testimony that he had suffered periodic back problems from time to time. Dr. Goldner reported that he saw claimant in 1971 for left lumbar radiculopathy [Ex. 29(1)].

Claimant had very little or no motivation to return to work from a financial point of view. Claimant testified that when he was working he earned between $1,000.00 and $1,100.00 dollars per month. He also testified that the combination of his workers' compensation benefits and the benefits from his privately owned income disability policy total $1,300.00 to $1,350.00 per month. Claimant testified that both of these items were tax free income. As defense counsel pointed out claimant would actually lose money if he returned to work. In addition, claimant's wife earns $30,000.00 in full-time employment and she has been employed for 22 years. Claimant countered that he had the use of a car and certain employee benefits and bonuses when he worked. Be that as it may, there is a very strong disincentive to work if you can obtain $200.00 to $350.00 more per month tax

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free by not working, especially if your back hurts all of the time and you have gotten out of the habit of going to work everyday. Claimant's motivation toward returning to work is further revealed by his application for social security disability benefits.

Particularly damaging to claimant's case was the testimony of Siracusano on November 25, 1985 that when a progressive return to work was planned, claimant demonstrated a decrease in tolerance for the endurance and flexability exercises and an increase in the frequency of his pain behaviors and complaints, even though he had been climbing 12 flights of steps per day and had been walking three times a day (Ex. 22). Siracusano testified that when the concept of work hardening was introduced, claimant's progress slowed, he wanted to see more doctors, he retained an attorney and he did not want to return to work until he had complete pain relief (Ex. 17).

Breed thought that claimant could return to work but indicated that claimant thought he should be 100 percent well before returning to work (Ex. 21).

Therefore, it would appear that claimant could return to car sales or service writer in the automobile dealership business; he could perform other sales jobs; and that other less desirable minimum wage types of jobs could be performed within claimant's limitations if claimant would have tried to work; however, he declined to try any employment of any kind.

Claimant has not sustained the burden of proof by a preponderance of the evidence that he is permanently and totally disabled. Diederich, 219 Iowa 587, 258 N.W. 899. Nor can it be said that claimant is permanently and totally disabled under the odd lot doctrine as defined by the Iowa Supreme Court in the case of Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). Claimant has not demonstrated a bona fide effort to return to gainful employment in the area of his residence. Therefore, he has failed to make a prima face case of permanent total disability under the odd lot doctrine. Emshoff v. Petroleum Trans. Services, (Appeal Decision March 31, 1987). Claimant has no anatomical, organic or physical abnormalities that have been identified by any of the medical practitioners which make a prima face case for total disability.

An employee making a claim for industrial disability will benefit by a showing of some attempt to find work. Hild v. Natkin & Co., I Iowa Industrial Commissioner Report 144 (Appeal Decision 1981); Beintema v. Sioux City Engineering Co., II Iowa Industrial Commissioner Report 24 (1981); Cory v. Northeastern States Portland Cement Co., Thirty-third Biennial Report of the Industrial Commissioner 104 (1976).

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Since claimant has made no showing of any effort to find any kind of employment, then there is no showing of what claimant can do within the boundries of his disability and limitations of persistant pain. Schofield v Iowa Beef Processors, Inc., II Iowa Industrial Commissioner Report 334, 336 (1981).

Defendant's serious offer of vocational rehabilitation weighs in their behalf. Schelle v. HyGrade Food Products, Thirty-third Biennial Report of the Industrial Commissioner 121 (1977). Claimant's failure to cooperate with vocational rehabilitation is a factor to consider when determining the amount of his industrial disability. McKelvey v. Dubuque Packing Co., Thirty-third Biennial Report of the Industrial Commissioner 227 (1976); Rapp v. Eagle Mills, Inc., Thirty-fourth Biennial Report of the Industrial Commissioner 264 (1979); Curtis v. Swift Independent Packing, IV Iowa Industrial Commissioner Report 88, (1984).

Claimant is not fully corroborated on the subject of pain. No one has suggested that claimant is not suffering pain but the degree of pain in not subject to independent verification. Pain that is not substantiated by clinical findings is no substitute for impairment. Waller v. Chamberlain Mfg, II Iowa Industrial Commissioner Report 419, 425 (1981). After extensive examination and testing, the doctors could only pinpoint that claimant's pain at the level of L-5, S-1 was possibly the result of epideral scarring from the prior two surgeries. None of the doctors had any further treatment modalities to offer claimant. Three doctors recommended against any further surgery. Claimant himself had not sought any further medical treatment for over a year.

Claimant testified that he suffered breathing problems due to an injury to his throat at the time of the surgery on June 26, 1984 for this injury. He also claimed to suffer bowel and bladder incontinence. These problems were not mentioned in the medical evidence until claimant saw Dr. Klassen on January 9, 1986, more than a year and one-half after the accident. Claimant has also alleged that he has sexual dysfunction in the nature of impotency due to pain from this injury. There is absolutely no medical evidence or even a suggestion that the bowel, bladder or sexual problems were caused by, or related to, this injury in any way for any reason.

Therefore, based upon all of the foregoing factors and all of the factors that go into a determination of industrial disability, it is decided that claimant has sustained a 35 percent industrial disability to the body as a whole.

As far as a deputy's power or authority to order a transcipt Iowa Code section 86.19 provides as follows.

The industrial commissioner, or a deputy commissioner,

may appoint or may direct a party to furnish at the party's initial expense a certified shorthand reporter to be present and report, or to furnish mechanical means to record, and if necessary, transcribe proceedings of any contested case under this chapter, chapters 85 and 85A and fix the reasonable amount of compensation for such service. The charges shall be taxed as costs and the party initially paying the expense for the presence or transcription shall be reimbursed. The reporter shall faithfully and accurately report the proceedings.

The refusal of defendants' counsel to pay for the transcript as he was ordered to do at the hearing was unreasonable and without legal justification. There is no evidence that the charges of the court reporter are excessive or exorbitant. Furthermore, this particular court reporter was selected by defendants' counsel himself as a matter of his own free choice of court reporter. Moreover, the same court reporter reported and transcribed claimant's deposition taken on March 13, 1986 and there is no evidence of any dispute about excessive or exorbitant charges for the deposition (Claimant's ex. 1).

FINDINGS OF FACT

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

That claimant was off work due this injury from March 23, 1984 to April 2, 1984 and again from June 20, 1984 to January 22, 1986.

That claimant's permanent functional impairment has been rated at approximately ten to 15 percent of the body as a whole as a result of this injury

That claimant was 48 years old at the time of the injury and had a high school education.

That no doctor testified that claimant should not return to his old job as a automobile salesman.

That Dr. Morrison and Dr. McKinney testified that claimant could return to his old job as an automobile salesman.

That vocational rehabilitation specialist Eischen testified that claimant could return to his old job as an automobile salesman.

That two registered physical therapists said that claimant could return to work to either full or part-time employment but that claimant declined to try to return to work on any terms.

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That claimant sustained a 35 percent industrial disability to the body as a whole.

CONCLUSIONS OF LAW

THEREFORE, based upon the evidence presented and the foregoing principles of law the following conclusions of law are made.

That claimant is entitled to healing period benefits for the two periods of time he was off work defined in the findings of fact [Iowa Code section 85.34(1)].

That claimant is entitled to 175 weeks of permanent partial disability benefits as industrial disability to the body as a whole. [Iowa Code section 85.34(2)u].

That defendants are legally obligated to provide the industrial commissioner with a transcript and to pay the reporter's fees for the transcript as ordered at the hearing by the deputy industrial commissioner (Iowa Code section 86.19).

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay to claimant one point five seven one (1.571) weeks of healing period benefits for the period from March 23, 1984 to April 2, 1984 and another eighty-three (83) weeks of healing period benefits for the period from June 20, 1984 to January 22, 1986, a total of eighty-four point five seven one (84.571) weeks of healing period benefits at the rate of two hundred thirty-four and 75/100 dollars ($234.75) per week in the total amount of nineteen thousand eight hundred fifty three and 04/100 dollars ($19,853.04).

That defendants pay to claimant one hundred seventy-five (175) weeks of pemanent partial benefits at the rate of two hundred thirty-four and 75/100 dollars ($234.75) per week in the total amount of forty-one thousand eighty-one and 25/100 dollars ($41,081.25) commencing on January 22, 1986.

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 are entitled to a credit for all benefits paid prior to hearing.

That defendants pay the costs of this action pursuant to Division of Industrial Services Rule 343-4.33 and in particular, pay the court reporter for the transcript of the hearing as ordered by the deputy at the time of the hearing.

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

Signed and filed this 5th day of April, 1988.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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2208 - 2906 - 2901
Filed February 22, 1988
DAVID E. LINQUIST

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILFRED E. McVAY,	:	
	:	
Claimant,	:	
	:	File No. 799446
vs.	:	
	:	A P P E A L
JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY,	:	D E C I S I O N
	:	
Employer,	:	
Self-Insured,	:	
Defendant.	:	

2208 - 2906 - 2901

Claimant alleged an occupational hearing loss. The record showed that he had been transferred between departments numerous times and exposed to various levels of noise. It was held that, since he was still subject to being transferred to a department with excessive noise levels, he had not been transferred from excessive noise level employment. As six months had not passed since one of the three triggering events under section 85B.8, the case was dismissed without prejudice as not being ripe for adjudication.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WILFRED E. McVAY,	:	
Claimant,	:	File No. 799446
vs.	:	
JOHN DEERE DUBUQUE WORKS OF DEERE & COMPANY,	:	A P P E A L
Employer, Self-Insured, Defendant.	:	D E C I S I O N

FILED
FEB 22 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Defendant appeals and claimant cross-appeals from an arbitration decision dismissing claimant's petition.

The record on appeal consists of the transcript of the arbitration proceeding and joint exhibits 1 through 10. Both parties filed briefs on appeal and defendants filed a reply brief.

ISSUES

Defendant's issues, as stated on appeal, are:

1. The decision of the deputy industrial commissioner should be reversed as contrary to the statute of limitations, Iowa Code section 85B.5, 85B.8, and, 85.26(1), as well as being contrary to the statutory purposes in establishing the two year statute of limitations.

2. The decision of the deputy Iowa Industrial Commissioner should be reversed because the decision was unsupported by substantial evidence that the claimant met his burden of proof to show that the hearing loss arose out of and in the course of employment and that there was any causal connection between claimant's hearing loss and the disability claimed.

Claimant stated the following issues on cross-appeal.

I. The decision of the deputy industrial

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commissioner that the statute of limitations as contained in chapters 85 and 85B of the 1985 Code of Iowa as amended had not run against the claimant was correct.

II. The claimant met his burden of proof to show that the hearing loss arose out of and in the course of his employment and that there was a causal connection between his hearing loss and the disability claimed.

III. Even if the deputy commissioner is incorrect and a transfer has occurred nonetheless the statute of limitations does not run until the employee discovers that there has been an injury.

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 began his present employment with defendant in 1960. Joint exhibit 10 established that claimant has held numerous job classifications with defendant and has been transferred several times. Noise level exposures in these positions varied from 60 dBA to 89 dBA. Claimant was still employed by defendant and at the time of the hearing, worked at a task that exposed him to a noise level of 76 dBA. Mervin McClenahan, M.D., stated that noise level exposures less than those set forth in Chapter 85B could cause hearing loss. Claimant filed this action on August 16, 1985.

APPLICABLE LAW

Iowa Code section 85B.8 states:

Date of Occurrence. A claim for occupational hearing loss due to excessive noise levels may be filed six months after separation from the employment in which the employee was exposed to excessive noise levels. The date of the injury shall be the date of occurrence of any one of the following events:

1. Transfer from excessive noise level employment by an employer.

2. Retirement.

3. Termination of the employer-employee relationship.

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The date of injury for a layoff which continues for a period longer than one year shall be six months after the date of the layoff. However, the date of the injury for any loss of hearing incurred prior to January 1, 1981 shall not be earlier than the occurrence of any one of the above events.

Iowa Code section 85.26(1) states:

> Limitation of actions.
>
> 1. An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

Pursuant to In Re Declaratory Ruling of John Deere Dubuque Works of Deere & Company, III Iowa Industrial Commissioner Report, 147 (1983), if a worker who has been exposed to permanent sensorineural hearing loss is transferred from the area of exposure to a non-exposure area, the statute of limitations under Iowa Code section 85.26 begins to run from the date of such transfer; if a worker is not transferred from the area of exposure, the statute of limitations would not begin to run until retirement or termination of the employment relationship. The first of these events to occur will "trigger" the running of the statute of limitations.

Excessive noise level means sound capable of producing occupational hearing loss. Section 85B.4(2), The Code.

The noise levels set forth under section 85B.5, The Code, are presumptive only. They do not constitute minimum levels at which a noise level will be viewed as excessive. Muscatine County v. Morrison, 409 N.W.2d 685 (Iowa 1987).

Because the times and intensities under section 85B.5, The Code, are not minimum levels for excessive noise, a change in work assignment from an area where the noise level exceeds the times and intensities set forth in section 85B.5, The Code, to an area where said times and intensities are not exceeded would not necessarily constitute a transfer under section 85B.8, The Code. Daughetee v. John Deere Dubuque Works, File No. 779848, Appeal Decision June 30, 1987.

ANALYSIS

Claimant alleges he has suffered a hearing loss arising out

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of and in the course of his employment. Iowa Code section 85B.8 states that a claim of hearing loss may be filed six months after separation from the employment in which the employee was exposed to excessive noise levels. The date of the injury is the date of the earliest of three events -- retirement, termination of the employment relationship or transfer from the excessive noise level employment by the employer.

In the instant case, claimant is still employed by defendant and thus, neither retirement or termination of the employment relationship has occurred. Defendant alleges that claimant was transferred from excessive noise level employment on June 15, 1980, when his noise exposure was reduced from 87 dBA to 80 dBA, and his claim is therefore barred by section 85.26(1), The Code.

However, the record shows that claimant is subject to reassignment to varying levels of noise exposure. He has been so reassigned numerous times in the history of his employment with defendant. His job change on June 15, 1980 was merely a reassignment within the same work force. It has been changed five times since 1980, and is subject to further reassignment.

Claimant works in an environment that continues to expose him to potentially excessive noise levels. He is subject to transfer to even greater noise exposure at any time. His action is thus premature and it follows that it is not barred by the statute of limitations under Iowa Code section 85.26. In light of this determination, the other issues on appeal are moot at this time and will not be addressed.

FINDINGS OF FACT

1. Claimant has been employed by the John Deere Dubuque Works of Deere and Company since 1960.

2. Throughout his employment with defendant, claimant has held several positions and has been transferred numerous times.

3. Claimant's exposure to noise has varied according to the positions he has held.

4. Claimant is currently exposed to a noise level of 76 dBA.

5. Claimant is currently subject to transfer to other departments with excessive noise levels.

6. Claimant has not retired or terminated his employment.

7. Claimant has not been permanently transferred from excessive noise level employment by the employer.

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CONCLUSION OF LAW

Claimant has failed to prove, by a preponderance of the evidence, that six months has passed after one of the three triggering events set forth in section 85B.8, The Code, and thus this matter is not ripe for adjudication under Chapter 85B, The Code.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That this matter be and the same is hereby dismissed without prejudice.

That the costs of the appeal, including the transcription of the hearing proceeding, are taxed to defendant.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ED MADISON, Claimant, vs. STURGEON TRUCK LINES, INC., Employer, and IOWA SMALL BUSINESS EMPLOYERS GROUP, Insurance Carrier, Defendants.	File No. 794964 A P P E A L D E C I S I O N FILED APR 28 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision denying all compensation because he failed to establish that he sustained an injury arising out of and in the course of his employment.

The record on appeal consists of the transcript of the arbitration hearing and defendants' exhibits 1 through 6. Only claimant has filed a brief on appeal.

ISSUE

The issue on appeal can be stated as whether claimant sustained an injury arising out of and in the course of employment when claimant voluntarily assisted another truck driver not employed by defendant employer.

REVIEW OF THE EVIDENCE

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

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

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evidence that he received an injury on May 22, 1985 which arose out of and in the course of his employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The 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.

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. Briar Cliff College v. Campolo, 360 N.W.2d 91 (Iowa 1984).

In Yates v. Humphrey, 218 Iowa 792, 255 N.W. 639 (1984), the supreme court held that an employee was in the course of his employment when he sustained an injury while, out of decency and courtesy, he assisted a nonemployee, who was rightfully on the employer's premises during the employee's working hours, to haul away cinders. The court found that the removal of the cinders was advantageous to the employer:

> While the cinders were undoubtedly of some benefit to Buck and other patrons who hauled them away, it appears in the evidence it was of benefit to the appellant plant that such cinders should be removed, and that, if such patrons had not removed them, the appellant owner of the plant would have been put to the trouble and expense of removing them. It is quite apparent, therefore, that the removal of the cinders from the plant was of benefit to the appellant owner thereof.

Id. at 796.

The court also found that a custom of helpfulness existed among defendant's employees:

> The manager of the plant testified that, while he had not given any of the employees specific orders in regard to assisting persons who were removing the cinders, and would not say that this was a specific duty of employees, the rendering of assistance to patrons was a matter of courtesy that was expected of the employees, and that he would expect a hired man at the plant to help a man if he needed it. He also said that such was the habit and custom of the people and had always been customary around the plant.
>
> We think it sufficiently appears in the evidence that not only the habits and customs of the people of the community generally, but the general nature of the work performed by the employees in the appellant's plant and the general spirit of helpfulness toward patrons of the plant, were such that the employees had reasonable grounds for believing, and that they understood, that their work was not limited strictly to the performance of specific duties, but that they were expected to perform such acts of courtesy and helpfulness toward patrons of the plant as would promote good will and redound to the benefit of their employer.

Id.

ANALYSIS

Claimant relies on the holding in the Yates case to support his contention that he was in the course of his employment when he voluntarily assisted another truck driver in moving trailer axles. Claimant contends that, as in Yates, it is customary for truck drivers to help each other and that such is beneficial to the employer. As the deputy noted, any benefit to the employer

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is simply too attenuated to support claimant's contention that his activity was in the course of his employment. The court in Yates found an apparent benefit to the employer in having cinders hauled away from the employer's plant. Yates at 796. No such apparent benefit exists in this case.

Yates is distinguishable from this case in that the injury to the employee in Yates was sustained on the employer's premises. Id. at 793. Claimant in this case was not on his employer's premises. At the time of the injury, claimant's truck was docked and was being loaded by employees of Arts Metals, Inc. The truck belonging to the driver claimant helped, had pulled away from the loading dock area and was not blocking claimant's truck. To hold as claimant contends would create a liability for employers which could not reasonably be anticipated by them. The greater weight of evidence supports the deputy's finding that claimant did not sustain an injury arising out of and in the course of employment.

FINDINGS OF FACT

1. Claimant started working for Sturgeon or Barr-Nunn on November 23, 1984.

2. Claimant was employed by Barr-Nunn on May 22, 1985.

3. On May 22, 1985, there was no business relationship between Barr-Nunn and Roach Truck Lines, Inc., of Madison, Wisconsin.

4. David R. Meyer is a self-employed truck driver who leased his equipment to Roach.

5. Claimant sustained an injury on May 22, 1985 while assisting Meyer in moving the axles on Meyer's trailer.

6. Meyer did not ask claimant for assistance on May 22, 1985; that is, claimant volunteered to assist Meyer.

7. Claimant did not contact Barr-Nunn to ask directives as to whether he should assist Meyer.

8. Barr-Nunn did not have a policy on May 22, 1985 as to whether or how its drivers assist other drivers.

9. The Meyer vehicle was out of the loading dock area and was not blocking claimant from leaving on his own.

10. Claimant was not receiving any assistance from Meyer or Roach to load or operate his vehicle on May 22, 1985.

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CONCLUSION OF LAW

Claimant failed to establish by a preponderance of the evidence that he sustained an injury on May 22, 1984 that arose out of and in the course of his employment with Barr-Nunn or Sturgeon Truck Lines, Inc.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant pay all costs of this action.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

KAREN J. MARCKS,	:	
	:	
Claimant,	:	File No. 679369
	:	
vs.	:	
	:	A P P E A L
RICHMAN GORDMAN,	:	
	:	D E C I S I O N
Employer,	:	
	:	FILED
and	:	
	:	JUN 29 1988
THE HARTFORD INSURANCE CO.,	:	
	:	IOWA INDUSTRIAL COMMISSIONER
Insurance Carrier,	:	
Defendants.	:	

STATEMENT OF THE CASE

Defendants appeal from a review-reopening decision awarding permanent total disability and medical benefits. Claimant cross-appeals.

The record on appeal consists of the transcript of the review-reopening proceeding and joint exhibits 1 through 73. Both parties filed briefs on appeal.

ISSUES

Defendants state the following issues on appeal:

1. Where claimant failed to raise the "odd-lot doctrine" as an issue at any time prior to or during the hearing, the deputy industrial commissioner erred in relying on the odd-lot doctrine in awarding claimant benefits in the review-reopening decision.

2. Where there was no substantial evidence to establish a causal relationship between injury and disability, the deputy industrial commissioner erred in finding and concluding claimant was entitled to benefits and finding and concluding a causal relationship existed between injury and disability.

Claimant adds the following issue on cross-appeal:

The deputy industrial commissioner erred in determining claimant's cash bonuses were irregular and not to be included in her gross earnings.

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REVIEW OF THE EVIDENCE

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

Briefly stated, claimant was 43 years old at the time of the hearing, and had a high school education. Although her normal occupation was as an administrative secretary for Barton Solvents, claimant worked part time as a sales clerk for defendant Richman Gordman. On May 17, 1981, claimant fell approximately six feet off a ladder while at work for Richman Gordman, injuring her back and elbow.

Prior to May 17, 1981, claimant had injured her back in a 1975 car accident. Claimant was diagnosed as having a herniated disc and underwent lumbar disc surgery by Cemil Adli, M.D., at the fifth lumbar interspace in September 1975. Claimant continued to experience pain, and subsequently underwent a fusion of the L5-S1 interspace in March 1976 by Dr. Adli. Claimant indicated she experienced relief following this surgery. On June 14, 1978, claimant was seen for lumbosacral strain by Dr. Rassekh. Claimant had normal myelograms in April 1978 and June 1980. Claimant was released to go back to her work as administrative secretary by Behrouz Rassekh, M.D., a neurosurgeon, in 1980. The record contained a photograph of claimant performing in a chorus line for a local variety show during this period. Claimant was also able to perform such activities as water skiing and swimming.

After her injury on May 17, 1981, claimant experienced pain in her lower back, right lower extremity and occasional pain in her left lower extremity. Claimant tried a transcutaneous stimulator without relief, as well as attending a pain clinic. Claimant sought medical attention from Edward R. Farrage, M.D., who prescribed a back brace. Claimant was also seen on August 5, 1981 by Maurice D. Margules, M.D., a neurosurgeon. Claimant reported to Dr. Margules that she was experiencing pain in the right lower extremity and weakness of her right foot. Dr. Margules noted that claimant had difficulty walking, dressing, undressing, and had rigidity of the lumbar spine, with forward flexion limited to five degrees.

A unilateral spinothalamic tractomy was performed by Dr. Margules on September 3, 1981, which revealed that both the L5 and S1 roots were compressed by bony structures and residual disc tissue. Dr. Margules also performed a resection of residual disc tissue at the L4-L5 interspace. Dr. Margules diagnosed claimant's condition as adhesive arachnoiditis. Claimant indicated that she experienced little relief as a result of this surgery.

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Dr. Margules indicated that during the surgery, the bony growth he found compressing the nerve route would not have been the result of the May 17, 1981 fall, but rather was the result of the 1976 fusion. However, he also stated that the degenerative disc problem would have been aggravated by the May 17, 1981 injury, based on the marked problems claimant experienced after the fall.

Although claimant sought relief from the pain after the surgery, subsequently she experienced more pain in the right lower extremity, which Dr. Margules attributed to adhesive arachnoiditis of the cauda equina. Claimant began to experience sudden bucklings or paroxysms of the right leg and falling in March 1982. Dr. Margules prescribed codeine for relief of claimant's pain, stating that neither further surgery or a pain clinic offered claimant any hope of relief.

On April 9, 1982, Dr. Margules performed a cordotomy of claimant's spinothalamic tract on the left to relieve pain in the right lower extremity. On April 18, 1982, Dr. Margules released claimant and noted there was no further intractible pain in the right lower extremity and no motor loss or bladder function loss. Dr. Margules concluded claimant was suffering from systems of adhesive arachnoiditis of the cauda equina, which was likely to be progressive in nature. Dr. Margules indicated that it was possible that this condition would not be detected by a myelogram or during surgery, and that arachnoiditis could be caused by bleeding, by surgery, by trauma, or meningitis.

On November 23, 1982, claimant reported to Dr. Margules that she was experiencing severe pain in the right posterior shoulder and the right trapezius muscle, as well as pain in both lower extremities. Dr. Margules expressed the opinion that claimant was unable to return to work at that time, and that her future prospects for return to work were unfavorable.

On July 1, 1983, claimant indicated to Dr. Margules that she had severe pain in the left lower extremity, which Dr. Margules also diagnosed as caused by claimant's adhesive arachnoiditis of the cauda equina. Dr. Margules also predicted that the pain might become more severe in the near future and may require surgery for pain relief, but on April 10, 1984, Dr. Margules recommended against further surgery for pain relief. Dr. Margules opined that claimant had a 35 percent permanent partial impairment of the body as a whole.

On February 3, 1984, Daniel L. McKinney, M.D., a neurological surgeon, examined claimant and diagnosed chronic pain syndrome secondary to arachnoiditis, and stated that no satisfactory treatment existed for claimant's condition.

On June 29, 1984, Dr. Margules opined that "as the result of

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the injury sustained on May 17, 1981, Mrs. Marcks has a partial permanent physical disability which is rated at 35 to 40% of the body as a whole." (Jt. Ex. 32) Dr. Margules prescribed a walker, crutches or cane, and stated that claimant should not walk up or down steps without assistance because of the danger of falling.

On September 13, 1984, claimant's family physician, E. B. Mathiason, M.D., stated that claimant was disabled due to intractable pain in the right lower extremity as a result of adhesive arachnoiditis of the cauda equina, post right dorsal cordotomy as well as left leg pain secondary to the above, along with generalized arthritis and fibrositis with pain in the neck and both arms developing three to six months after her last surgery.

On October 5, 1984, Jose Martinez, M.D., noted that claimant was experiencing bladder problems, and stated that "definitely her last surgery, mainly the cordotomy for the relief of her pain has much to do with her bladder." (Jt. Ex. 35)

On November 24, 1984, claimant was seen by Dr. Margules for her bladder dysfunction problems. Dr. Margules diagnosed this as neurogenic hypotonic bladder. Dr. Margules felt the bladder problems were not the result of the cordotomy in that the symptoms appeared two years later and he would have expected those symptoms to manifest sooner if they had been caused by the cordotomy.

Claimant was again seen by Dr. Martinez on June 13, 1985. Dr. Martinez found that claimant had improved but required self-catheterization four times daily, and diagnosed a permanent neurogenic bladder.

On August 23, 1985, Dr. Margules declined to give a rating of permanent impairment as claimant's condition was "still changing clinically." (Jt. Ex. 37) On September 3, 1985, Dr. Martinez referred claimant to Ronald L. Bendorf, M.D., for psychiatric consultation after claimant broke down in tears during the examination. On November 16, 1985, claimant suffered a contusion of the neck when she fell down twelve stairs.

After his examination of claimant in January 1986, Dr. Margules concluded that claimant had complete loss of bladder function, as well as repeated episodes of motor loss. Dr. Margules opined that claimant was totally disabled:

> A. At the present time, that is, as of January, when I last saw her, I felt that this woman was going to reach the levels of a high dysfunction. And she had by then total bladder dysfunction. And she had no control of her bladder, almost none. And has to use self-catherization. And had

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repeated episodes of loss of motor function, so I felt personally that she was really from the functional standpoint, totally disabled, as to performing any job in the open market.

....

Q. All right. Now, the motor function that you're talking about that she has lost, is -- relates to -- one or both of her lower extremities?

A. Yes.

Q. And that is handled by use of a walker and could be handled by using a wheelchair, under some circumstances, although if I am correct, this young lady has not yet progressed to using a wheelchair?

A. Oh, I think she doesn't want to. I told her that the only way I would allow her to go on and walk into open spaces by herself, certainly would be -- that would be impossible, unless she wants to take a chance. She did that once. She fell and I saw her in the emergency room and sustaining hematoma of her scalp or her face. I mean, this is -- I think she refuses to accept the evidence that she has to use a wheelchair. Or else to have somebody with her. And she is certainly totally restricted as to going up and down steps without help. I made that very clear to her.

Q. So the two problems that you take into -- physical problems that you primarily focus upon, are the bladder problem and the loss of the motor function in the lower extremities?

A. Yes....

....

Q. Doctor, when you said that in your opinion she is totally disabled, if you were putting that in functional terms then, are you saying that she's in your opinion one hundred per cent disabled functionally?

A. Yes.

....

Q. At the present time, can you describe her ability to function, with regard to bending,

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stooping, twisting, lifting, pushing or pulling, those motions?

A. I think this lady is extremely limited. She can try any of those things, if she is willing to accept the consequences of, you know, repeated falls and -- in public, which is not very pleasant and so on. As to working at home, I think she is very limited, only to doing very, very small menial part of her work. Bending, she can do some stoop -- she can do some of a little bit of everything, but nothing can be done to even less than thirty per cent of normal.

(Jt. Ex. 72, pp. 32-37)

Dr. Margules also expressed the opinion that claimant's fall of May 17, 1981 aggravated her condition:

Q. With regard to this fall from the ladder on May 17, 1981, in your opinion, was that -- or tell us to what extent that fall contributed to her problems of the buckling of the leg and the bladder problems and the adhesive arachnoiditis?

A. I think that -- you have to take into consideration the entire clinical picture of this patient. Okay? We all agreed that the lady had pre-existing problems. We all agree that this pre-existing problem changed radically after this episode of falling. So therefore I am basing my discussion and my reasoning on that fact. That her case was aggravated by this fall and from then, rather marked and precipitous changes have occurred in her condition. Therefore, I would say that her case was either -- the adhesive arachnoiditis was triggered or markedly aggravated by the fall from the ladder.

(Jt. Ex. 72, p. 36)

Dr. Margules stated that claimant's condition would continue to deteriorate:

Q. Would you go back and look at your notes for March 17, 1984?

A. 1984?

Q. Yes.

A. Yes, sir

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Q. If I understand your report, that appears to be the date when you made the decision that you would not do any further surgery; is that correct?

A. I think I had made that decision -- yeah -- at that time but I felt that nothing else could be done for this patient, yes.

Q. What I'm exploring is: When, in your opinion, she reached maximum medical improvement from which you would not anticipate any further improvement? Does that have anything to do with that decision?

A. Well, I think as I now look at this case, it is very difficult to say this woman has reached maximum improvement, because she is going to continue to deteriorate, so it's kind of the opposite of what I would like to try to say. I don't think she will ever reach maximum medical improvement because she is going to continue to deteriorate as times goes. So maybe we could say that she was at her best, maybe at this time and from then on, it was all the way downhill. It becomes a very moot point, I think, from the medical point of view.

(Jt. Ex. 72, pp. 37-38)

Dr. Margules acknowledged that claimant had numerous episodes of back pain prior to her fall of May 17, 1981, but also stated that it was impossible to determine if the fall on May 17, 1981 caused claimant's scar tissue to adhere to the nerve root system and caused her subsequent problems, or whether that adhesion would have occurred even without the fall. However, he based his conclusion on the fact that claimant was able to work before the fall, but then experienced a rapid, progressive deterioration of her condition after the fall:

Q. Doctor, when you examined her and performed that surgery in September, 1981, did you find any physical evidence that you can attribute directly to a fall on May 17, 1981, or did what you find was the residuals of that 1975 and 1976 surgeries?

A. You mean, could I say, after surgery, that I could ascribe what I found there as the result of the fall itself?

Q. Yes, sir.

A. No.

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Q. Yet you could identify the bony growth as traceable back to the surgeries in 1975 and 1976?

A. I found two things -- three different things: One was the bony growth, which was the result of the fusion. The second was the adhesive arach -- the adhesive arachnitis around the nerve root, which was present, I would assume, when she fell, but I don't know that for sure. And the third was the degenerative disc problem, the compression, which might have been -- most likely was aggravated by the trauma and involved some more -- and compressed the root. That's all I can say. But that is certainly not saying that I could say, this is strictly the result of that fall then. I'm talking about strictly from the tissue standpoint.

Q. So the key to ascribing any of her problems that she has today to a fall in May of 1981, is based upon her statement that there was a marked change in her pain pattern?

A. Yes. Partially that and partially the evolution of her symptoms, which is obviously quite marked.

....

Q. And so the key, of course, would be: Did the arachnoiditis of the cauda equina follow from the 1975 and 1976 injuries and surgical treatment? Or was the arachnoiditis caused by the fall on May 17, 1981? Would it not be?

A. Well, that is really -- yes, that would be a way to look at it. Unfortunately, I don't think anybody would be able to make a statement on this, because as I explained to you before, we're dealing with something that we can't see, so it's rather impalpable and we have therefore to use a rather deduction type of reasoning to arrive to a solution.

(Jt. Ex. 72, pp. 41-43)

On April 4, 1986, Dr. Margules opined that:

As the result of the injury sustained on May 17, 1981, and the ensuing severe complications of the adhesive arachnoiditis of the cauda equina, it is our opinion, at this time, that the patient is totally and permanently disabled.

As the result of those complications, this

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patient has frequent recurrent episodes of sudden paralysis of the lower extremities which cause her to fall sustaining severe injuries.

....

It is our opinion, at this time, that the patient's prognosis for the future is poor and the possibility of progressive disability is certainly to be considered with the patient finally being reduced to using a wheelchair or small electric cart for transportation purposes.

(Jt. Ex. 42)

On April 28, 1986, Dr. Mathiasen also opined that claimant was totally and permanently disabled. (Jt. Ex. 43)

Claimant last worked for Barton Solvents, her full-time employer, on July 1, 1981, and has not worked for Richman Gordman since the injury on May 17, 1981. Claimant began a clerical position for the office of Senator Tom Harkin in October 1983, but her supervisor, Bonnie Simons, testified as to claimant's increasing difficulty in walking, filing, etc., since December 16, 1985. Claimant is able to type, but can no longer bend to file or collect mail, cannot travel in a car with the Senator as she formerly did, and has difficulty moving about the office without using the walls for support. Claimant also has fallen at the office, and is no longer able to answer the phone. Ms. Simons also expressed doubt that claimant would be able to continue in her present position. Claimant's salary in this position is $500 monthly on a part-time basis. Ms. Simons testified that Senator Harkin has a policy of trying to hire handicapped or disabled workers.

Claimant and her husband both testified as to the restrictions on activities claimant has experienced since her fall, as well as claimant's psychiatric treatment by Ronald L. Bendorf, M.D., from September 4, 1985 through October 21, 1985, for depression. Claimant uses a walker or a cane at all times. Claimant states she falls frequently, and has had constant pain since approximately four months after her cordotomy.

The parties stipulated that claimant was married at the time of her injury, and had four exemptions. Claimant's earnings at Barton Solvents for the twelve months prior to her injury were $7,945.16, with monthly bonuses based on company profit, longevity, and gross wages, totaling $2,728.88. The record shows that claimant's bonuses are varied in amount, and that for one month claimant's pay record showed a cash bonus of zero dollars and zero cents. Claimant earned $652.02 from Richman Gordman in the twelve months prior to her injury.

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APPLICABLE LAW

The claimant has the burden of proving by a preponderance of the evidence that the injury of May 17, 1981 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

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

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

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

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

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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 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

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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).

A worker is totally disabled if the only services the worker can perform are so limited in quality, dependability, or quantity, that a reasonable, stable market for them does not exist. When a combination of industrial disablity factors precludes a worker from obtaining regular employment to earn a living, a worker with only a partial functional disability has a total industrial disability. Guyton v. Irving Jensen Company, 373 N.W.2d 101 (Iowa 1985).

A finding that a claimant is an "odd-lot" worker under Guyton, cannot be made if the odd-lot doctrine was not raised prior to or at the time of the administrative hearing. Klein v. Furnas Electric Company, 384 N.W.2d 370 (Iowa 1986); Armstrong v. Iowa State Buildings and Grounds, 382 N.W.2d 161 (Iowa 1986) Chamberlin v. Ralston Purina (Appeal Decision, October 29, 1987).

Iowa Code section 85.36(10) (1979) provides, in part:

> In the case of an employee who earns either no wages or less than the usual weekly earnings of the regular full-time adult laborer in the line of industry in which the employee is injured in that locality, the weekly earnings shall be one-fiftieth of the total earnings which the employee has earned from all employment during the twelve calendar months immediately preceding the injury but shall be not less than an amount equal to thirty-five percent of the state average weekly wage paid employees as determined by the Iowa department of job service under the provisions of section 96.3, and in effect at the time of the injury.

Iowa Code section 85.61(12) (1979) provides:

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

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Iowa Code section 85.34(1) (1979) provides:

Healing period. If an employee has suffered a personal injury causing permanent partial disability for which compensation is payable as provided in subsection 2 of this section, the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the date of the injury, and until he has returned to work or competent medical evidence indicates that recuperation from said injury has been accomplished, whichever comes first.

Apportionment is limited 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. Varied Enterprises, Inc., v. Sumner, 353 N.W.2d 407 (Iowa 1984).

ANALYSIS

Claimant has the burden to show that her present disability is causally connected to her injury of May 17, 1981. The record shows that prior to that date, claimant did have preexisting back problems stemming from her car accident and two subsequent surgeries. Two myelograms showed normal results prior to the May 17, 1981 fall. Claimant was able to work at two jobs and, in addition, engaged in recreational activitities involving the use of her back. Although she did find it necessary to seek medical attention for back strain during the five years from her last surgery in 1976 until her injury in May 1981, the record as a whole shows that claimant's preexisting back condition did not disable her from performing the duties of a secretary.

Subsequent to the fall on May 17, 1981, claimant related increased pain. Claimant's bladder problems were also subsequent to her May 17, 1981 injury. Claimant did not begin to experience falling incidents until after the May 17, 1981 injury. Although she was on medication prior to the May 17, 1981 injury, claimant's medication needs increased after the fall. Claimant's psychological problems in coping with her increasing disability also developed after her injury.

In addition, Dr. Margules opined that claimant's arachnoiditis condition was significantly aggravated by her fall on May 17, 1981. There is a difference of opinion between Dr. Margules and Dr. Martinez on whether claimant's bladder problems were caused by her fall or by her subsequent cordotomy. Dr. Martinez is a urologist, and opined that the bladder problems were caused by the cordotomy. Dr. Margules felt that since two years had elapsed between the cordotomy and the onset of the bladder

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problems, that the cordotomy did not cause the bladder problems. However, the cordotomy itself appears to have been caused by the fall of May 17, 1981. Claimant's bladder problems did not develop until after her May 17, 1981 injury. The record does not show any medical evidence that claimant would have been likely to suffer bladder control problems as a result of her condition prior to the May 17, 1981 injury. The opinion of Dr. Martinez that claimant's bladder problems are causally related to claimant's cordotomy will be given the greater weight.

"[A] workman who receives an injury which entitles him to workmen's compensation may have compensation for an aggravation or increase thereof in its treatment...." See Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 386, 101 N.W.2d 167, 173 (1960). If claimant is entitled to compensation for her injury of May 17, 1981, she is also entitled to compensation for the sequelae of that injury, including any aggravation of her condition by the cordotomy.

Dr. Margules' opinion was based on his observations of claimant's condition during surgery and treatment, as well as claimant's related history to him of her problems. Claimant's testimony as to the marked increase in pain and disability after the fall is corroborated by the exhibits showing claimant able to perform such activities as participating in a chorus line prior to her fall. When contrasted with the testimony of claimant's current work supervisor that claimant cannot answer a telephone, pick up mail, or even walk without holding onto walls, it is clear claimant has suffered a severe deterioration of her condition subsequent to the fall of May 17, 1981.

Although defendants sought to cast claimant's current condition as the result of a process that was ongoing prior to her fall and would have inevitably occurred even absent the fall, the testimony of Dr. Margules is significant in establishing the fall on May 17, 1981 as the cause of significant aggravation of claimant's arachnoiditis and disability. Even if defendants' argument that claimant's present condition would have inevitably occurred is accepted in spite of the absence of any evidence to that effect, the record still shows that the deterioration of claimant's condition has nevertheless been accelerated by the fall of May 17, 1981.

Finally, it is noted that Dr. Margules' opinion that claimant's aggravation of her arachnoiditis was caused by her fall of May 17, 1981, is uncontroverted in the record. Thus, it is concluded that the aggravation of claimant's arachnoiditis of the cauda equina and resulting disability was caused by her fall of May 17, 1981.

Defendants maintain on appeal that the deputy industrial commissioner improperly relied on the "odd-lot" doctrine in

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granting claimant permanent total disability. However, the deputy's decision found claimant to be permanently and totally disabled without reliance on the odd-lot doctrine, although it was determined that claimant might be permanently and totally disabled under Guyton as well.

The record shows that claimant did not raise the odd-lot doctrine in any of the pleadings, prehearing conference, or at the hearing. The Guyton case is a procedural holding that results in a shift of the burden of going forward with the evidence to the defendants to show that employment was available to the claimant. If claimant intended to rely on the odd-lot doctrine, it was necessary for claimant to properly raise that issue prior to the hearing so that the defendants would have an opportunity to prepare and present evidence that employment was in fact available. Since claimant did not raise the odd-lot issue prior to or at the hearing, thereby denying defendants the opportunity to put on evidence that claimant was not an odd-lot employee, that doctrine could not properly be relied on in determining the extent of claimant's disability.

Even if the odd-lot doctrine were properly raised, claimant is not an odd-lot employee. Claimant was employed at the time of the hearing. Although there was testimony that claimant's job was part time and might not continue much longer because of her increasing disability, it would be speculative to determine that claimant would soon be unemployed. Although the record indicates claimant may have been hired in Senator Harkin's office because of the policy to hire the disabled, her clerical position there is not a "make work" job, but rather a recognized occupation that does exist throughout the employment market. In order to find that claimant is an odd-lot employee, it must be shown that there is no market available for services claimant can perform. Clerical positions are commonly held by persons confined to a wheelchair and suffering disability as great as, or even greater than, claimant suffers. Some of these people work for years and are a great asset to their employers as well as society. To say that such people are permanently totally disabled is factually incorrect. That does not mean that if claimant's physical condition changes or her employment opportunities change she will not be determined to be permanently totally disabled under section 85.34(3). Since claimant is working and performing clerical services in a market where clerical service jobs exist, claimant is not an odd-lot employee.

Having determined that claimant is not an odd-lot employee, it is next necessary to ascertain the extent of claimant's disability. The record is undisputed that claimant's condition is permanent. Indeed, not only is claimant's condition not expected to improve, it is expected to worsen. Claimant is still capable of performing typing duties. Although accommodations would have to be made by any future employers, there

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is no showing that such accommodations are so extreme that an employer willing to make the necessary accommodations cannot be found. It is thus concluded that claimant is not totally disabled.

Claimant was given three ratings of impairment by Dr. Margules. Dr. Margules initially assigned claimant a rating of 35 percent impairment of the body as a whole and, later, 35 to 40 percent of the body as a whole. Later still, Dr. Margules opined that claimant was totally disabled, and this opinion was also expressed by Dr. Mathiason.

Although Dr. Margules stated that his rating was based on functional impairment, it was brought out in the record that Dr. Margules also took into consideration the types of jobs claimant could perform and the availability of that type of job. Medical evidence is properly limited to opinion testimony on the degree of functional impairment. Functional impairment is only one factor to be considered in determining industrial disability. Industrial disability is to be determined by the finder of fact. Dr. Margules' testimony will be utilized in the determination of industrial disability only as it related to claimant's functional impairment.

Claimant is no longer capable of performing the duties she performed as a clerk for Richman Gordman when she was injured. Claimant's ability to perform the duties of a secretary have been severely curtailed. Claimant has a loss of motor control in her lower extremities to the extent that she cannot walk without a walker, cane, or assistance. Claimant faces a danger of falling when she walks. Dr. Margules stated that claimant should be in a wheelchair. Claimant also suffers loss of bladder control. She cannot lift, bend, or stoop. She cannot perform such activities as answering a phone, filing or collecting mail. Claimant suffers constant pain. Claimant has also experienced psychological problems as a result of her injury. The only activity claimant can be expected to perform is typing.

Claimant's earning capacity has been reduced. While employed by Barton Solvents, claimant earned $7,945.16 in the year preceding her injury, with a bonus income of $2,728.88. She also worked in a part-time position where she earned $652.02. Claimant presently earns $500 per month on a part-time basis, or $6,000 annually. Claimant's ability to obtain employment as a secretary in the future would be affected by her impairment in that claimant is not able to produce work output to the same degree as she formerly could. In addition, claimant cannot perform many of the common activities of a secretary that she performed prior to her injury, such as filing, answering the phone, or picking up mail.

Claimant has a high school education. Her age was 43 at the

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time of the hearing. Claimant's work experience has been limited to secretarial positions and retail clerking. Claimant's motivation is to be commended. Based on these and all other appropriate factors for determining disability, it is concluded that claimant has an industrial disability of 90 percent.

Claimant had a preexisting back condition. To the extent that preexisting condition causes claimant's present disability, an apportionment should be considered. Claimant had a prior herniated disc and a fusion of the L5-S1 interspace in 1976. Claimant had an incident of lumbrosacral strain in 1978. It is determined that claimant had a prior industrial disability of 10 percent of the body as a whole. Claimant is determined to have an 80 percent industrial disability as a result of her injury of May 17, 1981.

Claimant states on appeal that the rate was improperly determined by the deputy commissioner. Specifically, it is urged that the deputy erred in disregarding claimant's bonuses under section 85.61(12). The record shows that claimant received a bonus every month, concurrent with her regular biweekly paycheck that she received near the end of the month. The amount of the bonus varied, and was determined by the company's profits, the employee's gross wages and the employee's longevity. In that the bonus was paid on a regular basis, that is, every month, it was not irregular. In addition, in that at least part of the bonus was determined by the company's profits, it appears to have been made available to employees to encourage efficiency. As such, it is in part incentive pay. The bonus income is includable in determining claimant's gross earnings under section 85.61(12), The Code. Claimant was injured while working at her part-time employment. Accordingly, the rate is determined under section 85.36(10), The Code. Claimant's income from all sources of employment during the twelve months prior to her injury was $11,326.06. Dividing this sum by 50, claimant's weekly earnings are determined to be $226.52. As claimant was married and had four exemptions at the time of her injury in May 1981, her rate of compensation is $148.06.

It is also necessary to establish claimant's healing period. Dr. Margules testified that on March 17, 1984, he determined that further surgery would not be performed, and that "nothing else could be done for this patient." Dr. Margules also stated that claimant would never reach maximum medical improvement as her condition continued to deteriorate. Claimant did not return to work significantly similar to the work she held at the time of the injury.

The healing period is that period during which there is reasonable expectation of improvement of the disabling condition, and ends when maximum medical improvement is reached. Where improvement is not anticipated from the start, claimant is

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not entitled to healing period benefits. See Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). The testimony of Dr. Margules indicates that claimant's condition steadily worsened from the time of the injury, and could be expected to continue to worsen. Claimant is not entitled to healing period benefits.

FINDINGS OF FACT

1. Claimant injured herself on May 17, 1981 when she fell from a ladder while working part-time as a sales clerk for defendant employer.

2. Claimant had had preexisting injuries to her low back for which she had two laminectomies at L5-S1 as well as drug and pain clinic therapy prior to May 17, 1981.

3. Claimant had marked and distinct changes in her physical condition following May 17, 1981.

4. Claimant severely aggravated her impairment of the L5-S1 nerve root distribution system and lit up or aggravated arachnoiditis of the cauda equina on May 17, 1981.

5. Claimant's neurogenic bladder is causally connected to her May 17, 1981 injury.

6. Claimant developed depressive symptomatology and received medical and psychotherapeutic treatment through Dr. Bendorf's office as a result of her May 17, 1981 injury and its physical and emotional sequela.

7. Claimant has arthritic and fibrositic changes in the neck and upper extremities not shown to result from her May 17, 1981 injury.

8. Claimant's lower extremities give way. She must walk with a cane at all times and uses a walker at home. Claimant cannot climb stairs unless accompanied by another adult to prevent her falling.

9. Claimant's condition is progressive and will worsen.

10. Claimant continues to work part-time as a receptionist-secretary and is able to type.

11. Claimant can no longer answer the telephone, bend to pick up the mail, stand and lift to file, or travel with her employer.

12. Claimant is 43 and a high school graduate.

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13. Claimant's primary past work experience is as an executive secretary.

14. Claimant's prescription and medical care costs for treatment of her arthritic and fibrositic conditions do not relate to a compensable injury.

15. Claimant has medical mileage expenses for 620.5 miles.

16. Claimant's parking costs for medical visits are a reasonable transportation expense.

17. Claimant was married and entitled to four exemptions when injured.

18. Claimant received regular monthly bonuses at her full-time employment totaling $2,728.88 at her Barton Solvents employment in the 12 calendar months immediately preceding her injury.

19. Claimant's Barton Solvents regular earnings in the 12 calendar months immediately preceding her injury were $7,945.16; her Richman Gordman earnings were $652.02. Her total earnings were $8,597.18; and her weekly earnings are $226.52.

20. Claimant's condition has continued to deteriorate since her injury and is not expected to improve.

21. Claimant's rate of compensation is $148.06.

22. Claimant was hospitalized from August 26, 1981 to September 12, 1981, and from April 4, 1982 to April 18, 1982.

CONCLUSIONS OF LAW

Claimant has established that her May 17, 1981 injury is the cause of the disability on which she bases her claim.

Claimant is entitled to permanent partial disability benefits equivalent to 80 percent of the body as a whole as a result of her injury of May 17, 1981.

Claimant is entitled to payment of costs of care from Dr. Bendorf's office.

Claimant is entitled to payment of post-injury prescription costs related to her compensable injury provided claimant delineates these as set forth in the decision of the deputy industrial commissioner dated August 28, 1986.

Claimant is entitled to temporary total disability benefits from August 26, 1981 to September 12, 1981, and from April 4,

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1982 to April 18, 1982.

Claimant is entitled to payment of costs outlined in exhibit 61.

Claimant is not entitled to payment of any prescription costs incurred prior to May 17, 1981.

Claimant is not entitled to payment of prescription costs related to treatment of her arthritic and fibrositic conditions.

Claimant is entitled to payment of medical mileage of 620.5 miles at a rate applicable when she incurred the costs.

Claimant is entitled to payment of parking costs of $12.50.

Claimant's bonus income is part of her gross earnings.

Claimant's rate of weekly compensation is $148.06.

Claimant did not properly raise the "odd-lot doctrine" for consideration by the deputy industrial commissioner.

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

ORDER

THEREFORE, it is ordered:

That defendants pay claimant temporary total disability benefits from August 26, 1981 through September 12, 1981, and from April 4, 1982 through April 18, 1982 at the rate of one hundred forty-eight and 06/100 dollars ($148.06).

That defendants pay claimant four hundred (400) weeks of permanent partial disability benefits at the rate of one hundred forty-eight and 06/100 dollars ($148.06) during the period of her disability.

That defendants pay claimant mileage and parking expenses as set forth in the above conclusions of law.

That defendants pay claimant the costs of medical care and prescription costs as set forth in the above conclusions of law. If claimant has not already done so, claimant shall file a written submission of compensable prescription costs as set forth in the deputy commissioner's order of August 28, 1986.

That defendants pay accrued amounts in a lump sum.

That defendants pay interest on weekly benefits pursuant to

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Iowa Code section 85.30.

That defendants pay costs including the costs of the transcription of the hearing proceeding pursuant to Division of Industrial Services Rule 343-4.33.

That defendants file claim activity reports as required by the agency.

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

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD MATHIESON, Claimant, vs. EBASCO SERVICES, Employer, and UNITED STATES FIDELITY AND GUARANTY Insurance Carrier, Defendants.	File No. 494274 A P P E A L D E C I S I O N FILED APR 28 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a remand decision denying payment of medical expenses. On April 17, 1986 claimant filed a petition for judicial review of the industrial commissioner's decision. On October 7, 1986 the district court for Woodbury County dismissed claimant's petition and remanded the matter to the industrial commissioner for further proceedings. The industrial commissioner remanded the case to the hearing deputy.

The record on appeal consists of the transcript of the hearing in this matter; claimant's exhibits 1 through 11; and defendants' exhibit A.

ISSUES

Claimant states the following issues on appeal:

1. Whether the deputy erred in not allowing the claimant to submit additional evidence to explain the "intent of the parties" and the reasons behind the § 85.35 settlement with open medical benefits.

2. Whether the deputy erred in concluding that claimant failed to prove by a preponderance of the evidence that there was a causal relationship between the medical expenses incurred by him and his compensable injury of February 24, 1978.

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REVIEW OF THE EVIDENCE

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

Claimant entered into a compromise settlement agreement pursuant to Iowa Code section 85.35 which was approved by this agency on April 10, 1981. The order approving this settlement states the disputed issue which was settled: "THAT there is evidence of a bona fide dispute or justiciable controversy existing between the parties as to whether all of the claimant's present industrial disability is causally related to the work injury of February 24, 1978 and the claimant alleged inability to perform gainful employment." (Claimant's Exhibit 1)

The application for order authorizing a compromise settlement states in part:

> The claimant and the defendants represent and state to the Industrial Commissioner that there is a bona fide dispute or justiciable [sic] controversy existing as to whether all of the claimant's present industrial disability is causally related to the work injury of February 24, 1978 and whether there is a causal relationship between the work injury of February 24, 1978 and the claimant's alleged inability to perform gainful employment. In support hereof see the medical reports submitted herewith and by this reference made a part hereof.
>
> The parties agree that the defendants will furnish all future reasonable and necessary medical treatment under Section 85.27 which treatment must result from the compensable injury of February 24, 1978. The parties further agree that such treatment shall be performed by or at the direction of a doctor selected by the defendants, or in the event of a disagreement, by a doctor determined upon application to the Iowa Industrial Commissioner.
>
> ....
>
> It is further agreed that this settlement is subject to the approval of the Industrial Commissioner or one of his Deputies, and when said settlement is approved, it is agreed that the same shall be res judicata to the facts herein.

(Cl. Ex. 2)

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APPLICABLE LAW AND ANALYSIS

The prior decision regarding additional evidence shall not be reversed.

In the appeal decision filed on March 14, 1986 the industrial commissioner discusses the effect of the settlement agreement in this case:

> Defendants would contend the disability resulted from matters extraneous to the injury and that a bona fide dispute exists that claimant's injury caused his total disability. As evidence they attached two medical reports. The only evidence which could support an allegation of a bona fide dispute that there were matters extraneous to the injury producing disability is the tenuous statement "that there has been some significant psychological overlay of symptoms."
>
> Evidence that the settlement was intended to be nothing more than an agreement for settlement is language in the application indicating "claimant shall bear the burden of persuading the Industrial Commissioner that a full commutation is in the claimant's best interests." A commutation (section 85.45) is inconsistent with a special case settlement (section 85.35). In a commutation, benefits payable are acknowledged as related to the injury and the period during which compensation is payable can be definitely determined. In a special case settlement any payment made is denied as being related to a compensable injury.
>
> Although others might have viewed it differently, the application for compromise settlement was approved on behalf of the agency as showing evidence of a bona fide dispute and that approval is not here being challenged.
>
> What is being asked is the effect of the order approving the application. The deputy ruled quite properly that a settlement under section 85.35 is not subject to review-reopening. The statute specifically provides that approval shall be binding on the parties and a final bar to further rights for workers' compensation. The claimant insists that the matter of continuing medical care related to the acknowledged injury is reviewable as it was specifically retained.
>
> In order for this argument to be consistent with section 85.35 the settlement must be viewed as having been considering two matters:--(1) a com-

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pensable injury of February 24, 1978 and (2) a condition unrelated to the injury which was causing or contributing to claimant's disability. Under such circumstances the first matter would be subject to review-reopening and the second matter would not.

In this case the question is whether or not the medical expenses for which claimant seeks reimbursement are related to the acknowledged compensable injury of February 24, 1978. Although it is not clear from the special case settlement what medical expenses would be considered related to the compensable injury and which would not, it would appear the only conditions providing evidence of an alleged bona fide dispute are the psychological symptoms. It would appear therefore the terms of the settlement included continuing medical benefits related to claimant's physical symptoms but not his psychological symptoms. This, however, is to be determined in a subsequent hearing.

(Appeal Decision, pages 3-4)

The deputy on remand found that the medical expenses for which claimant seeks payment are not related to the compensable injury of February 24, 1978. The greater weight of evidence supports the finding that the expenses for which claimant seeks payment are for treatment of claimant's depression resulting from his inability to find gainful employment. The commissioner, in the prior appeal decision, opined that the terms of the settlement provided for continuing medical benefits for claimant's physical symptoms only. In his remand decision the deputy also found that the terms of the settlement agreement clearly provided for continuing medical benefits for physical symptoms only.

Contrary to claimant's argument, the undersigned finds that the terms of the settlement agreement are unambiguous and require no additional evidence for interpretation. In construction of written contracts, the cardinal principle is that the intent of the parties must control; and except in cases of ambiguity, this is determined by what the contract itself says. Iowa R.App.P. (14)(f)(14); see also Chariton Feed and Grain, Inc. v. Harder, 369 N.W.2d 777, 785 (Iowa 1985).

The order approving the settlement and application for order approving the settlement state that a bona fide dispute exists as to whether claimant's inability to find gainful employment was causally related to his injury on February 24, 1978. Those documents also state that defendants will pay for claimant's medical expenses related to the compensable injury. The medical

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reports attached to the application for settlement present no dispute as to claimant's physical impairment.

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

FINDINGS OF FACT

1. On February 24, 1978 claimant suffered an injury arising out of and in the course of his employment.

2. On or about April 10, 1981 claimant entered into a compromise special case settlement which provided, inter alia, that there was a bona fide dispute as to whether claimant's inability to find gainful employment was causally related to his injury.

3. The compromise special case settlement entered into by claimant provided that defendants would continue to provide medical treatment for the compensable injury of February 24, 1978.

4. Subsequent to approval of the compromise special case settlement, claimant incurred medical expenses to treat depression which was causally related to his inability to find gainful employment.

CONCLUSION OF LAW

Claimant has failed to prove by a preponderance of the evidence that there is a causal relationship between the medical expenses incurred by him and his compensable injury of February 24, 1978.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from this proceeding.

That claimant shall pay all costs of this action.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RONDA MEFFERD, Claimant, vs. FARMLAND FOODS, INC., Employer, and AETNA CASUALTY AND SURETY COMPANY, Insurance Carrier, Defendants.	:	File Nos. 794522 762119 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 brought by Ronda Mefferd, claimant, against Farmland Foods, employer, and Aetna Casualty and Surety, insurance carrier, to recover benefits under the Iowa Workers' Compensation Act. The original notice and petition in this matter was filed on behalf of claimant on June 4, 1985, alleging "various" injury dates with the "last one on or about April 26, 1985." At the time of hearing, the original notice and petition was amended to add April 9, 1984 as an injury date and to specify that the injuries claimed may be the result of cumulative trauma. Defendants had no objection to the amendments and the same were granted. (It should be noted claimant presented testimony of an alleged arthritic condition as a result of alleged injuries in January 1984 and January 1985. These dates have not been pled, there is an absence of medical verification of the condition, and an absence of medical testimony concerning causal connection. Claimant also presents no argument in her post-hearing statement on these allegations. This office is not omniscient and the issues generated as a result of this testimony will not be addressed.) This matter came on for hearing before the undersigned deputy industrial commissioner December 2, 1987. The record was considered fully submitted at the close of the hearing. The record in this case consists of the testimony of the claimant and joint exhibits 1 through 23, inclusive.

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ISSUES

Pursuant to the prehearing report and order submitted and approved December 2, 1987, the following issues are presented for determination:

1. Whether or not claimant sustained an injury arising out of and in the course of her employment;

2. Whether the alleged work injury is the cause of the disability on which claimant now bases her claim;

3. The extent of claimant's entitlement, if any, to permanent partial disability benefits; and,

4. The appropriate rate of compensation for the alleged injury of April 9, 1984.

It has been stipulated claimant has received all the temporary total disability/healing period benefits to which she is entitled with the exception of a few days in 1984. However, claimant's request for this additional temporary total disability/healing period benefits has been withdrawn as an issue as claimant was unable to specify the dates involved. (See claimant's post-hearing statement, page 2)

FACTS PRESENTED

Claimant began working for defendant employer in May 1983 first arranging bacon and later as a bacon slicer where she lifted bacon bellies off of a skid and fed the slabs into a slicing machine. Claimant testified that from September to November 1983, she experienced tendonitis in her right hand; that on January 25, 1984, she dropped a box onto her toe; and that in March or April 1984, she felt something "pop" in her back while she was trying to pry apart two frozen bacon bellies. Claimant explained she was off work as a result of this last incident for approximately three weeks and then returned to light duty work although she was still experiencing pain. Claimant explained she had a "flareup" in her toe when she picked up a box and ran into a skid on January 25, 1985. Claimant testified that for at least two weeks prior to April 25, 1985, she was experiencing increased pain in her fingers, wrist, elbow, arms and back and returned to see her physician the following day. Claimant could not cite any particular incident which precipitated her pain.

Claimant explained that throughout the next year she continued experiencing problems with her back and arms although she had "been to all different doctors." She testified she began to see a chiropractor again, had gone through physical therapy and had seen a specialist in Omaha. Claimant quit her job with defendant employer in June 1986 when her physician advised she leave the cold environment and repetitive work of a packing

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plant. Claimant testified she continues to experience constant sharp pains in her back, arms and left foot which has gotten worse, but she cannot engage in recreational sports and that she has problems sleeping. Claimant has moved to the State of Washington where, along with her husband, she secured work as an apartment manager. Claimant quit that job because the hours and working conditions were inconvenient and acknowledged that she is not now actively seeking employment.

The medical records submitted into evidence reveal claimant has been seen by a multitude of doctors. Following the incident on April 9, 1984 which involved the "pop" to claimant's back, claimant was seen by her family physician, R. Mason, M.D., who instructed her to remain off work until April 23, 1984. Claimant saw a Dr. TanCreti after stubbing her toe on January 25, 1985, whom she also saw after complaining of pain in her arms on April 26, 1985. Claimant was thereafter released to light duty work but continued to complain of cramping in her arms and back. Claimant was referred to John Hennessey, M.D., who saw claimant on May 3, 1985 and opined claimant had back strain and tendonitis due to her work as a bacon slicer which required her to do frequent stooping and lifting.

Claimant saw Dr. William R. Hamsa on May 17, 1985 whose impression was that claimant had recurrent muscular and ligamentous pain in the cervical spine, shoulders and elbows secondary to employment and recurrent low back pain secondary to employment superimposed upon lumbar lordorsis and transitional vertebrae. Dr. Hamsa stated in his report of May 17, 1985 that:

> Nothing is indicated except conservative treatment. The patient has basically normal neurological findings in the upper and lower extremities, so I don't feel any further studies are indicated. I think she is either going to have to accept her symptoms and get along as best she can with her job or change her employment to something; that doesn't boter [sic] her. She was given a return to work release for Monday, May 20, 1985.

(Joint Exhibit 20)

In June 1985, claimant saw Dr. Ronald Soll on referral from Dr. Donald Soll and stated:

> I feel that the patient most likely has severe proprpioceptive [sic] loss which is causing her to over stress her extremities when doing any kind of significant physical labor. Conceivably, this may be a circulatory problem that has its underlying basis in her dietary habits but other factors also may be involved.

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(Jt. Ex. 18)

Claimant was evaluated April 16, 1986 by Behrouz Rassekh, M.D., who found claimant's physical and neurological examinations to be normal. Dr. Rassekh opined claimant has a mechanical back problem due to musculature ligamentous injury with no disc herniation. Claimant was advised on a program of exercise and released to return to her usual occupation as of April 16, 1986.

Claimant was evaluated by Joel T. Cotton, M.D., on June 17, 1986 in reference to pain and numbness. Dr. Cotton opined claimant's discomfort was not on a neurological basis and he neither placed claimant on any mode of treatment or medication nor did he find any reason to restrict her activity.

After claimant quit her employment, she was evaluated by Anil K. Agarwal, M.D., F.A.C.S., diplomat of orthopedic surgery, who stated on November 12, 1986:

> Examination of the cervical spine showed good range of motion. Biceps and triceps reflexes were normal with no motor or sensory losses. There was no paravertebral spasm present.
>
> Examination of the lumbar spine also showed good range of motion. Straight leg raising was unimpressive and there was no paravertebral spasm. Toe and heel gait was normal, and knee and ankle reflexes were also normal. Extensor hallucis longus strength was within normal limits. There was no gross motor or sensory loss.
>
> There was no neurological deficit present in the upper or lower extremities.
>
> X-rays of the cervical spine are withinin normal limits....
>
> ....
>
> The patient lacks any significant objective findings.

(Jt. Ex. 2-1)

Claimant was seen for evaluation by Horst G. Blume, M.D., on February 11, 1987. It appears from his report that Dr. Blume saw the previous medical reports and did a CT scan on claimant which revealed a minimal bulging disc on the right side at the neuroforamen of mild degree. (The actual CT scan report was not submitted into evidence and claimant had testified she never had a CT scan because defendants would not pay for it.) Dr. Blume

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opined:

> It is my opinion within reasonable medical probability that the patient has sustained an injury to the low back with irritation of the rami dorsalis of the posterior nerve roots of the intervertebral joints at the levels of L4/5 and L5/S1 on the right side and at L5/S1 on the left side of mild degree. The osteoarthritis of the facet joint at L5/S1 on the right side either is also the result of the accident of April 9, 1984, or was a pre-existing condition that aggravated this abnormal condition of the facet joints due the accident in April 1984. One also has to make the presumption that the disc pathology found can very well be as the result of previous work activity at Farmland Foods pre-existing from 1983 and became aggravated with the accident in 1984.

(Jt. Ex. 1, pp. 1-2)

It appears the last physicians to see claimant were Irving Tobin, M.D., orthopedic surgeon, and Robert F. Hood, M.D., neurologist, of Seattle and Tacoma, Washington, on June 12, 1987. Their report of the same date includes a complete history of claimant's treatment and symptoms and shows that a complete physical and neurological examination were done. The report concludes:

> RECOMMENDATIONS AND DISCUSSION: The patient has a multiplicity of complaints which apparently began shortly after she went to work at Farmland Foods as a bacon slicer. She apparently initially had a left foot injury. She developed complaints referable to her shoulders and forearms. She then had the injury for which we have been specifically requested to examine her, that is the injury of April 9, 1984 when she felt a popping in her back when she was separating two frozen pork bellies.
>
> Since that time, she has been seen by a multiplicity of medical specialists. No one has been able to come up with a definitive diagnosis. She reports a recent CT scan was found to be abnormal. It may well have been abnormal, but in the opinion of the examiners in regard to findings today, there are no findings that would suggest a surgically amenable problem in the lumbar area. There is certainly no evidence of nerve root compression.
>
> We took the liberty of conducting a complete neuromuscular as well as neurological examination

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of the extremities and we do not find evidence of any impairment regarding her shoulders, elbows, forearms, cervical, dorsal, lumbar spine, hips, knees or ankles. We do not find any abnormality other than her voluntary restriction of motion because of low back distress.

We know of no further diagnostic tests or treatment to suggest. We cannot help but feel that there is a significant degree of functional overlay and if further definitive evaluation considered by the interested parties, we would suggest that she undergo psychological and/or psychiatric evaluation.

From the standpoint of musculoskeletal and neurological examinations, her findings are normal. Her condition is fixed and static. No further treatment is indicated. She is capable of gainful employment without restrictions so far as the physical findings are concerned. We cannot explain her complaints of chronic pain.

(Jt. Ex. 17)

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 Apirl 26, 1985 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of April 26, 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

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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.

ANALYSIS

The first issue on appeal is whether claimant sustained an injury on April 9, 1984 and and on April 26, 1985 (cumulative) which arose out of and in the course of her employment. Claimant's testimony that she heard a "pop" in her back on April 9, 1984 which resulted in immediate pain is unrebutted. The medical reports support claimant's testimony. Therefore, it is determined that claimant has met her burden of proving she sustained an injury arising out of and in the course of her employment on April 9, 1984. The issue of the injury occurring April 26, 1985 (cumulative) is not necessarily as clear. Claimant testified the repeated lifting required of her job rather than any one particular incident caused the pain in her arms and contributed to the continuing pain in her back. Again, however, claimant's testimony is uncontroverted and is supported by the medical evidence. (See e.g. the report of Dr. Hamsa, exhibit 20, who finds claimant's recurrent muscular and ligamentous pain of the spine, shoulders, elbow and low back secondary to employment.) Further, claimant denied any previous back injury and was of sufficiently good health to have passed her preemployment physical with favorable conclusions as to the state of her health. Defendants have not presented any evidence contrary to that presented by the claimant and therefore it is accepted claimant's condition arose out of and in the course of her employment.

Since it has been stipulated that claimant has received all of the temporary total disability/healing period benefits to which she is entitled (noting that the issue of additional temporary total disability/healing period benefits has become moot based on claimant's failure to identify the disputed period), the only remaining issue is whether or not claimant is entitled to any permanent partial disability benefits as a result of the work-related injuries. Generally, a claim of permanent disability invokes an initial determination of whether

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the work injury is the cause of any permanent physical impairment or permanent limitation in work activity. Claimant, during the past three years, has consulted a veritable covey of health care providers including Doctors Mason, TanCreti, Hennessey, Hamsa, Ronald Soll, Donald Soll, Roberts, Edwards, Bendixon, Flood, Rassekh, Cotton, Anderson, Oatman, Agarwal and Blume. None of these physicians have provided either any impairment rating for the claimant nor have they imposed any permanent restrictions on claimant's work activity. Indeed, it appears that none of the physicians (with the possible exception of Dr. Blume who tentatively supports claimant's assertions with regard to her lower back) can even identify any medical reasons for her symptomology. The last physicians to evaluate claimant, Doctors Tobin and Hood, of Seattle-Tacoma, Washington, suggested claimant undergo psychological and/or psychiatric evaluation.

Claimant began her course of medical care seeing Dr. Mason who did eventually provide her with a medical certification that she was unable to return to work at the packing plant. Claimant explained in her deposition how she got that certification:

> Q. Did you ask Dr. Mason to write that note for you?
>
> A. No, I didn't.
>
> Q. How did he come to write that for you?
>
> A. Because I had been to different doctors and I went back to see her and she said I don't know what else to do for you. She said you have been to all different kinds of doctors and she said the only thing I can do is to give you a note to disable you from working at a packing plant. And she said would that be all right and I said I don't know. And she said do you want to think about it and I said you are the doctor, you tell me. I said I'm here trying to find out what is wrong. If you don't think I can do it or shouldn't be doing it, you tell me. And she said that she didn't think that I should be in there and disabled me. And told me I should try taking physical therapy, so I have been doing that.

(Claimant's Deposition, pages 9-10)

From this (since Dr. Mason's medical records have not been submitted into evidence), it would seem that Dr. Mason, too, could find no medical justification for claimant's symptoms but, so long as claimant continued to assert they were caused by her work, agreed that claimant should discontinue the work.

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Dr. Blume provides a "disability" rating of five percent. Initially, it must be noted that it is not within the domain of the medical expert to determine disability for it is impairment that is this expert's proper subject for comment. Dr. Blume's opinion is therefore given less weight particularly when it is weighed against the medical opinions of all the other physicians in this matter. Further, even Dr. Blume as the only physician to provide what might even remotely be considered an impairment rating, fails to provide any restrictions on claimant's employability or on her work activity.

Claimant argues that there are "myriads of injuries caused by repetitious trauma that are not capable of being identified by objective symptoms since there are none--only pain--often disabling" and that the only possible basis of refusing to honor claimant's claim would be if claimant's subjective complaints were found to be incredible which none of the doctors have so found. While the undersigned cannot conclude claimant does not believe she has pain, it must be concluded that claimant has failed to meet her burden that the work injury is the cause of any permanent impairment, the cause of any permanent restrictions in work activity, or the cause of any permanent disability. Therefore, claimant is entitled to nothing further from these proceedings and the other issue need not be addressed.

FINDINGS OF FACT

Wherefore, based on all the evidence presented, the following facts are found:

1. On April 9, 1984, while trying to pry apart two frozen bacon bellies, claimant felt something "pop" in her back resulting in pain.

2. For at least two weeks prior to April 25, 1985, claimant experienced increasing pain in her fingers, wrist, elbow, arms and back.

3. Claimant had no medical history of back pain or pain in her arms prior to her employment with Farmland Foods.

4. Claimant's pain was caused by her employment.

5. Claimant continued to experience pain and although she saw a number of physicians none were able to relieve her symptoms nor were they able to find any definite medical justification for those symptoms.

6. Claimant quit her employment in June 1986 after securing a medical certification that she was unable to return to work in a packing plant.

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7. Claimant continues to perceive pain.

8. Claimant has no permanent impairment as a result of her work injuries.

9. Claimant has no permanent work restrictions as a result of her work injuries.

10. Claimant has no permanent disability as a result of her work injuries.

CONCLUSIONS OF LAW

Wherefore, based on the principles of law previously stated, the following conclusions of law are made:

1. Claimant has established she sustained an injury which arose out of and in the course of her employment on April 9, 1984.

2. Claimant has established she sustained an injury which arose out of and in the course of her employment as a result of a cumulative injury on April 26, 1985.

3. Claimant has not established that her work injuries are the cause of any permanent disability.

ORDER

THEREFORE, IT IS ORDERED:

That claimant, having been paid for all the temporary total disability to which he is entitled, shall take nothing further from these proceedings.

That each party is assessed its own costs pursuant to Division of Industrial Services Rule 343-4.33.

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

Deborah A. Dubik
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DEPUTY INDUSTRIAL COMMISSIONER

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1402.40, 1803
Filed February 24, 1988
MICHAEL G. TRIER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HUGH GALEN MEHL, Claimant, vs. IOWA DEPARTMENT OF TRANSPORTATION, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 781559 A R B I T R A T I O N D E C I S I O N

1402.40, 1803

Thirty-seven-year-old claimant, who had not completed high school, sustained a back injury and underwent laminectomy surgery. He had a good result from surgery and returned to the same employment duties without any medically imposed physical restrictions. Claimant continued to complain of pain on a daily basis, which was aggravated by many of the activities in which he engaged in his employment. He discontinued some of his recreational off-work pursuits due to the pain. He had a small degree of permanent physical impairment in the range of 3%-5%. Claimant awarded 5% permanent partial disability industrially.

FILED

FEB 24 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

HUGH GALEN MEHL, Claimant, vs. IOWA DEPARTMENT OF TRANSPORTATION, Employer, and STATE OF IOWA, Insurance Carrier, Defendants.	File No. 781559 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 Hugh Galen Mehl against the Iowa Department of Transportation, his employer, and the state of Iowa, insurance carrier. Claimant seeks compensation for permanent partial disability as a result of the injury he sustained on November 19, 1984. The case was heard at Fort Dodge, Iowa on September 11, 1987 and was fully submitted upon conclusion of the hearing. The record in the proceeding consists of testimony from Hugh Galen Mehl and Edward M. Bergeson. The record also contains jointly offered exhibits 1 through 9.

ISSUES

The only issue presented for determination is the amount of permanent partial disability caused by the injury. The employer's liability and all other matters of potential dispute were established by stipulation of the parties. The rate of compensation was stipulated to be $175.36 per week. The healing period, pursuant to section 85.34(1) was stipulated to run from November 27, 1984 until April 29, 1985, the date upon which it was stipulated that any compensation for permanent partial disability should become payable.

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

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this decision.

The facts of this case as far as the occurrences leading up to the injury, the treatment and claimant's return to work are undisputed. The evidence presents little in the way of controversy between the parties regarding claimant's description of his complaints and continuing symptoms. Both claimant and Bergeson appear to be fully credible witnesses.

Hugh Galen Mehl is a 37-year-old single man who has been employed by the Iowa Department of Transportation since May, 1977. Prior to that time, he had driven a truck in the Army, ran a punch press in a factory, operated heavy equipment during construction at the Fort Dodge Airport, worked on a railroad gang crew and performed construction work as a laborer and as an electrician's helper.

During the years of his employment with the Iowa Department of Transportation, claimant has performed a variety of activities. These include mowing, repairing signs, driving trucks, operating snowplows and repairing highway blowouts. Claimant presently earns $9.01 per hour.

Claimant is not a high school graduate. He was kicked out of high school during what he indicated should have been his senior year.

Claimant related sustaining several injuries. He separated his shoulder in 1981 while playing softball. In 1983, he broke his right ankle at work.

On November 19, 1984, claimant injured his low back while loading fence posts onto a truck. He reported the injury to his supervisor. Claimant initially sought chiropractic treatment, but did not improve. He then sought care from Roy M. Hutchinson, M.D., who ordered physical therapy. When the therapy did not resolve claimant's complaints, he was referred to Mercy Hospital in Des Moines, Iowa where he came under the treatment of S. Randy Winston, M.D., a neurosurgeon. After a CT scan showed a herniated L5-S1 lumbar disc, hemilaminectomy surgery was performed (exhibit 2, page 19). After a relatively uneventful course of recuperation from the surgery, claimant was released to return to work effective April 29, 1985 (exhibit 3, pages 1-6).

On March 2, 1987, Dr. Winston issued a report in which he rated claimant as having a permanent partial impairment of three percent of the body as a whole. He found that claimant had full range of motion of his back with no discernable weaknesses or abnormal reflexes (exhibit 8). Dr. Winston explained the basis for his rating in exhibit 9.

Since returning to work in April, 1985, claimant has continued

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to perform his job in a manner which his supervisor, Edward M. Bergeson, considered as being "real good" in comparison to the work performed by claimant's co-workers. Bergeson characterized claimant as one of the better workers. Bergeson stated that if he did not have personal knowledge of the fact of claimant's injury that occurred in 1984, he would not be able to tell that claimant had a back problem through normal observation. Bergeson testified that he observes employees daily. He stated that claimant has performed without any restriction on his activity and without any complaint from co-workers alleging that claimant was not doing his share of the work. Bergeson indicated that claimant did occasionally complain of back pain.

Claimant testified that the surgery performed by Dr. Winston greatly improved his condition. He stated that currently he has some residual problems, however. Things which claimant indicated bothered him include riding a lawnmower, standing on concrete, sitting in a hard chair and driving his pickup. Claimant testified that he still does everything at work he did prior to his injury, but that he cannot do some things as well or as quickly and that he has to be more careful. He stated that he never has a day at work when he is completely free from pain. Claimant testified that it takes him longer to perform maintenance on equipment than it did prior to the injury and that bending over to work on equipment is painful. Claimant stated that riding the tractors used to cut grass bothers him, but that the larger equipment aggravates him less than the smaller units.

Claimant testified that he has experienced difficulties in attempting to engage in social activities and sports. Claimant stated that he has tried, but been unable, to play softball or basketball since the injury. He does play golf and bowl, although the activities do bother his back.

APPLICABLE LAW AND ANALYSIS

The only issue to be determined is claimant's entitlement to compensation for permanent partial disability. The facts in the case are relatively undisputed. Both witnesses appear credible.

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

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

When evaluating industrial disability, the actual impairment rating that is assigned is important only as it gives some indication of the overall degree of physical impairment. Small numerical differences are not as important as physical functional capacities. Dr. Winston assigned a three percent impairment rating. This may or may not be consistent with AMA guides, but the AMA guides are not the exclusive means of determining impairment ratings. Division of Industrial Services Rule 343-2.4. Regardless of whether claimant's impairment is three percent or five percent, it is apparent that he has had a good result from surgery. His functional limitations are small when compared to the limitations sometimes seen in other individuals who have had a similar injury and surgery.

Industrial disability, or loss of earning capacity, in a workers' compensation case is quite similar to impairment of earning capacity, an element of damages in a tort case. Impairment of physical capacity creates an inference of lessened earning capacity. The basic element to be determined, however, is the reduction in value of the general earning capacity of the person rather than the loss of wages or earnings in a specific occupation. Holmquist v. Volkswagon of America, Inc., 261 N.W.2d 516 (Iowa App. 1977) 100 A.L.R.3rd 143. Post-injury earnings create a presumption of earning capacity commensurate with those earnings, but they are not synonymous with earning capacity. 2 Larson Workmen's Compensation Law, section 57.21(d). Claimant's eductional background is such that he does not appear to be well suited for academic pursuits. Physical labor is his expected career field. At the present time, he appears to be getting along well in that field.

Claimant's spine has been compromised by surgery. He does have a small permanent functional impairment. Claimant's ability to perform strenuous physical activity has been impaired, albeit by a small amount. He has not suffered any actual loss of earnings and, in the record made, it appears that he will not if he is able to continue in his employment with the Iowa Department of Transportation. His employment appears to be relatively secure. His present assignment and the present method of assigning work within the work crew of which claimant is a part allows him the flexability needed to permit him to continue in that type of work. Work assignments and practices are, however, a matter of policy that is determined by management. Management styles and policies are known to change. If, for example, the practice of trading off when performing jackhammer work would change and claimant was assigned to be the designated

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jackhammer operator, he would likely have very serious problems. There is no indication in the record that such a change is anticipated, but common knowledge is sufficient to establish that any change in supervisory personnel brings with it a potential for change in supervisory practices. The one thing that is certain about the future is uncertainty. Change is more likely than absence of change. While claimant's disability from an industrial standpoint is small, it cannot be held to be nonexistent. It is therefore found and concluded that Hugh Galen Mehl has a 5% loss of earning capacity and a 5% permanent partial disability in industrial terms, compensable under the provisions of section 85.34(2)(u).

FINDINGS OF FACT

1. Hugh Galen Mehl has had a relatively good result from his laminectomy surgery, but continues to have back pain daily.

2. Claimant continues to perform the same type of work that he performed at the time of injury, but he does so with pain and with some small limitation of his physical abilities.

3. Claimant and Bergeson are credible witnesses.

4. Claimant is a 37-year-old single man.

5. Claimant did not complete high school.

6. All of claimant's work experience has been in the field of moderate to heavy physical labor.

7. Claimant has a permanent physical impairment in the range of 3%-5%.

8. Claimant has sustained a 5% impairment of his earning capacity.

CONCLUSIONS OF LAW

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

2. Claimant has a 5% permanent partial disability when the same is evaluated industrially under the provisions of section 85.34(2)(u).

ORDER

IT IS THEREFORE ORDERED that defendants pay claimant twenty-five (25) weeks of compensation for permanent partial disability at the stipulated rate of one hundred seventy-five and 36/100 dollars ($175.36) per week payable commencing April 29, 1985.

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All amounts are past due and owing and shall be paid in a lump sum together with interest pursuant to section 85.30.

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

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

Signed and filed this 24th day of February, 1988.

MICHAEL G. TRIER
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1803
Filed February , 1988
LARRY P. WALSHIRE

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT A. MEIER, Claimant, vs. JOHN KIRBY, INC., Employer, and FIREMAN'S FUND INSURANCE CO., Insurance Carrier, Defendants.	:	FILE NO. 826937 A R B I T R A T I O N D E C I S I O N

1803

Claimant was given a 75 percent award for industrial disability due to his inability to return to truck driving or any other position to which he is best suited since the work injury. Claimant remains unemployed and claimant's future potential vocational rehabilitation is unknown at the present time although he plans on attempting some sort of rehabilitation in the future. The odd-lot doctrine was not pled and was not applied.

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

ROBERT A. MEIER, Claimant, vs. JOHN KIRBY, INC., Employer, and FIREMAN'S FUND INSURANCE CO., Insurance Carrier, Defendants.	:	FILE NO. 826937 A R B I T R A T I O N D E C I S I O N FILED FEB 09 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Robert A. Meier, claimant, against John Kirby, Inc., employer (hereinafter referred to as Kirby), and Fireman's Fund Insurance Company, insurance carrier, for workers' compensation benefits as a result of an alleged injury on November 3, 1985. On December 9, 1987, a hearing was held on claimant's petition and the matter was considered fully submitted at the close of this hearing.

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

1. On November 3, 1985, claimant received an injury which arose out of and in the course of his employment with Kirby.

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $278.37 per week.

3. Claimant is seeking temporary total disability or healing period benefits from November 3, 1985 and defendants agree that claimant last worked for Kirby at that time.

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4. If the injury is found to have caused permanent disability, the type of disability is an industrial disability to the body as a whole.

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

ISSUES

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

I. Whether there is a causal relationship between the work injury and permanent disability; and,

II. The extent of weekly benefits for permanent disability to which claimant is entitled.

SUMMARY OF THE EVIDENCE

The following is a summary of evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision. 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 worked for Kirby, based in the Bettendorf, Iowa area, from May 31, 1985 until November 3, 1985, the date of the work injury in this case, as an over-the-road truck driver. Claimant drove a truck hauling loads of inedible animal fat to various parts of the nation. Claimant testified that he earned approximately $26,000 - $28,000 annually in this job. This job did not involve loading or unloading cargo but did require claimant to hook up and pull hoses. As a part of this work, claimant was paid extra money to clean and wash the truck. Claimant stated at hearing that he left his employment on November 3, 1985, solely because of the work injury. Defendants stated in answers to interrogatories submitted into the evidence that claimant was not terminated from his job following the work injury but his job was filled by another person. Claimant states that Kirby is no longer in business.

The facts surrounding the work injury are not in dispute. Claimant testified that on November 3, 1985, while washing his truck, he slipped and fell from the top of the tank trailer, a distance of approximately 12 feet, onto a concrete surface. Claimant said that he landed on his right side and hip. Claimant felt immediate pain in his hip and back and a rescue squad was

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called who transported him to the hospital. After a diagnosis of multiple contusions and soft tissue injury from the fall, claimant was admitted to the hospital for observation and testing. X-rays at the time did not show any fractures or other abnormalities and he was discharged on November 5, 1985 for further follow up care. Upon the advice of his physician, claimant did not return to Kirby after the accident.

Following his discharge from the hospital, claimant was at first treated by Michael Kelly, M.D., specialty, if any, unknown, with pain medication and physical therapy for persistent low back and hip pain. Claimant, at this time, began using a cane for walking. Claimant was then referred by Dr. Kelly to Fareeduddin Ahmed, M.D., specialty, if any, unknown, for evaluation and treatment in January, 1986. Upon a diagnosis of "inflammatory change effecting [sic] the right sacroiliac joint as well as the sypphysis pubis", and noting that the x-rays were negative, Dr. Ahmed treated claimant with physical therapy, ultrasound therapy and anti-inflammatory medication. In March, 1986, Dr. Ahmed noted a small decrease in pain and suggested claimant undergo a weight reduction program and continue exercises. In May, 1986, claimant had not improved and was referred by the defendant insurance carrier to Robert J. Chesser, M.D., a board certified rehabilitation specialist at the Franciscan Rehabilitation Center in Rock Island, Illinois. Upon receiving complaints of persistent lower back and right hip pain and negative CT scan and myelogram test, Dr. Chesser diagnosed claimant was suffering from right S-1 radicular process or a pinched nerve at the S-1 level of claimant's lower spine. In his deposition, Dr. Chesser could not state whether the impingement of the nerve was due to bone or disc material but from the history of no prior problems, he concluded that the condition was due to the November 3, 1985 fall. This opinion is based, in part, upon a positive ankle jerk test, a clinical test to detect nerve damage. Dr. Chesser admitted in his deposition upon cross-examination that it was possible that this positive ankle jerk test could be the result of a 1968 fracture of claimant's leg but maintained that in his opinion it was due to the November 3, 1985 fall. Dr. Chesser over the next several minutes attempted extensive physical therapy of claimant to improve his condition but the treatment did not prove successful. Only the use of an electrical nerve stimulation device called a TENS unit was helpful in relieving some of claimant's pain. In his deposition, Dr. Chesser stated that although he indicated to defendants' insurance carrier in June, 1987, that claimant's recovery had leveled off, he was not asked for such an opinion earlier. He stated that he usually concludes that patients reach maximum recovery in these types of injury one year after the injury. He also stated that in his opinion, claimant similarly had reached maximum healing one year after the incident or on November 3, 1986.

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In August, 1986, claimant underwent extensive physical and vocational rehabilitation testing at the Franciscan Center. Results of this testing indicated that claimant was very limited functionally and that claimant could not return to over-the-road truck driving. According to the Center, claimant was not able to lift over 11.5 pounds or lift frequently; could not carry over 13 pounds; could only push or pull infrequently and with no more force than 30 pounds; cannot bend forward, climb ladders and only climb stairs infrequently; sitting must be limited; must be allowed to change positions frequently; can only walk occasionally on his job; prolonged standing or squatting is not recommended; kneeling; and, crawling can only be performed extremely and frequently. The Center concluded as follows: "At present, Mr. Meier is functioning at a significantly low level. At the present time he would qualify for a part-time sedentary job due to his poor strength and overall endurance." From the vocational testing and assessment, the Center states as follows:

Vocational Interests/Skills:

The patient said he enjoyed trucking because it allowed him alot of independence. He has no other real skills. His only hobby was raising horses for a while. He said he did minor mechanics work, but has never had any formal training. "I figured I'd be a trucker driver forever". He says he has never thought about alternatives. He currently enjoys doing some woodworking; he recently built a cabinet for their microwave oven. Although he did typing in the service, it is not viewed as a vocational alternative.

. . .

Vocational Summary:

The patient seems reasonably intelligent but his education is limited. He has virtually no transferable skills. He has worked as a truck driver for over 20 years. Any other work experiences, such as minor repair work or typing, seem quite peripheral and do not afford the basis for vocational redirection. The patient also has no vocational alternatives in mind.

Recommendations:

From a vocational viewpoint, the only obvious choice is to try to return this man to his regular employment. He expresses willingness to be evaluated and participate in a work hardening program. Other than this, vocational redirection would basically have to start from scratch, with a battery of

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aptitude and interest tests. I would not expect the patient to be resistant initially, when started on physical capacity evaluation. However, he seems to have some conflicting attitudes about his rehabilitation needs. I believe he would become resistant if expected to push himself to tolerate pain, or if he was expected to go through very many changes/adjustments/adaptations. Although he can be pleasant, the M.M.P.I. suggests he is not actually a very flexible person.

Claimant has not returned to work in any capacity since the work injury. According to the Franciscan Center, claimant has cooperated fully in the testing of his physical and vocational attributes. Claimant earned his GED shortly before the hearing and plans on looking into the possibility of further training at a local community college.

Claimant was re-evaluated by Dr. Chesser in December, 1986, and his condition was found unchanged. Dr. Chesser opined that claimant suffers from permanent impairment which he rates at 15 percent caused by the November 3, 1985 injury. This opinion is uncontroverted in the record. Claimant testified that his low back, hip and leg pain continues especially with activity. This pain at times becomes severe when he "over does it." Claimant states that his activities around the house are extremely limited. Claimant currently does assist his wife in helping out relatives operate a bar and claimant spends a few hours each day serving coffee and busing tables without compensation.

Claimant is 42 years of age and possesses only a ninth grade formal education. Claimant joined the Navy during the tenth grade. In the Navy he was primarily a janitor but occasionally he did clerical work with some typing. Claimant testified that he has not performed typing since the Navy. Claimant was in the Navy for two years and has been a truck driver and after leaving the Navy he became a truck driver. Most of his truck driving has been as an over-the-road interstate trucker. Many of these truck driver jobs required that claimant load and unload trucks but a significant number only required that claimant drive the truck.

Claimant has admitted to being an alcoholic but denies that he has consumed any alcoholic beverages since receiving treatment in a detoxification center in February, 1985. Claimant denied during the hearing that he was drinking at the time of the November, 1985, fall.

There was no evidence from either party as to the possible availability of part-time sedentary work to claimant in the area of his residence.

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

APPLICABLE LAW AND ANALYSIS

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

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a preexisting injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

In the case sub judice, given the uncontroverted views of Dr. Chesser, claimant has established that he has suffered permanent impairment as a result of the work injury on November 3, 1985. Claimant was credible in testifying that he had no prior or subsequent injuries involving his back or hip.

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

In the case sub judice, claimant's medical condition before the work injury was excellent and he had no functional impairments or ascertainable difficulties. Claimant was able to fully perform his physical tasks which at times included heavy lifting, repetitive lifting, bending, twisting and stooping and prolonged sitting and standing. As a result of the painful back injury, the function of his whole body has been affected. Claimant's injury took several months to heal and he has experienced almost continuous pain in varying degrees since the date of injury.

Claimant's treating physician, Dr. Chesser, has given claimant a significant permanent impairment rating to the body as a whole and, more importantly, from an industrial disability standpoint, has imposed very significant work restrictions. Claimant had no prior work restrictions or physical impairments. Claimant's medical condition now prevents him from returning to his work as a truck driver, the type of work to which he is best suited or to any other heavy manual labor position. Claimant

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has very limited experience in any type of sedentary or clerical type of work.

Apart from his lost earnings during his healing period, claimant has suffered a significant permanent loss in actual earnings because of his inability to return to work.

Claimant is middle aged and should be in the most productive years of his life. Now his economic future is highly uncertain and depends largely upon his ability to rehabilitate himself vocationally. Defendants argue in their brief that any assessment of claimant's disability is premature because claimant is attempting vocational rehabilitation at the present time and this may effect his industrial disability. This agency has decided that any assessment of future success of retraining is improper in an industrial disability case. Such an assessment is too speculative. It is only claimant's present earning capacity which is relevant to the issue of permanent disability. Stewart v. Crouse Cartage Company, Appeal Decision filed February 20, 1987. Certainly, if the rehabilitation efforts are successful, this agency is available to defendants to review the matter upon a petition by defendants for review-reopening.

At the prehearing conference in this case, claimant indicated that he was not relying upon the so-called "odd-lot" doctrine under the holding in Guyton v. Irving Jensen Co., 373 N.W.2d 101, 105 (Iowa 1985). According to this decision, the burden of proof shifts to defendants, in appropriate circumstances, on the issue of the availability of light duty work to an injured worker. It is the policy of this agency that such a theory of law cannot be invoked by claimant without prior notice to defendants at the prehearing conference.

Looking then to the claimant's case, we find that claimant is able to perform part-time sedentary work according to his physicians and vocational assessments. Claimant is currently functioning in the capacity as a part-time bartender/waiter. One must conclude that he could do such work on an employed basis and claimant has not shown that such work is not available to him.

However, moving from an over-the-road truck driver making $28,000 per year to a part-time bartender/waiter, clerk or other unskilled sedentary work is certainly a very severe loss of earning capacity which should be fully compensated.

Therefore, after examination of all the factors of industrial disability, it is found as a matter of fact that claimant has suffered a 75 percent loss of earning capacity from his work injury. Based upon such a finding, claimant is entitled as a matter of law to 375 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 75 percent

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of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

As claimant has established entitlement to permanent partial disability benefits, claimant may be entitled to weekly benefits for healing period under Iowa Code section 85.34(1) from the date of injury until claimant returns to work; until claimant is medically capable of returning to substantially similar work to the work he was performing at the time of the injury; or, until it is indicated that significant improvement from the injury is not anticipated, whichever occurs first. Dr. Chesser indicates in this case that claimant reached maximum healing one year after the injury on November 3, 1986 and his opinions are uncontroverted. Therefore, claimant is entitled to healing period benefits from November 3, 1985 through November 3, 1986 and permanent partial disability benefits shall be awarded from November 4, 1986.

FINDINGS OF FACT

1. Claimant was a credible witness.

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

3. On November 3, 1985, claimant suffered an injury to the low back and hip which arose out of and in the course of his employment with Kirby. This was a soft tissue injury causing a radiculopathy or pinched nerve at the S-1 level of claimant's lower spine.

4. The work injury of November 3, 1985 was a cause of a period of disability from work beginning on November 3, 1985 and ending on November 3, 1986, at which time claimant reached maximum healing.

5. The work injury of November 3, 1985 was a cause of a 15 percent permanent partial physical impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no heavy lifting, pushing, pulling; no repetitive lifting, bending stooping or climbing; or, prolonged sitting or standing.

6. The work injury of Novemer 3, 1985 and the resulting permanent partial impairment then work restrictions is a cause of a 75 percent industrial disability. Claimant is 42 years of age with only a ninth grade formal education. Claimant is unable to return to truck driving, the employment to which he is best suited. Claimant's only work history has been as an employed truck driver. Claimant has only worked in a sedentary clerical job briefly when he was 18 years old while in the Navy. Claimant has earned his GED and plans on taking further schooling

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to achieve vocational rehabilitation. The probable success of claimant's plans to retrain himself is unknown. Claimant is currently unemployed and only helps out as a part-time bartender/ waiter in a bar owned by relatives for which he receives no compensation. Claimant is able to perform part-time sedentary work as a low grade clerical person; restaurant or bar worker; or, some type of light bench work.

CONCLUSIONS OF LAW

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

ORDER

1. Defendants shall pay to claimant three hundred seventy-five (375) weeks of permanent partial disability benefits at the rate of two hundred seventy-eight and 37/100 dollars ($278.37) per week from November 4, 1986.

2. Defendants shall pay to claimant healing period benefits from November 3, 1985 through November 3, 1986 at the rate of two hundred seventy-eight and 37/100 dollars ($278.37) per week.

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

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

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

6. Defendants shall file activity reports 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 1st day of February, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

BRUNO MEISTERBURG, Claimant, vs. GENERAL GROWTH PROPERTIES, Employer, and THE HARTFORD, Insurance Carrier, Defendants.	:	File No. 676911 A P P E A L D E C I S I O N FILED JAN 20 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from a review-reopening decision denying further compensation because he failed to establish a causal connection between his work injury and his disability.

The record on appeal consists of the transcript of the hearing and joint exhibits 1 through 13. Both parties filed briefs on appeal.

ISSUE

Whether claimant has met his burden in proving that the disability on which he is basing his claim was causally connected to the injury he received while working for defendant employer on July 24, 1981.

REVIEW OF THE EVIDENCE

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

Claimant testified that in July 1980 he was injured in a nonwork-related car accident in which he sustained a concussion, a bruised elbow and a torn cartilage in the left knee. Claimant admitted that following the car accident he had problems with headaches and with his left knee and left arm.

Claimant's primary treating physicians for his left knee

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problems were Sinesio Misol, M.D., and Sidney Robinow, M.D., now deceased. Dr. Misol testified by deposition that Dr. Robinow performed an arthroscopic examination of the knee and found "a little damage of the joint surfaces." (Misol Deposition, page 8) Dr. Misol stated that because claimant continued to experience pain and a clicking sensation, he performed an arthroscopy on October 30, 1980 which he stated revealed "a roughness of the undersurface of the patella, or the kneecap." (Misol Dep., p. 9) Dr. Misol stated that subsequently on December 5, 1980 he removed the inside cartilage of the knee joint. Dr. Misol continued to see claimant after December 5, 1980 and he opined the reason for those visits:

> Q. You mentioned seeing Mr. Meisterburg subsequent to December 5th, 1980. Could you briefly describe the reason for those visits.
>
> A. Yes. So what has happened to him is that the undersurface of the kneecap, that is not normal, and nothing was done or could be done to change that in any significant way, has continued to bother him some in that if he does squat down or go up and down ladders or steps, apparently there is still a little grinding and some discomfort. And the main thing, I believe, it is the lack of one of the cartilages in the knee, the inside cartilage, also known as medial meniscus, that has led to a little extra wear and tear in that part of the knee, because, after all, that structure is a shock absorber that cushions the weight-bearing transmitted from the thigh bone to the leg bone. Because of that, he has pain over the inner part of the left knee, and--

(Misol Dep., pp. 9-10, lines 21-25, 1-13)

Dr. Misol opines that claimant suffers a 20 percent permanent partial impairment of his left lower extremity as a result of the July 1980 car accident and subsequent surgeries.

Claimant stated that he only received immediate care for his concussion.

Claimant testified that in July 1981 while painting an apartment for defendant, he slipped and fell down a flight of stairs and landed on his left shoulder, left knee and head. Claimant stated that he went back to Dr. Misol for his knee problems. Dr. Misol opined concerning the effect of the July 1981 injury on claimant's preexisting knee condition:

> Q. And do you have an opinion as to what effect, if any, that injury of July 24th, 1981, had on the

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preexisting condition?

A. I have an opinion.

Q. What is that opinion?

A. That it probably did nothing but strain the joint a little bit, so no permanent damage added to the previous situation.

(Misol Dep., p. 11, lines 16-23)

Claimant has also seen Hugh W. Ratliff, M.D., Robert L. Allred, M.D., P.A., and R. R. Groff, D.C., since the work injury for examination and treatment of his left knee. Dr. Ratliff opines:

> IMPRESSION: POSSIBLE INTERNAL DERANGEMENT OF THE LEFT KNEE, MOST LIKELY CHONDROMALACIA OF THE PATELLA. POSSIBLE MEDIAL PLICA CAUSING POPPING ACROSS THE MEDIAL CONDYLE.
>
> DISPOSITION: I certainly see no reason for this patient to be wearing a brace since he is running a jackhammer and driving a truck, but I will start him on Nalfon 600 mg. t.i.d. for 2 weeks. See him back at that time and then if there is no improvement I will recommend arthroscopy of the knee primarily for diagnostic reasons, possibly for therapeutic reasons of an obvious cause for the popping and pain. Examination of the thigh reveals exactly 5 inches above the medial joint line with both knees at full extension. the patient has 14-3/4" circumference of the left thigh and 15-3/4" on the right thigh.

(Jt. Ex. 11, p. 1)

Dr. Allred performed Cybex tests which he opines reveal "substantial weakness inthe [sic] hamstring muscle group and some weakness in the guards group. The comparison of the two sides indicates that he might have an anterior cruciate deficient knee although that should be attainable information from his previous arthrosocopic [sic] examinations and/or from his previous surgery." (Jt. Ex. 13, p. 2)

Dr. Groff opines:

> He has been working full time performing manual labor. There is still some degree of weakness and discomfort in the leg during strenuous physical activity. I would rate his disability at 5% of the whole man.

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> Since Mr. Meisterburg was not seen in this office for a year after the accident, it is extremely difficult for me to determine if the accident was the cause of his problem. We contacted Dr. Misol in Des Moines, but he could be of little help to us.

(Jt. Ex. 12, p. 4)

Claimant stated that he went to Robert Jones, M.D., for his arm condition and that Dr. Jones referred him to Albert L. Clemens, M.D. Dr. Clemens reports the treatment and diagnosis of claimant's left arm condition in a December 21, 1981 letter:

> Mr. Meisterburg does have a diagnosis of a thoracic outlet syndrome, left, and it has been correlated with the injury for which you have inquired.
>
> The patient's original exam and diagnosis was made by Dr. Robert Jones, neurosurgeon of this city, as you have already noted. He underwent a left transaxillary resection of the 1st rib on 9-25-81, and is showing gradual improvement. He still has a markedly decreased grip in his left arm and hand. I last saw him on December 17, 1981. He definitely has less pain, better range of motion and I requested to see him in six weeks.

(Jt. Ex. 9, p. 1)

Dr. Clemens opines concerning the cause of claimant's thoracic outlet syndrome:

> In answer to your question in relationship to a fall which I believe was his second of two accidents, the only thing I can say would be that the patient correlates aggravation continuation of his symptoms. At least by history there is no anatomical way that I can be more specific. History, I am sure has also been obtained from Dr. Robert Jones, who is his original treating physician.

(Jt. Ex. 9, p. 2)

Dr. Clemens opines that claimant suffers from a 20 percent permanent partial impairment to the left upper extremity. See joint exhibit 9, page 3. Dr. Clemens reports that claimant is left-handed.

Claimant indicated that the surgery to remove his first rib reduced the numbness and tingling in his arm but that he still

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experiences numbness and tingling in his fingers.

Claimant continues to complain of headaches since the July 1981 work injury. Claimant opined that these headaches are untreatable except for aspirin and seclusion. On cross-examination, claimant denied that his headaches persisted from the July 1980 car accident through the July 1981 work injury. Claimant admitted that he had some numbness and atrophy in his left arm after the July 1980 car accident. Claimant also complains of back problems which he opines are due to his unusual gait to compensate for his knee problems.

After the work injury, claimant stated that he moved to McKinney, Texas to work in the city maintenance department. Claimant indicated that he worked for McKinney for two years doing physical labor including loading and unloading an asphalt truck and running a jackhammer. After leaving McKinney, claimant stated that he worked for two years as a painter for Fox and Jacobs Company doing interior and exterior painting. After leaving Fox and Jacobs, claimant stated that he worked on his own as a painting subcontractor for two and one-half years. At the time of the hearing, claimant reported that he was working for Summit Paving in Golden, Colorado as a laborer and light equipment operator.

Claimant also testified concerning prework-injury education and work history. Briefly stated, claimant has a high school diploma from Des Moines Technical High School, one and one-half years of college at Grand View College in Des Moines, and training in a position of various light equipment. Claimant has worked as a paint mixer for a body shop, an orderly, a batch maker for a feed mill, an EKG technician and a painter.

APPLICABLE LAW

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

The claimant has the burden of proving by a preponderance of the evidence that the injury of July 24, 1981 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all other evidence introduced bearing on the causal connection. Burt, 247 Iowa 691, 73 N.W.2d 732. The opinion of experts need not be

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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).

ANALYSIS

Claimant argues on appeal that the work injury aggravated a preexisting condition resulting in permanent disability. The deputy considered the question of whether claimant's disability is causally connected to the work injury:

However, due to the existence of a prior injury involving similar symptoms and a lack of helpful medical testimony, claimant was unable to establish by a preponderance of the evidence that the work injury was a significant cause or contributing factor of his current physical problems. Approximately a year before the work injury in this case, claimant was involved in an automobile accident which severely injured his left knee, left arm, and head. Claimant admitted at the hearing and in previous testimony that he had significant difficulties with his left knee and arm as a result of this accident including headaches.

Before the work injury, claimant underwent three surgical procedures on his knee by Dr. Misol and his former associate, Sidney Robinow, M.D. According to the records of these physicians, claimant complained of catching and of his knee "going out" before the work injury. In his deposition, Dr. Misol opines that claimant only suffered a mild strain of his knee in the July 1981 fall at work and that he suffered no change of condition resulting in additional permanent partial impairment. It was the further opinion of Dr. Misol that claimant's

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current continuing difficulties are an expected consequence of the injuries claimant sustained in the July 1980 auto accident. Again, Dr. Misol's opinions are uncontroverted in the record. Dr. Allred gave no opinions as to the cause of claimant's current leg weakness except for a lack of sufficient vigorous physical therapy.

Claimant admitted in his deposition that he had atrophy and weakness of his arm including tingling and numbness in his arm and fingers as a result of the car accident before the work injury. His complaints today are similar except that the tingling and numbness is now limited to his fingers subsequent to the surgery Dr. Clemens performed. In his deposition in December 1984, claimant stated that his primary difficulties at that time were his back and knee, not his hand. Although he may now have a recurrence of arm and hand problems, there does not appear to be a continuous causal link between claimant's arm complaints and the July 1981 work injury. More importantly, claimant's treating physician for the thoracic outlet syndrome condition which is considered to be the cause of claimant's current arm weakness and loss of feeling in his fingers could not clearly causally connect the thoracic outlet syndrome to the July 1981 work injury. In his report of April 6, 1982, exhibit 9, Dr. Clemens states as follows:

> In answer to your question in relationship to a fall which I believe was his second of two accidents, the only thing I can say would be that the patient correlates aggravation continuation of his symptoms. At least by history there is no anatomical way that I can be more specific.

There is no explanation in the record as to what the doctor meant by "patient correlates aggravation continuation of his symptoms." As no other medical opinions regarding the thoracic outlet syndrome were offered into the evidence, no finding of fact causally connecting the injury to permanency either to the hand or to the body as a whole could be made based upon this language. Dr. Clemens could be referring only to a temporary aggravation of symptoms or he may be only parroting the patient's view as to causal connection.

With reference to claimant's back difficulties, Dr. Groff rendered no opinions as to the cause of

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such problems. Claimant had no back complaints at the time of the work injury. In his deposition of December 1984 claimant stated that his back began to hurt "just lately." Although claimant theorizes that his back problems are due to his gait which was precipitated by the knee injury, no physician has been shown to support claimant's theories in this matter.

Given the absence of clear medical opinions, we are left only with claimant's belief that the work injury is a cause of his difficulties. Claimant testified at the hearing that although he had difficulties before the work injury, he was able to work. However, the evidence rather clearly demonstrates that claimant has worked steadily in heavy manual labor since leaving the employment of General Growth. Furthermore, his complaints before and after the injury are not significantly different. Although it is possible to make a finding of causal connection without clear support of medical authority such as when a connection is only a "medical possibility," this agency can do only when the lay testimony clearly establishes an absence of symptoms before the injury and the presence of symptoms immediately afterwards. Such a showing has not been made in this case.

(Review-Reopening Dec., pp. 3-5)

The greater weight of evidence supports the deputy's finding that claimant's present disability is not causally connected to the July 1981 work injury.

FINDINGS OF FACT

1. On July 24, 1981, claimant sustained injuries to his left knee, left shoulder and head when he fell down a flight of stairs while painting an apartment for defendant employer.

2. The July 24, 1981 work injury to claimant's left knee, left shoulder and head resulted in no permanent impairment.

CONCLUSION OF LAW

Claimant has not established a causal connection between his July 24, 1981 work injury and any permanent disability.

WHEREFORE, the decision of the deputy is affirmed.

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ORDER

THEREFORE, it is ordered:

That claimant take nothing further from these proceedings.

That claimant pay the costs of this appeal including the transcript of the hearing proceeding and defendants pay the costs of the review-reopening proceeding.

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

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICKY L. MERCHANT,

Claimant,

vs.

HART BEVERAGE COMPANY,

Employer,

and

ROYAL INSURANCE COMPANY

Insurance Carrier,
Defendants.

File No. 798237

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 awarding temporary total disability benefits.

The record on appeal consists of the transcript of the arbitration proceeding; joint exhibits 1 through 15; and claimant's exhibits 2 and 3. Both parties filed briefs on appeal.

ISSUES

Claimant states the following issues on appeal:

1. Whether claimant's permanent disability was causally related to his employment.

2. Whether the deputy properly found that claimant lacked motivation and was not discharged because of his injuries.

3. Whether claimant is entitled to an award of industrial disability.

REVIEW OF THE EVIDENCE

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

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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 adopted. The medical evidence in the record shows that claimant has not suffered permanent disability as a result of his injury of March 3, 1985. Claimant was discharged for poor work performance and absenteeism. Only a portion of claimant's absenteeism was caused by his work injury. Claimant has suffered temporary total disability as a result of his injury of March 3, 1985.

FINDINGS OF FACT

1. On March 3, 1985, claimant materially aggravated his preexisting low back condition while lifting at work.

2. As a result of the aggravation, claimant was temporarily totally disabled March 5 and 6, 1985 and from March 12 to March 21, 1985.

3. The treatment claimant received from March 5, 1985 to April 8, 1985 from Dr. Bronson was reasonable and necessary for the treatment of his injury.

4. Claimant did not suffer permanent disability as a result of his injury.

5. Claimant was discharged from his employment in June 1985 for poor job performance unrelated to his injury.

6. Claimant's rate of compensation is $257.02.

7. Claimant has been previously paid three weeks and five days of compensation under the Nebraska statute at a rate of $220.22.

CONCLUSIONS OF LAW

Claimant has proven by a preponderance of the evidence that he received an injury arising out of and in the course of his employment on March 3, 1985.

Claimant has proven by a preponderance of the evidence that there is a causal relationship between his injury and his temporary total disability and the chiropractic treatment rendered by Dr. Bonson.

Claimant has not suffered any permanent disability as a result of his injury of March 3, 1985.

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

ORDER

THEREFORE, it is ordered:

That defendants shall pay claimant temporary total disability benefits for two point two eight six (2.286) weeks at a rate of two hundred fifty-seven and 02/100 dollars ($257.02) per week.

That defendants are entitled to credit for benefits previously paid.

That defendants pay for the chiropractic treatment of Dr. Bronson.

That costs are taxed to claimant except for the attendance of the court reporter at hearing which is taxed to defendants. Costs of the appeal are taxed to claimant.

Signed and filed this 31st day of May, 1988.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LEWIS A. MERRITT, Claimant, VS QUAKER OATS, Employer, and IDEAL MUTUAL INSURANCE, Insurance Carrier, Defendants.	:	File No. 705825 R E V I E W - R E O P E N I N G D E C I S I O N

FILED

MAR 07 1988

IOWA INDUSTRIAL COMMISSIONER

INTRODUCTION

This is a proceeding in review-reopening from a memorandum of agreement. This action was filed by Lewis A. Merritt, claimant, against Quaker Oats, employer and Ideal Mutual Insurance Company, insurance carrier, defendants, for benefits as a result of an injury which occurred on June 18, 1982. The memorandum of agreement was filed on November 16, 1982 and pursuant to it claimant has been paid $5,098.33 in medical benefits, $8,275.92 in healing period benefits and $14,629.00 in permanent partial disability benefits on the basis of a 20 percent disability of the left arm which amounted to 50 weeks of permanent partial disability benefits. A hearing was held in Cedar Rapids, Iowa on June 23, 1987 and the case was fully submitted at the close of the hearing. The record consists of joint exhibits A, B, C and 1 through 6; claimant's exhibit D; defendants' exhibits 7 and 8; the testimony of Lewis A. Merritt (claimant), Philip J. Stoos (claimant's co-worker), Dewey L. Jacobson (claimant's co-worker), Betty Merritt (claimant's wife) and Gayne A. Darrow (claimant's supervisor). Both parties 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 injury.

That the claimant sustained an injury on June 18, 1982 which arose out of and in the course of employment with employer.

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That the injury was the cause of temporary disability; that claimant is entitled to temporary disabilty benefits from June 19, 1982 through January 2, 1983; that these benefits have been paid; and that temporary disability for that period is no longer an issue in dispute.

That claimant's entitlement to additional temporary disability benefits is disputed but the time off work for which claimant now seeks additional temporary disability benefits is stipulated to be from December 26, 1983 through October 12, 1984.

That the weekly rate of compensation, in the event of an award, is $292.58 per week.

That claimant's entitlement to medical benefits under Iowa Code section 85.27 and 85.39 is no longer in dispute.

That defendants are entitled to a credit for 50 weeks of permanent partial disability benefits paid prior to hearing at the rate of $292.58 per week in the total amount of $14,629.00.

ISSUES

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

Whether claimant is entitled to temporary disabilty benefits for the period from December 26, 1983 through October 12, 1984.

Whether the injury was the cause of any permanent disabilty.

Whether claimant is entitled to permanent disability benefits, and if so, whether claimant is entitled to scheduled member or industrial disability benefits.

Whether defendants are entitled to a credit under Iowa Code section 85.38(2) for $12,446.75 of income disability benefits paid under an employee nonoccupational group health plan prior to hearing for the period from December 26, 1983 through October 12, 1984.

Whether claimant is entitled to certain costs set out in claimant's exhibit D.

SUMMARY OF THE EVIDENCE

There were numerous duplications in the exhibits introduced into evidence because both parties introduced many of the same documents. Apparently, the parties made no attempt to comply with paragraph 10(2) of the hearing assignment order to eliminate this unnecessary duplication of exhibits. Nevertheless, all of the evidence was examined and considered. The following is a

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summary of the pertinent evidence.

Claimant was 55 years old at the time of his injury and 58 years old at the time of the hearing. He grew up on a farm and went to the tenth grade in high school. He was in the Navy for two years. At sea, he ran the boiler. On land, he repaired small engines. Past employments include machine shop work, running a lathe and a drill press in the winter and working on construction in the summer. He drove a truck over the road for three years. He was a plumber for five years and then operated his own plumbing shop for ten years. He started to work for employer in 1970 as a pipefitter and continues to be employed there as a pipefitter today. He passed a preemployment physical examination and testified that he had no shoulder problems when he started to work for employer.

Claimant stated that his job as a pipefitter requires a lot of overhead work. There are miles and miles of overhead pipe and some 10,000 sprinklers. His job is to keep this pipe system functioning. At the time of the injury he was installing a new steam line in a tunnel. He dislocated his left shoulder on June 18, 1982. Claimant had dislocated this same shoulder four times prior to this injury and twice after this injury.

Claimant testified that his first shoulder dislocation occurred at work in 1976. He was working in the humidity room standing on some sacks. As he stepped off the sack a friend called to him. This distracted him, he missed his footing, fell against the ladder, hit his shoulder and drove it out of its socket.

The medical report of John R. Walker, M.D., also records that claimant injured his shoulder again on December 8, 1976 when he was standing on a ladder loosening a pipe with a pipe wrench. He lost his balance and fell from the ladder approximately 15 feet, landing on his heels and then falling to his left side, striking his left shoulder (Exhibit A, Dr. Walker, page 1).

Claimant further testifed that in approximately January of 1981, while working at home, he reached down to pick up some sheetrock and his shoulder dislocated again. While his wife was driving him to the hospital for emergency care they crossed some railroad tracks. Claimant was crunched down in the seat due to pain and when the car struck the railroad tracks it popped his left shoulder back into the socket and the pain quit.

Claimant testified that in approximately April of 1982 he was putting some plywood on a roof at home when he dislocated his left shoulder again. He was standing on the ground, his foot slipped, and he fell against the house hitting his shoulder.

Then on June 18, 1982 claimant was working on a ladder in a

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tunnel on a steam line putting hangers on the ceiling to hold an eight inch pipe. He reached through the pipes with his left arm, his dominant arm, and put his wrench on a bolt. As he began to tighten the bolt, his left shoulder popped out again. Dewey Jacobson, a welder, and Philip Stoos, another pipefitter, were working with him at this time. He simply felt a sudden pain as he reached through the pipes and began to tighten the bolt with his wrench. Jacobson and Stoos had to help him get down from the ladder. He saw the nurse who sent him to the emergency room at St. Luke's Hospital where he was examined and treated. Claimant testified that they popped his arm back into the socket; however, the records of Dr. Walker indicate as claimant was being tranferred on a cart the shoulder dislocation reduced itself (Ex. A, Dr. Walker, p. 2).

Claimant then testified that his arm had popped out of the socket so many times that the employer's physician W. R. Basler, M.D., gave him a list of three specialists and claimant chose to go see Albert R. Coates, M.D., an orthopedic surgeon, in Cedar Rapids. Claimant related that Dr. Coates performed surgery in the summer of 1982 to staple and tighten the muscles in his left shoulder. Claimant added that after this surgery the little finger and ring finger on his left hand went numb. Then Dr. Coates performed a second surgery to relieve this finger numbness.

Claimant testified that he returned to work on January 2, 1983. He performed his job but his shoulder was still sore. He felt like it was not completely healed. He had trouble when working overhead. He stated that he did his job to the best of his ability but he had trouble doing it. Therefore, later in 1983 claimant related that he bid and received a job as a pipefitter in the ready-to-eat department because there was less overhead work there than in the pump department where he had been working. Claimant explained that seventy percent of the pump room work was overhead whereas only fifty percent of the ready-to-eat department work was overhead.

Claimant further related that on December 25, 1983 (Christmas Day) he injured his shoulder again at home. He climbed down a ladder into a well to let air out of the pump to make it stop short cycling. As he climbed out of the well there was ice on the step, his foot slipped, he fell and hit his arm and dislocated it again. He said that he was off work until February of 1984 following that incident. Dr. Coates released claimant to return to work on February 24, 1984 but Dr. Coates said that claimant was restricted from doing overhead work. Employer had no work for a pipefitter who could not do overhead work since most of a pipefitter's work is overhead. Claimant said employer told him that he would have to do the full job as a pipefitter or else they did not have any work for him at all. Claimant testified that this caused a severe financial crisis for him. He said that he worked at home to try to build up his ability to work

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while he continued to treat with Dr. Coates. Dr. Coates then tested claimant's strength on a machine and allowed him to return to work without restrictions on October 12, 1984. Since returning to work he has had to be cautious about how he does things and to be very careful as to how he works in order to do his job. He said that he had worked solidly from October 12, 1984 doing his old job as a pipefitter without any restrictions from the doctor. He has not missed any work since October 12, 1984 until he dislocated his left shoulder again at home on May 27, 1987 while putting siding on a shed at home. At that time, he was lifting a piece of siding, the wind caught it and jerked his shoulder out of the socket again. Claimant admitted that he used a hammer to put this siding on and was able to pound while standing on a ladder at face level.

Claimant disclosed that his fingers are still a little bit numb. He said he lacks the strength it usually takes to use pipe wrenches. He uses "cheater bars" on the wrenches. It is difficult to work overhead but he does the best he can. He indicated that he thought his left arm was atrophied and that he believed he was limited to lifting only 20 pounds as a self determined weight restriction. Claimant complained that his left arm hurts all of the time if he does not take pain pills. He said his pain pills are Bayer aspirin and Tylenol. He takes four to six of them per day. They do provide relief. This is what the doctor prescribed for him to take for pain. He has been taking them ever since his injury on June 18, 1982. He can no longer throw 60 pound bales of hay at home. He cannot mow the yard because the vibration of the mower hurts his left arm.

Claimant testified that he was earning $10.75 per hour on June 18, 1982. He also revealed that he was earning $14.10 per hour at the time of the hearing. He added that he works overtime practically every time the opportunity arises, which is approximately once a month, because he needs the money.

Philip J. Stoos testified that he is a 19 year employee of Quaker Oats. He is a pipefitter and was working with claimant at the time of his injury on June 18, 1982. Claimant was tightening a bolt while installing a hanger for an eight inch pipe when claimant slumped over on his ladder. He was ten or fifteen feet away when it occurred. Claimant was taken to a nurse and then to the hospital.

Dewey L. Jacobson testified that he is a 20 year employee of employer. He is a welder and was working with claimant on June 18, 1982. He was standing on the ladder behind claimant about half way up stabalizing the ladder. All of a sudden, claimant was laying over the ladder. He stated claimant does some things with his right hand now. It was Jacobson's opinion that claimant did not have as much power with his left hand and that he could not work like he used to do.

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Betty Merritt, claimant's wife, testified that after June 18, 1982 claimant could not put bales up in the barn at home and that if he hammered a lot it hurt his arm. She said claimant can no longer mow the yard because it jolts his shoulder. He cannot paint because it hurts his shoulder. They live on an acreage of eight acres. Claimant built a garage and a shed from scratch but since his injuries he is limited to what he can do.

Gayne A. Darrow testified that he is a 16 year employee of employer. He has been maintenance supervisor since 1981. He supervises all craft employees, including pipefitters. He has been claimant's supervisor since May 2, 1983. Claimant was earning $10.75 per hour on May 2, 1983. He now earns $14.10 per hour. Darrow stated that claimant was a very good worker. He never complains. He has never failed to perform his job. His work is not inferior to other pipefitters. Claimant is a very good pipefitter. He has never refused to work overtime when asked to do so. Claimant has never voiced any physical complaints or said that he had any difficulty doing his job. Claimant's attendance record is good. Claimant has not lost any work due to his shoulder. Claimant does not have any medical restrictions.

Darrow photographed a brief video of three jobs that a pipefitter does which was shown at the hearing. The video demonstrated a pipefitter (1) taking off a coupling (2) breaking a joint and (3) working on overhead pipes. Claimant said that these three jobs did not represent all of the jobs that a pipefitter does. Claimant also pointed out that the man in the video is six foot tall, whereas he is only five foot five inches tall and he finds many things over his head.

Darrow said he has never seen any medical reports on claimant. He has never thought of claimant as having a bad shoulder or having any impairment. He is a good worker who has always done his entire job without any complaints and has done it well.

Dr. Coates, the primary and only treating physician, first saw claimant on June 22, 1982 for what he described as recurrent dislocations of the left shoulder. Claimant did not have a dislocation at that time, but because of his chronic dislocation problem, claimant did not trust his shoulder and wanted to have it repaired. Dr. Coates described that claimant had torn the soft tissues on both sides of his shoulder joint which allowed his shoulder to dislocate repeatedly (Ex. C, pp. 4 & 5).

Dr. Coates speculated that claimant did not have a significant tear after the initial 1976 injury at work because the second dislocation did not happen until five years later. Apparently Dr. Coates was not aware of the second dislocation that occurred in December of 1976 that Dr. Walker described. Dr. Coates felt that the subsequent dislocations in January of 1981 and April of 1982 worsened claimant's condition to the point that the tear

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had become complete enough that it simply would not hold the shoulder in the joint anymore. Furthermore, the fact that the dislocations would reduce themselves spontaneously demonstrated that the shoulder was so unstable that it could slip in and out at will. When claimant's shoulder dislocated at work on June 18, 1982, it was not a normal shoulder (Ex. C, pp. 6-9).

Dr. Coates performed surgery on the left shoulder on June 30, 1982. At that time he confirmed that the joint capsule, which is the tissue attached to both sides of the shoulder joint, had been torn loose completely from the glenoid which is the cup part of the bone of the shoulder blade (scapula). Dr. Coates said there was nothing to hold the arm bone in that socket. The history of this injury was nontraumatic. Claimant was simply reaching up tightening a screw with a wrench when the shoulder slipped out of the joint. This would not cause extensive injury in a normal shoulder. The doctor testified that the surgery, which was called a tight capsule procedure, stapled the torn tissues next to the bone long enough for them to heal back in that position (Ex. C, pp. 9-11).

Dr. Coates said that claimant did not have any specific long standing injury as a result of the dislocation that occurred on June 18, 1982. The only reason for the surgery then was to repair it so that it would not continue to dislocate again and again. It's difficult to go through life with your shoulder popping out (Ex. C, pp. 12 & 13). The doctor said that claimant had a full range of motion without resistance. With resistance claimant had some limited range of motion and loss of strength. Nevertheless, the doctor testified that claimant was released to return to work at his old job without restriction and claimant did in fact return to work in January of 1983. The physician pointed out that the shoulder actually was more stable after the surgery than before the surgery. Claimant returned to work without restrictions to see if he could do the job by agreement between claimant, employer, insurance carrier and the doctor. Claimant continued to work until he injured his shoulder at home on December 25, 1983. Dr. Coates believed that claimant chipped his glenoid, the cup part of the shoulder blade, at that time (Ex. C, pp. 13-19). Dr. Coates determined that claimant sustained a permanent functional impairment after the June 18, 1982 injury and before the December 25, 1983 injury, but that he was unable to mathematically allocate or apportion how much impairment was due to prior dislocations previous to June 18, 1982 or the December 25, 1983 dislocation. Dr. Coates clearly stated that part of the permanent impairment was due to the prior dislocations but he could not say how much (Ex. C, pp. 19-22).

After the tight capsule surgical procedure on June 30, 1982 claimant developed ulnar dysfunction of the left arm that was caused by the surgery. Claimant began to have paresthesia in the ring and little finger of the left hand and hypersensitivity

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distal to the left elbow. Dr. Coates explained that this was because when he tightened up the tissues to attach them to the bone it pulled on the ulnar nerve which runs from the neck to the elbow at the point of the armpit causing these symptoms (Ex. C, pp. 24-25). Therefore, Dr. Coates then performed an ulnar nerve transplant and decompression on September 28, 1982 in an attempt to relieve these symptoms.

On September 28, 1983 Dr. Coates determined that claimant sustained a 20 percent permanent functional impairment of the left upper extremity (Ex. C, p. 28). He reiterated that he was unable to mathematically allocate or apportion how much of this rating was due to the injury of June 18, 1982 and how much was attributable to the prior dislocations (Ex. C, pp. 30-33). He did break down the 20 percent rating of the left upper extremity to say that one-half, or ten percent of it, was for the ulnar nerve and he determined this from reference to the Guides to Evaluation of Permanent Impairment, second edition published by the American Medical Association. The other one-half, or ten percent, is for the shoulder and he based this determination simply on his professional experience and judgment (Ex. C, pp. 39 & 40).

Claimant also had carpal tunnel syndrome on the left side but Dr. Coates said it was not related to claimant's shoulder condition and that the carpal tunnel syndrome is not included in the 20 percent permanent functional impairment rating (Ex. C, pp. 32-34).

Dr. Coates cautioned that claimant's shoulder prognosis was guarded. He stated that claimant should restrict or eliminate working overhead because it puts the most amount of strain on the repaired tissue. As far as the ulnar nerve injury, claimant should avoid putting pressure on the elbow as a matter of his own personal comfort (Ex. C, pp. 35-38). The doctor also warned that claimant should avoid heavy pushing and pulling with his left arm (Ex. C, p. 38).

John R. Walker, M.D., an orthopedic surgeon, examined claimant one time for a diagnosis and evaluation and made a report on February 23, 1987 (Ex. A). Dr. Walker took an excellent detailed history and even pointed out that claimant had two shoulder dislocations in 1976 rather than just one dislocation.

Dr. Walker felt that the glenoid chip which appeared on x-ray preexisted the December 25, 1983 fall in the pump well pit. Dr. Walker listed claimant's complaints about his shoulder, arm and hand then he concluded as follows.

OPINION: The patient has the following diagnoses:

1.) He has a post-traumatic arthritis of the left

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shoulder.

2.) He has still an unstable, not completely dependable shoulder following the original surgery.

3.) The patient appears to have a persistent ulnar neuritis of the left, upper extremity.

4.) He appears to have a carpal tunnel syndrome on the left with involvement of the median nerve.

All-in-all I believe that this patient has a permanent, partial impairment of the left, upper extremity amounting to 40% of the left upper extremity. This, then, reduces to a permanent, partial impairment of 24% of the whole man.

(Ex. A, Dr Walker, pp. 5 & 6)

Dr. Walker did not specify which of these conditions, if any, were caused by the injury of June 18, 1982. Nor did he mathematically allocate or apportion claimant's disability rating by or between these six different shoulder dislocations that he described.

Neither orthopedic surgeon recommened any further surgery for the shoulder or the ulnar nerve condition.

Dr. Coates testified that claimant did have a very unstable shoulder prior to June 18, 1982. Nevertheless, he felt that the injury of June 18, 1982 aggravated claimant's preexisting condition and precipitated the anterior capsulorrhaphy surgery which he performed on June 28, 1982 which he also called a tight capsule procedure. Again, Dr. Coates stated that he could not allocate or apportion the impairment because he had not seen claimant prior to June of 1982. He did concede that some of claimant's impairment was due to his earlier dislocations.

APPLICABLE LAW AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of June 18, 1982 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

However, expert medical evidence must be considered with all

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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).

Our supreme court has stated many times that a claimant may recover for a work connected aggravation of a preexisting condition. Almquist v. Shenandoah Nurseries, 218 Iowa 724, 254 N.W. 35 (1934). See also Auxier v. Woodward State Hosp. Sch., 266 N.W.2d 139 (Iowa 1978); Gosek v. Garmer and Stiles Co., 158 N.W.2d 731 (Iowa 1968); Barz v. Oler, 257 Iowa 508, 133 N.W.2d 704 (1965); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961); Ziegler v. United States Gypsum Co., 252 Iowa 613, 106 N.W.2d 591 (1960).

The right of a worker to receive compensation for injuries sustained which arose out of and in the course of employment is statutory. The statute conferring this right can also fix the amount of compensation to be paid for different specific injuries, and the employee is not entitled to compensation except as provided by the statute. Soukup v. Shores Co., 222 Iowa 272, 268 N.W. 598 (1936).

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

If a claimant contends he has industrial disability he has the burden of proving his injury results in an ailment extending beyond the scheduled loss. Kellogg v. Shute and Lewis Coal Co.,

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256 Iowa 1257, 130 N.W.2d 667 (1964).

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

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

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

Claimant contends that he is entitled to benefits for the period of time claimant was off work after he injured himself at home in the pump well on December 25, 1983. He claims benefits from December 26, 1983 until October 12, 1984 when he returned to work after that injury. There is no medical evidence or any other evidence or even suggestion that the work injury of June 18, 1982 caused the nonwork injury of December 25, 1983 or the disability resulting from the nonwork injury which occurred on December 25, 1983. DeShaw v. Energy Manufacturing Company, 192 N.W.2d 777, 780 (1971). On the contrary, Dr. Coates stated in a letter dated March 26, 1984 "This incident is an independent body injury." Everything else in the record supports Dr. Coates on this point. Not even the claimant in his testimony claimed that the work injury on June 18, 1982 caused either the injury or resulting disability on December 25, 1983 when claimant slipped and fell in the pump well at home. Therefore, it is determined that claimant is not entitled to temporary disability benefits as a result of the nonwork injury that occurred on December 25, 1983.

Claimant did sustain the burden of proof by a preponderance of the evidence that the work injury of June 18, 1982 was a cause of permanent disabilty. Dr. Coates stated that the injury of June 18, 1982 was the cause of some, but not all, of claimant's permanent disability. Dr. Coates explained this (1) at the time he wrote to the insurance carrier on July 20, 1982 (Ex. A, p. 11),

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(2) at the time he rated claimant on October 12, 1983 (Ex. A, p. 20), (3) at the time of his deposition (Ex. C, p.p. 19 & 22), and (4) and in his letter to defendants counsel on May 22, 1986 (Ex. A, pp. 36 & 37; Ex. 1, pp. 26 & 26).

Dr. Walker did not specify how much of his impairment rating was due to the injury of June 18, 1982. Nor did he address the subject of causal connection at all. This seriously damages Dr. Walker's opinion in as much as he described a total of six separate shoulder dislocations on six different dates.

Therefore, the only reliable opinion is that of Dr. Coates, the treating physician, who stated that the June 18, 1982 injury aggravated claimant's preexisting unstable shoulder condition and that the anterior capsulorrhaphy which he performed on June 30, 1982 caused claimant's ulnar nerve condition.

The injury is determined to be an injury to both the left upper extremity and also to the body as a whole. Dr. Coates clearly described that the injury affected both sides of the shoulder joint. The soft tissues that form the entire capsule between humerous of the arm and the glenoid of the scapula were torn loose and reattached by a staple. Dr. Coates stated that claimant had a complete avulsion of the subscapularis tendon as well as the anterior capsule (Ex. A, p. 11). Claimant described that his pain was to the anterior and superior portion of his left shoulder. This is what he told the doctor and this is what he testified to at the hearing. Claimant's worst impairment is lifting his arm overhead which is a function of the entire shoulder and not just the arm. The derangement then is in the shoulder and not just the arm. It is only manifested by the use of the arm. Therefore, it is determined that the injury to claimant's shoulder is an injury to the body as a whole. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949); Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Reports 281, (1982); Godwin v. Hicklin G.M. Power, II Iowa Industrial Commissioner Reports 170 (1981); Lauhoff Grain v. McIntosh 395 N.W.2d 834 (Iowa 1986).

Claimant also sustained a permanent injury to his arm as a sequelae of the tight capsule surgery on June 30, 1982 which compressed his ulnar nerve and resulted in the ulnar nerve transplant and decompression on September 28, 1982. Claimant still suffers residual paresthesia in the ring and little finger and hypersensitivity of the ulnar nerve just distal to the elbow (Ex. 1, p. 13). Injury resulting from medical treatment is considered as being proximate to the original injury. Cross v. Hermanson Bros., 235 Iowa 739, 741, 16 N.W.2d 616, 617 (1944); Heumphreus v. State, 334 N.W.2d 757 (Iowa 1983); and Bradshaw v. Iowa Methodist Hosptial, 251 Iowa 375, 101 N.W.2d 167 (1960). Therefore, claimant has sustained permanent disability to both the body as a whole, with respect to the left shoulder, and also

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a scheduled member injury to the left upper extremity due to the ulnar nerve residuals. The scheduled disability merges with and becomes part of the disability to the body as a whole.

Dr. Walker awarded claimant a 40 percent permanent functional impairment rating of the left upper extremity and stated that this converts to 24 percent of the body as a whole. It is almost inherently incredible that claimant has permanently lost almost one-half of the use of his left arm in view of the fact (1) that Dr. Coates looked at claimant's job duties and returned him to work after the June 18, 1982 injury without any restrictions, (2) that claimant returned to work in January of 1983 and performed his duties in the pump room satisfactorily until September of 1983 when he bid on and received the job of pipefitter, (3) that claimant was able to satisfactorily perform the job of pipefitter until his injury at home in the pump well on December 25, 1983, (4) that claimant returned to work on October 12, 1984 after his injury at home and has again satisfactorily performed his job, (5) that Darrow, claimant's supervisor since May 2, 1983, testified that claimant has satisfactorily performed the job of a pipefitter without physical complaint or any difficulty, also works overtime at every available opportunity and that claimant has lost no time from work due to his shoulder. Dr. Walker performed a very thorough examination and wrote a very carefully detailed informative report, but his impairment rating is at great disparity with the treating physician and also with the other evidence in this case.

Dr. Coates said that claimant suffered a 20 percent permanent functional impairment to the left upper extremity. He attributed ten percent of this to the ulnar nerve problem in the left upper extremity. He attributed the other ten percent to the left shoulder. Dr. Coates further explained that some of the ten percent allocated to the shoulder was caused by the earlier dislocations but he did not give a numerical apportionment or allocation. He did indicate that the injury of June 18, 1982 was not a significant injury. It was not traumatic. The shoulder displaced simply while reaching overhead. Therefore, based on the foregoing information it is determined that claimant has sustained a ten percent permanent functional impairment of the left upper extremity due to the ulnar nerve problems. The impairment to the left shoulder is something less than ten percent of the left upper extremity because of the prior dislocations, which when converted to the body as a whole would be even a much lower number. A full ten percent of the left upper extremity converts to only six percent of the whole person (AMA Guides, table 20, p. 23).

In evaluating industrial disability it is acknowledged that claimant is 58 years old, has a tenth grade education, and has had a variety of past employments. After the injury of June 18, 1982 he returned to the same job at the same pay in the pump

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house. No formal medical restrictions were issued. Claimant performed his old job from January of 1983 to September of 1983 when he requested and was granted the pipefitters job. Claimant testified that 70 percent of the pump room work was overhead whereas only 50 percent of the job in the ready-to-eat department was overhead. Claimant testified that he could perform this job even though it caused him pain and difficulty. His supervisor testified that he performed the job without any limitations or medical restrictions. He did his job well without loss of time.

Claimant testified that he was earning $10.75 at the time of the injury and was earning $14.10 at the time of the hearing. Therefore, claimant has received a substantial increase in actual earnings. Claimant had dislocated his shoulder at home on two different occasions after the injury of June 18, 1982 and is still able to satisfactorily perform his job for employer. There are no permanent restrictions from Dr. Coates, although, claimant was cautioned about doing overhead work and pushing and pulling with his left arm. Claimant's employment with employer appears to be secure. Based on the foregoing evidence it is determined that claimant has sustained an industrial disability of ten percent of the body as a whole taking into consideration both the shoulder injury and the ulnar nerve problems.

Since claimant was awarded no benefits for the period of disabilty from December 26, 1983 to October 12, 1984, then the issue of a credit pursuant to Iowa Code section 85.38(2) is moot. At the same time, defendants should know that a claim for credits under Iowa Code section 85.38(2) must be supported by evidence that (1) benefits were received under a group plan, (2) contributions were made to the plan by employer and (3) that the benefits should not have been paid if workers' compensation was received. Hebensperger v. Motorola Communications and Electronics, Inc, II Iowa Industrial Commissioner Report 187, 189 (1981). Defendants introduced no evidence that nonoccupational group plan payments would not have been paid if workers' compensation benefits were received. The plan document is the best evidence of what the plan provides on this issue and nothing from the plan document was introduced into evidence.

FINDINGS OF FACT

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

That there is no evidence that the injury of June 18, 1982 was the cause of claimant's injury, or resulting disability from the injury, that occurred to claimant in the pump well at home on December 25, 1983.

That Dr. Coates determined that the injury of June 18, 1982 was a cause of permanent disability to claimant's left shoulder

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and left arm.

That the injury to the left shoulder was an injury to both sides of the shoulder capsule and therefore, was an injury to the body as a whole.

That the injury to the ulnar nerve was an injury to claimant's left upper extremity because it affected only his arm.

That Dr. Coates stated that the carpal tunnel syndrome was not causally connected to the injury of June 18, 1982.

That Dr. Coates found that the injury of June 18, 1982 was the cause of a permanent impairment of 20 percent of the left upper extremity; ten percent of which was attributable to the ulnar nerve and that less than ten percent was attributable to the left shoulder.

That claimant has sustained an industrial disability of ten percent of the body as a whole which includes both his left arm and left shoulder.

CONCLUSIONS OF LAW

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

That the injury of June 18, 1982 was not the cause of claimant's injury on December 25, 1983 or the disability resulting from it.

That claimant is not entitled to temporary disabilty benefits for the period from December 26, 1983 to October 12, 1984.

That the injury of June 18, 1982 was the cause of permanent injury to claimant's left upper extremity and left shoulder.

That claimant has sustained an industrial disability of ten percent of the body as a whole taking into consideration both the left shoulder and the ulnar nerve condition.

That claimant is entitled to 50 weeks of permanent partial disability as industrial disability to the body as a whole.

That the issue of whether defendants are entitled to a credit under Iowa Code section 85.38(2) is moot.

That claimant is not entitled to the costs of this action set out in exhibit D.

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ORDER

THEREFORE, IT IS ORDERED:

That claimant take nothing from this proceeding because he has already been paid fifty (50) weeks of permanent partial disability benefits prior to hearing pursuant to the memorandum of agreement.

That the costs of this action are charged to claimant pursuant to Division of Industrial Services Rule 343-4.33.

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

Signed and filed this 10 day of March, 1988.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

JAMES W. MICHAELS, Claimant, vs. ROBERT J. ELLIOTT, INC., Employer, and HOME INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File Nos. 766891 808331 A P P E A L D E C I S I O N

FILED
JAN 28 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an aribtration decision denying any healing period, temporary or permanent disability benefits and medical benefits.

The record on appeal consists of the transcript of the arbitration hearing and joint exhibits 1 through 12. Both parties filed briefs on appeal.

The prehearing reports contain the following stipulations that are relevant to this decision.

1. On May 22, 1984 claimant received an injury which arose out of and in the course of his employment with defendant employer.

2. The injury of May 22, 1984 was a cause of temporary disability during a period of recovery but the extent of any such disability remained an issue to be dealt with in this decision.

3. Claimant has received ninety weeks of workers' compensation benefits prior to the hearing.

ISSUES

The issues on appeal are:

Whether claimant received an injury on February 2, 1984 that arose out of and in the course of his employment;

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Whether there is a causal relationship between any work injury and temporary or permanent disability; and

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

REVIEW OF EVIDENCE

Claimant began his employment with defendant employer on January 9, 1984 as an over-the-road truck driver. His duties included driving a semi-tractor truck and unloading various types of cargo.

Claimant testified that he first injured himself on February 2, 1984 while unloading wooden reels weighing from 100 to 200 pounds. He said that the injury felt like his neck "popped" and sharp pain ensued in his neck, right shoulder and arm. The pain then subsided and he continued working. After resting in his cab while other persons were loading his truck later in the day, the pain grew worse. Claimant said that he then returned to the terminal in Des Moines and reported the injury to two of defendant employer's managers, See and Thorson, as well as the night dispatcher. Claimant said that he was told by them to go to the hospital. Claimant stated that he arrived in Des Moines around 8:00 or 9:00 p.m. Claimant returned home and reported the next day to the emergency room at Illini Hospital. The emergency room physician diagnosed that claimant had probable cervical disc disease. Claimant said that following his visit to the hospital he called Nancy Moore, the safety director at defendant employer, and reported the injury. He said she told him that since it had been over 72 hours since the injury at the time he called it was too late to file a claim for workers' compensation.

Claimant testified that although his pain was continuing, at the request of Moore he returned to duty a few days later to take a load to the East Coast. Claimant indicated that he could only do this work because a friend of his, Richard Mercer, assisted him with his driving on the trip. Despite this assistance, claimant stated that he suffered from great pain during the trip and upon his return he requested Moore for time off. Despite being referred to a neurosurgeon, Harry Honda, M.D., by Illini Hospital, claimant began treatment with a chiropractor following the February 1984 onset of pain. At the completion of this chiropractic treatment, claimant returned to full duty on April 1, 1984. A couple of weeks before May 22, 1984 claimant saw Dr. Honda with similar complaints of pain in the right upper extremity.

Claimant said that on May 22, 1984 he injured himself again. He said that following a fall from a truck in an attempt to repair running lights on his trailer, he experienced pain in his neck, right shoulder, and arm similar to the pain in February 1984. Claimant stated that this incident occurred at a rest

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area in Ohio where he stopped during a rainstorm. Claimant returned to his home in East Moline and reported the injury to Moore and he then began to receive extensive treatment from Dr. Honda.

Claimant denied any significant prior problems or injuries to his neck or cervical spine before February 1984. Claimant only admitted to Dr. Honda in May 1984 that he had some pain in his neck for one or two days approximately ten years earlier.

Claimant revealed that his daily log for February 2, 1984 showed that he arrived in Des Moines at 12:30 p.m. although he actually arrived at approximately 9:00 p.m. He stated that the log which he signed was false. Claimant denied that he ever had any accident or trauma to his neck prior to February 3, 1984. Claimant denied that he had been injured driving a motorcycle. He also denied that he told Nancy Moore or her recepticnist he had been injured while driving a motorcyle or that he had physical problems.

Nancy Moore, safety director for defendant Robert J. Elliott, Inc., testified by deposition. She testified that she had a conversation with claimant on February 16, 1984 in which he requested time off because his back and neck were hurting. She testified that claimant had said he was not claiming a work injury and that he had been involved in a motorcycle accident prior to working for defendant employer. She testified that this conversation took place in her office in Des Moines. The doors to the office were open and Barbara Baker, the receptionist, was outside Moore's office door. Moore testified that she talked with Baker after claimant left because it was unusual that claimant had talked of an injury but that he would not claim it was work related. Moore stated that Baker typed a statement of what claimant had reported and Baker signed it. Moore indicated that she did not know where the statement was because the files had been transferred and moved. She also testified that she heard claimant tell Baker the same thing he had told her. She denied that claimant had told her he had been hurt on February 2, 1984.

Barbara Baker worked as switchboard operator and receptionist for defendant employer from December 8, 1983 through March 8, 1985. She testified that her desk was ten feet from Moore's work area. She stated that she overheard the portion of the conversation between claimant and Moore concerning the motorcycle accident and claimant's request for time off because his back was hurt would not be workers' compensation. She testified further that after claimant left Moore's office he told her (Baker) that he had had a motorcycle accident and it would not be workers' compensation because he had hurt his back before. She also stated that she talked with Moore later that day after claimant had left about what claimant had said and he had been very honest in what he said. She indicated that she made typed

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notes of her conversation with claimant and what she had overheard and signed the notes. She testified that she filed the notes in claimant's file in Moore's office.

Claimant was treated as an outpatient at the Illini Hospital on February 3, 1984. The diagnosis or reason for examination was given as pain right shoulder, unknown trauma. The radiologist report by B. Korosec, M.D., stated the following:

> CERVICAL SPINE:
>
> AP lateral and oblique views show reversal of cervical curve. Some arthritic changes are noted along the anterior and posterior vertebral bodies of C5 and C6. The relation of C1 to C2 shows no radiographic abnormalities on AP view. The odontoid however shows slight posterior deviation on the lateral projection. This could represent developemental [sic] variation or condition following old trauma.
>
> IMPRESSION: Reversal of cervical curve with degenerative arthritic spurring at C5-C6 levels as described.

(Jt. Ex. 4a)

Claimant was examined by Harry Honda, M.D., a neurological surgeon, on May 4, 1984. Claimant gave a history which included the events of February 2, 1984 which he testified to regarding feeling something pop in his neck while unloading heavy reels. Dr. Honda's impression was a herniated nucleus pulposus at the C5-6 level with radiculopathy of C6. He prescribed a cervical collar and gave claimant some analgesics although he thought these would not help and that claimant would require myelography and anterior cervical interbody fusion.

Claimant was treated as an outpatient by Illini Hospital on May 23, 1984 and was given a cervical collar. On May 31, 1984, claimant was seen for physical therapy for an accident described as "fell off tractor cab." He was treated as an inpatient on July 13, 1984. The hospital record indicates an accident of falling off tractor cab. The principal diagnosis was cervical disc herniation at C5-6 and C6-7 levels and on July 16, 1984 an anterior cervical discectomy and fusion at C5-6 and C6-7 levels was performed. The discharge summary dated July 27, 1984 which was signed by Dr. Honda gave the final diagnosis as "cervical radiculopathy of C6-7 due to degenerative disc disease at the C5-6 and C6-7 levels." On November 5, 1985, Dr. Honda released claimant to go back to work with no restrictions.

Claimant also underwent further diagnostic testing by Dr. Honda to determine the cause of claimant's continuing pain in 1986.

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At the direction of Dr. Honda claimant also underwent acupuncture treatment in 1986 by Dr. Koji Uemura following his return to work as a truck driver.

F. Dale Wilson, M.D., examined claimant on April 21, 1986 and opined that claimant's absences from work and a permanent partial impairment to claimant's body as a whole were caused by an injury sustained on February 2, 1984 and a further aggravation and a most serious cause of injury on May 22, 1984. Dr. Wilson rated claimant's impairment at 42 percent. Dr. Wilson's opinion was based on the fact that claimant had no prior history of injury to his neck or back except some treatment in 1972 when he was off work for a day because of a stiff neck.

APPLICABLE LAW

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 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.

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

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.

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Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a pre-existing injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist. Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

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).

Iowa Code section 85.27 provides that employers are to furnish employees medical benefits when an injury arises out of and in the course of employment.

ANALYSIS

The deputy was correct when he determined that claimant was not credible. Claimant made statements against his own interests that he was not going to file a workers' compensation claim because of the February accident and that he had had a prior motorcycle accident. Those statements were made to two people in separate conversations and were unusual enough that these two people discussed the statements. One of those persons even went so far as to make a written report of the statements. Claimant at the hearing denies both making the statements and the substance of the statements. His denial of making the statements is directly contradicted by two persons, one of which is no longer an employee of the defendant employer. The testimony of each of these persons is corroborated by the testimony of the other. Claimant has been untruthful in a material aspect of his testimony and therefore his testimony cannot be relied upon.

The claimant argues on appeal that the evidence establishes a February 2, 1984 accident. The only evidence in the record of the accident is claimant's testimony. That testimony is directly contradicted by statements he made on February 16, 1984.

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Therefore, claimant has failed to prove by the greater weight of the evidence that an injury occurred on February 2, 1984.

The claimant next argues that he was disabled because of the injury on May 22, 1984. The parties stipulated that there was an injury on May 22, 1984 that arose out of and in the course of employment and that the injury is a cause of temporary disability during a period of recovery. The length of the temporary disability is in dispute. The evidence in this case indicates that claimant was treated twice for a similar condition prior to May 22, 1984 as he was treated for after May 22, 1984. There is no evidence that an event on May 22, 1984 resulted in a condition different than what was present prior to that date. Claimant had a preexisting condition caused by a motorcycle accident. There is no evidence that his condition because of the accident was aggravated by an event on May 22, 1984. Claimant has been paid ninety weeks of temporary disability. The time period for payments May 22, 1984 through December 15, 1985 is included in the ninety weeks already paid. It cannot be determined when the stipulated temporary disability ended but it most certainly would have ended before claimant had surgery in July 1984. Claimant has been greatly overpaid for his entitlement to temporary total disability.

Nowhere in the evidence does Dr. Honda express an opinion as to the possible relationship of his treatment of claimant's neck, shoulder and arm difficulties to the May 22 work injury. Most of Dr. Honda's reports appear to focus on the alleged February incident as a precipitating factor. Dr. Wilson opines that claimant's absences from work and his permanent impairment to claimant's body as a whole were caused by the work injury. However, Dr. Wilson like Dr. Honda was not informed of any problems prior to the injury except for some pain in 1972 and is based on claimant's assertions which are less than credible. Dr. Wilson's opinion must therefore be rejected. Claimant has failed to prove by the greater weight of evidence that a permanent change of condition was a result of the May work injury.

Claimant also argues that he is entitled to be reimbursed for medical expenses and mileage incurred in receiving treatment of his injuries. As discussed above, there was insufficient evidence to determine precisely when the temporary aggravation caused by the May 22 injury ended but that it ended before July 1984. Claimant would be entitled only to medical benefits while he was being treated for the injury received on May 22. Any medical expenses incurred after July 1984 would not be for treatment of the injury and should not be allowed. It is impossible to tell when the other expenses (mileage) of claimant were incurred, although it appears they were incurred after July 1984. These other expenses should also not be allowed.

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FINDINGS OF FACT

1. Claimant is not a credible witness.

2. Claimant was in a motorcycle accident prior to beginning work for defendant employer.

3. Claimant injured his back and shoulder in the motorcycle accident.

4. Claimant's allegation of an injury on February 2, 1984 is not corroborated.

5. Claimant was not injured in a work accident on February 2, 1984.

6. Claimant was examined at Illini Hospital on February 3, 1984.

7. The radiologist who examined claimant on February 3, 1984 found that claimant's condition was a developmental variation or was a condition following an old trauma.

8. On February 16, 1984 claimant told Nancy Moore and Barbara Baker, employees of defendant, that he had been in a motorcycle accident and would not be claiming workers' compensation.

9. On May 4, 1984 claimant was examined by Dr. Honda, and Dr. Honda's impression was a herniated nucleus pulposus at the C5-6 level with radiculopathy of C6.

10. Claimant had an injury that arose out of and in the course of his employment on May 22, 1984.

11. On July 16, 1984 claimant had an anterior cervical discectomy and fusion at C5-6 and C6-7 levels.

12. The discharge summary dated July 27, 1984 which was signed by Dr. Honda found claimant to have degenerative disc disease.

13. Claimant has received temporary total disability benefits for ninety weeks including the period May 22, 1984 through December 15, 1985.

15. Claimant had recovered from the injury caused on May 22, 1984 sometime prior to July 1984.

16. Claimant claimed medical expenses and mileage for medical treatment after July 1984.

17. Claimant did not advise either Dr. Honda or Dr. Wilson of his prior back problems.

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18. Claimant's back condition and treatment in July 1984 and thereafter were the results of a preexisting condition unrelated to the injury of May 22, 1984.

19. The parties stipulated that there was an injury that arose out of and in the course of employment on May 22, 1984.

CONCLUSIONS OF LAW

Claimant has not established by a preponderance of evidence that on February 2, 1984 he suffered an injury arising out of and in the course of employment.

Claimant has not established by a preponderance of evidence a causal relationship between an injury to his back on May 22, 1984 and temporary disability beyond July 1984.

Claimant has not established by a preponderance of evidence a causal relationship between an injury to his back on May 22, 1984 and permanent disability.

Claimant has not established by a preponderance of evidence a causal relationship between an injury on May 22, 1984 and the claimed medical expenses.

WHEREFORE, the decision of the deputy is affirmed.

ORDER

THEREFORE, it is ordered:

That claimant shall take nothing from this proceeding.

That claimant shall 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 28th day of January, 1988.

David E. Linquist

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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FILED
001284A.
MAY 27 1988
IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

WAYNE MILBRODT, Claimant, vs. ROBERTS DAIRY, INC., Employer, and NATIONAL UNION FIRE INSURANCE, Insurance Carrier, Defendants.	File No. 778256 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, Wayne Milbrodt, against his employer, Roberts Dairy, Inc., and its insurance carrier, National Union Fire Insurance, to recover benefits under the Iowa Workers' Compensation Act as a result of an injury sustained on October 20, 1984. This matter came on for hearing before the undersigned deputy industrial commissioner at Sioux City, Iowa on February 4, 1988. A first report of injury was filed on October 26, 1984. At hearing, the parties stipulated that claimant was entitled to temporary total disability from October 20, 1984 through December 2, 1985; from March 26, 1986 through May 1, 1986; and, from June 16, 1986 to June 23, 1986. They further stipulated that claimant has been paid 64.37 weeks of either healing period or temporary total disability benefits.

The record in this case consists of the testimony of claimant and of Louis Welch as well as of joint exhibits 1 through 22 as identified in the submitted exhibit list.

ISSUES

Pursuant to the pre-hearing report, the parties stipulated as stated above as to entitlement to causally related temporary total disability benefits. They further stipulated that claimant did receive an injury arising out of and in the course of his employment; that claimant's rate of weekly compensation is $325.40; and, that claimant's entitlement to permanent partial disability began on December 2, 1985, but for those intermittent periods

subsequent thereto in which he was entitled to temporary total disability. The issues remaining to be decided are whether there is a causal relationship between claimant's injury and permanent partial disability; and, whether claimant is entitled to permanent partial disability benefits.

REVIEW OF THE EVIDENCE

Claimant reported that he is 55 years old and married. He reported he graduated from high school in 1951, having taken general courses only and has had no other formal education and no military service. Claimant's work history has predominantly been in the dairy industry. He began work for Roberts Dairy in approximately 1953, originally working night clean up and later working in the pasteurizing room as an operator and then as a vacation reliefperson. He eventually did supervisory work, contract sales work and route sales. Claimant continued in route sales and was a route salesperson at the time of his October 20, 1984 injury. Claimant reported that, in October, 1984, he worked from approximately 6:30 a.m. until 4:00 p.m., six days per week with a rotating day off during the week. He indicated that he had 25-30 stops per day with one of three routes covering approximately 100 miles round trip and with two routes consisting of approximately 150-160 miles round trip. Claimant testified his job involved constant lifting of milk cases weighing from 34-36 pounds as well as unloading and offloading his delivery truck. He reported that a two-wheeler was used for loading, but that one had to push or pull with the two-wheeler as well as maneuver it up and down stairs. Claimant reported that he was a commissioned route salesperson receiving a base pay of approximately $600 per month with commission on milk of approximately 3 3/4 (percent), on cheese and butter of approximately 1 3/4 (percent) and on filled orders of approximately two percent. Claimant's customers were schools, grocery stores, cafes, nursing homes and like institutions. In October, 1984, claimant was also working part-time as a ticket salesperson at a local greyhound park earning approximately $23-$24 per night, three or four nights per week. Claimant worked throughout the 1984 season and had worked in this employment for a number of years. Until 1973, claimant had also worked at various automobile dealerships repairing used cars for the sales lot.

On October 20, 1984, claimant was injured when he attempted to place a brick under a wheel of his running truck. Claimant was subsequently off work until December 2, 1985 when he returned to his route sales position. Claimant continues to undergo medical treatment periodically for problems with his urethra.

In January, 1986, Roberts Dairy merged three routes into two with claimant's route then consisting of two days of "country run" and three days of "city routes." Claimant reported that he

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continues to start work at 3:30 a.m., but that his afternoon quitting time varies from 1:30 to 6:00 or 7:00 p.m. Claimant indicated that Wednesday is his day off, but that he generally works part of that day picking up empty cases and dealing with invoices. Claimant reported that his country route is now approximately 220-230 miles per day. He characterized his work as the same, even though the route itself has changed. Claimant stated that he has pain and always feels stiff in the pelvic region. He indicated he has to urinate as many as 12-15 times per work day. Claimant described himself as very tired at day's end. He reported that he attempted to work at his former ticket sales job in Summer, 1986, but was unable to do so as he could not stand all night long. Claimant agreed that he works longer hours at the dairy than he had prior to his injury and that his earnings at the dairy are greater than they had been prior to his injury. Claimant agreed that he does the same yard work at home as he had done prior to his injury. Claimant has had no medically placed restrictions on lifting, standing, or other activity.

Louis Welch testified that he is branch manager of the Sioux City Roberts Dairy and has worked for the company for 21 years. He reported that, in his position, he has to maintain sales and is in charge of sales and product distribution. Mr. Welch previously worked as a route sales supervisor, a sales manager and a relief driver. He reported that he still runs his route salespersons' routes while the workers are on vacation or have days off. Welch reported that he knows claimant both from work and socially and that he sees claimant daily. He reported that he has seen claimant since the accident and has on occasion ridden claimant's route with him. Mr. Welch reported that he had not observed differences in claimant's work performance since his accident. He characterized claimant as doing a real good job and as having the biggest route. Mr. Welch characterized claimant's route since his injury as a tough route and indicated that he himself could not do the route as fast as claimant can do it. Welch reported that claimant's total earnings in 1983 were $25,367.56 and that claimant's total earnings in 1984 were $21,912.01. Welch reported that claimant's route earned $26,402.82 in 1984. Welch reported that claimant's total earnings in 1986 were $23,128.29 with claimant's route earning $25,231.66. Claimant was off two months on account of his injury in 1984 and was off one month in 1986. Welch reported that claimant's earnings in 1987 were $27,435.04. All earnings were as reflected on exhibit 18. Welch reported that there have been base pay increases since claimant's injury, one in February, 1987 and a second in February, 1988, each equalling approximately $20 per month. Welch indicated that claimant's earnings as reported on his W-2 statement and as reported on his commission sales statement might be discrepant since earnings in December of one year would not result in a settlement check until the following year. Commission statements for 1983, 1984, 1986 and 1987 were

reviewed.

Welch reported that he and claimant had cut wood during the fall of 1987 using a chain saw and carrying the wood from the wood lot to a truck. Welch stated that claimant did not complain about cutting and that both were tired when they were done because it was hard work. Welch indicated that claimant had told him he had tried to continue work at ticket sales, but had been too tired to do so. He reported that claimant did not say why, but that he kind of knew why as he had run claimant's route.

R. L. Morgan, M.D., reported that claimant's final diagnosis regarding his injury was a fracture of the pelvis, secondary to trauma; a urethral tear; upper GI bleed, secondary to stress ulcer; and, ileus. Dr. Morgan reported that claimant continued under the care of Robert A. Boldus, M.D., as regards the complications of the urethral tear, reciting those as impotence, incontinence and urethral stricture. As of June 12, 1985, Dr. Morgan reported that claimant's recovery from his urethral tear was not complete and that such would probably produce permanent disability. On August 7, 1986, Dr. Boldus reported that claimant had a stricture of the bulbous urethra which had been treated intermittently with stretching of the area through dilation. The doctor opined such had been effective in keeping the claimant voiding in a normal pattern, but stated he was certain that throughout his lifetime claimant would intermittently need to have the stricture dilated. The doctor opined that the presence of the stricture would certainly make claimant more susceptible to urinary tract infection. Dr. Boldus stated claimant had recently been hospitalized with epididymitis, an infection of the urinary tract. Dr. Boldus stated it would be difficult to put a percentage disability on such an injury, but stated he felt it could not be overlooked in settlement of the case.

On May 1, 1987, Dr. Boldus reported that he had followed claimant for a long time concerning his difficulties with impotence and had been attempting to make a reasonable estimate of claimant's disability with his known urethral stricture and his total loss of penile erectile function. Dr. Boldus reported he had written to a Dr. Richard Williams, chairman of the department of urology at the University of Iowa and had, as of that date, received his reply. He then stated that it would be reasonable that claimant would have a 50% "disability impairment" with his known injuries.

On March 4, 1985, Don E. Boyle, M.D., opined that claimant developed a bleeding duodenal ulcer, secondary to the stress of his accident and injuries.

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 October 20, 1984 is causally related to the disability on which he now bases his claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960).

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

The parties do not appear to dispute seriously that claimant's problems consisting of a healed fracture of the pelvis, the urethral tear, the bleeding duodenal ulcer and the ileus resulting from his work-related injury. Likewise, they do not disagree that claimant has had complications from the urethral tear, that is, impotence, incontinence and urethral stricture requiring periodic dilation of the urethra. Medical reports of Drs. Morgan, Boldus and Boyle support the causal relationship and are not contested in the record. Hence, a causal relationship is found. The fighting issue then is the nature and extent of claimant's permanent partial disability.

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

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function is to be considered and disability can rarely be found without it, it is not so that a degree of industrial disability is proportionally related to a degree of impairment of bodily function.

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

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

Claimant is 55 years old and has had a high school education, but no other formal training. His work experience has been virtually all in dairy work, beginning as a night cleanup person going through pasteurization room operator to route and contract sales. Claimant also worked for approximately one year as a supervisor. Testimony would suggest that claimant felt that position was not enjoyable and that he did not have the necessary aptitude for supervisory work. The evidence suggests that claimant's overall earnings have increased slightly subsequent to his work return following his injury when both gross earnings and net settlements are considered. Such has resulted due to a reorganization at Roberts Dairy which increased claimant's route sales work. Claimant's alternative to participation in that reorganization and taking on longer hours was to accept layoff, however. Claimant no longer works his part-time job at the local greyhound track. Defendants suggest that such was impossible,

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given claimant's longer work hours at the dairy and did not relate to any effects of claimant's injury. Claimant testified that increased fatigue and stiffness from the injury caused him to no longer participate in such work. The evidence suggests that both are likely factors in claimant's decision to discontinue his part-time work. Claimant does not have medical restrictions on lifting, standing or other activities. He apparently is able to satisfactorily perform his job duties with Roberts Dairy. Claimant requires intermittent dilation of his urethra. He also has a great susceptibility to urinary tract infections than does the general population. However, he has not lost time from work on account of these conditions since June, 1986. Claimant testified that he has a problem with frequency of urination and that such requires him to make special accomodations in order to carry out his route sales work. Claimant also has problems with impotency.

Nothing in the record suggests that claimant's urinary frequency substantially interferes with claimant's ability to perform his present job. Unfortunately, it could well interfere with claimant's ability to secure and maintain other employment, should his job at Roberts Dairy cease to exist. The evidence does not suggest that such is a remote possibility. Subsequent to his injury, claimant had to participate in one reorganization at the dairy and, as noted above, had the choice of working a larger route or of being laid off. Further reorganization, with a similar choice, might well make claimant unable to continue working, given claimant's problems with urinary frequency, his age, and stiffness and fatigue subsequent to his pelvic fracture, to which he testified. Were such to happen, those factors, coupled with claimant's lack of experience outside of the dairy industry, could well impact on his ability to obtain or maintain other employment at or near his present income. As defendants stress, claimant's increased earnings following his injury are a factor to be considered in assessing any industrial disability. We believe claimant's reduction in earning capacity would have been substantially greater had the employer not returned him to work. We commend the employer for doing so. Nevertheless, that factor must be balanced with other factors, including claimant's lack of job mobility as a result of his injury, in determining whether claimant's earning capacity has actually decreased on account of his injury. Claimant's inability to continue his second job suggests a decrease in claimant's actual job options following his injury.

Claimant stressed his impotence and suggested that such should be considered in assessing industrial disability. However, no evidence was introduced showing how the impotence either physically or psychologically affects claimant's earning capacity. Without such, we are unable to consider the impotence in assessing claimant's industrial loss on account of his injury. Dr. Boldus is the only individual who supplied an impairment

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rating. He stated that claimant had a 50% "disability impairment" on account of his urethral stricture and his impotence. The record does not suggest that Dr. Boldus consulted the AMA guides in arriving at that rating. Furthermore, it must be discounted for impotence. Similarly, permanent physical impairment or functional impairment is not the same as industrial loss. Industrial loss is loss of earning capacity. When all factors noted above are considered, claimant's loss of earning capacity on account of his injury results in a 25% permanent partial disability.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant received an injury on October 20, 1984 arising out of and in the course of his employment when he was crushed in the pelvic area when his truck rolled and he was caught for approximately 40 minutes.

Claimant was initially off work from the injury to December 2, 1985 and then from March 26, 1986 to May 1, 1986 and then from June 16, 1986 to June 23, 1986 for medical treatment and recuperation on account of his work injury.

As a result of the work injury, claimant has a healed fracture of the pelvis, a urethral tear, a bleeding duodenal ulcer and ileus.

As a result of the urethral tear, claimant suffers from impotence, incontinence and urethral stricture.

As a result of the urethral stricture, claimant needs intermittent dilation of his urethra and will likely require such throughout his lifetime.

As a result of his urethral stricture, claimant is likely to be more subject to urinary tract infection than would the general population.

As a result of his urethral stricture, claimant has problems with frequency of urination, often needing to urinate as many as 12-15 times per day.

Claimant is 55 years old and a high school graduate.

Claimant has no formal education beyond high school and no training other than work experience.

Claimant has worked predominantly in the dairy industry, working in jobs ranging from night cleanup to pasteurizing room operator to route and contract salesperson.

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Claimant worked as a supervisor for approximately one year before leaving such work.

Claimant's earnings have increased slightly subsequent to his injury.

Claimant returned to work at Roberts Dairy and continued to work after the dairy's reorganization, an event which required him to work longer hours.

Claimant has stiffness and fatigue following his longer work hours.

Claimant discontinued his part-time job at the greyhound track subsequent to his work injury.

Claimant's choice at the time of reorganization was either to accept the larger route or to take a layoff.

Claimant's job at Roberts Dairy is not wholly secure.

Claimant's age, work experience and problems related to his work injury decrease his job mobility.

Claimant is unlikely to be able to secure or obtain employment at or near his present wage, should his job at Roberts Dairy cease.

Claimant has not shown that his impotence is a factor which affects his earning capacity, either physically or psychologically.

Claimant has sustained a loss of earning capacity on account of his work injury of 25%.

CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has established a causal relationship between his work injury of October 20, 1984 and his claimed permanent partial disability.

Claimant has sustained a permanent partial disability of 25% on account of his October 20, 1984 work injury.

ORDER

THEREFORE, IT IS ORDERED:

Defendants pay claimant one hundred twenty-five (125) weeks of permanent partial disability benefits with those benefits to commence on December 2, 1985 and to be paid at the applicable

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rate of three hundred twenty-five and 40/100 dollars ($325.40). Permanent partial disability benefits shall not be payable during those periods following December 2, 1985 during which claimant received healing period benefits. Permanent partial disability benefits shall again commence on the first date subsequent to each period during which claimant received healing period benefits following December 2, 1985.

Defendants pay accrued amounts in a lump sum.

Defendants pay interest pursuant to section 85.30.

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

Defendants file Claim Activity Reports as required by Division of Industrial Services Rule 343-3.1.

Signed and filed this 27th day of May, 1988.

Helen Jean Walleser

HELEN JEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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FILED

JUN 24 1988

IOWA INDUSTRIAL COMMISSIONER

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CONNIE KAY MITCHELL,	:	
Claimant,	:	
vs.	:	File Nos. 762771
IOWA MEATS PROCESSING,	:	818960
Employer,	:	A R B I T R A T I O N
and	:	D E C I S I O N
CHUBB GROUP OF INSURANCE COMPANIES,	:	
Insurance Carrier, Defendants.	:	

INTRODUCTION

These are proceedings in arbitration brought by the claimant, Connie Kay Mitchell, against her employer, Iowa Meats Processing, and its insurance carrier, Chubb Group of Insurance Companies, to recover benefits under the Iowa Workers' Compensation Act as a result of alleged injuries of March 22, 1984 and January 3, 1986. This matter came on for hearing before the undersigned deputy industrial commissioner at Sioux City, Iowa on February 5, 1988. A first report of injury was filed on March 24, 1986 relative to the alleged January 3, 1986 injury and on April 24, 1984 relative to the alleged March 22, 1984 injury. Defendants have paid claimant 9 3/7 weeks of temporary total disability benefits.

The record in this case consists of the testimony of claimant and of Richard D. Sturgeon as well as of the deposition testimony of Jolene Annette Lottin and of joint exhibits 1 through 101.

ISSUES

Pursuant to the pre-hearing report filed by the parties, the parties stipulated that claimant's rate of weekly compensation for the alleged 1984 injury is $196.39 and for the alleged 1986 injury $290.05. The parties further stipulated that the provider of medical services would testify that costs for care other than that of Dr. Horst Blume were reasonable and necessary. The issues remaining to be decided as regards both claims are:

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

2. Whether there is a causal relationship between the alleged injury and the claimed disability;

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

4. Whether claimant is entitled to payment of medical costs as authorized by defendants and causally related to her injury and also as reasonable and necessary costs for care as regards medical care through Dr. Blume; and,

5. Whether an alleged oral settlement agreement is binding on the parties.

REVIEW OF THE EVIDENCE

Connie Kay Mitchell was born on June 2, 1953, has completed 10.5 grades of school and has obtained a GED. She worked as a production employee for Iowa Meats Processing from December, 1980 through December 1986. Claimant had prior meat packing experience with Iowa Beef Processors, Iowa Pork Industries and D & L Processors. Her beginning salary with Iowa Meats was $7.00 per hour. Her previous employers also paid between $6.50 and $7.00 per hour. Claimant also worked for approximately five months as a helper in a tax office. There, she checked tax return calculations, did debit and credit bookkeeping and answered the telephone.

For approximately four years while at Iowa Meats claimant graded bellies. She explained the procedure as involving pulling the belly off the line, setting it on a scale, trimming the belly and then throwing various trimmed parts into separate combos. Bellies were reported as weighing from 12-50 pounds. One grabbed the belly with the left hand and then reached with the right after trimming it. The weighed belly was thrown into the appropriate of four, weight-graded combos. The throw could have been backward or forward or to the side, depending upon which combo the thrower needed to reach. Four belly graders worked with four scales with 800 units or 1,600 bellies processed per hour. Claimant's position was on the farthest back of the scales. Claimant alleges she injured her left shoulder and arms through repetitive use as a belly grader. Claimant also worked trimming cheeks, boning picnics, trimming butts and boning loins.

During 1982 while pregnant, claimant trimmed butts, which she characterized as lighter work. A. D. Blenderman, M.D., took claimant off work at that time as she had developed shoulder, neck and left arm pain. Claimant stated that her pain had actually begun while grading bellies, but had continually worsened. Medical records, apparently of W. Jennings, M.D.,

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indicate that claimant complained of burning in the left shoulder on March 23, 1982. Myofascitis of the left trapezius was diagnosed. Dr. Blenderman, per medical reports, apparently took claimant off work from May 3, 1982 through August, 1982. Claimant was then off work from late September, 1982 through March, 1983 on account of the birth of her child on October 30, 1982. She returned to grading bellies. Claimant reported she was off work as of February 20, 1984 for left shoulder and neck pain for which she again saw Dr. Jennings. Claimant was then off work in November and December, 1985 on account of cluster headaches. In 1984, claimant apparently bid on loin pulling, but reported she was unable to do that job on account of neck and shoulder pain and was subsequently disqualified. Claimant sought care from R. Budensiek, D.O., initially in March, 1982 and then also in April, 1984 on account of right elbow and left arm complaints. She also saw John Dougherty, M.D., during that time. He apparently prescribed a shoulder brace. Claimant performed light-duty work in 1984, which she testified consisted of cleaning, picking up and painting. Claimant subsequently returned to belly grading. She testified she had continuous problems and used Advil which the plant nurse supplied.

Claimant testified that, on February 13, 1986, stacked meat fell upon her, striking her low back. She reported that she fell forward and was then jarred backwards with her legs forward and the rest of her body in a backward position. Claimant testified that, subsequent to that incident, she had episodes of left leg numbness which have since resolved. Claimant testified that, in Summer, 1986, she missed work intermittently over a period of six weeks for which she was paid temporary total disability benefits. Claimant again saw Dr. Dougherty during this period and, in April, 1986, saw William P. Isgreen, M.D. Claimant testified that neither Dr. Dougherty nor Dr. Isgreen provided treatment which gave her any relief. On her return to work, claimant was doing shoulder rolls. Claimant reported that, in Spring and Summer, 1986, she saw Joe M. Krigsten, M.D., and Milton D. Grossman, M.D., as directed by Walter Graves, John Morrell's safety director. Claimant reported that, on September 26, 1986, Mr. Graves advised her she would not be permitted to seek further medical care and she subsequently saw her own physician, a Dr. Van Patten. Claimant testified that Dr. Van Patten placed her on light-duty with restrictions on lifting and pushing and pulling with the left arm. She testified that she was subsequently laid off on the basis that light-duty within those restrictions was not available. Claimant expressed her belief that light-duty was available. Claimant is not now working. She testified that she had sought employment subsequent to her layoff, but felt it was not worth working for $3.50 per hour if one must pay a babysitter $45.00 per week. Claimant expressed an interest in returning to work after her youngest child enters kindergarten in Fall, 1988.

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Claimant testified that she continues to have problems with her neck and shoulder if she is required to do scooping, bending or scrubbing. She reported that she has difficulty sleeping and needs to change her position frequently if she is to be comfortable. She reported that she has been able to cook, clean and do family laundry, but has had trouble with lifting, bending, reaching, vacuuming and moving furniture. Claimant no longer bowls, lifts weights or plays softball.

Claimant saw Dr. Blume for examination related to her neck and shoulder in May, 1987. She characterized the examination as of several hours' duration and as including grip strength testing and x-rays. She reported that Dr. Blume has suggested a nerve block, but that she does not wish to undergo that procedure.

Claimant agreed she had had incidents at work on April 14, 1986 when her left wrist was caught in a door; on July 22, 1986 when she fell and hurt her back; on August 21, 1986 when she complained of neck and shoulder pain after she had lifted 60-pound boxes. Nursing notes in evidence confirm the alleged incidents. A nursing note relative to the April 14, 1986 incident indicates that a guard who witnessed the accident stated claimant had intentionally slammed the door on her wrist. The guard stated that claimant opened the door, put her wrist behind the door and then let the door shut on her wrist. The report for August 21, 1986 indicates that claimant is complaining of neck and shoulder pains since lifting 60-pound boxes. A note of January 3, 1986 indicates that claimant complained of right shoulder, thoracic back pain while pulling on a loin. BenGay was prescribed. Progress notes dated from February 20, 1986 through July 8, 1986 and with the initials "MAJ" indicate that, as of March 11, 1986, claimant stated she had had gradual onset of pain in the neck, especially on the left side, since three weeks earlier. Objectively, claimant had limited range of motion of the neck, especially on rotation to the right. Forward bending, side bending, flexion and extension were normal. There was some tenderness on the right paravertebral musculature. The assessment was of cervical myositis.

On April 9, 1986, Dr. Dougherty indicated that claimant could stand, walk or sit for five to eight hours; could occasionally lift up to ten pounds; could bend, climb, carry and kneel occasionally; and, was able to work an eight-hour day, but was unable to reach above shoulder level.

On April 23, 1986, Dr. Isgreen opined that his best assessment of claimant's neurological problems was involvement of the suprascapular nerve on the left below the trapezius and along the supraspinatus muscle area. He reported that, after four years of difficulty, he was pessimistic about doing anything to help claimant and felt he would simply declare that the chronic discomfort and the suggestion of irritation of the suprascapular

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nerve precluded working in situations requiring repetitive movement such as pulling and twisting of the shoulders and arms. The doctor opined that, under the 1984 AMA guidebook, permanent partial impairment of up to five percent was allowed for problems of the suprascapular nerve due to discomfort with three to five percent being "probably...a more realistic number." He opined that, after four years of discomfort, claimant had reached a plateau and that he would not anticipate further improvement.

William M. Krigsten, M.D., reported on June 9, 1986 that, when he first saw claimant on May 15, 1986, she had pain in the left side of her neck with a 25% loss of neck motion and tenderness in the left trapezius with some tenderness over the radial head. He reported that an EMG of May 16, 1986 was consistent with carpal tunnel syndrome, although clinically "this doesn't fit into the picture." He thought her trouble stemmed from the neck. On May 29, 1986, claimant had normal but painful neck motion. A Phalens test was negative on May 15, 1986, but as of May 29, 1986, made all fingers numb and tingle. Cervical spine stretchings were prescribed. Claimant did not believe such were helpful. On June 27, 1986, Dr. Krigsten opined that, given claimant' EMG evidence of carpal tunnel syndrome, he would give her a 1% impairment of the left arm.

John J. Dougherty, M.D., reexamined claimant on July 11, 1986. In a report of July 16, 1986, he stated that claimant's disability was strictly based on her complaints and that she, at best, would be entitled to 1%-2% of the left upper extremity. He felt that her ongoing complaints were associated with somewhat poor posture, her mild scoliosis and probably either an irritation to the suprascapula nerve or possibly a subscapula bursitis or periscapular syndrome. He saw no reason why claimant could not continue to work, but reported that she had been off work repeatedly in the past and continued to have a problem. He then opined that it appeared to him the only answer to her problem would be to quit work and to live with it. He opined that the possibility of a carpal tunnel syndrome should be discussed with claimant "although with the tongue in cheek." He thought her problem might possibly be myositis or fibrositis in the periscapular area and left shoulder which possibly could benefit from prolonged physiotherapy and deep heat. On October 7, 1987, G. L. Tapper, D.C., diagnosed claimant's condition as subluxation of the lower cervical, upper thoracic spine stating that, in layman's terms, such represented a minute misalignment of two vertebral segments in relationship to one another. He reported the condition can directly or indirectly result in subsequent irritation to the nerve or muscular tissues of the spinal column. Dr. Tapper felt that claimant's condition resulted from repetitive spinal stress over time. Dr. Tapper first saw claimant on August 26, 1986 per the request of John Morrell & Company. He reported the claimant stated that the previous week she had been lifting boxes weighing approximately 60 pounds for two days and then began to experience

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pain in the lower neck and upper back. The doctor indicated that this incident was the closest to a specific traumatic event which claimant related in her initial consultation.

Dr. Dougherty again examined claimant on October 19, 1987. He reported he was not terribly impressed with the amount of pain or discomfort she was having and he did not think she was having that much trouble. He was unsure as to what else to suggest in regards to treatment, but stated that an MMPI might be considered. He did not believe that a myelogram was indicated. He stated: "It appears to me as near as I can tell her complaints were just a gradual onset, probably associated with work.

Dr. Blume initially saw claimant on May 11, 1987. He concluded that claimant had sustained an injury to the cervical spine of the facet joints and paraspinal muscle mainly on the right side and mid upper cervical spine responsible for the cervical and occipital myalgia on the right side. He thought that both the neck and back conditions were related to years of working at the packing house where she did lifting, turning, twisting, reaching and throwing of pork bellies on a repetitive, daily and yearly basis. He felt claimant had a similar condition with some irritation of the facet joints and paraspinal muscles in the low back, but without evidence of lower cervical or lumbosacral nerve root irritation or compression signs. He reported that he would "basically agree with Dr. Isgreen, that the patient has a permanent partial impairment for the neck and back condition to the body as a whole of 5%."

The following medical expenses were entered into evidence through exhibits 2, 3, 4, 56, 62, 67, 70, 99, 100 and 101:

Dr. Krigsten -- 4/30/86-6/6/86	$ 225.00
Dr. Tapper -- 8/26/86-9/8/86	220.00
Dr. Van Patten -- 9/26/86-10/8/87	500.00
Dr. McGowan -- 8/18/80	32.50
Dr. McGowan -- 8/25/80	12.00
Dr. McGowan -- 8/27/80	12.00
Morningside Family Practice -- 7/8/86	20.00
Dr. Dougherty -- 7/31/86	400.00

Richard D. Sturgeon identified himself as a self-employed paralegal-legal assistant with claimant's counsel's firm. He reported that he had been involved in work on claimant's file and had communicated with the insurer and the employer regarding claimant's claim. Mr. Sturgeon expressed his belief that Iowa Meat Processing had changed its name to John Morrell & Company on March 15, 1986 and that Chubb had ceased to be Iowa Meat's insurer as of February 1, 1986. He reported that, in Spring, 1986, claimant had asked assistance with getting medical care as a result of a dispute between John Morrell and Chubb. Such had not been resolved as of October, 1986. Mr. Sturgeon described

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himself as actively participating in settlement negotiations with Chubb as those were carried out by Jolene Annette Loftin, a claims adjustor for Chubb. He reported that Ms. Loftin offered $6,000 on a special case settlement where an allegation of subsequent injury would be made. Sturgeon testified that he advised Loftin he was investigating the subsequent alleged injury and, if found, would file a new petition against John Morrell and its insurance carrier. Sturgeon reported that John Morrell subsequent denied that a new injury with John Morrell had occurred. He later stated that any new injury was not to the upper body, but, if any existed, was to the left lower back and left leg. He expressed his belief that that did not result in a McKeever situation and that, therefore, the parties were unable to settle under the proffered section 85.35 settlement.

Jolene Annette Loftin testified that Chubb had been Iowa Meats' insurer from December 1, 1983 through February 1, 1986. She indicated that Iowa Meats was sold to John Morrell & Company and that Chubb had never insured John Morrell. Ms. Loftin testified that claimant was paid medical benefits and temporary total benefits by Chubb through the following dates: February 21, 1986 through April 13, 1986; May 16, 1986 through May 20, 1986; and, July 9, 1986 through July 14, 1986. She expressed her belief that Chubb would not have paid such benefits had it been aware of the holdings in the McKeever decision. Ms. Loftin indicated that claimant was last given medical treatment by Chubb under section 85.27 in September, 1986. She indicated that Chubb had authorized claimant to see Dr. Jennings who had subsequently referred her to Dr. Dougherty. She indicated that Chubb also had permitted claimant to see Dr. Isgreen when claimant sought a second opinion. Ms. Loftin stated that Walt Graves had permitted claimant to seek treatment with Dr. Krigsten and Dr. Grossman without the insurer's knowledge.

Ms. Loftin indicated that, on approximately August 5, 1986, she had a phone conversation with Mr. Sturgeon in which she offered $6,000 to settle the claim on the basis of section 85.35. She reported that, on September 16, 1986, during a phone conversation, Sturgeon informed her that claimant had had an injury of February 13, 1986 and that, if Chubb was off coverage for such injury, the $6,000 was probably acceptable. Subsequently a letter was received reporting that claimant's counsel felt there was new information suggesting Chubb's coverage was through February 15, 1986 and that, if such were true, the offer would probably be rejected, but is such were not true, the offer would probably be accepted. Ms. Loftin indicated that she checked the coverage period and reestablished that the coverage ended as of February 1, 1986. She stated she therefore sent information to her counsel for processing of section 85.35 settlement papers. She reported that, by way of a phone conversation of September 29, 1986, Mr. Sturgeon advised her that the deal had fallen through.

APPLICABLE LAW AND ANALYSIS

Our first concern is whether claimant received an injury which arose out of and in the course of her employment with the alleged employer.

Claimant has the burden of proving by a preponderance of the evidence that she received injuries on March 22, 1984 and January 3, 1986 which arose out of and in the course of her employment. McDowell v. Town of Clarksville, 241 N.W.2d 904 (Iowa 1976); Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

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

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

The words "out of" refer to the cause or source of the injury. Crowe v. DeSoto Consol. Sch. Dist., 246 Iowa 402, 68 N.W.2d 63 (1955).

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

"An injury occurs in the course of the employment when it is within the period of employment at a place the employee may reasonably be, and while he is doing his work or something incidental to it." Cedar Rapids Comm. Sch. Dist. v. Cady, 278 N.W.2d 298 (Iowa 1979), McClure v. Union et al. Counties, 188 N.W.2d 283 (Iowa 1971), Musselman v. Central Telephone Co., 261 Iowa 352, 154 N.W.2d 128 (1967).

The supreme court of Iowa in Almquist v. Shenandoah Nurseries, 218 Iowa 724, 731-32, 254 N.W. 35, 38 (1934), discussed the definition of personal injury in workers' compensation cases as follows:

> While a personal injury does not include an occupational disease under the Workmen's Compensation Act, yet an injury to the health may be a personal injury. [Citations omitted.] Likewise a personal injury includes a disease resulting from an injury....The result of changes in the human body incident to the

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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.

In McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985), the Iowa Supreme Court upheld this agency's adaption of the cumulative injury rule for application in factually appropriate cases. The McKeever Court cited Larsen's Workmen's Compensation Law, section 39.50 at 11-350.28 for two general rules as to when the injury occurs for time limitation purposes in cumulative trauma cases. Under Larsen, the injury may occur when pain prevents the employee from continuing to work or when pain occasions the need for medical treatment. The Court adopted the view that the injury occurs when pain prevents the employee from continuing work reasoning that "clearly the employee is disabled and injured when, because of pain or physical disability he can no longer work." McKeever at 374. The McKeever Court then adopted what is commonly called the "last injurious exposure rule" for successive trauma cases, thereby placing full liability upon the carrier covering the risk at the time of the most recent trauma bearing a causal relationship to any disability. McKeever at 376.

Claimant alleges a cumulative trauma brought about through repetitious use of her arm and shoulder. In her petition, she cites two specific injury dates, that is, March 22, 1984 and January 3, 1986. The first reference in the record to complaints regarding claimant's upper extremity and shoulder area occur in what apparently is a note of Dr. Jennings of March 23, 1982 wherein he recites that claimant complains of burning in the

left trapezious area. Claimant was off work from May 3, 1982 through August, 1982, apparently on account of that complaint. Claimant has not alleged a specific injury date in 1982, however. Nor does the record made suggest that the claimant did not recover sufficiently from her condition at that time such that she could not return to and continue working. Indeed, the record indicates that claimant's next treatment for like conditions was in spring and summer, 1984. She saw Drs. Budensiek and Dougherty over that period, but apparently continued to perform light-duty work. Claimant alleges an aggravation of her condition on January 3, 1986, but presented little evidence regarding such. Claimant was then intermittently off work from February 21, 1986 through April 13, 1986; from May 16, 1986 through May 20, 1986; and, from July 9, 1986 through July 14, 1986. Chubb Group of Insurance Companies, the alleged insurance carrier in this action, insured Iowa Meats from December 1, 1983 through February 1, 1986. Apparently, Iowa Meats was sold to John Morrell & Company during 1986. Chubb has never insured John Morrell. Claimant continued to work at the Iowa Meats/John Morrell plant until she was terminated from John Morrell's employment on September 29, 1986. Claimant's termination resulted from her inability to work in the plant, given the restrictions that her personal physician, Dr. Van Patten, had imposed. Claimant had several incidents involving neck and shoulder pain after February 1, 1986. We exclude from those incidents the alleged injury of February 13, 1986 as findings indicate that that primarily involved the lower back and left lower extremity. Claimant did catch her left wrist in a door on April 14, 1986; she fell and hurt her back on July 22, 1986; and, she complained of neck and shoulder pain after lifting 60-pound boxes on or about August 21, 1986. On January 3, 1986, claimant had complained of right shoulder, thoracic back pain while pulling a loin. All of the above suggest that, while claimant may have had cumulative trauma which culminated in an injury under the McKeever doctrine, any such injury did not occur during Chubb's period of insurance coverage. Hence, under the McKeever doctrine, Chubb would not be liable for payment of workers' compensation benefits to claimant. Any injury would have occurred when claimant left work as pain prevented her from continuing to work. After 1982, a period for which claimant does not claim injury in this action, claimant did not leave work again until February 21, 1986. She did not ultimately leave, that is, she was not terminated on account of her restrictions and thereby unable to continue working, until September 29, 1986. Both those events were outside the period of Chubb's insurance coverage. Both events were also, apparently, beyond the times when Iowa Meats employed claimant. Hence, we do not find an injury arising out of and in the course of claimant's employment with Iowa Meats. [We expressly do not find as well that claimant sustained an injury arising out of and in the course of her employment with John Morrell. That question is not before us in this action. Any issue regarding whether claimant received an injury during

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her John Morrell employment would need to be addressed in a claim against that employer.]

As claimant has not prevailed on the threshhold issue of whether she received an injury which arose out of and in the course of her employment with this employer, we need not reach the remaining issues.

FINDINGS OF FACT

WHEREFORE, IT IS FOUND:

Claimant claims injury through repetitious use of her arm and shoulder as well as complains of neck pain.

Claimant complained of burning of the left trapezious on March 23, 1982.

Claimant was off work from May 3, 1982 through August, 1982 on account of that complaint.

Claimant treated for like complaints in Spring and Summer, 1984.

Claimant worked light-duty work during Spring and Summer, 1984.

Claimant complained of right shoulder, thoracic back pain while pulling a loin on January 3, 1986.

Claimant complained of neck and shoulder pain since lifting 60-pound boxes on August 21, 1986.

Claimant was off work for her neck, shoulder and extremity complaints from February 21, 1986 through April 13, 1986; from May 16, 1986 through May 20, 1986; and, from July 9, 1986 through July 14, 1986.

Chubb provided Iowa Meats with insurance coverage from December 1, 1983 through February 1, 1986.

John Morrell was the successor employer to Iowa Meats.

Chubb did not provide insurance coverage for John Morrell.

Claimant was terminated from employment with John Morrell on September 29, 1986 for the stated reason that the company could not provide claimant with work within restrictions which Dr. Van Patten imposed.

Pain did not prevent claimant from continuing to work at Iowa Meats during the period of coverage of the Chubb Group of Insurance Companies.

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CONCLUSIONS OF LAW

THEREFORE, IT IS CONCLUDED:

Claimant has not established an injury which arose out of and in the course of her employment with Iowa Meats during the period of insurance coverage of the Chubb Group of Insurance Companies.

ORDER

THEREFORE, IT IS ORDERED:

Claimant take nothing from this proceeding.

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

Signed and filed this 24th day of June, 1988.

Helenjean Walleser

HELENJEAN WALLESER
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

SHERYL MOORHEAD-FRAME, Claimant, vs. HILLHAVEN, Employer, and RANGER INSURANCE COMPANY, Insurance Carrier, Defendants.	:	File No. 747913 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

Claimant appeals from an arbitration decision denying benefits relating to a back injury of October 10, 1983.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 9; and defendants' exhibits 1 through 52. Both parties filed briefs on appeal.

ISSUES

Claimant states the issues on appeal are whether the deputy erred in determining that the claimant had not shown she received an injury arising out of and in the course of her employment and whether the deputy placed undue reliance upon the fact that claimant had prior lower back pain.

REVIEW OF THE EVIDENCE

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

Claimant originally injured her right foot on October 10, 1983 in a work-related accident. Claimant testified that while she was at home she slipped on her crutches and had back pain. She stated that this incident took place sometime in the first or mid part of November 1983. She stated that she called Dr. Kimelman and complained of back pain. She also testified that she told

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the doctor of back pain on examination the latter part of November. She further testified that she told Margaret McLaughlin at a medical terminology class that she fell with her crutches. Claimant's earlier answers to interrogatories indicated she had informed McLaughlin by telephone. Claimant initially denied and later testified she could not remember whether she missed work on June 7, 1983 because of a bike accident in which she had hurt her back.

Joshua J. Kimelman, D.O., testified that claimant did not mention the back pain from the slip with crutches in the telephone call she made to him on November 18, 1983 or the office visits on November 15 and December 6, 1983. Margaret McLaughlin, who was director of nursing for defendant Hillhaven and was claimant's supervisor in October 1983, testified that she did not recall claimant ever stating she had slipped with her crutches. Jeri Zurg, a staff nurse at Hillhaven, testified that she accepted work absence call-ins and that claimant had called in and said she would not be at work in June 1983 because she had a bike accident and hurt her back.

A Mercy Hospital admitting form dated April 16, 1981 reports that claimant complained of an injury to the lower back and right thigh. A September 6, 1983 note of Roy W. Overton, M.D., indicates that claimant complained of low backache and aching in the right hip area.

Kent M. Patrick, M.D., indicated in a letter dated January 25, 1985 that claimant did not relate history of back problems prior to the pain she developed while on her crutches following the foot injury. He noted that any activity could bring about the same back pain symptoms. In a letter dated January 2, 1985, Dr. Patrick indicated that he had only claimant's story and the records to go on that she developed back pain while on crutches. He opined in that sense the pain is work-related. He also noted in that letter that history of a preexisting or another injury would change the situation.

APPLICABLE LAW

The citations of law in the arbitration decision are appropriate to the issues and evidence and will be augmented only as necessary.

The claimant has the burden of proving by a preponderance of the evidence that the injury of October 10, 1983 is causally related to the disability on which she now bases her claim. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965). Lindahl v. L. O. Boggs, 236 Iowa 296, 18 N.W.2d 607 (1945). A possibility is insufficient; a probability is necessary. Burt v. John Deere Waterloo Tractor Works, 247 Iowa 691, 73 N.W.2d 732 (1955). The question of causal connection is essentially within the domain of expert testimony. Bradshaw v. Iowa Methodist

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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).

ANALYSIS

Claimant has the burden of proving by a preponderance of the evidence that the injury of October 10, 1983 is causally connected to her alleged disability. She asserts that she fell while using her crutches in early or mid-November 1983. That assertion is not corroborated by other lay testimony or the medical record. Her assertion that she informed two other persons of the injury contemporaneously to the event is directly contradicted by those persons. Dr. Patrick opined that claimant's pain, which was a result of use of the crutches, was work-related. He indicated, however, that his opinion would be different if there was a history of prior injury. There was evidence of prior back problems when claimant was seen for complaints of pain in the low back April 16, 1981 and September 6, 1983. Also, she missed work prior to November 1983 for a nonwork-related back condition.

Claimant has not proved by the greater weight of evidence that her back injury is causally connected to the incident on October 10, 1983.

Claimant argues on appeal that the deputy placed undue reliance upon the fact that claimant had prior lower back pain. The deputy in reaching her conclusion relied upon the evidence available, including the history of prior back problems. The deputy correctly relied upon this history, particularly in assessing whether claimant had met her burden of proof and in assessing whether Dr. Patrick's opinion was accurate in light of an inaccurate history.

FINDINGS OF FACT

1. Claimant was examined at Mercy Hospital April 16, 1981 for low back and right thigh pain.

2. Claimant reported she would be absent from work on account of a nonwork back injury in Spring prior to October 10,

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1983.

3. Claimant reported right leg pain radiating into the low back and right hip to Dr. Overton on September 6, 1983.

4. Claimant injured her right foot in a work incident of October 10, 1983.

5. Crutches were initially prescribed for claimant's right foot injury.

6. Claimant first saw Dr. Kimelman on October 14, 1983.

7. Dr. Kimelman advised claimant not to use crutches on November 15, 1983.

8. Claimant telephoned Dr. Kimelman's office and complained of back problems on November 18, 1983.

9. Dr. Kimelman surmised claimant's funny way of walking and her use of crutches were "screwing up" her back but did not report a specific incident of claimant falling on crutches on November 18, 1983 or at any other time.

10. Dr. Kimelman's notes reflect a minor reported incident wherein claimant injured her toes following her original foot injury.

11. Claimant's claim of a fall on her crutches is not corroborated.

12. Use of crutches alone might create back problems, but other sources need be considered where a claimant has had prior back problems.

13. Claimant has had prior back problems.

14. Claimant did not advise either Dr. Patrick or Dr. Kimelman of her prior back problems.

15. Claimant's back condition is as likely as not a pre-existing condition unrelated to her use of crutches as it is a condition created by her use of crutches.

CONCLUSIONS OF LAW

Claimant received an injury arising out of and in the course of her employment on October 10, 1983.

Claimant failed to meet her burden to causally connect any back problem to her injury of October 10, 1983.

WHEREFORE, the decision of the deputy is affirmed.

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ORDER

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 29th day of January, 1988.

DAVID E. LINQUIST
INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

FILED
MAY 12 1988
IOWA INDUSTRIAL COMMISSIONER

DANIEL MORRIS,	:	
Claimant,	:	File No. 787574
vs.	:	
CITY OF DES MOINES, IOWA,	:	A R B I T R A T I O N
Employer,	:	D E C I S I O N
Self-Insured,	:	
Defendant.	:	

INTRODUCTION

This is a proceeding in arbitration brought by Daniel R. Morris, claimant, against the City of Des Moines, Iowa, employer and self-insured defendant for benefits as a result of an injury that occurred on February 7, 1985. A hearing was held on August 21, 1987 in Des Moines, Iowa and the case was fully submitted at the close of the hearing. The record consists of the testimony of Daniel R. Morris (claimant), Michael E. Peterson (safety administrator) and Elizabeth A. Barstad (rehabilitation specialist) and Joint Exhibits one through 158. Both attorneys prepared and submitted outstanding briefs in support of their respective clients. The exhibit list and the exhibits were exceptionally well prepared. They were carefully arranged chronologically, clearly indexed and were very neat, orderly and readable.

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 February 7, 1985 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 in the event of an award, the weekly rate of compensation is $233.82 per week.

That the fees charged for medical services or supplies are fair and reasonable and that the provider of the supplies and

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services would testify that they were for reasonable and necessary treatment of the injury and defendant is not offering contrary evidence.

That no claim is made for credits pursuant to Iowa Code section 85.38(2) for previous payment of benefits under an employee nonoccupational group health plan.

That defendant is entitled to a credit for workers' compensation benefits paid prior to the hearing for 54 and 2/7 weeks at the rate of $233.82 per week.

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 temporary disability.

Whether the injury is the cause of permanent disability.

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

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

Whether claimant is entitled to certain medical expenses under the provisions of Iowa Code section 85.27.

Whether claimant is entitled to an independent medical examination under the provisions of Iowa Code section 85.39.

Whether claimant is an odd lot employee.

SUMMARY OF THE EVIDENCE

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

Claimant, who was born on January 11, 1943, was 41 years old at the time of the injury and 44 years old at the time of the hearing. He discontinued high school in the eleventh grade. He then entered the United States Army from 1960 to 1964. While in the army he obtained his G.E.D. (general education development) certificate. Claimant testified that during high school he did well in shop classes. Also, before entering the army he delivered papers on a paper route.

Past employments include work as a mechanic and vehicle

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maintenance work in the army. Claimant then worked as an assistant manager for Hudson Oil Company at which time he pumped gas and kept timesheets for other employees. He then got a better job with Jenkins Oil Company where he performed minor mechanical repairs and serviced automobiles. Next he performed maintenance and repairs on the assembly line at AMF Western Tool. He also worked as a spray painter there. After that, he moved to California and worked for Reynolds Aluminum as a coil operator. He also performed maintenance and inspection work for Reynolds. He worked for the Iowa State Highway Commission on a road crew as a maintenance man (Exhibit 145). He also engaged in a private tree removal business with other family members. Claimant denied any serious injuries or health problems prior to this injury. All of his prior employments required manual labor or physical activities with his arms.

Claimant testified that he started to work for employer in 1969. His employment application, however, is dated May 18, 1970 (Ex. 145). He passed a preemployment physical examination on May 26, 1970 (Ex. 143). He was appointed to the job of laborer in the Sewage Treatment Plant Division of the Public Works Department on May 27, 1970 (Ex. 108). He was appointed sewage treatment plant helper on August 17, 1970 (Ex. 107). Claimant earned a Waste Water Treatment Plant Operator Certificate on August 25, 1971 that certified that claimant was qualified to operate a grade II waste water treatment plant (Ex. 148).

Claimant was promoted to assistant sewage treatment plant operator on June 19, 1972 (Ex. 103). He operated, inspected and maintained technical equipment. The job called for knowledge of the materials and equipment used in the operation of water and sewage treatment plants; ability to read and interpret from gages the operating status of plant equipment; mechanical apptitude; ability to follow written and oral reports; ability to keep simple records; and ability to supervise the work of others (Ex. 151).

On December 4, 1972, claimant requested voluntary demotion to Sewage Treatment Plant Operator (Ex. 101). On July 21, 1980 claimant became Pumping Station Maintenance Worker (Ex. 96). This was the job claimant was performing at the time of this injury. Claimant's duties were to inspect and maintain pumping station equipment. Claimant testified that he inspected pumping stations, changed pumps, repacked pumps, mowed the grass, washed the windows, mopped the floors and maintained the buildings. The job description called for the following knowledge and abilities:

> Knowledge and Abilities: Knowledge of the care and operation of sewage pumping stations and equipment.
> Knowledge of the materials, methods and tools

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required to maintain such equipment.

Ability to operate electrical and mechanical equipment and to detect flaws or defects in operation.

Ability to follow oral and written instructions; ability to prepare reports.

Ability to serve as a lead person over a small crew and to maintain effective working relationships with them and with superiors.

Ability to operate a motor vehicle safety [sic] and efficiently.

(Ex. 150)

Claimant's work record and ratings were good (Exs. 109-116) except for a reprimand for an unauthorized coffee break on November 26, 1981 (Ex. 118).

Claimant reported a number of accidents and injuries over his 15 years of employment with employer but none of them involved his right shoulder (Exs. 119-138). Claimant testified that he was always able to return to work and perform manual labor after each of these incidents. Claimant stressed several times in his testimony that all of his jobs required physical, manual labor and the extensive use of his arm.

On February 7, 1985 claimant was working at the Neola Pumping Station behind Lutheran Hospital with Robert Lumely. They were carrying a pump housing down the steps into the pumping station. Lumely slipped and claimant caught the weight of the pump housing causing a burning sensation in his right shoulder. At lunch time, claimant reached for his jacket and could not lift his arm. His ring finger was swollen. Claimant went to the Mercy Hopsital emergency room and was then sent home. The following morning he went to the Employee Health Clinic at the armory and reported the injury (Ex. 92).

Randy Miller, D.O., treated claimant on February 7, 1985 and again on February 13, 1985. Dr. Miller reported on February 15, 1985 that claimant had a resolving right shoulder strain. Dr. Miller recorded that claimant had been unable to work since the time of the injury on February 7, 1985 (Ex. 91). Claimant returned to work on February 18, 1985 (Exs. 89 & 91). Claimant was then taken off work again and sent to see Scott B. Neff, D.O., on February 27, 1985 (Ex. 87 & 88). Claimant received the normal physical therapy for this type of injury on February 27, 1985 from Thomas W. Bower, L.P.T., due to a limited range of motion (Ex. 86).

On February 27, 1985, Dr. Neff speculated that claimant could have a hemorrhagic subacromial bursitis and impingement syndrome. He prescribed medications and increased the physical therapy. Dr. Neff did not believe claimant had a rotator cuff

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tear. He said that claimant should not work (Ex. 85). A bone scan was ordered on March 6, 1985 (Ex. 82). The bone scan did not show any increased uptake in the right AC joint and his passive range of motion was normal except for some crepitus and pain with abduction. Claimant was released to return to work on regular duty without specific limitations on March 18, 1985 (Exs. 77-79). At the hearing, however, claimant testified that he was only released to return to work to light duty. Claimant further contended that he had never been released to return to work to full duty at any time after the injury. Claimant did, however, return to work on March 18, 1985.

On September 13, 1985, claimant reported to the Employee Health Clinic that he was having trouble with his shoulder again. Claimant was referred to Dr. Neff again (Ex. 75 & 76). Dr. Neff said on September 18, 1985 that claimant complained of more pain and crepitus in his right shoulder and tingling and numbness in his right arm if he tried to work above shoulder level (Ex. 74).

Mr. Bower reported to Dr. Neff on September 23, 1985 that an EMG did not demonstrate any abnormality (Ex. 72). An arthrogram did not show a rotator cuff tear. Cervical spine films were normal for his age. A NEER subacromial impingement diagnostic test, however, was positive for shoulder impingement. A resection of the coracoacromial ligament, acromioplasty and resection of the subacromial bursa was proposed. If performed, claimant would be limited to sedentary work for two weeks and then could not do laboring work for from four to six weeks (Ex. 63). Claimant requested a second opinion on the surgery (Ex. 61). Robert F. Breedlove, M.D., also diagnosed impingement syndrome of the right shoulder and he also recommended the surgery (Ex. 58).

The surgery was performed on October 29, 1985 (Ex. 52). Claimant was taken off work on September 24, 1985 (Exs. 70 & 71). Claimant was scheduled to return to work on light duty on January 23, 1986 (Exs. 36-38). When claimant complained of pain on January 31, 1986 he was then kept off work again until February 7, 1986 (Ex. 34). Claimant actually requested to go back to his regular duty, instead of light duty on February 4, 1986 and the physical therapist thought that he could do so (Ex. 32).

On February 28, 1986 claimant continued to complain about right shoulder pain (Ex. 29). Claimant was then sent to the Sports Medicine Center at Iowa Methodist Medical Center on March 21, 1986 for extensive physical therapy (Ex. 27). When the physical therapy hurt his shoulder on March 27, 1986 (Ex. 26), Dr. Miller then took claimant off work again on March 28, 1986 (Ex. 25) until April 2, 1986 when he was returned to work light duty with no use of the right shoulder (Exs. 22 & 23).

On April 21, 1986, after claimant continued to complain of right shoulder pain, even on light duty, claimant was sent

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home by Kenneth Schultheis, D.O. (Ex. 19). On the same date, April 21, 1986, claimant was directed to go to the pain center at Mercy Hospital Medical Center (Ex. 17). Dr. Schultheis then released claimant to work again on light duty on May 2, 1986 (Exs. 13, 15 & 16).

Claimant maintained that there was no light duty work in his department. He was given one light duty job in the parts room but that involved using his right arm and reaching. Claimant therefore, contended that he could not perform that job. Claimant was then assigned another job washing walls in the library. After doing this job for only approximately two hours, his right shoulder swelled up clear out to the center of his chest. Claimant was assigned another job where he was directed to dig a hole with a shovel. After attempting to do this for two hours, he was forced to go home at break time. Claimant was assigned still another job to take inventory. Claimant contended that this job required writing and the writing caused his arm to hurt. Claimant testified that it felt like the bones in his shoulder were rubbing together.

On April 28, 1986, James Blessman, M.D., reported that claimant stated that he had intractable pain in his right shoulder which actually increased rather than decreased after the surgery. Claimant stated that he was having trouble sleeping. Furthermore, the pain in his shoulder was causing him to be very irritable. Dr. Blessman recommended that claimant be admitted to the Mercy Hospital Pain Center (Ex. 14).

A week earlier on April 21, 1986, Dr. Schultheis reported that claimant told him that he could no longer do his job even on light duty due to the pain. Claimant told Dr. Schultheis that he just could not work eight hours a day (Ex. 19). Dr. Schultheis then reported on May 5, 1986 that claimant requested a disability rating from him because claimant felt that he could no longer handle the job (Ex. 12).

Claimant testified that when he left the city in late June or early July of 1986, that there was very little that he could do with his right arm that did not irritate it. Claimant testified that he could not raise his right arm up above his waist. Working below his waist he only had approximately one-half of the strength in his right arm. Claimant averred that his arm constantly ached like a dull toothache and that it has continued to feel that way even up to the time of the hearing. Claimant explained that he refused to go to the Pain Center because he needed to work in order to get money. It was demonstrated on cross-examination however, that claimant's work was in the evening hours and that claimant could have worked and also gone to the Pain Clinic at the same time.

On May 7, 1986, Mr. Bower assessed a 17 percent permanent

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functional impairment of the right upper extremity (Ex. 9). On the same date, Dr. Neff found that claimant still had pain over the right AC joint. Claimant, however, declined to have another bone scan to see if degenerative changes had occurred. Claimant contended that the earlier bone scan gave him a rash on his legs. Dr. Neff contended that the rash on his legs was not related to the bone scan. At this time claimant also asserted that he was having severe headaches which began in his neck and go into his face (Ex. 9). At the request of Dr. Schultheis (Ex. 8) Dr. Neff fractioned Mr. Bower's permanent functional impairment rating of 17 percent. Dr. Neff assigned 12 percent of the rating to claimant's work-related injury and five percent of this rating to normal wear and tear that occurs with advancing age and activities unrelated to work (Ex. 7). Dr. Neff imposed no limitations or restrictions at this time (Exs. 7 & 9). At the time of claimant's final visit to the Employee Health Clinic on July 2, 1986, Dr. Blessman said that he believed that claimant's pain was real; that claimant could perform some limited duty; but that claimant was poorly motivated to return to work. At that time, he modified claimant's restrictions even further to enable him to return to work by stating that claimant should not lift more than five pounds. Dr. Blessman added that claimant refused to do even this. Again, he recommended that claimant try the Pain Center (Ex. 6).

Claimant was examined quite thoroughly and evaluated by a physician of his own choice, Paul From, M.D., on July 18, 1986. Dr. From reported that claimant had decreased range of motion of the neck, especially to the right. There was limitation of motion in the right shoulder with abduction limited to 90 degrees. Claimant also demonstrated a limitation of internal rotation. Claimant complained of pain and numbness in his shoulder which Dr. From said were due to this injury. He found that claimant sustained an impairment of ten to 12 percent of the body as a whole (Ex. 4).

Marshall Flapan, M.D., examined and evaluated claimant on January 15, 1987. He said that claimant continued to have pain and discomfort in his right shoulder which claimant said was worse after the surgery than prior to the surgery. Dr. Flapan related that claimant feels discomfort after only one hour of use. Actively claimant could not abduct more than 60 degrees. Passively Dr. Flapan could abduct his shoulder to 110 derees. Claimant demonstrated less grip strength on the right than on the left. Dr. Flapan diagnosed:

DIAGNOSIS:

1) Chronic shoulder pain and discomfort secondary to a work-related accident in February of 1985.

2) Post-op fibrosis of the right shoulder secondary

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to above.

3) Status post op: Impingement release right shoulder over a year ago.

(Ex. 3, page 2)

Dr. Flapan found that claimant sustained a 20 percent permanent functional impairment of the right upper extremity as a result of the work-related injury (Ex. 3, p. 2). He recommended the following restrictions:

RESTRICTIONS

It is my opinion at this time that Mr. Daniel Morris is able to work at some type of sedentary activity which does not require the extensive use of his right upper extremity. I doubt if he would be employable in any occupation which required the use of his hands above the level of his shoulders. Pulling and pushing with the right upper extremity should be restricted. Weight lifting would be okay, probably, lifting nothing higher than the level of his waist.

(Ex. 3, p. 2)

Dr. Flapan had nothing further to offer in the way of treatment. He stated that claimant's healing period had ended. He felt that with time and without abusing his shoulder that claimant's discomfort will tend to disappear (Ex. 3, p. 3).

Claimant chose to see Craig A. Wignall, D.C., in September of 1986. Claimant admitted that he was not referred there by employer. He also admitted that he did not notify employer that he was going to see Dr. Wignall and he did not ask permission to see Dr. Wignall. Dr. Wignall made a report on April 9, 1987. He stated that the entire right shoulder was irritated, range of motion was moderately reduced, there was evidence of fibrosis and myofacitis. Dr. Wignall stated that he did not believe claimant's shoulder would ever be normal again. He added that claimant would need treatments two to four times a month to prevent further deterioration (Ex. 2). Claimant testified that he saw Dr. Wignall because his wife went there first. Dr. Wignall told claimant's wife that he could help claimant. Claimant testified that Dr. Wignall manually moved his arm, then used a shocker and then put some deep heating stuff in his arm. The pain would go away for about two hours and then it would come back again.

A very detailed Functional Capacity Evaluation was performed at Mercy Pain Center on July 30, 1987. It showed that claimant

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had pain in his right shoulder which limited his ability to use his right upper extremity (Ex. 1).

On July 31, 1987 James L. Blessman, M.D., reported to defendant's vocational rehabilitation specialist, Elizabeth A. Barstad, that claimant could lift 50 pounds infrequently and 25 pounds or less frequently. Claimant was totally restricted from climbing a ladder and should not work in extreme cold temperatures on a regular basis. Dr. Blessman added that claimant should do no lifting above waist level and no reaching above shoulder level (Ex. 1, pp. 6 & 7).

On September 23, 1986, claimant was evaluated by Robert W. Jones, B.S. and G. Patrick Weigel, M.A., two vocational rehabilitation specialists. They also reported that claimant told them that the surgery increased his perceived pain and his ability to abduct, but the surgery had enabled him to flex his arm to shoulder level. Claimant also reported that any physical activity of any kind with his right arm aggravated his right shoulder. Claimant also reported to them that he had leg cramps and dermatitis which began two or three days after the bone scan and these symptoms have continued every since.

Claimant completed the pencil and paper portion of several tests: the General Apptitude Battery Test (GATB), the Career Assignment Inventory (CAI), Volpar Component Work Samples number four for upper extremity range of motion and number eleven for hand, eye and foot coordination. Claimant manifested difficulties in writing with his right arm and reaching. His test results were average and showed that he could do the vast majority of occupations found in the Dictionary of Occupational Titles (DOT) (Ex. 3, pp. 4-8).

These men reported that claimant's employment interests were blue collar types of jobs working with things rather than people. They said claimant was a good repairman and enjoyed that work. He displayed steady work habits and good concentration. Claimant avoided using his right arm. Weigel and Jones recommended that claimant return to work with the city of Des Moines in a light duty capacity within his restrictions with the possibility of eventually being able to work without restrictions. Claimant testified that the city never called him in and offered him any employment after they received this evaluation.

Claimant testified that his current condition is that when he moves his shoulder it feels like the bones are rubbing together. He cannot handle the vibration of a chain saw. He can no longer fish because he cannot crank the reel with his dominant right arm.

Claimant testified that his current employment is that he and his wife clean two buildings. He does this work simply to

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pay the bills. The duties are to take out the trash, dust and mop the floor. Claimant testified that he is able to perform these tasks. Claimant testified variously that this job requires one to two hours per day and at another point two to four hours per day. He added, however, that he himself could only work approximately one hour and then he would have to take a break and rest because of the pain in his right arm. Claimant first testified that could not remember, but later testified, that he did in fact start this job in January of 1986, even before he returned to work with the city after his surgery on October 29, 1985. He did not return to work for the city until February of 1986. Claimant further admitted that he was doing the tasks required by this job at the same time that he told the city he was unable to perform the light duty or modified work provided by them. Claimant explained however, that he did not know of any city job where you can work only one hour and then take a break. Claimant related that if he tried to work three or four hours it would hurt so bad that he would not be able to sleep.

Claimant testified that he and his wife divide $1,065.00 per month for doing this job. His share then, is $532.50 per month. He testified that he formerly earned $768.00 biweekly from the city. Claimant testified that Dr. Neff's statements in his letter of May 14, 1986 about this employment are false. Dr. Neff had said:

Mr. Bower tells me that this patient is leaving the employment of the city to supervise a janitorial crew that is run by his brother, and he is content to do that, and will make more money than he is currently making at his city job.

Obviously, that is a positive situation for him, and there is certainly no reason to restrict him from that activity of his choice.

* * *

In light of his expressed wishes to Mr. Tom Bower, we will certainly release him him from our care, to assume his new occupation as supervisor of a janitorial cleaning service.

(Ex. 9)

Claimant conceded that he has not sought any other kind of employment elsewhere because he did not believe he could find anything. He testified that he was never offered any vocational rehabilitation by employer. He was informed at one time that someone would contact him, but nobody ever did. Claimant testified that he has no plans to seek any other or different employment in the future. Claimant stated that he can no longer

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do woodworking at home because his right hand cannot hang on to the skill saw. He cannot do any of his old city jobs because he is unable to work eight hours a day.

Claimant admitted that no doctor told him that he could not do light work eight hours a day for the city. This was simply his own personal decision. He also acknowledged that it was his own personal decision to take a leave of absence. He granted that no doctor had recommended to him that he take a leave of absence from his job. He admitted that no one told him not to lift. He doesn't do it however, because when he gets objects to waist level he begins losing his strength.

Claimant's basic position was that the city offered him no employment that he could perform within his limitations. Claimant testified that he never did say that he did not want to work at all. He only complained about what effected his shoulder and arm.

Michael E. Peterson, safety administrator for the city, testified that he was aware of the injury on February 7, 1985. His first contact with claimant was in February of 1986 when claimant returned to work. Claimant called him and asked him about a disability settlement. Peterson testified that claimant not only received workers' compensation benefits while he was off work but also "J time" which is a supplement from the city that is equivalent to approximately 115 percent to 120 percent of claimant's net salary. Peterson related that claimant was offered light duty in March and April of 1985 but would not cooperate with the job modifications provided by the city. There was no medical evidence or explanation for why claimant could not do these jobs. Claimant was not held to any strict standard. The only objective in providing these jobs was to supply some work hardening to allow claimant to build up to regular employment again. Peterson testified that claimant made some effort but there was no explanation for why he could not do what the doctors expected him to do. Many of the tasks assigned to claimant could have been performed left handed.

Claimant would simply go home saying that he could not take the pain. Peterson said that Dr. Neff told him that claimant was not interested in working for the city in any capacity. At claimant's request he was given 60 days medical leave of absence and an additional 30 days of pay in approximately July of 1986. Claimant is currently on extended leave of absence without benefits. Peterson testified that claimant told him that he refused to go to the Mercy Pain Center because he could not handle it with his financial obligations. Peterson said that he offered to start claimant's permanent partial disability benefits but claimant still declined to go to the pain center. Peterson thought it was inconsistant that claimant could not work due to pain but at the same time refused to go to the pain center for

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treatment for his pain. Peterson said that claimant told him that he did not want to try any other jobs with the city. Claimant thought his own job was the easiest job. Peterson stated that claimant used up all of his medical leave and comp time and was then put on extended leave of absence. Peterson concluded that claimant simply did not want to work for the city.

After Dr. Neff rated claimant and discharged claimant from treatment, claimant did not ask for any further medical treatment from the city. Claimant never contacted the city again to ask for any employment. After claimant's evaluation by Weigel and Jones, claimant did not call Peterson and ask for a job. Peterson said he felt the burden was on the claimant to contact him if he wanted a job with the city. Peterson said that he felt no duty to contact claimant after he received the report of Weigel and Jones. He related that the city job structure is such is that it is not possible to simply tailor up a job for claimant to do within his restrictions. All of the jobs are either civil service or union jobs. You must either apply or bid in order to receive one of these jobs. As to claimant's future status with the city, Peterson said he is waiting to see what claimant's real interest is after the workers' compensation matter is resolved. Placing the claimant on a extended leave of absence status makes it easier for claimant to be reemployed. Claimant said that he had not heard of Dr. Wignall until the date of the hearing.

Elizabeth A. Barstad, a rehabilitation specialist, testified that she evaluates disabled persons and assists them in returning to their former job or in finding other employment. She was hired by the city to do a vocational assessment. She did not interview claimant personally in this case. She met him for the first time at the hearing. She did review his job history, his medical reports, claimant's deposition of March 10, 1987 and the work capacity evaluation of January 15, 1987. Barstad contended that it is neither helpful nor harmful to meet the claimant in person in order to perform an evaluation. She said that claimant's GATBY scores showed an educational level of two years beyond high school. Her primary consideration was the restrictions recommended by Dr. Blessman. On July 31, 1987, Dr. Blessman said that claimant could lift 50 pounds infrequently, 25 pounds or less frequently, he was prohibited from climbing ladders, he should not work in extremely cold temperatures, he should not lift above his waist and he should not reach above shoulder level.

Barstad testified that her computer printout demonstrated over 100 jobs from the Dictionary of Occupational Titles (DOT) that claimant had the ability to perform. She listed the following job categories within claimant's ability (1) janitor maintenance; (2) mail sorting; (3) security guard; (4) electronics jobs; (5) dispatcher; (6) clerical jobs and (7) supervisory jobs.

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Barstad testified that claimant was employable. She stated that she based her opinion upon Dr. Blessman's recommended restrictions and not upon the claimant's self-imposed restrictions. Barstad admitted that she was not asked to find a job for claimant but only to find the availabilty of jobs that he could do. Barstad further testified that she contacted a number of employers and found a number of job openings in these same categories that she felt claimant could perform.

APPLICALE AND ANALYSIS

The claimant has the burden of proving by a preponderance of the evidence that the injury of February 7, 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).

Claimant did sustain the burden of proof by a preponderance of the evidence that the injury was the cause of both temporary and permanent disabilty. Although claimant has had a number of injuries and health problems, he had sustained no problems with his right shoulder prior to this injury. All of the doctors proceeded on the history of the injury to the shoulder which occurred on February 7, 1985. No other cause is suggested either directly or indirectly in any of the evidence.

Claimant is entitled to temporary disability benefits for the periods of time that he was taken off work by the doctors. These periods of time are as follows:

(1) 02-07-85 to 02-18-85	(Exs. 89 & 91)
(2) 02-27-85 to 03-18-85	(Exs. 87 & 88; Exs. 77-79)
(3) 09-24-85 to 02-07-86	(Exs. 70 & 71; Ex. 34)
(4) 03-28-86 to 04-02-86	(Ex. 25; Exs. 22 & 23)

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(5) 04-21-86 to 05-02-86 (Ex. 19; Exs. 13, 15 & 16)

Even though Dr. Neff assessed an impairment rating on March 14, 1986, which is the date frequently used for maximum medical improvement, claimant is nevertheless, only entitled to payment for the periods of time when the doctors took him off work as set out above. For the same reason claimant is not entitled to temporary disability benefits until Dr. Flapan happened to mention gratuitously that claimant's healing period had ended on January 15, 1987.

As to permanent disabilty, claimant has not sustained the burden of proof by a preponderance of the evidence that he is permanently and totally disabled. Diederich v. Tri-City R. Co., 219 Iowa 287 258 N.W. 899 (1935). Nor can it be said that claimant is permanently and totally disabled under the odd lot doctrine as defined by the Iowa Supreme Court in the case of Guyton v. Irving Jensen Co., 373 N.W.2d 101 (Iowa 1985). In order to make out a prima facie case, claimant must first demonstrate a bona fide effort to return to gainful employment in the area of his residence. Claimant testified that he had not sought any employment of any kind anywhere since his injury. He had not made any attempt to return to work for the city based upon his own personal determination that the city does not have any jobs that he can do. Claimant has singularly and unilaterlly determined that there is no other employment in the competitive labor market that he can perform and therefore, he has made no attempt of any kind to find any employment anywhere. Therefore, claimant has failed to make a prime facie case of permanent total disability based upon the odd lot doctrine. Emshoff v. Petroleum Trans. Services, file no. 753723 (Appeal Decision March 31, 1987). Claimant has also demonstrated no anatomical, organic or physical abnormality that has been identified by any of the medical practitioners which would make out a primie facie case of permanent total disability. None of the doctors suggested that claimant is not able to work at all. On the contrary, a number of the medical practitioners recommended that claimant could work within certain restrictions. Claimant's self-determination of disability then is not supported or corroborated by any of the medical evidence or any other evidence in the record.

Furthermore, as pointed out by defense counsel in her brief, claimant's past employment accomplishments and his current abilities based upon the testimony of Weigel, Jones and Barstad place claimant well beyond the typical unskilled, unemployable, odd lot employee. Claimant has also failed to make out a prime facie case for this reason that he is an odd lot employee.

Even if claimant had made out a prime facie case as an odd lot employee, defendant demonstrated through (1) the testimony of Weigel, Jones, and Barstad; (2) the functional capacity evaluation and (3) the testimony of Dr. Blessman, that even

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though claimant has restrictions, he is still very employable in a number of occupations for which openings are usually available and were actually available at the time of the hearing.

If claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich, 219 Iowa 587, 593, 258 N.W. 899, 902 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 operative phrase then in industrial disability is loss of earning capacity. Ver Steegh v. Rolscreen, IV Iowa Industrial Commissioner Report 377 (1984).

Claimant was 41 years old at the time of the injury and 44 years old at the time of the hearing. He is therefore, in the middle part of his working life. His loss of future earnings from employment due to his disability is more serious than would be the case for a younger or an older individual. See Beck v. Turner-Busch, Inc., Thirty-fourth Biennial Report of the Iowa Industrial Commissioner 34 (1979); Walton v. B & H Tank Corp., II Iowa Industrial Commissioner Report 426 (1981).

At the same time, claimant is young enough to be retrained. The feasibility of retraining is one of the considerations involved in determining industrial disabilty. Conrad v. Marquette School, Inc., IV Iowa Industrial Commissioner Report 74, 78 (1984).

Claimant testified that he was told that he would be contacted by a vocational rehabilitation person but that he was never contacted. Therefore, defendant made no attempt to vocationally rehabilitate claimant. Schelle v. HyGrade Food Products, Thirty-third Biennial Report of the Industrial Commissioner 121 (1977).

At the same time, claimant did not seek private vocational rehabilitation or the services of the State of Iowa Vocational Rehabilitation Services on his own initiative. Defendant has demonstrated that they made an effort to modify approximately four jobs in order to meet claimant's restrictions. Claimant's

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contention that he could not perform these jobs was not supported or corroborated by the doctors or any other evidence. On the contrary, claimant did acknowledge that he was doing the janitorial service job as a self-employed person with his wife even prior to the time that he was released to return to work for the city after his surgery. Claimant's explanation of a dull ache and constant pain in his right shoulder and arm, even though they are true, are not a substitute for medical findings of impairment. Waller v. Chamberlain Mfg., II Iowa Industrial Commissioner Report 419, 425 (1981).

An employee making a claim for industrial disability will benefit by a showing of some attempt to find work. Hild v. Natkin & Co., I Iowa Industrial Commissioner Report 144 (Appeal Decision 1981); Bientema v. Sioux City Engineering Co., II Iowa Industrial Commissioner Report 24 (1981); Cory v. Northeastern States Portland Cement Co., Thirty-third Bienniel Report of the Industrial Commissioner 104 (1976).

Since claimant has made no showing of any effort to find any kind of employment, then there is no evidence from which it can be determined what claimant can and cannot do within the boundries of his disability and limitations of persistant pain. Schofield v. Iowa Beef Processors, Inc., II Iowa Industrial Commissioner Report 334, 336 (1981). Claimant's unsupported statement that he can only work approximately one hour with his right arm before he has to quit is not sufficient to sustain an award of permanent total disability or an extremely large award of permanent partial disability.

Nevertheless, claimant has established a substantial amount of industrial disability. Most of claimant's former employments during the last 15 years with the city and even prior to that are now foreclosed to claimant because of his lifting restrictions, no climbing of ladders restrictions, no work in extreme cold temperature restriction, no lifting above waist level restriction and no reaching above shoulder level restriction. These restrictions will cause a sizable reduction in claimant's earning capacity. Michael v. Harrison County, Thirty-fourth Bienniel Report of the Industrial Commissioner 218, 220 (Appeal Decision 1979).

At the same time, claimant's post injury earnings are not synonymous with his loss of earning capacity. Post injury earnings create an inference of earning capacity commensurate with them, but are rebuttable by evidence showing them to be an unreliable basis for estimating earning capacity. 2 Larson Workmen's Compensation Law, section 57.21(d). Post injury earnings are not synonymous with earning capacity. 2 Larson, sections 57.21, 57.31. This is particularly true in view of claimant's lack of motivation to perform the modified jobs provided by the city based on the testimony of Peterson, the doctors and the Employee Health Clinic. Post injury earnings

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are also no indicator in a situation where claimant has made no effort or any attempt to look for work within his abilities in the competitive labor market based upon the testimony of Weigel, Jones and Barstad.

Dr. Neff found claimant's permanent functional impairment to be 12 percent of the right upper extremity. This converts to seven percent of the body as a whole using the Guides to the Evaluation of Permanent Impairment, second edition of the American Medical Association, table 20, on page 23.

Dr. From stated that claimant's permanent functional impairment was ten to 12 percent of the body as a whole.

Dr. Flapan determined that claimant's permanent functional impairment rating was 20 percent of the right upper extremity and using the AMA Guides again this converts to 12 percent of the body as a whole.

Dr. Blessman did not give a permanent functional impairment rating.

Claimant has sustained a significant permanent functional impairment of the body as a whole. Also, claimant's restrictions imposed by Dr. Blessman are significant. At the same time, claimant did not satisfactorily explain why he could not do the modified jobs provided by the city when the doctors felt that he should be able to do them. Claimant did not satisfactorily explain why he has not sought employment within his restrictions within the competitive labor market. Claimant did not satisfactorily explain why he did not accept the treatment at the Pain Center which defendant was willing to pay for when claimant said that he was unable to work due to his pain. Claimant testified that he needed to work to obtain money. However, Peterson testified that claimant was offered the payment of permanent partial disability benefits while he took treatment at the Pain Center. It was also established that the Pain Center hours did not conflict with claimant's job which was primarily in the late afternoon and evening hours. Employers are responsible for the reduction in earning capacity caused by the injury. They are not responsible for a reduction in actual earnings because the employee resists returning to work. Williams v. Firestone Tire and Rubber Co., III Iowa Industrial Commissioner Report 279 (1982).

Based on the foregoing considerations and all of the factors that are considered in determining industrial disability, it is determined that claimant has sustained a 30 percent industrial disability to the body as a whole.

Claimant asserted that he has had a rash on his legs and leg cramps ever since the bone scan ordered by Dr. Neff. Fairly

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early in Iowa workers' compensation law the Supreme Court decided 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 aggravated or increased 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 v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 and Cross v. Hermanson Bros., 235 Iowa 739, 16 N.W.2d 616 (1944).

Dr. Neff however, stated that the rash was unrelated to the bone scan (Ex. 9). Claimant also admitted on cross-examination that this condition had not caused him any disability. Therefore, it is determined that claimant has not sustained the burden of proof by a preponderance of the evidence that the leg rash and cramps are sequellae of this injury. Even if he had done so, claimant has conceded that this condition caused no disability. Therefore, claimant is not entitled to any additional disability benefits based upon the alleged leg rash and leg cramps.

Iowa Code section 85.27 requires the employer to furnish reasonable medical treatment. It also gives employer the right to choose the care, except in the case of an emergency or in a situation where the industrial commissioner has ordered alternate care. Claimant testified that he personally chose to see Dr. Wignall. He admitted that he did not ask employer for permission to see Dr. Wignall. Employer had already supplied Dr. Neff, Dr. Miller and Dr. Schultheis that claimant could see at any time for authorized care. There was no emergency. There was no application for alternate care. Consequently it is determined that claimant is not entitled to reimbursement for the medical expense or medical mileage to receive treatment from Dr. Wignall.

Iowa Code section 85.39 provides:

If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary

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transportation expenses incurred for the examination.

Defense counsel contends that claimant must serve a request on defendant in order to be entitled to an independent examination and that claimant failed to serve such a request on either the defendant employer or the industrial commissioner. In Pirozek v. Swift Independent Packing, (File nos. 753642, 753643 and 724893) (Appeal Decision February 18, 1987) the industrial commissioner, Robert C. Landess, held that service of notice or a request in advance of the independent medical examination is not required by the statute. Commissioner Landess held as follows:

> Claimant sought an independent medical examination by a physician of his own choice. Although application was not made prior to the examination, the condition precedent of an evaluation made by an employer retained physician was present. The application is now made for reimbursement of the reasonable fee of the examination. The provision for reimbursement does not come into play until, as here, the defendants' liability is established. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 1984 (Iowa 1980). The allowance of the reasonable fee for such examination is correct.

Dr. From's fee in the amount of $400.00, although high, cannot be said to be unreasonable, in light of the extensive examination he made and the lengthy report on the status of claimant's physical condition. It is not necessary for claimant to serve a request upon defendant or the industrial commissioner prior to the examination. It is not necessary to apply for an examination prior to the actual examination itself. The operative factors are a prior evaluation performed by a physician retained by the employer which the employee believes to be too low and a determination that defendant is liable for the injury. In conclusion then, it is determined that claimant is entitled to payment for the examination of Dr. From in the amount of $400.00. No claim was made for reasonable transportation expense for this examination, therefore, no decision is made on this point at this time.

FINDINGS OF FACT

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

That the injury of February 7, 1985, caused claimant to be off work during the periods described in the foregoing section of this decision entitled Applicable Law and Analysis.

That the injury of February 7, 1985, was the cause of a significant permanent functional impairment to the body as a

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whole rated by Dr. Neff at seven percent, Dr. From at ten to 12 percent and Dr. Flapan at 12 percent.

That the restrictions of lifting 50 pounds infrequently, 25 pounds or less frequently, no climbing ladders, no work in extremely cold temperatures, no lifting above waist level and no reaching above shoulder level are significant work restrictions.

That claimant is unable to perform most of his former employments with this employer and other employers in the past.

That claimant is intelligent, versatile and has been able to obtain the objectives that he set for himself in the past.

That there are several other types of employment which claimant could perform based upon the testimony on Barstad, Weigel, Jones, the functional capacity evaluation and the reports of Dr. Blessman and Dr. Flapan.

That claimant himself, singularly and unilaterlly, determined: (1) that he cannot perform any of the modified light duty jobs provided to him by employer; (2) that employer had absolutely no jobs that he could perform and that is was necessary for him to quit working entirely for that reason and (3) that there are no jobs that he could perform in the competitive job market and therefore he has made no effort to seek any employment of any kind since the injury.

That claimant is currently working in self-employment with his wife in a janitorial service.

That there was no medical evidence or any other evidence of any kind in support of claimant's testimony that he could not perform the modified jobs provided by employer or that he is unable to find work that he can do in the competitive labor market in the area of Des Moines, Iowa.

That Dr. Wignall was not an authorized physician by the employer but on the contrary claimant admitted that this was his own choice of physician and that he did not seek permission from employer to see Dr. Wignall.

That claimant obtained an independent medical examination from Dr. From and incurred a $400.00 expense for this examination.

That claimant sustained a 30 percent industrial disability to the body as a whole.

CONCLUSIONS OF LAW

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

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That the injury was the cause of both temporary and permanent disablity.

That claimant is entitled to healing period benefits for the periods described in the Applicable Law and Analysis section of this decision.

That claimant is entitled to 150 weeks of permanent partial disability benefits based upon a 30 percent industrial disability to the body as a whole.

That claimant is not entitled to be reimbursed for the treatment of Dr. Wignall or his tranportation expenses to see Dr. Wignall.

That claimant is entitled to be reimbursed for the independent medical examination performed by Dr. From in the amount of $400.00.

That claimant did not sustain the burden of proof by a preponderance of the evidence that he is permanently and totally disabled as an odd lot employee or otherwise.

ORDER

THEREFORE, IT IS ORDERED:

That defendants pay healing period benefits to claimant as follows:

(1) 1.714 weeks from February 7 to February 18, 1985.
(2) 2.857 weeks from February 27 to March 18, 1985.
(3)19.571 weeks from September 24, 1985 to February 7, 1986.
(4) 0.857 weeks from March 28 to April 2, 1986.
(5) 1.714 weeks from April 21 to May 2, 1986.

A total of 26.713 weeks at the rate of two hundred thirty-three and 82/100 dollars ($233.82) per week in the total amount of six thousand two hundred forty-six and 91/100 dollars ($6,246.03).

That defendants pay to claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of two hundred thirty-three and 82/100 dollars ($233.82) per week in the total amount of thirty-five thousand seventy three dollars ($35,073.00) commencing on February 19, 1985 and as interrupted by the subsequent periods of healing period benefits in the foregoing paragraph.

That defendant is entitled to a credit for fifty-four point two eight six (54.286) weeks of workers' compensation benefits paid prior to hearing.

That all accrued amounts are to be paid in a lump sum.

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That interest will accrue pursuant to Iowa Code section 85.30.

That defendant pay to claimant or the provider of services the amount of four hundred dollars ($400.00) for the independent medical examination performed by Dr. From.

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

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

Signed and filed this 12th day of May, 1988.

Walter R McManus Jr

WALTER R. McMANUS, JR.
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

LINDA V. MORSE, Claimant, vs. CHAMPION GLOVE MFG. CO., Employer, and EMPLOYERS MUTUAL CASUALTY COMPANY, Insurance Carrier, Defendants.	FILE NO. 813735 A R B I T R A T I O N D E C I S I O N FILED APR 29 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Linda V. Morse, claimant, against Champion Glove Manufacturing Company, employer (hereinafter referred to as Champion), and Employers Mutual Casualty Company, insurance carrier, for workers' compensation benefits as a result of an alleged injury on May 10, 1985. On March 25, 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 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. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $235.00.

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.

ISSUES

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

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

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

III. The extent of weekly disability benefits to which claimant is entitled.

SUMMARY OF THE EVIDENCE

The following is a summary of the evidence presented in this case. For the sake of brevity, only the evidence most pertinent to this decision is discussed. Whether or not specifically referred to in this summary, all of the evidence received at the hearing was considered in arriving at this decision. 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 she worked for Champion from February 18, 1971 until the latter part of May, 1985, at which time she quit upon the advice of her physician. Claimant has held more than one job at Champion but primarily she was a "cutter" and a sewing machine operator. Champion manufactures sport gloves such as leather gloves to use to play golf. Claimant's job involved the cutting and sewing of leather used to make these gloves. Claimant testified that she was earning $9.10 per hour ($375.00 per week) in her job before she left in May, 1985.

Claimant testified that her work at Champion involved working in a very dusty environment from handling the leather used in the manufacturing process and that the "chalk" dust was visible. Claimant testified that on May 15, 1985, she was hospitalized for a severe asthma attack consisting of shortness of breath, coughing and running of the nose. Claimant was treated by Donald Burrows, M.D., a specialist in pulmonary care (lungs and breathing mechanisms). Dr. Burrows related the attack to the dust at work noting a prior diagnosis eight years previous for asthma and intermittent treatment since that time. Treatment by Dr. Burrows consisted of rest and increase in medication. Claimant was also placed on a "nebulizer" machine which is a device to nebulize medicine and blow the medicine into the bronchial tubes and lungs. After her release from the hospital on May 21, 1985, claimant testified that she returned to work for approximately four hours and again experienced breathing difficulties with coughing and she returned home to use the nebulizer. Claimant has had continuing problems since that time. Claimant has not returned to work at Champion upon the advice of Dr. Burrows.

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Dr. Burrows continued treatment of claimant and she was again hospitalized in June, 1985, after awaking one morning with another asthma attack. Dr. Burrows' treatment lasted until February, 1986. Since that time, claimant has been admitted to the emergency rooms of various hospitals on three occasions to receive shots and other treatment to control episodes of asthma attacks. The most recent episode occurred in December, 1987, while she was baking pies for Christmas. Claimant attributes this episode to the baking flour in the air at the time. Claimant also has no real explanation as to the precipitating factors in the other attacks.

In his deposition, Dr. Burrows opines that claimant has not suffered a permanent injury to her lungs as a result of the dust exposure at Champion. The doctor notes that what may appear dusty and dirty to asthmatics may not be dusty and dirty to nonasthmatics. The doctor describes claimant's asthma episode at Champion as an aggravation of a preexisting asthmatic condition. The doctor explained that although he does not believe that claimant was exposed to any specific chemicals, he believes that the dust exposure set up an irritation of the bronchial tubes in claimant's lungs and this irritation caused her to have increased sensitivity and susceptability to asthma attacks from lesser concentrations of dust or other items or from physical activity. When asked whether this aggravation has any permanency, the doctor felt that he expects claimant's aggravation to be fully reversed by modification in medications and removal of claimant from dusty environments. He has specifically prohibited claimant from working in any dusty work or play environments. In response to a specific question on whether the aggravation was permanent the doctor responsed in his deposition as follows:

> A. I'm not sure. And the reason being is I have asthmatics who can't work, who are disabled because we cannot fully reverse their disease, and it seems we have done everything we can possible to rid them of various exposures. So that in Linda Morse' case I would summarize she has very bad asthma that puts her at great risk for having problems with breathing in any type of dusty environment, that theoretically outside the dusty environment she should do well on the medication. But that doesn't take into account that when she gets older her asthma may get harder to control. It may not become reversible. Other factors may develop that cause her problems. It is not something that stays exactly the same way all the time.
>
> The analogy is good from the point of view -- maybe the point of view back then; but

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generally our bad asthmatics, they would not qualify. I wouldn't say that the only problem she had was her work environment. I think it contributed to her problem. I don't think if you remove her from the work environment she no longer has a problem with that. I would not make that statement.

Q. Because?

A. Because she has asthma. She has a tendency to react to various things. This discussion we are having, let me tell you, is debated what asthma is and what it means with lung doctors in lung conferences. It seems so simple but it is very complex, what is defined as asthma and what we call asthma and what it can do and not do.

If somebody has coronary artery disease, in other words, they have angina, the flow to their heart is decreased and when they exercise they get chest pain and potentially get a heart attack. If their job is chasing after dogs, well, they're going to have a lot of pain when they chase the dogs. Take them away from that job and put them at a desk job, they still have the coronary artery disease; but you have taken them away from the environment that makes it worse, in a sense.

Q. And the chasing of dogs didn't cause the coronary artery disease?

A. Correct.

Q. It just --

A. It could cause the heart attack in a sense precipitated on top of the coronary artery disease but didn't cause the underlying condition.

Q. And the same thing is true in this case?

A. Yes.

Q. The work environment of Linda Morse isn't the cause?

A. I don't think so.

Claimant does not dispute that she was diagnosed as an asthmatic prior to May, 1985, but denies any lost time due to asthmatic problems before May, 1985. She states that she also has been troubled by dust in her nonemployment activities and

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gave up horseback riding in 1983 because of her asthmatic condition.

Claimant is 39 years of age and is a high school graduate. Claimant testified that she has average academic skills. Prior to working for Champion claimant was involved in various jobs in manufacturing plants at minimum wage. According to vocational assessments made by the State Vocational Rehabilitation Agency, claimant performs at the eighth to tenth grade level in math, reading and spelling; at the 90th percentile level in space relation; and at the 100 percent level in ruler measurement. Claimant also possesses good people skills and potential for retraining in accounting and computer operation. According to Marion Jacobs, a vocational rehabilitation consultant, claimant has potential to fill such jobs as receptionist, various clerk positions and telephone sales earning from $4.35 per hour to $8.00 per hour. Jacobs states that if she could find a dust free manufacturing environment, she could use her manufacturing skills to earn from $6.25 per hour to $12.59 per hour. It was the opinion of Jacobs that claimant could return to work as a sewing machine operator at Champion. This opinion was based upon her observation that it was not dusty at Champion.

Since September, 1987, claimant has worked as a sewing machine operator of textile products and gun cases in a manufacturing environment that is dust free. Claimant testified that if she were physically able to return to her cutter job at Champion she would be making $10.50 per hour.

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

APPLICABLE LAW AND ANALYSIS

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

There is little question in this case that claimant has shown at least a work injury whether there is permanent effects or not in the form of an aggravation of a preexisting asthmatic condition. The causal connection views of Dr. Burrows on the relation of claimant's dust at work to her problems is only

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controverted by the observations of Marion Jacobs that she felt that the environment was dust free. As pointed out by Dr. Burrows, what may be clean to a nonasthmatic may very well be a different story for an asthmatic.

Claimant argues in the alternative for benefits under Chapter 85A due to an occupational disease. However, claimant failed to show that the dust to which claimant was exposed was more prevalent at Champion then in other occupations or in every day life. Consequently, no occupational disease could be found. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 190 (Iowa 1980).

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, 288 N.W.2d 181 (Iowa 1980).

The question of causal connection is essentially within the domain of expert medical opinion. Bradshaw v. Iowa Methodist Hospital, 251 Iowa 375, 101 N.W.2d 167 (1960). The opinion of experts need not be couched in definite, positive or unequivocal language and the expert opinion may be accepted or rejected, in whole or in part, by the trier of fact. Sondag v. Ferris Hardware, 220 N.W.2d 903 (Iowa 1974). The weight to be given to such an opinion is for the finder of fact, and that may be affected by the completeness of the premise given the expert and other surrounding circumstances. Bodish v. Fischer, Inc., 257 Iowa 516, 133 N.W.2d 867 (1965).

Furthermore, if the available expert testimony is insufficient alone to support a finding of causal connection, such testimony may be coupled with nonexpert testimony to show causation and be sufficient to sustain an award. Giere v. Aase Haugen Homes, Inc., 259 Iowa 1065, 146 N.W.2d 911, 915 (1966). Such evidence does not, however, compel an award as a matter of law. Anderson v. Oscar Mayer & Co., 217 N.W.2d 531, 536 (Iowa 1974). To establish compensability, the injury need only be a significant factor, not be the only factor causing the claimed disability. Blacksmith, 290 N.W.2d 348, 354. In the case of a preexisting condition, an employee is not entitled to recover for the results of a pre-existing injury or disease but can recover for an aggravation thereof which resulted in the disability found to exist.

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Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963).

The obvious fighting issue in the case sub judice is whether claimant has suffered permanent effects from the aggravation injury. The views of Dr. Burrows that claimant has no permanent damage to her lungs or bronchial tubes is uncontroverted and accepted. However, to conclude from the doctor's statements in his deposition that he believes to a medical certainty that claimant has not suffered permanent effects or impairment from the acute attack of May, 1985, is incorrect. The doctor, approaching the problem scientifically, is simply unsure according to the passages quoted above in his deposition. The doctor clearly stated that dust was a contributing factor to claimant's problems. He described a scenario in which exposure leads to an attack which further leads to increased sensitivity or susceptibility to future attacks in less hazardous environments at work or at home. Critical to Dr. Burrows' views and to the issue of whether claimant has suffered permanency from the Champion dust exposure is whether there has been a reversal of symptomatology and a reduction of the frequency of her attacks after leaving the dusty environment. It is rather obvious that a complete reversal of claimant's symptomatology has not happened. Dr. Burrows' analogy to angina pain in the quoted section of his deposition is not typical of claimant's situation because claimant continued to have difficulties despite leaving the dusty environment at Champion. This deputy commissioner has come to the realization in this case that a detailed analysis of each and every confusing and conflicting phrase in Dr. Burrows' deposition loses sight of an obvious fact. Claimant worked without lost time for almost 14 years at Champion and since the May, 1985, episode she has been unable to return to Champion or any other dusty environment. She now, unlike before, has permanent restrictions on her work activity no less devastating than a restriction against heavy lifting for a manual laborer. But for her episode in May, 1985, she would be working at Champion today. Therefore, the greater weight of all the evidence shows that claimant has suffered permanent restrictions on the type of work she can perform, whether you consider this a permanent partial impairment or not.

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

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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. See Olson, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Claimant's medical condition before the work injury was excellent and she had no assertainable disabilities before May, 1985. Claimant was fully able to perform her physical tasks before May, 1985. Claimant's treating physicians have restricted claimant's work activities by prohibiting work in a dusty environment. This restriction prevents her from returning to her former work or any other work which requires claimant to work in a dusty manufacturing environment. As a result of claimant's inability to return to her job at Champion she has suffered a 40 percent loss of earnings from a comparison of claimant's current earnings to that which she would make had she been working at Champion at the present time.

However, despite this loss of earnings, claimant is not physically impaired so long as she remains in a suitable environment and can fully perform manufacturing jobs such as the one she is performing today. As pointed out by Jacobs, claimant is able to perform numerous jobs in the labor market and will probably make more money in the future than her current salary. The exclusion of claimant from a certain portion of the labor market despite a lack of functional impairment is compensable under Chapters 85 or 85A. Blacksmith, 290 N.W.2d 348 (Iowa 1980).

Claimant is 39 years of age and has a high school education. Claimant's vocational counselors indicate that she is retrainable.

After examination of all the factors, it is found as a matter of fact that she has suffered a 15 percent loss of her earning capacity from her work injury. Based upon such a finding, claimant is entitled as a matter of law to 75 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u)

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which is 15 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection. As it was found that claimant reached maximum healing upon a discharge from the hospital on May 21, 1985, benefits will be awarded from May 22, 1985.

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 reaches maximum medical improvement.

Claimant left work on May 10, 1985, due to her asthmatic condition and she was discharged from the hospital on May 21, 1985. Claimant's asthmatic condition and treatment of that condition has remained essentially constant since that time. Therefore, claimant is entitled to healing period benefits from May 10, 1985 through May 21, 1985.

FINDINGS OF FACT

1. Claimant was a credible witness.

2. On May 10, 1985, claimant suffered an injury to her lungs which arose out of and in the course of her employment with Champion. Claimant suffered a severe asthmatic attack as a result of exposure to dust which aggravated a preexisting condition.

3. The work injury of May 10, 1985, was a cause of a period of temporary disability from work beginning on May 10, 1985 and ending on May 21, 1985, at which time claimant reached maximum healing. The treatment in the form of medication and other modalities prescribed during this hospitalization continues for the most part today. Claimant's condition has remained stable since May 21, 1985.

4. The work injury of May 10, 1985, was one of the significant causes of a permanent restriction against working in a dusty or fumy environment. The dust exposure at Champion caused increased sensitivity and susceptibility to asthmatic attacks from exposure to anything other than a dust free environment. Although claimant improved after leaving the work environment at Champion in May, 1985, she remains on medication and other modalities and continues to suffer periodic episodes of attacks from relatively minor exposures to dust and other activity.

5. The work injury of May 10, 1985, was a cause of a 15 percent loss of earning capacity. Claimant is unable to return to work as a cutter at Champion. Cutters currently make $10.50 per hour at Champion. Claimant currently only earns $6.25 per hour in her job as a sewing machine operator. Claimant has suffered a 40 percent loss of actual earnings but she will

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probably make significantly more money in the future. Claimant is retrainable and is able to perform sedentary and clerical work or manufacturing work in a suitable environment. Claimant is currently working in a suitable and stable job.

CONCLUSIONS OF LAW

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

ORDER

1. Defendants shall pay to claimant seventy-five (75) weeks of permanent partial disability benefits at the rate of two hundred thirty-five and no/100 dollars ($235.00) per week from February 22, 1985.

2. Defendants shall pay to claimant healing period benefits from May 10, 1985 through May 21, 1985 at the rate of two hundred thirty-five and no/100 dollars ($235.00) per week.

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

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

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

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

Signed and filed this 29 day of April, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

CLIFFORD F. MUILENBURG,

Claimant,

vs.

JOHN MORRELL & COMPANY,

Employer,
Self-insured,
Defendant.

File No. 797018

A P P E A L

D E C I S I O N

FILED
JUN 21 1988
IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

Claimant appeals from an arbitration decision awarding claimant permanent partial disability benefits of 18.375 weeks for occupational hearing loss and entitling claimant to one-third the cost of a hearing aid.

The record on appeal consists of the transcript of the arbitration hearing; claimant's exhibits 1 through 9; and defendant's exhibits A and B. Both parties filed briefs on appeal.

ISSUE

The issue on appeal is whether the deputy correctly attributed one-third of claimant's hearing loss to work for defendant.

REVIEW OF THE EVIDENCE

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

On December 4, 1956, claimant entered the U.S. Army. While in the army, he was in an artillery unit and he was around 105 Howitzers and 4.2 mortars when they were fired. He was honorably discharged with no hearing impairment disability on December 3, 1958. He farmed from 1958 to 1967 during which time he operated farm equipment.

Claimant started working for defendant on September 11, 1967. Prior to his employment with defendant, claimant was given a pre-employment physical. The results of that physical, which

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apparently used a whisper test, are unclear. Claimant testified that his hearing was normal at that time. His wife and a coworker also testified that his hearing was normal at that time.

Claimant testified that he held various jobs at defendant. He first worked about six weeks on the kill floor. He then worked as a tender in the beef plant for three years which was the only time he did not work in the pork plant. He began working on the loading dock in 1970 where he worked for 12 years. While working on the loading dock, he worked in the freezer, making boxes and loading trucks. The time he spent inside the truck while loading the truck varied from ten minutes to two and one-half hours at a time. Claimant and two of his coworkers described the work on the loading dock as noisy and they indicated that conversation in the area was not possible because of the noise. Claimant stated that the noise level of the different aspects of the loading dock job varied from quite noisy to little noise. A coworker of claimant stated that the cooling units on the trucks were not operated during cooler weather from November to March and that he was not sure but that about 50 percent of the time was spent inside the trucks on the loading dock job. The claimant stated that the plant was shut down for 15 months in 1983-1984. He next worked on the cut floor trimming loins for four to five months. After that he worked night cleanup for seven months. He last worked at the plant on April 27, 1985. In the 1970's, claimant realized he had a hearing loss and obtained a hearing aid in 1978.

Dennis L. Howrey, the personnel/labor relations manager of John Morrell's Sioux City, Iowa plant, testified that he formerly worked in the same capacity at the Estherville plant where claimant worked. He conducted a noise level survey in February 1982 at the pork plant. A noise survey was done at the pork plant by the Chicago office of defendant in 1984. Howrey testified the following:

> Q. Now, Denny, you were here to hear the testimony of Mr. Muilenburg. And I'd ask you to look at Exhibits 4, and that's Claimant's Exhibit No. 4, and Exhibit Number A, those two exhibits. And just go through and I guess as best you're able to sort of tell me if possible by looking at those what the noise levels were at the various places that he worked. I believe the first place that he worked was he worked six weeks on the kill floor on day clean up. Would there be any figures on there that would correspond to areas where he might be working?
>
> A. If it was what they call the janitor's job on the kill, you go from one end of the kill to the other. So could be in any of those areas.

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Q. So that would be beginning at the time he began working for, Morrell which would have been in about 1967, I believe. After that he said he worked three years in the cooler. Where he worked as a tenderer. Would there be anything in there that would be corresponding to that?

A. No. I believe that was in the beef plant.

Q. That's. Then he worked ten years on the loading dock. And because of the insignificant noise levels you never did any studies on the loading dock; is that right?

A. No. I never did. And also the noise survey that was done by Mr. Howe excludes the loading dock also.

Q. Now you indicate the last year and a half he worked about half of that time, I believe, trimming loins and the other half as night clean up?

A. Yes. Okay. The loin trimming area would be -- let's see. On Defendant's Exhibit A under pork cut upper level where it states saddle conveyor, loin trimming, the decibel reading there was 84 decibels. When I did my survey in 1982 I got a range of -- at that time of a low of 86 decibels to a high of 89 decibels.

Q. Now, were any studies to the best of your knowledge done in regard to night clean up?

A. No.

Q. Why haven't any studies been done in regard to night clean up?

A. The reason that I did not do anything on night clean up was, as I said before, in 1982 when you go into the area you can pretty well tell by the sound and the noise that's going on if it's even close to an 85 decibel. And also in the OSHA inspection that was done by the State Department and night clean up -- I might add in the plant that I'm at right now we have basically the same type of equipment you have the ham ax saw, the shoulder ax saw, the Jones saws, the Wizzard knives, the scribe saws and everything. The equipment is basically the same. And Ray Weidemeier (sp), who spearheaded this OSHA team that came in, did do some noise levels on the clean up in the plant that we have in

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Sioux City. And he didn't do anything further than the initial sound level readings to see if it was approaching the 85 decibel area.

Q. Was it?

A. No.

....

Q. So you have no personal knowledge of the noise problem existing in that plant from 1967 to 1978; is that correct?

A. No. I have no knowledge of that.

Q. So you do not know in that period of time what the noise level would have been on the loading dock or in the refers or on the kill floor or on the second floor or whatever?

A. No. I wouldn't have any idea.

(Transcript, pages 79-81, 84)

Claimant was examined by R. David Nelson, Audiologist, in 1978, 1980, and 1983. The initial exam showed hearing loss. There was a mild decrease in hearing sensitivity from the initial examination to the last test date.

C. B. Carignan, M.D., took a history and examined claimant in September 1985. Dr. Carignan opined that claimant's hearing loss was due to exposure to loud noise during the time he worked for defendant. The doctor was unaware of claimant's military experience when he gave that opinion but he was aware that claimant had farmed for ten years. The doctor stated that claimant's binaural hearing impairment is 35.3 percent. The doctor testified that there was no change in claimant's hearing from March 7, 1983 to August 26, 1985.

Daniel L. Jorgensen, M.D., whose specialty is otolaryngology, examined claimant in 1985. The doctor was aware of claimant's military, farming, and work experience. He reviewed the audiogram. He opined that claimant's hearing loss was not a direct result of work for defendant but that the work can contribute to the loss. He further opined that the military experience would probably be more significant. He observed that claimant had a significant history of noise exposure from the military, from the farm, and perhaps also from work at defendant. The doctor stated that claimant's binaural hearing loss is 31.5 percent.

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APPLICABLE LAW

Iowa Code chapter 85B provides benefits for occupational hearing loss. Iowa Code section 85B.4 (1985) provides:

> 1. "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.
>
> 2. "Excessive noise level" means sound capable of producing occupational hearing loss.

Iowa Code section 85B.5 (1985) provides that an excessive noise level is sound which exceeds duration and sound levels given in a table in that section.

Excessive noise levels are those which are capable of producing occupational hearng loss. The table in section 85B.5 lists levels and durations which, if met, will be presumptively excessive noise levels requiring the employer to inform the employee of the existence of such levels. It is not a minimum exposure level necessary to establish excessive noise levels. Noise levels less than those in the tables may produce an occupational hearing loss. Muscatine County v. Morrison, 409 N.W.2d 685 (Iowa 1987).

ANALYSIS

If a claimant proves that he was exposed to a noise level for a duration specified in section 85B.5, he has established the presumption that his hearing loss is an occupational hearing loss. Claimant clearly has not established this presumption. Neither of the noise level studies were done in a work area when he was working in that area. He worked on the kill floor in 1967 for six weeks but the noise studies were not done until 1982 and 1984. He worked on the loading dock for 12 years and apparently worked there until the plant was closed for 15 months in 1983 and 1984. It can be concluded from claimant's testimony that claimant worked on the loading dock approximately from October 1970 to December 1982, on the cut floor approximately from April 1984 to September 1984, and on the cleanup approximately from October 1984 to April 1985 when he was last employed by defendant. Dr. Carignan testified that there was no change in claimant's hearing between tests given on March 7, 1983 and

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August 26, 1985. Also, claimant testified that he noticed a loss of hearing in the 1970's. The job that claimant performed that coincided with the identification of the hearing loss was the work on the loading dock. As Dennis Howrey testified, the noise level studies do not include the loading dock area. In addition, the duration of claimant's exposure to noise levels cannot be determined because, for example, he testified that he would be inside trucks for periods of time ranging from ten minutes to two and one-half hours. It is impossible to tell whether the longer or shorter durations may have occurred in the summer when the refrigeration units on the trucks were operating or in the winter when they were not.

Claimant could prevail if he proved a hearing loss which was the result of exposure to excessive noise at a level less than specified in the tables. There is no objective evidence to determine the noise level on the loading dock or to determine the duration of claimant's exposure to the noise. It was claimant's opinion and his coworkers' opinion that the area in which claimant worked was noisy. However, it was Howrey's opinion and apparently Howe's opinion that the noise level on the loading dock was not high enough to include that area in either of their noise level surveys. Dr. Carignan opined that claimant's hearing loss was due to loud noise during the time he worked for defendant but he was unaware of claimant's military experience when he gave that opinion. Dr. Jorgensen opined that claimant's military experience would probably be more significant.

Claimant has not proved by the greater weight of evidence that his hearing loss is the result of exposure to excessive noise while working. There is no noise level study indicating the noise level and duration of exposure and claimant has a history of exposure to noise. The deputy erred in concluding that one-third of claimant's hearing loss was attributable to his work with defendant.

FINDINGS OF FACT

1. Claimant is 48 years of age.

2. Claimant worked on a ranch after finishing the twelfth grade.

3. Claimant joined the U.S. Army on December 4, 1956 and was honorably discharged on December 3, 1958.

4. In the U.S. Army claimant was trained to use artillery, specifically, 105 Howitzers and 4.2 mortars.

5. Due to the loud noise encountered by claimant in the army, he used cotton in his ears in an unsuccessful attempt to protect them from excessively loud noise.

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6. After discharge from the army, claimant farmed from 1958 through 1967 and was exposed to excessively loud noise.

7. Claimant started work for defendant in 1967 at the Estnerville, Iowa plant and worked at a number of jobs in Estherville until the operation was shut down in April 1985.

8. Claimant had a physical examination when he started work for defendant, which may or may not have included a whisper test and/or audiogram to test claimant's hearing; the examining doctor may have relied on claimant's oral representation that his hearing was "normal."

9. Claimant did not sustain hearing loss while working for defendant.

10. Claimant's binaural hearing loss in 1985 was 31.5.

CONCLUSION OF LAW

Claimant has not established by a preponderance of the evidence that he sustained occupational hearing loss while working for defendant.

WHEREFORE, the decision of the deputy is reversed.

ORDER

THEREFORE, it is ordered:

That claimant take nothing from these proceedings.

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

That claimant pay the costs of the appeal including the transcription of the arbitration hearing.

Signed and filed this 21st day of June, 1988.

DAVID E. LINQUIST
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BEFORE THE IOWA INDUSTRIAL COMMISSIONER

RICHARD A. MUSTO, Claimant, vs. JOHN MORRELL & COMPANY, Employer, and NATIONAL UNION FIRE INSURANCE CO., Insurance Carrier, Defendants.	:	FILE NO. 843223 A R B I T R A T I O N D E C I S I O N FILED MAR 31 1988 IOWA INDUSTRIAL COMMISSIONER

STATEMENT OF THE CASE

This is a proceeding in arbitration brought by Richard A. Musto, 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 February 12, 1987. On February 12, 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 Patricia Conway. The exhibits received into the evidence at the hearing are listed in the prehearing report. According to the prehearing report, the parties have stipulated to the following matters:

1. On February 12, 1987, claimant received an injury which arose out of and in the course of his employment with Morrell.

2. Claimant's rate of weekly compensation in the event of an award of weekly benefits from this proceeding shall be $289.16 per week.

3. Claimant is entitled to healing period benefits from April 16, 1987 through October 17, 1987.

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4. The work injury was a cause of permanent industrial disability to the body as a whole.

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

ISSUE

The only issue submitted to the undersigned by the parties for determination in this proceeding is the extent of claimant's entitlement to weekly benefits for permanent disability.

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 40 year old, permanently injured packinghouse worker who, at least at the time of hearing, had not returned to work in any capacity. Claimant's injury involves his back. Claimant testified that on February 12, 1987, while picking up a basket full of meat weighing approximately 50 to 80 pounds he developed pain in his low back radiating down his legs. Subsequent to this incident, the pain grew gradually worse and finally he sought treatment from William Krigsten, M.D. and Milton Grossman, M.D. who placed claimant on light duty at Morrell. According to a medical report from Dr. Krigsten dated April 20, 1987, claimant's treatment was conservative for a possible defect in the "pars interartitularis at L4-5." In April of 1987, claimant was referred to Quentin Durward, M.D., a neurosurgeon and John J. Dougherty, M.D., an orthopedic surgeon. Subsequent to continued conservative treatment and further tests showing evidence of a herniated disc at L4-5 level of claimant's spine, surgery was performed on claimant's back called a laminectomy and fusion on April 17, 1987. According to Dr. Durward, claimant's healing period lasted a full six months following this surgery. After the six month period claimant has released to return to work in a work hardening situation with gradual increase in activity as tolerated. However, Dr. Durward stated that claimant should not lift over 25 pounds or be placed in any job that required a lot of bending or twisting. Dr. Durward opined that claimant suffered a 10 percent permanent partial impairment to the body as a whole from the injury.

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Claimant suffered a back injury while lifting at work in 1985 which required his absence from work, medical treatment and bed rest for a few days. Claimant testified that he was able to return to work to full duty one week after the injury and he had no further difficulties with his back until the work injury in this case.

While he was on light duty status following the February, 1987 injury, on March 9, 1987 claimant and his fellow employees at Morrell went on strike as a result of a labor/management dispute. Claimant has not been employed in any capacity since that time.

Claimant is a high school graduate and completed a two year course in computer programming at Western Iowa Tech in the late 1960's after his tour of duty in the U.S. Navy. Claimant testified that his high school grades were poor and that he barely got through the computer course. Claimant said that he never utilized any of his computer training in employment or otherwise since the 1960's and he has not received any updated training in computer programming.

Following his graduation from high school, claimant worked for a few months in construction and in garbage collection. Claimant spent six years in the navy, four years of which were on active duty. Claimant attended storekeeper school and "counted bombs" in Vietnam. Claimant served two years on a ship as a storeroom clerk. Claimant stated that he only acquired skills in counting and some inventory procedures during his military service. Claimant attented Western Iowa Tech after his military service as stated above.

Claimant's first employment after attending Western Iowa Tech was a meat packing job at Armour Foods. Claimant held jobs as a meat trimmer, loin grader, "hooked sides", and night clean-up in the kill floor area. Claimant said that he earned $8.00 per hour in such work. When the Sioux City plant closed in 1979, claimant transferred to an Armour plant in St. Joseph, Missiouri. However, after a month he returned to Sioux City for family reasons and worked for five months operating a heavy jack hammer for an asphalt and cement contractor. He earned $5.00 to $6.00 per hour in this construction work. Claimant then began working for Iowa Beef in "pre-cut." Claimant testified that he suffered no significant injuries while performing any of this prior meat packing work or in construction.

In 1981, claimant left Iowa Beef to work for Siouxland constructing a new meat packing plant. After the plant was built, the facility became Iowa Meats and was later sold to Morrell. Claimant worked in the same plant until the strike in March 1987. During his employment at this facility, claimant worked in the loin trimming, loin grading and wrapping, side cut, shoulder axe, box shop, and the carmel department. Claimant

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worked in the box shop the longest period of time. This work involved repetitive heavy lifting from 40 to 70 pounds. Claimant left the box room for a higher paying job as a cook in the carmel department when Morrell began marketing cryogenically packed pre-cooked meats. Claimant testified that the cook job involved very heavy work in emptying ashes, loading wood into the barbecue ovens, preparation of tenderizing products, lifting baskets of meat, lifting 50 pound buckets of ingredients and emptying grease pans and carrying grease buckets weighing over 50 pounds. It was while performing this job that he incurred the February, 1987 injury. At the time of the injury claimant had been earning $8.50 per hour, approximately one dollar less than when he took the cook job because of a plant wide wage cut that the union had agreed to. After claimant was placed on light duty following the injury, claimant performed labeling work. Claimant testified that despite its light nature, the job caused him difficulties in that the work was performed in a freezer at 32 degrees Fahrenheit throughout the entire shift and the floor was constantly icy and slick. He said that the cold increased the pain and numbness in his leg.

After claimant's release to return to work in October, 1987, defendants retained a vocational rehabilitation counselor, Patricia Conway. Conway first obtained a functional capacity assessment from Dr. Dougherty in December, 1987. According to Dr. Dougherty, claimant could never lift or carry over 25 pounds, only occasionally lift or carry 11 to 24 pounds and frequently lift or carry only 10 pounds. Dr. Dougherty also indicates that claimant can never crawl, climb or reach above his shoulder level and only occasionally push or pull, bend or squat. Finally, the doctor indicated that claimant would be able to work over an eight hour day within these restrictions.

After learning that claimant was interested in returning to suitable work at Morrell's, Conway obtained for claimant an offer from Morrell management to return to light duty work in the box shop on January 18, 1988. However, claimant declined this offer because his fellow employees were still on strike and he did not wish to cross the picket line. Shortly before the hearing in this case, the labor dispute at Morrell was settled and apparently Morrell was about to return the strikers back to work. However, when asked by Conway if the offer to claimant to return to work still was valid after the strike, Morrell management responded with "no comment."

Conway's testing of claimant indicated that he has a high interest level in literature and clerical work. GATB test indicated that claimant has above average in intelligence and general aptitude. She believes that this testing indicates possible employment as a librarian or as a newsreporter, although she admitted that such jobs would require further schooling and that schooling is not likely for claimant who has very limited

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financial resources and a wife with health problems. Conway believes that claimant has a good potential for successful retraining and for placement in alternative suitable employment in that he possesses many transferable skills especially in the clerical, inventory and computer work. She states that his loss of earning capacity earnings would only amount to about five or 20 percent from her analysis of the job service quarterly reports although she did not elaborate on how she arrived at this figure. Conway's plan was first to place claimant back at Morrell's. If that was not possible, she plans to place him in clerical or shipping and receiving work. Conway also expressed the belief that it was possible for claimant to be a paralegal in that most of the paralegal jobs in the Sioux City area allow for on-the-job training. Conway finally states that claimant is not an average disabled person due to his above average intellectual and educational abilities.

Claimant testified that he was satisfied with Conway's help but doubts defendants will continue paying for her assistance in the future. He believes that schooling is not realistic for him. He would like to return to light duty at Morrell if offered a job. Claimant testified that he made an unsuccessful job search at places of employment other than Morrell. Claimant currently participates in a weekly job club with other disabled persons who are looking for work to discuss job search techniques and compare notes on available work in the area.

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

APPLICABLE LAW AND ANALYSIS

Claimant must establish by a preponderance of the evidence the extent of weekly benefits for permanent disability to which claimant is entitled. As the claimant has shown that the work injury was a cause of a permanent physical impairment or limitation upon activity involving the body as a whole, the degree of permanent disability must be measured pursuant to Iowa Code section 85.34(2)(u). However, unlike scheduled member disabilities, the degree of disability under this provision is not measured solely by the extent of a functional impairment or loss of use of a body member. A disability to the body as a whole or an "industrial disability" is a loss of earning capacity resulting from the work injury. Diederich v. Tri-City Railway Co., 219 Iowa 587, 593, 258 N.W. 899 (1935). A physical impairment or restriction on work activity may or may not result in such a 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

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period; the work experience of the employee prior to the injury, after the injury and potential for rehabilitation; the employee's qualifications intellectually, emotionally and physically; earnings prior and subsequent to the injury; age; education; motivation; functional impairment as a result of the injury; and inability because of the injury to engage in employment for which the employee is fitted. Loss of earnings caused by a job transfer for reasons related to the injury is also relevant. Olson v. Goodyear Service Stores, 255 Iowa 1112, 1121, 125 N.W.2d 251, 257 (1963). See Peterson v. Truck Haven Cafe, Inc., (Appeal Decision, February 28, 1985).

Claimant's medical condition before the work injury was excellent and he had no functional impairments or ascertainable disabilities. Claimant apparently fully recovered from the 1985 back injury. Prior to February, 1987, claimant was able to fully perform physical tasks such as heavy lifting and repetitive lifting, bending, twisting and stooping.

Claimant's treating physician, Dr. Durward, has given claimant a 10 percent permanent partial impairment rating to the body as a whole and causally relates this to the work injury. Of greater significance to an industrial disability case is claimant's activity restrictions. Dr. Dougherty's restrictions are very serious for a person whose only employment history has been in heavy physical work. Claimant will never be able to return to his former meat packing work or to any other laboring work, the work to which he is best suited given his past experience.

Claimant is 40 years of age and should be in the most productive working 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 older individual. See Becke v. Turner-Busch, Inc., Thirty-Fourth Biennial Report of the Iowa Industrial Commissioner 34 (1979) and Walton v. B & H Tank Corp., II Iowa Industrial Commissioner Report 426 (1981).

Claimant has shown motivation to seek other employment and cooperated fully with the rehabilitation efforts that have been offered to him to date. However, none of these efforts have been successful at the present time.

Claimant has a high school education and exhibited above average intelligence at the hearing. From vocational testing, claimant apparently possesses above average aptitudes for many types of sedentary occupations. However, additional schooling is not a realistic possibility at the present time due to his family situation. Whether or not he will go to school and successfully complete schooling to obtain a technical or professional job in the future is too speculative at the present time to consider in evaluating his current disability.

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The opinions as to claimant's potential loss of earnings by the vocational rehabilitation counselor in this case was not convincing as she did not explain how she arrived at her figures.

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 so-called "odd-lot" doctrine. This doctrine is a procedural device designed to shift the burden of going forward with evidence as to claimant's employability to a defendant employer in certain factual situations. See Klein v. Furnas Electric Co., 384 N.W.2d 370, 375 (Iowa 1986). A worker becomes an odd-lot employee when an injury makes a 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 reasonable stable market for them does not exist. Id. In Guyton, the supreme court held that under the odd-lot doctrine, there can be 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 worker is not employable in the competitive labor market, the burden to produce evidence shifts to the employer as to the availability of suitable work. 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 worker is entitled to a finding of total disability. Id at 106.

In the case sub judice, claimant made a reasonable effort to find suitable work. However, defendants have gone forward with the evidence and offered an opinion by a vocational rehabilitation expert that claimant is employable. The odd-lot doctrine does not change the ultimate burden of proof and claimant has not shown that he is only able to perform services which are so limited in quality, dependability or quantity that a reasonable stable market for them does not exist. This does not mean however, that claimant does not have a substantial loss of earning capacity which must be adequately compensated in this decision.

After examination of all the factors of industrial disability, it is found, as a matter of fact, that claimant has suffered a 50 percent loss of earning capacity from his work injury. Based upon such a finding, claimant is entitled as a matter of law to 250 weeks of permanent partial disability benefits under Iowa Code section 85.34(2)(u) which is 50 percent of 500 weeks, the maximum allowable number of weeks for an injury to the body as a whole in that subsection.

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FINDINGS OF FACT

1. Claimant was a credible witness.

2. The work injury of February 12, 1987, was a cause of a 10 percent permanent partial impairment to the body as a whole and of permanent restrictions upon claimant's physical activity consisting of no lifting or carrying over 24 pounds, only occasional lifting or carrying of 11 to 24 pounds and only repetitive or frequent lifting up to 10 pounds. Claimant can never crawl, climb or reach above his shoulder level and only occasionally can he push, bend or squat. However, claimant is able to work over an eight hour day within these restrictions.

3. The work injury of Feburary 12, 1987, and the resulting permanent partial impairment was a cause of a 50 percent loss of earning capacity. Claimant is 40 years of age with a high school education and two years training in computer programming. Claimant's grades in school were poor and he barely got through the computer programming course. Claimant, however, does possess above average intellectual skills and aptitudes. Claimant has prior experience in clerical and sedentary work in the U.S. Navy. Claimant's only work history has been in heavy physical labor employment outside of the military service. Claimant is employable in sedentary work in the area of his residence but at a greatly reduced earnings capacity.

CONCLUSIONS OF LAW

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

ORDER

1. Defendants shall pay to claimant two hundred fifty (250) weeks of permanent partial disability benefits at the rate of two hundred eighty-nine and 16/100 ($289.16) per week from October 18, 1987.

2. Defendants shall pay to claimant healing period benefits from April 16, 1987 through October 17, 1987 at the rate of two hundred eighty-nine and 16/100 ($289.16) per week.

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

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

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

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

Signed and filed this 31ST day of March, 1988.

LARRY P. WALSHIRE
DEPUTY INDUSTRIAL COMMISSIONER

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